COMMENTARIES

ON THE

LAWS OF ENGLAND,

BY

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IN ONE VOLUME,

TOGETHER WITH

A COPIOUS GLOSSARY OF LEGAL TERMS EMPLOYED; ALSO,
BIOGRAPHICAL SKETCHES OF WRITERS REFERRED TO; AND A CHART OF DESCENT
OF ENGLISH SOVEREIGNS,

EDITED BY

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PREFACE.

NEARLY a century and a half ago, the students of Oxford University listened to the lectures of Sir William Blackstone on the subject of English law; which literary and historical compilations were subsequently embodied in the four volumes of his commentaries. From that time to the present day, wherever the English language is spoken, these commentaries have been adopted by jurists, lawyers, students and literary men generally, as an epitome of the fundamental principles of our jurisprudence.

Numerous editions of the work have appeared, more or less abridged, and usually copiously annotated. Whether, in an elementary work of this nature on the general principles of English law, a profusion of notes is an advantage, may well be doubted. In addition to the fact, that many of such notes are necessarily of local application, or a mere reprint of the notes and opinions of previous editors, it is a question, whether their great number and variety would not tend to confuse the student, and, to some extent, divert his attention from the original text. So convinced of this fact are the faculties of a few of our leading law schools, that the catalogues of such institutions in certain instances, in specifying the works to be studied, mention Blackstone's Commentaries, "*exclusive of editors' notes.*"

Dr. Samuel Johnson, in his preface to an edition of Shakespeare's plays, advises the reading of the dramas, with utter disregard of the notes of the commentators. He states, most emphatically, that the general effect of the work is weakened by reference to such notes, the mind chilled by such interruption, and the thoughts diverted from the principal subject; until the reader, wearied by perusal of the notes and comments, at last discards the book itself; for its beauty is no longer discernible.

Where a law has been abrogated or materially altered, or has become obsolete, a single word to that effect in a foot-note will apparently suffice to check its further investigation; which plan has been adopted in the present edition. The retention of such annulled statutes in the text is because of their historic value, and to render the work more full and accurate; which the paucity of notes enables the present editor to accomplish in much greater degree. He has labored to retain in this edition all of Blackstone's great work, which has any bearing whatever upon the present law, whether it be the law itself, as now operative, or the grand principles which underlie it; and also all matter of historic interest contained in the commentaries, which may prove valuable or entertaining reading.

The marked separation of paragraphs, and the constant use of distinctive catch-words, together with the clear large type of the text, will, it is hoped, not only render the book attractive in appearance, but also readily understood by the student of law, as well as by the active practitioner.

The plan of the work and a portion of the manuscript were submitted, before publication, to the examination of several pro-minent professors of law in two universities, and their approval of its general features obtained.

A novel addition to the book is the glossary of nearly two thousand legal terms, maxims and brief Latin phrases, used in the commentaries, with abridged definitions.

Biographical sketches of lawgivers and writers mentioned in the commentaries are appended to this edition, and also a chart of the line of descent of the sovereigns of England, from the date of the heptarchy to the present time.

TABLE OF CONTENTS.

INTRODUCTION.

BOOK I.

THE RIGHTS OF PERSONS.

BOOK IV.

PUBLIC WRONGS.

ENGLISH SOVEREIGNS.

CHART OF DESCENT.

[SAXONS.]

1. Egbert, A. D. 827
× 2. Ethelwolf, 837

3. Ethelbald, 857 **4. Ethelbert, 860** **5. Ethelred, 866** **6. Alfred, 871**

7. Edw. the Elder, 900

9. Edmund, the Pious, 941 **10. Edred, 948** **8. Athelstan, 925**

[DANISH.] **11. Edwy, 955** **12. Edgar, 959**

15. Sweyn, 1013 **13. Edw. the Martyr, 975** **14. Ethelred II, 978**
×

17. Canute, 1017 **16. Edmund, Ironside, 1016** **20. Edw. Confessor, 1042**

18. Harold I, 1036 **19. Canute II, 1040** **A daughter**
×

21. Harold II, 1066

[NORMANS.]

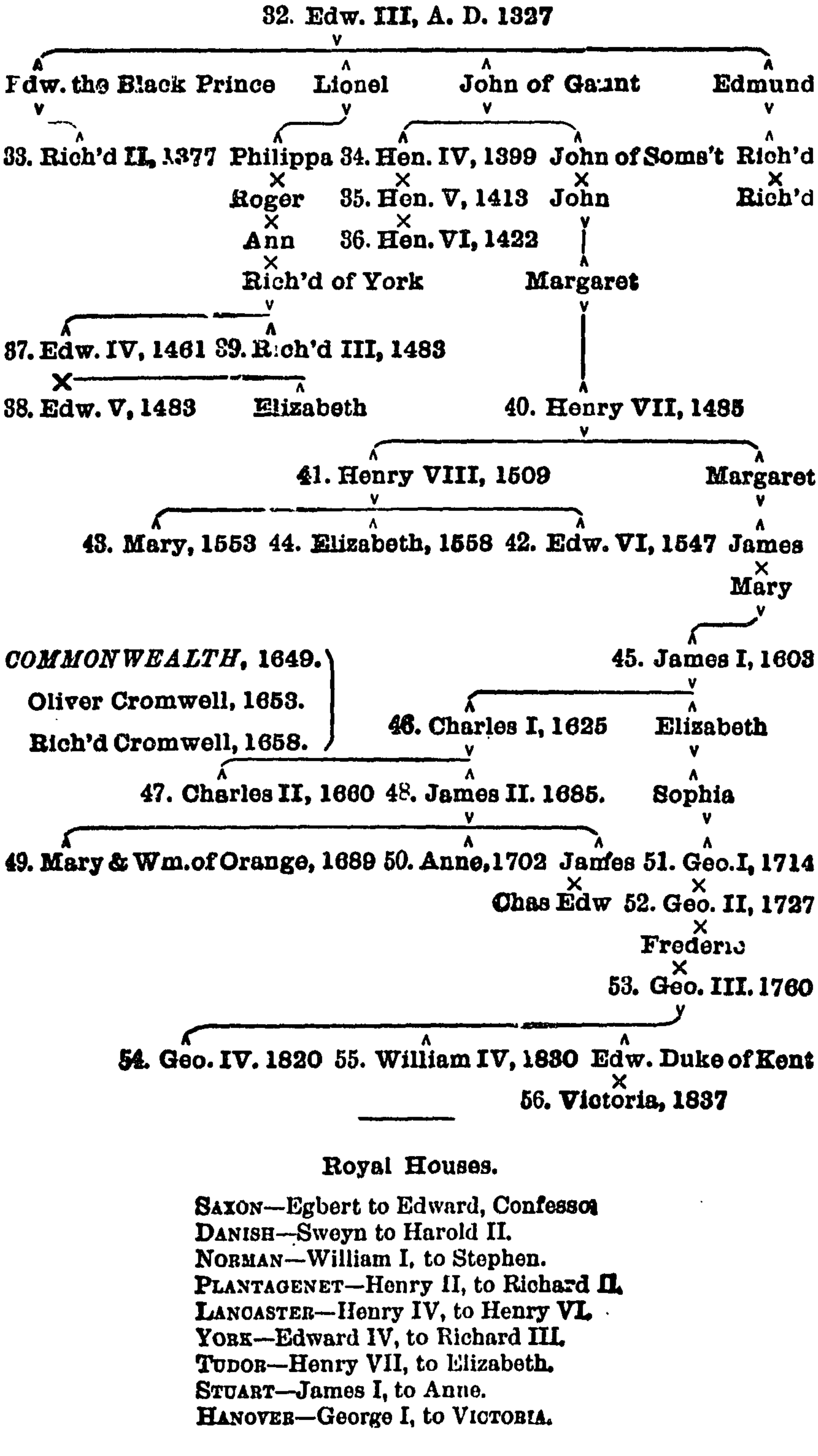
22. William I, the Conqueror, 1066

Rob't of Normandy **23. Wm. II, Rufus, 1087** **24. Henry I, 1100** **Adela**
×
Richard

Matilda **25. Stephen, 1135**
×

26. Henry II, 1154

27. Richard I, 1189 **Geoffrey** **28. John, 1199**
× **×**
Arthur **29. Henry III, 1216**
×
30. Edw. I, 1272
×
31. Edw. II, 1307
×
32. Edw. III, 1327



Royal Houses.

SAXON—Egbert to Edward, Confessor
DANISH—Sweyn to Harold II.
NORMAN—William I, to Stephen.
PLANTAGENET—Henry II, to Richard II.
LANCASTER—Henry IV, to Henry VI.
YORK—Edward IV, to Richard III.
TUDOR—Henry VII, to Elizabeth.
STUART—James I, to Anne.
HANOVER—George I, to VICTORIA.

INTRODUCTION.

SECTION I.—THE STUDY OF THE LAW.[1]

Neglected in England. In most continental countries, a gentleman's education is deemed incomplete, unless he has attended a course of lectures upon the institutes of the emperor Justinian and the local constitutions of his native soil. This is in marked contrast with the ignorance of our own gentlemen of the laws and constitution of England.

Civil Law Studied. Some Englishmen attend foreign universities in Switzerland, Germany and Holland, and study to some extent the civil law, while neglecting the examination of the admirable system of English law, which is virtually unknown, except to members of the legal profession, though built upon the soundest foundations, and approved by the experience of ages. Englishmen should not carry their veneration of the civil law so far, as to sacrifice our Alfred and Edward to the names of Theodosius and Justinian. We should not prefer the edict of the praetor, or the rescript of the Roman emperor to our own immemorial customs, or the sanctions of an English parliament, unless we can also prefer the despotic monarchy of ancient Rome and Byzantium to the free constitution of Britain.

Requisite for Liberal Education. A competent knowledge of the laws of one's country is the proper accomplishment of every gentleman and scholar, and is almost an essential part of a liberal education. In the days of Cicero, the boys at Rome were obliged to learn the twelve tables by heart, and thus acquire an early knowledge of the laws and constitution of their country.

Utility of its Study. We shall demonstrate the utility of some acquaintance with the municipal law of the land, by specifying its particular uses in all prominent situations in life.

Civil Liberty. Notice the singular frame and polity of the land governed by this system of laws, a land, in which polit-

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[1] Delivered before the students of Oxford University, in 1758, by Sir William Blackstone, Vinerian professor.

ical and civil liberty are the very end and scope of the constitution. This liberty consists in doing whatever the laws permit, effected by a general conformity to those equitable rules of action, by which the humblest individual is protected from the oppression of the greatest.

Leading Principles of Law. Every man should be conversant with such laws as immediately concern him, in order to know the obligations imposed upon him. Persons of ability and leisure are inexcusable for being ignorant of the law. A man possessing landed property, with all its long train of descents and conveyances, settlements, entails and encumbrances, should certainly understand a few leading principles, the knowledge of which may preserve him from the practice of gross imposition upon him by his agents.

Drafting of Wills. So as to the language, form and attestation of wills, an ignorance thereof might prove most serious, where choice or necessity resulted in a party's drawing his own testament. Much litigation often results from the absence of certain formal expressions, or the existence of enigmatical sentences, rendering the intent of the testator obscure.

Capacity of Jurors. All men of property are liable to be drawn as jurors, to establish the rights, estimate the injuries, weigh the accusations and occasionally to dispose of the lives of others. In this capacity, questions of nice importance come before them, the solution of which requires some legal skill, especially where law and fact are blended. The general incapacity of juries has unavoidably thrown more power into the hands of the judges to direct, control and even reverse their verdicts, than the constitution intended.

Magistrates. Many gentlemen of fortune are called upon to act as magistrates, and determine questions of right, as well as to distribute justice. Such officials should not only have the will and power, but also the knowledge requisite to administer the law.

House of Commons. Our country gentlemen of position often enter parliament. By virtue of their office, they become the guardians of the constitution, the makers, repealers and interpreters of the English laws, delegated to watch, to check, and to avert every dangerous innovation. It is their province to propose and adopt solid improvements, and to transmit to posterity the constitution and laws, amended if necessary, but with-

out derogation. How unbecoming for a legislator to vote for a new law, when utterly ignorant of the old one! It would appear, that every man of fortune thinks himself a legislator, and that the course of reading requisite in the learned professions is unnecessary in his case. Inconsiderate alterations in our laws have occasioned great mischief, and were probably due to the defective legal education of our legislators. Almost all the perplexing questions, the niceties, intricacies and delays, which have disgraced the courts of justice, owe their origin not to the common law itself, but to innovations that have been made by acts of parliament.

House of Lords. This class is composed of the hereditary counsellors of the crown, and judges upon their honor of the lives of their brother peers; and they are also arbitrers of the property of their fellow subjects, as a tribunal of last resort. In their judicial capacity they decide the nicest and most critical points of the law, and examine and correct errors, that have escaped the attention of the sages of the profession. Their sentence is final, decisive, irrevocable; no appeal, no correction, not even a review can be had, and to their determination all inferior courts must conform. As their power is great, so is their responsibility. If they judge wrongly, they do an alarming injury, which is without possible redress.

Other Learned Professions. The clergy in particular should have a knowledge of the law. There are branches of the law in which they have a peculiar interest, and with which they should familiarize themselves by acquaintance with some learned writers. Possibly it may not be essential for physicians to study law, except in their pursuit of general knowledge, or as to the formal execution of wills.[1]

Civil and Canon Laws. The civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in England. They have no more binding effect here than our laws have elsewhere. But as far as these foreign laws have in some particular cases, and in some particular courts, been recognized by our laws, so far their weight goes and no further. In all points in which the different systems depart from

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[1] Since Blackstone's time, medical jurisprudence has become an important branch of law, and the testimony of medical experts is frequently given in courts of justice.

each other, the law of the land takes precedence of the law of Rome, whether ancient or modern, imperial or pontifical. Hence every judge should know in what cases and how far the English laws have given sanction to the Roman; in what points the latter are rejected, and where they are so intermixed and blended, as to form certain supplemental parts of the common law of England, distinguished by the titles of the king's maritime, military and ecclesiastical laws.

The Common Law. Its History. The ancient collection of unwritten maxims and customs called the common law, had subsisted immemorially in this kingdom, and though somewhat impaired by the violence of the times, had in great measure weathered the rude shock of the Norman conquest. The people were attached to it, because its decisions were universally known, and were excellently adapted to the genius of the English nation. In the knowledge of this law consisted much of the learning of the dark ages. It was then taught in the monasteries, in the universities, and in the families of the principal nobility. The clergy of that day, like their predecessors, the British druids, were proficient in the study of the law. Among the Normans, the judges were usually created out of the sacred order, and all the inferior offices were supplied by the lower clergy, whence their successors to this day are termed clerks.

Norman Clergy. The common law, not being committed to writing, but only handed down by tradition, use and experience, was not relished by the foreign clergy, who had crowded here in the reign of William the Conqueror and his two sons, and were utter strangers to our constitution and our language. An accident nearly completed its ruin.

Study of Civil Law Revived. A copy of Justinian's pandects being newly discovered at Amalfi, Italy, in 1135 A. D., soon brought the civil law into vogue over the west of Europe, where before it had become obsolete, and in a manner forgotten. This now became the favorite of the clergy, who borrowed the method and many of the maxims of their canon law from this original. The study of it was introduced into several universities abroad, especially at Bologna; and many nations recovering from the convulsions consequent upon the overthrow of the Roman empire, adopted the civil law as the basis of their several constitutions, blending it with their own feudal customs.

Introduction in England. Theobald, a Norman abbot, elected to the see of Canterbury, and extremely addicted to the new study, brought over with him many proficients therein, among them Roger, surnamed Vacarius, whom he placed in the Oxford University to teach it to the people. But it was not well received in England, where a mild system of laws had long been established, and though the clergy adopted it with eagerness, yet the laity, who were more interested in preserving the old constitution, continued wedded to the use of the common law. King Stephen issued a proclamation, forbidding the study of the civil law, which order the clergy treated as a piece of impiety, and ignored, by teaching that law in their schools.

Antagonism and Parties. From this time, the nation was divided into two parties. On the one side was the clergy, mainly foreigners, who studied only the civil and canon laws, which now became interwoven; on the other, the nobility and laity, who adhered with equal pertinacity to the old common law. Much jealousy and ill-feeling ensued.

Withdrawal of the Clergy. The clergy, unable to extirpate the municipal law, withdrew themselves by degrees from the temporal courts, and in the reign of Henry III were forbidden by their episcopal constitutions to appear as advocates. Nor did they long continue to act as judges, objecting to the oath of office, that they should in all things determine according to the law and custom of the realm, though they still retained the high office of chancellor, an office then of little judicial power. As its business increased, they modelled the process of the court at their discretion.

Opposition to Common Law. Wherever they retired, the clergy carried with them the same zeal to introduce the rules of the civil, in exclusion of the municipal law. This appears from the spiritual courts, from the chancellor's courts in both the universities, and from the high court of chancery; in all which the proceedings are to this day much conformed to the civil law. The probable reason for this, is that these courts were all under the direction of the ecclesiastics, among whom it was a point of religion to exclude the municipal law, Innocent IV having forbidden the very reading of it by the clergy, because its decisions were not founded upon the imperial constitutions, but on the customs of the laity. In those days, the Roman laws

were studied with alacrity in the seats of learning, to wit, the universities, and the common law despised and esteemed little better than heretical.

Its Study Neglected. Many causes have prevented the common law becoming a part of academical education. At first, long usage and custom; secondly, the intrinsic merit of the civil law, which was known to the instructors of youth, coupled with their total ignorance of the merits of the common law; and thirdly, because the study of the common law, having been previously banished, had fallen into a different channel, and was cultivated in another place. For being entirely abandoned by the clergy, the study and practice of the common law devolved upon laymen, who cherished aversion to the civil law, and displayed their ignorance, as well as contempt of it, publicly. The balance of learning was greatly on the side of the clergy, and as the common law was no longer taught, it would probably in time have been overrun by the civil law, but for a fortunate occurrence.

Location of the Common Pleas Court. This was the fixing of the court of common pleas, the grand tribunal for settling disputes of property, to be held in one certain spot, that the seat of justice might be permanent and known to the entire nation. Formerly this court was held with all the other superior courts in the *aula regis*, or in such of his palaces, where the king resided; and was removed with his household from one end of the kingdom to the other. To remedy this great inconvenience to suitors, the *magna carta* enacted, that the common pleas should no longer follow the king's court, but be located in some certain place. Since then it has always been held at Westminster. This brought together the professors of municipal law from the entire kingdom, and formed them in an aggregate body, whence a society was established, devoting itself solely to the study of the laws of the land, whereby those laws were raised to the perfection they suddenly attained, under the auspices of our English Justinian, King Edward I.

Sources of Our Law. If the student of the common law should desire to trace the law to its fountains, let him read of the customs of the Britons and Germans, as recorded by Cæsar and Tacitus; to the codes of the northern continental nations, and more especially to those of our own Saxon princes; to the rules of the Roman law, either left here in the days of Papinian or

imported by Vacarius and his followers; but above all to that inexhaustible reservoir of legal antiquities and learning, the feudal law. These fundamental principles should be compared with the precepts of the law of nature and the practice of other countries, explained by reason and illustrated by examples.

SECTION II.—THE NATURE OF LAWS IN GENERAL.

Defined. In its broadest sense, law signifies a rule of action. It embraces all kinds of actions, animate or inanimate, rational or irrational. Thus we say: the laws of motion, of gravitation, of optics, of mechanics, as well as the laws of nature and of nations. It is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.

Fixed Principles. At the creation of matter, God impressed certain principles upon it, from which it can never depart, and without which it would cease to be. He then established certain laws of motion, to which all movable bodies must conform. So a clockmaker establishes certain arbitrary laws for the movements of the time-piece, following which it answers the end of its formation.

Natural Law. The same rule holds as to vegetable and animal life, which are governed by fixed laws. The progress of plants from the seed to the root, and from thence to the seed again; the method of animal nutrition, digestion, secretion and other branches of vital economy are not left to chance or to the will of the creature itself, but are guided by unerring rules laid down by the Creator.

Human Law. Laws, in the confined sense we shall treat of them, denote the rules not of action in general, but of human action, that is, the precepts by which man must regulate his behavior.

Divine Law. The will of his Maker is called the law of nature. Man is entirely a dependent being, subject to the laws of his Creator, to whose will he must conform. Although endowed with free will, yet it is regulated and restrained in some degree by certain immutable laws of good and evil, to which Deity Himself conforms. These principles are included among others, that we should live honestly, should hurt no one, and should render to every one his due. To these three precepts, Justinian has reduced the whole doctrine of law. As a Being of

infinite power He could prescribe any laws, however unjust and severe, but as a Being also of infinite wisdom, He has laid down only such laws, as are based upon justice.

Divine Goodness. As a Being of infinite goodness, God has so inseparably connected the laws of eternal justice with the happiness of each individual, that the latter cannot be attained, without observing the former. He has graciously reduced the rule of obedience to this one precept, that man should pursue his own true and substantial happiness. This is the foundation of ethics or natural law.

Law of Nature. This law, being coeval with mankind and dictated by God Himself, is obligatory upon all. No human laws are of any validity if contrary to this, as they derive their force and authority from this original. We must discover what the law of nature directs in every circumstance of life, by considering what method will tend the most effectually to our own substantial happiness.

Revealed Divine Law. In compassion for the imperfections of human reason, God has mercifully at times discovered and enforced His laws by direct revelations. These are found in the holy scriptures. These precepts, when revealed, are really a part of the original law of nature. The revealed law is of greater authenticity, than the moral system framed by ethical writers, termed the natural law, because one is the law of nature, as declared to be by God Himself; the other is only what, by the light of human reason, we imagine to be that law.

Foundation of Human Law. Upon these two foundations, the law of nature and the law of revelation, depend all human laws; *i. e.* no human laws should contradict them. Upon indifferent points, the divine and natural law leave a man at his own liberty, subject for the benefit of society to restraint within certain limits. With regard to points that are not indifferent, human laws are only declaratory of and in subordination to the divine law.

Example. Instance of Murder. This crime is expressly forbidden by the divine law, and demonstrably by the natural law, and from these prohibitions arise the true unlawfulness of the crime. Those human laws that annex a punishment to it do not increase its moral guilt. If, therefore, any human law should allow or enjoin the commission of such crime, we should disobey such law, or we would offend both the natural and divine.

Unimportant Matters. In unimportant matters, not commanded or forbidden by those superior laws, the inferior legislature has opportunity to interpose, and to make that action lawful which before was not so.

Law of Nations. The human race is necessarily divided into many separate states and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this intercourse, called the law of nations, in which, as no superiority is acknowledged, the states will allow no dictation, but depend entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues and agreements between these several communities.

MUNICIPAL LAW.

Defined. This is 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."

A Rule. It is a rule, permanent, uniform and universal. Where the operation is confined to one individual, it is a sentence, not a law. It is not advice, which we are at liberty to follow or ignore. Our obedience to the law depends not on our approbation, but upon the maker's will. Counsel is a matter of persuasion, law is a matter of injunction. It is a rule, and not a mere compact or agreement. A compact is a promise proceeding from us, law is a command directed to us.

Rule of Civil Conduct. This distinguishes municipal law from natural or revealed. The former is the rule of moral conduct, and the latter not only of moral conduct, but of faith. Municipal law regards man as a citizen as well as a creature, and bound to other duties to his neighbor than those of mere nature and religion; duties to contribute to the subsistence and peace of society.

Rule Prescribed and Announced. A bare resolve of a legislator without external sign is no law. Notice must be given to the people who are to obey it. The manner of notice is unimportant. In the case of the English common law, the notice is by tradition and long practice. It may be by proclamation, or under certain acts of parliament by public reading. The general course, however, is by writing or printing. In every case, the notice should be public and easily understood.

Ex Post Facto Laws. These are wholly unreasonable. They are enacted after a crime has been committed, stamping the past act as a crime, which had not before been declared such, and inflicting punishment. A subsequent law in such case pronounces as a crime an act, which was innocent at the time it was committed. All laws should, therefore, be made to commence *in futuro*, with proper notice of their passage, which is implied in the term "prescribed." After such public notification, it is the business of every subject to become conversant with the law, and ignorance of what he might know is no excuse.

Rule Prescribed by the Supreme Power in a State. Legislation is the greatest act of superiority one can exercise over another. Hence it should be the act of the sovereign power.

Origin of Society. The foundations of society are the wants and the fears of individuals. Single families formed the first natural society among themselves. Its limits were daily extended, and laid the first imperfect rudiments of civil or political society. When this grew too large to subsist conveniently in that pastoral state in which the patriarchs lived, by migrations it became subdivided. Afterwards as agriculture increased, migrations became less frequent, and various tribes reunited, sometimes by compulsion and conquest, sometimes by accident, and occasionally by compact. Undoubtedly mankind is kept together by the sense of weakness, which shows the necessity of union. This, therefore, is the solid foundation and cement of civil society. This we term the original contract of society. It may never have been expressed at the first institution of a state, yet is understood in the very act of associating together, namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or in other words, that the community should guard the rights of each individual, and that, in return for this protection, each individual should submit to the laws of the community.

Who shall Govern. Civil society once formed, government is necessary to keep it in order. A superior must be constituted, whose commands all the members must obey. The control should be reposed in such persons, who possess in some degree the divine attributes of wisdom, goodness and power; wisdom to discern the interests of the community, goodness to

strive to pursue such real interest, and strength or power to carry the knowledge and intention into action. These are the natural foundations of sovereignty, the requisites for every well-constituted frame of government.

Forms of Government. The origin and beginning of the several forms of government are involved in uncertainty, but in all there must have been a supreme, irresistible, absolute, uncontrolled authority. Political writers of antiquity specify three forms of government:

First. When sovereign power is lodged in an aggregate assembly, consisting of all the free members of a community, which is called a democracy.

Second. When it is lodged in a council, composed of select members, when it is styled an aristocracy.

Third. When it is entrusted in the hands of a single person, and then it is called a monarchy.

Legislative Power. By the sovereign power is meant the making of laws. At any time, the legislature may alter the law by a new edict, and may entrust the execution of its laws into whatever hands it pleases, by constituting a few or many executive magistrates. All the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.

Democracy. Where the right of making laws resides in the people, public virtue or goodness of intention is more likely to be found, than either of the other qualities of government. Public assemblies are often foolish in their impulses and weak in execution, but their object is generally praiseworthy, and they abound in patriotism and public spirit.

Aristocracy. More wisdom is to be found in this than in any other frame of government, composed as it usually is of the most experienced citizens, but there is less honesty than in a republic, and less strength than in a monarchy.

Monarchy. This is the most powerful form of government, for by the entire conjunction of the legislative and executive powers, all the sinews of government are knitted together and united in the hand of a prince; but then there is imminent danger of his employing that strength for oppressive purposes.

Compared. Democracies are usually the best calculated

to direct the end of a law; aristocracies to invent the means by which that end shall be attained, and monarchies to carry those ends into execution. The ancients knew of no other permanent form but these three.

English Constitution. England has the advantages of all three of these forms of government. The executive form is lodged in a single person, combining the strength and dispatch found in the most absolute monarchy. The legislature of the kingdom is entrusted to three distinct, independent powers, the king, the lords spiritual and temporal, an aristocratic assemblage of prominent persons, and lastly, the house of commons, freely chosen by the people from among themselves, which makes it a species of democracy. This aggregate body composes the British parliament, and has the supreme disposal of everything. Each branch has a negative power sufficient to repel any dangerous innovation. In no other shape could these three great qualities of government be so well and happily united. If the power were lodged in the king and the house of lords only, laws might be prudently made and well executed, but they might not always have the good of the people in view. If lodged in the king and commons, we should lack that circumspection and caution, which the wisdom of the peers affords. If the king had no voice in the government, his prerogatives would be encroached upon and his office probably abolished. If at any time the independence of any one of the three should be lost, or become subservient to the views of the other two, there would soon be an end to the English constitution.

Submission to Authority. Wherever the supreme authority in any state resides, it is the right of that authority to make laws, that is, to prescribe the rule of civil action. This is patent from the very end and institution of civil states, which are collective bodies, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. As these several wills cannot by any natural union be joined together, so as to produce one uniform will of the whole, it must be accomplished by a political union, by the consent of all to submit their private wills to the will of one man or of assemblies of men, to whom the supreme power is entrusted. This will of one man or of assemblies of men is termed law.

Promulgation of Laws. It is not only the right of the

supreme power to make laws, but it is also its duty to give directions declaratory of its will. It must establish general rules for the information and direction of all persons in all points, whether of positive or negative duty. Every man may thus know what to look upon as his own, what as another's, what absolute and what relative duties are required of him, what is to be esteemed honest, dishonest or indifferent, what degree of natural liberty every man retains, what he has yielded as the price of the benefits of society, and how he is to use those rights assigned him, in order to promote public tranquility.

Right and Wrong. The law having ascertained the boundaries of right and wrong, it is its business to enforce those rights and to restrain or redress those wrongs. We shall consider in what manner the law ascertains these, and the method which it takes to command the one and prohibit the other.

Parts of every Law. 1. *Declaratory, whereby the rights to be observed and the wrongs to be avoided are clearly defined and laid down.*

2. *Directory, whereby the subject is instructed and enjoined to observe those rights and to abstain from the commission of those wrongs.*

3. *Remedial, whereby a method is pointed out to recover a man's private rights or redress his private wrongs.*

4. *Vindicatory, whereby it is signified, what evil or penalty shall be incurred by such as commit any public wrongs and transgress or neglect a duty.*

Declaratory. This depends not so much upon the law of revelation or nature, as upon the wisdom and will of the legislator. No human legislature has power to abridge or destroy natural rights, unless the owner himself shall commit an act that amounts to a forfeiture. Divine or natural duties receive no stronger sanction, from being also declared to be duties by the law of the land.

Mala in se. Crimes forbidden by the superior law, and therefore styled *mala in se*, contract no additional turpitude from being declared unlawful by the legislature. Hence the declaratory part of the municipal law has no force or operation at all, with regard to actions that are intrinsically right or wrong.

Mala prohibita. But with regard to things in themselves

indifferent, the case is different. They become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, to promote the welfare of society. 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.

Directory. This part of the law virtually includes the former, the declaration being usually collected from the direction. In things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or omit them.

Remedial. This is so necessary a consequence of the declaratory and directory parts, that laws must be 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 the protection of the law.

Vindicatory. With regard to the sanction of the laws, or the evil that may attend the breach of public duties, legislators have usually made their laws vindicatory rather than remuneratory, or to consist rather in punishment than in actual particular rewards. The quiet enjoyment of all our civil rights and liberties, the result of obedience to municipal law, is in itself the best reward. To furnish other reward for this would be too profuse a bounty. Also the dread of evil is more potent than the prospect of good. Hence legislators seldom proffer reward for the performance of duty, but affix penalties against trangressions, or else leave the nature and quantity of the punishment to the discretion of the judges, who are entrusted with the execution of the laws. The vindicatory part of the law is the most effectual, as the main strength and force of the law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws. Legislators and their laws are said to compel and oblige, by declaring a penalty against all offenders, whereby by reason of the impending correction, compliance is preferable to disobedience, whereas rewards in their nature can only persuade and allure; nothing is compulsory but punishment.

Prohibitory Laws. Appeal to Conscience. Our ethical writers assert, that human laws are binding upon men's consciences. But if that were the only obligation, the good alone

would regard the law, and the bad would set it at defiance. Then again, while in regard to things *mala in se* the path of duty is plain, because we are bound by superior laws, which enjoin positive duties, yet in things *mala prohibita* without any intermixture of moral guilt, annexing a penalty for non-compliance, conscience is not concerned, except in directing a submission to the penalty in case of breach. The alternative is offered; either abstain from this, or submit to such a penalty. Conscience in such case will be clear, whichever alternative a man choses to embrace. These prohibitory laws do not make the transgression a moral offense; the only obligation to conscience is to submit to the penalty if levied. This only refers to laws simply penal, where the thing forbidden or enjoined is wholly a matter of indifference, and the penalty is simply a compensation. But where disobedience to the law involves public or private injury, it is also an offence against conscience.

Interpretation of Laws. In the Roman empire, when any doubt arose upon the construction of its laws, it was usual to state the case to the emperor in writing, and to take his opinion upon it. His answers were termed rescripts, and had in succeeding cases the force of laws. In like manner the canon laws, or decretal epistles of the popes, are all of them rescripts. They argue from particulars to generals. The best method to interpret the will of the legislator is, by exploring his intentions at the time the law was made, by signs the most natural and probable. These signs are either:

The words, the context, the subject matter,

The effects and consequence, or the spirit and reason.

Words. These 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 sense. Terms of art or technical terms must be taken according to the acceptation of the learned in each art, trade or science.

Context. If words are dubious, we may establish their meaning from the context, which may be used to compare a word or a sentence, whenever it is ambiguous, equivocal or intricate. Thus a preamble is often called in to help the construction of an act of parliament. Of similar benefit is the comparison of a law with other laws made by the same legislator,

that have some affinity with the subject, or that expressly relate to the same point.

Subject Matter. Words are always supposed to have a regard thereto, and the expressions of the legislator are presumed to have been directed to the subject matter.

Effects and Consequence. The rule is, where words bear either none, or a very absurd signification, if literally understood, we must deviate a little from the received sense of them.

Reason and Spirit of the Law. This is the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, viz.: to consider the cause which moved the legislator to enact it. For when the reason ceases, the law itself ought to cease with it.

Equity Defined. From this method of interpreting laws by the reason of them arises what is called equity, which is defined by Grotius, to be "*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 somewhere be a power vested of defining those circumstances, which, had they been foreseen, the legislator himself would have expressed.

No Fixed Rules in Equity. Equity thus depending essentially upon the particular circumstances of each individual case, there can be no established rules and fixed precepts laid down, without destroying its very essence, and reducing it to a positive law. And on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. Law without equity, though hard and disagreeable, is more for the public good than equity without law, which would make every judge a legislator, and introduce infinite confusion, as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.

SECTION III.—THE LAWS OF ENGLAND.

Division. *Lex non scripta, the unwritten or common law.*
Lex scripta, the written or statute law.

Leges non Scriptæ. The unwritten law includes not only general customs, or the common law, 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. Though these be termed *leges non scriptae*, they include more than those merely oral, or communicated from the former ages to the present day solely by word of mouth.

History of Unwritten Law. It is true that in the profound ignorance of letters of earlier days, all laws were entirely traditional, because writing was but seldom employed. With us, however, at this period, the evidence 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 legal writers preserved and transmitted from ancient times. We use the term *non scriptae*, because their original institution and authority were 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 through the kingdom. Our laws, says Lord Bacon, are as mixed as our language, and as our language is so much the richer, the laws are the more complete. The intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes and the Normans, must have insensibly introduced and incorporated many of their own customs with those that were before established, thereby probably improving the texture and wisdom of the whole.

Saxon Laws. In the time of Alfred, the local customs of the several provinces of the kingdom had grown so various, that he deemed it expedient to compile his Dome Book for general use. This volume was extant until the time of Edward the Fourth. It contained, we may suppose, the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings. The occupation and establishment of the Danes in England introduced new customs and caused this code to fall into disuse, or at least to become mixed with coarser

laws, so that at the beginning of the eleventh century, there were three principal divisions of laws prevailing in different districts, viz., the Mercian laws of the middle counties, the laws of the West Saxons in the south and west, and the Danish law of the eastern coast, the part most exposed to the visits of this piratical people. The northern provinces at that time were under a distinct government.

Code of Edward the Confessor. Out of these three codes, King Edward the Confessor extracted one uniform digest of laws, to be observed through the entire kingdom. This undertaking apparently was no more than a new edition or fresh promulgation of Alfred's code, with additions and improvements suggested by the experience of a century and a half. Alfred was the *conditor*, Edward the Confessor the *restitutor*. Our ancestors struggled to maintain these laws under the first Norman princes. Subsequent kings allayed popular clamor, by promising to restore and keep them, when pressed by foreign emergencies or domestic discontent.

Conflict with the Civil Law. These are the laws, that so vigorously withstood the repeated attacks of the civil law, which established in the twelfth century virtually a new Roman empire over most of the states on the continent. They probably lost their political liberties thereby, while the free constitution of England was rather improved than debased.

Its Name and Antiquity. These in short are the laws, which originated that collection of maxims and customs, now known as the common law, a name either given to it to distinguish it from other laws, or more probably as a law common to the entire realm, the *jus commune*. The precise beginning of an ancient custom is difficult to ascertain. Its merit depends upon it having been used time out of mind, a time, whereof the mind of man runneth not to the contrary. This gives it weight and authority.

Divisions. 1. *General customs.* These are the universal rules of the whole kingdom, and form the common law in its stricter and more usual signification.

2. *Particular customs.* These for the most part affect the inhabitants of particular districts.

3. *Certain particular laws.* These by custom are adapted and used in some particular courts of somewhat extensive jurisdic-

tion. Some have divided the common law into established customs and established rules and maxims.

First. **General Customs.** These are usually called the common law, that is, that law by which proceedings and determinations in the king's ordinary courts of justice are guided and directed.

Jurisdiction. This for the most part settles the course in which lands descend by inheritance, the manner and form of acquiring and transferring property, the obligations and solemnities of contracts, the rules of expounding wills, deeds and acts of parliament, the respective remedies of civil injuries, the several species of temporal offences, with the manner and degree of punishment, and an infinite number of minuter particulars.

Minor Jurisdiction. Thus, for example, that there shall be four superior courts of record, the chancery, the king's bench, the common pleas and the exchequer, that the eldest son alone is heir to his ancestor, that property may be acquired and transferred by writing, that a deed is of no validity unless sealed and delivered, that wills should be construed more favorably and deeds more strictly, that money lent upon bond is recoverable in an action of debt, and that breaking the peace is punishable by fine and imprisonment. All these are doctrines not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, common law, for their support.

Validity of Customs and Maxims. The judges of the courts of justice determine their validity. They are the depositaries of the laws, the living oracles, who decide all cases of doubt according to the law of the land. Their decisions are the most authoritative evidence that can be given of the existence of such customs, as form part of the common law.

Records. The judgment itself and the previous proceedings are carefully registered and preserved, under the name of records, in public repositories provided, to which recourse is had for precedents.

Precedents. It is an established rule to abide by former precedents, where the same points come again in litigation. This prevents the scale of justice from wavering with every new judge's opinion, and the law in that case being 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 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. The exception is where the former determination is incorrect, much more if it be clearly contrary to 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. They do not decide that the former decision was bad law, but that it was not law. Lawyers tell us, that the common law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Also whenever a standing rule of law, of which the reason is not remembered or discerned, has been broken in upon by statutes, the wisdom of the rule has in the end appeared from the inconveniences that have followed the innovation.

Their Value. The doctrine of the law is this: Precedents and rules must be followed, unless flatly absurd or unjust, for though their reason be not at first obvious, yet we owe a deference to former times. The law and the opinion of the judge are not always convertible terms, or one and the same thing, since it sometimes may happen, that the judge may mistake the law. But as a rule, the decisions of courts of justice are the evidence of what is common law.

Reports of Decisions. The decisions of courts, therefore, are held in the highest regard, and are not only preserved as records, but are published in numerous volumes of reports. These reports are histories of the several cases, with a short summary of the proceedings, the arguments on both sides, and the reasons the court gave for its judgment. These serve as indices to and also explain the records. The reports are extant from the reign of Edward II, and from that time until the reign of Henry VIII were taken by the prothonatories and published annually, whence they were termed year books. Since that time this work has been done by private parties, who often have produced imperfect versions.[1]

Roman Adherence to Custom. The ancient Roman law, during the days of its liberty, paid also a great regard to custom,

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[1] Besides these reporters, there are authors whose works are greatly respected by the students of common law. Among them are Glanvil, Bracton, Britton, Fleta, Hengham, Littleton, Stratham, Brooke, Fitzherbert and Coke.

but not so much as our law does, it only then adopting it, when the written law was deficient.

English Adherence to Custom. It is one of the characteristic marks of English liberty, that our common law depends upon custom, which carries this internal evidence of freedom along with it, that it was probably introduced by the voluntary consent of the people.

Second. **Particular Customs.** These affect only the inhabitants of particular districts. They are the remains of those numerous local customs, out of which the common law, as it now stands, was collected by Alfred, and afterwards by Edgar and Edward the Confessor; each district sacrificing some of its own special usages, in order to effect an uniform and universal system of laws. Particular counties, cities, towns and manors were indulged in the privilege of abiding by their own customs, in contradistinction to the rest of the nation, which privileges were confirmed to them by parliament.

Gavelkind. Such is the custom of gavelkind in Kent and some other parts of the kingdom, which was general until the Norman conquest. This custom ordains, that all the sons alike shall succeed to a father's inheritance, and that though the ancestor be attainted, the heir shall succeed to his estate, without any escheat to the lord.

Borough English. Such also is the custom that prevails in certain ancient boroughs, and therefore called borough-English, that the youngest son shall inherit the estate in preference to all his elder brothers.

Other Customs. There are other less important particular customs, as the *lex mercatoria*, the custom of merchants for the benefit of trade, the customs of manors, and the particular customs of the city of London.

Rules Relating thereto. The laws relating to particular customs regard either the proof of their existence, their legality when proved, or their usual method of allowance. As to the proof, except as to gavelkind and borough-English, they must be specially pleaded. The customs of London differ from all others in point of trial, which is never before a jury. To make a particular custom good, the following requisites are necessary:

Requisites of every Custom. 1. *It must have been used so long, that the memory of man runneth not to the contrary.*

2. *It must have been continued. There must have been no interruption of the right, though there may have been of the possession.*

3. *It must have been peaceable and acquiesced in.*

4. *It must be reasonable, or at least no good reason can be assigned against it.*

5. *It ought to be certain.*

6. *It ought to be compulsory, although originally established by consent. It ought to be left to the option of every man, whether he will use it or not.*

7. *Customs must be consistent with each other, and must be construed strictly and submit to the king's prerogative.*

Third. **Peculiar Laws.** By custom, these are used only in certain peculiar courts and jurisdictions. These are the civil and canon laws. It may seem somewhat improper to apply the term *non scriptae* to these, as the yare set forth in pandects, codes and institutions, also by councils, decrees and decretals, and enforced by expositions, decisions and treatises of the learned. But their force in this kingdom is not because they were written, nor upon their intrinsic authority. They have no authority in England, but are admitted in certain particular cases, by universal usage in some particular courts, and they form a branch of the *leges non scriptae.*

Civil Law. By this is understood the municipal law of the Roman empire, as comprised in the institutes, the code and the digests of the emperor Justinian, and the novel constitutions of himself and some of his successors. The Roman law was founded upon the regal constitutions of their ancient kings; next upon the twelve tables of the decemviri; then upon the laws or statutes enacted by the senate or people, the edicts of the praetor, the opinions of learned lawyers, and lastly upon the imperial decrees or constitutions of successive emperors. These were codified by the emperor Theodosius the Younger, A. D. 438, and for many centuries it was used as the only book of civil law in western Europe. In the eastern empire, the emperor Justinian compiled the present body of civil law, with the aid of Tribonian and other lawyers, completing it about 533 A. D.

Justinian Code. This contains: 1. The Institutes or first principles of Roman law, in four books. 2. The Digests or Pan-

dects in fifty books, containing the opinions of eminent lawyers. 3. A new code or collection of imperial constitutions, in twelve books. 4. The Novels, or new constitutions, being a supplement to the code, containing new decrees. These form the body of Roman law, or *corpus juris civilis.* They soon fell into neglect and oblivion, till about the year 1130, when a copy of the digests was found at Amalfi in Italy, which suddenly gave new authority to the civil law, and introduced it into several nations.

Canon Law. This is a body of Roman ecclesiastical law, relative to such matters, over which that church professed to have proper jurisdiction. It 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. It remained in confusion until the year 1151, when Gratian, an Italian monk, animated by the discovery of Justinian's pandects, reduced the ecclesiastical constitutions into some method, in three books, known as the *Decretum Gratiani.* The subsequent decrees were published in the same method by Gregory IX in 1230 in five books, to which a sixth book was added by Boniface VIII. The Clementine constitutions or decrees of Clement V were subsequently annexed by his successor John XXII, who also published twenty constitutions of his own, called the Extravagantes, in the fourteenth century. Five books were appended by subsequent pontiffs.

Jurisdiction of Civil and Canon Laws. There are four courts, in which the civil and canon laws are permitted, under different restrictions, to be used: 1. Ecclesiastical courts. 2. Military courts. 3. Courts of admiralty. 4. Courts of the two universities. Their reception in these courts is grounded entirely on custom. The courts of common law have the superintendency over such courts, to keep them within their jurisdiction, to restrain and prohibit any excess of power, and in case of contumacy, to punish the officer who executes, or the judge who enforces an illegal sentence. The common law expounds such acts of parliament, as concern the extent of these courts, or the matters to be tried therein. The king's courts at Westminster will grant prohibitions to restrain 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. The civil and canon laws at present in England are inferior branches of the customary or unwritten laws of the country.

LEGES SCRIPTÆ.

Defined. These are the written laws of the kingdom, and are statutes, acts or edicts, made by the king, with the consent of the lords spiritual and temporal, and the commons, in parliament assembled. The oldest of these is the famous *magna carta*; the records of acts before that time being now lost.

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 must take notice judicially and *ex officio*, without the statute being particularly pleaded. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons and private concerns. The Romans entitled them *senatus decreta*, in contradistinction to the *senatus consulta*, which regarded the whole community. These have to be formally shown and pleaded.

Declaratory Statutes. Statutes also are either declaratory of the common law, or remedial of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable, in which case the parliament, for the purpose of avoiding doubts and difficulties, declares what the common law is, and ever has been.

Remedial Statutes. 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 of judges, or from any other cause. This being done, either by enlarging the common law, where it was too circumscribed, or by restraining it, where it was too lax, has occasioned a division of remedial statutes into enlarging and restraining statutes.

RULES IN CONSTRUING STATUTES.

1. Old Law, Mischief and Remedy. Three points are to be considered in the construction of all remedial statutes: *The old law, the mischief and the remedy.* That is, how the old 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 has provided to cure this mischief. And it is the business of the judge, so to construe the act, as to suppress the mischief and advance the remedy.

2. Questions of Rank. 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. Penal statutes must be construed strictly.

4. Statutes against Frauds. Statutes against frauds are to be liberally and beneficially expounded. Where the statute acts upon the offender and inflicts a penalty, it is to be taken strictly, but when the statute acts upon the offence, by setting aside the fraudulent transaction, it is to be construed liberally.

5. Clauses must be in Accord. One part of a statute must be so construed by another, that the whole may, if possible, stand.

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

7. Questions of Precedence. Where the common law and a statute differ, the common law gives place to the statute, and an old law gives place to a new one. 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.

8. Repealing Statute. If a statute that repeals another is itself afterwards repealed, the first statute is hereby revived, without any formal words to that purpose.

9. Acts of Parliament. Acts of parliament, derogatory from the power of subsequent parliaments, have no binding effect. The legislature, being the sovereign power, is always of absolute authority. It acknowledges no superior power, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. Cicero declared, that when you repeal the law itself, you repeal the prohibitory clause, which guards against such repeal.

10. Invalid Statutes. Acts of parliament, that are impossible to be performed, are of no validity, and if there arise out of them any absurd consequences, contradictory to reason, they are, with those collateral consequences, void. If parliament will positively enact an unreasonable thing, there is no power in the ordinary forms of the constitution vested with authority to control it. The judges are not at liberty to reject it, for that were to set the judicial power above that of the legislature, which would be subversive to all government.

Collateral Matters. But where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges naturally conclude, that this consequence was not foreseen by the parliament, and, therefore, they are at liberty to expound the statutes by equity, and only *quoad hoc* disregard it.

Equity. Jurisdiction. Equity is also frequently invoked to assist, moderate and explain the laws. There are peculiar courts of equity established for the benefit of the subject; to detect latent frauds and concealments, which the process of the courts 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 result from misfortune or oversight, and to give a more specific relief, and one more adapted to the circumstances of the case, than can always be obtained by the rules of the common law. This is the business of our courts of equity, which are only conversant with matters of property. In criminal cases, no power should be lodged in any judge to construe the law, otherwise than according to the letter. A man cannot suffer more punishment than the law assigns, but he may suffer less. In case of apparent hardship, the crown has the power to pardon.

Section IV. COUNTRIES SUBJECT TO ENGLISH LAWS.

England Originally alone Subject. The kingdom of England, over which our municipal laws have jurisdiction, includes by the common law only the territory of England. And yet the civil laws and local customs of this land do now obtain with certain restrictions, in part or in all the adjacent countries of Wales, Scotland and Ireland.

WALES.

Political History. Wales had continued independent of England, unconquered and uncultivated, in a primitive, pastoral state for many centuries, as Cæsar and Tacitus describe the ancient Britons, even from the time of the hostile Saxons, when Christians retired to these natural intrenchments for protection from their pagan visitants. When the invaders themselves became Christian converts, and organized regular governments, this retreat of the ancient Britons grew daily narrower. They were driven from one fastness to another, and gradually abridged of their wild independence.

Conquest of Wales. Early in our history we find their princes doing homage to the crown of England, till at length in the reign of Edward I, who may justly be styled the conqueror of Wales, the line of their ancient princes was abolished, and the king of England's eldest son became their titular prince, being styled "prince of Wales." The territory of Wales was annexed, by a kind of feudal resumption, to the dominion of the crown of England. By statute also of Wales, material alterations were made in their laws, so as to reduce them nearer to the English standard, especially in the forms of judicial proceedings, but they still retained much of their original polity, particularly their rule of inheritance, dividing the lands equally among the issue male.

Made English Subjects. The finishing stroke to their independence was given in the reign of Henry VIII of England, which advanced their civil prosperity, by admitting them to a thorough communication of laws with English subjects. They were made fellow citizens with their conquerors, a generous method of triumph, which the republic of Rome practiced with great success, till she reduced all Italy to obedience to her rule, by admitting the vanquished states to partake of the Roman privileges. The statute of Henry VIII enacted: (1) That Wales should be forever united to England. (2) That all Welshmen born shall have the same liberties as the other subjects of the king. (3) That lands in Wales shall be inheritable according to the English tenure and rules of descent. (4) That the laws of England and none other shall be used in Wales. The country was divided into twelve shires.

SCOTLAND.

Political History. The kingdom of Scotland, notwithstanding the union of the crowns on the accession of James, continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected. Apparently this could be readily accomplished, as both kingdoms were anciently under the same government, and still retained a very great resemblance, though far from an identity in their laws. By an act of parliament in the reign of James I, the two kingdoms of Scotland and England were declared one.

Resemblance to England. There was a marked conformity in the religion and language of the two nations, also in their ancient laws, the descent of the crown, their parliaments, their titles of nobility, their officers of state and justice, their writs, their customs, and even the language of their laws. On which account, Coke supposes the common law of each to have been originally the same.

Terms of Union. The union of the two countries was not in all respects effected, however, until 1707. The name, Great Britain, was applied to them. The succession to the monarchy was the same, as had been settled with regard to England. One parliament should represent them, and there should be a communication of all rights and privileges. The English standard of coins, weights and measures should be adopted. The laws relating to trade, customs and excise should be the same. But all the other laws of Scotland were to remain in force, though alterable by the parliament of Great Britain. Sixteen Scottish peers were to represent Scotland in parliament, and forty-five members to sit in the house of commons. The church of Scotland and also the four universities of that kingdom were established forever.

The Act of Union. The two countries are now so inseparably united, that separation between them can never occur, except by mutual consent, or the successful resistance of either, upon apprehending an infringement of the fundamental and essential conditions of the union. One of these conditions is, the preservation of the two churches of England and Scotland in the same state as they were at the union, and the maintenance of the acts of uniformity, which establish our common prayer. Another condition is, that the municipal laws of Scotland shall

be preserved there, unless altered by parliament. As these have not been so altered in any important particulars, the municipal or common laws of England are, generally speaking, of no force or validity in Scotland.

Berwick upon Tweed. This town was originally part of the kingdom of Scotland, but was reduced into the possession of the English crown by Edward I, who gave the town a charter, which was confirmed by Edward III. James I remodelled this, and all its franchises and liberties were subsequently confirmed in parliament. Though at the present time, certain royal writs do not run into Berwick, any more than in Wales, yet all prerogative writs may issue there as elsewhere.

IRELAND.

Political History. This country is still distinct, though a dependent, subordinate kingdom. Its laws generally agree with those of Great Britain. Its inhabitants for the most part are descended from the English, who planted in it a kind of colony, after its conquest by Henry II, and the introduction there of the laws of England. Being thus in a state of dependence, it must necessarily conform to such laws, as the superior state thinks proper to prescribe.

The Brehon Law. At the time of the conquest, the Irish people were governed by what they called the Brehon law, so styled from the Irish name of judges, who were termed Brehons. But king John visited Ireland, accompanied by learned men of the law, and, in right of dominion by conquest, ordained that Ireland should be governed by English laws. The Irish were averse to this, and still clung to the Brehon law, so that Henry III and Edward I repealed the order, but at length under Edward III, this law was formally abolished. Yet even in Elizabeth's reign, many of the natives preserved this law, which had been delivered to them by tradition.

General Acts of Parliament. But as Ireland was a distinct dominion, it is to be observed, that though the immemorial customs or common law of England were made the rule of justice in Ireland also, yet no acts of the English parliament, since the reign of king John, extended into that kingdom, unless it was specially named or included under general words, such as "within any of the king's dominions."

Irish Parliament. The original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding parliaments at his pleasure, which enacted such laws as they thought proper. But an ill use being made of this liberty, in the reign of Henry VII a set of statutes were enacted, called Poyning's laws, from the name of the then lord deputy, to restrain the power of the deputy and also of the Irish parliament. These provided, that before any parliament be summoned in Ireland, the reasons and causes for convening the same be submitted to the English king, who might at his discretion grant a license for holding the same, at which session only such propositions, as had been certified to the king, should be acted upon. As this precluded any law being proposed, which had not been preconceived before the parliament convened, and hence occasioned great inconvenience, it was provided in Queen Mary's time, that any new propositions might be certified to England during the session of the parliament. By this means, there was nothing left to the Irish parliament, but a bare negative or power of rejecting, not of proposing or altering any law.

Ireland a Dependent State. The Irish nation, being excluded from the benefit of the English statutes, was deprived of many good and profitable laws made for the improvement of the common law, and the measure of justice in both kingdoms becoming thence no longer uniform, it was enacted by another of Poyning's laws, that all acts of parliament before made in England should be of force in Ireland. But the laws passed from the time of Henry VII to that period do not bind the Irish people, unless specially named, or included in general words. If so specified, they are bound by such acts, for this follows from the very nature and constitution of a dependent state, which is under obligation to conform to the will or law of that superior person or state, upon which the inferior depends. To emphasize this state of dependency, a statute was passed in the reign of George I, which declared, that the kingdom of Ireland ought to be subordinate to and dependent upon the imperial crown of Great Britain, as being inseparably united thereto, and that the king with the consent of the parliament of Great Britain had power to make laws to bind the Irish people.

Appeals from Courts. The ultimate resort from the courts of justice in Ireland, as in Wales, is to those of England;

a writ of error in the nature of an appeal, lying from the king's bench in Ireland to the king's bench in England, or an appeal from chancery there to the house of lords here; it being expressly declared by the same statute, that the peers of Ireland have no jurisdiction to affirm or reverse any judgments or decrees whatsoever. Although justice be in general administered in the courts of the inferior jurisdiction, yet an appeal in the last resort ought to be to the courts of the superior state, because otherwise the law in such inferior dominion might be insensibly changed within itself, without the assent of the superior, and because otherwise judgments might be given to the disadvantage of the superior, or to make the dependence to be only of the person of the king and not of the crown of England.

Isle of Man. This is a distinct territory from England, and is not governed by English laws, neither does any act of parliament extend to it, unless it be specially named therein. It was formerly a subordinate feudatory kingdom, subject to the king of Norway, then to king John and Henry III of England, afterwards to the kings of Scotland, and then again to the crown of England.

Other Islands. The islands of Guernsey, Jersey, Sark and Alderney were parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, which are for the most part the ducal customs of Normandy. They are not bound by acts of parliament, unless particularly named.

Foreign Colonies. These are also in some respects subject to the English laws. Colonies, like the American plantations, in distant countries, are either those, where the lands are claimed by the right of occupancy only, or by finding them desert and uncultivated, and peopling them from the mother country, or where, when already cultivated, they have been either gained by conquest or ceded by treaties. These rights are founded upon the law of nature, or at least upon that of nations.

Uninhabited Countries. Where these are discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. This rule is subject to many restrictions. Such

subjects carry with them, only so much of the English law, as is applicable to their own situation and the condition of an infant colony, such as the general rules of inheritance and of protection from personal injuries. The artificial distinctions incident to the property of a great and commercial people, the laws of police and revenue and many other provisions are unnecessary for them, and hence not in force. What shall be admitted and what rejected, must in the first instance be decided by their own provincial judicature, subject to the revision and control of the king in council; the whole of their constitution being also liable to be reformed by the legislature in the mother country.

Conquered and Ceded Countries. These have already laws of their own, which may be altered and changed by the king, until which time the ancient laws of the country remain, unless against divine law. Our American plantations are not subject to the common law of England, they being no part of the mother country, but distinct, though dependent dominions. They are subject, however, to the control of the parliament. though not bound thereby, unless particularly named.

Interior Polity of the Colonies. These are of three sorts: (1) Provincial establishments, the constitutions of which depend on the respective commissions issued by the crown to the governors, and the accompanying instructions, under which provincial assemblies are constituted, with the power of making proper local ordinances. (2) Proprietary governments, granted by the crown to individuals, in the nature of feudatory principalities, with the subordinate powers of legislation, such as once belonged to counties-palatine. (3) Charter governments, in the nature of civil corporations, with the power of making by-laws for their own interior regulation, not contrary to the laws of England, and with such rights, as are given them in their several charters of incorporation. They have a governor named by the king, and courts of justice of their own, from whose decisions an appeal lies to the king and council in England. Their general assemblies, which is their house of commons, with their council of state constitute their upper house, which with the concurrence of their governor make suitable laws. By statute, all of the king's colonies in America are subordinate to and dependent upon the crown and parliament of Great Britain, which have full power to make laws to bind them, as subjects of England.

King's Private Dominions. As to any foreign possessions, which may belong to the person of the king by hereditary descent, by purchase or other acquisition, as the territory of Hanover, they are entirely unconnected with the laws of England. Happily the Norman possessions were lost to England in the reign of Henry VI, after nearly four hundred years of ruinous wars for their defence. A statute now exists, that in case the crown shall hereafter come to a person not being a native of England, the nation shall not be obliged to wage war for the defence of any dominions, which do not belong to the crown of England, without consent of parliament.

Jurisdiction over the Sea. The main or high seas are part of the realm of England, for thereon the courts of admiralty have jurisdiction, but they are not subject to the common law. The 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 an alternate jurisdiction; one upon the water, when it is full sea, the other upon the land, when it is an ebb.

TERRITORY OF ENGLAND.

Divisions. Ecclesiastical and civil.

1. Ecclesiastical. Two provinces, Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses or sees of bishops, whereof Canterbury has twenty-three and York three, besides that of the Isle of Man, which was annexed to York by Henry VIII. Every diocese is divided into archdeaconries, of which there are sixty-three in all; each archdeaconry into rural deaneries, and every deanery into parishes.

Parishes. A parish is that circuit of ground, which is committed to the charge of one parson or vicar, having care of souls therein. There are about ten thousand of these districts. In the early ages of Christianity, parishes were unknown. There was no appropriation of ecclesiastical dues to any particular church, but one could contribute his tithes to any priest or church he pleased, provided he did it to some, otherwise it was left with the bishop for distribution among the clergy, and for other pious purposes, at his discretion. Some forest and desert lands were not within the limit of parishes, and hence were

termed extra-parochial. These tithes were paid to the king and not to the bishop.

2. Civil. The civil division of the territory of England is into counties. These are subdivided into hundreds, and the latter into tithings or towns.

Tithings. Ten freeholders with their families originally composed a tithing. These all dwelt together, and were sureties to the king for the good behavior of each other. If an offence was committed in their district, they were bound to have the offender forthcoming. Anciently no man was suffered to remain in England over forty days, unless he was enrolled in some tithing. Tithings, towns or vills mean the same in law. A city is a town incorporated, which is or has been the see of a bishop. To several of these towns, there are small appendages belonging, called hamlets.

Hundreds. Ten tithings composed a superior division, called a hundred, which was governed by a high constable or bailiff, in which formerly was held the hundred court. Alfred originated these divisions, borrowing the idea from Denmark and France.

Counties or Shires. An indefinite number of these hundreds make up a county or shire. Shire is a Saxon word, meaning a division; but a county, *comitatus*, is derived from *comes*, the count of the Franks, that is the earl or alderman of the shire, to whom its government was intrusted. This he usually exercised by his deputy, the sheriff, or *shire-reeve*, signifying the officer of the shire, upon whom the civil administration of it now entirely devolves. At present there are forty counties in England and twelve in Wales. Three of these counties, Chester, Durham and Lancaster are called counties-palatine, and had peculiar privileges. There are also counties corporate, which are certain cities and towns, that by special favor are counties of themselves, and not comprised in any county, but are governed by their own magistrates.

COMMENTARIES

ON THE

LAWS OF ENGLAND.

PREAMBLE.

We shall consider the rights that are commanded, and then the wrongs that are forbidden by the laws of England.

Rights. Rights may be subdivided, into those which concern and are annexed to the persons of men, and are termed *jura personarum*, the rights of persons; or into such as a man may acquire over external objects, which are entitled *jura rerum*, the rights of things.

Wrongs. Wrongs are divisible into 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.

DIVISION OF THESE COMMENTARIES.

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 or 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.*

BOOK THE FIRST.

THE RIGHTS OF PERSONS.

Defined. The rights of persons, as commanded 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 acceptation of rights or *jura*. Both may indeed be comprised in this latter division, but it will be more clear to consider them as duties acquired from, rather than as rights belonging to particular persons.

Division of Persons. Persons are divided by 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, and are called corporations or bodies politic.

Division of Rights. The rights of persons, considered in their natural capacities, are also of two sorts, absolute and relative. Absolute, which are such as appertain 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.

Chapter I. ABSOLUTE RIGHTS OF INDIVIDUALS.

Defined. By absolute rights, are meant 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.

Absolute Duties. 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 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 but social or rela-

tive duties. No matter how abandoned may be a man's principles, or how vicious his practice, provided he keeps his wickedness to himself, and does not violate public decency, he is out of the reach of human laws. But if he makes his vices public, then they become by his bad example, of pernicious effect to society, and it is the business of human laws to correct them.

Rights and Duties Distinguished. But with respect to rights, the case is different. Human laws define and enforce, as well those rights which belong to a man as an individual, as those which belong to him as related to others.

Primary Aim of Law. 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 the mutual assistance and intercourse of social communities. The primary end of human laws is to maintain and regulate these absolute rights of individuals. Such rights as are social and relative, result from the formation of states and societies, so that to maintain them is clearly a subsequent consideration. Therefore the principal object of human laws should 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 are numerous and complicated.

Natural Liberty. The absolute rights of man, considered as a free agent, are denominated the natural liberty of mankind, which consists 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, when God endowed man with 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 boon, and obliges himself to conform to those laws, which the community has thought proper to establish. Otherwise there would be no security to individuals in any of the enjoyments of life.

Civil Liberty. Political or civil liberty is no other than natural liberty, so far restrained by human laws, as is requisite for the general advantage of the public. 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 every causeless restraint of the will of the subject is a degree of tyranny, and even laws themselves, if they regu-

late our conduct in matters of mere indifference, are destructive of liberty. That constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject master of his own conduct, except in those points, wherein the public good requires some direction or restraint. Locke has well said: "Where there is no law, there is no freedom." The idea and practice of this political or civil liberty flourish in their highest vigor in these kingdoms, and can only be lost by the folly or demerits of its owner. They are founded on nature and reason, and are coeval with the English form of government, though subject at times to fluctuations and change. From time to time, their fundamental articles have been asserted in parliament, as often as they were thought to be in danger.

Magna Carta. This great charter of liberty was obtained by force from king John, and afterwards was confirmed by his son Henry III. It contained but few new grants, but was for the most part declaratory of the fundamental laws of England. A statute subsequently directed this charter to be allowed, as the common law, and all judgments contrary to it were declared void.

Different Acts of Parliament. Then followed corroborating statutes from Edward I to Henry IV. After a long interval, appeared the Petition of Right, assented to by Charles I, in the beginning of his reign, which was a parliamentary declaration of the liberties of the people. More ample concessions were subsequently made by this unhappy prince to his parliament. Then came the famous *Habeas Corpus* act under Charles II. To these succeeded the Bill of Rights, delivered by the lords and commons to William and Mary, on their accession to the throne in 1688. Lastly these liberties were again asserted at the commencement of the eighteenth century in the Act of Settlement, whereby the succession to the crown was limited to the house then in power.

Of What the Rights Consist. The rights themselves, thus defined by these several statutes, consist in a number of private immunities, the residuum of natural liberty, which was not required to be sacrificed by the laws of society to public convenience, or else those civil privileges, which society had engaged to provide, in lieu of the natural liberties, so given up by individuals.

Division of Rights. These may be reduced to three principal or primary articles:

1. *The right of personal security.*
2. *The right of personal liberty.*
3. *The right of private property.*

RIGHT OF PERSONAL SECURITY.

Defined. This right consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation.

1. Life. This right is inherent by nature in every individual, and exists even before the child is actually born.

Rights of Unborn Child. The offence of abortion of a quick child is not murder, but homicide or manslaughter. An infant *in ventre sa mere* is supposed in law to be born for many purposes. It is capable of having a legacy made to it. It may have a guardian assigned to it, and may have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. The same ruling holds in the civil law.

2. Limbs. Such limbs as are referred to here, are those members which may be useful to a man in fight, and the loss of which alone amounts to *mayhem* in the common law. By the possession of these, he can protect himself from external injuries, and they cannot be destroyed or disabled, without a manifest breach of civil liberty. Homicide even is pardonable, if done in self defense of life or limb. And the same is a sufficient excuse for the commission of many misdemeanors.

Duress. The constraint a man is under in these circumstances is termed duress, from the Latin *durities*, of which there are two sorts, duress of imprisonment, where a man loses his liberty, and duress *per minas*, where the hardship is only threatened. 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 or being beaten is no duress, nor of having one's house burned, or of goods taken away or destroyed, because in such cases, a man may have satisfaction in equivalent damages, but no suitable atonement can be made for the loss of life or limb.

Relief of the Poor. The law not only regards life and limb, but furnishes a man with everything necessary to his sup-

port. No man is so poor, but he may demand a supply sufficient for all the necessities of life from the more opulent, by the several statutes ordained for the relief of the poor.

Civil Death. These rights can only be terminated by the death of the person, by a civil or natural death. The civil death commenced, if a man was banished the realm by the process of the common law, or entered into a monastery and became a professed monk, in which cases he was absolutely dead in law, and his heir took his estate. A monk, on taking his vows, was deemed *civiliter mortuus*, and like other dying men might make his will and appoint executors, or the ordinary in case of his intestacy, might grant letters of administration to his next of kin. Even a lease made to a third person during the life of one, who afterwards became a monk, terminated by his entry into a monastery. Hence the use of the term "natural life" in legal documents. No cognizance was taken in England of vows made in a foreign country. This disability has been abolished, and also that of banishment, consequent upon abjuration.

Natural Death. The natural life, the gift of the Creator, cannot legally be destroyed by an individual, neither by the person himself, nor by any class of individuals, merely on their own authority. Yet it may be forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishment. The statute law of England very seldom, and the common law never inflicts any punishment extending to life or limb, unless upon the highest necessity, and under the express warrant of law.

3. Body. The remainder of a man's body or person is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating and wounding.

4. Health. A man's health is entitled to preservation from such practices, as may prejudice or annoy.

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

RIGHT OF PERSONAL LIBERTY.

Defined. This consists in the power of locomotion, of

changing situation, or moving one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. It is a right strictly natural, which the laws of England have never abridged without sufficient cause, and which cannot be abridged by a magistrate, without the explicit permission of the laws. No freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law.

Habeas Corpus Act. By this act, passed in the reign of Charles II, no subject of England can be long detained in prison, except in those cases, in which the law requires and justifies such detainer. Lest this act be evaded by demanding unreasonable bail or sureties, a later act enacts, that excessive bail shall not be required. It is only in cases of great emergency to the state, that the operations of this act are suspended for a limited time to imprison persons suspected of treason, without assigning cause therefor. In such cases as these, the nation parts with its liberty for the time, in order to preserve it forever.

Duress. The confinement of the person is an imprisonment, so that the keeping a man against his will in a private house, arresting or forcibly detaining him, is an imprisonment. If a man is under duress of imprisonment, which is a compulsion by an illegal restraint of liberty, until he seals a document, or the like, he may allege the duress and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge or for other cause, seals a bond or deed, this is not by duress of imprisonment, and he cannot avoid it.

Process must be Regular. 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, 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. A 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, by his royal prerogative,

may issue his writ *ne exeat regnum*, and prohibit a subject leaving the country. This may be necessary for the public service.

Transportation and Exile. But no power, except the authority of parliament, can send any subject of England out of the land against his will, not even if he be a criminal. Exile and transportation are unknown to the common law, and whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by some express statute. *Magna carta* declares, that no freeman shall be banished, unless by the judgment of his peers or by the law of the land.

Violation of Habeas Corpus Act. By the *habeas corpus* act, that second *magna carta*, and stable bulwark of our liberties, it is enacted, that no subject of the realm shall be sent as prisoner abroad, but that all such imprisonments shall be illegal. One who shall dare to commit another contrary to law, shall be disqualified from holding office, shall incur the penalty of a *praemunire* and be incapable of receiving pardon; and the party suffering shall also have his private action against the person committing, and shall recover treble costs, besides his damages, the minimum being five hundred pounds.

Expulsion Illegal. 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.

RIGHT OF PRIVATE PROPERTY.

Defined. This is the third absolute right, and consists in the free use, enjoyment and disposal by a man of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature.

Obligations to Society. Its modifications, the method of preserving it in the present owner, and of transferring it from man to man, are entirely derived from society, and are some of the civil advantages, in exchange for which every individual has resigned a part of his natural liberty.

Unjust Seizure of Lands. Upon this principle, 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. 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, or expelled from his franchises or freehold, unless dispossessed by course of law.

Public Good Secondary. The law will not authorize a violation of the right of property, even for the public good. Thus a new road through private grounds may be beneficial to the community, but it cannot be laid out without the 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 judge of this common good, and to decide on its expediency. Besides the public good is interested in the protection of every individual's private rights, as modelled by the municipal law.

Eminent Domain. In this and similar cases, the legislature alone can interpose, and compel the individual to acquiesce. It does this, not by arbitrarily depriving the party of his property, 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.

Taxes, how Levied. Nor is this the only instance, in which the law of the land has postponed even public necessity to the sacred rights of private property. No subject can be constrained to pay any taxes, even for the support of government, but such as are imposed by his own consent or that of his representative in parliament. Under the petition of right of Charles I, no man shall be compelled to yield any tax without common consent, by act of parliament.

How these Rights are Secured. In vain these rights would be declared, ascertained and protected, if the constitution had not provided a mode to secure their actual enjoyment. It has therefore established certain other auxiliary, subordinate rights of the subject, which serve as barriers to protect these three great and primary rights. These are:

1. *The constitution, powers and privileges of parliament.*

2. *The limitation of the king's prerogative, by well-defined bounds, which cannot be legally exceeded, except by the consent of the people.*

Checks and Safeguards. The former of these keeps the legislative power in due vigor, rendering it improbable that laws should be enacted, destructive of general liberty; the latter is a guard upon the executive power, by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.

3. *The right of every one to apply to courts of justice for the redress of injuries.* Since the law is in England the supreme arbitrer of every man's life, liberty and property, courts must at all times be open to the subject, and the law be duly administered therein. The *magna carta* declares, that every one may take his remedy by course of law, may have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay.

Affirmative and Negative Statutes. Numerous affirmative laws have been passed by parliament, wherein justice is directed to be done according to the law of the land, which law may be known to all, for it depends not upon the arbitrary will of any judge, but is permanent, fixed and unchangeable, except by authority of the power that made it. Negative statutes from time to time have been passed, whereby abuses, perversions and delays of justice, especially by the prerogative, have been restrained.

Innovations Prevented. 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, otherwise innovations would creep into the body of the law itself. The king may erect new courts, but they must proceed according to the old established forms of the common law.

4. *By petition for redress.* In cases of uncommon injury or infringement of the above rights, which the ordinary course of justice cannot remedy, there still remains a subordinate right, which appertains to every one, of petitioning the king or either house of parliament for the redress of grievances.

Russian Rules. In Russia, the czar Peter allowed no subject to petition the throne, until he had first solicited two min-

isters of state. If he obtained justice from neither, he might then petition the prince, but upon pain of death, if found in the wrong. This of course virtually forbade petition, and the sovereign, not made cognizant of the wrong, had no opportunity to redress it.

Restrictions to Petition. The restrictions to petition in England are of a nature extremely different, and while they promote the spirit of peace, are no check upon that of liberty. To prevent a tumult or riotous demonstration, it was enacted, that no petition to the government for any alteration in church or state, shall be signed by more than twenty persons, unless the matter be approved of by three justices of the peace, or the major part of the grand jury in the country, and in London by the mayor, aldermen and common council, nor shall any petition be presented by more than ten persons at a time. But now, under a more recent statute, every subject has a right of petition.

5. *By bearing arms for defense.* These must be suitable to the condition and degree of the subject, and such as are allowed by law.

Summary. So long as these rights remain inviolate, the subject is perfectly free, for every species of tyranny must act in opposition to one or more of these rights. To preserve these, it is requisite, that the constitution of parliament be supported, and that limits, well defined, be placed to the royal prerogative. To vindicate these rights, English subjects are entitled to the regular administration of justice in the courts of law, also to the right of petitioning the king and parliament for the redress of grievances, and lastly to the right of using arms for defense. These rights and liberties we may enjoy entire, except where the laws have laid them under necessary restraints.

CHAPTER II. THE PARLIAMENT.

Magistrates. The most universal public relation, by which men are connected together, is that of government, as governors or governed; in other words, as magistrates and people. Of magistrates, some are supreme, in whom the sovereign

power of the state resides, others are subordinate, deriving their authority from the supreme magistrate, and accountable to him for their conduct.

Tyrannical Government. In all tyrannical governments, the supreme magistracy, or the right of both making and 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, there can be no public liberty. Such a magistrate may both enact and execute tyrannical laws. But where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with such large power, as may tend to the subversion of its own independence and of the liberty of the subject.

English Government. In England, the supreme power is divided into two branches, the one legislative, to wit, parliament, consisting of the king, lords and commons; the other executive, composed of the king alone.

Origin and History of Parliament. The first institution of parliament is so far hidden in the dark ages of antiquity, that the tracing of its origin is uncertain. The word "parliament," *parlement* or *colloquium*, is a term of comparatively modern date, derived from the French, and signifying a place for conference.[1] It was first applied to general assemblies of the states, under Louis VII in France, about the middle of the twelfth century. Long before the introduction of the Norman language into England, all matters of importance were debated and settled in the great councils of the realm; a practice which seems to have been universal among the northern nations, particularly the Germans, and carried by them into all the countries of Europe, which they overran at the dissolution of the Roman empire. Relics of this constitution, under various modifications, are still to be met with in the diets of Poland, Germany and Sweden, and the assembly of the estates in France,[2] for what is there now called the parliament, is only the supreme court of justice, consisting of the peers, certain ecclesiastics and judges, which cannot be termed a general council of the realm.

The Wittena-gemote. In England, this general council or meeting of wise men, the *magnum concilium regis*, met from time

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[1] The word was first used in England during the reign of Henry III.

[2] These assemblies terminated in 1561.

to time, to order the affairs of the kingdom, to make new laws, and to reform the old. We read of it as early as Ina, king of the West Saxons, Offa, king of the Mercians, and Ethelbert, king of Kent. King Alfred ordained, that it should meet twice in the year, or oftener if need be. The succeeding Saxon and Danish monarchs held frequent councils of this sort, as appears from their respective codes of laws.

Other Great Councils. There is no doubt, but that great councils were regularly held under the first leading princes of the Norman line. The general assize or assembly in the reign of Henry II uttered decisions in contradistinction to custom or common law. Hence it appears, that general councils or parliaments were coeval with the kingdom itself. How they were constituted and composed is a matter of dispute, and particularly, whether the commons were summoned at all, or if summoned, at what time they formed a distinct assembly.

Antiquity of the Constitution. It is conceded, that in the main, the constitution of parliament, as it now stands, was marked out in the reign of king John, in 1215, in the great charter granted by that prince, wherein he promised to summon certain titled personages personally, together with all bishops, abbots, earls and the greater barons, and all other tenants in chief under the crown, by the sheriffs and bailiffs, to meet at a certain place, with forty days notice. This constitution has existed from the year 1266 until the present time.

1. 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 the session. It can never be convened by its own authority. If it could meet spontaneously, without being called together, its members would never unanimously agree as to the place and time of meeting, and great confusion would ensue. By statute of Charles I, if the king neglected to call a meeting of parliament for three years, the peers might assemble and issue writs for choosing one. If they neglected to do so, their constituents might act. This act was repealed under Charles II. At the time of the revolution of 1688, when William and Mary were summoned to the throne, the lords and commons upon their own authority, and at the summons of the prince of Orange, convened. This was based upon the convic-

tion, that king James II had abdicated the government, and that the throne was vacant. In case of a vacancy of the throne, the form of the royal writ *ex necessitate rei* must be laid aside, otherwise no parliament could ever meet again. The rule, however, is certain, except in such contingency, that the king alone can convoke the parliament. This, by ancient statutes, he is bound to do annually; not necessarily a new parliament, but only to permit a parliament to sit annually for the redress of grievances and dispatch of business, if need be. Three years by statute is the longest space that shall intervene.

2. The Constituent Parts of a Parliament. These are the king and the three estates of the realm, the lords spiritual, the lords temporal, and in another house, the commons. The king alone has the power of dissolving it.

Legislative and Executive Powers. To preserve the balance of the constitution, the executive power should be a branch of the legislative. Their total union would produce tyranny; their total disjunction would in the end produce the same effect, by causing that union, against which it seems to provide. The legislative would soon become tyrannical, by making continual encroachments on the executive power.

The Long Parliament. Thus, the long parliament of Charles I at first acted in a constitutional manner, with the royal concurrence, redressed many grievances, and established many salutary laws. But when the two houses assumed the power of legislation, in exclusion of the royal authority, and took the reins of administration, and in consequence of those united powers, overturned both church and state, parliament established a worse oppression, than any they pretended to remedy.

Veto Power of the King. To prevent such encroachments, the king himself, as part of the parliament, is granted a veto power, and his authority is shown in rejecting, rather than resolving. This royal negative consists, not in mere inability to do wrong, but in preventing wrong from being done. The crown cannot institute alterations of the present law, but it may disapprove changes suggested by the two houses. The legislative cannot abridge the executive power of any right, which it now has by law, without its own consent, since the law must remain as it is, unless all the powers agree to alter it.

Mutual Check on each Other. This then is the true excellence of the English government, that all the parts of it form a mutual check upon each other. Thus every branch of civil policy supports and is regulated by the rest, and mutually keep each other from exceeding their proper limits, while the whole is prevented from separation by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done.

The Spiritual Lords. These consist of two archbishops and twenty-six bishops,[1] and at the dissolution of monasteries by Henry VIII, included likewise twenty-six abbots and two priors. All these hold ancient baronies under the king. But though these lords spiritual are a distinct estate from the lords temporal, yet in practice they are usually blended together, under the one name of the lords, and intermix in their votes. Hence they are one estate in every effectual sense, though the ancient distinction still nominally continues. If a bill should pass their house, there is no doubt of its validity, though every lord spiritual should vote against it.

The Lords Temporal. These consist of all the peers of the realm, by whatever title of nobility distinguished, dukes, marquises, earls, viscounts or barons. Some of these sit by descent, some by creation, others, since the union with Scotland, by election, as is the case, with the sixteen peers, who represent the body of the Scotch nobility. The distinction of rank and honors is laudable, in order to reward such as may be eminent for their services to the state, without burden to the community, exciting generous emulation. This, while it might be dangerous in a republic, or under a despotic sway, is attended with good effects under a free monarchy. A body of nobility is necessary in our mixed constitution, in order to support the rights of both the crown and the people, by forming a barrier to withstand the encroachments of both. When in the seventeenth century, the commons had determined to extirpate monarchy, they also voted the house of lords to be useless and dangerous. It is highly

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[1] On the union with Ireland, an addition of one archbishop and three bishops was made for that country.

necessary, that the body of nobles should have a distinct assembly, distinct deliberations, and distinct powers from the commons.

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 who has a voice in parliament, personally or by his representatives. In a free state, a branch at least of the legislative power should reside in the whole body of the people. In the petty republics of Greece, and in the first rudiments of the Roman state, this power was exercised by the people in their aggregate or collective capacity. In so large a country as ours, the people do that by their representatives, which it is impracticable to perform in person. Every member, though chosen by one particular district, serves for the entire realm, not simply for his constituents, but for the commonwealth. Therefore he is not bound to consult his constituents, unless he deems it prudent so to do.

Joint Action Necessary. These are the constituent parts of a parliament, the king, the lords spiritual and temporal, and the commons. The consent of all three is required to enact any new law, that shall bind the subject. The statute enacts, that if any person shall affirm, that both or either house of parliament has any legislative authority without the king, he shall incur the penalties of *praemunire*.

3. Laws and Customs Relating to Parliament. The power and jurisdiction of parliament, says Coke, are so absolute, that they cannot be confined, either for causes or persons, within any bounds. It has sovereign authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters ecclesiastical or temporal, civil, military, maritime or criminal. 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 the succession to the crown, as was done in the reigns of Henry VIII and William III. It can alter the established religion, as occurred in the reign of Henry VIII and his three children. It can change even the constitution of the kingdom and parliament itself, and in short can do everything that is not naturally impossible. What it does, no authority on earth can undo. So long as the English constitution lasts, the power of parliament is absolute.

Qualifications of Members. Every member must have reached the age of twenty-one years. He must take the oath of allegiance, supremacy and abjuration, and repeat the declaration against certain religious observances.[1] Aliens, even though naturalized, are ineligible. Sentence for criminal acts disbars a party. Each house decides, as to the eligibility of its own members.

Privileges of Members. These privileges were not only intended to protect the members from being molested by their fellow subjects, but also more especially from being oppressed by the power of the crown. The dignity and independence of the two houses are in great measure preserved, by keeping their immunities indefinite. Some of their privileges, however, are those of speech, of persons, of their domestics, and of their lands and goods. Their freedom of speech ought not to be questioned in any court or place out of parliament. They are privileged from arrest and seizure by process from the courts of law. To assault, by violence, a member of parliament, or even his menial servant, is a high contempt of parliament, and is punished with severity. No member can be arrested and taken into custody, unless for some indictable offence, without a breach of the privilege of parliament. A peer's person is forever sacred and inviolable, and that of a member of the house of commons, 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 at any time for more than fourscore days. Formerly courts of justice took cognizance of privilege of parliament by writ of privileges, in the nature of a *supersedeas*, to deliver the party out of custody, when arrested in a civil suit. But now such an arrest is irregular *ab initio*, and a party is discharged on motion. The claim of privilege has been usually guarded with an exception, as to the case of indictable crimes, of treason, felony or breach of the peace. These privileges of members of parliament have been restricted, so that at the present time the chief, if not the only privilege, of parliament in such cases, seems to be the right of receiving immediate information of the imprisonment or detention of any member, with the reasons for which he is detained.

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[1] Roman Catholic members take a different oath.

4. The Laws and Customs of the House of Lords. These will be treated of in the third and fourth books. One peculiar privilege, was the right to kill one or two deer in the king's forests, in going to and from parliament. Another was the right to be attended by the judges of the courts of king's bench and common pleas, as likewise by the king's learned counsel, and by the masters in chancery. The peer also has a right to vote in parliament by proxy, which does not exist in the house of commons. His reasons for giving a dissenting vote are allowed to be entered on the journal, termed his protest. All bills, that may affect the right of the peerage, are by the custom of parliament, first discussed in the upper house, and are to suffer no amendments in the house of commons.

5. The Laws and Customs of the House of Commons. These relate principally to the raising of taxes and the election of members.

Taxes. All grants of subsidies originate in the house of commons, but are not effectual until they have the assent of the other two branches of the legislature. The reason of this exclusive privilege is, that the supplies are raised upon the body of the people, and it is therefore proper, that they alone should have the privilege of taxing themselves. Yet a large share of the property taxed is in the possession of the nobility, and, therefore, the commons not being the sole persons taxed, this cannot be the cause of their having the sole right of raising and modelling the supply. The true reason, arising from the spirit of our constitution, appears to be this: The lords, being a permanent, hereditary body, created at pleasure by the king, are more influenced by the crown than the commons, who are a temporary, elective body. It would, therefore, be dangerous to give the lords the power of framing new laws for the subject; it is sufficient that they have the power of rejecting, if they think the commons too lavish. They, however, have no power of amendment in such matters.

Elections. In regard to the election of knights, citizens and burgesses, we notice the exercise of the democratic part of our constitution, for in a democracy, there can be no exercise of sovereignty, but by suffrage, which is a declaration of the people's will. The Athenians were so jealous of this prerogative, that a stranger, who interfered in the assemblies of the peo-

ple, was deemed guilty of high treason, and punished with death.

(1) **Qualification of Electors.** The reason for requiring a property qualification in voters, is to exclude such persons, as are in so mean a situation, as presumably to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a prominent, an artful or a wealthy man a larger share in elections, than is consistent with general liberty.

Roman Elections. In Rome in earlier times, the method of voting was by centuries, and property not numbers, turned the scale. Subsequently when the tribunes of the people introduced the method of voting by tribes, numbers only were regarded, and property entirely overlooked.

English Voters. The English constitution steers between the two extremes. Only such are entirely excluded, as can have no will of their own. The richest man has only one vote at one place, yet if his property be at all diffused, he has probably a right to vote at more than one poll.

Knights of the Shire. (1) Electors of knights of the shire must have freehold to the value of forty shillings a year in the county, clear of all deductions, except of taxes. The knights of shires are representatives of the land holders. The estate of the elector must be a freehold, that is for life at least. This sum is equivalent to about twenty pounds at present. (2) The voter must be at least twenty-one years of age. (3) No person convicted of perjury shall be entitled to vote. (4) Fraudulent conveyance of a freehold shall not entitle one to vote. (5) Every voter shall have in actual possession, or be in receipt of the profits of his freehold for twelve months. (6) No one shall vote in respect of an annuity or rent charge, out of a freehold estate, unless registered twelve months before. (7) In mortgaged or trust estates, the person in possession shall have the vote. (8) Only one person shall be permitted to vote for one house, to prevent the splitting of freeholds. (9) The voter's estate must have been assessed at least twelve months before the election. (10) No tenant by copy roll shall vote as a freeholder.

Electors of Citizens and Burgesses. These are supposed to be the mercantile part or trading interest of the kingdom. Formerly the crown summoned the most flourishing

towns to send representatives to parliament. The misfortune was, that the deserted boroughs continued to be summoned, as well as those to whom their trade was transferred. The universities were in general not empowered to send burgesses to parliament. But James I indulged them with the permanent privilege of sending two members to protect the rights of the republic of letters. A voter must have been admitted to his freedom twelve months.

(2) **Qualifications of Members of the House of Commons.** (1) They must not be alien born or minors. (2) They must not be any of the twelve judges, nor the clergy, nor persons attainted of treason or felony. (3) Sheriffs, mayors and bailiffs are not eligible in their own counties. (4) Originally they must have been inhabitants of the places from whence elected, but recently this has been repealed. (5) Certain public officers and agents are ineligible. (6) Pensioners under the crown are ineligible. (7) No one accepting an office under the crown, except an officer of the army or navy accepting a new commission, is eligible. (8) All knights of the shire shall be actual knights, or have estates sufficient to be knights. (9) Every knight of a shire shall have a clear estate of freehold to the value of six hundred pounds per annum, and every citizen and burgess to the value of three hundred pounds, except the eldest sons of peers and of persons qualified to be knights of shires, and the members for the two universities. Subject to these restrictions and disqualifications, every subject of the realm is eligible.

(3) **Method of Conducting Elections.** As soon as parliament convenes, the chancellor, or if a vacancy during the session, the speaker, by order of the house, and without such order, if a vacancy occur by death, or the member's becoming a peer, sends his warrant to the clerk of the crown in chancery, who issues writs to the sheriff of every county for the election of members. Within three days thereafter, the sheriff sends his precept to the returning officers of the cities and boroughs, commanding an election, which they proceed to do within eight days, giving four days notice. The election of knights of the shire must be proceeded with by the sheriff in person at the next county court, which is held monthly by him to try petty causes, not exceeding forty shillings. All undue influences upon electors are illegal. Soldiers must be removed at least two miles from the polls. Riots will make an election void.

Bribery. The greatest danger, however, is from bribery. No candidate shall give any money or entertainment to electors, or promise to give any to certain persons, or to the place in general to secure election, on penalty of being incapacitated to serve in parliament. And if any money, gift, office, employment or reward be given or promised to any voter at any time, to influence him to give or withhold his vote, as well he that takes as he that offers such bribe, forfeits 500 pounds, and is forever disabled from voting and holding office, unless he discovers some other offender of the same kind.

The Return of the Election. The election being closed, the returning officer in boroughs returns his precept to the sheriff with the names of the persons elected and their majorities, and the sheriff makes return to the clerk of the crown in chancery before the day of meeting, if it be a new parliament, or within fourteen days after the election, if it be an occasional vacancy.

6. The Method of Making Laws. This is much the same in both houses. Each house has its speaker.

The Speaker. The speaker of the house of lords is the lord chancellor, or keeper of the great seal, or any other person appointed by the king's commission, otherwise it is said the house of lords may elect. The speaker of the house of commons is chosen by the house, but must be approved by the king. He cannot give his opinion or argue any questions, but the speaker of the house of lords may, if he be a lord of parliament.[1]

The Majority Controls. In each house, the act of the majority binds the whole, and this majority is declared by votes openly and publicly given.

Bills Introduced. To bring a bill into the house, if the relief sought be 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. The petition, when founded on facts, which may be disputed, is referred to a committee of members, who examine the matter alleged, and report it to the house, upon which leave is given to bring in the bill. In public matters, the bill is brought in upon

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[1] In the house of commons, the speaker never votes, except to give a casting vote, while in the house of lords, the speaker always votes as a member.

motion made in the house, without any petition at all. Formerly all bills were drawn in the form of petitions, which were entered upon the parliament rolls, with the king's answer thereunto subjoined. A private bill begun in the house of lords is referred to two judges, to examine and report the state of the facts alleged, to see that all parties consent, and also to settle all technical points.

Reading of the Bill. This is read a first time, and after 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 be at either of the readings, and if the opposition succeeds, the bill must be dropped for that session.

Referred to a Committee. After the second reading, the bill is referred to a committee, which in matters of small importance is selected by the house. Upon a bill of consequence, the house resolves itself into a committee of the whole house, which is composed of every member. To form it, the speaker quits the chair, another member being appointed chairman, and then may sit and debate as a private member.

Work of the Committee. In these committees, the bill is debated clause by clause, amendments made, the blanks in the printed copy of the petition filled up, and sometimes the bill entirely remodelled. 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, and the question is put upon every clause and amendment.

Passage of the Bill. When the house has passed upon the amendments of the committee, and sometimes added new amendments of its own, the bill is ordered to be engrossed, or written in a strong gross hand, on rolls of parchment, sewed together. It is then read a third time, and amendments may even then be 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 discloses the contents, and holding it, 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 until the reign of Henry VIII, when distinct titles were introduced for each chapter. It is then carried to the other house and delivered to the speaker.

Approval by the Other House. In the other house, it passes through the same forms, except the engrossing, and if rejected, no more notice of it is taken. But if it is agreed to, the lords send a message to two masters in chancery, or upon matters of great importance to two of the judges, that they have agreed to the same, and the bill remains with the lords, unless they amend it.

Amended and Returned. If 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 amendment, 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.

Bill Deposited. When both houses have done with any bill, it is always deposited in the house of peers, to await 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.

Royal Assent. This may be given in two ways: (1) In person, when the king comes to the house of peers, in his crown and royal robes, and sending for the commons to the bar, the titles of all the bills that have passed both houses are read, and the king's answer is declared by the clerk of the parliament, in Norman French, the only remaining badge of the conquest[1]. If the king assents to a public bill, the clerk usually declares: "the king wills it;" if to a private bill: "be it, as it is desired." If he refuses his assent: "the king will advise upon it." When a bill of supply is passed, it is presented to the king by the speaker of the house of commons, and the royal assent is thus expressed: "the king thanks his loyal subjects, accepts their benevolence, and wills it so to be." When the bill has received the royal assent, it is then a statute, or act of parliament.

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[1]Until the reign of Richard III., all of the statutes were either in Latin or French, more frequently the latter.

Proclamation of the Act. This statute, or act, is placed among the records of the kingdom, and needs no formal promulgation to give it the force of a law, as was necessary by the civil law, with regard to the emperor's edicts. A copy, however, is usually printed, for the information of the whole land. Before the invention of printing, the sheriff of every county announced the new act, in the county court.

Binding Effect of the Act. The act thus announced, binds every subject in the land, and in all the dominions of the king, nay, even the king himself, if he be particularly named therein. And it cannot be amended, dispensed with, suspended or repealed, but in the same forms, and by the same authority of parliament, as it requires the same strength to dissolve as to create an obligation. At one time, the king could, in many cases, dispense with penal statutes, but he can do so no longer, without consent of parliament.

7. Adjournment, Prorogation, or Dissolving of Parliament. Adjournment. This is merely a continuance from day to day, and is done by the authority of each house, and does not affect the other. If the king signifies a desire for an adjournment of either house, it is made, otherwise a prorogation would assuredly follow, which would be most inconvenient to business, as it puts an end to the session, and bills not perfected must be resumed *de novo*, if at all, at a subsequent session.

Prorogation. This is the continuance of the parliament, from one session to another. This is done by royal authority, expressed either by the lord chancellor, in his majesty's presence, or by commission from the crown, or more frequently by proclamation. Both houses are, necessarily, prorogued at the same time. At one time, the king's assent to bills, in itself, put an end to the season, but now a prorogation must be expressly made, to terminate it. If, in times of imminent danger, the parliament be separated by adjournment or prorogation, the king is empowered to call them together by proclamation, with fourteen days notice.

Dissolution. This is the civil death of the parliament. It may be effected in three ways: (1) By the king's will, expressed either in person, or by representation, for as the king has the sole right of convening the parliament, it is a branch of his prerogative to prorogue the body for a time, or put an end to its

existence. Otherwise it might become perpetual, which would prove extremely dangerous. It would encroach upon the executive power, as it did, with fatal effect, in the reign of Charles I., who, unadvisedly, assented to an act to continue the parliament then in being, until such time as it should please to dissolve itself. (2) It may be dissolved by the demise of the crown. Formerly this occured immediately upon the announcement of the death, but this being found inconvenient, and indeed dangerous, in the event of a disputed succession, it was enacted, that the parliament, in being, shall continue for six months after the death of the monarch, unless sooner prorogued or dissolved by his successor. If the parliament be not in session, at the time of his decease, it shall assemble immediately, and if no parliament then exist, the last parliament shall assemble. (3) It may be dissolved, or expire, by length of time. Seven years is the extreme limit.

CHAPTER III.—THE KING AND HIS TITLE.

Title, how Vested. The supreme executive power in England, is vested in a single person, the king or queen, for it matters not to which sex the crown descends; but the person entitled to it whether male or female, is immediately invested with all the insignia, rights and prerogatives of sovereign power.

1. **Hereditary.** It is descendible to the next heir, on the demise of the last proprietor. All regal governments must be hereditary or elective. The crown of England has never been the latter, although attempted to be made so by the regicides of Charles I.

Not Jure Divino. It is by no means hereditary, *jure divino.* Such a title may have subsisted under the theocratic establishments of the children of Israel, in Palestine, but it never existed in any other country. This hereditary right has no relation to the civil laws of the Jews, the Greeks or Romans, or any other nation.

Elective Monarchies. It must be owned, that an elective monarchy seems the best suited of any to the rational principles of government, and the freedom of human nature; and hence we find in the infancy of most states, the leader has usually been

elective. And if the individuals who compose that state could always continue true to first principles, uninfluenced by passion or prejudice, unassailed by corruption, and unawed by violence, elective succession would be most desirable. The best, the wisest, and bravest man would receive the crown, which his endowments merited.

Evils of an Elective System. History and observation inform us, that elections of every kind are frequently brought about by influence, partiality and artifice, or at least such charge is proclaimed by a disappointed minority. All societies are liable to this evil, both those of a private and domestic kind, as also the great community of the public. Time suppresses false suspicions in the former, and appeals to tribunals, remedy them by legal means, if they be true, but in the great society of the nation, there is no superior to resort to, but the law of nature, no mode of redress, but the actual exertion of force. The quarrel between two nations, complaining of mutual injustice, is only decided by an appeal to arms, as is the case in an internecine strife, where the violation of principles leads to civil war.

2. Mode of Inheriting. Descent. This generally corresponds with the feudal line of descent, marked out by the common law, in the succession to landed estates, with a few material exceptions. Like estates, the crown will descend lineally to the issue of the reigning monarch, and as in common descents, the preference of males to females, and the right of primogeniture among the males are strictly adhered to. Like lands, the crown, on failure of the male line, descends to the issue female. But among the females, the crown descends, by right of primogeniture, to the eldest daughter only, and her issue, and not, as in common inheritances, to all the daughters at once.

By Representation. Again, the doctrine of representation prevails in the descent of the crown, as it does in other inheritances, whereby the lineal descendants of any person deceased, stand in the same place, as their ancestor, if living, would have done. Thus, Richard II succeeded his grandfather, Edward III, in right of his father, the Black Prince, to the exclusion of all his uncles, his grandfather's younger children. Lastly, on failure of lineal descendants, the crown goes to the next collateral relations of the late king, provided they are lineally descended from the blood royal, that is, from royal stock, which originally acquired the crown.

Half Blood. But there is no objection, as in the case of common descents, to the succession of one of the half blood, that is, where the relationship proceeds not from the same couple of ancestors, which constitutes a kinsman of the whole blood, but from a single ancestor only; as when two persons are derived from the same father, but not from the same mother, and *vice versa*, provided only, that the one ancestor, from whom both are descended, be one, from whose veins the blood royal is communicated to each. Thus Mary inherited from her half brother, Edward VI., and Elizabeth inherited from Mary, all children of the same father, Henry VIII., but all by different mothers.

3. Not an Indefeasible Right. The doctrine of hereditary right by no means implies an indefeasible right to the throne. The king, and the houses of parliament, may defeat this hereditary right, and by entails, limitations and provisions, exclude the immediate heir, and vest the inheritance in another. Hence the word "successors" is used, in addition to the word "heirs," in our statutes: "the king's majesty, his heirs and successors." If the heir apparant were an idiot, or a lunatic, or otherwise incapable of reigning, parliament could set him aside for another.

4. The Crown's Descendible Quality. However, the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in its wearer. Hence the king is said never to die in his political capacity, for he survives in his successor. For the right of the crown vests, *eo instanti*, upon the heir, so there can be no *inter-regnum*. However acquired, it becomes in him absolutely hereditary, unless by the rules of some limitation, it is otherwise determined. Even in those cases, where the succession has been violated, the crown has ever been looked upon as hereditary in the wearer of it.

ENGLISH SOVEREIGNS.

Egbert. About the year 800, Egbert found himself king of the West Saxons. How his ancestors acquired their title, whether by force, fraud, contract, or by election, it matters not to inquire. He acquired the other kingdoms of the heptarchy, some by consent, but most of them by a voluntary submission. It is a maxim of civil polity, that the acquired state assimilate with the stronger one, and must adopt its laws and customs. Hence all the kingdoms of England acquiesced under the hereditary monarchy of the West Saxons.

Before Edmund Ironside. From Egbert to Edmund's death, a period of over two hundred years, the crown descended regularly, through a succession of fifteen princes, without deviation, save only that the sons of Ethelwolf succeeded each other in the kingdom, without regard to the children of the elder branches, according to the rule of succession prescribed by their father, and confirmed by the *wittena-gemote*, in the heat of the Danish invasions. Also Edred, the uncle of Edwy, retained the throne for about nine years, in the right of his nephew, the times being dangerous. But this was to preserve, not destroy, the succession, and Edwy succeeded him.[1]

Canute. Edmund Ironside was obliged, by the hostile irruption of the Danes, at first to divide his kingdom with Canute, king of Denmark, and on Edmund's death, Canute seized the whole of it, and drove Edmund's sons into enforced exile. Here the succession was suspended by actual force, and a new family introduced upon the throne, in whom it continued hereditary for three reigns, when upon the death of Hardicanute, the ancient Saxon line was restored, in the person of Edward the Confessor.

Edward the Confessor. This Saxon king was not the true heir to the throne, being the younger brother of Edmund Ironside, who had a son still living, surnamed Edward, the outlaw or exile.[2] This banished son was, at that time, in Hungary, and the English, having just shaken off the Danish yoke, required a ruler at the moment, and the Confessor was the next of the royal line then in England. On his decease, without issue, Harold II usurped the throne, and almost simultaneously came the Norman invasion, the right to the crown being all the time in Edgar, surnamed Atheling, or illustrious, who was the son of Edward, the outlaw, and grandson of Edmund Ironside.

William I. William the Norman claimed the crown by virtue of a pretended grant from Edward, the Confessor, a grant, which, if real, was utterly invalid, because it was made without the consent *generali senatus et populi conventu et edicto*, which shows that at that date, the king, with the consent of the general council, might dispose of the crown, and change the line of suc-

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[1]But Edmund, the son of Edward, the Elder, was put aside to make way for Athelstan, his bastard brother, and Edmund, his brother succeeded the latter.

[2]Edmund Ironside was illegitimate, while Edward the Confessor, was the legitimate son of Ethelred, the Unready.

cession. Edgar Atheling's undoubted right was overwhelmed by the violence of the times, though frequently asserted by the English nobility after the conquest, till the time of his death, without issue, but all their attempts in his favor proved futile.

What he Acquired. This conquest, by William of Normandy, was like that of Canute, a forcible transfer of the crown of England, into a new family, and all the inherent properties of the crown passed with it. The victory obtained at Hastings was not a victory over the nation collectively, but only over the person of Harold, hence the sole right the Conqueror could pretend to acquire thereby, was the right to possess the crown of England, not to alter the nature of the government. The English laws remained in force, and he took the crown, subject to those laws, and with all its inherent properties, the first and principal of which was its descendibility. After this, we must drop our race of Saxon kings, and derive our descents from a new stock, who acquired by right of war, a strong and undisputed title.

Sons of William I. Accordingly it descended from him to his sons, William II and Henry I. Robert, his eldest son, was kept out of possession by the arts and violence of his brothers, on the pretense, that he was already provided for, having been constituted duke of Normandy, under his father's will. But on his death, without issue, Henry I acquired a good title to the throne.

Stephen of Blois. This king was the grandson of William I, by his daughter, Adelicia, and claimed the throne by a feeble, hereditary right, not as being the nearest of the male line, but the nearest of the blood royal, excepting his elder brother, Theobald, who was earl of Blois, and apparently had waived his claim to the succession. The real right was in the empress Matilda, or Maud, the daughter of Henry I, the rule of succession being, that the daughter of a son shall be preferred to the son of a daughter. So that Stephen was little better than a mere usurper, and therefore he chose to rely on a title by election, while the empress Maud, so called, asserted her hereditary right by the sword, which dispute finally resulted in the compromise, that Stephen should keep his crown, but that Henry, the son of Maud, should succeed him.

Henry II. On the death of Stephen, Henry the son of Maud or Matilda succeeded to the throne. He was the undoubted heir to the throne, as descended from William I, and

was further dear to the English people, because he was lineally descended from Edmund Ironside, the last of the Saxon race of hereditary kings. For Edward, the outlaw, son of Edmund Ironside, had a daughter Margaret, who married Malcolm, king of Scotland, and in her the Saxon hereditary right resided. Matilda, wife of Henry I, was one of his children, and Maud, the mother of Henry II, was her daughter. The sons of Malcolm were the real heirs to the English throne however, hence Henry's best title was as heir to the Conqueror.

John. Richard I succeeded his father, Henry II, and dying childless, the right vested in his nephew Arthur, the son of Geoffrey, his next brother. But John, the youngest son of Henry II, seized the throne, claiming the crown by hereditary right, that he was next of kin to the deceased king, being his surviving brother, whereas Arthur was removed one degree further, being his brother's son, though by right of representation, he stood in the place of his father Geoffrey. This claim puzzled the understandings of our brave but unlettered ancestors, and drew numerous well intentioned partisans to espouse the cause of John, for it was a point as then undetermined in common inheritances, whether the child of an elder brother should succeed to the land in right of representation, or the younger surviving brother in right of proximity of blood. However, on the death of Arthur and his sister Eleanor without issue, a clear and indisputable title vested in Henry III, the son of John; and from him to Richard II, a succession of six generations, the crown descended in the true hereditary line.

Children of Edward III. Upon Richard II resigning the crown and leaving no issue, the right thereof resulted to the issue of his grandfather, Edward III. His eldest son was Edward, the Black Prince of Wales, the father of Richard II. Three others are mentioned among the sons of Edward III: William, who died without issue; Lionel, duke of Clarence, his third son, and John of Gaunt, duke of Lancaster, his fourth. By the rules of succession, the descendants of Lionel, duke of Clarence, were entitled to the throne, on the resignation of Richard II, and had been declared by the king, years before, as the presumptive heirs to the throne, which declaration was confirmed in parliament.

Henry IV. But Henry, duke of Lancaster, the son of John

of Gaunt, having then a large army in the kingdom, the pretense of raising which was to recover his patrimony from the king, and to redress the grievances of the subject, made it impossible for any other title to be asserted with safety, and he became king. He was compelled, however, to declare that he claimed not as a conqueror, which he desired to do, but as a successor, descended from the blood royal. He claimed by two titles, the one of being the first of the blood in the entire male line, whereas the duke of Clarence left only one child, a daughter Philippa, from which female branch, by a marriage with Edmond Mortimer, earl of March, the house of York descended. The other title by which he claimed, was by reviving an exploded rumor, that Edmond, earl of Lancaster, to whom Henry's mother was heiress, was in reality the elder brother of Edward I, though his parents, on account of his personal deformity, had imposed him on the world for the younger. Therefore, Henry would be entitled to the crown, either as successor to Richard II, in case the male line was preferred over the female, or even prior to that unfortunate prince, if the crown could descend through a female, while an entire male line existed.

Edward IV. Henry V and Henry VI, son and grandson of Henry IV, successively reigned. In the latter's reign, the house of York asserted their dormant title, and after imbruing their kingdom in blood and confusion for seven years, at last established it in the person of Edward IV. At his accession to the throne, the distinction of a king *de jure* and a king *de facto* was first taken, in order to indemnify such as had submitted to the late establishment, and to provide for the peace of the kingdom, by confirming all honors conferred, and all acts done by those who were now called usurpers.

Richard III. Edward IV left two sons and a daughter, the elder of which sons, as Edward V, enjoyed the regal dignity for a very short time, and was then deposed by Richard, his unnatural uncle, who immediately usurped the crown, having charged his nephews with being bastards. He is believed to have murdered both these nephews, upon whose death the right of the crown devolved upon their sister Elizabeth.

Henry VII. The tyrannical reign of Richard III gave occasion to Henry, earl of Richmond, to assert his title to the crown, a title the most unwarranted ever known, and which

nothing could have given success to, but the universal detestation of the usurper Richard. For besides that he claimed under a descent from John of Gaunt, whose title was now exploded, the claim was through John, earl of Somerset, a bastard son of John of Gaunt and Catharine Swinford. This son was legitimated, it is true, by act of parliament, but with an express reservation, *excepta dignitate regali.*

Usurped Power. Notwithstanding all this, after the battle of Bosworth Field, he assumed the regal dignity; the right of the crown then being in Elizabeth, daughter of Edward IV. His possession was established by parliament, although that body carefully avoided any recognition of his right, which indeed was none at all, and the king would not have it by new law, whereby a right might seem to be conferred upon him; and therefore a middle way was chosen, under indifferent words: "That the inheritance of the crown should rest, remain and abide in king Henry VII and the heirs of his body," but not determining either way, whether that possession was *de jure* or *de facto* merely. However, he soon married Elizabeth of York, the undoubted heiress of the Conqueror, and thereby gained by much his best title to the crown.

Henry VIII. Henry VIII, the issue of this marriage, succeeded to the crown by clear hereditary right, and transmitted it to his three children in successive order. In his reign, at several times the parliament busied itself in regulating the succession to the kingdom. It enacted, that the crown should be entailed to his majesty, and the heirs male of his body; and in default of such sons, then to Elizabeth, who was declared to be the king's eldest issue female, in exclusion of Mary, on account of her supposed illegitimacy by the divorce of her mother, queen Catharine.

Mary and Elizabeth. But upon the king's divorce from Anne Boleyn, the lady Elizabeth was also declared bastardized, and the crown settled on the king's children by the queen, Jane Seymour, and also his children by the king's future wives, and in default of such children, with this remarkable remainder, to such persons, as the king by letters patent, or last will and testament, should appoint; a vast power, but indisputably valid.

Subsequently Legitimated. But this power was never executed, for by subsequent statute, the king's daughters were

legitimated, and the crown was limited to prince Edward, after that to Mary, and then to Elizabeth, and the heirs of their respective bodies, which succession took effect accordingly.

James I. On the death of Elizabeth without issue, the line of Henry VIII became extinct. Reference was then made to Margaret, eldest daughter of Henry VII, and Elizabeth of York, his queen. She wedded James IV, king of Scotland, and from them was descended James VI, of Scotland, who centred in himself all claims to the English throne, from the conquest downward, as he was the lineal heir of the Conqueror. He was also descended from the Saxon line, through a lineal ancestor, Margaret, the sister of Edgar Atheling, and grand-daughter of Edmund Ironside. James the First, of England, therefore, united in his person, every possible claim, by hereditary right, to the English throne, being the heir both of Egbert and of William I.

Divine Right of Kings Claimed. No wonder, therefore, that a prince of more learning than wisdom, who could deduce an hereditary title for more than eight hundred years, should easily be taught by flatterers of the time to believe that his right was divine.

Charles I. His son and successor, Charles I, in whom so many hereditary rights centred, was told by the judges who pronounced his sentence, that he was an elective prince, elected by the people, and therefore accountable to them in his own proper person for his conduct. The confusion that followed the fatal catastrophe of this unfortunate prince, will be a standing argument in favor of hereditary monarchy to all future ages. To recover the peace, which they had lost for twenty years, the parliament restored the rightful heir of the crown.

Altering the Succession. There have been several instances after this, where parliament has asserted or exercised the right of altering or limiting a succession, which they had done in the reigns of Henry IV, Henry VII, Henry VIII, Mary and Elizabeth.

Bill of Exclusion under Charles II. The purport of this bill was to set aside the king's brother, and presumptive heir, James, the duke of York, from the succession, on the score of his opposition to the established church. It passed the house of commons, but was rejected in the upper house. This proved, that though the crown was hereditary, yet parliament had the

power to defeat the inheritance, else such a bill would have been ineffectual. The lords did not dispute the power, but merely the propriety of an exclusion.

James II. The bill having failed, James II succeeded to the throne of his ancestors, and might have retained it, but for his own infatuated conduct, which produced the revolution of 1688. There never before had happened such a case in English history, as the abdication of the reigning monarch, and the consequent vacancy of the throne. It was not a defeasance of the right of succession, and a new limitation of the crown, by the king and both houses of parliament; it was the act of the nation alone, upon conviction that no king existed. Thus ended, by this sudden vacancy of the throne, the old line of succession, nearly nine hundred years after the reign of Egbert. It was shown, that the king had endeavored to subvert the constitution, by breaking the original contract, had violated the fundamental laws, and had withdrawn himself from the kingdom, and thus virtually abdicated the government; which abdication did not only affect the person of the king himself, but also all his heirs, and made the throne vacant. Whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself.

Beneficial Effects Succeeding the Abdication. From thence a new era commenced, in which the bounds of prerogative and liberty have been better defined, the principles of government more thoroughly examined and understood, and the rights of the subject more explicitly guarded by legal provisions, than in any other period of English history. The convention avoided all wild extremes. They held, that the misconduct of king James amounted to an endeavor to subvert the constitution, and not to an actual subversion or total dissolution of the government. They prudently voted it to amount to no more than an abdication, and a consequent vacancy of the throne, whereby the government was allowed to subsist though James was no longer king.

William and Mary. The right of disposing of a vacancy of the throne naturally results to the lords and commons, the trustees and representatives of the nation. They declared, that William and Mary, prince and princess of Orange, should be king and queen, to hold the crown during their lives, and the life of the survivor of them, the sole power to be exercised by William.

during their joint lives, but in the names of both, and that after their decease, the crown shall be to the heirs of the princess. In default of such issue, then to the princess Anne, of Denmark, and the heirs of her body, and in default of such heirs, then to the heirs of the prince of Orange. Mary and Anne were the daughters of king James II. William was the grandson of Charles I, and nephew, as well as son-in-law, of James II.

Acquired by Purchase, not by Descent. These three princes, William, Mary and Anne, did not take the crown by hereditary right or descent, but by w[illegible] of donation or purchase, by which is meant, any method of acquiring an estate, otherwise than by descent. Mary was only nominally queen, jointly with her husband, William, who alone had the regal power, and he was personally preferred to Anne, though his issue was postponed to hers. Hence they were successively in possession of the crown, by a title different from the usual course of descent.

Succession to the Throne. Towards the end of king William's reign, when all hope of issue surviving from any of these princes, died with the duke of Gloucester, the king and parliament deemed it their duty to limit and appoint the succession, in order to prevent another vacancy of the throne, which must have ensued at their deaths. A previous statute excluded all persons from the throne, who held communion with the church of Rome, and enacted, that the crown should descend to such protestants as would have inherited, had the other party been dead.

Sophia of Hanover. Sophia of Hanover appeared to be the party entitled to succeed them, in default of issue of any one of the three sovereigns. She was the electress and duchess dowager of Hanover, and the most accomplished princess of her age. Sophia was the daughter of Elizabeth of Bohemia, the daughter of James I of England, and was the nearest of the ancient blood royal, professing the protestant religion. On her and the heirs of her body, being protestants, was settled by statute the succession to the crown.

George I. The princess Sophia, dying before queen Anne, the inheritance descended to her son, who acquired the title of Georg[illegible] I. The crown descended then to George II, his son, and afterwards to his grandson, George III.[1]

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[1]From George III, it descended to his son, George IV, who, dying without issue, was succeeded by his brother, William IV. On his death, his niece, Victoria, daughter of his youngest brother, Edward, duke of Kent, became queen.

The Right of Succession. In this due medium consists the true constitutional right of succession. The extremes, between which it steers, are each of them destructive of those ends, for which societies were formed. Where the magistrate upon every succession, is elected by the people, and may be deposed by his subjects, it looks like the perfection of liberty, when spread out on paper, but in practice will be ever productive of tumult, contention and anarchy. And on the other hand, divine, indefeasible, hereditary right, when coupled with the doctrine of passive obedience, is surely, of all constitutions, the most slavish. But when such hereditary right, as our laws have vested in the royal stock, is closely interwoven with those liberties, which are the inheritance of the subject, this union will form a constitution, in theory beautiful, in practice approved, and probably in duration permanent.

CHAPTER IV. THE KING'S ROYAL FAMILY.

The Queen. She is either queen regnant, the ruling queen, who holds the crown in her own right, with the powers of a king; queen consort, the wife of the king; or queen dowager, the widow of a king.

Queen Consort. She is a public person, exempt and distinct from the king, and not like other married women, so closely connected, as to have lost all legal or separate existence while the marriage continues. She may purchase lands and convey them, and make leases, without the concurrence of her husband. She is also capable of taking a grant from him, which no other wife is privileged to accept from her husband. She has separate courts and offices, distinct from those of the king, not only in matters of ceremony, but even of law. She may likewise sue and be sued alone, without joining her husband. She may have a separate property in goods, as well as lands, and has a right to dispose of them by will. In short, in all legal proceedings, she is treated as a *feme sole*, and not as a *feme covert*, and may transact her own concerns, without troubling and disquieting the king, whose continual care should be for the public good.

Prerogatives and Revenue. The queen has also many exemptions and minute prerogatives. She pays no toll, and is

liable to no amercements, but in general, unless the law expressly exempts her, she is upon the same footing with other subjects. She also has some pecuniary advantages, which provide her with a distinct revenue. The original revenue of our ancient queens seems to have consisted in certain reservations or rents out of the demesne lands of the crown, which were expressly appropriated to them. An odd perquisite belonging to the queen consort was this, that on the taking of a whale on the coast, which is a royal fish, it was divided between the king and queen.

Personal Security. Though the queen is in all respects a subject, yet as to personal security, she is placed on the same footing as the king, and it is equally treason to compass her death. If the queen be accused of treason, she shall be tried by the peers of parliament.

Queen Regnant. The husband of a queen regnant is her subject, and may be guilty of high treason against her, but in the instance of conjugal infidelity, he is not subjected to the same penal restrictions. Her unfaithfulness might debase the heirs to the crown, while no such danger could result from his act.

Queen Dowager. She is the widow of a king, and enjoys most of the privileges, which belonged to her as queen consort. But it is not high treason to conspire her death, because the succession to the crown is not thereby endangered. Yet no man can marry the queen dowager, without special license from the king, on pain of forfeiting his lands and goods. But she, though an alien born, is entitled to dower after her husband's demise, which no other alien is. A queen dowager in marrying a commoner does not lose her regal dignity, as peeresses dowagers do their peerage.

Prince of Wales. He is the heir apparent to the crown.[1] His royal consort and the princess royal, or eldest daughter of the king, are likewise peculiarly regarded by the laws. To conspire against his life is as much high treason, as to plot against the life of the king. The heir apparent is usually made prince

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[1] Edward II was the first prince of Wales. His father, on subduing that country, promised the people, on condition of their submission, to give them a prince born among them, and who could speak no other language. He then appointed his own babe.

of Wales and earl of Chester by special creation and investiture, but being the king's eldest son, he is by inheritance, duke of Cornwall, without any new creation.

Who are Included. The term royal family is now restricted since the revolution and act of settlement, to the protestant issue of the princess Sophia. The more confined sense includes only those within a certain degree of propinquity to the reigning prince, and to whom, therefore, the law pays marked respect, but after that degree is past, they fall into the rank of ordinary subjects.

More Remote Branches. The younger sons and daughters of the king, and other branches of the royal family, who are not in the immediate line of succession, were little further regarded by the ancient law, than to give them a certain precedence before all peers and public officers. Under the description of the king's children, his grandsons are held to be included.

Marriage of Members of the Royal Family. By statute, no descendant of George II, other than the issue of princesses, married into foreign families, may marry, except with the previous consent of the king, under the great seal, provided if such descendant has reached the age of twenty-five, he or she may after twelve months notice to the king's privy council, contract and solemnize marriage, without the consent of the crown, unless both houses of parliament shall before the end of the year, disapprove of such intended marriage. Persons taking part or being present at such prohibited marriage, shall suffer the penalty of the statute of *praemunire*.

CHAPTER V.—THE KING'S COUNCILS.

1. Parliament. We have already treated of the parliament in a previous chapter.

2. The Peers of the Realm. By birth, these are hereditary counsellors of the crown, and may be convened by the king to impart their advice in all matters of importance to the realm, either during the session of parliament, or during its vacation. They are privileged from arrest at all times.

3. Judges of the Courts of Law for Legal Matters.

4. The King's Privy Council. The king's will is the sole constituent of a privy counsellor, and the number of his council is indefinite. They are native born, and are made by the king's nomination, and may be removed at his discretion.

Their Duties. (1) To advise the king, according to the best of his judgment. (2) To advise for the king's honor and good of the public, without partiality through affection, love, doubt or dread. (3) To keep the king's council secret. (4) To avoid corruption. (5) To help and strengthen the execution of what shall be there resolved. (6) To oppose all persons, who shall attempt the contrary. (7) To observe keep and do all that a good and true counsellor ought to do to his lord.

Their Powers. To inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law. But their jurisdiction herein is only to inquire and not to punish, and the persons committed by them are entitled to their *habeas corpus*, as much as if committed by a justice of the peace. Under Charles I, the court of star chamber and the court of requests were dissolved. In plantation or admiralty cases, which arise out of the jurisdiction of the kingdom, and in matters of lunacy or idiocy, although possibly involving questions of extensive property, the privy council continues to have cognizance, being the court of appeal in such cases, or rather the appeal lies to the king himself in council. Whenever a question arises between two provinces in America or elsewhere, the king in his council exercises original jurisdiction, upon the principles of feudal sovereignty. But from all dominions of the crown, excepting Great Britain and Ireland, an appellate jurisdiction is vested in the same tribunal, which usually exercises its judicial authority in a committee of the whole privy council, who hear the allegations and proofs, and make their report to his majesty in council, by whom the judgment is finally given.

Their Privileges. These consist principally in the security, which the law has given them against attempts on their lives. Any conspiracy by the king's servants of his household to take away the life of a privy counsellor is felony, though nothing be consummated.

Their Dissolution. This depends upon the king's pleasure. He may, whenever he thinks proper, discharge any partic-

ular member, or all of them, and appoint new men. The privy council continue for six months after the demise of the crown, unless sooner determined by the successor.

CHAPTER VI.—THE KING'S DUTIES.

Defined in 1688. His dignity and prerogative are established by the laws of the land, it being a maxim in law, that protection and subjection are reciprocal. These duties are what were meant by the convention in 1688, when they declared that king James II had broken the original contract between king and people. After the revolution of that year, it was deemed advisable to declare these duties expressly, and to reduce that contract to a certainty.

Oath of Coronation. The principal duty of the king is to govern the people according to law. This is not only consonant to the principles of nature, liberty, reason and society, but has been an express part of the common law, even when prerogative was at its height. The coronation oath includes a promise by the sovereign, to govern according to the statutes of parliament, and the laws and customs of the same. In the king's part of this original contract are expressed all the duties that a monarch can owe to his people; viz. to govern according to law, to execute judgment in mercy, and to maintain the established religion.

The Established Church. By the act of union under queen Anne, the preceding statutes were confirmed, the one of the parliament of Scotland, the other of the parliament of England, that every king at his accession shall take oath, to preserve the Presbyterian church government in Scotland, and to preserve the settlement of the church of England within England, Ireland, Wales and Berwick, and the territories thereunto belonging.

CHAPTER VII.—THE KING'S PREROGATIVE.

Divine Right of Kings. In former ages, the limit of the king's prerogative was deemed a topic too sacred to be prepared by the pen of a subject. It was ranked among the *arcana*

imperii, and, like the mysteries of the *bona dea*, was not suffered to be examined into by any but such as were initiated in its service. Elizabeth directed her ministers to abstain from discoursing about matters of state, and her successor, James I, who had imbibed high notions of the divinity of legal sway, said, that as it is atheism and blasphemy in a creature to dispute what Deity may do, so it is presumption and sedition in a subject to question what a king may do in the height of his power; "hence," added he, "good Christians will be content with God's will, revealed in his word, and good subjects will rest in the king's will, revealed in his law."

Ancient Doctrine. But this never was the language of our ancient constitution and laws. The limitation of the regal authority was an elementary principle in all the Gothic systems of government, established in Europe, though gradually overborne by violence and chicanery, in most of the kingdoms on the continent.

Meaning of the Term. Prerogative is that special preeminence, which the king has above all other persons, and out of the ordinary course of the common law, by right of his regal dignity. It signifies, *prae* and *rogo*, something that is required or demanded before, or in preference to all others. Hence in its nature it is singular and eccentrical, and can only be applied to those rights and capacities, which the king enjoys alone, and not to those he enjoys in common with his subjects. Prerogative is the law in the case of the king, which is law in no case of the subject.

Divisions—Direct or Incidental. The direct are such positive, substantial parts of the royal character and authority, as spring from the king's political person, without reference to any extrinsic circumstance, as the right of sending ambassadors, of creating peers, and of making war or peace. Incidental prerogatives always bear 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 claim for a debt shall be preferred before a claim of a subject.

Direct Prerogatives. These are divided into three kinds; being such as regard the king's royal character, his royal author-

ity, and lastly, his royal income. These are necessary, to secure reverence to his person, obedience to his commands, and an affluent supply for the ordinary expenses of government, whereby the executive power is maintained in independence and vigor. Our free constitution has interposed restrictions, to prevent this prerogative from trampling on the liberties it was meant to secure.

Royal Dignity. In every monarchy, it is necessary to distinguish the prince from his subjects, not only by outward decoration, but by ascribing to him certain qualities, as inherent in his royal capacity, distinct from any other individual in the nation. He is presumed to possess certain attributes of a great and transcendent nature, by which the people are led to look upon him as a superior being.

I. His Sovereignty. He is said to have imperial dignity, and is styled *basileus* or *imperator*. His realm is termed an empire, and his crown imperial. He owes no subjection to any other earthly potentate. No suit or action, even in civil matters can be brought against the king, because no court can have jurisdiction over him. Authority to try would be in vain, without authority to redress; the sentence of a court would be contemptible, where it could not enforce execution, and who shall command the king? His person is sacred, even though his measures be tyrannical and arbitrary, for no jurisdiction can try him in a criminal manner, much less condemn him to punishment. If such a power were vested in any tribunal, domestic or foreign, there would soon be an end to the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

Remedy for Tyranny. Yet the subjects of England are not without remedy, in case the crown should invade their rights, either by private injuries or public oppressions.

Remedies for Private Injuries. If any person has, in point of property, a just demand upon the king, he must petition him in a court of chancery, where the chancellor will administer right, as a matter of grace, though not upon compulsion. This is consonant with what is laid down by the writers on natural law. The end of such action is not to compel the prince to observe the contract, but to persuade him. Hence the case itself proceeds rather upon natural equity, than upon the municipal laws. And as to personal wrongs, says Locke, the harm which a

hasty tempered sovereign can do in his own person, not being likely to happen often, nor to extend far, nor by his single strength being able to subvert the laws, nor oppress the body of the people, such inconveniences are well recompensed by the peace of the public, and security of the government.

Remedy for Public Oppression. The law has assigned a remedy, where the vitals of the constitution are not attacked. As the king cannot misuse his power, without the advice of evil counsellors, these men may be punished, by means of indictments and parliamentary impeachments, so that no man shall dare to assist the crown in opposition to the laws of the land. The king himself can do no wrong, is a maxim of law.

The King can do no Wrong. As to such public oppressions as tend to dissolve the constitution, the law will not suppose, as it will not distrust, those invested with any part of the supreme power, since such distrust would render the exercise of such power precarious. For wherein 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. The supposition of law therefore is, that neither the kiug, nor either house of parliament, collectively taken, is capable of doing any wrong, since in such cases, there would be no adequate remedy. If such wrong should ever happen, the exigencies of the times must provide new remedies.

Abdication. 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, aud should withdraw from the kingdom, this conjunction of circumstances, as in the case of James II, would amount to an abdication, and the throne would be thereby vacant.

II. His Absolute Perfection. The king can do nothing wrong. This means, 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 the people. It also means, that the prerogative of the crown extends not to any injury; it is created for the good of the people, and therefore cannot be exerted to their prejudice.

Incapable of Wrong Intent. The king is not only incapable of doing wrong, but even of thinking wrong. In him there is neither folly nor weakness.

His Advisers Censured. And therefore, if the crown grant any franchise or privilege to a subject, contrary to reason, or prejudicial to the state, or to a private person, the law will not suppose the king meant injury, but declares the king was deceived in the grant, and thereupon such grant is rendered void for deception, practiced upon him by his agents. The law will cast no imputation on him, whom it intrusts with the executive power, nor believe him capable of disregarding his trust. Both houses of parliament may, however, remonstrate against the acts, messages and speeches of royalty, censuring therefor the advisers of the administration, and treating the king with the utmost respect and deference.

No Laches Presumed. The law also determines, that in the king can be no negligence or laches, and therefore no delay will bar his right. *Nullum tempus occurit regi* is the maxim. Busied for the public good, he has not always leisure to assert his rights in the time limited.

No Attainder or Minority. In him there can be no corruption of blood, for if the heir to the crown were attainted of treason or felony, and afterwards the crown descended to him, this would purge the attaint *ipso facto*. Nor can a king, in judgment of law, as king, ever be a minor, and therefore his royal grants and assents to acts of parliament are good, though he has not attained the age of twenty-one. When the heir apparent is very young, it has been usual to appoint a guardian or regent for a limited time, but in law, the king has no legal guardian.

III. His Perpetuity. The king never dies. Immediately upon the decease of the reigning prince, in his natural capacity, his imperial dignity, by act of law, without any *inter-regnum*, is vested at once in his heir, who is *eo instanti*, king to all interests and purposes. His natural dissolution is called a demise, not a death, an expression which merely signifies a transfer of property, and when we say the demise of the crown, we mean merely, that the kingdom is demised to his successor, and so the royal dignity becomes perpetual.

As Chief Magistrate. The executive part of the government is wisely placed in a single hand by the British constitution, for the sake of strength, unanimity and despatch. Were it placed in many hands, it would be subject to many wills, which would create weakness in the government. The king therefore is not

only the chief, but the sole magistrate, all others acting by commission from, and in due subordination to him.

Powers of the King. While not advocating arbitrary power, we may lay it down as a principle, that in the exertion of lawful prerogative, the king is, and ought to be, absolute, or so far so, that there shall be no legal authority, that can either delay or resist him. He may reject bills, make treaties, coin money, create peers, pardon offences as he pleases, unless the constitution has expressly laid down some exception or boundary, declaring that his prerogative in such case had a defined limit. Otherwise the power of the crown would be but a name, insufficient for the ends of government, if where the jurisdiction is clearly established, any man was permitted to disobey it, in the ordinary course of law. Extraordinary recourse to first principles may be necessary, where the contracts of society are in danger of dissolution, and the law proves too weak a defence against the violence of fraud or oppression.

Civil Liberty. Civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society, which cannot be maintained without obedience to some sovereign power; and obedience is an empty name, if every individual has a right to decide how far he himself shall obey. One class of people observing the absolute sovereignty of the crown, laid down most strongly in our law books, have denied, that any case can be excepted from so general and positive a rule, forgetting how impossible it is, in any practicable system of laws, to point out those eccentrical remedies, which the sudden emergency of national distress may dictate, and which that alone can justify. On the other hand, over zealous republicans, feeling the absurdity of unlimited passive obedience, have gone to the other extreme, and because resistance is justifiable, when the being of the state is endangered, and the public voice justifies resistance, they have allowed to every individual the right of determining this, and of employing private force to resist even private oppression. The former are advocates of slavery, the latter demagogues of faction, with doctrines productive of anarchy.

Locke's Definition of Prerogative. "Prerogative," says Locke, "consists in the discretionary power to act for the public good, where the positive laws are silent. If that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner."

What Prerogative Affects. The prerogatives of the crown, as herein considered, respect either the nation's intercourse with foreign nations, or its own domestic government and civil policy.

PREROGATIVE IN FOREIGN AFFAIRS.

Binding Effect of King's Act. In foreign affairs, the king is the representative of the people. It is impossible for the individuals of a state to act in unanimity. What therefore is done by the royal authority in regard to foreign powers, is the act of the whole nation. What is done without the king's concurrence, is the act of private men. A subject, committing acts of hostility against a nation in league with England, without the royal assent, is guilty of a great offence against the law of nations.

1. **Foreign Ambassadors.** The king has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home. The rights, powers, duties and privileges of ambassadors are determined by the law of nature and of nations, and not by any municipal constitutions. They represent masters, who owe no subjection to laws, but those of their own country, and hence their actions are not subject to the private law of that state, wherein they are appointed to reside. An ambassador ought to be independent of every power, except that by which he is sent, and is not subject to the municipal laws of the nation, where he exercises his functions. If he grossly offends, he may be sent home, and accused before his master, who is bound to do justice, or be deemed an accomplice of his crimes.

Liability for Crime. There is great dispute among the writers on the law of nations, whether this exemption extends to crimes *mala in se*, or merely to those *mala prohibita*. It has been the generally accepted doctrine, that where an ambassador commits an offence against the law of reason and nature, he shall lose the privilege, and not be exempt from punishment in the country where the crime was committed. But now the general theory of this country, as well as the rest of Europe, as set forth by Grotius, is, that the security of ambassadors is of more importance than the punishment of a particular crime. And, therefore, few, if any, examples have happened within a century past, where an ambassador has been punished for any offence, however atrocious in its nature.

Liability in Civil Actions. In regard to civil suits, all

jurists agree, that neither an ambassador or any member of his suit, can be prosecuted for debt or contract in the courts of the kingdom, where he is sent to reside. Coke asserts, that if an ambassador here made a contract, which is good *jure gentium*, he shall answer for it here. So few cases, however, have arisen, that our law books are silent upon this question before the reign of queen Anne, where a Russian ambassador was arrested in London for a debt of fifty pounds. He gave bail, and at once complained to the queen. The persons concerned in the arrest, seventeen in number, were sent to prison, and subsequently were convicted by a jury, the judge reserving a question of law, how far those facts were criminal, which point of law was never argued. Meanwhile the czar resented the affront greatly, and demanded that the sheriff of London and others should be put to death. A humiliating act of parliament was passed, to prevent such arrests in the future. This act, elegantly engrossed, with an ample apology from the queen, was forwarded the czar, who thereupon agreed that the offenders be discharged. This statute declared, that all process, whereby the person of an ambassador or of his servant may be arrested, or his goods detained, or seized, shall be null and void, and the parties prosecuting or executing such process shall be deemed violators of the law of nations, and shall suffer penalties and corporal punishment, as the chancellor shall deem fit. This now is the law of the land, and is enforced in the courts of common law.

2. Treaties with Foreign States. It is also the king's prerogative to make treaties, leagues and alliances with foreign states and princes. By the law of nations, it is essential, that a league be made by the sovereign power, and then it is binding on the entire community. In England that power is vested in the person of the king. Whatever contracts he engages in, no other power in the kingdom can legally delay, resist or annul. The king's ministers, however, may be impeached, who from criminal motives, advise the framing of a treaty, injurious to the interests of the country.

3. Making War or Peace. The king has the sole prerogative in this matter. The right of making war is vested in the sovereign, individuals having yielded their private rights in this respect on entering into society. Unauthorized volunteers in violence are not ranked among open enemies, but are treated

like pirates and robbers. A denunciation of war ought always to precede active hostilities, which shows that such war is not undertaken by private persons, but by the will of the whole community. In England, it must be publicly declared by the king's authority. The same authority must be proclaimed to end the war. The power of parliamentary impeachment of ministers of the king advising an improper or inglorious war, exists also in this case.

4. Letters of Marque and Reprisal. Sometimes the delay in making war may be detrimental to individuals, who have suffered by foreign depredations. Our law has in some respects armed the subject with powers to impel the prerogative, by directing the ministers of the crown to grant letters of marque and reprisal upon due demand. This produces an incomplete state of hostilities, which generally ends in a formal declaration of war. These letters are grantable by the law of nations, whenever the subjects of one state are injured by those of another, and justice is denied by that state, to which the oppressor belongs. The words marque and reprisal are used as synonomous, and signify, the latter, a taking in return, the former, the passing the frontiers in order to such taking. The letters order the seizing of the bodies or goods of the subjects of the offending state, wherever found, until satisfaction be made. This custom of reprisals seems dictated by nature itself, and we find very ancient instances of it. The sovereign power must determine when reprisals shall be made, else every private sufferer would be a judge in his own cause. This form must be observed: The sufferer must first apply to the lord privy seal, and he shall make out letters of request. If, after such request of satisfaction be made, the party required do not promptly make restitution, the chancellor shall make out letters of marque, under the great seal, by virtue of which he may attack and seize the property of the aggressor nation, without being deemed a robber or pirate.

5. Granting Safe-conducts. Without these, by the law of nations, no member of one society has a right to intrude into another. Each nation may adopt such measures, as it sees fit, as to the admission of strangers, excepting those who are driven on the coast by necessity, or by any cause, that deserves compassion. Great tenderness is shown by our laws to foreigners in distress, and also to the admission of strangers. As long as

their nation is at peace with ours, and they themselves behave peaceably. they are under the king's protection, though liable to be sent home at any time. But no subject of a nation at war with us, can, by the law of nations, come into the realm, or travel on the high seas, or send his goods from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct, granted under the king's seal, and enrolled in chancery. But passports, under the king's manual, or licenses from his ambassadors abroad, are now more usually obtained, and are of equal validity.

Foreign Merchants. The law of England, as a commercial country, pays special regard to foreign merchants. *Magna carta* provides, that they shall have safe-conducts to travel through England, without being subjected to unreasonable imposts, except in time of war. If hostilities break out, foreign merchants in England may be attached in person or in goods, but shall not be harassed, until it be learned how our merchants are treated in such country, and if our merchants are secure in that land, their merchants shall be secure in ours. This was the common rule of equity among all the northern nations, and Montesquieu says of this clause in *magna carta*, that "the English have made the protection of foreign merchants one of the articles of their national liberty. They know better than any people on earth to value religion, liberty and commerce."

Commerce Despised by Romans and Canonists. The Romans treated commerce as a dishonorable employment, and prohibited its exercise by persons of birth, rank and fortune, while the canonists looked on trade as inconsistent with Christianity, and decided at the council of Melfi, A. D. 1090, that it was impossible with a safe conscence to exercise any traffic, or follow the profession of the law.

PREROGATIVE IN DOMESTIC AFFAIRS.

1. His Legislative Power. The king is a constituent part of the supreme legislative power, and as such has the prerogative of rejecting such provisions in parliament, as he judges improper to be passed. The king is not bound by any act of parliament, unless he be specially named. The most general words that can be devised, affect him not in the least, if they tend to restrain any of his rights or interests. It would be dangerous to the state, if the strength of the executive power were

liable to be curtailed, without its own express consent, by constructions and implications of the subject. Yet where an act is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding, as well upon the king as the subject, and likewise the king may take the benefit of any particular act, though he be not named.

2. His Military Command. The king is the generalissimo, or the first in military command within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community, and the principal use of government is to direct that united strength in the most effectual manner to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose. In a monarchy, the military power must be trusted in the hands of the prince.

His Military Power. As general of the kingdom, the king has the sole power of raising and regulating fleets and armies. His prerogative of enlisting and governing them was disputed in the long parliament of Charles I, but was solemnly declared by statute to be in the king alone. This power was also extended to forts and castles. No subject can build a castle or house of strength without the king's consent.

Ports and Havens. To secure his marine revenue, the king has the prerogative of appointing ports and havens, for persons and merchandise to pass in and out the realm, as he in his wisdom sees proper. By the feudal law, all navigable rivers and havens were computed among the regalia, and were subject to the sovereign of the state. The king, therefore, had the power of granting the franchise of havens and ports, yet he could not narrow and confine their limits, when once established, but any one had the right to load or discharge his merchandise in any part of the haven, whereby the revenue of the customs was much diminished by fraudulent landings. Hence was passed in Elizabeth's reign a statute, which enabled the crown by commission to ascertain the limits of all ports, and to assign proper wharfs and quays in each port for the exclusive landing and loading of merchandise.

Light Houses. The erection of beacon and light houses is also a branch of the royal prerogative, whereof the first were

anciently used to alarm the country in case of the approach of an enemy, and all of them are useful in guiding vessels at sea by night, as well as by day. The king has the power to cause them to be erected in fit and convenient places, as well upon the lands of the subject, as upon the demesnes of the crown. This power is usually vested by him in letters patent to the high admiral.

Ne Exeat Regno. The king may prohibit the exportation of arms or ammunition, under severe penalties. He may also compel his subjects to remain within the realm, or recall them when beyond seas. By the common law, however, every subject may leave the realm, without obtaining the king's permission. At one time, some by reason of their stations, were under a perpetual prohibition from going abroad, without license obtained; among whom were peers, on account of their being counsellors of the crown, all knights, who were bound to defend the kingdom from invasions, all ecclesiastics, on account of their attachment at one time to the see of Rome, all artificers, lest they should instruct foreigners to rival us in their manufactures. In the reign of Edward III, an act was passed, forbidding all persons to go abroad without license, except only the lords and great men of the realm, and true and notable merchants, and also the king's soldiers. But this act was repealed under James I, and now any one can go abroad when he pleases. Yet undoubtedly if the king, by writ of *ne exeat regno*, under his great or privy seal, thinks proper to prohibit him from so doing, or if he send a writ to a man, when abroad, commanding his return, and the subject disobeys, it is a high contempt of the king's prerogative, for which the offender's lands shall be seized till he return, and then he is liable to fine and imprisonment.

3. Fountain of Justice. The king is the fountain of justice, and general conservator of the peace of the kingdom. He is not the author or original, but only the distributor of justice. He is the steward of the public, to dispense justice to whom it is due. The original power of judicature, by the fundamental principles of society, is lodged in the society at large, but as it would be impracticable for the people in their collective capacity to render justice to individuals, therefore every nation has committed that power to magistrates, who with more expedition can hear and determine complaints, and in England this power is with the king and his substitutes. He, therefore, has alone

the right of erecting courts of judicature, as he possesses the sole executive power, in which he is assisted by courts acting under his authority. Hence all jurisdictions of courts are derived from the crown; their proceedings were generally in the king's name; they pass under his seal, and are executed by his officers.

Jurisdiction of Judges. It is probable in early times, our kings often heard and determined causes between party and party. But at present, by long usage, our kings have delegated their whole judicial power to the judges of their several courts, which courts are the grand depositories of the fundamental laws of the kingdom, and have gained a known jurisdiction, regulated by certain established rules, which the crown cannot now alter, but by act of parliament.

Duration of the Judicial Office. To maintain the dignity of the judges in the superior courts, it was enacted that their commissions shall be made and their salaries established. They may be removed by action of parliament, otherwise they are continued in their offices during their good behavior, notwithstanding any demise of the crown, which formerly vacated their seats.

In Criminal Cases. In criminal proceedings, it would be an absurdity, if the king personally sat in judgment, because in regard to these matters he appears in another capacity, that of prosecutor. All offences are either against the king's peace, or his crown and dignity, and are so laid in every indictment. Though in their consequences they generally seem, except in the case of treason, and a few other crimes, to be rather offences against the kingdom than the king, yet as the public has delegated all its powers, with regard to the execution of its laws, to one visible magistrate, affronts to that power and breaches of those rights are offences against him to whom they are so delegated by the public. He is, therefore, the proper person to prosecute all public offences and breaches of the peace, being the person injured. Under the Gothic constitution, in cases of a forcible injury offered to the person of a fellow subject, the offender was accused of a kind of perjury, in having violated the king's coronation oath.

Pardoning Power. Another branch of the prerogative is that of pardoning offences, for it is reasonable, that he only who

is injured shall have the power of forgiving. We shall treat of this hereafter.

Judicial Power Distinct. 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 preservation of the public liberty, which cannot exist long in any state, unless the administration of common justice be separated both from the legislative, and also from the executive power. Were it joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law, which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative. Nothing is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state.

Legal Ubiquity of the King. His majesty, in the eye of the law, is always present in all of his courts, though he cannot personally distribute justice. His judges are the mirror, in which the king's image is reflected. It is the regal office, and not the royal person, that is always present in court; always ready to undertake prosecutions, or pronounce judgment for the protection of the subject. From his ubiquity, it follows, that the king can never be non-suit, which is the desertion of a suit or action, by the non-appearance of the plaintiff in court. In the forms of legal proceedings, the king is not said to appear by his attorneys, as other men do, for in contemplation of law he is always present in court.

Proclamations. As the fountain of justice, we may deduce the prerogative of issuing proclamations, which is vested in the king alone. These proclamations have a binding force, and enforce the laws of the realm. For though the making of laws is entirely the work of 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. Therefore, his edicts or proclamations are binding upon the subject, where they neither contradict the old laws, nor tend to establish new ones, but only to enforce the execution of such laws as are already in being, as the king deems necessary.

4. Fountain of Honor, Office and Privilege. He is really the parent of them. It is impossible that government can be maintained, without a due subordination of rank, that the people shall know and distinguish those set over them, in order to yield them their due respect. Also that the officers themselves, encouraged by emulation, may the better discharge their functions, and the law supposes that no one can be so good a judge of their several merits and services, as the king himself, who employs them. It has, therefore, entrusted him with the sole power of conferring dignities and honors on those who deserve them.

Offices and Honors. The king has the prerogative of erecting and disposing of offices. All honors in their original had offices and duties annexed to them. An earl, *comes*, was the governor of a county, and a knight, *miles*, was bound to attend the king in his wars. For the same reason that honors are in the disposal of the king, offices ought to be so likewise, and as the king may create new titles, so may he create new offices, but with this restriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices, for taxes can only be imposed by act of parliament.

Privileges Conferred. The king has the prerogative of conferring privileges upon private persons. Such as granting precedence to any of his subjects, or converting aliens into denizens. Such also is the prerogative of erecting corporations, whereby a number of private persons are united, and enjoy many liberties, powers and immunities in their politic capacity, which they were utterly incapable of in their natural. The king, having the sole administration of the government in his hands, is the best and only judge, in what capacities, with what privileges, and under what distinctions, his people are the best qualified to serve, and to act under him. Under the imperial law, it was the crime of sacrilege, even to doubt whether the prince had appointed proper officers in the state.

5. The Arbitrer of Commerce. By this is meant domestic commerce only. As to transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reasons, the affairs of commerce are regulated by a law of their own, called the law merchant, *lex mercatoria*, which all nations acquiesce in. Even some

matters relating to domestic trade come under the jurisdiction of this law merchant, as for instance, the drawing, acceptance and transfer of inland bills of exchange.

Public Marts. These are places of buying and selling, such as markets and fairs, with the tolls thereunto belonging. They can only be set up, by virtue of the king's grant or by immemorial usage and prescription, and he has a right to direct and order them as he pleases.

Weights and Measures. The regulation of these should be universally the same through the kingdom, being the general criteria, which reduce all things to the same or an equivalent value. Weight and measure being in their nature arbitrary and uncertain, it is expedient that they be reduced to some fixed rule or standard. This standard should be visible, palpable and material, 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. This standard was originally kept at Winchester.

Standard of Length. Most nations have regulated their standard of measures by comparison with the parts of the human body, as the palm, the hand, the span, the foot, the cubit, the ell or arm, the pace and the fathom. But as these are of different dimensions in men of different proportions, a new standard of measure was ascertained by Henry I, who commanded that the ell, which answers to the modern yard, should be the exact length of his own arm. One standard of measure of length being gained, all others are easily derived from thence. Thus five and a half yards make a perch, and one-third of a yard is a foot. An inch was the length of three grains of barley.

Measures, Superficial and of Capacity. Superficial measures are derived, by squaring those of length; and measures of capacity, by cubing them.

Standard of Weights. This was originally taken from grains of wheat, whence the lowest denomination is termed a grain, thirty-two of which compose a penny-weight, whereof twenty make an ounce, and twelve ounces a pound. And upon these principles, the first standards were made, being originally so fixed by the crown, and subsequently thus regulated by parliament.

Money. As money is the medium of commerce, it is the

king's prerogative to give it currency and authority. Money is a universal medium or common standard, by comparison with which the value of all merchandise can be ascertained, or it is a sign, which represents the respective values of all commodities. Metals are well calculated for this sign, because they are durable as well as portable, and capable of many sub-divisions. A metal is also most proper for a common measure, because it can easily be reduced to the same standard in all nations, and every nation fixes upon it its own impression, so that the weight and standard may be known by inspection only.

Money, Shifting in Value. As the quantity of precious metals increases, the universal medium will sink in value. The consequence is, that more money must be given now for the same commodity, than was given formerly. If any accident diminished the quantity of gold and silver, their value would proportionately rise.

Coining of Money. In all states, this is an act of the sovereign power, that its value may be known on inspection. There are three things to be considered: the materials, the impression and the denomination.

Materials. Money, says Coke, must be either of gold or silver, and none other was issued by the royal authority till 1672, when copper coins were circulated by Charles II, and ordered current in all payments under six-pence.

Impression. The stamping of coin is the unquestionable prerogative of the crown. At one time certain bishops and monasteries had the privilege of coining money, yet this was usually done by special grant from the king, or by prescription, which supposes one. Besides they had only the profit of the coinage, and not the power of instituting the impression or denomination, the stamp being usually sent them from the exchequer.

Denomination. This is the value, for which the coin is to pass current. In order to fix this value, the weight and fineness of the metal are both to be taken into consideration. When a given weight of gold or silver is of a given fineness, it is then of the true standard, and called esterling, or sterling metal, and of this sterling metal, the coin of the kingdom must be made. The king's prerogative seems not to extend to the debasing or enhancing the value of the coin, below or above the sterling value, though Sir Matthew Hale thinks differently. The king may also

by proclamation, legitimate foreign coin, and make it current here, declaring at what value it may be taken. The king may at any time decree a coin no longer current.

6. **Head of the National Church.** By statute of Henry VIII, the king was made the supreme head of the church of England. A similar statute was enacted in the reign of Elizabeth. In virtue of this authority, he convenes, prorogues, restrains, regulates and dissolves all ecclesiastical synods or convocations. This was an inherent prerogative of the crown long before the reign of Henry VIII.

The Synod. The synod or convocation in England differs considerably in its constitution from the synods of other christian kingdoms, those consisting wholly of bishops, whereas with us, the convocation is the miniature of parliament, wherein the archbishop presides with regal state. The upper house of bishops represents the house of lords, and the lower house, composed of representatives of the several dioceses at large, and of each chapter therein, resembles the house of commons, with its knights of the shire and burgesses. This was owing to the policy of Edward I, who allowed the inferior clergy to form ecclesiastical canons. The king has the right to nominate to vacant bishops and certain other ecclesiastical preferments. He is the last resort in all ecclesiastical causes, an appeal in chancery lying to him from the sentence of a judge.

CHAPTER VIII.—THE KING'S REVENUE.

Preamble. This chapter will treat of the king's revenue, which the British constitution has vested in his royal person to support his dignity and maintain his power, being a portion which every subject contributes of his property to secure the remainder. The revenue is either ordinary or extraordinary.

ORDINARY REVENUE.

Defined. Ordinary revenue is such, as has either subsisted time out of mind in the crown, or else has been granted by parliament, by way of purchase or exchange, for such of the king's inherent, hereditary revenues, as were found inconvenient to the subject.

Far Less than Formerly. The greater part of the former revenue of the king is now in the hands of his subjects, to whom it has been granted from time to time, by the kings of England, which has rendered the crown somewhat dependent on the people for its support.

1. Custody of the Temporalties of Bishops. Upon the vacancy of a bishopric, the custody of all the lay revenues and lands revert to the king, as he is the founder of all bishoprics. This revenue, which once was considerable, is now, by a customary indulgence, almost reduced to nothing, for the new bishop, upon his confirmation, usually receives the entire restitution of the temporalties, at the time he does homage to the king.

2. Corodies. These entitle the king to send one of his chaplains to be maintained by a bishop, or receive a pension. This privilege has fallen into disuse.

3. Tithes. The king is entitled to all the tithes arising in extra-parochial places, which he holds for the good of the clergy generally. Neither tithes nor corodies seem, however, to increase the revenue of the king.

4. First Fruits or Tenths. This is a tax on all spiritual preferments in the kingdom. These were originally a part of the usurpations over the clergy, first introduced by Pandulph, during the reigns of John and Henry III. The first fruits were the first year's entire profits of a spiritual preferment. The tenths were the tenth part of the annual profit of each living, which was also claimed by the Holy See, founded on the precept of the levitical law, which directs that the Levites should offer the tenth part of their tithes as a heave offering to the Lord, and give it to Aaron, the high priest. The claim met with a vigorous resistance from the English parliament, but the mass of the clergy favored it, and sent large sums of money to Rome. It was abolished by Henry VIII. The monarchs of England, for a time, claimed it for themselves, and received a portion of it, until this exaction was stopped by Anne.

5. Rents of the Demesne Lands of the Crown. These lands were either the share reserved to the crown at the original distribution of landed property, or such as came to it afterwards, by forfeitures or other means. Anciently these were very extensive, comprising divers manors, the tenants of which had very peculiar privileges. At present they are contracted within a

very narrow compass, having been almost entirely granted to private subjects. This has occasioned parliament frequently to interpose, and particularly after William III had impoverished the crown. In his reign, an act was passed, whereby all future grants or leases from the crown for any longer period than thirty-one years or three lives were declared void, except with regard to houses, which may be granted for fifty years. The tenant was made liable for waste. The usual rent must be reserved, or if no rent, one-third of the clear value. The misfortune, however, is that the act was made too late, after almost every valuable possession of the crown had been granted away forever, or else upon very long leases.

6. Military Tenures and other Prerogatives. Most lands in the kingdom were subject to military tenures, until they were abolished by Charles II. There was also a profitable prerogative of purveyance and pre-emption, which was a right by the crown of buying up provisions and other necessaries for the use of the royal house, held at an appraised valuation, in preference to all others, and without the owner's consent. Also of forcibly impressing the carriages and horses of the subject to do the king's business on the public roads, in the conveyance of timber, baggage and the like, however inconvenient to the proprietor, upon paying him a settled price.

7. Wine Licenses. These were paid by retail dealers, except in a few privileged places. This source of revenue was abolished, and an annual sum of about 7,000 pounds, issuing out of the new stamp duties on wine licenses, was settled on the crown in its stead.

8. Forest Profits. Forests are waste grounds belonging to the king, stocked with beasts of the chase, which are under the king's protection for his recreation and pleasure, and for the preservation of the king's game. There are particular laws, privileges, courts and offices relating thereto. The profits consisted in amercements and fines for offences against the forest laws. These courts have been virtually abolished.

9. Profits from Courts of Justice. These consist in fines, imposed upon offenders, forfeiture of recognizances, amercements levied upon defaulters, also fees due the crown in a variety of legal matters, as for setting the seal to charters, original writs and other legal proceedings, and for permitting

fines to be levied of lands, to bar entails, or otherwise to insure their title. These, in process of time have almost all been granted to private persons, or appropriated to particular uses.

10. **Royal Fish.** These are the whale and sturgeon. They belong to the king, if thrown ashore, or caught near the coast. They are granted him, in consideration of his guarding the seas from pirates.

11. **Shipwrecks.** Where the goods or cargo of a shipwrecked vessel were thrown upon the land, the goods so wrecked were formerly adjudged to the king, and that all right to the property was lost by the former owner. This law was against reason and humanity. Later a statute was enacted, that if proof could be adduced of the existence of the owner of the goods, within a year and a day, they should be restored to him, otherwise they became the property of the sovereign. If the goods are of a perishable nature, they shall be sold, 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. If it be one of the king's vessels, and it be wrecked on another's land, the king may claim it at any time, even after the year and a day.

Jetsam, Flotsam and Ligan. To constitute a legal wreck, the goods must come to land. If they continue at sea, they are termed 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 floating on the surface of the water; 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 claims them, but the owner may recover possession, even if they have been thrown over to lighten the ship.

Goods Returned to Owner. If a ship be lost off shore, and the goods come to land, which cannot be called a wreck, they shall be delivered to the owner, who shall pay a reasonable reward to those who saved them, which is called salvage. If any persons, except the sheriff, take any goods so cast on shore, which are not legal wreck, the owners may obtain a commission to find them out, and compel the finders to make restitution.

Salvage. All head officers and other persons living in towns near the sea, on application, must summon hands and help a ship in distress, under penalty of one hundred pounds. In

case of salvage, three neighboring justices shall decide the amount. All persons who secrete such goods shall forfeit treble their value, and if they wilfully cause the ship to be destroyed, they are guilty of felony, without benefit of clergy. Pilfering such goods is petit larceny.

12. Mines. This is to supply the king with material for coinage, and, therefore, the mines which are properly royal, and to which the king is entitled when found, are only those of gold and silver. This law does not refer to mines of other metals, even if mixed with the precious metals.

13. Treasure Trove. (French, *trover*, to find). This is where any money or coin, gold, silver, plate or bullion is found hidden anywhere, the owner thereof being unknown. The treasure belongs to the king. But if found in the sea or upon the earth, it belongs to the finder, and not to the king, if no owner appears. It is the hiding, not the abandoning of it, that gives the king a property. A man who hides property does not mean to relinquish it, but reserves a right of claiming it again, if he sees occasion. If he dies and his secret dies with him, the law gives it to the king as part of the royal revenue. But a man who scatters his treasure on the sea, is construed to have absolutely abandoned his property, and, therefore, it belongs to the finders, unless the owner appear and assert his right, which then proves the loss to have been by accident.

Hidden Treasure. Formerly all treasure-trove belonged to the finder, as was also the rule of the civil law. Afterwards it was deemed expedient to grant part of it to the king, which part was specified to be all hidden treasure; such as is casually lost and unclaimed, and also such as is designedly abandoned, remaining the right of the finder. In earlier times the finding of deposited treasure was more frequent than now. When the Romans were driven out of different countries by the northern nations, they often concealed their money in the ground, with a view to return to it when the irruption was over, and the invaders driven back. But as this never happened, the treasures were not claimed, and on the death of the owner, the secret died with him. The conquering generals, aware of the value of these hidden treasures, made it highly penal to secret them from the public service. In England, at one time the penalty was death, but now it is fine and imprisonment.

14. Waifs. These 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 to the owner, for not himself pursuing the felon, and recovering his goods. Therefore, if the owner at once follow the thief and apprehend him, or convict him afterwards, he shall have his goods again. Waived goods do not belong to the king, till seized by somebody for his use, for if the party robbed seize them first, though at the distance of twenty years, he shall retain them. If the goods are hidden 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, they are not *bona waviata*, and the owner may have them when he pleases. The goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs. This exception is for the encouragement of trade, and also because there is no wilful default in the foreign merchant's not pursuing the thief, he being generally a stranger to our laws, usages and language.

15. Estrays. These are such valuable animals as are found wandering in any manor, whose owner is unknown, in which case the law gives them to the king as the lord paramount of the soil, in recompense for the damage done therein. They now most commonly belong to the lord of the manor, by special grant from the crown. To vest an absolute property in the king or his grantee, they must be proclaimed in the church and two adjacent market towns. If no man claims them after proclamation, and the lapse of a year and a day, they belong to the king or his grantee, without redemption, even though the owner was a minor.

What are Estrays. Any beasts may be estrays, that are by nature tame, and in which there is a valuable property, as sheep, oxen, swine and horses, which we call cattle. For animals, on which the law sets no value, as a dog or cat, or animals *ferae naturae*, as a bear or wolf, cannot be termed estrays. Swans may be estrays, but not any other fowl. He that finds an estray, so long as he keeps it, must supply it with provisions, and preserve it from damage. He may not use it for labor, but is liable in an action for so doing. Yet he may milk a cow, for that tends to its preservation.

General Rule. One general reason, which holds for all

these estrays, is because they are *bona vacantia*, or goods in which no one else can claim a property. And, therefore, by the law of nature, they belonged to the first occupant, or finder, and so continued under the imperial law. But in settling the modern constitutions of most of the governments in Europe, it was thought proper, in order to avoid contention, and to provide towards the support of public authority in a manner the least burdensome, that these rights should be annexed to the supreme power.

16. Forfeitures. The next branch of the king's ordinary revenue consists in forfeitures of lands and goods for offences. The civilians call them *bona confiscata*, because they belonged to the *fiscus* or treasury. The reason of this forfeiture for crimes is, that all property is derived from society, being one of those civil rights conferred upon individuals, in exchange for a degree of natural freedom, which every man must sacrifice, when he enters into social communities.

Confiscation. If therefore, a member of the community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to the privileges of such contract, and the state may resume that portion of property, or any part of it, which the laws have previously assigned him. Hence in every offence of an atrocious kind, the laws of England have exacted a total confiscation of the personal estate, and in many cases a perpetual, in others only a temporary loss, of the offender's immovable or landed property, and have vested them both in the king.[1] We will treat further of forfeitures under the head of crimes in the fourth book, excepting one species only, called a deodand.

Deodand. By this is meant, whatever personal chattel is the immediate cause of the death of any reasonable creature; which is forfeited to the king, to be distributed in alms. Originally it was designed as an expiation for the souls of those, who were snatched away by sudden death, and which should be given to the church, in the same manner as the apparel of a stranger, who was found dead, was applied to purchase masses for the good of his soul. No deodand was due, where an infant was killed by a fall, for the reason, that by want of discretion, he was presumed

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[1] Forfeiture of estate and corruption of blood do not exist in the United States, nor now in England, except forfeiture for treason.

incapable of sin. But if the object that killed an infant was in motion at the time of the accident, as a horse, or if a cart ran over him, they shall be forfeited as deodands, on the principle that such misfortunes are in part owing to the negligence of the owner, though he may not have been concerned in the killing.

The Instrument Causing Death. In all indictments for homicide, the instrument of death may be claimed by the king as a deodand, and be presented to him by the jury, which tries the criminal. No deodands are due for accidents happening on the high seas, for they are out of the jurisdiction of the common law, but if a man fall from a boat in inland waters, and is drowned, the vessel and cargo, at one time, became a deodand. But juries of late years have lessened these forfeitures, by finding only some trifling thing, or a portion of an entire thing, to have been the occasion of death. Deodands and forfeitures in general, may be granted by the king to a particular subject, as a royal franchise.

17. **Escheat.** This happens on defect of heirs to succeed to inheritances, whereupon they in general revert to and vest in the king, the original proprietor of all the lands. This subject properly belongs to the second book of the commentaries.

18. **Custody of Idiots and Lunatics.** An idiot or natural fool, is one who has no understanding from his birth, and hence is presumed never likely to attain any. For which reason the custody of both him and his lands was formerly vested in the lord of the fee, and still continues so by special custom in some manors. But this power was so abused by subjects, that finally it was given to the king, by common consent, as the conservator of the people, in order to prevent the idiot from wasting his estate, and reducing himself and his heirs to poverty. After the death of such idiot, the king transfers his estate to the heirs, in order to prevent the idiot from alienating his lands and disinheriting his heirs.

Writ de Idiota Inquirendo. By the old common law, this was a writ to inquire whether a man was an idiot, which question was tried by a jury of twelve men. If they found him such, the profits of his lands and the custody of his person might be given by the king to some subject interested. This branch of the revenue has long been deemed a hardship upon private families, yet few instances are given of the oppressive exertion of it, since it seldom happens, that a jury finds a man an idiot from birth, but only

non compos mentis from some particular time, which has an operation very different in law.

Who is an Idiot. A man is not an idiot, if he has any glimmering of reason, so that he can tell his parents, his age, and other common matters. A man born deaf, dumb and blind, is looked upon by the law, as in the same state as an idiot.

Lunatics Defined. A lunatic, or one *non compos mentis*, is one who has had understanding, but by disease, grief or accident, has lost the use of his reason. A lunatic properly is one, who has lucid intervals, sometimes enjoying his reason, sometimes not; this condition being believed to be affected by changes of the moon. Under the general name *non compotes mentis*, 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 as are judged by the court of chancery incapable of conducting their own affairs.

The King, a Guardian. To these also, as well as idiots, the king is guardian, but for a very different purpose. For the law always imagines these accidental misfortunes may be removed, and therefore only constitutes the crown a trustee for these persons, to protect their property, and to account to them for all profits received, should they recover, or after their death, to their representatives.

Treatment of Lunatics. On the first attack of lunacy, or other occasional insanity, while there may be hope of speedy restoration of reason, it is usual to confine the parties in private custody, under the direction of their nearest relatives and friends, such private mad-houses being regulated by provisions of the legislature. But when the disorder has grown permanent, and the circumstances of the party will bear additional expense, it is proper to apply to the king for authority for a lasting confinement.

Writ de Lunatico Inquirendo. The method of proving a man *non compos* is very similar to that of proving him an idiot. The lord chancellor, under special authority from the king, upon petition or information, grants a commission to inquire into the state of the party's 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.

Committee of the Lunatic. To prevent sinister practices, the next heir is seldom permitted to be the committee of his person, because it is to his interest that the party should die.[1] The rule does not apply to the next of kin, provided he is not his heir, for it is his interest to preserve the lunatic's life, in order to earn his commissions. The heir, however, is generally made the manager or committee of the lunatic's estate, as it is his clear interest to preserve it, accountable, however, to the court of chancery, and to the *non compos* himself, if he recovers, or to his administrators.

Civil Law Practice. In the case of idiots and lunatics, the civil law agreed with ours, by assigning them tutors to protect their persons, and curators to manage their estates. In the case of spendthrifts, the Roman law went far beyond the English.

Spendthrift. For if a man by notorious prodigality was wasting his estate, he was deemed *non compos*. By the laws of Solon, such prodigal was branded with perpetual infamy. But with us, when a man on an inquest has been returned an unthrift and not an idiot, no further proceedings have been had. And the propriety of this practice itself seems to be very questionable. It was an excellent method of benefitting the individual, and of preserving estates in families, but was hardly calculated for the genius of a free nation, and was a restraint on liberty.

Most of this Ordinary Revenue Alienated. This was very large formerly, and capable of being indefinitely increased, for there few estates in the kingdom, that have not, at some period or other since the Norman conquest, been vested in the hands of the king by forfeiture, escheat or otherwise. Fortunately for the liberty of the subject, this hereditary landed revenue, by improvident management, has sunk almost to nothing, and the casual profits of other branches are likewise almost entirely alienated from the crown.

Deficiencies Supplied. To supply the deficiencies, new methods of raising money, unknown to our ancestors, are now resorted to, which constitute the king's extraordinary revenue. The public patrimony being now in the hands of private subjects, private contributions must supply the public service. It is but fair, that the gain by the extraordinary, should be as great as the

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[1] This rule of exclusion of the heir as committee is not generally adhered to at the present time.

loss from the ordinary revenue. The total abolition of taxes would result in pernicious consequences.

The True Theory of Taxation. As the true idea of government consists in this, that some few men are deputed by many others, to preside over public affairs, so that indivjduals may better be enabled to attend to their private concerns, it is necessary that those individuals should be bound to contribute a portion of their private gains, in order to support such government, and to reward such magistracy, which protects them in the enjoyment of their properties. Wisdom and moderation must be displayed, not only in granting, but in raising necessary supplies. It must be done in such a manner, as is most conducive to the national welfare, and at the same time most consistent with economy and the liberty of the subject, who when properly taxed, contributes only some part of his property, in order to enjoy the rest of it.

EXTRAORDINARY REVENUE.

Action of the House of Commons. These extraordinary grants are usually termed aids, subsidies and supplies, and are granted by the house of commons, the members of which, when they have voted a supply to the king, usually resolve themselves into a committee of ways and means, to consider the means of raising the supply so voted. Every member may then propose such scheme of taxation, as he thinks least detrimental to the public. The resolutions of this committee, when approved by a vote of the house, are generally final. Though the supply cannot be actually raised, till directed by an act of the whole parliament, yet the action of the house of commons, in this particular, is deemed certain to become a law.

Taxes. The taxes are either annual or perpetual. The usual annual taxes are those upon land or malt.

ANNUAL TAXES.

1. Land Taxes. In its modern shape, this has superseded all former methods of rating either property or persons, in respect of their property, whether by tenths or fifteenths, subsidies in lands, hydages, scutages or talliages.

Tenths and Fifteenths. These were temporary aids, issuing out of personal property, and granted to the king by parliament. They were formerly such fractional parts of all the movables belonging to the subject, when such movables were far

less considerable than at present. Tenths were first introduced under Henry II, to aid the crusades, whence the tribute was called the Saladin tenth. But afterwards fifteenths were granted more frequently than tenths.

Scutages. Under ancient military tenures, every tenant of a knight's fee was bound, if called upon, to attend the king in his army for forty days in each year. But this personal attendance becoming irksome, the tenants sent substitutes, and in process of time made a pecuniary satisfaction to the king in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee, under the name of scutages, which were first levied under Henry II, on his expedition to Toulouse. Scutages afterward were assessed, whenever the king went to war, in order to hire mercenary troops, and to pay his contingent expenses. King John, in his *magna carta*, promised that no scutage should be imposed, without the consent of the common council of the realm.

Hydages, Talliages and Subsidies. Of the same nature with scutages upon knight's fees were the assessments of hydage upon all other lands, and of talliage upon cities and burghs. These fell into disuse upon the introduction of subsides, about the time of Richard II and Henry IV. They were taxes, not immediately imposed upon property, but upon persons according to their reputed estates. Aliens were charged a double sum. This grant did not extend to spiritual preferments, these being usually taxed by the clergy themselves, until the reign of Charles II, when ecclesiastical subsidies fell into total disuse.

II. Malt Tax. This is assessed annually by parliament, and amounts at this time to 750,000 pounds.

PERPETUAL TAXES.

I. The Customs. These are the duties, toll, tribute or tariff, payable upon merchandise exported and imported. Two reasons are assigned for investing this revenue in the king: because he gave the subject leave to depart the kingdom, and to carry his goods with him; and also because the king is bound to keep up the ports and havens, and to protect the merchants from pirates.

The Meaning of the Term. Some assert, that they are called customs, because they were the inheritance of the king by immemorial usage and the common law, and not granted him by

any statute; but Coke asserts, that the king's first claim to them was by grant of parliament.

Hereditary Customs of the King. The hereditary customs of the crown were those on wool, skins and leather, and were due on the exportation of these three commodities, which were styled the staple commodities of the kingdom, because they were obliged to be brought to these ports, where the king's staple was established. Merchant strangers, being aliens, paid as customs, half as much again as was charged against natives.

Prisage of Wines. It was the right of the king to take two tons of wine from every ship importing into England twenty tons or more. It was also called butlerage, being paid to the king's butler.

Subsidies, Tonnage and Poundage. Other customs, payable upon exports and imports, were distinguished into subsidies, which were taxed on the above staple commodities of the kingdom, tonnage, which was a duty upon all wines, over and above the prisage, and poundage, which was a duty imposed *ad valorem* on all other merchandise whatsoever. There were also other imposts occasionally laid on by parliament, as circumstances and times required.

Ultimately Paid by the Consumer. These custom duties are immediately paid by the merchant, although ultimately by the consumer. And yet they are the duties felt least by the people. The merchant is content, as he does not pay them for himself; and the consumer, who really pays them, confounds them with the price of the commodity. There however is this inconvenience, that imposts, if too heavy, are checks upon trade.

Smuggling. This also gives rise to smuggling, which often becomes quite lucrative, and its natural punishment, the confiscation of the goods, ineffectual. Recourse therefore should be had to more severe punishment to stop it.

Profits of Middle-men. There is another ill consequence attending high imposts, that the earlier any tax is laid on a commodity, the heavier it falls upon the consumer in the end, for every trader, through whose hands it passes must have a profit, not only upon the raw material, and his own labor and time in preparing it, but also upon the very tax itself, which he advances to the government; otherwise he loses the use and interest of the money he advances.

II. **Excise Duty.** This is an inland tax, paid sometimes on the consumption of the commodity, or frequently upon the retail sale. This is doubtless the most economical way of taxing the subject, the charges of levying, collecting and managing the excise duties being much less than other branches of the revenue. It also ren'ers the commodity cheaper to the consumer than charging it with customs, because generally paid at a much later stage. But at 'he came time, this arbitrary proceeding of excise laws seems hardly compatible with the temper of a free nation.

Search for Goods. To prevent frauds, the officers are empowered to enter and search the offices of such as deal in excisable commodities, at any hour of the day, and in some cases, of the night also. A trial by jury may be barred, and the hearing be before commissioners or justices, and these may be in disregard of the common law. From its first inception to the present time, the very name of excise has been odious to the English people. It has been imposed on many commodities to support the enormous expenses of our wars on the continent.

III. **Salt.** This tax had usually been temporary, but under George II was made perpetual.

IV. **Post Office.** This branch of the revenue is universally popular, as instead of being a burden, it is a manifest advantage to the public. It is the duty for the carriage of letters. In early times, this business was confined to the furnishing of post horses to persons who desired to travel rapidly, and to the despatching of valuable packages on special occasions. The franking privilege was claimed by the house of commons, as early as 1660. There cannot be desired a more eligible method than this of raising money, for therein both the government and people find a mutual benefit.

V. **Stamp Duties.** These are a tax imposed upon all parchment and paper, whereon any legal proceedings or private instruments of any nature are written, and also upon licenses, almanacs, newspapers, advertisements, cards, dice and small pamphlets. If moderately imposed, this tax is of service to the general public, by authenticating instruments, and rendering forgery difficult, as the officers vary their stamps frequently by marks known only to them. They were first used in the reign of William and Mary.

VI. **Houses and Windows.** As early as the conquest,

mention is made in Domesday book of fumage or smoke farthings, which were paid the king for every chimney in the house. Under Charles II, a revenue of two shillings was charged for every hearth. Under William and Mary, this unpopular tax was abolished. In lieu of it, a tax was imposed on all houses, except cottages, and also upon all windows. Under George II, a new duty was imposed on all dwelling houses inhabited.

VII. Male Servants. This was a duty of 21*s.* per annum, for every male servant employed in certain specified capacities, except those employed in trade, manufactures or husbandry.

VIII. Hackney Coaches. This was a duty from licenses to chairs and hackney coaches in London and adjacent parts.

IX. Offices and Pensions. This is an annual payment out of all salaries, fees and perquisites of offices, and pensions payable by the crown, exceeding the value of 100*l.* per annum.

The National Debt of England. After the revolution of 1688, when our altered connections with Europe introduced a new system of foreign politics, the expenses of the nation in settling the new establishment, and in maintaining long wars on the continent, for the security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the house of Austria, maintaining the liberties of the Germanic body, and other purposes, increased to an unusual degree. It was deemed unadvisable to raise all the expenses of any one year by taxes levied within that year, lest the people should murmur. It was, therefore, the policy of the times to anticipate the revenues of their posterity, by borrowing immense sums for the current expenses of the state. These certificates of the public debt became a new and transferable species of property, a system which originated in Florence in 1344.

Effect of the Debt on the Nation. This debt of the nation may be termed perpetual, but yet is redeemable by the same authority that established it, which at any time has power to pay off the capital. By this means, nominally the quantity of property is increased, but in idea only. The money exists only in name, in paper, in public faith and in parliamentary security. The pledge pawned for the security of this debt is the land, the trade and the personal industry of the subject, from which the money arises to pay the taxes. The property of a creditor of the public consists in a certain portion of the national taxes. By

how much, therefore, is he the richer, by so much the nation, which pays these taxes, is the poorer.

Is a National Debt a National Blessing? The only advantage to a nation from a public debt is the increase of circulation, by multiplying the cash of the nation, and creating a new species of currency, assignable at any time and in any quantity. A certain proportion of debt seems, therefore, highly useful to a trading people; yet the present magnitude of our national encumbrance very far exceeds all commercial benefit, and is productive of great inconvenience. The enormous taxes raised upon the necessaries of life for the payment of the interest on this debt are injurious both to trade and manufactures, by enhancing the price of the raw material as well as the price of the commodity itself. The very increase of paper circulation needed for the purposes of commerce, has a tendency to augment the price of everything. If part of the debt be owing to foreigners, either they draw annually out of the kingdom a quantity of specie to pay the interest, or else obtain unreasonable privileges to induce their residence here. If the whole be owing to subjects only, it is then charging the industrious subject, who pays his share of the taxes, to maintain the idle creditor, who receives them. It weakens the internal strength of a state, by anticipating those resources, which should be reserved to defend it in case of necessity. The interest we now pay on our debt is nearly sufficient to maintain any war, that any national exigencies could require.

Funded Debt. The respective products of the several taxes were originally separate and distinct funds, being securities for the sums advanced on each several tax. To avoid confusion, it was requisite to reduce these separate funds, by uniting them, superadding the faith of parliament for the general security of the whole. There are now three funds: the aggregate fund, the general fund and the South Sea fund.

Sinking Fund. The customs, excises and other taxes, which are to support these funds, depending upon contingencies, upon exports, imports and consumptions, must necessarily be of uncertain amount. The surplus of the three funds, over and above the interest charged upon them is carried into the sinking fund, because originally intended to sink and lower the national debt. The sinking fund is the last resource of the

nation, the resource on which must chiefly depend all our hopes of ever discharging or moderating the encumbrance.

The Civil List. Before any part of the aggregate fund can be applied towards paying the principal of the national debt, it stands pledged by parliament to raise an annual sum for the maintenance of the king's household, and the civil list. The expenses defrayed by the civil list are those relating to the civil government, as the expenses of the royal household, salaries of officers of state and the king's servants, the appointments of foreign ambassadors, the maintenance of the king and royal family, the king's private expenses and the privy purse, secret service money, pensions and bounties. The civil list is properly the entire king's revenue in his own distinctive capacity, the rest being rather the revenue of the public or its creditors.

Restrictions of the Royal Power. Most of the laws for ascertaining, limiting and restraining the king's prerogative have been made since the middle of the seventeenth century, commencing with the petition of right under Charles I. The powers of the crown have been greatly curtailed and diminished since the reign of James I, particularly by the abolition of the star chamber and high commission courts in the time of Charles I, by the disclaiming of martial law and the power of levying taxes, and by the disuse of forest laws. Also by the many excellent provisions under Charles II, especially the abolition of military tenures, purveyance and pre-emption, the *habeas corpus* act, and the act to prevent the discontinuance of parliament for over three years, and since the revolution, by the emphatic words in which our liberties are asserted in the bill of right and act of settlement, by the act of septennial elections, by the exclusion of certain officers from the house of commons, by ordering the seats of the judges permanent, and their salaries liberal and independent, and by restraining the king's pardon from obstructing parliamentary impeachments. Besides in view of the impoverishment of the crown, in being stripped of all ancient revenues, it must greatly rely on the liberality of parliament for its support, which naturally detracts from its independence and power.

Gift of Offices. On the other hand, every prince, at the first session of parliament after his accession, has by long usage a royal addition to his hereditary revenue, settled upon him for

life, and seldom need apply to parliament for supplies. In regard to power, an English monarch is now in no danger of being overborne by either the nobility or the people. The entire collection and management of so vast a revenue, being placed in the hands of the crown, have necessitated new officers, who are created and removable at the royal pleasure, which of course extends its influence. To this may be added the frequent opportunities of conferring particular obligations by preference in loans and other money transactions. So in regard to the officers in our large army, and the places which the army has created.

The Army Patronage. A newly acquired branch of power is the force of a disciplined army, paid by the crown, though ultimately by the people, raised by the crown, officered by the crown and commanded by the crown.

Surplus Money. Add to this the immense revenue, which is annually paid to the creditors of the public, or carried to the sinking fund. This is first deposited in the royal exchequer, and from thence issued out to the respective offices of payment.

Only Nominal Power Lost by the King. Whatever, therefore, may have become of the nominal, the real power of the crown has not been too far weakened by transactions in the last century. Much has been given up, but much has been acquired. The stern commands of the prerogative have yielded to the milder voice of influence.

CHAPTER IX.—SUBORDINATE MAGISTRATES.

Preamble. Having treated of the supreme legislative power or parliament, and the supreme executive power, the king, we now proceed to inquire into the rights and duties of subordinate magistrates.

Who They Are. By these we include officers, who have a general jurisdiction and authority dispersed throughout the kingdom. These are principally sheriffs, coroners, justices of the peace, constables, surveyors of highways and overseers of the poor. We shall speak of their antiquity and origin; of the manner of their appointment and removal, and of their rights and duties.

I. SHERIFF.

Origin. The sheriff is an officer of very high antiquity, his

name being derived from two Saxon words, meaning officer of the shire. In Latin, he was called *vice-comes*, deputy of the earl, to whom the custody of the shire was committed, on the first division of this kingdom into counties. But the earls in time, not being able to transact the business of the county, reserved to themselves the honor; but the labor was devolved upon the sheriff, who is now entirely independent of the earl, the king granting letters patent to the sheriff alone.

Election or Appointment. Sheriffs were formerly chosen by the inhabitants of the several counties. In some counties, however, sheriffs were hereditary, and were so in Scotland, until George II. This election was in all probability not vested in the commons, but required the royal approbation. In the Gothic constitution, the judges of the county courts were elected by the people, but confirmed by the king. In England, these elections, growing tumultuous, were put an end to by the statute of Edward II, which enacted, that the sheriffs should henceforth be assigned by the chancellor, treasurer and the judges. By later statutes, other officers were added to this appointing power. It is now done by all the judges, and the great officers and privy counsellors. Three persons are suggested, one of whom is to be appointed.

Duration of Office. Sheriffs, by virtue of old statutes, continue in their office but one year, and yet, it has been said, a sheriff may be appointed during the king's pleasure. No man, who has occupied the office one year, can be compelled to serve again within three years thereafter.

His Duties. These 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 determines all cases of forty shillings value and under in his county court, and he also has a judicial power in other civil cases. He is likewise to decide the election of knights of the shire, subject to the control of the house of commons, and also the election of coroners; to judge of the qualification of voters, and to declare who is elected.

His Criminal Jurisdiction. As the keeper of the king's peace, he is the first man in the county. He may apprehend and commit to prison all persons who break the peace or attempt to break it, and may exact bail to keep the peace. He

is bound *ex officio* to pursue and take traitors, murderers, felons and other misdoers, and commit them to jail. He is to defend his county against the enemies of the king, and may command the entire power of the county to attend him, which is called the *posse comitatus*, or power of the county, and this summons all over fifteen years old, except peers. They are bound to attend upon warning, under pain of fine and imprisonment. Though the sheriff be the principal conservator of the peace in his county, yet by the express directions of the great charter, he is forbidden to hold any pleas of the crown, or in other words, to try any criminal offence. For it would be unbecoming, that the executioner of justice should be also the judge, should impose as well as levy fines and amercements, should one day condemn a man, and execute him the next. Neither can he act while sheriff, as an ordinary justice of the peace.

His Ministerial Capacity. The sheriff is bound to execute all process issuing from the king's courts of justice. He serves the original writ in a civil cause, arrests and takes bail. Later he summons and returns the jury for the trial. When judgment is finally given, he must see it carried into execution.

In Criminal Matters. In criminal matters, he also arrests and imprisons, he returns the jury, he has the custody of the delinquents, and he executes the sentence of the court, though it extend to death itself.

As King's Bailiff. In this capacity, the sheriff must preserve the rights of the king within his bailiwick, for so his county is frequently called in the writs. The word bailiwick was introduced by the Norman princes in imitation of the French, whose territory was 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 and estrays, 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.

His Deputies. To execute these various offices, the sheriff has under him many inferior officers, as under-sheriffs, bailiffs and jailers, who must neither buy, sell nor farm their offices.

Under-Sheriff. This officer usually performs all the duties of the sheriff in his absence. He holds office but one

year, and is not allowed to practice as an attorney during his continuation in office. This latter prohibition is often evaded.

Bailiffs. These sheriff's officers are either bailiffs of hundreds or special bailiffs. The former collect fines in their hundreds, summon juries, attend the judges and justices at the assizes and quarter sessions, and execute writs and other processes in their hundreds. As these are generally unlettered men, though skilful in serving writs, and making arrests and executions, it is now usual to join special bailiffs with them, who are shrewd persons, employed by the sheriffs for their dexterity. The sheriff, being responsible for their acts, usually exacts an obligation from them, with securities for the due execution of their office, and hence they are called bound bailiffs.

Jailers. These are servants of the sheriff, who himself is responsible for their conduct. Their business is to keep safely all such persons, as are committed to them by lawful warrants. If they suffer any 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. To this end, the sheriff must have lands in the county to answer the king and his people. The abuses of jailers to prisoners are restrained by special statute.

II. CORONER.

Origin. This was a very ancient office at the common law. The officer is called coroner, *coronator*, because he has principally to do with pleas of the crown, or such wherein the king is more immediately concerned. 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 particular coroners for every county in England.

Qualifications. The coroner is chosen by all the freeholders in the county court. He must have lands enough to be made a knight, whether he be really knighted or not, for he should possess an estate sufficient to maintain the dignity of his office. Through the neglect of gentlemen of property, the office has fallen into disrepute and into hands of unworthy men, who seek the office solely for its perquisites, where formerly no reward was allowed,

Duration of Office. He may be chosen for life, but may be removed, either by being made sheriff or *verderor*, a keeper

of forests, which are offices incompatible with the other; or by the king's writ for cause, as that he is engaged in other business, incapacitated by years or sickness, has not a sufficient estate in the county, or lives in an inconvenient part of it. And by the statute of George II, extortion, neglect or misbehavior are causes of removal.

His Duties. The office and power of a coroner are also like those of the sheriff, either judicial or ministerial, but principally judicial. He must inquire when any person is slain, or dies suddenly or in prison, concerning the manner of his death. And this must be in sight of the body, *super visum corporis*, for if the body be not found, the coroner cannot sit. He also must sit at the very place, where the death happened. The inquiry is made by a jury, over whom he presides. If the jury find at their inquest any one guilty of homicide, the coroner is to commit him to prison for further trial, and is also to inquire concerning his lands and goods, which are forfeited thereby. He must also inquire, whether any deodand has accrued to the king or the lord by the death, and must certify the entire inquisition, together with the evidence therein, to the court of king's bench, or the next assize. He is to also inquire concerning shipwrecks, and certify whether it be a wreck or not, and who is in possession of the goods. He is to inquire, who is the finder of treasure-trove, and where it is located, and also whether any one is suspected of finding a treasure. In a ministerial office, he is merely the sheriff's substitute, when that official is interested in the suit or of kin to either party.

II. JUSTICES OF THE PEACE.

Conservators of the Peace. The king is the principal conservator of the peace, and may give authority to any other to punish such as break it. The lord chancellor, the lord treasurer, the lord high steward of England, the lord marshal, the lord high constable, and all the justices of the king's bench, also the master of the rolls, are general conservators of the peace throughout the kingdom, and may commit all breakers of it, or bind them in recognizance to keep it, while the other judges are only so in their own courts. The coroner and sheriff are conservators of the peace in their own counties, and both may take a recognizance or security for the peace. Constables, tithing men and the like, are also such conservators in their own jurisdictions, and may

apprehend all breakers of the peace, and commit them in default of security.

Claim to the Title of Conservators. Those who were without any office, and merely conservators of the peace, either claimed that power by prescription, or were bound to exercise it by the tenure of their lands, or were chosen by the freeholders in full county court, before the sheriff. In the reign of Edward III, the election of the conservators of the peace was taken from the people, and given to the king, who granted them the power of trying felonies, and the more honorable appellation of justices.

Their Appointment. They are appointed by the king's special commission, under the great seal, the powers of which were settled by the judges in 1590. This empowers them to keep the peace, and any two of them to inquire of felonies and other misdemeanors; hence the term, justices of the peace.

Qualifications. They should be men of property, and of the best reputation, and among the most worthy men in the county.

Duration of Their Offices. As the office of a justice is conferred by the king, it subsists only during his pleasure. It is determinable: (1) By the demise of the crown, or rather in six months thereafter. If the same justice is placed in commission by the king's successor, he shall not be obliged to sue out a new *dedimus potestatem* from the clerk in chancery, empowering persons therein named to administer to him the oath, or swear to his qualifications afresh. (2) By express writ, under the great seal, discharging a justice. (3) By superseding the commission by writ of *supersedeas*, which suspends, but does not destroy the power of all the justices, as it may be revived by *procedendo*. (4) By a new commission, which virtually discharges all the former justices that are not included therein, for two commissions cannot exist at once. (5) By accession to the office of sheriff or coroner.

Powers and Duties. These depend on the commission of a justice, and on the statutes, which have created objects of his jurisdiction. His commission empowers him singly to conserve the peace in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and inferior criminals. Two or more justices may hear and determine all felonies and other offenses.

Privileges and Liabilities. If any well-meaning justice makes any undesigned slip in practice, great lenity is shown him in courts of law, and he is protected in the upright discharge of his office. He may not be sued for any oversights, without previous notice, and all suits begun against him must be stopped on tender of sufficient amends. On the other hand, any malicious or tyrannical abuse of his office, is usually severely punished, and all persons who recover a verdict against a justice, for any wilful or malicious injury, are entitled to double costs.

IV. CONSTABLES.

Origin. The word constable is of Saxon origin, and signifies the support of the king. Others derive it through the French from the Latin *comes stabuli*, an officer well known in the empire, so called, like the great constable of France, as well as the lord high constable of England, because he was to regulate all matters of chivalry, tilts, tournaments and feats of arms, which were performed on horseback. The office of lord high constable in England has been disused, except only upon great and solemn occasions, such as the king's coronation.

Two Kinds. These are high constables, and petty constables. The former are appointed at the court leets of the hundreds, over which they preside, or by the justices of the quarter sessions, and are removable by the same authority. The petty constables are inferior officers in every town and parish, subordinate to the high constable of the hundred, first instituted under Edward III. They were formerly also tithing men, but these are now chosen by a jury at the court leet, and if it be not in session, they are appointed by two justices of the peace.

Duties. The general duty of all constables, both high and petty, as well as of the other officers, is to keep the king's peace in their several districts, and to that purpose, they are armed with very large powers of arresting and imprisoning, of breaking open houses, and the like. They are to keep watch and ward in their respective jurisdictions. Ward, guard or *custodia* is chiefly applied to the day time, in order to apprehend rioters and robbers on the highways, the hundred being answerable for all robberies committed thereon by day-light, for having kept negligent guard. Watch is properly applicable to the night only, and begins when ward ends. The constable may appoint watchmen at his discretion, regulated by the custom of the place. The constable

may do what the tithing man may, but the powers of the latter are less than those of the former.

V. SURVEYORS OF HIGHWAYS.

Appointment. Every parish is bound to keep its highways in repair, unless by reason of the tenure of lands, this care is consigned to some particular person. The care of bridges devolved upon the county. If the parish neglected the highways, it might be indicted for its neglect, but as the whole parish could not be summoned to perform the work, surveyors of the highway were chosen in every parish. They are selected by two neighboring justices.

Duties. They must execute a variety of laws for the repairs of the public highways, that is, of ways leading from town to town: (1) They must remove all annoyances in the highway, or give notice to the owner to do so, who is liable to penalties for non-compliance. (2) They are to call together all the inhabitants and occupiers of lands within the parish, six days in every year, to labor in fetching materials or repairing the highway. (3) The surveyors may be reimbursed for their purchase of materials for repairs, also for erecting guide posts, and making drains. (4) If the personal labor of the parish be not sufficient, the surveyors, with the consent of the quarter sessions, may levy a rate upon the parish, in aid of the personal duty.

VI. OVERSEERS OF THE POOR.

Origin. Till the time of Henry VIII, the poor of England subsisted entirely on private benevolence. The monasteries were their principal resource, which from charitable motives supported a numerous and idle poor, whose sustenance depended upon the alms, daily distributed from the gates of religious houses. Upon the total dissolution of these institutions, statutes were enacted, providing for the poor and impotent. The poor were of two classes: those sick and impotent, and hence unable to work, and those idle and sturdy, and therefore able, but not willing to exercise any honest employment. Edward VI founded three royal hospitals for their relief: Christ's and St. Thomas' for the impotent, through infancy or sickness, and Bridewell for the punishment and employment of the vigorous and idle. These were largely insufficient, and under Elizabeth, overseers were appointed in every parish. These must be substantial householders, and be nominated by two neighboring justices.

Duties. They are to raise competent sums for the relief of the poor, impotent, blind, and others not able to work; also to provide work for such as are able, and cannot otherwise get employment, but this latter duty is most shamefully neglected. For these purposes, they are empowered to make and levy rates upon the inhabitants of the parish, as set forth in the statute. One object of this statute was to provide raw materials, to be worked up at their several homes, instead of accumulating the poor in one common work-house, a practice which mingles the sober and diligent with those who are dissolute and idle, and destroys all endearing family connections, the only felicity of the indigent. A defect of this statute was confining the management of the poor to small parochial districts, which are frequently incapable of furnishing proper work. After the restoration, these districts were subdivided, rendering the employment of the poor even more difficult.

Settlements. By the statute of Charles II, a legal settlement was gained by birth or by inhabitancy, apprenticeship or service for forty days. To prevent frauds in acquiring a residence, notice in writing had to be given the parish officers. Subsequently other circumstances of notoriety were equivalent to such written notice.

Present Law of Settlement. This may be acquired: (1) By birth, even if the child be a bastard. Though *prima facie* the settlement of legitimate children is the place of birth, yet it is not conclusively so. (2) By parentage, being the settlement of one's father or mother; all legitimate children being really settled in the parish, where their parents are settled, until they acquire a new residence for themselves. (3) By marriage a new settlement may be acquired. For a woman marrying a man, who is settled in another parish, changes her settlement, the law not permitting the separation of husband and wife. But if the man has no settlement, hers is suspended during his life, if he remains in England, and is able to maintain her, but in his absence, or after his death, or during perhaps his inability, she may be removed to her old settlement. (4) By forty days residence. If a stranger comes into a parish, and delivers notice in writing of his place of abode, and the number of his family, to one of the overseers, and resides there unmolested for that time, he is legally settled thereby. The law presumes that such an one, at the date of giving such notice, is not likely to become chargeable, or he would not

venture to give it, or the parish would remove him. (5) Renting a tenement for a year of the annual value of ten pounds, together with forty days residence in the parish, gains a settlement without notice. (6) Being charged with and paying taxes in the parish. (7) Executing, when appointed, any public parochial office for an entire year, like church warden, and being resident in the parish forty days. (8) Being hired for a year, when unmarried and childless, and serving for such period. (9) Being bound an apprentice gives one a settlement in that place, where he serves forty days. (10) Having an estate of one's own, and residing thereon forty days.

Removal from Parish. All persons, not so settled, may be removed to their own parishes, on complaint of the overseer, by two justices of the peace, if he deem it likely, they will become chargeable to the parish into which they have intruded, unless they are in a way of effecting a legal settlement, as by having hired a house. In all other cases, if the parish to which they belong, will grant them a certificate, acknowledging them to be their parishioners, they cannot be removed, merely because likely to become chargeable, but only when they become actually so.

CHAPTER X.--THE PEOPLE, WHETHER ALIENS, DENIZENS OR NATIVES.

Aliens and Natives. The first division of the people is into aliens and natural born subjects. The latter are such as are born within the dominions of the English crown, the former, those who are born out of it.

Allegiance in Feudal Tenures. Allegiance is the tie or *ligamen*, which binds the subject to the king, in return for the protection the king affords the subject. The connection is founded in reason and the nature of government, and the name and form are derived 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 subsisting between lord and vassal, that the lord should protect his vassal

in the enjoyment of the territory he had granted him, and on the other hand, that the vassal should be faithful to his lord, and defend him against his enemies.

Oath of Fealty. 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 landlords, nearly in the same terms as our oath of allegiance. There was this exception, however, in that, in the oath of fealty, a reservation existed of the faith due to a superior lord by name, under whom the landlord himself was a tenant. But when the acknowledgement was made to the absolute superior himself, who was vassal to no man, it was called the oath of allegiance. Land held by this exalted species of fealty was called a liege fee, the vassals liege men, and the sovereign, their liege lord. When sovereign princes did homage to each other for lands held under their respective sovereignties, it was simple homage, which was only an acknowledgement of tenure. In England, it becoming a settled principle of tenure, that all lands in the kingdom are held of the king as lord paramount, no oath but that of fealty could be taken to inferior lords, and the oath of allegiance was confined to the person of the king alone. By an easy analogy, the term "allegiance" soon came to signify all other engagements due from subjects to their prince.

Oath of Allegiance. 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 honor, and not to know or hear of any ill or damage intended him, without defending him therefrom." Sir Matthew Hale says of it, that "it is short and plain, not entangled with intricate clauses or declarations, and yet is comprehensive of the whole duty from the subject to his sovereign." But at the revolution, the oath being deemed to favor the notion of non-resistance, the present form was adopted, the subject only promising, "that he will be faithful, and bear true allegiance to the king," without mentioning his heirs, or specifying in what that allegiance consists.

Oaths of Supremacy and of Abjuration. The oath of supremacy is a renunciation of the pope's civil authority, while the oath of abjuration, introduced under William III, amply supplies the loose and general texture of the oath of allegiance,

recognizing the right of the king, derived under the act of settlement, engaging to support him to the utmost of his power, to disclose all traitorous conspiracies against him, and expressly renouncing any claim of the descendants of the late pretender. 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 one, whom they suspect of disaffection. The oath of allegiance may be offered to all persons over twelve years of age, whether natives, denizens or aliens, in the court leet of the manor or county.

Implied Allegiance. Besides these express engagements, the law holds that there is an implied, original and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise. The formal profession, therefore, or oath of subjection, is nothing more than a declaration in words, of what was before implied in law. The sanction of an oath, in case of the violation of duty, adds perjury to treason; it only strengthens the social tie, by adding to it that of religion.

Natural Allegiance. Allegiance is of two species, natural and local, the one perpetual, the other temporary. Natural allegiance is such as is due from all men born within the king's dominions, immediately upon their birth, when at once they come under the protection of the king. It 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 concurrence of the legislature. An Englishman, who moves to China, owes the same allegiance to the king of England there as at home, and twenty years hence, as well as now. It is a principle of universal law, that the natural born subject of one prince cannot by any act of his own, not even by swearing allegiance to another, discharge his natural allegiance to the former, for this allegiance was intrinsic, primitive and antecedent, and cannot be divested, without the concurrent act of the prince, to whom it was first due.[1]

Local Allegiance. This is such as is due from an alien or stranger born, for such period as he remains in the king's dominions and protection, and it ceases on his removal therefrom. Natural allegiance is perpetual, while this is but temporary. It

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[1] The maxim is: *nemo potest exuere patriam*, no one is able to cast aside his country.

is founded upon an implied contract, that so long as one affords protection, so long the other will demean himself faithfully. Even if an usurper is in full possession of the sovereignty, an alien visitor should not practice anything against his crown or dignity.

Loyalty. The 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. Hence arose the principle of personal attachment and affectionate loyalty, which induced our forefathers to hazard their all in defence of their sovereign.

Alien's Property in Lands. An alien born may purchase lands or other estates, but not for his own use, for the king is thereupon entitled to them. If he can acquire permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England. This would be inconsistent with that allegiance, which he owes to his own natural liege lord, and in time the effect of foreign influence would be noticeable. Wherefore by the civil law, such contracts were decreed void.

Aliens' Acquisition of Personal Property. An alien may acquire a property in goods, money and other personal estate, or may hire a house in which to dwell. Personal estate is of a transitory and movable nature, and this indulgence to strangers is necessary for the advancement of trade. An alien may trade as freely as other people, and may bring an action concerning personal property. He may make a will, and dispose of his personal estate. This refers to subjects of countries, which are at peace with England, for alien enemies have no rights or privileges, unless by the king's special favor, during the time of war.

Children of Subjects, born Abroad. There are exceptions to the rule, that an alien is one, who is born out of the king's dominions. A statute was passed for the naturalization of the children of his majesty's English subjects, born in foreign countries during the late troubles, on the principle, that every man owes natural allegiance where he is born, and cannot owe two 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 his son. To encourage foreign commerce, it was enacted under Edward III, that all children born abroad, provided both their parents were at the time of their birth in allegiance to the king of England, and the mother had passed the seas by her husband's consent, might inherit, as if born in England. At the present time, all children born abroad, whose fathers or paternal grandfathers were natural born subjects, are now deemed to be subjects to all purposes, unless said ancestors were attainted or banished for treason, or at the date of the birth of such children, were in the service of a prince at enmity with Great Britain.

Children of Aliens born Here. The children of aliens, born in England, are generally natural born subjects, and entitled to all the privileges of subjects.

Denizens. A denizen is an alien born, who has obtained as a gift of the king, letters patent to make him an English subject. He is in a kind of middle state between an alien and a natural born subject, and partakes of the nature 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, being an alien, had no inheritable blood, and, therefore, could convey none to his son. Also the issue of a denizen, born before denization, cannot inherit from him, but his subsequent issue may. A denizen is not excused from paying the alien's duty. No denizen can be a member of the privy council or of either house of parliament, or hold any office of trust, civil or military, or be capable of any grant of lands from the crown.

Naturalization. This cannot be performed but by act of parliament, for by this, an alien is placed in exactly the same state, as if he had been born in the king's dominions, except that he is incapable, as well as a denizen, of being a member of the council or parliament, or to hold office. No bill of naturalization can be received in either house without such disabling clause in it, nor without a clause, prohibiting a 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, unless he has received the sacrament of the Lord's supper,[1] within one month before

[1] Israelites may be naturalized, without receiving the sacrament.

the bringing in of the bill, and taken the oaths of allegiance and supremacy in the presence of parliament. But these provisions have usually been dispensed with by special acts of parliament, previous to bills of naturalization of foreign princes or princesses.

Different Naturalization Laws. These distinctions between aliens, denizens and natives have been frequently sought to be removed by one general naturalization act. Every foreign seaman, who in time of war serves two years on board an English ship, by virtue of the king's proclamation, is *ipso facto* naturalized. And all foreign protestants and jews, upon residing seven years in any of the American colonies, without an absence at any time of over two months, and also all foreign protestants serving two years in a military capacity there, or being three years employed in the whale fishery, without afterwards absenting themselves for more than one year, upon taking the oaths, shall be naturalized, subject to the restriction relating to official positions as above.

CHAPTER XI.—THE CLERGY.

Divisions. The people of all classes are divisible into the clergy and laity, the former comprehending all persons in holy orders, and in ecclesiastical offices.

Privileges. Large privileges are allowed this revered body of men by our municipal laws, although they have been greatly abridged, inasmuch as these privileges had been abused. For the laws having exempted the clergy from almost every duty, they sought a total exemption from every secular tie. The personal immunities for the most part continue. A clergyman cannot be compelled to serve upon a jury, nor appear at a court leet, which almost every person is obliged to do; but if a layman be summoned on a jury, and afterwards take orders, he shall appear and be sworn. Neither can he be chosen to any temporal office, as bailiff, constable or the like. During his attendance on divine service, he is privileged from arrests in civil suits. In cases of felony, a clerk in orders shall have the benefit of his clergy, without being branded in the hand, and may likewise claim it more than once.

Disabilities. As they have their privileges, clergymen have also their disabilities. They are incapable of sitting in the house of commons, and by statute are not allowed in general to take any lands to farm,[1] nor to keep a tan-house or brew-house, nor engage in any manner of trade, nor sell any merchandise, under forfeiture of its treble value, which prohibition is consonant with the canon law.

Ranks and Degrees. In the constitution of ecclesiastical polity, there are divers ranks and degrees. Under each division, we will consider: (1) The method of their appointment. (2) Their rights and duties. (3) The manner wherein their character or office may cease.

I. Archbishop or Bishop. This prelate is elected by the chapter of the cathedral church, by virtue of a license from the crown. In earlier times, election was the usual mode of elevation to the episcopal chair throughout all Christendom, and this was performed by the laity as well as the clergy, till at length it becoming tumultuous, the sovereigns themselves of the respective kingdoms of Europe took the appointment in some degree in their own hands. They reserved the right to confirm these elections, and of granting investiture of the temporalties, which now began to be annexed to the spiritual dignity, without which confirmation and investiture, the elected bishop could neither be consecrated nor receive secular profits.

Laity Excluded from the Elections. The policy of the church began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected, although, the crown having an absolute negative, possessed authority almost equivalent to the direct right of nomination.

Royal Right of Investiture. Hence the right of appointing to bishoprics is said to have been in the crown of England, the king having the right of confirmation and investiture. But when in time, the custom of election by the clergy alone was fully established, the church began to except to the usual method of granting investitures, which was by the king delivering a ring and a staff or crosier, asserting that this was an

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[1] By statute George III, clergymen and curates are restrained from taking more than eighty-five acres to farm, without the consent of the bishop, and must not cultivate it for more than seven years.

encroachment upon the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction. In the eleventh century, Gregory VII published a bull of excommunication against all princes, who should dare to confer investitures, and all prelates who should venture to receive them. This was a radical step, towards rendering the clergy entirely independent of the civil authority, and long and eager were the contests occasioned by this claim.

Concessions. Acceding in part to this demand, Henry V, emperor of Germany, together with the kings of England and France, desisted from investitures by ring and crosier, and altered the form, receiving only homage from the bishops for their temporalties. Archbishop Anselm, a haughty and able prelate, obtained this concession from Henry I of England, and John, a century later, to obtain the protection of the church against his discontented barons, was prevailed to yield to the monasteries and cathedrals the free right of electing the prelates, whether abbots or bishops, reserving only to the crown the custody of the temporalties, during a vacancy. This was re-established by statute of Edward III.

Statute of Henry VIII. But by statute of Henry VIII, the ancient right of nomination was, in effect, restored to the crown, it being enacted, that on a future vacancy, the king may send the dean and chapter his license to proceed to an election, with a missive from the king, suggesting the name of the party he desired them to elect. If they deferred the election twelve days, the king himself had the power to appoint.

Archbishop. An archbishop is the chief of the clergy in a whole province, and has the inspection of the bishops of that province, as well as of the inferior clergy, and may remove them for notorious cause. He also has his own diocese, wherein he exercises episcopal jurisdiction. As archbishop, he, on receipt of the king's writ, calls the bishops and clergy of his province to meet in convocation. To him all appeals are made from inferior jurisdictions, and as appeals are from bishops to him in person, so are they from the consistory courts to his archepiscopal court. During the vacancy of any see, he is guardian of the spiritualties thereof, as the king is of the temporalties. If his own see be vacant, the dean and chapter are the spiritual guardians. The archbishop of Canterbury has the privilege of crowning the

king. He may grant special licenses to marry, and confer the degrees in the two universities.

Powers of a Bishop. Beside the administration of certain holy ordinances, he inspects the manners of the people and clergy, and may punish them by ecclesiastical censures. For this purpose he has several courts under him, and is expected to visit every portion of his diocese. His chancellor is appointed to hold his courts for him, and to aid him in matters of ecclesiastical law. He institutes all ecclesiastical livings in his diocese.[1]

Termination. Archbishoprics and bishoprics become void, by death, deprivation for crime, and resignation.

II. Dean and Chapter. These are the council of the bishop, to assist him with their advice in affairs of religion, and also the temporal concerns of the see. The word dean or *decanus* was derived from the party originally being appointed over ten canons or prebendaries.

Appointment. All ancient deans are elected by the chapter, under letters of recommendation from the king, in the same manner as bishops. The dean and chapter are the nominal electors of a bishop. Deaneries and prebendaries may became void, like a bishopric, by death, by deprivation, or by resignation to either the king or a bishop.

III. Archdeacon. His ecclesiastical jurisdiction is immediately subordinate to the bishop, who usually appoints him. He visits the clergy, and has a separate court for the punishment of offenders by spiritual censure, and for hearing all causes of ecclesiastical cognizance.

IV. Rural Deans. These are ancient officers of the church, but almost obsolete. They seem to have been deputed by the bishop, to inspect the conduct of the parochial clergy, to report dilapidations, and to examine candidates for confirmation.

V. Parsons and Vicars. A parson, *persona ecclesiae*, is one who has full possession of all the rights of a parochial church. By his person the church is represented, and he is in

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[1] A bishop has the powers: (1) Of ordination, and hence may confer orders. (2) Of jurisdiction in his see. (3) Of the administration of the revenues. He consecrates churches, ordains priests, confirms, suspends, excommunicates, grants licenses for marriage and makes probate of wills.

himself a body corporate, in order to defend the rights of the church, which he personates by a perpetual succession. He is sometimes called the rector or governor of the church, but the title "parson" is the most honorable title that a parish priest can enjoy.

Emoluments. A parson has, during his life, the freehold in himself of the parsonage, the glebe, the tithes and other dues. But these are sometimes appropriated, that is, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living. At the first establishment of the clergy, the tithes of the church were distributed in a fourfold division for the use of the bishop, for maintaining the fabric of the church, for the poor, and for the incumbent. When the bishops became amply endowed, they lost their share of the tithes. The portion given to the officiating priests was then diminished, and they were often almost compelled to ask alms for their support. This appropriation may be severed, as if the patron present a clerk, who is inducted to all intents complete parson. And when such clerk is distinct from the vicar, the rectory thus vested in him becomes what is called a *sinecure*, because he has no cure of souls, having a vicar under him, to whom that cure is committed.

Vicars. These corporations or religious houses were wont to depute one of their own body to perform divine service, and administer the sacraments, in those parishes, of which the society was thus the parson. This officiating minister was no more than a curate, and, therefore, as vicegerent was called *vicarius* or vicar. His stipend was at the discretion of the appropriator, and it became so reduced in amount, that the legislature was forced to interpose, and order that out of the appropriations, the bishop shall see that the vicarage shall be sufficiently endowed.

Parsons and Vicars. The distinction between a parson and vicar is this: the parson has for the most part the whole right to all the ecclesiastical dues in his parish, but a vicar has generally an appropriator over him, entitled to the best part of the profits, to whom he is in effect perpetual curate, with a standing salary. The method of becoming a parson or vicar is much the same. To both these, four requisites are necessary: holy orders, presentation, institution and induction. Any clerk

may be presented to a parsonage or vicarage. A parson or vicar may cease to be: (1) by death, (2) by cession, in taking another benefice, (3) by consecration, when he is promoted to a bishopric, (4) by resignation, (5) by deprivation, such as attainder of treason or felony, or conviction of infamous crime; for heresy or immorality, also for neglect, simony and other causes.

VI. Curates. A curate is the lowest degree in the church, being in the same state that a vicar was formerly, an officiating minister, instead of the proper incumbent.

VII. Church Wardens. These are the guardians and keepers of the church, and representatives of the body of the parish. They are sometimes appointed by the minister and sometimes by the parish, and occasionally jointly. They have no interest whatever in the lands of the church. Their office is also to repair the church, and to make levies for that purpose, but they are recoverable only in the ecclesiastical court. They are also joined with the overseers in the care of the poor.

VIII. Parish Clerks and Sextons. These have freeholds in their offices, and though they may be punished, yet they cannot be deprived by ecclesiastical censure. They are generally appointed by the incumbent, but by custom may be chosen by the inhabitants.

CHAPTER XII.—THE CIVIL STATE.

Division. The laity may be divided into three distinct classes: the civil, the military and the maritime. We will first treat of the civil state.

What It Includes. The civil state includes all orders of men, from a nobleman to a peasant, that are not comprehended among the clergy, the military or the maritime. It consists of the nobility and the commonalty. All degrees of nobility and honor are derived from the king as their fountain, and he may institute what new titles he pleases. Hence all degrees of nobility are not of equal antiquity. They are dukes, marquises, earls, viscounts and barons.

I. Dukes. A duke is the superior in rank of the nobility, though of less antiquity than some. He ranks next to the royal family. The name *duces*, signifies as among the Romans, lead-

ers of armies. After the Norman conquest, the kings for many generations continuing dukes of Normandy, would not honor any subjects with the title of duke, till the time of Edward III, who claiming to be king of France, lost the ducal in the royal dignity. He created his son the Black Prince, duke of Cornwall, and many more of the royal family were afterwards raised to the like honor. In the reign of Elizabeth, the whole order became extinct, but it was revived by her successor, who created George Villiers, duke of Buckingham.

2. **Marquises.** This is the next degree of nobility. The office formerly was to guard the frontiers and limits of the kingdom, which were called the marches, from the word *marche*, a limit. These referred to the borders of Scotland and Wales, which were hostile. The persons who commanded there were called lords marchers or marquises, whose authority was abolished by Henry VIII.

3. **Earls.** This is a very ancient title. Among the Saxons they were called *ealdormen*, or elder men, signifying the same as the Roman senators. They were also called *schiremen*, because they had each the civil government of a shire. On the irruption of the Danes, they changed their name to eorles. In Latin, they are called *comites*, from being the king's attendants. After the Norman conquest, they were sometimes called counts, from the French, but they did not long retain that name, though their shires are called counties. The government of the county at the present time is devolved upon the sheriff, the earl's deputy or *vice-comes*. In writs or commissions, the king usually calls an earl his "trusty and well beloved cousin."

4. **Viscounts.** The name of *vice-comes* or viscount was made a title of honor by Henry VI, without any shadow of office pertaining to it.

5. **Barons.** This is the most general title of nobility, for originally every peer had a barony annexed to his other titles. They were probably the same with our present lords of manors, to which the name of court baron gives countenance. Originally all barons had seats in parliament, but the number had become so great in the reign of John, that a division was made, and only the greater barons were admitted, which gave rise to the separation of the two houses of parliament.

The Right of Peerage. The right of peerage was orig-

inally territorial, that is, annexed to lands, honors, castles and manors, the possessors of which were, in right of those estates, deemed peers of the realm, and were summoned to parliament. When the land was alienated, the dignity passed with it as appendant. But afterwards, when alienations were frequent, the dignity of the peerage was confined to the lineage of the party ennobled, and instead of territorial, became personal. Actual proof of a tenure of barony became no longer necessary to constitute a lord of parliament.

Mode of Creating Peers. Peers are now created by writ or patent. The creation by writ, or the king's letter, is a summons to attend the house of peers, by the style and title of that barony, which the king is pleased to confer; that by patent, is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more ancient mode, but a man is not ennobled thereby, unless he actually sit in the house of lords. A person created by writ holds the dignity to him and his heirs, without words of that purport in the writ; but in letters patent, there must be words to direct the inheritance, else the dignity enures only to the grantee for life.

Privileges Connected with the Peerage. In criminal cases, a nobleman shall be tried by his peers.[1] The great are always obnoxious to popular envy; were they to be judged by the people, they might be in danger from the prejudice of their judges, and could not be said to be tried by their equals, which is secured by *magna carta*. If a woman noble in her own right weds a commoner, she still remains noble, and shall be tried by her peers, but if she be only noble by marriage, then by a second marriage to a commoner, she loses her rank. A peer or peeress cannot be arrested in civil cases, and they have many privileges in judicial proceedings. A peer, sitting in judgment, gives his verdict upon his honor, not upon his oath, but when he is examined as a witness, he must be sworn. Slander against a peer is a greater offense than against other men. It is termed *scandalum magnatum*, and subjected to peculiar punishments.

Loss of Rank. A peer cannot lose his nobility, but by death or attainder. He cannot be degraded but by act of parliament.

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[1] This applies only to treason, felony and misprison of the same. In all misdemeanors, a peer is tried like a commoner, by a jury. Peers have no exemption from arrest for treason, felony or breach of the peace.

Rank Among the Commonalty. The commonalty, like the nobility, are divided into several degrees, yet in law they are all peers, in respect to their want of nobility. Originally the first name of dignity beneath a peer, was a vidame or valvasor. No such title now exists, and that rank is held by the knight of the order of St. George, or of the garter, first instituted by Edward III, in 1344. Next, after certain official dignities, follows a knight banneret, succeeded by baronets, which title is a dignity of inheritance, created by letters patent, and usually descendible to the issue male. It was first instituted by James I, to raise a sum for the reduction of the province of Ulster, in Ireland,[1] whence all baronets have the arms of Ulster superadded to their family coat.[2] Next follow knights of the bath, an order instituted by Henry IV, and revived by George I. They are so called from bathing on the night before their creation. The last of these inferior nobility are knights bachelors, the most ancient, though the lowest order of knighthood.

Esquires and Gentlemen. Esquires and gentlemen are only names of respect. Colonels, serjeants of law, and doctors in the three learned professions, outrank them. Coke says any esquire is a gentleman, who is defined to be one *qui arma gerit*, who bears coat armor, the grant of which adds gentility to a man's family. An estate does not confer the title of esquire, of whom there are four sorts: (1) The eldest sons of knights, and their eldest sons, in perpetual succession. (2) The eldest sons of younger sons of peers, and their eldest sons in succession. (3) Esquires created by the king's letter patent, or other investiture. (4) Esquires by virtue of their offices, as justices of the peace, and others.

Definition of a Gentleman. "As for gentlemen," says Sir Thomas Smith, "they may be cheaply made in this kingdom, for whoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and to be short, who can live idly, and without manual labor, and will bear the port, charge and countenance of a gentleman, shall be called master, and shall be taken for a gentleman."

Yeoman. A yeoman is he, that hath free land of forty shil-

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[1] One hundred gentlemen advanced 1,000*l.* each, for which this title was conferred upon them.

[2] The arms of Ulster are a hand gules or a bloody hand in a field argent.

lings a year. He was anciently qualified thereby to serve on juries, and vote for knights of the shire.

Tradesmen, Artificers and Laborers. The rest of the commonalty are tradesmen, artificers and laborers, who, as well as all others, under the statute of Henry V, must be styled by the name and addition of their estate, degree or mystery, and the place to which they belong, in all original writs of actions personal, appeals and indictments, in order to clearly specify the person.

CHAPTER XIII.—MILITARY AND MARITIME STATES.

THE MILITARY STATE.

The Profession of a Soldier. This includes the whole of the soldiery, appointed for the defence of the realm. In a land of liberty, it is extremely dangerous to make a distinct order of the profession of arms. In absolute monarchies, this is necessary for the safety of the prince, but in free states, the profession of a soldier is justly an object of jealousy. No man should take up arms, but with a view to defend his country and its laws; he puts not off the citizen, when he enters the camp. The laws of England know no such state, as that of a perpetual standing soldier, bred up to no other profession than that of war, and it was not until the reign of Henry VII, that the kings of England had even a guard about their persons.

In Saxon Times. It appears from the laws of Edward the Confessor, that the military force was in the hands of the dukes, or heretochs, who were constituted through every county, being taken out of the principal nobility. Their duty was to lead and regulate the English armies, and their power was almost unlimited. They were elected by the people in full assembly, or *folk mote*. This large share of power, thus conferred by the people, though intended to preserve the liberty of the subject, was detrimental to the prerogative of the crown. This was evidenced by the use made of it in the reign of Edmund Ironside by Edric, duke of Mercia, who, by his repeated treacheries, finally transferred the crown to Canute the Dane. Alfred first settled a national militia in the kingdom, and by his prudent discipline, made all his subjects soldiers. The dukes however were left

with too much power, which enabled duke Harold, on the death of Edward the Confessor, to mount, for a short space, the throne of the kingdom, in prejudice of Edgar Atheling, the rightful heir.

Effect of the Norman Conquest. At the conquest, the feudal law was introduced here in all its rigor, the whole of which law is built on a military plan. All the lands in the kingdom were divided into knight's fees, about 60,000 in number, and for every knight's fee a knight or soldier, *miles*, was bound to attend the king in his wars for forty days in the year, in which space of time, before war was reduced to a science, the campaign was generally finished. By this means, without any expense, an army of 60,000 men was always at the king's command. This personal service, in time, degenerated into pecuniary commutations or aids, and at last the military part of the feudal system was abolished at the restoration of Charles II.

Military Tenures. Meanwhile the kingdom was not left wholly without defence, in case of domestic insurrections, or the prospect of foreign invasions. Besides those, who by their military tenures were bound to serve forty days in the field, statutes of Henry II and Edward I obliged every man to provide arms, in order to keep the peace, and constables were appointed to see that this was done. These acts were repealed under James I. While they were in force, the princes from time to time, sent into every county under commission of array, officers in whom they could confide, to muster and array the inhabitants of every district. No man was compelled to leave the kingdom for any cause, nor go out of his shire, except on urgent necessity, nor should provide soldiers, unless by consent of parliament. The immediate cause of the fatal rupture between Charles I and the parliament was, how far the power of the militia inherently resided in the king, the two houses denying this prerogative of the king, and illegally seizing the entire control.

Rights of the Crown. Soon after the restoration of Charles II, when the military tenures were abolished, the sole right of the crown to govern and command the militia was again recognized.

Standing Armies. While the nation was engaged in war, more veteran troops and regular discipline were deemed necessary, than could be expected from a mere militia. Hence more vigorous methods were put in use for the raising of armies. Martial law, which is built on no settled principles, but is entirely

arbitrary in its decisions, is in reality no law, and hence should never be permitted in times of peace, when the king's courts are always open. The petition of right enacts, that no soldier shall be quartered on the subject, without his consent, and the raising or keeping a standing army in time of peace, cannot be done, unless with the consent of parliament. The retention of standing armies was first introduced during the reign of Charles VII, in France, and has of late years universally prevailed over Europe. For the safety of the kingdom, the defence of the possessions of Great Britain, and the preservation of the balance of power in Europe, it has been deemed necessary to maintain even in time of peace, a standing body of troops, under the command of the crown, who are *ipso facto* disbanded at the expiration of every year, unless continued by parliament. Nothing ought to be more guarded against, in a free state, than making the military power, a body too distinct from the people. It should wholly be composed of natural subjects, who ought to be enlisted for a limited time, and should live intermixed with the people. No camp or inland fortress should be allowed.

Mutiny and Desertion. To keep this body of troops in order, mutiny and desertion are punishable, even by death itself. In times of peace, there should be a relaxation of military rigor, hence by our militia laws, a much lighter punishment is inflicted for desertion in time of peace. By the Roman law, this distinction was made in tranquil times, but it is not so made with us. The discretionary power of a court martial is almost an absolute legislative one.

Penalties Fixed and Certain. One of the greatest advantages of our law is, that not only the crimes themselves, which it punishes, but also the penalties which it inflicts, are ascertained and notorious; nothing is left to arbitrary discretion. Two precautions should be observed: (1) To prevent the introduction of slavery. (2) If introduced, not to entrust slaves with arms.

Soldiers' Last Wills. Soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages and other personal chattels, without those forms, which the law requires in other cases. Under the civil law, if a soldier, *in articulo mortis*, wrote anything in bloody letters on his shield, or in the dust of the field with his sword, it was a good will.

THE MARITIME STATE.

Naval Supremacy. This is more agreeable to the princi-

ples of our free constitution than the military state. The royal navy of England has ever been its greatest defence and ornament. To such perfection had it attained in the twelfth century, that the code of maritime laws, called the laws of Oleron, compiled by Richard I of England, at the isle of Oleron, on the coast of France, then part of the English possessions, was adopted by all the nations of Europe, as the substructure of their maritime constitutions.

The Navigation Act. The present condition of our marine is in a great measure owing to the salutary provisions of the statutes, called the navigation acts, which encouraged the increase of English shipping and seamen. The rudiments of this beneficial act were framed in 1650, with a narrow, partial view, being intended to annoy our own sugar islands, by stopping the opulent trade they were carrying on with the Dutch. This prohibited all ships of foreign nations from trading with any English plantations, without license from the council of state. The next year it was extended to England itself, and no goods were suffered to be imported into England in any other than English vessels.

Impressing Seamen. The power of impressing seamen for the sea service by the king's commission, has been a matter of dispute, though it is of ancient origin. No statute expressly declares such power. Fishermen and ferrymen appear to have been exempted. Besides this method of impressing, which is only defensible from public necessity, to which all private considerations must yield, there are other ways to obtain seamen. Parishes may bind out poor boys apprentices to masters of merchantmen.

Discipline and Punishment. Discipline in the royal fleet is directed by certain express rules, articles and orders, first enacted by the authority of parliament soon after the restoration. In these articles of the navy, almost every possible offence is set down, and the punishment thereof annexed, in which respect seamen have much the advantage over the land service, whose articles of war are not enacted by parliament, but framed at the pleasure of the crown.

Privileges. The privileges conferred on sailors are similar to those extended to soldiers. They are relieved, when maimed, or wounded, or superannuated, either by county rates, or the

royal hospital at Greenwich. They have the power to exercise trades, and of making nuncupative wills, and further, no seaman on board his majesty's ships can be arrested for debt for a sum under twenty pounds.

CHAPTER XIV.—MASTER AND SERVANT.

PREAMBLE.

The great relations in private life are:

1. **Master and Servant.** This is founded in convenience, whereby a man is directed to call in the skill of others, where his own skill and labor are insufficient.

2. **Husband and Wife.** This is founded in nature, but modified by civil society.

3. **Parent and Child.** This is consequential to marriage, being its principal end and design.

4. **Guardian and Ward.** This is a kind of artificial parentage, to supply the deficiency of the natural, whenever it happens.

I. THE SEVERAL SORTS OF SERVANTS.

Slavery. Pure slavery does not exist in England, whereby an absolute and unlimited power is given to the master over the life of the slave. It is repugnant to reason, and the principles of natural law, that such a state should subsist anywhere. Justinian gives three erroneous origins of the right of slavery:

Jure Gentium. First, he alleges it to have arisen *jure gentium*, from a state of captivity in war. The conqueror, say the civilians, has a right to the life of his captive, and having spared that, may deal with him as he pleases. But it is an untrue position, that by the law of nature, a man may slay his enemy. He has only a right to kill him in case of absolute necessity, for self-defence. War is itself justifiable, only on principles of self-preservation, and gives no other right over prisoners, but merely to disable them from doing harm to us, by confining their persons.

Jure Civili. Secondly, it is said that slavery may begin, *jure civili*, when one man sells himself to another. This, if it refers to contracts to work for another, is very just, but when applied to strict slavery, is impossible. Every sale implies a

price, a *quid pro quo*, an equivalent given to the seller in lieu of what he transfers to the buyer, but what equivalent can be given for life or liberty? Even the price he receives pertains *ipso facto* to the master, the instant he becomes his slave.

Jure Naturæ. Lastly, it is said, that slavery may be hereditary. *Servi nascuntur;* the children of slaves are *jure naturæ* by a negative kind of birth-right, slaves also.

Slavery Under Edward VI. England abhors, and will not endure the existence of slavery in the nation. Under Edward VI, a statute was enacted, that all idle vagabonds should be made slaves, and be fed upon bread and water; should wear a ring of iron around their necks, arms or legs, and should be compelled, by beating and chaining, to perform their allotted work, however vile. Two years later, this act was repealed.

Slavery Forbidden. The law as now laid down, frees a slave the instant he lands in England, and he will be protected in person and property. A contract of apprenticeship, however, is not interfered with.

1. **Menial Servants.** These are domestics or *intra moenia*, between walls. The contract between them and their masters arises from 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, through the seasons, when there is work to be done, and when there is not.

Vagrants Compelled to Work. All single men, between the ages of twelve and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible means of livelihood, are compellable, by two justices, to go out to service in husbandry, or certain specific trades, for the promotion of industry and no master can discharge his servant, or servant leave his master, after being so retained, without a quarter's warning, unless upon reasonable cause to be allowed by a justice of the peace. They may however, part by consent, or make a special bargain.

2. **Apprentices.** This word is derived from the French, *apprendre*, to learn. Apprentices are usually bound for a term of years by deed indented, or indentures, to serve their masters, and be instructed and maintained by them. The object frequently is to learn a trade, a mystery or art. Sometimes large

sums are given for this instruction. Children of poor persons may be apprenticed out by overseers, with the consent of two justices, till twenty-one years of age, to such persons who are thought fitting. It is held, that they are compellable to receive them, and that gentlemen of fortune, and even clergymen, are liable to such compulsion.

Discharged or Absconded. They may be discharged for reasonable cause, either at the request of themselves or their masters at the quarter sessions, or by one justice, with appeal to the sessions, who may, if they deem fit, direct restitution of a ratable share of the money given with the appentice. An apprentice who has absconded, and has received less than ten pounds, is compellable to serve out his time of absence, or make satisfaction for the same, within seven years from the expiration of the original contract.

3. Laborers. These are only hired by the day or the week, and are not part of the family. Concerning these, some excellent regulations exist: (1) Directing, that all persons, who have no visible effects, must 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 sheriff or the justices in sessions to settle their wages. (5) Inflicting penalties on such as give or exact more wages, than are so settled.

4. Stewards, Factors and Bailiffs. These act in a ministerial and superior capacity, though the law holds them as servants *pro tempore*.

II. EFFECT OF SERVICE UPON MASTER AND SERVANT.

Exclusive Right to Trade. By hiring and service for a year, or apprenticeship under indentures, a person gains a settlement in that parish, wherein he has 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. Attempts have frequently been made to repeal the exclusive part of the act. but hitherto without success.

Restraints of Practicing Trade. At common law, every man might practice what trade he pleased, but this statute restrains that liberty to such as have served as apprentices. The adversaries of it say, that it tends to introduce monopolies, which are pernicious to trade, while its advocates allege, that unskilfulness in trade is equally as detrimental to the public as monopolies.

This reason only extends to such trades as require skill. Others say, that no one would undergo a seven years servitude, if others were allowed the same advantages, without having undergone the same discipline. For trading in a country village, apprenticeships are not requisite.

Correction of Apprentices. A master may, by law, correct his apprentice for negligence, or other misbehavior, so it be done with moderation. If any servant assaults his master, or his master's wife, he shall suffer one year's imprisonment, and other punishment, usually corporal,

Wages. By service, all servants, except apprentices, become entitled to wages, according to their agreement, if menial servants; or according to the appointment of the sheriff or sessions, if laborers or servants in husbandry.

III. EFFECT OF STRANGERS ON MASTERS AND SERVANTS.

Suits at Law by Master. The master may maintain, that is assist his servant in any action at law against a stranger. He may also bring an action against any man for beating his servant, assigning as a special reason, his own damage by the loss of his service, and this loss must be proved on the trial. He may justify an assault in defence of his own servant, and a servant in defence of his master. Also he may sue any one, who knowingly employs his servant during the term of his employment with the master. If the stranger was ignorant of the servant's employment, no action lies, unless the stranger refuse to restore him on demand.

Master's Liability. If the servant commit a trespass by the command or encouragement of his master, both master and servant are guilty, for the latter is only to obey his master, in matters that are honest and lawful. If an inn-keeper's servants rob his guests, the master is bound to restitution, for his negligence in not obtaining honest servants is a kind of implied consent to the robbery. So if a servant at a tavern furnish bad wine, which results in the sickness of a guest, the master is liable.

Question of Agency. 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, but if I pay it to a professional man's servant, whose usual business is not to receive money for his master, and he embezzles it, I must pay it over

again. If a steward rents 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, who is accustomed 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. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes upon trust, for there is no implied order to the tradesman to trust my servant, but if I usually send him on trust, or sometimes on trust and sometimes with ready money, I am answerable, for the tradesman cannot tell when he comes by my order, and when he comes upon his own authority.

Negligence of Servants. If a servant by his negligence damages a stranger, the master shall answer for his neglect. But the damage must be done, while he is actually employed in the master's service, otherwise the servant shall alone answer for his misbehavior. On this principle, if a servant while lighting his master's fire, negligently sets fire to an adjacent house, the master is liable, because the negligence occurs in his master's service, but otherwise, if passing along the street, he negligently sets fire to some dwelling, for there he is not in his master's immediate service, and must himself answer for the damage personally. A master is chargeable, if a member of his family throws anything out of his house into the street, to the damage of any individual, or to the common nuisance of the public.

Master Responsible. In all such cases, the master may frequently be a loser by the trust reposed in his servant, but never can be a gainer, nor shelter himself from punishment by laying the blame on his servant. The reason of this is, that the wrong done by his servant is looked upon in law as the wrong of the master himself, and it is a rule, that no man shall take advantage of his own wrong.

CHAPTER XV. HUSBAND AND WIFE.

Preamble. The second private relation of persons is that of marriage, which includes the reciprocal rights and duties of

husband and wife, or as the law books call them, of *baron* and *feme.*

I. MARRIAGE A CIVIL CONTRACT.

Province of the Spiritual Courts. Our law considers marriage in no other light than as a civil contract. The holiness of the rite is left entirely to the ecclesiastical law, the temporal courts not having jurisdiction to consider unlawful marriage a sin, but merely a civil inconvenience. The punishment of incestuous marriage is the province of the spiritual court, which acts *pro salute animae.* The law treats marriage as any other contract, good and valid, where the parties were willing to contract, able to contract, and lastly actually did contract, in the proper forms of law.

Parties Willing to Contract. *Consensus, non concubitus, facit nuptias* is the maxim of the civil law in such case. We have adopted almost all the notions of the legitimacy of marriage from the canon and civil laws.

Parties able to Contract. In general, all persons are able to contract marriage, unless they labor under some particular disabilities and incapacities.

Canonical Disabilities. These disabilities are of two kinds: first, such as are canonical, and sufficient 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 close relationship by blood, affinity or close relationship by marriage, and some particular corporal infirmities. Such disabilities are either founded upon the express words of the divine law, or are consequences plainly deducible from thence. The ecclesiastical magistrate may separate the offenders and inflict penance for the offence.

Voidable Marriages. Such marriages not being void *ab initio*, but voidable only by sentence of separation, are esteemed valid for all civil purposes, unless such separation is decreed during the lives of both parties. Therefore, when a man married his wife's sister, the court could not make a decree of nullity and bastardize the issue, but could proceed against the man for incest.

Levitical Law. At one period, a great variety of degrees of kindred were made impediments to marriage, which resulted

in a statute under Henry VIII, that nothing, God's law except, shall impeach any marriage, but within the levitical degrees, the furthest of which is between uncle and niece.

Consummated. By the same statute, all impediments arising from pre-contract with other persons were abolished, unless they had been consummated with bodily knowledge, in which case the canon law holds such contract to be a marriage *de facto*, but this clause was repealed by statute of Edward VI.

Disabilities under Municipal Law. The other sort of disabilities are those which are created, or at least enforced, by the municipal laws. They are regarded, not so much as a moral offence, as on account of the civil inconveniences that follow in their wake. 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.

1. Prior Marriage. Where a party has another husband or wife living, an indictment for felony will lie, and the second marriage is void; bigamy and polygamy being condemned by the new testament, and the policy of all prudent states.

2. Non-age. This is sufficient to avoid all contracts, on account of the imbecility of judgment in the parties contracting. If a boy under fourteen and a girl under twelve marry, the marriage is imperfect, and when either party comes to the age of consent, 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 to the age of the parties, for if they are ripe for marriage, it is a good marriage, whatever their age may be. Under our law, if at the age of consent, they agree to continue together, they need not be married again. If at the date of the marriage, the husband be of lawful age and the wife be under twelve, he as well as she may disagree, for in contracts the obligation must be mutual; both must be bound or neither.[1]

3. Want of Consent of Parents or Guardians. If the parties themselves at marriage had attained the age of consent, there lacked no other concurrence to make the marriage valid,

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[1] Yet there are various contracts between a minor and adult, in which the minor is not liable, but the adult is bound.

and this was agreeable to the canon law. Penalties of 100 pounds are laid on every clergyman, who marries a couple, either without publication of banns, which may give notice to parents and guardians, or without a license, to obtain which the consent of such parties must be sworn to, as having been received. The civil law required such consent at all ages, unless the children were emancipated, or beyond the parents' power. If such consent from the father was wanting, the marriage was null, and the children illegitimate, but the consent of the mother or guardian, if unreasonably withheld, might be supplied by the judge, and if the father was *non compos*, a similar remedy was given.

Void Marriages. Marriages celebrated by license, where either of the parties is under twenty-one, not being a widow or or widower, without the consent of the father, or if he be dead, of the mother or guardian, shall be void. A like provision is made as in the civil law, where the parents or guardians are *non compos*.

Effect of Restraints of Marriage. On the one hand, this prevents the clandestine marriage of minors, while on the other, restraints upon marriage, especially among the lower class, are detrimental to the public, by hindering the increase of the people, and to religion and morality, by encouraging licentiousness, and thereby destroying one object of society.

Roman Law. Effect of Seduction. The Roman law, while it forbade marriage, without the consent of parents or guardians, was less rigorous in regard to other restraints, for if a parent did not provide a husband for his daughter, by the time she arrived at the age of twenty-five, and she afterwards committed an indiscretion, he was not allowed to disinherit her on that account.

4. Want of Reason. Lacking this, no matrimonial contract is valid. Yet formerly it was held, that the issue of an idiot was legitimate, and consequently his marriage was legal. The civil law made such deprivation of reason a previous impediment, though not a cause of divorce, if it happened after marriage. Modern law determines the marriage of a lunatic, not occuring in a lucid interval, to be absolutely void. If prior to the marriage, a commission has declared him to be a lunatic, his subsequent marriage is void.

Parties Actually do Contract. This is of course requisite to constitute the marriage. Any contract made, *per verba de presenti*, words of the present tense, and in case of cohabitation, *per verba de futuro* also, between persons able to contract, was before a late act, deemed a valid marriage. 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 prescribed, the neglect of which, though penal, do not invalidate the marriage. It is held to be essential to a marriage, that it be performed by a person in orders.

Summary of the Law of Marriage. As the law now stands, 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 the consent of parents or guardians, or without it in case of widowhood. And no marriage is voidable after the death of either of the parties, nor during their lives, unless for the canonical impediments of precontract, if that still exists, of consanguinity, of affinity or of corporal imbecility existing before marriage.

II. DISSOLUTION OF MARRIAGE.

How Effected. Marriages are dissolved by death or divorce. There are two kinds of divorce, the one total, the other partial.

Divorce, a Vinculo Matrimonii. This total divorce must be for a canonical cause of impediment, which existed before marriage, as is the case with consanguinity; and not supervenient or arising afterward. In cases of total divorce, the marriage is declared null, as having been unlawful *ab initio*, and the parties are absolutely separated *pro salute animarum*, for which reason no divorce can be decreed, but during the life of the parties.[1] The issue of such marriage thus dissolved, are bastards.

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[1] In the United States, decrees of nullity or of divorce are granted for canonical causes, and excepting in the state of South Carolina, absolute divorces are granted for many additional causes, occurring after marriage.

Divorce, a Mensa et Thoro. This may occur, where the marriage is just and legal *ab initio*, but for some supervenient cause, it becomes improper or impossible for the parties to live together. Such is the case of intolerable ill-temper or adultery, in either of the parties. The canon law reverences so greatly the nuptial tie, that it will not permit its severance for any cause whatever, that arises after the union is made. The revealed law, as set forth in the Bible, assigns adultery as the only cause for a man to put away his wife, and marry another. The civil law, which is partly of pagan origin, allows many causes of absolute divorce. Some of these causes were apparently trifling, as if a wife go to the theatre or public games, without her husband's knowledge and consent. Confessions of the parties as to canonical disabilities will not suffice, under the English law, to obtain a divorce. Divorces *a vinculo* have, of late years, for adultery, been granted by special acts of parliament.

Alimony. In divorces *et mensa et thoro*, the law allows alimony to the wife, which is that allowance made to a woman out of her husband's estate, being settled at the discretion of the ecclesiastical judge, on considering the circumstances of the particular case. This is sometimes called her estovers, for which, if he refuses payment, he may be excommunicated, or may be sued by a common law writ of *de estoveriis habendis*, in order to recover it. Is is generally proportioned to the rank and quality of the parties. In case of the wife's elopement, and living with her paramour, the law allows her no alimony.

III. LEGAL CONSEQUENCES OF MARRIAGE.

Married Women. Restrictions. By marriage, the husband and wife are one person in law, that is, the legal existence of the woman is suspended during marriage, or at least is incorporated into that of the husband, under whose protection and cover, she performs everything, and is therefor called by French law, a *feme covert*, or under the protection of the husband, her baron or lord, and her condition during marriage is one of coverture. A man cannot grant anything to his wife, or enter into covenant with her,[1] for the grant would be to suppose her separate existence, and to contract with her, would be to contract with himself. Also usually all compacts made between the parties, prior to

[1] Except through the intervention of a trustee.

their union, are voided by their intermarriage.[1] A woman may indeed be attorney for her husband, for that implies no separation, but merely a representation. A husband may bequeath any portion or all of his estate to his wife by will.

Husband's Liability. A husband is bound by law to provide necessaries to his wife, and if she contracts debts for them, he is obliged to pay them, but is not chargeable for aught except necessaries. If, however, she elopes, and the shopkeeper is apprised of the fact, she cannot bind her husband for necessaries furnished. If a wife be indebted before marriage, her husband is bound afterwards to pay such debt, for he has adopted both her and her circumstances.

Joinder in Actions at Law. If the wife be injured in her person or property, she cannot sue for redress without her husband's concurrence, and in his name, as well as her own, neither can she be sued, without her husband be also made a defendant. If, however, the husband has abjured the realm, or is banished, she may sue alone, for then he is dead in law. In criminal prosecutions, the wife may be indicted and punished separately, for the union is only a civil one. But in trials of any sort, they are not allowed to give evidence either for or against each other, principally because of the union of person. But where the offence is directly against the person of the wife, this rule has been usually dispensed with, and by statute of Henry VII, in case a woman is abducted, she may testify against her husband, in order to convict him of felony. He cannot close her mouth in such case, by going through the meaningless form of a ceremony of marriage.

Wife's Immunity from Liability. Though the law considers husband and wife as one person, yet there are some instances, in which she is separately 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 a like matter of record, in which case, she must be solely and secretly examined, to learn if her act be voluntary. And in some felonies committed by her through con-

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[1] But their contract is not destroyed by their marriage, where the act is to be performed *in futuro*, after the marriage is determined, as an ante-nuptial contract to leave the wife so much after the death of the husband.

straint of her husband, the law excuses her, but this extends not to treason or murder.

Correction of the Wife. Under the old law, the husband might give his wife moderate correction. For as he is to answer for her misbehavior, the law intrusted him with the power of restraining her by domestic chastisement, as he would punish a child or an apprentice. But this power of correction was confined within reasonable bounds, and he was prohibited from using violence. The civil law gave a man even a larger authority over his wife, permitting him to whip her, if he deemed it necessary. This form of correction was checked in the reign of Charles II, and has not been revived, but the courts of law still permit a husband to restrain his wife of her liberty, in case of any gross misbehavior.

CHAPTER XVI.—PARENT AND CHILD.

Division of Children. Children are of two sorts, legitimate and illegitimate. The latter are termed bastards.

I. LEGITIMATE CHILD.

Defined. Such a child is one born in wedlock, or within a competent time afterwards. The civil law legitimated a child, even if the marriage between the parents took place after its birth. In England, the nuptials must precede the birth.

1. Duties of Parents to Children. These consist of three things: 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. By begetting them, parents entered into a voluntary obligation to do all in their power to preserve the life or lives they had bestowed. Thus the children have a right to claim maintenance from their parents. The municipal laws enforce such duty, though Providence has implanted in the breast of all parents that natural affection for their offspring, which the ingratitude of a child can never totally suppress.

Rule of the Civil Law. The civil law obliges the parent to provide maintenance for the child. It carries this principle

so far, that it will not suffer a parent to disinherit a child in his will, without expressly giving his reason for doing so, and there are fourteen reasons enumerated, which may justify such act. If the parent allege no reason or a bad one, the child might set such will aside, as a testament at variance with the natural duty of the parent.

Rule of the English Law. We will notice, what provision our own laws have made for this natural duty. On every man is reposed an obligation to provide for his offspring. The parents and grandparents of poor children shall maintain them, if of sufficient ability, according as the quarter session courts may direct, and if a parent runs away, the churchwardens and overseers of the poor shall seize his rents, goods and chattels, and dispose of them towards their relief.

Children Unable to Work. No person need provide maintenance for his issue, unless where the children are unable to work, either through infancy, disease or accident, and then is only obliged to find them in necessaries. The law does not compel a father to maintain an idle and lazy child in ease and indolence.

Disinheriting Children. Our law has made no provision to prevent the disinheriting of children by will, leaving every man's property at his own disposal, though it might be advisable to compel the parent to leave the child a necessary subsistence. Among persons of fortune, it is not infrequent to provide a competence to younger children in the marriage articles, and the bulk of the estate to the eldest child. Children cannot be disinherited by any ambiguous words in a will, there being required the utmost certainty of the testator's intentions to take away the right of an heir.

Protection. This is also a natural duty, which is rather permitted than enjoined by any municipal laws, nature, in this respect, needing a check, rather than a spur. A parent may maintain a child in a law suit, and may justify an assault and battery, in defense of his child.

Education. This duty is pointed out to the parent by reason, and is of the greatest importance. Yet the municipal laws are defective on this point, by not compelling a parent to bestow a proper education upon his children. Our laws, however, make provision for the education of the children of the

poor, by the statutes apprenticing them, in such a manner, as may ultimately render their abilities useful to the commonwealth. The rich are left at their own option, whether they will bring up their children to be ornaments or disgraces to their family. Disabling statutes as to the foreign education of English children have been repealed.

2. Power of Parents. Authority over their children is given parents to enable them more effectually to perform their duty, and partly as a recompense for their care in discharging it. The ancient Roman law gave the father the power of life and death over his child, on the principle, that he who gave had also the power of taking away. In the emperor Hadrian's time, this law was materially modified, but large authority was permitted, for a son could acquire no property of his own, during the life of his father, but all the profits of his acquisitions belonged to his parent, at least for life.

Under English Law. The power of a parent is much more moderate, but still sufficient to keep the child obedient. He may lawfully correct his child, being under age, in a reasonable manner. The consent of the parent to the marriage of his child under age was directed under our ancient law, and now it is absolutely necessary in order to make the contract valid. 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, he must account for them, when he comes of age. He may have the benefit of his childrens' labor, while they reside with him, and are maintained by him, but this is no more than he is entitled to from his apprentice and servant. A mother is only entitled to reverence and respect. The legal power of a father over a child ceases when the latter reaches twenty-one years of age, for the child has arrived at the age of discretion, and is then enfranchised. Up to that age, the father may appoint a testamentary guardian over him, or may delegate part of the parental authority to a tutor or schoolmaster, who is then *in loco parentis.*

3. Duties of Children. These duties to parents arise from a principle of natural justice. 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, and those who have sustained and educated us ought in return to be supported by us, if they should require assistance.

Athenian Laws. The Athenian laws obliged all children to provide for their father, when fallen into poverty, with an exception as to spurious children, whom he had not supported or educated, and to those whom he had not afforded opportunity to gain a livelihood. In regard to bastard children, our laws agree with those of Athens.

II. ILLEGITIMATE CHILD.

1. Who are Bastards. A bastard by English law, is one who is not only begotten, but born out of lawful wedlock. The civil and canon laws remove this stain, if the parents afterwards intermarry, wherein they differ from the English law, which though not so strict, as to require that the child shall be begotten, yet make it indispensable, for legitimacy, that it be born after marriage. The reason of our law is assuredly superior to that of the Roman law in this respect, if we reflect upon the object of the marriage contract, taken in a civil light, abstractly from any religious view, which has nothing to do with the legitimacy of the children.

Main Object of Marriage. The main end and design of marriage being to devolve upon some person the care, maintenance and education of the children, this end is better answered by legitimating all issue born after wedlock, than by legitimating issue of the same parties, born before wedlock, when wedlock afterwards ensues. The reasons therefor are these:

Comparison with Roman Law. (1) Because of the uncertainty who is the father of the child, whereas by confining the proof to the birth, and not to the begetting, our law renders it certain, what child is legitimate, and upon whom devolves its maintenance. (2) Because by the Roman law, a child may be continued a bastard or made legitimate, at the option of the father and mother, by a marriage *ex post facto*, thereby inviting many frauds and partialities, which by our law are prevented. (3) Because by those laws, a man may remain a bastard, till forty years of age, and then become legitimate, by the subsequent marriage of his parents, whereby the main end of marriage, the protection of infants, is frustrated. (4) Because this rule of the Roman law admits of no limitations, as to the time

or number of bastards to be legitimated, which is a discouragement to the matrimonial state, one inducement to which is not only the desire to have children, but of procreating lawful heirs.

Leniency of English Law. The constitution of England guards against this indecency. For if a child be begotten, when the parents are single, and they endeavor to make an early reparation for the offence, by marrying within a few months thereafter, our law does not bastardize the child, if it be born, though not begotten, in lawful wedlock.

Posthumous Child. Children born before matrimony are bastards by our laws, 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. The law is not exact as to a few days.

Spurious Pregnancy. Where a widow is suspected of feigning herself with child, in order to produce a suppositious heir to the estate, this is an attempt, which the Gothic law esteemed equivalent to the most atrocious theft, and punished with death. In such case, 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 restrainst till delivered, which is conformable to the practice of the civil law. If the widow be 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.

Doubtful Parentage. But if a man dies, and his widow soon after marries again, and a child is born within such a time, as 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 at years of discretion, choose which of the fathers he pleases. To prevent this, the civil law ordained, that no widow should marry for one year, and the same constitution was probably transmitted to our ancestors from the Romans, during their stay in Britain, for we find it established, under the Saxon and Danish governments.

Non-access Presumed. Under some circumstances, children born during wedlock may be bastards, as if the husband be out of the kingdom for above nine months, so that no access on his part can be presumed. But generally during coverture, access of the husband shall be presumed, unless the contrary be

shown, which is such a negative, as can only be proved by showing him to be elsewhere. After a divorce *a mensa et thoro*, if the wife produces children, they are bastards, 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 be an apparent impossibility of procreation on the part of the husband, the issue of the wife shall be a bastard. Likewise in case of a divorce *a vinculo matrimonii*, all the issue born during the coverture are bastards, because in England, such divorce is always upon a cause, that rendered the marriage unlawful and null from the beginning.[1]

2. Duty of Parents to Bastards. This is principally that of maintenance. The civil law denied maintenance to bastards under certain circumstances.

Fornication and Bastardy. When a woman is delivered, or declares herself with child, and will upon oath charge fornication and bastardy against any one, the justice shall issue his warrant, and arrest the party, holding him to bail, or in default thereof commit him to prison. The bond is either to maintain the child, or to appear at the next quarter sessions court and have the facts tried. 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 may grant an order for the keeping of the bastard, by charging the mother or the reputed father with the payment of money, or other sustentation for that purpose.

Property Seized by the Overseers. If the parent run away from the parish, the overseers may seize his rents and goods, in order to maintain the said bastard child. No woman can be compulsorily questioned concerning the father of her child, till one month after her delivery, which necessarily gives such parent an opportunity to escape.

3. Rights and Incapacities of Bastards. The rights are very few, being only such as he can acquire. He can inherit nothing, being looked upon as *nullus filius*, no man's son. He may gain a surname by reputation, though he has none by inheritance. All other children have their primary settlement in their father's parish, but a bastard in the parish where born,

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[1] In the United States, this rule applies to total divorces or decrees of nullity for canonical causes only.

for he has no father. If he should be born in a licensed hospital, he has a settlement in the parish to which the mother belongs.

Disabilities. He cannot be heir to any one, neither can he have heirs, except of his own body. He has no ancestor, from whom any inheritable blood can be derived, for he is kin to nobody. Yet the civil law, so famed 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 an act of parliament, as was done in the case of John of Gaunt's bastard children, by a statute of Richard II.

CHAPTER XVII.—GUARDIAN AND WARD.

Divisions. 1. The different kinds of guardians, how they are appointed, their powers and duties.

2. The different ages of persons, as defined by the law.

3. The privileges and disabilities of an infant, or one under age, and subject to guardianship.

I. KINDS OF GUARDIANS, THEIR POWERS AND DUTIES.

Under the Roman Law. The guardian with us performs the office both of tutor and curator of the Roman laws; the former of whom had 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.

By Nature. The father, and in some cases the mother, of the child, is the guardian by nature. If an estate be left to an infant, the father is, by common law, the guardian, and must account to the child for the profits. With regard to daughters, the father might, by deed or will, assign a guardian to any female child under the age of sixteen, and if none be so assigned, the mother shall in such case be guardian.

For Nurture. This of course is the father or mother, till

the infant attains the age of fourteen years. In default of parents, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for its maintenance and education.

In Socage. Next are guardians in socage, who are also termed guardians by the common law. These exist, 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, an uncle on the mother's side cannot possibly inherit this estate, and therefore would be a suitable 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 for him to abuse his trust.

Guardians under Roman Law. The Roman law proceeded on a contrary principle, committing the care of the minor to him, who is the next to succeed to the inheritance, presuming that the next heir would take the best care of an estate, to which he has a prospect of succeeding. They ignored the fact, that in such case, it would be the guardian's interest to remove the encumbrance of his ward's life from the estate.

Discretion at Age of Fourteen. These guardians in socage, like those for nurture, continue only till the minor is fourteen years of age, for then he is presumed to possess sufficient discretion to select his own guardian.

Testamentary Guardians. This the minor may do, unless one be appointed by his father, under the statute of Charles II, which, considering the weakness of judgment in children of the age of fourteen, and the abolition of guardianship in chivalry, which lasted till the age of twenty-one, enacts, that a father may by deed or will, dispose of the custody of his child, born or unborn, to any person, either in possession or reversion, till such child attains the age of twenty-one years. These are called guardians by statute, or testamentary guardians. There are also special guardians by custom of London and other places.[1]

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[1] Guardians *ad litem* may be appointed, to sue or defend actions, if the infant comes into court and desires it. The infant himself, on reaching the age of fourteen, may select his own guardian, with the consent of the court. The king, as the universal guardian of infants, deputes his powers to the chancellor, who may appoint guardians.

Account of a Guardian. When the ward comes of age, the guardian must furnish him an account of all that he has transacted on his behalf, and must answer for all losses for his wilful default or negligence. To prevent disputes as to such account, it has become the practice to vouch such accounts before officers of the chancery court, on previous application made by the guardian. The lord chancellor is, by right derived from the crown, the general and supreme guardian of all infants, as well as of idiots and lunatics. In case therefore, a guardian abuses his trust, the court will check and punish him, and for good cause, will remove him, and appoint another in his stead.

2. Age of Ward. Males. A male at twelve may take the oath of allegiance, at fourteen be at years of discretion, and therefore may consent or disagree to marriage, may choose his own guardian, and if his discretion be actually proved, may make his testament of his personal estate. At seventeen he may be an executor, and at twenty-one is at his own disposal, and may alien his lands, goods and chattels.

Females. A female at seven, 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 she is at years of legal discretion, and may choose a guardian, at seventeen may be an executrix, and at twenty-one may dispose of herself and her lands.

Age of Majority. So the 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, until that time, is styled an infant in law. Under the Greeks and Romans, women were never of age, but subject to perpetual guardianship, unless when married, and when that perpetual tutelage was removed in time by the law, full age in females, as well as in men, was not until they had attained twenty-five years.

3. Privileges and Disabilities of Infants. Their very disabilities are privileges, to secure them from the harmful results of imprudent acts. An infant cannot be sued, but under the protection and by joining the name of his guardian,[1] but he may sue,

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[1] In fact, he is sued in his own name alone, but his appearance on record is by his guardian. It is within the province of the court to appoint a guardian *ad litem*, in the particular action.

either by his guardian, or by his *prochein amy*, his next friend. This next friend 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. In criminal cases, an infant of the age of fourteen years may be capitally punished, but under the age of seven he cannot. The age 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 date of the offence, he may be convicted, and undergo judgment and execution of death, though he had not attained to years of puberty or discretion. Sir Mathew Hale cites a case of a girl of thirteen, who was burned for killing her mistress, another of a boy, still younger, who concealed himself, after slaying his companion, for it appeared by his hiding, that he knew he had done wrong, and could discern between good and evil. Still later, a boy of ten years of age, who had committed a heinious murder, was deemed worthy of capital punishment.

Laches not Imputed to Infant. With regard to estates and civil property, an infant has many privileges. He shall lose nothing by non-claim or neglect to demand his right, nor shall any other laches or negligence be imputed to an infant, except in some particular cases.

Privileges of Infants. It is usually true, that an infant can neither aliene his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him. To these rules, there are some exceptions. Thus 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. An infant, who has had an advowson, may present to the benefice, when it becomes vacated. An infant may also purchase lands, but his purchase is incomplete, for on his arrival at age, he may affirm or disaffirm the contract, without alleging cause, and so may his heirs, if he dies without ratification of the agreement. An infant under twenty-one can make no deed, but what is afterwards voidable, yet in some cases, he can bind himself apprentice by indenture for seven years, and he may, by deed or will, appoint a guardian for his children. Notwithstanding the

general rule, that an infant can make no contract, which will bind him, yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and other necessaries, and likewise for his good teaching and instruction.[1]

CHAPTER XVIII.—CORPORATIONS.

Doctrine of Perpetual Succession. As all personal rights die with the person, it has been found necessary, when the public is benefitted by the continuance of particular rights, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

Benefit of Corporations. These artificial persons are called bodies politic, bodies corporate or corporations, of which a great variety exist, for the advancement of religion, of learning, and of commerce, in order to preserve entire and forever those rights and immunities, which if granted only to the individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. In holding estates, or other property, if land be granted for the purposes of religion or learning to persons not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the lands are changed.

Theory of Corporations. But when they are consolidated and united into a corporation, they and their successors are deemed one person in law, having one will, which is collected from the sense of the majority of the individuals. This one will may establish rules for the regulation of the whole, which are the municipal laws of this little republic; or rules may be prescribed to it at its creation, which are then in the place of

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[1] He is also liable for necessaries furnished his family. Infants are liable for the torts which they commit. He may be sued in trover and in an action on the case for damages. A direct promise, or an express agreement by him, after he becomes of age, is necessary to ratify a previous contract, and make it obligatory on him. It has been held, that a mere acknowledgement of the debt, or even a part payment on account made after he becomes of age, will not suffice.

natural laws. The privileges and immunities, the estates and possessions of the corporation, when once vested in them, remain, without any new conveyance, to new successions; for the individual members are but one person in law, a person that never dies, as the river is the same river, though the parts composing it change every instant.

Historical Origin. The Romans originally invented these political constitutions. They were introduced by Numa Pompilius, the second king, who finding, upon his accession, the city rent by the rival factions of Sabines and Romans, thought it prudent to subdivide them, by instituting separate societies of every trade and profession. They were encouraged 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 greatly refined and improved upon the invention, particularly with regard to sole corporations, consisting of one individual only, of which the Roman lawyers had no notion, their maxim being, that *tres faciunt collegium.*

Divisions. Corporations are either aggregate or sole.[1]

Corporations Aggregate. These consist of many persons united together into one society, and are maintained by a perpetual succession of members, so as to continue forever, as the mayor and commonalty of a city.

Corporations Sole. These consist of one person only and his successors, in some particular station, incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their persons, they could not have had. The king is a corporation sole; so is a bishop, and every parson and vicar.

Example—Parson. At the original endowment of parish churches, the freehold of the church, the parsonage, the glebe and the tithes of the parish, were vested in the then parson by the bounty of the donor, with intent that the emoluments should

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[1] Another division of corporations is into public and private. Public corporations are created for the purposes of municipal government, as cities, towns and boroughs.

ever continue, as a recompense for the parson's spiritual care. How was this to be effected? The freehold was vested in the parson. If it were vested in him, in his natural capacity, on his death it might descend to his heir, and would be liable for his debts and encumbrances, or at best the heir might be compelled to convey those rights to the succeeding incumbent. The law, therefore, has wisely ordained, that the parson, *quatenus* parson, shall never die, any more than the king; by making him and his successors a corporation. By this means, all the original rights of the parsonage are preserved entire to his successor, for the present incumbent and his remotest predecessor are one and the same person in law, and what was given the one was given the other also.

Ecclesiastical Corporations. Another division of incorporations is into ecclesiastical and lay. Ecclesiastical corporations are where the members who compose them are entirely spiritual persons, such as bishops, certain deans and prebendaries, all archdeacons, parsons and vicars, who are sole corporations; also deans and chapters, bodies aggregate. They are erected for the furtherance of religion, and for perpetuating the rights of the church.

Lay Corporations. These are of two sorts, civil and eleemosynary.

(1). **Civil.** The civil are such as are created for a variety of temporal purposes. The king, for instance, is made a corporation to prevent in general the possibility of an *interregnum* or a vacancy upon the throne, and to preserve the possessions of the crown entire; for immediately upon the demise of one king, his successor is in full possession of his regal rights and dignity. Other lay corporations are erected for the good government of a city or town, as a mayor and commonalty; some for the regulation of manufactures and commerce, as the trading companies of London and other towns; also church wardens for the consecration of the goods of the parish; also the college of physicians, for the improvement of medical science.

(2) **Eleemosynary.** These corporations 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 hospitals for the maintenance of the poor, sick and impotent, and certain colleges, etc.

The Subject Treated.—We will now consider:

1. *How corporations may be created.*
2. *Their powers, capacities and incapacities.*
3. *How corporations are visited.*
4. *How they may be dissolved.*

I. CREATION OF CORPORATIONS.

Under the Civil Law. By the civil law, they were created by the mere act and voluntary association of their members, provided such convention was not contrary to law.

The King's Consent. Apparently the prince's consent was not essential to their foundation, but in England, the king's consent, either impliedly or expressly given, is absolutely necessary to the erection of any corporation. 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 presumed to have given their concurrence; common law being nothing else but custom, arising from the general agreement of the community.

By Common Law and Prescription. Of this sort are the king himself, all bishops, parsons, vicars, church wardens and some others, who by common law, have ever been held to have been corporations, *virtute officii.* The king's consent is also presumed to have been given to all corporations by prescription, such as the city of London, which have existed from time immemorial. In such cases, though the members thereof can show no legal charter of incorporation, yet in cases of such antiquity, it is presumed to have existed, and to have been lost or destroyed.

Royal Assent Essential. The methods, by which the king's consent is expressly given, are either by act of parliament or charter. The royal assent is a necessary ingredient of such act, but most of the statutes of this nature in former years, either confirmed the previous creation of corporations by the king, or permitted the king to erect a corporation *in futuro* with certain powers. Hence the immediate creative act was usually performed by the king alone, by virtue of his royal prerogative. All the methods, therefore, whereby corporations exist, by common law, by prescription and by act of parliament, are for the

most part reducible to this of the king's letters patent, or charter of incorporation.

Power Deputed to a Subject. 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 persons and powers of the corporation, but it is really the king who erects, and the subject is but the instrument.

Its 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 therefrom is not material. Such name is the very being of its constitution, without which it could not perform its corporate functions.

II. POWERS OF A CORPORATION.

Incident Thereto. After a corporation is formed and named, it acquires many powers, rights, capacities and incapacities. Some of these are inseparably incident to every corporation, and are of course tacitly annexed.

Incidental Powers. The five powers incident to every corporation aggregate are these:

1. *To have perpetual succession.*

2. *To sue or be sued, grant or receive by its corporate name, and to do all other acts, as natural persons may.*

3. *To purchase lands and hold them, for the benefit of themselves and their successors.*

4. *To have a common seal.*

5. *To make by-laws for its government.*[1]

Privileges and Disabilities. It must always appear by attorney, for it cannot appear in person, being as Coke says: invisible, and existing only in intendment and consideration of law. It can neither maintain, nor be made defendant in an action of battery, or such like personal injury. It cannot commit treason or felony or other crime in its corporate capacity, though as individuals, its members may. It is not liable to attainder or forfeiture. It cannot be executor or administrator, or perform any personal duties, for it cannot take an oath for the due execution of its office. It cannot be seized of lands for

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[1] These are included by law in the very act of incorporation. They were allowed by the twelve tables of Rome.

the use of another, for such kind of confidence is foreign to the end of its institution.[1] It cannot be outlawed, for outlawry always supposes a precedent right of arresting, for which cause, the proceedings to compel a corporation to appear in any suit by attorney are always by distress on their lands and goods. It cannot be excommunicated, for a corporation has no soul, as Coke observes, and hence cannot be summoned into the ecclesiastical courts upon any account, for those courts act solely *pro salute animae*, and their sentences can only be enforced by spiritual censures.

Powers Incident to Certain Corporations. There are also other incidents and powers, that belong to certain kinds of corporations, which do not appertain to others. An aggregate corporation may take goods and chattels for the benefit of itself and successors, but a sole corporation cannot, for such moveable property is liable to be lost or embezzled, and would occasion disputes between the successor and executor. In ecclesiastical and eleemosynary foundations, the king or the founder may give them rules 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. Limits of Power. Aggregate corporations also that have by their constitutions a head, as a dean or warden, cannot do any acts during the vacancy of the headship, except only appointing another; neither are they capable of receiving a grant. In aggregate corporations, the act of the major part is esteemed the act of the whole. By the civil law, this part must have consisted of two-thirds of the whole, else no act could be performed. But with us, any majority is sufficient to determine the act of the whole body. By statute of Henry VIII, all private statutes were declared utterly void, whereby any grant or election made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more of the minority, but this statute extends not to any negative or necessary voice, given by the founder to the head of such society.

Right to Hold Lands. Formerly no devise of lands to a

[1] This law is totally altered by modern legislation.

corporation was good. By a variety of statutes, its privilege even of purchasing from a living grantor is much abridged, so that now a corporation, either ecclesiastical or lay, must have a license from the king to purchase before it can exert that capacity, which is vested in corporations by the common law; nor is even this in all cases sufficient.

Statutes of Mortmain. These statutes are generally called the statutes of mortmain; all purchases made for corporate bodies being said to be purchases in mortmain, *in mortua manu.* Coke assigns as the origin of the term, that these purchases being usually made by ecclesiastical bodies, the members of which were reckoned dead persons in law, land therefore held by them might with propriety be said to be held *in mortua manu.*

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

III. CORPORATIONS—HOW VISITED.

By the Ordinary or the Founder. To prevent a deviation from the objects for which corporations are founded, the law has provided proper persons to visit, inquire into and correct all irregularities that may arise, in either sole or aggregate corporations, and whether ecclesiastical, civil or eleemosynary. With regard to all ecclesiastical corporations, the ordinary is the visitor, so constituted by the canon law. With respect to all lay corporations, the founder, his heirs or assigns, are the visitors, whether the foundation be civil or eleemosynary.

Who is the Founder? It is generally asserted, that civil corporations are subject to no visitation, but merely to the common law of the land. As a rule, the founder, his heirs or assigns, are tho visitors of all lay corporations. The founder in the original sense, is the king alone, for he only can incorporate a society, and in civil incorporations, such as a mayor and commonalty, where there are no possessions given to the body, there is no other founder than the king; but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law makes two species of foundation, the incorporation, in which sense the king is the founder, the other, 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. If the king and a private person join in endowing an eleemosynary foundation, the king alone shall be its founder. The right of visitation in general vests in the king, as the founder of all civil corporations, and in eleemosynary ones in the patron or endower.

Inquiry by the Court. The king's exercise of this jurisdiction, as visitor, is in the court of the king's bench, where all misbehaviors of this kind of corporations are inquired into and redressed, and all their controversies decided.

Eleemosynary Corporations. By the dotation, the founder and his heirs are of common right the legal visitors, to see that such property is rightfully employed, but if the founder has assigned such duty of visitation to another, then his assignee so appointed is vested with the founder's powers, to the exclusion of his heir. These corporations are chiefly hospitals or colleges in the universities. It is now held as established law, that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons, and that the right of visitation does not arise from the principles of the canon law, but of necessity was created by the common law.

IV. DISSOLUTION OF CORPORATIONS.

Disfranchisement. Any particular member may be disfranchised, by acting contrary to the laws of the society or the laws of the land, or he may voluntarily resign.

Reversion of the Property. But the body politic itself may be dissolved in several ways, which dissolution is its civil death. The lands and tenements shall revert to the person or his heirs, who granted them to the corporation, for the law annexes a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the object of the grant has failed. The grant is only during the life of the corporation, and when by any cause, that life be determined by the dissolution of the body politic, the grantor takes it back by reversion, as he would do in the case of every other grant for life.

Debts. The debts of a corporation, whether due by it to others, or from its debtors to the corporation itself, are extinguished by its dissolution, so that the members thereof cannot recover, nor on the other hand can they be charged in their natural capacities.

How Dissolved. A corporation may be dissolved:

1. *By act of parliament.*

2. *By the natural death of all its members, in the case of an aggregate corporation.*

3. *By the surrender of its franchises into the hands of the king.*

4. *By forfeiture of its charter, through negligence or abuse of its franchises.*

Quo Warranto. The regular course to effect a dissolution, is to bring an information in the nature of a writ *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of the law for state purposes in the reigns of Charles II and of James II, by the seizure of the charter of the city of London, gave great and just offence, though in strictness of law the proceedings may have been regular. This forfeiture of the city charter can never again occur, and in the future, no civil corporation shall be dissolved, on the ground of the failure to elect a mayor or commonalty on the day appointed in the charter.[1]

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[1] Yet refusing or neglecting to hold an election for officers, in accordance with the terms of the charter of a civil corporation, is certainly a ground for forfeiting such charter.

BOOK THE SECOND.

THE RIGHTS OF THINGS.

CHAPTER I.—PROPERTY IN GENERAL.

Study of Property Rights. The *jura rerum* are those rights which a man may acquire in and to things, unconnected with his person. These are the rights of dominion or property, which a man claims and exercises to the exclusion of all other individuals. Few men seek to investigate the foundation of these rights, being satisfied with the possession of property, inherited by them, or devised to them, the title of which they are reluctant to examine. It will be well, if the mass of mankind will obey the laws when made, without scrutinizing the reasons for making them. But when law is to be considered as a rational science, the rudiments of these positive constitutions of society become an object of study.

Everything Originally in Common. The true foundation of man's dominion over external things is derived from the gift of the creator at the inception of the human race. Probably among the early inhabitants of the world, everything was held in common among them, and every one took from the public stock, to his own use, what he actually needed.

Community of Property. Had mankind continued to live in primeval simplicity, these general notions of property would have answered the purposes of life. This communion of goods was only applicable, even in the earliest stages, to the substance of the thing, but could not be extended to the use of it. By the law of nature and reason, he who first used it, acquired therein a kind of transient property, that lasted only while he used it; in other words, the right of possession continued for the same time, as did the act of possession. Thus the ground was in common, yet whoever was in occupation of any specified part, acquired a sort of ownership, from which it would have been unjust to have forcibly ejected him, but the instant he vacated it, another man

might justly seize it. Cicero compares such a world to a theatre, which is common to the public, and yet the place any man has taken is, for the time, his own.

Permanent Dominion Requisite. With the increase of population came the necessity of more permanent dominion of property, and the appropriation to individuals of the substance of the thing to be used. Otherwise contests would continually have arisen, as to the first occupancy of the same object, and its value would be but slight, if one should have but a usufructuary property therein.

Habitations of Brutes. In the case of habitations, even the brute creation, to which everything else is in common, observe a kind of permanent property in their dwellings, especially for the protection of their young, to preserve which, both beasts and birds would hazard their lives.

Property Rights Established. Hence a property was soon established in every man's house and homestead, which originally seem to have been temporary huts, suited to the wandering lives of the owners, before any property in the soil was established. Hence movables became sooner appropriated than the permanent soil, mainly because land, to be fit for use, necessitated the bodily labor of the occupant, which labor bestowed on an object gives the best title to exclusive property therein.

Pastoral Migration. A permanent property was established in flocks and herds, and also in wells of water, which were essential to the rearing of cattle. All this while, the soil and pasture remained still in common as before, except perhaps in the neighborhood of towns, where the necessity of an exclusive property in lands was first felt. When the herbage upon one tract of land was devoured, it was deemed a natural right to occupy other lands for pasture, which practice still holds among the Tartars, and other wild nations, and also existed in Germany, until the decline of the Roman empire. The withdrawal of Lot to the plain of Jordan, while his uncle, Abraham, continued to dwell in the land of Canaan, illustrated this migratory habit.

Colonies and Conquests. Upon the same principle, colonies were sent to find new habitations, when the mother country was over-crowded, as exemplified by the Phœnicians and Greeks, also by the Germans and Scythians. How far the seizing of countries already peopled, and the expelling or slaying the de-

fenceless natives, because they differed from the invaders in language, religion, government or color, is consonant to reason or religion, may be questioned.

Growth of Agriculture. As the world grew more populous, and uninhabited spots more difficult to discover, the spontaneous products of the earth became exhausted. It then became requisite to find means of providing regular subsistance, which promoted the art of agriculture, and introduced the idea of a more permanent property in lands. No one would till the soil, if another could seize the matured product of his industry and labor.

Origin of Government. Necessity begat property, and in order to retain that property, recourse was had to civil society, which resulted in the formation of states, government, laws, punishments, and the public exercise of religious duties. Thus connected, it was found that a part of society sufficed to provide, by their manual labor, for the necessary subsistence of all; and leisure was given to others to cultivate the mind, to invent useful arts, and to lay the foundations of society.

Possession of Land. How Acquired. The only remaining question is, how this property became actually invested; how a man obtained an exclusive right to hold in a permanent manner specific land, which belonged before to all mankind. Occupancy having given the right to the temporary use of the soil, also gave the original right to the permanent property in the substance of the earth itself. All writers on the subject agree, that the original title was gained by occupancy, every man seizing for his own continued use, such spots of ground, as he desired, provided it had not been pre-occupied by another.

Abandonment of Possession. Property both in lands and movables, being thus originally acquired by the first taker, remains in him till such time as he indicates an intention to abandon it, when it is liable to be appropriated by the next occupant. So if one possessed of a jewel, casts it away, the finder thereof becomes its possessor. But if he hides it privately, and it is discovered, the finder acquires no property therein, nor will he be entitled to its possession, where the owner has lost it. This is the doctrine of the law of England, in relation to treasure trove.

Transfer of Possession. This voluntary abandonment of property by one man, and its subsequent occupancy by another,

was calculated merely for the rudiments of society, and soon ceased to exist. It was found that what was comparatively valueless to one man was useful to another, who was ready to give something of value in exchange for it. This mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant or conveyance, whereby the right of occupancy became vested in the new acquirer.

Result of the Occupant's Death. The most effectual way of abandoning property is by the death of the occupant, when both the actual possession and the intent to retain possession cease. All property in a man, therefore, terminates at his death, considering man as unconnected with civil society; and in a savage state the next immediate occupant would acquire a right thereto. But under civilized governments, the almost universal law has either given a dying person a power of continuing his property, by disposing of his possessions by will, or if he neglects to make such disposition, the municipal law steps in, and declares who shall be the successor, representative or heir of the deceased.

Escheat to the State. In the absence of a last will, or of existing heirs of the deceased, the doctrine of escheat is adopted in almost every country, whereby the property becomes vested in the state, which succeeds to those inheritances to which no other title can be found.

Right of Descent. The right of inheritance, or descent, to the children and relatives of the deceased, seems to have been allowed much earlier than the right of devising by last will and testament. This appears to be the prompting of nature, yet we often mistake for nature, what we find established by long custom.

Children, as Heirs. The transmission of one's possession to posterity has an evident tendency to make a man a good citizen, and a useful member of society. It prompts a man to deserve well of the public, when he is sure the reward of his services will not die with himself, but be transmitted to those to whom he is deeply attached. The original of this right of inheritance arose, however, from a more simple principle. A man's children or nearest relatives are usually his death-bed attendants, and on his decease, the next immediate occupants. Therefore in the earliest ages, on failure of children, a man's servants, born under his roof, and present at his death, were allowed to be his heirs.

Where Inheritance Indefeasible. 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. It was found that so strict a rule of inheritance, made heirs disobedient, defrauded creditors of their just debts, and prevented fathers from dividing or charging their estates, as the exigencies of their families required.

Introduction of Power to Will. This resulted, in allowing a man to dispose of his property, or at least a part of it, by testament, that is, by written or oral instructions, properly witnessed, according to the pleasure of the testator, which we style his will. In England, until modern times, a man could only dispose of one-third of his movables from his wife and children, and in general no lands were permitted to be devised by will, until the reign of Henry VIII, and then only a certain portion, for it was not until after the restoration, that the power of devising real property became general.

Origin of Wills. Wills and testaments, rights of inheritance and succession, are creatures of civil and municipal laws, and regulated by them, every distinct country having its own forms and requisites, to render a will valid; hence the right of inheritance varies in different countries.

English Law of Inheritance. In England, this diversity is most marked. In personal estates, the father may succeed to his children, while in landed estates, he can never be their heir by the remotest possibility.[1] In general, only the oldest son, in some places only the youngest, in others, all the sons together have a right to succeed to the inheritance. In real estate, males are preferred to females, and the eldest male will usually exclude the rest,[2] while in the division of personal estates, females shall share equally with the males, and no right of primogeniture exists.

Who Should Inherit. The law of nature suggests, that upon the death of the possessor, the estate should again become common, and be open to the next occupant, while the municipal law or positive law of society directs it to vest in such person, as

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[1] By statute of George IV, a lineal ancestor is capable of being heir to his issue, in preference to collaterals.

[2] Not applicable to the United States.

the last proprietor shall by will appoint, and in defect of such appointment, to his heir at law.

Usufructuary Property. A few things must, however, remain in common, being such wherein nothing but an usufructuary property can be had, wherefore they belong only to the first occupant, during his tenure. Such are the elements of light, air and water, which a man may occupy by reason of his windows, gardens or mills; also animals *ferae naturae*, or of untamable nature, which any man may seize for his own pleasure. All these things, so long as they remain in possession, a man may enjoy, but if they escape him, or if he abandons their use, they return to the common stock, and another man may seize them.

Permanent Property in Other Things. There are other things, in which a permanent property may subsist, not only as to the temporary use, but also the substance, which but for the provisions of the law, might at times be without a proprietor. Such are forests and waste grounds, which were not appropriated in the general distribution of lands, and also wrecks, estrays and wild animals, termed game. The law wisely vests these things in the sovereign, or in his representatives, the lords of manors, thus carrying out the principle of assigning to everything capable of ownership, an owner.

CHAPTER II.—REAL PROPERTY. CORPOREAL HEREDITAMENTS.

PREAMBLE.

Division of Things. The objects of property are things as distinguished from persons; and things by the law of England are of two kinds; things real and things personal.

Things Real. These are such as are permanent, fixed and immovable, which cannot be carried out of their place, as lands and tenements.

Things Personal. These are goods, money and all other movables, which may attend the owner's person, wherever he thinks proper to go.

Division. In treating of things real, let us consider:

1. *Their several sorts or kinds.*
2. *The tenures, by which they may be held.*
3. *The estates, which may be had in them.*
4. *The title to them, how acquired and lost.*

Things Real. These consist of lands, tenements and hereditaments.

Land. Land comprehends all things of a permanent, substantial nature, being a word of very extensive signification.

Tenement. Tenement is a word of still greater extent, and though usually applied to buildings, yet in its original sense signifies everything that may be holden, provided it be of a permanent nature, whether of a substantial or of an unsubstantial kind. Thus *liberum tenementum*, frank tenement, applies not only to lands, but also to offices, rents, commons and the like, and as lands and houses are tenements, so is an advowson, or a franchise, an office or a peerage.

Hereditament. Hereditament is by far the most comprehensive term, as it includes not only lands and tenements, but whatsoever may be inherited. Thus an heir-loom, which is a mere movable, may be a hereditament, so also a condition, which is a restriction in a conveyance. Hereditaments are of two kinds, corporeal and incorporeal. Corporeal consist of such as effect the senses, such as may be seen and handled; incorporeal are not the object of sensation, are creatures of the mind, and exist only in contemplation.

CORPOREAL HEREDITAMENTS.

Land Defined. This consists wholly of substantial and permanent objects, comprehended under the title of land. Land, says Coke, in its legal sense, comprehends any ground, soil or earth, as arable, meadows, pastures, woods, moors, marshes, heath or waters. Also all castles, houses and other buildings, consisting of land, which is the foundation, and the structure thereon, so that if I convey the land, the building passes with it. One cannot recover possession of a pool of water, but of the land covered by the water. For water is a movable thing, and continues common by the law of nature, hence the property therein is temporary and usufructuary. But the land covered by the water is permanent and fixed, and is a certain, substantial property.

Extent of Landed Rights. Land has an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum* is the maxim of the law, hence no man can erect a structure, which shall overhang the land of another. Downwards in a direct line, the owner of the surface owns to the centre of the earth, as is evidenced in the case of mines. Hence land includes not only the face of the earth, but everything under it or over it. If a man grants all his lands, he grants thereby his mines, his woods, his houses and his waters, as well as his fields. Under the name of messuage or castle, nothing but the particular thing mentioned will pass, but under the name of land, which is *nomen generalissimum*, everything terrestrial will pass.

CHAPTER III.—INCORPOREAL HEREDITAMENTS.

Defined. 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, which may consist in lands, houses, jewels, or the like, but something collateral thereto, as a rent issuing out of the land or houses, or an office relating to those jewels. Corporate hereditaments are the substance, while incorporeal hereditaments are but a sort of accident, which inhere in and are supported by such substance, and may or may not belong to it, without any visible alteration therein.

Examples. Their existence is merely in idea, though their effects may be frequently objects of our bodily senses. We must not confound together the profits produced and the thing or hereditament, which produces them. An annuity for instance is an incorporeal hereditament, for though the money, which is the product of the annuity, is of a corporeal nature, yet the annuity itself, which produces the money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes are incorporeal, being merely a contingent right, collateral to or issuing out of lands, and hence not the object of sense.

Kinds. *Incorporeal hereditaments are mainly of ten sorts:*

Advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities and rents.

1. **Advowson.** This is the right of presentation to a church or ecclesiastical benefice. Advowson, *advocatio*, signifies the taking into protection, and is synonomous with patronage, *patronatus*, and he who has the right of advowson is called the patron of the church. 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 were before given to the clergy in common, from whence arose the division of parishes, the lord had the right to name such minister. It is not the bodily possession of the church, but it is the right to give some other man a title to such possession.

Divisions. Advowsons are either appendant or in gross. Lords of manors being originally the only founders and patrons of churches, the right of patronage or presentation is termed an advowson, appendant to the manor, and will pass or be conveyed together with the manor, as incident thereto. But where the property of the advowson has been separated from the property of the manor by conveyance, it is called an advowson in gross or at large, and becomes annexed to the person of the owner, and not to the manor.

Further Division. Advowsons are either presentative, collative or donative. Presentative, where the patron has the right of presentation to the bishop or ordinary, and to demand of him the appointment of a clerk. Collative, where the bishop and patron are one and the same person, in which case the bishop cannot present to himself. Donative, when the king, or any subject by his license, founds a church, and ordains that it shall be merely in the disposal of the patron, subject to his visitation only, and not to that of the ordinary, and vested absolutely in the clerk, without presentation, institution or induction. As the law now stands, if the true patron once waives this privilege of donation, and presents to the bishop, and his clerk is admitted, the advowson becomes forever presentative, and no longer donative.

2. **Tithes.** These are the tenth part of the increase, yearly arising from the profits of lands, the stock upon lands, and the personal industry of the inhabitants, or predial, mixed and personal. In general, tithes are to be paid for everything that yields an annual increase, as grain, fruit or cattle, but not for anything

that is of the substance of the earth, as stone or lime, nor for wild animals, whose increase is not annual, but casual.

Origin. The title of the clergy to tithes is not upon any divine right, though a competent maintenance for ministers of the gospel is undoubtedly *jure divino*. Natural reason informs us, as well as do the positive precepts of the Bible, that this class of men should be furnished with the necessary conveniences, and the moderate enjoyments of life. Hence all municipal laws have provided a liberal and descent maintenance for their national clergy; ours have established that of tithes, probably in imitation of the Jewish law.

History. Possibly tithes were introduced into England by Augustine the monk, contemporary with the planting of christianity among the Saxons, at the end of the sixth century. Charlemagne established their payment in France, dividing them into four parts: one to maintain the church edifice, a second for the poor, the third for the bishop, and the fourth for the parochial clergy.

To Whom Due. At their introduction, though all men were obliged to pay tithes, they might give them to what priests they pleased, or pay them to the bishop, who distributed them among his diocesan clergy. But when dioceses were divided into parishes, the tithes of each parish were alloted to their own minister.

Special Exemption from Payment. This exemption may be accomplished by a real composition, or by a custom or prescription.

Real Composition. A real composition is when an agreement is made between the owner of the lands and the parson or vicar, with the consent of the ordinary and the patron, that such lands for the future shall be discharged from the payment of tithes, by reason of some land or other recompense given to the parson. By statute of Elizabeth, no real composition is good for over three lives, or twenty-one years, and is now rarely heard of.

Discharge by Custom or Prescription. This is where, time out of mind, persons or lands have been partially or totally discharged from the payment of tithes. It is either *de modo decimandi*, where by custom, a particular manner of tithing is allowed, different from the general law, or a prescription *de non decimando*, which is a claim to be entirely discharged of tithes,

and to pay no compensation in lieu of them. Thus the king, by his prerogative, is discharged therefrom. These personal privileges, where not annexed to the land, are confined to the king and the clergy, for their tenant or lessee shall pay tithes. Spiritual persons or corporations, in various ways, were capable of having their lands totally discharged of tithes.

3. Common. The right of common is a profit, which a man has in the land of another, as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like: of pasture, of piscary, of turbary, and of estovers.

Of Pasture. This is the right of feeding one's beasts on another's land, for in waste grounds or commons, the property of the soil is generally in the lord of the manor. It is either appendant, appurtenant, because of vicinage, or in gross.

Appendant. Common appendant is a right belonging to the owner or occupier of arable land to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. These beasts are such as are of the plough, or such as manure the ground. This is of universal right, and is inseparably incident to the grant of the lands.

Appurtenant. Common appurtenant arises from no connection of tenure, nor from any absolute necessity, but may be annexed to land in other lordships, or extend to other beasts, as hogs or goats, which neither plough nor manure the ground. It is not of general right, but can be claimed by immemorial usage, which the law esteems proof of a grant for this purpose.

Because of Vicinage. This is where the inhabitants of two contiguous townships have usually intercommoned the beasts of one straying into the fields of the other, without molestation. This is only a permissive right, to excuse a trespass, and therefore either township may enclose and bar out the other. Neither has any person of one township a right to put his beasts originally into the other's common, but if they escape and stray thither, the trespass is usually ignored.

In Gross. This is annexed to a man's person, being granted to him and his heirs by deed, or it may be claimed by prescriptive right, and may be vested in one owning no land.

Limited in Number and Time. These species of pasturable common may be limited as to number and time. The lord of the manor may enclose so much of the waste as he pleases

for tillage or wood ground, provided he leaves common sufficient for such as are entitled thereto. The lord and commoner may bring actions for damage done, either against strangers or against each other, the lord for public injury and a commoner for his private damage.

Of Piscary and of Turbary. Common of piscary is a liberty of fishing in another man's water, and common of turbary is a liberty of digging turf upon another man's land.

Of Estovers. The word estovers from *estoffer*, to furnish, is a liberty of taking necessary wood, for the use or furniture of a house or farm from off another's estate. It is synonomous with the Saxon word *bote*. These botes or estovers must be reasonable ones, and the tenant or lessee may take them without waiting for special permission, unless restrained by special covenant to the contrary.

4. Ways. This is the right of going over another man's ground. This does not refer to the king's highways, nor of common ways, leading from a village into a field, but of private ways, in which a particular man may have a right, though another be the owner of the soil. This may be granted by a special permission, as when the owner of land grants to another the liberty of passing over his grounds to go to church, to market, or the like, in which case the right is given to the grantee alone, and dies with him. In such grant, there can be no assignment, nor has the grantee the right to have any person accompany him.

By Prescription. A way may be also by prescription, as if the inhabitants of a hamlet, or the owners and occupiers of a farm, have immemorially used to cross a certain ground for a particular purpose; for this usage presupposes an original grant.

By Act and Operation of Law. If a man grant a piece of land in the middle of his field, he at the same time tacitly and impliedly gives the grantee a way to come out of it, and the latter may cross the land for that purpose without trespass. For when the law gives a thing to a man, it grants impliedly whatever is necessary for enjoying the same.

5. Offices. These are a right to exercise a public or private employment, and to take the fees and emoluments thereto belonging. They are incorporeal hereditaments, whether public, as those of magistrates, or private, as of bailiffs or receivers. 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. No judicial office can be granted in reversion, but ministerial offices may, for they can be executed by deputy. By statute, public offices cannot be sold.

6. **Dignities.** These bear a near relation to offices. They are a species of incorporeal hereditament, wherein a man may have a property or estate.

7. **Franchises.** Franchise and liberty are synonomous terms.

Defined. This is a royal privilege or branch of the king's prerogative, existing in the hands of a subject. Franchises usually arise from the king's grant, or in some cases may be held by prescription, which presupposes a grant. They are of various kinds, and may be vested in either natural persons or bodies politic, in one man or in many, but the same identical franchise that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant.

Examples. 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 to do other corporate acts. And each member is also said to have a franchise. Other franchises are to hold a court leet, to have a manor, to have wrecks, estrays, treasure trove, forfeitures or deodands, to have a court of one's own, to have the cognizance of pleas, to have a bailiwick, a fair, or a market, to take tolls, or to possess a forest, park or fishery, endowed with privileges of royalty.

Forests. A forest is the same as a chase, and differs from a park in not being enclosed, and in not being limited to a man's own grounds. Yet it is not every enclosed field or common, which a man stocks with deer, that constitutes a park, for the king's grant or immemorial prescription is a prerequisite. Free warren is a similar franchise, erected for the preservation and custody of animals *feræ naturæ*.

Fisheries. A free fishery is the exclusive right to fish in a public river, and is a royal franchise. The making such grants, restraining the use of running water, was prohibited in the great charter of king John.

8. **Corodies.** These are a right of sustenance, or to receive certain allotments of provisions and victuals for one's mainte-

nance. In lieu of which, a pension or sum of money is sometimes substituted.

9. **Annuities.** These arise from temporal, as corodies do from spiritual persons. An annuity is 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 a certain sum per annum, without expressing out of what lands it shall issue, no land at all shall be charged with it, but it is a mere personal annuity.

10. **Rents.** The word rent or render, *reditus*, signifies a compensation or return, in the nature of an acknowledgment for the possession of some corporeal hereditament. It is defined to be a certain profit, issuing yearly out of lands and tenements corporeal.

Must be a Certain Profit. It must be a profit, yet not necessarily money, for grain and other things frequently are rendered for rent. It may also consist in services or manual labor, as to plough land, to attend the king or lord to the wars, 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.

Must Issue Yearly. It must also issue yearly, though not necessarily every successive year, for it may be reserved every second or other year, yet, as it is a recompense produced out of the profits of the lands or tenements held, it ought to be reserved yearly, because the profits annually arise. It must issue out of the thing granted, and not be part of the thing or land itself.

Must Issue out of Lands and Tenements. That is, it must issue from some inheritance, whereunto the owner or grantee of the rent may have recourse to distrain. Therefore, a rent cannot be reserved out of an advowson, a common, an office or a franchise. 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 does not affect the inheritance, and is no legal rent in contemplation of law.

Kinds of Rent. At common law, there are three kinds of rent: rent-service, rent-charge and rent-seck.

Rent Service. This is so called, because it has some corporeal service incident to it, as at least fealty to the feudal oath of fidelity. If a tenant holds his lands by fealty and ten shillings rent, he holds by rent-service. If he be in arrear for rent, at the day appointed, the lord may distrain of common right, without reserving any special power of distress, provided he has in himself the reversion or future estate of the lands and tenements, after the lease has expired.

Rent Charge. This exists, where the owner of the rent has no future interest, or reversion expectant in the land, as where a man by deed conveys his estate in *fee-simple*, with a certain rent payable thereout, and adds to the deed a clause of distress, that if the rent be in arrear, it shall be lawful to distrain for it. 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 a rent charge, because in this manner the land is charged with a distress for the payment of it.

Rent Seck. This is barren rent, *reditus siccus*, which is in effect nothing more than a rent reserved by deed, but without any clause of distress.

Other Rents. Rents of assize are certain established rents of the freeholders and copyholders of a manor, which cannot be varied. Those of the freeholders were often termed chief rents, and both kinds quit rents, because thereby the tenant was quit or free from other service. If the payments were reserved in silver, they were termed white rent; when in baser money, or in grain or labor, they were termed black-mail. Rack rent is only a rent of about the full value of the tenement. A fee-farm rent is a rent charge issuing out of an estate in fee, of at least one-fourth the value of the lands, at the time of its reservation, which was virtually a mode of letting lands to farm in *fee-simple*.

Remedy by Distress. The same remedy by distress exists for recovering rents, also for rents-seck, rents of assize and chief rents, as in the case of rents reserved upon lease.

Place and Time of Payment. Rent is regularly due and payable upon the land from whence it issues, if no particular place is specified in the reservation, but in case of the king, it is payable to his officers at the exchequer, or to his receiver in the country. It is demandable before sunset of the day whereon it is reserved, though strictly not absolutely due until midnight.

CHAPTER IV.—THE FEUDAL SYSTEM.

Importance of Its Study. It is impossible to accurately understand the constitution of the kingdom, or the laws which regulate its landed property, without some acquaintance with the nature and doctrine of feuds or the feudal law, a system universally received throughout Europe twelve centuries ago. We must remember, that the obsolete doctrines of our laws are frequently the foundation for much of that which remains, and to properly understand many rules of modern law, we must have recourse to the ancient.

Origin of Feuds. The constitution of feuds had its original from the military policy of the northern or Celtic nations, the Goths, Huns, Franks, Vandals and Lombards, who poured into all the regions of Europe at the decline of the Roman empire. It continued in their respective colonies, as a means to secure their new acquisitions, and to that end large districts of land were allotted by the general to the superior officers, and by them dealt out in smaller parcels to inferior officers and deserving soldiers.

Oath of Fealty. These allotments were called *feoda*, feuds, fiefs or fees. The word fee signifies a conditional stipend or reward, and the condition annexed to it was, that the possessor should serve faithfully, both at home and in war, him who gave it, for which purpose he took the oath of fealty. If he failed to perform the service, or deserted his lord in battle, the lands were to revert to the grantor.

For Mutual Defence. Allotments thus acquired, springing from the same right of conquest, could not subsist independently of each other, wherefore all givers as well as receivers were mutually bound to defend each other's possessions. To effect this, government, and for that purpose subordination, was necessary. Every receiver of lands, or feudatory, was bound when called on by his immediate lord of the fee, to defend him. Such lord was subordinate to some superior lord, and so upwards to the general or prince himself. Thus the feudal connection was established, a proper military subjection introduced, and an army of feudatories enlisted, prepared not only to defend each man's own property, but to defend the whole of this their newly acquired country.

Introduction of Feuds. The universality and early use of this feudal plan among those nations in Europe, whom the Romans called barbarous, appears from the records relating to the Cimbri and Teutones, at their first irruption into Italy about a century before the Christian era. Seven hundred years later, in invasions of other nations, the same constitution was more fully displayed in the distribution and protection of newly acquired territories.

Adoption by Older Nations. The wisdom of these constitutions, introduced by the northern conquerors in their new dominions, added to their personal valor, alarmed the princes of countries, which had formerly been Roman provinces, but had revolted, or been deserted by their old masters in the general wreck of the empire. Wherefore most of them adopted a similar policy. Prior thereto, the possessions of their subjects were allodial, that is, wholly independent of any superior, but now they parcelled out their territories anew, under the like feudal obligations of military fealty. Thus in a few years, the feudal constitution or doctrine of tenure extended itself over the entire country.

Civil Law Ignored. This alteration of the doctrine of landed property necessarily resulted in changes of customs and laws, so that the feudal laws soon drove out the Roman, which had hitherto obtained, and the civil law for centuries remained lost and forgotten.

Introduction in England. But this feudal polity, thus by degrees established over the continent of Europe, was not received in England as part of the national constitution, until the reign of William the Norman. Something similar, it is true, was introduced during the Saxon reigns, but it did not obtain universally. The Saxons were firmly settled in Britain as early as the year 600, but it was not until two centuries later, that feuds arrived at their full vigor, even on the continent.

Gifts from William I. The introduction of feudal tenures into England was not effected immediately after the conquest, which term "conquest" means acquisition, in the feudal sense. Nor by the mere arbitrary will of the conqueror, but apparently were gradually established by the Norman barons and others in such forfeited lands, as they received as a gift from the conqueror, sanctioned by the great council of the nation. The pro-

digious slaughter of the English nobility at the battle of Hastings caused numerous forfeitures.

Domesday Book. In the nineteenth year of William's reign, an invasion from Denmark was imminent, and the military constitution of the Saxons having been laid aside, and no other introduced, the kingdom was wholly defenceless, which caused the king to bring over an army of Normans and Bretons, and quarter them on the English people, who were oppressed thereby. As soon as the danger was over, the king held a large council, the immediate consequence of which was the compiling of the great survey, called the domesday book, which was finished in the next year. The principal land-holders thereupon submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person.

Willingly Adopted. The new polity therefore seems not to have been imposed by the conqueror, but freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had accepted it, for self-security. They had the recent example of France before them, which had gradually surrendered all the allodial lands to the king, who restored them to the owners as a feud, to be held by them as vassals of the crown. In France this change was gradual, while in England it was done at one time by the common consent of the nation.

The King, the Universal Lord. It thus became a necessary principle, though in reality a fiction of our English tenures, that the king is the universal lord, and original proprietor of all lands in the kingdom, and that no man can possess any part of them, but as a gift from him, to be held upon feudal services. By consenting to the introduction of feudal tenures, our ancestors probably meant no more than to put the kingdom in a state of defence, by establishing a military system, and by maintaining the king's title and territories, with equal fealty, as if they had received the lands as feudatories. The Norman interpreters, however, construed the act differently, and introduced the rigorous doctrines prevalent in Normandy, with such hardships and services, as if the English people owed all they possessed to the bounty of their sovereign lord.

The Norman Rule. Our ancestors, who were not beneficiaries, deemed these arbitrary conclusions as grievous impositions; hence Henry I found it expedient to promise the restoration of

the Saxon laws of king Edward the confessor. Accordingly he redressed the greater grievances, which had been imposed by William I and William Rufus, but still reserved the fiction of feudal tenure for military purposes. But this charter was gradually abrogated, and the former grievances revived by himself and succeeding princes, till in the reign of king John, they became so intolerable, that his barons rose in arms against him. This at length produced the famous great charter at Runingmead, which with some alterations, was confirmed by his son, Henry III.

Magna Carta. Although the immunities granted in the great charter were much less than those which Henry I had yielded, yet they were justly esteemed a vast acquisition to English liberty. The immunities bestowed later, under king Charles, were even greater, than those contained in the charter of John. The liberties of Englishmen are not mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness, but a restoration of that ancient constitution, of which our ancestors had been defrauded by the finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.

Prefatory Remarks. Having given the rise and progress of feuds, we will next consider their nature, doctrine and principal laws, wherein we trace the ground work of many parts of our public policy, and the origin of tenures now either obsolete or remaining in force.

Lord and Vassals. The fundamental maxim of all feudal tenure is this: that all lands were originally granted by the sovereign, and therefore holden, directly or indirectly, of the crown. The grantor was called the proprietor or lord, and retained the dominion or ultimate property of the feud or fee. The grantee, who had the use or possession, according to the terms of the grant, was styled the feudatory or vassal, which was another name for the tenant or holder of the lands.

Open Investiture and Grant. The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi*, which are still used in our deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession, in presence of the other vassals, which was important, when the art of writing was but little known. The evidence of the ownership of property was thus

reposed in the memory of neighbors, who in case of a disputed title, were afterwards called upon to decide the difference, their testimony being added to the external proof presented.

Ceremony of Investiture. Besides an oath of fealty to the lord, from which sprang the oath of allegiance of later days, the vassal upon investiture, made homage usually to the lord, humbly kneeling, being ungirt and uncovered. Placing his hands between those of his lord, who sat before him, he there professed, that "he did become his man from that day forth, of life and limb and earthly honor," whereupon the lord kissed him. This ceremony was termed *homagium*, or manhood.

Service Pledged. The next consideration was the service he was bound to render, in recompense for the land. In original feuds, this was only two fold: to follow or do suit to the lord in his courts in time of peace, and in his armies or retinue, when necessity should call him to the field. The lord, in early times, was the legislator and judge over his feudatories, and therefore the vassals of the inferior lords were bound by their fealty to attend their domestic courts baron, which existed in every manor, for doing speedy justice to all the tenants, and to answer complaints against them, as also to form a jury for the trial of fellow tenants.

Duties of Barons. The barons themselves, or lords of inferior districts, were termed peers of the king's court, and were bound to attend him when summoned, to hear causes of greater consequence in the king's presence and under the direction of his grand justiciary, the peers reserving to themselves the right of appeal from those subordinate courts. The military branch of service consisted in attending the lord in the wars, in proportion to the quantity of land held.

Precarious Tenure at First. Feuds at their introduction were precarious as well as gratuitous, and held at the will of the lord, who was then the sole judge, as to whether his vassal performed his duties faithfully. Afterwards they became certain for one or more years. Among the ancient Germans, they continued only from year to year, an annual distribution of lands being made by the leaders in their general assemblies This was done, lest their thoughts should be directed from war to agriculture, and lest luxury and avarice should be encouraged, by the erection of permanent houses.

Descent of Feud to Heir. But when the general migration was nearly over, and peaceable possession of the newly acquired settlements had introduced new customs and manners, and when the fertility of the soil had encouraged the study of husbandry, a more permanent degree of prosperity was introduced, and feuds were granted for the life of the feudatory. But still feuds were not hereditary, though frequently granted by the lord to the children of the former possessor, till in process of time, it was thought hard to reject the heir, if he were capable of performing the services; but infants, women and priests, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud.

Reliefs Paid the Lord. But the heir, when admitted to the feud, generally paid a fine or acknowledgement to the lord, in horses, arms or money, for such renewal of the feud, which was termed a relief, as it raised up and re-established the inheritance. When feuds became hereditary, this relief continued on the death of the tenant, though the original foundation for it had ceased.

Lines of Succession. In time, feuds by degrees were extended beyond the life of the first vassal to his sons, or perhaps to such 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 proportions, and as they died off, their shares reverted to their lord, and did not descend to their children, or even to their brothers. But when the feud was given to a man and his heirs, in general terms, on his death, his male descendants *in infinitum* were admitted to the succession. It was a maxim in feudal succession, that none were capable of inheriting a feud, but such as were lineally descended from the first feudatory.

Primogeniture. The descent being confined to males, originally extended to all the males alike, all the sons succeeding to equal portions of the father's feud. But this being found to be inconvenient by dividing the services, honorary feuds or titles of nobility were introduced, which were not of a divisible nature, but could only be inherited by the eldest son, in imitation of which, military feuds began in most countries to descend, according to the same rule of primogeniture, to the eldest son, in exclusion of the rest.

Alienation of a Feud. The feudatory could not aliene or

dispose of his feud, nor could he exchange, mortgage or devise it, without the consent of his lord. The original conferring of the feud was based on the ability of the feudatory to serve in war. If he were lacking in ability, he should not be at liberty to transfer this gift to one less able. And as the feudal obligation was reciprocal, the feudatory was 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 transfer his feud without consent of his lord.

Sub-Tenants. All feuds were originally of a military nature, and in the hands of military persons, though the feudatories being often incapacitated from cultivating their lands, soon found it necessary to commit part of them to inferior tenants who made return therefor in service, cattle, grain or money, thus giving time to the feudatories to attend to their military duties.

Inferior Feudatories. This return or *reditus* was the origin of rents, and by these means the feudal polity was greatly extended; these inferior feudatories being under similar obligations of fealty; to do suit at court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate lords. But at the same time it demolished the ancient simplicity of feuds.

Derivative and Improper Feuds. Feuds began to be bought and sold, and deviations were made from the old rules of tenure and succession, which were held no longer sacred, when the feuds themselves ceased to be purely military. Hence these tenures began to be divided into proper and improper feuds, the latter being the derivative feuds; such, for instance, as were sold to a feudatory for a price; such as were held upon base or less honorable 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. If, however, the difference was not expressed in the creation, such new-created feuds followed the nature of the original and proper feud.

Decay of the Feudal System. As soon as the feudal system became considered as a civil establishment, rather than a military plan, the ingenuity of the age was taxed to draw the most refined and oppressive consequences from what originally

was a plan of simplicity and liberty, equally beneficial to lord and tenant, and calculated for their mutual protection. From this one foundation, different superstructures have been raised in different countries of Europe.

CHAPTER V.—ANCIENT ENGLISH TENURES.

Derived from the King. Almost all the real property in England is, by the policy of its laws, supposed to be granted by, dependent upon, and holden of some superior lord, by and in consideration of certain services to be rendered the lord by the tenant or possessor. The thing held is called a tenement, the possessors tenants, and the manner of their possession a tenure. All the land is supposed to be holden originally from the king, who is styled the lord paramount, or above all. Such tenants as took directly from the king, when they granted out portions of their lands to inferior persons, became also lords, with respect to such persons, though still tenants as respects the king, and hence they partook of a middle nature, and were termed mesne or middle lords.

Extent of Feuds. The king was lord paramount; his grantee was a mesne lord, and the person to whom he transferred a part of the lands was the tenant *paravail*, or lowest tenant, being the one, who was supposed to make avail or profit of the land. No land now remains, which is properly allodial, that is, according to the feudists, land not holden of any superior. The lands of England hence are plainly feuds, or partake very strongly of the feudal nature.

Tenants in Capite. Tenants who held directly from the king, were called his tenants *in capite*, or in chief, which was the most honorable species of tenure, but at the same time subjected the tenant to more burdensome services, than did inferior tenures.

Division of Tenures. There seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced, the *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 and Base Services. Free services were such as were not unbecoming a soldier or a freeman to perform, as to serve under the lord in the wars, to pay a sum of money or the like. Base services were such as were only fit for peasants or persons of a servile rank, such as to plough the lord's land, or other lowly employment.

Certain and Uncertain Services. The certain services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence, as to pay a stated annual rent, or to plough a field in a given time. The uncertain services depended upon unknown contingencies, as to do military duty, or pay an assessment in lieu of it, when called upon, or to do whatever the lord should command.

Four Lay Tenures. Four kinds of lay tenure subsisted in England until the middle of the seventeenth century, three of which still exist. They are: (1) Knight service. (2) Socage. (3) Pure villenage. (4) Privileged villenage.

Tenements. Tenements are of two kinds: frank-tenement and villenage. Of frank-tenements, some are held freely in consideration of homage and knight service, others in free socage, with the service of fealty only. Of villenage, some are pure and others privileged. He that holds in pure villenage shall do whatever is commanded him to do, and hence always be bound to an uncertain service. The other kind of villenage is villein socage, and those villeins do villein service, but such as is certain and determined.

Resumé of Feudal Service.

1. *Where the service was free but uncertain, as military service with homage, it was termed tenure in chivalry, or by knight service.*

2. *Where the service was both free and certain, as by fealty only, or by rent and fealty, that tenure was called free socage.*

3. *Where the service was base in its nature, and uncertain as to time and quantity, the tenure was absolute or pure villenage.*

4. *Where the service was base in its nature, but reduced to a certainty, this was termed privileged villenage or villein socage.*

I. KNIGHT SERVICE.

Defined. This was the most honorable species of tenure. In Latin, it was termed *servitium militare*, and in law-French, chivalry or *service de chivaler*. This differed in very few points from a pure feud, being entirely military. A determinate quantity of land was necessary, called a knight's fee, *feodum militare*. He who held by knight service was bound to attend his lord to the wars for forty days in every year, if called on, which attendance was his *reditus* or return, his rent or service for the land. If he held only half a knight's fee, twenty days service was all that could be required of him, and so in proportion.

Livery of Seisin. The tenure of knight's service was granted by words of pure donation, *dedi et concessi*, was transferred by investiture, or delivering corporal possession of the land, usually called *livery of seisin*, and was perfected by homage and fealty.

Incidents to Knight Service. It drew after it seven consequences, as inseparably incident thereto: *Aids, Relief, Primer Seisin, Wardships, Marriage of Ward, Fines for Alienation, Escheat.*

1. **Aids.** These were originally mere benevolences granted by the tenant to the lord, in times of difficulty and distress, but afterwards they came to be considered as a right, and not a matter of discretion. These aids were three in number:

(1) To ransom the lord's person, if taken prisoner. Neglect in this particular, when it was within the vassal's power, was an absolute forfeiture of his estate.

(2) To make the lord's eldest son a knight, which was formerly attended with great ceremony and expense. This aid could not be demanded, until he was fifteen years of age, or capable of bearing arms.

(3) To give the lord's eldest daughter a suitable marriage portion, for daughters' portions were in those days extremely slender, inasmuch as few lords could save much out of their incomes, nor could they acquire money, being wholly conversant with arms, nor were they able to encumber their estates, by the nature of their tenures. Even the monasteries contributed to the knighting of their founder's male heir, and the marriage of his female descendants. The lord and vassal of the feudal law bore a resemblance in this respect to the patron and client

of the Roman republic, as three aids were raised by the client: to marry his patron's daughter, to pay his debts, and to redeem his person from captivity.

Additional Aids Demanded. Beside these ancient feudal aids, the tyranny of lords by degrees exacted more, as aids to pay the lord's debts, in imitation of the Romans; and aids to enable him to pay reliefs to his superior lord, from which last, the king's tenants *in capite* were of course exempted. To check this abuse, the *magna carta* ordained, that no aids be taken by the king without consent of parliament, nor by inferior lords, except the three ancient ones above mentioned. But this provision was omitted in the charter of Henry III, and not re-enacted until the reign of Edward I, which fixed the aids of inferior lords at twenty shillings, the estimated twentieth part of every knight's fee, for making the eldest son a knight or marrying the eldest daughter.

2. Relief. This was incident to every feudal tenure, by way of fine or composition with the lord, for taking up the estate at the death of the last tenant. Feuds were life estates when reliefs were first required, but they continued, even after feuds became hereditary. They were deemed the greatest grievances of tenure, especially at first, when they were at the will of the lord, so that if he demanded an exorbitant relief, it was practically to disinherit the heir. William I directed that the relief should be a certain number of arms and habiliments of war, but under Henry II, a composition of 100 shillings for every knight's fee was fixed, and the relief was only payable, if the heir at the death of his ancestor had reached the age of twenty-one.

3. Primer Seisin. The burden was only incident to the king's tenants *in capite*, and not to those who held of inferior lords. It was a right the king had, when his tenant *in capite* died seised of a knight's fee, to receive of his heir, if of age, one entire year's profits of the lands, if in immediate possession, or half a year's profits, if the lands were in reversion, expectant on an estate for life. But by the ancient law of feuds, immediately upon a vassal's death, the superior was entitled to take possession of the land, as protection against intruders, till the heir appeared to claim it and receive investiture, during which interval the lord was entitled to the profits, and unless the heir claimed within a year and a day, it was by strict law a forfeiture.

For a time the popes, as feudal lords of the church, claimed in like manner from the English clergy the first year's profits of each benefice, by way of first-fruits.

4. Wardships. If the heir was under the age of twenty-one, he was not liable for the above contribution, but the lord, as guardian in chivalry, was entitled to the wardship of such male heir, and also of the female, if she were under fourteen. 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. For the law supposed the heir-male unable to perform knight service under twenty-one, but the female was deemed capable of marriage at the age of fourteen, and the lord once having her in ward might retain her as such, until she arrived at sixteen.

Reasons in Support of Wardships. This wardship, as far as relates to lands, though it could not be part of the law of feuds, so long as they were arbitrary, temporary or for life only, yet when they became hereditary and hence often descended to infants, who could perform no military service, seem upon feudal principles, not to have been unreasonable. The custody of the feud was retained by the lord, that he might out of the profits thereof provide a fit person to supply the infant's services, until he could perform them himself. The feud being originally a stipend or reward for such service, the lord might properly withhold the stipend, so long as the service was suspended. Under Henry I, for a few years this custody was taken from the lord, and given to the widow or next of kin.

Custody of the Minor. The wardship of the body was in consequence of the wardship of the land, for he, who enjoyed the infant's estate, was the best person to educate and maintain him during his infancy, and the lord was a suitable party to qualify him for those services, which he subsequently would be called upon to perform.

Inquisition and Livery. When the male heir reached twenty-one, or the heir-female 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 of half a year's profit of the land, though *magna carta* prohibited this. However, they were excused all reliefs, and, if king's tenants, also all primer seisins. To ascertain the profit

that arose to the crown by these first fruits of tenure, and to grant the heir his living, the justices formerly made inquisition before a jury, termed an *inquisitio post mortem*, to inquire into the facts and ascertain the value thereof. This proceeding at length became an intolerable grievance, as by color of false inquisitions, many persons were compelled to sue out livery from the crown, who were by no means tenants. Afterwards a court of wards and liveries was erected, for conducting the same inquiries in a more legal manner.

Order of Knighthood. When the heir became of full age, provided he held a knight's fee *in capite* under the crown, he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine to the king. In those heroic times, no one was qualified for deeds of arms and chivalry, who had not received this solemn order. The ancient Germans, says Tacitus, in order to qualify their young men to bear arms, presented them in a full assembly with a shield and lance, which ceremony probably was the original of the feudal knighthood.

When Abolished. This prerogative of compelling the king's vassals to be knighted, or to pay a fine, was recognized in parliament, and was resorted to as an expedient by English monarchs to raise money, particularly by Edward VI and queen Elizabeth, but the people murmured against it, when exerted by Charles I, who seemed unable to distinguish between the arbitrary stretch and the legal exertion of prerogative. It was abolished during his reign.

5. Control of Ward's Marriage. Before a ward became of age, there was another mark of authority the guardian could exercise. This was the right of marriage, which, in its feudal sense, signified the power the lord or guardian in chivalry had of disposing of his infant ward in matrimony. The guardian could tender the ward a suitable match, without disparagement or inequality; which if the infant refused, he or she forfeited the value of the marriage to their guardian, that is, so much as a jury would assess, or any one would *bona fide* give the guardian for such an alliance, and if the infant married without the guardian's consent, he or she forfeited double the value.

Selling the Ward in Marriage. This was one of the greatest hardships of our ancient tenures. There were good reasons, why the lord should have the restraint and control of

the ward's marriage, especially of his female ward, because of her tender years, and of the danger of such female ward's intermarrying with the lord's enemy, but no reason why the lord should have the sale or value of the marriage. This custom was introduced into England with the rest of the Norman feuds. By the great charter, it was provided, that heirs should be married without disparagement, the next of kin having previous notice of the contract. But these provisions on behalf of the relations were omitted in the charter of Henry III. This right of selling the ward in marriage was expressly declared by the statute of Merton.

6. Fines for Alienation. Another incident of tenure by knight service was that of fines due to the lord for every alienation, whenever the tenant transferred land. This depended on the nature of the feudal connection, a feudatory not being allowed to transfer his lord's gift to another, and substitute a new tenant, without the consent of his lord, nor could the lord alienate his seignory without his tenant's consent, which consent was called an *attornment*. This restraint upon the lord soon wore away, while that upon the tenants continued longer. When everything in time came to be bought and sold, the lords would not grant a license to their tenants to aliene, without a fine being paid. These fines were only exacted from the king's tenants *in capite*. By statute of Edward III, one-third of the yearly value was to be paid in licenses of alienation.

7. Escheat. This 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. It occurs, where he died without heirs of his blood, or if his blood was corrupted by commission of treason or felony, which abolished every inheritable quality. In such cases the land escheated, or reverted to the lord of the fee.

Resumé of Knight-Service. These were the principal qualities, fruits and consequences of tenure by knight-service; a tenure by which most of the lands in the kingdom were held till the middle of the seventeenth century, created for a military purpose, *viz.*, for defence of the realm, by the king's principal subjects.

Other Knight-Services. There were some other species of knight-service, improperly so called, as the tenure by grand serjeanty, whereby the tenant was bound, instead of serving the

king generally in the wars, to do some special honorary service to the king in person, as to carry his banner or sword, or to be his butler or other officer at his coronation. Tenure by *cornage* was to wind a horn, when the Scotch or other enemies entered ths land, in order to warn the king's subjects. These services of chivalry and grand serjeanty were all personal, and uncertain as to their quality or duration.

Compounding for Knight-Service. Escuage. But the personal attendance in knight-service growing troublesome in many respects, the tenant found means of compounding for it, by sending another in his stead, and in process of time making a pecuniary satisfaction to the lord in lieu of it. This satisfaction at last came to be levied by assessments, at so much for every knight's fee; hence this kind of tenure was called in Latin *scutagium*, *scutum* being a denomination for money, or *escuage* in Norman French, being a pecuniary instead of a military service. This first took place in the reign of Henry II, and became universal. In this reign, these assessments were made arbitrarily and at the king's pleasure. King John was compelled to agree, that no *scutage* should be imposed without consent of parliament. If the *escuage* had been a settled, invariable sum, payable at certain times, it would have been but a mere pecuniary rent, and the tenure, instead of knight service, would have been *socage*.

Result of Escuage. By the degeneration of personal military duty into *escuage* or pecuniary assessments, all the advantages of the feudal constitution were destroyed, and nothing but the hardships remained.

Burdens of the Feudal System. Instead of forming a national militia composed of gentlemen, bound by their interests, honor and oaths to defend their king and country, the system of tenures became merely a means of raising money to pay mercenaries. Meanwhile the families of our nobility and gentry groaned under burdens imposed on them by the subtlety of the Norman lawyers. For beside the scutages, to which they were liable in defect of personal attendance, they might be called upon for aids by the king or lord paramount, when his eldest son was to be knighted, or his eldest daughter to be married. The heir, if of full age, on the death of his ancestor, was plundered of his first emoluments by way of relief or primer seisin, and if under age, of his entire estate during his infancy. He was then to pay half

a year's profits, as a fine for suing out his livery, and and also the price or value of his marriage, if he refused such wife as his lord and guardian had bartered for, and imposed upon him, or twice that value, if he married another woman. Add to this the expensive honor of knighthood, and when with fortune shattered he was obliged to sell what was left of his patrimony, he was compelled to pay an exorbitant fine for the license of alienation.

Abolishment of Tenures. Some temporary grievances were assuaged by successive acts of parliament, till at length James I, for an equivalent, consented to abolish them all, which was not carried into practical execution, until the reign of Charles II, when at length the military tenures, with their heavy appendages, were destroyed at one blow. By statute, all sorts of tenures, held of the king or others, were turned into free and common socage, save only tenures in frankalmoign, copyhold and the honorary services of grand serjeantry. This statute was a greater acquisition to the civil property of the kingdom than *magna carta* itself, since that only pruned the luxuriances that grew out of military tenures, but the statute of king Charles extirpated both root and branches.

CHAPTER VI.—MODERN ENGLISH TENURES.

Reduction of Tenures. Although in the reign of Charles II, the oppressive or military part of the feudal constitution itself was happily annulled, yet no new constitution was introduced, since by the statute certain tenures above stated were reserved, while the other tenures were reduced to one general species of tenure, called free and common socage. This being sprung from the same feudal original as the rest, necessitates the contemplation of the ancient system. The military tenure, or knight service, consisted of services deemed free and honorable, but uncertain as to time. The second species of tenure or free socage consisted of similar free services, but such as were reduced to an absolute certainfy. And this tenure now exists, having absorbed the other tenures.

II. SOCAGE.

Defined. In its general signification, socage denotes a tenure by any certain and determinate service. It differs thus from knight service or chivalry, where the render was precarious and uncertain. It is defined to be, where the tenant holds his tenement of the lord by any certain service, in lieu of all other services, so that they be not services of chivalry or knight service; hence whatsoever is not tenure in chivalry is tenure in socage. The service must be certain, as to hold by fealty and a fixed rent, or by homage, fealty and a fixed rent, or by homage and fealty without rent, or by fealty and certain corporal services, as by ploughing the lord's land for a certain time, or by fealty alone, without other service, for all these are tenures in socage.

Division. Socage is of two sorts: free socage, where the services are not only certain but honorable, and villein socage, where the services, though certain, are of a baser nature.

Derivation of Name. Tenants in free socage held by the former tenure, and were termed *liberi sokemanni*. The Saxon word *soc* signifies liberty or privilege, and socage, in Latin *socagium*, is a free or privileged tenure. Some lawyers derive the term from *soca*, an old Latin word, meaning a plough, as that in ancient times the socage tenure consisted in nothing else but services in husbandry, which the tenant was bound to perform for his lord. In process of time, this service was changed into an annual rent, by consent of all parties. Hence they retained the name, socage or plough service. Littleton however tells us, that to hold by fealty only, without paying any rent, is tenure in socage, for here is plainly no commutation for plough service.

Socage, a Preferable Tenure. Even services, confessedly military, the instant they were reduced to a certainty, changed their name and nature, and were called socage. It was the certainty therefore that denominated it a socage tenure. It was not left to the arbitrary calls of the lord, as were the tenures of chivalry. Britton describes lands held in socage tenure, as those, whereof the nature of the fee is changed by feoffment out of chivalry for certain yearly services, and in respect whereof neither homage, ward, marriage nor relief can be demanded. Which leads us to inquire, that if socage tenures were of such base and servile original, as the derivation from the word plough or *soca* would indicate, it is hard to account for the great immu-

nities the tenants of such tenures always enjoyed, so highly superior to those of tenants by chivalry. In the reigns of Edward I and of Charles II, it was deemed of great value to tenants, to reduce the tenure by knight service to tenure by socage.

Socage Tenures, the Relics of Liberty. It is probable that socage tenures were the relics of Saxon liberty, retained by such persons, as had neither forfeited them to the king, nor been obliged to exchange their tenure for the more honorable but more burthensome tenure of knight service. This is specially remarkable in the tenure called gavelkind, which prevails in Kent, a species of socage tenure, preserved from the Norman innovations. Those who thus preserved their liberties were said to hold in free and common socage.

Other Methods of Holding Free Lands. As the distinguishing mark of this species of tenure is the having its renders or services ascertained, it will include all other methods of holding free lands by certain rents and duties, and in particular, petit serjeanty, tenure in burgage, and gavelkind.

Petit Serjeanty. By statute of Charles II, grand serjeanty was not totally abolished, but only the slavish appendages attached to it, while the honorary services, as officiating at a coronation, are still retained. Petit serjeanty resembles it, for as grand serjeanty is a personal service, so the other is a rent or render, both tending to a purpose relating to the king's person. Petit serjeanty consists in holding lands of the king, by the service of rendering to him annually some small implement of war. This is but socage in effect, says Littleton, for it is no personal service, but a certain rent, *liberum et commune socagium*. *Magna carta* enacted, that no wardship of the lands or body should be claimed by the king, in virtue of a tenure by petit serjeanty.

Tenure in Burgage. This is where the king or a subject is lord of an ancient borough, in which the tenements are held by a rent certain. A borough is distinguished from other towns, by the right of sending members to parliament. Burgage tenure is where houses, or lands, which were formerly the site of houses, in an ancient borough, are held of some lord in common socage, by a certain established rent. They stood the shock of Norman encroachments, mainly on account of their insignificance, as a hundred of them together would hardly have aggregated a knight's fee. Besides the owners of them, being chiefly artificers,

and persons engaged in trade, could not with any propriety, hold a tenure in chivalry. Here also is an instance of a tenure in socage, and yet not held by plough service.

Borough English. The free socage, in which these tenements are held, is a remnant of Saxon liberty, which may explain the great variety of customs, affecting many of these tenements, so held in ancient burgage, the principal and most remarkable of which is that called "Borough English," *viz.*, that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father. Littleton assigns as a reason for this, that the youngest son, by reason of his tender age, is not so capable as the rest to help himself. Other authors have assigned a most singular reason for this custom; that the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding night, and hence it was more probable, that the youngest son was the offspring of the tenant. This custom did prevail in Scotland, but it is not known that it extended to England.

Custom of the Tartars. Among the Tartars, this custom of descent to the youngest son prevails. That nation is composed of shepherds and herdsmen, and the elder sons migrate from their father with a certain allotment of cattle, and seek a new habitation. The youngest son, remaining latest with his father, is naturally the heir of his house, the rest being already provided for. So also among many other northern nations. This custom may be the remnant of the pastoral state of our British and German ancestors, as described by Caesar and Tacitus.

Special Customs. Other special customs exist in different burgage tenures, as that in some, the wife shall be endowed in all her husband's tenements, and not of the third part only, as at the common law, and a man might dispose of his tenements by will, which was not allowed after the conquest, until the reign of Henry VIII, though in the Saxon times, it was allowable.

Gavelkind. The successful struggle of the men of Kent to retain a portion of their ancient liberties resulted in their maintaining the custom of gavelkind, the properties of which tenure are:

(1) The tenant is of age at fifteen, sufficient to aliene his estate by feoffment.

(2) The estate does not escheat in the case of attainder and execution for felony, the maxim being, "the father to the bough, the son to the plough."

(3) In most places, the tenant always had a power to will.

(4) The lands descend to all the sons together, as was anciently the most usual course of descent throughout England.

A Species of Socage Tenure. Yet gavelkind was only a species of socage tenure, modified by the custom of the country, the lands being holden by suit of court and fealty, which is a service in its nature certain.

Socage Tenure among the Saxons. Tenure in free socage partakes very strongly of the feudal nature. Feuds were not unknown among the Saxons, though they did not form part of their military policy. Socage tenure existed in much the same state before the conquest as afterwards. By successive charters of enfranchisement granted to the tenants, the number and value of socage tenures became very great.

Socage and Chivalry Compared. The tokens of their feudal original appear, from a comparison of the incidents and consequences of socage tenure with those of tenure in chivalry:

1. How Land Held. Both were held of superior lords; one of the king, either immediately, or as lord paramount, and in the latter case of a subject or mesne lord between the king and his tenant.

2. Subject to Rent. Both were subject to the feudal return, rent or some service, based on an original grant from the lord to his tenant. In the military tenure or feud, this was from its nature uncertain; while in socage, which was a feud of an improper kind, it was certain, fixed and determinate, though perhaps nothing more than bare fealty.

3. Oath of Fealty. Both from their constitution were subject to the oath of fealty, which usually drew after it suit to the lord's court. And this oath, every lord, of whom tenements are held, should call on his tenants to take in his court baron; otherwise it may grow out of memory, whether the land be held of the lord or not, and so he may lose his seignory, and the profits which may accrue to him from escheats or like contingencies.

4. Aids. The tenure in socage was subject to aids for knighting the son and marrying the eldest daughter. These aids originally were mere benevolences, though afterwards claimed as a matter of right, but were all abolished under Charles II.

5. Reliefs. Relief is due upon socage tenure, as well as

upon tenure in chivalry, but the manner of taking it differed. The relief in 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. Reliefs in knight service were only payable, if the heir, at the death of his ancestor, was of full age, but in socage they were due, even if the heir was under age, because the lord had no wardship over him.

6. Primer Seisin. Primer seisin was incident to the king's socage tenants, as well as to those by knight service. But tenancy *in capite*, as well as primer seisin, were abolished by the statute.

7. Wardships. Wardship is also incident to tenure in socage, but of a nature different from that incident to knight service. For if the inheritance descend to an infant under fourteen, the wardship does not belong to the lord of the fee, because in this tenure, no military or other personal service being required, there was no occasion for the lord to take the profits, in order to provide a substitute for his infant tenant. But his nearest relative, to whom the inheritance cannot descend, shall be his guardian in socage, and have the custody of his land and body, until the ward arrive at the age of fourteen.

Guardian. At fourteen, this wardship in socage ceases, and the heir may then 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. It is true that young heirs, being left at such tender age to choose their own guardians till twenty-one, might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage tenures, the statute of Charles II enacted, that a father might by will appoint a guardian, till his child should attain the age of twenty-one. If no such appointment be made, the court of chancery will frequently interpose and name a guardian.

8. Marriage. In socage tenure, marriage was not any perquisite 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. The law in favor of infants is always jealous of guardians, and made them account in this case, not only for what they did,

but also for what they might receive on the infant's behalf, lest by collusion the guardian should have received the value, and not accounted therefor. But the statute having destroyed all values of marriage, this doctrine has ceased with them. At fourteen years of age, the ward might have disposed of himself in marriage, without consent of his guardian, till the act preventing clandestine marriages. The doctrines of wardship and marriage in socage tenure, as thus shown, were opposed to those in knight service.

9. Fines for Alienation. These were probably due for lands holden of the king *in capite* by socage tenure, as well as in tenure by knight service, but now all fines by alienation are abolished.

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

Merger of These Tenures. Under these two species of tenures, almost all the free lands of the kingdom were held until the restoration in 1660, when the former were abolished and sunk into the latter, so that the lands of both sorts are now held by one universal tenure of free and common socage.

III. PURE VILLENAGE.

A Division of Tenures. Villenage is another grand division of tenure, as distinguished from *liberum tenementum*, or frank tenure. It is subdivided into pure and privileged villenage. From the tenure of pure villenage have sprung our present copyhold tenures, or tenure by copy of court roll, at the will of the lord, in order to obtain a clear idea of which, it is requisite to show the nature of manors.

Manors. These are as ancient as the Saxon constitution, just as was the case with feuds. They differed in some immaterial circumstances from those that now exist. A manor, *manerium, a manendo*, because the usual residence of the owner, was a district of ground held by lords, who kept in their own hands as much land, as was necessary for the use of their families, which were called demesne lands, being occupied by the lord, or *dominus manerii*, and his servants.

Tenemental Lands. The other, or tenemental lands, they distributed among their tenants, which lands from the different

modes of tenure, were distinguished by the names of book-land and folk-land.

Book-land. Book-land or charter-land was held by deed, under certain rents and free services, and in effect differed nothing from the free socage lands, and from hence have arisen most of the freehold tenants, who have particular manors, and owe suit and service for the same.

Folk-land. Folk-land was held by no written assurance, but distributed among the common folk, at the pleasure of the lord, and resumed at his discretion, being land held in villenage.

Waste Lands. The residue of the manor, being uncultivated, was termed the lord's waste, and served for public roads, and for common of pasture to the lord and his tenants.

Court-baron. Manors were formerly called baronies, as they are still lordships, and each lord or baron could hold a domestic court, called the court-baron, for redressing nuisances and misdemeanors within the manor, and for settling disputes of property among the tenants. Two tenants at least were necessary for a jury, in default of which number, the manor was lost.

Results of Subinfeudation. In early times, the king's greater barons, who held a large extent of territory under the crown, granted out smaller manors to inferior persons, to be holden of themselves. The superior lord is called the lord paramount over such manors, and his seignory is frequently called an honor and not a manor. The inferior lords granted to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum*. The superior lords, by this process of subinfeudation, lost all their feudal profits of wardships, marriages and escheats, which fell into the hands of these middle or mesne lords, who were the immediate superiors of the terre-tenants, who occupied the land.

Quia Emptores Statute. This occasioned a provision in the amended charter of Henry III, that no man should either give or sell his land, without reserving sufficient to answer the demand of his lord, and by statute of *quia emptores* of Edward I, that in all feoffments or sales of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. Also by later statute, no tenant *in capite* since the accession of Edward I, and no ten-

ant of a common lord since the statute of *quia emptores*, could create any new tenants to hold of himself.

Folk-land. With regard to the folk-land or estates held in villenage, this was a species of tenure, neither strictly feudal, Norman nor Saxon, but compounded of them all. Under the Saxon government, the holders were people in a condition of servitude, employed in servile occupations, and belonging like cattle to the lord of the soil. They held the folk-land, from which they were removable at the lord's pleasure. On the arrival of the Normans, it was probable they admitted these wretched persons to the oath of fealty, thus raising them to an estate superior to slavery, but inferior to every other condition.

Origin of Word "Villenage." This they called villenage, and the tenants villeins, either from the word *vilis*, or else as Coke asserts from a villa, because they lived chiefly in villages, and were employed in rustic works of a sordid kind, resembling the Spartan helots, to whom alone the culture of the lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honorable employment.

Baseness of Villenage. These villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land, or villeins in gross, or at large, that is annexed to the person of the lord, and transferable by deed from one person to another. They could not leave their lord without his permission, but if they ran away or were purloined, could be recovered by action, like beasts or chattels. They held indeed some small portions of land by way of sustaining themselves, but it was at the mere will of the lord, who might dispossess them at his option. They held it upon villein services of the meanest kind, which services were not only base, but uncertain as to time and quantity. Their condition was like that of the boors in Denmark or the traals in Sweden, and apparently were monuments of Danish tyranny.

Property of a Villein. A villein could acquire no property in lands or goods, but if he purchased either, the lord might seize them to his own use, unless the villein had previously disposed of them.

Marriage of a Villein. In many places a fine was payable to the lord, if the villein presumed to marry his daughter to any one, without leave of 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, whence they were called *nativi*, which gave rise to the female appellation of a villein, who was called a *neife*. In case of a marriage between a freeman and a *neife*, or a villein and a freewoman, the issue followed the condition of the father, contrary to the maxim of the civil law, that *partus sequitur ventrem*. But no bastard could be born a villein, because he is *nullus filius*, and as he can gain nothing by inheritance, he should lose nothing by it.

Personal Injuries. The law, however, protected the person of the villein, as one of the king's subjects, against atrocious injuries of the lord, for he might not kill or maim his villein, though he might beat him, since the villein had no action at law against his lord in such case. A *neife* had also an appeal of rape, if violated forcibly by the lord.

Enfranchisement. Villeins might be enfranchised by manumission, expressed or implied; express, where a deed of manumission was given; implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or for years; for this was dealing with his villein on the footing of a freeman, such ownership in a villein being totally inconsistent with his former state of bondage. So also if a lord brought an action against his villein, this enfranchised him, as the lord might have a short remedy by seizing the goods of the villein, as by such suit he placed his villein on an equality with him in law. But if the lord indicted him for felony, it was otherwise, for the lord could not inflict a capital punishment on him.

Copyhold Tenures. How Formed. Villeins, by these and other means, in process of time, gained position, and strengthened the tenure of their estates to that degree, that they came to have an interest in them, in many places as good, and in others better than their lords. The benevolence of many lords of manors permitting 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 the lord's will. Though nominally holding at the will of the lord, yet it is such a will, as

is agreeable to the customs of the manor, which customs are preserved in the rolls of the several courts-baron. And as such tenants had nothing to show for their estates but these customs and admissions entered on the court rolls, or the copies of such entries witnessed by the steward, they were called tenants by copy of court-roll, and their tenure a copyhold.

Decline of Villenage. Copyholders are in truth no other but villeins, who by a long series of encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will. This accounts for the great variety of customs in different manors, as to the descent of the estates, and the privileges belonging to the tenants. When tenure in villenage was virtually abolished, though copyholds were reserved, by the statute of Charles II, there was hardly a pure villein left in the nation. Although the persons of villeins were enfranchised by manumission and long acquiescence, their estates in strictness, remained subject to the same servile conditions and forfeitures as before, though in general, the villein services were commuted for a small rent.

Principles of Copyhold Tenure. 1. That the lands be parcel of, and situate within that manor, under which they are held. 2. That they have been demised or demisable, by copy of court-roll, immemorially. Immemorial custom is the life of all tenures by copy, hence no new copyhold can be created.

Length of the Tenure. In some manors, where the custom has been to permit the heir to succeed his 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 copyholders for life only, for the custom of the manor has in both cases so far superseded the will of the lord, that, provided the services be performed or stipulated for by fealty, the tenants can retain possession.

Incidents to a Copyhold. The appendages of a copyhold tenure, that it has in common with free tenures, are fealty, services in rent or otherwise, reliefs and escheats. The two latter belong to copyholds of inheritance, the former to those for life also. Besides these, copyholds have also heriots, wardships and fines.

Heriots. Heriots, which are a Danish custom, are a render of the best beast, or other valuable thing to the lord, on the death

of the tenant. This is a relic of villein tenure, and is incident to both species of copyhold, but wardship and fines to those of inheritance only.

Wardships. Wardship, in copyhold estates, partakes both of that in chivalry and that in socage. The lord is the legal guardian, who usually assigns some relative of the infant tenant to act in his stead, and he, like the guardian in socage, is accountable to his ward for the profits.

Fines. 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, favoring the liberty of copyholds, have made them reasonable in their extent, otherwise they might amount to a disherison of the estate. No fine therefore is allowed upon descents and alienations, as a rule, of more than two years value of the estate. The English law, favoring liberty, has removed, as far as possible, every badge of slavery; however some nominal ones may remain, by declaring, that the will of the lord must be interpreted by the custom of the manor, and where no custom has grown up to the prejudice of the lord, as in the case of arbitrary fines, the law interposes with equitable moderation, and will not suffer the lord to disinherit the tenant.

IV. PRIVILEGED VILLENAGE OR VILLEIN SOCAGE.

Nature of this Tenure. This is such as has been held of the kings of England from the date of the conquest. The tenants herein cannot aliene or transfer their tenements by grant or feoffment, any more than pure villeins can, but must surrender them to the lord, to again be granted in villenage. This tenure in ancient demesne is an exalted species of copyhold, partaking of the baseness of villenage in the nature of its services, and the freedom of socage in their certainty.

Ancient Demesne. This consists of those lands or manors, which though now perhaps granted to private subjects, were actually in the hands of the crown at the conquest, and so appear 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 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 copyholders in only a few points. Others were enfranchised by royal favor, being bound in respect of their lands to perform some of the better sort of villein services, but those determinate and certain. All which are now changed into pecuniary rents, in consideration of which, many immunities and privileges were granted 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, termed a writ of *right close;* not to pay toll or taxes, not to contribute to the knights of the shire, not to be placed on juries, and the like.

Tenants in Ancient Demesne. These tenants, though their tenure be copyhold, yet have an interest equivalent to a freehold, for though their services were of a base and villeinous original, yet the tenants were highly privileged villeins, with services fixed and determinate. They could neither be ousted at the lord's will, nor hold land against their own. No lands are ancient demesne, but lands held in socage, not in free and common socage, but in the subordinate class of villein socage. Possibly, as this socage tenure was founded upon predial services, or those of the plough, some have imagined that all socage tenures arose from the same original, and have not distinguished between free socage or socage of frank-tenure and villein socage, or socage of ancient demesne.

Differ from Common Copyholds. As a species of copyhold, these tenures are exempted from the operation of the statute of Charles II, but they differ from common copyholds in the above privileges, and they differ from freeholds, in that they cannot be conveyed by the common law conveyance of feoffment, but must pass by surrender to the lord, like copyholds, the words: "to hold according to the custom of the manor," being however substituted in lieu of "to hold at the will of the lord."

Lay Tenures. Two Species. We notice, in this examination, the mutual connection and dependence that tenures, ancient and modern, have upon each other. Whatever alterations these tenures have undergone from the Saxon era to the reign of Charles 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. But there is one other species of tenure

reserved by the statute of Charles II, which is of a spiritual nature, called the tenure in frankalmoign.

V. TENURE IN FRANKALMOIGN.

Defined. This term, derived from *libera eleemosyna* means "free alms," whereby religious corporations, aggregate or sole, hold lands of the donor, to them and their successors forever. The service they were to render for these lands was not certainly defined, but only in general to pray for the soul of the donor, and therefore they did no fealty, which is incident to all other services. This is the tenure, by which all the ancient monasteries and religious houses held their lands, and by which the parochial clergy, and many ecclesiastical and religious foundations hold them to this day, the nature of the service being, upon the reformation, altered to the doctrines of the church of England. It was an old Saxon tenure, and retained by the Normans, out of respect to religion.

Exemption from Certain Services. Tenants in frankalmoign were discharged of all other services, except the duty of repairing the highways, building castles, and repelling invasions, just as were the Druids, under the ancient Britons. Even at present, this spiritual tenure is distinct from all others. If the service be neglected, the lord has no remedy by distress, but merely by complaint to the ordinary. In this, it materially differs from the tenure by divine service, in which the tenants were obliged to do some special divine service, as to sing so many masses, or distribute a certain sum in alms. All such donations are now out of use.

CHAPTER VII.—FREEHOLD ESTATES OF INHERITANCE.

PREAMBLE.

Estate Defined. An estate in lands, tenements and hereditaments signifies such interest, as the tenant has therein. It is called *status* in Latin, signifying the condition or circumstance, in which the owner stands with regard to his property.

What is to be Regarded. To ascertain this, estates may be considered:

First. With regard to the quantity of interest, which the tenant has in the tenement.

Second. With regard to the time, at which that quantity of interest is to be enjoyed.

Third. With regard to the number and connections of the tenants.

The Quantity of Interest. This is measured by its duration and extent. Either his right of possession is to subsist for an uncertain period, during his own life, or the life of another; to end with his decease, or to remain to his descendants, or it is limited to a certain period; or lastly, it is infinite and unlimited, being vested in him and his representatives forever. This occasions the primary division of estates into:

Estates of freehold.

Estates of less than freehold.

Estates of Freehold. An estate of freehold, *liberum tenementum*, or frank-tenement, is the possession of the soil by a freeman. It requires actual possession of the land, or legally speaking, freehold, which can only be given by the ceremony of livery of seisin, which is the same as feudal investiture.

Defined. A freehold, therefore, is such an estate in lands, as is conveyed by livery of seisin; or in tenements of an incorporeal nature, by what is equivalent thereto. Therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these being properly estates of freehold, and as no other estates are conveyed with the same solemnity, therefore no others are properly freehold estates.

Divisions. Estates of freehold are either estates of inheritance, or estates not of inheritance.

FREEHOLD ESTATES OF INHERITANCE.

Divisions. These are divided into inheritance absolute or fee simple, and inheritances limited, one species of which we usually call fee-tail.

I. ESTATES IN FEE SIMPLE.

Defined. A tenant in fee simple, or in fee, is he who has 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.

Meaning of Fee. The true meaning of the word "fee," *feodum*, is the same with that of feud or fief, in contradistinction to *allodium*, which means every man's land, that he possesses in his own right, without owing rent or service to any superior. This is property in its highest degree, and the owner thereof is seised absolutely, in his own demesne. But *foedum*, 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. A feud or fee is defined, to be the right which the vassal or tenant has 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 always remaining in the lord. This allodial property no English subject possesses, it being a principal of law, that all the lands in England are holden mediately or immediately of the king.

King and Subject. Property Rights. The king, therefore, has absolute dominion, and all subjects' lands are in the nature of *foedum* or fee, whether derived by them by descent or purchase, for they are always accompanied by feudal limitations, which were imposed upon the original feudatory. A subject, therefore, has only the usufruct, and not the absolute property of the soil, the *dominium utile*, but not *dominium directum*. The highest estate a subject can possess is expressed: "seised thereof in his demesne, as of fee." It is a man's demesne or property, since it belongs to him and his heirs forever, yet this demesne is strictly not absolute or allodial, but qualified or feudal; it is not purely his own, since it is held of a superior lord, in whom the ultimate property resides.

Modern Interpretation of Fees. This is the primary sense of the word, "fee." Our lawyers rarely now use the word in this 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 most extensive interest one can have in a feud, and when the term is used simply, or has the mere adjunct "simple" attached, as 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 restriction to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. In no other sense is

the king said to be seised in fee, he being the feudatory of no man.

In all Hereditaments. A fee, in its secondary sense, as a state of inheritance, may be had in either corporeal or incorporeal hereditaments. Of the former a man is said to be seised in his demesne, as of fee, of the latter, he is only said to be seised, as of fee. For, as incorporeal hereditaments are collateral to and issue out of lands and houses, their owner has no property or demesne in the thing itself, but has only something derived out of it, resembling the *servitutes* or services, of the civil law. The *dominium* or property is frequently in one man, while the appendage or service is in another.

Divisions of a Fee Simple Estate. Divers inferior estates may be carved out of a fee-simple. As if one grants a lease for twenty-one years or for a life, the fee-simple remains vested in him and his heirs, and after the end of the time or the life, the lands revert to the grantor or his heirs. Yet sometimes the fee may be in abeyance, *i. e.*, 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 existing, and ready to vest, whenever a proper owner appears. Thus in a grant to A for life, with remainder to the heirs of B, the inheritance is neither granted to A nor B, nor can it vest in the heirs of B till his death, *nam nemo est hæres viventis;* it remains, therefore, in abeyance during the life of B.

The Word "Heirs." The word "heirs" is necessary in a 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. The great nicety about the insertion of the word "heirs" in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness. As the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted for his life only, unless the donor by an express provision in the grant, extended it also to his heirs. But this rule has now many exceptions:

"Heirs" in a Will. 1. It does not extend to devises by will, where a more liberal construction is allowed; hence by a devise to a man forever, or to one and his assigns forever, or to

one in fee-simple, the devisee has an estate of inheritance, for the design of the testator is manifest from the words of perpetuity annexed. 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.

"Heirs" in Recoveries. 2. Nor does this rule extend to fines and recoveries, as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs."

"Heirs" in Creating Peers. 3. In the creation of nobility by writ, the peer has an inheritance of his title, without expressing the word "heirs," for heirship is implied in its creation.

"Heirs" in Grants to Corporations. 4. In grants of land to sole corporations and their successors, the word "successors" supplies the place of "heirs," for as the latter take from their ancestors, so does the successor from the predecessor. But in a grant to a corporation aggregate, the word "successors" is not necessary, though usually inserted; for as a corporation never dies, such estate is perpetual and equivalent to a fee-simple.

"Heirs" in Grants to the King. 5. In the case of the king, a fee-simple will vest in him, without the word "heirs" or "successors" in a grant, because the king, in judgment of law never dies.

General Rule. But the general rule is, that the word "heirs" is necessary to create an estate of inheritance.

II. LIMITED FEES.

1. *Qualified or base fees.*

2. *Fees conditional at common law, and afterwards fees-tail by the statute de donis.*

1. **Base or Qualified Fee.** This is such an one, as has a qualification subjoined thereto, and which must be determined, whenever the qualification annexed to it is at an end. As a grant to A and his heirs, tenants of the manor of X, when the heirs of A cease to be tenants of that manor, the grant is 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 collateral circumstances, which qualify and debase the purity of the donation, it is, therefore, a qualified or base fee.

2. **Conditional Fee.** At the common law, this 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 collateral and lineal females. 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. This was a condition annexed to all grants whatever, that on failure of the heirs specified in the grant, the land should return to the ancient proprietor. Such conditional fees were agreeable to the nature of feuds, when they first ceased to be estates for life, and were not yet absolute estates in fee simple. Traces of these fees are found in the ancient Saxon laws.

Performance of Condition. As to the condition annexed by the common law to these fees, our ancestors held: that 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 in the donee. They therefore called it a fee-simple, on condition that he had issue. When a condition is performed, it is thenceforth entirely gone, and the thing to which it was before annexed becomes absolute and wholly unconditional.

Result of Performance. As soon as the grantee had issue born, his estate became absolute by the performance of the condition, at least for 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.

3. To empower him to encumber the land, so as to bind his issue.

Donor's Reversion. This was thought the more reasonable, because by the birth of issue, the possibility of the donor's reversion was rendered more precarious, and his interest seems to have been the only one the law was solicitous to protect, without much regard to the right of succession.

Changed to Fee-Simple Absolute. However if the tenant did not aliene the land, the course of descent was not altered by the performance of the condition, for if the issue afterwards

died, and also the tenant or original grantee, without making any alienation, the land, by the terms of the donation, could descend to none but the heirs of his body, and in default of them, must have reverted to the donor. For which reason, the donees of these conditional fee-simples took care to aliene, as soon as they 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.

Statute de Donis. The inconveniences which attended these limited and fettered inheritances induced the judges to favor this subtle *finesse* of construction, to abridge these conditional estates. But the nobility, who desired to perpetuate their possessions in their own families, to put a stop to this practice, procured the passage of the statute *de donis conditionalibus*, which paid more regard to the private intentions of the donor, than to the interests of the public. This statute revived in some sort the ancient feudal restraints 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 not, should revert to the donor.

Origin of Estates-tail. The judges, in construing this statute, determined that the donee had no longer a conditional fee-simple, which became absolute and at his own disposal, the instant the issue was born; but they divided the estate into two parts, leaving in the donee a new kind of estate, which they termed a fee tail, and investing in the donor the ultimate fee-simple of the land, expectant on the failure of issue, which expectant estate is now called a reversion. Littleton tells us, that tenancy in fee tail is by virtue of this statute.

What may be Entailed. We will now consider what things may or may not be entailed, under the statute *de donis*. Tenement is the only word used in the statute, which Coke asserts, comprehends all corporeal hereditaments, also all incorporeal hereditaments, which savor 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, and have relation to fixed and certain places. But merely personal chattels, which savor not at all of the realty, cannot be

entailed. Neither can an office relating to such chattels, nor an annuity, which charges only the person, and not the lands of the grantor. But if granted to a man and the heirs of his body, the grantee has still a fee conditional at common law, as before the statute, and by his alienation, after issue born, may bar the heir or reversioner.

What may not be Entailed. An estate to a man and his heirs for another's life cannot be entailed, for this is strictly no estate of inheritance, and therefore not within the statute *de donis*. Nor can a copyhold estate be entailed by virtue of the statute, for that would encroach upon 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 the lord's will.

Two Kinds of Estates-tail. Estates tail are either general or special. Tail general is where lands or tenements are given to one and the heirs of his body begotten, because no matter how often he marry, his issue in general by all marriages is, in successive order, capable of inheriting the estate tail, *per formam doni*.

Fee-tail Special. Tenant in tail special is where the gift is restrained to certain heirs of the donee's body. This may happen in several ways, as where tenements are given to a man and the heirs of his body by his present wife. This would be special tail. The words of inheritance, to him and his heirs, give a man an estate in fee; but to him and to heirs by him begotten, makes it a fee-tail, and the person being also limited, on whom such heirs shall be begotten, makes it a fee-tail special.

Heir-tail, Male or Female. Estates in general and special tail may also be either in tail male or tail female. In case of an entail male, the heirs female shall never inherit, nor *e converso*, the heirs male, in case of a gift to heirs female. And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. Hence if a man has two estates tail, one male, the other female, and he has issue a daughter, who has issue a son, this grandson can succeed to neither estate, for he cannot convey his descent wholly in either the male or female line.

Words "Heirs" and "Body." As the word "heirs" is necessary to create a fee, the word "body" or some other words of procreation are requisite to make it a fee tail, and to ascertain to what heirs a fee is limited. Hence if either the words of inher-

itance or procreation be omitted, this will not constitute an estate tail. A grant to a man and his children, seed or offspring is only an estate for life, wanting the words of inheritance, "his heirs." A gift to a man and his heirs, male or female, is an estate in fee simple.

Indulgence as to last Wills. In last wills, where 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.

Estates in Frank-marriage. Another species of entailed estates, not now in use, but yet still capable of subsisting in law, are estates in frank-marriage. By such gift, the donees shall have the tenements to them and the heirs of their two bodies begotten; that is they are tenants in special tail. This is where tenements are given by one man to another, together with a wife, who is a daughter or cousin of the donor, to hold in frank-marriage. This word does, *ex vi termini*, not only create an inheritance like the word frankalmoign, but likewise limits that inheritance, supplying not only words of descent, but of procreation also. Such donees in frank-marriage are liable to no service but fealty, for a rent reserved thereon is void, until the fourth degrees of consanguinity be past between the issues of the donor and the donee.

Incidents to a Tenancy in Tail.

1. A tenant in tail may commit waste, by felling timber on the land, or pulling down houses, or the like, without accounting therefor.

2. The wife of such tenant shall have her dower or thirds of the estate tail.

3. The husband of such tenant may be tenant by curtesy.

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.

Evils of Estates-tail. The establishment of this family estate occasioned infinite disputes. Children became 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 color of long leases, the issue might have been practically disinherited, and creditors 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 the property for what it was worth. Innumerable latent entails were produced to deprive purchasers of lands they had bought; law suits were increased; treasons were encouraged, as estates-tail were not liable to forfeiture longer than for the tenant's life. They were considered the common grievance of the realm, but the nobility were attached to this statute, because it preserved their family estates from forfeiture, and hence they prevented its abolition by the legislature. However, by the contrivance of a politic prince, a method was devised to evade them.

Barred by Common Recoveries. About two hundred years elapsed after the enacting of the statute *de donis*, before the application of common recoveries in the reign of Edward IV, which were declared to be a bar of an estate-tail. The king observing in the disputes between the houses of York and Lancaster, how little effect attainders for treason had on families, whose estates were protected by entails, suffered a noted case to be brought before the court, wherein it was determined, that a common recovery suffered by a tenant in tail should destroy such tenancy. These recoveries are fictitious proceedings, introduced by a kind of *pia fraus*, to elude the statute *de donis*, but however clandestinely introduced, are now by long use and acquiescence a most common assurance of lands, and are looked upon as the legal mode of conveyance, by which a tenant in tail may dispose of his lands and tenements.

Forfeited for High Treason. This expedient having abridged the duration of estates-tail, others were devised to strip them of other privileges, especially from their freedom of forfeiture for treason, which was effected by a statute of Henry VIII, enacting, that all estates of inheritance should be declared forfeited to the king upon conviction of high treason.

Other Modes of Barring. Subsequently by statute, certain leases made by a tenant in tail, not prejudicing the issue, were allowed to be good in law and to bind the issue in tail, and by further statute in the same reign, which declared a fine duly levied by a tenant in tail to be a complete bar to him and his heirs, and all other persons claiming under such entail.

Exception of Crown Property. Yet in order to preserve the property of the crown from any danger of infringement, all estates-tail created by the crown, and of which the crown has the reversion, are excepted. By statute, all estates-tail are liable to

be charged with debts due the king by record or special contract, as since, by the bankrupt law, they may be sold for debts contracted by a bankrupt. An appointment by tenants in tail of the lands entailed to a charitable use is good, without fine or recovery.

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

CHAPTER VIII.—FREEHOLDS, NOT OF INHERITANCE.

Division. These freeholds are estates for life only, of which some are conventional, or expressly created by the act of the parties, and others merely legal, or created by construction and operation of law.

I. ESTATES FOR LIFE.

Defined. Life estates, expressly created by deed or grant, 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, or tenant by another's life, *pur autre vie.*

Of Feudal Origin. These estates for life, like inheritances, are of feudal nature, and for a time were the highest estate one could have in a feud, which was not, in its original, hereditary. They are conferred by the same feudal solemnities, the same investiture or livery of seisin, as fees themselves are, and they are held by fealty, if demanded, and such rents and services, as the lord or lessor, and his tenant or lessee, have agreed upon.

How Created. They may be created, not only by express words, but also by a general grant, without defining or limiting any specific estate. As if one grants to A the manor of X, this makes him tenant for life. It cannot be construed to be a fee, as there are no words of inheritance or heirs mentioned in the grant, but the law will construe it to be as large an estate as the words of the donation will bear, and therefore an estate for life.

Construed against the Grantor. Also such a grant at large, or a grant for a term of life generally, is construed for the life of the grantee, if the grantor had power to make such grant; for an estate for a man's own life is of a higher nature than for another's 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.

Exceptional Life Estates. Estates for life usually endure as long as the life for which they are granted, but some of them 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; when the woman remarries, the estate is determined. Yet while it subsists, it is an estate for life, because the time of its endurance being uncertain, it may by possibility last for life, if the contingency do not sooner happen. A life estate may also be determined by a civil death, as if the life tenant enter a monastery, whereby he is dead in law; for which reason in conveyancing, the grant is usually made for "the term of a man's natural life," which only ends by his natural death.

Incidents to Life Estates. These are applicable not only to that species of tenants for life, which are expressly created by deed, but also to those species, which are created by act and operation of law.

1. Estovers and Botes. Waste. Every life tenant, unless restrained by agreement, may of common right take upon the land demised to him, reasonable estovers and botes. For he has 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 do other waste upon the premises, as it tends to permanent loss to the person entitled to the inheritance.

2. Emblements. A 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 land, 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 of law, that *actus Dei nemini facit injuriam*. The representatives, therefore, of the life tenant shall have the emblements to compensate for the labor and expense of tilling, manuring and sowing the lands, and also for the encouragement of husbandry, which is entitled to the utmost security.

Under the Feudal Law. 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 first of March and the end of August, the heirs of the tenant received the whole. Our law of emblements is derived from this, but much improved.

Tenant pur Autre Vie. So also, if a man be tenant for the life of another, and the *cestuy que vie*, or he on whose life the land is held, dies after the corn is sown, the tenant *pur autre vie* shall have the emblements. The same is also the rule, if a life estate be determined by the act of law.

Effect of the Divorce of Co-tenants. If a lease be made to husband and wife during coverture, which is in effect an estate for life, and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*, the husband shall have the emblements, for the decree of divorce is the act of law.

When Tenant not Entitled. 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 re-marries, he or she shall not be entitled to the emblements.

What Emblements Include. The doctrine of emblements extends not only to grain sown, but also to roots planted, or other annual artificial profit, but it is otherwise as to fruits, grass and the like, which are not planted annually, at the expense and labor of the tenant, but are either a permanent or natural profit. When a man plants a tree, he does not do so for any immediale profit, but for himself in the future, or for succeeding tenants. The advantages also of emblements are particularly extended to the parochial clergy, by statute of Henry VIII. For all persons presented to an ecclesiastical benefice, or to any civil office in

England, are considered as tenants for life, unless the contrary be expressed in the form of the donation.

3. **Under-Tenants or Lessees.** These sub-tenants have even greater indulgences than the lessors, the original tenants for life. The law of estovers and emblements applies to both parties, but in those cases, where a tenant shall forego the emblements, because the estate determined by his own act, the exception shall not reach the lessee, who is a third party. As in the case of a widow taking *durante viduitate;* her re-marriage 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 the woman then marries, this her act shall not deprive such sub-tenant of his emblements, who is a stranger and cannot prevent her re-marriage. At common law the lessees of tenants for life, on the death of the lessor, might leave the premises and pay no rent, since the last quarter day. To remedy this, a statute allows the executors or administrators of the tenant for life to collect from the sub-tenant rent to the date of the death of the lessor.

II. TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINCT.

When it Happens. This happens, where one is tenant in special tail, and one from whose body the issue was to spring, dies without issue, or having left issue, it becomes extinct. Then 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 to be begotten by his present wife, and the wife dies without issue; in such case, the man has an estate tail, which cannot possibly descend to any one. To have called him a tenant in fee-tail special would not have distinguished him from others, and besides he has no longer a fee, for he can have no heirs capable of taking *per formam doni.* Had it called him tenant in tail without issue, this would not have excluded the possibility of future issue. If a tenant in tail, without possibility of issue, this would exclude time past as well as present. Hence the present lengthy term is the only appropriate one to use.

How Created. 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 wife, and

the heirs of their two bodies begotten, and they are totally divorced, they shall be only 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.

Privileges and Restrictions. This estate partakes partly of an estate tail and partly of an estate for life. The tenant is only tenant for life, but with many of the privileges of a tenant in tail; as not to be punishable for waste; or he is a tenant in tail, with many of the restrictions of a tenant for life; as to forfeit his estate, if he aliene it in fee-simple, whereas such alienation by a tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner, who is not concerned, until all possibility of issue be extinct. But in general, the law looks upon this estate as equivalent to an estate for life only, with which tenancy, it may be exchanged, which can only be done in the case of estates, equal in their nature.

III TENANT BY THE CURTESY OF ENGLAND.

Defined. This exists, 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 issue was capable of inheriting her estate. In this case, on the death of his wife, the husband shall hold the lands for his life, as tenant by the curtesy of England.

Possesses Some Resemblance to Feudalism. It appears to have been the established law of Scotland, and was introduced into England by Henry I. It is likewise used in Ireland, under an ordinance of Henry III. The word "curtesy" apparently signifies an attendance upon the lord's court or *curtis*. It is not generally believed to have been a consequence of feudal tenure, and yet some feudal reasons may be given for its introduction. For if a woman seised of lands has issue by her husband, and dies, the husband is the natural guardian of the child, and as such is of right entitled to the profits of the land, in order to maintain it, for which reason the heir apparent of a tenant by the curtesy could not be in ward to the lord of the fee, during the life of such tenant. As soon, therefore, as any child was born, the father began to have a permanent interest in the lands, became one of the *pares curtis* or *curiae*, did homage to the lord, and was called tenant by the curtesy initiate; and this

estate, having once vested in him by the birth of a child, was not suffered to determine by the subsequent death or the coming of age of the infant.

Requisites. Four requisites are necessary to make a tenancy by the curtesy: *Marriage. Seisin of the wife. Issue. Death of the wife.*

1. **Marriage.** The marriage must be canonical and legal.

2. **Seisin of the Wife.** It 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 tenant by the curtesy, though there have been no actual seisin of the wife. 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 upon her seisin, the husband can have no title by the curtesy.[1]

3. **The Issue must be Born Alive.** Some mistakenly assert, that it must be heard to cry. Crying is the strongest evidence of its life, but not the only evidence. It must also be born during the life of its mother, for if the mother dies in labor, and the Caesarean operation is performed, the husband shall not be tenant by the curtesy. For at the instant of the mother's death, he was not entitled, as having had no issue born, but the land descended to the unborn infant, and the estate once so vested, shall not be taken from him. In gavelkind lands, a husband may be tenant by the curtesy, without having any issue.

Actual Seisin Requisite. If a woman be tenant in tail male, and has only a daughter born, the husband has no curtesy rights, because such issue female can never inherit the estate in tail male. And this seems to be the chief 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.

Question of Time. The time when the issue was born is

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[1] This proposition has been questioned.

immaterial, provided it was during the coverture; for whether it was 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.

4. Death of the Wife. The husband, by the birth of the child, becomes tenant by the curtesy initiate, and may do many acts to charge the land, but his estate is not consummate till the death of the wife.

IV. TENANT IN DOWER.

Defined. This is where the husband of a woman is seised of an estate of inheritance and dies; in which case the widow shall have one-third part of all the lands and tenements, whereof he was seised at any time during the coverture, to hold during the term of her natural life.

History of Dower. Dower, *doarium* or *dos* among the Romans, signified the marriage portion, which the wife brought to her husband, but with us, signifies that kind of property, to which the civil law, in its original state, had nothing that bore any resemblance. Dower out of the lands was unknown apparently in the early part of our Saxon constitution, for in the laws of king Edmond, the wife is directed to be supported wholly out of the personal estate. Afterwards, as in gavelkind tenure, the wife became entitled to a conditional estate in one-half of the lands, with a proviso that she remained chaste and unmarried, as is usual also in copyhold dower or free bench.[1] Some ascribe its introduction to the Normans, others to the Danes under Sweyn, the father of Canute.

Dower Estate. In treating of this estate, let us consider:

1. *Who may be endowed.*
2. *Of what endowed.*
3. *The manner how.*
4. *How dower is barred.*

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, does not destroy the dower. Where a woman elopes from her husband, and lives with a paramour, she shall lose her

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[1] Free bench is a widow's estate in such lands as her husband died seised of, whereas dower is her estate in lands of which the husband was seised during the coverture.

dower, unless her husband condones her offence. The wife of an idiot is not entitled to dower, because an idiot cannot marry, being incapable of assenting to any contract. By the ancient law, the wife of a person attainted of treason or felony could not be endowed, and at the present date, widows of traitors are barred of dower, except in cases of certain modern treasons relating to the coin, but not the widows of felons. An alien cannot be endowed,[1] unless she be queen consort, for no alien is capable of holding lands. The wife must be above nine years of age at her husband's death, otherwise she shall not be endowed.

1. Of what a Wife may be Endowed. She may 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, could by possibility have been heir. Therefore, if a man, seised in fee-simple, has a son by his first wife, and on her death marries again, the second wife 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. This principle does not hold, where a man holds as donee in special tail, with heirs of his body begotten on his first wife.

Seisin in Law and in Deed. 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.

Transitory Seisin. The seisin of the husband for a transitory instant only, when the same act which conveys him the property conveys it from him again, will not entitle the wife to dower, for the lands were merely *in transitu*, and never rested in the husband. But if the land abide in him for the interval of but a single moment, it seems that the wife shall be endowed thereof.[2]

Copyhold Estates. Alienation. Copyhold estates are not liable to dower, being only estates at the lord's will, unless

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[1] She may be, if she has been naturalized, or if she married under a license obtained from the king.

[2] This means, that he holds it as his own, and not in a fiduciary capacity.

by the special custom of the manor. But where dower is allowable, it matters not, though the husband aliene the lands during the coverture, for he alienes them subject to dower.

3. The Manner in which a Woman may be Endowed.

Kinds of Dower. There are four subsisting species of dower, a fifth one, *de la plus belle*, having been abolished with military tenures:

(1.) *Dower by the common law*, as herein described.

(2.) *Dower by particular custom*, as that a wife should have one-half or the whole of her husband's lands.

(3.) *Dower ad ostium ecclesiae*, which is where the tenant in fee-simple of full age, openly at the door of the church, where all marriages were formerly celebrated, after affiance made and troth plighted, endows his wife with all or a portion of his lands, specifying the same, on which the wife, after his 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, with his express consent, endows his wife with part of his father's lands.

History of Dower in England. The doctrine of dower has undergone many changes since its first introduction into England. It first was of the nature of dower in gavelkind, a moiety of the husband's lands, but forfeitable by incontinency or a second marriage. Under Henry I, this forfeiture occurred only where the husband left issue, and subsequently it ceased to be enforced in any case. Under Henry II, the dower *ad ostium ecclesiae* was the usual species of dower, and was binding on the wife, if she consented at the time of marriage. It gave her no more endowment than with one-third part of the lands, and it might be less, lest by too liberal endowment, the lord should be defrauded of his wardships and other feudal profits. If no specific dotation was made at the church porch, she was endowed by the common law of the third part of such lands and tenements, as the husband was seised of at the time of the espousals and no other, unless he specially promised to endow her with future acquisitions. If he had no lands, an endowment in goods, chattels or money at the time of espousals was a bar to any lands subsequently acquired. The dower *ad ostium ecclesiae* and *ex assensu patris* are now obsolete.

Under the Feudal System. The method of endowment or assigning dower by the common law is now the only usual species. By the old law, founded on feudal exactions, a woman could not be endowed without a fine paid to the lord, neither could she marry again without his license, lest she should contract herself, and so convey part of the feud, to the lord's enemy. This license, the lord managed to be well paid for, and sometimes would compel a second marriage, in order to obtain the fine. But by *magna carta*, the widow need pay nothing for her marriage, nor be compelled to wed, but however could not marry without the consent of her lord.

Widow's Quarantine. Further, that nothing shall be taken for assignment of the widow's dower, but she shall remain in her husband's 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, which word signifies this number of days, whether in this or any other connection.

Assigned by the Heir or his Guardian. The particular lands to be held in dower, must be assigned by the heir of the husband, or his guardian, so as to entitle the lord of the fee to demand the services of the heir in respect to such lands. 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, 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.

Admeasurement of Dower. If the heir or his guardian do not assign the dower during quarantine, or assign it unfairly, the widow has her remedy at law, and the sheriff is appointed to assign it. Or if the heir, while under age, or his guardian assign more than she ought to have, it may afterwards be 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.

Jointures Introduced. Upon pre-arranged marriages, and in estates of considerable consequence, tenancy in dower happens very seldom, for the claim of a wife to dower became a great clog to alienations. Wherefore, since the disuse of *dower ad ostium ecclesiae*, jointures have been introduced in their stead, as a bar to the claim at common law.

4. How Dower may be Barred or Prevented. A widow may be barred of her dower by elopement, divorce, being an alien, by the treason of her husband, and other disabilities above mentioned. Also by detaining the title deeds or evidences of the estate from the heir, until she restores them. If a dowager alienes the land assigned her for dower, she forfeits it *ipso facto*, and the heir may recover it by action. A woman may also 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 of Henry VIII, termed the statute of uses.

Jointures. A jointure signifies a joint estate, limited to both husband and wife, but in common parlance extends also to a sole estate, limited to the wife only. Coke defines it, as "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." This description is framed from the purview of the statute of uses.

Before the Statute of Uses. Before the making of that statute, the greater part of the land of England was conveyed to uses, the property or possession of the soil being vested in one man, and the use, or the profits thereof, in another, whose directions with regard to the disposition thereof, the former might be compelled by a court of equity to observe and follow. Now, though the husband had the use of lands in absolute fee-simple, yet the wife was not entitled to dower therein, he not being seised thereof, wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint tenancy, or jointure, which settlement would be a provision for the wife, in case she survived her husband.

Effect of the Statute of Uses. The statute of uses ordained, that such as had the use of lands should to all intents be reputed and taken to be absolutely seised and possessed of the soil itself. As a result of such legal seisin, wives would have become dowable of such lands as were held to the use of their husbands, and also to special estates, as had been settled upon them in jointure; had not the same statute provided, that upon making such an estate in jointure to the wife before marriage, she shall be forever precluded from dower.

Four Requisites:

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 auter vie, or for any term of years, or other smaller estate.*

3. *It must be made to herself, and to no other in trust for her.*

4. *It must be expressly made in satisfaction of her whole dower, and not of any particular part of it.*

Election of Dower. 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 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 have dower *pro tanto* at the common law.

Jointure and Dower Compared. There are some advantages attending tenants in dower, that do not extend to jointresses, and so *vice versa*, jointresses are in some respects more privileged than tenants in dower. By the old common law, tenants in dower pay no tolls or taxes, nor can the king distrain for his debt, if contracted during the coverture. But on the other hand, a widow may at once enter, without formal process on her jointure land, as she might have done on dower *ad ostium ecclesiae*, which a jointure resembles; whereas no small trouble and a very tedious mode of proceeding, is necessary to compel a legal assignment of dower. Also though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow. Sir Edward Coke justly gives jointure the preference, as being more sure and safe to the widow.

CHAPTER IX.—ESTATES LESS THAN FREEHOLD

Three Kinds.

1. *Estates for years.*
2. *Estates at will.*
3. *Estates by sufferance.*

I. ESTATE FOR YEARS.

Defined. An estate for years is a contract for the possession of lands or tenements for some determinate period. It occurs, where a man lets them to another for a term of years, agreed upon between the lessor and lessee; and the lessee enters thereon. If the lease be but for a half or quarter of a year or any less time, the lessee is also termed a tenant for years, a year being the shortest term which the law in this case notices.

Years, Months and Days. The space of a year is a determinate period, consisting of three hundred and sixty-five days, the additional day in leap year, together with the preceding day, accounting for one day only. That of a month is more ambiguous; there being 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 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. Hence a lease for twelve months is only for forty-eight weeks, but if it be for a twelve-month, it is for a year. In the space of a day, the entire twenty four hours are usually reckoned, the law generally rejecting all fractions of a day, in order to avoid disputes. Hence if I bind myself to pay money on a certain day, I may do so before twelve o'clock at night of such day.

Granted to Farmers. Estates for years were originally granted to farmers, who annually rendered some equivalent in money, provisions or other rent to the lessors or landlords, but to encourage them to cultivate and manure the soil, they had a permanent interest granted them, not determinable at the will of the lord. Yet they were deemed almost the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, and not as having property of their own. They were not allowed to have a freehold estate, but their interest at their death vested in their executors, who were to settle the decedent's debts with the lord and other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated by a common recovery, suffered by the tenant of the freehold, which abrogated all leases for years then subsisting, unless afterwards renewed by the recoveror.

Originally Precarious and Brief. Estates for years hence were precarious and likewise usually very short, like modern leases upon rack rent. By the ancient law, no leases were allowed for more than forty years, as longer possession, especially without livery, might defeat the inheritance. This abridged term soon became antiquated, and when the statute of Henry VIII protected against these fictitious recoveries, and the tenant's interest rendered secure and permanent, long terms became frequent, continuing subject however to the same rules of succession, and with the same inferiority to freeholds, as when they were little better than tenancies at the will of the landlord.

Certainty as to Time Requisite. Every estate which must expire at a period certain and fixed, by whatever words created, is an estate for years. Hence this estate is frequently called a term, *terminus*, because its duration is bounded, limited and determined; for it must have a certain beginning and a certain end. But *id certum est, quod certum reddi potest*, therefore, if a man makes a lease to another for so many years, as the other man may name, it is a good lease for years, though at present uncertain, yet when the other one names the years, it is reduced to a certainty.

Indefinite Duration, Void. 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 X shall live, is void from the beginning, for it can never be reduced to a certainty during its continuance. So also, if a parson makes a lease of his glebe for so many years as he shall continue parson. But a lease for ten years, if A 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.

Distinguished from a Life Estate. An estate for years is inferior to one for life, or *pur autre vie*, or an inheritance. These are freeholds, while an estate for years is only a chattel. A lease for years may be made to commence *in futuro*, but a lease for life cannot. No estate or 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 to commence hereafter, and because no livery of seisin is necessary to a lease for years, such lessee is not said to be seised.

Right of Entry. Nor indeed does the bare lease vest any estate in the lessee, but only gives him the right of entry in the tenement, which 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 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 has the freehold.

Words "Term" and "Time." Thus the "term" does not merely signify the time specified in the lease, but the estate and interest that passed by the lease, and therefore the term may expire, during the continuance of the time, as by surrender, forfeiture and the like. Hence if I grant a lease to A for three years, and at the expiration of 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, and after the expiration of the said time, in such case B's interest will not commence till the time is fully elapsed, whatever may become of A's term.

Estovers. The tenant for a term of years has incident to the estate, unless specially excepted, the same estovers as the tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote and hay-bote.

Emblements. As to the profits of lands sowed by the tenant for years, there is this difference between him and a tenant for life; that where the term of the former is certain, as where he holds up to a fixed date and sows grain, which does not mature before the end of that term, the landlord shall have it, for it was the tenant's folly to sow that which he knew he could not reap the profits. But where the lease for years depends upon an uncertainty, as upon the death of a lessor, who himself is but a tenant for life, or a husband seised in his wife's right, or if the term of years be determinable upon a life or lives, the tenant, or his executors, shall have the emblements in the same manner as a tenant for life, or his executors. Not so, if it determine by the act of the party himself, as if the tenant for years does anything, that amounts to a forfeiture, in which case the emblements go to the lessor.

II. ESTATES AT WILL.

Definition. Rights of Tenants. This 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 the lease obtains possession. Such tenant has no certain, indefeasible estate, capable of being assigned by him to another, because the lessor may eject him, whenever he pleases. Such estate, however, may be determined also at the will of the tenant.

Emblements. That it is at the will of both parties must be understood with some restriction. If the tenant at will sows the land, and before the grain is ripe is ejected by his landlord, he yet may have the emblements, and free ingress and egress, to cut and carry away the profits. All the cases of emblements turn upon the point of uncertainty. If the tenant cannot possibly know when the landlord would determine his will, and hence could make no provision against it, and thereupon sows the land; in such case the law will not permit him to be a loser by it. If the tenant himself determines the tenancy, he loses the emblements.

Ending of this Estate. What will determine the will on either side was formerly a matter of dispute. It is now settled, that besides the express assertion of the lessor, that the lessee shall hold no longer, which must be made either upon the land or by notice given to the lessee, the exercise of any act of ownership by the lessor will suffice, as entering upon the land 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. Also 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.

Equities between Parties. The law is careful, that no sudden determination of the will by one party shall tend to the manifest and unforseen prejudice of the other. This appears in the case of emblements, and the right of ingress and egress to the lessee to remove his goods, after the determination of the lessor's will. And, if rent be paid quarterly or semi-annually, and the lessee determines the will, he must pay to the end of the current quarter or half-year.

Often Construed from Year to Year. Of late years, courts have usually opposed construing demises, where no certain term is mentioned, to be tenancies at will, but have rather

held them to be from year to year, so long as both parties please, especially where an annual rent is reserved. In such 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 usually understood to be six months.

Copyhold Estates. A very important species of estates at will is that of an estate held by copy of court-roll, a copyhold estate. Originally this was nothing better than an estate at will. The indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs, according to particular customs of their districts, the will of the lord became qualified and limited by the custom of the manor. The custom was regarded as evidence of the lord's will, which hence became no longer arbitrary and precarious, but fixed by the custom. A copyhold tenant is therefore now as fully a tenant by the custom as a tenant at will.

Copyhold Tenant. Almost every copyhold tenant was therefore thus tenant at the will of the lord, according to the custom of the manor, which customs differ as much as the humor and temper of the respective lords. Such tenant, so far as the custom warrants, may have any other of the estates, or quantities of interest, and hold them united with this customary estate at will. In many manors, a copyholder may be tenant in fee-simple, in fee-tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition, subject however to be deprived of these estates, upon the concurrence of circumstances, which the will of the lord, promulgated by custom, has declared to be a forfeiture, or absolute determination of these interests. Yet none of these interests amount to a freehold, for the freehold of the entire manor abides in the lord only, who has granted out the use and occupation, but not the corporal seisin of certain parcels thereof to his customary tenants at will.

Copyhold Tenure. Its Origin. This complicated tenure, by which the same man, with regard to the same land, was at the same time tenant in fee-simple, and also tenant at the lord's will, apparently arose from the nature of villenage tenure, in which a grant of any estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein. The lords, while willing to grant estates to their villeins, which might endure for their lives, or sometimes descend to their issue, yet

not caring to manumit them entirely, might scruple to grant them an absolute freehold; and hence contrived, that a power of resumption at the will of the lord should be annexed to these grants, whereby the tenants were still kept in a state of villenage, and no freehold conveyed them in their respective lands, which remained in the lord.

Modern Copyholds. Afterwards, when these villeins became modern copyholders, and by custom had acquired an indefeasible estate in their lands, in performing the usual services, but yet continued to be styled tenants at the will of the lord, the law determined, that the freehold of lands so held abides in the lord of the manor, and not in the tenant; for though he really holds to him and his heirs forever, yet he is also said to hold at another's will.

Customary Freeholders. But copyholders of free or privileged tenure, derived from the ancient tenants in villein-socage, are not said to hold at the will of the lord, but only according to the custom of the manor. There is no absurdity in them enjoying a freehold interest, and hence the law does not suppose the freehold of such lands to rest in the lord, but in the tenants themselves, who are sometimes called customary freeholders, being allowed to have a freehold interest. but not a freehold tenure.

Present Status. In common cases, copyholds are still ranked among tenancies at will, though custom, which is the life of the common law, has established a permanent property in the copyholders, who were formerly little better than bondmen, equal to that of the lord himself, in the tenements held of the manor, nay sometimes, even superior; for we may now look upon a copyholder of inheritance, with a fine certain, to be little inferior to an absolute freeholder in point of interest, and in the clearness and security of his title, frequently in a better situation.

III. ESTATES AT SUFFERANCE.

Defined. This is where one comes into possession of land by lawful title, but subsequently retains it without any title whatever. As if a man takes a lease for a year, and at its expiration continues to hold the premises, without fresh lease from the owner of the estate. Or if a man makes a lease at will, and dies, the estate at will is thereby determined, but if the tenant continue the possession, he is a tenant at sufferance. But no

man can be tenant at sufferance against the king, to whom no laches or neglect in not ousting the tenant is ever imputed by law, but his tenant, so holding, is considered an intruder.

How Terminated. 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 against a stranger, because such tenant being once in possession under a lawful title, the law supposes him to continue under an equally lawful title, unless the owner of the land, by some public act such as entry, declares his continuance wrongful.

Ejectment, or Notice to Quit. Landlords are obliged in these cases to make formal entries upon their lands, and recover possession by ejectment, and at the utmost by the common law, the tenant was bound to account for the profits of the land detained. By statute of George II, after written notice to deliver possession, and refusal or neglect on the part of the tenant, the latter shall pay double the yearly value. Tenancy at sufferance is now almost in disuse, except by consent of the owner.

CHAPTER X.—ESTATES UPON CONDITION.

Defined. The existence of an estate upon condition depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created or enlarged, or finally defeated. These conditional estates are more properly qualifications of other estates, than a distinct species; as any quantity of interest, a fee, a freehold or a term of years, may depend upon these provisional restrictions.

Kinds. They are of two sorts:

1. *Estates upon condition implied.*

2. *Estates upon condition expressed, under which may be included:*

3. *Estates held in vadio, gage or pledge.*

4. *Estates by statute merchant or statute staple.*

5. *Estates held by elegit.*

I. ESTATES UPON CONDITION IMPLIED IN LAW.

Defined. This is where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words. As if a grant of an office be made to a man, without other words; the law tacitly annexes a condition, that the grantee shall duly execute his office, on breach of which condition, the grantor or his heirs may oust him.

Offices—Mis-user and Non-user. An office, either public or private, may be forfeited by *mis-user* or *non-user*, both of which are breaches of this implied condition. By mis-user, or abuse, as where a judge accepts a bribe. By non-user, or neglect, which in public offices that concern the administration of justice or the commonwealth, is of itself a direct cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special damage is occasioned thereby. Public offices require constant attention, but private offices not demanding so unremitting a service, the temporary neglect of them is not necessarily productive of mischief, upon which account some special loss must be proven, in order to vacate these. Franchises, 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 may be forfeited, either by abuse or neglect.

Forfeiture of Estates. All forfeitures of estates for any acts of the tenant, that are incompatible with the estate, which he holds, comes under this principle. As if tenants for life or years enfeoff a stranger in fee-simple; that is, by common law, a forfeiture of their estates, being a breach of the implied condition, that they shall not attempt to create a greater estate than they possess themselves. So if a tenant for life, for years or in fee commit a felony, the king or other lord of the fee is entitled to the tenements, because there is a condition, that the tenants shall not commit felony, which the law tacitly annexes to every feudal donation.

II. ESTATES UPON CONDITION EXPRESSED IN THE GRANT.

Defined. This 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.

Conditions Precedent. These conditions are either precedent or subsequent. Precedent conditions are those that 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. So a grant to a man of an estate, upon condition he pays a certain sum within a limited time, is also a condition precedent.

Conditions Subsequent. But if a man grants 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; this is 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 a certain manor, is an estate, on condition that he and his heirs continue tenants of such manor.

Dependence of Other Estates. Upon the same principle depend the determinable estates of freehold, heretofore mentioned, as *durante viduitate*, estates upon condition that the widow do not marry, and the like. On the breach of these subsequent conditions, the estates are determined.

Limitation of Estate. A distinction is made between a condition in deed and a limitation, which Littleton terms also a condition in law. When an estate is so limited by the words of its creation, that it cannot endure longer than till the contingency happens, upon which it is to fail, this is denominated a limitation, as when land is granted to man, so long as he is the parson of X, or while he continues unmarried. The next subsequent estate, which depends upon such determination, becomes immediately vested, as soon as the contingency happens, without any act done by him, who is next in expectancy.

Condition in Deed. But when an estate is upon condition in deed, as if granted expressly upon condition to be void upon the payment of a certain sum by the grantor, or so that the grantee remains unmarried, the law permits it to endure beyond the time, when such contingency happens, unless the grantor or

his heirs or assigns take advantage of this breach of the condition, and make either an entry or a claim.

Distinction between Condition and Limitation. Yet though strict words of condition be used in the creation of an estate, if on breach of the condition, the estate is limited over to a third person, and does not immediately revert to the grantor, or his representatives, this the law construes to be a limitation and not a condition, because if it were a condition, then upon the breach thereof, only the grantor or his representatives could avoid the estate by entry, and so the third party's interest in remainder, might be defeated by their neglect to enter. But when it is a limitation, the estate of the grantee determines, and that of the third party commences, and he may enter on the lands, the instant the grantee fails to comply with the condition.

Limitation in a Devise. So also if a man by a 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 is deemed 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.

Uncertainty Preserves the Freehold Character. In all these cases of limitations or conditions subsequent, so long as the condition, express or implied, either in deed or 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. For the breach of these conditions, being contingent and uncertain, this uncertainty preserves the freehold, because the estate is capable of lasting forever, or at least for the life of the tenant, if the condition remains unbroken. But where the estate is a chattel interest, which must determine at a time certain, and may determine sooner, this continues a mere chattel, and is not ranked among estates of freehold.

Void Conditions. Express conditions, if they be impossible or become so by the act of God, or the act of the feoffor himself, or if they be contrary to law, or repugnant to the nature of the estate, are void. If they be conditions subsequent to the vesting of the estate, the estate shall become absolute in the tenant. But if the condition be precedent, or be performed before the estate vests, the estate is void, and the grantee takes nothing.

There are some estates defeasible upon a condition subsequent, as:

III. ESTATES HELD IN PLEDGE.

Two Kinds. Estates held *in vadio*, in gage, or pledge are of two kinds:

Living pledge, vivum vadium.

Dead pledge, or mortgage, mortuum vadium.

Living Pledge, Vivum Vadium. This is where a man borrows a sum from another, and grants him an estate, to hold till he is repaid such sum out of the rents. The estate is void by such condition, as soon as such sum be repaid. The land or pledge is said to be living; it subsists, and survives the debt, and immediately on the discharge of the obligation, results back to the borrower.

Mortgage, Dead Pledge, Mortuum Vadium. This is a very common pledge, and exists, where a man borrows of another a specific sum, and grants him an estate in fee, on condition, that, if he, the mortgagor, shall repay the mortgagee the said sum on a certain time 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 the mortgagee shall then reconvey the estate to the mortgagor. In this case, the land, which is so placed 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 absolute. 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.

Dower and Other Encumbrances. As it was formerly a doubt, whether by taking such estate in fee, it did not become liable to the wife's dower and other encumbrances of the mortgagee, which doubt has now been over-ruled by our courts of equity, it became usual to make long terms in the mortgage, with conditions to be void on payment of the mortgage money, which course has been pursued, mainly because on the death of the mortgagee, such term becomes vested in his personal representatives, who alone in equity are entitled to receive the money lent.

Entry. As soon as the estate is created, the mortgagee may enter on the lands, but is liable to be dispossessed, on payment to him of the mortgage money at the day limited. 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 evicted by the mortgagor.

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 common law, yet the courts will consider the real value of the tenements, compared with the sum borrowed. If the value be greater, they will allow the mortgagor any reasonable time to redeem his estate, paying to the mortgagee his principal, interest and expenses. This advantage allowed to mortgagors is termed the equity of redemption, and this enables a mortgagor to call on the mortgagee in possession of the estate, to redeliver it, and account for the rents and profits received, on the payment of his whole debt and interest, thereby turning the *mortuum* into a kind of *vivum vadium*.

Foreclosure. But on the other hand, the mortgagee may either compel the sale of the estate, in order to immediately obtain his money, or else call upon the mortgagor to redeem his estate at once, or in default thereof, to be forever foreclosed from redeeming the same; that is, to lose the equity of redemption, without possibility of recall. Also in some cases of fraudulent mortgages, the mortgagor forfeits this equitable right.

Ejectment Actions. It is not, however, usual for mortgagees to take possession of the estate, unless where the security is precarious or small, or where the mortgagor defaults in payment of interest. In such cases, the mortgagee usually brings an ejectment, and takes the land into his own hands in the nature of a pledge, or *pignus* of the Roman law, whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was where the possession of the thing pledged remained with the debtor. But by statute of George II, after payment or tender by the mortgagor, of principal, interest and costs, the mortgagee can maintain no ejectment, but may be compelled to re-assign his securities.

Livery of Seisin. In Glanvil's time, when the universal method of conveyance was by livery of seisin, no pledge was good, unless possession was also delivered to the creditor, to pre-

vent subsequent and fraudulent pledges of the same land. The wisdom of our ancient law is shown, by the frauds which have arisen since the exchange of those public conveyances for more private and secret bargains.

IV. ESTATES HELD BY STATUTE MERCHANT AND BY STATUTE STAPLE.

Similar to Living Pledges. These are defeasible on conditions subsequent, and are nearly related to the living pledges before mentioned, or estates held till the profits discharge a debt liquidated. Both these estates are securities for money; that by statute merchant, entered before the chief magistrate of some trading town, pursuant to the statute of Edward I *de mercatoribus*, the other before the mayor of the staple, *viz.*, the grand mart for the principal manufactures of the kingdom. They were originally permitted only among traders, for the benefit of commerce, 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 his creditor, till out of the rents and profits of them, the debt may be satisfied. While the creditor holds such lands, he is tenant by statute merchant or statute staple. There is also a similar security, like a statute staple, acknowledged before a chief justice, whereby the benefit of this mercantile transaction extended to all the king's subjects. But these are only binding, by the statute of frauds of Charles II, on the lands in the hands of *bona fide* purchasers, from the day of their recording.

V. ESTATE BY ELEGIT.

Defined. This is created by operation of law for the security and satisfaction of debts. *Elegit* is the name of a writ, founded on a statute, 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*. This is a mere conditional estate, defeasible as soon as the debt is levied.

Feudal Restraints to Trade. It is remarkable, that the feudal restraints of alienating lands, and charging them with the debts of the owner, were moderated earlier for the benefit of trade and commerce, than for any other consideration. Before the statute of *quia emptores*, it is believed that the proprietor of

lands was unable to alienate more than a moiety of them. But by the statute *de mercatoribus*, passed the same year, the whole of a man's lands was liable to be pledged in a statute merchant for a debt contracted in trade, though one-half of them was liable to be taken in execution for any other debt of the owner.

Coke's Construction of these Estates. Of these estates, by statute merchant, statute staple and elegit, Coke says: "the tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds, which make them exceptional, because though they may hold an estate of inheritance or for life, *ut liberum tenementum*, until their debt be paid, yet it shall go to their executors, and though to recover their estates, they shall have the same remedy as has a tenant of the freehold, yet it is but the similitude of a freehold, and *nullum simile est idem*."

Chattel Interests. This indeed only proves them to be chattel interests, because they go to the executors, and not to the heir, which is inconsistent with the nature of a freehold, but it does not assign a reason, why the estates should so vest; which reason probably is, that being a security and remedy for personal debts, due to the deceased, to which debts the executor is entitled, the law has therefore thus directed their succession, that the security and remedy should be vested in those, to whom, if recovered, the debts would belong. On the same principle, if lands be devised to an executor, until out of their profits, the testator's debts be discharged, this interest in lands shall be a chattel interest, and on the death of such executor, shall go to his executors, because they, being liable to pay the original testator's debts, so far as his assets will extend, are entitled to possess that fund, out of which he has directed them paid.

CHAPTER XI.—ESTATES IN POSSESSION, REMAINDER AND REVERSION.

Time of Their Enjoyment. Having thus considered estates, with regard to their duration, or the quantity of the owners interest therein, we now shall examine them with regard

to the time of their enjoyment, when the actual permanency or taking of the rents and profits begins. Estates therefore with regard to this consideration, may either be in possession or in expectancy.

Estates in Expectancy. These are in remainder, by the act of the parties, and in reversion, by act of law.

I. ESTATES IN POSSESSION.

Defined. These 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. All the estates hereinbefore referred to are of this kind, and nothing more need be said of them; but the doctrine of estates in expectancy contains some of the most abstruse learning in the English law.

II. ESTATES IN REMAINDER.

Defined. An estate in remainder is an estate limited to take effect and be enjoyed, after another estate is determined. As where a man seised in fee-simple grants lands to A for twenty years, and after the end of said term, then to B and his heirs forever; here A is tenant for years, remainder to B in fee. An estate for years is here first carved out of the fee, and given to A, and the residue or remainder of it is given to B. But both these interests are in fact only one estate, being equal, when added together, only to one estate in fee. They are indeed different parts, but they constitute but one whole; they are carved out of one inheritance, are both created, and subsist together, the one in possession, the other in expectancy.

Example. So if land be granted to A for twenty years, and then to B for life, and at B's death, to be limited to C and his heirs forever, this makes A a tenant for years, with remainder to B for life, remainder over to C in fee. In this case, the estate of inheritance undergoes a division into three parts, and if there were a hundred remainders, there would be but one estate.

Contrasted with Fee-simple Estate. No remainder can be limited after the grant of a fee-simple estate, because such fee-simple is the highest and largest estate that one can enjoy, and he who is tenant in fee has in him the entire estate. A remainder therefore, which is a 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. Certain rules must be observed in the creation of remainders.

1. **Must be some Precedent Estate.** Some particular estate must precede the estate in remainder, as an estate for years to A, with remainder to B. This precedent estate is termed the particular estate, as being only a small part, or *particula*, of the inheritance, the residue or remainder of which is granted over to another. The necessity of creating this particular estate, is because the term "remainder" is a relative expression, and implies that some part of the thing has been previously disposed of, for where the whole has been conveyed at once, there cannot possibly be a remainder, but the interest granted would be an estate in possession.

Freehold Estates must be with Livery of Seisin. An interest created to commence at a future 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 chattels, by contracts to be executed in the future, while an estate of freehold must be created to commence immediately, 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 be contradictory, if an estate, which is to commence *in futuro*, 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.

The Two Estates are one in Law. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred to a future time, it is necessary to create a previous particular estate, which may subsist, till that time is completed, and for the grantor to deliver immediate possession of the land to the tenant of such particular estate, which is construed to give possession also to him in remainder, since the two estates are one and the same in law. The whole estate passes at once from the grantor to the grantee, and the remainder man is seised of his remainder, at the same time that the termor is possessed of his term. The enjoyment must be deferred, but it is, to all intents, an estate commencing *in praesenti*, though to be occupied and enjoyed *in futuro*.

Cannot be an Estate at Will. The particular estate is said

to support the remainder. A lease at will is not such a particular estate; as an estate at will is too slender and precarious to be 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 to do this, the entry of the grantor at once determines the estate at will.

Void Remainder. 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. Hence if the particular estate is void at its creation, or be defeated afterwards, the remainder, supported thereby, shall be defeated also, as where the particular estate is for the life of one not *in esse*.

2. When the Remainder Must Commence. 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. A common law livery of seisin must be made on the particular estate, whenever a freehold remainder is created. Where limited on an estate for years, it is necessary that the lessee for years have livery of seisin, in order to obtain the freehold from the grantor, otherwise the remainder is void. Not that the livery is requisite to the estate for years, but as livery is required to convey the freehold, and yet cannot be given to him in remainder, without infringing the possession of the lessee for years, the law allows such livery made to the lessee, to relate to him in remainder, as both are but one estate in law.

3. When the Remainder Must Vest. It must vest in the grantee during the continuance of the particular estate, or *eo instanti*, it determines. As 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, the remainder vests instantly in the survivor, where 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 has

a son, here the remainder will be void, for it did nor vest in any one during the continuance, or at the end of the particular estate; and it would not alter matters, if B should subsequently have a son, for the remainder is gone forever. 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 detached.

Result of these Rules. Upon these rules, but principally the last, the doctrine of contingent remainders depends.

Division of Remainders. Remainders are either vested or contingent.

VESTED REMAINDERS.

Defined. These are remainders executed, whereby a present interest passes to the party, though to be enjoyed *in futuro*. The estate in this case is invariably fixed, to remain to a determinate person, after the particular estate is spent. As if A be a tenant for twenty years, remainder to B in fee, B has a vested remainder, which nothing can defeat.

CONTINGENT REMAINDERS.

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

The Person Uncertain. 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 not, but the instant that a son is born, the remainder becomes vested, and no longer contingent. 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.

Posthumous Child. By the strict rule of law, if A were tenant for life, remainder to his son in tail, and A died without issue born, but leaving his wife pregnant, and after his death a posthumous son was born, this son could not take the land by virtue of the remainder, for he was not *in esse*, when the particular estate was determined. To remedy this hardship, a statute

of William III enacted, that posthumous children shall take in remainder, the same as if they had been born in their father's lifetime.

Probable Possibility. This species of contingent remainder to a person not in being, must however be limited to some one, that may, by common possibility or *potentia propinqua* be *in esse*, before the particular 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.

Remote Possibility. But a remainder to the right heirs of B, if there be no such person as B *in esse*, is void. Two contingencies must happen in such case; 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 makes it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son, who has none, is good, for by common possibility, he may have one, but if it be limited to his son John, 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 that particular name. A limitation of a remainder to an unborn bastard is void, the contingency being too remote. Thus may a remainder be contingent, on account of the uncertainty of him who is to take it.

Uncertain as to the Event. 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 contingent, depending upon a dubious event, the uncertainty of his surviving A.

Not Limited on an Estate for Years. 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 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 pass from 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, and if the estate be not of a freehold nature, the freehold cannot vest in it.

How Defeated and Destroyed. 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 a 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 remainder vests; the consequence of which is, that he utterly defeats them all.[1] As if there be a tenant for life, with remainder to his eldest son unborn in tail, and such tenant before his son be born, surrender 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.

Trustees Appointed. In these cases, it is necessary to have trustees appointed to preserve the contingent remainders, in whom there is vested an estate in remainder, to commence when the life estate determines. If therefore the estate for life determines otherwise than by the death of the life tenant, 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.

Latitude as to Terms in a Will. Great nicety is required in creating and securing a remainder. In devises by last will and testament, which are usually drawn up, when the party is *inops consilii*, the courts give greater latitude of construction than in formal deeds, which are presumed to be made with great caution and advice; hence in such cases, remainders may be created in some measure contrary to the rules, but they are not termed remainders, but executory devises, or devises hereafter to be executed.

EXECUTORY DEVISES.

Defined. An executory devise of lands is such a disposi-

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[1] But a conveyance of a greater estate than he possesses is no forfeiture, and will not defeat a contingent remainder.

tion of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency.

Differs from a Remainder. It differs from a remainder in three material points:

1. *It needs no particular estate to support it.*

2. *By it a fee-simple, or less estate, may be limited after a fee-simple.*

3. *By this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.*

1. When it may Arise. It may exist, when one devises a future estate to arise upon a contingency, and until that contingency happens, leaves it to descend to his heirs at law. As if one devises lands to a *feme sole* and her heirs, upon her day of marriage; here in effect is a contingent remainder without any particular estate to support it; a freehold commencing *in futuro*. This limitation, though 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 livery of seisin, therefore it may commence *in futuro*; the reason why it cannot commence *in futuro* in other cases being the necessity of actual seisin, which always operates *in praesenti*. Since it may 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. Such devise, not being a present interest, cannot be barred by a recovery, suffered before it commences.

2. A Fee Limited after a Fee. A fee or other less estate may be limited after a fee. This happens, where a testator 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 years, then to B and his heirs; the remainder, though void in a deed, is good in an executory devise.[1]

Reasonable Time. In both these species of executory devises, the contingencies ought to be such, as may happen within a reasonable time; as within a life or lives in being, or

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[1] Fearne, in his book on Remainders, defines an executory devise to be: "Such a limitation of a future estate or interest in lands or chattels, as the law admits in the case of a will though contrary to the rules of limitation in conveyances at common law."

within a moderate term of years, for courts of justice are opposed to a perpetuity, which the law abhors. Where there is no power of alienation, estates are rendered incapable of answering those ends of social commerce, for which property was at first established.

Utmost Limit of Time. The utmost length of time allowed for the contingency of an executory devise of either kind to happen, is that of a life or lives in being, and twenty-one years thereafter. As when lands are devised to such unborn son of a *feme covert*, as shall first attain the age of twenty-one years, 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 minority of the son.

3. Limited on a Term of Years. By executory devise, a term of years may be given to one man for his life, with remainder over, 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 a larger estate than one for years. At first, the courts hesitated to restrain the devisee for life from aliening the term, but only held, that if he died without exerting that act of ownership, the remainder over should then take place. Subsequently it was held, that the devisee for life had no power to aliene his term, so as to bar the remainderman, and though such remainders may be limited to as many persons successively, as the devisor thinks proper, yet they must all be *in esse* during the life of the first devisee, and the ultimate remainder is to the one who survives the rest. 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.

III. ESTATES IN REVERSION.

Defined. This is the residue of an ate left in the grantor, to commence in possession, after the determination of some particular estate granted out by him. 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, for years or at will, continues in the lessor. A reversion is never created by deed, or other writing, but arises from construction of law; a remainder can never be limited, unless by

deed or devise. Both are equally transferable, when actually vested, being both estates *in praesenti*, to take effect *in futuro*.

Fealty and Rent. The doctrine of reversion is derived from the feudal constitution. For when a feud was granted to a man for life, or to him and his issue male, rendering rent or service; then on his death or the failure of issue male, the feud was determined, and resulted back to the lord. Hence the usual incidents to reversions are fealty and rent. Even where no rent is reserved, fealty results of course as a badge of tenure, being often the only evidence, that the lands are held 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. By a general grant of the reversion, the rent will pass with it, as an incident, though by the grant of the rent generally, the reversion will not pass.

Distinction from Remainders. Great care is requisite in distinguishing reversions from remainders, as they differ in the incidental rights of the reversioner, and the respective modes of descent. Thus, if one, seised of a paternal estate in fee, makes a lease for life, with remainder to him and his heirs, this is properly a mere reversion, to which rent and fealty shall be incident, and which shall only descend to the heirs of his father's blood, and not to his heirs generally, as a remainder limited to him by a third person would have done, for it is the old estate, which was originally in him, and has not left him.

Concealment of Death. To assist those having estates in remainder, reversion or expectancy, after the death of others, against fraudulent concealment of their death, it is enacted by statute of Anne, that such persons, on application to the court of chancery, and order made therein, once in every year shall, if required, be produced to the court or its commissioners. Upon neglect or refusal, they shall be deemed dead, and the person entitled to such expectant estate may enter upon the lands, till the party shall appear to be living.

Doctrine of Merger. Whenever a greater estate and a lesser coincide and meet in the same person, without any intermediate estate, the lesser one is at once annihilated, or in law phrase, merged, that is, sunk in the greater. Thus if there be tenant for years, and the reversion in fee-simple becomes his,

the term of years is merged in the inheritance, and no longer exists. But they must come to the same person in one and the same right, else if the freehold be in his own right, and he has a term in another's right, *en autre droit*, there is no merger. If he who has the reversion in fee marries the tenant for years, it is no merger, for he has the inheritance in his own right, the lease in the right of his wife.

Estate-tail an Exception. 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 no merger occurs. Estates tail are preserved from merger by the operation of the statute *de donis*, on the probable consideration that, in the usual cases of merger of estates for life or years, by uniting with the inheritance, the particular tenant has the sole interest, and has power to defeat, destroy or surrender them to him who has the reversion; therefore when united with the reversion in fee, the law deems it a surrender of the inferior estate. But in an estate tail, for a long time, the tenant had no power to bar or destroy it, and now can only do it by certain special modes, by fine, or recovery, or the like, hence it would have been unjust to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue. It is a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee.

CHAPTER XII.—ESTATES IN SEVERALTY, JOINT TENANCY, COPARCENARY, AND COMMON.

Preamble. We now shall treat of estates, with respect to the number and connection of their owners, the tenants, who occupy and hold them. Estates of any quantity or length of duration, and in either actual possession or expectancy, may be held in four different ways: in severalty, joint-tenancy, coparcenary and common.

I. SEVERALTY.

Defined. He who holds lands or tenements in severalty,

or is sole tenant thereof, holds them in his own right only, without any one being joined or connected with him in interest, during his estate therein. This is the usual way of holding an estate, hence but little about it is peculiar or to be remarked.

II. JOINT-TENANCY.

Defined. This 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 termed an estate in joint-tenancy, or in jointure, which words signify a union or conjunction of interest, though in common parlance, jointure is now usually confined to that joint estate, frequently vested in the husband and wife before marriage, as a full satisfaction and bar of dower.

1. How Created. 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 it is by the act of the parties, and never by the mere act of the law. 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. For the law interprets the grant, so as to make all parts of it take effect, which can only be done, by creating an equal estate in them both. As the grantor has thus united their names, the law gives them a thorough union in all other respects.[1]

2. Its Properties. 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. In other words, the 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.

Unity of 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, nor one in fee, and the other in tail. If land be limited to A and B for their lives, this makes them joint tenants of the

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[1] Joint-tenancy is regarded with disfavor by the courts, and every effort is made in favor of construing the intent to be to form a tenancy in common.

freehold; if to A and B and their heirs, it makes them joint tenants of the inheritance.

Unity of Title. The estate of joint tenants 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, otherwise the tenants would have different titles, one of which might be good, and the other bad, which would destroy the jointure. Joint-tenancy cannot arise by descent or act of law, but merely by purchase or acquisition by the act of the party.

Unity of Time. Their estates must be vested at one and the same period. As in case of a present estate made to A and B, or a remainder to them in fee, after a particular estate; in either case, they are joint tenants of the 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 pending 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 his heir; now A's heir and B's heir are not joint tenants of this remainder, but tenants in common, because one moiety vested at one time, and the other moiety at another.

Extreme Example. Yet where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for the term of their lives, and he afterwards married, 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 till the intermarriage, and being then awakened, had relation back, and took effect from the original time of creation.

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 a moiety or one-half, and the other of the other moiety, but each has an undivided moiety of the whole, and not the whole of an undivided moiety.

Husband and Wife. Estate in Entirety. 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.[1]

Other Incidents to Joint-tenancy. Other consequences and incidents to the joint-tenant's estate depend upon the intimate union of interest and possession. If two such tenants let their land by verbal lease, reserving rent to be paid to one, it shall enure to both, in respect of the joint-reversion. The same result follows on a surrender of the lease. Livery of seisin, made to one joint-tenant, shall enure to both of them, and the entry or re-entry of one joint-tenant is the act of both. One joint-tenant cannot sue or be sued in relation to the joint estate, without joining the other.[2]

Suits between Joint-tenants. It is held, that one joint tenant cannot have an action against another for trespass, in respect of the land, for each has an equal right of entry. But one joint-tenant can do no act, which may tend to defeat or injure the estate of the other, as to execute leases, or to grant copyholds. One tenant may have an action of waste against the other, for an act tending to the destruction of the inheritance, and also an action of account, where one tenant is apparently receiving more than his share of the profits of the tenements held in joint-tenancy.

Survivorship of Joint-tenant. This is 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 autre 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, who shall be entitled to the entire estate, whatever it may be. This is the natural sequence of the union and entirety of their interest, the interest of the tenants being 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

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[1] Where an estate is conveyed to a husband and wife and to a third party, such third party takes a moiety of the estate. The statutes of the various United States, abolishing joint tenancies and converting the estates into tenancies in common, have no bearing on estates in entirety.

[2] Until the statute of William III, the possession by one joint-tenant was the possession of the other.

distinct, the joint tenancy instantly ceases. But while it continues, each joint-tenant has a concurrent interest in the whole.

Result of Death of Tenant. On the death of one, the sole interest in the whole remains in the survivor, for no one can now claim a joint estate with him, nor a separate interest in any part of the tenements. As the survivor's original 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 alone shall be entitled to the estate.

Accumulation to the Survivor. 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. This *jus accrescendi* should be mutual, which is probably a reason, why neither the king nor any corporation can be a joint-tenant with a private person, for here is no mutuality, as a king and the corporation can never die.

3. How a Joint-tenancy may be Destroyed. This may be done by destroying any of its constituent unities:

(1) Question of Time. That of time, which respects only the original commencement of the joint estate, and hence cannot be affected by any subsequent transactions.

(2) Disuniting their Possession. The joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their possession. Joint tenants being seised *per my et per tout*, everything that tends to narrow that interest is a severance of the jointure. Hence if two joint-tenants agree to divide their lands, and hold them in severalty, they are no longer joint-tenants, and the right of survivorship is destroyed. By common law, they could make partition of their lands, but only by the consent of all; but by statute of Henry VIII, one can compel the other by writ of partition to divide the lands.

(3) Destroying the Unity of Title. The jointure may be ended by destroying the unity of title. As if one joint-tenant 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 tenant hold by different titles, one only being from the original grantor, though till partition made, the unity of possession continues. But a devise of one's share by will is no

severance of jointure, for no testament takes effect, before the death of the testator, and by such death the right of the survivor is already vested.

(4.) **Destroying the Unity of Interest.** Hence, 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. Also 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. Whenever the jointure ceases or is severed, the right of survivorship ceases with it. Yet, if one of three tenants alienes his part, the two remaining tenants still hold their portions by joint-tenancy and survivorship, and if one joint-tenant releases 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 preserve their original constituent unities.

Summary of Causes of Destruction. 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 the above four indispensable requisites, a sameness of interest and undivided possession, a title vesting at one and the same time, and by the same act or grant, the jointure is instantly dissolved.

Advantages of Dissolving the Jointure. Generally 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 heirs. Sometimes however it is disadvantageous, as if there be joint-tenants for life, and they make partition, this dissolves the jointure, and while before they each 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. If there be two joint-tenants for life, and one grants his part for the life of his companion, it is a forfeiture, for it is creating an estate, which may by possibility last longer than that to which he is legally entitled.

III. COPARCENARY ESTATES.

Defined. 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 com-

mon law, as where a person, seised in fee-simple or in fee-tail, dies, and his next heirs are two or more females, or their representatives. In this case, they shall all inherit, and these co-heirs are called coparceners, or for brevity, parceners. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree. In either of these cases, all the parceners together constitute but one heir, and have but one estate among them.

Property of Parceners. In some respects the properties of parceners resemble 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 lands; and the entry of one is the entry of all in some cases. They cannot maintain trespass against each other; and they differ from joint-tenants in being excluded from maintaining an action of waste, for coparceners could at all times stop waste by writ of partition, but till the statute of Henry VIII, joint-tenants had no such power.

Differ from Joint-tenants. (1) They always claim by descent, whereas joint-tenants claim by purchase. No lands can be held in coparcenary, but estates of inheritance; whereas not only estates in fee and in tail, but also for life and for years may be held in joint tenancy.

(2) There is no unity of time necessary to an estate in coparcenary. For if a man's two daughters held an estate of this description, and one daughter died, the surviving daughter and the heir of the deceased one are still parceners.

(3) Parceners, though they have an unity, have not an entirety of interest. They are properly entitled each to 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 remains. And as long as the lands continue in course of descent and united in possession, so long are the tenants therein, whether male or female, 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 is made, then the lands are no longer held in coparcenary, but in common.

Partition by Parceners. Parceners are so called, says Littleton, because they may be constrained to make partition.

(1) They may agree to divide the lands in severalty in equal parts, each to take a portion.

(2) They may choose a friend to make partition for them, and then the sisters shall each choose her part according to seniority of age, or otherwise, as shall be agreed. The privilege of seniority is personal, for if the eldest sister be dead, her issue shall not choose, but the second sister shall have precedence.

(3) Where the eldest divides, she shall choose last, for by the rule of law, *cujus est divisio, alterius est electio.*

(4) Where the sisters agree to cast lots for their shares.

(5) Where one or more sue out a writ of partition against the others. Thereupon the sheriff shall visit the lands, and make partition thereof by the verdict of a jury, there impanelled, and assign to each of the parceners her part in severalty. Some property is not divisible, as the mansion house, common of estovers or other common, but the eldest sister, if she desire, may have them, making the others a reasonable satisfaction out of other parts of the inheritance, otherwise they shall have the profits thereof in turn.

Frankmarriage. Another consideration attends an estate in coparcenary, where one of the daughters has had an estate given with her in frankmarriage by her ancestor, which is a species of estate-tail. In this case, if lands descend from the same ancestor to her and her sisters in fee-simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in frankmarriage, in equal proportion with the rest of the lands descending.

Hotch-pot. This is termed, bringing the lands into hotch-pot, or into a pudding, where many things are presumably mixed. This means, that the lands given in frankmarriage, and those descending in fee-simple, should be blended and divided in equal portions among the daughters. But this was left to the choice of the donee in frankmarriage. If she refused to so act, the remaining lands were divided equally among her sisters. But if instead of descending in fee-simple, they descended in fee-tail, the donee in frankmarriage obtained her share in them, without resorting to the hotch-pot. The reason of this distinction is, that lands descending in fee-simple are distributed, by the policy of law, for the maintenance of all the daughters, while lands descending in tail are distributed by the designation of the giver, *per formam doni*, and hence may be unequal. No lands, but such as are given in frankmarriage, shall be brought into hotch-pot, and this species of gift is now in disuse.

Dissolved. Estates 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 descending to and vesting in one single person, in severalty.

IV. TENANCY IN COMMON.

Defined. Tenants in common are such as hold by several and distinct titles, but by unity of possession, because no one knows his own severalty, hence all occupy promiscuously. The tenancy happens, where there is an unity of possession merely, but perhaps an entire disunion of interest, title and 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 there is no necessary unity of interest; one may hold by descent, the other by purchase, or the one by purchase from A, and the other by purchase from B, so there is no unity of title; one's estate may have been vested fifty years, another but yesterday, so there is no unity of time. The only unity is that of possession, because no man can tell which part is his own.

How Created. It 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, we mean destruction, which severs only the unity of title and interest, but not that of possession.

Examples. As if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common, for they have now several titles and interests. If one of two parceners alienes, the alienee and the remaining parcener are tenants in common, because the parcener holds by descent, and the alienee by purchase. So if a grant be made to two men, 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 occurred, if the grant had been to a man and woman, and the heirs of their bodies begotten. The issue in these cases will be tenants in common, because they must claim by different titles, one as heir of A, the other as heir of B.

Change of Estate. 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.

Created by Limitation in a Deed. A tenancy in common may also be created by express limitation in a deed, but care must be taken not to insert words, which imply a joint estate. Then if lands be given to two or more, and it be not joint tenancy, it is a tenancy in common. The law at one time favored joint-tenancy rather than tenancy in common, because the services issuing from the land, as rent, etc., are not divided, nor the entire services, as fealty, multiplied by joint-tenancy, as they necessarily must 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, as also if one grants to another half his land, because joint-tenants do not take by distinct moieties, and by such grants the division and severalty of the estate are plainly expressed.

Construction of Devises. But a devise to two persons to hold jointly and severally, is said to be a joint-tenancy, as an estate given to A and B, equally to be divided between them. In deeds, this has been said to be a joint-tenancy, yet in wills it is certainly a tenancy in common, because the devisor evidently meant what is most beneficial to the devisees, though his meaning have been imperfectly expressed.

Careful Description Necessary. And this nicety in the wording of grants, makes it the more usual and the safer 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.

Incidents to a Tenancy in Common. By statute, tenants in common are compellable to make partition, 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 the same as appertain to joint-tenants, such as being liable to reciprocal actions of waste and of account. By the common law, no tenant in common was liable to account to his companion for embezzling the profits of the estate, though if one actually turn the other out of possession, an action of ejectment will lie against him. There are other incidents of joint-tenants, which arise from

the privilege of title, or the union and entirety of interest, such as joining 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 in 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 partition between the several tenants in common, which gives them all respective severalties. These estates differ in nothing from sole estates, but merely in the blending and unity of possession.

CHAPTER XIII.—TITLE TO THINGS REAL, IN GENERAL.

Definition of Title. Coke defines a title, to be the means, whereby the owner of lands has the just possession of his property. There are several stages or degrees requisite to form a complete title to lands and tenements, as follows:

I. NAKED POSSESSION.

Defined. This is the actual occupation of the estate, without any apparent right or pretence of right to hold and continue such possession. This may happen, when one man invades the possessions of another, and by force or surprise, turns him out of the occupation of his lands, which is termed a disseisin, being a deprivation of the corporal freehold of the lands, which the tenant before enjoyed.

Illegal Entry. Or it may happen, that after the death of the ancestor, and before the entry of the heir, or after the death of the particular tenant, and before the entry of him in remainder or reversion, a stranger may take possession of the land, to the exclusion of the rightful owner. The wrong doer in such case, has only a mere naked possession, which the rightful owner may put an end to by a variety of legal remedies.

Rights of a Mere Possessor. Meanwhile, till some act be

done by the rightful owner to divest this possession and assert his title, such actual possession is, *prima facie*, evidence of a legal title in the possessor, and, by length of time and negligence of the real owner, it may by degrees mature into a perfect and indefeasible title. At all events, without such actual possession, no title can be completely good.[1]

II. RIGHT OF POSSESSION

When it Exists. This is the next step to a good and perfect title, and may reside in one man, while the actual possession is not in himself, but in another. For if a man is disseised, or otherwise kept out of possession, though the actual possession be lost, yet he has still remaining in him the right of possession, and may exert it at any time, by entering, and turning the disseisor out of that occupancy, which he has illegally gained.

Apparent and Actual. This right of possession is of two sorts: an apparent right of possession, which may be defeated, by proving a better; and an actual right of possession, which will stand the test against all opponents.

Heir of a Disseisor. Thus if the disseisor, or other wrongdoer, dies possessed of the land, whereof he so became seised by his own unlawful acts, and the same descends to his heir, now by the common law, the heir has obtained an apparent right, though the actual right of possession resides in the person disseised, and it shall not be lawful for the person disseised to divest this apparent right, by mere entry or other act of his own, but only by an action of law. The law will rather presume, until the contrary be legally proved, the right to reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. The feudal law favored the right of descent, in order that some one might be on the spot to perform the feudal duties and services; and therefore, when a feudatory died in battle, or otherwise, it presumed his children were entitled to the feud, till the right was otherwise determined by the peers of the feudal court.

Result of Laches. But if he, who has the actual right of possession, presents his claim, and brings his action within a reasonable time, and can prove by what unlawful means the

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[1] To oust such party in actual possession, the plaintiff must recover on the strength of his own title, and not on the weakness of his opponent's.

ancestor became seised, he will then, by sentence of law, recover possession of that, to which he has such actual right. Laches may give his adversary an actual right of possession.

III. RIGHT OF PROPERTY.

Defined. This is the *jus proprietatis*, without either possession, or the right of possession. This is often termed the mere right, *jus merum*, and the estate of the owner is in such cases to be totally divested, and put to a right.

Right of Possession in Another. A person in this situation may have the true ultimate property in the lands in himself, but owing to circumstances, resulting either from his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favor of his antagonist, who has thereby obtained the absolute right of possession.

Example. Result of Laches. As if a person disseised, or turned out of possession, neglects to pursue his remedy within the time allowed by law, and by this means, the disseisor or his heir gains the actual right of possession. In such case, the law presumes he had a good right originally, when he entered on the lands, or gained a sufficient title subsequently; hence after so long an acquiescence, the law will not suffer his possession to be disturbed, without inquiring into the absolute right of property. Still, if the person disseised or his heir has the true right of property remaining in himself, his estate is indeed turned into a mere right; but by proving such his better right, he may at length recover the lands.

Writ of Right. If by accident, neglect or otherwise, judgment is given for a party in any possessory action, that is, where the right of possession only, and not that of property, is contested, and the other party has the right of property, that is now turned to a mere right, and produces proof thereof in a subsequent action, denominated a writ of right, he shall recover his seisin of the lands.[1]

Examples of these Respective Rights. Thus if a disseisor turn me out of possession of my lands, he thereby gains a mere naked possession, while I retain the right of possession and right of property. If the disseisor dies, and the lands

[1] The writ of right is now abolished by statute.

descend to his son, the son gains an apparent right of possession, but I still retain the actual right both of possession and property. If I acquiesce for thirty years, without bringing any action for the possession of the lands, the son gains the actual right of possession, and I retain nothing but the right of property. And even this right of property will fail, unless I act within sixty years. So also if the father be tenant in tail, and alienes the estate-tail to a stranger in fee, the alienee thereby gains the right of possession, and the son has only the mere right, or right of property. And hence it will follow, that one man may have the possession, another the right of possession, and a third the right of property. For if a tenant in tail enfeoffs A in fee-simple, and dies, and B disseises A, now B will have the possession, A the right of possession, and the issue in tail the right of property. A may recover the possession against B, and afterwards the issue in tail may evict A, and unite in himself the possession, the right of possession, and also the right of property.

IV. A COMPLETE TITLE TO LANDS.

Merger of These Rights. It is an ancient maxim of the law, that no title is completely good, unless the right of possession be joined with the right of property, which right is then termed a double right, *jus duplicatum* or *droit-droit*. And when to this double right, the actual possession is also united, when there is *juris et seisinae conjunctio*, then, and then only, is the title completely legal.

CHAPTER XIV.—TITLE BY DESCENT.

PREAMBLE.

Acquisition and Loss. Having stated the several gradations and stages requisite to form a complete title to lands, tenements and hereditaments, we will next consider the several manners, in which the title may be lost and acquired; whereby the dominion of things real is either continued or transferred. By whatever mode one man gains an estate, by that same method or its correlative, some other man has lost it. As where the heir

acquires by descent, the ancestor has first lost his estate by his death; where the lord gains by escheat, the estate of the tenant is first lost by the extinction of his hereditary blood; where a man gains an interest by occupancy, the former owner has relinquished his right of possession; where one man claims by prescription, another man has parted with his right by an ancient and now forgotten grant, or has forfeited it by neglect of himself and his ancestors for ages; and so in case of forfeiture, the tenant by his own misbehavior or neglect has renounced his interest in the estate, whereupon it devolves upon that person, who by law may take advantage of such default.

Modes of Acquisition and Loss. The methods of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by law to two:

1. *Descent, where the title is vested in a man by the single operation of law.*

2. *Purchase, where the title is vested in him by his own act or agreement.*[1]

Descent Defined. 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 heir at law. An heir is he, upon whom the law casts the estate immediately on the death of the ancestor, and the estate is termed an inheritance.

Knowledge on this Point Essential. The doctrine of descents or law of inheritance in fee-simple, is the principal object of real property in England. All the rules, relating to purchases, whereby the legal course of descents is altered, constantly refer to this settled law of inheritance, as a *datum* or first principle, upon which subsequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation, that cannot be perfectly understood, without a previous knowledge of the law of descents in fee-simple.

Consanguinity. As the common law doctrine of inheritance depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be necessary to state the true notion of this alliance in blood. Consanguinity or kindred is defined to be *vinculum personarum ab eodem stipite descendentium*,

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[1] The term "purchase" in law is any other mode of acquiring real property than by descent. It may be by a man's own act or agreement, by devise, and by every species of gift or grant.

the connection of persons descended from the same stock. It is either lineal or collateral.

Lineal Consanguinity. This subsists between persons, of whom one is descended in a direct line from the other. It may be in a direct descending line, as father to son, or in a direct ascending line, as son to father. Every generation in this direct lineal consanguinity constitutes a different degree, reckoning either upwards or downwards. A man's father is related to him in the first degree, and so also is his son, while his grandfather and his grandson are related to him in the second degree. This holds true in the canon, the civil and the common law. By actual computation, every man at the distance of twenty generations has more than a million of ancestors, commencing with his two parents, his four grandparents and his eight great grandparents.

Collateral Kindred. Collateral relations agree with lineal ones, in that they descend from the same stock or ancestor, but differ, in that they do not descend, one from the other. The common ancestor is the *stirps* or root, the one trunk or common stock, from whence these relations branched out, and though but collateral kinsmen, they each have a portion of the ancestor's blood in their veins, and hence are termed *consanguineos.* Suppose each couple of our ancestors to have left two children, and each of those children on an average two more, we will find that all of us have now existing nearly two hundred and seventy million of kindred in the fifteenth degree, at the same distance from the common ancestors as ourselves. This of course is materially decreased by intermarriage between kindred.

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 whatever degree the two persons, or the more remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus X and his brother are related in the first degree, while X and his nephew are related in the second degree, for the nephew is two degrees removed from the common ancestor, his own grandfather.

Rules of Inheritance. There are certain rules or canons of inheritance, according to which, estates are transmitted from the ancestor to the heir:

I. Inheritances shall lineally descend to the issue of the person,

who last died actually seised in infinitum, but shall never lineally ascend.

Heirs Apparent and Presumptive. By law, no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor be 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 those whose right of inheritance is indefeasible, provided they outlive the ancestor. Heirs presumptive are such, who, if the ancestor should die immediately, would, under present circumstances, be his heirs, but whose right of inheritance may be defeated by the contingency of some nearer heir being born. Nay, even if the estate has descended by the death of the owner to a brother, nephew or daughter, whose presumptive succession would be destroyed by the birth of a child, and a posthumous child be born, the estate shall be taken away from such presumptive heir.

Actual Seisin of the Ancestor. Such ancestor, from whom an inheritance of lands may be derived, must have had actual seisin of the 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 has had the equivalent to corporal seisin in hereditaments that are incorporeal, such as the receipt of rent and the like. But he shall not be accounted an ancestor, who has only a bare right or title to enter or be otherwise seised. The law requires this notoriety of possession, as evidence that the ancestor had the property in himself, which is now to be transmitted to the heir. Which notoriety has taken the place of the ancient feudal investiture, whereby, while feuds were precarious, the vassal, on the descent of lands, was formerly admitted in the lord's court, and there received his seisin in the nature of a renewal of his ancestor's grant, in the presence of the feudal peers. The seisin of any person makes him the root or stock, from which all future inheritance, by right of blood, must be derived, as expressed, *seisina facit stipitem.* As early as the time of Henry II, we find the rule laid down, that the land shall never ascend, *haereditas nunquam ascendit.*[1]

II. The male issue shall be admitted before the female; sons shall be preferred to daughters.

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[1] This rule is now altered.

Males Preferred. This preference of males to females is agreeable to the law of succession among the Jews, and also among the Athenians, but was totally unknown to the laws of Rome, as at present extant, wherein brothers and sisters succeeded to equal portions of the inheritance. The English preference for males arose entirely from the feudal law. Our Welsh ancestors preferred the males, but the Danish invaders of England made no distinction of sex, and admitted all children at once to the inheritance. The early Saxons also manifested a preference for the male sex. Under feudal principles, no female could ever succeed to a proper feud, inasmuch as she was unable to perform the military services for which the feudal system was established. The English law does not extend to a total exclusion of the females, as the Salic law, where feuds were most strictly retained; it only postpones them to males, for though daughters are excluded by sons, they succeed before any collateral relations; our law, like that of the Saxon feudists, taking a middle course between the absolute rejection of females, and the placing them on a footing with males.

III. Where there are two or more males, in equal degree, the eldest only shall inherit, but the females all together.

Primogeniture. This right of primogeniture in males seems anciently to have only obtained among the Jews, in whose constitution, the eldest son had a double portion of the inheritance. By the laws of Henry I, in England, the eldest son had the capital fee or principal feud of his father's possessions, and no other pre-eminence. Afterwards the eldest daughter had the mansion house, when the estate descended in coparcenary. The Greeks, Romans, Britons and Saxons, and even originally the feudists, divided the lands equally, some among all the children, some among the males only.

Benefits therefrom. But when the sovereigns began to create honorary feuds, or titles of nobility, it was found necessary to make them impartible, *feuda individua*, and in consequence descendible to the eldest son alone. To this was added the inconvenience of splitting estates, *viz.*, the division of military services, the multitude of infant tenants incapable of performing any duty, the consequent weakening of the strength of the kingdom, and the inducing younger sons to adopt an idle life in the country, instead of engaging in mercantile, military, civil or ecclesiastical duties.

Lands in Socage Tenure. Yet we find that socage estates frequently descended to all the sons equally, up to the reign of Henry II, but they have now fallen into the right of succession by primogeniture, except in Kent.

Female Primogeniture. Females continue as they were by the ancient law, for they were all equally incapable of performing any personal service. The prevention of the minute subdivision of estates was left to be provided for by the lords, who had the disposal of these female heiresses in marriage. However the succession by primogeniture, even among females, took place as to the inheritance to the crown, and the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honor. Thus if an earl dies, leaving only daughters, the eldest shall not necessarily be countess, but the king may confer the title on any of the daughters, as he pleases.

IV. The lineal descendants, in infinitum, of any person deceased, shall represent their ancestor, i. e., shall stand in the same place, as the person himself would have done, had he been living.

Representation by Race. Thus the child or grandchild, either male or female, of the eldest son succeeds before a younger son, and so *in infinitum*. And these representatives shall take just so much as their principals would have done. Thus if a man has two daughters and one die, leaving six children, the surviving daughter, on the death of her father intestate, takes a moiety of his estate, the remaining moiety to be divided among the six grandchildren, being the share which their mother would have had, if she had lived.

Per Stirpes. This taking by representation is termed succession *in stirpes*, according to the roots, since all the branches inherit the same share as their root, whom they represent, would have done. And in this manner also was the Jewish succession, but the Roman differed somewhat. In the descending line, the right of representation continued *in infinitum*, and the inheritance descended *per stirpes*. And so among collaterals, if any person of equal degree with the persons represented was still existing, as if the deceased left one brother and two nephews, the sons of another brother, the succession was still guided by the roots.

Per Capita. If, however, both of the brothers were dead, leaving issue, then their representatives in equal degree became

themselves principals, and shared the inheritance *per capita*, that is, share and share alike, they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation. So if a man's next heirs are six nieces, three by one sister, two by another, and one by a third, his inheritance by the Roman law was divided into six parts, and one given to each of the nieces, whereas the law of England in this case would divide it into only three parts, and distribute it *per stirpes*, thus: one-third to the three children, who represent one sister, another third to the two, who represent the second, and the remaining third to the one child, who is the sole issue of her mother.

English Mode of Representation. This mode of representation is a result of the double preference given by our law, first to the male issue, and next to the first born among the males, to both which, the Roman law is a stranger. For if all the children of three sisters were in England to claim *per capita*, in their own right as next of kin to the ancestor, then the eldest male among them would exclude his brethren and sisters and also his cousins, or else the law would be inconsistent with itself, and depart from its preference to males, and the first born among persons of equal degree.

Example of Per Stirpes Representation. Whereas by dividing the inheritance *per stirpes*, according to the roots, the rule of descent is kept uniform; the issue of the eldest son excludes all other persons, while the issue of two daughters divide the inheritance between them, provided their mothers, if living, would have done the same. If a man has two sons, A and B, and A dies, leaving two sons, and then the grandfather dies; now the elder son of A shall succeed to the whole of his grandfather's estate, but if A had left only two daughters, they would have succeeded to equal moieties of the whole, in exclusion of B and his issue. But if a man has only three daughters, C, D and E, and C dies, leaving two sons, D, leaving two daughters, and E, leaving a daughter and a son, younger than his sister; here when the grandfather dies, the elder son of C shall succeed to one-third, in exclusion of the younger; the two daughters of D to another third, and the son of E to the remaining third, to the exclusion of his sister. And the same right of representation, restrained by the same rules of descent, prevails downwards *in infinitum*.

Established in England. This right does not appear to

have been established in England, until the reign of Henry III, prior to whose reign, in the title to the crown especially, we find contests between the younger brother and his nephew, the son of a deceased brother, in regard to the inheritance of their common ancestor; for the uncle is nearer of kin to the common stock by one degree than the nephew, though the latter, by representing his father, has in him the right of primogeniture. Even to this day in lower Saxony, proximity of blood takes precedence of representative primogeniture, that is, the younger surviving brother is admitted to the inheritance before the son of an elder brother, deceased.

V. 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.

Blood of the First Purchaser. Thus if A purchases land, and it descends to B, his son, and B dies seised thereof without issue, whoever succeeds to this inheritance must be of the blood of A, the first purchaser of this family. The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether by sale or gift, or by any other method, except by descent.

Peculiar to Our Law. This is a rule almost peculiar to our own laws. It was entirely unknown among the Jews, Greeks and Romans, who looked no further than the person who died last seised of the estate, but assigned him an heir, without regard to the origin of his title. Our rule, agreeing with the law of Normandy, had a feudal original.

Of the Blood of the Ancestor. When feuds became hereditary, the heir, who would succeed to the feud, must be of the blood, that is, lineally descended from the first feudatory or purchaser. Hence if a vassal died, seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer.

Collateral Heirs. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors; then his brother, or other collateral relation, who derived his blood from the first feudatory, might succeed to such inheritance. The reason for this distinction was this, that what was given to a man for his personal service and personal merit, ought not to descend to any, but the heirs of his person.

Issue of the Body of the Ancestor. And therefore, as in estates tail, which a proper feud resembled, so in the feudal donation, the will of the donor or original lord, when feuds were turned from life estates into inheritances, was not to make them absolutely hereditary, like the Roman *allodium*, but hereditary only *sub modo;* not hereditary to the collateral relations or lineal ancestors, or husband or wife of the feudatory, but to the issue descended from his body only.

Collateral Kinsmen Admitted. In time, when the feudal rigor somewhat abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum*, to hold *ut feudum antiquum;* that is, with all the qualities annexed of a feud derived from his ancestors. And then the collateral relations were admitted to succeed even *in infinitum*, as they might have been of the blood of the first imaginary purchaser, because every collateral kinsman must be descended from some one of his lineal ancestors.

Present Grants of Fee-simple Estates. Of this nature are all the grants in fee-simple in the kingdom, for there is not at present in England such a thing as a grant of a *feudum novum*, to be held, *ut novum*, unless in the case of a fee-tail, where none but the lineal descendants of the first donee or purchaser are admitted; but every grant of lands in fee-simple is with us a *feudum novum* to be held, *ut antiquum*, as a feud, whose antiquity is indefinite, and hence the collateral kindred of the grantee or descendants from his lineal ancestors, by whom the lands might have been purchased, are capable of being called to the inheritance.

Heirs of the Ancestor. Yet when an estate has really descended in the course of inheritance to the person last seised, the strict rule of the feudal law is still observed, and none are admitted, but the heirs of those through whom the inheritance has passed, for none others have the blood of the first purchaser in them. As if lands come to a man by descent from his mother, no relation of his father, as such, shall ever be his heir of these lands; and *vice versa*, if they descend from his father, no relation of his mother, as such, shall ever be admitted thereto. This is also the rule of the French law, which is derived from the same feudal source.

Where of Doubtful Origin. So far as the feud is really

antiquum, the law traces it back, and will not suffer any to inherit, but the blood of those ancestors, from whom the feud was conveyed to the late proprietor. But when through length of time, it can be traced no further, or it was taken by an ancestor as a feud of indefinite antiquity, the law admits the descendants of such ancestors either paternal or maternal, to be in their due order the heirs of the last holder.

Law of Collateral Inheritance. This then is the principle, upon which the law of collateral inheritances depends: that upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser, or that it shall result back to the heirs of the body of that ancestor, from whom it either has, or by fiction of law, is supposed to have originally descended.

VI. The collateral heir of the person last seised must be his next collateral kinsman of the whole blood.

Different Modes of Computing Degrees. He must be so either personally or *jure representationis*, according to the canonical degree of consanguinity. Hence, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who are only in the second. Herein consists the reason of the different methods of computing the degrees of consanguinity in the civil law on the one hand, and in the canon and common laws on the other.

Under the Civil Law. The civil law regards consanguinity chiefly with respect to succession, and hence considers only the person deceased, to whom the relation is claimed. It counts the degree of kindred, according to the number of persons, through whom the claim must be derived from him.

Under the Canon Law. The canon law regards consanguinity principally with a view to prevent incestuous marriages, and therefore looks up to the ancestor of the same blood, reckoning the degrees from him.

Under the Common Law. The common law regards consanguinity principally with respect to descents, and having therein the same objects in view, as the civil law, it apparently ought to proceed according to the civil computation. But it resembles the canon law, in its respects to the purchasing ancestor, from whom the estate was derived, and hence counts its degrees in the same manner. The designation of person, in

seeking for the next of kin, will come to exactly the same end, though the degrees will be differently numbered, whichever mode of computation we use, since the right of representation of the parent by the issue is allowed to prevail *in infinitum*, otherwise there would often have been claimants in exactly the same degree of kindred; as for instance, uncles and nephews, which would have produced endless confusion. The issue of a man's brother are all of them in the first degree of kindred with respect to inheritance, those of his uncle in the second, and those of his great uncle in the third, as their respective ancestors, if living, would have been.

On Failure of Issue. On failure of issue of the person last seised, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus if a man die without issue, his estate shall descend to his brother or his representatives, he being lineally descended from the next ancestor, the man's father. On the failure of brothers and sisters and their issue, it shall descend to the uncle of the deceased, and so on.

Representation through the Father. Here it must be observed, that the lineal ancestors, though according to the first rule, incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stock, from which the next successor must spring. Hence in the Jewish law, which in this respect, corresponds with ours, the father or other lineal ancestor is said to be the heir, though long since dead, as being represented by his issue, who are held to succeed not as brothers, uncles, etc., but in right of representation, as the offspring of the father or grandfather of the deceased.

Title from a Brother. But though the common ancestor be thus the root of the inheritance, yet with us, it is unnecessary to name him in tracing the descent, as the descent between two brothers is held to be an immediate descent, and therefore title may be made from brother to brother, without mentioning their common father, who is in reality the fountain of inheritable blood in such case. On default of issue of such parent, we ascend to the next degree and so upwards *in infinitum*, till some couple of ancestors be found who have other issue descending from them than the deceased, in a parallel or collateral line. In such derivation, the same rules of sex, primogeniture and representation, as in lineal descents from the person of the last proprietor, must be observed.

Half-blood cannot inherit. The heir need not be the nearest kinsman absolutely, but only *sub modo*, that is he must be the nearest kinman of the whole blood, who takes precedence of a much nearer kinsman of the half-blood, who in such case will be entirely excluded. The estate shall escheat to the lord, rather than that the half-blood shall inherit. A kinsman of the whole blood is he who is derived, not only from the same ancestor, but from the same couple of ancestors. The possession of a brother will make his sister of the whole blood his heir, in preference to a brother of the half-blood. But if land descends from a father to a son, and he dies before entry, his half-brother, son of the same father may inherit, not as the heir of his half-brother, but as heir to the commcn father, who was the person last actually seised.

Harsh Expulsion. This total exclusion of the half-biood from the inheritance is almost peculiar to our own law, and is looked upon as a strange hardship by some, who misapprehend the rule, which is not so much to be considered as a rule of descent as a rule of evidence.

Principle of Collateral Inheritance. The great principle of collateral inheritance is this, that the heir to a *feudum antiquum* must be of the blood of the first feudatory or purchaser, that is, derived in a lineal descent from him. It was originally requisite, as upon gifts in tail it still is, to trace the pedigree of the heir from the first donee or purchaser, and to show that such heir was his lineal representative. But when by length of time, and a long course of descents, the first feudatory or purchaser was forgotten, and the proof of an actual descent from him became impossible; then the law substituted a reasonable in lieu of an impossible proof, for it remits the proof of an actual descent from the first purchaser, and only requires, that the claimant be next of the whole blood to the person last in possession, or derived from the same couple of ancestors.

Restrictions in Recent Feuds. As this is the case in *feudis antiquis*, where there really did once exist a purchasing ancestor, who is forgotten: it is also the case in *feudis novis*, held *ut antiquis*, where the purchasing ancestor only existed in fiction of law. Of this nature are all present grants of lands in fee-simple, which are inheritable, as if they descended from some indefinite ancestor, and therefore, any collateral kindred of the real modern purchaser may inherit them, provided they be of the whole blood, but those of the half-blood are excluded.

Reasons for Exclusion of Half-blood. This exclusion of the half-blood is certainly a most subtle nicety, but considering the principles on which our law is founded, it is not an injustice, nor always a hardship, since even the succession of the whole blood was originally an indulgence, rather than the strict right of collaterals, and though not extended to the demi-kindred, yet they are rarely abridged of any right, they could have enjoyed before. The half-blood have always a much less chance to be descended from an unknown, indefinite ancestor of the deceased, than the whole blood of the same degree.

Instances of Great Hardship. In some instances this exclusion is carried further, than the principle upon which it is founded will warrant, particularly when a kinsman of the whole blood, in a more remote degree, as an uncle or great-uncle, is preferred to one of the half-blood in a nearer degree, as the brother; for the half brother has the same chance of being descended from the purchasing ancestor as the uncle, and a much greater chance than the grand-uncle. It is especially overstrained, when a man having two sons by different mothers, leaves his estate to the elder by descent, who enters and dies without issue, in which case the younger son cannot inherit the estate, because he is not of the whole blood of the last proprietor.

Exceptions as to the Crown and Estates-tail. Originally the custom of excluding the half-blood in Normandy extended only to exclude a *frater uterinus*, when the inheritance descended *a patre*, and *vice versa*, and possibly in England also. By our law, as it now stands, the crown may descend to the half-blood of the preceding sovereign, so that it be the blood of the first monarch purchaser. Thus it did actually descend from Edward VI to queen Mary, and from her to queen Elizabeth, who were respectively of the half-blood to each other. Hence in estates-tail, where the pedigree from the first donee must be strictly proved, half-blood is no impediment to the descent, because when the lineage is clearly made out, there is no need of this auxiliary proof.

General Rule. The rule then is this, that in order to keep the estate of a man, as nearly as possible in the line of his purchasing ancestor, it must descend to the nearest couple of ancestors, that have left descendants behind them, because the descendants of one ancestor only are not so likely to be in the line of that purchasing ancestor, as those that are descended from

both. To avoid confusion that might arise between the several stocks, wherein the purchasing ancestor may be sought for, another qualification is requisite, beside the proximity and entirety, which is that of dignity or worthiness of blood.

VII. 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, in fact, have descended from a female.

Preference for Males. 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. This rule is warranted by the examples of the Hebrew and Athenian laws, though in the time of Hesiod, when a man died without wife or children, all his kindred, without distinction, divided his estate among them. It is also warranted by the Roman law, wherein the *agnati*, or relations by the father were preferred to the *cognati*, or relations by the mother, till the edict of the emperor Justinian abolished all distinction between them. It is also conformable to the law of Normandy, which in most respects agrees with our English law of inheritance.

Descent from Mother's Side. Whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed, and no relation of his by his father's side can ever be admitted to them, because he cannot possibly be of the blood of the first purchaser. And so, *e converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. But if such first purchaser could not readily be discovered, the lawyers usually sought to find him by taking the next relation of the whole blood to the person last in possession, giving a preference to males, through the entire course of lineal descent from the first purchaser to the last tenant. If the investigation finds no heirs of the male stock, then, and then only, it resorts to the mother's side after leaving no place untried.

Difficulty of the Search. Through all stages of collateral inheritance, there exists a constant preference of the agnatic succession, or issue from the male ancestors, founded on the capacity of the male to perform personal services. Had there been

utter exclusion of females, the original male ancestor could have been more readily traced, but as males have not been perpetually admitted, but only generally preferred, so females have not been utterly excluded, but only generally postponed to males, and the ancestor in some cases becomes only a strong probability.

CHAPTER XV.—TITLE BY PURCHASE.

Defined. Purchase, *perquisitio*, is the possession of lands and tenements, which a man has by his own act or agreement, and not by descent from any of his kindred. It includes every method of acquiring an estate, except 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. In a confined acceptation, purchase is applied only to such acquisitions of land, as are obtained by bargain and sale for money or other valuable consideration.

Examples. 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, for he comes to the estate by his own agreement; that is, he consents to the gift. A man, who had his father's estate settled upon him in tail, before he was born, is also a purchaser, for he takes a different estate, from the one 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.

In Certain Devises, But if a man, seised in fee, devises his whole estate to his heir at law, so that the latter takes no greater or less estate by the devise, than he would have done without it, he shall be adjudged to take by descent, even though the land be charged with encumbrances; this being for the benefit of creditors and others having demands on the estate of the ancestor.

Examples of this Distinction in Remainder Estates. If a remainder be limited to the heirs of A, here A 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 an 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.

"Heirs" as a Word of Limitation. The ancestor, during his life, bears in himself all his heirs, and 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 deemed a word of purchase, but a word of limitation, enuring so as to increase the estate of the ancestor from a tenancy for life to a fee-simple.[1] Had the heir been allowed to take as a purchaser originally nominated in the deed, then in the times of strict feudal tenure, the lord would have been defrauded by such a limitation of the fruits of his seigniory, arising from a descent to the heir.

Conquest. Its Original Meaning. What we call purchase, the feudists called conquest, both denoting any means of acquiring an estate out of the usual course of inheritance. This is still the phrase in the Scotch law, as it was among the Norman jurists, who styled the first purchaser the conqueror. This was all that was meant by the title given to William the Norman. He was the *conquaestor* or *conquisitor*, signifying that he was the first of his family who acquired the crown of England, and from whom all future claims to descent must be derived.

Difference between Descent and Purchase. An estate acquired by descent and an estate obtained by purchase differ principally in 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 the mother's side, but he takes it *ut feudum antiquum*, as a feud of indefinite antiquity, whereby it becomes

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[1] This is termed the "Rule in Shelley's Case."

inheritable to the 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 or covenant, bind himself and his heirs, and then dies, this obligation shall bind the heir, only as he, or any one in trust for him, had any estate of inheritance vested in him by descent from such ancestor, sufficient to answer the charge, whether he remains in possession, or has alienated it before action brought; which sufficient estate is in the law called assets, from the French word *assez*, enough. Therefore, if a man covenants for himself and his heirs, to keep my house in repair, I can compel his heir in such case to perform this covenant, when he has an estate or assets sufficient therefor, derived from the covenantor.

Methods of Purchase. Title, how Acquired. Purchase, in its legal signification, includes the five following methods of acquiring a title to estates:

1. *Escheat.*
2. *Occupancy.*
3. *Prescription.*
4. *Forfeiture.*
5. *Alienation.*

TITLE BY ESCHEAT.

Defined. Escheat is a consequence of feudal tenure. The word is of French or Norman origin, and signifies chance or accident. With us it denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforseen contingency, in which case the land reverts or results back to the original grantor or lord of the fee.

Why an Estate by Purchase. Escheat being a title frequently vested in the lord by inheritance, it may seem more properly to fall under the head of acquiring title by descent, being vested in him by act of law, and not by his own act or agreement. But in order to complete this title by escheat; the lord must 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 on doing any act which implies waiver of his right, as by accepting rent of an usurping stranger, his title by

escheat is barred. It is therefore in some respect, a title acquired by his own act, as well as by act of law.

Principle of Escheats. 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 extinct, and since none can inherit, but such as are of his blood, it follows, the inheritance itself must fail, the land become *feudum apertum*, and must result back to the lord of the fee.

Two Kinds of Escheats. Escheats are those *propter defectum sanguinis*, and those *propter delictum tenentis*, the former being for lack of heirs, the latter for attainted blood. Both these species may be comprehended under the first denomination only, for he who is attainted suffers an extinction of his blood also. The inheritable quality is expunged in the one case, and expires in the other. We will consider the cases, wherein hereditary blood may be deficient:

1, 2, 3. Death of the Tenant. Three cases, where inheritable blood is wanting, may be collected from the rules of descent heretofore laid down:

(1) When the tenant dies without any relations on the part of any of his ancestors.

(2) When he dies without any relations on the part of those ancestors, from whom his estate descended.

(3) When he dies without any relations of the whole blood.

Blood of the First Purchaser. In two of these cases the blood of the first purchaser is certainly, and in the other is probably, at an end, and hence in all of them, the land shall escheat to the lord of the fee, who would be prejudiced, if in opposition to the inherent condition annexed to all feuds, any one, not of the blood of the first feudatory, should succeed to the lands.

4. Monsters. A monster, which has not the shape of mankind, but resembles the brute creation, has no inheritable blood, and cannot be heir to any land, albeit, brought forth in marriage.

5. Bastards. Bastards are incapable of being heirs. They are such children, as are not born either in lawful wedlock, or within a competent time after its determination. Such are held to be sons of nobody, *nullius filii*, and they have no inheritable blood. Hence, if there be no other claimant than such illegitimate children, the land shall escheat to the lord.

Under the Civil Law. The civil law differs from ours, and allows a bastard to succeed to an inheritance, if after his birth, his father and mother intermarry.[1] Also if the father had no lawful wife or child, then even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of his estate, and a bastard could succeed to the whole of his mother's estate, although she was never married. But our law, in favor of marriage, is much less indulgent to bastards.

Exceptional Case. It shows some little regard for them, however, in one instance, where the parents of a bastard subsequently marry and have a legitimate son. If such latter son neglect to seize the inheritance on his father's death, and the bastard enters upon the lands, and enjoys them until his death, whereby they descend to his issue, the legitimate son and his heirs are totally barred of their right, for the law will not suffer a man to be bastardized after death, who died seised of the estate.

Heirs of Bastards. Bastards can have no heirs, but these of their own bodies. For as all collateral kindred consists in being derived from a common ancestor, and a bastard has no legal ancestor, he can have no collateral kindred. Hence if a bastard purchase land and dies seised thereof, without issue, and intestate, the land shall escheat to the lord of the fee.

6. Aliens. Aliens also are incapable of taking by descent, or inheriting, as they have no inheritable blood, rather indeed upon a principle of civil policy, than upon reasons strictly feudal. Though if lands had been suffered to fall into the hands of those owing no allegiance to the English crown, the design of introducing feuds, the defence of the kingdom, would have been defeated. Wherefore, if a man leaves no other relations but aliens, his land shall escheat to the lord.

Cannot hold by Purchase or Inheritance. Aliens are under still greater disabilities than bastards, for they are also unable to hold by purchase. Hence they can have no heirs' because they can have nothing for an heir to inherit; they have no inheritable blood.

Effect of Naturalization. If an alien be made a denizen by the king's letters patent, and then purchases land, his son

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[1] So also under the Scottish law, if there has been no intermediate marriage of either with a third party.

born before his denization shall not, under the common law, inherit, but a son born afterwards may do so. But if the father had been naturalized by act of parliament, such elder son might then inherit, for the act has a retrospective effect.

Sons of an Alien. Coke holds, that if an alien comes into England, and there has issue two sons, who are thereby natural born subjects, and one of them purchases land and dies, the other brother cannot be his heir, because the common stock, the *commune vinculum*, is the father, who having no inheritable blood in him, could communicate none to his sons, and as the sons could not be heirs to the father, neither son could be heir to the other. But this opinion has been overruled, and it is now held, that sons of an alien, born here, may inherit from each other, the descent from a brother being an immediate one.

By later Statutes. By statute of William III, it is also enacted, that all persons, being natural born subjects, may inherit, and take title by descent from any of their ancestors, lineal or collateral, although their parents or other ancestors were born out of the king's allegiance. By statute of George II, no such right of inheritance shall accrue, unless to persons in being, and capable of taking as heirs at the death of the person last seised, excepting where lands descend to the daughter of an alien, which estate shall be divested in favor of an after-born brother.

7. Attainder. By attainder, also for treason or other felony, the blood of the person attainted is so corrupted, as to be rendered no longer inheritable. Care must be taken to distinguish between forfeiture of lands to the king, and this species of escheat to the lord. Forfeiture of all property was the doctrine of the old Saxon law, as a part of punishment for the offence, and does not relate to the feudal system, nor was altered by the Norman tenures, a consequence of which was escheat. Escheat therefore operates in subordination to the ancient law of forfeiture.

Bearing of Escheat upon Attainder. The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony, is corrupted and stained, and the original donation of the feud is thereby determined. Upon proof of guilt by legal attainder, the bond of fealty was held to be broken, the inheritable quality of the offender's blood extinguished, and the estate reverted to the lord of the fee.

Effect of the Law of Escheat on Forfeiture. The law of

feudal escheat was brought into England at the conquest, and was added to the ancient law of forfeiture. By attainder, the land of all felons would revert to the lord, but the superior law of forfeiture intervenes and intercepts it, in treasons forever, in other felonies for a year and a day, after which time it goes to to the lord in a regular course of escheat, as it would have done to the heir of the felon, if the feudal tenure had not been introduced. Gavelkind lands are in no case subject to escheat for felony, though liable to forfeiture for treason.

Right of Dower. As a result of this doctrine of escheat, all lands of inheritance immediately revesting in the lord, the wife of the felon was liable to lose her dower, until the statute of Edward VI, which restored the right to her, unless her husband had been attainted of high treason.

Distinction between Escheat and Forfeiture. The law of forfeiture stops with the estate of the offender at the time of his offence or attainder, but the law of escheat pursues the matter still further. For the blood of the tenant being extinguished, he is incapable of inheriting lands in the future. This illustrates the distinction between forfeiture and escheat.

Example of such Distinction. If therefore a father be seised in fee, and the son commits treason and is attainted, and then the father dies, the lands escheat to the lord, because the son is incapable of being heir, and there can be no other heir during his life, but nothing shall be forfeited to the king, for the son never had an interest in the land. In this case the escheat operates, but not the forfeiture. But where a new felony is created, which does not extend to corruption of the blood, here the lands of the felon shall not escheat to the lord, but the profits shall be forfeited to the king for a year and a day, and so long after as the offender lives.

Breaks the Course of Descent. A further consequence of this corruption of blood, is, that the person attainted is not only incapable of inheriting or transmitting his property by heirship, but he also obstructs the descent of lands to his posterity, in cases where they derive their title through him from a more remote ancestor. The ancient law of feuds allowed the grandson to be heir to his grandfather, though the son was guilty of felony.

Power of the Crown to Pardon. Parliament alone can

remove corruption of blood. The king may excuse the public punishment, but cannot abolish the private right of individuals, as a result of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone concerned, but he cannot wipe away the corruption of blood, for therein a third person has an interest, viz., the lord who claims by escheat.

Distinction between Aliens and Attainted Persons. A difference exists between aliens and persons attainted. Of aliens, who could by no possibility be heirs, the law takes no notice, and an alien elder brother shall not impede the descent to a natural born younger brother. But in attainders, it is otherwise, for if a man has issue a son and is attainted, and afterwards pardoned, and then has issue a second son and dies, the corruption of blood is not removed from the elder, and therefore he cannot be heir, neither can the younger be heir, for he has an elder brother living, who once had a possibility of being heir. The land shall escheat to the lord, though, had the elder died without issue during the life of the father, the younger son, born after the pardon, might have inherited. Sons born before a father is attainted may be heirs to each other, which differs from the case of the sons of an alien.

A Great Hardship. On the whole, a person attainted is neither allowed to retain his former estate, nor to inherit a future one, nor even to transmit an inheritance to his issue. This corruption of blood has been looked upon as a great hardship, because other oppressive features of the feudal tenures have been abolished.[1]

Corporation Property. One instance exists, where lands held in fee-simple do not escheat to the lord, and this is the case of a corporation; for if it be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat. The law tacitly annexes a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter. The heirs of the donor are substituted for the lord of the fee, which, in case of subinfeudations, was formerly allowed of a vassal, until restrained by the statute of *quia emptores*.

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[1] And now corruption of blood is almost entirely abolished, for by statute of George III, it was abolished in all cases, except for treason and murder.

CHAPTER XVI.—TITLE BY OCCUPANCY.

Defined. Occupancy is the taking possession of those things, which before belonged to nobody. This is the foundation of all property, or of holding those things in severalty, which by the law of nature, were common to all mankind. But when it was agreed, that everything capable of ownership should have an owner, reason suggested, that he who first declared his intention of appropriating a thing to his own use, and actually took it into possession, should gain an absolute property in it.

Tenancy pur Autre Vie. In England the right of occupancy to lands extends only to the case, where a man was tenant *pur autre vie*, and died during the life of *cestui que vie*, or him by whose life it was held; in this case, he who could first enter on the land, might lawfully retain possession, so long as *cestui que vie* lived, by right of occupancy. It did not revert to the grantor, for he had parted with his interest, so long as *cestui que vie* lived; it did not escheat to the lord of the fee, for all estates must be of the absolute entire fee, and not of any particular estate carved out of it, much less such 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 the executors, for they could not succeed to a freehold. Belonging therefore to nobody, it could be appropriated during the life of the *cestui que vie* by the first occupant.

Special Occupancy by Heir. But there was no right of occupancy, where the king had the reversion of the lands; as against him there could be no prior occupant, because *nullum tempus occurrit regi*. And even in the case of a subject, had the estate *pur autre vie* been granted to a man and his heirs during the life of *cestui que vie*, there the heir may enter and hold possession, and is called in law a special occupant. This latter title still exists, but the title of common occupancy is now utterly extinct. Such heir is held to succeed to the ancestor's estate, not by descent, but as an occupant, specially appointed by the original grant.

Incorporeal Hereditaments. There can be no common occupancy of incorporeal hereditaments, as of rents, commons and the like, because there could be no actual entry made, or corporal seisin had, and hence by the death of the grantee *pur autre vie*, a grant of such hereditaments was entirely determined.

Object of these Statutes. These statutes create no new estate, or keep that alive, which by the common law was determined, but merely dispose of an interest in being, to which by law there was no owner, and which was therefore left open to the first occupant. When there is a residue left, the statutes give it to the executors and administrators, instead of the first occupant, but they will not create a residue, on purpose to give it to either. They only meant to provide a certain instead of an uncertain owner to lands, which were nobody's; this being the only instance, wherein a title to real estate could be acquired by occupancy. In the case of a sole corporation, as the parson of a church, when he dies or resigns, though there be no actual owner of the land, till a successor be appointed, yet there is a legal, potential ownership, existing in contemplation of law, and the successor is entitled to the profits from the date the vacancy commenced.

Escheat to King or Lord. In all other instances, when the tenant dies intestate, and no owner is found in course of descent, the law vests an ownership in the king, or in the subordinate lord of the fee by escheat.

Deposits from River and Sea. So also in some cases, where the laws of other nations give a right by occupancy, as of an island rising in a river, or by the alluvion or dereliction of the waters, the law of England assigns an immediate owner. Bracton states, that if an island arise 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 to him, who is proprietor of the nearer shore. If the island rise in the sea, it belongs to the crown. Lands gained from the sea, if the gain be by imperceptible degrees, belong to the owner of the land adjoining, for *de minimis non curat lex*, but if the gain be sudden and considerable, it belongs to the king, on the principle, that whatever has no other owner, is vested by law in the king. It is said that, when an owner of ground abutting on a river loses his ground imperceptibly by the actions of the waters, he has no remedy, but if the course of a river be changed by a sudden and violent flood, and thereby he loses his ground, he shall have as a recompense, what the river has left in any other place.

CHAPTER XVII.—TITLE BY PRESCRIPTION.

Defined. This exists, where 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 is properly a local usage, and not annexed to a person; prescription is merely a personal usage. All prescription must be either in a man or his ancestors, or in a man and those whose estate he holds, which latter is called prescribing in a *que* estate. By the statute of limitations of Henry VIII, no person shall make any prescription by the seisin or possession of his ancestor, unless such seisin has been within threescore years next before such prescription made.

Things Prescribed for. Incorporeal Hereditaments. Nothing but incorporeal hereditaments can be claimed by prescription, as a right of way or common. No prescription can give a title to lands. But as in a right of way, there is no corporal seisin and the enjoyment will usually be at intervals, the right to enjoy it can only depend on immemorial usage.

In whom the Prescription is Laid. A prescription must be in him, that is tenant in the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates, for such estates commenced within the memory of man. The copyholder must prescribe under cover of the tenant in fee-simple.

Must have been a Grant. A prescription may not be for a thing, which cannot be raised by grant. The law allows prescription only in supply of the loss of a grant, and hence every prescription presupposes a grant to have existed.

Matters of Record cannot be Prescribed for. What is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered of record, such as the royal franchise of deodands and felon's goods. These not being forfeited, until the matter on which they arise is found by the inquisition of a jury, are made a matter of record, and the forfeiture cannot be claimed by an inferior title. 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.

In a Que Estate. Among things incorporeal, which may be claimed by prescription, a distinction is made as to the manner

of prescribing, that is whether a man shall prescribe in a *que* estate, or in himself and his ancestors. 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 appurtenant to lands; but if he prescribes in himself and his ancestors, he may prescribe for anything that lies in grant, not only things that are appurtenant, but also such as may be in gross.

Descendibility. Estates gained by prescription are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule. The prescription is rather to be considered as an evidence of a former acquisition, than as one *de novo*, and hence 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 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 acquired by descent or purchase, for every accessory follows the nature of its principal.

CHAPTER XVIII.—TITLE BY FORFEITURE.

Forfeiture Defined. 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 he alone, or the public with himself, has sustained.

How it may Occur. Forfeiture may occur in various degrees, and by various means:

1. *By crimes and misdemeanors.*
2. *By alienation, contrary to law.*
3. *By lapse, resulting from non-presentation to a benefice.*
4. *By simony.*
5. *By non-performance of condition.*
6. *By waste.*
7. *By breach of copyhold customs.*
8. *By bankruptcy.*

I. Crimes and Misdemeanors. The offences, which induce a forfeiture of lands and tenements to the crown are:

(1) Treason. (2) Felony. (3) Misprison of treason. (4) Praemunire. (5) Drawing a weapon on a judge, or striking a person in a court of justice. (6) Recusancy.[1]

II. Alienation Contrary to Law. This is either alienation in mortmain, alienation to an alien, or alienation by particular tenants. In the two former cases, the forfeiture arises from the incapacity of the alienee to take; in the latter from the incapacity of the alienor to grant.

In Mortmain. This alienation *in mortua manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. These purchases were chiefly made by religious houses, in consequence whereof, the lands became perpetually inherent in one dead hand, the statutes permitting which having been skillfully contrived.

License to Corporations. By the common law, a man might dispose of his lands to another man at his own discretion. Yet it was necessary for corporations to have a license in mortmain from the crown, to enable them to purchase lands, for the king, as the ultimate lord of the fee, ought not, except with his own consent, to lose his privilege of escheats, and other feudal profits, by the vesting of lands in tenants, who can never be attainted or die. Where there was an intermediate lord, his license must also be obtained for the alienation of the specific land. If no license was obtained, the king or other lord might enter on the land so aliened in mortmain, as a forfeiture.

The Law Evaded. The ingenuity and influence of the clergy led to a novel contrivance to evade the prohibition, by having the tenant, who desired to alienate, first convey his lands to the religious houses, and instantly take them back again to hold as tenant to the monastery; which instantaneous seisin occasioned no forfeiture, and then by pretext of some other forfeiture, surrender or escheat, the society entered into the lands, as immediate lords of the fee. By the charter of Henry III, all such attempts were made void, and the land forfeited to the lord of the fee.

Fictitious Title by Common Recovery. But as this prohibition extended only to religious houses, bishops and other

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[1]The statute as to recusancy is repealed.

sole corporations were not included therein, and the law was again evaded, which produced the statute of Edward I, as a presumed sufficient security against alienations in mortmain. The religious houses now began to set up a fictitious title to the land, and to bring an action to recover it from the tenant, who, by collusion, made no defence, and thereby judgment was given for the religious house, which then recovered the land on supposed prior title. Thus were invented those fictitious adjudications of right, termed common recoveries. A statute thereupon enacted, that in such cases a jury should decide the demand of the religious house, and if adverse to its claim, the land should revert to the lord or the king. Then came the statute of *quia emptores*, which abolished all subinfeudations, and gave liberty to all men to alienate their lands, to be held of their next immediate lord, and a proviso was inserted, that this should not authorize alienation in mortmain.

Uses and Trusts. Ecclesiastical ingenuity then devised a new plan of conveyance, by which lands were granted to nominal feoffees, to the use of religious houses, whereby they received the actual profits, while the seisin remained in the nominal feoffee, who accounted for the rents to his *cestui que* use. Thus was introduced uses and trusts, the foundation of modern conveyancing. But by statute of Henry VIII, all future grants of lands for such purposes were to be void, if granted for more than twenty years.

Exception as to Licenses by the Crown. During all this time, the crown, by granting a license of mortmain, could remit the forfeiture, so far as it related to its own rights, and enable a corporation to hold lands in perpetuity.

Gifts for Charitable Uses. By statute of George II, it was enacted, that no lands or tenements shall be given or charged with any charitable uses, unless by deed, executed before two witnesses twelve months before the death of the donor, and enrolled in the chancery court within six months after its execution; and unless such gift be made to take effect immediately, and be without power of revocation, and that all other gifts should be void. An exception was made as to the two universities and certain colleges.

2. Alienation to an Alien. This is cause for forfeiture to the crown of the land so alienated.

3. Alienation by Particular Tenants. This is when the alienation is greater than the law allows, and divests the remainder or reversion. In such case there is a forfeiture to him, whose right is attacked thereby. As if a tenant for life alienes by feoffment or fine for the life of another, or in tail or in fee; these being estates, which may last longer than his own. This is not only beyond his power, but is also a forfeiture of his estate.[1] Such alienation amounted to a renunciation of feudal dependence, and the particular tenant, by granting a larger estate than his own, has by his own act put an end to his original interest, and made way for the remainder man or reversioner.

By Tenant in Tail. If a tenant in tail alienes in fee, there is no immediate forfeiture to the remainder man, but a mere discontinuance, which the issue may afterwards avoid by due course of law, for the party in remainder or reversion has a very remote and barely possible interest therein, until the issue in tail become extinct.

Rights of a Lessee. The law will not hurt an innocent lessee for the fault of his lessor, nor permit the lessor, after he has granted a good and lawful estate, by his own act to avoid it and defeat the interest, which he himself has created.

Disclaimer by the Tenant, Equivalent both in its nature and consequences to an illegal alienation by the particular tenant, is the civil crime of disclaimer, as where he who holds of a lord neglects to render him due services, and upon action brought to recover them, disclaims to hold of his lord. This disclaimer in any court of record is a forfeiture of the lands to the lord, upon feudal reasons. So where such tenant in a court of record does any act, which amounts to a virtual disclaimer, as if he claims a greater estate than was originally granted him at the first infeudation, or if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, or by collusive pleading, such behavior amounts to a forfeiture of his particular estate.

III. Lapse. This is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary, by the neglect of the patron to present, also to the metropolitan by

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[1] By statute, this cause of forfeiture is now impossible, since the abolition of fines and recoveries.

neglect of the ordinary, and to the king, by neglect of the metropolitan. But no right of lapse can accrue, when the original presentation is in the crown. The term, in which the title to present by lapse accrues, is six months, according to the computation of the church. In case the benefice becomes void by death, or cession through plurality of benefices, the patron is bound to take notice of the vacancy at his own risk, for these are matters of notoriety; but in case of a vacancy by resignation or canonical deprivation, the law requires the bishop to give notice thereof to the patron, otherwise he can take no advantage, by way of lapse.

IV. Simony. This is the corrupt presentation of any one to an ecclesiastical benefice for money, gift or reward. It is so called, from the resemblance it bears to the sin of Simon Magus,[1] though the purchasing of holy orders seems nearer his offence. By the canon law, it was a grievous crime, and becomes more odious, because it is ever accompanied with perjury, for the presentee is sworn to have committed no simony. By simony, the right of presentation to a living is forfeited, and vested *pro hac vice* in the crown.

Rules on this Subject. This was not an offense punished in a criminal way by the common law, the clerk being left to ecclesiastical censures. As these did not affect the simoniacal patron, statutes were passed to restrain the offence by civil forfeitures. (1) To purchase a presentation to a vacant living is open simony. (2) It is simony, for a clerk to bargain for the next presentation, the incumbent being apparently about to die. (3) For a father to purchase a presentation to provide for his son, is not simony, for the son is not concerned in the purchase, and the father by nature is bound to provide for him. (4) If such contract be made with the patron, the clerk not being privy thereto, while the presentation in such case shall devolve upon the crown, as a punishment to the patron, the clerk incurs no disability or forfeiture. (5) That bonds given to pay money to charitable uses, on receiving the presentation to a living, are not simonaical, provided the patron or his relations are not benefitted thereby. (6) That bonds of resignation, in case of non-residence or taking another living, are not simonaical, there

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[1] A Hebrew magician, who sought to purchase from St. Paul the gift of the Holy Ghost.

being no corrupt consideration, but such only as is for the good of the public. (7) General bonds to resign at the patron's request are held to be legal, unless proof be adduced that the contract was a corrupt one. The patron must not make ill-use of such bond, by demanding a resignation wantonly or without good cause.

V. Breach of Condition. Another kind of forfeiture is that of breach or non-performance of a condition annexed to the estate, either expressly by deed at its original creation, or implied by law, from a principle of natural reason.

VI. Waste. Waste, *vastum*, is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him, who has the remainder or reversion in fee-simple or fee-tail.

Voluntary or Permissive. Waste is either voluntary, which is a crime of commission, as by pulling down a house; or permissive, which is a matter of omission only, as by suffering it to fall, for want of necessary repairs. Whatever does a lasting damage to the freehold or inheritance is waste.

Houses and Timber. Therefore removing floors or other things fixed to the freehold of a house is waste. If a house be destroyed by tempest or the like, which is an act of Providence, it is not waste; but otherwise, if it be burned by the negligence of the lessee, though no action will lie against a tenant for an accident of this kind. It may be committed in ponds and warrens, by reducing the number of creatures therein. Timber also is part of the inheritance. Such as oak, ash and elm in all places, and in some countries, other trees used for building purposes. The tenant may cut down underwood at any seasonable time, and may take sufficient estovers for house-bote and cart-bote, unless restrained by particular covenants.

Lands and Mines. The conversion of land from one species to another is waste. To convert wood, meadow or pasture into arable, or *vice versa*, is waste. This not only changes the course of husbandry, but the evidence of the estate, as when a *close*, described and conveyed as pasture, is found to be arable. The same rule is observed with regard to converting one species of edifice into another, even though it be improved in value. To open the lands and search for mines of metal, coal, etc., is waste, for that is a detriment to the inheritance, but if the pits

or mines were opened before, it is no waste for the tenant to continue mining. The general subjects of waste are houses, timber and land.

Who are Liable for Waste. By the feudal law, all feuds were originally for life only. But by ancient common law, not only he who was seised of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant, save only in three persons: guardian in chivalry, tenant in dower, and tenant by the curtesy. These were created by the act of the law itself, but a tenant for life or for years came in by the demise and lease of the owner of the fee, who might have provided against the committing of waste by the lessee. But by statute, these latter tenants also are punishable for waste, both voluntary and permissive, unless their leases were made, without impeachment of waste. But a tenant in tail, after possibility of issue extinct, is not impeachable for waste, because his estate was at its creation, one of inheritance. Neither does an action of waste lie for the debtor against a tenant by statute, recognizance or *elegit*, because against them, the debtor may set off the damages in account, but properly it should lie for the reversioner, expectant on the determination of the debtor's own estate, or of estates derived from the debtor.

The Punishment for Waste. By common law, only single damages were allowed, except in the case of a guardian, who forfeited his wardship. The statute of Gloucester directs, that the other four species of tenants shall forfeit the place, wherein the waste is committed, and also treble damages to him, who has the inheritance. If waste be done here and there over a wood, the entire wood shall be recovered, or if in several rooms of a house, the whole house shall be forfeited. If waste be done in only one end of a wood, or one room in a house, which can readily be separated from the rest, that part is the only thing wasted, and that only shall be forfeited to the reversioner.[1]

VII. Copyhold Estates. A forfeiture results in copyhold estates, by breach of the customs of the manor. These estates are not only liable to the same forfeitures as those which are held in socage, for treason, felony, alienation and waste, but also to peculiar forfeitures, annexed to this species of tenure, by breach of general customs of all copyholds, or peculiar local customs.

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[1] By statute of William IV, the writ of waste has been abolished.

As these tenements were originally held by the lowest vassals, the marks of feudal dominion continue much the strongest upon this mode of property. Most of the offences, which occasioned a resumption of the fief by the feudal law, still continue causes of forfeiture in many of our modern copyholds.

VIII. Bankruptcy. Lands and tenements may become forfeited by the act of becoming a bankrupt, which person is defined to be a trader, who secretes himself, or does certain other acts, tending to defraud his creditors. A commission of bankruptcy is awarded against such person, and the commissioners shall have power to dispose of his lands and tenements, which he had in his own right at the date of bankruptcy, or which shall descend or come to him afterwards, before his discharge.

As to Estates-tail. This now also includes estates-tail in possession, remainder or reversion, unless the remainder or reversion shall be in the crown, and such sale shall be good against all such issues in tail, remainder men and reversioners, whom the bankrupt himself might have barred by a common recovery or other means.

Mortgages and Fraudulent Conveyances. All equities of redemption upon mortgaged estates shall be at the disposal of the commissioners, who shall have the same powers as the bankrupt had to redeem them. All fraudulent conveyances to defeat the intent of these, are declared void, but no purchaser *bona fide*, for a good or valuable consideration, shall be affected by the bankrupt laws, unless the commission be issued within five years after the commission of the act of bankruptcy. A bankrupt may thus lose all his real estate, which may at once be transferred by his commissioners to their assignees, without his consent.

CHAPTER XIX.—TITLE BY ALIENATION.

Defined. The most usual mode of acquiring title to real estate, is by alienation, conveyance, or purchase in its limited sense, whereby estates are voluntary resigned by one man and accepted by another, whether effected by sale, gift, marriage, settlement, devise or other transmission of property, by the mutual consent of the parties.

Feudal Restraints of Alienation. This manner of taking estates is not of equal antiquity in England with that of taking them by descent. By the feudal law, a pure feud could not be transferred from one feudatory to another, without the consent of the lord, lest thereby a tenant might be substituted unfit or unable to perform feudal services. Nor could the feudatory subject the land to his debts, otherwise he could easily evade the feudal restraint of alienation. 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 alter its course by prescribing an unusual path of descent, or by imposing limitations; nor could he aliene, even with the agreement of the lord, without also obtaining the consent of his own apparent or presumptive heir. Nor could the lord aliene without consent of his vassal, which consent 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 for years.

Partial Alienation Allowed. By degrees, this feudal severity wore off, experience showing, that property best answers the purposes of civil life, especially in commercial countries, when its transfer is unrestrained. A statute of Henry I allowed a man to dispose of all lands, which he himself had purchased, for over these he was thought to have more power, than over what had been transmitted to him by descent. But he was not allowed to sell all his acquisitions, so as totally to disinherit his children. Afterwards, he was allowed to part with all of 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 the fourth of the inheritance of his ancestors, without the consent of his heir.

Restrictions Gradually Removed. 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 usually amounted to a 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 at liberty to aliene their lands at their discretion. Even the tenants *in capite* could do so, on paying a fine to the king. By different statutes, restrictions to alienation of

lands were gradually removed, and the entire lands and not a moiety merely are chargeable with the debts of the owner, and may be absolutely sold for the benefit of trade by the several statutes of bankruptcy. The restraint of devising lands by will, except in some places by particular custom, lasted longer, but was removed with the abolition of the military tenures. The doctrine of attornments lasted even longer, though many attempts were made to evade them.

I. WHO MAY ALIENE, AND TO WHOM.

As to Reversions and Remainders. In other words, who is capable of conveying, and who of purchasing? All persons in possession are *prima facie* capable, unless the law has laid them under disabilities. But if a man has only in him the right of either possession or property, he cannot convey it to another. 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 is said, be assigned to a stranger, unless coupled with some present interest.[1]

Persons Attainted. Persons attainted of treason, felony and *praemunire* are incapable of conveying, from the date of the offense, provided attainder follows, for such conveyance 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 lord of the fee, though they are disabled to hold. If purchased after attainder, the lands are subject to forfeiture; if before, to escheat, as well as forfeiture, according to the nature of the crime.

Corporations. So also corporations 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 and Lunatics. Idiots, persons *non compos*, infants and persons under duress are not totally disabled to convey or purchase, but only *sub modo*. Their acts are voidable, but not void. The king, on behalf of an idiot may avoid his acts. A person *non compos*, afterwards becoming sane, shall not be permitted to allege his own insanity in order to avoid a grant, for

[1] This position has been questioned.

no man is allowed to stullify himself.[1] Clearly however, the heir, or other person interested, may after the death of an idiot or a person *non compos mentis*, avail himself of the incapacity of the decedent, and avoid the grant. And also if he purchases under such disability, and does not afterwards on recovering his senses, agree to the purchase, his heir may either waive or accept the estate at his option.

Infants and Parties under Duress. In like manner an infant may waive such purchase or conveyance, when he arrives at full age, or if he does not actually sanction it, his heirs may waive it after him. Persons also, who purchase or convey under duress, may affirm or avoid such transaction, when the duress is withdrawn. All these are under the protection of the law. Yet the guardians of a lunatic may renew in his right, under the directions of the chancery court, any lease, and apply the profits for his benefit.

Married Women. The case of a *feme covert* is somewhat different. She may purchase an estate without her husband's consent, 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 assents, 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 during her widowhood, she does not express her consent. But her conveyance or other contract except by some matter of record, is absolutely void, and hence cannot be made good by any subsequent agreement.[2]

Aliens. The case of an alien born is also peculiar. He may purchase anything, but after purchase, he can hold nothing, except a lease for years of a house for convenience and merchandise, in case he be an alien friend; all other purchases, when found by an inquest of office being forfeited to the crown.[3]

II. HOW ONE MAY ALIENE OR CONVEY.

How to Continue the Possession. In consequence of the admission of rights in property, some means had to be devised,

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[1] This doctrine no longer exists, and any man may defend on the ground, that he was *non compos mentis* at the date of a contract, to which he was a party.

[2] This doctrine as to the disabilities of a married woman is subject to many qualifications.

[3] Modified by statute of queen Victoria.

whereby a separate right should be originally acquired, which was that of occupancy or first possession. When once gained, it was necessary to continue this possession, or else property would again become common. Hence the municipal law established descents and alienations; the former to continue the possession in the heirs of the proprietor, after his involuntary dereliction of it by death; the latter to continue it in those persons, to whom the proprietor, by his voluntary act, should choose to relinquish it in his lifetime.

Evidence of a Transfer. It became necessary that this transfer should be properly evidenced, in order to prevent disputes, either about the fact, as whether there was a transfer, or concerning the parties to the transfer, or with regard to the subject matter of the transfer, or its mode and quality, as for what period, of time or in other words, for what estate and interest the conveyance was made. The legal evidences of these transfers are called the common assurances of the kingdom, whereby every man's estate is assured to him, and all controversies are prevented or ended.

Common Assurances. These common assurances are of four kinds:

1. *By matter in pais or deed. This is an assurance transacted between two or more persons in pais, that is, in the country, on 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 take effect during the life of the party conveying or assuring.*

4. *By devise, contained in a man's last will and testament.*

CHAPTER XX.—ALIENATION BY DEED.

First. General nature of a deed.

1. *What a deed is.*
2. *Its requisites.*
3. *How avoided.*

Second. Kinds of deeds and their incidents.

I. WHAT A DEED IS.

Defined. A deed is a writing, sealed and delivered by the parties. It is sometimes called a charter, *carta*, from its materials, but usually is termed a deed, *factum*, because it is the most solemn act a man can perform in the disposal of property; hence a man shall always be estopped by his own deed, or not permitted to aver anything in contradiction to what he has so deliberately avowed.

An Indenture. If a deed be made by more than one party, there ought to be as many copies of it as parties, and each copy should be cut or indented, formerly serrated, *instar dentium*, but now in a waving line on the top or side to correspond with the other, which deed, so made, is called an indenture. Formerly when deeds were more concise than now, it was usual to write both parts on the same piece of parchment, with some words or letters written between them, through which the parchment was cut, either in a straight or indented line, leaving half the word on one part and half on the other. But now indenting has come into use, without cutting through any letters at all, and serves but little purpose except to give name to the deed. The copy which is executed by the grantor is called the original, and the rest are counterparts, though frequently the parties execute every part, which renders them all originals.

Deed-Poll. 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.

II. REQUISITES OF A DEED.

First. Parties and Subject Matter. There must be persons able to contract and to 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. 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.

Second. Consideration. The deed must be founded on good and sufficient consideration. Not upon usurious contract, nor upon fraud or collusion, either to deceive *bona fide* purchasers or just and lawful creditors, which bad considerations will vacate the deed, and subject the offending parties to forfeit-

ures, and often to imprisonment. A deed without consideration is of no effect, for it is construed to enure or to be effectual, only to the use of the grantor himself.

Good and Valuable Consideration. The consideration may be either good or valuable. 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 for the grant, and hence is founded on motives of justice. Deeds made upon good consideration only, are deemed as merely voluntary, and are frequently set aside in favor of creditors and *bona fide* purchasers.

Third. Must be Written or Printed. It may be in any character or language, but must be upon paper or parchment. If written on stone, board, linen, leather or the like, it is no deed. Nothing is more secure from alteration or more durable than writing upon paper or parchment. It must have the regular stamps required by statute for the increase of the public revenue, else it cannot be given in evidence.

Leases in Writing. Formerly many conveyances were made by parol or word of mouth only, but as this often led to fraud, a statute was passed in the reign of Charles II, that no lease-estate or interest in lands made by livery of seisin, or by parol only, except leases, not exceeding three years from the making, whereon the reserved rent is not less than two thirds of the real value, shall be looked upon as a greater estate 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 authorized in writing.

Fourth. The Arrangement of the Matter. The matter written must be legally or orderly set forth, that is, there must be words sufficient to specify the agreement, and bind the parties. Courts of law determine the sufficiency. The formal parts usually set forth in deeds are not absolutely necessary, so there be sufficient words to declare legally and clearly the party's meaning. But as such formal parts are calculated to convey that meaning in the clearest manner, and have been settled by the wisdom of ages, it is prudent to retain them.

1. **The Premises.** These set forth the number and names of the parties, with their additions or titles. These also contain the recital of such deeds, agreements or matters of fact required to explain the reasons for the present transactions, and herein is also set down the consideration. And then follows the certainty of the grantor, the grantee, and thing granted.

2. **The Habendum.** Its office is to determine what estate or interest is granted by the deed, though this may be 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 a 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.

3. **The Tenendum.** The *tenendum*, and "to hold," is now of little use, and is only retained by custom. Sometimes formerly it was used to signify the tenure, by which the estate granted was to be held, but now it is never specified. Before the statute of *quia emptores*, it was sometimes used to denote the lord, of whom the land should be held, but as that statute, directed all future purchases to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* became obsolete.

4. **The Reddendum.** Then follow the terms of stipulation, if any, upon which the grant is made, the first of which is the *reddendum*, or reservation to the grantor of something out of what he had before granted, as a sum for rent. Under the feudal system, this rent, in chivalry, consisted chiefly of military services; in villenage, of the most slavish offices, and in socage, usually of money or of services, of any other certain profit. To make a *reddendum* good, if it be of any thing newly created by the deed, the reservation must be to the grantors, and not to a stranger.

5. **Condition.** This 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," etc.

6. **Warranty.** Next follows the clause of warranty, whereby the grantor, for himself and his heirs, warrants and secures

to the grantee, the estate so granted. By the feudal constitution, if the vassal's title to enjoy the feud was disputed, he might call the lord or donor to warrant or insure the gift, which if he failed to do, and the vassal was evicted, the lord was bound to recompense him with another feud of equal value. By our ancient law, before the statute of *quia emptores*, if a man enfeoffed another in fee, by the feudal word *dedi*, to hold of himself and his heirs by certain services, the law annexed a warranty to the grant, which bound the feoffor and his heirs, to whom the services were originally stipulated to be rendered.

Bound to Warrant Title. On a similar principle, in case, after partition of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty, because they enjoy the equivalent. And so, upon a gift in tail or lease for life, rendering rent, the donor or lessor and his heirs, to whom the rent is payable, are bound to warrant the title. But in a feoffment in fee, by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs, because it is his mere personal contract, the tenure resulting back to the lord of the fee. In other forms of alienations, introduced since the statute, no warranty is implied, hence it became necessary to add an express clause of warranty to bind the grantor and his heirs, which is a kind of covenant real.

Express Warranties. These express warranties were introduced to evade the strictness of the feudal doctrine of non-alienation, without the consent of the heir, For though he, at the death of his ancestor, might have entered on any tenements, that were aliened without his concurrence, yet, if a clause of warranty was added to the ancestor's grant, this covenant, descending upon the heir, insured the grantee, not so much by confirming his title, as by obliging such heir to yield him a recompense in lands of equal value. The law, in favor of alienations, did not suppose that an ancestor would wantonly disinherit his next of blood, and therefore presumed that he had received a valuable consideration, and that this equivalent descended to the heir, together with the ancestor's warranty. So that when an ancestor conveyed to a stranger and his heirs, or released the right in fee-simple to one in possession, adding a warranty to his deed, such warranty not only bound the warrantor himself, but also his heir, and this whether that warranty was lineal or collateral to the title of the land.

Lineal Warranty. Lineal warranty was where the heir derived, or might by possibility have derived, his title to the land warranted either from or through the ancestor who made the warranty; as where a father or an elder son, in his father's lifetime, released to the disseisor of either themselves or the grandfather with warranty, this was lineal to the younger son.

Collateral Warranty. Collateral warranty was, where the heir's title to the land neither was, nor could have been derived from the warranting ancestor; as where a younger brother released to his father's disseisor, with warranty, this was collateral to the elder brother. But where the conveyance, to which the warranty was annexed, immediately followed a disseisin, or operated itself as such, this being in its original founded on the tort or wrong of the warrantor, was termed a warranty, commencing by disseisin, and was not binding on the heir of such tortious warrantor.

Obligation of the Heir. In both these warranties, the obligation of the heir in case the warrantee was evicted, to yield him other lands in their stead, was only on condition, that he had other sufficient lands by descent from the warranting ancestor. But though without assets, he was not bound to insure the title of another, yet in case of lineal warranty, whether assets descended or not, the heir was barred from claiming the land himself, otherwise he would then gain assets by descent, if he had them not before, and must fulfil the warranty of his ancestor.

Heirs' Duty in Collateral Warranties. The same rule, with less justice, was adopted in collateral warranties, which likewise, though no assets descended, barred the heir of the warrantor from claiming the land by any collateral title, as he might hereafter have assets by descent, either from or through the same ancestor. In view of the inconvenience of this latter branch of the rule, when tenants of the curtesy aliened their lands with warranty, which collateral warranty of the father descending to the son, barred him from claiming his maternal inheritance, the statute of Gloucester declared, that such warranty should be no bar to the son, unless assets descended from the father. By statute of Anne, all warranties by any tenant for life shall be void against those in remainder or reversion, and all collateral warranties by any ancestor, who has no estate of inheritance in possession, shall be void against his heir. A ten-

ant in tail in possession may now in some cases make a good conveyance in fee-simple, by superadding a warranty to his grant, which, if accompanied with assets, bars his own issue, and without them bars such of his heirs, as may be in remainder or reversion.[1]

7. Covenants. These 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 has 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. If the party covenants for himself and his heirs, it is a covenant real, and descends upon the heirs, who are bound to perform it, provided they have assets by descent. 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 a covenant a better security than any warranty. In some respects it is a less security, and therefore more beneficial to the grantor, who usually covenants only for the acts of himself and his ancestor, whereas a general warranty extends to all mankind. For which reason, the covenant in modern practice has superseded the other.

8. Conclusion. This 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 that a deed is good, which mentions no date, or has a false date, or even an impossible date, as the thirtieth of February, provided the real date of delivery can be proved.

Fifth. Reading of the Deed. This is requisite, when any of the parties express a desire for it, and if not done on request, the deed is void as to him. If he can, he should read it himself, but if blind or illiterate, it should be read to him. If it be read falsely, it will be void for such part as is misrecited, unless it be agreed, by collusion, that the deed shall be read falsely, on purpose to make it void, in which case, it shall bind the fraudulent party.

Sixth. Sealing the Deed. It is requisite that the party making the deed should seal, and now in most cases, I apprehend, should sign it also. The use of seals, as a mark of authen-

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[1] Such warranties of real estate have long fallen into disuse.

ticity to letters and papers, is extremely ancient. We read of it among the Jews and Persians, in the earliest and most sacred records of history. In the civil law also, seals were the evidence of truth, and were required on the part of the witnesses at least, on the attestation of every testament. In the times of our Saxon ancestors, they were seldom used in England. They usually affixed the sign of the cross, which custom the illiterate imitate to this day, by signing a cross for their mark, when unable to write their names.[1] The Normans introduced waxen seals. Coats of arms were not introduced into seals, until about the reign of Richard I, who brought them home from the crusade.

Signing the Deed. The neglect of signing and the 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. This too, nothwithstanding the statute of Charles II revives the Saxon custom, and expressly directs the signing in all grants of lands, and many other species of deeds. Signing now seems as necessary as sealing, though it has been sometimes held, that the one includes the other.[2]

Seventh. Delivery of the Deed. The deed must be delivered by the party himself or his certain attorney, which is expressed in the attestation "sealed and delivered." A deed takes effect only from its delivery, for if the date be incorrect, the delivery ascertains the time of it. And if another person seals the deed, yet if the party deliver it himself, he thereby adopts the sealing, and by a parity of reason, the signing also, and makes them both his own.

In Escrow. A delivery may be either absolute, that is, to the 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 scroll 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.

Eighth. Attestation of the Deed. This is the execution

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[1] A mere scroll in lieu of a seal, suffices in most of the United States.

[2] Some writers, however, deem "signing" not essential, unless in cases, under the Statute of Frauds, and deeds executed under powers.

in the presence of witnesses. This is necessary, rather for preserving the evidence, than for constituting the essence of the deed. Our modern deeds are merely an improvement on the *brevia testata*, or written memoranda of a conveyance in feudal times. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names, but they only heard the deed read, and then the clerk added their names, Witnesses now usually subscribe their attestations either at the bottom, or on the back of the deed.

III. AVOIDING A DEED.

Essentials of a Deed. If a deed wants any of the essential requisites above mentioned, it is a void deed, *ab initio:*

(1) Proper parties and a proper subject matter.

(2) Good and sufficient consideration.

(3) Writing on stamped paper or parchment.

(4) Sufficient and legal words, properly disposed.

(5) Reading, if desired, before the execution.

(6) Sealing, and by statute in most cases, signing also.

(7) Delivery.

When Avoided, by Matter Ex Post Facto. (1) By erasure, interlining or other alterations 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*, or any other obliteration or defacing.

(4) By the disagreement of such, whose concurrence is necessary 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, when it be proved, that the deed was obtained by fraud or force, or it is shown to be a forgery.

In any of these cases, the deed may be avoided, either in part or totally.

Species of Deeds. We are next to consider the usual species of deeds, together with their respective incidents. We will examine the particulars of those, which from long practice

are used in the alienation of real estate, usually denominated conveyances, as they convey lands and tenements from man to man. They are either conveyances at common law, or such as receive their force and efficacy by virtue of the statute of uses.

Division of Conveyances. Of conveyances by the common law, some are called original or primary conveyances, which are those, by means whereof the benefit or estate is created; others are derivative or secondary, whereby the benefit or estate is enlarged, restrained, transferred or extinguished.

Original Conveyances. Original conveyances are the following:

1. *Feoffment.* 2. *Gift.* 3. *Grant.*
4. *Lease.* 5. *Exchange.* 6. *Partition.*

Derivative Conveyances. These are:

7. *Release.* 8. *Confirmation.* 9. *Surrender.*
10. *Assignment.* 11. *Defeazance.*

1. Feoffment. This term is derived from the verb *feoffare*, to enfeoff, or *infeudare*, to give one a feud, and a feoffment is *donatio feudi*. It is the most ancient mode of conveyance, the most solemn and public, and hence the easiest proven. It is the gift of any corporeal hereditament to another. The *feoffor* is the giver, and the person enfeoffed, the *feoffee*. It is derived from the ancient feudal donation, and though it may be performed by the word, "enfeoff" or grant, yet the aptest word of feoffment is *do* or *dedi*. It is still governed by the same feudal rules. In pure feudal donations, the lord, from whom the feud moved, must expressly limit the continuance and quantity of the estate, which he confers, so if one grants by feoffment, and limits no estate, the grantee has barely an estate for life. For as the personal abilities of the feoffee were presumed to induce the feoffment, the feoffee's estate ought to be confined to his person, and subsist only for his life, unless the feoffor, by express provision in the creation of the estate, has given it a longer continuance.

Livery of Seisin. But by the mere words of the deed, the feoffment is by no means perfected, as there remains a material ceremony to be performed, called *livery of seisin*, without which the feoffee has but a mere estate at will. Livery of seisin is no other than the feudal investiture, or delivery of corporal possession of the land or tenement, which was held necessary to com-

plete the donation, and an estate was then only perfect, when *fit juris et seisinae conjunctio.*

Investitures. Investitures were probably intended to show in conquered countries the actual possession of the lord, and that he did not grant a bare, litigious right, but a firm and peaceable possession. And at a time when writing was seldom practiced, a mere oral gift, at a distance from the land bestowed, was not likely to be remembered by bystanders, who had no interest in the grant. Afterwards they were retained by a public and notorious act, that the country might testify to the transfer of the estate. In all civilized nations, some notoriety of this kind has ever been held requisite, in order to acquire and ascertain the property of lands.

Under Roman Law. In Roman law, *plenum dominium* could not subsist, unless a man had both the right and the corporal possession, which possession must be acquired with both an actual intention to possess, and an actual seisin or entry into the premises, or part o' them, in the name of the whole.

Ecclesiastical Fromotions. Even in ecclesiastical promotions, where the freehold passes, corporal possession is still required to completely vest the property in the new proprietor, who by the canon law, acquires the *jus ad rem* or imperfect right by nomination, but not the *jus in re* or complete right, unless by corporal possession.

Corporal Possession Essential. So also, even in the descent of lands by our law, till one has made an actual corporal entry into the lands, for if he dies before entry, his heir shall not be entitled to take possession, but the heir of the person, who was last actually seised. It is not therefore a mere right to enter, but the actual entry, that makes a man complete owner, so as to transmit the inheritance to his own heirs, *non jus, sed seisina facit stipitem.*

Symbolical Delivery. 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 witnesses, which by agreement should represent the thing designed to be conveyed, the occupancy of which symbol was equivalent to the occupancy of the land itself. Among the Jews, as defined in the book of Ruth, the removal of a shoe and its delivery to a purchaser served as a tes-

timony in Israel. Among the Goths and Swedes, contracts for the sale of land were made before witnesses, the buyer extending his cloak, while the seller cast a clod of the land into it, in order to give possession, and a staff was tendered from the vendor to the vendee. With our Saxon ancestors, the delivery of a turf was necessary to establish the conveyance of lands. To this day, the conveyance of our copyhold estates is usually made from the seller to the lord or his steward, by the delivery of a rod, and then from the lord to the purchaser, by re-delivery of the same in the presence of a jury of tenants.

Conveyances in Writing Introduced. Conveyances in writing were the last improvement. The mere delivery of possession, either actual or symbolical, depending on the memory of witnesses, was likely to be forgotten and incapable of proof. The new necessities of commerce required means to be devised to charge and encumber estates, which were liable to a multitude of conditions, for the purposes of raising money. This could not be effected by a mere corporal transfer of the soil, which was calculated to convey an absolute, unlimited dominion. Written deeds were therefore introduced to specify and perpetuate the peculiar purposes of the party who conveyed, yet for many years, they were never made use of, but in company with the more notorious method of transfer, by delivery of corporal possession.

Livery of Seisin, where Necessary. Livery of seisin by common law is necessary to be made upon every grant of an estate of freehold in corporeal hereditaments, whether of inheritance or for life. In incorporeal hereditaments it could not 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, an actual entry is necessary to vest the estate in the lessee, which is called his interest in the term, or *interesse termini*. This entry serves the purpose of notoriety, as well as livery of seisin from the grantor could have done. One reason why freeholds cannot be made to commence *in futuro*, is that they cannot be made but by livery in seisin, which must always take effect *in praesenti*, as it is an actual manual tradition of the land.

In Remainder Estates. On the creation of a freehold remainder, at the same time as a particular estate for years, at the common law, livery must be made to the particular tenant. But if such remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for

years, but to the remainder-man himself, by consent of the lessee for years. Without his consent, no livery of the possession can be given.

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, come to the land or house, and there before witnesses, declare the contents of the feoffment or lease, on which livery is to be made. If it be made of land, the feoffor delivers to the feoffee a clod, a turf, or a twig, saying in effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." If it be of a house, the feoffor must take the ring or latch of the door, the house being empty, and deliver it to the feoffee in the same form, and thereupon the feoffee must enter alone, and shut the door. He may then open it, and admit the others.

Separate Tracts of Land. If the conveyance or feoffment be of divers lands, in the same county, in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, suffices for all, but if in several counties, there must be as many liveries, as there are counties. If the title to these lands 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. If the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants, because no livery can be made in this case, without consent of the particular tenant, and the consent of one will not bind the rest. It is prudent to endorse the livery of seisin on the deed, specifying the manner, place and time of making it, together with the names of the witnesses.

Livery in Law. This 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." If the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise, unless he dares not enter, through fear of bodily harm, and then his continual claim, made yearly, in due form of law, as near as possible to the lands, suffices. This livery in law cannot be given or received by attorney.

2. Gift. 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, the words of the conveyance being *do* or *dedi*, and the estate passing by living of seisin. The terms donor and donee are used.

3. Grants. Grants, *concessiones*, are the regular methods, by the common law, of transferring the property of incorporeal hereditaments, or such things, whereof no livery can be had. All corporeal hereditaments lie in livery, while others lie in grant. The operative words are "*dedi et concessi*," have given and granted.

4. Leases. 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 has in the premises, for if it be for the whole interest, it would be an assignment. The usual words of operation in it are: "demise, grant and to farm let," *demisi, concessi, et ad firmam tradidi.* Farm or *feorme* is a Saxon word, meaning provision, and was used instead of rent or render, because anciently the greater part of rents were reserved in provisions; in corn or poultry, until money became more abundant. By this conveyance, an estate for life, for years or at will may be created, either in corporeal or incorporeal hereditaments. In the former, livery of seisin is necessary.

Duration of Leases. By the common law, as it stood for centuries, all persons seised, of an estate, might let leases to endure so long as their own interest lasted, but no longer. Hence a tenant in fee-simple might let leases of any duration, for he had the entire interest, but a tenant in tail or for life could make no leases, which would bind the issue in tail or reversioner, nor could a husband, seised *jure uxoris*, make a valid lease for any longer term than the joint lives of himself and wife, for then his interest expired. Corporations aggregate might have made what estates they pleased, without the confirmation of any person whatever.

Where Lease Unreasonable. Where as now, by statutes, this power, where it was unreasonable and might be made ill-use of, is restrained; and where in other cases, the restraint by the common law seemed too hard, it is in some measure removed. The former statutes are called the restraining, the latter the enabling statutes.

Enabling Statute. The statute of Henry VIII empowers

three kinds of persons to make leases, to endure for three lives or twenty-one years, who could not do so before. A tenant in tail by such lease may bind his issue in tail, but not those in remainder or reversion. A husband seised in the right of his wife in fee-simple or fee-tail, provided his wife join in the lease, may bind her son and her heirs thereby. Lastly, all persons, seised of an estate of fee-simple in right of their churches, which extends not to parsons and vicars, may bind their successors.

Requisites of such Leases. Certain requisites however must be observed to make such leases binding: (1) The lease must be by indenture, and not by deed poll or by parol. (2) It must begin from the day of the making, and not in the future. (3) Any old lease in existence must be surrendered or be within a year of expiring. (4) It must be either for twenty-one years or three lives, and not for both. (5) It shall not exceed such period, but may be for a shorter term. (6) It must be of corporeal hereditaments, and not of such things as lie merely in grant. (7) It must be of lands or tenements, most commonly let for twenty years past. (8) The most usual rent for twenty years past, must be reserved yearly on such lease. (9) Such leases must not be made without impeachment of waste. These are the guards imposed by statute to prevent abuses.

Disabling or Restraining Statute. The statute of Elizabeth, made for the benefit of the successor, enacts, that all grants by archbishops and bishops other than for twenty-one years, or three lives from the making, or without reserving the usual rent, are void. This restriction was afterwards extended to certain other inferior corporations, sole and aggregate.

5. Exchange. This is a mutual grant of equal interests, the one in consideration of the other. 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 the same period. The exchange must 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. But entry must be made on both sides, for if either party die before entry, the exchange is void, for want of sufficient notoriety. If after an exchange of lands, either party be evicted of those which were taken by him in exchange, through defect of

the other's title, he shall return to the possession of his own, by virtue of the implied warranty contained in all exchanges.

6. Partition. This takes place, 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 an unity of interest, and in all an unity of possession, it is necessary that they all mutually convey, and assure to each the several estates they are to take separately. By the common law, coparceners, being compellable to make partition, might have made it by parol only, but now a deed is in every case necessary.

Explanation of these Conveyances. The above are the several species of primary or original conveyances. Those which follow 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.

7. Releases. These are a discharge, or a conveyance of a man's right in lands or tenements to another, who has some former estate in possession. The words used therein are: "remised, released and forever quit claimed."

How They may Enure. (1.) By way of enlarging an estate, as if there be a 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. In this case the releasee must be in possession of some estate, for the release to work upon.

(2.) By way of passing an estate, as when one of two coparceners releases to the other, this passes the fee-simple of the whole.

(3.) By way of passing a right, as if a man be disseised and passes to the disseisor all his right; here the disseisor acquires a new right, and that which was tortious is rendered lawful.

(4.) By way of extinguishment.

(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, with the same effect as if the disseisee had entered, and afterwards had enfeoffed one of the disseisors in fee.

8. Confirmation. This is of a nature allied to a release.

Coke defines it to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure, or whereby a particular estate is increased. The words of making it are: "have given, granted, ratified, approved and confirmed." Thus if a tenant for life gives a lease for forty years, and dies during the term, here the lease for years is voidable by him in reversion, yet if the latter had confirmed the estate of the lessee for years before the death of the life tenant, it is no longer voidable, but sure.

9. Surrender. This rendering up is of a nature opposite to a release; for as that operates by the greater estate descending upon the less, a surrender is the falling of a less estate into a greater. It is the yielding up of an estate for life or years to him who has the immediate reversion or remainder, wherein the particular estate may merge, by mutual agreement between them. The usual words are: has "surrendered, granted and yielded up." The party surrendering must be in possession, and the other party must have a higher estate; hence a tenant for life cannot surrender to one who has a remainder in years.

Livery of Seisin Unnecessary. In a surrender there is no need for livery of seisin, for there is a privity of estate between the parties, and livery took place at its creation. Nor is livery required on a release or confirmation in fee to a 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 re-lessee or confirmee are one and the same estate.

10. Assignment. This is properly a transfer, or making over to another of the right one has in any estate, though it usually applies to an estate for life or years. 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, while in assignment, he parts with the entire property, and the assignee stands in his place.

11. Defeazance. This 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 created, may be defeated. 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.

When Executed Subsequently. No subsequent secret revocation of a solemn conveyance executed by livery of seisin was then allowed, though when uses were introduced, a revocation of such uses was permitted by 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 subsequent defeazances.

CONVEYANCES UNDER THE STATUTE OF USES.

Origin of Uses and Trusts. Uses and trusts are in their origin of a similar nature, answering more to the *fidei commissum*, than the *usus fructus* of the civil law, which latter was the temporary right of using a thing, without having the ultimate property. But the *fidei commissum*, which usually was created by will, was the disposal of an inheritance to one, in confidence, that he should convey it or dispose of the profits at the will of another. The right was deemed a vested right, which occasioned the well-known division of right by the Roman law into *jus legitimum*, a legal right, which was remedied by the ordinary course of law; *jus fiduciarum*, a right in trust, for which there was a remedy in conscience, and *jus precarium*, a right in courtesy, for which the remedy was only by entreaty or request. In our law, a use might be ranked under the rights of the second kind, being a confidence reposed in the 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.

History of Uses in England. The notion was taken from the civil law in the reign of Edward III, by means of foreign ecclesiastics, to evade the statutes of mortmain, by obtaining grants of land to the use of religious houses. This evasion was crushed by statute of Richard II, with respect to such houses. The idea continued, however, to be applied to a number of civil purposes, particularly as it removed the restraint of alienations by will. During the contentions between the houses of York and Lancaster, uses grew almost universal, through the desire men had in those perilous times to provide for their children by will, and of securing their estates from forfeitures, when each of the contending parties, as they became uppermost, attainted the other.

When the Trust was Discharged. Chancery originally

could give no relief, but against the person himself intrusted for *cestui que use*, and not against his heir or alienee. This was altered under Henry VI. A purchaser for valuable consideration, without notice, held the land discharged of any trust. Neither the king nor any corporation aggregate could be seised of any use but their own; that is, they might hold the lands, but need not execute the trust.

Not liable to Perform the Trust. If the feoffee to uses died without heir, or committed a forfeiture, or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained as tenant by the curtesy, nor the wife by dower assigned, were liable to perform the use; because they were not parties to the trust, but came in by act of law.

Rules as to Uses. The use itself or interest of the *cestui que use* had elaborate distinctions:

(1) Nothing could be granted to an use, whereof the use is inseparable from the possession, as annuities, ways and commons, or whereof the seisin could not be instantly given.

(2) An use could not be raised without a sufficient consideration. For where a man makes a feoffment to another, without any consideration, equity presumes that he meant it to the use of himself, unless he expressly declares it to be for the use of another.

(3) Uses were descendible, according to the rules of the common law, in the cases of inheritances in possession.

(4) Uses might be assigned by secret deeds between the parties, or be devised by last will, as no livery of seisin was necessary. 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 only tenant at sufferance.

(5) Uses were not liable to any of the feudal burdens, and did not escheat for felony or other defect of blood, but the land itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime, and the lord might hold it discharged of the use.

(6) No wife could be endowed, or husband have the curtesy of a use, for no trust was declared for their benefit at the original grant. Hence it became customary to settle before marriage some joint estate to the use of husband and wife for their lives, which was the origin of marriage jointures.

(7) A use could not be extended by writ of *elegit*, or other legal process, for the debts of *cestui que use*.

Abuses of Uses. The doctrine of uses was full of niceties and subtleties. Lord Bacon says, that this course of proceeding "was turned to deceive many of their just rights. A man who had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds, the husband of his curtesy, the lord of his wardship, relief, heriot and escheat, the creditor of his extent for debt, and the poor tenant of his lease." To remedy these inconveniencies, many statutes were passed, which tended to consider *cestui que use* as the real owner of the estate.

Statute of Uses. This idea was carried into full effect by the statute of uses, passed under Henry VIII. This in conveyances and pleadings, was called the statute for transferring uses into possession. This statute enacts, that when any person shall be seised of lands, etc., to the use of, or in trust for any other person or body politic, the person or corporation entitled to the use shall from thenceforth be seised or possessed of the land, etc., of and in the like estates, as they have in the use or trust, and that the estate of the persons so seised to uses shall be deemed to be in him who has the use, in such quality, manner, form and condition as they had before in the use." The statute thus executes the use, that is, conveys the possesion to the use, and transfers the use into possession, making *cestui que use* complete owner.

Effect of this Statute. This statute did not abolish the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of the *cestui que use* into a legal instead of an equitable ownership. Thereupon the courts of common law began to take cognizance of uses, instead of sending the party to seek relief in chancery. As the statute, the instant a use was raised, converted it into an actual possession, most of the incidents formerly attending 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 a purchaser, discharged of the use, nor be liable to dower or curtesy, from the seisin of the feoffee, because the legal estate was instantaneously transferred to *cestui que use*, when the use was 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 *terre-tenant* also; and likewise were no longer devisable by will.

Interpretation by Judges. The necessity of mankind induced the judges to abate the rigor 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 was made, and if it cannot take place at that time, the operation of the statute may wait till the use shall arise upon some future contingency, within a reasonable time, meanwhile the ancient use shall remain in the original grantor.

Differs from an Executory Devise. Which doctrine, when devises by will were again introduced, and considered equivalent in point of construction to declarations 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; hence 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.

Fee Limited after a Fee. In both these cases a fee may be limited to take effect after a fee, because 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 and Resulting Uses. It was also held, that a use, though executed, may change from one to another by circumstances *ex post facto*, which is called a secondary or shifting use. And whenever the use limited by the deed expires, or cannot vest, it returns to him who raised it, and is styled a resulting use.

Revocation of Uses. The uses originally declared may be revoked at any time, and new uses be declared of the land, provided the grantor reserved such power at the creation of the estate, whereas the utmost allowed by the common law was a deed of defeazance, coeval with the grant itself, and therefore a

part of it. In case of such revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead.

Restrictions in Uses. By this train of decisions in courts of law, the power of the court of chancery over landed property was greatly curtailed. But a few technical scruples restored it with tenfold increase. The judges held, that no use could be limited on an use, and that when a man sells his land for money, which raises an 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 the first use, and that the second was a nullity. Again as the statute mentions only those 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 lastly, 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.

Deemed Trusts in Equity. The court of chancery determined, that though these were not uses, which the statute could execute, yet still they were trusts in equity, which in conscience ought to be performed. Thereupon the doctrine of uses was revived, under the denomination of trusts, and a statute was introduced, which merely made a slight alteration in the formal words of a conveyance.

Doctrine and Effect of Trusts. Courts of equity, in this new jurisdiction, wisely avoided many of those mischiefs, which made uses intolerable. The statute of frauds of Charles II having required, that every declaration, assignment or grant of any trust in lands or hereditaments, except those arising from implication or construction of law, shall be made in writing and signed, the courts now consider a trust estate as equivalent to the legal ownership, governed by the same rules of property; and trusts have been made to answer in general all the beneficial ends of uses, without their inconvenience or frauds. The trustee is merely the instrument of conveyance, and can affect the estate, only by alienation for a valuable consideration to a purchaser without notice, which as *cestui que use* is generally in possession of the land, can rarely happen. The trust will

descend, may be alioned, is liable to debts, to executions, to forfeiture, to leases, and other encumbrances, and even to the husband's curtesy, as if it were an estate at law. It is held not liable however to escheat to the lord, because the trust was never intended for his benefit.

Fallen into Disuse. The only present service of this statute is to give efficacy to certain new and secret species of conveyance, which save the trouble of making livery of seisin, the only ancient conveyance of corporeal freeholds. But now this has given way to:

12. Covenant to Stand Seised of Uses. This is a species of conveyance, 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 to be benefitted by it, having thus acquired the use, is put at once into corporal possession.

13. Bargain and Sale of Lands. This is a kind of real contract, whereby the bargainor for pecuniary consideration contracts to convey the land, and becomes by such bargain a trustee for, or seised to the use of the bargainee; and then the statute of uses completes the purchase; the bargain vesting the use, and the statute the possession. To prevent clandestine conveyance of freeholds, a statute enacted, that such bargains and sales should not enure to pass a freehold, unless the same be made by indenture, and enrolled within six months. Chattel interests or leases for years were deemed not sufficiently worthy of regard to be thus enrolled.

14. Lease and Release. This was first invented shortly after the statute of uses, and is now the most common of any, and not to be shaken. It is thus contrived: A lease, or rather bargain and sale upon pecuniary consideration for one year, is made by the tenant of the freehold to the lessee or bargainee. Now this, without enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the latter the use of the term for one year, and then the statute immediately vests the possession. He therefore, being in possession, is capable of receiving a release of the freehold and reversion, which 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 release, as also a conveyance by lease and release, is said to amount to a feoffment.

15. Deeds to Lead or Declare Uses. These lead or declare the uses of other more direct conveyances, as feoffments, fines and recoveries.

16. Deeds of Revocation of Uses. This power is reserved at the raising of the uses, to revoke such as were then declared, and to appoint others in their stead.

Deeds to Charge or Discharge Lands. We will now briefly refer to such deeds as are not used to convey, but to charge or discharge lands, as obligations or bonds, recognizances and defeazances upon them both.

(1) **Obligation or Bond.** This is a deed, whereby the obligor binds 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 a single one, but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else remain in force; such as the payment of rent, performance of covenants, or the repayment of a debt with interest, which principal sum is usually one-half of the penal sum specified in the bond. If the condition be not performed, the bond becomes forfeited, and charges the obligor, while living, or after his death his heir, if not sufficient personal assets left, provided the heir has real assets by descent. It is therefore not a direct, but a collateral charge on lands.

When Void. If the condition of the bond be impossible, at the time of making it, or against law, or 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 obligation, from which he cannot be released. If it be to do a thing *malum in se*, the obligation itself is void, for the contract is unlawful. If the condition be possible at the time of making it, and afterwards becomes impossible by act of God, by the act of law or the act of the obligee himself, the penalty of the obligation is saved.

Forfeited Bond. 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 gave a man merely his principal, interest and expenses, in case the forfeiture accrued by non-payment of money borrowed, the damages sus-

tained, upon non-performance of the covenants, or the like. By statute of Anne, in the case of a bond conditioned for the payment of money, the payment or the tender of the sum due, with interest and costs, even though the bond be forfeited, and suit commenced thereon, shall be a full satisfaction and discharge.

(2) **Recognizance.** This is an obligation of record, which a man enters into before some court of record or authorized magistrate, 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, that the bond is the creation of a fresh debt, the recognizance an acknowledgment of a former debt upon record, the party making it being termed the cognizor. It is certified by an officer of court, is witnessed by the record of a court, and not by the party's seal, hence cannot with propriety be termed 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 enrolment on record.

(3) **Defeazance.** A defeazance on 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. It differs 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 parties by a separate, and frequently a subsequent deed. When the condition is performed, the estate of the obligor is discharged therefrom.

Lack of Registry of Deeds. These are the principal species of deeds, or matters *in pais*, by which estates may be conveyed, or at least affected. Among which the conveyances to uses are by much the most frequent, though they are defective in lacking notoriety, so that purchasers or creditors cannot know, with any absolute certainty, what the estate and the title to it in reality are, upon which they are to lay out or lend money. In the ancient feudal mode of conveyance, by corporal seisin of lands, this notoriety was in some measure answered, but the advantages therefrom are now defeated by the introduction of death bed devises and secret conveyances, and no sufficient guard exists against fraudulent charges and encumbrances, since the disuse of the Saxon custom of transacting all conveyances at the county court, and entering a memorial of them in a ledger in

some adjacent monastery. In Scotland, every act and event, regarding the transmission of property, is regularly entered on record. And some of our provincial divisions, like York and Middlesex, have erected registers in their several districts.

CHAPTER XXI.—ALIENATION BY MATTER OF RECORD.

Matters of Record. 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 invoked to substantiate, preserve and be a perpetual testimony of the transfer of property, 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.*

I. PRIVATE ACTS OF PARLIAMENT.

Modes of Assurance. These of late years have become a common mode of assurance. It may sometimes happen, that an estate is greatly entangled by contingent remainders, resulting trusts, springing uses, executory devises, and the like artificial contrivances, so that courts of equity cannot relieve the owner. Or by the strictness or omission of family settlements, the tenant of the estate may be abridged of some reasonable power, or it may be necessary, in settling an estate, to secure it against the claims of infants or other persons, suffering under legal disabilities, who are not bound by judgments or decrees.

Power of Parliament in the Matter. Parliament occasionally has unfettered estates, and assured them to purchasers against claims of infants or disabled persons, by settling an equivalent for the interest so barred. This practice was carried to a great length the year after the restoration, by setting aside many conveyances made by constraint, in order to screen estates from forfeiture. But now such acts are passed with great caution, and in the house of lords are referred to two judges to exam-

ine and report the facts alleged, and to settle all technical forms. Nothing also is done, without express consent of all parties in being and interest, capable of consent. A general saving is added to the bill of the right and interest of all persons whatsoever, except those whose consent is so given or purchased, and who are therein named, though it is held, that even if such saving be omitted, the act shall bind none but the parties.

It is a Private Statute. A law thus made, though it binds all parties to the bill, is yet looked upon, rather as a private conveyance, than 'a solemn legislative act. It is termed a private statute, and is not printed among the other laws of the session. It has been held void, if obtained by fraud, or if contrary to law and reason. It remains, however, enrolled among the public records of the nation, as testimony of the conveyance or assurance.

II. THE KING'S GRANTS.

Matters of Record. These are also matters of public record. No freehold can be given to the king, says St. Germyn, but derived from him, but by matter of record. To this end, a variety of offices are erected, through which the king's grants must pass and be enrolled, subject to close inspection by the officers, that nothing unlawful be granted.

Charter or Letter-patent. These grants, whether of lands, honors, liberties or franchises, are contained in charters or letters patent, that is open letters, so called because they are not sealed up, but exposed to view, with the great seal attached, and are usually addressed by the king to all his subjects. In this they differ from letters of the king to particular persons, which are not proper for inspection, and hence are sealed up and called writs *close*, *literae clausae*, and are recorded in the close rolls, while the others are in the patent rolls.

Manner of Granting. Grants or letters patent must first pass by bill prepared by the attorney and solicitor general, in consequence of a warrant from the crown, and be signed with the king's sign manual. The manner of granting by the king does not differ more from that by a subject, than the construction of his grants, when made.

Construction of Grants. 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. Thus in a grant of the profits of land, free ingress, egress and regress are inclusively granted. But the king's grant shall not enure to any other intent, than that which is precisely expressed in the grant. As if he grants lands to an alien, it operates nothing, for such grant shall not enure to make him a denizen, so that he may be capable of taking by grant.

3. When it appears, from the face of the grant, that the king is mistaken or deceived, either in matter of fact or of law, or if his own title to the thing granted be different from what he supposes, or if the grant be informal, or contrary to the rules of law, the grant is void. To prevent deceits of the king, with regard to the value of the estate granted, it is provided by statute of Henry IV, that no grant of his shall be good, unless in the grantee's petition for it, express mention be made of the value of the lands.

III. FINES OF LANDS AND TENEMENTS.

Divisions: 1. *The nature of a fine.* 2. *Its several kinds.* 3. *Its force and effect.*

1. Its Nature. A fine is a feoffment of record, or more properly an acknowledgement of a feoffment on record. It has at least the same force and effect as a feoffment in the conveying and assuring of lands, though it is one of the methods of transferring estates of freehold by common law, in which livery of seisin is not necessary to be actually given. It is an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices, whereby the lands become the right of one of the parties. In its original, it was founded on an actual suit, commenced at law for the recovery of the possession of land or other hereditaments, and the possession thus gained was found to be so effectual, that fictitious actions were commenced to obtain the same security.

Name and Antiquity. A fine is so called, because it puts an end not only to the suit commenced, but to all other suits concerning the same matter. Fines are of equal antiquity with the rudiments of the law itself, even prior to the Norman invasion. The statute of Edward I declared and regulated the manner in which they should be levied and carried on.

(1.) Suit Commenced. The party to whom the land is to be

conveyed or assured commences a suit against the other, generally an action of covenant, the foundation of which is a supposed agreement, that the one shall convey the lands to the other, on the breach of which agreement, action is brought. On this writ, there is due to the king a *primer* fine.

(2.) **Leave to Agree the Suit.** As soon as the action is brought, the defendant makes overtures of settlement. The plaintiff having given pledges in court to prosecute his suit, which he endangers, if he deserts it without license, applies to the court for leave to adjust the matter. This leave is readily granted, for another fine is then due the king by his prerogative.

(3.) **The Agreement Itself.** This is usually an acknowledgement from the deforciant, or him who keeps the other out of possession, that the lands in question are the right of the complainant. From this recognition of right, the party levying the fine is called the cognizor, and he to whom it is levied the cognizee. The acknowledgement must be before a judge of the common pleas court, or two authorized commissioners in the county. A *feme covert* should be privately examined.

(4.) **Note of the Fine.** This is only an abstract of the writ of covenant and the agreement, naming the parties and the parcels of land. This must be enrolled of record.

(5.) **Foot of the Fine.** This is the conclusion of the fine, and includes the entire matter, reciting the parties, the time and place, and before whom it was acknowledged or levied. Indentures are made of these facts, and delivered to the parties, beginning thus: "this is the final agreement," and then reciting the whole proceeding at length. And thus the fine is completely levied at common law.

Notoriety of the Fine. By statute, more solemnities are added, to render the fine more public and less liable to be levied by fraud and covin; by the reading of a note of the fine openly in court, by enrolling it of record in court, and by the posting in the room of a table of the fines of the county for each term.

2. Four Kinds of Fines. (1) A fine upon the acknowledgement of the right of the cognizee, as that which he has of the gift of the cognizor. This is the best and surest kind of fine, and is said to be a feoffment of record, the livery, thus acknowledged in court, being equivalent to an actual livery, so that the assurance is a confession of a former conveyance.

(2) A fine upon acknowledgement of the right merely, and 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. Of such reversions, there can be no feoffment, or donation with livery supposed, as the possession during the particular estate belongs to a third person.

(3.) A fine "*sur concessit*" is where the cognizor, to end disputes, though he acknowledges no precedent right, yet grants to the cognizee an estate *de novo*, usually for life or years. This may be done by reserving a rent or the like.

(4.) A double fine, comprehending the first and third, was used to create particular limitations of estates.

The first of these species of fine is the most used, as it conveys a clean and absolute freehold, and gives the cognizee a seisin in law, without an actual livery. Hence it is called a fine executed, whereas the others are but executory.

3. Force and Effect of a Fine. These depend on the common law, and the statutes of Henry VII and of Henry VIII. By the former statute, the right of all strangers is bound, unless they make claim by action or lawful entry within five years, except *feme coverts*, infants, prisoners, persons *non compotes*, or beyond sea; who have five years time granted them, after removal of disability. The common law gave claimants only a year and a day. The statute of Henry VII was believed to have been intended to bar estates-tail in order to unfetter the estates of his powerful nobility, and lay them more open to alienations. The statute of Henry VIII removed all difficulties by declaring, that a fine levied by a person of full age, to whose ancestors lands had been entailed, shall be a perpetual bar to them and their heirs claiming by force of such entail.

Defined. A fine is a solemn conveyance on record, from the cognizor to the cognizee, the persons bound thereby being parties, privies and strangers.

Parties. These are either the cognizors or the cognizees, who are concluded by the fine, and barred of any latent right they might have, even under the impediment of coverture.

Privies. Privies to a fine are such as are in any way related to the parties who levy the fine, and claim under them by right of blood, or other right of representation. Such as are the heirs general of the cognizor, the issue in tail, 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 his 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. These are all other persons, except only parties and privies. These are also bound by a fine, unless within five years after proclamation made, they interpose their claim, provided they are under no legal impediments, and have then a present interest in the estate. The impediments are coverture, infancy, imprisonment, insanity and absence beyond sea. Five years are allowed such parties, after the impediment is removed. Persons having only a future interest, as those in remainder or reversion, have five years allowed them to made claim, after such right accrues. They must bring an action within one year after making the claim, or they are barred.

When a Fine is of no Effect. To make a fine available, the parties must have some interest or estate in the lands to be affected by it. Else it were possible, that two strangers might conspire to defraud the owners, by levying fines of their lands, for if discovered, they would not suffer, but remain *in statu quo*, whereas if a tenant for life levies a fine, it is an absolute forfeiture of his estate to the remainder-man or reversioner, if claimed in proper time. If a stranger officiously interferes in an estate, which in no wise belongs to him, his fine is of no effect, and may be set aside, unless by such as are parties or privies thereto. If a tenant for years, who has a chattel interest and no freehold in the land, levies a fine, it operates nothing. It is usual for him to make a feoffment first, to displace the estate of the reversioner, and create a freehold by disseisin.

IV. COMMON RECOVERIES.

Origin. These were invented by ecclesiastics to elude the statutes of mortmain. They were afterwards encouraged by the courts to put an end to fettered inheritances, and bar not only estates-tail, but also all remainders and reversions expectant thereon.

1. Their Nature. A common recovery resembles a fine, in that it is a suit, 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. A recov-

ery is in the nature of an action at law, not immediately compromised like a fine, but carried on through every stage of proceeding.

Illustrated. Suppose A tenant of the freehold is desirous to suffer a common recovery, in order to bar all entails, remainders and reversions, and to convey the same in fee-simple to B. To effect this, B sues A for the lands, alleging in the writ, that A has no legal title, but that he came into possession after C had turned the demandant out. The subsequent proceedings are made up into a record or recovery-roll. A then calls on D, who is supposed at the original purchase to have warranted the title to A, and thereupon prays that D may be called in to defend the title which he so warranted. This is called the voucher or calling of D, the vouchee, to warranty. D then appears, is impleaded, and defends the title. Whereupon B, the demandant, asks leave of the court to *imparl*, or confer in private with D, the vouchee. This done, D disappears or makes default. Then judgment is given for B, now called the recoveror, to recover the lands against A, the recoveree, and A has judgment to recover of D lands of equal value, in recompense for the lands so warranted by him and lost by his default. This is called the recovery in value. But D having no lands of his own, who from being frequently so vouched, and usually being the crier of the court, is called the common vouchee, A has only a nominal recompense for the land so recovered against him by B, which lands are now absolutely vested in him by judgment of law, and seisin delivered by the sheriff. So that this collusive recovery operates merely in the nature of a conveyance in fee-simple from A, the tenant in tail, to B, the purchaser.

Double Voucher. Sometimes there is a double or treble voucher, as the exigency of the case may require, and indeed it is usual to have a double voucher, 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 seised, whereas if the recovery be had against another person, and the tenant in tail be vouched, it bars every latent right he may have in the lands recovered.

Barring Issue in Tail. 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 possibly obtain a recovery in lands from the common vouchee, these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail. The reason will also hold good as to most remainder-men and reversioners, to whom the possibility will remain and revert, as a full recompense, but it will not always hold, and judges have astutely invented other reasons to sanction recoveries. It has been said, that though the estate-tail is gone from the recoveree, yet it is not destroyed, but only transferred, and still subsists in the recoveror, his heirs and assigns, and as the estate-tail continues forever, the remainders or reversions expectant on its determination can never take place.

Evading the Statute de Donis. To such awkward shifts and subtle refinements of reasoning did our ancestors have recourse to get the better of the stubborn statute, *de donis.* The design for these contrivances was laudable; the unriveting the fetters of estates-tail, but we cannot admire the means. Our modern courts have adopted a more manly way of treating the subject, by considering common recoveries in no other light than as the formal mode of conveyance, by which tenant in tail may aliene his lands. It has often been desired, that the process of this conveyance could be shortened, by either repealing the statute *de donis*, or by vesting in every adult tenant in tail the same absolute fee-simple at once, which he may now obtain by the collusive fiction of a common recovery, though this might bear hard upon those in remainder or reversion; or lastly, by empowering the tenant in tail to bar the estate-tail by deed, which is warranted, not only by the usage of our American colonies and the decisions of our own courts, which allow a tenant in tail, without fine or recovery, to appoint his estate to any charitable use, and in case of a bankrupt tenant in tail, empower his commissioners to sell the estate at any time by deed indented and enrolled.[1]

2. Force and Effect. The force and effect of common recoveries appear to bar not only estates-tail, but remainders and reversions expectant thereon. By statute, a remainder or reversion in the king is not barred, nor can a woman after her

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[1] Fines and recoveries are now deemed mere forms of conveyance, the theory and original principles being little regarded.

husband's death suffer a recovery of lands settled on her by her husband, or settled upon her and her husband by an ancestor. By another statute, no tenant for life can suffer a recovery, so as to bind those in remainder or reversion. If, however, he vouch the remainder-man, and he appears and vouches the common vouchee, it is then good.

Must be Seised of the Freehold. In all recoveries, it is necessary that the recoveree, or tenant to the *praecipe*, 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. The nicety thought requisite in conveying the legal freehold, in order to make a good tenant to the *praecipe*, is removed by the statute of George II, which enacts: that though the freehold be vested in lessees, yet those who are entitled in remainder or reversion may make good tenants to the praecipe; that though the deed or fine which creates such tenant be subsequent to the judgment of recovery, yet if it be in the same term, the recovery shall be valid in law; and though the recovery itself do not appear of record, yet the deed, after a possession of twenty years, shall be sufficient evidence, on behalf of a purchaser for valuable consideration, that such recovery was duly suffered.

Deeds to Lead or Declare Uses. As to deeds to lead or to declare the uses of fines and of recoveries, if they be levied or suffered, without good consideration, and without any uses declared, they, like other conveyances, enure only to the use of him who levies or suffers them. 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.

CHAPTER XXII.—ALIENATION BY SPECIAL CUSTOM.

Copyhold Lands. This obtains only in particular places, and relates only to a particular species of real property. It is confined to copyhold lands, and such customary estates as are held in ancient demesne, or in manors of a similar nature; which being of a peculiar kind, and originally no more than pure or

privileged villenage, were never alienable by deed. The method of transferring is generally by surrender, though in some manors, by special custom, recoveries may be suffered of copyholds.

Surrender. Surrender is the yielding up of the estate by the tenant into the hands of the lord, for purposes expressed in the surrender. The process in most manors, is that the tenant shall come to the steward, or else to two customary tenants of the same manor, provided there be a custom to warrant it, and there, by delivering up a rod, glove, or other symbol into the hands of the lord by the hands of his steward, or of the said two tenants, yield all his interest and title to the estate, in trust to be again granted out by the lord to such persons, and for such uses, as are named in the surrender, and the custom of the manor will warrant.

Grant to Second Tenant. Upon such surrender in court, or upon presentment of a surrender made out of court, the lord, by his steward, grants the same land to *cestui que use*, to hold by ancient rents and customary services, and thereupon admits him tenant to the copyhold. Upon such admission, he pays a fine to the lord, according to the custom of the manor, and takes the oath of fealty.

Consent of Lord Essential. The fief, being of a base nature and tenure, is unalienable, without the knowledge and consent of the lord, hence the copyhold estate is surrendered into his hands. Custom has given the tenant a right to name his successor, but formerly it was otherwise. When, therefore, the lord had accepted a surrender of his tenant's interest, upon confidence to re-grant the estate to another person, either then expressly named, or to be afterwards named in the tenant's will, chancery enforced this trust as a matter of conscience. Even to this day, the new tenant cannot be admitted but by composition with the lord, and by paying him a fine for the license of alienation.

Transfer of Copyhold Explained. This method of conveyance is so essential to the nature of a copyhold estate that it cannot be properly transferred by any other assurance. No feoffment or grant has any operation thereon. If I would exchange a copyhold with another, I cannot do it by an ordinary deed of exchange at the common law, but we must surrender to each other's use, and the lord will admit us accordingly.

If I would devise a copyhold, I must surrender it to the use of my last will and testament, and in my will I must declare my intentions and name a devisee, who will then be entitled to admission.

Its several Parts. To more clearly apprehend the nature of this peculiar assurance, we must take a separate view of its several parts: the surrender, the presentment, and the admittance.

1. The Surrender. A surrender, by an admittance subsequent, whereto the conveyance is to receive its perfection and confirmation, is rather a manifestation of the alienor's intention, than a transfer of any interest in possession. For, till admittance of *cestui que use*, the lord takes notice of the surrenderor as his tenant, and he shall receive the profits of the land to his own use, and discharge all services due the lord, yet the interest remains in him, not absolutely, but *sub modo*, for he cannot pass away the land to another, or make it subject to any new encumbrance. But no legal interest is vested in the nominee before admittance, and if he enters, he is a trespasser.

Subsequent Acts. If he surrenders to the use of another, the surrender is void, and by no matter *ex post facto* can be confirmed. No subsequent admittance can make an act good, which was *ab initio* void. If the lord refuse to admit the tenant, he is compelled to do so by a bill in chancery or a mandamus, and the surrenderor can in no wise defeat this grant or countermand his own deliberate act.

2. The Presentment. By the general custom of manors, this is to be made at the next court baron, immediately after the surrender. It is to be brought into court by the same persons who took the surrender. In all material points it must correspond with the surrender. If the surrender be conditional, and the presentment be absolute, the surrender, presentment and admittance thereupon are void. If a man surrenders out of court and dies before presentment, and presentment be made after his death, it suffices. So if *cestui que use* dies before presentment, yet it be made after his death, the heir shall be admitted.

3. The Admittance. This is the last stage of copyhold assurances. It is of three sorts: An admittance upon a voluntary grant from the lord; an admittance upon surrender by the former tenant; an admittance upon a descent from the ancestor.

On Voluntary Grant from the Lord. In such admittance, when copyhold lands have escheated or reverted to him, the lord is an instrument. For though he may keep the lands in his own hands, or dispose of them at his pleasure, by granting a fee-simple, a freehold or a chattel interest therein, and may change their nature from copyhold to socage tenure, so as to be reputed their absolute owner; yet if he will still continue to dispose of them as copyhold, he is bound to observe the ancient custom in every point, and can make no alteration, for that would create a new copyhold.

On Admittances upon Surrender. The lord in this case is to no intent reputed as owner, but wholly as an instrument; and the tenant admitted shall be subject to no charges or encumbrances of the lord.

On Admittance upon Descents. The lord is also a mere instrument in such case, resulting from the death of an ancestor; and as no interest passes to him by the surrender or death of his tenant, so no interest passes from him by the act of admittance. Admittances upon descent differ from admittances upon surrender, in that by surrender, nothing is vested in *cestui que use* before admittance, no more than in voluntary admittances, but upon descent, the heir is tenant by copy immediately upon the death of his ancestor. He may enter into the land before admittance; may take the profits and may punish any trespass done upon the ground. The admittance of the heir is principally for the benefit of the lord, to entitle him to his fine, and is not so much necessary to strengthen the heir's title.

CHAPTER XXIII.—ALIENATION BY DEVISE.

Antiquity of Devises. Before the conquest, lands were devisable by will. But upon the introduction of 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. Some have questioned, whether this restraint was not founded upon truer principles of policy, than the power of wantonly disinheriting the heir by will, and transferring the

estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this, it is alleged, prevented one man from growing too powerful, since it rarely happens, that a man is heir to many others, though by management, he may frequently become their devisee.

Accumulation of Estates. The ancient law of the Athenians directed, that the estate of the deceased should always descend to his children, or on failure of lineal descendants, should go to his collateral heirs, which prevented the accumulation of estates. Solon altered the law, and permitted a man, on failure of issue, to dispose of his lands as he pleased, which soon produced an excess of wealth in some, and poverty in others, resulting in the utter extinction of liberty, and the subversion of the state. On the other hand, it would now seem hard, on account of some abuses, to debar the owner of lands from distributing them, after his death, as the exigence of his family affairs, or the justice due to his creditors, may require. Accumulation of property, the result of the doctrine of succession, to which the Athenians were strangers, should be always discouraged in commercial countries, whose welfare depends on the moderate fortunes of those engaged in the extension of trade.

Restraint of Devises. By the common law of England, since the conquest, no estate, greater than for a term of years, could be disposed of by testament, except only in Kent, and some ancient burghs, and a few manors. And though the feudal restraint on alienations by deed vanished very early, yet the restraint on wills continued for centuries later, from an apprehension of infirmity and imposition on the testator, *in extremis*, which made such devises suspicious.

Statute of Wills. 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. By the statute of wills of Henry VIII, it was enacted: that all persons seised in fee-simple, except *feme coverts*, infants, idiots and persons of non-sane memory might by written will devise to any other person, except to bodies corporate, two-thirds of their lands and tenements, held in chivalry, and the whole of those held in socage, which now by statute of Charles II, amounts to their entire landed property, except their copyhold tenements.

Devises to Corporations. Corporations were excepted in

these statutes, to prevent the extension of gifts in mortmain, but now by the statute of Elizabeth, 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 a bequest. A devise could be made by a copyhold tenant, without surrendering to the use of his will, and by a tenant in tail, without fine or recovery.

Loose Construction of the Act. With regard to devises in general, experience soon showed, how difficult and hazardous a thing it is to depart from the rules of the common law. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance, for so loose was the construction of the act, by the courts of law, that bare notes in the handwriting of another person were allowed to be good wills within the statute of Elizabeth.

Will must be Written and Witnessed. To remedy which, the statute of frauds and perjuries of Charles II enacts, that all devises of lands and tenements shall be in writing, and signed by the testator, or some other person in his presence, and by his express direction, and be subscribed in his presence by credible witnesses.

Revocation of a Will. And a solemnity nearly similar is requisite for revoking a devise by writing, though it may be revoked by burning, cancelling, tearing or obliterating thereof by the devisor, or in his presence, and with his consent. It may also be impliedly revoked, 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.

Subscribing Witnesses. Though the witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times.[1] But they must all subscribe their names as witnesses in his presence, lest by any possibility, they shouldmistake the instrument. A decision of the court of king's bench, forbidding legatees or creditors to be witnesses to a will, where the legacies and debts were charged on the real estate, alarmed purchasers, and led to the statute of George II, which restored the competency and credit of such legatees, by declaring void all legacies given to witnesses, and hence preventing their interest affecting their testimony. The same statute estab-

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[1] By a statute of Victoria, the testator must sign at the foot or end of the will.

lished the competency of creditors, by directing their testimony to be admitted, but allowing their credit, like that of all other witnesses, to be considered by court and jury, before whom such will may be contested.

Effect on Creditors. An 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 of William and Mary provided: that all wills, limitations, dispositions and appointments of real estate, by tenants in fee-simple, or having power to dispose by will, shall, as against such creditors, be deemed fraudulent and void, and that actions may be brought against both heir and devisee.

Witnesses to a Will. A will of land, under these statutes, is considered by the courts, 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 land, such subscription is requisite by statute, in order to identify a conveyance after the death of the devisor.

After Acquired Lands. Upon this notion, that a devise affecting lands is merely a species of conveyance, is founded the distinction between devises and testaments of personal chattels; that the latter will operate upon whatever the testator dies possessed of; the former only upon such real estate, as was 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, he has republished his will.[1]

Rules for the Construction of Wills and Deeds. Certain rules have been laid down by the courts for the construction and exposition of wills and deeds:

1. **Intent of the Parties.** That the construction be favorable, and as near the apparent intent of the parties as the rules

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[1] The statute of Victoria has abolished this distinction, and all property, of which a man is possessed or entitled to at the time of his death, passes by his will.

of law will admit. It must also be reasonable, and agreeable to common understanding.

2. **Not too much Stress on the Words.** That where the intent is clear, too minute a stress must not be laid on the strict interpretation of words, *nam qui haeret in litera, haeret in cortice.* Therefore by a grant of a remainder, a reversion may well pass and *e converso.* Neither false English nor bad Latin will destroy a deed. *Mala grammatica non vitiat chartam.*

3. **Construe the Entire Deed.** That the construction be made upon the entire deed, and not upon disjointed parts of it. Therefore every part of it must if possible be made to take effect, and every word must operate in some shape or other.

4. **Deed taken against Grantor.** That the deed be taken most strongly against him that is the agent or contractor, and in favor of the other party. *Verba fortius accipiuntur contra proferentem.* As if a tenant in fee-simple grants of any one an estate for life generally, it shall be construed for the life of the grantee. 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 deemed the words of both. But in a deed-poll, they are the words of the grantor only, and shall be taken most strongly against him.

5. **Words of Two Senses.** That if the words will bear two senses, one agreeable to and one against law, the one agreeable to law shall be preferred.

6. **Repugnant Clauses.** That in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the former shall be received, and the latter rejected. Wherein it differs from a will, for there the latter of two repugnant clauses shall stand. This 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 attempt to reconcile them.

7. **Wills Liberally Construed.** 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. Hence the law many times 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. Where implications are allowed, they generally must be such as are necessary, or at least highly probable, and not merely possible inferences. And herein there is no distinction between the courts of law and equity, for the will being considered in both courts in the light of a limitation of uses, is construed in each with equal favor, and expounded rather on its own peculiar circumstances, than by any general rules of positive law.

CHAPTER XXIV.—THINGS PERSONAL.

Formerly Held in Contempt. Under the title of things personal are included all sorts of things movable, which may attend a man's person wherever he goes. Being only the objects of the law, while they remain within the limits of its jurisdiction, and being also of a perishable quality, they are not esteemed of so high a nature as permanent and immovable things, such as lands and houses, and the profits issuing therefrom. Our first legislators took great care to ascertain the rights and to direct the disposition of real property, but entertained a low opinion of all personal estate, which they regarded as a transient commodity.

Personal Property formerly but Trifling. The amount of personal property in early times was comparatively trifling, owing to the scarcity of money, and the ignorance of luxury of the feudal ages. A tax of the fifteenth or tenth of all the movables of the subject was frequently laid without scruple. Hence the frequent forfeitures inflicted by the common law of all a man's goods and chattels for misbehaviors, that at present do not seem to deserve such punishment. Our ancient law books did not often condescend to notice personal property.

Present View of Personal Property. But of later years, since the extension of trade and commerce, which are entirely occupied in this species of property, we have taken different views of it. Our courts now regard a man's personalty in a light nearly

equal to his realty, and have adopted a more enlarged mode of considering it, frequently drawn from the rules established by the Roman law.

Chattels. Things personal, by our law, do not only include things movable, but also something more, the whole of which are comprehended by the general name of chattels, a French word, signifying goods. It is, however, derived from the technical Latin word, *catalla*, which primarily signified cattle, but in its secondary sense, was applied to all movables. The Normans accounted all things not feuds, as chattels. And in this extended, negative sense, our law adopts it; the idea of goods or movables only, being not sufficiently comprehensive. Two requisites were required to constitute a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of these qualities, according to the Normans, was not a heritage or fief, hence it must be a personal estate or chattel.

Divisions. Chattels are distributed by the law into two kinds: *Chattels real and chattels personal.*

1. Chattels Real. Chattels real, says Coke, are such as concern or savor of the realty, as terms for years of land, the next presentation to a church, estates by statute merchant, staple, elegit or the like. All these are interests issuing out of or annexed to real estate, of which they have one quality, immobility, which denominates them real, but want the other, indeterminate duration, and this want makes them chattels. The utmost period for which they can last is fixed and determinate, either for a space of time certain, or till a particular sum of money be raised out of such a particular income, so that they are not equal in law to the lowest estate of freehold, a lease for another's life.

Distinct from a Freehold. Then tenants were considered, on feudal principles, as merely bailiffs or farmers, and the tenants of the freehold might at any time, till the reign of Henry VIII, have destroyed their interest. A freehold is conveyed by livery of seisin, and corporal investiture, which gives the tenant so strong a hold of the land, that it never can be wrested from him during his life, but by his own act of transfer or forfeiture, or by the happening of some future contingency, as in estates *pur autre vie.* A chattel interest is conveyed by no seisin or corporal investiture, but by the mere entry of the tenant, and it will certainly expire at a fixed time, if not sooner.

2. Chattels Personal. Properly speaking, these are things movable, which may be annexed to or attendant on the person of the owner, and conveyed by him from one place to another. Such are animals, furniture, money, jewels, grain, garments, and the like. We will consider the nature of such property or dominion, to what it is liable, and then the title to it, or how it may be lost or acquired.

CHAPTER XXV.—PROPERTY IN THINGS PERSONAL.

In Possession and Action. Property in chattels personal may either be in possession, which is where a man has not only the right to enjoy, but has the actual enjoyment of the thing; or in action, where a man has only a bare right, without any occupation or enjoyment. Property in possession is divided into two sorts: an absolute and a qualified property.

1. Property in Possession Absolute. This is where a man has solely and exclusively the right and also the occupation of any movable chattels, so that they cannot cease to be his, without his own act or default. Such may be all inanimate things as goods or money, also all vegetable products, as fruit, when severed from the stalk or tree, or the whole plant itself, when severed from the ground.

Animals. But with regard to animals, who have a power of motion, and, unless confined, can change their location, there is a great difference with respect to their several classes, in the law of nature and in the law of all civilized nations. Animals are either *domitiae* or tame, or *ferae naturae*, of a wild disposition. In tame or domestic animals, as horses or poultry, a man may have absolute property, because they continue perpetually in his occupation, and will not stray, except by accident or enticement, by which the owner does not lose his property. The stealing of such animals is felony, for these are things of intrinsic value. But in animals *ferae naturae*, a man can have no absolute property.

The Offspring of Animals. Of all domestic or tame animals, the brood belongs to the owner of the dam or mother,

partus sequitur ventrem, not only because the male is frequently unknown, but also because the dam, during her pregnancy, is almost useless to the owner, and yet has to be maintained and cared for by him. An exception to the rule is the case of young cygnets, which are to be divided equally between the owners of the cock and the hen, for the male swan is well known from his constant association with the hen, and here the reasons of the general rule cease, *cessante ratione, cessat et ipsa lex.*

II. Qualified Property. Other animals, not tame and domestic, are either not the objects of property, or else are qualified, limited or special property, which is not in its nature permanent, but may sometimes exist. This species of property may exist in such animals as are *ferae naturae*, of a wild nature, as well as in other things under particular circumstances.

Animals Ferae Naturae. A man may be invested with a qualified property in all creatures *ferae naturae, per industriam propter impotentiam* or *propter privilegium.*

1. Per Industriam Hominis. A qualified property in animals may exist, by a man's reclaiming and taming them, by industry and education, or by so confining them, within his immediate power,that they cannot escape, and use their natural liberty. Such are deer in a park, fish in a private pond and the like. 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 known by their usual custom of returning, as is the case with pigeons. But if they stray and do not return in the usual manner, a stranger may take them. If a deer reclaimed has a collar or other mark upon him, and goes and returns at his pleasure, remaining not long absent, the owner's property in him still continues.

Ownership of Bees. Though a swarm of reclaimed bees light upon my tree, I have no property in them, till I have hived them, but they are the owner's, as long as he keep them in sight, and has power to pursue them. But it has also been said, that the only ownership in bees is *ratione soli*, and a qualified property therein exists in the owner of the woods, in which the bees have swarmed.

Distinction in the Value of Animals. In all reclaimed creatures, the property is not absolute, but defeasible, and may

be destroyed, if they return to their wildness, and are found at large. While however they continue qualified property, an action will lie against any one, who detains them or unlawfully destroys them. By common law, it is as much a felony to steal them, if fit for food, as to steal tame animals, but not so, if they are only kept for pleasure, curiosity or whim, such as dogs,[1] cats, parrots and singing birds, because their value depends upon the caprice of the owner, though it may amount to a civil injury, to be redressed by a civil action. Among the ancient Britons, cats were looked upon as of intrinsic value, and the killing or stealing of a cat was deemed a grievous crime, punishable by fine.

2. Propter Impotentiam. A qualified property may exist in animals *ferae naturae*, on account of their own inability. As when birds build in my trees, and have their young in nests, I have a qualified property in the young, till they are able to fly away, and it is trespass and sometimes felony, for a stranger to remove them.

3. Propter Privilegium. That is, a man has a qualified property of hunting, taking and killing wild animals, in exclusion of other persons. He has a transient property in game within his own domains, but when they leave such locality, the qualified property ceases.

Qualified Property in Other Things. It may subsist in the very elements of fire or light, of air and of water. A man can have no permanent property in these, as he may in land, since they are of a fugitive nature, and can admit only of a precarious and qualified ownership, which lasts while they are in actual use and occupation, but no longer.

Ancient Lights and Water-courses. 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 garden; fouls his water, or lets it out, or diverts an ancient watercourse, that used to run to the other's mill or meadow, the law will 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 actually occupying them, they become again common.

Bailments. Property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner,

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[1] By statute of Victoria, dog stealing is deemed a misdemeanor.

when the thing itself is capable of absolute ownership. As in the case of *bailment*, or delivery of goods to another person for a particular use, as to a carrier or innkeeper, for conveyance or safekeeping. Here there is no absolute property in either the bailor or bailee, for the former has the right, but not the immediate possession, while the bailee has the possession, and only a temporary right. But it is a qualified property in them both, and each is entitled to an action, if the goods be damaged or taken away. So also in the case of goods pawned or pledged, either to repay money, or otherwise. The same may be said of goods distrained for rent or other cause of distress, which are in the nature of a pledge, and may be redeemed or forfeited. But a servant, who has the care of his master's goods, has neither any property nor possession, either absolute or qualified, but only a mere charge.

Choses in Action. This is where a man has not the occupation, but merely a bare right to occupy the thing in question; the possession of which may be recovered by a suit at law. Hence it is called a thing or *chose* in action. Such is money due on a bond, for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession until recovered by course of law. If a man promises to do any act, and fails in it, whereby damage ensues to another, the recompense for this damage is a chose in action. In the case of a bond, the property or right of action depends upon an express obligation or contract to pay a stated sum, and in the case of the mere promise, it depends upon an implied contract, that if the covenantor fails to perform his promise, he will pay the damages sustained by the breach.

Right of Action. On all contracts or promises, express or implied, the law gives an action of some sort to the party injured by the non-performance; either to compel the wrong-doer to do justice to the other party or to render a satisfaction, equivalent to the damage sustained. But while the thing remains in suspense, and the injured party has only the right, but 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 therein, as to things in possession.

Time of Enjoyment. By ancient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because being things transitory,

and liable to be lost, impaired or destroyed, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual quarrels, and check commerce, if such limitations in remainders were generally allowed.

Exception in the Case of Wills. But yet in last wills and testaments, such limitations of personal goods, in remainder, after a bequest for life, were permitted. 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 all the time, to continue in the executor of the devisor.

Present Law on the Subject. But now that distinction is disregarded, and therefore if a man, either by deed or will, limits his goods to one man for life, with remainder to another, it is good. But where an estate-tail in things personal is given to a man, it vests in him the total property, for if there were a remainder over, it would tend to a perpetuity, as the devisee or grantee in tail of a chattel cannot bar the entail.

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 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 thereof, and unless the jointure be severed, the same doctrine of survivorship shall take place as in real property. 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. For the encouragement of husbandry and trade, it is held that stock on a farm, though occupied jointly, as also a stock in partnership in trade, shall always be considered as common and not as joint property, and there shall be no survivorship therein.

CHAPTER XXVI.—TITLE TO THINGS PERSONAL BY OCCUPANCY.

PREAMBLE.

Personal Property Acquired or Lost. The methods by which personal property may be acquired or lost are twelve.

1. *Occupancy.*
2. *Prerogative.*
3. *Forfeiture.*
4. *Custom.*
5. *Succession.*
6. *Marriage.*
7. *Judgment.*
8. *Gift or grant.*
9. *Contract.*
10. *Bankruptcy.*
11. *Testament.*
12. *Administration.*

TITLE BY OCCUPANCY.

Curtailed by Laws. This was the original method of acquiring any property, but has since been restrained by the positive laws of society, to maintain harmony among mankind. For this purpose, gifts and contracts, testaments, legacies and administrations have been introduced, in order to continue and transfer that property and possession in things personal, which has once been acquired by the owner. And where such things are found without any other owner, they for the most part belong to the king, except in a few instances, where the right of occupancy is still permitted to exist.

1. Goods of an Alien Enemy. It is said that anybody may seize, to his own use, the goods of an alien enemy. While enemies, they are not entitled to the protection of our laws, and no restitution need be made them for chattels that may be seized. But this right of seizure of an alien enemy's goods must be limited to captors, authorized by the public authorities, and to such goods, as are brought into this country by such alien enemy, after a declaration of war, without a safe conduct or passport. Hence 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. Also 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 vested in the second taker; unless the goods were retaken the same day, and the owner before sunset puts in his claim for the property.

2. Unclaimed Movables. Whatever unclaimed movables are found presumably abandoned by the last proprietor belong to the finder, unless they be waifs, estrays, wrecks or hidden treasure, for these belong by law to the king.

3. The Elements: Light, Air and Water. These can only be appropriated by occupancy. If I have an ancient win-

dow, 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 was in him. If my neighbor makes a tan-yard, which affects the atmosphere of my house or garden injuriously, the law gives me a remedy, but if he first erects such nuisance, and I subsequently move next door, I have no remedy. 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 had a prior occupancy.

4. Animals Ferae Naturae. By the original grant of the Creator, all men had a right to take such animals, and may still do so, unless restrained by law. When so seized, they become, while living, a man's qualified property, or if dead, are absolutely his own, so that to steal them becomes sometimes a criminal offence, and in other cases, a civil injury. The restrictions laid on this right in England relate principally to royal fish, as whale and sturgeon, and also to game, the taking of which belong to the prince or to those to whom he has granted such privilege.

5. Emblements. To this principle of occupancy may be referred the method of acquiring a special personal property in growing corn or other emblements, by any possessor of the land, who had sown or planted it, which emblements are distinct from the real estate in the land, and subject to many of the incidents attending personal chattels. They were devisable by testaments, before the statute of wills, and at the death of the owner, shall vest in his executor and not in his heir, and by statute, but not by common law, are distrainable for rent. They are not the subject of larceny, before being severed from the land.

6. Accessions. By the Roman law, if any corporeal substance received afterwards an accession by natural or artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidery of cloth, the conversion of wood or metal into 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 to a different species, as by making wine or bread out of another's grapes or wheat, it belonged to the new operator, who was only to make satisfaction to the former proprietor for the materials which he had converted. Our courts hold the same doctrine. It is also held, that if one takes away garments,

and clothes another's wife or son, and afterwards they return home, the garments cease to be the property of him who provided them, being annexed to the person of the wearer.

7. Confusion of Goods. Where the goods of two persons are so intermixed, that they can no longer be distinguished, the English law partly differs from the civil. If it have been by consent, probably the proprietors have an interest in common in proportion to their respective shares. But if one wilfully intermix the property, without consent or knowledge of the other, the civil law, though it gives the sole property to the party who did not interfere, yet allows a satisfaction to the other for the loss. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded.

8. Literary Composition. This property is grounded on labor and invention. An author has the right to his original literary composition, so that no other person, without his permission, shall publish it. The identity of such composition consists entirely in the sentiment and the language, and no other man has the right to exhibit it, especially for profit, without the other's consent. This consent may perhaps be tacitly given to all mankind, when an author suffers it to be published by another's hand, without any claim or reserve of right, and without stamping it by marks of ownership.

Author's Rights. But in case the author sells a single book, or totally grants the copyright, it is urged on the one hand, that the buyer has no more right to multiply copies of such book for sale, than he has to imitate a ticket for a concert; and that the copyright grant, with its exclusive rights, is perpetually transferred to the grantee. On the otherhand, it is claimed, that though the exclusive property of the manuscript undoubtedly belongs to the author, before it is printed or published, yet on its publication, such exclusive right vanishes.

Roman Law. The Roman law adjudged, that if a man wrote anything on the parchment or paper of another, the writing should belong to the owner of the blank materials, the scribe to receive a satisfaction; but in works of genius and invention, as in painting on another man's canvas, the law gave the canvas to the painter.

Copyright. The statute of Anne, amended by that of George III, declares, that the author and his assigns shall

have the sole liberty of printing his works for fourteen years, and if at the end of that term, the author himself be living, then for fourteen additional years.[1] The inventors of prints and engravings are entitled to a copyright for a term of twenty-eight years.

Patents. By statute of James I, a royal patent of privilege was granted for fourteen years to any inventor of a new manufacture, for the sole making or working of the same, by virtue whereof a temporary property becomes vested in the king's patentee.[2]

CHAPTER XXVII. — TITLE BY PREROGATIVE AND FORFEITURE.

TITLE BY PREROGATIVE.

Defined. This is whereby a right accrues either to the crown itself, or to such as claim under the title of the crown, as by the king's grant, or by prescription, which supposes an ancient grant.

Things Acquired. Such are all tributes, taxes and customs, in which the king acquires, and the subject loses a property, the instant they become due; if paid, they are a *chose* in possession; if unpaid, a *chose* in action. Hither may also be referred all forfeitures, fines and amercements due the king, by virtue of his ancient prerogative, or by modern statutes.

King's Right to Joint Property. The king cannot have a joint property with any person in one entire chattel, or in one not capable of division, but where the titles of a king and a subject concur, the king shall have the whole. This is also true of a chattel real. If a bond be given to a king and a subject, the king shall have the whole penalty. For as it is beneath the dignity of the king to be partner with a subject, so neither does the

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[1] By later statute of George III, the author of a book, printed or published, shall be entitled to a copyright for twenty-eight years, and if he be living at the end of that time, then for the residue of his natural life. By statute of Victoria, the time was extended to forty-two years, or the period of the author's life, and seven years thereafter.

[2] By statute it may be renewed for fourteen additional years.

king ever lose his right in any instance; but where they interfere, he is always preferred. If one of two joint owners of a bond assigns his part to the king or forfeits it to the crown, the king shall have the entire debt.

Other Property of the King. There are certain other instances of title by prerogative, in which chattels are vested in the crown without transfer or assignment, such as in wrecks, treasure trove, waifs, estrays, royal fish and swans. There is also a prerogative copyright in certain books, as the published acts of parliament, proclamations and orders of council, also all liturgies and books of divine service. The king has a right by purchase to such law books, grammars, etc., compiled or translated at the expense of the crown; also the right of printing the translation of the Bible.

Game. There exists a prerogative property in such animals *ferae naturae* as are known by the appellation of game, with the right of pursuing, taking and destroying them, which is vested in the king alone, and by him granted to certain of his subjects. This right is an incorporeal hereditament, though the profits of it are of a personal nature. By the law of nature, every man may take to his own use any animal *ferae naturae*, as it is the property of the first occupant. This was so held by the imperial law up to the time of Justinian. But this right may be restrained by positive laws for the benefit of the community. This restriction may be either with respect to the place in which this right may be exercised; or with respect to the animals, that are the subject of the right, or the persons allowed or forbidden to exercise it.

Object of the Game Laws. Many reasons exist for enacting these restraining statutes. 1. To encourage agriculture, by giving every man an exclusive dominion over his own soil. 2. To prevent the extirpation of the animals. 3. To check idleness and dissipation among working men, the result of universal license. 4. To prevent popular insurrections, by disarming the bulk of the people.

Change in Game Laws. The law does not thereby take from a man his present property, but only abridges the means of acquiring a future property by occupancy. However defensible these provisions may be, they owe their origin to slavery. The Roman law, though it knew no restrictions as to persons or animals, respected the privacy of place, and allowed no man, with-

out permission, to hunt or sport upon another's grounds. The canon law forbade clergymen from hunting, as such diversion was not indulged in by the saints or primitive fathers. The canons of our Saxon church enjoined the same prohibition, though after the conquest, our secular laws dispensed with this canonical impediment, and spiritual persons were allowed to hunt for recreation, in order to render them more fit for the performance of their duties. To this day, it is a branch of the king's prerogative, at the death of every bishop, to possess his kennel of hounds, or a composition in lieu thereof.

History of Game Laws. All civil prohibitions of this nature, entitled forest or game laws, were introduced into Europe coeval with the feudal system, when the swarms of northern barbarians founded the most of the present kingdoms of Europe on the ruins of the western empire. For when a conquering general divided a country among his soldiers or feudatories, it behooved him, in order to secure his new acquisitions, to keep the natives in as low a condition as possible, and to prohibit the use by them of arms. Nothing could effect this better, than to prevent them from hunting, and to reserve the right of conducting such sport to himself and his feudatories.

Where most Effective. It is remarkable, that in those nations, where the feudal policy remains most uncorrupted, the forest or game laws continue in their highest rigor. In some parts of Germany, it is death for a peasant to be found hunting in the woods of the nobility.

In Early England. In England, hunting has ever been esteemed a princely diversion. In the time of the Britons, the island was filled with all sorts of game, and the inhabitants derived partial subsistence from the chase. But when under the Saxon government, lands began to be cultivated and enclosed, the beasts fled into the forests, and hence were held to belong to the crown, though every freeholder had full liberty of sporting upon his own territory.

King's Forests. Upon the Norman conquest, a new doctrine prevailed, and the right of taking all beasts of chase or venary, and such other animals, as were accounted game, was then held to belong to the king, and to those authorized by him. The king, as lord paramount of the fee, had the right of the universal soil, and could enter thereon, and take the animals at his

pleasure, they being *bona vacantia*, having no owner. This right, thus vested in the crown, was exerted with the utmost rigor, and ancient forests, and vast tracts of country, depopulated for that purpose, were reserved solely for the king's diversion. Oppression existed, under color of forest law, for the sake of preserving the beasts of chase; to kill any of which, within the limits of such forests, was as penal as to cause the death of a man.

Carta de Foresta. King John laid a total interdict upon the winged as well as the four-footed creation. The cruel hardships which these forest laws occasioned the subject, made our ancestors as jealous for their reformation, as for the relaxation of the feudal rigor and other Norman exactions, and hence they contended as warmly for the immunities of the *carta de foresta* as for the *magna carta* itself. This prerogative is now no longer a grievance to the subject.

Royal Grants. But as the king reserved to himself the forests for his exclusive diversion, so he granted from time to time other tracts of land to his subjects as *chases* or parks, or gave them license for such in their own grounds, which indeed are smaller forests, but not governed by forest laws. As to all inferior species of game, called beasts and fowls of *warren*, the liberty of taking or killing them is another franchise of royalty, termed *free warren*, a word which signifies preservation or custody, as the exclusive liberty of taking fish in a public stream is called a free fishery. The granting of any of these franchises or liberties was to protect the game, by giving the grantee an exclusive power of killing it himself, provided he prevented other persons.

Game in the Grounds of Another. Hence the sole right of taking and destroying game belongs to the king, or to one who derives his right from the crown, *propter privilegium*. If a man starts game within his own grounds, and follows it into another's, and kills it there, the property remains in himself. But if a stranger starts game in one man's chase or free warren, and hunts it into another liberty, the property continues in the owner of the chase. Or if a man starts game on another's private grounds, and kills it there, the property belongs to him, in whose ground it was killed, because it was also started there. Whereas, if after being started there, it is killed in the grounds of a third person, the property vests in the person who started and killed it, though guilty of a trespass against both the owners.

TITLE BY FORFEITURE.

Punishment for Crime. This is the third method by which a title to goods and chattels may be acquired and lost, as a punishment for some crime, and as a compensation for the offence or injury against him to whom they are forfeited. Some forfeitures are for offences *mala in se*, against the divine law, natural or revealed, but the greater part are *mala prohibita*, or acts which derive their guilt, solely from their prohibition by the law of the land. Most of these forfeitures go to the crown, but in the case of partial forfeitures, a moiety often goes to the informer or the poor. In the instance of one total forfeiture, *viz.*, that by a bankrupt, who is guilty of felony by concealing his effects, the forfeiture accrues entirely to his creditors.

For what Causes. Goods are totally forfeited by conviction of high treason or misprision of treason; of petit treason; of felony in general, and particularly of felony *de se*, and of manslaughter, nay even by conviction of excusable homicide; by outlawry for treason or felony; by conviction of petit larceny; by flight in treason or felony, even if the party be acquitted; by standing mute, when arraigned of felony; by drawing a weapon on a judge, or striking any one in the presence of the king's courts; by *praemunire;* by pretended prophecies, upon a second conviction; by owling, and by challenging to fight on account of money won at gaming.

Date of Forfeiture. This forfeiture commences from the time of conviction, not from the time of committing the act, as in forfeitures of real property, yet a fraudulent transfer of goods to defeat the interests of the crown is made void by statute.

CHAPTER XXVIII.—TITLE BY CUSTOM.

Defined. This is where a right vests in some particular persons, either by the local usage of some particular place, or by the almost universal usage of the kingdom. It would be an endless task to enumerate all the special customs of the kingdom, but we will refer to three sorts of customary interests, which obtain somewhat generally through England, *viz.*, heriots, mortuaries, and heir-looms.

1. Heriots. These are usually divided into heriot-service and heriot-custom. The former are due upon a special reservation in a grant or lease of lands, and hence amount to little more than rents; the latter arise upon no special reservation whatever, but depend merely upon immemorial usage. 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.

Origin and History. The first establishment of compulsory heriots in England was by the Danes. These, for the most part, consisted of arms, horses and habiliments of war, which were delivered up to the sovereign on the death of the vassal, to be placed in other hands for the service and defence of the country. Under William the Norman, heriots were transmitted into reliefs. These are now for the most part confined to copyhold tenures, and are due by custom only, which is the life of all estates by copy, and perhaps is the only instance, where custom has favored the lord. For this payment was originally a donation or gratuitous legacy of the tenant, and custom has established this discretional act of gratitude into a permanent duty. A heriot may also appertain to free land, that is held by service and suit of court.

The Article Itself. The heriot is sometimes the best live beast of which the tenant dies possessed, or the best inanimate thing, as a jewel or piece of plate, but it is always a personal chattel, which on the death of the tenant its owner, being ascertained at the option of the lord, becomes vested in him, and is no charge on lands. On the death of a *feme covert*, no heriot can be taken, for she can have no property in things personal. In some places there is a customary composition in money.

2. Mortuaries. A mortuary is a sort of ecclesiastical heriot, being a customary gift due the minister in many parishes, on the death of a parishioner. Originally it was a voluntary bequest to the church, being intended as an expiation for personal tithes, which the party in life might have neglected to pay. The second best chattel was reserved to the church as a mortuary. Centuries ago in France, every man who died without bequeathing a part of his estate to the church was deprived of christian burial. If he died intestate, his relations and the bishop appointed arbitrators, to determine what he should have given the church, had he made a will.

Originally a Voluntary Donation. Anciently the mortu-

ary was brought to the church with the corpse, and hence it was called a *corse-present*, as it was then a voluntary donation. In the time of Henry III, it had become an established custom, so that a bequest of heriots and mortuaries was held necessary in every testament of chattels. A statute of Henry VIII affixed a stated sum for the mortuary, proportioned to the appraised value of the estate. No mortuary is due at the death of a *feme covert*, or of a child, or of a man who is not a housekeeper, or of a wayfaring man.

3. Heir-looms. These are such goods and personal chattels, as contrary to the nature of chattels, shall go by special custom to the heir with the inheritance, and not to the executor. The termination *loom*, means limb, so that an heir-loom is a member of the inheritance. Heir-looms are generally such things as cannot be taken away, without damaging the freehold. Deer in an authorized park, and fishes in a pond, though personal chattels, yet being annexed to the inheritance, go with it, accompanying the land, whether it vests by descent or purchase. Title deeds, with the chest in which contained, also go to the heir, and in some places, carriages, utensils, and other household goods are deemed heir-looms, but such custom must be strictly proved.

Fixtures. By almost general custom, whatever is strongly affixed to the freehold, and cannot be severed except by violence or damage, shall pass to the heir.

Rights of the Heir. Other personal chattels also are deemed heir-looms, as a tombstone in a church, or the coat-armor of an ancestor, there suspended, with ensigns of honor. Pews are somewhat of the same nature, which may descend by immemorial custom to the heir.

Dead Bodies. But the heir has no property in the body or ashes of his ancestors, nor can he bring a civil action against those who violate or disturb their remains, when buried. The person, who has the freehold of the soil may do this, and if the shroud be stolen by one who takes up the body, it is felony, for the property thereof remains in the executor, or whoever had charge of the funeral.

Not Affected by a Devise. Though heir-looms are mere chattels, yet they cannot be devised away from the heir by will, but such a devise is void, even by a tenant in fee-simple.

Though the owner in his life time might have sold or disposed of them, as he might of the timber of his estate, yet they, at his death, being instantly vested in the heir, the devise shall be postponed to the custom, whereby they have already descended.[1]

CHAPTER XXIX.—TITLE BY SUCCESSION, MARRIAGE AND JUDGMENT.

TITLE BY SUCCESSION.

Where Applicable. The fifth method of gaining a property in chattels, either personal or real, is by succession, which, in strictness of law, is only applicable to corporations aggregate, in which one set of men, by succeeding another set, may acquire the property of the corporation. The true reason whereof is because, in law, a corporation never dies. Even if the succession be not expressed in a grant to a corporation, the law itself will imply it. So that a gift to a corporation, either of lands or chattels, without naming its successors, vests an absolute property in it, so long as the corporation exists.

Sole Corporations. With regard to sole corporations, a distinction must be made. If such corporation be the representative of a number of persons, it has the same power as a corporation aggregate, to take personal property in succession. If, however, the sole corporation represent no others than itself, as bishops and the like, no chattel interest can regularly go in succession, and therefore if a lease for years be made to a bishop and his successors, his executors or administrators, and not his heirs, shall have it. The word "successors," when applied to a person in his political capacity is equivalent to the word "heirs," in his natural capacity.

Right of Succession. The general rule, with regard to corporations sole, is that no chattel can go to or be acquired by them in right of succession. To this rule there are two exceptions. One in the case of the king, in whom a chattel may vest, by

[1] The term heir-loom is often also applied to pictures, plate and furniture.

a grant of it made to a preceding king and his successors. The other exception is where, by a particular custom, some particular corporations sole have acquired a power of taking particular chattel interests in succession. The rule is this: 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.

Property Vested in Husband. The sixth mode of acquiring personal property 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.

Unity of Interest of the Parties. This depends entirely on the notion of unity of person between the husband and wife, it being held, that they are one person in law, so that the very existence of the woman is suspended during the coverture, or entirely merged into that of the husband.

Distinction as to Real and Personal Estate. Hence it follows, that whatever personal property belonged to the wife before marriage, is by marriage absolutely vested in her husband. In real estate, he only gains a title to the rents and profits during coverture, which on feudal principles remains entire to the wife after her husband's death, or to her heirs, if she die 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 reduces them to possession, by exercising some act of ownership; otherwise the property remains in the wife, or to her representatives, after the coverture is determined.

Acquisition of Chattels. There is a marked difference in the acquisition of this 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.

Chattels Real. A chattel real vests in the husband, not absolutely, but *sub modo*. As in the case of a lease for years, the

husband shall receive all the rents and profits, and may 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 could not 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.

Choses in Action. So also of chattels personal or in action, as debts upon bonds, 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 his own, and shall go to his executors or his administrators, and shall not revest in the wife. But if he dies, before he has recovered or reduced them into possession, so that at his death, they continue *choses* in action, they shall survive to the wife, for the husband never exerted his power to obtain them. This is also the case, if an estray enters the wife's franchise, and the husband seizes it. It then becomes his absolute property.

Distinction between Chattels Real and Personal. In both these species of property, the law is the same, where the wife survives the husband, but where the husband survives the wife, there is a marked difference; for he shall have the chattel real by survivorship, but not the *chose* in action, except in the case of arrears of rent due the wife before her coverture, which, in case of her death, belong to her husband by statute. The reason for this difference in the general law is this: the husband is in absolute possession of the chattel real during the coverture, by a kind of joint tenancy with the wife, and the law will not wrest it from him, and give it to her representatives, though should he die first, it would have survived to the wife, unless he had altered the possession. But a *chose* in action shall not survive to him, because he never was in possession of it during the coverture, and the only method he had to gain possession was by suing in his wife's right, which he could not do after her death. But he may be her administrator, and may in that capacity recover such things in action, as became due to her before or during the coverture.

Choses in Possession. As to chattels personal or choses in possession, which the wife has in her own right, as ready money, jewels, household goods and the like, the husband has therein an immediate and absolute property devolved in him by the marriage, which never can again revest in the wife or her representatives.

Wife's Paraphernalia. In one 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*, a term used in the civil law, and derived from the Greek, signifying something over and above her dower. In our law, it signifies the apparel and ornaments of the wife, suitable to her rank and degree. These she retains at the death of her husband, over her jointure or dower. The husband cannot bequeath by his will such ornaments and jewels of his wife, though perhaps during his life he might have the power to dispose of them. But if she continues in their use until her husband's death, she shall afterwards retain them against all persons, except creditors, where there is a deficiency of assets.[1]

TITLE BY JUDGMENT.

Effect. A judgment, in consequence of an action in court, is frequently the means of vesting the right and property of chattel interests in the prevailing party. We must distinguish between property, the right of which is before vested in the party, and of which only possession is recovered by suit; 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 judgment of law. Of the former sort are all debts and *choses* in action, as bonds or contracts, in which cases the right accrues to a creditor, and is completely vested in him, at the time the bond was sealed or the contract made, and the law only gives him a remedy to recover possession of that right, which already belongs in justice to him.

Exceptional Kind of Property. But a species of property exists, to which a man has no claim or title till after suit commenced and judgment obtained in a court of law, where the

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[1] In such case, where this personal property is seized by creditors of the husband, the wife may recover its value from the heir, where the real estate is sufficient.

right and remedy do not follow each other, as in common cases, but accrue at 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. **Penalties by Particular Statutes.** These are such, as may be recovered in an action popular, by him or them who will sue for the same. Such party obtains an inchoate, imperfect degree of property, by commencing his suit, but it is not consummated till judgment, for if any collusion appear, he loses the priority he had gained. But, otherwise, the right so attaches in the first informer, that the king, who before the suit could pardon, cannot, after action commenced, remit anything but his own part of the penalty.

The Informer's Rights. For, by commencing the suit, the informer has made the popular action his own private suit, and no power, but that of parliament, can release the informer's interest. This gift of a penalty is open therefore to the first occupant, who declares his intention to possess, by instituting his action and obtaining judgment to recover it.

2. **Damages for an Injury.** A species of property also acquired or 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 a battery, imprisonment, slander or trespass. Here the plaintiff has no certain demand until after verdict. After assessment of damages and judgment thereon, he instantly acquires and the defendant loses his right to a specific sum. The judgment does not so properly vest a new title in him, as to fix and ascertain the old one; it does not give, but it defines the right. The primary right to a satisfaction for injuries is given by the law of nature, and the suit is the means of ascertaining and recovering that satisfaction.

3. **Costs and Expenses of Suit.** These are often arbitrary, and rest entirely on the determination of the court, on weighing all circumstances, both as to the *quantum*, and also, in courts of equity especially, and upon motions in courts of law, as to whether there shall be any costs. These costs, when given, are an acquisition made by judgment of law.

CHAPTER XXX.—TITLE BY GIFT, GRANT AND CONTRACT.

TITLE BY GIFT OR GRANT.

How Distinguished. Gifts or grants, which are the eighth mode of transferring personal property, are thus distinguished from each other: Gifts are always gratuitous; grants are upon some consideration or equivalent. They are divided, with regard to their subject matter, into gifts or grants of chattels real, and gifts or grants of chattels personal.

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. A consideration, however slight, converts a gift if executed into a grant; if not executed, into a contract.

Of Chattels Personal. Grants or gifts of chattels personal are the act of transferring the right and 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 most essential.

Fraudulent Conveyances. But this conveyance, when merely voluntary, is somewhat suspicious, and is usually construed to be fraudulent, if creditors or others become sufferers thereby. By statute of Henry VII, all deeds of gift of goods, made in trust to the use of the donor, shall be void, because creditors of the donor might also be defrauded of their rights. And by statute of Elizabeth, 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 entire value of the goods, one moiety to the king, and another moiety to the party aggrieved, and on conviction, shall suffer imprisonment for six months.

Delivery of Possession. A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately. It is not in the donor's power to retract it, though he did it without any consideration, unless it be preju-

dicial to creditors, or the donor was under legal incapacity, as infancy, coverture, duress or the like, or if he were imposed upon by false pretences, ebriety or surprise. But if the gift does not take effect, by delivery of immediate possession, it is not properly a gift, but a contract, which a man can only be compelled to perform upon good and sufficient consideration.

TITLE BY CONTRACT.

Contract Defined. A contract, which usually conveys an interest merely in action, is defined to be an agreement, upon sufficient consideration, to do or not to do a particular thing.

Points to be Considered:

(1) *The agreement.* (2) *The consideration.* (3) *The thing to be done or omitted, or the different species of contracts.*

I. The Agreement. This is a mutual bargain, and hence there must be at least two contracting parties of sufficient ability to contract.

Assignment of a Chose in Action. In conformity with an 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. Hence when a debt or bond is 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. But the king is an exception to the rule, for he might always grant or receive a *chose* in action by assignment, and the courts will protect the assignment thereof, as much as the law will that of a chose in possession.[1]

Express and Implied Contracts. This contract or agreement may be either express or implied. Express contracts are where the terms of the agreement are openly 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 man to perform work for me, the law implies, that I undertake to pay him as much as his labor deserves. If I obtain wares from a tradesman, without any agreement of price, the law concludes, that I contract to pay their value.

Question of Damages. There is one species of implied

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[1] Negotiable paper may be transferred, however, by simple endorsement, and suit thereon brought in the name of the holders.

contract, which permeates all contracts, conditions and covenants, that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by my neglect or refusal. In short, almost all the rights of personal property, when not in actual possession, depend in a great measure upon contracts of some kind, or at least may be reduced under some of them. This indeed is the method taken by the civil law, which refers most of the duties and rights it treats of to the head of obligations *ex contractu* and *quasi ex contractu*.

Executed and Executory Contracts. A contract may also be either executed, as where the possession and right are transferred together; or executory, where the right only vests, and the reciprocal property is not in possession, but in action. A contract executed, which differs in no respect from a grant, conveys a chose in possession; a contract executory, only a chose in action.

II. The Consideration. This is 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, express or implied, there must be something given in exchange, something that is mutual or reciprocal. The consideration must be lawful, or the contract is void.

Good Consideration. Good consideration is that of blood or natural affection between near relations. This consideration however may be set aside, when it tends to defraud creditors or other third persons of their just rights.

Valuable Consideration. But a contract for any valuable consideration, as for money, for marriage, for work done, or for other reciprocal agreement, can never be impeached at law, and if it be of sufficient adequate value, is never set aside in equity, for there has been an equivalent or recompense, and the party contracted with is therefore as much an owner or creditor, as any other persons.

Species of Valuable Consideration. 1. *Do ut des*, as when I give money or goods, on a contract, that I shall be repaid money or goods. Of this kind are loans of money on bond or promise of repayment, and all sales of goods, with contract express or implied.

2. *Facio ut facias*, as when I agree with a man to do his work for him, if he will do mine for me, or if two persons agree

together to marry, or to do any positive acts on both sides. Or to forbear on one side in consideration of something done on the other, or for mutual forbearance.

3. *Facio ut des*, when a man agrees to perform anything for a price, either specifically mentioned, or left to the determination of the law to set a value upon it, as when a servant hires himself for certain wages or an agreed sum of money, or is hired generally.

4. *Do ut facias*, which is the direct counterpart of the preceding, as when I agree with a servant to give him such wages, upon his performing such work.

Nudum Pactum. A consideration of some sort is so absolutely necessary to the formation 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 no man can be compelled to perform it.[1] The municipal law will not compel the execution of an agreement, for which no visible inducement was offered; on the maxim, *ex nudo pacto, non oritur actio.* But any degree of reciprocity will prevent the compact from being nude, and 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.*

Proof of Promise. This rule was established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no reason could be assigned, and 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 consideration, in order to evade payment, and every note from the subscription of the drawee, carries with it internal evidence of a good consideration.[2] Courts will support them both as against the contractor himself, but not to the prejudice of creditors or strangers to the contract.

III. 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 may be acquired are:

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[1] A seal to any written contract or promise imports consideration.

[2] If the action be brought by the payee of a promissory note, the maker may aver want of consideration; but if brought by an endorsee, a *bona fide* holder, for valuable consideration, without notice, no such defence avails.

1. *Sale or exchange.*
2. *Bailment.*
3. *Hiring and borrowing.*
4. *Debt.*

1. Sale or Exchange. This is a transmutation of property from one to another, in consideration of some price or recompense in value. There must be a *quid pro quo*. If it be a commutation of goods for goods, it is more properly an exchange, but if it be a transfer of goods for money, it is termed a sale. Money is the universal medium established for the convenience of mankind, which may be exchanged for all sorts of other property, whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be most burdensome. Hence all civilized nations adopted very early the use of money, though the practice of exchange still exists among several savage nations. But as the law treats sales and exchanges alike, we shall speak of them both, under the head of sales.

Restricted, Pending Writ of Execution. Where the vendor has in himself the property of the goods sold, he may dispose of them to whomever he pleases, at any time and in any manner, unless execution has issued against him on a judgment for a debt or damages, and the writ of execution has been actually placed in the hands of the sheriff. In such event, the sale would be fraudulent, and the property of the goods shall be bound to answer the debt, from the time of delivering the goods. Formerly it was bound from the *teste* or issuing of the writ, and still remains so between the parties, but was altered in favor of purchasers.

Removal of Goods. If a man agree with another for goods at a certain price, he may not remove them without paying for the, for it is no sale without payment, unless the contrary be expressly agreed. But if he pays a part of the price, the property of the goods is bound by it, and the vendee may recover the goods by action, as also may the vendor recover the price of them.

Requisites to Validity of Sale. By statute of Charles II, no contract for the sale of goods to the value of ten pounds or more shall be valid, unless the buyer actually receives part of the goods sold, by way of earnest on his part, and pays part of the price to the vendor to bind the bargain, or in part payment, or unless some note in writing be signed by the party or his agent, who is to be charged with the contract. With regard to goods

under that value, no contract therefor shall be valid, unless the goods 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.

Hand-shaking a Symbol of Sale. Anciently among the northern nations, shaking hands was held necessary to bind the bargain, a custom we still retain in many verbal contracts. This was called a hand-sale, till in time, this word was used to signify the price or earnest then given.

Effect of Tender. 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 upon. But if he tenders the money, and the vendor refuse it, the vendee may seize the goods, or have an action against the vendor for detaining them.

Sale without Delivery. By a regular sale, even without delivery, the property is so absolutely vested in the vendee, that if A sells a horse to B, who pays him earnest, or signs a note 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.

Sales in Market Overt. But property may also in some cases be transferred by sale, though the vendor has none at all in the goods, for it is expedient, that the buyer, by taking proper precautions, may be secure of his purchase, otherwise commerce would soon end. Hence the rule of law is, that all sales and contracts of things vendible in fairs or markets *overt*, that is, open, shall not only be good between the parties, but also binding on all those, who have any right or property therein.

Saxon Custom. In ancient times, private contracts were discountenanced by law, and our Saxon ancestors prohibited the sale of anything above the value of twenty pence, unless in open market.

Locality of Market. Market *overt* in the country is only held on special days, provided by charter or prescription for particular towns, but in London, every day, except Sunday, is market-day, and every store in which goods are publicly exposed for sale, is market *overt*, for such things only as the owner professes to trade in.

Goods Stolen. If my goods be stolen 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 king's property, such sale will not bind him, though it binds infants, *femmes covert*, idiots, lunatics, and men beyond sea or in prison. If the goods be stolen from any one, 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, he loses not his property in the goods. So likewise, if the buyer knows that the property is not in the seller, or that there is fraud in the transaction, or that the seller is an infant, or *feme covert*, not usually trading for herself, or if the sale be not made in the fair or market, or not at the usual hours, the owner's property is not bound thereby.

Horses Stolen. Property in horses is not easily altered by sale, without the express consent of the owner. A purchaser gains no property in a horse that has been stolen, unless it be bought in a fair or market *overt*. Nor shall such sale divest the property of the owner, if within six months after the stealing, he presents his claim before a magistrate, near where the horse be found; and within forty days thereafter proves his property by the oath of two witnesses, and tenders to the person in possession such price as he has *bona fide* paid for the animal in market *overt*.

Warranty. By the civil law, an implied warranty was annexed to every sale as to the title of the vendor; and 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 prove deficient, without any express warranty. But with regard to the goodness of the wares, 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 used art to disguise them.

2. Bailment. This term, from the French *bailler*, to deliver, is a delivery of goods in trust, upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee. As if cloth be delivered to a tailor to make a suit of clothes; he takes it upon an implied contract to render it again when made, and that in a workmanlike manner. So if goods be delivered to a common carrier, he is under a contract to safely deliver them to the person named. So goods delivered to an innkeeper or his servant must be safely kept and delivered to the guest, when he claims them.

Examples of Bailment. If a man takes horses to graze on his grounds, which the law calls *agistment*, he takes them on an implied contract to return them to the owner. A pawnbroker's contract to restore goods pledged, on payment of a certain sum at a specified time, is an express contract. If a landlord distrain for rent, or an officer for taxes, the goods for a time are only a pledge in the hands of the distrainors, who are bound to return them, if the debt and costs are paid before the time of sale, or when sold, to return the overplus. If a friend deliver anything to a friend to keep for him, the receiver is bound to restore it on demand. A general bailment will not charge the bailee with any loss, unless it happen by gross neglect, which is an evidence of fraud; but if he undertakes specially to keep the goods safely, he is bound to take the same care of them, as a prudent man would take of his own..

Right of Suit by both Parties. 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 left in him the right to a chose in action, grounded upon such contract. The bailee, as well as the bailor, may maintain an action against those who injure or take away these chattels. The bailee may vindicate, in his own right, his possessory interest against a third person; for he is responsible to the bailor, if the goods are lost, or damaged by his wilful default or gross negligence, or if he do not deliver up the goods on lawful demand; hence 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.

3. Hiring and Borrowing. These are 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 recompense, while borrowing is merely gratuitous. They are both contracts, whereby the possession and a transient property are transferred for a particular time or use, on condition to restore the goods at the expiration of the time or the performance of the use; and in case of hiring, together with the price, expressly agreed upon, or left to be implied by law.

Position of the Parties. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, with an implied condition to use it with moderation, and the

owner or lender retains a reversionary interest therein, and acquires a new property in the price or reward.

Interest on Money Loaned. The most usual species of this reward caused many good men in former times to doubt its legality *in foro conscientiae.* This was the question of interest, where money was lent on a contract to repay not only the principal sum, but also an increase by way of compensation. Some termed this increase, interest, others denominated it usury. This opposition to any increase on the original sum was founded on the prohibition of it by the law of Moses, and by the saying of Aristotle, that money is barren, and cannot breed money. The canon law has proscribed the taking of even the least increase for the loan of money as a mortal sin.

Morality of Accepting Interest. In answer to this, it is noticeable, that the Mosaical precept was clearly a political and not a moral precept. It only prohibited the Jews from taking usury from their brethren, the Jews, but permitted them to receive it from a stranger, which proves the taking of such reward for the use, for so the word usury signifies, is not *malum in se.* The barrenness of money, as mentioned by Aristotle, might be also said of houses, which never breed houses, and many other things which are let for hire. Though money was first used only as a medium of exchange, yet the law of a state may well allow it to be turned for the purpose of profit, for the convenience of society.

Necessity for Paying Interest. Unless money can be borrowed, trade cannot be carried on, and if no premium was allowed for the hire of money, few persons would lend it, or at least borrowing at short warning, which is the life of commerce, would be entirely at an end. In the dark ages, when interest was laid under an interdict, commerce was at its lowest ebb, and fell entirely into the hands of the Jews and Lombards, and commerce only grew, when the taking of interest was again introduced. As all other conveniences of life may be bought or hired, while money can only be hired, there can be no oppression in taking a recompense or price for this.

Usury. To demand an exorbitant price is contrary to conscience, while a reasonable equivalent for the use of money is not immoral; but a distinction must be made between a moderate and an excessive profit, the former of which we call interest, and

the latter usury. Grotius says: "if the compensation allowed by law does not exceed the proportion of the hazard run or the want felt by the loan, its allowance is neither repugnant to the natural nor the revealed law, but if it exceeds those bounds, it is then oppressive usury."

Rate of Interest. The question of the exorbitance 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 rate of general interest must depend upon the general inconvenience to the lenders. This results entirely from the quantity of specie or current money in the kingdom. In every nation a certain quantity of money is necessary, all above which may be spared or lent without much inconvenience to the lenders, and the greater this national superfluity is, the more numerous will be the lenders, and the lower ought the rate of the national interest to be.

Hazard of a Loss. 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 being generally in a compound ratio, formed out of the inconvenience and the hazard. Thus if the quantity of specie in a nation be such that the inconvenience of lending for a year is computed to amount to three per cent; a man having money to loan, would probably loan on good personal security at five per cent, allowing two for the hazard run; he would loan on mortgage at four per cent, the hazard being less, and to the state, on the maintenance of which all his property depends, at three per cent, there being no hazard whatever.

Extra Interest Allowed. Sometimes the hazard will be greater than the legal rate of interest will compensate. This gives rise to the practice of: (1) *Bottomry, or respondentia.* (2) *Policies of insurance.* (3) *Annuities on lives.*

(1) **Bottomry.** This originally arose from permitting the master of a ship, in a foreign country, to hypothecate the ship, in order to raise money to refit, and is in the nature of a mortgage of the vessel, in which the master pledges the keel or bottom of the ship, *partem pro toto*, as a security for the repayment. If the ship be lost, the lender loses all his money, but if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however much it may exceed the legal rate. This is allowed to be a valid contract in all trading

nations for the benefit of commerce, and by reason of the extraordinary hazard incurred. In this case the ship and tackle, if brought home, are answerable, as well as the borrower, for the money lent.

At Respondentia. But if the loan is not in the vessel, but upon the cargo and merchandise, which must necessarily be exchanged during the voyage, then only the borrower personally is bound to answer the contract, who is then said to take up money at *respondentia*. These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself, as when a man lends a merchant money to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case the voyage be safely performed. By statute of George II, restrictions were made as to bottomry or at *respondentia* on vessels bound to or from the East Indies.

(2) **Polices of Insurance.** A policy of insurance is a contract between A and B, that upon A paying a premium equivalent to the hazard run, B will indemnify or insure A against a particular event. This is founded on the principle of hazard, but not that of inconvenience, for the insurer is never out of possession of his money, till the loss actually happens. Thus too, in a loan, if the chance of repayment depends upon the borrower's life, it is usual, beside the ordinary rate of interest, for the borrower to have his life insured till the time of repayment, for which he is charged an additional premium, suited to his age and constitution. In this manner, any extraordinary or particular hazard may be provided against, which the established rate of interest will not reach.

Insurable Interest. To prevent these insurances from being turned into a species of gaming, it is enacted by statute of George III, that no insurance shall be made on lives, or on any other event, wherein the party insured has 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.

Marine Insurances. This does not however extend to marine insurances, which were provided for by a prior law of their own. Such contracts, which entirely depend on good faith and integrity, are vacated by the least shadow of fraud or undue concealment, and on the other hand, being greatly for the bene-

fit and extension of trade by distributing the gain or loss among a number of persons, they are greatly encouraged by the common law and statutes.

Wagering Marine Policies. A practice formerly existed of insuring large sums, without having any property on the vessel, called insurances, interest or no interest, and also of insuring the same goods several times over, both of which were a species of gaming, termed wagering policies. A statute of George II declared such policies void, except upon privateers, and upon ships or merchandise from the Spanish and Portuguese dominions, for obvious reasons, and further enacted, that no re-assurance shall be lawful, except that the former insurer be insolvent, a bankrupt or dead; and lastly, that in the East India trade, the lender of money on bottomry or at *respondentia* shall alone be insured for the money lent, and the borrower, in case of a loss, shall recover no more upon any insurance, than the surplus of his property above the value of his bottomry or *respondentia* bond.

(3) Annuities. 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 pay annually, during his life, some part of the money borrowed, with legal interest for such principal as is unpaid, and an additional compensation for the extraordinary hazard run of losing that principal entirely, by the contingency of the borrower's death.

Heavy Premiums. The real value of the contingency must depend on the age, constitution, situation and conduct of the borrower, and hence the price is difficult to reduce to a general rule. If by the terms of the contract, the lender's principal be put in jeopardy, no inequality of price will make it an usurious bargain, though under some circumstances of imposition, it will be relieved in equity.

Rates of Interest. Upon the two principles of inconvenience and hazard, compared together, different nations at different times have established different rates of interest. The Romans at one period allowed twelve per cent. per annum to be taken for common loans. Justinian reduced it to four per cent. but allowed higher interest to be taken of merchants, for the hazard was greater in their case. Holland at one time allowed

eight per cent on common loans, and twelve to merchants, which policy Lord Bacon strove to introduce into England, but our law established one standard for all alike.

Variations in the Rate of Interest. The rate of interest in England 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. The statutes of Henry VIII and Elizabeth allowed ten per cent. Her successor, James I, reduced it to eight, and Charles II to six, while under Anne, it was reduced to five per cent.

Interest on Foreign Contracts. 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. The refusal to enforce such contracts would put an end to foreign trade. By statute of George III, all mortgages and other securities upon estates in Ireland or the plantations, bearing interest, not exceeding six per cent, shall be legal, though executed in Great Britain, unless the money lent shall be then known to exceed the value of the thing in pledge, in which case the borrower shall forfeit treble the sum so borrowed.

4. Debt. This is a species of contract, whereby a *chose* in action or right to a certain sum of money, is mutually acquired and lost. This may arise from any of the other species of contracts. As in the case of a sale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the sum agreed upon, and the vendor has a property in this price, as a *chose* in action, by means of this contract of debt. Any contract, 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. It is usually divided into debts of record, debts by special, and debts by simple contract.

Debt of Record. This 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 a defendant to a plaintiff on an action or suit at law, this is a contract established by the sentence of a court.

Recognizance. 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 a court or magistrate, with a condition, that such acknowledgment shall be void, upon the appearance of the party, his good behavior or the like. These are ranked among the highest class of debts, viz., debts of record, being witnessed by the best kind of evidence; by matter of record.

Debts by Specialty. These are such, whereby a sum of money becomes, or is acknowledged to be due by deed, or instrument under seal. It is the creation or acknowledgement of a debt from the obligor to the obligee. Unless the obligor performs a condition annexed, as the payment of rent or money borrowed, the observance of a covenant or the like, the bond becomes forfeited, and the debt becomes due in law.

Debts by Simple Contract. These exist, 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 evidence, the most simple of any, or by notes unsealed, which are capable of a more easy proof, and therefore better than a verbal promise. A vast variety of obligations branch out from this latter class, through the numerous contracts for money which exist.

Promise to Pay Another's Debt. Statute of Frauds. By statute of Charles II, 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.

Bills of Exchange. A bill of exchange is a security, originally invented among merchants for the more easy remittance of money from one to the other, which has been adopted in most 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 in the most distant part of the world may have money remitted to him from any trading country, without danger of robbery or loss.

History and Terms Used. This method was brought into

use by the Lombards and others, when banished for taking usury, in order the more easily to draw their effects out of one country into other countries selected by them for residence. The term "draft" is often applied to a bill of exchange. The person who writes the letter is called in law the drawer, the one to whom it is written, the drawee, and the person to whom it is payable, the payee.

Foreign and Inland Bills. These bills are either foreign or inland; foreign, when drawn by a merchant, residing abroad, on his correspondent in England, or *vice versa*, and inland, when both the drawer and drawee reside in the kingdom.[1]

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. By statute of Anne, they are made assignable and endorsable.

Minimum Sum. By statute of George III, all promissory or other notes, bills of exchange, drafts and undertakings in writing, being negotiable or transferable, for the payment of less than twenty shillings, are declared null and void. It was made penal to utter them, as being prejudicial to trade and public credit. And notes, bills, drafts and undertakings under five pounds, are subjected to many regulations and formalities; the omission of which vacates the security, and is penal to him who utters it.[2]

Negotiability. The payee, or person to whom or to 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 to bearer, or to another person by name, who is then called the endorsee, and he may assign it to another, and so *in infinitum*. And a promissory note, payable to A or bearer, is negotiable without endorsement, and payment may be demanded by any holder of it.

Acceptance of a Bill of Exchange. But in the case of a bill of exchange, the payee or endorsee is to go to the drawee, and offer the bill for acceptance, which acceptance, so as to charge

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[1] A bill drawn in one of the United States upon a person doing business in another state, is held to be a foreign bill of exchange.

[2] By statute of George IV, the issuing of promissory notes for any sum under five pounds is prohibited, under a penalty of twenty pounds.

the drawer for 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 for its payment, this being now a contract on his side, based on an acknowledgement, that the drawer has effects in his hands, or at least credit, sufficient to warrant the payment.

Protest for Non-acceptance. If the drawee refuse to accept the bill, 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. But if no such notary reside in the place, then by any other substantial inhabitant, in the presence of two credible witnesses, and due notice of such protest must be given to the drawer.

Protest for Non-payment. If such bill be accepted by the drawee, and he fails to pay it within three days after it falls due, which three days are called days of grace, the payee or endorsee should have it protested for non-payment, in the same manner, and by the same persons, who are to protest it in case of its non-acceptance, notifying the drawer of the protest.

Liability of the Drawer. The drawer on receipt of notice or production of protest, either of non-acceptance or non-payment, is bound to make good to the payee or endorsee, not only the amount of the bill, within a reasonable time after non-payment, without any protest, by rules of the common law, but also all interest and charges, computed from the time of the protest being made.

Timely Notice to Drawer. 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 conveniently may be, for though when one draws a bill of exchange, he subjects himself to its payment, if the person on whom it is drawn refuses either to accept or pay, yet that it is with this limitation, that if the bill be not paid when due, the person to whom it is payable, shall within convenient time give the drawer notice thereof, for otherwise the law will imply it paid, for it would be prejudicial to commerce, if a bill might rise up against a drawer at any distance of time.

Liability of Endorser. If the bill be an endorsed one, and the endorsee cannot get the drawee to discharge it, he may call

upon either the drawer or the endorser, or any subsequent endorser, for each endorser is a warrantor for the payment of the bill, which is frequently taken in payment as much upon the credit of the endorser, as upon that of the drawer. Such endorser has a right after payment, to call on previous endorsers on the bill, as well as the drawer, but the first endorser can demand payment from the drawer only.

Same Rules as to Notes. What has been said of bills of exchange is also applicable to promissory notes. These are endorsed and negotiated from hand to hand, 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.—TITLE BY BANKRUPTCY.[1]

Preamble. Having already referred to the transfer of the real estate of a bankrupt, we shall now treat of it as it principally relates to the disposition of chattels, in which the property of persons in trade more usually consists, rather than in lands or tenements.

1. *Who may become a bankrupt.*
2. *What acts make a bankrupt.*
3. *Proceedings on a commission of bankruptcy.*
4. *Manner of transfer of goods by bankruptcy.*

I. WHO MAY BECOME A BANKRUPT.

Defined. A bankrupt is defined as "a trader" who secretes himself, or does certain other acts, tending to defraud his creditors. He was formerly considered in the light of a criminal or offender.

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[1]The word "bankrupt" is derived from *bancus* or *banque*, which signifies the table or counter of a tradesman, and *ruptus*, broken, denoting thereby one whose bench or shop is gone.

Humane Aspects of the Bankrupt Law. At present the laws of bankruptcy are calculated for the benefit of trade, and founded on the principles of humanity, as well as justice, and hence confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors, by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment; on the debtor, by exempting him from the rigor of the general law, whereby his person could be confined, at the discretion of his creditor, though he have nothing to satisfy the debt. The law of bankrupts gives them the liberty of their persons, and some pecuniary emoluments, upon condition that they surrender up their entire estates to be divided among their creditors.

Rigors of the Roman Law. In this respect our legislature has imitated the example of the Roman law. Not the terrible law of the twelve tables, whereby the creditors might cut the debtor's body into pieces, and each take his proportionate share, *de debitore in partes secando.* Nor even the less inhuman laws, of imprisoning the debtor's person in chains, of subjecting him to stripes and hard labor, at the mercy of his rigid creditors, and sometimes selling him, with his wife and children, into perpetual foreign slavery *trans Tiberim*, an oppression which produced many popular insurrections, and secessions to the *mons sacer.*

Roman Law of Cession. We refer to the law of cession, introduced by the Christian emperors, whereby if a debtor ceded or yielded up all his property to his creditors, he was secured from being dragged to jail, *inhumanum est spoliatum fortunis suis in solidum damnari.* This was subsequently carried too far, by allowing a debtor to retain what little property he had, if he swore, that it was not sufficient to pay his debts; a law, which led to perjury, injustice and absurdity.

Traders Alone Included. The laws of England have steered between these extremes; providing against the inhumanity of the creditor, who may not confine an honest bankrupt after his effects are delivered up; and, at the same time, seeing that his just debts be paid, so far as his effects will extend. Yet, cautious of granting too great indulgence to debtors, they allow the benefit of the laws of bankruptcy to none but actual traders, since that class of men are, generally speaking, the only persons liable to accidental losses, and to an inability to pay their debts, without any fault of their own. If persons in other situations of

life run into debt, they must take the consequences of their own indiscretion, even if they meet with sudden accidents, that may reduce their fortunes; for the law holds, that none but a trader should encumber himself with heavy debts. Trade cannot be carried on without mutual credit, and the contracting of debts is both justifiable and necessary. Later acts have extended the privileges of bankruptcy to many other classes.

Extended to Other Parties. Buying or selling only will not qualify a man to become a bankrupt, but it must both be buying and selling, out of which he gains a livelihood. And where persons buy goods, and make them up into saleable commodities, as is done by shoemakers and the like, though part of their gain is by bodily labor, and not by buying and selling, yet they are within the statute of bankrupts.

Infants and Feme Sole Traders. An infant, though a trader, cannot be made a bankrupt, for he can only owe for necessaries, and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due. No person can be made a bankrupt for debts, which he is not liable at law to pay. But a *feme-covert* in London, being a sole trader, according to the custom, is liable to a commission of bankruptcy.

II. ACTS CONSTITUTING BANKRUPTCY.

Watchfulness of the Law. The effort of a trader to avoid his creditors, or evade their just demands, is declared to be an act of bankruptcy, upon which a commission may be sued out. The law is extremely watchful to detect a man, whose circumstances are declining, that the creditors may receive as large a proportion of their debts as may be, and that a man may not go on wantonly wasting his substance, and then claim the benefit of the statutes, when he has nothing left to distribute.

Particular Acts of Bankruptcy. 1. Separating from the realm, with intent to defraud his creditors. 2. Departing from his house, with intent to secrete himself, and thus avoid creditors. 3. Keeping in his own house privately, so as not to be seen by his creditors, except for necessary cause. 4. Procuring himself to be arrested or imprisoned, without just cause; this being an attempt to defraud creditors. 5. Procuring his money or goods to be attached or sequestered by legal process; when an attempt to defraud his creditors of their security. 6. Making

any fraudulent conveyance to a friend or secret trustee, of his lands, tenements, or goods. 7. Procuring any protection, not being himself privileged by parliament, to screen himself from arrest. 8. Endeavoring by petition to the king, or by bill in the courts against any creditors, to compel them to take less than their just debts, or to procrastinate the time of payment originally contracted for. 9. Lying in prison for two months or more upon arrest or other detention for debt, without finding bail, which shows a weakness in his credit, either from his poverty or bad character. 10. Escaping from prison, after an arrest for £100 or upwards. 11. Neglecting to satisfy a just debt to the amount of £100 or more, within two months after service of process for such debt upon any trader having the privilege of parliament.[1]

Lenient Construction of the Act. The whole law of bankrupts being an innovation on the common law, courts of justice have been reluctant to extend or multiply acts of bankruptcy by any construction or implication. Hence it has been held, that a man, removing his goods privately to prevent their being seized in execution, committed no act of bankruptcy, as the statutes mention only fraudulent gifts to third persons, and procuring them to be seized by sham process, in order to defraud creditors; but this, though a palpable fraud, is not adjudged an act of bankruptcy. So also a banker's stopping or refusing payment is no such act, for there may have been good reasons for his so doing, as suspicion of forgery; but if, on such account, he lies in prison two months, he then is deemed a bankrupt.

III. PROCEEDINGS ON A COMMISSION OF BANKRUPTCY.

By Petition. These, so far as they affect the bankrupt himself, depend entirely on the several statutes of bankruptcy. There must be first a petition to the lord chancellor by one creditor to the amount of £100, or by two to the amount of £150, or by three or more to the sum of £200, which debts must be proved by affidavit.

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[1] The English Bankrupt Act of 1849 has increased the number of these enumerated cases to fifteen, and modified six of them. The Act of the United Congress gives six instances of acts of bankruptcy. 1. Departure from the state, with intent to defraud creditors. 2. Concealing himself to avoid arrest. 3. Fraudulently procuring himself to be arrested. 4. Procuring his goods to be attached, distrained, or taken in execution. 5. Removing his goods, or concealing them to prevent their being levied upon. 5. Making a fraudulent sale or transfer of lands or goods, or evidences of debt.—*Sharswood.*

Commission Granted. The chancellor thereupon grants a commission to discreet persons, who are termed commissioners of bankrupt, and security of £200 is required to make the party amends, if they do not prove him a bankrupt. If they receive compensation from the bankrupt for suing out the commission, so as to obtain more than their ratable dividends of the bankrupt's estate, they forfeit all they have received, and also their whole debt. The commissioners meet at their own expense, and as a maximum are allowed a compensation of 20*s.* *per diem* each.

Choice of Assignee. After they have been sworn to duly perform their duties, they first receive proof of the party's being a trader, and having committed an act of bankruptcy. If proved, they declare him a bankrupt, and give notice thereof, and appoint three meetings. At one of these meetings, an election of assignees is made, to whom the bankrupt's estate shall be assigned, and be vested for the benefit of creditors. These assignees are selected by the major part in value of the creditors, who have at the time proved their debts, but may be appointed by the commissioners, and afterwards be approved or rejected by the creditors. No creditor, whose debt does not amount to 10*l.*, shall vote for assignees.

Surrender by the Bankrupt. At or before the third meeting, within forty days from the original advertisement, the bankrupt, after receiving notice, must surrender himself personally to the commissioners, which surrender, if voluntary, protects him from arrest, until his first examination be past. Thenceforth he must conform to the statutes of bankruptcy, or be guilty of felony, without benefit of clergy, and shall suffer death, and his estate be distributed among his creditors.

Arrested for Absconding. If the bankrupt abscond, or is likely to do so, between the time of the commission and the last day of surrender, he may, by warrant, be apprehended, and committed to the county jail, and his goods and papers be seized by the commissioners.

Examination of the Bankrupt. When the bankrupt appears, the commissioners are to examine him, as to all matters relating to his trade and effects. They may also summon and examine his wife and any other person, in relation to his affairs If they refuse to answer or to subscribe to their examination, they may be sent to prison without bail, till they yield and give full

answer. The bankrupt is bound on this examination to make a full discovery of his estate, as well in expectancy as in possession, and how he has disposed of the same, together with all books and writings relating thereto.

Punishment of the Bankrupt. He is also to deliver, as far as lies in his power, to the commissioners, all his effects, except the necessary apparel of himself and family. If he conceals or embezzles any effects to the amount of 20*l*., or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony, without benefit of clergy, and his goods be divided among his creditors. And unless his inability to pay his debts arose from some casual loss, upon conviction of misconduct or negligence, he may be placed in the pillory for two hours, and have one of his ears nailed thereto and cut off.

Concealed Effects. After the time allowed for the bankrupt to make such discovery has expired, any party voluntarily discovering any part of the estate, hitherto unknown to the assignees, shall be entitled to five per cent out of the effects so discovered, and possibly a further reward. Any trustee concealing any effects of the bankrupt is subjected to a penalty.

Certificate of Creditors. If however, the bankrupt proves frank and honest, the law displays no such severity. If he has made a full discovery, and if in consequence thereof, four-fifths of his creditors of 20*l*. and upwards, will sign a certificate to that purport, the commissioners are to authenticate such certificate, and transmit it to the lord chancellor, and he or two of the judges, whom he shall appoint, on oath made by the bankrupt, that such certificate was without fraud, may allow the same, or disallow it, upon cause shown by any of the creditors of the bankrupt.

Discharge of the Bankrupt. If the certificate be allowed, the bankrupt is entitled to a decent allowance out of his effects, for his future support, and to put him in the way of honest industry. This is also in proportion to his former behavior in the early discovery of the decline of his affairs, thereby giving his creditors a larger dividend. He also has an indemnity granted him of being free and discharged forever from all debts owing by him at the time he became a bankrupt, even though judgment has been obtained against him, and he lies in prison upon execution for such debts. The proceedings in bankruptcy are on petition to be entered of record, as a perpetual bar against

actions to be commenced on this account, though in general, the production of the certificate, properly allowed, shall suffice.

When Allowance not Granted. No such allowance shall be granted, unless such certificate be signed and allowed, nor where the bankrupt does not make discovery of a fictitious debt produced, but suffers other creditors to be imposed upon. Neither can he claim it, if he has given a marriage portion of over 100*l.* to any child, unless he had at that time sufficient left to pay his debts; or if he lost at any one time 5*l.*, or in all 100*l.* within the year before he became bankrupt by gaming or wager, or 100*l.* in stock jobbing during the same time.

Second Bankruptcy. When once a man has been cleared by a commission of bankruptcy, or has compounded with his creditors, or has been delivered by an act of insolvency, and afterwards again becomes bankrupt, he must pay at least fifteen shillings on the pound. Bankrupts are only thereby indemnified as to the confinement of their bodies, but any further estate they may acquire remains liable to their creditors, excepting their necessary apparel, household goods, and tools of trade.

IV. TRANSFER OF GOODS BY BANKRUPTCY.

By the Assignees. Under the statute, all the personal estate and effects of the bankrupt are vested by the act of bankruptcy in the future assignees of the commissioners, whether goods, in actual possession, or debts, contracts, and other *choses* in action, and the commissioners may open any house of the bankrupt and seize the same. When the assignees are chosen by the creditors, the commissioners are to assign every thing over to them to hold as if vested in the bankrupt himself, with the remedies to recover it.

Acts of the Bankrupt after Bankruptcy. This transfer includes all the property of the bankrupt from the time he committed the first act of bankruptcy; once a bankrupt, always a bankrupt. All transactions of the bankrupt from that date are null and void, either with regard to the alienation of his property, or the receipt of his debts from those who are privy to his bankruptcy, for they are the property of his future assignees. An execution sued out, but not served and executed on the bankrupt's effects, till after the act of bankruptcy, is void against the assignees. An exception exists in the case of the king, whose execution binds such goods. In France, every act of a merchant

for ten days precedent to the act of bankruptcy, is presumed fraudulent, and hence void. But in England, no money paid by a bankrupt to a *bona fide* creditor, even after an act of bankruptcy done, shall be liable to be refunded. Nor shall any debtor of a bankrupt, who pays him his debt without knowledge of his bankruptcy, be liable to account for it again.

Compromise of a Debt. The assignees may pursue any legal method of recovering this property vested in them, but cannot commence a suit in equity, nor compound any debts owing to the bankrupt, nor refer any matter to arbitration, without the consent of the creditors, or the major part of them in value, at a meeting to be held after notice.

Dividend Declared. Having collected all the effects possible, and reduced them to money, the assignees must, after four and within twelve months subsequent to the commission being issued, give twenty-one days notice to the creditors of a meeting for dividend or distribution, at which time, they must produce their accounts, and verify them by oath if required. They then declare a ratable dividend upon the debts, which have been proved, according to their quantity, and not according to the quality of the debts.

Secured Debts. Mortgages, for which the creditor has real security in his hands, are safe, for the commission of bankruptcy reaches only the equity of redemption. So also are personal debts, where the creditor has a chattel in his hands, as a pledge for the payment, or has taken the debtor's goods in execution.

Landlord's Claim. The landlord has a preferred claim for one year's rent due, even though he had neglected to distrain, while the goods were on the premises, which he is otherwise allowed to do, no matter as to the *quantum* of rent.

Judgments, Notes and Bonds. But otherwise, judgments and recognisances, both which at other times, as debts of record, have a priority, and also bonds, and obligations by deed or special instrument, which are called debts by specialty, are put on a level with debts by mere simple contract, and all paid *pari passu*. Debts, not due at the time of the dividends made, as bonds and notes of hand, payable at a future day certain, shall be proved and paid equally with the rest, allowing a discount in proportion. Insurances and obligations upon bottomry or *respon-*

dentia, bona fide made by the bankrupt, though forfeited after the commission is awarded, shall be looked upon in the same light as debts contracted before bankruptcy.

Interest out of Surplus. Within eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects were exhausted by the first. If any surplus remain, after selling the estate and paying every creditor his full debt, it shall be restored to the bankrupt. Though the usual rule is that all interest on debts shall cease from the time of issuing the commission, yet in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt or his representatives.

CHAPTER XXXII.—TITLE BY TESTAMENT AND ADMINISTRATION.

Division of the Subject. We shall inquire into:

1. *The antiquity of testaments and administrations.*
2. *Who is capable of making a last will.*
3. *The nature of a testament, and its incidents.*
4. *Executors and administrators, who they are, and how appointed.*
5. *Office and duty of executors and administrators.*

I. THE ORIGIN OF TESTAMENTS AND ADMINISTRATIONS.

Original Occupancy of Property. When property became vested in the first occupant, it was necessary for the peace of society, that this occupancy should be continued to those persons, to whom he should transfer it, which introduced the doctrine and practice of alienations, gifts and contracts. These precautions would be imperfect, if confined only to the life of the occupier, for then, upon his death, all his goods would again become common, and create great confusion.

Right of Continuing the Occupancy. The law has therefore given to the proprietor a right of continuing his property after his death, in such persons as he shall name; and in

defect of such appointment, or where it is not permitted, the law has directed the goods to be vested in certain particular individuals, exclusive of all other persons. The former method of acquiring personal property, according to the directions of the decedent, we call a testament; the latter, which is presumed. according to the will of the deceased, though not expressed, we term an administration, being the same which the civil lawyers term a succession *ab intestato*, and which answers to the descent or inheritance of real estates.

Will of the Patriarch Jacob. Testaments are of very high antiquity. We find them in use among the ancient Hebrews, as where Jacob bequeathed to his son Joseph a portion of his inheritance, double that of his brothers, which was carried into execution many hundred years later, when the posterity of Joseph was divided into two distinct tribes, those of Ephraim, and of Manasseh. These had two several inheritances assigned them, whereas the descendants of each of the other sons formed but a single tribe, and had only one portion of inheritance.

In Different Nations. Solon was the first legislator to introduce wills into Athens, but, in many other parts of Greece, they were totally discountenanced. In Rome, they were unknown until the compilation of the laws of the twelve tables, which first gave the right to bequeath; and among the northern nations, particularly the Germans, testaments were not in use. The right of making wills, and disposing of property after death, is merely a creature of the civil state, which has permitted it in some countries, and denied it in others, and even where allowed by law, it is subjected to different formalties and restrictions in almost every nation.

In Early England. In England, the power of bequeathing is coeval with the first rudiments of the law. Mention is made of intestacy in the old law before the conquest, as being merely accidental. This power of bequeathing did not extend originally to all a man's personal estate. Under Henry II, a man's goods were to be divided into three parts; of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal. If he died without a wife, he might then dispose of a moiety, and the other moiety went to his children. If he had a wife and no children, the wife was entitled to a moiety, and he might bequeath the other, but if he died, with-

out either wife or issue, the whole was at his own disposal. The shares of the wife and children were termed their reasonable parts, and the writ *de rationabili parte bonorum* was given to recover them.

Change in the Law. This continued to be the law at the time of *magna carta*, which provides that the king's debts shall first be levied, and then the residue of the goods shall go to the executor, to perform the will of the deceased. In the reign of Edward III, the right of the wife and children was still held to be the common law, and is also mentioned as such by writers under Charles I. But the law has altered by imperceptible degrees, and the deceased may now, by will, bequeath all his goods and chattels. Coke thinks this was never the universal law, but only obtained in particular places by special custom. In disposing thus of his property, it was the custom in many places for a man to remember his lord and the church, by leaving them his two most valuable chattels, which was the original of heriots and mortuaries, and bequeath the remainder as he pleased.

Claim of the King. As to such testable goods as a man made no disposition of, he was said to die intestate, and, by the old law, the king could seize on his goods, as the *parens patriae*, and general trustee of the kingdom. The king continued to exercise this prerogative by his ministers of justice for some time, 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 wills there proved, in case they made any disposition. Afterwards, the crown, in favor of the church, invested the prelates with this branch of the prerogative.

Goods of an Intestate. The goods of intestates were given to the ordinary by the crown, and he might seize them, and keep them without wasting; and also might aliene, give or sell them at his will, and dispose of the money in *pios usus*. The ordinary was the king's almoner within his diocese, in trust to distribute to the poor, or what were termed pious uses. The probate of wills, of course, followed, for it was thought just that the will be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was superseded thereby.

Residue for Pious Uses. The reverend prelates, in the discharge of this trust, were not accountable to any but God for their conduct. Hence, abuses became prevalent, and finally the clergy, under the name of the church and the poor, took the entire residue of the decedent's estate, after the *partes rationabiles*, or two-thirds were deducted for the wife and children, without paying the debts or other charges thereon. The first check to this inordinate power was to compel the payment of the debts of the decedent, as far as the goods extended.

Origin of Administrators. To take the administration to the estate out of the hands of the ordinary or his immediate dependents, the statute of Edward III provides that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods, who shall be put on the same footing, with regard to suits and accounting, as executors under a will. Administrators hence were only the officers of the ordinary, appointed by him, being the next lawful friend of the deceased, who is interpreted to be the next of blood, that is, under no legal disabilities. A later statute permitted the ecclesiastical judge to grant administration either to the widow or next of kin, or to both of them, at his own discretion, and where two persons are in the same degree of kindred, gives the ordinary his election to appoint either.

II. WHO MAY MAKE A TESTAMENT.

Causes of Prohibition. Generally every person has the right to make a will, who is not under some special prohibition by law or custom. These prohibitions are principally upon three accounts:

(1) *Want of sufficient discretion.*
(2) *Want of sufficient liberty and free will.*
(3) *Because of criminal conduct.*

1. Infants. Under the civil law, males under the age of fourteen, and females under the age of twelve were deemed infants.[1] Apart from the question of age, the ecclesiastical court is the judge of every testator's capacity.

Mental Incapacity. Persons *non compotes*, idiots or natural fools, persons grown childish by age or disease, as well as drunkards, are incapable by reason of mental imbecility, from

[1] By statute of Victoria, a testator or testatrix must be at least twenty-one years of age, when the will is made.

making a will, until the disability is removed. So also persons born blind, deaf and dumb, who, wanting the common inlets of understanding, are incapable of having *animum testandi*, hence their testaments are void.

2. Prisoners and others in Duress. The law of England does not make prisoners or captives absolutely intestable, but only leaves it to the discretion of the court to judge, under the particular circumstances of duress, whether such person had *liberum animum testandi*.

Married Women. Our law as to a married woman differs most materially from the civil. Among the Romans, there was no distinction, and she had the same power of bequeathing as a feme-sole had. But with us, a married woman is not only utterly incapable of devising lands, being excepted out of the statute of wills of Henry VIII, but also incapable of bequeathing chattels, without her husband's consent. For all her personal chattels are absolutely his, and he may dispose of her chattels real, or may retain them, if he survive her.

Husband's Assent to Wife's Will. Yet by her husband's license, she may make a will, and the husband upon marriage frequently covenants with her friends, to allow her that license, or rather to give his assent to a particular will, which it must be, to be a complete testament, even though he has assented to her making a will. Yet such will suffices to prevent the husband from administering his wife's effects, as is his general right, and 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 or agreement is bound to allow.

Donatio Causa Mortis. A distinction like this occurs in the civil law. For though a son, who was *in potestate parentis* could not make a legal testament, even though the father permitted it, yet he might with the like permission, make what was called a *donatio causâ mortis*.

Queen-consort. The queen-consort is an exception to the general rule, for she may dispose of her chattels by will, without the consent of her lord.

Married Woman's Will. Any *feme-covert* may bequeath goods, which are in her possession *in auter droit* as executrix or

administratrix, for these can never be the property of her husband, and if she has any pin-money or separate maintenance, it is said she can dispose of her savings by testament, without the control of her husband. But if a *feme-sole* make a will, and afterwards marries, such subsequent marriage is esteemed a revocation in law, and entirely vacates the will.

3. Incapacitated by Criminal Conduct. Persons incapable of making testaments, on account of their criminal actions, are firstly all traitors and felons, from the time of conviction, for then their goods are forfeited to the king. A *felo de se* may not make a will of his goods, for they are forfeited by the manner of his death, but he may make a devise of his lands, for they are not forfeited. Nor can outlaws, while the sentence of outlawry exists, for their goods 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, by the common law their testaments may be good, *quod libera sit cujuscunque ultima voluntas.*

III. NATURE AND INCIDENTS OF A TESTAMENT.

Meaning of Testament. Testaments are so called, because they are *testatio mentis.* A testament is the legal declaration of a man's intentions, which he wills to be performed after his death. In England, it is styled his will, and is drawn, attested, and published, with all due solemnities and forms of law.

Wills, Written or Verbal. Testaments are of two sorts: written and verbal, or nuncupative. 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.

Codicil. A codicil, *codicillus,* a little book or writing, is a supplement to a will, or an addition made by the testator, annexed to and to be taken as a part of a testament. It is an explanation or alteration, or is intended to add to or subtract from the former disposition of the testator. It may be either written or nuncupative.

Nuncupative Wills. As nuncupative wills and codicils are liable to great impositions, and may occasion perjuries, the statute of frauds of Charles II has laid many restrictions on them, except when made by mariners at sea, and soldiers in actual service. As to all other persons it enacts:

(1.) 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. Three witnesses, at least, must swear to the act.

(2.) No nuncupative will shall be good, where the estate bequeathed exceeds thirty pounds, unless proved by three such witnesses, present at the making thereof, the Roman law demanding 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 where he had previously been 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 was put in writing within six days. Nor shall it be proved till fourteen days after the death of the testator, nor till process has first issued to call in the widow or next of kin to contest it, if they think proper.

Summary of Requisites to a Verbal Will. Owing to the numerous requisites, nuncupative wills are now fallen into disuse, and the only instance when favor should be shown them is when the testator is suddenly prostrated with violent illness. The testamentary words must be spoken, with an intent to bequeath, and 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 impositions 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 too hastily and without notice, lest the family of the testator be unduly surprised.[1]

Absence of Signature. 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

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[1] By the wills act of Victoria, nuncupative wills are no longer valid, except the wills of soldiers and mariners, in actual military service or at sea, who are permitted to thus dispose of their personal estates.

though written in another man's hand, yet if it be proved to be according to the testator's instructions, and approved by him, it has been held to be a good testament of his personal estate.[1]

Last Will Holds. No testament is of any effect till after the death of the testator. 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 re-establishes the first.

How a Will May be Avoided. Testaments may be avoided in three ways:

1. *If made by one having mental incapacity.*
2. *By making another testament of a later date.*
3. *By cancelling or revoking it.*

Irrevocable Words. For though I make a will irrevocable in the strongest words, yet I am at liberty to revoke it, because my own act or language cannot alter the disposition of law, so as to make that irrevocable, which is in its nature revocable.

Child Disinherited. Without an express revocation, if a man, who has made his will, subsequently marries, and has a child, this is an implied revocation of his former will, which he made in a state of celibacy. The Romans set aside testaments, if they disinherited or totally passed by, without assigning a true and sufficient reason, any child of the testator. But if the child had any legacy, however small, it was a proof that the testator had not lost his memory or reason, which otherwise the law presumed, but was supposed to have acted for some substantial cause, and in such case no *querela inofficiosi testamenti* was allowed. Hence probably arose that 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 will not set aside a testament simply because the heir or next of kin is not mentioned therein.

IV. EXECUTORS AND ADMINISTRATORS; WHO THEY ARE AND HOW APPOINTED.

Who may be an Executor. An executor is he to whom another man commits by will the execution of his last will and

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[1] By statute of Victoria, this distinction between wills of real and personal estate is now abolished, and every will to be valid must be signed at the foot by the testator or by some one in his presence or by his direction, and such signature shall be acknowledged by the testator in the presence of two witnesses.

testament. All persons are capable of being executors, who are capable of making wills, and many others besides, as a *feme-covert* or an infant; 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 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 will.

Administrator, with Will Annexed. The 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. If no executor be named in the will, which renders it incomplete, or if an incompetent person be named as executor, or if the executor refuses to act, the ordinary must grant administratum *cum testamento annexo*, to some other person, such administrator having duties nearly similar to those of an executor.

Persons Entitled to Administer. But if the decedent died wholly intestate, then general letters of administration must be granted by the ordinary to such administrator, as the statutes of Edward III and Henry VIII, hereinbefore referred to, direct, viz.:

1. To grant administration of the goods of the wife to the husband, or his representatives, and of the husband's effects to the widow, or 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, who are the nearest in degree to the intestate; but of persons in equal degrees, the ordinary may select whom he pleases.

3. That this nearness or propinquity of degree shall be reckoned according to the computation of the civilians, and not of canonists, which the law of England adopts in the descent of real estate, 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. Hence the children, and on failure of children, the parents of the deceased, are entitled to the administration. Then follow brothers, grandfathers, uncles or 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, for feudal reasons. Therefore the brother of the half-blood shall exclude the uncle of the whole blood, and the ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his discretion.

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. 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 he may grant letters *ad colligendum bona defuncti*, which neither makes him executor nor administrator; his only duty being to keep the goods in his safe custody, and to do other acts for the benefit of those entitled thereto.

King's Appointee. If a bastard, who as *nullius filius*, has no kindred, or if any other party died intestate, without leaving wife or child, it was formerly 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 grants him administration, as the appointee of the crown.

Executor of an Executor. The interest vested in the executor by the will of the decedent, 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 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 depends on the special confidence of the deceased, and he is allowed to transmit that power to another, in whom he has equal confidence; but the administrator is merely an officer of the ordinary, in whom the decedent has reposed no trust.

Administrator de Bonis Non. Wherever therefore the course of representation from executor to executor is interrupted by any one administration, it is requisite to commit administration afresh of the goods of the deceased not admin-

istered 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 have only a limited or special administration committed to his care, viz.: of certain specific effects, such as a term of years; the rest being committed to others.

V. OFFICE AND DUTIES OF EXECUTORS AND ADMINISTRATORS.

Duties of Both Compared. These in general are the same in both executors and administrators, except, 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 second, that an executor may do many acts, before he proves the will, but an administrator can do nothing, till letters of administration are issued; for the former derives his power from the will and not from the probate, while the latter owes his power entirely to the appointment of the ordinary.

Executor de son Tort. If a stranger assumes to act as executor without just authority, as by intermeddling with the goods of the decedent, and many other acts, he is called in law an executor of his own wrong, *de son tort*, and is liable to all the troubles of an executorship, without any of its profits or advantages. But merely performing acts of necessity or humanity, as burying the corpse of the deceased, or locking up his goods, will not amount to such meddling, as will charge a man as executor of his own wrong.

Liability of an Executor de son Tort. He cannot bring an action himself, in right of the deceased, but actions may be brought against him, in which creditors shall name him executor, generally, for they would naturally conclude his assumption of such position indicated his possession of a will of the deceased, which had not yet been probated. He is chargeable with debts of the decedent, to the extent of the assets that may come into his hands, and as against creditors shall be allowed all payments made to any other creditor in the same or a superior degree, himself only excepted. Though as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages, unless, perhaps, upon a deficiency of assets, the rightful executor may be prevented from satisfying his own debt.

1. **Funeral Expenses.** A rightful executor must bury the deceased in a manner suitable to the estate he left behind him. Necessary funeral expenses are allowed previous to all other debts and charges, but, if the executor or administrator be extravagant in such expenditures, it is a species of waste of the property of the deceased, and shall be prejudicial to him only, and not to his creditors or legatees.

2. **Probate of the Will.** The executor, or the 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, that 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 is disputed. When the will is so proved, the original must be deposited in the registry of the ordinary, and a copy be made out under the seal of the ordinary and delivered to the executor or administrator, together with a certificate of its probate.

Letters of Administration. In default of any will, the person entitled to administer must 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, upon his entering into a bond with sureties to faithfully execute his trust.

Property in Two Jurisdictions. If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration granted by him, will suffice, but if the deceased had *bona notabilia*, or chattels to the value of a hundred shillings in two distinct jurisdictions, then the will must be proved, or administration taken out before the metropolitan of the province, by way of special prerogative. Whence the courts, where the validity of such wills is tried, and the offices, where they are registered, are called the prerogative courts and the prerogative offices of the provinces of Canterbury and York.

Prerogative Courts. Which prerogative is based on the fact, that as the bishops were originally the administrators of all intestates in their respective dioceses, and as the present administrators are in effect none other than their officers or substitutes, it was impossible for them to collect any goods of the deceased, other than such as lay within their own dioceses, beyond which their episcopal authority did not extend. But it would be

extremely troublesome to take out administrations for every diocese in which the deceased had *bona notabilia*, and it would puzzle creditors and legatees to ascertain from what fund their demands would be paid. A prerogative is, therefore, vested in the metropolitan of each province, to make in such cases one administration serve for all. This accounts for the taking out of administration to intestates, that have large and diffusive property, in the prerogative court; and the probate of wills naturally follows the powers of granting administrations.

3. **Inventory.** 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 to the ordinary upon oath, if required.

4. **Collection of Assets.** He is to collect all the goods so inventoried, and to that end has large powers and interests conferred on him by law; being the representative of the deceased, and having the same property in the goods, as his principal had when living, and the same remedies to recover them. Whatever is recovered, that is of a saleable nature and may be converted into ready money, is called assets in the hands of the executor or administrator (from the French, *assez*), that is, sufficient or enough to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. All such assets he may convert into ready money to meet demands, that may be made upon him.

5. **Payment of Decedent's Debts.** In the 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 grade out of his own estate.

(1.) *He must pay all funeral expenses, and the costs of probate of the will, and the like.*

(2.) *Debts due the king on record or specialty.*

(3.) *Debts preferred by special statutes.*

(4.) *Debts of records, as judgments, statutes and recognizances.*

(5.) *Debts due on special contracts, as for rent, for which the lessor has a better remedy by distraining, or upon bonds and covenants, under seal.*

(6.) *Debts on simple contracts, viz.: upon notes unsealed and verbal promises. Among these simple contracts, servants' wages are, with reason, preferred to any other, and so stood the ancient law.*

Personal Debt of the Executor. 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. This does not apply to an executor of his own wrong, for if it were so, creditors would strive to obtain possession of the decedent's goods. If a creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or not, provided there be assets sufficient to pay the testator's debts, for otherwise it would be unfair to defraud the testator's creditors of their just debts, by a mere voluntary release.[1]

Priority in Payment. If no suits have been commenced against an executor, he 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, Payment of Legacies. After the debts are all discharged, the legacies next are to be regarded, and are to be paid by the executor as far as his assets may extend, but he may not give himself preference therein.

Legacy, Defined. A legacy is a bequest or gift of goods and chattels by testament, and the recipient is the legatee, which every person is capable of being, unless particularly disabled by the common law or statute. This bequest transfers an inchoate property to the legatee, but the legacy is not perfect, without the executor's assent. In the executor 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.

Abatement of Legacies. Specific Legacy. In case of a deficiency of assets, 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, unless there be not sufficient without it. Upon the same principle, if the legatees have been paid their legacies, they are afterwards bound

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[1] This was the rule at common law, but it has long been held, that a debt due from the executor of a testator is general assets of the estate, and the law will presume that the executor as an individual has paid such debt to himself in his representative capacity, and will consider it as assets in his hands, for which he will be personally liable at the action of any creditor.

to refund a ratable part, in case debts come in more than sufficient to exhaust the residuum after the legacies are paid.

Lapsed Legacy. Vested and Contingent. If a legatee dies before the testator, the legacy is lost or lapsed, and shall sink into the residuum.[1] And if a contingent legacy be left to any one, as if he shall attain 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, 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, had the legatee lived. This distinction is borrowed from the civil law. But if such legacies be charged upon real estate, in both cases they shall lapse for the benefit of the heir.[2]

Interest on Legacies. In case of a vested legacy, due immediately, and charged on land, or money in the funds,[3] which yield an immediate profit, interest shall be payable thereon from the testator's death, but if charged on the personal estate, which cannot at once be obtained, interest will not commence until one year from the death of the testator.

Donatio Causa Mortis. There is also permitted another death-bed disposition of property, which is called a *donatio causa mortis*. This occurs, when a person in his last sickness, expecting death, delivers or causes to be delivered to another the possession of any personal goods, which may *inter alia* include bonds or bills drawn by the dying person on his banker, to keep in case of his decease. The 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 itself shall revert to himself, being only given in contemplation of death, or *mortis causa*. This differs from a testamentary disposition of property, in being accom-

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[1] An exception exists by statute of Victoria, where the legacy is to a child or other issue of the testator. In such case, the issue of such deceased legatee takes its parents legacy, provided the issue be living at the date of the testator's death.

[2] Unless the will direct otherwise.

[3] Not now the law. Interest on a pecuniary legacy is not payable for one year after the testator's death. The rule is different as to legacies charged on land.

panied with delivery of possession, and has come to us from the civil lawyers, who themselves borrowed it from the Greeks.

7. Residuary Estate. When all the debts and particular legacies are discharged, the surplus or *residuum* must be paid to the residuary legatee, if one be appointed by the will. If there be none, it was long a notion, that it devolved to the executor's own use, by virtue of his executorship. This is now understood, with this restriction, that although where the executor has no legacy at all, the *residuum* in general shall be his own, yet wherever there is sufficient on the face of the will, by a competent legacy or otherwise, to imply that the testator intended his executor should not have the residue, the undevised surplus of the estate shall go to the next of kin, the executor then standing on the same footing as an administrator.

Distribution of an Intestate's Estate. By statute of Charles II, it is enacted, that the surplus of the estate of intestates, except in the case of a *feme-covert*, which is left as at common law, shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner:

To Widow and Children. 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 issue of a deceased child, then a moiety shall go to the widow, and a moiety to the next of kin in equal degree, and their representatives. If no widow, the whole shall go to the children.

To Next of Kin. 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 are to be investigated by the same rules of consanguinity, as those who are entitled to letters of administration.[1]

To Father and Mother. And likewise by this statute, the mother, as well as the father, succeeded to all the personal effects of the children, who died intestate, and without wife or issue, in exclusion of the brothers and sisters of the decedent. And so the law still remains with respect to the father, but by statute of

[1] No difference is made between the whole and half blood in the distribution of an intestate's personal estate.

James II, 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.

Advancements. Another part of the statute of distributions enacts, that no child of the intestate, except his heir at law, on whom he settled in his lifetime any estate in land or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters. If however the estates so given them, by way of advancement, are not equivalent to the other shares, the children so advanced shall now have so much as to make them equal. This just provision is derived from the *collatio bonorum* of the imperial law.

Distribution per Stirpes or per Capita. The doctrine and limits of representation have been mainly 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 than *per stirpes*. They are divided *per capita*, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred and not *jure representationis*, in the right of another person.

Example. As if the next of kin be the intestate's brothers A, B and C; here his effects are divided into three portions, and distributed *per capita*, one to each; but if one of these brothers had been dead, leaving three children, and another B, leaving two, then the distribution must be *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 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.

Ancient Customs Affecting Distribution. The statute of distribution expressly excepts and reserves the customs of London, of the province of York, and of all other places having peculiar customs of distributing the effects of intestates. Though in those places, the restraint of devising is removed by these statutes, their ancient customs remain in force, with respect to the estates of intestates.

Particular Customs. In London, York, Scotland and probably also in Wales, the effects of the intestate, after payment of his debts, are in general divided according to the ancient universal doctrine of the *pars rationabilis*. If the decedent leave a widow and children, his substance, after deducting for the widow her apparel, and the furniture of her bedchamber, is divided into three parts, one of which belongs to the widow, another to the children, and the third to the administrator. If a widow only, or children only, they shall respectively in either case take one moiety, and the administrator the other. If neither widow nor child, the administrator takes all. Prior to the statute of distributions of James I, the administrator was wont to apply this to his own use, and it was termed the dead man's part.

Effect of Jointure. If the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of non-entity, with regard to the custom only, but she shall be entitled to her share of the dead man's part, under the statute of distributions, unless barred by special agreement.

Advancements to Children, Hotchpot. And if any of the children are advanced by the father, in his lifetime, with any sum of money, less than their full proportionate part, they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are entitled to any benefit under the custom, but, if they are fully advanced, the custom entitles them to no further dividend.

Customs of London and York. In nearly every point, the customs of York and London agree, and at one time a similar custom prevailed in all parts of the island, indicating the whole to have been of British original. If, however, it was derived from the Roman law of successions, it must have been taken from that fountain earlier than the time of Justinian, from whose constitutions it considerably differs. It may have been owing to Roman usages, introduced in the time of Claudius Caesar, who established a colony in Britain to instruct the natives in legal knowledge, inculcated and diffused by Papinian, who presided at York as *praefectus praetorii*, under the emperors Severus and Caracalla, and continued by his successors, in the beginning of the fifth century.

BOOK THE THIRD.

PRIVATE WRONGS.

PREAMBLE.

Object of Law. The establishment of rights and the prohibition of wrongs.

Wrongs Defined. Private and Public. The former are an infringement or privation of the private or civil rights of individuals, as such, *i. e.*, civil injuries; the latter, a breach of public rights and duties, which affect the whole community as such, *i. e.*, crimes and misdemeanors.

Remedies. Principally by applications to the courts, *i. e.*, by civil suit or action. This book will treat of such. Certain injuries, however, require a more speedy remedy, calling for an extra-judicial or eccentrical kind.

Modes of Redress. There are three kinds of redress:

That which is obtained by the mere act of the parties.

That which is effected by the mere operation of law.

That which arises from suit or action in courts, the act of the parties co-operating with the act of law.

CHAPTER I.—REDRESS BY THE PARTIES' ACTS.

First. From the act of the injured party only.

1. Self-defence. The defence of one's self, of husband or wife, of parent or child, or of master or servant. Where one of these his relations be forcibly attacked in his person or property, a man may repel force by force, and the breach of the peace is chargeable only upon him who begins the affray. This is the

prompting of nature. It considers, that the future process of law affords no adequate remedy for injuries accompanied with force, which, unless opposed by force, might be carried to wanton lengths of outrage. Care however must be taken, that the resistance does not exceed the bounds of mere defence and prevention, otherwise the defender becomes an aggressor.

2. **Recaption or Reprisal.** This happens, when one is unlawfully deprived of personal property, or where wife, child, or servant is wrongfully detained, in which case he may lawfully claim or retake them, wherever he finds them, so it be not in a riotous manner or attended with breach of the peace. This may be his only opportunity to do himself justice, as his goods or member of his family may otherwise be concealed or removed, if he await his remedy at law. If therefore he can contrive to regain his property without force or terror, he is justified in so acting. This right of recaption must never be exerted, where it shall occasion strife, or endanger the peace of society.

3. **Entry.** Entry by the party himself on lands taken from him without right is a remedy, if it can be done peaceably.

4. **Abatement of Nuisances.** Whatever unlawfully annoys or damages another is a nuisance. The party aggrieved may abate or remove it, so that he commits no breach of the peace in so doing. Such annoying and obstructing injuries require an immediate remedy, and cannot wait for the slow progress of forms of justice.

5. **Distress. Generally.** Of cattle, or goods for non-payment of rent or other duties, or for cattle damaging or trespassing upon land. A landlord can thus prevent tenants secreting or withdrawing their goods to his prejudice, and in the case of trespassing cattle he can at once seize them, as it may be impossible in the future to ascertain whose cattle committed the damage.

Distress. Defined. A distress, *districtio*, is the taking a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed.

Distress Allowed. (1.) *For non-payment of rent.* By common law this was incident to every rent service, and by reservation to rent charges, and by statute to all kinds of rent. A distress, therefore, may be taken for any kind of rent in arrear, the

detaining whereof beyond the day of payment is an injury to the party entitled to it.

(2.) *For neglect of personal service to the lord.*

(3.) *For amercements in a court leet.*

(4.) *For trespass of cattle. The owner of the soil can detain them until recompensed.*

(5.) *For several duties and penalties assessed by parliament.*[1]

Things Distrained. All chattels personal may be distrained, unless particularly exempted.

Things Exempt. Animals *ferae naturae* are exempt. Articles in the personal use or occupation of a man are for the time privileged, also valuable things in the way of trade, which are presumed to belong to customers. Generally speaking, whatever goods are found on the premises, whether in fact they belong to the tenant or to a stranger, are distrainable for rent. Otherwise a door would be open to infinite frauds upon the landlord.

Goods of a Stranger. These may be seized, when upon the premises. The stranger has his remedy against the tenant by action, if, by the tenant's default, the chattels are distrained, so that he cannot redeem them, when called upon.

Beasts of a Stranger. Where the beasts found on a tenant's land are placed there with the consent of the owners of the beasts, they are distrainable at once by the landlord for rent in arrear, as also where the stranger's cattle break the fences and commit trespass. But if the lands are not sufficiently fenced, the landlord cannot distrain the cattle, till they have been *levant* and *couchant* on the land, that is, have been there long enough to have lain down and risen to feed, which is one night at least; by which time the law presumes knowledge of their whereabouts by the owner, and negligence in not seeking them. Yet if the tenant neglected to repair the fences, and thereby the cattle entered his grounds, without fault of the owner, they are not distrainable for rent, until actual notice has been given to the owner, and he has neglected to remove them.

Other Articles Exempt. A man's tools and utensils of trade are exempt from distress. This is for the public good, as their deprivation would disable the owner from serving the state.

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[1] In a few of the United States the remedy by distress does not exist.

A distress is merely intended to compel the payment of rent, and not as a satisfaction for non-payment, and therefore to deprive a party of the instrument and means of paying, would counteract the very end of the distress. Formerly beasts of the plough and sheep were exempt, but they now may be seized under the statute.

Perishable Articles. Nothing shall be distrained for rent, which may not be rendered again in as good plight as when distrained. Hence milk, fruit and the like cannot be distrained. Anciently, but not now, neither shocks of corn nor growing grain could be distrained. Things fixed to the freehold cannot be distrained, as windows, doors and chimney pieces.

Distresses, how Taken, Disposed of and Avoided. Formerly they were merely looked upon as a pledge or security for the payment of rent or satisfaction of damage done. And so the law continues with regard to distresses of beasts, taken damage *feasant*, over which the distrainor has no other power than to retain them, until satisfaction is made. But distresses for rent in arrear have taken the place of the common law system.

When and how Made. Distresses must be made by day, unless in the case of damage *feasant*, where the beasts might escape, unless at once distrained. The premises must be entered upon by the party or his bailiff. Formerly this had to be done 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 continues at the time of the distress.

Fraudulent Removal. Formerly if he could not find sufficient distress on the premises, he could go nowhere else, and therefore knavish tenants, in anticipation of a distress, fraudulently removed their goods. But now the landlord may distrain the goods of his tenant carried from the premises clandestinely, wherever he finds them, within thirty days thereafter, 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 value to the landlord.

Beasts. The landlord may also distrain the beasts of his tenant, feeding upon any common appendant to the demised premises.

Forcible Entrance. The landlord might not formerly

break open a house to make a distraint, for that is a breach of the peace. But when he was in the house, it was held he might break open an inner door, and now he may, by the assistance of the peace officer, break open in the day time any place, where 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 such goods are concealed there.

Second Distraint. The distraint should be for the entire amount due, and not for part at one time and part at another. If there be not sufficient on the premises at the time, a second distress may complete the remedy.

Excessive Distraint. Distresses must be proportioned to the thing distrained for. If unreasonable, a party may be heavily amerced for the same. For homage, fealty, or suit and service, it is said no distress can be excessive, for as these distresses cannot be sold, upon making satisfaction, the owner may have his chattels again. The remedy for excessive distresses is by a special action; for an action of trespass is not maintainable upon this account, it being no injury at the common law.

Disposal of the Thing Distrained. It must be impounded in some pound by the taker. On its way thither, it may be rescued by the owner, in case the distress was taken without cause, or contrary to law; as if no rent was due, or if it was taken on the highway, or the like. But if once impounded, though taken without cause, it is in the custody of the law, and cannot be forcibly removed.

The Pound. A pound (*parcus*, an enclosure), is either pound *overt*, open overhead, or pound *covert*, that is, close. No distress of cattle can be driven out of the hundred, except to a pound *overt*, within the same shire, not more than three miles distant. This is for the benefit of the tenants, that they may know where to find and replevy the distress. 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 distress of animals be impounded in a common pound *overt*, the owner must take notice at his peril, but if in any special pound *overt*, the distrainor must give notice to the owner; and in both these cases the owner, and not the distrainor, is bound to provide the beasts with food and necessaries. But if

they are put in a pound *covert*, in a stable or the like, the landlord or distrainor must feed and sustain them. A distress of household goods or other dead chattels, which are liable to be stolen or damaged by the weather, ought to be impounded in a pound *covert*, else the distrainor must answer for the consequences.

Use of Distrained Beast. Formerly the goods impounded were only in the nature of a pledge or security to compel satisfaction, and a distrainor could not work or use a distrained beast. Thus the law continues as to beasts taken damage *feasant*, and distresses for suit or services, which must remain impounded until satisfaction given or the owner contests the right of distraining, by replevying the chattels.

Replevin. To replevy (*replegiare*—to take back the pledge), is when a person distrained upon applies to the sheriff, and has the distress returned him, 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 to the distrainor. This is a replevin, which answers the same end to the distrainor as the distress itself.

Appraisement and Sale. This kind of distress, though it punishes the owner, yet if he makes no satisfaction or payment, is no remedy to the distrainor. By act of parliament, in all cases of distress for rent, if the tenant or owner do not within five days after the distress is taken, and notice of the cause given him, replevy the same with sufficient security, the distrainor, with the sheriff or constable, shall cause the property to be appraised by two appraisers and sell the same towards satisfaction of the rent and charges, rendering the overplus, if any, to the owner himself. Thus a full satisfaction may now be had for rent in arrears, by the mere act of the party himself, viz.: by distress.

Irregularities in Process. Formerly if an irregularity was committed, it vitiated the whole, and made the distrainors trespassers, but now the party aggrieved shall only have an action for the real damage sustained, and not even that, if tender of amends be made before the action is brought.

6. Seizing of Heriots.[1] This was another species of self remedy, not unlike the taking of cattle or goods in distress. Heriot

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[1] Heriots were the best beasts or goods of the tenant or owner of the land, which, by custom, were given to the lord on the death of such tenant.

service is a species of rent, and the lord may distrain for this, but in heriot custom, the lord may seize the identical thing itself, but nothing else. The like speedy remedy may be given to many things that lie in franchise, as waifs, wrecks, estrays, deodands, and the like, which may be seized without the formal process of a suit, which, however, may, if desired, be resorted to.

Second. From the joint act of the parties. Either by accord, or by arbitration.

1. Accord. This is a satisfaction agreed upon by the party injuring and the party injured, which, when performed, bars all actions upon this account. By statutes, in case of irregularity in the method of distraining and in mistakes by justices of the peace, even tender of sufficient amends to the party injured is a bar to all actions, whether acceptable or not.

2. Arbitration. This is where the parties injuring and injured submit all matters in dispute concerning any personal chattels or personal wrongs to the judgment of arbitrators, who are to decide the controversy. If they do not agree, it is usual to add another person, as umpire (*imperator* or *impar*), to whose sole judgment it is then referred. The decision is called an award. The question is thus as fully determined, as if by agreement of the parties or the judgment of a court.

Real Estate. Award. But the right of real property cannot thus pass by a mere award, otherwise, in feudal times, the land might have been aliened collusively, without the consent of the superior. Yet doubtless an arbitrator may now award a conveyance or lease of land.

Revocability of Submission. Though, originally, the submission to arbitration was by word or by deed, which was revocable, it is now the practice to enter into mutual bonds, with condition to stand by the award.

When Resorted to. Arbitration may be resorted to not only where the cause is pending, but also where no action has been brought. By statute, all parties desiring to end a controversy may agree, that their submission of a suit to arbitration shall be made a rule of a court of record, and may insert such agreement in their submission, which agreement being proved on oath by one of the witnesses thereto, the court will make a rule, that such submission and award shall be conclusive. After such rule, the parties disobeying may be punished for a contempt of

the court, unless such award be set aside for misbehavior or corruption of the arbitrators, proved on oath to the court, within one term after the award be made.

CHAPTER II.—REDRESS BY OPERATION OF LAW.

1. **Retainer.** If a debtor make his creditor his executor, or if he becomes his administrator, the law allows him to retain enough to pay himself, before any other creditor of equal degree. The reason being, that an executor cannot sue himself as a representative of the deceased to recover what is due him in a private capacity, but having the whole personal estate in his hands, he may apply part of it to that purpose. Otherwise he would be placed in a worse position than other creditors. For though a ratable distribution of the assets among the creditors is the most equitable method, yet, as every such scheme has hitherto been found impracticable and productive of mischief, so that the creditor who first commences suit is entitled to a preference in payment, it follows that the executor who cannot commence suit must be paid the last of any, and, if the estate be insolvent, will receive nothing, unless he be allowed thus to retain it. The doctrine of retainer is the necessary consequence of the other doctrine, the priority of such creditor who first commences the action.[1]

Co-Executors. But the executor shall not retain his debt to the prejudice of those of a higher degree. Nor shall one executor have preference over a claim of equal degree of a co-executor; they shall both be proportionately discharged. Nor shall an executor *de son tort* be permitted to retain.

II. **Remitter.** This is where he who had the true property in lands, is out of possession thereof, and has no right to enter without recovering possession in an action, but afterwards the freehold is 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

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[1] This is not the law in the United States. Debts of equal degree are paid ratably, and the executor has no such preference.

entry, which he has gained by a bad title, shall be *ipso facto* annexed to his own inherent good one, and his defeasible estate shall be annulled by act of law, without his participation. For he has hereby gained a new right of possession, to which the law immediately annexes his ancient right of property. If the subsequent estate or right of possession be gained by a man's own act or consent, as by immediate purchase, being of full age, he shall not be remitted. The taking such subsequent estate was his own folly, and is deemed a waiver of his prior right.

Incidents. To every remitter there are these incidents: an ancient right and a new defeasible estate of freehold, uniting in one and the same person, which defeasible estate must be cast upon the tenant, and not gained by his own act or folly. Otherwise he who has right would be deprived of all remedy. For as he himself is the person in possession of the freehold, there is no other person against whom he can bring an action to establish his prior right. And for this cause the law does adjudge him in by remitter, that is, in such plight as if he had recovered the same land by suit. But there shall be no remitter to a right, for which the party has no remedy by action.

CHAPTER III.—COURTS IN GENERAL.

Concurrent Remedies. Even where the law permits an extrajudicial remedy, it does not exclude the ordinary course of justice. Though at the time I may defend myself, yet afterwards I may prosecute for assault and battery; though I peaceably retake my goods, yet I may bring my action of trover or detinue; though I may enter on lands, where I have a right of entry, yet I may demand possession in a real action. I may myself abate a nuisance, or call upon the law to do it for me. I may distrain for rent, or have an action for debt, at my option. If I do not distrain my neighbor's cattle, damage *feasant*, I may compel him by action of trespass to give satisfaction. I may refuse accord or arbitration, and obtain redress in some other way.

Mere Operation of Law. But as to remedies by mere operation of law, they are given, because no remedy can be min-

istered by suit or action, without running into the absurdity of a man bringing an action against himself. In all other cases, where there is a legal right, there is a legal remedy, by suit or action at law, whenever that right is invaded.

Courts and Jurisdiction. 1. *Courts of justice, their nature and species.*

2. *Injuries cognizable in each species of court.*

Courts of Justice. A court is a place where justice is judicially administered. In England the power of the judges is an emanation of the royal prerogative.

Jurisdiction. Some courts have a more limited jurisdiction than others. Some are constituted to inquire only; others to hear and determine; some to determine in the first instance, others upon appeal and by way of review. Some are courts of record; some, not of record.

Courts of Record. A court of record is one, where the acts and judicial proceedings are enrolled for a perpetual testimony. The records are of such high authority, that their truth is not to be called into question. It is a settled rule, that nothing shall be averred against a record, nor shall any plea or proof be admitted to the contrary. If its existence be denied, it shall be tried by nothing but itself, that is, upon bare inspection, whether there be such record or not, else there would be no end of disputes.[1] If there appear to be a mistake of the clerk in making up such record, the court will direct him to amend it.

Courts Not of Record. Such is the court of a private man in England, as courts baron, incident to every manor.[2]

Attorneys. Beside the actor or plaintiff, the *reus* or defendant and the judex or judicial power, every court has its attorneys, who answer to the procurators or proctors of the civilians and canonists. An attorney is one who is placed in the stead or turn of another to manage his matters of law. Formerly every suitor prosecuted or defended his suit in person, unless by special license. No man can practice as an attorney, but such as is admitted and sworn as an attorney of that particular court.[3]

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[1] Exception, where fraud is charged.

[2] Also justices and magistrates courts.

[3] In the United States, he may be admitted on motion to try a particular case, in another court of equal jurisdiction to the one in which he is accustomed to practice.

English Advocates. In England, there are two species or degrees: barristers and serjeants. The former are admitted after a course of study, the latter after a long term of years of practice as barristers. Suitors are termed clients, like the dependents upon the Roman orators. In England, a counsel can maintain no action for his fees.[1] The fee is deemed an honorarium. It has been held, that a counsel is not answerable for any matter by him spoken relative to the case in hand, and suggested in his client's instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless, but if he mentions an untruth of his own invention, he is liable. Counsel guilty of deceit or collusion are punishable.

CHAPTER IV.—COURTS OF COMMON LAW AND EQUITY.

Kinds. 1. *Of public and general jurisdiction.*

2. *Of private and special jurisdiction in certain districts.*

Courts of Public Jurisdiction. Four kinds: Common law and equity, ecclesiastical courts, courts military, courts maritime. The courts in their jurisdiction ascend gradually from the lowest to the supreme courts, which were constituted to correct the errors of the inferior ones. Of late years the more petty tribunals have fallen into decay.

1. Piepoudre. The courts of *piepoudre*, or the dusty feet of suitors, are the lowest tribunals. It is a court of record incident to fairs and markets, in which the steward who owns the toll of the market is the judge.

2. Court Baron. The court baron is incident to every manor, and is held by the steward within the said manor. It is not a court of record.[2]

3. Hundred Court. The hundred court is only a larger court baron, and likewise is not a court of record.

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[1] In the United States, he may claim a stipulated fee or a *quantum meruit* for his services.

[2] Obsolete.

4. County Court. The county court is incident to the jurisdiction of the sheriff. It is not a court of record.

5. Court of Common Pleas or Common Bench. Under the Saxon constitution there was only one superior court, the *wittena-gemote*, or general council. This great universal court in time ceased to follow the king, and was established in Westminister Hall. Its jurisdiction was to hear and determine all pleas of land and injuries merely civil, between subject and subject. This gave rise to the inns of court in its neighborhood, in which the body of common lawyers was established.

Pleas. Pleas or suits are divided into two sorts: pleas of the crown, which comprehend all crimes and misdemeanors, wherein the king is the plaintiff, and common pleas, which include all civil actions depending between subject and subject. The former of these belonged to the jurisdiction of the court of king's bench, the latter to that of the court of common pleas, which is a court of record, and is styled by 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 determined, though, in most of them, the king's bench has also a concurrent authority. The judges hear and determine all matters of law arising in civil cases, real and personal. These it takes cognizance of, as well originally as upon removal from inferior courts. A writ of error, in the nature of an appeal, lies from this court to the court of the king's bench.

6. Court of King's Bench. This is so called because the king was accustomed formerly to sit there in person. It is the supreme court of common law in England. The whole judicial authority of this court is in the mouth of the judges. This court is a remnant of the *aula regia*, which was not located at any one place, but followed the king wherever he went. For centuries, however, it has been located at Westminster. 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. It commands magistrates and others to do their duty in all cases, where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition. It takes cognizance of both criminal and civil causes, the former in the crown side of the court, the latter in its plea side.

Jurisdiction. On the plea side, or civil branch, it has an original jurisdiction, and cognizance of all actions of trespass or other injury committed *vi et armis*, of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case, which allege fraud; all of which savor of a criminal nature, although the action is brought for a civil remedy, and makes the defendant liable to pay a fine to the king, as well as damages to the injured party. The same doctrine is now extended to all actions on the case: but no action of debt or detinue or other mere civil suit can, by the common law, be prosecuted by any subject in this court by original writ out of chancery.[1] An action of debt, given by statute, may be brought in the king's bench, as well as in the common pleas. In process of time, it began to hold pleas for all personal actions whatsoever.

7. Court of Exchequer. This court is inferior in rank to both that of king's bench and the court of common pleas, but is a court of law and of equity also. It is a very ancient court of record, and intended principally to order the revenues of the crown, and to recover the king's debts and duties. It is called exchequer, from the checked cloth, resembling a chess board, that covers the table. By their original constitution, the jurisdiction of the courts of common pleas, king's bench and exchequer were entirely separate and distinct, the common pleas being intended to decide all questions between subject and subject, the king's bench to correct all crime and misdemeanors that amount to a breach of the peace, and the exchequer to adjust and recover the king's revenue. But now nearly all kinds of civil actions may be brought in the king's bench, and 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 he is the king's farmer or debtor.

8. High Court of Chancery. This, in matters of civil property, is the most important court of justice. Its name of chancery, *cancellaria*, is from the practice of cancelling the king's patents when issued contrary to law.

Chancellor's Powers. The office and name of chancellor was known to the courts of the Roman empire. He is a privy

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[1] This last clause is not the present practice.

counsellor. To him belongs the appointment of all justices of the peace, and he is visitor of all hospitals and colleges. He is the general guardian of all infants, idiots and lunatics, and has superintendence of charitable uses. In his judicial capacity in the court of chancery he has vast and extensive jurisdiction, one ordinary in a court of common law, the other extraordinary, in a court of equity.

Ordinary Powers. 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 the king's letters patent, when made against law, and to hold plea of petitions, traverses of offices and the like, when the king has been advised to do any act or been put in possession of any lands or goods, in prejudice of a subject's rights. On proof of which, as the king can do no wrong, the law questions not, but the king will redress the injury, and refers that task to his chancellor, the keeper of his conscience. The court also holds plea of all personal actions, where an officer of the court is a party. The chancellor cannot try a cause, as he has no power to call a jury, but he must deliver the record into the court of king's bench, where it shall be tried by the country, and judgment shall be given thereon. And when judgment is given in chancery, upon demurrer or the like, a writ of error, in the nature of an appeal, lies out of this ordinary court to the court of king's bench, though such writ has not been taken out for several centuries. In the ordinary court, all original writs issue that pass under the great seal, all commissions of charitable uses, sewers, bankruptcy, idiocy, lunacy and the like.

Extraordinary Powers. As a court of equity, the court of chancery is of the greatest judicial consequence. The distinction between law and equity, as administered in different courts, never seems to have been known. The earlier writers never speak of the equitable jurisdiction of the court of chancery. It seems probable, that when the courts of law gave a harsh or imperfect judgment, the application for redress used to be to the king in person, and his privy council. They were wont to refer the matter to the chancellor, who mitigated the severity, or supplied the defects of the judgment. 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.

Appeals. From this court of equity in chancery, as from the other superior courts, lies an appeal to the house of peers. The differences between appeals from a court of equity and writs of error from courts of law are:

1. That the former may be brought upon any interlocutory matter, the latter upon nothing but a definite judgment.

2. That on writs of error, the house of lords pronounces the judgment, and on appeals, it gives directions to the court below to rectify its own decree.

9. Court of Exchequer Chamber. This has no original jurisdiction. It is only a court of appeal.

10. House of Peers. This is the supreme court of judicature in the kingdom. It has no original jurisdiction, but only upon appeals and writs of error, to rectify any injustice or mistake of the law committed by the courts below. On the dissolution of the *aula regia*, this august tribunal succeeded to such authority. It is the last resort in all causes, and every subordinate tribunal must conform to its determinations.

11. Courts of Assize and Nisi Prius. These are composed of two or more commissioners, who are sent through the kingdom, except in London and Middlesex, where courts of *nisi prius* are held each term before the judges of the superior courts, 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 Westminister. Our ancestors ordained, that no man should be a judge of assize in his own county.

Sub-divisions and Duties. 1. The commission of the peace. 2. Commission of *oyer* and *terminer*. 3. A commission of general jail delivery. 4. A commission of assize, directed to take the verdict of a jury of assize, and summoned for the trial of landed disputes. 5. Commission of *nisi prius*, empowering the justices to try all questions of fact issuing out of the courts of Westminster that are ready for trial. These are usually appointed to be tried at Westminster on a day named, unless before, *nisi prius*, the day fixed, the judges come to that court.

CHAPTER V.—COURTS ECCLESIASTICAL, MILITARY, AND MARITIME.

History. In the time of our Saxon ancestors, there was no distinction between the lay and ecclesiastical jurisdictions. Under the papal policy, it was an established maxim, that all ecclesiastical persons and all ecclesiastical causes should be solely subject to ecclesiastical jurisdiction, which jurisdiction was lodged in the pope by divine right. It was not, however, until the Norman conquest that this doctrine was received in England, and the ecclesiastical court was separated from the civil.

Different Kinds. 1. Archdeacons. 2. Consistory. 3. Court of arches. 4. Court of peculiars. 5. Prerogative court, for the trial of testamentary causes, where the deceased left property within two different dioceses. 6. The court of delegates, which was the great court of appeal. 7, Commission of review, granted only in extraordinary cases, to reverse the sentence of the court of delegates. None of these were courts of record.

Military Courts. Courts of chivalry. Not courts of record. Virtually obsolete.

Maritime Courts. The court of admiralty and its court of appeal. Its proceedings are according to the method of the civil law. It is held before the lord high admiral of England, and is not a court of record.[1]

CHAPTER VI.—COURTS OF A SPECIAL JURISDICTION.

1. Forest courts, for the government of the king's forests.
2. Commissioners of sewers.
3. Court of policies of assurance. Marine losses.
4. Court of marshalsea, where one or both parties is or are in the king's domestic service.
5. Court of the principality of Wales.

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[1] This Jurisdiction has been extended.

6. Court of the duchy chamber of Lancaster.

7. Courts of the counties palatine.

8. Courts in Devonshire and Cornwall for tinners.

9. Courts of London and other cities, of a private and limited species.

10. The chancellor's court of the two universities.

CHAPTER VII.—COGNIZANCE OF PRIVATE WRONGS.

1. ECCLESIASTICAL COURTS.

Causes Tried Therein. Three causes, pecuniary, matrimonial, and testamentary.

Pecuniary Causes. For withholding dues or tithes, also for spoliations, dilapidations, and neglect to repair churches, satisfaction could be obtained in the ecclesiastical courts.[1]

Matrimonial Causes. I. Jactitation of marriage, or the boasting of the existence of a marriage, which never actually took place. 2. To compel the celebration of a marriage. This no longer exists. 3. For the restitution of conjugal rights, where one party unlawfully lives separated from the other. 4. Divorce for cause arising after marriage. In this case a divorce *a mensa et thoro* may be applied for. For cause existing previous to the marriage, a divorce *a vinculo matrimonii* may be sought. 5. For alimony. None was allowed, where the wife was adjudged guilty of adultery. Dower also was refused.[2]

Testamentary Causes. Divisible into three branches: the probate of wills, the granting of administrations, and the suing for legacies.[3]

Practice. Proceedings in the ecclesiastical courts are regulated according to the practice of the civil and the canon laws, or rather according to a corrected mixture of both, by citation, by libel (libellus, a little book), specifying the allegations, by answer and proofs. Decided by a a single judge without a jury. The

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[1] Unimportant, by recent statutes.

[2] All these causes are now transferred in England to the divorce court.

[3] This jurisdiction, much extended, is vested in the probate courts.

jurisdiction is defective in the inability to enforce its decrees. No other process exists but excommunication.[1]

2. COURTS MILITARY, OR COURTS OF CHIVALRY.

Damages Never Given. As this court cannot meddle with anything determinable by the common law, it can give no damages. Can only order reparation in point of honor. It is not a court of record.

3. COURTS MARITIME, OR OF ADMIRALTY.

Jurisdiction. For injuries committed on the high seas and not within the precincts of any county. It has jurisdiction of things flotsam, jetsam, and ligan. If part of the contract lies upon the sea and part on the land, the admiralty court has no jurisdiction. It belongs to other courts. A contract for seamen's wages made on land is an instance of this. So also is a contract made on the sea to be performed on land. The proceedings are similar to those of the civil law. The first process is usually by arrest of the defendant's person. The court may fine and imprison for a contempt in the face of the court.

4. COURTS OF COMMON LAW. INJURIES COGNIZABLE THEREBY.

Jurisdiction. All other injuries are cognizable by these courts. Every wrong has its remedy, and every injury its redress. These injuries and these remedies will be treated of in subsequent chapters. Two species of injuries will be treated of here. One, when justice is delayed by an inferior court, that has proper cognizance, or when such inferior court takes upon itself to examine a cause and decide the merits without legal authority. The first of these injuries, refusal or neglect of justice, is remedied either by writ of *procedendo* or of *mandamus*.

Procedendo. This writ issues out of the court of chancery, where judges of any subordinate court delay the parties and give no judgment for either party. The writ, in the king's name, commands them to proceed to judgment, but without specifying any particular judgment; for that judgment, if erroneous, may be set aside on writ of error or appeal, and upon further neglect, the judges of the inferior court may be punished by contempt by writ of attachment, returnable in the king's bench or common pleas.

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[1] Excommunication is now prohibited. In lieu thereof, the defendant is pronounced contumacious.

Mandamus. A command, issuing in the king's name, from the court of king's bench, and directed to any person, corporation or inferior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court supposes to be consonant to right and justice. It is a high, prerogative writ, of a most extensive, remedial nature, and may be issued in some cases, where the injured party has also another more tedious mode of redress, as in the case of an admission or restitution to an office. It issues in every case, where the party has a right to have a thing done, and has no other specific means of compelling its performance. It will lie to compel the admission or restoration of the party applying to any office or franchise of a public nature, whether spiritual or temporal, to academic degrees, to the use of a church, 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 corporations to affix their seal, to compel the holding of a court, and for an infinite number of other purposes.

To Inferior Courts. It issues to the judges of any inferior court, commanding them to do justice, whenever the same is delayed. It is the peculiar business of the court of king's bench to superintend all inferior tribunals, and to enforce the exercise of their judicial and ministerial powers, and this not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice.

Process. The writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below, whereupon to satisfy the court that there is ground for such interposition, a rule is usually made, directing the party complained of, to show cause why a writ of *mandamus* should not issue. If he shows no sufficient cause, the writ itself is issued, at first in the alternative, either to do thus, or signify some cause to the contrary, to which a return or answer must be made at a certain day.

The Return. If the return shows no sufficient 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 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 on affidavits, but will for the present believe him, and proceed no further on the *mandamus*. The party injured has an action against him for false return, and may recover adequate damages, together with a peremptory *mandamus* to do his duty.

Encroachment of Jurisdiction. The second injury, which is that of encroachment of jurisdiction, or calling one *coram non judice* to answer in a court that has no legal cognizance of the cause, is also a grievance, for which the common law provided a remedy by the writ of prohibition.

Writ of Prohibition. This writ issues out of the court of king's bench, but for the furtherance of justice, it may in some cases be had from the courts of chancery, common pleas or exchequer, directed to the judge and parties to a suit in an inferior court, commanding them to cease from the prosecution thereof, upon 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.

Penalty for Disobedience. And if either the judge or the party shall proceed after such prohibition, an attachment for contempt may be issued at the discretion of the court, and an action will lie against them to recompense the party injured in damages. So long as the clergy held, that the ecclesiastical courts were wholly independent of the civil, great struggles occurred between the temporal and spiritual courts concerning the writ of prohibition, and the proper object of it.

Process. 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 in being drawn *ad aliud examen*, by a jurisdiction or process disallowed by law, upon which at the court's discretion, the writ of prohibition directly issues, commanding the judge not to hold, and the party not to prosecute his plea. Sometimes the point may be too doubtful to be decided merely upon a motion, and then the party applying is directed by the court to declare in prohibition, that is, to prosecute an action, by filing a declaration against the other upon a fiction, which is not traversable, that he has proceeded in the suit below, notwithstanding the writ of prohibition.

The Judgment. And if upon demurrer and argument, the

court shall finally be of opinion, that the matter suggested is a sufficient ground of prohibition in point of law, then judgment with nominal damages shall be given to the complainant; and the defendant and also the inferior court shall be prohibited from proceeding further. On the other hand, if the superior court think differently, then judgment shall be given against the party complaining, and a writ of consultation shall be awarded, so called, because upon deliberation, the judges find the prohibition to be ill-founded, and therefore by this writ, return the cause to its original jurisdiction, to be there determined in the inferior court.

Not Conclusive. Even in ordinary cases, the writ of prohibition is not absolutely conclusive. Though the ground be a good one in point of law, for granting the prohibition, yet if the fact that gave rise to it, afterwards be falsified, the cause shall be remanded to the former jurisdiction.

CHAPTER VIII.—OF WRONGS AND THEIR REMEDIES.

The Subject Treated. We will at this time confine ourselves to such wrongs, as may be committed in the intercourse between subject and subject, which the king, as the fountain of justice, is bound to redress in the ordinary forms of law.

Natural Remedy. As all wrong is merely a privation of right, the natural remedy is to put the party in possession of that right, of which he has been deprived. This may be effected, by the delivery of the subject matter in dispute to the legal owner, as when lands or chattels are unjustly withheld or invaded, or where there is not an adequate remedy, by exacting a pecuniary satisfaction in damages, as in case of assault, breach of contract, etc.

Right to Damages. At the time of the injury, the party has acquired an inchoate right to damages, though such right be not fully ascertained, till they are assessed by law.

Actions and Suits. The instruments, whereby the remedy is obtained, are a diversity of suits or actions, the lawful demand of one's right.

Suits, Their History. The Romans, after the example of the Greeks, early introduced set forms for actions and suits, and made it a rule that each injury should be redressed by its proper remedy only. The forms of these actions were secreted in the books of the pontifical college, till the secretary of Appius Claudius stole and published a copy. Bracton, speaking of original writs, on which all our actions are founded, declares them to be fixed and immutable, unless by act of parliament.

SUITS ARE PERSONAL, REAL AND MIXED.

Personal Actions. These 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 founded upon contracts, the latter upon torts or wrongs. Of the former nature are all actions upon debts or promises; of the latter all actions for trespasses, nuisances, assaults, slander, and the like.

Real Actions. These concern real property only, in which the plaintiff claims title. These actions are now pretty generally laid aside in practice, on account of the nicety required, and the great length of process.[1]

Mixed. These actions partake 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.

Two Kinds of Private Wrongs. There are two kinds: the one without violence, as slander or breach of contract; the other coupled with force, as batteries or false imprisonment. The latter species savor of a criminal kind, being attended with breach of the peace, for which a fine should be paid the king, as well as a private satisfaction to the party injured. Another division is, into those injuries, which affect the rights of persons, and those which affect the right of property.

Rights of Persons. These are absolute, which belong to private men considered merely as individuals; and relative, which are incident to them as members of society, and connected with each other by various ties and relations. As the absolute rights are those of personal liberty and of private property, so the injuries must be of a corresponding nature.

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[1] All real and mixed actions are now abolished, except actions for dower, *quare impedit* and ejectment.

First. Injuries to personal security. These are against their lives, their limbs, their bodies, their health, or their reputation.

I. INJURY TO LIFE.

This will be treated of in a subsequent division.

II.—III. INJURY TO LIMBS AND BODIES.

1. **Threats.** Menaces of bodily hurt, through fear of which a man's business is interrupted. A menace alone, without a consequent inconvenience, constitutes no injury. To complete the wrong, they must both exist. The remedy for this is in pecuniary damages, to be recovered by an action of trespass *vi et armis.*

2. **Assault.** An attempt or offer to beat another, without touching him, described as an unlawful setting upon one's person.[1] This, also, is an inchoate violence, for which an action of trespass *vi et armis* for compensation in damages will lie.

3. **Battery.** 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. Every man's person is sacred, and no one should meddle with it. The Cornelian law distinguished verberation, which is accompanied with pain, from pulsation, which is attended with none. Battery in some cases is lawful, as where one having authority, as a parent or master, corrects a child, a scholar or an apprentice. So where the blow is one of self-defence, occasioned by the assault of another.

4. **Wounding.** This is only an aggravated species of battery.

5. **Mayhem.** This a more atrocious injury, and consists in violently depriving another of the use of a member proper for his defence in a fight. This is a battery, attended with this aggravating circumstance, that thereby the party injured is forever disabled from making so good a defence against future external injuries as heretofore. These defensive members are not only arms and legs, but a finger, an eye, a fore-tooth, and also some others. But the loss of a jaw-tooth, the ear or the nose, is not mayhem, for they are of no use in fighting. The remedial action of trespass *vi et armis* lies to recover damages for this injury, which no motive, except self-preservation, can

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[1] As where one lifts his cane or his fist in a threatening manner at another, or strikes at him, but misses him.

justify. An English statute gives treble damages for the loss of an ear, though it is not mayhem.

Concurrent Remedies. For the last four causes an indictment may be brought as well as an action, and frequently both are prosecuted, the one at the suit of the crown for the crime against the public, the other at the suit of the party injured for reparation in damages.

IV. INJURY TO HEALTH.

When it Exists. This exists where, by any unwholesome practices of another, a man sustains any apparent damage to his health. 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 unskillful management of his physician, surgeon or apothecary. Malpractice is a grave misdemeanor, whether for experiment or by neglect.

Trespass on the Case. There 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 is an universal remedy given for all personal injuries without force; so called, because the plaintiff's whole cause of complaint is set forth at length in the original writ. For though there are methods prescribed, and forms of action for redressing ordinary wrongs, in which the act itself is immediately injurious to person or property, as battery, non-payment of debts, detaining one's goods, and the like; yet, where any special consequential damages arise, which could not be foreseen and provided for in the ordinary courts of justice, the party injured is allowed to bring a special action.

Differs from Trespass vi et Armis. Wherever the common law gives a right or prohibits an injury, it also gives a remedy by action, and, therefore, when a new injury is done, a new method of remedy must be pursued. It is a settled distinction, that where an act is done which is in itself an immediate injury to another's person or property, the remedy is usually by 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 consequences and collaterately, there no action *vi et armis* will lie, but an action on the special case for damages.

V. INJURIES TO REPUTATION.

1. **Slander. Defined.** This may be by malicious, scan-

dalous, and slanderous words, tending to a man's damage and derogation. This may endanger a man in law, by impeaching him of some heinous crime, as to say that a man has poisoned another, or is perjured; or it may exclude him from society, as to charge him with having an infectious disease; or it may hurt his trade or livelihood, as to call him a bankrupt, a quack or a knave. Words spoken of a judge or other dignitary, are termed *scandalum magnatum*, and held to be still more heinous, though they might not be actionable in the case of a common person. They result in more injury.

Particular Damage. This offence is redressed by an action on the case, and now may be sustained without proving that any particular damage has happened, but merely upon the probability that it might happen. But with regard to words that do not on their face 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*.[1] Mere scurrility or opprobrious words, which neither import nor are in fact attended with any injurious effects, will not support an action. Temporal damage must ensue.

Harmless Words. Words of heat and passion, as to call a man a rogue or rascal, if productive of no ill consequence, and not of any of the dangerous species above mentioned, are not actionable; neither are words spoken in a friendly manner, as by way of advice or admonition, without ill-will, for that must be maliciously spoken to be slander.

Justification. If the defendant be able to justify and prove the words to be true, no action will lie, even though special damage has ensued, for then it is no slander. If a man can prove that a party is bankrupt, a quack or a knave, as the case may be, this will destroy the respective actions, for though there may be damage from it, yet, if the fact be true, it is *damnum absque injuria*, and, where there is no injury, the law gives no remedy. This is similar to the reasoning of the civil law.

2. Libels. These may be printed or written. They may

[1] Thus to call a clergyman a bastard is not a cause for action, unless he can show some special loss by it, as the loss of his presentation to a benefice. So, to slander another man's title, as to spread injurious reports, that, if true, would deprive him of his estate, is actionable, provided any special damage accrues to the proprietor thereby, as if he loses an opportunity to sell the land.

be pictures, signs, and the like, which set a man in an odious or ridiculous light, and thereby diminish his reputation. There are two remedies, one by indictment and another by action. The former for the public offence, for every libel has a tendency to the breach of the peace, by provoking the person libelled to break it, which offence is the same in point of law, whether the matter contained be true or not, and, therefore, the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it in justification.[1]

Justification. In the remedy by action on the case, which is to make reparation for the injury, the defendant may for words spoken, written or printed, justify the truth of the facts, and show that the plaintiff has received no injury. But as to signs and pictures, it seems requisite 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 if it does not appear that the picture referred to the plaintiff, he cannot recover.

3. Malicious Prosecution. Under the mask of justice and public spirit, private spite thus can be gratified. For this the law allows damages.

Proceedings. The action may be one of conspiracy, where there is more than one defendant, or by the more usual way, by a special action on the case for a false and malicious prosecution. In order to carry on the former, it is necessary for the plaintiff to obtain a record of his indictment and acquittal, but in prosecutions for felony, it is usual to deny a copy of the indictment, where there is the least probable cause on which to found a prosecution. It would be a hardship, if prosecutors, who have a tolerable ground of suspicion, were liable to be sued at law, whenever their indictments miscarried. But an action on the case may be founded on an indictment, wherein no acquittal can be had, as if it be rejected by a grand jury, or be *coram non judice*, or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation and expense upon which the action is founded. However any probable cause for preferring it is sufficient to justify the defendant.

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[1] Under the English statute, and also in the United States, the defendant in any indictment may plead the truth of the matters charged, and justify its publication for good motives and for the public benefit. If this plea of justification be not sustained, the offence is usually aggravated.

Second. Injuries to personal liberty.

False Imprisonment. The law has decreed a punishment for this great crime, and has given a private reparation to the party. At the present, it removes the actual imprisonment, and after it is over, subjects the wrong doer to a civil action, on account of the damage sustained for the loss of time and liberty

What Constitutes. Two points are requisite: 1. The detention of the person. 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in jail or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. 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 the 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 the common law, or by 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 on the highways. It may arise by executing a lawful warrant or process on Sunday, which service is void.

Remedy. The remedy is of two sorts: the one removes the injury, the other makes satisfaction for it. The means of removal are fourfold:

1. Writ of Mainprize. This directs the sheriff, where the offence is bailable, to take sureties for the party's appearance. They are termed mainpernors.

2. Writ de Odio et Atia. This commanded a sheriff to inquire, whether a prisoner charged with murder was committed on just cause of suspicion, or for hatred and ill-will.

3. Writ de Homine Replegiando. It lies to replevy a man out of custody, on giving security to the sheriff, that he shall be forthcoming, when wanted.[1]

4. Writ of Habeas Corpus. This is the most celebrated of writs, various kinds of which are made use of to remove prisoners from one court into another, for the more easy administration of justice. Such writs of *habeas corpus* are:

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[1] These three writs are virtually obsolete.

Ad Respondendum. This is the writ of *habeas corpus* granted, when a man has 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.

Ad Satisfaciedum. This writ issues, where a prisoner has had judgment against him in an action, and the plaintiff wishes to bring him up to some superior court to charge him with process of execution.

Ad Prosequendum, Testificandum, Deliberandum, etc. These 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, where the fact was committed.

Ad Faciendum et Recipiendum. This issues, when a person is sued in some inferior jurisdiction, and is desirous of removing the action into the superior court, commanding the inferior judges to produce the defendant, together with the day and cause of his caption and detainer, to do and receive what the king's court may consider best. This is a writ of right, without any motion in court, and it instantly supersedes all proceedings in the court below. All writs of *habeas corpus* must be signed by a judge of the court, out of which they are awarded. No cause, under the value of ten pounds, shall be removed by *habeas corpus* into any superior court, unless the defendant so removing the same, shall give special bail for payment of debt and costs.

Ad Subjiciendum. This is a great and efficacious writ in cases of illegal confinement, ordering a person detaining another to produce him with the day and the cause of his caption and detention, to do, submit to and receive whatsoever the judge or court awarding such writ shall consider in that behalf. This writ may issue from the court of king's bench, or the court of common pleas, in term time, or in vacation by a fiat from any law judge, or from the lord chancellor, and runs into all parts of the dominion. If it issue in vacation, it is usually returnable before the judge who awarded it. If the term intervene, it may be returned into court.

When Granted. In the king's bench and common pleas, it is necessary to apply for it by motion to the court, as is the case in all other prerogative writs (*certiorari*, prohibition, *man-*

damus, etc.), which do not issue, as of mere course, without showing cause for the exercise of such power. It will only be granted for probable cause. When once granted, the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner. If it issued of mere course, without disclosing good cause, a party might obtain temporary enlargement thereby, though sure to be remanded when brought in court. If probable ground be shown, that the party is imprisoned without just cause, and therefore has a right to be delivered, the writ of *habeas corpus* is then a writ of right, which may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained.

Commitments. There exists an absolute necessity for expressing upon every commitment the reason for which it is made, that the court, upon a *habeas corpus* may examine into its validity; and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner.

The Habeas Corpus Act. This was passed during the reign of Charles II of England, and is considered as another *magna carta*. The statute enacts:

(1.) That on complaint and request in writing, by or on behalf of any person committed and charged with any crime, (except for treason or felony, expressed in the warrant, or as accessory, or on suspicion thereof, plainly expressed in the warrant, or unless he is convicted or charged in execution by legal process), the chancellor or a judge in vacation shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges, and, upon the return made, shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature.

(2.) That such writs shall be endorsed as granted, in pursuance of this act, and signed by the person awarding them.

(3.) That the writ shall be returned, and the prisoner brought up, within a limited time, according to the distance, not exceeding twenty days.

(4.) That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the

custody of a prisoner, without sufficient reason or authority, shall forfeit 100 pounds for the first offence, and 200 pounds for the second.

(5.) That no person, once delivered by *habeas corpus*, shall be recommitted for the same offence, on penalty of 500 pounds.

(6.) That every person committed for treason or felony shall, if he require it, the first week of the next term, or the first day of the next session of oyer and terminer, be indicted in that term or session, or else admitted to bail, unless the king's witnesses cannot be produced at that time; and if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence; but that no person after the assizes be open for the county in which he is detained shall be removed by *habeas corpus*, till after the assizes are ended, but shall be left to the justice of the judges of assize.

(7.) That any such prisoner may move for and obtain his *habeas corpus*, as well out of the chancery or exchequer as out of the king's bench or common pleas, and the lord chancellor or judges denying the same, on sight of the warrant, or oath that the same is refused, shall forfeit to the party aggrieved 500 pounds.

(8.) Extending the writ to certain neighboring islands.

(9.) That no inhabitant of England shall be transported, unless he has committed a capital offence in the place to which he is to be sent.

Generally. This statute extends only to the case of commitments for such criminal charges, as can produce no inconvenience to public justice, by a temporary enlargement of the prisoner; all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But even upon writs at common law, it is expected by the court that they should be immediately obeyed, without waiting for an *alias* or *pluries*, otherwise an attachment will issue. The remedy, therefore, is now complete for removing the injury of unjust and illegal confinement. It frequently happens, that parties suffer a long imprisonment, because they are forgotten.

Remedy for False Imprisonment. By an action of trespass *vi et armis*, usually called an action of false imprisonment, which is generally accompanied with a charge of assault and

battery. The party therein shall recover damages for the injury he has received.

Third. The right of private property.

Discussed Heretofore. Though the enjoyment of property when acquired is strictly a personal right, yet its nature and the means of its acquisition or loss fall more directly under the second division of this book, the rights of things.

Injuries. We shall now consider the injuries that may be offered to the relative rights of persons, considered as members of society, connected by various ties and relations, as husband and wife, parent and child, guardian and ward, master and servant.

1. Injuries to a Husband. (1.) Abduction. The taking away of a man's wife. This may be by fraud and persuasion or by open violence. The law in both cases supposes force and constraint, the wife having no power to consent. The remedy is by action of trespass *vi et armis*. The husband shall recover not only his wife, but damages. Both the king and the husband may entertain this action, and the latter may also recover damages in an action on the case against such as persuaded and enticed the wife to live separate from her husband, without a sufficient cause.

2. Adultery. This is criminal conversation with another man's wife, which is both a crime and a civil injury. The law gives satisfaction to the husband by an action of trespass *vi et armis* against the adulterer, in which the damages are usually large and exemplary. These are affected by circumstances, as by the rank or fortune of the parties, the relation or connection between them, the seduction or otherwise of the wife, her previous behavior and character, and the husband's obligation to provide for children, which he suspects to be spurious. A marriage in fact must be proved in this case, though generally in other cases reputation and cohabitation suffice, as evidence of marriage.

3. Beating or Otherwise Ill-using a Man's Wife. If it be a common assault and battery, the usual remedy is by an action of trespass *vi et armis*, which must be brought in the name of the husband and wife jointly, but if the mal-treatment be so severe, that for the time, the husband is deprived of the company and assistance of his wife, the law gives him a separate remedy, by an action upon the case for damages.

II. Injuries to a Parent. (1.) Abduction. The taking of his

children away. This is remediable by an action of trespass *vi et armis*. (2) Marrying his son and heir without the consent of the parent.[1]

III. Injuries to Guardian or Ward. A speedy and summary method of redressing all complaints relative to wards and guardians has obtained, by an application to the court of chancery, which is the supreme guardian of all infants. Testamentary guardians may maintain an action of trespass for recovery of a ward, and also for damages to be applied to the use of the infant.

IV. Injuries to Master and Servant. There are two species of injuries. The one is the retaining a man's hired servant before his time has expired; the other is the beating or confining him in such a manner, that he is not able to perform work.

Hiring Another's Servant. Every master has by his contract purchased for a valuable consideration the services of his domestics for a limited time. The inveigling or hiring his servant, which induces a breach of the contract, is thereby an injury to the master, who is entitled to an action on the case, and he may also sue the servant for the non-performance of the contract. But if the new master was not apprised of the former contract, no action lies against him, unless he refuses to restore the servant on demand.

Beating Another's Servant. This depends upon the property, which the master has by his contract acquired in the labor of the servant. The servant has a remedy in an action of battery against the aggressor. The master also, as a recompense for his own 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 the jury will give satisfaction. A similar practice existed among the Athenians.

The Inferior Party. 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 in such injuries is totally disregarded. The inferior has no property in the company, care or assistance of the superior, as the superior is held to have in those of the infe-

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[1] Obsolete.

rior, and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for the beating of her husband, for she has no separate interest in anything during during her coverture. The child has 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 child, if the husband or parent be slain, has a peculiar species of action allowed, in the nature of a civil satisfaction. 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 contract, he suffers no injury, and is entitled to no action for any battery or imprisonment, which such master may happen to endure.

CHAPTER IX.—INJURIES TO PERSONAL PROPERTY.

Distinction from Real Property. Personal property consists in goods, moneys, and all other movable chattels and things thereunto incident; a property which may attend a person, wherever he goes, and from thence receives its denomination. Real property consists of such things as are permanent, fixed and immovable, as lands, tenements and hereditaments of all kinds, which are not annexed to the person, nor can be moved from the place where they subsist.

Division. We will consider the injuries to the right of personal property in possession, and then to personal property in action only.

FIRST. PERSONAL PROPERTY IN POSSESSION.

Two Kinds of Injuries. Two species of injuries, viz., the privation of that possession, and the abuse or damage of the chattels, while the possession continues in the legal owner. The former is dividable into the unlawful *taking* them away, and the unjust *detaining* them,though the original taking was lawful.

1. AN UNLAWFUL TAKING.

Occupancy and Transfer. The right of property in all external things being solely acquired by occupancy, and preserved and transferred by grants, deeds and wills, which are a

continuation of that occupancy, it follows, that when one has once gained a rightful possession of goods, either by a just occupancy or a legal transfer, whoever, either by fraud or force, dispossesses one of them, is guilty of a transgression against the law of society. For there must be an end of all commerce between man and man, unless private possession be secured from unjust invasions; and if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong, or most cunning, and the weak could never be secure of their possessions.

Remedy. One remedy is the restitution of the goods so wrongfully taken, with damages for the loss sustained, which is effected by the action of replevin.

REPLEVIN.

Identity of the Article. This and the action of detinue are almost the only actions, in which the actual specific possession of the identical personal chattels is restored to the proper owner. For things personal are of a nature so transitory and perishable, that it is for the most part impossible either to ascertain their identity, or to restore them in the same condition as when they came into the hands of the wrongful possessor. The law therefore contents itself generally, with rendering a pecuniary equivalent to the party injured, by giving him satisfaction in damages.

A Distress. But in the case of distress, the goods are from the first taking in the custody of the law, and not merely in that of the distrainor, and therefore they may not only be identified, but also restored to their first possessor, without any material change in their condition. And being thus in the custody of the law, the taking them back by force is an atrocious injury, and denominated a *rescous*, for which an action on the case may be brought, and if the distress was taken for rent, treble damages may be obtained. The term *rescous* is likewise applied to the forcible delivery of a prisoner from an officer on his way to prison, for which also an action on the case may be brought. The rescuer may also be punished by attachment.

Process by Replevin. The action is brought upon a distress taken wrongfully and without sufficient cause, being a redelivery 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 [illegible] adjudged against him, after which the distrainor may keep it till tender made of sufficient amends, but must then redeliver it to the owner. The statute directs, that (without suing out a writ in chancery, as was formerly done) the sheriff, immediately upon complaint to him made, shall proceed to replevy the goods. Upon application to the sheriff or his deputies, security is to be given, that the party replevying will pursue his action against the distrainor, and that, if the right be determined against him, he will return the distress against him, for which purpose he is bound to find pledges *de retorno habendo*.

Bond. Besides these pledges, the sufficiency of which is 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 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.

Object. As the end of all distresses is 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 occasion great inconvenience. The sheriff, on receiving such security, is immediately to cause the chattels taken in distress to be restored to the party distrained upon.

Distrainor's Claim to Goods. Where the distrainor claims a property in the goods so taken, the law allows him to keep them, without reference to the manner by which he has gained possession, being a kind of personal *remitter*. Where he does so claim, 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. If it be found in the distrainor, the sheriff can proceed no further, but must return the claim of property to the court, to be there further prosecuted, if thought advisable, and there finally determined.

The Act of Replevin. But if no claim of property be put in, or if the sheriff's inquest determine it against the distrainor, then the sheriff is to replevy the goods, making use even of force, if the distrainor resist, in case the goods be found in the county.

Goods Eloigned. But if the distress be carried out of the county or concealed, then the sheriff may return, that the goods or beasts are eloigned, carried to a distance, to places to him unknown, and thereupon the party replevying shall have a writ of *capias in withernam*, which signifies a second distress, in lieu of the distress formerly taken and eloigned. So that there is now distress against distress, one being to answer the other by way of reprisal, and as a punishment for the illegal behavior of the original distrainor. For which reason goods taken in *withernam* cannot be replevied, until the original distress is forthcoming.

Jurisdiction. 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. Either party may remove it to the superior courts of king's bench or common pleas, the plaintiff at pleasure, the defendant upon reasonable cause.

Freehold Involved. Where, in the proceedings, any right of freehold comes in question, the sheriff can proceed no further.

Avowry. Upon this action brought, and declaration delivered, the distrainor, who is now the defendant, may make avowry; that is, he avows taking the distress in his own or his wife's right, and sets forth the reasons of it, as for rent in arrears, damage done, or other causes.

Cognizance. 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 merits of this avowry or cognizance, the cause is determined.

Distress Unjust. If it be determined for the plaintiff that the distress was wrongfully taken, he has already gained possession of his goods, and shall keep them and may recover damages.

Distress Just. 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, which were distrained and then replevied, are returned to his custody, to be sold or otherwise disposed of, as if no replevin had been made.

Effect of Non-suit. The plaintiff, when nonsuited, cannot

sue out a fresh replevin, but he may have a second writ, termed a writ of second deliverance, in order to have the same distress again delivered to him, on giving the like security as before. But in case of distress for rent in arrears, the writ of second deliverance is in effect taken away by statute, which directs that if the plaintiff be nonsuit before issue joined, then, upon suggestion made upon the record in the nature of an avowry or cognizance, or if judgment be given against him on demurrer, without any such suggestion, the defendant may have a writ to inquire into the value of the distress by a jury, and shall recover the amount of it in damages. If less than the arrears of rent, or if more, then so much as shall assess such arrears with costs, or if the nonsuit be after issue joined, or if a verdict be against the plaintiff, then the jury shall assess such arrears against the defendant, and if the distress be insufficient to answer the arrears distrained for, the defendant may make further distresses.

Second Distress. If pending a replevin for a former distress, a man distrains again for the same rent, then the party is not driven to his action of replevin, but shall have a writ of recaption, and recover damages for the redistrainor's contempt of the process of law.

Damages. Other remedies for other unlawful taking of a man's goods consist only in recovering a satisfaction in damages. If one takes goods out of the actual or virtual possession of another, without lawful title so to do, it is an injury, 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, at his option, may have another remedy by an action of trover and conversion.

2. UNJUST DETAINER.

Original Taking Lawful. This may exist, even if the original taking was lawful.[1]

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[1] *Examples.* If I distrain another's cattle, damage *feasant*, and before they are impounded, he tenders me sufficient amends; now although the original taking was lawful, my subsequent detention of them after tender of amends was wrong, and he shall have an action of replevin against me to recover them, in which he shall recover damages for the detention only and not the caption, because the original taking was lawful. Or if I lend a man a horse, and he afterwards refuses to restore it, the injury consists in the detaining, not in the original taking, and the mode of recovering possession is by an action of detinue.

Detinue. One may recover possession of the property unlawfully detained, by an action of detinue. One must ascertain the thing detained, in such manner that it may be specifically known and recovered. It cannot be brought for money, corn and the like, for that is not distinguishable from other money and corn, unless it be corn in a marked sack.

Requisites in Actions of Detinue. 1. That the defendant came lawfully into possession of the goods, either by delivery to him or finding them. 2. That the plaintiff has a property. 3. That the goods have some value. 4. That they be ascertained in point of identity. Upon this the jury, if the verdict be for the plaintiff, assess the respective values of the parcels detained and also damages for detention. The judgment is conditional, that the plaintiff recover the said goods or their respective values, and also damages for detaining them.

TROVER AND CONVERSION.

Origin of the Action. Originally this was an action of trespass upon the case, for 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. By a fiction of law, actions of trover were finally 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 Conversion. The injury lies in the conversion, for any man may take into possession the goods of another, 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 also is, *prima facie*, sufficient evidence of a conversion. The fact of the finding or trover is therefore now totally immaterial, for the plaintiff need only suggest as a form, that he lost the goods, and that the defendant found them, and if he proves that the goods are his property, and that the defendant has 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.

Obvious Damage. Damage offered to things personal, while in the possession of the owner, as by taking from the value of a chattel, or making it of less value than before, is too obvious for explanation.

Two Forms of Action. Two remedies exist in law; by action of trespass *vi et armis*, where the act is in itself immediately injurious to another's property, and therefore necessarily accompanied by 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. Damages are obtainable in both suits in proportion to the injury to the property, and it is not material, whether the damage be done by the defendant himself, or by his servants under his direction; for the action will lie against the master as well as the servant.[1]

SECOND. THINGS IN ACTION.

Nature. These rights are founded on and arise from contracts, the nature and division of which were explained in the preceding volume.

Division of Contracts. Contracts express and contracts implied. We shall point out the injuries that arise from the violation of each, with their respective remedies.

Express Contracts. Express contracts include debts, covenants and promises.

1. DEBT.

Defined. This is a sum of money due by certain and express agreement, as by a bond for a fixed 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 action is debt, to compel the performance of the contract and recover the specified sum due. This is the shortest and surest remedy, particularly where the debt arises upon a specialty, that is, upon an instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain

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[1] *Example.* If a man keep a dog, accustomed to do mischief, as by worrying sheep, etc., the owner, cognizant of such habit, must answer for the consequence.

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 to a special action on the case, according to the nature of my contract.

Brought upon Specialties. Actions of debt are now seldom brought, but upon specialties, wherein the sum due is precisely expressed.

Damages pro tanto Only. Part Performance. 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 one is not confined to the precise demand stated in the declaration. For if any debt be proved less than the sum demanded, the law will raise a promise *pro tanto*, and the damages will be proportioned to the actual debt.[1] And even if the action is 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 the Writ. Debet and Detinet. It is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only. That is, it 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 another, 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. But if 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 for a horse, the writ shall be in the *detinet* only, for nothing but money, for which I or my ancestors in my name have personally contracted, is properly considered as my debt. A writ of debt in the *detinet* only for goods, is merely a writ of *detinue*, and followed by the same judgment.

2. COVENANT.

Defined. A covenant contained in a deed to do a direct act

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[1] In an action of debt, a plaintiff may prove and recover less than the sum demanded in the writ.

or to omit one, is another species of express contract, the violation or breach of which is a civil injury.

Language of the Writ. The remedy for this is by a writ of covenant, which directs the sheriff to command the defendant to keep his covenant with the plaintiff, without specifying its nature, or show good cause to the contrary; and if he does not, or the covenant is so broken, that it cannot now be specifically performed, then the subsequent proceedings should set forth with precision the covenant, the breach, and the loss which has happened thereby; whereupon the jury will give damages for the injury sustained by the plaintiff.

Covenant Real. This species differs from the rest. It is a covenant to convey or dispose of lands, which seems to be partly of a personal and partly of a real nature. The remedy for this is by a special writ of covenant for a specific performance of the contract, concerning certain lands described in the writ. It directs the sheriff to command the defendant, termed the deforciant, to keep the covenant made between the plaintiff and him, concerning the identical lands in question. On this process, fines are 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 these lands, for the completion of which contract he brings this action. And for the end of this difference, the fine is made, whereby the deforciant or cognizor, acknowledges the tenements to be the right of the plaintiff or cognizee.

Leases for Years. As these leases were formerly considered only as contracts or covenants for the enjoyment of rents, and not as the conveyance of any real interest in the land, the ancient remedy for the lessee, if ejected, 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.

Parties and Privies. At common law, no persons could 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 this, a statute was passed, giving the assignee of a reversion, after notice of such assignment, the same remedies against a particular tenant by entry or

action, for waste or other forfeitures, non-payment of rent and non-performance of covenants, as the assignor himself might have had, and also making him equally liable for acts agreed to be performed by the assignor, except in the case of warranty.

3. PROMISES.

Defined. 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 it be to do an 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 plaintiff; the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury is to settle.[1] So in the case of a simple contract, if the debtor promises to pay the debt, and does not, this breach of promise entitles the creditor to his action on the case, instead of being driven to his action of debt.

Promissory Note. A promissory note to pay money on a day certain is an express *assumpsit*, and the payee by common law or the endorsee by statute, may recover the value of the note in damages, if it be unpaid.

STATUTE OF FRAUDS.

Verbal Promise Insufficient. Some agreements, even if 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 the memory of witnesses, which sometimes induces perjury. To prevent this, the statute of frauds and perjuries enacts, that in the five following cases, no verbal promise will suffice to ground an action, but at the least some note or memorandum of such promise shall be made in writing, and signed by the party to be charged therewith.

Written Agreement Requisite. 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.*

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[1] As if a builder promises A, that he will build his house within a time limited, and fails to do it. A has an action on the case against the builder for this breach of his promise or *assumpsit*, and shall recover pecuniary satisfaction for the injury sustained by such delay.

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. *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.

IMPLIED CONTRACTS.

Defined. These 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.

First. Implied by the fundamental constitution of government.

Obligation as a Citizen. Every man is this case is a contracting party. Thus every one is bound, and has 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. It is a part of the original contract, entered into by all mankind, who partake of 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, becomes instantly a debt, which he has beforehand contracted to discharge.

Former Recovery. It is an implied agreement, that gives the plaintiff a right to institute a second action, founded merely on the general contract, in order to recover such damages or sum of money, as are assessed by the jury and adjudged by the court to be due by defendant to plaintiff in any former action. So if he has once obtained judgment for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an action of debt upon the judgment, and shall not be put upon the proof of the original cause of action, but upon showing the judgment once obtained, still in full force and unsatisfied, the law immediately implies, that by the original contract of society, the defendant has contracted a debt, and is bound to pay it. Since the disuse of real actions, actions of debt upon judgments in personal suits are seldom brought, as the costs are thereby doubled, owing to there being two suits.

Corporation Rules. Under an implied original contract

to submit to the rules of a community, whereof we are members, a forfeiture imposed by the by-laws and private ordinances of a corporation upon any that belong to the body immediately creates a debt in the eye of the law, and such forfeiture unpaid works an injury to the party entitled to receive it, for which the remedy is by an action of debt.

Penal Statutes. The same rule may be applied to penal statutes, whereby forfeiture is inflicted for transgressing the provisions of an act. The party offending is bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture to such persons, as the law requires. The application of the forfeiture is either to the party aggrieved, or else to any of the king's subjects in general.

Forfeitures and Penalties. Usually these forfeitures, created by statute, are given at large to any common informer, or in other words, to any one who will sue for the same. These actions are termed popular actions, because they are given to the people in general.[1]

Qui tam Action. Sometimes one part is given to the king, to the poor or to some public use, and the other part to the informer or prosecutor, and then the suit is called a *qui tam* action, because it is brought by a person *qui tam pro domino rege.* If the king commences the suit, he shall have the whole forfeiture. But if any one has begun a *qui tam* action, no other person can pursue it, and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even on the king himself.

Collusive Action. To prevent the friends of the offenders bringing a suit to forestall other actions, the statute enacts, that no recovery, otherwise than by verdict, obtained by collusion in an action popular, shall be a bar to any other action prosecuted *bona fide.* There was a provision of the Roman law, that if a person was acquitted of any accusation, merely by the prevarication of the accuser, a new prosecution could be commenced against him.

Second. Implied from natural reason and the just construction of law.

What it Includes. This contract does not arise from the

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[1] *Example.* Of the former sort, is the forfeiture inflicted upon the hundred, wherein a man is robbed, which is meant to compel the hundredors to pursue the felon, for if they take him they stand excused. Otherwise the party robbed is entitled to prosecute them by special action on the case for damages.

express determination of any court, or the positive direction of any statute, but from natural reason, and the just and true construction of law. It 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 has engaged to perform, what his duty or what justice requires.

1. **Quantum Meruit.** If a man employs another to transact any business for him, or to perform any work, the law implies that he undertook or assumed to pay him as much as his labor deserved. If not paid, the latter has his remedy by an action on the case upon this implied *assumpsit*, wherein he may suggest that the party promised to pay him as much as he reasonably deserved, and then aver, that his labor was worth such a particular sum, which the defendant has omitted to pay, But this valuation is submitted to the determination of the jury, who will assess such a sum in damages, as they think he merited. This is called an *assumpsit* on a *quantum meruit.*

2. **Quantum Valebat.** This is similar to the former, being only where one takes goods of a tradesman, without expressly agreeing for the price. 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, if the vendee refuse to pay that value.

3. **Money Received by Mistake, or for Use.** Where one has received money belonging to another, without any valuable consideration given therefor, an implied contract to pay over exists. The law construes this to be money 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 owner. If he unjustly detains it, an action on the case lies against him for the breach of such implied promise, and he will be made to repay the owner in damages, equivalent to what he has detained in violation of his promise. This is a very extensive and beneficial remedy, applicable to almost every case, where the defendant has received money which 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 any undue advantage is taken of the plaintiff's situation.

4. **Money Expended for Another's Use.** Where one has

expended money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on the *assumpsit.*

5. **Insimul Computissent.** This action is on a stated account between two merchants or other persons, in which 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. The action, which is on the case, decla s that the plaintiff and defendant had settled their accounts together (*insimul computissent*), and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it.

Action of Account. If no account has been made up, then the legal remedy is by bringing a writ of account, commanding the defendant to render a just account to the plaintiff, or show good cause to the court to the contrary. In this action, if the plaintiff succeeds, there will be two judgments: the first, that the defendant do account (*quod computet*) before auditors appointed by the court, and when the amount is ascertained, the second judgment is, that he do pay the plaintiff so much as he is found in arrear. By statute, it may also be brought against executors and administrators, as well as against the parties themselves. These actions of account are now seldom instituted, as it is found that the more effectual and prompt way is by bill in equity, where a discovery may be made on the defendant's oath, without relying merely on the evidence, which the plaintiff may be able to produce. When, however, an account is once stated, nothing is more common than an action upon the implied *assumpsit* to pay the balance.

6. **Liability for Negligence.** It is inferred, that every one who undertakes any office, employment, trust or duty, contracts with those who employ him, to perform it with integrity, diligence and skill. And if by his want of one of these qualities, any injury accrues to individuals, they have their remedy in damages by a special action on the case.[1] An attorney, who betrays the

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[1] *Example.* If a public officer is guilty of neglect of duty or a palpable breach of it, of non-feasance or mis-feasance, as if the sheriff does not execute a writ or makes a false return. If a sheriff or jailer suffer a debtor to escape *pendente lite*, he is liable in an action on the case. But if after judgment, the escape thus takes place, the debtor being charged in execution for a certain sum, the officer is compellable in an action of debt, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand.

cause of his client, or being retained, neglects to appear at the trial, by which the cause miscarries, is liable to an action on the case for a reparation to his client. There is in law an implied contract with an innkeeper to secure his guest's goods in his inn; with a common carrier to be answerable for the goods he carries; with a farrier, that he shoes his horse well, without laming him; with a workman that he performs his business in a workmanlike manner; *aliter*, an action on the case lies for damages for breach of their undertaking. If an innkeeper opens his house for travellers and exposes his sign, it is an implied engagement to entertain all travellers, and an action on the case will lie against him for damages, if without good reason he refuses to admit a traveller.

Where Special Agreement Required. But if one employs a person to transact any of these concerns, whose business it is not, the law implies no such general undertaking, but in order to charge him with damages, a special agreement is required.

Fraud. If 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 will lie for damages, upon the implied contract, that every transaction is fair and honest.

Warranty. In contracts for sales, it is understood that the seller undertakes that the thing sold is his own. If it proves otherwise, an action on the case lies against him to exact damages for this deceit. In contracts for provisions, it is implied that they are wholesome. Where a man sells anything, warranting it to be good, the law annexes a tacit contract, that if it be not so, he shall compensate the buyer, else it is an injury, for which an action on the case for damages will lie. The warranty must be upon the sale, for if made after, and not at the time of the sale, it is void, for it is then made without consideration, neither does the buyer then take the goods upon the credit of the vendor.

Relates to Things in Being. The warranty can only reach to things in being at the time the warranty is made, and not to things *in futuro*, as that a horse is sound at the time of the sale, not that he will be sound a year hence. But if the vendor knew the horse or goods to be unsound, or in a shape different from what he represents them to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness.

Plain Defects. A general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses, as if a horse is warranted perfect, and lacks his tail or an ear, unless the buyer be blind. But if the horse lacks the sight of one eye, yet as the discernment of such defect is often a matter of skill, an action on the case will lie for damages for this imposition. And if cloth be warranted to be of such a length, which it is not, an action the case will lie for damages, for that cannot be discerned by sight, but only by a collateral proof, by measuring it.

Action of Deceit. This is an additional remedy to give damages in some particular cases of fraud, and principally, where one man does any thing 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 non-suit, whereby the plaintiff becomes liable for costs, or where one obtains or suffers a fraudulent recovery of lands or chattels, to the prejudice of him who has right. Also when by collusion, the attorney of the tenant makes default in a real action, or where the sheriff returns, that the tenant was summoned when he was not, and in either case he loses the land, a writ of deceit lies against the demandant, and also the attorney, or the sheriff and his officers. It also lies in cases of warranty and of other personal injuries committed contrary to good faith and honesty. But an action on the case for damages, in the nature of a writ of deceit, is more usually brought on these occasions.

CHAPTER X.—OUSTER OF THE FREEHOLD.

PREAMBLE.

Injuries to the Realty. There are six real injuries, or injuries which affect real rights, to wit:

1. *Ouster.*
2. *Trespass.*
3. *Nuisance.*
4. *Waste.*
5. *Subtraction.*
6. *Disturbance.*

OUSTER.

Defined. Ouster, or dispossession, is an injury that carries with it the amotion of possession, for thereby the wrong-doer acquires the actual occupation of land, and obliges the rightful

owner to seek his legal remedy, in order to gain possession, and damages for the injury sustained. Ouster may be either of the freehold or of chattels real.

Of the Freehold. This ouster is effected by: *Abatement. Intrusion. Disseisin. Discontinuance. Deforcement.*

1. ABATEMENT.

Defined. This is where one dies seised of an inheritance, and before the heir or devisee enters, a stranger, without right, makes entry, and gets possession of the freehold. This entry is termed an abatement, and he himself is called an abator. The term means a beating down, and is derived from the French.

Used in Three Senses. It is used in three senses: Abating or beating down a nuisance; abating a writ or action, signifying the defeat of such writ, by some fatal exception to it; and abatement, as set forth in this chapter, 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.

Occupancy of a Decedent's Estate. This is somewhat similar to an immediate occupancy in a state of nature, which is effected by taking possession of the land, the instant the prior occupant, by his death, relinquishes it. This is opposed to the law of society, and the law of England, which for the preservation of peace, has prohibited, as far as possible, all acquisitions by mere occupancy, and has directed that lands on the death of the present possessor should immediately vest, either in some person expressly named and appointed by the deceased as his devisee, or in default of such appointment, in such of his next relations, as the law has selected as his heirs at law. Every entry therefore 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 greatest injuries to the right of real property.

2. INTRUSION.

Defined. This is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. It happens where a life tenant dies seised of certain lands, and a stranger enters thereon, after such death of the tenant, and before any entry of him in remainder or reversion.

Differs from Abatement. An abatement is always to the

prejudice of the heir or immediate devisee; an intrusion is to the prejudice of him in remainder or reversion.[1] 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.

3. DISSEISIN.

Defined and Distinguished. This is a wrongful putting out of him who is seised of the freehold. The two former species of injury were by a wrongful entry, where the possession was vacant; but this is an attack upon him who is in actual possession, and the turning him out of it. Those were an ouster from a freehold in law; this is an ouster from a freehold in deed.

Corporeal and Incorporeal. Disseisin may be effected either in corporeal inheritances or incorporeal. Disseisin of things corporeal, as of houses and lands, must be by entry and actual dispossession of the freehold, as if a man enters either by force or fraud into the house of another, and turns or at least keeps him out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession, for the subject is not capable of actual bodily possession, but it depends on their respective natures and various kinds, being generally nothing more than a disturbance of the owner in the means of coming at or enjoying them.

Freehold Rent. Ancient law books mentioned five methods of working a disseisin with regard to freehold rent: 1. By enclosing the land, and thus preventing distraint. 2. By forestaller, by which the lessor is frightened off. 3. By rescous, which forcibly retakes a distress, or prevents one being made. 4. By replevin of the distress. 5. By denial, where the rent is not paid on demand. All of these amount to a disseisin of rent, that is, they wrongfully put the owner out of the only possession, of which the subject matter is capable, namely the receipt of it. All these disseisins of hereditaments incorporeal, are only so at the election of the party injured, if for the sake of more easily trying the right, he is pleased to suppose himself disseised.

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[1] *Example.* If A dies seised of lands in fee simple, and before the entry of B his heir, C enters thereon, it is abatement, but if A be tenant for life, with remainder to B in fee simple, and after the death of A, C enters, this is intrusion.

Fiction of Law. And so too, even in corporeal hereditaments, a man may frequently suppose himself to be disseised, when he is not so in fact, for the sake of entitling himself to the more easy remedy of an assize of novel disseisin, instead of the more tedious process of a writ of entry.

Feudal Law of Disseisin. The true injury of compulsory disseisin seems to be that of dispossessing the tenant, and substituting one-self to be the tenant in his stead, in order to effect which in feudal times, the consent of the lord, who alone could change the seisin, was necessary. Subsequently no regard was had to the lord's concurrence in the claim of the dispossessor, but the latter was considered as the sole disseisor, and this wrong was then allowed to be remedied by entry only, without any form of law, as against the disseisor himself, but required a legal process against his heir or alienee. When the remedy by assize was introduced, the facility induced those who were wrongfully dispossessed, to feign themselves to be disseised, merely for the sake of the remedy.

Entry Unlawful in above Cases. These three species of injury are such, wherein the entry of the tenant *ab initio*, as well as the continuance of his possession, 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 the possession afterwards.

4. DISCONTINUANCE.

When it Occurs. This happens, when he who has an estate-tail makes 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.

Tenant in Tail. As if a tenant in tail makes a feoffment in fee-simple, or for the life of the feoffee or in tail, which acts are beyond his power, for he can only make a lease for his own life; in such case the entry of the feoffee is lawful during the life of the feoffor. But if he retains possession after the death of the feoffor, it is an injury, which is termed a discontinuance; the ancient legal estate, which ought to have survived to the heir in tail being gone, or for a while discontinued. For on the death of the alienors, neither the heir in tail, nor they in remainder or reversion expectant on the determination of the estate tail, can enter on and possess the lands so alienated.

5. DEFORCEMENT.

Defined and Distinguished. This is the holding of any lands to which another person has a right. The original entry was legal, but the detainer has become unlawful.

It Is a Nomen Generalissimum. It includes an abatement, an intrusion, a disseisin or a discontinuance, as well as any other species of wrong whatsoever, whereby he, who has 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 who has the right of property, but never had possession under that right. So that whatever injury (withholding the possession of a freehold), is not included under one of the former heads, is comprised under this of deforcement.

The Remedy. This, in injuries by ouster, is universally the restitution and delivery of possession to the right owner, and, in some cases, damages also for the unjust amotion.

Remedy by Entry. This is done by the legal owner, when another person, who has no right, has previously taken possession of lands. In this case, the party entitled may make a formal but peaceable entry thereon, declaring that thereby he takes possession, 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 fear or menaces, he may make claim as near to the estate as he can, with like form, which claim is in force for a year and a day, when it must be repeated at every such period. Such entry gives a man seisin, puts him into immediate possession, and thereby makes him complete owner, and capable of conveying it by descent or purchase.[1]

Entry, when Available. This remedy takes place in only

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[1] But now by statute, no person shall be deemed in possession of land, merely by reason of having made an entry thereon, and no continual or other claim upon or near any land shall preserve any right of making an entry. By the statute, a bare entry on land has no effect whatever, unless there be a change of possession. When this takes place, the remedy by entry is still in operation; when not, an entry is of no avail, and this remedy no longer exists.—*Stewart.*

three of the five species of ouster, viz., abatement, intrusion and disseisin, for as in these the original entry was unlawful, they may therefore be remedied by the mere entry of him who has right. But upon a discontinuance or deforcement, the owner cannot enter, but is driven to his action, for the original entry being lawful, and hence an apparent right of possession gained, the law will not suffer that to be overthrown by the mere act or entry of the claimant. Yet a man may enter where the tenancy is by sufferance, for such tenant has but a bare possession, which may he defeated, like a tenancy at will, by the mere entry of the owner.

Entry taken away by Descent. Descents, which take away entries, are, where any one, seised of the inheritance of a corporeal hereditament, dies, whereby the same descends to his heir. In this case, however feeble the right of the ancestor may be, the entry of any other person, who claims a right to the freehold is taken away, and he cannot recover possession against the heir by this summary method, but is driven to his action to gain a legal seisin of the estate. The reasons are, because the heir comes to his estate by act of law, and not by his own act; the law therefore protects his title, and will not suffer his possession to be divested, till the claimant has proved a better right; also, because the heir may not know the true state of his title, and lastly, it is agreeable to the dictates of reason. It was well adapted to the military spirit of the feudal tenures, by protecting the rights of the heirs of absent feudatories.

Property and the Right of Property. In every complete title to lands, two things are necessary: the possession or seisin, and the right or property therein. If the possession be severed from the property, if A has the right of property; and B has unlawful possession, this is an injury to A, which the law remedies, by putting him in possession by different means, according to circumstances.

Entry Suffices. Thus as B the wrong-doer has only a naked possession, without any shadow of right, A who has both the right of property and the right of possession may put an end to his title at once, by the summary method of entry.

Result of Death of Wrong Doer. But if B dies seised of the lands, then B's heir advances one step further towards a good title; he has not only a naked possession, but also an apparent right of possession. The law presumes that the possession,

which is transmitted from the ancestor to the heir, is a rightful possession, until the contrary be shown, and therefore the mere entry of A is not allowed to evict the heir of B, but A is driven to his action at law to remove the possession of the heir, though his entry alone would have dispossessed his ancestor.

Legal Disabilities Protect. As a rule, no man can recover possession by mere entry on lands, which another has by descent. This rule has exceptions, as where the claimant was under legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity or absence from the country, in which cases there are no laches in the claimant, and therefore no descent shall bar his entry.

Limitation. If any person disseises or turns another out of possession, no descent to the heir of the disseisor shall take away the entry of him who has a right to the land, unless the disseisor had peaceable possession five years next after the disseisin. But the statute does not extend to any feoffee or donee of the disseisor. No entry shall be made upon lands, unless within twenty years after the right shall accrue. No entry shall be of force to satisfy the statute of limitations or to avoid a fine levied of lands, unless an action be thereupon commenced within one year thereafter, and prosecuted with effect.[1]

Estate Tail. When the tenant in tail alienes the lands entailed, this takes away the entry of the issue in tail, and drives him to his action in law to recover the possession. The law will not suppose, without proof, that the ancestor of him in possession acquired the estate by wrong, and therefore after five years peaceable possession and a descent cast, will not suffer the possession of the heir to be disturbed by mere entry without action. Besides the alienee, who came into possession by a lawful conveyance, which was at least good for the life of the alienor, has not only a bare possession, but an apparent right of possession, which is not allowed to be divested by the mere entry of the claimant. Courts go as far as they can to make estates tail alienable, by declaring such alienations to be voidable only, and not absolutely void.

Deforcement. Where the deforciant had originally a lawful possession of the land, but now detains it wrongfully, he still

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[1] By statute, one period of limitation, to wit: twenty years, is established for all lands and rents.

continues to have the presumptive *prima facie* evidence of right, that is, possession lawfully gained. This shall not be overturned by the mere entry of another.

Entry must be Peaceable. It must not be made with force, 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 wrong is remedied by immediate restitution, the criminal is punishable by fine.

Forcible Entry. For by statute, on complaint to any justice of the peace, of a forcible entry on lands or tenements, or a forcible detainer after a peaceable entry, he shall try the truth, and upon force found, shall restore the possession to the party so put out, and in such case, or if any alienation be made to defraud the possessor of his right, which is declared void, the offender shall forfeit, for the force found, treble damages to the party aggrieved, and pay a fine to the king. But this does not extend to such as endeavor to keep possession *manu forti*, after three years peaceable enjoyment of themselves or their ancestors, or those under whom they claim.

Apparent Right of Possession. Next follow another class, who differ from those who have mere possession, without the shadow of right. These parties have not only a bare possession, but also an apparent right of possession, which cannot be removed but by orderly course of law, in which it must be shown, that though a party has possession, and therefore the presumptive right, yet there is a right of possession superior to his, residing in him who brings the action.

Remedies. By writs of entry and assize, which are actions merely possessory.[1] They decide nothing with respect to the right of property, only restoring the demandant to the position, he had before he was dispossessed. But the title to lands is now usually tried in actions of ejectment or trespass.

CHAPTER XI.—OUSTER OF CHATTELS REAL.

Ouster from Estates held by Statute, Recognizance or Elegit. This amotion of possession is only liable to happen

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[1] These writs were abolished by statute.

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. Coke observes, that these tenants hold their estates, *ut liberum tenementum*, until their debts are paid.

Ouster from an Estate for Years. A disseisin or ejection of the tenant from the occupation of the land during the continuance of the term. The law provides two remedies, according to the circumstances and situation of the wrong doer, the writ of *ejectione firmae*, which lies against the wrong doer himself, 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, and recover restitution of the term of years, as well as damages for the ouster or wrong. The latter writ has fallen into disuse.

EJECTMENT.

Where it Lies. It lies, where lands or tenements are let for a term of years, and afterwards the lessor, reversioner, remainderman, or any stranger, ejects or ousts 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.

Its History. Since the disuse of real actions, this mixed proceeding has become the common method of trying the title to lands or tenements. The writ of covenant, for breach of the contract contained in the lease for years, was anciently the only specific remedy for recovering against the lessor a term from which he had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger, claiming under a title superior to that of the lessor, or by a grantee of the reversion, though the lessee might still maintain an action of covenant against the lessor for non-performance of his contract or lease, yet he could not recover the term itself. If the ouster was committed by a mere stranger, without any title to the land, the lessor by a real action might indeed recover possession of the freehold, but the lessee had no other remedy against the ejector but in damages, by a writ of *ejectione firmae* for the trespass committed, in ejecting him. But afterwards, when the courts of equity began to oblige the ejector to make a specific restitution

of the land to the party immediately injured, the courts of law adopted the same method, and in the prosecution of a writ of ejectment, introduced a species of remedy not warranted by the original writ, nor prayed by the declaration, a judgment to recover the term, and a writ of possession thereupon.

To Test Title. This remedy by ejectment, is, in its origin, an action brought by one who has a lease for years, to repair the injury done him by dispossession. To convert it into a method of trying title to the freehold, it was first necessary for the claimant to take possession of the lands, to empower him to constitute a lessee for years, who may be capable of receiving this injury of dispossession. For it would be an offence, called maintenance, to convey a title to another, when the grantor is not in possession of the land. When, therefore, a person, who has the right of entry into lands, determines to acquire that possession, which is wrongfully withheld by the present tenant, he makes a formal entry on the premises, and being so in possession of the soil, he there, upon the land, seals and delivers a lease 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 by accident or agreement, comes upon the land, and ejects him.

Tenant in Possession. For this injury, the lessee is entitled to his action of ejectment against the tenant, or this casual ejector, whoever it was that ousted him, to recover back his term and damages. But where this action is brought against such casual ejector, 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.

Notice. Wherefore it is a rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession, if any there be, and without making him a defendant, if he please.

Four Points must be Proven. Title, lease, entry and ouster. He must show a good title in his lessor, and that the lessor, being seised by virtue of such title, did make him a lease for the present term; that he the lessee or plaintiff did enter or take possession by virtue of said lease; and lastly, that the defendant ousted or ejected him.

Writ of Possession. 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 to him the undisturbed and peaceable possession of his term.

Later Mode of Action. 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.[1]

Damages. The damages recovered in these actions are now usually inadequate, being a shilling or nominal sum.

Action for Mesne Profits. In order to complete the remedy, when the possession has been long detained, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits, which the tenant in possession has wrongfully received. This action may be brought ir the name of either the nominal plaintiff in the ejectment, or his lessor, against the tenant in possession, whether he be made a party to the ejectment, or suffers judgment 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 he sues for antecedent profits, the defendant may make a new defence.

Advantages of this Form of Action. Such is the modern way of bringing obliquely in question the title to lands and tenements, in order to try it in this collateral manner, a method now universally adopted. It is adapted to try the mere possessory title to an estate, and has succeeded real actions, as being infinitely more convenient, because the form of the proceeding being fictitious, it is in the power of the court to direct the application of that fiction, so as to prevent fraud. The parties can thus go to trial on the merits, without being entangled in the nicety of pleading on either side.

Not Always Adequate. The writ of ejectment is not an

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[1] The procedure act of 1852 changed all this, and the former action of ejectment has given way to the new procedure. In the United States, ejectment is usually commenced, after writ issued, by filing a declaration or complaint, setting forth, that the plaintiff is entitled to the premises, describing them, and that defendant unlawfully withholds the same. A copy is served upon the defendant, who pleads or answers, or judgment by default is taken. Sometimes parties not in possession may be added. Generally a defeated party may have a second trial. Damages may be given in the same suit.—*Cooley.*

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 parties. It will not lie of an advowson, a rent, a common or other incorporeal hereditament, except for certain tithes, nor will it lie, where the entry of him that has right is taken away by descent, discontinuance, twenty years dispossession or otherwise.

Recovery of Possession for Non-payment of Rent. This action of ejectment is however rendered a very easy and expeditious remedy for landlords, whose tenants are in arrears, by statute, which enacts, that every landlord, who has by his lease, a right of re-entry in case of non-payment of rent, when half a year's rent is due, and no sufficient distress is to be had, may serve a declaration in ejectment on his tenant, or fix the same upon some notorious part of his premises, which shall be valid, without any formal re-entry or previous demand of rent. A recovery in such ejectment shall be final, both in law and equity, unless the rent and all costs be paid or tendered within six months.

CHAPTER XII.—TRESPASS.

As to Real Property. This injury may be offered to a man's real property, without any amotion from it.

Defined and Distinguished. Trespass, in its largest sense, signifies any offence against the law, whether it relates to a man's person or to his property. Beating another is trespass, for which an action *vi et armis* will lie. Taking or detaining a man's goods is trespass, for which an action *vi et armis*, or on the case, or of trover and conversion will lie; so also non-performance of promises is a trespass, on which an action on the case or *assumpsit* is grounded, and in general, the misfeasance or act of one man, whereby another is injuriously treated or damnified, is a trespass. Where such act is directly and immediately injurious to the person or property of another, and therefore necessarily accompanied with some force, an action of trespass *vi et armis* will lie, but if the injury is only consequential, a special action of trespass on the case may be brought.

Unwarrantable Entry. In the limited sense, we are at present to consider it, it signifies no more than an entry on another man's land without lawful authority, and doing some damage, however inconsiderable, to his real property. The right of *meum* and *tuum*, or property in lands, being once established, is exclusive; that is that the owner may retain to himself the sole use and occupation of his soil. Every entry thereon, without the owner's leave, is a trespass. The Roman laws made an express prohibition necessary to constitute this injury, but the law of England does not wait for this, but treats every entry without the owner's permission on another's land as an injury, for which an action of trespass will lie, but determines the *quantum* of that satisfaction, by considering how far the offence was wilful or inadvertent, and by estimating the value of the damage sustained.

Quare Clausum Fregit. For such unwarrantable entry, the writ commands 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. Every such entry carries with it some damages, even if no special loss can be assigned. The writ specifies one general damage, the treading down and bruising the herbage.

Plaintiff's Requisites. One must have a property, either absolute or temporary, and actual possession by entry, to be able to maintain an action of trespass, or at least, it is requisite that he have a lease and possession of the herbage of the land. An heir before entry cannot have this action against an abator, though a disseisee may have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seised of the land; but he cannot have it for any act done after the disseisin, until he has gained possession by a re-entry, when he may maintain it for the intermediate damage done; for after his re-entry, the law supposes the freehold to have all along continued in him.

Trespassers. But now by statute, if a guardian or trustee of an infant, a husband seised *jure uxoris*, or a person having an estate determinable upon a life or lives, shall after the determination of their respective interests, hold over and continue in possession of the lands, without the consent of the person entitled thereto, they are adjudged to be trespassers, and any reversioner or remainder man, expectant on any life estate, may once in every year, by motion in the court of chancery, procure

the *cestui que vie* to be produced by the tenant to the land, or may enter thereon in case of his refusal or wilful neglect.

Wrongful Holding Over. In case, after the determination of any term of life or years, any one shall wilfully hold over the same, the lessor or reversioner is entitled to recover by action of debt, either at the rate of double the annual value of the premises, where he has demanded, and given written notice to the tenant to deliver possession, or else double the usual rent, in case the notice of quitting proceeds from the tenant himself, having power to determine his lease, and he afterwards neglects to carry such notice into execution.

Cattle Trespassing. A man is answerable not only for 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 tread down the herbage and spoil the grain or trees, this is a trespass, for which the owner must answer in damages. The party injured has a double remedy; by distraining the cattle thus damage *feasant*, or doing damage, till the owner shall render him satisfaction, or else by leaving him to the common remedy, by action.

Trespass vi et Armis, In either of these cases of trespass on another man's land, either by himself or by his cattle, the action is trespass *vi et armis*, for the law always couples the idea of force with that of intrusion upon the property of another. If the unwarranted trespass be proved, the jury should assess the damages.

Continuing Trespasses. In trespasses of a permanent nature, where the injury is continually renewed, as by cattle consuming herbage, the declaration may allege a continuing injury, and the plaintiff shall not be compelled to bring separate actions for every day's separate offence. 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 number of trees, they may be laid to be done, not continually, but at divers days and times within a given period

Justifiable Trespass. In some cases trespass is justifiable, or rather entry on another's land not 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. So a man

may enter an inn, without leave of the owner first specially asked. So a landlord may enter to distrain for rent, a commoner to attend his cattle, commoning on another's land, and a reversioner, to see if waste be committed.

Misbehavior of Intruder. But where a man misbehaves, or makes an ill use of the authority the law gives him, he shall be accounted a trespasser *ab initio;* as if one enters an inn, and will not depart in reasonable time, but tarries against the owner's wishes; this wrongful act shall have relation back even to the first entry, and make the whole a trespass.

Nonfeasance. A bare nonfeasance, as not paying for the wine he ordered, will not make him a trespasser, for this is only a breach of contract, for which an action of debt or *assumpsit* will lie.

Subsequent Irregularity. But by statute, no subsequent irregularity of the landlord shall make the first entry a trespass, but the party injured shall have a special action on the case, for the real specific injury sustained, unless tender of amends has been made.

Trespasser ab Initio. But still, if a reversioner, who enters on pretence 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, the law adjudges that he entered for this unlawful purpose, and as the act is a trespass, he shall be esteemed a trespasser *ab initio.*

Defences. A man may also justify in an action of trespass, on account of the freehold, and that the right of entry is in himself; and this defence brings the title of the estate in question.

Trespass and Ejectment Distinguished. This is one way, since the disuse of real actions, to try the property of estates; though it is not so usual, as that of ejectment, because that, being now a mixed action, not only gives damages for 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.

Trifling Suits. Limit as to Costs. To prevent trifling and vexatious actions of trespass, as well as other personal actions, it has been enacted, that where the jury, who try an action of trespass, give less damages than forty shillings, the plain-

tiff shall be allowed no more costs than damages, unless the judge shall certify under his hand, that the freehold or title of the land came chiefly in question. There is an exception, where the trespass is shown to have been wilful and malicious, and it be so certified by the judge, in which case the plaintiff shall recover full costs.

Wilful and Malicious. Every trespass is wilful, where the defendant has notice, and is forewarned not to come upon the land, as every trespass, though slight, is malicious, where the intent of the party plainly appears to be to harass and distress the plaintiff.

CHAPTER XIII.—NUISANCE.

Defined. The word nuisance signifies anything that works hurt, inconvenience or damage. Nuisances are of two kinds, public or common nuisances, which affect the public, and hence belong to public wrongs, or crimes and misdemeanors; and private nuisances, which are anything done to the hurt or annoyance of the lands, tenements or hereditaments of another. Nuisances are of two kinds: affecting corporeal inheritances and incorporeal inheritances.

I. AS TO CORPOREAL INHERITANCES.

Projecting Roof. If a man builds his house so close to mine, that his roof overhangs my roof, and throws the water off his roof upon mine, it is a nuisance, for which an action will lie.

Stopping Ancient Lights. To erect a building so near to mine, that it obstructs my ancient windows, is a nuisance. The windows must have subsisted a long time without interruption, otherwise no injury is done. For he has as much right as I to build a new edifice, as every man has a right to build what he pleases, and as high as he will on his own soil, so as not to prejudice what has long been enjoyed by another; but it is folly to build so near the grounds of another.

Corrupting the Air with Noisome Smells. Light and air are indispensable requisites to every dwelling. No one has a right to keep his hogs so near the house of another, that the

stench incommodes him. Nor can he set up and practice there an offensive trade, which should be exercised in remote places. This therefore is an actionable nuisance.[1]

When not Actionable. But depriving one of a mere matter of pleasure, as of a fine prospect, by building a wall or the like, as it abridges nothing really convenient or necessary, is no injury, and hence not an actionable nuisance.

Running Water. It is a nuisance to stop or divert water, that runs to another's meadow or mill, or to corrupt or poison a water-course, by erecting a dye house or lime pit in the upper part of the stream, or in short to do any act therein, that in its consequences must necessarily prejudice one's neighbor.

2. AS TO INCORPOREAL HEREDITAMENTS.

Examples. The law displays the same equity as in the preceding case. If I have a way annexed to my estate across another's land, and he obstructs my use of it by placing logs across it or ploughing it up, it is a nuisance. Also if I am entitled to hold a market, and another person sets up a market so near mine, that he does me injury, it is a nuisance to the freehold I have in my market. The questions of time and distance are to be considered. So where an ancient ferry exists. It is not a nuisance to erect a mill near mine, which draws away custom, unless the water be intercepted. Nor is it a nuisance to set up any trade or school in a neighborhood or rivalship with another, for by such emulation, the public are likely to be gainers. If it occasion damage, it is *damnum absque injuria*.

REMEDIES.

Public Nuisances. 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, no one can assign his particular portion of it, or if he could, it would be hard, if every subject could harass the offender with a separate action. No person, natural or corporate, can have an action for a public nuisance or punish it. This rule admits of a single exception, where a private person suffers some extraordinary damage beyond the rest

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[1] So erecting a smelting house for lead so near another's land, that the vapor kills his grain or damages his cattle. Or if a man neglects to clean a ditch, which he ought to do, and my lands are overflowed as a result.

of the king's subjects by a public nuisance, in which case he shall have a private satisfaction by action.[1]

Abatement by an Individual. If a man has abated or removed a nuisance, which offended him, he is entitled to no action. He had choice of two remedies: either to abate it himself, by his own act and authority, or by suit, in which he may recover damages, and remove it by aid of the law. Having elected either remedy, he is totally precluded from the other.[2]

Action for Damages. This is a suit for damages, in which the party injured recovers damages for the injury sustained, but cannot thereby remove the nuisance. As every continuance of a nuisance is held to be a fresh offence, therefore a new action will lie, and exemplary damages probably be given, if after one verdict against him, the defendant has the hardiness to continue it.

Who may Sue and be Sued. In this action on the case to recover damages, it is not necessary, that the freehold should be in the plaintiff and defendant respectively, as in real actions, but it is maintainable by one who has possession only against another that has like possession.

Forcible Abatement. If a man is obstinate, and prefers rather to pay damages than abate the nuisance, recourse may be had to the old remedies, which will effectually conquer the defendant's perverseness, by sending the sheriff with his *posse comitatus* to level it.

CHAPTER XIV.—WASTE.

Defined. Waste is destruction in lands and tenements. It is a spoiling of an 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. This *vastum* or waste is either voluntary or permissive, the one by an actual and designed demolition, the other arising from mere neg-

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[1] *Example.* As if by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer injury by falling therein.

[2] In the United States, he has also a preventive remedy by writ of injunction in the courts of equity. A man is not barred of an action of damages in the States by abating the nuisance.

ligence, and want of sufficient care in repairs, fences and the like. We must show to whom this waste is an injury, and who is entitled to any, and what remedy by action.

1. **Persons Injured.** These are they, who have some interest in the estate wasted.

Fee Simple Estate. If a man be the tenant in fee simple, without any encumbrance on the premises, he may commit whatever waste he pleases, without being accountable to any one. And though his heir will be the sufferer, yet *nemo est haeres viventis;* for no man is certain of succeeding him, as death is uncertain, or he may alien or devise his estate to whom he please, and may thus disinherit his heir at law. The waste in such case is *damnum absque injuria.*

Right of Common. 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. If the owner demolishes the whole wood, and thus destroys the power of taking estovers, this is an injury to the commoner, amounting to a disseisin of his common of estovers, for which he had his remedy formerly by assize, but now by an action on the case to recover damages for the waste of the woods, out of which his estovers were to issue.

Remainder Men and Reversioners. The most important interest affected is that of him who has the remainder or reversion of the inheritance, after a particular estate for life or years in being. Here if the particular tenant commits or suffers waste, it is a manifest injury to him that has the inheritance, as it tends to dismember it of its principal incidents and ornaments, among which timber and houses are the most important. The law has given an adequate remedy to him in remainder or reversion, to whom the inheritance appertains in expectancy. For he, who has the remainder for life only, is not entitled to sue for waste, since his interest may never perhaps come into possession, and then he has suffered no injury.[1]

2. **Redress.** Two kinds. Preventive and corrective. The former remedy is by a writ of estrepment, which is a French term, meaning waste; the latter, by that of waste.[2]

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[1] But a parson or vicar may sue for waste, where he is seised, in right of his church, of any remainder or reversion.

[2] Both these writs are now abolished. The remedy to recover damages is by an action on the case; and to recover possession, by ejectment.

Injunction. The courts of equity, upon bill exhibited, complaining of waste and destruction, will grant an injunction to stay waste, until the defendant shall have put in his answer, and the court shall thereupon make further order. This has now become the usual mode of preventing waste.

Action of Waste. This is a mixed action, partly real so far as it recovers land, and partly personal, so far as it recovers damages.

CHAPTER XV.—SUBTRACTION.

Defined. Subtraction happens, when any person who owes a duty, custom or service, 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, while that strikes at the very title of the party injured, and amounts to an ouster or actual dispossession. It is remediable by due course of law.

Fealty and Rent. These were duties, which were the conditions, upon which the ancient lords granted their lands to their feudatories. A feudal bond was executed between lord and tenant; that the latter must do suit or duly attend the lord's courts; must serve on juries, to decide questions of property of their neighbors, or correct their misdemeanors; and lastly should yield annual returns to the lord, in military attendance, in provisions, in arms, in matters of ornament or pleasure, in employments or labors, and in money, all of which are comprised under the general terms, *reditus* or rent. The subtraction or non-observance of any of these conditions is an injury to the freehold of the lord.

Remedy by Distress. The general remedy is by distress, the taking a personal property by way of pledge, to enforce the performance of something due from the party distrained upon. Another remedy is by action of debt for a breach of contract. Special remedies exist for subtractions, to compel specific performance of the service due by custom, but an action on the case for damages will also lie for all of them.

CHAPTER XVI.—DISTURBANCE.

Defined. This is a wrong done to an incorporeal hereditament, by hindering or disquieting the owners in their regular and lawful enjoyment of it.

Kinds. Five Divisions. *Of franchises, of common, of ways, of tenure, of patronage.*

1. Of Franchise. As where a man has a franchise in keeping a fair or market, of taking toll, of seizing waifs or estrays, or any other species of franchise whatever, and he is disturbed in the lawful exercise thereof. As where one obstructs the passage to my market, refuses to pay toll, or hinders me from seizing a waif or estray, whereby it escapes, in all such cases, there is an injury done to the legal owner; his property is damnified, and the profits arising from such franchise are diminished. To remedy this, a man may sue by a special action upon the case, or in case of toll, he may take a distress if he please.

2. Of Common. Where the right of another to his common is incommoded or diminished. This may happen, where one, not having a right of common, places his cattle on the land, and thereby robs the cattle of the commoners of their share of pasture. Or putting in animals that are not commonable, as hogs or goats.

Distress. If the beasts of a stranger 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 be anything considerable, so that he may lay his action with a *per quod*, or allege that he was thereby deprived of his common. But for a trivial trespass, the commoner has no action, but the lord has for entry and trespass committed.

Surcharging a Common. Putting more cattle therein than the pasture and herbage will sustain, or the party has a right to do. The remedy is either by distraining so many of the beasts as exceed the number allowed, or else by an action of trespass, both which may be had by the lord, or by a special action on the case for damages, in which any commoner may be plaintiff. But the ancient and most effectual mode was by writ of admeasurement of pasture.

Enclosing or Obstructing a Common. This may be

done by erecting fences, or by driving the cattle off the land, or by ploughing up the soil. A lord may enclose a common, if he injures no one.

3. Of Ways. This is somewhat similar to common. It happens, when a person, having the right of way over another's ground, 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 in so easy a manner, as he might have done. If this be a way annexed to his estate, and the obstruction is made by the tenant of the land, it is a nuisance, another species of injury. But if the right of way, thus obstructed by the tenant, be only in gross, that is annexed to a man's person, and unconnected with any lands, or if the obstruction be made by a stranger, it is then, in either case, merely a disturbance; for the obstruction of a way in gross is no detriment to any land, and therefore is not a nuisance, and the obstruction of it by a stranger can never tend to put the right of way in dispute. The remedy is by action on the case to recover damages.

4. Of Tenure. This is the breaking of the connection, which subsists between the landlord and the tenant, which the law will not suffer wantonly to be dissolved by a third person. The driving away of a good tenant from off an estate is an injury of no small consequence. If a stranger by menaces, or unlawful distresses, or by fraud or other means, drives a tenant away or inveigles him to leave, this is a wrong to the lord, and reparation must be made by a special action in damages on the case.

5. Of Patronage. This is the obstruction of a patron to present his clerk to a benefice. The writ of *quare impedit* is the only one now used in such cases.

CHAPTER XVII.—INJURIES PROCEEDING FROM OR AFFECTING THE CROWN.

Kinds. There may be injuries which a subject may suffer from the crown, and there may be those which the crown may receive from a subject.

I. INJURIES TO THE SUBJECT.

The King's Infallibility. That the king can do no wrong is a fundamental principle of the English constitution. Nothing that goes amiss in the conduct of public affairs can be charged personally to him. His ministers are accountable for it to the people. 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. When by misinformation or inadvertence, the crown is induced to invade the private rights of a subject, though no action will lie against the sovereign, yet the law permits the subject to inform the king of matters, and he orders the judges to do justice to the party aggrieved.

Restitution, how Obtained. By petition of right, and by plea of right. Both of these methods may be prosecuted either in the chancery or exchequer. If judgment be obtained, the crown is instantly out of possession.

II. INJURIES TO THE CROWN. HOW REDRESSED.

1. By Usual Common Law Actions. As the king, by reason of his ubiquity, cannot be disseised or dispossessed of any real property, which is once vested in him, he can maintain no action, which supposes a dispossession of the plaintiff, such as an assize or an ejectment, but he may bring a *quare impedit*. So too he may bring an action of trespass for taking away his goods, but such actions are not usual for breaking his close or other injury upon his soil.

2. By Inquisition or Inquest of Office. This is an inquiry made by the king's officers, or by writ to them sent, or by commissioners, concerning any matter that entitles the king to lands or goods. This is done by a jury. As to inquire, whether the king's tenant for life died seised, whereby the reversion accrues to the king. Also in case of wreck or treasure trove. There must be an inquisition of office with a jury, except in cases of attainder for high treason, where the king shall have the forfeiture instantly. In regard to real property, if an office be found for the king, it puts him in immediate possession, without the trouble of a formal entry, provided a subject in a like case would have had the right to enter; and the king shall receive all the mesne profits from the time this his title accrued. If however the king's escheator seize lands without cause, upon returning them, the party shall have the mesne profits restored to him.

3. By Scire Facias in Chancery. Where the crown has unadvisedly granted anything by letters patent, which ought not to be granted, or where the patentee has done an act, that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of *scire facias* in chancery. This may be brought, either on the part of the king, in order to resume the thing granted, or if the grant be injurious to a subject, the king is bound of right to permit him, upon his petition, to use his royal name for repealing the patent in a *scire facias*. And so, if upon office untruly found for the king, he grants the land over to another, he who is grieved thereby, and traverses the office itself, is entitled, before issue joined, to a *scire facias* against the patentee, in order to avoid the grant.

4. By Information. This is filed by the attorney-general in the exchequer. It is a 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 differs from an information filed in the court of the king's bench, in that this is instituted to redress a private wrong, by which the property of the crown is affected, while the other is calculated to punish some public wrong. The most usual informations are those of intrusion and debt, the one for any trespass on the lands of the crown, the other upon any contract for moneys due the king, or for any forfeiture upon the breach of a penal statute. Usually these are left to be enforced by common informers, under *qui tam* actions. There is also an information *in rem*, as anciently, in the case of treasure trove, wrecks, waifs and estrays.

5. By Quo Warranto. This 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 claims, 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 franchise, having never had a grant of it, or having forfeited it by neglect or abuse.

Effect of Judgment. In case of judgment for the defendant, he shall have an allowance of his franchise, but in case of judgment for the king, that the party is entitled to no such franchise or has disused or abused it; the franchise is either seised into the king's hands to be granted out again, or if it be

not such franchise as may subsist in the hands of the crown, there is merely judgment of ouster, to turn out the party who usurped it.

Modern Procedure. The length of this process caused its practical disuse, 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. Properly this is a criminal mode of prosecution to punish the usurper by fine, and to oust him, but has long been applied to the mere purpose of seizing the franchise or ousting the wrongful possessor, the fine being nominal only.

When Applicable. This proceeding is now applied to the decision of corporation disputes between party and party, without any intervention of the prerogative. An information in the nature of a *quo warranto* may now be brought, with leave of the court, at the relation of any one, who is styled the relator, against any one usurping, intruding into, or unlawfully holding any franchise or office in any city, town or borough; it provides for its speedy determination, and directs that if the defendant is convicted, judgment of ouster and a fine may be given against him, and that the relator shall pay or receive costs.

6. By Mandamus. This is a full and effectual remedy for refusal of admission, where a person is entitled to an office or place in a corporation, and also for wrongful removal, when a person is legally possessed. These are injuries, for which, though redress may be had by other means, yet as the franchises concern the public, and may affect the administration of justice, this prerogative writ may issue from the court of king's bench, commanding upon good cause shown to the court, that the party complaining be admitted or restored to his office.

Proceedings. 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. After judgment obtained for the prosecutor, he shall have a peremptory writ of *mandamus*, to compel his admission or restitution. The writ of *mandamus* is in the nature of an action, wherein the party applying and succeeding may be entitled to costs, in case it be the franchise of a citizen, and also in general a writ of error may be had thereupon.

Election Cases. It may be issued, where within the regular time, no election has taken place, or it shall afterwards become void; requiring the electors to proceed to election, and courts to be held for admitting and swearing magistrates chosen.

Summary. We have gone through the whole circle of civil injuries, and the modes of redress provided. The difficulties which attend their discussion arise from their great variety, their very unmethodical arrangement, and the numerous terms of art employed.

Remedy for every Injury. The English laws adapt their redress exactly to the circumstances of the injury, and do not furnish one and the same action for different wrongs, which are impossible to be brought within one and the same description. There is hardly a possible injury to person or property, for which the party injured may not find a remedial writ, in terms adapted to his particular grievance.

Fictions and Expedients. In personal actions, the remedy is plain and simple. In the methods prescribed for the recovery of landed and other permanent property, as the right is more intricate, the feudal remedy by real actions is somewhat more difficult and attended with delays. To obviate these difficulties and retrench those delays, the rights of real property are now obtained in mixed or personal suits, in which we have recourse to arbitrary fictions and expedients.

Modern Alterations. Great fundamental alterations in the old forms of jurisprudence cannot be made abruptly, and our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls are magnificent and venerable, but useless, and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult.

CHAPTER XVIII.—THE ORIGINAL WRIT.

Resumé. Under the head of redress by suit, we have pointed out the nature and several species of courts of justice, wherein remedies are administered for all sorts of private

wrongs. We then showed, to which of these courts application in particular cases may be made for redress, according to the distinction of injuries; what wrongs are cognizable by one court, and what by another. Under the title of injuries, cognizable by the courts of common law, we explained the specific remedies by action provided for every possible wrong or injury.

Preamble. We will now proceed to examine the manner in which these several remedies are pursued and applied by action in the courts of common law, to which will be subjoined a brief account of the proceedings in courts of equity. We will confine ourselves to the modern method of practice; the mode of prosecuting a suit upon any of the personal writs hereinbefore referred to in the court of common pleas at Westminster, the court originally constituted for the prosecution of all civil actions. It is true, that the courts of king's bench and exchequer have now attained a concurrent jurisdiction of very many civil suits, and the forms of proceeding are in all material respects the same in all of these courts. Hence, by giving an abstract of the progress of a suit through the court of common pleas, we shall at the same time give a general account of the proceedings in the other two courts, taking notice of any marked difference in the local practice of each.

DIVISIONS OF A SUIT.

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 proceedings in nature of appeals.*
8. *The execution.*

THE ORIGINAL WRIT.

Different Actions. This is the beginning or foundation of the suit. A party injured and demanding satisfaction first asks, what redress the law has given for that injury, and thereupon makes application or suit for the particular specific remedy, which he is advised to pursue. If it be for money due on bond, he must bring an action of debt; if for goods detained without force, an action of detinue or trover; if taken with force, an action of trespass *vi et armis;* if 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.

The Writ Itself. To this end he is to sue out an original writ from the court of chancery, which is the mint of justice, wherein all the king's writs are framed. This is a mandatory letter under the great seal. It is directed to the sheriff of the county, wherein the injury is committed, 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. These writs are demandable of common right, on payment of the usual costs.[1]

The Return. 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 for the jurisdiction of the court, being the king's warrant for the judges to proceed to the determination of the cause.

Kinds of Writs. They are either optional or peremptory.

Optional. The former is in the alternative, commanding the defendant to do the thing required, or show a reason to the contrary. This is used, when 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, or to render an account; 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 the choice, to redress the injury or stand the suit.

Peremptory. This writ 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, the intervention of a court is requisite. Such are writs of trespass or on the case, wherein no debt or specific thing is sued for, but only damages. For this end, the defendant is immediately called upon to appear in court, provided the plaintiff enters good security to prosecute his claim. Both writs are tested or witnessed.

Security. The security given by the plaintiff for prosecuting his claim is common to both writs, and is at present a mere

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[1] In small actions below forty shillings, which are brought in the county court, no royal writ is necessary. In lieu of it, the foundation is by plaint, which is a private memorial in open court to the judge.

matter of form. John Doe and Richard Roe are always returned as the pledges. The ancient use of them was to answer for the plaintiff, if he failed in the prosecution of his claim, and was amerced by the crown, for raising a false accusation. Under the laws of Portugal, damages were given against a plaintiff, who prosecuted a groundless action.

Return Day. 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 it, is called the return of the writ. It is always made returnable at the distance of at least fifteen days from the date or *teste*, that the defendant may have time to come up to Westminster from the most remote part of the kingdom, and upon a day in one of the four terms, in which the court sits.

Terms of Court. Terms were gradually formed from the canonical constitutions of the church, being the leisure seasons of the year, not occupied by the great festivals or fasts. In early times, the whole year was one continual term for hearing and deciding causes. At length the church interposed, and exempted certain holy seasons from being profaned by forensic litigation. The time of Advent and Christmas gave rise to the winter vacation; the time of Lent and Easter to the spring vacation, the time of Pentecost to the third, and the long vacation between midsummer and Michaelmas was allowed for hay-time and harvest. All Sundays and some particular festivals were included in the same prohibition, which was established by a canon of the church, A. D., 517, and was ratified by the Theodosian code.

Appearance Days. There are in each of these terms, stated days, called days in bank, *dies in banco*, days of appearance in the Court of Common Bench. They are generally about a week distant from each other, and have reference to some festival of the church. On some one of these days all original writs must be made returnable, and they are called the returns of that term. If the return days are fixed on Sunday, the court never sits to receive them until the Monday after, and therefore no proceedings can be held, or judgments given on Sunday. The first return in every term is, properly speaking, the first day in that term. But on every return day, the person summoned has three days of grace, beyond the day named in the writ, for his appearance, and if he appears on the fourth day inclusive, *quarto die post*, it is sufficient.

CHAPTER XIX.—PROCESS.

Defined. Process is the means of compelling the defendant to appear in court. Original process is founded upon the original writ. Mesne process issues, pending the suit, upon some collateral, interlocutory matter, as to summon juries, witnesses, and the like. Mesne process is distinguished from final process or process of execution, in that it signifies all such process as intervenes between the beginning and end of a suit. Process 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.

Notice. This notice is given upon all real praecipes, 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 the sheriff's deputy, either in person or left at his house or land. The warning on his land is given by notice raised on the grounds.

ATTACHMENT.

Mode of Attaching. If a defendant disobey this monition, the next notice is by attachment. This writ does not issue 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 is commanded to attach him, by taking *gage*, that is certain of his goods, which he shall forfeit if he does not appear; or making him find securities, who shall be amerced in case of his non-appearance.

When an Original Process. This is the first process, without any previous summons, upon actions of trespass *vi et armis*, or for other injuries, which though not forcible, are yet trespasses against the peace, as deceit and conspiracy, where the violence of the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attached, without any precedent warning.

Disobedience. If, after attachment, the defendant neglects to appear, he not only forfeits this security, but is moreover further compellable by writ of *distringas* or distress infinite, which is a subsequent process from the common pleas.[1]

Result. Here by the common, as well as the civil law, the

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[1] Obsolete.

process ended in case of injuries without force, the defendant, if he had any substance, being gradually stripped of it all by repeated distresses, as a penalty for his contumacy. If he had no substance, he could not make satisfaction, and the process was nugatory.

Injury, with Force. In the cases of injuries 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.*

Capias ad Respondendum. But this immunity of the defendant's person, in cases of peaceable though fraudulent injuries, worked harm, and thereupon a *capias* was also allowed to arrest the person, in actions of account, though no breach of the peace be suggested, in actions of debt and detinue, and in all actions on the case. Before this change of law, a practice existed of commencing the suit by bringing an original writ of trespass *quare clausum fregit,* for breaking the plaintiff's close *vi et armis,* which, by the old common law, subjected the defendant's person to be arrested by writ of *capias,* and then afterwards by connivance of the court, the plaintiff might proceed to prosecute for any other less forcible injury. This practice still continues, except in actions of debt, though now by statute, a *capias* may be had upon almost every species of complaint.

Nature of the Writ of Capias. If therefore the defendant, being summoned or attached, makes default and neglects to appear, or if the sheriff returns *nihil,* or that the defendant has 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, 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 writ 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 the court, and not under the great seal of England, and are tested, not in the king's name, but

in that of the chief justice only. They bear date on the same day on which the writ immediately preceding was returnable.

Later Practice. It is now usual to sue out the *capias* in the first instance, upon a supposed return of the sheriff, especially if it be suspected that the defendant, upon notice of the action, will abscond; and afterwards a fictitious original is drawn up, if the party is called upon so to do, with a proper return thereon. When this *capias* is delivered to the sheriff, he grants a warrant to his inferior officers to execute it on the defendant.[1]

Testatum Capias. If the sheriff of the county cannot find the defendant in his jurisdiction, he returns *non est inventus*, whereupon another writ issues, called a *testatum capias*, directed to the sheriff of the county, in which the defendant is supposed to reside, reciting the former writ, and that it is testified, that the defendant lurks in his bailiwick, whereupon he is commanded to take him, as in the former *capias*. To save expense, where the defendant is known to live in another county, it is usual 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. It illustrates the maxim, *in fictione juris consistit æquitas*.

Outlawry.[2] When a defendant absconds, and a plaintiff would proceed to outlawry against him, there must first be sued out an original writ, and after that a *capias*. These are followed by an *alias*, and after that a *pluries* writ. Then comes a writ of *exigi facias*, after which the defendant is outlawed.

King's Bench. Latitat. In certain causes in this court, particularly in actions of ejectment and trespass, one may proceed by original writ, with attachment and *capias*, returnable wherever the court may be. But the more usual proceeding is without any original, but a species of process called the bill of Middlesex, or if in the county of Kent, it would be the bill of Kent. When this court came into any county, it immediately superseded the ordinary administration of justice, by the general commission of oyer and terminer, and substituted a process of its own to bring in such persons, as were accused of committing any forcible injury. This bill of Middlesex is founded on the plaint of trespass, *quare clausum fregit*, and is a kind of *capias*, com-

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[1] Arrest upon mesne process by *capias* is virtually abolished.

[2] Obsolete.

manding the sheriff to take the defendant and have him in court. If the sheriff returns *non est inventus*, then there issues a writ of *latitat* to the sheriff of another county, which is similar to the *testatum capias* of the Common Pleas. And just as a *testatum capias* may be sued out upon a supposed preceding *capias*, so in the king's bench, a *latitat* is usually sued out on a supposed and not an actual bill of Middlesex. But if the party lives in the county where the action is laid, a common *capias* suffices, or if in Middlesex, by bill of Middlesex only.

Exchequer Court. Quo Minus. The first process is by writ of *quo minus*, in order to give the court a jurisdiction over pleas between the parties. In which writ, the plaintiff is alleged to be the king's farmer or debtor, and that the defendant has 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.

Later Statutes. The method of pursuing the cause is nearly the same in all the courts, after the first process is taken. Formerly the sheriff was obliged to take the defendant in custody for not having obeyed the original summons, as he had thereby shown a contempt of the court, but under later statutes, he can now only personally serve the defendant with the copy of the writ or process, and with written notice to appear by his attorney in court to defend this action, which in effect reduces it to a mere summons.

Common Bail. If the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in his sureties for his future attendance and obedience, which sureties are called common bail, being the imaginary persons, John Doe and Richard Roe. 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.

Special Bail. But if the plaintiff will make affidavit, 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. The true cause of action should be expressed in the body of the writ or process.

Ac etiam Clause. A clause of *ac etiam* is added to the usual complaint of trespass. The defendant is brought in to answer the plaintiff of a plea of trespass, and also to a bill of debt; the complaint of trespass giving cognizance to the court, and that of debt authorizing the arrest.

Endorsement on Writ. The sum sworn to by the plaintiff is endorsed on the writ, and the sheriff or his officer is then obliged actually to arrest or take into custody the body of the defendant, and having done so, to return the writ endorsed, *cepi corpus*.

The Arrest. There must be a corporal seizing or touching the defendant's body.[1] After this the bailiff may lawfully break into a house in which the party may be; otherwise he has no such power, but must await his opportunity to arrest him. The law deems every man's house his castle of defence and asylum, wherein he shall suffer no violence. Nor can such forcible entrance be made into a man's house to serve upon him a citation or summons.[2]

Exemption from Arrest. Peers of the realm, members of parliament and corporations are privileged from arrest. Against them the process to enforce an appearance must be by a 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 court, are supposed to be there attending, are not liable to be arrested by the ordinary process of the court, but must be sued by bill, termed a bill of privilege, as being personally present in court. Clergymen actually performing divine service are for the time privileged from arrest, as likewise members of a convocation in actual attendance. Suitors, witnesses, and other persons necessarily attending any courts of record upon business, are not to be arrested during their actual attendance, which includes their necessary coming and returning. No arrest can be made in the king's presence or palace, nor in any place where the king's justices are actually sitting.

The King's Protection. Under the common law, the king might take his debtor into his protection, so that no one might

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[1] Actual manual caption is not deemed necessary.

[2] Before the arrest takes place, a bailiff cannot break open the outer door of a house, but if he effect an entrance without violence, he may break open an inner door even of a lodger, where admittance on demand is not granted.—*Chitty.*

sue or arrest him, until the king's debt be paid, but by statute, another creditor may proceed to judgment against him, with a stay of execution, till the king's debt be paid, unless such creditor will undertake for the king's debt, and then he shall have execution for both.

Sunday. No arrest can be made, nor process served upon Sunday, except for treason, felony or breach of the peace.

Bail. After the defendant is arrested, he must either go to prison, or put in special bail to the sheriff. The intent of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered, whether the sheriff detains the person, or takes sufficient security for his appearance. It is called bail, from the French word, *bailler*, to deliver, because the defendant is delivered to his sureties, and is supposed to continue in their friendly custody, instead of going to jail. Bail is effected, by entering into a bond or obligation, with one or more sureties, substantial, responsible bondsmen, to insure the defendant's appearance at the return of the writ. This obligation is termed a bail bond.

Sheriff's Liability. The sheriff, at his peril, may let the defendant go without sureties, for having once taken him, he is bound to keep him safely, so as to be forthcoming in court. Otherwise an action lies against the sheriff for an escape. He is also obliged to take a sufficient bail-bond, if tendered. By statute, he shall take bail for no other sum, than the amount endorsed on the plaintiff's writ.

Appearance. Upon the return of the writ, or within four days thereafter, the defendant must appear. This is done by entering and justifying bail to the action, which is commonly called putting in bail above.

Suit against the Bail. If this be not done, and the bail taken by the sheriff be good, the plaintiff may take an assignment from the sheriff of the bail bond, and bring an action thereon against the bail taken by the sheriff.

Suit against the Sheriff. But if such bail be insolvent, the plaintiff may proceed against the sheriff himself, by calling upon him to return the writ, if not already returned, 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.

Bail, before whom Entered. The bail above, or bail to the action, must be put in either in open court, or before one of the judges thereof, or in the country, before a commissioner appointed for that purpose, which must be transmitted to the court.

The Recognizance. The bail, who must be at least two in number, must enter into a recognizance in a sum equal, or in some cases double to that which the plaintiff has sworn to, whereby they do jointly and severally undertake, that if the defendant be condemned in the action, he shall pay the costs and condemnation, or render himself a prisoner, or that they will pay it for him, which recognizance is transmitted to the court in a slip of parchment, entitled a bail piece.

Justifying Bail. If excepted to, the bail must be perfected, that is, they must justify themselves in court, or before the commissioner in the country, by swearing themselves housekeepers, and each of them to be worth the full sum of which they are bail, after payment of all of their debts.

Provisions of Bond. This is similar to the *stipulatio* or *satisdatio* of the Roman laws, which is mutually given by the litigant parties; by the plaintiff, that he will prosecute his suit and pay the costs, if he loses his cause; by the defendant, that he shall continue in court, and abide the sentence of the judge.

Surrender by the Bail. There exists this difference, that under the Roman law, the sureties were bound to see the costs and condemnation paid, whereas our special bail may be discharged, by surrendering the defendant into custody, within the time allowed by law, for which purpose they are at all times entitled to a warrant to arrest him.[1]

Where Special Bail Required. Special bail is required only upon actions of debt, or on the case in trover, or for money due, where the plaintiff can swear the cause amounts to ten pounds, but in actions, where the damages are precarious and 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. In such cases, no special bail

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[1] Bail may surrender the defendant even after judgment. He has no exemption from arrest, either on Sunday or going to or to coming from court, or in the house of a stranger, so no outer door be broken. He can be arrested under a bail piece, wherever found, even if he be beyond the jurisdiction of the court.—*Chitty.*

is taken, except by a judge's order, or by the particular direction of a court in some peculiar species of injury, 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.

When Demandable of Executors, etc. 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 *devisavit*, or wasting the goods of the deceased; the wrong being of their own committing.

CHAPTER XX.—PLEADINGS.

Defined. Pleadings are the mutual altercations between the plaintiff and defendant, which at present are delivered into the proper office in writing, though formerly they were put in by counsel, *ore tenus* or *viva voce*, in court, and then minuted down by the prothonotaries.

DECLARATION.

Its Form. The first of these is the declaration or *narratio*, the count, 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.

Optional, in what Action to Declare. In the king's bench, when the defendant is brought into court by bill of Middlesex, upon a supposed trespass, in order to give the court jurisdiction, the plaintiff may declare in whatever action, or charge him with whatever injury he thinks proper, unless he has held him to bail by special *ac etiam*, which the plaintiff is then bound to pursue. And so also, to have the benefit of a *capias* to secure the defendant's person, one may in the common pleas sue out a writ of trespass *quare clausum fregit*, for breaking the plaintiff's close, and when the defendant is once brought in upon

this writ, the plaintiff declares in whatever action the nature of his true injury may require, as in an action of covenant, or on the case for breach of contract, unless by holding the defendant to bail on a special *ac etiam*, he is bound himself to declare accordingly.

Local Actions. 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 county.

Transitory Actions. For injuries, that might have happened anywhere, as debt, detinue, slander and the like, the plaintiff may declare in any county he pleases, and the trial will be had in the county, where the declaration is laid.

Change of Venue. If, however, the defendant make affidavit, that the cause of action, if any, arose not in that but another county, the court will direct a change of *venue* or *visne*, that is the *vicinia* or neighborhood, in which the injury is declared to be done, and will oblige the plaintiff to declare in the other county, unless he will undertake to give material evidence in the first. For as the statute ordered all writs to be laid in their proper counties, this, as the judges believed, empowers them to change the venue, if required, and not to insist on abating the writ. This power is discretionally exercised, so as to prevent and not to cause a defeat of justice. And it will sometimes remove the venue from the proper jurisdiction, especially of a limited kind, upon a suggestion, duly supported, that a fair and impartial trial cannot be had therein.[1]

Counts in a Declaration. In actions on the case, it is customary 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 to another. As in an action on the case upon an assumpsit for goods sold and delivered, the plaintiff usually counts or declares, first, upon a settled and agreed price between him and the defendant, to wit, twenty pounds, and lest he should fail in the proof of this, he counts likewise upon a *quantum valebant*, that the defendant bought other goods, and agreed to pay him so much as they were reasonably worth, and he avers that they were worth other twenty pounds, and so on in

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[1] The power of changing the venue has been extended in England, by statute, to local actions.

three or four different shapes, and at last concludes, with declaring that the defendant had refused to fulfil any of these agreements, whereby he is damaged 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 receive proportionate damages.

Conclusion of the Declaration. The declaration concludes with these words: "And thereupon he brings suit." By suit, *secta* (*a sequendo*), was formerly understood the followers or witnesses of the plaintiff.

Laches in Filing. Non-suit or Non-pros. If the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against 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 non-suit or *non prosequitur* is entered, and he ought to be non-prossed. He shall not only pay costs to the defendant, but is liable to be amerced to the king.[1]

Retraxit. A *retraxit* differs from a non-suit, in that the one is negative, and the other positive; the non-suit 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.

Discontinuance. This is somewhat similar to a non-suit, 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. The plaintiff must begin again, by suing out a new original, usually paying costs to his antagonist. By the death of the king, no action is discontinued.

Plea must be Filed. After the filing of the declaration, the defendant, within a reasonable time, must make his defence, and put in his plea, else the defendant will at once recover judgment by default, or *nihil dicit*, of the defendant.

Defences. Defence signifies not a justification, protection or guard, but merely an opposing or denial (from the French verb *defender*), of the truth or validity of the complaint. It is a

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[1] The introduction of John Doe and Richard Roe, at the end of the declaration as plaintiff's common pledges, no longer is requisite.

general assertion, that the plaintiff has no ground of action, which assertion is afterwards extended and maintained in his plea. It would be absurd to suppose that the plaintiff comes and defends, or in the vulgar acceptation, justifies, the force and injury in one line, and pleads that he is not guilty of the trespass complained of in the next. All this is clear, if we understand by defence an opposition or denial.[1]

Technicalities. Formerly the nature of the defence was examined carefully, so that if no defence was made, though a sufficient plea was pleaded, the plaintiff recovered judgment. For a general defence or denial was not prudent in every situation, since thereby the propriety of the writ, the competency of the plaintiff, and the cognizance of the court were allowed. By defending the force and injury, the defendant waived all pleas of misnomer, and 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. But of late years these niceties have been discountenanced, though they may be insisted on.

Special Jurisdiction. Franchises. Before defence made, if at all, cognizance of the suit must be claimed, when any person or body corporate has the franchise, not only of holding pleas within a particular limited jurisdiction, but also of the cognizance of pleas. 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.

Claim of Cognizance. This claim of cognizance must be put in before full defence is made or imparlance prayed, for these are a submission to the jurisdiction of the superior court; and the delay is a laches, which will not be allowed, if it occasion a failure of justice, or if an action be brought against the person himself, who claims the franchise, unless he has also a power in such case of making another judge.

Amicable Settlement. Imparlance. After defence made,

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[1] Therefore in actions of dower, where the demandant does not count of any injury done, but merely demands her endowment, the tenant makes no defence. In writs of entry, where no injury is stated in the count, but merely the right of the demandant and the defective title of the defendant, the tenant defends his right or also denies his own right to be such as suggested. In writs of right, the defendant defends the right of the demandant and his seisin.

the defendant must put in his plea. But before he defends, if the suit has been commenced by *capias* or *latitat*, without any special original, he is entitled to demand one imparlance, and may before he pleads, have time granted by the court to see if by "talking" with the plaintiff, an amicable arrangement can be effected. This was founded on the biblical injunction: "Agree with thine adversary quickly, whilst thou art in the way with him;" which has a plain reference to the Roman law of the twelve tables.

Oyer. Before a defendant puts in his plea, he may in real actions demand a view, to ascertain the identity of the thing in question. He may crave *oyer* of the writ, or of the bond, or other specialty sued upon, that is, to hear it read to him, as in olden times few people could read 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 declaration.

Real Actions. Aid Craved. New Defendant. The tenant may call for the assistance of another to help him plead, because of the feebleness of his own estate. Thus a tenant for life may pray aid of the remainder man or reversioner, that is, that he shall be joined in the action and help to defend the title.

Real Action. Common Recovery. Voucher. Voucher is the calling in of some person to answer the action, who has warranted the title to the tenant or defendant. This we still use in the form of common recoveries, which are grounded on the writ of entry, a species of action which relies chiefly on the weakness of the tenant's title, who therefore vouches another person to warrant it. If the vouchee appear, he is made the defendant, instead of the voucher, but if he afterwards make default, recovery shall be had against the original defendant, and he shall recover an equivalent in value against the deficient vouchee.

PLEAS.

Divisions. *Pleas are of two sorts: dilatory, and to the action.*

1. Dilatory. Imparlance. These tend merely to delay or put off the suit, by questioning the propriety of the remedy, rather than by denying the injury. They cannot be pleaded after a general imparlance, which is an acknowledgement of the propriety of the action. Imparlances are either general, 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, and be granted by discretion of the court.

Dilatory. Kinds. Dilatory pleas are: 1. To the jurisdiction of the court, alleging that it ought not to hold plea of this injury, as it occurred in another jurisdiction. 2. 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, attainted of treason or felony, under a *praemunire*, an infant or a *feme covert*. 3. In abatement, which abatement is either of the writ or the count, for some defect in one of them, as by a misnomer of the defendant, or other want of form in any material respect.

Abatement. Actions ex Delicto. In actions for wrongs actually done or committed by the defendant, as trespass, battery and slander, the rule is that *actio personalis moritur cum persona*, and that it never shall be revived either by or against the executors or other representatives.[1] 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.[2]

Abatement. Actions ex Contractu. 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.

Must be Under Oath. No dilatory plea shall be admitted, without affidavit made of the truth thereof, or some probable matter shown to the court to induce it to believe it true.

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[1] Formerly the death of either the plaintiff or the defendant abated the suit, but now it may be continued by the legal representatives, after a suggestion on the record.

[2] By statute, an action of trespass or on the case may be maintained by an executor or administrator for injury to a decedent's real estate in his life time, if such injury was committed within six months before his death, and suit brought within one year after the death, and also against executors or administrators for wrongs committed by the deceased to another man's property, real or personal, within six months of the death, and suit brought within six months after administration taken.—*Cooley.*

When Not Allowed. 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 plaintiff a better, that is, show how it might be amended, that there may not be two objections upon the same account. Nor 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.

Plea to the Jurisdiction or Person. All pleas to the jurisdiction conclude to the coguizance of the court, praying judgment, "whether the court will have further cognizance of the suit." Pleas to the disability, pray judgment, "whether the plaintiff ought to be answered.

Pleas in Abatement. These conclude to the writ or declaration, by praying judgment of the writ of declaration, and that the same may be quashed 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.

Result, when Allowed. When these dilatory pleas are allowed, the cause is either dismissed from that jurisdiction, or the plaintiff is stayed till his disability is removed; or he is obliged to sue out a new writ, by leave obtained from the court, or to amend and frame anew his declaration.

Judgment of Respondeat Ouster. Where the dilatory pleas are not allowed, but 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.

2. Pleas to the Action. These are answers to the merits of the complaint. They dispute the very cause of suit. This is done by confessing or denying it.

Tender. Effect of. A confession of the whole complaint is unusual, 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 harass his debtor with an action, it becomes necessary for the defendant to acknowledge the debt, and plead the tender, adding that he has always been ready, and is still ready to discharge it. 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.

Confession and Avoidance. Frequently the defendant confesses one part of the complaint by a *cognovem actionem* in respect thereof, and denies the rest, in order to avoid the expense of carrying that part to a formal trial, which he has no ground to litigate.

Payment into Court. This is necessary upon pleading a tender, and is itself a kind of tender to the plaintiff, by paying into the hands of a 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 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. It is usually grounded upon ar affidavit (Latin *affido*) 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.

Effect.—If after the money be paid in, the plaintiff proceeds, it is at his own peril, for if he does not prove more to be due than has been paid into court, he shall be nonsuited and pay the defendant costs, but he shall still have the money so paid in, for that much the defendant acknowledged to be his due.

Set-off. In this case, 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 whole or in part. Where there are mutual debts between the plaintiff and the defendant, one debt may be set against the other, and either pleaded in bar, or given in evidence upon the general issue at the trial, which shall operate as payment, and extinguish so much of the plaintiff's demand.

Division of Pleas to the Action. *Pleas that totally deny the cause of complaint, are either the general issue or a special plea in bar.*

(1.) The General Issue. This general plea traverses and denies at once the whole declaration, without offering any special matter, whereby to evade it. As in trespass *vi et armis*, or on the case, not guilty; in debt upon contract, *nil 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;

or in a writ of right, that the tenant has more right to hold, than the demandant 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.

What may be Given in Evidence. Formerly the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he desired to palliate the charge, it was usual to set forth the facts in a special plea, which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. It is an invariable rule, that every defence, which cannot be thus specially pleaded, may be given in evidence upon the general issue at the trial. Of late years to avoid chicanery and delay, the courts have usually permitted the general issue to be pleaded, which leaves everything open; the fact, the law and the equity of the case, and have allowed special matter to be given in evidence at the trial.

(2.) Special Pleas in Bar. These are in bar of the plaintiff's demand, and vary with the circumstances of the defendant's case. As in real actions, a general release or a fine, both of which may destroy the plaintiff's title. Or in personal actions, an accord, arbitration, conditions performed, nonage of the defendant or other fact, which precludes the plaintiff from his action. A justification is likewise a special plea in bar, as in actions of assault, 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 was really as bad as the defendant represented him.

STATUTES OF LIMITATION.

Real Estate.[1] A man may plead the statutes of limitation in bar, or the time limited by statute, beyond which no plaintiff can lay his cause of action. This in a writ of right is sixty years; in writs of entry or other possessory actions real of the seisin of one's ancestors, in lands, and either of their seisin or one's own, in rents, suits and services, fifty years, and in actions real, for lands grounded upon one's own seisin, thirty years. Posses-

[1] Modified somewhat in England by later statutes.

sion for sixty years is a bar against even the king's prerogative. Twenty years is a limitation in an action of ejectment, for no ejectment can be brought, unless where the lessor of the plaintiff is entitled to enter upon the lands, and by statute, no entry can be made by any man, unless within twenty years after his right shall accrue.

Limitations. Personal Actions. All actions of trespass *quare clausum fregit*, or otherwise, detinue, trover, replevin, account and case, except upon accounts between merchants, debt upon simple contract, or for arrears of rent, are limited to six years after the cause of action commenced. In assumpsit, the plea is *non assumpsit infra sex annos.*

Limitations. Crimes. Actions of assault, menace, battery, mayhem and imprisonment may be brought within four years, and actions for words within two years after the injury committed. All suits, indictments and informations upon any penal statutes, where the forfeiture is to the crown alone, shall be sued within two years, and where the forfeiture is to a subject or to the crown and a subject, within one year after the offence was committed, unless where any other time is specially limited by the statute.

Limitations. Error or Appeal. No writ of error, *scire facias*, or other suit shall be brought to reverse any judgment, fine or recovery, for error, unless it be prosecuted within twenty years.[1]

Athenian Law. *Interest reipublicae ut sit finis litium.* The Athenian laws generally prohibited all actions, where the injury occurred more than five years before the complaint was made.

Estoppel. This is likewise a special plea in bar. It happens, where a man has done some act or executed some deed, which estops or precludes him from averring anything to the contrary.[2]

Conditions and Qualities of a Plea. 1. *The plea must be single and contain only one matter, for duplicity begets confu-*

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[1] Reduced to six years by Act of 1852.—*Cooley.*

[2] As if a tenant for years who has no freehold, levies a fine to another person. Though this is void as to strangers, yet it shall work as an estoppel to the cognizor, for if he afterwards brings an action to recover the lands, and his fine be pleaded against him, he is thereby estopped from saying, that he had no freehold at the time.

sion. But by statute of queen Anne, by leave of court, a man may plead two or more distinct matters or single pleas.

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 allegation in every material point.*

5. *That it be so pleaded as to be capable of trial.*

Form of a Special Plea. Special pleas are usually in the affirmative, sometimes in the negative, but they always advance some new fact not mentioned in the declaration, and they must be averred to be true, "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.

Rule as to Special Pleas. 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 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.[1]

Replication. When the plea of the defendant is filed, if it does not amount to an issue or total contradiction of the declaration, but only evades it, the plaintiff may reply to the defendant's plea.

He may traverse the plea, that is, totally deny it.

He may allege new matter in contradiction of the defendant's plea.

He may confess and avoid the plea, by some new matter or distinction, consistent with the plaintiff's former declaration.

Rejoinder. To the plaintiff's replication, the defendant may rejoin, or put in an answer. This is termed a rejoinder. The plaintiff may reply to this by a sur-rejoinder.

Rebutter. Upon which, the plaintiff may rebut, and the defendant answer him by a sur-rebutter.

Pleading must be Consistent. The whole of this process

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[1] This form of special pleading in actions of trespass is now abolished.

is termed the pleading, and in its several stages, one must not depart or vary from the title or defence, which he has once insisted upon. A departure in pleading might cause endless altercation. Therefore the replication must support the declaration, and the rejoinder the plea, without departing from it. The pleadings of each party must be consistent one with the other.

Replication, Assigning Facts. 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 this general wrong to a more particular certainty, by assigning the injury afresh, with all its particular 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 in Pleading. This 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. This would often embarrass both court and jury, and would add greatly to the expense. Protestations were once allowed in pleading, whereby a party interposed an oblique allegation or denial of some fact, protesting that such a matter does or does not exist, and at the same time avoiding a direct affirmation or denial. Coke defined a protestation, to be "an exclusion of a conclusion."

Conclusion of the Plea. In any stage of the pleadings, when either side advances or affirms any new matter, he usually 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, 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 reads, "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, "and this he prays may be inquired of by the country."

Issue Tendered. 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, 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 said to be at issue, all their debates being at last contracted to a single point, which must now be determined, either in favor of the plaintiff or of the defendant.

CHAPTER XXI.—ISSUE AND DEMURRER.

Issue Defined. Issue, *exitus*, being the end of all the pleadings, is either upon matter of law, or matter of fact.

DEMURRER.

Defined. An issue upon matter of law is termed a demurrer. 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. The party, first demurring, rests upon the point in question.

Example of Demurrer. 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 showing the stranger's right, here the plaintiff may demur in law to the plea, and so on in every part of the proceedings, where either side perceives any material objection in point of law, upon which he may rest his case.

Form. 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 for want of sufficient form in the writ or declaration. In such cases the demurrer must set forth, in what the deficiency exists.

Joinder In Demurrer. And upon either a general or 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. The judges must then determine this demurrer or issue in law.

Issue of Fact. This is where the fact only and not the law is disputed. When he, who denies or traverses the fact pleaded by his opponent, has tendered the issue thus: "And this he prays may be inquired of by the country", or "and of this he puts himself upon the country", it may be immediately 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 a jury. This establishment of different tribunals for determining questions of fact from those that decided questions of law, is similar to the course pursued in the Roman republic.

Continuance in Court. During all these proceedings, from the date of the defendant's appearance in obedience to the writ, it is necessary that both the parties be kept or continued in court, till the final determination of the suit, The court can determine nothing, unless in the presence of both the parties, in person or by their attorneys, or upon default of one of them, after his original appearance.

Non-suit. 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 non-suit, or not to follow or pursue his complaint, and shall lose the benefit of his writ.

Judgment by Default. If the negligence be on the side of the defendant. judgment may be had against him, for such his default.

Continuance. After issue or demurrer joined, a day is continually given and entered of record, for the parties to appear from time to time, as the exigence of the case may require; if these continuances are omitted, the cause is thereby discontinued and the defendant discharged.[1]

Plea, puis darrein Continuance. Sometimes after the defendant has pleaded, nay, even after issue or demurrer joined,

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[1] These continuances are now a mere matter of form.

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 has given the defendant a release, and the like. If the defendant takes advantage of this new matter, as early as he can, he is permitted to plead in 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 forethought, 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 by a writ of *audita querela*, of which hereafter. And these pleas *puis darrein continuance*, when brought to a demurrer in law or issue of fact, shall be determined in like manner as other pleas.

Paper Books. 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 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. The record is a history of the most material proceedings in the case, the original writ and summons, all the pleadings, the declaration, view or oyer prayed, the imparlance, plea, replication, rejoinder, continuances, and whatever further proceedings have been had; all entered *verbatim*, and also the issue or demurrer and the joinder therein.

Norman French and Law. Latin Employed. These were formerly written in Norman or law French, until the reign of Edward III, when it was enacted, that all pleas should be in the English tongue, but be entered and enrolled in Latin. The Latin, which succeeded the French for the entry and enrollment of pleas, and which continued in use for four centuries, is so similar to the English, that it resembles a home production. The truth is, that what is termed law Latin is in reality a mere technical language, calculated for eternal duration, and easy to

be apprehended in present and future times, and hence best suited to preserve those memorials, intended for perpetual rules of action.

Law Latin. It may be observed of law Latin, as a writer says of law French, "that it is so very easy to be learned, that the meanest wit that ever came to the study of law, doth come to understand it almost in ten days, without a reader." Many terms of art, in which the law abounds, are harsh, when Latinized, which was unavoidable, when things of modern use, of which the Romans had no idea and consequently no phrases to express them, came to be delivered in the Latin tongue. It would puzzle a Latin scholar to find a Latin appellation for a constable, a record, or a deed of feoffment, for which our ancestors coined the words, *constabularius*, *recordum* and *feoffamentum*. A similar necessity to this produced a similar effect at Byzantium, when the Roman laws were turned into Greek, for the use of the Oriental empire. The lawyers, in that day, studied more the exact import of the words, than the delicacy of their cadence. The terms of the law are not more numerous, more uncouth or more difficult to be explained by a teacher, than those of logic, physics and philosophy, nor even of the politer arts of architecture and its kindred studies, or the science of rhetoric. The law therefore, with its technical phrases, stands upon the same footing with other studies, and requires only the same indulgence.

The Use of Latin. This technical Latin continued in use, till the subversion of the ancient constitution under Cromwell, when among many other innovations in the law, the language of our records was altered and turned into English. But at the restoration of king Charles, this novelty was no longer countenanced, and the Latin again was used. And thus it continued until 1730, when by statute of George II, it was again decreed that the proceedings at law should be set forth in English. The avowed object of the change was, that the common people might have knowledge of what was alleged or done, for and against them in the process and pleadings, the judgment and entries in a cause. The translation of technical phrases was found to be so absurd, as *nisi prius*, *quare impedit*, *fieri facias*, *habeas corpus* and the like, that by statute of George III, a new act allowed all technical words to continue in the usual language.

Issue of Law and Fact. 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 argument, determined by the court, and not by any trial by jury, and judgment is thereupon accordingly given. Thus is an issue of law, or demurrer, disposed of. An issue of fact takes up more form and preparation to settle, for here the truth of the matters must be examined and established by proper evidence in the channel prescribed by law.

CHAPTER XXII.—THE SEVERAL SPECIES OF TRIAL.

Uncertainty of Our Law. The alleged uncertainty of our legal proceedings is a theme of jest. It owes its origin to the number of our municipal constitutions, and the multitude of our judicial decisions, occasioning an abundance of rules. People are apt to be angry at the want of simplicity in our laws; they mistake variety for confusion, and complicated cases for contradictory. They point to arbitrary government, to uncultivated nations, to narrow domestic republics; and unreasonably require the same paucity of laws, the same conciseness of practice in a nation of freemen, in a polite and commercial people, and a populous territory.

Despotic Governments. In an arbitrary, despotic government, where the lands are at the disposal of the prince, the rules of succession, or the mode of enjoyment, must depend upon his will and pleasure. Hence there can be but few legal determinations relating to the property, the descent or conveyance of real estates, and the same holds in a stronger degree with regard to goods and chattels, and the contracts relating thereto. Under a tyrannical sway, trade must continually be in jeopardy, and can never be extensive; hence rules for adjusting commercial regulations are of little necessity. Marriages are usually contracted with women treated as slaves, hence no laws are needed to regulate the rights of dower, jointure and marriage settlements. Few are the persons who can claim the privileges of the laws, as the majority are the commonalty, boors or peasants. These are therefore left to the private coercion of their lords, are esteemed incapable of either right or injury, and hence are entitled to no redress.

Wild and Savage People. If we were strangers to science, commerce and art, we might be content to refer all disputes to the first passer-by, and thus abruptly end every controversy. In a state of nature, there is no room for municipal laws, and the closer approach a nation makes thereto, the fewer laws they will need. When the people of Rome were sturdy shepherds, all their laws were contained in ten or twelve tables; but as luxury and dominion increased, the civil law increased in the same proportion, and swelled to an amazing bulk, though successively pruned and retrenched by Theodosius and Justinian.

Petty States and Narrow Territories. Much fewer laws will suffice here than in large ones, because there are fewer objects upon which the laws can operate.

Causes of the Multiplicity of Laws. The extent of the country which they govern, the commerce and refinement of its inhabitants, and above all the liberty and property of the subject, result in numerous laws. These produce an infinite fund of disputes, which must be terminated in a judicial way, and it is essential to a free people that their property shall be as certain and fixed as the constitution of the state. Though in some countries, everything is left to the judge to determine, yet with us, he is only to declare and pronounce, not to make the law.

Multitude of Decisions. Hence a multitude of decisions, or cases adjudicated, will arise, for seldom will it happen that any one rule will exactly suit many cases. In proportion as the decisions of courts of judicature are multiplied, the law will be loaded with decrees, that may sometimes interfere with each other, because the succeeding judges may not be apprised of the prior adjudication, or because they may think differently from their ancestors, or because the same arguments did not occur formerly as at the present, or because of the natural imperfections, that attend all human proceedings. But whenever this happens to be the case in any material point, the legislature is ready to intervene to remove the doubt, upon due deliberation had, and determine by declaratory statute, how the law shall be held for the future.

Contradictions and Uncertainties. Whenever contradictions or uncertainties exist, they may be imputed to the defects of human laws in general, and not owing to any particular ill construction of the English system. Indeed the reverse is

most strictly true. English law is less embarrassed with doubtful questions, than any other known system of the same extent and the same duration.

Civil Law. The civil law, as collected by Justinian, is extremely diffuse, and the idle comments by learned jurists are literally without number. These private opinions of scholastic doctors are not judicial determinations of the court, but breed distraction and confusion in their tribunals.

Canon Law. The same is true of the canon law, though the text thereof is not of half the antiquity of the common law of England, and though the more ancient any system of law is, the more it is liable to be perplexed with a multitude of judicial decrees.

Common Law. When, therefore, a body of laws, of so high an antiquity as the English, is in general so clear, it argues deep wisdom and foresight in such as laid the foundation, and great care in such as have built the superstructure.

Multitude of Law Suits. The multitude of law suits is by no means an argument against the clearness and certainty of the law itself, for among the curious disputes which are daily to be met with in the course of legal proceedings, it is obvious that very few arise from obscurity in the rules or maxims of law. An action to determine the question of inheritance is unheard of, unless the fact of the descent be controverted. The dubious points arise chiefly from the difficulty of ascertaining the intention of individuals, in their disposition of property, and in their contracts, conveyances and testaments. It is an object of importance in this free and commercial country, to lay as few restraints as possible upon the transfer of possessions from hand to hand, or their various designations marked out by the prudence, convenience, necessities, or even by the caprice of their owners; yet to investigate the intention of the owner is frequently a matter of difficulty, among entangled conveyances or obscure wills.

Obscure Meaning. The law rarely hesitates in declaring its own meaning; but the judges are frequently puzzled to find out the meaning of others. This the powers, the interest and the properties of a tenant for life and a tenant in tail, are clearly distinguished by law, but what words in a will shall constitute this or that estate will be disputed, as long as the carelessness, ignorance or singularity of testators shall continue to clothe their intentions in dark expressions.

Dishonest Interest. However fertile in legal controversies may be the result of the ignorance and wilfulness of individuals, they are largely outnumbered by the dishonesty and disingenuity of parties; by either suggesting complaints that are false in fact, and thereupon bringing groundless actions, or by their denying such facts, as are true, in setting up unwarrantable defences. *Ex facto oritur jus.* If, therefore, the fact be perverted or misrepresented, the law which arises from thence will be unavoidably unjust or impartial. And in order to prevent this, and to set right the fact, and establish the truth contended for, it is necessary to appeal to some mode of trial, which the law of the country has ordained for a criterion of truth and falsehood.

Trial Defined. Trial is the examination of the matter of fact in issue. Experience shows, that a hundred of our law suits arise from disputed facts, for one, where the law is doubted. There are many different species of trial, according to the different subjects or things to be tried. The law of England, in its endeavors to investigate truth, will not confine itself to one or a few matters of trial, but varies its examination of facts according to the nature of the facts themselves, the invariable principle being, that as well the best method of trial, as the best evidence upon that trial, and which the nature of the case affords, and no other, shall be admitted in an English court of justice.

SEVEN SPECIES OF TRIAL IN CIVIL CASES.

By record; by inspection or examination; by certificate; by witnesses; by wager of battle; by wager of law, and by jury.

I. TRIAL BY RECORD.

When Resorted to. 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 this he prays, may be inquired of by the record, and the other doth the like." 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 recover.

The Record Itself. The trial, therefore, of this issue is merely by the record, for as Coke observes, a record is of so high a nature, and imports in itself such absolute verity, that if it be

pleaded, there is no such record, it shall not receive any trial by witness, jury or otherwise, but only by itself.

II. TRIAL BY INSPECTION OR EXAMINATION.

When Resorted to. This occurs, 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 the senses, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute.

Jury Unnecessary. For where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it, who are properly called in to inform the conscience of the court, in respect of dubious facts; and therefore when the fact from its nature must be evident to the court, either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone.

Example. If a defendant pleads in abatement of the suit, that the plaintiff is dead, and one appears and calls himself the plaintiff, which the defendant denies; in this case the judges shall determine, by inspection or examination, whether he be the plaintiff or not. In all of these cases, the judges, if they conceive a doubt, may order it to be tried by jury.

III. TRIAL BY CERTIFICATE.

When Allowed. This is allowed in such cases, where the evidence of the person certifying is the only proper criterion of the point in dispute. For when the fact in question lies out of the cognizance of the court, the judges must rely on the solemn averment of persons in such a station, as affords them the most clear and competent knowledge of the truth. As therefore such evidence, if given to a jury, must have been conclusive, the law to save trouble and circuity, permits the fact to be determined upon such certificate.

IV. TRIAL BY WITNESSES.

Without a Jury. This trial, *per testes*, is without the intervention of a jury. This is the only method of trial known to the civil law, in which the judge is left to form his sentence upon the credit of the witnesses examined. Ii is very rarely used. It may be resorted to when a widow brings a writ of dower, and the

tenant pleads that the husband is not dead. This being looked upon as a dilatory plea, is allowed to be tried by witnesses, examined before the judge. In every case, says Coke, the affirmative must be proved by two witnesses at the least.[1]

V. TRIAL BY WAGER OF BATTLE.

History and Origin. This species of trial is of great antiquity, but is now disused. It owed its origin to the military spirit of our ancestors, joined to a superstitious frame of mind; it being in the nature of an appeal to Providence; under a belief, that heaven would give the victory to him who had the right. The Burgundians, a German clan, resident in Gaul, first introduced it. It was the common usage of all those warlike people from the earliest times. The early Germans usually decided all contests of right by the sword. 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 one civil. The first, in the court-martial or court of chivalry and honor; the second, in appeals of felony; and the third, upon issue joined in a writ of right, the last and most solemn decision of real property.

Writs of Right. For in writs of right, the *jus proprietatis* is in question, but other real actions merely involve questions of the *jus possessionis*, which are usually more plain and obvious, and need not the decision of Providence. Another pretext for allowing it upon these final writs of right, was also for the sake of such claimants as might have the true right, but yet by the death of witnesses or other defect of evidence, are unable to prove it to a jury.

The Contest. Where the tenant in a writ of right pleads the general issue, that he has more right to hold than the demandant has to recover, and offers to prove it by the body of his champion, which tender is accepted by the demandant, then the champion of the tenant throws down his glove as a gage or pledge, and thus wages or stipulates battle with the champion of the demandant, who by taking up the glove accepts the challenge. The reason why it is waged by champions, and not by the parties themselves, in civil actions, is because, if any party to the suit die, the suit must abate, and therefore no judgment be

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[1] In courts of law, in general, one witness suffices. In courts of equity, two witnesses are usually required.—*Chitty.*

given by the lands, if either of the parties was slain; and also that no person might claim exemption, as was allowed in criminal cases, where the battle was waged in person. A piece of ground is laid out sixty feet square, on one side of which sit the judges of the common pleas, clad in their scarlet robes; also a bar is prepared for the learned serjeants at law. The court sits at sunrise, and the combatants are bound to fight till the stars appear in the evening. If the champion of the tenant can hold out that long, the tenant shall prevail, for it is a drawn battle, and he is in possession. Judgment is given for the party, whose champion is victorious. The weapons allowed them are only batons or staves, an ell long, so that but seldom death occurs. Each combatant has a leather target. In the court military, they fought with sword and lance. First, the champions grasp each other's hands, the one taking oath, that the tenements in dispute are not the right of the demandant; the other swears in like manner that they are. They next take an oath against sorcery and enchantment.

The Victory. The victory may arise from the death of either champion, or if either champion proves recreant, that is, yields, and pronounces the horrible word "craven," which consigns him to obloquy and makes him infamous, and not to be accounted *liber et legalis homo*, being supposed by the event to be found forsworn, and hence never thereafter put upon a jury, or allowed to testify as a witness. The tenant or defendant in a writ of right had it in his election to demand the trial by battle.

VI. TRIAL BY WAGER OF LAW.

Defined. The defendant in this case puts in sureties, that at such a day he will take the benefit, which the law has allowed him. Our ancestors considered, that an innocent man of good credit might be overborne by a multitude of false witnesses, and therefore established this species of trial, by the oath of the defendant himself, for if he will absolutely swear himself not chargeable, and appears to be a person of reputation, he shall go free and forever acquitted of the debt or other cause of action.

History. This method of trial is not only to be found in the codes of almost all the northern nations, but its original may be traced as far back as the Mosaical law. "If a man deliver unto his neighbor an ass or an ox, or any beast to keep, and it die or be hurt or be driven away, no man seeing it; then shall an oath of

the Lord be between them both, that he has not put his hand unto his neighbor's goods, and the owner of it shall accept thereof, and he shall not make it good." There is also a resemblance between this species of trial, and the canonical purgation of the clergy, when accused of any capital crime. The defendant, or person accused, was in both cases to make oath of his own innocence, and to produce a certain number of compurgators, who swore that they believed his oath. This is similar to the *sacramentum decisionis* of the civil law, where one of the parties to the suit, not being able to prove his charge, offered to refer the decision of the cause to the oath of his adversary, which the adversary was bound to accept, or tender the same proposal back again, otherwise the whole was taken as confessed by him.

Manner of Waging Law. He, who has waged or given security, brings with him into court eleven of his neighbors, for by the old Saxon constitution every man's credit in courts of law depended upon the opinion, which his neighbors had of his veracity. The defendant is then admonished of the nature and danger of a false oath. He then swears: "I do not owe unto A. B. the sum of ten pounds, nor any penny thereof, in manner and form as the said A. B. hath declared against me. So help me God." And thereupon his eleven neighbors shall avow, upon their oaths, that they believe him. As a wager of law is equivalent to a verdict, it ought to be established by equal testimony, namely, by the oath of twelve men.

Witnesses. As long as the custom continued of producing the *secta*, the suit, or witnesses to give probability to the plaintiff's demand, the defendant was not put to wage his law, unless the *secta* was first produced, and their testimony was found consistent.

Gothic Law. In the old Swedish or Gothic constitution, wager of law was not only permitted, as it still is in criminal cases, but was absolutely required, in many civil cases, which occasioned frequent perjury. Ecclesiastics introduced this method of purgation from their canon law, and the frequent perjuries that resulted were punished in part by pecuniary fines, payable to the church.

England. In what Cases Allowed. In England, wager of law has never been required, and has only been admitted, where an action is brought upon such matters, as may be supposed to be privately transacted between the parties, and wherein

the defendant may be presumed to have made satisfaction, without being able to prove it. Therefore it obtains only in actions of debt upon simple contract, or for amercement in actions of detinue, and of account, where the debt may have been paid, the goods restored, or the account balanced, without any evidence of either.

Where it does not Lie. It does not lie, where there is any specialty, as a bond or deed to charge the defendant, for that would be cancelled, if satisfied; but when the debt arises by word only; nor does it lie in an action of debt, for arrears of an account, settled by auditors in a former action.

Effect. And by such wager of law, when admitted, the plaintiff is perpetually barred; for the law, in the simplicity of the ancient time, presumed that no one would forswear himself for any worldly thing.

Real Actions. Wager of law lies in a real action, where the tenant alleges he was not legally summoned to appear; as well as in mere personal contracts.

Parties Disbarred. A man outlawed, attainted for false verdict, for conspiracy or perjury, or otherwise becoming infamous, shall not be permitted to wage his law. Nor shall an infant under twenty-one, for he cannot take an oath. But a *feme covert*, when joined with her husband, may be admitted to wage her law, as may also an alien. It is a rule, that where a man is compellable by law to do anything, whereby he becomes creditor to another, the defendant in that case may not wage his law, for then it would be in the power of a bad man to incur debt, against the wishes of his creditor, and afterwards to swear it away.

Exceptional Cases. But where the plaintiff has given voluntary credit to the defendant, there he may wage his law, for by giving him such credit, the plaintiff has himself born testimony, that he is one whose character may be trusted. Hence in an action of debt against a prisoner, by a jailer, for his victuals, the defendant shall not wage his law, for the jailer cannot refuse him sustenance, but otherwise, for the board of a man at liberty. In an action for debt by an attorney for his fee, the defendant cannot wage his law, because the plaintiff is compellable to be his attorney. So in an action of debt by a servant, where he has been retained according to the statute of laborers, which obliges certain persons to go out to service, the master shall not wage his law, because the plaintiff was compellable to serve. But it is otherwise, if the hiring was by special contract.

Not Allowed when Damage Uncertain. In no case, where a contempt, trespass, deceit or any injury with force is alleged, can the defendant wage his law, for he cannot have satisfied the plaintiff his demand, in cases where damages are uncertain, and left to be assessed by a jury. Nor will the law trust the defendant with an oath to discharge himself, where the private injury is coupled as it were with a public crime, that of force and violence, which would be equivalent to the purgation oath of the civil law, which ours has so justly rejected.

Executors Barred. Executors and administrators, when charged for the debt of the decedent, shall not be permitted to wage their law, for no man can with a safe conscience wage law of another man's contract, that is, swear that he never entered into it, or privately discharged it.

The King and his Debtors. The king also has his prerogative; for as a wager of law imports a reflection on the plaintiff for dishonesty, there shall be no wager on actions brought by him. And this prerogative extends to his debtor, for in a writ of *quo minus* in the exchequer, for a debt on simple contract, the defendant is not allowed to wage his law.

Summary. New Forms Introduced. Thus the wager of law was never permitted, but where the defendant bore a good character, and it also was confined to such cases, where a debt might be supposed to be discharged, or satisfaction made in private, without any witness to attest it, and many other prudential restrictions accompanied this indulgence. By degrees, new forms of action were introduced, and new remedies devised, wherein no defendant was at liberty to wage his law. So that now no plaintiff need apprehend any danger from the hardiness of his debtor's conscience, unless he voluntarily chooses to rely on his adversary's veracity, by bringing an obsolete instead of a modern action.

Trespass on the Case Substituted. Therefore one shall hardly hear at present of an action of debt brought upon a simple contract; this being supplied by an action of trespass on the case for the breach of promise or *assumpsit*, wherein, though the specific debt cannot be recovered, yet damages may be given equivalent thereto. And this being an action of trespass, no wager of law can be waged therein.

Trover and Conversion Substituted. So instead of an action of detinue to recover the very thing detained, an action on

the case in trover and conversion is usually brought, wherein though the specific chattel cannot be had, yet the defendant shall pay damages for the conversion, equal to the value of the chattel; and for this trespass also, no wager of law is allowed.

Bill in Equity Substituted. In place of actions of account, a bill in equity is usually filed, wherein though the defendant ans ·rs under oath, yet such oath is not conclusive on the plaintiff that he may prove everything by other evidence, in contradiction of the defendant's evidence.

Fallen into Disuse. So that wager of law is quite out of use, being avoided by the mode of bringing the action; but still it is not out of force. Hence when a new statute inflicts a penalty, and gives an action of debt for recovering it, it is usual to add, in which no wager of law is allowed.

CHAPTER XXIII.—TRIAL BY JURY.

Its History. The trial by jury, or *per pais*, by the country, has been used out of mind in England; probably coeval with the first civil government of the land. It was certainly in use among the earliest Saxon colonies. We find traces of juries in the laws of all those nations which adopted the feudal system, as in Germany, France and Italy, who had all of them a tribunal, composed of twelve good men and true, *boni homines*, usually the vassals or tenants of the lord, being the equals or peers of the parties litigant. The laws of king Ethelred mention them. This tribunal was universally established among the northern nations, and so interwoven in their very constitutions, that the earliest accounts of one give traces of the other. Its establishment in England, though for a time greatly impaired by the introduction of the Norman trial by battle, was always so highly valued by the people, that no conquest nor change of government could prevail to abolish it. In *magna carta*, it is termed the principal bulwark of our liberties, and in all countries, it is esteemed as a privilege of the highest and most beneficial nature.

Two Kinds in Civil Causes. Extraordinary and ordinary.

Two species of extraordinary trials by jury are that of the grand assize, and the jury to try an attaint.[1]

The Issue and Venire. When therefore an issue is joined by these words: "And this the said A. prays may be inquired 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*, commanding the sheriff, "that he cause to come here on such a day, twelve free and lawful men of his county, by whom the truth of the matter may be better known, and who are not of kin to A. or B. to recognize the truth of the issue between the said parties."

Jurisdiction. Thus the cause stands ready for a trial at the bar of the court. Trifling suits were ended in the court baron, hundred or county courts, but all causes of great importance are still usually retained upon motion, to be tried at the bar in the superior court. To avoid compelling parties, witnesses and jurors to try an unimportant action at Westminster, a practice obtained of continuing the cause from term to term in the court above, provided the justices did not previously come into the county, where the cause of action arose. If they arrived there within that interval, the cause was removed from Westminster to that of the justices in *eyre*. These were superseded by the modern justices of assize, who came twice or thrice each year into the several counties.

Summoning Jurors. As only the trial, and not the determination of the cause, was now intended to be had in the court below, therefore the clause of *nisi prius* was omitted from the conditional continuances, and was inserted in the writs of *venire facias*, that is, that the sheriff should cause the jurors to come to Westminster on such a day, *nisi prius*, "unless before that day, the justices assigned to take assize, should come into his said county." The sheriff returned his jurors to the court of the justices of assize, and there the trial was had. This clause of *nisi prius* is now left out of the writ of *venire facias*, and inserted elsewhere in the proceedings. No inquests, except of assize and jail delivery, shall now be taken by writ of *nisi prius* till after the sheriff returns the names of the jurors to the court above.

Return of the Venire. The practice now is to make the sheriff's *venire* returnable on the last return of the same term,

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[1] Abolished.

wherein issue is joined, which from the making up of the issues therein are usually called issuable terms. He returns the names of the jurors in a panel, a little pane, or oblong piece of parchment, annexed to the writ.

Jury must Appear at the Assizes. This jury is not summoned, and hence makes default. Then a compulsory process is awarded against the jurors, a *distringas* or *habeas corpora juratorum*, commanding the sheriff to have their bodies, or to distrain their lands and goods, that they may appear upon the day appointed. The writ then commands the sheriff to have their bodies at Westminster on the first day of the next term, or before the said justices of assize, if before that time they meet. As the judges are sure to come to the circuit, among whom are usually two of the judges of the court of Westminster, the sheriff returns and summons the jury to appear at the assizes, and there the trial is had before the justices of assize and *nisi prius*.

Sheriff an Interested Party. If the sheriff be a party to the suit, or be related by blood or affinity to either of the parties, the *venire* shall be directed to the coroner, who may be substituted for the sheriff in this and similar contingencies. If the coroner is also interested, the *venire* shall be directed to two clerks of court, or two persons of the county, named by the court and sworn. These *elisors* in such case shall name the jury, and their return is final, no challenge being allowed to their array.

Advantages of this System. (1.) The Sheriff. The person returning the jurors is a man of some consequence and not likely to commit wilful errors, but is responsible for the faults of himself and officers, and by the obligation of his oath to fulfil his duty.

(2.) Ample Notice Given. As to the time of their return. The panel is returned to the court upon the original *venire*, and the jurors summoned weeks in advance of the trial, whereby the parties may have notice of the jurors, and of their sufficiency, characters, connections and relations, that so they may be challenged on just cause, while by means of the compulsory process of *distringas* or *habeas corpora*, the cause is not likely to be retarded for want of jurors.

(3.) Place of Trial. The place of their appearance, which in cases of consequence is at the bar of the court, in ordinary cases is at the assizes held in the county, where the cause of

action arises, and the witnesses and jurors live, which is a saving of expense.

(4.) **The Judges Themselves.** The persons before whom they are to appear, and before whom the trial is to be held, are the judges of the superior court, if it be a trial at bar, or the judges of assize, delegated from the courts at Westminster by the king, if the trial be held in the country. The very point of their being strangers in the county is of infinite service, in preventing factions and parties. Formerly to remove all suspicion of partiality, a statute provided, that no judge of assize should hold pleas in any county, wherein he was born or lives.

Consultation and Commingling of Judges. These justices, though shifted at every assize, are all sworn to the same laws, have had the same education and studies, converse and consult together, communicate their decisions, and preside in courts, which are mutually connected and judgments blended, as they are interchangeably courts of appeal or advice to each other.

Uniformity of Rules and Administration. Hence their administration of justice and conduct of trials are consonant and uniform, whereby confusion and contrariety are avoided, which would naturally arise from a variety of uncommunicating judges.

Non-suit or Continuance. Notice of Trial. When the general day of trial is fixed, the plaintiff or his attorney brings down the record to the assizes and enters it, so that it may be called in course. If not so entered, it cannot be tried, and plaintiff may thus delay trial, unless the defendant apprehending such neglect, himself undertakes to bring on the trial. But this practice has fallen into disuse, since the passage of a statute, which enacts, that if after issue joined, the cause is not carried down to be tried, the plaintiff shall be deemed nonsuited, and judgment be given for the defendant. If the plaintiff wishes to try the suit, he must give the defendant due notice of trial, proportioned to his distance from the court. If the notice be not countermanded by the plaintiff, and he changes his mind as to trial, he shall be liable to the defendant for costs. Either party however, for good cause, as upon absence, or sickness of a material witness, may upon motion, obtain a continuance.

Proceedings in Court. When the cause is called in court, the record is handed to the judge to examine the pleadings and

the issues to be maintained, while the jury is sworn. To this end the sheriff returns his writ of *habeas corpora* or *distringas*, with the panel of jurors annexed, to the judge's officer in court. The jurors are either special or common.

Special Juries. 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. In such cases, the prothonotary took the freeholder's book, and at random struck off forty-eight freeholders in the presence of both attorneys, who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel. By statute, either party is entitled, on motion, to have a special jury struck upon the trial of any issue, as well at the assizes as at bar, by paying the additional expense, unless the judges will certify that the cause required such special jury.

Common Juries. The Panel. A common jury is one returned by the sheriff. He shall not return a separate panel for every 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 their names being written on tickets, shall be placed in a box, and when each cause is called, twelve of these, whose names shall be first drawn from the box, shall be sworn upon the jury, unless absent, challenged or excused; or unless a previous view of the premises shall have been thought necessary by the court.

Jury of View. In such case, six or more of the jurors returned, to be agreed on by the parties, or named by a judge or proper court officer, 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 calculated to restrain the partiality of the sheriff, or any tampering with the jurors, when returned.

Challenges. As the jurors appear, they are sworn, unless challenged by either party. Challenges are of two sorts: to the array, and to the polls.

Challenge to the Array. This is an exception to the whole panel, in which the jury is arrayed or set in order by the sheriff, in his return. It may be made on account of some

partiality or some default in the sheriff or his deputy, who arrayed the panel. And usually, the same reasons, that before the awarding of the *venire* sufficed to direct it to the coroners or elisors, will be sufficient to quash the array, when made by a person, of whose partiality there is any reasonable suspicion. So where the sheriff arrays the panel, at the nomination or under the direction of either party, this is cause for challenging the array.

Jury of the Vicinage. Also a challenge is tenable, where none of the jury were returned from the vicinity of the place where the cause of action was laid in the declaration, as, by the policy of the ancient law, some of the jury must be from the neighborhood. For living near, both parties naturally appealed to them, as to the country. They were supposed to know beforehand the characters of parties and witnesses, and therefore they knew better, what credit to give to the facts alleged in evidence. On the other hand, juries coming out of the immediate neighborhood would be apt to intermix their prejudices and partialities in the trial of right. By a later statute, the jury need now only come from the body of the county at large, and not *de vicineto*, or from the particular neighborhood.

Aliens. By the ancient law, the array may also be challenged, if an alien be a party to the suit, and a motion be made to the court for a jury *de medietate linguae*, consisting of one-half denizens and one-half aliens, for a more impartial trial, a privilege indulged to strangers in no other country. But where both parties are aliens, no partiality is presumed, and the jury shall all be denizens. At this date, a court might hesitate, whether it has now power, to direct a panel to be thus returned.[1]

Judges cannot be Challenged. Under the civil and canon laws, a judge may be refused upon any suspicion of partiality. By the former laws of England, he might be refused for good cause, but now the law is otherwise, and judges cannot be challenged. For the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.

Challenges to the Polls. These are exceptions to particular jurors. Coke reduces them to four heads: *propter honoris respectum, defectum, affectum and delictum.*

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[1] By statute, such a jury is only now allowed upon trials of felonies and misdemeanors.

(1.) **Propter Honoris Respectum.** As where a privileged person, as a lord of parliament, is empanelled.

(2.) **Propter Defectum.** As if a juryman be an alien born. This is a defect of birth; if he be a slave, this is defect of liberty. But the principal deficiency is defect of estate sufficient to qualify him to be a juror. This depends upon a variety of statutes.

Aliens as Jurors. When the jury is partly of natives and partly of foreigners *de medietate linguae*, no want of land shall be cause of challenge to the alien, for as he is incapable of holding any, this would totally defeat the privilege.

(3.) **Propter Affectum.** Jurors may be challenged for suspicion of bias or partiality. This may be either a principal challenge, or to the favour. The principal challenge is, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favor.

Partiality of Jurors. As that the 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.

Challenge to the Favor. Challenges to the favor are where the party has no principal challenge, but objects only from some probable circumstance of suspicion, as acquaintance and the like; the validity of which must be left to the determination of triors, whose office is to decide whether the juror be favorable or unfavorable. The triors are two indifferent persons named by the court, and if they find him indifferent, he shall be sworn.

(4.) **Propter Delictum.** These challenges are for some crime or misdemeanor, that affect the juror's credit and render him infamous. As for conviction of treason, felony, perjury or conspiracy, or if he has received judgment of the pillory, or to be branded, or be outlawed or attainted. Or if he has proved recreant, when champion in the trial by battle.

Examined on Voir Dire. The juror may himself be examined on oath of *voir dire, veritatem dicere*, with regard to such causes of challenge, as are not to his dishonor or discredit, but

not with regard to any crime, or anything which tends to his disgrace or disadvantage.

Jurors Excused. Besides these challenges, which are exceptions against the fitness of jurors, and whereby they may be excluded from serving, there are also other causes to be made use of by the jurors themselves, which are matters of exemption, whereby their service is excused and not excluded. This applies to sick persons, non-residents, men over seventy years old, and infants under twenty-one. Also to physicians, counsellors, attorneys, officers of the court and the like. Clergymen are usually excused out of favor and respect to their function. But if they own lands, they are liable to be empanelled, in respect of their lay fees, unless they be in the service of the king, or of some bishop.

The Panel. Tales. A *tales* is a supply of such men as are summoned upon the first panel, in order to make up the deficiency. By statute, at the prayer of either party, the judge is empowered to award *tales* of persons present in court, to be joined to the other jurors to try the cause, who are liable however to the same challenges as the principal jurors. This is usually done, till the legal number of twelve be complete.[1]

The Oath. When a sufficient number of persons empanelled 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, *juratores*.

Advantages of the Jury System. We observe how impartially just is the law in England, in framing a tribunal thus excellently contrived for the test and investigation of truth. This plan results in the avoiding of frauds and secret management, by electing the twelve jurors out of the whole panel by lot. It is excellent in its caution against all partiality and bias, by quashing a whole panel or array, if the officer returning is suspected to be other than indifferent. Also in its repelling particular jurors, if probable cause be shown of malice or favor to either party.

Roman Juries. Challenges. A great multitude of exceptions or challenges allowed to jurors, who are the judges of fact,

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[1] Usually, no writ is necessary in the United States, the court having the power to direct the sheriff to summon from the bystanders the requisite number.

was practiced in the Roman republic, before she lost her liberty. That the select judges should be appointed by the praetor, with the mutual consent of the parties; indeed these select judges appear in many respects to bear a remarkable resemblance to our juries. They were first returned by the praetor, then their names were drawn by lot, till the number was completed. Then the parties were allowed their challenges, next they struck what we call a *tales*, and lastly the judges, like our jury, were sworn.

Duties of the Jury. The jury are now ready to hear the merits and fix their attention the closer to the facts, which they are empanelled and sworn to try.

Opening by Counsel. The pleadings are opened to them by counsel on that side, which holds the affirmative of the question at issue.

Affirmative Proof. For the issue is said to lie, and the proof is always first required upon that side, which affirms the matter in question; in which our law accords with the civil law.

Statements of Counsel. The opening counsel briefly informs the jury what has been transacted; 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 set down to be determined. Formerly the whole record and process of the pleadings was read to them in English by the court, and the matter in issue clearly explained to their capacities. 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. The party who began is heard by way of reply.

EVIDENCE.

Defined. 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 other. No evidence ought to be admitted to any other point.

Example. Suit upon a Bond. 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 not; he cannot give a release of this bond in evidence, for that does not destroy the bond, and therefore does not prove the issue, viz., that the bond had no existence.

Kinds. Evidence on the trial by jury is of two kinds: that which is given in proof, or that which the jury may receive by their own private knowledge. The former, or proofs, are either written or parol, that is, by word of mouth.

Written Proofs. Written proofs, or evidence, are: (1) *Records*, (2) *Ancient deeds of thirty years standing, which prove themselves.* (3) *Modern deeds.* (4) *Other writings, which must be attested and verified by parol evidence of witnesses.*

Best Evidence must be Produced. One general rule runs through all the doctrine of trials, namely, 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 non-production of it is a presumption that it would have detected some falsehood, that at present is concealed. So no evidence of a conversation with another will be admitted, but the man himself must be produced.

Hearsay Evidence. Customs and Traditions. Yet in some cases, as in proof of any general custom or matters of common tradition or repute, the courts admit 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.

Book Accounts. So too, books of account, or shop books, are not allowed of themselves to be given in evidence for the owner. But a clerk who made the entries may have recourse to them to refresh his memory. And if such clerk, who was accustomed to make those entries, be dead, and his hand-writing be proved, the book may be read in evidence. For as tradesmen are often under the necessity of giving credit without any note or writing, this is therefore, when accompanied with other collateral proofs of fairness and regularity, the best evidence that can be produced. The law formerly held, that this species of proof must be confined to such transactions as have happened within one year before the action was brought, unless between merchant and merchant, in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be adjusted.

WITNESSES.

Subpoena. Witnesses are brought into court by writ of

subpoena ad testificandum. This commands them, laying aside all pretence and excuse, to appear at the trial on pain of one hundred pounds, to be forfeited to the king, to which the statute added a penalty of twenty pounds to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence.

Tender of his Expenses. But no witness, unless his reasonable expense 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, except he resides within certain limits, and is summoned to give evidence within the same.

Compulsory Process. This compulsory process to bring in an unwilling witness, and the additional penalty in case of disobedience, are of excellent use in the thorough investigation of truth.

Athenian Witnesses. And upon the same principle in the Athenian courts, the witnesses, who were summoned to attend a trial had the choice of three things: either to swear to the truth of the fact in question, to deny or abjure it, or else to pay a fine of a thousand drachmas.

Competency. All witnesses of whatever town or country, who 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 are too scandalous to associate.

Examined on Voir Dire. An interested witness may be examined upon a *voir dire*, if suspected of being secretly concerned in the event. Or his interest may be proved in court; which latter is the only method of supporting an objection to the former class, for no man is to be examined to prove his own infamy.

Attorneys. Confidential Communications. And no counsel, attorney, or other person, entrusted 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 may have come to his knowledge, without being interested in the cause.[1]

Number of Witnesses. 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. Yet our law considers that there are many transactions, to which only one person is privy, and therefore does not always demand the testimony of two, which the civil law universally requires.

Civil Law Practice. The modern practice of the civil law in this respect is peculiar, for as it does not allow a less number than two witnesses to the full proof, they call the testimony of one, though never so clear and positive, half proof only, on which no sentence can be founded. To make up therefore the necessary complement of witnesses, when they have only one to a single fact, they admit the party himself to be examined in his own behalf, and administer to him what is called the suppletory oath, and if his evidence happens to be in his own favor, this immediately converts the half proof into a whole one. To avoid the temptation of perjury, it lays down the rule, that no one ought to be a witness in his own case.

Circumstantial Evidence. Next to positive proof, which is always required where it can possibly be had, the doctrine of presumptions must take place. This is termed circumstantial evidence. For when the fact itself cannot be demonstrately shown, that which comes nearest to the proof of the fact, is the proof of such circumstances, as 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. Violent presumption is many times equal to full proof, for there those circumstances appear, which necessarily attend the fact. As if a tenant cannot prove the payment of former rent, but produces a receipt for rent subsequently due, in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent to full proof, for though actual payment is not proved, yet the receipt in full of all demands is proved, which could not be without such payment; and it therefore induces so forcible a presumption, that no proof shall be admitted to the contrary.

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[1] This exemption is now allowed to attorneys only, and not to other parties.

Probable Presumption. Probable presumption, arising from such circumstances as usually attend the fact, has also its due weight, as if in a suit for rent due in 1754, the tenant proves the payment of the rent due in 1755; this will prevail to exonerate the tenant, unless it be clearly shown that the rent of 1754 was retained for some special reason, or that there was some fraud or mistake. Light presumptions have no weight at all.

The Whole Truth Called for. 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.

Examination in Open Court. All this evidence is to be given in open court, in the presence of the parties, their attorneys, and all bystanders, also before the judge and jury; each party having the liberty to except to its competency, which exceptions are publicly stated, and by the judge 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.

Bill of Exceptions. And if either in his directions or decisions, the judge misstates 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 wherein he is supposed to err, and this he is obliged to seal. 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 natnre 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.

Demurrer to Evidence. This 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 consequence of which there arises a doubt in law. In which case the adverse party may, if he please, 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. This draws the question of law from the cognizance of the jury, to be decided by the court.

Power to Grant New Trials. But neither these demurrers to evidence, nor the bill 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*.

Examination Viva Voce. This open examination of witnesses *viva voce* in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer or his clerk in the ecclesiastical courts, as borrowed from the practice of the civil law.

Depositions Criticised. In such examination, the witness may frequently depose that in private, which he would be ashamed to testify to in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language, but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken.

Advantages of Oral Examination. Besides, the occasional questions of the judge, the jury and the counsel, propounded suddenly to the witness, will sift out the truth much better than a formal set of interrogatories previously penned and settled. And the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.

Effect of the Presence of the Judge. Nor is the presence of the judge, during the examination, a matter of small importance; for besides the respect and awe, with which his presence will naturally inspire the witness, he is able by use and experience to keep the evidence from wandering from the point in issue.

Inspection of the Witnesses. In short, by this method of examination and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior and inclination of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge in the absence of those who made them. And yet, as much may be fre-

quently collected from the manner in which the evidence is delivered, as from the matter of it. These are a few of the advantages attending this English way of giving testimony, *ore tenus*.

Roman Practice. This idea was familiar among the ancient Romans, as Quintilian lays down very good instructions for examining witnesses *viva voce*. This continued until the time of Hadrian. But the civil law, as now modelled, rejects all public examination of witnesses.

Private Knowledge of Jurors. As to such evidence as the jury may have 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 has been held, that though no proofs be produced on either side, yet the jury may bring in a verdict to the best of their knowledge. With the introduction of new trials, the practice which now universally obtains, was first introduced, that if a juror knows anything of the matter at issue, he may be sworn as a witness, and give his testimony publicly in court.

Judge's Charge. When the evidence is gone through with 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.

Retirement of the Jury. Food and Drink. After the proofs are summed up, unless the case be very clear, the jury withdraw from the bar to consider their verdict, and in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire or candles, unless by permission of the judges, till they are all unanimously agreed. This method of accelerating unanimity was not wholly unknown in other constitutions of Europe, and in matters of greater concern. Where juries eat or drink at all, or have eatables about them, without consent of the court and before a verdict, it is fineable; and if they do so at his charge for whom they find a verdict, this verdict will be set aside.

Communicating with a Juror. Also if they speak with either of the parties or their agents, after they have 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 a verdict; any of those circumstances will entirely vitiate such verdict.

Disagreement of Juries. 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 around the circuit from town to town in a cart.

Verdict Unanimous. This necessity of a total unanimity seems to be peculiar to our constitution. Among the ancient Goths, only the consent of the major part of the jury was required, even in criminal cases. In the case of an equal division, the defendant was held to be acquitted.

Announcing the Verdict. When they are unanimously agreed, the jury return to the bar, and before they deliver their verdict, the plaintiff is bound to appear in court by himself or by his attorney, in order to answer the amercement, to which, by the old law, he is liable in case he fails in his suit, as a punishment for his false claim. To be amerced (*a mercie*) is to be at the king's mercy with regard to the fine imposed. The amercement is now disused.

Non-suit of Plaintiff for Non-appearance. The form however still continues, and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be non-suit. Therefore, it is usual for the plaintiff, when he or his lawyer perceives, that he has not given evidence sufficient to maintain his issue, to be voluntarily non-suited or withdraw himself, whereupon the crier is ordered to call the plaintiff, and if neither he nor any one for him appears, he is non-suited, the jurors are discharged, the action is at end, and the defendant shall recover his costs. The reason of this practice is, that a non-suit is better for the plaintiff than a verdict against him. For after a non-suit, 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, will deliver in their verdict.

Privy Verdict. A privy verdict, is when the judge has left or adjourned the court, and the jury being agreed, in order to be

delivered from their confinement, obtain leave to give their verdict privately to the judge out of court. This privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in court, wherein the jury may, if they believe it, vary from the privy verdict. So that the privy verdict is indeed a mere nullity, and is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore is very seldom indulged.

Public Verdicts. But the only effectual and legal verdict is the public verdict, in which the jury openly declare to have found the issue for the plaintiff or 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 a case any difficult matter of law, the jury for the sake of better information and to avoid the danger of having their verdict set aside, will find a special verdict, and therein 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.

Special Verdict by Another Method. Another method of finding a species of special verdict, is when the jury find a verdict generally for the plaintiff, bnt subject nevertheless to the opinion of the judge of the court, 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* being stayed in the hands of the officer of *nisi prius*, till the question is determined, the verdict is then entered for the plaintiff or defendant, as the case may happen.

No Record of Special Verdict. But as nothing appears upon the record but the general verdict, the parties are precluded thereby 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 think proper, take upon themselves to determine, at their own hazard, the complicated questions of fact and law, and without either special verdict or special case, may find a verdict absolutely, either for the plaintiff or defendant.

Jury Discharged. When the jury have delivered their verdict, and it is recorded in court, they are then discharged.

Advantages of Jury Trials. Such a trial is as expeditious and cheap, as it is convenient, equitable and certain. A commission out of chancery, or the civil law courts, for examining witnesses in one cause will frequently last as long, and even be fully as expensive, as the trial of a hundred issues at *nisi prius*. And yet the fact cannot be determined by such commissioners at all; not till the depositions are published and read at the hearing of the cause in court.

Jury Trial, a Bulwark of Liberty. Upon these accounts, the trial by jury is looked upon as the glory of the English law, and it is not only an advantage in regulating the civil property, but is enhanced when applied to criminal cases. It is the most transcendent privilege, which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals. It has secured the just liberties of this nation for a long succession of ages. Montesquieu concludes, that because Rome, Sparta and Carthage have lost their liberties, therefore those of England in time must perish. But it must be recollected, that those states, at the time when their liberties were lost, were strangers to the trial by jury.

Eulogy of the Jury System. The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, usually chosen by the prince, or by parties holding the highest offices in the state, their decisions will frequently have an involuntary bias towards those of their own rank and dignity; for it is not to be expected, that the few should be always attentive to the interests and good of the many. On the other hand, if the power of judicature was placed in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts. It is therefore wisely ordered, that the principles and axioms of law, which are general

propositions flowing from reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts, as come properly ascertained before them. For here partiality can have little scope; the law is well known, and is the same for all ranks and degrees. But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder.

Safety in Numbers. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice.

Oppressive Measures Checked. For the most powerful individual in the state will be cautious of committing any invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that when once the fact is ascertained, the law must of course redress it. This, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.

Jury System. Effect of Withdrawal. Every new tribunal, erected for the decision of facts, without the intervention of a jury, is a step towards establishing an aristocracy, the most oppressive of absolute governments.

Feudal System. An Aristocracy. The feudal system, to effect military subordination, pursued an aristocratical plan in all its arrangements of property, which would have been intolerable in times of peace, but for the privileges of trial by the feudal peers. When such trial on the continent fell into disuse, the nobles increased in power, till the state was ruptured by rival factions, and oligarchy, under the shadow of regal government established, unless where the people have taken shelter under absolute monarchy.

Sweden. This is peculiarly the case in Sweden, where trials by jury have fallen into disuse, and the government has degenerated into a mere aristocracy, in which the liberties of the people are extinguished.

Duty of a Citizen. It is the duty of every man to maintain this valuable constitution in all its rights, to restore it to its ancient dignity, if at all impaired; to amend it, wherever defective; and above all to guard jealously against the introduction of new and arbitrary methods of trial, which under plausible pretences, may imperceptibly undermine this best preservative of English liberty.

Removal of Impediments. Yet the best and most effectual method to preserve and extend the trial by jury in practice, would be to remove the defects and improve the advantages, incident to this mode of inquiry. If justice is not satisfactorily done in this method of deciding facts, the people will resort in search of that justice to another tribunal, though more dilatory, expensive and arbitrary in its frame and constitution. If justice is not done to the crown by the verdict of a jury, the necessities of the public revenue will call for the erection of summary tribunals.

DEFECTS OF THE JURY SYSTEM.

Discovery under Oath. 1. *The want of a complete discovery by the oath of the parties.* This each of them now may have, by assuming the expense and circuity of a court of equity, and by consent, it may sometimes be had, even in the courts of law.

Inconsistency in the Rejection of Evidence. This mode has long been established in our courts of equity, as also the civil law courts, and it seems the height of absurdity, that in the same case, between the same parties, in examining the same facts, a discovery by the oath of the parties, should be permitted on one side of Westminster Hall and denied on the other; or that the judges of the same court should be bound by law to reject such species of evidence, if attempted on a trial at bar, but when sitting the next day as a court of equity, should be obliged to hear such explanation read, and to found their decrees upon it. Within the same country, governed by the same laws, such a mode of inquiry should be universally admitted or rejected.

Books and Papers. 2. *The want of a compulsive power for the production of books and papers belonging to the parties.*

Subpœna Duces Tecum. In the hands of third persons, they can generally be obtained by rule of court, or by adding a clause of requisition to the writ of subpœna, which is then called a subpœna *duces tecum.* But in mercantile transactions, especially, the sight of the party's own books is frequently decisive.

The entries show, what the parties understood at the time as to the transaction, though subsequent events may tempt one to give a different version.

Equity Invoked to Discover Facts. ...e, however, may be finally obtained, and produced on a trial at law, by the circuitous course of filing a bill in equity; whereas there should be an original power for the same purpose in a court of law.

Foreign Witnesses. 3. *Lack of power to examine witnesses abroad and to receive their depositions.*[1]

Depositions. These should be taken where the witnesses reside, especially when the cause of action arises in a foreign country, to which should be added the power of examining witnesses, who are aged, or going abroad, upon interrogatories *de bene esse*, their testimony to be read in evidence, and in the event of the trial taking place after their death or departure, otherwise to be wholly suppressed, Both are now often effected by the mutual consent of the parties, and may be done indirectly, through the channel of a court of equity.

Opportunity for Change of Venue. 4. *No opportunity is afforded for a change of venue, where desirable.*

Place of Trial. The administration of justice should not only be chaste, but should not even be suspected. A jury of the vicinage has some advantages, but is often liable to strong objections, especially in small jurisdictions, or where the question in dispute is one of great local interest, or where a cry has been raised, and the passions of the multitude been inflamed, or where one of the parties is popular, and the other a stranger, or obnoxious. It is true, that if a whole county is interested in the question to be tried, the trial may take place in an adjoining county, but as there may be a strict interest so minute, as not to occasion any bias, so there may be the strongest bias, without any pecuniary interest. To summon a jury, laboring under local prejudices, is laying a snare for their consciences, and although they may be upright, the parties will grow suspicious, and resort under various pretences to another mode of trial.

Change of Venue. When Made. The courts of law will therefore, in transitory actions, very often change the venue or

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[1] This difficulty has been removed by subsequent statutes.

county in which the cause is to be tried, but in local actions, though they sometimes do it indirectly, and by mutual consent, yet to effect it directly and absolutely, the parties are driven to a court of equity, where, upon making out a proper case, it is done upon the ground of being necessary to a fair, impartial and satisfactory trial.[1]

Locality of the Trial. All over the world, actions transitory follow the person of the defendant, while territorial suits must be discussed in the territorial tribunal. I may sue a Frenchman here for a debt contracted abroad; but lands lying in France must be sued for there, and English lands must be sued for in England.

Successive Tribunals. Formerly they were usually demanded only in the court baron of the manor, with jurors chosen from the lord's tenants. When the cause was removed to the hundred court, the lord of the hundred had a further power to convoke the inhabitants of different *vills* to form a jury, observing probably always to intermix among them a stated number of tenants of that manor, wherein the dispute arose. When afterwards it came to the county court, the great tribunal of Saxon justice, the sheriff had wider authority, and could impanel a jury from the men of his county at large, but was obliged to return a competent number of hundredors. The restriction as to hundredors has gradually worn away, that of counties still remains, for many beneficial purposes, but as the king's courts have a jurisdiction coextensive with the kingdom, there can be no impropriety in sometimes departing from the general rule, when justice requires an exception.

CHAPTER XXIV.—JUDGMENT, AND ITS INCIDENTS.

Preamble. We are now to consider the transactions in a cause, next subsequent to arguing the demurrer, or the trial of the issue.

The Postea. If the issue be one of fact, and upon the trial, by any of the methods heretofore mentioned, it be found for

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[1] This may be done in a court of law.

either the plaintiff or the defendant, or specially; or if the plaintiff make default, or is non-suit; or whatever, in short, is done after the joining of the issue and awarding the trial, it is entered on record, and is called a *postea*. This means, that afterwards, *postea*, the 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 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 is thus continued by the *postea*.

Entry. Next follows the judgment of the court, upon what has previously passed, both the matter of law and the matter of fact being now adjusted.

Arrest of Judgment. New Trial. Judgment however for certain causes may be suspended or arrested, for it cannot be entered till the next term after trial, and upon notice to the other party. 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.

NEW TRIALS.

When Granted. The causes of thus suspending the judgment, by granting a new trial, are 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; or if it appear by the report of the judge, certified by the court, that the verdict was without or contrary to the evidence, and the judge is dissatisfied therewith, or the jury have given exorbitant damages; or if the judge has misdirected the jury, so that they found an unjustifiable verdict.[1] In such cases, the court awards a new or second trial. But if two juries give similar verdicts, a third trial is seldom awarded.

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[1] A new trial is also often granted, because of after discovered material evidence, or because of the conviction of a witness for perjury committed on the trial. In criminal cases, no new trial is granted in the event of an acquittal.

Misbehavior of Jurors. The setting aside of the verdict of a jury, and granting a new trial on account of the misbehavior of the jurors, is of ancient date. Judgments have been stayed, and new *venires* awarded, because the jurymen ate and drank without the consent of the judge, or because the plaintiff had privately given a juryman a paper, even before he was sworn. The first reported case of a new trial, granted on account of excessive damages awarded by a jury, was in 1655, and this act of the jurors was termed misbehavior, inasmuch as they evinced a notorious partiality.

Verdict against the Charge of the Court. In early times, a practice took rise in the common pleas, of granting new trials upon the mere certificate of the judge, unfortified by any report of the evidence; that the verdict had passed against his opinion, though such practice was not adopted in the court of king's bench, which allowed new trials for misbehavior, surprise or fraud, or if the verdict was notoriously contrary to the evidence. At that time, it was held, that whatever matter could avoid a verdict ought to be returned on the *postea*, and not merely surmised by the court, lest posterity should wonder why a new trial was granted, without sufficient reason appearing upon the record.

New Trials More Easily Obtained Now. In the reign of Charles II. new trials were granted upon affidavits, and the former strictness of the courts of law, in respect of new trials, having driven many parties into courts of equity to be relieved from oppressive verdicts, they are now more liberal in granting them, on the principle, that where justice is not done upon one trial, the injured party is entitled to another.

Verdict Formerly Reversed by writ of Attaint. Formerly, the principal remedy for the reversal of an unjust verdict, was by writ of attaint. Instead of appealing to Providence for a decision, as in the trial by battle, it was referred to the oath of fallible or perhaps corrupted men.

Erroneous Verdict. Remedy. Our ancestors knew that a jury might give an erroneous verdict, which ought not to conclude the question in the first instance, but the remedy, which they provided, shows the ignorance of the times and the simplicity of the points, then usually litigated in the courts of justice. They supposed, that the judge having announced the law, the

proof of facts must be always so clear, that if they found a wrong verdict they must be corruptly perjured. Whereas a juror may find a just verdict from unrighteous motives, or give a verdict manifestly wrong, without any bad motive, as from inexperience in business, incapacity, misapprehension, inattention to circumstances, and many other innocent causes. But such a remedy as this laid the injured party under an insuperable hardship, by making a conviction of the jurors for perjury the condition of his redress.

Verdict Corrected. Ancient Mode. The judges saw this, and therefore very early, even upon writs of assize, they devised a variety of distinctions, by which an attaint might be avoided, and the verdict corrected in a more temperate method. Thus, if excessive damages were given, they were moderated by the discretion of the judges. And if either in that or any other case, justice was not completely done, it was remedied by certificate of assize, which was in fact a second trial of the same cause by the same jury.

Amended Verdict. And in mixed or personal actions, as trespass, wherein no attaint originally lay, if the jury gave a wrong verdict, the judges did not deem themselves warranted in pronouncing an iniquitous judgment, but amended it, if possible, by subsequent inquiries of their own, or referred it to another examination.

Attaints, Obsolete. Second Trial. After attaints had become more general, the judges frequently, even for the misbehavior of jurymen, instead of prosecuting the writ of attaint, awarded a second trial. This proved so expedient, that attaints became obsolete. Time brings new remedies more beneficial to the subject, the result of experience and public approbation.

Verdict not Final. If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would compel, in causes of consequence, a resort to the form of the imperial law, upon written depositions, which might be reviewed in the course of appeal.

Trial on the General Issue Only. Causes of great importance, titles to land, and large questions of commercial property come often to be tried by a jury, merely upon the general issue; where the facts are complicated, the evidence of great length and variety, and sometimes contradictory, and where the nature of the dispute frequently introduces nice questions and subtleties of law.

Surprised by Evidence. Either party may be surprised by a piece of evidence, which had he known would be produced, he could have explained or answered; or may be puzzled by a legal doubt, which a little recollection would have solved.

The Judge's Errors. In the hurry of trial, a judge may mistake the law and misdirect the jury, or he may not be able to make the evidence clear to them, nor remove the erroneous impressions instilled by able advocates.

The Jury may Err. The jury are to give their opinion *instanter*, that is before they separate or take food. Under these circumstances, the most intelligent and best intentioned men may bring in a verdict, which on cool deliberation, they would wish to reverse.

Views of the Losing Party. Next to doing right, the great object in administering justice is to give public satisfaction. If the verdict was against the opinion of his counsel, or even the belief of bystanders, no party would be satisfied, unless he had an opportunity to review it. His doubts would be decisive; he would deem the verdict unjust and abhor a tribunal, which he imagined had done him an injury, which he could not redress.

New Trials. Advantages. Granting a new trial under proper regulations cures all these inconveniences, and yet preserves entire, and perfects the most excellent method of decision, the glory of the English law, a trial by jury. A new trial is a re-hearing of the cause before another jury, as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court, awarding a second trial on the other, and the subsequent verdict, even though it differ from the first, imports no censure or reflection on the other jury, who, had they possessed the same information, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject, and nothing is now tried, but the real merits of the case.

The Argument. Sufficient grounds must be shown to satisfy them, that it is necessary to justice that the cause should be further considered. If the matter be new, and was not presented before the judge 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 has retained his notes of

the evidence. Counsel are heard on both sides, to impeach or establish the verdict, and the court gives its reasons at large, why a new trial should not be had. The true import of the evidence is duly weighed, false coloring is removed, and all points of law, which arose at the trial, are explained and settled.

When not Granted. Nor do the courts lend too easy an ear to every application 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 slight to warrant 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, 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.

Granted on Conditions. In granting such further trial, which is a matter of sound discretion, the court may usually, and does supply these defects in this mode of trial, which we have stated, by laying the party applying under such equitable terms, as his opponent may 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. The delay and expense of this proceeding are so trifling, that it is seldom moved for in order to gain time or to gratify humor.

When Motion Made. The motion must be made within the first four days of the next succeeding term, within which term it is usually heard and decided.[1]

Civil Law Tribunals. In tribunals which conform to the process of the civil law, and in every other country of Europe, the parties may appeal from day to day, and from court to court, upon questions merely of fact, which is a perpetual source of obstinate delay and expensive litigation.

New Trials, the best Mode of Correcting Errors. With

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[1] The rules of different courts are not in accord, as to when a motion for a new trial must be filed.

us, no new trial is allowed, unless there be a manifest mistake, and the subject matter is worthy of interposition. The aggrieved party may still have recourse to his writ of attaint after judgment; in the course of the trial he may demur to the evidence, or tender a bill of exceptions. And if the first is totally laid aside, and the other two very seldom put in practice, it is because experience has shown, that a motion for a second trial is the shortest, cheapest and most effectual cure for imperfections in the verdict, whether they arise from the mistakes of the parties themselves, of their counsel, or even of the judge or jury.

ARRESTS OF JUDGMENT.

How They Arise. These arise from intrinsic causes, appearing upon the face of the record. Of this kind are:

Variance between Declaration and Writ. Where the declaration varies totally from the original writ. Thus, where the writ is in debt or detinue, and the plaintiff declares in an action on the case, for an *assumpsit*. 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.

Variance between Verdict and Pleadings. Where the verdict materially differs from the pleadings and issue thereon. Thus, in an action for words, where 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."

Insufficient Declaration. This is where the case laid in the declaration is not sufficient in point of law to found an action upon. Whatever is alleged in arrest of judgment upon matter of law must be such, as would, upon demurrer, have sufficed to overturn the action or plea.

E Converso. 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 which at the trial, it is impossible to support the action or defence, this omission shall be aided by a verdict.

Examples. Action of Trespass. As if, in an action of trespass, the declaration does not allege, that the trespass was committed on a certain day, or if the defendant justifies, by

prescribing for a right of common for his cattle, and does not plead that his cattle were *levant* and *couchant* on the land; though either of these defects might be good cause to demur to the declaration or plea, yet if the adverse party omit to take advantage of such omission in due time, but takes issue and has a verdict against him, these exceptions can not after verdict be moved in arrest of judgment.

Cured by Verdict. For the verdict ascertains these 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 the judge, would find a verdict for either party, unless he had proved those circumstances, without which his general allegation is defective.

Defects must be Material. 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.

When not Cured by Verdict. But if the thing omitted be essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is 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.

Defect in the Pleadings. If by the inadvertence of the pleader, 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 should be given, the court will after verdict award a repleader, unless it appear from the whole record, that nothing material can possibly be pleaded in any shape whatever, and then a repleader will be fruitless. And whenever a repleader is granted, the pleadings must begin *de novo* at that stage, whether it be the plea, replication or rejoinder, wherein there appears to be a deviation from the regular course.

Judgment Entered. 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 of record.

Kinds of Judgment. Judgments are the sentence of the

law, pronounced by the court upon the matter contained in the record. They are of four kinds:

1. *Where the facts are confessed by the parties, and the law determined by the court, as in the case of judgment upon demurrer.*

2. *Where the law is admitted by the parties, and the facts disputed, as in the case of a judgment on a verdict.*

3. *Where both the fact and the law arising thereon are admitted by the defendant, which is the case of judgments by confession or default.*

4. *Where the plaintiff is convinced, that either the fact or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution, which is the case in judgments on a non-suit or retraxit.*

Natural Conclusion. The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but that of the law. It is the conclusion that regularly follows from the premises of law and fact, which stand thus: against him who has ridden over my corn, I may recover damages by law, but A has done so, therefore I shall recover damages against A.

Logical Proposition. If the major proposition be denied, this is a demurrer in law; if the minor, then it is an issue of fact, but if both be confessed or determined to be right, the conclusion or judgment of the court must follow, which judgment depends therefore not on the arbitrary caprice of the judge, but on the settled and invariable principles of justice.

Style or Wording of the Judgment. The judgment, in short, is the remedy prescribed by law for the redress of injuries, and the suit or action is the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation, and therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear its own, but "it is considered," 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. All these species of judgments are either interlocutory or final.

Interlocutory Judgments. These are such as are given in the middle of a cause, upon some plea, proceeding or default; which judgment is only intermediate and does not finally deter-

mine or complete the suit. Of this nature are all judgments for the plaintiff upon pleas in abatement of the suit or action, in which the court orders the defendant to answer over, *respondeat ouster*, that is put in a more substantial plea. When he shall have done so, further proceedings may be had.

Damages not Ascertained. The more usual interlocutory judgments 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 can only be done by a jury. This can only happen, when the plaintiff recovers; but when judgment is given for the defendant, it is always complete, as well as final.

Where an Interlocutory Judgment Happens. This happens in the first place, where the defendant allows judgment to go against him by default, or *nihil dicit*, as if he files no plea to the plaintiff's declaration; also by confession, or *cognovit actionem*, where he acknowledges the plaintiff's demand to be just; or by *non sum informatus*, 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 for a debt for a sum certain, the judgment is absolutely complete.

Warrant of Attorney. Judgments Confessed. Therefore it is 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 *nihil dicit*, *cognovit actionem* or *non sum informatus* in an action of debt, to be brought by the creditor against the debtor for the specific sum due, which judgment, when confessed, is complete and binding, providing it be docketed, that is entered in a book, according to statute.

Writ of Inquiry. But where damages are to be recovered, a jury must be called 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, but because the court know not what damages the said plaintiff hath 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 the 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, upon an action, wherein damages are recovered, the judgment is also incomplete without a writ of inquiry.

Final Judgments. These put an end to the action, by declaring, that the plaintiff himself is entitled or is not entitled to recover the remedy for which he sues. In which case, if the judgment be for the plaintiff, it is also considered, that the defendant be either amerced for his wilful delay of justice in not immediately obeying the king's writ by rendering the plaintiff his due, or be taken up, *capiatur*, till he pays a fine to the king for the public misdemeanor which is coupled with the private injury, in all cases of force, of falsehood in denying his own deed, or unjustly claiming property in replevin, or of contempt, by disobeying the command of the king's writ or the express prohibition of any statute.

Fines Imposed upon Defendant. But now in cases of trespass, ejectment, assault and false imprisonment, the statute provides, that no writ of *capias* shall issue for this fine, nor any fine be paid, but the plaintiff shall pay the fee to the proper officer, and be allowed it against the defendant with other costs. And therefore, upon such judgments in the common pleas, they used to enter, that the fine was remitted, and now in both courts they take no notice of any fine or *capias*.

Fines Imposed upon Plaintiff. But if judgment be for the defendant, then in case of fraud and deceit to the court, or in malicious suits, the plaintiff may also be fined; but in most cases, it is only considered, that he and his pledges of prosecuting be nominally amerced for his false claim, and that the defendant may go thereof without a day, that is without further continuance or adjournment; the king's writ, commanding his attendance, being now fully satisfied, and his innocence shown.

COSTS.

Under the Common Law. Costs are a necessary append-

age to judgments. The common law did not professedly allow costs, the amercement of the vanquished party being his only punishment, though in reality costs were always considered and included in the *quantum* of damages, in actions where damages were given, and even now, costs for the plaintiff are always entered on the roll, as increase of damages by the court.

Allowed by Statute. But because these damages were frequently inadequate to the plaintiff's expenses, the statute ordered costs to be added, and further directed, that the same rule should hold in all cases, where the party is to recover damages. And therefore in such actions, where no damages were then recoverable, as at one time in *quare impedit*, no costs are allowed, unless expressly given by statute. The costs on both sides are taxed by the prothonotary.

Exemption from Costs. The king, and any one suing in his name, shall neither pay nor receive costs.[1] As it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them. In two other cases an exemption lies from paying costs. Executors and administrators,[2] while suing in the right of the deceased, shall pay none, for the statute does not give costs to defendants, unless where the action supposes the contract to be made with, or the wrong to be done to the plaintiff himself.

Poverty an Excuse. And paupers, who will swear they are not worth five pounds, are by statute to have original writs and subpoenas *gratis*, and counsel assigned them without fee, and are excused from paying costs, when plaintiffs, but shall suffer other punishment at the discretion of the judges. An old law, which has fallen into entire disuse, gave paupers the option, if nonsuited, to pay the costs, or be whipped. It seems, however, that a pauper may recover his actual costs, though if defeated, he pay none, for the counsel and clerks are bound to give their labor to him, but not to his antagonist.

No Costs Allowed, where Small Damages. To prevent trifling and malicious actions for words, for assault and battery, and for trespass, it is enacted, that where the jury award less damages than forty shillings, the plaintiff shall be allowed no

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[1] Not the case at present in civil actions.—*Cooley.*

[2] Altered by statute, and now they are liable, unless the judge orders otherwise.—*Cooley.*

more costs than damages, unless the judge, before whom the cause is tried, shall certify, under his hand on the back of the record, that an actual battery was proved, or that in trespass, the freehold or title to the land came chiefly in question.

CHAPTER XXV.—PROCEEDINGS IN THE NATURE OF APPEALS.

Kinds. These proceedings are of four kinds: *writs of attaint, of deceit, of audita querela, and of error.*

1. WRIT OF ATTAINT.

Where it Lies. This lies to inquire, whether a jury of twelve men gave a false verdict; so that the judgment following thereon may be reversed. This must be brought in the lifetime of the successful party, and of two at least of the jurors who gave it. This lies, at the common law, only on writs of assize, and upon the very point involved, and not upon collateral matter. This issue should be tried by a common jury. It did not lie, under the common law, in trespass, debt, or other actions personal, because these were always determined by common juries. Subsequently, however, by statute, an attaint could be sued upon inquests, and allowed in all pleas of trespass, and further extended to all pleas whatever, personal and real, except only the writ of right.

The Jury. The jury, who are to try this false verdict, must be twenty-four, and are called the grand jury. In suits involving forty or more pounds, or of forty shillings a year in land, each grand juror must have freehold to the annual value of twenty pounds. The same evidence is given to the grand jury, as to the petit jury.

Punishment of Jurors. If the grand jury found the verdict a false one, the judgment by the common law was, that the jurors should become forever infamous, should forfeit their goods and the profits of their lands; should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their meadows ploughed, and that the plaintiff should be restored to all he had lost by reason of the unjust verdict. The severity of this pun-

ishment had the usual effect of preventing the execution of the law, and hence by statute, a more moderate punishment was inflicted on attainted jurors, viz.: perpetual infamy, and a forfeiture of money.

2. WRIT OF DECEIT.

When Used. This action, or one in the 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 have been recovered to the prejudice of him who has right.[1]

3. AUDITA QUERELA.

Defined. This 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 has given him a general release, or if the defendant has paid the debt to the plaintiff, without procuring satisfaction to be entered on the record. In these, and the like cases, wherein the defendant has good matter to plead, but has had no opportunity of pleading it, either at the beginning of the suit, or *puis darrein continuance*, which must be always before judgment, an *audita querela* lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff.

Nature and Form of the Writ. It is a writ directed to the court, stating that the complaint of the defendant has been heard, *audita querela defendentis*, and then setting out the matter of the complaint. It, at length, enjoins the court to call the parties before it, and having heard their allegations and proofs, to cause justice to be done between them.

When It Lies. 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 has a good defence, is too late to make it in the ordinary forms of law.

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[1] Abolished.

Almost Obsolete. 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*.

4. WRIT OF ERROR.

Method of Redress. The principal method of redress for erroneous judgments in the king's court of record, is by writ of error to some superior court of appeal.

When it Lies. A writ of error lies for some supposed mistake in the proceedings of a court of record. To amend errors in a court not of record, a writ of false judgment lies. The writ of error only lies upon matters of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it. The method of reversing an error in the determination of facts, is by a new trial to correct the mistakes of the former verdict.

Amendments. Formerly writs of error were sometimes brought on very trivial grounds, as mis-spellings and other mistakes of the clerks, all of which might be amended at common law, while all the proceedings were on paper, and hence considered as only in *fieri*, and therefore subject to the control of the courts. But when once the record was made up by the common law, no amendment could be permitted, unless within the very terms of which the judicial act so recorded was done, for during the term, the record is in the breast of the court, but afterwards, it admitted of no alteration. But now the courts have become more liberal, and will allow of amendments at any time, while the suit is pending, notwithstanding the record be made up, and the term be past. They consider the proceedings in *fieri*, till the judgment is given, and therefore 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. Statute of Jeofails. 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 the proceedings, and acknowledges such error (*jeo faile*), he is at liberty by such statute to amend it. These statutes are numerous, and by them all trifling exceptions are so thoroughly guarded against, that writs of error cannot now be maintained, but for some material mistake assigned.

History of Amendments. The rise and history of amendments is curious. Formerly when all pleadings were *ore tenus*, if a slip was perceived and objected to by the opposite party or the court, the pleader instantly acknowledged his error, and rectified his plea, which caused the length of dialogue reported in the ancient year books. The judgments were entered up by the clerks, and if any mis-entry was made, it was rectified by the minutes, or by the remembrance of the court itself. In the reign of Edward I, when the treatise of Britton was published, a check was given to the unwarrantable practice of some judges, who had made false entries on the rolls to cover their own misbehavior, and had taken upon them by amendments and erasures to falsify their own records. The king forbade such alterations, and inflicted heavy punishments upon justices, who had been addicted to this practice. The severity of these proceedings alarmed succeeding judges, who through fear of being charged with doing wrong, hesitated to do right. It was so hazardous to alter a record, that they resolved not to touch the records, but held that even palpable errors, when enrolled and the term at an end, were too sacred to be rectified or called into question. Even though the record was a falsity, they dared not judicially and publicly amend it, to make it agreeable to truth. In the reign of Richard II, they refused to amend the most glaring errors and mis-entries, except by authority of parliament.

Refusal to Amend. Under this affected timidity of the judges, every slip, even of a syllable or letter, was now held to be fatal to the pleader, and overturned his client's cause. They might have excused themselves from amending in criminal, and especially in capital cases. They need not have granted an amendment, where it would work injustice to either party, or where he could not be put in as good a condition, as if his adversary had made no mistake. The precedents were strictly followed to the great obstruction of justice and the ruin of suitors, who suffered as much by the obstinacy and strictness of the courts, as they could have done even by their iniquity. Justice was entangled in a net of mere technical jargon.

Technical Objections Removed. The legislature has therefore been compelled to interfere by no less than twelve statutes to remedy those opprobrious niceties, in which it has been seconded by judges of a more liberal cast, and this unseemly degree of strictness is almost eradicated.

Bail must be Entered. 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 who brings the writ, or who is plaintiff in error, must, except in some peculiar cases, find substantial pledges of prosecution or bail, to prevent delays by frivolous pretences to appeal, and for securing payment of costs and damages, which are now payable by the vanquished party in most cases.

The Courts of Appeal. A writ of error lies from the inferior courts of record in England into the king's bench, and not into the common pleas. Also from the king's bench in Ireland to the king's bench in England. It likewise may be brought from the common pleas at Westminster to the king's bench, and from the latter court to the house of lords. From proceedings on the law side of the exchequer, a writ of error lies into the court of the exchequer chamber before the lord chancellor, lord treasurer and the judges of the court of king's bench and common pleas, and from thence, it lies to the house of peers.

To the House of Lords. From proceedings in the king's bench in debt, detinue, covenant, account, case, ejectment or trespass, originally begun therein by bill, except where the king is party, it lies to the exchequer chamber, before the justices of the common pleas and barons of the exchequer, and from thence also to the house of lords, but where the proceedings in the king's bench do not commence therein by bill, but by original writ sued out of chancery, this takes the case out of the general rule, so that the writ of error then lies, without any intermediate state of appeal, directly to the house of lords, the ultimate resort of every civil action.

Court of Last Resort. All courts 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.

CHAPTER XXVI.—EXECUTION.

When it Issues. If the regular judgment of the court, after the decision of the suit, be not suspended, superseded or reversed, in one of the modes hereinbefore set forth, 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.

Habere Facias. 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, he 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, the delivery of a twig, a turf or the ring of the door, in the name of seisin, is sufficient execution of the writ.

Special Writ. In other actions, where the judgment is, that something 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.

Nuisance. In the case of a nuisance, a writ issues to the sheriff to abate it, at the charge of the party, which likewise issues even in case of an indictment.

Replevin. Upon a replevin, the writ of execution, is the writ *de retorno habendo*, and if the distress be eloigned, 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.

Detinue. 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 are, to show cause why they should not be delivered; and if the defendant still continues obstinate, then, if the judgment has been by default or on demur-

rer, the sheriff shall summon an inquest to ascertain the value of the goods, and the plaintiff's damages, which, being either so assessed, or by the verdict in case of an issue, shall be levied on the person or goods of the defendant.

Replevin and Detinue. So that after all, in replevin and detinue, the only actions for recovering the specific possession of personal chattels, if the wrong doer be very perverse, he cannot be compelled to a restitution of the identical thing taken or detained, but he still has his election to deliver the goods or their value; an imperfection in law, that results from the nature of personal property, which is easily concealed or conveyed out of the reach of justice, and not always amenable to the magistrate.

Kinds of Executions. Executions in actions, where money only is recovered, as a debt or damages, and not any specific chattel, are of five sorts:

Against the body of the defendant.
Against his goods and chattels.
Against his goods, and the profits of his lands.
Against his goods, and the possession of his lands.
Against his body, lands and goods.

1. CAPIAS AD SATISFACIENDUM.

This is distinct from a *capias ad respondendum*, which lies to compel an appearance at the commencement of a suit. This cannot be sued out against any, but such as were liable to be taken upon the former *capias*.

Its Intent. The intent of it is to imprison the body of the debtor, till satisfaction be made for the debt, costs and damages.

Exemption from Arrest. It does not lie against any privileged person, peers or members of parliament, nor against executors or administrators, nor against such other persons, as could not originally be held to bail.[1] Coke mentions an instance where extreme old age was held a cause for exemption from imprisonment.

Husband and Wife. 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

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[1] Imprisonment for debt in England is not allowed at the present day in actions on contracts, except where fraud exists.

husband and wife in execution, but if the action was originally brought against her when sole, and the plaintiff recovers judgment, 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 misbehavior 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.

Estops other Process. This 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.

Death of the Defendant. If the defendant dies, while charged in execution on this writ, the plaintiff may, after his death, sue out a new execution against his lands, goods or chattels.

Language of the Writ. 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, until he does.

For Costs. 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.

Escape. When a defendant is once in custody upon process, he is held confined, and if he afterwards is seen at large, it is an escape, and the plaintiff may have an action against the sheriff for his whole debt. For though, upon arrests, and upon mesne process, which is process during the progress of the suit, the sheriff, until the statute of William III, might have indulged the defendant as he pleased, so that he produced him in court to answer the plaintiff at the return of the writ; yet, upon a taking in execution, he could never give any indulgence, for in that case confinement is the whole of the debtor's punishment, and of the satisfaction made the creditor.

Escapes. Voluntary and Negligent. Escapes are either voluntary or negligent. Voluntary are such as are by the express consent of the keeper, after which he can never retake his pris-

oner, though the plaintiff may retake him at any time, but the sheriff must answer for the debt. Negligent escapes, are where the prisoner escapes without the keeper's knowledge or consent; and then the defendant may be retaken, and the sheriff shall be excused, if he has him again before any action brought against him for the escape.

Rescue. A rescue of a prisoner in execution, either going to jail or in jail, or a breach of prison, will not excuse the sheriff from being guilty of, and answering for the escape, for he ought to have sufficient force to keep him, since he may command the power of the county.

Discharge of a Debtor. But by statute, if a defendant, charged in execution for a debt not exceeding one hundred pounds, will surrender all his effects to his creditors, except his apparel, bedding and tools of trade, not aggregating ten pounds, and will make oath of his punctual compliance with the statute, the prisoner may be discharged, unless his creditor insists on detaining him; in which case he shall allow him 2*s.* 4*d.* per week, to be paid weekly, and on failure of making this payment, the defendant shall be discharged. Yet the creditor, at any future time, may have execution against the lands and goods of such defendant, though never more against his person.

Discovery and Surrender of Property. On the other hand, the creditors may, as in case of bankruptcy, compel such debtor, charged in execution for any debt under one hundred pounds, to make a discovery and surrender of all his effects for their benefit, whereupon he is also entitled to the like discharge of his person.

Liability of the Bail. Where a *capias* is sued out, and *non est inventus* is returned thereon, the plaintiff may issue process against the bail, if any were given, the stipulation having been, 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. If the two former stipulations are not carried out, the last must immediately take place.

Execution against the Bail. To accomplish this, 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 if, 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 him.

2. FIERI FACIAS.

Form of Writ. The sheriff is commanded, *quod fieri faciat de bonis*, that is, he cause to be made of the goods and chattels of the defendant the sum or debt recovered. This lies against privileged persons also, and against executors or administrators with regard to the goods of the deceased.

Peaceable Entrance. The sheriff may not break open any outer door, but must enter peaceably, and may then break open any inner door belonging to the defendant, in order to take the goods.

The Sale. And he may sell the goods and 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. If part only of a debt be levied on a *fieri facias*, the plaintiff may have a *capias ad satisfaciendum* for the residue.

3. LEVARI FACIAS.

Effect. This 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.

4. WRIT OF ELEGIT.

When Allowed. This is a judicial writ given by the statute, either upon a judgment for a debt or damages, or upon the forfeiture of a recognizance taken in the king's court.

Restriction of Alienation of Lands. By the common law, a man could only have satisfaction of goods, chattels, and the present profits of lands, by writs of *fieri 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 wore

away, the consequence still continued, and no creditor could take possession of the lands, but only levy upon the growing profits, so that if the defendant aliened his lands, the plaintiff was ousted of his remedy.

Goods Taken at Appraisement. The statute therefore granted this writ of *elegit*, called so, 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 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 satisfaction of his debt.

Profits from Lands. If the goods are not sufficient, then the moiety of his freehold lands, which he had at the date of the judgment, whether held in his own name, or of some one 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 terminate, as on the death of the defendant, if he be a tenant for life or in tail. During this period, the plaintiff is called tenant by *elegit*.

Alienation of Lands Prevented. We have before observed, that under the ancient common law, lands were not chargeable for debts, otherwise, the connection between the lord and tenant might be destroyed, fraudulent alienations might be made, and the services be transferred, to be performed by a stranger, provided the tenant incurred a large debt, sufficient to cover the land. Therefore, even by this statute, only one-half of the land is subject to execution, that out of the remainder, sufficient might be left for the lord to distrain for his services; and upon the same feudal principle, copyhold lands cannot be taken in execution, upon a judgment.[1]

Debts to the King. But in case of a debt to the king, the common law allowed possession of the lands to be taken, till the debt was paid. For being the ultimate proprietor of the landed estates, he might seize the lands, if anything was owing from his vassal; and was not defrauded of his services, when he himself ousted the vassal.

Followed by a Capias. This execution, or seizing of lands by *elegit*, is never followed by the imprisonment of the defendant,

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[1] By statute, the sheriff now delivers to the judgment creditor all lands of the defendant.

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 writ in this case is no more in effect than a *fieri facias*. So that body and goods may be taken in execution, or lands and goods, but not body and land too, upon any judgment between subject and subject in the course of the common law.

5. EXTENT, OR EXTENDI FACIAS.

When Allowed. This writ issues upon some prosecutions given by statute, as in the case of recognizances for debts acknowledged on statutes merchant or staple; upon forfeiture of these, the body, lands and goods may be taken in execution, to compel the payment of the debt.

The King's Claims Preferred. In suing out execution, the king's claim shall be preferred to that of any other creditor, who had not obtained judgment, before the king commenced his suit. The king's judgment also affects all lands, which his debtor had at or after the time of the contracting of the debt, or which any of his officers had at or after the time of his entering upon the office; so that if such officer of the crown alienes for a valuable consideration, the land shall be liable to the king's debt, even in the hands of a *bona fide* purchaser, though the debt due the king was contracted by the vendor long after the alienation.

Lien of Judgment. Whereas judgment between subject and subject related, even at common law, no further back than the first day of the term in which they were recovered, in respect of the lands of the debtor, and did not bind his goods, but from the date of execution, and now, by the statute of frauds, the judgment shall not bind the lands of a *bona fide* purchaser, but only from the day of its entry on the record.

Lien of Execution. Nor shall the writ of execution bind the goods in the hands of a stranger or purchaser, but only from the actual delivery of the writ to the sheriff, or other officer, who must endorse on it the day he received it.

Satisfaction Entered. 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 harassed on the same account.

Laches in Issuing Execution. All these writs of execu-

tion must be sued out within a year and day after the judgment is entered, otherwise the court concludes *prima facie* that the judgment is satisfied and extinct.

Scire Facias to Revive Judgment. Yet, however, it will grant a writ of *scire facias* 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 bring an action of debt, founded on this dormant judgment, which was the only method of revival allowed by the common law.

SUMMARY OF BOOK III.

In the present book, we have considered the nature of remedies by the mere act of the parties or the mere operation of law, without suit in the courts. We have next reviewed the remedies by suit or action in courts, and have contemplated the nature and species of courts instituted for the redress of particular injuries, and then have shown in what particular courts application must be made for the redress of particular injuries, or the doctrine of jurisdiction and cognizance. We afterwards considered the nature and distribution of wrongs and injuries, affecting every species of personal and real rights, with the respective remedies by suit,which the law of the land has afforded for every possible injury. And lastly, we have dednced and pointed out the method and progress of obtaining such remedies in the courts of justice proceeding from the original writ, through all the stages of process, to compel the defendant's appearance; and of pleading or formal allegation on the one side, and excuse or denial on the other, with the examination of the validity of such complaint or excuse upon demurrer, or the truth of the facts alleged and denied, upon issue joined and its several trials; to the judgment or sentence of the law, with respect to the nature and amount of the redress given; till after considering the suspension of that judgment by writs in the nature of appeals, we have arrived at its final execution, which puts the party in possession of his right, or else gives him a satisfaction, either by equivalent damages, or by the imprisonment of the party guilty of the injury complained of.

Excellencies of English Law. This care and circumspection in the law, in providing that no man's right shall be affected

by legal proceeding, without previous notice given him, and yet that the debtor on being thus notified, shall not escape justice; requiring that every complaint be accurately ascertained in writing, and be as exactly answered; in clearly stating the question, either of law or fact; in deliberately resolving the former, after full discussion, and indisputably fixing the latter by a diligent and impartial trial; in correcting such errors, as may have arisen in either of those modes of decision, from accident, mistake or surprise; and in finally enforcing the judgment, where nothing can be alleged to impeach it; this anxiety to grant every individual the enjoyment of his civil rights, without intrenching on the rights of others; the parental solicitude which pervades our whole legal constitution, is the genuine offspring of that spirit of equal liberty, which is the felicity of Englishmen.

Unprofessional Acts. While there are delays in the practice of the law, which are complained of, yet those complaints are exaggerated. There may, as in other departments, be a few unworthy professors, who study chicane and sophistry, rather than truth and justice, and who may endeavor to screen the guilty by an unwarrantable use of those means, which were intended to protect the innocent. But the frequent disappointments and the constant discountenance, that they meet with in the courts of justice, have reduced this class to a very small compass.

Delays in the Conduct of a Suit. Yet some delays are unavoidable in the conduct of a suit, however desirous all parties may be for a speedy determination. These arise from liberty, property, civility, commerce, and an extent of populous territory. More time and circumspection are requisite in causes where the suitors have valuable and permanent rights to lose, than where their property is trivial and precarious, and what the law gives them to-day may be seized by their prince to-morrow. In Turkey, where little regard is shown to the lives or fortunes of the subject, all causes are quickly decided; the pasha on a summary hearing, ordering which party he pleases to be bastinadoed. But in free states, the trouble, expense and delays of judicial proceedings are the price that every subject pays for his liberty, and in all governments, says Montesquieu, the formalities of law increase, in proportion to the value which is set on the honor, the fortune, the liberty and life of the subject.

Civil Law had more Delays. From these principles, it

might follow that the English courts are more subject to delays than those of other nations, as they set a greater value on life, liberty and property. Yet, in reality, we enjoy the advantage, while we are exempt from a proportionate share of the burden. The course of the civil law, to which many nations conform their practice, is much more tedious than ours. Especially is this the case in France.

Far less Delay than Formerly. Great improvement in the celerity of justice has resulted from the disuse of real actions; by the statutes of amendments and jeofails, and by other regulations; and also by the increased time and attendance given by the judges in the courts. In the Roman year, twenty-eight days only were allowed to the praetor for deciding causes, whereas in England one-fourth of the year is term time, in which the court sits constantly for the despatch of matters of law. Then we have the close attendance of the courts of chancery for determining suits in equity, and the numerous courts of assize and *nisi prius*, that sit in vacation for the trial of matters of fact.

CHAPTER XXVII.—PROCEEDINGS IN COURTS OF EQUITY.

Concurrent Jurisdiction. The same jurisdiction is exercised, and the same system of redress pursued in the equity court of the exchequer as in the court of chancery, with a distinction however, as to some few matters, peculiar to each tribunal, and in which the other cannot interfere.

MATTERS PECULIAR TO CHANCERY.

1. Infants. On the abolition of the court of wards, the general protection of infants was intrusted to the king in his court of chancery. When, therefore, a fatherless child has no other guardian, the court of chancery may appoint one, and from its proceedings, an appeal lies to the house of lords.

Guardian ad Litem. The court of exchequer can only appoint a guardian *ad litem* to defend an infant when sued, 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, upon a bill for that purpose filed, either tribunal, indiscriminately, will take care of the property of the infant.

2. Idiots and Lunatics. The king himself used formerly to commit the custody to proper committees in every particular case; but now to avoid solicitations and partiality, a warrant is issued by the king to the chancellor 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 the party be an idiot or 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.

3. Charities. The king, as *parens patriae*, has the general superintendence of all charities, which power he exercises through the chancellor. Whenever necessary, the attorney general, at the instance of some relative or informant, files, *ex officio*, an information in the court of chancery, to have the charity established. The chancellor is also empowered to inquire into 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. This is not a proceeding at common law, but is treated as an original cause in the court of equity.

The Evidence.. The evidence below is not written, and the respondent in his answer to the exceptions, may allege what now 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 the costs. It is thus considered an original cause throughout, and an appeal lies, as of course, from the chancellor's decree to the house of peers.

4, 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.[1]

Jurisdiction. The jurisdiction of the court of chancery does not extend to some causes, wherein relief may be had in the exchequer. It has no cognizance of such mistaken charities,

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[1] This jurisdiction is now given to the court of bankruptcy in England.

wherein relief may be had in the exchequer. Nor can chancery give any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property, not even in cases where he is a royal trustee. Such causes must be determined by the court of exchequer, as a court of revenue, which alone has power over the king's treasury, and the officers employed in its management. In other matters, what is said of the court of equity in chancery, will be equally applicable to the other courts of equity. Whatever difference there may be in the forms of practice, it arises from the different constitutions of their officers.

Equity Defined. In its true meaning, equity is the soul and spirit of all law; positive law is construed, and rational law is made by it. In this, equity is synonymous with justice, that is, in the true sense of the rule. The terms, courts of equity and courts of law might mislead us, as if one judged without equity, and the other judged without law. Such a distinction is erroneous.

DISTINCTION BETWEEN EQUITY AND LAW.

Rigor of the Common Law. (1.) It is said, that it is the business of a court of equity to abate the rigor of the common law. But no such power is contended for. Hard as a case may be in common law, rigorous and unjust the rule, yet a court of equity has no power to interfere. Thus the law is written.

Interpretation of Statutes. (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 profess to interpret statutes according to the true intent of the legislature. Generally all cases cannot be foreseen, or if foreseen, cannot be expressed. Some may 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 the 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.

Construction of Laws. 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 in the

courts both of law and equity; the construction in both must be the same. Each endeavors to fix and adopt the true sense of the law in question; neither can enlarge, diminish or alter that sense.

Fraud, Accident and Trust. (3.) It has been said, that these are the proper and peculiar objects of a court of equity. But every kind of fraud is equally cognizable in a court of law, and some frauds are cognizable only there. Many accidents are remedied in a court of law, as loss of deeds, mistakes in receipts or accounts, wrong payments, and many other errors, many of which cannot be relieved in a court of equity. A technical trust, created by the limitation of a second use, however, does peculiarly appertain to the equity court. 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, of having undertaken to account for money received to another's use, which is the ground of an action on the case almost as remedial as a bill in equity.

Discretion in Equity Proceedings. (4.) It has been said, that courts of equity are not bound by rules or precedents, but act from the opinion of the judges, founded on the circumstances of every particular case.

Precedents are Followed. Whereas the system in equity courts is a labored, connected system, governed by established rules and bound by precedents, some of which may perhaps be liable to objection. Nay, sometimes a precedent is so strictly followed, that a particular judgment, founded upon special circumstances, gives rise to a general rule.

Mistaken Theories as to Equity. It is a mistake to suppose, that a court of equity is amenable to no law, either common or statute, and assumes the rule of an arbitrary legislator in every particular case. Grotius or Puffendorf, great masters of jurisprudence, would have been as little able to discover the system of a court of equity in England, as the system of a court of law; especially as the notions of the character, power and practice of a court of equity were formerly adopted by our principal lawyers.

Arbitrary Powers of Chancellor. But this was in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves, partly from their ignorance of law, being frequently bishops or statesmen, partly from an-

bition or lust of power, but principally from the narrow and unjust decisions of the courts of law, had usurped such unlimited authority, as has been totally disclaimed by their successors.

Early Decrees of no Weight. The decrees of a court of equity were then rather in the nature of awards, with more probity of intention than knowledge of the subject, founded on no settled principles, and therefore valueless as precedents.

Similarity In Law and Equity. But the systems of jurisprudence in our courts, both of law and equity, are now equally artificial systems, founded on the same principles of justice and positive law, but varied in the forms and mode of proceeding; the one being originally derived from the feudal customs during the Saxon and Norman judicatures, the other, with equal improvements, form the imperial and pontifical formularies introduced by clerical chancellors.

Similar Rules in Law and Equity. The suggestion in every bill, to give jurisdiction in equity is, that the complainant has no adequate remedy at the common law. But no one therefore should conclude, that no case is adjudged in equity, where there might have been relief in law. 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. The measure of substantial justice ought to be the same in both.

Example of Equitable Interference. Bonds. Thus the penalty of a bond, originally contrived to evade the absurdity of a prohibition against taking interest for money, was pardonably considered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest, for the judges could not give judgment, that the interest should be specifically paid. But when afterwards the taking of interest became legal, as the necessary sequence of commerce, their successors still wilfully and technically adhered to the ancient precedents, and refused to consider the payment of principal, interest and costs full satisfaction of the bond. At the same time, liberal men, who sat in the courts of equity, construed the instrument according to its just intent, as merely a security for the loan, as understood by the parties. So in mortgages, being only a landed, as the other is a personal security for the money lent, the payment of principal, interest and costs,

ought at any time, before judgment executed, to have saved the forfeiture in a court of law, as well as in a court of equity.

Bonds and Mortgages. And the inconvenience and injustice of putting different constructions in different courts upon the same transaction, obliged parliament at length to interfere, and direct that in the cases of bonds and mortgages, what had long been the practice in courts of equity, should also be followed in the future in courts of law.

Provisions in Agreements. Neither a court of equity nor of law can vary men's wills or agreements, or make such documents for them. One court ought not to extend, and the other abridge, a lawful provision inserted by the parties. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages, nor against a lapse of time, where the time is material to the contract, as in covenants for the renewal of leases. Both courts will equitably construe, but neither court pretends to control or change, a lawful stipulation.

Law and Equity Rules Harmonious. The rules of decision in both courts are equally pertinent to the subjects of which they take cognizance. Where the subject matter is such as requires to be equitably determined, 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 time honored precedents. 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 the privileged cases of ambassadors, etc. In mercantile transactions, they follow the marine law, and argue from the usages in maritime countries. When 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. Where a foreign municipal law is involved in the case, they both seek information from the rule of the country, and decide accordingly.

In what they Differ. In what does the essential difference between the courts of law and equity consist? Principally in the distinct modes of administering justice adopted by each; in the mode of proof, the mode of trial, and the mode of relief. Upon these and partly upon two other accidental grounds of jurisdic-

tion, which were formerly driven into these courts by narrow decisions in courts of law, viz., the true construction of securities for money lent, and the form and effect of a trust or second use, has been gradually erected that structure of jurisprudence, which prevails in our courts of equity.

(1.) **Mode of Proof.** When facts rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath as 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.

Jurisdictior in Equity. As incident to accounts, they take a concurrent cognizance of the administration of personal assets, and consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. Also of tithes, of partnerships and many other mercantile transactions, and so of bailiffs, receivers, factors and agents. Also over 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 fraud or concealment. And thus, 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.

(2.) **Mode of Trial.** This is by interrogatories administered to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside, Where the cause originates abroad, and the witnesses reside upon the spot, or if it arose in England, and the witnesses are abroad, or shortly about to depart, or if witnesses here are aged or infirm; these are grounds for a court of equity to grant a commission to examine them.[1]

(3.) **Mode of Relief.** The want of a more specific remedy than can be obtained in a court of law, gives a concurrent jurisdiction to a court of equity in a great variety of cases.

Specific Performance. Thus, in executory agreements, a court of equity will enforce performance, unless it be improper or impossible, instead of giving damage for their non-performance. Hence a fiction is established, that what ought to be done

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[1] Courts of law now have the same power.

shall be considered as done, and shall relate back to the time it should have been done.

Concurrent Cognizance. 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 jurisdiction, to prevent the expense of endless litigation. In various kinds of frauds, it assumes a concurrent jurisdiction, not only for the sake of discovery, but of a more extensive and specific relief, as by setting aside fraudulent deeds, decreeing re-conveyances, or directing an absolute conveyance merely to stand as a security. And for the sake of a more complete relief, by decreeing a sale of lands, a court of equity holds plea of all debts, encumbrances and charges that may issue thereout.

(4.) True Construction of Securities for Money Lent. Equity courts have jurisdictiou over this question. When they held the penalty of a bond to be the form, as a pledge to secure repayment of the sum advanced with a compensation for its use, they settled the doctrine of personal pledges or securities, which applies also to mortgages of real estate.

Mortgages. The mortgagor continues owner of the land, the mortgagee of the money lent upon it; but the ownership is mutually transferred, and the mortgagor is barred from redemption, if, when called on 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.

(5.) The Form of a Trust or Second Use. Courts of equity have exclusive jurisdiction, as to the subject matter of all settlements and devises in that form, and of the long terms in complicated conveyancing. Nearly the same rules, as would govern the estate in a court of law, govern the trust if no trustee is interposed, and by a positive system in equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of the common law.

Progress of Equity Practice. Eminent lawyers, some of whom have held the great seal, have, by degrees, erected the system of relief administered by a court of equity into a regular science, attained by study and experience, and from which, when understood, it may be known what remedy a suitor is entitled to expect and by what mode of suit, as readily and with as much precision in a court of equity as one of law.

Should Work in Harmony. For the sake of certainty, peace and justice, each court should as far as possible follow the other, in the best and most effectual rules for attaining desirable ends. It is a maxim, that equity follows the law, and in former days, the law had not scrupled to follow equity. Many valuable improvements in the ancient state of our tenures, and the forms of administering justice, have arisen from the reason, that the same thing was effected by means of a subpœna in chancery.

Bill in Equity. The Form. A suit in chancery is commenced, by preferring a bill to the chancellor, in the style of a petition. This is in the nature of a declaration at common law, or a libel in the spiritual courts, setting forth the circumstances of the case at length, as some fraud, trust or hardship, for which "your orator is wholly without remedy at the common law." Relief is therefore prayed, and also process of subpœna against the defendant, to compel him to answer upon oath to all the matter charged in the bill. If it be to quiet possession of lands, to stay waste, or to stop proceedings at law, an injunction is also prayed, as in the civil law an *interdictum*, commanding the defendant to cease.

Parties, Defendants. 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 propriety.

Impertinent Matter. It must not contain scandalous or impertinent matter, otherwise the defendant may refuse to answer it until such matter is expunged, which is done by referring it to a master in chancery. He examines the propriety of the bill, and orders such matter struck out, if he finds it exists; and the defendant shall have his costs, which ought of right to be paid by the counsel who drafted the bill.

Injunction. When the bill is 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 fail to answer within the allotted time, an injunction will issue as of course, and when the answer is filed, the injunction can only be continued upon a sufficient ground, appearing from the answer itself. But if an injunction be wanted to save waste, or similar urgent injury, then upon the filing of the bill, and a proper case supported by affidavit, the court will at once grant an injunction,

to continue until the defendant shall have answered, and till the court make some further order. When the answer comes in, the court upon argument decides, whether the injunction shall then be dissolved, or continued until the hearing of the cause. This decision is based both upon an examination of the answer, and also of the affidavits.

Subpœna. But upon common bills, as soon as they are filed, a process of subpœna is taken out, which is a writ, commanding the defendant to appear and answer the bill on a penalty of 100*l.* If the defendant, thus served, does not appear within the time limited by the rules of court, and plead, answer or demur to the bill, he is then said to be in contempt.

Attachment. The process of attachment, which is a writ in the nature of a *capias*, is then awarded against him. It is directed to the sheriff, commanding him to attach, or take the defendant, and bring him into court. If the sheriff return *non est inventus*, then an attachment with proclamation issues, directing public proclamation by the sheriff throughout the county to summon the defendant to appear and answer. If this be also returned *non est inventus*, a commission of rebellion is awarded against him, and four commissioners ordered to attach him, wherever found in Great Britain, as a rebel. Subsequently if not found, the court sends a serjeant at arms in quest of him, and a sequestration issues to seize all his personal estate, and the profits of his real, and to detain them, subject to the court's order. The plaintiff's bill in then taken *pro confesso*, and a decree is made accordingly.

Purged of Contempt. If the defendant be taken on any process, he is to be committed to prison, till he puts in his appearance or answer, or performs whatever else this process is issued to enforce, and clears his contempt by the payment of the plaintiff's costs incurred thereby. A similar process issues in all sorts of contempts, during the progress of the cause.

Corporations and Peers. The process against a corporation is by *distringas*, to distrain them by their goods and chattels, rents and profits, till they shall obey the summons or directions of the court. If a peer be a defendant, the chancellor sends a letter missive to him to request his appearance, together with a copy of the bill, and if he neglects to appear, he is served with a subpœna. If he still continues in contempt, a sequestra-

tion issues against his lands and goods, without any *mesne* process of attachment, which is directed against the person, and hence not applicable to a lord of parliament.

Absconding Defendant. The above process cannot be sued out until after process of the subpœna, for then the contempt begins, as the respondent has not been presumed previously to have had notice of the bill. If the defendant absconds to avoid service, a day shall be appointed for him to appear to the bill, and notice given him by public advertisement, otherwise the bill will be taken *pro confesso*.

Act of the Defendant. If the defendant appears, and receives a copy of the bill, he is next to demur, plead or answer.

Demurrer. A demurrer in equity is nearly of the same nature as a 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 equity therein contained, or where the plaintiff, by his own showing, appears to have no right, or where discovery is sought, which may cause a forfeiture or may convict a man of a crime. For any of these causes, a defendant may demur. If the demurrer is allowed, the plaintiff's bill shall be dismissed; if it be overruled, the defendant must answer.

Plea. 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. The truth of such plea the defendant is bound to prove, if requested by the plaintiff. But as bills are often of a complicated nature, a man may plead as to part, demur as to part, and answer to the residue. No exceptions to formal minutiæ in the pleadings will be here allowed, for the parties are at liberty to amend, on discovery of any errors in form.

The Answer. An answer is the usual defence made to a plaintiff's bill. It is sworn to, unless the action be an amicable one. This method of proceeding is taken from the ecclesiastical courts, like the rest of the practice in chancery; for there, in almost every case, the plaintiff may demand the oath of his adversary. Yet if in the bill, any question is put, that tends to

the discovery of any crime, the defendant may demur and refuse to answer.

Commission. If the defendant lives within twenty miles of London, he must be sworn before one of the masters of the court; if farther off, there must be a commission to take his answer in the country, where the commissioners administer to him the usual oath, and then the answer being sealed, a commissioner carries it up to the court or sends it by a messenger, who swears he received it, as it is, from a commissioner.

Defective 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 be not done, the answer may be excepted to for insufficiency, and the defendant be compelled to put in a more sufficient answer.

Cross Bill. A defendant cannot pray anything in his answer, but to be dismissed the court. If he claims relief against the plaintiff, he must do it by an original bill of his own, which is called a cross bill.

Amended Bill. After answer put in, upon payment of costs, the plaintiff may amend his bill, either by adding new parties or new matter, or both, upon the additional light given him him by the defendant, and the latter is obliged to answer afresh such amended bill.

Supplemental 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 arise, which did not exist before, he must set it forth by a supplemental bill.

Bill of Revivor. There may also be 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 *in statu quo.*

Bill of Interpleader. There is likewise a bill of interpleader, where a person, who owes a debt or rent to one of the parties to the suit, but until its determination, he knows not to whom, desires, that they may interplead, that he may be safe in the payment. It is usual in the latter case, to order the money paid into court for the benefit of the party, to whom it may be found due. The plaintiff must annex an affidavit to his bill, swearing there is no collusion between him and either party.

Argument on Bill and Answer. 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 such case, he must take the defendant's answer to be true in every point.

Replication and Rejoinder. 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 the reverse, which he is ready to prove; upon which the defendant rejoins, averring the like on his side, which is joining issue on the facts in dispute.

Interrogatories and Depositions. Proof is made by examining witnesses, and taking their depositions in writing, according to the manner of the civil law. For that purpose, interrogatories are framed, or questions in writing, which and which alone are to be proposed to the witnesses in the cause. These interrogatories must be short and pertinent, and not leading, for if they be such, the depositions will be suppressed.

Commission. For the purpose of examining witnesses in or near London, an examiner's office is appointed, but for such as live at a distance, a commission to examine witnesses is granted, to take depositions at such locality. If foreigners, skilful interpreters are employed. The deposition of a heathen, who believes in a supreme being, taken by commission in the most solemn manner, according to the custom of his own country, may be read. The commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the court of chancery. Their clerks are also sworn to secrecy.

Witnesses. The witnesses are compellable by process of subpœna, as in the courts of common law, to appear and submit to examination.

Bill to Perpetuate Testimony. If witnesses are old and infirm, it is usual to file a bill to perpetuate their testimony, although no suit may be pending; for it may be, that an antagonist only waits for the death of some of them to begin his suit. This is most frequent, when lands are devised away from the heir at law; and the devisee in order to perpetuate the testimony of witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will *verbatim*, 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 a decree, no relief being prayed, but the heir is entitled to his costs, even if he contests the will. This is usually termed proving a will in chancery.

Depositions Published. When all the witnesses are examined, and not before, the depositions may be published, under a rule, after which they are open for inspection of the parties, and may be copied.

Decree of Master of the Rolls. The cause is then ready for hearing, and may be placed on the list at the instance of either plaintiff or defendant, before either the chancellor or the master of the rolls, according to the discretion of the clerk of the court, regulated by the nature and importance of the suit, and the number of causes then pending before them. As to the authority of the master of the rolls to hear and determine causes, and his power in the court of chancery, the statute declares, that all decrees by him made, except such as the court appropriated to the great seal alone, should be deemed valid, but may be altered by the chancellor.

Absence from the Hearing. Either party may be subpœned to hear judgment on the day fixed for the hearing, and then if the plaintiff does not attend, his bill will be dismissed with costs. If the defendant makes default, a decree will be made against him, which will be final, unless he pays the plaintiff's costs of attendance, and shows good cause to the contrary on a day appointed by the court.

Bill Dismissed for Laches. A plaintiff's bill may at any time be dismissed for want of prosecution, which is in the nature of a non-suit at law, if he suffers three terms to elapse without moving forward in the cause.

Cross Bills. When there are cross causes on a cross bill, filed by the defendant against the plaintiff in the original cause, they are generally arranged to be heard together, so that the same decree may answer for both.

Method of Hearing Causes. The parties on both sides appearing by counsel, plaintiff's bill is first opened in brief, and the defendant's answer also, by the junior counsel on both sides, after which the plaintiff's leading counsel states the case and the

matters in issue, and the points of equity arising therefrom. Plaintiff's depositions are then read by one of the clerks, and such part of the defendant's answer, as the plaintiff thinks material and of use; and after this, counsel for the plaintiff makes his observations and arguments. Then the defendant's counsel go through the same process for him, except that they may not read any portion of his answer; and counsel for the plaintiff are heard in reply.

Rendition of the Decree. When counsel have finished, the court pronounces the decree, adjusting every point in debate, according to equity and good conscience, the minutes of which decree are taken down and read openly in court by the registrar.

Costs. While the matter of costs to be given either party is merely a discretionary one, according to the circumstances of the case, yet they are usually given to the defendant, if he has been wrongfully vexed.

The Decree Itself. The chancellor's decree is either interlocutory or final. It seldom happens, that the first decree is final, or concludes the cause, for if any matter of fact is strongly controverted, the court being sensible of the weakness of written depositions, usually directs the matter to be tried by a jury. In such event, the fact is usually directed to be tried in the court of king's bench, or at the assizes upon a feigned issue.[1]

Feigned Issues. These issues seem borrowed from the Roman law, and are also frequently used in the courts of law, by consent of the parties, to determine some disputed right, without the formality of pleading, and thereby to save much time and expense in the decision of a cause.[2]

Case Stated. 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 be created, it is the practice of the chancery 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 submitted to their decision, who certify their opinion to the chancellor.

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[1] Under present chancery practice, the court itself usually determines those issues, which were formerly sent to a common law court jury.

[2] The consent of the court should first be obtained before arranging a feigned issue.

Delay in the Decree. Master's Report. Another thing also retards the completion of decrees. Frequently long accounts are to be settled, and incumbrances and debts to be inquired into, before a decree can do full justice. These matters, by the decree on the first hearing are always referred to a master in chancery to examine, which examination frequently lasts for years, and then he is to report the facts, as they appear to him, to the court. This report may be excepted to, disproved and over-ruled; otherwise it is confirmed and made absolute, by order of the court.

Final Decree. 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 estate.

Petition for Re-hearing.[1] If any party feels aggrieved by the decree, he may petition the chancellor for a re-hearing, whether it was heard before him, or a judge in his stead, or the master of the rolls. Every decree must be signed by the chancellor before it is enrolled, unless a re-hearing is allowed. Every petition for a re-hearing must be signed by two counsel of character, concerned in the cause, certifying, that they apprehend the cause is proper to be re-heard. Upon the re-hearing, 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 now sits to hear reasons, why the decree should not be enrolled. At this hearing every omission of evidence or argument may be supplied. But after the decree is once signed and enrolled, it cannot be re-heard or rectified, except by bill of review, or by appeal to the house of lords.

Bill of Review. This may be had upon an apparent error in judgment, appearing upon 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 have been obtained at the time of the decree. 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.

Appeal to Parliament. This is to the house of lords,

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[1] Of late years, the court of chancery itself usually determines these points, without transferring them to a jury in the law courts.

which is the last resort of the subject, who thinks himself aggrieved by an interlocutory order, or final determination in the court. It is effected by petition to the house of lords, and not by writ of error, as upon judgments at common law. It is obvious, that when the courts of equity became principal tribunals for deciding causes of property, a revision of their decrees, by way of appeal, became equally necessary, as a writ of error from the judgment of a court of law. But no new evidence is admitted in the house of lords upon any account, this being a distinct jurisdiction. 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 before.

BOOK THE FOURTH.

PUBLIC WRONGS.

Divisions of the Subject. We now proceed to consider public wrongs, or crimes and misdemeanors, with the means of their prevention and punishment:

1. *The general nature of crimes and punishments.*
2. *The persons capable of committing crimes.*
3. *Their several degrees of guilt, as principals or accessories.*
4. *The several species of crimes, with the punishment annexed to each.*
5. *The means of preventing their perpetration.*
6. *The method of inflicting those punishments, which the law has annexed to each crime.*

Chapter I.—THE NATURE OF CRIMES, AND THEIR PUNISHMENT.

The King, as Prosecutor. The discussion and admeasurement of this topic form the code of criminal law, or what is termed in England, the doctrine of the pleas of the crown, so called, because the king is supposed by the law to be the person injured by every infraction of the public rights, and is therefore, in every case, the proper prosecutor for every public offence.

Knowledge of Criminal Law. The knowledge of this branch of jurisprudence, which teaches the nature, extent and degree of every crime, and adjusts to it its adequate penalty, is of the utmost importance to every one. No rank in life, no uprightness of heart, no prudence of conduct will preclude a man at some

period from being interested in these researches. The infirmities of some, the vices and passions of others, the instability of human affairs, and numberless unforseen events will teach us, that it is a matter of universal concern to know what the laws forbid, and the consequences of a violation of such laws.

Criminal Legislation Imperfect. The importance of the criminal law necessitates legislative care in properly forming and enforcing it. It should be founded on principles permanent, uniform and universal, conformable to the dictates of truth and justice, the feelings of humanity and the rights of mankind, though it sometimes may be modified, narrowed or enlarged, according to the local necessities of the state. Yet from a lack of attention to these principles in the first formation of these laws, and adopting in their stead, the impetuous dictates of avarice, ambition and revenge; from retaining discordant political regulations, established by conquerors or factions; from giving a lasting efficacy to sanctions, that were intended to be temporary, or from too hastily employing means disproportioned to the end, in order to check the progress of some prevalent offence, it has happened, that the criminal law in every country in Europe is more imperfect than the civil.

Needs Revision and Amendment. Even in England, where our crown law is more nearly advanced to perfection, where crimes are more accurately defined, and penalties less uncertain and arbitrary, where all our accusations are public, and our trials open, where torture is unknown, and every delinquent is judged by his equals, even here we notice some particulars that need revision and amendment. These have chiefly arisen from too scrupulous adherence to some rules of the ancient common law; from not repealing penal laws, that are obsolete or absurd, and from too little attention in framing and passing new ones.

Care in Framing Laws. It is never usual, in the house of lords, even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges, and hearing their report thereon. Surely equal precaution is necessary, when laws are to be established, which may affect the property, the liberty, and perhaps even the lives of thousands.

Absurd and Cruel Penalties. Had such a reference taken place, it is impossible, that in the eighteenth century, it could

have been made a capital crime to break down the mound of a fish pond, or cut down a cherry tree in an orchard. To this day, it is a felony, without benefit of clergy, to be seen for one month in the company of persons, who are called Egyptians. These outrageous penalties, being seldom or never inflicted, are hardly known to the public, but that rather aggravates the mischief, by laying a snare for the unwary.[1]

I. CRIMES.

Defined. A crime or misdemeanor is an act committed or omitted, in violation of a public law, either forbidding or commanding it. The words crimes and misdemeanors are mere synonymous terms, though in common usage the word "crimes" implies the more atrocious offence, while smaller faults and omissions are termed "misdemeanors."

Distinction between Public and Private Wrongs. 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 misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social, aggregate capacity.[2]

Private Action for the Tort. In all cases the crime includes an injury; every public offence is also a private wrong, and somewhat more; it affects the individual, and affects the community. Thus robbery is an injury to private property, but were that all, a civil satisfaction in damages might atone for it; the public mischief is the crime, and it must be punished. In gross injuries, the private wrong is absorbed in the public, and we seldom hear of satisfaction being made the individual. But there are crimes of an inferior nature, in which the public punishment is not so severe, but it affords room for private compensation also. Thus a party may be indicted for assault and battery, and be punished by fine and imprisonment, and the party may also have his private remedy for damages, by action of trespass for the injury he has received. So in the case of a public nuisance, where one is injured by its existence.

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[1] These suggestions have led to a thorough revision and correction of the criminal code of England.

[2] Wrongs done to individuals and not to the community, for which a private action is maintainable for damages, are usually termed torts.

Wrong Redressed and Crime Punished. Upon the whole, in taking cognizance of all wrongs, the law has a double view, viz: not only to redress the party injured, by either restoring to him his rights, if possible, or by giving him an equivalent; but also to secure to the public the benefit of society, by preventing or punishing every breach of those laws, which the sovereign power has established.

2. PUNISHMENTS.

Defined. These are evils or inconveniences consequent upon crimes, being devised, denounced and inflicted by human laws, in consequence of disobedience or misbehavior in those, to regulate whose conduct, such laws were made. Herein we will consider the power, the end and the measure of human punishment.

(1.) **Power of Human Punishment.** This means the right of the legislator to inflict discretionary penalties for crimes. The right of punishing crimes against the law of nature, as murder, is in a state of nature vested in every individual. In a state of society, this right is transferred from individuals to the sovereign power, whereby men are prevented from being judges in their own causes, which is one of the evils that civil government was intended to remedy. The power which at one time individuals had of punishing offences against the law of nature is now vested in the magistrate alone, who dispenses justice by the consent of the entire community.

Offenses Against Society. As to offences against the laws of society, which are only *mala prohibita* and not *mala in se*, the magistrate is also empowered to inflict coercive penalties, and this by the consent of individuals, who in forming societies, distinctly or expressly invest the sovereign power with the right of making laws, and of enforcing obedience to them when made, by exercising upon their non-observance, severities adequate to the evil. The law, by which men suffer, was made by their own consent; it is a part of the original contract into which they entered, when first they became members of society, and which heretofore has contributed to their own security.

Extent of the Power. The right conferred by consent upon the state, gives it the same power and no more over all its members, as each individual had naturally over himself or others.

Capital Punishment. How far then ought legislators to inflict capital punishments for positive offences; offences against the municipal law only, and not against the law of nature, since no individual naturally has a power of inflicting death upon himself or others for actions in themselves indifferent? With regard to offences *mala in se*, capital punishments are in some instances inflicted by the command of God himself to all mankind, as in the case of murder, "whoso sheddeth man's blood, by man shall his blood be shed." So also in the Creator's positive code of laws for the regulation of the Jewish republic. But they are sometimes inflicted, without such express warrant, for offences that are not against natural but only against social rights.

Death Penalty Defended. The practice of inflicting capital punishment for offences of human institution, is justified by that great and good man, Sir Matthew Hale, that "when offences grow enormous, frequent and dangerous to a kingdom or state, destructive or pernicious to civil societies, and to the insecurity of the kingdom or its people, severe punishment and even death itself is necessary to be annexed to laws." Every humane legislator should be extremely cautious of establishing laws that inflict the death penalty. A better reason should be assigned, than that no lighter remedy will be effectual.

(2,) The End or Final Cause of Human Punishments. This is not by way of expiation, for the crime committed, for that must be left to God's determination, but as a precaution against future offenses of the same kind.

Preventing a Recurrence of the Crime. This is effected in three ways: By the amendment of the offender, for which purpose corporal punishments, fines and temporary exile or imprisonment are inflicted; or by deterring others by the dread of his example from offending in the like way, which gives rise to all ignominious punishments; or lastly, by depriving the offender of the power to do future mischief, which is effected by either putting him to death or condemning him to perpetual confinement or exile. The object of preventing future crimes is the end of all these species of punishments. The method of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and not to exceed it, and the more severe punishments should not be inflicted, but when the offender appears incorrigible, which may be inferred by the act being one of deep malignity, or from a repetition of minuter offenses.

(3) **The Measure of Human Punishment.** The quantity of punishment can never be absolutely determined by any standing invariable rule, but it must be left to the arbitration of the legislature to inflict such penalties, as are warranted by the laws of nature and society, and such as appear to afford precaution against future offences.

Law of Retaliation. The *lex talionis*, or law of retaliation, cannot in all cases be an adequate or permanent rule of punishment. In some cases, it apparently is dictated by natural reason, as in the case of conspiracies to do an injury, or false accusations of the innocent. The Egyptians compelled a man to swallow the poison, which, without good reason, was found in his custody. In general, the difference of persons, place, time, provocation or other circumstances may enhance or mitigate the offence, and in such cases, retaliation can never be a proper measure of justice. Sometimes retaliation may be too easy a sentence, as if a man put out the remaining eye of one who had lost one before, it is too slight a punishment for the maimer to lose only one of his, and therefore the law of the Locrians, which demanded an eye for an eye, was altered, in imitation of Solon's laws, that he who struck out the eye of a one-eyed man, should lose both his own in return.

Retaliation Inexpedient. Theft cannot be punished by theft, and so with other crimes. Even those instances, where retaliation appears to be used by divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the same injury and no more; but this correspondence between the crime and punishment is barely a consequence from some other principle. Even death is not always an equivalent for death, the life of one party being infinitely more valuable to society in many cases, than the life of the other, hence the death sentence proceeds upon other principles than retaliation.

Retaliation Inadequate. The punishment ought rather to exceed than equal the injury, as it is contrary to equity, that the innocent should suffer as much as the guilty.

Retaliation for Incomplete Injuries. With regard indeed to crimes that are incomplete, which consist merely in the intention, as conspiracies and the like, the villany may be frustrated, or the conspirators may have a chance to escape punishment, and this may be one reason why the *lex talionis* is more

proper to be inflicted, if at all, for a crime intended, but not effected. The law of retaliation was introduced into England by statute of Edward III, to punish such only as preferred malicious accusations against others, the law being, that the party incur the same pain, that the other should have had, in case the suggestions were found untrue. This act was repealed, after a single year's trial.

General Principles. There are some general principles, drawn from the nature and circumstances of the crime, that may assist in allotting it an adequate punishment.

Object of the Crime. The more exalted the object of an injury is, the more care should be taken to prevent that injury, and the more severe the punishment. Therefore treason in conspiring the king's death is punished with greater rigor, than even killing a private subject. And yet generally a design to transgress is not so flagrant as the actual completion of that design. It requires more obstinacy in wickedness to perpetrate a crime, than barely to entertain the thought of it, and it is an encouragement to repentance, that it is never too late to retract; for which reason an attempt to rob or kill, is far less penal than actual robbery or murder.

Mitigation of a Crime. Again, the violence of passion or temptation may sometimes alleviate a crime; as theft, in case of hunger, is more worthy of compassion, than when committed through avarice or to supply a luxurious excess. To kill a man upon sudden resentment is less penal, than upon cool, deliberate malice. The age, education and character of the offender, the repetition of the offence, the time, place and company, wherein it was committed, may aggravate or extenuate the crime.

Grades of Punishment. Further, as punishments are chiefly intended for the prevention of future crimes, it is reasonable, that among crimes of different natures, those should be most severely punished, which are the most destructive of public safety and happiness; and among crimes of equal malignity, those which a man has the most easy opportunities of committing, and hence has the strongest inducement to commit. Hence for a servant to rob his master is a greater crime, than for a stranger to do so. Formerly, in the Isle of Man, it was not a felony to steal an ox or an ass, as it was difficult to conceal so large an animal, but to steal a pig or a fowl was a capital offence.

Harsh Punishments. Lastly, we may observe that pun-

ishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes and amending the manners of a people, than such as are more merciful, yet properly intermixed with due distinctions of severity. Crimes are more effectually prevented by the certainty than by the severity of punishment. Montesquieu asserts, that the excessive severity of laws hinders their execution. When the punishment surpasses all measure, the people out of humanity will frequently prefer immunity to it. It is said, that laws made for the preservation of the commonwealth without great penalties are more often obeyed, than laws made with extreme punishments. Sanguinary laws indicate the weak constitution of a state.

Roman Punishments. The laws of the Roman kings, and the twelve tables of the decemvirs were full of cruel punishments, but the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished; under the emperors, severe punishments were revived, and then the empire fell.

Variety of Punishments. It is moreover impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws show a manifest defect either in the wisdom of the legislature or the strength of the executive power. It is a kind of quackery in government to apply the same universal remedy in every case of difficulty. True, it is much easier to extirpate than to amend mankind; yet that magistrate must be deemed a cruel surgeon, who amputates every limb, which through ignorance or indolence he will not attempt to cure.

Scale of Punishments Necessary. It has been ingeniously proposed, that a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least. In any event, a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offences of an inferior rank. Where men see no distinction made in the nature and gradations of punishment, they will be led to conclude, there is no distinction in the guilt. Thus, in France, the punishment of robbery, with or without murder, is the same, hence robbery is usually accompanied with murder. In China, murderers are cut to pieces and robbers not, hence robbery often occurs on the highway, while murders are unusual.

Capital Offences. It is difficult to justify the frequency of

capital punishment to be found at this day in England, no less than one hundred and sixty crimes having been declared by parliament to be felonies without benefit of clergy, and hence punishable with death.[1]

Results of Harsh Penalties. So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute; juries from the same motive will ignore their oaths, and either acquit the guilty or mitigate the nature of the offense, and judges will respite numerous convicts and recommend them to the royal mercy. Among so many chances of escaping, the hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt, and if unexpectedly the hand of justice falls upon him, he deems himself unfortunate in falling at last a sacrifice to those laws, which long impuuity has taught him to contemn.

CHAPTER II.—PERSONS CAPABLE OF COMMITTING CRIMES.

Exemption from Punishment. In this chapter we will inquire what persons are exempted from the censures of the law, upon the commission of those acts, which in other persons would be severely punished. As a general rule, no one shall be excused from disobeying the laws; but this rule is subject to special exceptions. All the several pleas and excuses, which protect the committer of a forbidden act from the punishment otherwise annexed thereto, may be reduced to the want or defect of will.

Vicious Will Requisite. An involuntary act cannot induce any guilt; the concurrence of the will, being the only thing that renders human action either praiseworthy or blamable. To make a complete crime cognizable by human laws, there must be both a will and an act. For though, *in foro conscientiae*, a fixed design to do an unlawful act is almost as heinous as its commission, yet no temporal tribunal can punish for what it does not know. Hence an overt act, or some open evidence of an intended

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[1] This list, since Blackstone's day, has been greatly diminished.

crime, is necessary to render a man liable to punishment. And as a vicious will, without a vicious act, is no civil crime, so an unwarrantable act, without a vicious will, is no crime at all. So to constitute a crime, there must include both a vicious will and an unlawful act. Three cases exist when the will does not join with the act.

Will not Joining with the Act. (1.) Where there is a defect of understanding. Where there is no discernment, there is no choice, and where there is no choice, there can be no act of the will; he therefore who has no understanding, can have no will to guide his conduct. (2.) Where there is understanding and will sufficient, but not called forth at the time of the act; which is the case in all offences committed by chance or ignorance; here the will is neuter, and neither concurs nor disagrees. (3.) Where the action is constrained by some outward force. Here the will counteracts the deed, and is so far from concurring with it, that it protests against what the man is oblig_d to perform.

Divisions of Incompetent Persons. Infancy, idiocy, lunacy and intoxication belong to the first class; misfortune and ignorance to the second; and compulsion or necessity to the third.

1. Infants. Infancy or nonage is a defect of the understanding. Infants, under the age of discretion, ought not to be punished by any criminal prosecution whatever. What is the age of discretion, differs in various nations.

By the Civil Law. The civil law distinguished the age of minors, or those under twenty-five years old, into three stages: *infantia*, up to seven years of age; *puerita*, from seven to fourteen, and *pubertas*, from fourteen upwards. The period of *puerita* was subdivided into two equal parts. During the first stage of infancy, and the next half stage of childhood, they were not punishable for any crime. During the other half of childhood, approaching to puberty, from ten and a half to fourteen years, they were punishable, if found to be capable of mischief, but not with the utmost rigor of the law. During the last stage, at the age of puberty and subsequently, minors were liable to be punished, capitally or otherwise.

Minor's Privileges. The law of England does in some cases privilege a minor as to common misdemeanors, so as to escape fine and imprisonment; particularly in cases of omission,

as neglect to repair a highway, and similar offences; for not having his property until twenty-one, he cannot do what the law may require. Where there is a breach of the peace, a battery, or the like, a full grown minor above fourteen, is equally liable to punishment, as an adult.

Capital Crimes. With regard to capital crimes, the law is still more circumspect, distinguishing the degrees of age and discretion. By the ancient Saxon law, the age of twelve was established as the age of possible discretion, when first the understanding might open, and from that time until the offender was fourteen, he might or might not be guilty of a crime, according to his natural capacity. Under twelve, it was held, he could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he committed.

Capacity, rather than Age. But now, the capacity of doing ill is not so much measured by years, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years may have as much cunning as another of fourteen. Under seven years, an infant cannot 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 is *doli capax*, and could discern between good and evil, he may be convicted, and suffer death. Thus a girl of thirteen was burned for killing her mistress, and a boy of ten, and another of nine, who had killed their companions, sentenced to death, and he of ten years actually hanged, because it appeared that one boy hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to judge between good and evil. A boy of eight was executed for firing two barns, it appearing that he possessed malice, revenge and cunning. But in all such cases, the evidence of that malice, which is to supply age, ought to be strong, and very clear.

II. Idiots and Lunatics. This defect of will, which excuses crimes, arises from a defective or vitiated understanding. In criminal cases, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities; no, not even for treason itself.

Lunacy, pendente Lite. If a man, in his sound memory, commits a capital offence, and before arraignment, he becomes mad, he ought not to be arraigned, because he is not able to

properly plead. If, after he has pleaded, he lose his reason, he shall not be tried, for how can he make his defence? If, after he be tried and found guilty, he becomes insane before judgment, judgment shall not be pronounced; and if after judgment, he becomes of non-sane memory, execution shall be stayed, for had he been of sound memory, he might have alleged something in stay of judgment or execution.

Lucid Interval. Trial by Jury. If there be any doubt, whether the party be *compos* or not, this shall be tried by a jury. Total idiocy or absolute insanity excuses from the guilt, and of course from the punishment of any crime committed under such deprivation of the senses, but if a lunatic has lucid intervals, he shall answer for what he does in those intervals. Madmen, not being answerable for their actions, should not be allowed liberty of acting, unless under control.

III. Drunkards. As to voluntarily contracted madness by 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 as an excuse for criminal misbehavior. Coke asserts, that a drunkard has no privilege thereby, but what hurt soever he does, his drunkenness aggravates it.

Effect of Climate. The use and abuse of strong liquors depend much upon the temperature of the climate. The same indulgence which is required to make the blood move in Norway, would make an Italian mad. A German, says Montesquieu, drinks through custom, founded upon constitutional necessity; a Spaniard drinks through choice, out of the mere wantonness of luxury; and drunkenness ought to be more severely punished, where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid, as in Germany and more northern countries.

No Excuse for Crime. In the warm climate of Greece, a law of Pittacus enacted, that he who committed a crime when drunk, should receive a double punishment, one for the crime itself, the other for the ebriety which prompted him to commit it. The Roman laws made great allowance for this crime. But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, will not suffer it to palliate a crime.

IV. Misfortune or Chance. This is a deficiency of will,

where a man commits an unlawful act not by design. Here the will is neutral, and does not co-operate with the deed, which therefore lacks one main ingredient of a crime. If any accidental mischief happens to follow the performance of a lawful act, the party stands excused from all guilt; but if a man be doing anything unlawful, and an unforseen 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.

V. Ignorance or Mistake. An injury resulting from such causes, is 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 burglar in his own house, by mistake, kills one of his own family, this is no criminal act. For a mistake in point of law, which every person of discretion is presumed to know, is in criminal law, no defence. *Ignorantia legis excusat neminem* is as much a maxim of our law as it was of the Roman.

VI. Compulsion and Necessity. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves, and which, it is presumed, his will would reject. As punishments are only inflicted for the abuse of that free will, which God has given to man, it is just that a man should be excused for those acts, which are done through unavoidable force and compulsion.

1, Civil Subjection. By this, 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 an act contrary to morality or religion. How far this excuse will be admitted *in foro conscientiae*, or whether one in such case is bound to obey the divine rather than the human law it is not for us to decide; but obedience to the laws is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal.

Wife's Subjection to Husband. 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. Neither a son nor servant are excused for the commission of any crime, by the coercion of a parent or master; but in some cases, the

command of the husband will privilege the wife from punishment, even for a capital offence. If a wife commit theft or other crime in her husband's company, the law construes his presence as a coercion, and she is not deemed guilty of a crime, being not considered as acting by her own will. Among the northern nations, this privilege extended to any woman transgressing in concert with a man; the male alone was punished, the female was dismissed.

Exceptions. Mala in se. This rule admits of an exception as to wives, in crimes that are *mala in se*, and prohibited by the law of nature, as murder and the like, inasmuch as in a state of nature, no one is in subjection to another. So in treason, no plea of coverture shall excuse the wife; no presumption of the husband's coercion shall extenuate her guilt. In inferior misdemeanors, an exception also exists, that a wife may be indicted with her husband for keeping a brothel, as this is an offence touching the government of the house, and is an act, as a rule, conducted by females. In all cases, where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence, as if she were a *feme sole*.

2. Duress per Minas. This species of compulsion is by threats or menaces, which induce a fear of death or bodily harm, and for that reason take away the guilt of many crimes, at least before a human tribunal. The fear which compels a man to do an unwarrantable action ought to be well grounded. This holds as to positive crimes, so created by the laws of society, but not as to natural offenses, so declared by divine law.

3. Choice Between two Evils. This species of necessity is the result of reason and reflection, and obliges a man to do an act, which, without such obligation, would be criminal. This occurs, when a man has his choice of two evils set before him, and chooses the less pernicious one. He rejects the greater evil and chooses the less. As where a man is bound to arrest another for a capital offence, and being resisted, kills the offender, rather than permit him to escape.

4. Theft from Necessity. It has been a disputed point, whether a man in extreme want of food or clothing is justified in stealing to relieve his present necessities. Grotius and Puffendorf, together with many foreign jurists, hold in the affirmative, maintaining by many plausible reasons, that in such cases, the community of goods revived, Yet it is an unwarranted doctrine

and is now antiquated; the law of England admitting no such excuse. King Solomon says: "If a thief steals to satisfy his soul when he is hungry, he shall restore seven-fold; he shall give all the substance of his house." Men's properties would be insecure, if liable to be invaded to supply the wants of others, of which wants no man can be an adequate judge, but the party who pleads them.

VII. The King can do no Wrong. This arises from the excellence and perfection of his royal person. He is not under the coercive power of the law, and is deemed incapable of committing a folly or a wrong.

CHAPTER III.—PRINCIPALS AND ACCESSORIES.

I. A Principal. A man may be a principal in an offence in two degrees. In the first degree, he is the actor, the perpetrator of a crime; in the second degree, he is present, aiding and abetting the act to be done. The presence may be a constructive rather than an actual one, as when one commits a robbery, and another keeps watch at a convenient distance. In case of murder by poisoning, a man may be a principal, by preparing and laying the poison or persuading another to drink it, who is ignorant of its quality; and yet not administer it himself, nor be present when it is taken. Such a party cannot be termed an accessory, otherwise there would be no principal. He is guilty as principal in the first degree.

II. An Accessory. Such a one is not the chief actor in the offence nor present at its performance, but in some way concerned therein, either before or after the act. We will inquire what offences admit of accessories; who may be an accessory before the fact; who may be an accessory after the fact; and lastly how accessories, distinct from principals, are to be treated.

1. What Offences admit of Accessories. In high treason, there are no accessories, but all are principals, on account of the heinousness of the crime. The bare intent to commit treason is in many instances actual treason. This will not hold in the inferior species of treason, which do not amount to the idea of compassing the death of the king. In petit treason, murder

and felonies, there may be accessories, except only in those offences, which are unpremeditated, as manslaughter, in which there can be no accessories before the fact. In petit larceny, and in all crimes under the degree of felony, there are no accessories either before or after the act, but persons concerned therein, if guilty at all, are principals. In trespass, all are principals, because the law does not descend to distinguish the different shades of guilt in petty misdemeanors. An accessory cannot be guilty of a higher crime than his principal.

2. Who may be an Accessory before the Fact. This is one, who being absent at the time of the commission of the crime, does yet procure, counsel or command another to commit a crime. Absence is necessary to make him an accessory, for if he be present, he is guilty of the crime as principal. 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 ensues upon that act, but he is not accessory to any act distinct from the other. Thus if A command or advise B to burn C's house, and he, in so doing, commit a robbery; now A, though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unconsequential nature. But if the felony committed be the same in substance with that which is commanded, and only varying in circumstantial matters, as if upon a command to poison B, he should be stabbed or shot by A, the commander is accessory to the murder, the manner of the execution of the order being merely collateral.

3. Accessory after the Fact. This may be, where a person, knowing a felony to have been committed, receives or assists the felon. Any assistance whatever given to a felon, to prevent his being apprehended and punished, makes the assistor an accessory. As furnishing him with a horse to escape, money or food to support him, a house or other shelter to conceal him, or open force to protect him. But to relieve a felon in jail with clothes or other necessaries, is no offence, for this is not helping him to escape the vengeance of the law. All receivers of stolen goods, with knowledge of facts, are now accessories to the theft, though formerly they were not considered so. The felony must be complete at the time the assistance was given. To do effectual justice, the nearest relations are not permitted to aid or receive one another, if it will tend to prevent an arrest. Otherwise such parties become accessories *ex post facto*. But a wife

cannot become such accessory by the concealment of her husband, for she is presumed to act under his coercion, and hence is not bound to make known the place of his hiding.

4. How Accessories are Punished. By the ancient law, borrowed from the Gothic constitutions, accessories suffered the same punishment as the principals. If one was liable to death, so was the other. This was the law in Athens. The reasons of the present distinctions between accessories and principles are: (1) To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted; the commission of an actual robbery, being quite a different crime from that of harboring the robber. (2) Because, though by the ancient law, both were punished alike, yet now, by the statutes relating to the benefit of clergy, a distinction is made between them; accessories after the fact being allowed the benefit of clergy in all cases, except horse stealing and stealing of linen from bleaching grounds, which is denied to the principals and to accessories before the fact, the latter to be treated with a little less severity than the former. This may prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself, as his danger would be greater than his accomplices, by reason of the difference of the punishment. (3) Because formerly no accessory could be tried, until his principal was convicted, or at least he must have been tried at the same time, though that law is now much altered. (4) Because, though a man may be indicted as accessory and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving and counselling a felon, is no acquittal of the felony itself, but it is doubtful, if a man be acquitted as principal, whether he can afterwards be indicted as accessory before the fact, since the offences are so nearly allied; an acquittal of the one may be an acquittal of the other. The punishment is nearly the same for principals and for accessories before the fact.

CHAPTER IV.—OFFENCES AGAINST GOD AND RELIGION.

PREAMBLE.

Distinction between Private and Public Vices. Human laws can have no concern with any but social and relative duties, being intended only to regulate the conduct of man, as a member

of society. All crimes, therefore, ought to be estimated merely according to the mischiefs which they produce in civil society; and private vices, or breach of mere absolute duties, which man as an individual is bound to perform, are not the object of any municipal law, any further than as by their evil example they may prejudice the community, and become a species of public crimes. Thus the vice of drunkenness, if committed privately, is beyond the reach of human tribunals, but if committed publicly, is liable to temporal censure. The vice of lying is not taken notice of by our law, unless it carries with it some public inconvenience, as spreading false news, or some social injury, as slander, for which a private recompense is given. Both public and private vices are subjects of eternal justice, but public vices alone are liable to temporal punishments.

Mala Prohibita Only. On the other hand, there are some misdemeanors which are punished by municipal law, that have in themselves nothing criminal, but are made unlawful by reason of public convenience, such as poaching and the like. Naturally these are not crimes, but their criminality consists in their disobedience to the supreme power, which has an undoubted right, for the peace of the community, to make some things unlawful, which are in themselves indifferent.

Division of Offences. The offences which are injurious to civil society, and therefore punishable by our laws, may be divided thus:

1. *Those which are more immediately injurious to God and religion.*

2. *Such as violate or transgress the law of nations.*

3. *Such as especially affect the executive power of the state, or the king and his government.*

4. *Such as more directly infringe the rights of the public.*

5. *Such as derogate from those rights and duties, which are owing to particular individuals, in the preservation of which the community is interested.*

OFFENCES AGAINST GOD AND RELIGION.

Defined. These are crimes which more immediately offend God, by openly transgressing the precepts of religion, either natural or revealed, and mediately, by their bad example and consequence, the law of society also, which renders them amenable to censure.

I. Apostasy. This is a total renunciation of Christianity, by embracing either a false religion, or no religion at all, This offence can only exist, in such as have once professed true religion. The conversion of a christian to paganism was punished by Constantine with confiscation of goods, to which the emperors Theodosius and Valentinian added capital punishment, in case the apostate endeavored to convert others. The zeal of our ancestors imported this harsh doctrine into our country, and at one time, apostates were burned at the stake.

Basis of Judicial Oaths. The belief in a future state of rewards and punishments, the entertaining just ideas of the attributes of the Supreme Being, and a firm persuasion that He superintends and will finally compensate every action in human life, are the grand foundation of judicial oaths, which call God to witness the truth of those facts, which perhaps may only be known to him and the party attesting. All moral evidence, all confidence in human veracity must be weakened by apostasy, and overthrown by total infidelity.

Not Cognizable by Our Laws. Wherefore all affronts to christianity, or endeavors to depreciate its efficacy in those who have once professed it, are highly deserving of censure. Yet, taken in a spiritual light, our laws have no jurisdiction over it. The punishment therefore has long ago become obsolete, and the offence of apostasy was for a time the object only of the ecclesiastical courts, which corrected the offender *pro salute animæ*. The last penal statute for this offence was in the reign of William III. where it was severely punished.

II. Heresy. This consists not in a total denial of christianity, but of some of its essential doctrines, publicly and obstinately avowed. Particular modes of belief or unbelief, not tending to overturn christianity itself, or to sap the foundations of morality, are by no means the object of coercion by the civil magistrate. What doctrines may be adjudged heresy were left by our old constitution to the determination of the ecclesiastical judge, who had herein a most arbitrary latitude. A general definition of a heretic in those days extended to the smallest deviation from the doctrines of the church. The first general councils, on the contrary, defined all heretical doctrines with the utmost exactness. What ought to have alleviated the punishment, the uncertainty of the crime, seems to have enhanced it in those days of blind religious zeal.

Punishments for Heresy. At first, the canonists merely enjoined penance, excommunication and ecclesiastical deprivation; afterwards, imprisonment and confiscation of goods *in pios usus*. They subsequently even made heresy a capital offence, through the aid of the temporal power.

History of such Punishments. Hence, the capital punishments inflicted on the Donatists and Manicheans by the emperors Theodosius and Justinian; hence also, the constitutions of the emperor Frederic, adjudging death by fire to all persons found guilty of heresy by the ecclesiastical judge. The same emperor ordained, that if any temporal lord, after being admonished by the church, neglected to clear his territories of heretics within a year, it should be lawful to seize the lands, and to utterly exterminate the heretical possessors. Upon this foundation was built that arbitrary power, so long claimed and fatally exerted by the church, of disposing even of the kingdoms of refractory princes. The pope afterwards expelled this very emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou.

Heresy in England. In ancient times in England, the conviction of heresy, by the common law, was not in an ecclesiastical court, but before the archbishop himself, in a provincial synod, and the delinquent was delivered over to the king, to do as he should please with him. In the reign of Henry IV, the clergy, to increase their power, obtained an act of parliament, empowering the diocesan alone, without the intervention of a synod, to convict of heretical tenets; and unless the convict abjured his opinions, or if, after abjuration, he relapsed, the sheriff was bound, if required by the bishop, to commit the victim to the flames, without waiting for the consent of the crown. Under Henry V, lollardy, which was a form of religion, was made a temporal offence and indictable in the king's courts; which gained thereby a concurrent jurisdiction with the king's consistory.

Reign of Henry VIII. As time advanced, the power of the ecclesiastics was somewhat moderated, the statute of Henry VIII declaring, that offences against the see of Rome are not heresy. The ordinary was not allowed to act on mere suspicion, but the party must first be accused by two credible witnesses, or an indictment of heresy be found in the king's courts of common law. Six years later, in the same reign, the law of the six articles was made, which established the contested points of transub-

stantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession. The statute declared all opponents of the first of these doctrines to be heretics, who should be burnt with fire, and opponents of the remainder to be felons, who should suffer death. The same law established a mixed jurisdiction of clergy and laity for the trial of heretics, and retained all the corrupt abuses of the past, while intent on destroying the supremacy of the bishops of Rome.

Elizabeth's Reign. During this reign, all former statutes relating to heresy were repealed, which left the jurisdiction of heresy as it stood at common law; allowing the ecclesiastical courts to inflict censures, and the provincial senate to burn the heretics. The statute set bounds to what should be accounted heresy. It embraced only such tenets, as had been heretofore declared so: (1) By the words of the canonical scriptures. (2) By the first four general councils, or such others as have only used the words of the Bible. (3) Which shall hereafter be so declared by parliament, with the assent of the clergy in convocation. This reduced heresy to a greater certainty than before, but the writ *de heretico comburendo* still existed, and was not totally abolished, until the reign of Charles II; which reign delivered our lands from the slavery of military tenures, our bodies from arbitrary imprisonment by the *habeas corpus* act, and our minds from the tyranny of superstitious bigotry, by demolishing the last badge of persecution in the English law.

Present Law, Relating to Heresy. Everything is now as it should be, with respect to the spiritual cognizance and punishment of heresy; unless perhaps, that the crime should be more strictly defined, and no prosecution permitted, even in the ecclesiastical courts, till the tenets, are by authority, previously declared to be heretical. Under these restrictions, it seems necessary, for the support of the national religion, that church officers should have power to censure heretics, but not to harass them with temporal penalties.

III. Offences Against the Established Church. These are positive, by reviling its ordinances; or negative, by non-conformity to its worship.

1. Reviling its Ordinances. This is a much grosser crime than mere non-conformity, since it carries with it indecency, arrogance and ingratitude; indecency by setting up private judgment in virulent opposition to authority; arrogance, by treating

with contempt established doctrines; and ingratitude, by denying the liberty of conscience to members of the national church, which others enjoy. Hence, by statute of Elizabeth, a party reviling the sacrament of the Lord's supper, was punishable by fine and imprisonment; a minister speaking derogatory of the book of common prayer, was imprisoned one year for the first offence, and for life for the second. If any person in plays, songs or words, should speak in derogation of such work, he might be fined for the first and second offences, and for the third, forfeit all his goods and be imprisoned for life.[1]

2. Non-conformity to the Worship of the Church. This is a matter of private conscience, to the scruples of which our laws have shown a just indulgence. All persecutions of weak consciences, on the score of religious persuasions, are unjustifiable on every principle of natural reason, civil liberty, or sound religion.

Absence from Divine Worship. Non-conformists are of two sorts: first, such as absent themselves from divine worship in the established church, through total irreligion, and attend the service of no other persuasion. By statute of Elizabeth and James I, these forfeit one shilling to the poor every Lord's day they so absent themselves, and twenty pounds to the king, if they continue such default a month. If persons keep in their houses a party, thus irreligiously disposed, they forfeit ten pounds a month.

Mistaken Zeal. The second species of non-conformists are those who offend through a mistaken or perverse zeal. But the offence of schism is by no means the object of temporal coercion and punishment. If men quarrel with the ecclesiastical establishment, the civil magistrate has nothing to do with it, unless their tenets and practice threaten ruin or disturbance to the state. He is bound indeed to protect the established church, and if this can be effected by admitting none but its members to offices of trust, he is at liberty to do so; the disposal of offices being one of discretion.

Protestant Dissenters. In former times, several disabilities and restrictions were laid upon dissenters, but at length the legislature, with a spirit of magnanimity, displayed indulgence to such. Penalties were conditionally suspended by statute of Wil-

[1] This act was repealed as to dissenters, in the reign of George III.

liam and Mary against their majesty's protestant subjects, dissenting from the church of England, by the toleration act, which was confirmed by queen Anne. By this statute, no existing penal laws, shall extend to any protestant dissenters, provided: (1) they take the oath of allegiance and supremacy; (2) that they repair to some certified congregation; (3) that the doors of such meeting house be unlocked and unbolted. Dissenting teachers must subscribe to the articles of religion mentioned in the statute of Elizabeth, which concern the confession of the true christian faith, and the doctrine of the sacraments, with the express exception of those relating to the government and powers of the church and to infant baptism; or if they object to the same, shall subscribe to the declaration prescribed by George III, professing themselves to be christians, and that they believe the scriptures contain the revealed will of God, and to be the rule of doctrine and practice. They are then left at full liberty to act as their consciences dictate, in the matter of religious worship.

Roman Catholics. What has been said of the protestant dissenters would hold equally for a general toleration of Roman Catholics, provided their separation be founded only upon difference of opinion in religion, and does not extend to a control of the civil government.

Obsolete Laws. Religious Intolerance. (1) Persons professing that religion, beside being subjected to penalties for not frequenting their parish church, are disabled from taking their lands, either by descent or purchase, after eighteen years of age, until they renounce their faith. (2) Recusants, convicted in court of not attending the service of the church of England, are subject to certain disabilities and forfeitures, and can hold no office or employment. They must not keep arms in their houses; they may not come within ten miles of London, on pain of 100*l.*; they can bring no action at law, or suit in equity. They are not permitted to travel five miles from home without license, upon pain of forfeiture of their goods. Within three months after conviction, they must either renounce their errors or leave the realm, and if they do not depart, or if they return without license, they shall suffer death as felons. (3) Should their priests celebrate mass, except in the houses of ambassadors, they would be liable to perpetual imprisonment. All foreign priests visiting England, and remaining three days, without taking the oaths, are deemed guilty of high treason; and all persons harboring them, of felony,

without the benefit of clergy. These laws are seldom exerted to their utmost rigor, or they would be inexcusable.[1]

Church of England Protected. In order to secure the established church against perils from non-conformists of all denominations, there are two bulwarks erected, called the corporation and test acts;[2] by the former of which, no person could be legally elected to any governing office of any city or corporation, unless within a year before, he had received the sacrament of the Lord's supper, according to the rites of the church of England; and he must also take the oaths of allegiance and supremacy, at the same time he takes the oath of office, otherwise the election is void. The law directs all officers, civil and military, to take the oaths, and make the declaration, in any of the king's courts, within six months after their admission; and also within the same time to receive the sacrament of the Lord's supper, according to the usage of the church of England, in some public church, upon forfeiture of 500*l*., and disability to hold the said office.

Gross Impieties. We proceed now to consider some gross impieties and immoralities, which are punished by our municipal law, frequently in concurrence with the ecclesiastical; the spiritual court punishing *pro salute animae*, for the safety of the soul, while the temporal courts correct more for the sake of example, than for private amendment.

IV. Blasphemy. An offence against God and religion is that of blasphemy against the Almighty, by denying His being or providence, or by contumelious reproaches of Christ. Also all profane scoffing at the holy scriptures, or exposing them to contempt and ridicule. This is punished by fine and imprisonment, or infamous corporal punishment.

V. Cursing. This is somewhat allied to blasphemy. By statute of George II, which repeals all former acts, every laborer, sailor or soldier profanely swearing, shall forfeit one shilling for every offence, and every other person under the degree of a gentleman, two shillings; and every gentleman or person of rank, five shillings, for the poor of the parish, and on the second offence, double, and the third offence, treble. In default of payment, the offender shall be sent to the house of correction for ten days. Profanity was expressly forbidden in stage plays.

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[1] Fortunately for the credit of civilization, these laws have been repealed.

[2] Repealed in 1828.

VI. Witchcraft and Sorcery. Another species of offence against God and religion, which our ancient books treat of at length, was the crime of witchcraft, conjuration, enchantment or sorcery. The civil law punished with death, not only the sorcerers themselves, but those who consulted them. Our own laws have been equally penal, ranking this crime in the same class with heresy, and condemning both to the flames. In the reign of Henry VIII, a statute enacted, that all witchcraft and sorcery should be deemed felony, without benefit of clergy, which punishment, in the reign of James I, was awarded to any one invoking any evil spirit, or consulting, covenanting with, entertaining, employing, feeding or rewarding any such spirit, or exhuming dead bodies to be used in any witchcraft, sorcery, charm or enchantment, or killing or hunting any person by such infernal arts. And if any person should attempt by sorcery to discover hidden treasures, or to restore stolen goods, or to provoke unlawful love, or to hurt any man or beast, though not consummated, he should suffer imprisonment and the pillory for the first offence, and death for the second.

Recent Legislation. These acts continued in force until recently, to the terror of elderly females in the kingdom; and many poor wretches were sacrificed thereby to the prejudice of their neighbors, and their own illusions, not a few having confessed the fact at the gallows. But by statute of George II. no prosecution shall for the future be instituted for witchcraft or sorcery. But the misdemeanor of pretending to tell fortunes, or discover stolen goods by skill in the occult sciences is still punishable by fine and the pillory.

VII. Religious Impostures. These imposters falsely pretend that they bear an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion, by bringing it into ridicule and contempt, are punishable by the temporal courts, with fine and imprisonment.

VIII. Simony. This crime is the corrupt presentation of any one to an ecclesiastical benefice for gift or reward. It is an offence against religion, as well by reason of the sacredness of the charge, which is thus profanely bought and sold, as because it is always attended with perjury in the person presented.

IX. Profanation of the Lord's Day. This offence is vulgarly called Sabbath-breaking, and is punished by the municipal

law. Beside the indecency and scandal of permitting any regular business to be publicly transacted on that day in a country professing christianity, and the corruption of morals which usually follows its profanation, the keeping this day holy, as a time of relaxation. as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes, which would otherwise degenerate into a wild ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation during the ensuing week with health and cheerfulness; it imprints upon the minds of the people that sense of their duty to their God, so necessary to make them good citizens, but which would be defaced by an unremitted continuance of labor, without any stated time to recall them to the worship of their Maker.

History of Sunday Laws. The laws of Athelstan forbade all merchandizing on the Lord's day, under very severe penalties. By statute of Henry VI. all fairs and markets must be closed on that day, except on the four Sundays in harvest. In the reign of Charles I, innocent recreation or amusement, as it was termed, was permitted within the respective parishes, after divine service was over; while under Charles II, no person was allowed to work on the Sabbath, nor to use any boat or to expose goods for sale, except meat in public houses, milk at certain hours, and works of necessity and charity. No drover or carrier was allowed to travel on that day.

X. Drunkenness. By statute of James I. this vice was punished by a fine of five shillings, or by sitting six hours in the stocks, by which time it was presumed that the culprit would become sobered, and not liable to do mischief.

XI. Open Lewdness. This is 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 fine and imprisonment. In the year 1650, not only were incest and adultery capital crimes, but also the repeated acts of keeping a brothel or committing fornication, were upon a second conviction, made felony, without benefit of clergy. But at the restoration, when men, from an abhorrence of hypocrisy of recent times, fell into a contrary extreme of licentiousness, it was deemed unadvisable to renew a law of such unfashionable rigor. And these offences have been left to the feeble coercion of the spiritual

court, according to the rules of the canon law; a law which has treated the offence of incontinence, nay even adultery itself, with a great degree of tenderness and lenity, owing perhaps to the constrained celibacy of its first compilers. The temporal courts take no cognizance of the crime of adultery, otherwise than as a private injury.[1]

Bastards. In the case of bastard children, the law looks principally on the question of maintenance, although in the reign of Elizabeth, punishment was inflicted on both the mother and the putative father, and under James I on the woman only. But in both those cases, the penalty could only be inflicted, if the bastard became chargeable on the parish, for otherwise the mere compulsory maintenance of the child was considered a punishment.

CHAPTER V.—OFFENCES AGAINST THE LAW OF NATIONS.

Defined. 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.

General Principles. This general law is founded upon the 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.

No Arbitrer to Decide. And as none of these states will allow a superiority in the other, therefore no state can prescribe rules to the rest, but such rules must necessarily result from those principles of natural justice, in which learned men agree, or they depend upon mutual compacts or treaties between the respective communities, in the construction of which, there is no

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[1] Adultery is punished criminally in some of the United States, and the innocent marital partner may obtain civil damages against the *particeps criminis*.

judge to resort to, but the law of nature and reason, to which all are equally subject.

Fully Adopted in England. In arbitrary states, this law, where it contradicts, or is not provided for by the municipal law of the country, is enforced by the royal power; but since in England, no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations is here adopted in its full extent by the common law, and is a part of the law of the land.

Statutes merely Declaratory. Acts of parliament made to enforce this universal law, or to facilitate the execution of its decisions, do not introduce a new rule, but merely declare the fundamental constitutions of the kingdom.

Mercantile and Marine Questions. Thus, in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry and others of a similar nature, the law merchant, which is a branch of the law of nations, is constantly adhered to. So too, in all disputes relating to prizes, shipwrecks, hostages and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and approved writers.

Demand of Satisfaction. Offences against the law of nations can rarely be the object of the criminal law of any particular state, as they are principally incident to entire nations, in which case recourse can only be had to war. But where the individuals of any state violate this general law, it is the duty of their government to punish them. It is incumbent upon the nation injured, first to demand satisfaction, and that justice be awarded the offender, by the state to which he belongs, before charging his sovereign as an accomplice or abettor, and thus involving his community in the calamities of a foreign war.

Offences Specified. 1. *Violation of safe-conducts.*

2. *Infringements of the rights of ambassadors.*

3. *Piracy.*

I. Violation of Safe-conducts or Passports. These documents are expressly granted by the king or his ambassadors to the subjects of a foreign power, even in time of mutual war, and their violation is an infringement of the law of nations. Also the committing of acts of hostilities against such as are in amity, league or truce with us, who are here under a general implied

safe conduct. These are breaches of public faith, without the preservation of which, there can be no intercourse or commerce between one nation and another; and such offences may be a just ground of war, since it is not in the power of the foreign prince to enforce justice upon the individual delinquent, but he must require it of the whole community.

Foreign Merchants. During the continuance of any safe conduct, express or implied, the foreigner is under the protection of the law, and as, by *magna carta*, foreign merchants shall be entitled to safe conduct and security throughout the kingdom, any violation of either the person or the property of such merchant, may be punished by indictment in the king's name. If any subject offend on the sea or in port, under the king's control, against any stranger in amity, league or truce, or under safe conduct, by attacking his person or robbing him of his goods, the chancellor or the justices of king's bench or common pleas may cause full restitution to be made to the party injured.

II. Rights of Ambassadors. These have been treated of heretofore. The law of England recognizes their privileges, by immediately stopping all legal process sued out against ambassadors or members of their suite. All process of seizure of person or goods, whether of an ambassador or of his domestic servant shall be null and void, and parties prosecuting, soliciting and executing such process shall be punished.

III. Piracy. Defined. This crime of robbery and depredation upon the high seas is an offence against the universal law of society; a pirate, according to Sir Edward Coke, being *hostis humani generis.* Having renounced the benefits of society and government, he has reduced himself to a savage state of nature, by declaring war against all mankind, who naturally retaliate, by declaring war against him in self defence.

Jurisdiction of Courts. By ancient common law, piracy, if committed by a subject, was a species of treason; if by an alien, felony only. Since the time of Edward III. it is felony also in a subject. Formerly it was only cognizable by the admiralty courts, which proceed by the rules of the civil law. Under Henry III. the common law courts were awarded jurisdiction.

Additional Piratical Offences. The offence of piracy by common law, consists in committing those acts upon the high seas, which if committed on land, would have amounted to felony there.

By statute, some other offences are made piracy also, as where a subject commits an act of hostility at sea against another of his majesty's subjects, under color of a commission from a foreign power. Further, any commander or sailor, betraying his trust and running away with a ship or goods, or voluntarily yielding them to a pirate or conspiring to do so, or creating or attempting to create a mutiny, shall be adjudged a pirate, felon and robber, and shall suffer death. By statute of George I. he is expressly excluded from the benefit of clergy.

Accessories. Trading with known pirates, or furnishing them with stores and ammunition, or fitting a vessel for piratical purposes, or in any way consulting, confederating or corresponding with them, or the forcible boarding of a merchant vessel and destroying any of her goods, shall be deemed piracy, and such accessories shall be treated as principals, and are made felons, if captured, without benefit of clergy. If the commander of the vessel attacked behave cowardly, he shall be punished by imprisonment. Any natural born subject or denizen, who in time of war shall commit hostilities at sea against a fellow subject, or shall assist an enemy, shall be tried and convicted as a pirate.

CHAPTER VI.—HIGH TREASON.

PREAMBLE.

Allegiance. Treason amounts to a total renunciatien of allegiance to the king, or at least to a criminal neglect of that duty, which is due from a subject to his sovereign. Allegiance is the tie or *ligamen* which binds every subject, to be true and faithful to his liege lord and king, in return for protection afforded him, and truth and faith to bear of life and limb and earthly honor, and not to know or hear any ill intended him, without defending him therefrom. Allegiance is of two species, the one natural and perpetual, which is inherent in natives only; the other local and temporal, which is incident to aliens also.

Offences Against the King. Offences more immediately affecting the king, his crown or his dignity, are in some degree a

breach of this duty of allegiance, whether natural or innate, or local, and acquired by residence. They are of four kinds:

1. *Treason.*
2. *Felonies injurious to the king's prerogative.*
3. *Praemunire.*
4. *Other misprisions and contempts.*

HIGH TREASON.

Defined. Treason, *proditio*, imports a betrayal, treachery, or breach of faith. It therefore happens only between allies. It is a general appellation to denote, not only offences against the king and government, but also the guilt of an inferior, who abuses the confidence reposed in him by a superior, between whom and himself there subsists a natural, civil or even spiritual relation, and so far forgets the obligations of duty, subjection and allegiance, as to destroy the life of such superior or lord. Formerly for a wife to kill her husband, and a servant his master, were denominated petit treasons.[1]

Against the Crown. When disloyalty attacks the crown itself, it is denominated high treason, which is the highest crime that it is possible to commit. If the crime be indeterminate, says Montesquieu, this alone suffices to make any government degenerate into arbitrary power. By the ancient common law, great latitude was left to the judges to decide what was treason, whereby the creatures of tyrannical princes could create constructive treasons, by raising offences to the grade of treason; which never were deemed such. To remedy this, the statute of Edward III was enacted, defining what offences were treasons, which is our guide in examining the several species of high treason, comprehended under seven distinct branches.[2]

1. Compassing the Death of the King, Queen or Eldest Son. A queen regnant is included in such crime of high treason, but not her husband. Only the eldest son and heir is specified. It must be a king *de facto* and not *de jure*, even if he be an usurper, because temporary allegiance, at least, is due to him. Hence treasons against Henry VI were punished under Edward IV, though all the line of Lancaster had been declared usurpers, by act of parliament.

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[1] Abolished.

[2] Confirmed by act of George III, which clearly defines treason.

King de facto Only. A writer on crown law carries the point of possession so far, that he holds, that a king out of possession has no claim to our allegiance, no matter what title he may set up, and we should resist him. A statute of Henry VII excuses all subjects from any penalty or forfeiture, who assist and obey a king *de facto*. This principle would be confounding all ideas of right and wrong; and the true distinction seems to be, that the statute of Henry VII does by no means command any opposition to a king *de jure*, but excuses and justifies obedience to a king *de facto*.

Accidental Act. Compassing or imagining the death of a king are synonymous terms; the word compass signifying the design, and not as in common parlance, the carrying such design into effect. Therefore an accidental stroke with no traitorous intent, which mortally wounds the sovereign, is no treason; as was the case, when Sir Walter Tyrrel, while shooting, by the king's command, at a hart in the forest, killed William Rufus himself.

Must be an Overt Act. The act of the mind cannot possibly come under judicial cognizance, unless there be an overt act. Yet the tyrant Dionysius executed a subject, barely for dreaming that he had killed the king, which was held of sufficient proof, that he had thought of it in his waking hours. The English statute requires, that the accused be convicted, upon sufficient proof of the act.

Examples. Thus to provide weapons or ammunition for killing the king, is an overt act of treason in imagining his death. So also to conspire to imprison the king by force, and to assemble conspirators for that purpose, and taking any measures to render such treasonable purposes effectual, in causing the king's death, is an overt act of high treason.

Treasonable Words. How far mere words, spoken by an individual, and relating to a treasonable act or design then in agitation, shall amount to treason, was formerly a matter of doubt. By common law and by statute of Edward III, words spoken amount only to a high misdemeanor, and not to treason. They may be spoken in heat, without forethought or intent, or their meaning be misunderstood or distorted. The context often determines their meaning, as well as does the tone of voice in which they are uttered. Nothing therefore is more equivocal and ambiguous than words.

Written Words. If the words be written, it evinces more deliberate intent, and has been held to be an overt act of treason; for to write is to act, *scribere est agere*. Even in this case, the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason, as in the case of Peachum, for treasonable passages in a sermon, never preached, and of Algernon Sydney, who was executed for the authorship of certain papers found in his closet. Of late years, even the publications of certain treasonable writings have been doubted to be sufficiently overt acts of treason.

2. Carnal Knowledge of Certain Royal Females. These are the queen consort, the eldest unmarried daughter of the king, and the wife of the king's eldest son and heir. As to the king's companion, the queen consort, it may be high treason in both parties, as the fatal experience of some of the wives of Henry VIII evinced. The plain intent is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious, and therefore, when this reason ceases, the law ceases with it. To violate a queen regnant or princess dowager is held to be no treason. By the feudal law, it was a felony, attended with a forfeiture of the fief, if a vassal violated the wife or daughter of his lord, but not so if he only violated his widow.

3. Levying Domestic War against the King. 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 grievances or evil counsellors. Private individuals must not interfere forcibly in matters of such high import, as such power exists only in parliament. The constitution does not justify any private resistance for private grievances, though in cases of national oppression, the nation has justifiably risen as one man to vindicate the original contract between the king and the people.

Examples. 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; the universality of the object making it a rebellion against the state, and an usurpation of the power of government. So if two subjects quarrel and levy war against each other, as they did in feudal times, it was only a great riot and contempt, and no treason. A bare conspiracy to levy war does not amount to treason, unless especially pointed at the person of the king or his government.

4. Aid and Comfort to the Enemy. This must be proved by some overt act, as by giving the enemy information, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like. By enemies are meant the subjects of a foreign power, with whom we are at open war.

Pirates and Rebels. As to foreign pirates or robbers, who may invade our coasts, without open hostility between the respective nations, the giving them assistance is treason. So acts of adherence or aid rendered our fellow subjects in actual rebellion at home will amount to high treason, as it would be 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 power, and one who owes no allegiance to the crown of England. If a person be under actual constraint, and under a well grounded apprehension of injury to his life or person, through fear or compulsion joins with rebels or enemies in the kingdom, this is not treason, if he leaves them, as soon as he finds a safe opportunity.

5. Counterfeiting the Great Seal. But if a man takes wax, bearing the impression of the king's great or privy seal, from one patent and fixes it to another, this is held to be only an abuse of the seal, and not a counterfeiting of it.

6. Counterfeiting the King's Money. This is treason, whether the false money be uttered in payment or not. Also if the king's minters alter the standard of alloy, established by law. But gold and silver money only are held to be within the statute. Importing foreign counterfeit money is treason, if the intent be to utter it here; but the mere uttering it, without importing it, is not within the statute.

7. Murder of Certain High Officials. The actual killing of the chancellor, treasurer or a justice of the court, while attending his official duties, is treason. By later statutes, this is extended to the lord keeper or commissioner of the great seal.

Changes in the Law of Treason. Under Richard II, extravagant indictments for treason were sanctioned, but ,these were swept away in the next reign. But afterwards, in the reign of Henry VIII, the spirit of inventing new treasons was revived. Though many of these causes were afterwards annulled, and by statute, all treasons were reduced to the standard adopted by

Edward III, yet from time to time the number has considerably increased. These new treasons are as follows:

(1.) **Treasons Relating to Religion.** To defend foreign religious jurisdiction in this realm is for the first offence a misdemeanor, for a subsequent one, high treason.

(2.) **Treasons Relating to the Coin or Other Royal Signatures.** By a law of the emperor Constantine, false coiners were declared guilty of high treason, and condemned to be burned alive. In Athens, all counterfeiters were subjected to capital punishment. Yet counterfeiting is usually practiced, rather for the sake of private gain, than out of disaffection for the sovereign. Before the statute of Edward III, the offence of counterfeiting the coin was only a species of petit treason. Clipping or defacing the genuine coin is now high treason, which formerly it was not. Also where one, without proper authority, shall make or mend, or shall buy, sell, conceal or knowingly have in his possession implements of coinage, or shall carry the same out of the king's mint. His counsellors, aiders and abettors are also guilty of the same heinous crime.

(3.) **Treason Against the Act of Settlement,** This act was enacted to secure the Protestant succession to the throne, and for transferring the crown to the house of Hanover. The statute was passed in the reign of William III, at the time when the son of the former king, James II, who had been compelled to abdicate his throne, claimed that throne under the title of James III. although only thirteen years of age. To aid the claimant in any manner was termed high treason.

Punishment. This is solemn and terrible. The law reads, that the offender shall be drawn or rather dragged to the gallows; he shall be ha· ·d and cut down alive; his entrails shall be removed and bu· ·d while he yet lives; his head shall be decapitated, his body be divided into four parts, and his head and quarters be at the king's disposal.

CHAPTER VII.—FELONIES AGAINST THE KING'S PREROGATIVE.

PREAMBLE.

Felony—Defined. In its general acceptation, felony 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. Felonies which are termed clergyable, or to which the benefit of clergy extends, were anciently punished with death in lay offenders, though now by statute for the first offence, universally remitted. All treasons are felonies, as well as other offences, now capital. So also are some other offences, not punishable by death, as homicide by chance-medley, or in self defence, also petit larceny; all which are felonies, because they subject the party to forfeitures.

Definition of Felony Reiterated. It is an offence, which occasions a total forfeiture of goods or lands, or both, at the common law, and to which capital or other punishment may be super-added, according to the degree of guilt.

Derivation of the Word. The word is of feudal original, but the derivation is puzzling. Some derive it from the Greek *phalos*, an impostor, others from the Latin *fallo, fefelli*. Coke gives it a still stranger etymology, but all agree, it is crime, occasioning a forfeiture of lands or goods. Sir Henry Spelman derives it from two northern words, meaning the price of a fief. Feudal writers constantly speak of it as a forfeiture to the lord.

Under the Feudal Law. Acts, whether of a criminal nature or not, which are forfeitures of copyhold estates, are termed felonies in the feudal law. So, likewise injuries of a criminal nature were demonstrated felonies, that is, forfeitures; as assaulting the lord. Greater crimes, as murder and robbery, fell under the same title. The lord himself might be guilty of felony, and forfeit his seignory to the vassal by the same acts, as the vassal would have forfeited his feud to his lord.

Meaning Gradually Changed. Felony and the act of forfeiture to the lord being thus synonymous terms in the feudal law, or the introduction of that law into England, those crimes which induced such forfeiture or escheat of lands and forfeiture of goods also, were denominated felonies. Certain crimes were

felonies, because their consequence was forfeiture; still, by long use, the term felony was applied to the crime committed, and not to the penal consequence.

Capital Punishment. Capital punishment hence by no means enters into the definition of felony. It may exist without it, as in the cases of suicide, infanticide, homicide, and petit larceny; and it is possible hanging may be inflicted, and yet the offence be no felony, as in the case of heresy by the common law, which though a capital offence, worked no forfeiture, an inseparable incident to felony.

Forfeiture Necessary. The true criterion of felony is forfeiture. Coke observes, that in all felonies, which are punishable with death, the offender loses his lands in fee simple; and also his goods, while in such as are not so punishable, his goods and chattels only are forfeited.

Benefit of Clergy. The idea of felony is so connected with capital punishment, that we find it hard to separate them, and to this usage, the interpretations of the law now conform. And therefore, if a statute makes any new offence felony, the law implies, that it shall be punished with death, that is 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 privilege be not taken away by statute.

Felonies Against the King's Prerogative. These are:

1. Offences Relating to the Coin, less than Treason. These indicate some misdemeanors, not amounting to felony, as for instance: The introduction of foreign coins of base metal; the melting down of sterling coin; the importation of foreign counterfeit coin, or the receiving or knowingly paying out the same; the counterfeiting here of foreign coin; the purchase or sale of filings or clippings of standard coin; the whitening of copper coin for sale, to make it resemble silver; the purchase or sale of any malleable composition, heavier than silver, and made to look like gold; the receipt or payment of counterfeit or diminished mill money, not being cut in pieces.

2. Offences Against the King's Council. If any sworn servant of the king's household conspires to kill a lord of the realm, or other person, sworn of the king's council, he shall be guilty of felony. To assault any privy counsellor in the execution of his office, is made felony, without benefit of clergy.

3. Serving a Foreign Prince. In serving foreign states, the act is generally inconsistent with allegiance to one's own prince. Under James I, a statute made it a felony, for a person to leave the realm to serve any foreign prince, without having first taken the oath of allegiance. Statutes of similar import have been passed in later times.

4. Embezzling or Destroying the King's Armor or Stores of War.

5. Desertion in Time of War. This may occur in land or sea service, and either in England or abroad. It is deemed a felony, and is now without benefit of clergy. Other military offences are punished with fines, imprisonment and other penalties.

CHAPTER VIII.—PRAEMUNIRE.

Meaning of the Term. This is so called from the words of the writ preparatory to the prosecution thereof: *praemunire facias* A. B., "that you cause A. B. to be forewarned," that he appear before us to answer the contempt, etc., which contempt is recited in the preamble of the writ. It originated in the power once claimed in England by the pope.

Ecclesiastical Tyranny. Religious principles, which when pure and genuine, tend to make men better citizens, have, when perverted and erroneous, been usually subversive of civil government, and been the instrument of every pernicious design, that can be harbored in the heart of man. The unbounded authority that was exercised by the Druids in the West, under the influence of pagan superstitution, and the terrible ravages committed by the Saracens in the East, to propagate the religion of Mahomet, both attest the truth of the observation, that civil and ecclesiastical tyranny are mutually productive of each other.

Church of England Eulogized. The church of England, on the contrary, inculcated due obedience to lawful authority, and in her principles and practice has been unquestionably loyal. In matters of faith and morality, it acknowledges no guide but the scriptures, and in matters of external polity and of private right, it derives all its title from the civil magistrate, looking to the king as its head, and the parliament as its lawgiver.

Religious Bigotry. The dreadful effects of religious bigotry, when actuated by erroneous principles, even of the protestant kind, are evident from the history of the anabaptists in Germany, the covenanters in Scotland, and that deluge of sectaries in England, who overturned the church and monarchy, and shook every pillar of law, justice and private property.

Early Christianity in England. The ancient British church was a stranger to the bishop of Rome and his authority. The pagan Saxon invaders, having driven the professors of christianity to the remotest corners of our island, were afterwards converted by Augustine and other missionaries from the court of Rome. No civil authority was claimed by the pope in these kingdoms till the era of the Norman conquest. Duke William, in his projected invasion of England, had the sanction of the reigning pontiff of Rome, in return for which he subsequently imported Norman prelates, and aggrandized them on their arrival.

Foundation of Government. The most stable foundation of legal and rational government is a due subordination of rank, and a gradual scale of authority; while tyranny is most surely supported by a regular increase of despotism, rising from the slave to the sultan. In the latter case, the measure of obedience is limited only by absolute will and pleasure.

Growth of the Church. Legates were introduced into every kingdom of Europe, bulls and decretal epistles became the rule of faith and discipline; the judgment of the pontiff was the final resort in all cases of doubt or difficulty, and his decrees were enforced by anathemas and spiritual censures. Estates held by feudal tenure were denominated *beneficia*, being deemed gratuitous donations. Hence the care of the souls of a parish came to be termed a benefice.

As to Lands and Tithes. As lands escheated to the lord in default of a legal tenant, so benefices lapsed to the bishop upon non-presentation by the patron, in the nature of a spiritual escheat. The annual tenths collected from the clergy were equivalent to the feudal render or rent reserved upon a grant; the oath of canonical obedience was copied from the oath of fealty, required from the vassal; and the *primer seisins* of our military tenures, whereby the first profits of an heir's estate were extorted by the lord, gave birth to the exaction of first fruits from the beneficed clergy. The occasional aids and talliages, levied

upon vassals by the prince, gave a handle for the church to levy Peter-pence and other taxations. In time, the best livings were filled with foreign clergy, unskilled in and adverse to the laws and constitution of England.

Influence of the Church. King John resigned his crown to the pope, and afterwards re-accepted his sceptre from the papal legate, to hold as a vassal of the holy see, at the annual rent of one thousand marks. The introduction of monks of the Benedictine order, men of austere religion, separated from the world by vows of perpetual celibacy, and reputed to be of extraordinary sanctity, greatly strengthened the influence and power of the church with the people. Innumerable abbeys and religious houses were built within a century after the conquest, and endowed richly with lands. A great cause of this prolonged tenure of power, was owing to the fact, that the adherents and advocates of the church united in themselves all the learning of Europe for centuries together.

Edward I. His Opposition. Edward I seized the temporalities of the clergy, made light of bulls and processes, and strengthened the statutes of mortmain. Coke deemed him the founder of all subsequent statutes of *praemunire*, which were framed to overcome this ecclesiastical power.

Edward III, and Richard II. Open hostility existed between Edward III and the holy see. In the reign of Richard II, no alien could be presented to any ecclesiastical preferment, and all liegemen of the king, accepting a living by any foreign provision, was put out of the king's protection, and the benefice made void; to which was added the punishment of banishment and forfeiture.

Statute of Praemunire. In the writ for the execution of all these statutes, the words "*praemunire facias*," commanding a citation of the party, denominate not only the writ, but the offence itself, by the name of *pruemunire*, and the main statute itself is termed the statute of *praemunire*. It enacts, that whoever procures any processes, excommunications, bulls, or other things against the king, his crown and realm, with his or their abettors, shall be put out of the king's protection, their lands and goods forfeited to the king, and they shall be attached by their bodies to answer to the king and his council, or process of *praemunire facias* shall be made out against them.[1]

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[1] The terrible penalties of a *praemunire* are denounced by a variety of statutes, and prosecutions upon it are unheard of in English courts.

CHAPTER IX.—MISPRISIONS AND CONTEMPTS.

Defined. Misprisions is a term derived from the old French, *nespris*, a neglect or contempt. It means such high offences against the king and the government, as are bordering on the degree of capital. It is said, that a misprision is contained in every treason and felony whatsoever, and if the king so please, the process against the offender may be for the misprision only.

Divisions. Misprisions are usually divided into two sorts:

1. *Negative, which consist in the concealment of something, which ought to be revealed.*

2. *Positive, which consist in the commission of something, which ought not to be done.*

I. MISPRISION OF TREASON, OR FELONY.

Defined. This is of the first, or negative kind, and consists in the bare knowledge and concealment of treason, without any degree of assent thereto. Any assent makes the party himself a principal traitor; as indeed the concealment did at common law, but now by statute is termed a misprision.

Punishment. This concealment becomes criminal, if the party apprized of the treason, does not forthwith reveal it to a judge or a justice of the peace. The punishment for this offence is loss of the profits of land during life, forfeiture of goods, and imprisonment for life.[1]

Misprision of a Felony. This 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.

Treasure-trove. Another species of concealment is that of treasure-trove, which belongs to the king or his grantees. At one time this offence was punishable by death, but now only by fine and imprisonment.

II. CONTEMPTS, OR HIGH MISDEMEANORS.

1. Mal-administration of Public Office. This positive misprision is usually punished by parliamentary impeachment, the penalties consisting of banishment, imprisonment, fines or perpetual disability.

Embezzlement of the Public Funds. The Romans termed

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[1] But this is only in cases of high treason. Misprision of a lower degree is punishable only by fine and imprisonment.

this misprision, *peculatus*, which the Julian law punished with death, where committed by a magistrate, and with banishment in other cases. With us, it is punishable by fine and imprisonment. Other misprisions are, in general, contempts of the executive magistrate.

2. Contempts against the King's Prerogative. As by refusing to assist the king for the good of the public, either in his councils or in his wars. So also, neglecting to join the *posse comitatus*, or power of the county, when required by the sheriff or justices, which is a duty incumbent upon all who are beyond the age of fifteen, under the degree of nobility, and able to travel.

Foreign Interests Preferred. Contempt against the perogative, may also be by preferring the interests of a foreign potentate to those of one's own, or by doing or receiving anything, that may create an undue influence in favor of such power; as by taking a pension from any foreign prince, without the consent of the king.

Disobeying the King's Command. Or by disobeying the king's lawful commands, whether expressed by writs issuing out of his courts, or by summons to his council, or by letters to a subject abroad to return, or by the king's writ of *ne exeat regno*, which is a proclamation to the subject, that he shall not leave the kingdom. Disobedience to these commands or to an act of parliament is a high misprision.

3. Contempts Against the King's Power and Government. This may be done by speaking or writing against them, cursing or wishing the king ill, or retailing scandalous stories in relation to him. For this expressed contempt, a man may be fined and imprisoned.

4. Contempts Against the King's Title. These are by rash speech, not amounting to treason or *praemunire*, denying the right of the king to his crown. This heedless species of contempt is punished by fine and imprisonment.

Refusing to take Oaths. Contempt may also arise from refusing to take the oaths, appointed by statute for the better securing the government, and yet acting in a public office or other capacity where such oaths are required, viz: of allegiance, supremacy and abjuration. The penalties in such case are nearly the same as are inflicted in a *praemunire*, being an incapacity to hold the office or any other, to prosecute any suit, to be guardian

or executor, to take any legacy or deed of gift, and to vote for members of parliament.

5. Contempts Against the King's Palaces or Courts. Before the conquest, fighting in the palace was punished with death. By statute of Henry III, malicious striking in the king's palace, where the king resides, whereby blood is drawn, is punishable by life imprisonment and fine at the king's pleasure, and also with the loss of the offender's right hand.

Affrays in the Courts. But striking in the king's courts is made more penal than even in the king's palace, for in such case, there is a disturbance of public justice. Before the conquest, such an act was a capital felony. A strike or blow in a court of justice, whether blood be drawn or not, or even assaulting a judge sitting in court, by drawing a weapon, without a blow struck, is punishable by the loss of the right hand, imprisonment for life, and forfeiture of goods, and of the profits of lands for life.

Rescue. A rescue of a prisoner from any court, without striking a blow, is punished by perpetual imprisonment and forfeiture of goods and of the profits of land during life. An affray or riot, near the court, is punished only with fine and imprisonment.

Contempt of Court. Not only such as are guilty of actual violence, but also of threatening and reproachful words to a judge sitting in court are guilty of a high misprision, and punishable by large fines, imprisonment and by corporal punishment. Even in the inferior courts of the king, an affray or contemptuous behavior is punishable by fine.

Threats Against Legal Opponent. All such as are guilty of injurious treatment of 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, or the opposing attorney, or a juror for his verdict, or a jailor for keeping him in custody; which offences, if they proceed further than threats, were punishable, under the Gothic constitutions, with exile and forfeiture of goods.

Other Contempts. Lastly, to endeavor to dissuade a witness from testifying; to disclose an examination before the privy council or the grand jury; or to advise a prisoner to stand mute, are high misprisions, and contempts of the king's courts, punishable by fine and imprisonment.

CHAPTER X.—OFFENCES AGAINST PUBLIC JUSTICE.

PREAMBLE.

Crimes Against the State. Five Species.

1. *Against public justice.*
2. *Against public peace.*
3. *Against public trade.*
4. *Against public health.*
5. *Against public police or economy.*

OFFENCES AGAINST PUBLIC JUSTICE.

Different Kinds. Some of these are felonious, whose punishment may be death; others are only misdemeanors.

1. Embezzling or Vacating Records. This act and the falsifying of proceedings in a court are felonious offences. By statute of Henry VI, if any clerk or other person wilfully withdraw or avoid any record or process in the superior courts of justice in Westminster Hall, by reason whereof the judgment shall be reversed, or not take effect, it shall be felony in both the principal actors and also in their abettors. By statute of James I, to acknowledge any fine, recovery, deed, statute, bail or judgment in the name of another person, not privy to the same, is felony, without benefit of clergy. No man's property would be safe, if records might be suppressed or falsified, or persons' names be falsely assumed in courts or before public officers.

2. Intimidation of a Prisoner. If a jailer, by too great duress of imprisonment, make any prisoner in his charge become an approver or an appellor against his will; that is, to accuse and give evidence against another person, it is felony in the jailer.

3. Obstruction of Legal Process. A third offence is obstructing the execution of legal process. This offence is particularly heinous, when it is an obstruction of an arrest upon criminal process. The party opposing such arrest becomes thereby *particeps criminis*, that is, an accessory in felony, and a principal in high treason. Formerly the greatest obstruction to public justice, both of the civil and criminal kind, was the multitude of privileged places, where indigent persons assembled to shelter themselves from justice, especially in London, under the pretext of their having been ancient palaces of the crown.

4. Escape. An escape of a person arrested on criminal process, by eluding the vigilance of his keepers, before he is put in confinement, is an offence against public justice, punishable by fine or imprisonment. But the officer permitting such escape is more culpable than the prisoner, the natural desire of liberty inciting the latter.

Official Negligence or Collusion. Officers, who after arrest, negligently permit a felon to escape, are punishable by fine; but if the officer connives at the escape, it is a much more serious offence, and the punishment of the officer in such case should be commensurate with that punishment which would probably have been awarded the criminal, had he been found guilty and sentenced. And this, whether the party was actually committed to jail, or was only under a bare arrest. But the officer cannot be thus punished, till the original delinquent has actually received judgment, or been attainted of the crime. But before the conviction of the principal party, the officer neglecting his duty may be fined and imprisoned.

5. Breach of Prison. By the common law, the crime of breaking prison, or conspiring so to do, was felony, but by statute, where a party lawfully confined on an inferior charge breaks jail, the punishment is for a high misdemeanor only.

6. Rescue. This is the forcibly and knowingly freeing another from an arrest or imprisonment, and is generally the same offence in a stranger so rescuing, as it would have been in a jailer to have voluntarily permitted an escape. A rescue therefore of one apprehended for felony is felony; for treason, treason, and for a misdemeanor, a misdemeanor also. But here, as is the case 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, there may have been no offence committed.

Aid to a Prisoner. By statute of George II, to convey to any prisoner, in custody for treason or felony, any arms, instruments of escape or disguise, though no escape be attempted, is felony, but if the offence charged be a minor one, it is then a misdemeanor.

7. Premature Return from Transportation. Formerly all convicts returning before the expiration of their respective terms, were liable to a death sentence, as were also those who aided them to escape.

8. Taking a Reward, under False Pretence. This was a pretence to help an owner recover his stolen goods.

9. Receiving Stolen Goods Knowingly. This is a high misdemeanor. Under the common law, this crime was but a misdemeanor only. By statute of Anne, the receivers may be prosecuted and punished, though the principal felon be unconvicted. The prosecutor has now two methods in his choice; either to punish the receivers for the misdemeanor immediately, before the thief is taken, or to wait until the felon be convicted, and then punish them as accessories to the felony. He can only resort to one of these modes of punishment.

10. Compounding a Felony. This was formerly termed theft *bote*, which is where the party robbed not only knows the felon, but also receives his goods again or other amends, upon agreement not to prosecute. Formerly such act was held to make the party an accessory, but now is punishable as a misdemeanor only, by fine and imprisonment.

No Questions Asked. By statute of George II, even to advertise a reward for the return of things stolen, with no questions asked, or words to the same purport, subjects the advertiser and the printer to a forfeiture of fifty pounds each.

11. Barretry. This 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 is a lawyer, who is thus able, as well as willing, to do mischief, he ought also to be disbarred from practice. Under the statute of George I, where any one, convicted for barretry, afterwards attempts to practice as an attorney in any suit, he shall be transported for seven years.[1]

Fictitious Plaintiff. Another offence is the institution of a suit in the name of a fictitious plaintiff, whether it be a fabulous name, or of one ignorant of the suit. It is a high contempt, punishable at the court's discretion in the higher tribunals, and by six months imprisonment and treble damages by judges of inferior courts.

12. Maintenance. This is similar to the last mentioned offence, being an officious intermeddling in a suit, that in no way

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[1] A man cannot be guilty of barretry, if the act be a single one.

belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it; a practice which was greatly encouraged by the first introduction of uses. This is an offence against public justice, as it keeps alive contention. The Roman law frowned severely upon it. A man may, however, maintain the suit of a kinsman, servant, or poor neighbor.

13. Champerty. This is a species of maintenance, and is punished in the same manner; being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued upon between them, if they prevail at law, whereupon the *champerter* is to carry on the party's suit at his own expense. *Champart*, in the French law, signifies a similar division of profits, being a part of the crop due annually to the landlord. In our sense of the word, it signifies the purchasing of a suit, or the right of suing. It is abhorred so much by our law, that a *chose* in action, or thing, of which one has the right, and the other the possession, is not assignable at common law, because no man should purchase a claim to sue in another's right. These pests of society, who officiously interfere in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted upon by the Roman law.

14. Compounding of Informations. The compounding of informations upon penal statutes is an offence of an equivalent nature in criminal causes, and tends to render the laws odious. The statute of Elizabeth punished severely such informers, who made composition without leave of court, or accepted promises of money from the defendant to excuse him.[1]

15. Conspiracy to Indict. Malicious Prosecution. A conspiracy to indict an innocent man of felony falsely and maliciously, who is accordingly indicted, is an abuse of public justice.[2] The party injured may either have a civil action, or the conspirators, of which there must be at least two, may be indicted at the suit of the king, for which the punishment under the ancient common law was very severe. They forfeited their goods, and also their

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[1] This applies only to common informers, and not to cases, where the penalty is given the party aggrieved.

[2] It is no excuse for a conspiracy to carry on a malicious prosecution, that the indictment preferred was insufficient, or that the court before which the case was taken had no jurisdiction. The offence of conspiracy is not confined to injuring a single individual. It may be to injure public trade, or public health, or to do any illegal act.—*Chitty.*

lands for life, lost their civil privileges as jurors or witnesses, had their lands wasted, their houses razed, their trees rooted up, and were themselves consigned to prison. The present punishment is fine and imprisonment.

Blackmail. To this head may be referred the offence of sending letters threatening to accuse of an indictable crime, with a view to extort money or other property.

16. Perjury. This takes place after a suit has been commenced. It is termed wilful and corrupt. Coke defines it, 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.

When Oaths are Valid. The law takes no notice of a false oath, but such as is committed in a court of justice, having power to administer it, or before some magistrate or proper officer, invested with similar authority, in some proceedings relative to a civil suit or a criminal prosecution; for it esteems other oaths unnecessary.

Affidavit in Extra-Judicial Matters. It is much to be questioned, how far a magistrate is justified in taking a voluntary affidavit in any extra-judicial matter, as is now too frequent upon every petty occasion. By such idle oaths, a man *in foro conscientiae* incurs the guilt, and yet evades the temporal penalties of perjury.

Requisite. The perjury must be corrupt, *malo animo*, wilful, positive and absolute,[1] and must be some material point. No regard is paid to it, if it be merely in some trifling collateral circumstance.

Subornation of Perjury. This offence consists in procuring another to take such a false oath, as constitutes perjury in the principal.[2]

Punishment. Anciently the punishment of perjury and subornation was death; afterwards banishment or cutting out the tongue. Subsequently it was forfeiture of goods, but now it is

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[1] Yet if a man swears, that he believes that to be true, which he knows to be false, he is as criminal, in point of law, as if he had made a positive assertion, that the fact was as he swore he believed it to be. The oath may be on the trial or by affidavit, so that it be before an officer authorized to administer it, in a pending proceeding, and as to a material fact. It is not necessary that the statement be credited, or do actual injury.—*Chitty.*

[2] The false oath must be actually taken. Mere solicitation will not suffice.

fine and imprisonment, and a prohibition against ever again giving testimony. Under the statute of Elizabeth, the offender was nailed by both ears to the pillory.

17. **Bribery.** This exists, when a judge or other person concerned in the administration of justice, takes any undue reward to influence his behavior in his office. In the east, it is customary never to petition any superior for justice, without tendering him a gift. The Roman law, though containing injunctions against bribery, tacitly encouraged the practice; allowing the magistrate to receive small presents, restricting them to the value of one hundred crowns *per annum*. By the laws of Athens, he who offered was prosecuted, as well as he who received a bribe.[1] In England this crime is punished by fine and imprisonment.

18. **Embracery.** This is an attempt to influence a jury corruptly by promises, persuasions, entreaties, money, entertainments, and the like. This offence is punishable by fine and imprisonment.

19. **False Verdict.** Whether this act of jurors was occasioned by embracery or not, it was considered criminal, and was punished by attaint.

20. **Negligence of Public Officers.** This applies to sheriffs, coroners, constables, and the like, and renders the offender liable to be fined. In notorious cases, it would lead to a forfeiture of the office.

21. **Oppression and Partiality of Officials.** This is a crime of deep malignity, and the power and wealth of the offenders often result in their immunity from punishment. It occasionally is exercised by judges, justices and magistrates, in the administration of their offices.

Punishment. 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 punished with forfeiture of their offices, also by fines, imprisonment or censure, regulated by the nature and aggravations of the offence.

22. **Extortion.** This is an abuse of public justice, which consists of an officer's unlawful taking, by color of his office, from any man, any money or thing of value, that is not due to

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[1] It is equally a crime to give as to receive a bribe. It was formerly deemed so heinous an offence in judges, that in the reign of Edward III. the chief justice of England was hanged for it.

him, or more than is due, or before it is due. The punishment is by fine and imprisonment, and sometimes by a forfeiture of the office.

CHAPTER XI.—OFFENCES AGAINST THE PUBLIC PEACE.

Defined. 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; statute law having made a few of them felonies.

1. Riotous Assemblages. Twelve or more persons, assembling for an unlawful purpose, and not dispersing on proclamation, constitute such an assemblage. By statute of George I. this offence is declared felony, without benefit of clergy.

2. Unlawful Hunting. Where it occurs in any legal forest or park, by night, or by parties with blackened faces or otherwise disguised.

3. Threatening Letters. Knowingly to send any letter without a name, or with a fictitious name, demanding money, or threatening without demand, to kill a king's subject or to fire his property, is made felony, without benefit of clergy.

4. Destruction of any Lock, Sluice or Flood-gate. This offence is a felony, where such structure was erected by authority of parliament on a navigable river. So also wilfully damaging banks of streams to obstruct navigation and injure the adjacent country. Also the destruction of any turnpike gate, fence or toll-house.

5. Affrays. This word is from the French *affraier*, to terrify, and signifies the fighting of two or more persons in some public place, to the terror of his majesty's subjects. If the fighting be in private, it is an assault, and not an affray. Affrays may be suppressed by any private person A constable or similar officer, whose duty it is to keep the peace, may break open doors to suppress an affray, or apprehend the affrayers. He may either carry them before a magistrate, or imprison them by his own authority temporarily, till the heat is over, and may then perhaps make them find sureties for the peace.

Punishment. Fine and imprisonment are usually inflicted, proportioned to the nature of the case.

Where Aggravated. A duel is an aggravated affray, though no mischief has ensued. Another aggravation is, when thereby officers of justice are disturbed in the due execution of their office. So also, where a respect to the particular place ought to restrain and regulate men's behavior, more than in ordinary cases.

In Churches and Churchyards. Affrays in churches or churchyards are esteemed very heinous offences, and even quarrelsome words, which are not an affray elsewhere, are considered so in such localities. Where a blow is struck, or one lay violent hands upon another in such sacred place, he shall be excommunicated; and where a weapon is drawn with wilful intent, or where it is used, the offender, besides excommunication, shall have an ear cut off, or having no ears, shall be branded on the cheek with the letter "F."

6. Riots, Routs and Unlawful Assemblies. Three persons at least are required to constitute an unlawful assembly. Their meeting must be with intent to commit an unlawful act, and they part without doing it, or making any motion towards it.

A Rout. A rout is, where three or more meet to do an unlawful act upon a common quarrel; as forcibly to break down fences upon an alleged right of way or common, and make some advances towards it.

A Riot. 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, or to 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, to the number of twelve persons, was made capital in certain cases, but from the number of three to eleven by fine and imprisonment only.[1] Formerly in riots and routs, the pillory in flagrant cases was superadded.[2]

How Suppressed. Any two justices, together with the sheriff or under-sheriff of the county, may come with the *posse comitatus*, if need be, and suppress such riot, unlawful assembly,

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[1] Women are punishable as rioters, but infants under the age of discretion are not.

[2] The pillory is now abolished.

or rout, arrest the rioters, and on the spot make a record of the transaction; which record shall be a sufficient conviction of the offenders.

7. Tumultuous Petitioning. This was carried to a great length in the times preceding the grand rebellion. By statute of Charles II, no more than twenty names shall be signed to any petition to the king or either house of parliament, for the alteration of things established by law; unless the contents thereof be previously approved by three justices or by the majority of the grand jury, and in London by the lord mayor, aldermen and common council. No more than ten persons shall present this petition.

8. Forcible Entry or Detainer. This 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, unless his entry was taken away or barred by his own neglect. The entry, now allowed by law, is a peaceable one, that only being forbidden, where maintained with violence and weapons. A justice or justices may examine a jury to try the forcible entry or detainer complained of; may fine, and compel restitution by means of the sheriff, without inquiring into the merits of the title. This may also be done by indictment at the general sessions. This provision does not extend to such as endeavor to obtain possession by force, where they or their ancestors have been in peaceable enjoyment of the lands for the preceding three years.

9. Carrying Deadly Weapons. The offence of riding or going armed with dangerous weapons is a crime against the public peace, by terrifying the people, and is particularly prohibited by statute. In Athens, by the law of Solon, a man was finable who walked about the city in armor.

10. Spreading False News. This is, where an attempt is made to cause discord between the king and nobility, or concerning any great man of the realm.

11. False and Pretended Prophecies. Where these are uttered with intent to disturb the peace, they are punishable, as they raise jealousies among the people, and terrify them with imaginary fears. In the reign of Edward VI, they were punished capitally.

12. Challenges to Fight. A challenge by word or letter, or to be the bearer of such challenge, is a punishable offence.

13. **Libels.** These signify any writings, pictures or the like, of an immoral or illegal tendency. But in the sense we now consider them, they are malicious defamations of a party, 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 public peace, by stirring up the objects of them to revenge and perhaps to bloodshed.

Falsity of the Libel. A communication of a libel to any 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 printed, for it equally tends to a breach of the peace. For the same reason, it is immaterial, with respect to the essence of the 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 falsity of it may aggravate its guilt or enhance its punishment. In a civil action, 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; therefore the truth of the accusation may be pleaded in bar of the suit.

Criminal Prosecution. In a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is all that the law considers, and, therefore, in such prosecutions the only points to be inquired into are: (1) making or publishing of the book or writing; (2) whether the matter be criminal; and if both these points are against the defendant, the offence against the public is complete.

Punishment. The punishment of such libelers, for either making, repeating, printing or publishing the libel, is fine, and such punishment as the court in its discretion shall inflict; regarding the quantity of the offence and the quality of the offender. By the law of the twelve tables at Rome, libels which affected the reputation of another were made capital offences, but before the reign of Augustus the punishment became corporal only. Under the emperor Valentinian, it was again made capital, not only to write, but to publish, or even to omit destroying them.

Liberty of the Press. Although blasphemous, immoral, treasonable, schismatical, seditious or scandalous libels are punishable 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 essential to the nature of a free state; but this consists in laying no previous restraint upon publications, 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, 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.

Freedom of Censure. But to punish, as the law does at present, any dangerous or offensive writings, which are judged to be 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. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left. The disseminating, or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man may be allowed to keep poisons in his closet, but not publicly vend them on the street as cordials. To censure the licentiousness of the press is to maintain its liberty.

CHAPTER XII.—OFFENCES AGAINST PUBLIC TRADE.

Division. Offences against public trade are either felonious or not felonious. Of the first sort are:

1. Owling. This is so called from its being carried on in the night. It is the offence of transporting wool or sheep out of the kingdom, to the detriment of its staple manufacture.

2. Smuggling. This is the offence of importing goods, without paying the duties imposed thereon by the laws of the

custom and excise. This is restrained by a great variety of statutes, which inflict pecuniary penalties and seizure of the goods, and affix the guilt of felony.

3. Fraudulent Bankruptcy. Statute law takes notice of several species of fraud, to wit: the bankrupt's neglect of surrendering himself to his creditors; his non-conformity to the directions of the several statutes; his concealing or embezzling his effects to the value of 20*l.*; and his withholding any books or writings, with intent to defraud his creditors.

Punishment. The offence of fraudulent bankruptcy, being an atrocious species of *crimen falsi*, ought to be put upon a level with forgery and counterfeiting. Under the statute of James II, the offender was placed in the pillory for two hours, with one of his ears nailed to the same, and cut off.

4. Usury. This is an unlawful contract upon the loan of money, to receive the same again with exorbitant increase. Under the statute, not only are such contracts totally void, but the lender shall forfeit treble the money borrowed. It is also an offence, to procure and solicit any infant to grant any life annuity, or to promise or otherwise engage to ratify it, when he comes of age.

5. Cheating. This is an offence more immediately against public trade. A vast number of statutes bear upon this subject, many of which relate to selling by false weights and measures. Also any deceitful practice in cozening another by artful means, whether in matters of trade or otherwise, is punishable by fine and imprisonment, as is also the case where a man defrauds another of valuable chattels, by color of any false token or false pretence, or where he disposes of another's goods without the consent of the owner.

6. Forestalling the Market. This offence consists in buying or contracting for any merchandise or victuals 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.

7. Regrating. This consists in the buying of corn or victuals in any market, and selling it again in the same market, or within four miles of the place, thus enhancing the price of provisions, as every successive seller must have a successive profit.

8. **Engrossing.** This is 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 a few rich men to raise the price of provisions at their own discretion. And so the total engrossing of any commodity, with intent to sell it at an unreasonable price, is an offence indictable and finable at the common law. Among the Romans, these offences and other malpractices to raise the price of provisions, were punished by a pecuniary mulct.

9. **Monopolies.** This is 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 illegal combinations reached an enormous height during the reign of queen Elizabeth, but were in a great measure corrected in the reign of her successor. Combinations also among victualers and artificers to raise the price of provisions, or any commodities, or the rate of labor, were, in many cases, severely punished by particular statutes. In the reign of Edward VI, the punishment for the first offence was by a forfeiture of 10*l.* or 20 days' imprisonment, with an allowance of only bread and water; 20*l.* or the pillory for the second, and 40*l.* for the third, or else the pillory, loss of one ear and perpetual infamy.

10. **Unlawful Exercise of a Trade.** This consists, where a party has not served as an apprentice for the seven years fairly required by law; as it is detrimental to public trade, from the supposed want of sufficient skill in the trader.

11. **Inducements to Artificers to Settle Abroad.** Artificers going into foreign countries, and not returning within six months after warning given by the British ambassador where they reside, shall be deemed aliens, and forfeit all their lands and goods, and shall be incapable of any legacy or gift. Parties who have enticed them abroad are liable to fine and imprisonment.

CHAPTER XIII.—OFFENCES AGAINST PUBLIC HEALTH AND PUBLIC ECONOMY.

Offences against Health. 1. Quarantine Evaded. If any person, infected with contagious disease, be commanded by the mayor or other proper officer of his town to keep his house, and shall disobey the order, he may be enforced. By statute of George II, the method of performing quarantine, or forty days probation, by ships coming from infected countries, was placed in much more regular order than formerly. Parties guilty of disobeying such directions, and also persons escaping from the lazarets, or place where quarantine is to be performed, were declared guilty of felony, without benefit of clergy.

2. Selling Unwholesome Provisions. This was punished by fine and imprisonment.

Offences against the Public Police or Economy. Some of these amount to felony, and others to misdemeanors only. Among the former are:

1. Clandestine Marriages. By statute, marriages must be celebrated in the church or public chapel, wherein banns have been usually published, except by license of the archbishop of Canterbury. To solemnize marriage in any other manner or place, or without due publication of banns or license obtained, not only render the marriage void, but subject the person solemnizing it, to felony. It is also a crime to make a false entry in a marriage register, or to alter it when made. Also to utter the same as true, knowing it to be false; or to destroy or procure the destruction of any register in order to vacate any marriage.

2. Bigamy and Polygamy. Bigamy properly signifies being twice married. Polygamy, having a plurality of wives at once. Polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations. In northern countries, the very nature of the climate seems to proclaim against it. It is punishable by the laws of Sweden with death. In England, by statute of James I, the crime 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 be, for she is indeed no wife at all; and so *vice versa* of a second husband.

Cases, where not a Felony. There are five cases, in which such second marriage, though in the first three void, is yet no felony. (1) Where either party has been continually abroad for seven years, whether the party at home had notice of the other's being alive or not. (2) Where either of the parties has been absent from the other seven years within this kingdom, and the remaining party has had 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 divorced *a vinculo*. (5) Where either of the parties was under the age of consent at the time of the first marriage; for in such case the 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, it is probable that such second marriage would be within the reason and penalties of the act.

3. Vagrant Soldiers and Mariners. This is where idle soldiers and mariners wander about the realm, or persons pretending so to be; thus abusing the name of such honorable profession. This sanguinary law, making it a felony, without benefit of clergy, though in practice deservedly antiquated, still remains a disgrace to our statute book.

4. Gypsies. Outlandish persons, calling themselves gypsies, or Egyptians, are another object of the severity of some of our unrepealed statutes. These are a strange community of wandering impostors and jugglers, who were first noticed in Germany about the beginning of the 15th century, and have since spread themselves all over Europe. They first appeared in the year 1417, under passports, real or pretended, from the emperor Sigismund, king of Hungary. Pope Pius II mentions them in his history (1464), as thieves and vagabonds, then wandering with their families over Europe, under the name of Zigari; whom he supposes to have migrated from the country of Zigi, which nearly answers to the modern Circassia. In a few years they gained such a number of idle proselytes, who imitated their language and complexion, and betook themselves to the same arts of chiromancy, begging and pilfering, that they were expelled from France in 1560, and from Spain in 1591. In 1530, by statute of

Henry VIII, they were directed to avoid the realm and not return under pain of imprisonment, and forfeiture of their goods.

5. Nuisances. These 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. These are termed common nuisances, and are distinct from private nuisances, inasmuch as they annoy the whole community in general, and not merely some particular person, and therefore are indictable only and not actionable; for 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.

Different Nuisances. (1) **On Highways.** 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 repairs. A house erected, or an enclosure made upon any part of the king's demesnes, or on a highway or public water, is called a purpresture.

(2) **Offensive Trades.** All those 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.

(3) **Disorderly Houses.** All disorderly inns or ale houses, bawdy houses, gaming houses, stage plays, unlicensed booths, and the like, which are public nuisances, and may, upon indictment, be suppressed and fined.

Inns. Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted and suppressed, and the inn-keepers fined, if they refuse to entertain a traveller without a very sufficient cause. Under the hospitable laws of Norway, the severest grade of punishment is inflicted on inn-keepers, who refuse to furnish accommodations at a just and reasonable price.

(4) **Lotteries.** These are declared to be public nuisances, and all grants, patents or licenses for the same are contrary to law.

(5) **Fire-works.** Selling fire-works, also the throwing of them in the street, by which danger may ensue to buildings. Also, the keeping or conveying too large a quantity of gunpowder at any one time, or in any one place or vehicle, is actionable.

(6) **Eavesdroppers.** These are people who listen under walls or windows, or the eaves of a house, to conversation, from which they frame slanderous and mischievous tales.

(7) **Common Scolds.** These are declared to be a public nuisance to the neighborhood, and the term *communis rixatrix* shows that they are confined to persons of the feminine gender; for which offence a woman may be indicted, and if convicted, shall be placed in the *trebucket*, or cucking stool, which term is frequently corrupted into ducking stool, and then be plunged in the water for punishment.

6. **Idleness.** This is a high offence against the public economy. In China, it is a maxim, that if a man does not work, or if a woman remains idle in the empire, somebody must suffer cold or hunger; the produce of the lands not being more than sufficient, with culture, to maintain the inhabitants. The court of Areopagus, at Athens, punished idleness, and exerted a right to examine every citizen as to how he spent his time. Civil law expelled all sturdy vagrants from the city. Our law divides these parties into three classes: idle and disorderly persons, rogues and vagabonds and incorrigible rogues. Persons harboring vagrants are liable to a fine of forty shillings, and to pay the expenses brought upon the parish thereby.

7. **Luxury and Extravagance.** Sumptuary laws against luxury, and extravagant expenses in dress, diet, and the like, have from time to time been passed. Montesquieu asserts, that luxury is necessary in monarchies, as in France, but ruinous as to democracies, as in Holland. In regard therefore to England, whose government is compounded of both species, it may therefore be a question, how far private luxury is a public evil, and as such cognizable by public laws. In the reign of Edward III, Edward IV and Henry the VIII, penal laws were passed against piked shoes, short doublets and long coats; all of which were repealed by statute of James I; but as to excessive diet there still remains one ancient statute unrepealed, passed under Edward III, which ordains, that no man shall be served at dinner with more than two courses, except upon some great holidays therein specified, in which he may be served with three.

8. **Gambling.** This is an offence of the most alarming nature, tending to promote public idleness, theft and debauchery among people of a lower class; while among persons of a super-

ior rank, it has frequently been attended with the sudden ruin and desolation of ancient and opulent families, and abandoned prostitution of every principle of honor and virtue, and too often has ended in suicide. To restrain this pernicious vice among the inferior sort of people, the statute of Henry VIII was made; which prohibits to all but gentlemen, the games of tennis, tables, cards, dice, bowls, and other unlawful diversions there specified, unless during Christmas times, under pecuniary pains and imprisonment. Tacitus asserts, that among the ancient Germans, the loser often went into voluntary slavery and suffered himself to be bound and sold; terming this perseverance in so bad a cause a point of honor. One would almost be tempted to think Tacitus was describing a modern Englishman. By several statutes during the reign of George II, all private lotteries by cards, tickets and dice, and particularly the games of faro, basset, ace of hearts, hazard, passage, rolly polly, and all other games with dice, except backgammon, are prohibited under a heavy penalty. Public lotteries, unless by authority of parliament, and all manner of ingenious devices were also prohibited; but the inventions of sharpers are swifter than the punishment of the law, which only hunts them from one device to another. Another statute of the same reign, prevents the multiplicity of horse racing, another form of gaming.

9. Violation of Game Laws. This is an offence, which the sportsmen of England seem to think of the highest importance, and associations have been formed all over the kingdom to punish its commission. It is the offence of destroying such beasts and fowls, as are ranked under the denomination of game; the laws being termed game laws.

Statutes Relating Thereto. Statutes for preserving the game are many and various, but mostly obscure and intricate. Exemptions from the penalties inflicted by the statute law are: (1) To those having a freehold estate of 100*l.* per annum; there being fifty times the property required to enable a man to kill a partridge, as to vote for a knight of the shire. (2) To one having a leasehold for 99 years of 150*l.* per annum. (3) Being the son and heir apparent of an esquire, (a very loose and vague description), or person of superior degree. (4) Being the owner or keeper of a forest, park, chase or warren. No person, however, qualified to kill, may make merchandise of this valuable privilege, by selling or exposing for sale any game.

CHAPTER XIV.—HOMICIDE.

PREAMBLE.

Summary. Having considered crimes against God and religion, also offences against the law of nations, thirdly, those which affect the king, and fourthly, such as more directly infringe the rights of the public in its collective capacity, we now lastly consider crimes, which in a more peculiar manner affect individuals.

Injuries to the Public also. If these injuries were confined to individuals, they would come under the head of private wrongs, for which a satisfaction would be due only to the party injured; but they are of a much more extended import, because their commission involves a violation of the laws of nature; because they almost always include a breach of the peace; and because by their example and evil tendency they endanger all civil society. Hence, in addition to the satisfaction due in many cases to the individual by action for the private wrong, the offender is liable to public punishment for the crime.

The Punishment. The prosecution for such offences is always in the king's name, in whom the executory power of the law resides. Under the old Gothic constitutions, there was a three-fold punishment inflicted on all offenders: first, for the private wrong done the party injured; second, for the offence against the king, by disobeying his laws; and thirdly, for the crime against the public by their evil example.

Three Kinds of such Crimes. These crimes against private subjects are of three kinds: against their persons, their habitations, and their property. Of offences against the person, the offence of destroying the life of a human being is the most serious.

HOMICIDE.

Kinds. Homicide is of three kinds: justifiable, excusable and felonious. The first has no share of guilt at all; the second very little, while the third is the greatest of crimes.

I. JUSTIFIABLE HOMICIDE.

1. The Result of Necessity. In such homicide, there exists no will, intent or desire, nor even negligence in the slayer, who acts blamelessly. Such is the act of an executioner, who thereby fulfils the requirement of the law. If any unauthorized party perform such act, he is guilty of murder; as also

would be the case of the judge, who without lawful commission, sentences the criminal, who loses his life thereby.

Permissive Homicide. Again, in some cases homicide is justifiable, rather by the permissive, than by the absolute command of the law, either for the advancement of public justice, or where committed for the prevention of some atrocious crime.

2. In the Advancement of Public Justice. This occurs:

(1.) Where an officer in the execution of his office, in a civil suit or criminal case, kills a person, who assaults and resists him.

(2.) Where an officer, or a private person, attempts to take a man charged with felony and is resisted; and in the endeavor kills him.

(3.) In case of a riot or rebellious assembly, the officers, dispersing a mob, may resort to extreme measures, even though death be the result.

(4.) Where prisoners assault a jailer, and in self defence he slays an assailant, he is justified in so doing, to prevent an escape.

(5.) If trespassers in forests or parks will not surrender themselves to the keepers, they may be slain.

In all these cases, there must exist an apparent necessity on the officer's side; that the party could not be arrested, the riot could not be suppressed, or the prisoners could not be retained; otherwise such homicide would be unjustifiable.

(6.) If a champion in a wager of battle lost his life, it was imputed to be the judgment of God.[1]

3. For the Prevention of any Atrocious Crime. Homicide in such case is justifiable, both by the law of nature and by the statute law. Thus if a person attempts to rob or murder another, or to break open a house in the night time, or to burn it, and shall be killed in such attempt, the slayer shall be acquitted. The crime must be accompanied with force. The Jewish law, which punished no theft with death, made homicide only justifiable in the case of nocturnal house-breaking. In Athens it was lawful to kill such criminal, if taken in the act, as was also the case in Rome.

In Defence of Chastity. The Roman law, and likewise that of the Jewish republic, justified homicide in defence of the chastity either of one's self or relations. The English law justi-

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[1] No longer the law, as such contests are forbidden.

fies a woman killing one who attempts to ravish her; or the slaying by a husband or father, of a man who attempts a rape upon his wife or daughter; but not if he takes them in adultery, for the one is forcible, the other not.

Force Repelled by Force. The uniform principle which runs through all laws, seems to be, that where a crime, in itself capital, is attempted to be committed by force, it is lawful to repel such force by the death of the party.

Without Fault. In cases of justifiable homicide, the slayer is rather to be commended than blamed, and is to be totally acquitted, which is not quite the case in ex able homicide, the very name whereof imports some fault, error or omission, though trivial.

II. EXCUSABLE HOMICIDE.

Two Kinds. Either *per infortunium*, by misadventure; or *se defendendo*, for self preservation.

(1.) **Per Infortunium.** This is where a man, doing a lawful act, without bad intent, unfortunately kills another, as where a man in shooting at a mark, undesignedly kills a man. Also where an officer punishing a criminal, 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, he is guilty of manslaughter.

In Games or Sports. By the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games permitted by the state, was not held guilty of homicide. In general, if death ensues in consequence of an idle, dangerous and unlawful sport, the slayer is guilty of manslaughter, for the act itself is unlawful.

(2.) **Se Defendendo.** In self defence. This is the case, where a man in protecting himself from an assault, or the like, in the course of a sudden quarrel, kills him who assaults him. The law terms this *chance-medley*, a casual affray, or *chaud medley*, an affray in the heat of blood or passion. To excuse homicide by this plea of self defence, it must appear, that the slayer had no other obable means of escaping from his assailant.

Differs from Manslaughter. When both parties are actually combating at the time the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not begun

the fight, or having begun it, endeavors to decline further struggle, and afterwards, being pressed, kills his antagonist to save himself, the homicide is excusable, as self defence. The law requires, that he must first have retreated, as far as he safely could to avoid the assault, before he turned upon his assailant.

Act of Revenge. Duelling. Not only the manner of the defence, but the time also must be considered, for if the person assaulted does not fall upon the aggressor until the affray is over, or when he is running away, this is revenge, and not defence. Yet if two men agree to fight, and in the duel, one retreats, and when pressed by his adversary, kills him, this is murder, because of the previous malice and design.

Defending near Relations. Under this excuse of self-defence, master and servant, parent and child, husband and wife, upon killing an assailant, in defending one another respectively, are excused; the act of the relative assisting being construed the same as the act of the party himself.

Shipwrecks. In the case of a shipwreck, where a man, for self-preservation, consigns to death another party, who has seized the same plank for safety, but which will not sustain both, the homicide is clearly excusable.

Negligence Presumed. Certain circumstances may exist, wherein these two species of homicide, by misadventure and self-defence, agree; and these are in their blame and punishment. The law values human life so highly, that it imputes misbehavior in the slayer, unless he acts by command and permission of the law. In the case of misadventure, it presumes negligence in him who unfortunately commits it, believing that in the original quarrel, both parties were in some fault. In the other case, the law cautions men not to venture to kill other upon their own private judgment, and it must be a stern necessity to excuse such an act.

Israelitish Law. Cities of Refuge. Among the Jews, even the slaughter of enemies required a solemn purgation, which implied that the killing of a man, from whatever cause, left a stain behind it. The Mosaical law appointed certain cities of refuge for him, who killed his neighbor unawares; until he reached which asylum, the avenger of blood might slay him, nor could he leave such city with safety, until the death of the high priest.

Laws of Other Nations. In the imperial law, casual hom-

icide was excused by the express sanction of the emperor, in each case; while among the Greeks, the misfortune was expiated by voluntary exile for a year. In Saxony, a fine was paid to the kindred of the slain party, and in France, a largess was given to the poor, and masses performed for the soul of the deceased.

Ancient English Penalty. Under ancient English laws, the penalty in such case inflicted, consisted, it seems, in a forfeiting of goods by way of fine or *weregild*, which was probably disposed of as in France, to pious uses.

III. FELONIOUS HOMICIDE.

Defined. This is the killing of a human being of any age or sex, without justification or excuse.

SUICIDE.

Defined. Self-murder is one form of this crime, which was the pretended heroism, but real cowardice, of the Stoic philosophers; who thus avoided ills, which they had not the fortitude to endure. Though apparently countenanced by the civil law, it was denounced by the Athenian law, which ordered the offender's hand to be severed from the arm. The English law ranks suicide among the highest crimes, and if it has been done through the advice of another, such accessory is guilty of murder.

Felo de Se. A suicide is one, who deliberately puts an end to his own existence, or commits an unlawful malicious act, which results in his own death; as if in 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 in his senses, and of years of discretion. Coroner's juries strain a point, when they assert that the very act of suicide is proof of insanity, as if every man, who acts contrary to reason, was himself devoid of reason. A hypochondriac can discern right from wrong, as also can a lunatic, during a lucid interval.

Punishment for Self-murder. The law, in such case, can only reach the man's reputation and fortune. Hence it has ordered an ignominious burial in the highway, with a stake driven through the offender's body, and a forfeiture of his goods and chattels to the king.[1] If he holds lands with his wife for a term of years, the latter forfeits her rights of survivorship, and the land is forfeited to the king.

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[1] This public interment no longer takes place. No punishment for this offence exists in the United States.

MANSLAUGHTER.

Defined. This offence differs from that of murder, in that, when voluntary. it arises from the sudden heat of the passions, while murder is occasioned by the wickedness of the heart. Manslaughter is the unlawfully killing of another, without malice express or implied, which may be either voluntary or involuntary. There can be no accessories before the fact, the act being without premeditation.

Voluntary Manslaughter. If upon a sudden quarrel, two persons fight, and one slay the other, this is manslaughter; so also, if upon such an occasion, they go out and fight in a field; for this is one continued act of passion. So if a man be greatly provoked, as by having his nose pulled or other great indignity, and immediately kills the aggressor, though this is not excusable as an act of self defence, nor is it murder without previous malice, yet it is manslaughter.

Time Allowed for Reflection. Yet in such cases of homicide upon provocation, if sufficient time has elapsed for passion to cool, and reason to interpose, and the insulted party subsequently kills the other, this is deliberate revenge, and amounts to murder.

Killing an Adulterer. So if a man detects another in the act of adultery with his wife, and kills him on the spot; though this was allowed by the laws of Solon, as likewise by the civil law, where the paramour was found in the husband's own house; yet in England, it is manslaughter of the highest degree, in which the court directed the hand of the offender to be slightly burned.

Differs from Excusable Homicide. Manslaughter in sudden provocation differs from excusable homicide, *se defendendo*, in this, that in the latter for self preservation, there is an apparent necessity to kill the aggressor; while in manslaughter, it is only a sudden act of revenge.

Involuntary Manslaughter. This differs from homicide, excusable by misadventure, in this, that the latter happens in consequence of a lawful act, while the former is the result of an unlawful one. So when a person does an act, lawful in itself, but in an unlawful manner, and without due caution, as where a workman flings down a stone from a house and kills a passer-by; this may be either misadventure, manslaughter or murder, according to the circumstances under which the act was done. If

it occur in a country village, where few passengers are found, and he calls out to have a care, it may be misadventure only, but if it happen in a large city, where people are continually passing, it is manslaughter, though he gives loud warning; and murder if he gives no notice whatever, for this would show malice against all mankind. If the act be in prosecution of a felonious intent, naturally attended with bloodshed, it will be murder, but if only a civil trespass was intended, it will be manslaughter.

Stabbing. One species of manslaughter is punished as murder, the benefit of clergy being taken away by statute, namely, the offence of mortally stabbing another, though done upon sudden provocation. This statute was made, on account of the frequent quarrels and stabbings with short daggers between the Scotch and English at the accession of James I.

MURDER.

Punishment. This crime is almost universally punished with death. The Mosaical law reads, that "whoso sheddeth man's blood, by man shall his blood be shed." The name is derived from the Teutonic word "*moerda.*" A heavy amercement was levied on a *vill*, where it was committed, as was the case in England under the reign of Canute, on account of his countrymen, the Danes, being often secretly slain by the English; and was afterwards adopted by William the Norman. The law in this respect was afterwards abolished.

Defined. Murder, says Coke, is when a person of sound memory and discretion unlawfully kills any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied. Lunatics or infants cannot commit the crime, unless they show a consciousness of doing wrong and a discernment between good and evil. The unlawfulness must be without warrant or excuse, and there must be an actual killing, and not a mere assault.

Form of Death. Any form of death suffices, but if a party be indicted for murder by poisoning, he cannot be convicted on evidence of death by shooting, or other totally different species of death. If the difference is immaterial, as an allegation of death by a wound from a sword, and it proves to have been from an axe, the difference is not essential. The most detestable species of murder is by poison. By statute of Henry III, murder by poisoning was made treason, and the offender was boiled to death. In the next reign this act was repealed.

False Witness Punished. By the common law, it was held to be murder to bear false witness against a party, with a design thereby to effect his death. In such case, the Goths punished the judge, the witness and the prosecutor, where a conspiracy between them existed; and among the Romans, the false witness was punished capitally, as being guilty of a species of assassination.

Consequential Murder. If a man does an act of which the probable consequence may be, and eventually is, death, such killing may be murder; although no killing be primarily intended; as was the case of a son, who exposed his sick father to the weather against his will, by reason of which he died. So too, if a man has a beast that is used to do mischief, and he, knowing it, suffers the beast to roam abroad, and it kills a man, even this is manslaughter in the owner; but if he purposely turned it loose, though for the sport of frightening people, it is as much murder, as if he had incited a bear or a dog to attack persons.

Negligence of a Physician. If a physician give his patient a potion or plaster to cure him, and it kills him, this is but misadventure, and he shall not be punished criminally, however liable he may be in a civil action for his ignorance or negligence.

Date of the Death. To make the killing murder, it is requisite that the party die within a year and a day after the stroke or cause of death administered; the day of the injury being computed therein.

Killing of an Alien Enemy. The killing must be of a reasonable creature in being, and under the king's peace. An alien or outlaw is entitled to as much protection in this sense as a subject, except he be an alien enemy, in time of war.

Unborn Child. To kill a child in its mother's womb is now no murder, but a great misprision; but if a child be born alive, and die by reason of the potion or bruises it received in the womb, it seems to be murder. In the murder of bastard children by unnatural mothers, there is difficulty in proving the child to have been born alive; hence, by a former statute, where such mother endeavors to conceal the death of her bastard offspring, by burying the child, or the like, she shall suffer death, unless she can prove by one witness at least, that the child was actually born dead. The law, which makes the concealment of the bastard's death almost conclusive evidence of its murder by

the mother, is also the law of the Danes, Swedes and French. Of late years, the English law requires some sort of presumptive evidence, that the child was born alive.

Malice Aforethought must Exist. This is the criterion, which distinguishes murder from other killing; and this malice prepense, *malitia praecogitata*, is not so properly spite against the deceased, in particular, as any evil design in general, the dictate of a wicked heart.

Express Malice. This exists, where one, with deliberate mind and formed design, kills another. External circumstances indicate this inward intent, as lying in wait, menaces, previous grudges, and concerted schemes to do harm.

Duelling. This includes the offence of duelling, where both parties meet avowedly with intent to murder, thinking it their duty as gentlemen to risk their own lives and the lives of others, in contravention of human and divine laws. The law stigmatizes the act, where fatal consequences ensue, as murder, and punishes the seconds as well as the surviving principal. Yet it requires a degree of passive valor to combat the dread of even undeserved contempt, arising from prevalent false notions of honor; and the strongest laws will not eradicate this pernicious custom, until a method be found to compel the aggressor to render some other satisfaction to the affronted party, which the world shall esteem equally reputable.

Examples of Express Malice. 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, he is guilty of murder by express malice; as where a master corrected his servant with an iron bar, a schoolmaster stamped upon a prostrate pupil, so that each of the sufferers died, they were justly deemed murderers, because the correction, being excessive, proceeded from a bad heart. So where the act of a man shows him to be the enemy of mankind, as by deliberately discharging his gun into a crowd, or by resolving to kill and subsequently actually killing the next man he chances to meet. So if parties conspire to do an unlawful act against the king's peace, of which the probable consequence may be bloodshed, and one of them kills a man, it is murder in all, because of the evil intended beforehand.

Implied Malice. The law often implies malice, where no

malice is expressed; as where a man wilfully poisons another, though no particular enmity be proved. Also, if a man kills another suddenly, without any or considerable provocation, the law implies malice. No affront by words or gestures is a sufficient provocation to extenuate so violent an act. But if the person, so provoked, had unfortunately killed the other, by beating him a manner apparently intended only to chastise and not to kill him, the law would adjudge the crime manslaughter, and not murder.

Killing a Civil Officer. If one kills an officer of justice while executing his duty, or any of his assistants endeavoring to conserve the peace, or any private person striving to suppress an affray or to apprehend a felon, knowing his authority or intent, it is murder.

Felonious Design. And if one intends to commit felony, and undesignedly kills a man, it is murder. Thus if a man shoots at A, and misses him, but kills B, this is murder, because of the previous felonious intent. So where a person gives a woman a medicine to effect abortion, and it operates so violently as to kill her, this is murder.

What Constitutes Murder. As a general rule, all homicide is malicious, and amounts to murder, unless where justified by the command or permission of the law, excused on account of accident or self preservation, or alleviated into manslaughter, by either the involuntary consequence of some act, not strictly lawful, or if voluntary, occasioned by some sudden and sufficiently violent provocation.

Burden of Proof on the Prisoner. All these circumstances of justification or alleviation the prisoner must show, to the satisfaction of both court and jury; the latter of whom are to decide whether the facts alleged are proved to have actually existed; the former how far they extend to take away or mitigate guilt. All homicide is presumed to be malicious, until the contrary be shown.

Punishment. Formerly murder and manslaughter were punished alike, but now by statute, the benefit of clergy is taken away from murderers through malice *prepense*, their abettors, procurers and counsellors. In atrocious cases, it was customary to hang the murderer, after execution, upon a gibbet in chains near the place where the crime was committed, but this was no part of the legal judgment, and the like is occasionally still prac-

ticed in the case of notorious thieves. This is contrary to the Jewish, but in accordance with the civil law; which assigns as one ground, that it would form a comforting sight to the relatives and friends of the deceased.

Parricide. By the Roman law, parricide, which was the term applied to the murder of one's parents or children, was punished more severely than any other species of homicide. After being scourged, the offender was sewed up in a leather sack, with a live dog, a cock, a viper, and an ape, and cast into the sea. In the ancient Gothic constitution, the breach both of natural and civil relations was ranked in the same class with crimes against the state and the sovereign.

Petit Treason. Petit treason may happen by a servant killing his master , a wife, her husband, or an ecclesiastical person his superior. This crime is murder in its most odious degree. A person, indicted of petit treason and acquitted, may be found guilty of manslaughter or murder. The punishment for petit treason in a man, was to be drawn and hanged, and in a woman to be drawn and burnt.

CHAPTER XV.—OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

Division. Some of these crimes, such as homicide, of which we have just treated, are felonies ; others are simple misdemeanors. Of felonies, we will refer to mayhem, forcible abduction and marriage, rape, and to the crime against nature.

(1.) **Mayhem.** This is not only a civil injury, but also an atrocious breach of the king's peace. It is the violently depriving another of the use of such of his members, as may weaken him in fight. Hence the cutting off or disabling a man's hand or finger, the striking out his eye or foretooth, or depriving him of parts of the body which sustain his courage, are held to be mayhems. But the removal of the nose or ear, while they disfigure a man, do not make him less formidable as an antagonist.

Punishment. By the ancient law of England, he who maimed a man, whereby he lost a part of his body, was sentenced to lose a like part; *membrum pro membro*, which is still the law in Sweden. But the law of retaliation in England was found to be an inadequate punishment, and it fell into disuse. By statute of Charles II, this offence, when wilfully perpetrated, was punished as a felony, without benefit of clergy.

Shooting. A similar punishment was inflicted upon any one who wilfully and maliciously shot at any person, with apparent intent to kill or maim, even though no evil consequence resulted.[1]

2. Forcible Abduction and Marriage. This was vulgarly called, stealing an heiress. By statute of Henry II, if any one for lucre took a woman against her will, who possessed or was heiress to property, and afterwards married or defiled her; such person, his procurers and abettors, shall be punished for felony, without benefit of clergy. This too, though the marriage or defilement be by her subsequent consent, if the first taking was against her will. So, *vice versa*, if the woman be originally taken away with her own consent; yet if she afterwards refuse to continue with the offender, and be forced against her will, she may be deemed from that time to be taken against her will. In such case, the woman may give evidence against the offender, though he is her husband *de facto*, contrary to the general rule of law, because he is no husband *de jure*, if the marriage was against her will. The defendant ought not to be permitted to take advantage of his own wrong, and oppose the taking of her testimony, because of the act of marriage, which is an ingredient of the crime charged.

Elopements of Minors. An inferior degree of the same kind of offence, but not attended with force, consists in the act of a person, over fourteen, unlawfully taking away any woman child, unmarried, within the age of sixteen years, from the possession, and against the will of her father, mother, guardian or governor. The punishment is increased, where he deflowers the child, or without the consent of her parents, marries her. The punishment of the consenting girl was the forfeiture of her lands to the next of kin, during the life of her husband. The latter part

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[1] Penal servitude was substituted.

of the act is now practially useless, by provisions which make the marriage void.

3. Rape. This crime is attended with greater aggravation than forcible marriag and is the carnal knowledge of a woman, forcibly and against her will.

Hebrew and Roman Laws. Under the Jewish law, it was punished with death, if the damsel was betrothed to another man. If she was not betrothed, then a heavy fine of fifty shekels was to be paid the damsel's father, and she was to be the wife of the ravisher until death. The civil law punished the crimes of forcible abduction, and also that of rape, with death, and confiscation of goods. The stealing away a woman from her parents or guardians, and debauching her, was equally penal, by the emperor's edict, whether she consented or was forced. The Roman law assumed, that a woman would never go astray, without the seduction and arts of the other sex, and therefore by making highly penal the solicitation of the men, they strove to secure effectually the honor of the women. But the English law does not entertain quite such sublime ideas of the honor of either sex; and demands proof, that the rape was against the woman's will.

Punishment Under English Law. Rape was punished under the Saxon laws with death. From the time of William I to Henry III, it was punished by castration and the loss of eyes. In the reign of Edward I, the offence of ravishing a damsel within the age of twelve years, with or without her consent, or of any other woman without her consent, was reduced to a trespass. But this lenity produced terrible consequences, and ten years later, the offence was again made a felony. By statute of Elizabeth, it was without benefit of clergy, and where the child was under ten years of age, her consent was immaterial.

The Parties—their Competency. A boy under fourteen years is presumed by law incapable of committing a rape; the law supposing an imbecility of body in this case, as well as of mind. Although, under the civil law, a prostitute is deemed incapable of being injured in this manner; yet this is not the case in England, where it is deemed a felony to force a concubine or a harlot.

Prompt Information Given. To prevent malicious accusations, the law reads, that the woman should immediately after the outrage, go to the next town, and there make discovery of the

wrong to some credible persons, and acquaint the officials. No time of limitation is fixed, but the jury will rarely give credit to a stale complaint.

The Testimony of the Woman. The party ravished is a competent witness, but the credibility of her statement must be left to the jury. If she be of good repute; if she gave prompt information, and made search for the offender, and if the party accused fled because of it; these facts would give greater probability to her testimony. But if she be of evil fame, and her evidence be uncorroborated; if she concealed the injury for a considerable time after she had the opportunity to complain; if the place specified was one from which it was possible to be heard, if she had made an outcry, and she made none; these and like circumstances carry a strong but not conclusive presumption, that her story is false.

Infant, Under Twelve. Evidence. Where the crime is asserted to have been committed on a girl under twelve years of age, she may be a competent witness, if she comprehends the nature and obligations of an oath, or even be sensible of the wickedness of telling a lie. There is no determinate age, at which the oath of a child ought to be admitted or rejected. Where the evidence of children is admitted, it is much to be wished, 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 solely on the unsupported accusation of an infant, under years of discretion. The charge of rape, said Hale, is an accusation easy to make, hard to be proved, but harder to be defended by the party accused, though innocent.

4. Crime against Nature. This unnatural crime may be committed with either man or beast. It ought to be clearly proved, and then be severely punished, for if the charge be false, the accuser deserves a punishment inferior only to that for the crime itself. This crime caused the destruction of Sodom and Gomorrah, by fire from heaven.

Misdemeanors. The misdemeanors against the persons of individuals are assaults, batteries, wounding, false imprisonment and kidnapping.

5. Assault. 6. Battery. 7. Wounding. We have heretofore considered these offences as private wrongs, for which a satisfaction in damages is given to the party aggrieved. Consid-

ered in a public light, as a breach of the king's peace, they are indictable, and punishable with fine and imprisonment. The most atrocious species of battery, is the beating of a clergyman, or of a clerk in orders.

8. False Imprisonment. Beside the private satisfaction given to the individual by action, the law also demands public vengeance for the loss the state has sustained by the confinement of one of its subjects.

9. Kidnapping. This is the forcible abduction of a person from his own country, and the sending him into another. The Jewish law punished this offence capitally, as did also the civil law. The common law of England punished this heinous crime with fine, imprisonment, and formerly with the pillory.

CHAPTER XVI.—OFFENCES AGAINST THE HABITATIONS OF INDIVIDUALS.

1. Arson. This is the wilful and malicious burning the house or out-house of another man. This is an offence of very great malignity, because it is an offence against the right of habitation, which is acquired by the laws of nature and of society; and because of the terror and confusion that necessarily attend it; and because in the case of simple theft, the thing stolen remains *in esse* for the benefit of the public; whereas by burning, it is destroyed. It is frequently more destructive than murder itself, of which it is often the cause. For which reason, the civil law punished with death, such as maliciously set fire to contiguous houses in towns, but was more lenient to those who only fired a cottage or other isolated house. Our English law assigns grades to this crime.

The Houses Burned. Not only the bare dwellings, but all out-houses, that are parcels thereof, but not contiguous thereto, as barns and stables, may be the subject of arson. The common law also accounted it felony to burn a barn in a field, if filled with hay or corn; and even the burning of a stack of grain was likewise accounted arson.

Firing One's Own House. The offence of arson may be

committed by wilfully firing one's own house, provided the house of a neighbor be likewise burned; but if the mischief terminates with one's own dwelling, the offence is not felony, no matter what was the intent. For by the common law, no intent to commit a felony amounts to the same crime, though it does, in some special cases, by statute. However, the wilful firing one's own house, in a town, is a high misdemeanor, and severely punished. And, if a landlord or reversioner fire his own house, while it is occupied by a tenant, it is arson; for during the lease, the house is the property of the tenant.

Must be a Malicious Burning. A bare attempt, by actually setting fire to a house, unless it absolutely burns, does not fall within the description of *incendit et combussit;* which words, in the days of law Latin were essential to all indictments for arson. The burning and consuming of any part suffices, though the fire be afterwards extinguished. It must be a malicious burning, otherwise it is a trespass only. If a person shooting a gun, happens to set fire to the thatch of a house, this act is not felony, according to Sir Matthew Hale. A servant negligently setting fire to a house or otherwise forfeited 100*l*., or was sent to the house of correction for eighteen months.

Punishment. By the Saxon law, arson was punished with death. In the reign of Edward I, the incendiaries were burnt, by a species of *lex talionis*, as was the punishment under the Gothic constitution. The punishment has been repeatedly changed by numerous statutes.

II. BURGLARY.

Defined. This is nocturnal housebreaking, called by the ancient law *hamesecker*, as it is termed at this date in Scotland. It is a very heinous offence, not only because of the terror which it inspired, but because of it being a forcible invasion of the right of habitation, which every individual might acquire even in a state of nature. In civil society, the laws assist the weaker party, and protect him, if his habitation be assailed.

Defence of One's Dwelling. The law of England terms a man's house his castle, and will never suffer it to be violated with impunity. For this reason, no outer doors can in general be broken open to execute any civil process; though in criminal cases, the public safety supersedes the private. On this principle, a man may assemble people together lawfully, to the number of

eleven, to defend his house, which he is not permitted to do in any other case.

A Burglar. Coke defines a burglar as "he that by night breaketh and entereth into a mansion house, with intent to commit a felony." Four things are to be considered: the time, the place, the manner, and the intent.

1. The Time. It must be by night, for in the day time, there is no burglary. We have seen, in the case of justifiable homicide, how much more heinous the law deems attacks by night than by day; allowing the party attacked by night to kill the assailant with impunity. Anciently, the day was accounted to begin at sunrise, and to end at sunset, but the better opinion seems to be, that if there be daylight or *crepusculum* enough to discern a man's face, it is no burglary. But this does not extend to moonlight, or many midnight burglars would not receive full punishment. The malignity of the offence arises from it being done at a time when sleep disarmed the owner, and rendered his home defenceless.

2. The Place. It must be in a mansion-house. The breaking open of a church is burglary, as it is the mansion-house of God; and the breaking open the gates of a town in the night comes under the same head, as the mansion-house of the municipal corporation. No distant barn or warehouse is looked upon as a man's castle of defence, nor is a breaking into of houses wherein no man resides, deemed burglary. A house, however, wherein a man sometimes lives, and which the owner has left for a short time, with intent to return, *animo revertendi*, is an object of burglary, though no occupant be in it at the time. And if the barn, stable or warehouse be parcel of the mansion-house, and within the same common enclosure, though not under the same roof, or contiguous, a burglary may be committed therein.

Mere Lodgers. A lodging-room in any private house is the mansion, for the time being, of the lodger, if the owner does not himself dwell in the house, or if he and the lodger enter by different outward doors. But if the owner himself lives in the house, and has but one outward door, at which he and his lodgers enter, such lodgers are only inmates. So, too, the house of a corporation, inhabited in separate apartments by its officers, is the mansion-house of the corporation only.

A Shop. If a man hires a shop, parcel of another man's

house, and works or trades in it, but never sleeps there, it is no dwelling, nor can burglary be committed there; for by the lease, it is severed from the rest of the house. Nor can burglary be committed in a tent or booth erected at a fair, though the owner may lodge therein; for the law regards only permanent residences, and the lodging of the owner in so fragile a tenement makes no difference, any more than his occupying at night a covered wagon.

3. The Manner. There must be both a breaking and an entry to constitute a burglary. But they need not be simultaneous; for if a hole be broken one night, through which the breakers enter the next night, they are burglars. There must, in general, be an actual breaking, not a mere legal *clausum fregit*, by leaping over ideal boundaries, which may constitute a civil trespass; but there must be a forcible irruption. It must be by breaking, or by removing a glass, or otherwise opening a window; by picking a lock, or opening it with a key; by lifting a door-latch, or unloosing any other fastening.

Negligence of Owner. But if a person leaves his doors or windows open, it is his own negligence, and if a man enters therein, it is no burglary; yet if he afterwards unlocks a chamber or inner door, it is so.

Burglarious Entry. But to come down a chimney is a burglarious entry, as is also to knock at the door, and upon opening it, to rush in with felonious intent; for the law will not be trifled with by any such evasions. And so if a servant opens and enters his master's chamber, with felonious design, or knowingly lets a robber enter; or where one lodger in an inn opens and enters the door of another, with ill intent, it is burglary.

The Entry. The least entrance with any part of the body, or with an instrument held in the hand, is sufficient; as to step across the threshold, to put a hand or hook in a window to draw out goods, or a pistol to demand money. The entry may be before the breaking as well as after, as where one conceals himself in the house by day, and breaks out at night, after the commission of the felony. But there must be a breaking, as well as an entry, to complete the burglary.

4. The Intent. This must be felonious, otherwise the act is a trespass only. It is the same, whether such intention be carried into execution, or only demonstrated by some attempt of which the jury is to judge. Hence, such a breach or entry of a

house by night, with intent to commit a robbery, a murder, a rape, or other felony, is burglary, whether the thing be actually perpetrated or not. Nor does it matter, whether the offence was felony at common law, or by statute.

Punishment. At common law, burglary was within the benefit of clergy, but by statute, clergy is taken away from principals, abettors and accessories before the fact. In Athens, where no simple theft was punishable with death, burglary was made a capital crime.

CHAPTER XVII. — OFFENCES AGAINST PRIVATE PROPERTY.

I. LARCENY.

Two Kinds. The word is derived from *latrocinium*, theft. Larceny is of two kinds: simple theft, unaccompanied with any other atrocious circumstances; and mixed or compound larceny.

Simple Larceny. When goods above the value of twelve pence were stolen, it has been termed grand larceny, while the theft of goods of smaller value was termed petit larceny.[1] Simple larceny is the felonious taking and carrying away of the goods of another.

1. **There must be a Taking.** This implies the consent of the owner to be wanting. Therefore no delivery of goods from the owner to the offender upon trust can be deemed a larceny. As if A lends B a horse, which he does not return, or if I send goods by a carrier, and he conveys them away, these are not larcenies; but if the carrier opens a pack of goods, and removes part thereof, or if he carries it to its destination, and afterwards takes the entire pack, the act is larceny, for here the *animus furandi* is manifest; since in the first case, he had no other inducement to open the goods, and in the second, the trust was determined. Bare non-delivery may arise from other than felonious design, and may result from an accident.

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[1] A statute of queen Victoria abolishes the distinction between grand and petit larceny, in awarding a punishment.

Act of Servant. By common law, it was not larceny for a servant to run away with goods committed to him to keep, but only a breach of civil trust. But by statute, it was made felony for a servant to embezzle his master's goods, except in the case of apprentices and of servants under eighteen years of age. But if the servant had not the possession, but only the care and oversight of the goods, the embezzling of them was felony at the common law.

Hotel Guest. So if a guest rob his inn of a piece of plate, it is larceny; for he has not the possession delivered to him, but only the use.

One's own Goods. A man may be guilty of a felony, in stealing his own goods from a pawnbroker, with whom he had pledged them, or from any one to whom he had entrusted them, with intent to charge said bailee their value.

2. There must be a Carrying Away. *Cepit et asportavit*, was the old law Latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is sufficient carrying away. As if a guest stealing goods out of an inn, has removed them from a room to the base of the stairs; or if a thief, removing plate from a chest, lays it upon the floor, but is surprised before he escapes with it, this is larceny.

3. Must be Felonious. That is, it must be done *animo furandi*, or as the civil law expresses it, *lucri causa*. This request excuses those who labor under incapacities of mind or will, and partially exonerates [illegible] trespassers, and other petty offenders, such as a servant, who takes his master's horse without his knowledge, and brings him home again. The ordinary discovery of a felonious intent, is where the party does the act clandestinely, or being charged with the act, denies it; but this is by no means the only criterion of criminality.

It must be of the Personal Goods of Another. If they are things real, or savor of the realty, larceny at the common law cannot be committed of them. Lands, tenements and hereditaments, corporeal or incorporeal, cannot in their nature be carried away. Of things that adhere to the freehold, as corn, grass and trees, larceny could not be committed, according to the rules of the common law, but the severance of them is merely in most cases a trespass. These things were parcel of the real estate, and while they continued so, were immovable.

Severed from Realty. If they were severed by violence, so as to be changed into movables; and at the same time, by the same continued act, carried off by the person who severed them, they could not be said to be taken from the proprietor in this newly acquired state of mobility, which is essential to the nature of larceny; being never in the possession of any one, but of him who committed the trespass. But if the thief severs them at one time, and they are thus converted into chattels, and he takes them away at another time, it is larceny; and so also if the owner has severed them. And now, by statute, the stealing of rails or gates fixed to a dwelling house or outhouse, or in any garden belonging thereto, is made felony. The stealing of growing vegetables, fruits, trees or roots, is punishable by fine and imprisonment.

Written Documents. The stealing of writings relating to real estate has been held no felony, but a trespass, because they savor of the realty. Bonds, bills and notes, which concern mere choses in action, were also at 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. But by statute, they are held to be larcenies, just as would be the money they were meant to secure.

Animals. Larceny cannot be committed of animals, *ferae naturae*, such as deer in a forest, nor can it be of fish in an open river, or wild fowls at their natural liberty. But if they are reclaimed or confined, the law is otherwise; as of deer in an enclosed park, or fish in a private pond. But of all valuable domestic animals, as horses, and all animals, *domitae naturae*, which serve for food, as cattle, swine and poultry, and of their produce, taken from them while living, as milk or wool, larceny may be committed; and of the flesh of all such animals when killed. As to those animals which do not serve for food, and hence the law deems of no intrinsic value, as dogs of all sorts, and other creatures kept for whim or pleasure, though a man may have a base property therein, and maintain a civil action for their loss, yet they are not the subject of larceny. But by statute, pecuniary penalties or imprisonment are inflicted on those who steal a dog.

Unknown Owner. Even if the owner be unknown, provided there be a property in the thing taken, it is larceny, and an indictment will lie for the stealing of goods of a party un-

known. Likewise among the Romans, a prosecution for theft might be instituted without the intervention of the owner. Stealing a corpse from the grave, though a crime, is not felony, unless some of the grave-clothes be stolen with it. The laws of the Franks made no distinction in the grade of the offence.

Punishment of Simple Larceny. By the Jewish law, theft was punished by a fine, and by satisfaction to the party injured. In the earlier civil law, the punishment was not capital. The law of Draco punished it with death, but his laws were said to be written in blood; and Solon afterwards changed the penalty to a pecuniary mulct. The Attic laws, once in a time of dearth, made it a capital offence to break into a garden and steal figs; and the odious informers were termed "sycophants," which name is now perverted from its original meaning.

The Natural Penalty. The natural punishment for injuries to property would seem to be the loss of the offender's own property, which ought to be the case, if all fortunes were equal. But as those who have no property themselves are generally the most covetous of the property of others, it is necessary to substitute temporary imprisonment in lieu of a pecuniary satisfaction, to which is often added an obligation to labor. In the major part of Europe, however, the punishment for theft continues to be capital.

Early English Law. The ancient Saxon laws punished theft with death, if the property was above twelve pence in value; but the criminal was permitted to redeem his life by a pecuniary ransom; as among their ancestors, the Germans, by a stated number of cattle. But under Henry I, the power of redemption was taken away, and the offender was capitally punished, as under the Saxon law.

Death Penalty Evaded. As a result, juries have often strained a point, and brought in the goods stolen to be under the value of twelve pence, when they were of much greater value; which was a kind of pious perjury. It is also true, that by the merciful extension of the benefit of clergy a person who commits simple larceny for any amount, though guilty of a capital offence, shall be excused the pains of death for the first crime.

Horse and Cattle Stealing. In many cases of simple larceny, the benefit of clergy is taken away by statute, as for horse stealing in both principals and all accessories, taking cloths from

the place of manufacture, stealing sheep or cattle, plundering vessels, stealing deer, hares and fish, and robbing the mail of letters. The Romans punished most severely the stealers of cattle, as did the Goths for theft of cattle, and of corn left in the field; such property being difficult to guard, and esteemed under the peculiar custody of heaven.

Mixed or Compound Larceny. This 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.

1. **Larceny from the House.** This is not distinguished from simple larceny at common law, unless accompanied by breaking into the house at night, when it is termed burglary. But by statute, the benefit of clergy is taken from larcenies committed in a house, in almost every instance.

2. **Larceny from the Person.** This is either by privately stealing, or by open and violent assault, which is usually termed robbery.

Pickpockets. The offence of picking a man's pocket or the like, privily, without his knowledge, of property worth over twelve pence, was punished without benefit of clergy by statute of Elizabeth. The severity of this law was owing to the ease with which such offences were committed, the difficulty of guarding against them, and the boldness with which they were practiced. These cut-purses were more severely punished than common thieves by both the Roman and Athenian laws.

Robbery. The *rapina* of the civilians is the felonious and forcible taking from the person of another of goods or money of any value, by violence or putting him in fear. To constitute robbery:

(1.) **There must be a Taking.** If a thief, having once taken a purse by violence, return it, still the act is a robbery; and the crime is also committed, where a robber, by menaces and violence, puts a man in fear, and drives away his cattle before his face. But if the taking be not either directly from his person, or in his presence, it is no robbery.

Attempt to Rob. By statute of George II, it is a felony maliciously to assault another with any weapon or offensive instrument, or by menaces or violence to demand any money or goods, with a felonious attempt to rob.

(2.) **Value of the Thing Taken.** The value is immaterial. The forcible extortion makes the act a robbery.

(3.) **The Taking must be by Force.** Or there must be a previous putting in fear, which makes the violation of the person more atrocious than privately stealing. This previous violence or putting in fear distinguishes robbery from other larcenies. Putting in fear is not requisite, if there have been violence; as when a man is knocked senseless by a footpad without previous warning, and then robbed.

II. MALICIOUS MISCHIEF.

Defined. This offence is not done, *animo furandi*, or with an intent of gaining by another's loss, but either out of a spirit of wanton cruelty or of revenge; in which, it bears a resemblance to the crime of arson. By statute, this offence is made highly penal.

III. FORGERY.

Punishment. By the civil law this *crimen falsi*, as it was termed, was punished with death or banishment. It is the fraudulent making or alteration of a writing to the prejudice of another man's right. It was punished in England by fine and imprisonment, and at one time by the pillory. By a variety of statutes, severe punishment may be inflicted on the offender. Under Elizabeth, to forge, or knowingly to give in evidence a forged deed or will, with intent to affect the right of real property, was punished by forfeiture to the party aggrieved of double costs and damages; by standing in the pillory, and having both ears cut off, and the nostrils slit and seared; by forfeiture to the crown of the profits of the lands of the offender, and by perpetual imprisonment.

Later English Statutes. By statute, since the revolution, when paper credit was first established, capital punishment was inflicted for forging, altering or uttering as true, when forged, bank bills or notes, or other securities. By statute of George III, the forging or counterfeiting any stamp, or mark to denote the standard of gold and silver plate, was punished by transportation. There is now hardly a case possible, wherein forgery that tends to defraud, is not made a capital crime.

CHAPTER XVIII.—MEANS OF PREVENTING OFFENCES.

Preventive Justice. Preventive justice, upon every principle of reason, of humanity, and of sound policy, is preferable to punitive justice, the execution of which is always attended with harsh circumstances. Preventive justice consists, in obliging those persons, whom there is a probable ground to suspect of future misbehavior, to stipulate with, and to give full assurance to the public that such offence shall not happen, by finding pledges or securities for keeping the peace, or for their good behavior.

Object of Punishment. Human punishments, in a comprehensive view, are rather calculated to prevent future crime, than to expiate past ones. They tend to the amendment of the offender, or to deprive him of the power to do future mischief, or to deter others by his example. The prevention of future crimes is thus sought to be effected by amendment, disability, or example.

Saxon Frankpledges. By the Saxon constitution, these securities were always on hand by means of king Alfred's wise institution of decennaries or frankpledges, wherein the tithing of freemen of an entire neighborhood were mutually pledged for each other's good behavior. This great and general security having fallen into disuse, the laws of Edward the Confessor made suspected persons find special security in the following manner:

1. What the Security is. It consists in being bound, with one or more securities, in a recognizance or obligation to the king, entered on record, or by some judicial officer; whereby the parties acknowledge themselves indebted to the crown in a stipulated sum, with condition to be void, if the party shall appear in court on a day therein mentioned; and meanwhile shall keep the peace, either generally towards the king, or particularly also with regard to the person who craves security. If it be for good behavior, then on condition, that he shall behave himself well, either generally or specially, for the time therein limited, or for life. This recognizance, if taken by a justice of the peace, must be certified to the next sessions, and if the conditions be broken, the recognizance becomes forfeited, or absolute, and the parties to it may be sued for the sums for which they are respectively bound.

2. Who May Take or Demand Security. Any justice of

the peace may do so, by virtue of his commission, or those who are, *ex officio*, conservators of the peace. Or it may be granted at the request of any subject, upon due cause shown, if the demandant be under the king's protection. If the justice be averse to act, it may be granted by a mandatory writ, called a *supplicavit*, issued out of the king's court, or chancery; which will compel the justice to act as a ministerial, and not as a judicial officer; and he must make a return to such writ, specifying his compliance. But this writ is seldom used; for on application to the superior courts, they usually take the recognizance. Wives may demand such recognizance against their husbands, and husbands against their wives. But *femmes covert* and minors ought to find security by their friends only, for they are incapable of being themselves bound.

3. **How it May be Discharged.** By the demise of the king, to whom the recognizance is made; or by the death of the principal party bound, if it be not before forfeited; or by the order of the court to which such recognizance has been certified by the justices; or if granted on a private account, by the release of the party at whose request it was granted; or by his default of appearance to ask a continuance.

Difference in the Securities. These two species of securities, for the peace, and for good behavior, differ somewhat as to the cause of granting, or the means of forfeiting, as we shall explain.

Sureties for the Peace. 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 angry words, or carry unusual weapons, to the terror of the people; also all common barretors; all such as are brought before him by a constable, for a breach of the peace in his presence; and such persons, as have forfeited their recognizances to keep the peace.

Swearing the Peace. Also, whenever a private person has just cause to fear that another will do him, or his property, an injury, or will procure others to do so, he may demand surety of the peace against such person, on making oath, that he is actually under fear of death or bodily harm, and will show just cause for such apprehension, by reason of the menaces or attempts of the other; swearing that he does not require such surety out of malice, or for mere vexation. This is termed swearing the peace against another.

Recognizance Forfeited. Such recognizance for keeping the peace may be forfeited by any actual violence, or even by a 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 tends to a breach of the peace, 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. Neither are mere reproachful words, as calling a man a knave or a liar, a sufficient breach of the peace to forfeit a recognizance, unless they amount to a challenge to fight.

Sureties for Good Behavior. The justices have power to bind over to secure their good behavior all those who are not of good fame, wherever they be found, to the intent, that the people be not troubled or damaged, nor the peace diminished. A man may be bound to his good behavior for causes of scandal, *contra bonos mores*, as well as *contra pacem;* as for frequenting bawdy houses, with women of ill 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 duties.

Commitments. A justice may bind over all night walkers, eavesdroppers, such as keep suspicious company, or are reported to be thieves, such as sleep in the day, and wake in the night, common drunkards, whoremasters, the putative fathers of bastards, cheats and tramps. 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 may be a good one.

Recognizance Forfeited. This may be done by the same means as one for the security of the peace, and also by some others; as by going armed with unusual attendance, to the terror of the people, or by seditious language, or other misbehavior, which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never happen: for though it is just to compel suspected persons to give security, yet it would be hard, upon such suspicion, without proof of actual crime, to forfeit their recognizance.

CHAPTER XIX.—COURTS OF CRIMINAL JURISDICTION.

Jurisdiction. In inquiring the method of inflicting the punishments, which the law has annexed to particular offences, we shall specify the several courts wherein offenders may be prosecuted, and shall explain the proceedings therein. Some of these courts are of a public and general jurisdiction throughout the entire realm, while others are only of a private and special authority, and confined to some localities.

Courts Independent of each Other. As it is contrary to the spirit of English law to suffer any man to be tried twice for the same alleged criminal offence, especially if acquitted upon the first trial; therefore these criminal courts may be said to be independent of each other, at least so far that the sentence of the lowest of them can never be controlled or reversed by the highest in the kingdom, unless for error in matter of law, apparent upon the record; though sometimes cases may be removed from one to the other before trial.

1. Parliament. This is the supreme court, not only for the making, but also for the execution of laws, by the trial of great offenders by the method of impeachment. We shall not here refer to acts of parliament to attaint particular persons of treason or felony, or to inflict pains and penalties, outside the common law, to serve a special purpose.

Impeachment. An impeachment before the lords, by the commons of Great Britain, in parliament, is a prosecution of the established law, and has been frequently put into practice; being a presentment of the most high and supreme court of criminal jurisdiction, by the most solemn grand inquest of the kingdom. A commoner cannot be impeached before the lords for any capital offence, but only for high misdemeanors; whereas a peer may be impeached for any crime.[1] The articles of impeachment are a species of bills of indictment found by the house of commons, and afterwards tried by the house of lords, who are in cases of misdemeanors, considered as peers of the whole nation.

Official Misconduct Punished. Though in general, the

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[1] For misdemeanors, peers, like commoners, are to be tried before a jury, but for treason and misprision of treason, felony and misprision of felony, the trial shall be before peers, as heretofore.

union of the legislative and judicial powers ought to be carefully avoided, yet it may happen, that a subject entrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of crimes such as an ordinary magistrate dares not or cannot punish. Of these official offences, the representatives of the people, or house of commons, cannot properly judge, because their constituents are the parties injured, and can therefore only impeach. It would be unwise to try this impeachment before the ordinary tribunals, which would naturally be influenced by the authority of so powerful an accuser. Reason suggests that this branch of the legislature which represents the people, must bring its charge before the other branch, which consists of the nobility, who have not the same interests as popular assemblies. In this respect, the English constitution is vastly superior to those of the Grecian or Roman republics, where the people were at the same time both judges and accusers.

Pardon. No pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in parliament.

2. Lord High Steward's Court. This is a court instituted for the trial of peers, indicted for treason or felony, or for misprision of either. The office of this great magistrate was formerly hereditary, or at least held for life; but for centuries past, it has been bestowed *pro hac vice* only, and is granted only to a lord of parliament.

Removal by Certiorari. When such an indictment is found by a grand jury of freeholders in the king's bench, or at the assizes before the justices of oyer and terminer, it is to be removed by a writ of certiorari into the court of the lord high steward, which alone has the power to determine it. In case a peer be indicted, the king creates a lord high steward *pro hac vice*, by commission under the great seal; which recites the indictment so found. The case being removed by certiorari, commanding the inferior court to certify it, the high steward directs a precept to the serjeant at arms to summon all the lords in parliament to try the peer.

Trial of a Peer. During the session of parliament, the trial of an indicted peer is not properly in the court of the lord high steward, but before the court of the king in parliament. The high steward is however appointed to give weight to the case, but he is rather in the nature of a speaker *pro tempore*, or

chairman of the court, than the judge, for the collective body of peers are judges both of law and fact. If held in the recess of parliament, the high steward is the sole judge of matters of law, as the lords are of matters of fact.

Lords Spiritual. The lords spiritual may, if they choose, remain in court in capital cases, till the court proceeds to vote guilty or not guilty. This resolution extends only to trials in full parliament, for in the court of the high steward, no bishops can be summoned; for they themselves, not being entitled to trial there, surely ought not to be judges there. The privilege of being thus tried depends upon nobility of blood, rather than a seat in the house.

3. King's Bench. The court is divided into a crown side and a plea side. On the crown side, it takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor. Into this court, also all indictments may be removed by certiorari from all inferior courts, and tried, either at bar or at *nisi prius*, by a jury of the county, out of which the indictment is brought. It is the principal court of criminal jurisdiction in England, and included all that was good of the jurisdiction of the former court of star-chamber; which was abolished by statute of Charles I, to the joy of the whole nation.

4. Chivalry Court. This was a military court, or court of honor, when held before the earl marshal only, but also a criminal court, when held jointly before him and the lord high constable of England. In took cognizance over pleas of life and limb, arising in matters of arms and war, as well out of the realm as within it. But the criminal as well as the civil part of its authority has fallen into entire disuse, there being now no permanent high constable of England.

5. Admiralty Court. This court is held before the lord high admiral of England, or his deputy, and is both a court of civil and of criminal jurisdiction. It has cognizance of all crimes and offences committed, either upon the sea, or on the coasts of any English country, But as this court proceeded without jury, in a manner similar to the practice under the civil law, but contrary to the spirit of the law of England, which deprives no man of life on the opinion of a single judge, it was enacted by statute of Henry VIII, that these offences should be tried by commissioners of oyer and terminer, under the king's great seal; namely, the admiral, or his deputy, and three or four other judges. The

indictment must first have been found by a grand jury of twelve men, and afterwards tried by a petit jury, and the proceedings be conducted according to the law of the land.

Jurisdiction of the above Courts. These five courts may be held in any part of the kingdom, and their jurisdiction extends over crimes arising therein. The following courts, though they are of a general nature, and universally diffused, are of a local jurisdiction, and confined to particular districts.

6. Oyer and Terminer Courts. These 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 in England, except in the four northern ones, where they are held but once, and in London and Middlesex, where they are held eight times. The commissioner of oyer and terminer is to hear and determine all treasons, felonies and misdemeanors. This is directed to the judges to "inquire, hear and determine" an indictment found at the same assizes; for they must first inquire by means of the grand jury, or inquest, before they are empowered to hear and determine by means of the petit jury.

7. General Gaol Delivery Court. They have besides a commission of general gaol delivery, which empowers them to try and to deliver every prisoner, who shall be in confinement, when the judges arrive at a circuit town, whenever or before whomsoever indicted, or for whatever crime committed. It was anciently the custom to issue special of gaol delivery for each particular prisoner, termed writs *de bono et malo*, but this being found inconvenient, a general commission for all the prisoners has been substituted. By this means all offenders in the jails are generally tried, punished or delivered at these semi-annual sessions.

Special Commission. Restrictions. Sometimes also, upon urgent occasions, the king issues a special commission of oyer and terminer and gaol delivery, confined to those offences, which require immediate attention. At one time no judge or lawyer could act on the commission within the county, where he was born, or in which he resided, but that restriction no longer exists.

8. Quarter Sessions Court. This is a court, that must be held in every county once in each quarter of the year, which by statute of Henry V is appointed for the week after Michaelmas day; the week after Epiphany; the week after the close of

Easter; and the week after the translation of St. Thomas, the martyr, or July 7.

Jurisdiction. The jurisdiction of this court extends to the trying of all felonies and trespasses; though it seldom tries any greater felonies than those within the benefit of clergy. Murders and other capital felonies are usually remitted for trial to the assizes. Smaller misdemeanors, not amounting to felony, are tried here. Some of these are proceeded upon by indictment, and others in a summary way by motion and order thereon, which order may usually be removed into the court of king's bench by writ of *certiorari*, and be there either quashed or confirmed. In most corporation towns, there are quarter sessions kept before justices of their own, within their respective limits; which courts have the same authority in most cases as the general quarter sessions of the county.

9. Sheriff's Tourn. This is a court of record held twice each year before the sheriff in different parts of the county, and in the court-leet of the county.

10. Court-leet. This court of record is held once a year within a particular hundred or manor before the steward of the leet. Its original intent was to view the frankpledges; the freemen being pledged in each hundred for the good behavior of each other. It is intended to preserve the peace and punish the more minute offences. The business of the sheriff's tourn and of the court-leet now devolves almost entirely upon the court of quarter sessions.

11. Coroner's Court. This is also a court of record, to inquire into cases of violent or sudden death, and of deaths in prison. It must be held *super visum corporis.*

12. Clerk of the Market's Court. This is incident to every fair and market in the kingdom, to punish misdemeanors therein; as a court of *piepoudre* is to determine disputes relating to private or civil property. Its object is principally to take cognizance of weights and measures, to try whether they are according to the true standard.

Courts of Partial Jurisdiction. (1) Court of the lord steward, or comptroller of the king's household.[1] (2) Courts of the two universities. These courts may try all criminal offences

[1] This court is abolished.

or misdemeanors, under the degree of treason, felony or mayhem. These latter crimes are referred for trial to the court of the lord high steward of the university. For a century past, these proceedings, have not been reduced into practice.

CHAPTER XX.—SUMMARY CONVICTIONS.

Proceedings in Criminal Courts. Proceedings for the punishment of offences in the courts of criminal jurisdiction are easy and simple; the law not admitting any fictions, as in civil causes. These proceedings are of two kinds: summary and regular.

Term Defined. A summary proceeding is for the conviction of offenders, and the inflicting of certain penalties created by parliament. There is no intervention of a jury, but the party accused is acquitted or condemned at the discretion of him, whom the statute has appointed for his judge. Of late it has been so extended, as to threaten the disuse of our trials by jury.

1. Offences against the Revenue. Of this summary nature are all trials of offences against 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 county. The power of these officers of the crown has become very formidable.

2. Offences against the Public Peace. Summary proceedings may be instituted before justices of the peace, in order to inflict petty pecuniary mulcts for the commission of disorderly offences, such as profanity, drunkenness and vagrancy; and which were formerly punished by the verdict of a jury in a court-leet. This change in the administration of justice has resulted in the almost disuse of the court-leet and sheriff's tourn, and in the burthensome increase of the business of a justice of the peace; whereby men of character are led to refuse that position, and it sometimes devolves upon objectionable personages.

Proceedings. The process of these summary convictions is speedy. One check however exists upon them, by making it necessary to summon the party accused, before he is condemned.

After this summons, the magistrate may examine witnesses upon oath, and then enter his written conviction; upon which he usually issues his warrant, either to apprehend the offender, or else to levy the penalty incurred, by distress and sale of his goods. If no special statute exists, allowing summary proceedings, parties can only be convicted by indictment or information at the common law.

Contempts, Punishable by Attachments. These attachments have been immemorially used by the superior courts of justice. Contempts 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 plainly tend to create an universal disregard of their authority. The principal instances of either sort, punishable by attachment, are these:

By Inferior Judges and Magistrates. This occurs, when such officials act unjustly, oppressively or irregularly in the administration of their offices, or when they disobey the king's writs issuing out of the superior courts, by proceeding in a cause, after it is ended or removed by writ of prohibition, *certiorari*, error, supersedeas and the like. Any corrupt or iniquitous practices of subordinate judges are contempts of the superintending authority of the king's superior courts, whose duty it is to keep them within the bounds of justice.

By Sheriffs, Bailiffs and Jailers. Offences committed by officers of the court, by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behavior or culpable neglect of duty.

By Attorneys and Solicitors. These are also officers of the court, and may be punished in this manner in gross cases of fraud and corruption, injustice to their clients and other dishonest practices. For the malpractice of the officers reflects some dishonor on their employers, and if frequent or unpunished, creates among the people a disgust for the courts themselves.

By Jurymen, Such as making default, when summoned; refusing to be sworn, or to render any verdict; eating or drinking without the leave of court, and especially at the cost of either party, and other misbehaviors or irregularities; but not in the mere exercise of their judicial capacities, by giving a false verdict.

By Witnesses. Such as making default when summoned, refusing to be sworn or examined, or prevaricating, when sworn.

By the Parties to the Suit. As by disobedience to any order or rule, made in the progress of a cause; by non-payment of costs, awarded by the court on 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 contempt of court. 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.

By other Persons. Even by peers themselves, when enormous and accompanied with violence, such as forcible *rescous* or the like; or when the acts committed import a disobedience to the king's prerogative writs of prohibition or *habeas corpus*, they are punishable in this summary manner. Some of these contempts may arise in the face of the court, as by rude behavior, by obstinacy or prevarication; by breach of the peace or any wilful disturbance; or may arise elsewhere, as by disobeying the king's writ, or the rules of 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 permission) of causes pending; and by any act showing a gross want of the respect due the court.

Necessity for such Power. The process of attachment for such contempt must necessarily be as ancient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be nugatory. A power in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, is an inseparable attendant upon every superior tribunal.

Rule to show Cause. 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 occurring at a distance, of which the court cannot have so perfect a knowledge, except by the confession of the parties, 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 party suspected to show cause why an attachment should not issue against him; or in very flagrant cases 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 makes absolute the original rule.

Process by Interrogatories. This process of attachment is merely intended to bring the party into court; and when there, he must either stand committed, or enter bail, in order to answer upon oath such interrogatories, as may be administered for the better information of the court, with regard to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation. If the defendant deem an interrogatory improper, he may move the court to strike it out. If he can clear himself on oath, he is discharged; if he perjure himself, he may be indicted for perjury.

Punishment. If the party confess the contempt, the court will punish him by fine or imprisonment, or both. If the contempt be of a nature, that when the fact is once acknowledged, the court can learn nothing further by interrogatories, the defendant may receive his judgment without replying to interrogatories; but if he obstinately refuse to answer, or answers evasively, he is guilty of a high and repeated contempt, and is punished at the discretion of the court.

This Equitable Process Criticised. This method of compelling a man to answer upon oath to a criminal charge, is opposed to the genius of the common law in any other instance, and is probably derived from practice in the courts of equity. Until the introduction of sequestrations, the whole process of equity courts, in the several stages of a case, and for the enforcement of the final decree, was in the nature of a process of contempt, acting *in personam*, and not *in rem*. In equity, however, a man's answer may be disproved by affidavits of the opposite party; whereas in the courts of law in these cases, if he clear himself by his answers, the complaint is totally dismissed. This mode is of great antiquity.

CHAPTER XXI.—ARRESTS.

PREAMBLE.

Criminal Proceedure. We are now to consider the regular method of proceeding in the courts of criminal jurisdiction, which may be distributed under twelve general heads:

1. *Arrest.*
2. *Commitment and bail.*
3. *Prosecution.*
4. *Process.*
5. *Arraignment and its incidents.*
6. *Plea and issues.*
7. *Trial and conviction.*
8. *Clergy.*
9. *Judgment and its consequences.*
10. *Reversal of Judgment.*
11. *Reprieve, or pardon.*
12. *Execution.*

ARREST.

Defined. 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 are equally liable in criminal cases; but no man should be arrested, unless charged with such a crime, as will at least justify him being held in bail, when taken.

Mode of Arrest. In general, an arrest may be made in four ways:

1. *By warrant.*
2. *By an officer without warrant.*
3. *By a private person without warrant.*
4. *Upon hue and cry.*

1. The Warrant. 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 cases where they have jurisdiction over the offence, in order to compel the person accused to appear before them. This extends to all treasons, felonies, and breaches of the peace, and to all such offences, as they have power to punish by statute. Sir Matthew

Hale asserts, that a justice has power to apprehend a person accused of felony, though not yet indicted; also one suspected of felony, by the party praying for the warrant, the justice being a competent judge of the probability of his guilt. In both cases, the justice should examine, upon oath, the party requesting a warrant, as well to ascertain that a crime was committed, as also to show the cause of suspecting the party who is to be apprehended.

Requisites. The 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 made; and should be directed to the constable, or it may be to a private person by name, requiring him to bring the party either generally before any justice of the peace of the county, or only before the justice who granted it.

General Warrant. A general warrant to apprehend all persons suspected, without naming or describing any particular one, is illegal and void for uncertainty; for it is the duty of the magistrate and not of the officer to judge of the ground of suspicion. And a warrant to arrest all persons guilty of a crime therein specified is no legal warrant. In fact, it is no warrant at all, and will not justify the officer who acts under it; whereas a warrant properly penned, even though the magistrate has exceeded his jurisdiction, will, at all events, indemnify the officer who executes it ministerially.

Backing Warrants. A warrant from a justice of the court of king's bench extends throughout the kingdom; but a warrant from a justice of the peace in one county, must be backed, that is signed by a justice of the peace in another, before it can be executed there. Formerly a fresh warrant had to be issued in each county; but now any warrant for apprehending an English offender, who may have escaped to Scotland and *vice versa*, may be endorsed and executed by the local magistrates, and the offender carried back to the place in the united kingdom, where the offence was committed.

2. Arrests by Officers Without Warrant. (1) A justice of the peace may apprehend, 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 a felon within the county without warrant. (4) The constable, who has great authority with regard to arrests. He may, without warrant, arrest any one for a 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 a 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 arrest, it is murder in all concerned. (5) Watchmen, either those appointed by statute to keep watch from sunrise to sunset, or such as are mere assistants to the constable, may *virtute officii*, arrest all offenders, particularly night-walkers, and commit them to custody until the morning.

3. By Private Persons Without Warrant. Any private person, who is present when any felony is committed, is bound by law to arrest the felon, on pain of fine or imprisonment, if he escape through the negligence of the bystanders. And they may break open doors in following such felon, and if they kill him, provided he cannot otherwise be taken, it is justifiable. If they are killed in endeavoring to make such arrest, it is murder. Upon probable suspicion, a private person may arrest a felon or a person suspected of felony. But he is not justified in breaking open doors to do it; and if either party kill the other in the attempt, it is manslaughter. Such arrest upon suspicion is barely permitted, and not enjoined by the law.

4. Upon Hue and Cry. Hue from *huer*, to shout, was the old common law process of pursuing with horn and voice, all felons, and such as had dangerously wounded any one. When the people of a hundred were held responsible for loss occasioned by a robbery within their bounds, unless the felon was caught, they used to pursue the criminal on horse and foot. Hue and cry may be raised, either by precept of a justice of the peace, or by a peace officer, or by any private man that knows of a felony. But if a man maliciously raises such shout, he shall be severely punished, as a disturber of the peace.

Rewards. In order to encourage the apprehending of certain felons, rewards and immunities are sometimes bestowed, by acts of parliament, on such as bring them to justice.

CHAPTER XXII.—COMMITMENT AND BAIL.

Examination Before a Justice. Immediately after the arrest, the delinquent should be taken before a justice of the peace, who shall examine the circumstances of the alleged crime, and write down the examination, and the information of those who bring him. By the common law, *nemo tenebatur prodere seipsum*; and a man is not compelled to testify against himself, but the fault is to be discovered by other means and by the testimony of other men. If, upon this inquiry, it appears that either no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, he should be discharged.

Bail or Imprisonment. Otherwise the party charged with the offence must either be committed to prison or give bail; that is, enter security for his appearance, to answer the charge against him. This commitment is only for safe custody; but in felonies and other offences of a capital nature, no bail can be a security, equivalent to the actual custody of the person. When a man's life is in jeopardy, he would forfeit anything to save it; and it is no satisfaction or indemnity to the public to seize the effects of those who have bailed a murderer, if the culprit himself be suffered to escape.

Amount of Bail. In civil cases, every defendant is bailable; but in criminal matters, it is otherwise. To refuse or delay to bail any person bailable, is an offence against the liberty of the subject, in any magistrate; nor should excessive bail be required; though what be determined excessive must be left to the courts, to determine under the circumstances of each case. On the other hand, if the magistrate takes insufficient bail, he is liable to be fined, if the criminal does not appear. Bail may be taken in court, or before a justice, and in some cases before a sheriff, coroner or other magistrate. In all offences below felony, the defender ought to be admitted to bail, unless prohibited by some special act of parliament.

What Offences are not Bailable. When the imprisonment is only for safe custody before the conviction, and not for punishment afterwards; in such cases bail is refused, when the offence is of an enormous nature, for then the public is entitled to the highest security, viz: the body of the accused. By the ancient common law, all felonies were bailable, till murder was excepted by stat-

ute. Later statutes prohibit a justice of the peace from admitting to bail parties brought before him on the following charges:

1. Upon an accusation of treason.
2. Of murder.
3. Of manslaughter, if the prisoner be clearly the slayer, or if any indictment be found against him.
4. Of breaking prison, after having been committed for felony.
5. Outlawed persons.
6. Such as have abjured the realm.
7. Approvers, and persons by them accused.
8. Persons taken in the act of felony.
9. Persons charged with arson.
10. Excommunicated persons, taken by writ.
11. Thieves, openly defamed and known.
12. Persons charged with other felonies, or manifest and enormous offences, not being of good fame.
13. Accessories to felony, and not being of good reputation.

These seem to be in the discretion of the justices, whether bailable or not.

Persons of Good Repute. In the following cases, persons must be bailed, upon offering good security:

(1.) Persons of good fame, charged with a bare suspicion of manslaughter.

(2.) Such persons, charged with petit larceny, or any felony, not before specified.

(3.) Such persons, charged with being accessory to a felony.

Power of Court. The court of king's bench, or a judge thereof in vacation, may take bail for any crime whatsoever, even though it be treason or murder.

Commitment to Jail. If the offence be not bailable, or the party cannot find bail, he is to be committed to the county jail by the *mittimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment; there to abide, until delivered by due course of law. But this imprisonment is only for safe custody, and not for punishment; hence in this interval between the commitment and trial, the prisoner should be most humanely treated; but jailors are usually a merciless race of men, who being conversant with scenes of misery, are hence steeled against any tender sensation.

CHAPTER XXIII.—MODES OF PROSECUTION.

Manner of Accusation. The manner of the formal accusation of offenders, by prosecution, 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.

I. Presentment. This term includes, 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, upon which the officer of the court must afterwards frame an indictment, before the party presented need answer.

Inquisition of Office. An inquisition of office is the act of a jury, summoned by a proper officer, to inquire of matters relating to the crown, upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traversed or denied; and therefore the inquest or jury should hear both sides. Of this nature are all inquisitions of *felo de se*; of flight in persons accused of felony; deodands and the like. Other inquisitions may afterwards be traversed and examined, as particularly the coroner's inquisition on the death of a man, when it finds any one guilty of homicide; for in such cases the offender, so presented, must be arraigned upon this inquisition, and may dispute the truth of it.

II. Indictment. An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by a grand jury.

Drawing of 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 men of the county; 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. As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at least, and not more than twenty-three, that twelve may be a majority.

Grand Jury Receive Indictments. The grand jury are previously instructed, by a charge from the presiding judge.

They then withdraw to receive indictments, which are referred to them in the name of the king, but at the suit of any private prosecutor, and they are only to hear evidence on the part of the prosecution; for the finding of an indictment is but in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire on their oaths, whether there be sufficient cause, to call upon the party to answer. They ought to credit the truth of an indictment, as far as the evidence before them goes, and not to rest satisfied with remote probabilities.

Jurisdiction of Grand Jury. The jury are sworn to inquire only for the body of the county, and hence cannot regularly inquire of a fact done out of the county, for which they are sworn, unless by an enabling act of parliament. To so high a nicety was this matter once 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 of Edward VI, he is now indictable in the county, where the party died. By statute of George II, 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 may happen. If treason be committed without the realm, it may be inquired of within the realm, as the king shall direct. Murders, whether committed in England or in foreign parts, may be inquired into in any part of the kingdom.

Forum of the Action. But, in general, all offences must be inquired into, as well as tried, in the county, where the crime was committed. Yet, if larceny be committed in one county, and the goods be carried into another, the offender may be indicted in either, for the offence is complete in both. But for robbery, burglary and the like, a man can only be indicted, where the act was committed; for, although, the carrying away the goods to another county is a continuation of the original taking, and is therefore larceny in the second county, yet it is not robbery or burglary in that jurisdiction.

Endorsement on Indictment. After the grand jury have heard the evidence, if they deem it to be a groundless accusation, they formerly endorsed on the bill "*ignoramus*," or we know nothing of it; intimating that though the facts might possibly

have been true, that truth did not appear to them, but now they endorse: "not a true bill" or "not found," and then the party is discharged without further answer. But a fresh bill may be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they endorse upon it "a true bill," or, anciently, "*billa vera*." The indictment is then said to be found, and the party stands indicted. To find a bill, there must at least twelve of the grand jury agree, and afterwards, the entire petit jury of twelve men at the trial must find him guilty. If twelve of the grand jury assent, it is a good presentment, though some of the rest disagree.

Indictments. Time and Place. The indictment, when so found, is publicly delivered into court. Indictments must have a precise and sufficient certainty. By statute of Henry V, they must set forth the christian name, surname and addition of the state and degree, mystery, town or place of the offender; and all this to identify his person. The time and place are ascertained by naming the day and township, in which the act was committed; though a mistake in these points is generally not held material, provided the time be laid previous to the finding of the indictments, and the place be within the jurisdiction of the court; unless, where the place is laid, not merely as a venue, but as a part of the description of the act. But, occasionally, the time may be very material, where there is a limitation assigned by statute for the prosecution of offenders.

Indictments. Technical Words. The offence must be set forth with clearness and certainty; and in some crimes, particular words must be used, which the law appropriates to precisely express the offence. Thus, in treason, the words "treasonably, and against his allegiance," must be used. In indictments for murder, it is necessary to say, that the party "murdered," not "killed" or "slew" the other. In all indictments for felonies, the adverb "feloniously" must be used. In burglaries, "burglariously"; in rapes, "ravished"; in larcenies, "feloniously took and carried away," are necessary to every indictment, for these only can express the very offence.

Indictments. Value of the Thing. In indictments, the value of the thing, which is the subject of the offence, must sometimes be expressed. In larcenies, this is necessary to disclose, whether it is grand or petit larceny, and whether entitled or not to the benefit of clergy; in homicides of all sorts, it is necessary,

as the weapon with which it was committed is forfeited to the king, as a deodand.

Where Trial without Indictment. The remaining methods of prosecution are without any previous finding by a jury. One of these is where a thief was taken with the *mainour*, that is, with the thing stolen upon him *in manu*. If detected, *flagrante delicto*, he might be tried formerly without indictment, and, by the Danish law, hung upon the spot, without trial. But, at present, the only species of proceeding at the suit of the king, without previous presentment or indictment by a grand jury, is that of information.

III. Informations. Two Kinds. 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.

On Penal Statutes. 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* action, only carried on by a criminal, instead of a civil process.

Limitation of Action. By statute of Elizabeth, no prosecution upon any penal statute, the suit and benefit whereof are limited, in part, to the king, and in part, to the prosecutor, can be brought by any common informer, after the expiration of one year from the date of the offence; nor on behalf of the crown, after the lapse of two years longer; nor where the forfeiture was originally given only to the king, can such prosecution be had after the expiration of two years from the commission of the offence.[1]

Filed in the King's Name. Informations, exhibited in the name of the king alone, are of two kinds: first, those that are properly his own suits, and filed *ex officio*, by his own officer, the attorney-general; second, those in which the king is only the nominal prosecutor, the action being at the relation of some private person or informer; and they are filed by the king's attorney, in the court of the king's bench.

King's Own Prosecutions. The object of the king's own prosecutions are properly great misdemeanors, that disturb or endanger his government, or interfere with the discharge of his royal functions. For offences so dangerous, the law has per-

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[1] Now reduced to six months.

mitted the crown the power of an immediate prosecution, without waiting to apply to any other tribunal.

Prosecutions, ex Relatione. The objects of these informations, filed by the master of the crown office, upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not particularly disturbing the government; but which, on account of their magnitude or pernicious example, deserve public animadversion.

Trial and Punishment. When an information is filed, it must be tried by a petit jury of the county, where the offence arises; and if the defendant be found guilty, the court will punish him.

Antiquity of Informations. This mode of prosecution, by information or suggestion, filed of record by the attorney-general, or filed in the court of king's bench, is as ancient as the common law itself. For, as the king was bound to prosecute, or lend the sanction of his name to a prosecutor, whenever informed by the grand jury, that there existed sufficient ground for a criminal suit; so, when these immediate officers were otherwise assured, that a man had committed a gross misdemeanor, they were at liberty without delay, to convey that information to the court of king's bench, by a suggestion on record, and to carry on the prosecution in the king's name.

Applies to Misdemeanors Only. Informations are confined to misdemeanors only; for whenever any capital offence is charged, the law requires the accusation to be warranted by the oath of twelve men, before the party be required to answer it.

Abuses of Informations. And, as to those offences, in which informations were allowed as well as indictments, so long as they were conducted in a legal and regular course, in the court of king's bench, the subject had no reason to complain. The same notice was given, the same pleas were allowed, the same trial by jury had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment. But when the statute of Henry VIII had extended the jurisdiction of the star chamber, the members of which were the sole judges of the law, the fact, and the penalty; and permitted informations to be brought by any informer, upon any penal statute, not extending to life or limb, at the assizes, or before the justices of the peace; then the orderly jurisdiction of the court of king's

bench fell into disuse and oblivion, and by hunting up obsolete penalties, certain men, by this tyrannical mode of prosecution, harassed the subject, and shamefully enriched the crown.

Information, an Oppressive Mode. Upon the dissolution of the court of star chamber, in the reign of Charles I, the old common law authority of the court of king's bench, as the *custos morum* of the nation, was revived in practice. Yet, in the same act of parliament, which abolished this court, a conviction by information was mentioned, as a legal mode of conviction. This method of prosecution was unpopular, because of the ill-use the master of the crown office made of his authority, by permitting the subject to be harassed with vexatious informations by any malicious or revengeful prosecutor. For the power of filing informations resided in the breast of the master, and being filed in the name of the king, subjected the prosecutor to no costs; though on trial they proved to be groundless. This oppressive use of them caused a struggle, soon after the accession of William III, to procure them declared illegal by the court of king's bench, which, however, refused to give such judgment. A few years later, a statute was passed, that the clerk of the crown shall not file any information, without directions from the court of king's bench, and that every prosecutor shall give security to prosecute with effect, and to pay costs. Informations, however, at the king's own suit, filed by his attorney-general, are not affected by this act.

Quo Warranto. This is 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 used to try the civil rights of such franchises. 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, to fine the defendant for his usurpation, as well as to oust him from his office; yet usually considered as merely a civil proceeding.

IV. Appeal. An appeal, as here used, does not signify any complaint to a superior court of an injustice done by an inferior one, which is the general use of the word; but it here means an original suit, at the time of its commencement. An appeal, therefore, when spoken of as a criminal prosecution, denotes an accusation by one private subject against another, for some heinous crime; demanding punishment for the injury, rather than for the

offence against the public. This method of prosecution is seldom resorted to, owing to the great nicety required in conducting it.

Pecuniary Recompense for Crime. This private process for punishing public crimes, had its origin at a time, when a private pecuniary satisfaction called a *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous offences. The custom was derived from the ancient Germans. Also, by the Irish Brehon law, in case of murder, the brehon or judge used to compound between the murderer and the prosecutors, who were frequently the near relatives of the deceased; by causing the malefactor to give to the child or wife of the deceased, or other relatives, a recompense, which was called an *eriach*. In our Saxon laws, we find the several *weregilds* for homicide, rated from the death of a *ceorl* or peasant, up to the king. In the laws of Henry I, other offences are mentioned, redeemable by weregilds. When the offences became no longer redeemable, the private process was still continued, to inflict punishment on the offender; though the party injured was allowed no pecuniary compensation for the offence.

Most Appeals Abolished. Though appeals were thus in the nature of prosecutions for some atrocious injury against an individual, yet it was also permitted, that any subject might charge, by appeal, another subject of high treason. At present, however, the only appeals, now in force, for things done in the realm, are appeals of felony and mayhem.

Appeal of Felony. An appeal of felony may be brought, for crimes committed either against the parties themselves or their relatives. The crimes against the parties themselves are larceny, rape and arson; and for these, as well as for mayhem, the parties robbed, ravished, maimed, or whose houses are burned, may institute this private process. The only crime against one's relatives, for which an appeal can be brought, is that of killing them, by either murder or manslaughter. But this can only be brought by certain relatives; by the wife for the death of her husband, or by the heir male for the death of his ancestor. If the wife, however, marries pending the action, she is estopped; and if she marry after judgment, she cannot have execution. The heir must be the heir male, and next in succession. To this rule, there are three exceptions: (1) If the person killed leaves an innocent wife, she only, and not the heir shall have the appeal. (2) If there be no wife, and the heir be accused of the

murder, the person who next to him, would have been the heir male, shall bring the appeal. (3) If the wife kills her husband, the heir may appeal her of the death. All appeals of death must be sued within a year and a day after the death of the party.

Estoppel of Appeal. These appeals may be brought previous to any indictment; and if the appellee be acquitted, he cannot afterwards be indicted for the same offence. Under the Gothic law, if an offender gained a verdict, when prosecuted by the party injured, he was deemed also acquitted of any crown prosecution for the same offence; but on the contrary, if he made his peace with the king, still he might be prosecuted at the suit of the party. And so with us; if a man be acquitted or found guilty on an indictment of murder, and be pardoned by the king, still he ought not to go at large till the year and day be past, in order to answer any appeal for the same felony, not having as yet been punished for it; though he had been found guilty of manslaughter on an indictment, and has had the benefit of of clergy, and suffered the judgment of the law, he cannot afterwards be appealed, for it is a maxim of law "*nemo bis punitur pro eodem delicto.*" Before this statute was made, it was not usual to indict for homicide within the time limited for appeals, which caused much inconvenience.

Appellee Acquitted. If the appellee be acquitted, the appellor shall suffer one year's imprisonment, and pay a fine to the king; besides restitution to the party for imprisonment and infamy sustained. If the appellor cannot do this, his abettors shall do it for him, and also be liable to imprisonment. This provision caused appeals to fall into disuse.

Appellee Convicted. If the appellee be found guilty, he shall suffer the same judgment, as if he had been convicted by indictment; but with this difference, that on an indictment, which is at the suit of the king, the king may pardon and remit the execution; but the king cannot pardon on an appeal, which is at the suit of a private subject, to make an atonement for the private wrong. When a weregild was paid as a fine for a homicide, it could not be remitted by the king. The ancient usage, as late as the reign of Henry IV, was, that all relatives of the slain should drag the appellee to the place of execution; a custom founded in the savage spirit, which prevailed throughout Europe, after the irruption of the northern nations. However, the punishment of the offender may be remitted by the concurrence of all parties interested.

CHAPTER XXIV.—PROCESS UPON INDICTMENT.

Fugitive from Justice. Where the offender is a fugitive, or has secreted himself to avoid arrest in capital cases; or in misdemeanors, has not been bound over to appear at the assizes or sessions, an indictment may be preferred against him in his absence; since, even were he present, he could not be heard before the grand jury. If it be found, process must issue to bring him into court, for the indictment cannot be tried, unless he personally appears. In capital cases, no man shall be put to death, without being brought to answer by due process of law.

Venire Facias. The proper process on an indictment for any petit misdemeanor, or on a penal statute, is a writ of *venire facias*, which is in the nature of a summons to appear. And if, by the return thereto, it appears that the party has lands in the county, whereby he may be distrained, then a distress infinite shall be issued from time to time, till he appears.

Capias. But if the sheriff returns, that he has no lands in his bailiwick, then upon his non-appearance, a writ of *capias* shall issue, commanding the sheriff to take his body, and have him at the next assizes. If he cannot be taken on the first *capias*, a second and a third shall issue, called respectively 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 issue, or two in the case of other felonies, though the usage is to issue but one in any felony. And so, in the case of misdemeanors, it is now the usual practice for a 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.

Process of Outlawry. But if he absconds, and it is thought proper to pursue him to an outlawry, then a greater exactness is necessary. For in such case, after the several writs have issued, according to the nature of the respective crimes, without any effect; the offender shall be put in the *exigent*, in order to his outlawry; that is, he shall be proclaimed to surrender, at five county courts, and if he be returned *quinto exactus*, and does not appear at the fifth requisition, then he is adjudged to be outlawed, or put out of the protection of the law, so that he is incapable of taking the benefit of it in any respect.

Punishment of an Outlaw. The punishment for outlawry upon an indictment for a misdemeanor, is the same as for outlaw-

ries upon civil actions, viz., forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, just as if the offender had been found guilty by a jury. His life, however, is still under the protection of the law, though anciently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf, by any one, who should meet him; because having renounced all law, he was to be dealt with, as in a state of nature, when any one finding him might slay him. Yet now, no man shall wilfully slay an outlaw; but in so doing, is guilty of murder, unless the act be done in the effort to apprehend him. Any one may arrest an outlaw on a criminal prosecution, either on his own responsibility or by warrant of *capias utlagatum*.

Outlawry Reversed. The proceedings in outlawry being extremely technical, are frequently reversed on error, and if any single point be omitted or misconducted, the whole outlawry is illegal; upon which reversal, the party accused may plead to the indictment.

Certiorari Facias. Pending proceedings, writs of *certiorari facias* are usually had, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench; which is the sovereign's ordinary court of justice in criminal causes. This is done for four purposes:

(1.) To consider and determine the validity of appeals or indictments and the proceedings thereon, and to quash or confirm them for cause.

(2.) Where it is surmised, that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the defendant tried at the bar of king's bench, or before the justices of *nisi prius*.

(3.) It is so removed, in order to plead the king's pardon there.

(4.) To issue process of outlawry against the offender in those counties, where the process of the inferior judges will not reach him.

Effects of Certiorari. Such writ of *certiorari*, when issued and delivered to the inferior court for removing any record or proceeding, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely

erroneous and illegal, unless the court of king's bench remands the record to the court below, to be there tried and determined.

When Granted. A *certiorari* may be granted at the instance of either the prosecutor or the defendant; the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the justices of gaol-delivery, or after issue joined, or confession of the fact in any of the courts below. Indictments found by the grand jury against a peer must, by *certiorari*, be certified and transmitted into the court of parliament, or into that of the lord high steward. In places of exclusive jurisdiction, as the two universities, indictments must be delivered to the courts therein established by charter, to be tried.

CHAPTER XXV.—ARRAIGNMENT AND ITS INCIDENTS.

Defined. When the offender appears voluntarily to an indictment, or has previously been in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be arraigned. To arraign, is to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment.

Prisoner's Hand Uplifted. The prisoner is called to the bar by name, and is to be free from fetters, unless there be evident danger of an escape; when he may be secured by irons. He is then told to hold up his hand; thereby admitting the name by which he is called. This form is, however, not indispensable, for being intended merely to identify the person, any other acknowledgement will suffice; hence, if the prisoner refuses to raise his hand, but confesses to be the person named, this will answer.

Pleads Guilty or Not Guilty. Then the indictment is read to him distinctly in English, which was done, even when all other proceedings were in Latin, that he may fully understand the charge. He is then asked, whether he is guilty or not guilty of the crime, whereof he stands indicted.

Trial of Accessories. By the old common law, the accessory could not be arraigned till the principal was attainted,

unless he chose to be, for he might waive the benefit of the law; and in such case the principal and accessory may be simultaneously arraigned, may plead and be tried together. But otherwise, if the principal had never been indicted, had stood mute, had challenged over thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder. The accessory in any such cases could not be arraigned, for *non constitit*, whether any felony was committed, 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. To avoid this, the law will not allow the accessory to be tried, so long as the principal remains liable to be tried hereafter. Upon the trial of the accessory, even after the conviction of the principal, the accessory may, if he can, controvert the guilt of his supposed principal, and prove him innocent of the charge.

Incidents. When a criminal is arraigned, he either stands mute, or confesses the fact, these being incidents to the arraignment, or else he pleads to the indictment.

1. Prisoner Stands Mute. Regularly a prisoner is said to stand mute, when being arraigned for treason or felony, by:

(1.) Making no answer at all.

(2.) Answering foreign to the purpose, and refusing to answer otherwise.

(3.) Pleading "not guilty", but refusing to put himself upon the country. If he says nothing, the court should impanel a jury, to inquire whether he stands obstinately mute, or whether he be dumb *ex visitatione Dei*.[1]

If the latter be the case apparently, the judges in the interest of the prisoner, shall proceed to trial, and examine all points, as if he had pleaded "not guilty."

Obstinately Mute. If he be found obstinately mute, as was the case with a prisoner who actually cut out his own tongue, then on an indictment for high treason, it has been settled, that standing mute is equivalent to a conviction, and he shall receive judgment and execution. So also in the lowest species of felony, in petit larceny, and in all misdemeanors, standing mute has

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[1] By statute of George IV, where a prisoner pleads "not guilty," without more, he shall be put on trial by jury; but if he refuse to plead, the court may order a plea of "not guilty" to be entered, and the trial to proceed.—*Chitty*.

always been equivalent to conviction. But upon appeals or indictments for other felonies, or petit treason, the prisoner, by the ancient law, was not 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 forte et dure*.

Punishment. Before this was pronounced, the prisoner had not only *trina admonitio*, but also a respite of a few hours; and the sentence was distinctly read to him, that he might realize his danger; and after all, if he continued obstinate, and his offence was clergyable, he had the benefit of his clergy allowed him, even though he was too stubborn to pray it. If no other means could prevail, and the prisoner continued stubbornly mute, the judgment was given without distinction of sex or degree. A judgment, which was made exquisitely severe, that, by that very means, it would rarely need to be resorted to.

The Rack. The rack, or question, to extort a confession from criminals, is a practice of a different nature; this having been only used to compel a man to put himself on trial, while that was a species of trial in itself. The trial by rack is utterly unknown to the law of England; though once the ministers of Henry IV erected a rack of torture, as part of their design to introduce the civil law into the kingdom, as a rule of government. This instrument was termed in derision the duke of Exeter's daughter, and still remains in the tower of London. It existed in the civil law, and was adopted by the French and other foreign nations, who contrived this method, that innocence should manifest itself by a stout denial, or guilt by a plain confession. Thus rating a man's virtue by the hardiness of his constitution, and his guilt by the sensibility of his nerves.

Torture of the Penance. The English judgment of penance for standing mute, was as follows: The prisoner shall be placed in a low, dark chamber in the prison; he shall lie prone on his back, on the bare floor, naked, unless where decency forbids. On his body shall be placed a great weight of iron. He shall have no sustenance, save three morsels of the worst bread on the first day, and three draughts of standing water on the second day. In such situation, this shall be his alternate diet until he dies, or as the earlier judgment ran, until he answers.

History of this Torture. It has been doubted, whether

this punishment existed at the common law, as it is not mentioned until the reign of Edward I, when the judgment seems to have been strict prison confinement, with hardly any sustenance. It was possible for a man to exist under such lingering punishment for forty days. The practice of loading him with weights, called pressing him to death, was gradually introduced between the reigns of Edward III and Henry IV, being intended as a species of mercy to the delinquent, by abridging his torment; and instead of continuing till he answered, it was directed to continue till he died. 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 hence this lingering punishment was probably intended to extort a plea, without which no judgment of death could be given; and so the lord lost his escheat. But in high treason, standing mute was equivalent to a conviction.

Present Result of Standing Mute. At present, if a prisoner, upon his arraignment, stands mute, it amounts in all cases to a constructive confession.[1]

II. Confession of the Prisoner. Upon a simple and plain confession, the court awards judgment; but it is usually reluctant to record such confession, out of tenderness to the prisoner, and will generally advise him to retract it, and plead to the indictment.

Confession by Approvement. There is another species of confession, spoken of formerly, of a far more complicated kind, called *approvement.* It is, when a person indicted of treason or felony, and arraigned, confesses the fact before plea entered, and appeals or accuses others in the same crime, in order to obtain his pardon. He is then called an approver, or prover, *probator*, and the party accused or appealed, the appellee. Such approvement can only be in capital cases, and it is, in effect, equivalent to an indictment, since the appellee is equally called upon to answer it; and if he has no legal exceptions to make to the person of the approver, he must put himself upon his trial. If found guilty, he must suffer the judgment of the law; and the approver shall have his pardon, *ex debito justitiae.* If the appellee

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[1] The practice now, is for the court to enter a plea of not guilty for the accused party.

be acquitted, the approver shall receive judgment to be hanged, upon his own confession of the indictment, for the condition of his pardon had failed, *viz.*: the conviction of another person. It is in the discretion of the court to permit the approved thus to appeal; but in fact, it has long been disused, for much mischief arose to good men, by false and malicious accusations thus made.

Accomplices. It has, however, been usual for the justices of the peace to admit an accomplice to testify against his fellows, upon implied confidence, which the judges of gaol-delivery have usually countenanced, that if such accomplice makes a full discovery of his crimes, and gives his evidence without prevarication, he shall not himself be prosecuted.

CHAPTER XXVI.—PLEA AND ISSUE.

How Made: 1. *A plea to the jurisdiction.*
2. *A demurrer.*
3. *A plea in abatement.*
4. *A special plea in bar.*
5. *The general issue.*

Plea of Sanctuary. Formerly there was another plea, now abrogated, that of sanctuary. If a person accused of any crime, except treason and sacrilege, had fled to a church or churchyard, and within forty days thereafter, went in sackcloth and confessed himself guilty before the coroner, giving the details of the offence; and took oath, that he abjured the realm, from which he would forthwith depart from such port as should be assigned him, and would never return, except by leave of the king; he thus saved his life, by going, with cross in hand, at convenient speed, to the port assigned, and embarking. By this abjuration, his blood was attainted, and his goods forfeited.

Plea of Benefit of Clergy. Formerly also, the benefit of clergy used to be pleaded before trial or conviction, and was called a declinatory plea, which name was also given to that of sanctuary. But as the prisoner upon a trial has a chance to be acquitted, and if convicted of a clergyable felony, is entitled

equally to his clergy after as before conviction, this course was disadvantageous, and therefore the benefit of clergy is now rarely pleaded, but if it be done, it is prayed before judgment.[1]

I. Plea to the Jurisdiction. This is where the indictment is taken before a court, which has no cognizance of the offence; as for the crime of treason at the quarter sessions, in which case the defendant may except to the jurisdiction of the court, without answering at all to the crime alleged.

II. Demurrer to the Indictment. The prisoner, in such case, acknowledges the fact alleged to be true, but joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, or whatever the crime is alleged to be. Some hold, that if, on demurrer, the point of law be adjudged against the prisoner, he shall have judgment and execution, as if convicted by verdict. Others deny this, holding that in such case, he shall be directed to plead the general issue, not guilty, after a demurrer determined against him. The latter appears the more reasonable method, because if a defendant admits the fact in court, and refers it to the opinion of the court, whether it be felony or not; and the court so decides it to be felony; the court will not record the confession, but permit him afterwards to plead not guilty. Though a man, by mispleading in a civil action, may lose his property in some cases, yet the law will not suffer him, by such niceties, to lose his life.

Seldom Used. Demurrers to indictments are seldom used, since the same advantages may be taken upon a plea of not guilty, or afterwards in arrest of judgment, when the verdict has established the fact.

III. Plea in Abatement. This is principally for a misnomer, a wrong name, or a false addition to the defendant. In such case, the indictment may be abated, as writs or declarations may be in civil actions. In the end, little advantage accrues to the defendant 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. 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.[2]

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[1] The benefit of clergy is abolished by statute of George IV, in all cases of felony.

[2] Such defects are amendable, or are cured by verdict.

IV. Special Pleas in Bar. These go to the merits of the indictment, and assign a reason, why the prisoner should not answer 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. *A pardon.*

1. Autrefois Acquit or Former Acquittal. This is founded on the maxim of English common law, that no man is to be brought into jeopardy of his life more than once for the same offence. When a man is once fairly found not guilty upon any indictment, or other prosecution before any court having jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore an acquittal on an appeal is a good bar to an indictment for the same offence. So also was an acquittal on an indictment a good bar to an appeal by the common law; and a practice was introduced, not to try any one on an indictment for homicide, till after the year and day, within which appeals may be brought, were past; by which time probably witnesses had died, or the case was forgotten. To remedy this, by statute of Henry VII, indictments shall be proceeded upon immediately, at the king's suit, for the death of a man, without waiting for bringing an appeal, and that the pleas of *autrefois acquit* on an indictment, shall be no bar to prosecuting an appeal.

2. Autrefois Convict, or Former Conviction. This plea of a former conviction for the same crime, though no judgment was ever given, or perhaps will be, being suspended by benefit of clergy or other cause, is a good plea in bar of an indictment; for no man should be twice brought in danger of his life, for one and the same crime. The pleas of former acquittal or former conviction must be upon a prosecution for the same identical act and crime.

3. Autrefois Attaint, or Former Attainder. This is a good plea in bar, whether it be for the same or any other felony. 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 of any subsequent indictment or appeal, for the same or any other felony. The prisoner is dead in law by the first attainder, his blood is corrupted, and his property forfeited.

Exceptions to the Rule. But to this rule, there are some exceptions, wherein *cessante ratione, cessat et ipsa lex*, as :

(1.) Where the former attainder is reversed for error. So also where reversed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards.

(2.) Where the attainder was upon indictment, such attainder is no bar to an appeal ; for the prior sentence is pardonable by the king, who could suffer such sentence to stop the prosecution of a second, and then after the time of appealing, grant the delinquent a pardon.

(3.) An attainder in felony is no bar to an indictment of treason ; because not only the judgment and manner of death are different, but the forfeiture is more extensive, and the land goes to different persons.

(4.) Where a person attainted of one felony is afterwards indicted as principal in another, to which there are also accessories, prosecuted at the same time; in this case the plea of *autrefois attaint* is no bar, but he shall be compelled to take his trial, because the accessories to such second felony cannot be convicted, until after the conviction of the principal. A plea of *autrefois attaint* is never good, but where a second trial would be quite superfluous.

4. Pardon. 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. There is one advantage of pleading a pardon in bar, or in arrest of judgment before sentence is passed. By stopping the judgment it stops the attainder, and prevents the corruption of blood, which when once corrupted cannot afterwards be restored, except by act of parliament.

Contradictory Pleas. Civil Actions. In civil actions, a man must stand by the plea he has elected to make, by which he is concluded, and cannot resort to another, if that be determined against him ; as if in an action of debt, the defendant pleads a general release, and no such release be proved, he cannot afterwards plead the general issue, *nil debet*, as he might at first, as he is thus estopped, because *interest reipublicae, ut sit finis litium.*

Respondeat Ouster. Pleading Over. In criminal prosecutions, however, *in favorem vitae*, as well upon appeal as upon indictment, when a prisoner's plea is found against him

upon issue tried by a jury, or adjudged against him in point of law by the court, still he shall not be concluded or convicted thereon, but he shall have judgment of *respondeat ouster*, and may plead over to the felony, the general issue, not guilty. For the law allows many pleas, by which a prisoner may escape death, but only one plea, in consequence whereof it can be inflicted, viz., on the general issue, after an impartial examination and decision of the fact, by the unanimous verdict of a jury.

V. General Issue. Plea of Not Guilty. Upon this general issue alone, the prisoner can receive his final judgment of death. In indictments of felony or treason, there can be no special justification put in by way of plea. In an indictment for murder, a man cannot plead, that the act was in self-defence. He must plead the general issue, not guilty, and give this special matter in evidence. These pleas amount in effect to the general issue. The charge of felonious intent is the very *gist* of the indictment, and must be answered directly, by the general negative, not guilty. The jury upon evidence, will note any defensive matter, and give their verdict accordingly, as effectually as if it were or could be specially pleaded. Hence, this is the most advantageous plea for the prisoner.

Brief Entries of Pleadings. When the prisoner has thus pleaded not guilty, *non culpabilis* or *nient culpable*, which formerly was abbreviated, *non cul*, the clerk on behalf of the crown replies, that the prisoner is guilty, and that he is ready to prove him so. This is done by two words abbreviated "*cul prit.*" This is therefore a replication on behalf of the king, *viva voce*, at the bar; which was formerly the course in all civil and criminal proceedings. 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 in a single syllable "*prit*," signifying, that he was ready to prove his assertions. By this replication, the king and prisoner were therefore at issue, which is the case, when the parties come to a fact, affirmed on one side, and denied on the other. Here the

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[1] This statement applies to cases of felony only, and not to misdemeanors, where the failure of a plea in bar precludes a subsequent plea of not guilty, unless upon demurrer.—*Chitty*.

prisoner pleads not guilty, while the clerk replies, guilty, adding, and this he is ready to verify, *et hoc paratus est verificare*, which same thing is expressed by the single word "*prit*" or by "*cul prit.*"

Duty of the Clerk of Court. The negligence of clerks, in abridging the entry of pleadings, probably led to the use of these brief terms, and to the phrase formerly used by the clerk of the arraigns, immediately on plea made, by asking the prisoner: "Culprit, how wilt thou be tried?" If the prisoner be a commoner, he should reply: "by God and my country," and if a peer: "by God and my peers." If he stands mute, the indictment in treason is taken *pro confesso;* and in cases of felony, he shall be convicted of the crime.[1] When the prisoner has thus put himself on trial, the clerk answers: "God send thee a good deliverance."

CHAPTER XXVII.—TRIAL AND CONVICTION.

Saxon Superstition. The several methods of trial and conviction of offenders, established by the laws of England, were formerly very numerous, through Saxon superstition. The Saxons, like other northern nations, were addicted to divination, and hence invented a considerable number of methods of purgation or trial, to preserve innocence from false witnesses; in the belief, that God would interpose miraculously.

1. Ordeal, This was the most ancient species of trial, and was termed *judicium Dei*, and sometimes *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party. This was of two sorts: fire-ordeal and water-ordeal. The former was confined to persons of higher rank, the latter to the common people. Both these might be performed by deputy; but the principal was to answer for the success of the trial, the deputy acting for hire or friendship.

Fire-ordeal. This was performed, either by taking in the hand, unhurt, a piece of red-hot iron of from one to three pounds weight; or else by walking barefoot and blindfold over nine red-

[1] If he stands mute, by statute of George IV, the court will enter the plea of not guilty for him.

hot plougshares, laid lengthwise at unequal distances. If the party escaped unhurt, he was adjudged innocent; but if it happened otherwise, as without collusion, it usually did, he was then condemned as guilty.

Water-ordeal. This was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby, or by casting the person suspected into a river or pond of cold water; and if he floated therein, without any action of swimming, it was deemed an evidence of his guilt, but if he sunk, he was acquitted. The relics of this ordeal are traceable in the barbarity still practiced in some countries to discover witches, by drowning them in a pool of water to prove their innocence.

History of the Ordeal. Purgation by ordeal seems to have been very ancient and universal, in the times of superstitious barbarity. It was known to the ancient Greeks; for in the Antigone of Sophocles, a suspected person declared his readiness to "handle hot iron, and to walk over fire," in order to manifest his innocence. Grotius gives instances of water-ordeal in Bithynia and Sardinia. On the coast of Malabar,[1] the natives in some cases, when accused of an enormous crime, are obliged to swim across a broad river, abounding with crocodiles. If they escape death, they are reputed innocent. In Siam, besides the fire and water ordeals, occasionally the contending parties are exposed to the fury of a tiger. If the beast spare either, that party is accounted innocent; if neither, both are held to be guilty; if both, the trial is deemed incomplete.

In England. As late as the reign of king John, we find grants to the bishops and clergy to use the *judicium ferri, aquae et ignis.* And both in England and Sweden, the clergy presided at this trial, and it was only performed in the churches or in other consecrated ground. However the canon law declared very early against trial by ordeal, as being the fabric of the devil, *contra praeceptum Domini.* On this authority, the trial by ordeal was abolished by an act of parliament in the reign of Henry III.

II. The Corsned, or Morsel of Execration. This species of purgation was somewhat similar to the former, being a piece of cheese or bread, of about an ounce in weight, which was consecrated with a form of exorcism; desiring of the Almighty, that

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[1] On the southwest coast of Hindostan.

it might cause convulsions and paleness, and find no passage, if the man was really guilty; but might turn to health and nourishment, if he was innocent. This resembled the water of jealousy among the Jews, which by God's special appointment, caused the belly to swell and the thigh to rot, if the woman was guilty of adultery.

Mingled with the Sacramental Bread. The corsned was given to the suspected person, who at the same time partook of the holy sacrament; if indeed the corsned was not the sacramental bread itself; till the subsequent doctrine of transubstantiation preserved it from profane uses. Our historians assert, that Godwin, earl of Kent, in the reign of Edward the Confessor, abjuring the death of the king's brother, appealed to his corsned, which stuck in his throat and killed him. In the kingdom of Pegu,[1] this custom prevails, though raw rice is substituted in lieu of bread. A whimsical mode of deciding law suits exists in the kingdom of Monomotapa,[2] where the witness for the plaintiff chews the bark of a tree, endued with an emetic quality; which being sufficiently masticated, is then infused in water, and given to the defendant to drink. If his stomach rejects it, he is condemned; if it stays with him, he is absolved, unless the plaintiff will drink some of the same water; and if it stays with him also, the suit is left undetermined.

Saxon Origin. These two methods of trial were principally in use among our Saxon ancestors. The next method was introduced by Norman princes.

III. Trial by Battel, Duel or Single Combat.[3] This was another species of presumptuous appeals to Providence, to give the victory to the innocent or injured party. This trial by *battel*, can be demanded by the appellee, in either an appeal or an approvement; and is carried on with equal solemnity, as that on a writ of right; but with this difference, that there each party might hire a champion, but here they must fight in their proper persons.

Parties Exempted. Hence, if the appellant or approver be a woman, a priest, an infant, or of the age of sixty, or lame or blind, he or she may counterplead and refuse the wager of *battel*,

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[1] Situate in farther India; south of Burmah and west of Siam.

[2] Situate in southeast Africa, near the mouth of the Zambesi river.

[3] Abolished by statute of George III.

and compel the appellee to put himself upon the country. Also peers of the realm, bringing an appeal, shall not be challenged to wage *battel*, on account of the dignity of their person; nor the citizens of London, by a special charter, because fighting is foreign to their education. So likewise, if the crime be notorious, as if the thief be taken with a *mainour*, or the murderer in the room with a bloody knife, the appellant may refuse the tender of *battel* from the appellee; for it is unreasonable, that an innocent man should stake his life against one, who is already half convicted.

Form and Manner. The form and manner of waging *battel* upon appeals are much the same, as upon a writ of right, only the oaths of the two combatants are much more solemn. The appellee, when appealed of felony, pleads not guilty, throws down his glove, and declares he will defend the same with his body. The appellant takes up the glove, and replies, that he is ready to make good the appeal, body for body. The appellee then taking the book in his right hand, and in his left, the right hand of his antagonist, swears:

The Oath. "*Hoc audi homo, quem per manum teneo,*" etc. "Hear this, O man, whom I hold by the hand, who callest thyself John by the name of baptism, that I, who call myself Thomas, by the name of baptism, did not feloniously murder thy father, William by name, nor am in any way guilty of the said felony. So help me God and the saints; and this I will defend against thee, by my body, as this court shall award." To which the appellant replies, holding the Bible and his antagonist's hand: "Hear this, O man, whom I hold by the hand, who callest thyself Thomas, by the name of baptism, that thou art perjured, and therefore perjured, because that thou feloniously didst murder my father, William by name. So help me God and the saints; and this I will prove against thee by my body, as this court shall award."

The Battle Itself. The battle is then fought with batons, with the same solemnity, and the same oaths against amulets and sorcery, that are used in the civil combats; and if the appellee be so far vanquished that he cannot fight any longer, he shall be adjudged to be hanged immediately, and his blood shall be attainted. But if he kills his opponent, or can maintain the fight from sunrise till the stars appear in the evening, he shall be

acquitted. So also, if the appellant becomes recreant, and pronounces the horrible word, "craven," he shall lose his *liberam legem*, and become infamous; and the appellee shall recover his damages, and be forever quit, not only of the appeal, but of all indictments likewise for the same offence.

IV. Trial of Peers. Peers are tried, when capitally indicted, in the court of parliament, or the court of the lord high steward; but in case of an appeal, a peer shall be tried by a jury.[1] No special verdict can be given, and the peers need not agree in their verdict, but the greater number will bind the minority.

V. Trial by Jury. The trial by jury or the country, *per patriam*, is the grand bulwark of English liberty, secured to every man by the great charter.

Advantage in Criminal Cases. Its value is greater in criminal, than in civil cases; since in times of difficulty and danger, more is to be apprehended from the violence and partiality of jndges appointed by the crown, in suits between the king and the subject, then in property disputes between individuals. Our law places the barriers of a presentment and a trial by jury between the liberties of the people, and the prerogative of the crown. The executive power of the laws is properly vested in the king; and yet the power might be dangerous and destructive to the constitution, if exerted, without check or control, by justices of *oyer* and *terminer*, occasionally named by the crown, who might imprison. despatch or exile any man, who was obnoxious to the government.

Palladium of Our Liberties. By English law, no man need answer the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury; and that the truth of every accusation, whether preferred by indictment, information or appeal, should afterwards be confirmed by the unanimous vote of twelve of his equals and neighbors, indifferently chosen and above suspicion. The liberties of England will abide as long as this *palladium* remains sacred and inviolate; and will be secure against all open attacks and secret machinations, which might undermine it, by the introduction of new and arbitrary modes of trial by justices of

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[1] The nobility are tried by their peers for treason and felony, and misprision of these; but in all other criminal prosecutions, they are tried like commoners, by a jury.

the peace, commissioners of the revenue, and courts of conscience. While arbitrary powers, well executed, may be more convenient; yet delays and slight inconveniences in the forms of justice are the price, that all free nations must pay for their liberty in more substantial matters. These inroads are opposed to the spirit of our constitution; and though begun in trifles, the precedent may gradually increase, to the utter disuse of juries in questions of great concern.

Panel of Jurors. When a prisoner, on being arraigned, pleads not guilty, and for his trial, has 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 of the neighborhood, which means, of the county. If the proceedings are in the court of king's bench, there is time allowed, between the assignment and the trial, for a jury to be impanelled, by a writ of *venire facias* to the sheriff, as in civil causes; and the trial of misdemeanors is had at *nisi prius*, unless it be of such consequence, as to merit a trial at bar, which is always had, when the prisoner is tried for any capital offence.

Distinction as to the time of Trial. But before the commissioners of oyer and terminer and gaol-delivery, the sheriff, by virtue of a precept directed to him, returns a panel of forty-eight jurors, to try all felons that may be called upon their trial that session; and hence it is usual to try all felons as soon as possible after their arraignment. But it is not customary, unless by consent, or where the defendant is actually in jail, to try persons indicted of misdemeanors at the same term of court, in which they have pleaded not guilty, or traversed the indictment. But they usually give bail to appear at the next assizes or session, and then and there to try the traverse, giving notice to the prosecutor.

Privileges in Cases of High Treason. In cases of high treason, whereby corruption of blood may ensue, except treason in counterfeiting the king's coin or seal, or misprision of such treason, the indictment must be found within three years, except in the case of an attempted assassination of the king. The prisoner shall be furnished with a copy of the indictment, but not the names of the witnesses, at least five days before the trial, and indeed before the arraignment; for then is the time to take any exceptions thereto, by way of plea or demurrer. He shall

also have a copy of the panel of jurors two days before his trial; and lastly he shall have the same compulsive process, to bring in his witnesses for him, as is usual to compel their appearance against him. By later statute, the prisoner is also to be furnished with a list of all the witnesses to be produced, and the jurors impanelled, with their occupations and abodes, and a copy of the indictment is to be delivered to him ten days before the trial in the presence of two witnesses; the better to prepare him for challenges and defence. Ten days being deemed too long a period for such notice, as the session of *oyer* and *terminer* might end before that time expired, the law on this point was repealed in relation to inferior species of high treasons. And now no person, indicted for felony, is entitled to such copies before the time of trial.[1]

Challenges, Generally. When the trial is called, the jurors are to be sworn as they appear, to the number of twelve, unless challenged by the party. 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 same reasons as in civil causes. It is necessary, that the sheriff be totally indifferent. Where an alien is indicted, the jury should be *de medietate*, or half foreigners, if so many are found in the place; except in cases of treason, aliens being very improper judges of the breach of allegiance; and except as to the class called Egyptians. In every jury there should be a competent number of hundredors, and the particular jurors be *omni exceptione majores*, not liable to objection either *propter honoris respectum*, *propter defectum*, *propter affectum*, or *propter delictum*, on account of dignity, or of incompetency, or of partiality, or of wrongful act.[2]

Challenges Peremptory. Challenges upon any of the foregoing accounts are styled challenges for cause; which may be without stint in both civil and criminal trials. But in criminal cases, at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary species of challenge to a certain number of jurors, without showing any cause whatever, which is

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[1] In misdemeanors the defendant is entitled to a copy, and the prosecution may give it in felony cases, otherwise it must be read slowly in court, so that it may be taken down. In the United States, the right is generally secured by statute or the constitution.—*Cooley*.

[2] The provision as to hundredors is repealed.

termed a peremptory challenge.[1] This is grounded on two reasons: (1) Sudden impressions and unaccountable prejudices are sometimes awakened by the mere looks and gestures of another, which might affect a prisoner as to a juryman, and render him reluctant to have his case tried before him. (2) Because, upon failure to establish a challenge for cause, the mere fact of challenging might awaken the resentment of a juror; and to prevent ill consequences therefrom, a prisoner is permitted to peremptorily challenge him.

Prisoner's Privileges. The privilege of peremptory challenges is granted to the prisoner, but denied by the statute to the king, who must assign a cause satisfactory to the court. The cause, however, need not be assigned, till the entire panel is gone through, and unless there cannot be a full jury without the person so challenged. The king's counsel must then show cause, or the juror shall be sworn.

Limited Number of Challenges. The peremptory challenges of the prisoner must have some limit, otherwise there may be no trial. The common law grants have thirty-five; that is one under the number of three full juries. It dealt with a man who peremptorily challenged more than this number, and refused to retract his challenge, as with one who stood mute, or refused his trial; by sentencing him to the *peine forte et dure* in felony, and by attainting him in treason. By statute of Henry VIII, no one arraigned for felony can have more than twenty peremptory challenges. The court disregarded any additional ones.

Jurors' Oaths. If by reason of challenges, or the default of 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 be 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 the evidence."

Counsel for the Prisoner. When the jury is sworn, if it be a cause of consequence, the indictment is usually opened, and the evidence marshalled, examined and enforced by the counsel for the crown or prosecution. Under the old common law, no

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[1] A peremptory challenge is not allowed in the trial of misdemeanors, or of collateral issues. By statute of George IV, such challenges, beyond the number allowed by law, are void.

counsel was allowed a prisoner upon the trial, upon the general issue, in any capital crime, unless some point of law arose, proper to be debated. The judge was supposed to look after the interests of the prisoner, to see that the proceedings against him were legal and regular. In cases, however, of high treason, which would work corruption of the blood, or misprision of treason, except as to counterfeiting the king's coin or seal, counsel were allowed.

Evidence. The doctrine of evidence upon pleas of the crown is, in most respects, the same as that upon civil actions. There are some points, however, in which they differ:

Confession of Treason. In all cases of high treason, petit treason, and misprision of treason, two lawful witnesses are required to convict a prisoner; unless he voluntarily confess the crime in open court, or before a magistrate, or person having competent authority to take the confession, and it be proved by two witnesses. But hasty, unguarded confessions, made to persons having no such authority, ought not to be admitted in evidence under this statute.

Confessions Generally. Even in cases of felony, confessions they 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 by their nature of being disproved by other negative evidence.

Witnesses in Cases of Treason. By statute of William 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 kinds; and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. But in almost every other accusation, one positive witness is sufficient. Montesquieu lays it down as a rule, that those laws which condemn a man to death, in any case, on the deposition of a single witness, are fatal to liberty; as the witness who affirms, and the accused who denies, make an equal balance; a third witness is therefore needed to incline the scale.

Single Witness. This seems to be carrying matters too far; for there are some crimes, in which the very privacy of their nature excludes the possibility of having more than one witness

Neither indeed is the bare denial of the person accused equivalent to the positive oath of a disinterested witness. In cases of indictment for perjury, this doctrine is better founded; and there our law adopts it; for one witness cannot convict a man indicted for perjury, because then there is only one oath against another. In cases of treason also, there is the accused man's oath of allegiance to counterpoise the information of a single witness; which may be a reason, why the law requires a double testimony to convict him, though the principal reason is to secure the subject from being the victim of conspiracies, which are the engines of crafty politicians.

Hand-writing. 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, familiar with the party's hand, that they believe the paper to have been written by him, is evidence to be left to a jury.

Still-born Child. Proof. The 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.

Presumptive Evidence of Felony. All presumptive evidence of felony should be admitted cautiously; for the law holds it better that ten guilty persons escape, than that one innocent party suffer. Sir Matthew Hale lays down two rules: (1) Never to convict a man for stealing the goods of a person unknown, merely because he will not account how he came by them; unless an actual felony be proved of such goods. (2) Never to convict any person of murder or manslaughter, till at least the body be found dead.

Witnesses for the Defence. The ancient practice was not to allow counsel to any prisoner accused of a capital crime; neither should he be suffered to exculpate himself by the testimony of any witnesses. Queen Mary humanely opposed this latter principle, and admitted such evidence against the crown; and under Elizabeth, the prisoner's witnesses were heard, but not under oath. At length, by statute of William III, and afterwards of Anne, in cases of treason and felony, all witnesses for the prisoner might be examined upon oath, in the same manner, as the witnesses against him.

The Verdict. When the evidence on both sides is closed, and indeed, after any evidence has been given, the jury cannot be discharged, unless in cases of evident necessity, till they have rendered their verdict; but are to deliver it 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 withdraw to confer, and return to receive the verdict in open court.

Verdict, General or Special. 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, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they doubt the matter of law, and hence choose to leave it to the determination of the court.

Power of the Judge. The practice, formerly in use, of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for rendering a verdict, contrary to the direction of the judge, was arbitrary, unconstitutional and illegal. If the judge's opinion must rule the verdict, the trial by jury would be useless. Yet in many instances, where, contrary to evidence, the jury have found the prisoner guilty, their verdict has been mercifully set aside, and a new trial granted. But there has been no instance of granting a new trial, where the prisoner was acquitted upon the original trial.

Result of Verdict. If the jury find the prisoner not guilty, he is then forever discharged of the accusation, except he be appealed of felony within the time limited by law. And upon his acquittal or discharge, for want of prosecution, he shall be immediately released, without payment of fee to the jailer. But if the jury find him guilty, he is then said to be convicted of the crime, whereof he stands indicted. He may be convicted, either upon confessing the offence, and pleading guilty, or by his being found so by the verdict.

Costs and Expenses of Prosecutor. On conviction of the offender, two collateral circumstances at once arise. 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 felony, the reasonable expenses of prosecution, and also if the prosecutor be poor, a compensation for his trouble and loss of

time, are to be allowed him out of the county, if he petitions the judge for that purpose; and by further statute, witnesses are to be also paid.

Restitution of Goods. On a conviction for larceny, in particular, the prosecutor shall have restitution of his goods. 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. A later statute, enacts, that if any person be convicted of larceny, by the evidence of the party robbed, he shall have full restitution of his money and goods, or the value of them, out of the offender's goods, if he has any, by writ, to be granted by the justices. This has, in practice, superseded the use of appeals in larceny.

Rights of Purchasers of Stolen Goods. This writ of restitution shall reach the goods so stolen, even though the goods have been sold in market overt. This seems hard upon the buyer; yet the rule of law is, *spoliatus debet, ante omnia, restitui.* As either the owner or buyer must suffer, the law prefers the right of the owner, who has sought to pursue the felon to punishment, to the right of the buyer.

Writ of Restitution. Trover. 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 prosecutors. Without such writ of restitution, the party may peaceably retake his goods, wherever he finds them, unless a new property have been fairly acquired therein. If the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for such goods, and recover a satisfaction in damages. But such action does not lie before prosecution, for so felonies would be settled; and also reception is unlawful, if done with intent to compound the larceny; it then becoming the heinous offence of theft-bote.

Settlement with the Prosecutor. It is not uncommon, when a person is convicted of a misdemeanor, affecting mainly an individual, as a battery, for the court to permit the defendant to speak with the prosecutor before judgment is pronounced; and if the prosecutor then declares himself satisfied, to inflict but a trivial punishment. This is done to reimburse the prosecutor

his expenses, and to make him some private amends, without the trouble and circuity of a civil action. But it is a dangerous practice, and though it may be entrusted to the judges of the superior courts of record, it ought never to be allowed in local or inferior jurisdictions, such as the quarter sessions; where prosecutions for assaults are often commenced rather for private gain than from public motives. Above all, it should never be suffered, where the testimony of the prosecutor himself is necessary to convict the defendant; for by this means, the rules of evidence are subverted, and the prosecutor becomes in effect a plaintiff. For though a private citizen may dispense with satisfaction for his private injury, he cannot remove the necessity of public example. The right of punishing belongs not to the individual, but to society, or to the sovereign, who represents that society, and a man may renounce that right, as to himself, but he cannot yield the right of others.

CHAPTER XXVIII.—BENEFIT OF CLERGY.

1. Origin. The *privilegium clericale*, benefit of clergy, originated from the pious regard paid by Christian princes to the church.[1] Two exemptions were granted to the church: (1) Exemption of places consecrated to religious duties from criminal arrests, which was the foundation of sanctuaries. (2) Exemption of the persons of clergymen from criminal process before the secular judge in a few particular cases.

Claims of the Clergy. The clergy, increasing in power, claimed as a right and *jure divino*, that which had been awarded them as a favor; and by their canons and constitutions, sought a vast extension of these exemptions, as well in regard to the crimes themselves, as to the persons exempted; among whom at length was every subordinate officer belonging to the church, and even certain laymen. The total exemption of the clergy from secular jurisdiction in England was sought, but never thoroughly effected, though allowed in some capital cases.

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[1] The benefit of clergy is now abolished.

When Benefit of Clergy Claimed. In the reign of Henry VI, it was finally settled, that the prisoner should first be arraigned, and might either then claim the benefit of clergy, by way of declinatory plea; or, after conviction, by way of arresting judgment. This latter way is most usually practiced, as it is more to the satisfaction of the court to have the crime previously ascertained by confession or the verdict of a jury; and better for the prisoner himself, who may possibly be acquitted, and so have no need of the benefit of clergy.

Its History. Originally no man was admitted to the benefit of clergy, but such as had the *habitum et tonsuram clericalem*. In process of time, every one who could read, being accounted a clerk or *clericus*, was allowed the benefit of clerkship, though not initiated in holy orders. But when learning, by means of printing, began to be generally disseminated, it was found that as many laymen as divines were admitted to the *privilegium clericale*, and therefore by statute of Henry VII, a distinction was drawn between mere lay scholars and clerks in orders. All laymen, who were allowed this privilege, were burnt with a hot iron on the thumb. By statute of Edward VI, the peers of the realm, having a voice in parliament, may have the benefit of peerage, equivalent to that of clergy, for the first offence, although they may not be able to read; and without being burnt in the hand for all offences then clergyable to commoners, and also for house-breaking, highway robbery, horse-stealing, and robbery of churches.

Mode of Trial. Such privileged parties were discharged from the sentence of law in the king's court, and delivered over to the ordinary, to be dealt with according to ecclesiastical canons. The trial was held before the bishop or his deputy, and by a jury of twelve clerks. The party himself was first required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who swore, they believed he spoke the truth; then witnesses were to be examined on oath, but on behalf of the prisoner only; and lastly, the jury were to bring in their sworn verdict, which was usually one of acquittal; otherwise, if a clerk were found guilty, he was disgraced, or subjected to penance. There was much perjury in this solemn farce of a mock trial; the delinquent party, though convicted before in the king's court on the clearest evidence, being almost compelled to

swear to his innocence. And yet by this purgation, the party was restored to his credit, his liberty, and his lands.

Offender Delivered to the Ordinary. This almost constant acquittal of clerks by purgation, caused the temporal courts, on proof of the heinous guilt of an offender, to deliver him to the ordinary, *absque purgatione faciendâ*, in which situation the clerk convict could not make purgation, but was to continue in prison during life, and was incapable of acquiring personal property or receiving the profits of his lands, unless he was pardoned.

Penalty by Burning the Hand. The statute of Elizabeth discontinued this delivery to the ordinary, but released the offender, who had been allowed his clergy, upon such allowance and burning of the hand; but the judge, at his discretion, could imprison the party for any time not exceeding a year. Women, convicted of simple larceny, could be burned in the hand, whipped, stocked, or imprisoned. The punishment, by burning the hand, being deemed ineffectual, the burning of the left cheek was substituted. This change lasted but seven years. Those men who could not read, if under the degree of peerage, who were convicted of clergyable felonies, were hanged.

In Case of Larceny. Afterwards, it was considered, that education was no extenuation of guilt, but quite the reverse. By statute of Anne, it was enacted, that benefit of clergy should be granted to those entitled to ask it, without requiring them to read. Subsequent statutes, in cases of larceny, substituted transportation in some cases, and in others commitment of the offender to the house of correction, or to certain penitentiary houses, which were reformatory in their nature. By statute of George III, the court, in all clergyable felonies, instead of burning the hand of the offender, may impose a fine, or may order the offender to be whipped.

2. Who are Entitled to the Benefits of Clergy. All clerks in orders, without any branding, and of course, without any transportation, fine or whipping, which are substituted in lieu of the other, are to be thus privileged, and immediately discharged; and this, as often as they offend. All lords of parliament and peers of the realm shall be discharged in all clergyable and other felonies provided for by the act, without any burning in the hand, or imprisonment, or other punishment; but this is only for the first offence. Lastly, all the commons of the

realm, not in orders, male or female, shall for the first offence, be discharged of the capital punishment of felonies, within the benefit of clergy ; upon being burnt in the hand, whipped or fined, or suffering imprisonment, or in case of larceny, upon being transported. It has been said, that infidels and heretics were not capable of the benefit of clergy, until after the statute of Anne, as being under a legal incapacity for orders.

3. For what Crimes the Benefit of Clergy is Allowed. Neither in high treason, nor in petit larceny, nor in any mere misdemeanors, was the benefit of clergy permitted at common law ; hence, as a rule, it was allowable only in petit treason and capital felonies. But yet the benefit of clergy was not allowable in all felonies, for in some, it was denied even by the common law; as for lying in wait for one on the highway, destroying and ravaging a country, or arson, that is, the burning of houses ; all of which border in some degree on treason.

In Marine Cases. So tender is the law as to inflicting capital punishment in the first instance for any inferior felony, that notwithstanding by the marine law of Henry VIII, the benefit of clergy is not allowed in any case, whatsoever; yet when offences are committed within the admiralty jurisdiction, which would be clergyable when committed on land, the constant course is to acquit and discharge the prisoner.[1]

Rules. (1) In all felonies, clergy is now allowable, unless taken away by express acts of parliament.

(2) That, where clergy is taken away from the principal, it is not of course taken away from the accessory, unless he is particularly included in the words of the statute.

(3) That, when the benefit of clergy is taken away from the offence, as in the cases of murder, robbery, rape and burglary, a principal in the second degree being present, aiding and abetting the crime, is properly excluded from his clergy.

(4) That, where it is only taken away from the person committing the offence, as in the case of stabbing, or of larceny in a dwelling, or privately from the person, his aider and abettor are not excluded.

4. Consequences of the Benefit of Clergy. Branding, fine, whipping, imprisonment or transportation, are rather con-

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[1] By later statutes, offences on the high seas are punished in the same manner, as if they had occurred on shore.—*Chitty*.

comitant conditions, than consequences of receiving this indulgence. The consequences are such as affect his present interest and future credit and capacity; as having been once a felon, but now purged from that guilt by the privilege of clergy, which operates as a kind of statute pardon.

Results to the Party. (1) By this conviction, he forfeits all his goods to the king.

(2) That, after conviction, and till he receives the judgment of the law, by branding or some of its substitutes, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to the disabilities of a felon.

(3) That, after burning, or its substitute, or pardon, he is discharged forever of that and other felonies before committed, within the benefit of clergy, but not of felonies, from which such benefit is excluded.

(4) That, by the burning, or its substitute, or the pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted.

(5) That such advantages, as pertain to commoners and laymen, subsequent to the burning in the hand, are equally applicable to all peers and clergymen, although never branded at all, or subjected to a substituted punishment.

CHAPTER XXIX.—JUDGMENT AND ITS CONSEQUENCES.

Proceedings after the Verdict. When, upon a capital charge, a verdict of guilty is rendered, in the presence of the prisoner; he is asked by the court, if he has anything to offer, why judgment should not be awarded against him. In the case of a misdemeanor, and a verdict of guilty, a *capias* may be awarded to bring in the prisoner to receive his judgment; and if he absconds, he may be prosecuted, even to outlawry.

Arrest of Judgment. The prisoner, at this juncture, as well as at his arraignment, may 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 again indicted.

Defects In the Indictment. 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.[1] In favor of life, great strictness has at all times been observed, in every point of an indictment.

Technicalities of Indictments. Sir Matthew Hale complains, that this strictness has become a blemish in the law and its administration, "for, that more offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence." And yet no man was more tender of life, than this excellent judge.

A Pardon. A pardon may also be pleaded in arrest of judgment; and it has the same advantage here, as if pleaded on arraignment; the saving the attainder, and of course the corruption of blood, which nothing but parliament can restore, when a pardon is not pleaded until after sentence. When a man has obtained a pardon, he ought to plead it at once.

Praying Benefit of Clergy. Praying the benefit of clergy may also be ranked among the motions in arrest of judgment.

Pronouncing of Judgment. If all these resources fail, the court must pronounce that judgment, which the law has annexed to the crime. Some punishments are capital, extending to the life of the offender, and consist generally in being hanged until dead, though in very atrocious offences, other circumstances of terror, pain or disgrace are superadded; as in treasons of all kinds, being drawn or dragged to the place of execution; in high treason, affecting the king's person or government, disembowelling alive, beheading and quartering; and in murder, a public dissection. And in case of treason committed by a female, the judgment is that she be burned alive.

Variety of Punishments. But the humanity of the English nation has authorized, by tacit consent, an almost general mitigation of such parts of these judgments, as savor of torture or cruelty; a sledge or hurdle being usually allowed to such

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[1] Formal defects on the face of the indictments can only be taken advantage of before the jury are sworn, by demurrer or motion to quash.

traitors, as are condemned to be drawn; and parties being first strangled before being disemboweled or burned. Some punishments consist in exile, banishment, abjuration of the realm, or transportation; others in perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or goods, or both, or of the profits of lands for life; others cause a disability to hold offices or employments, being heirs, executors or the like. Some, but rarely, cause a mutilation or dismembering, by cutting off the hand or ears; or for a lasting stigma, by slitting the nostrils, or branding in the hand or cheek. Some are merely pecuniary, by fines; and lastly, some mainly consist in their ignominy, and are usually mixed with some degree of corporal pain, inflicted for crimes, which arise from indigence, or render even opulence disgraceful. Such as whipping, hard labor in the house of correction, the pillory, the stocks and the ducking-stool.

Punishments in Other Countries Contrasted. Disgusting as this catalogue of punishments may seem, it will compare favorably with that shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in Europe. And it is one of the glories of English law, that the species, though not always the quantity or degree of punishment, is ascertained for every offence, and that it is not left in the discretion of a judge or even a jury, to alter that judgment, which the law has beforehand ordained. For if judgments were to be the private opinions of judges, men would be slaves to their magistrates, and would be ignorant of their conditions and obligations. Whereas, where an established penalty is annexed to crime, the criminals may read their certain consequence in that law.

Discretionary Punishments. Discretionary fines and length of imprisonment, which our courts can impose, may seem an exception to this rule. But the general nature of the punishment by fine or imprisonment is, in these cases, fixed and determined, though the duration and quantity of each must vary from the aggravations of the offence, the quality and condition of the parties, and other circumstances. The *quantum* of fines cannot be ascertained by an invariable law. What is ruin to one man's fortunes, may be an indifferent matter to another. Thus, the law of the twelve tables at Rome fined every opulent person who struck another, twenty-five *denarii*.

Bill of Rights. The bill of rights declares, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted; and further, that all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void. The bill of rights was only declaratory of the old constitutional law, which had declared such previous grants void.

Fines. The reasonableness of fines in criminal cases has also been regulated. A rule obtained, even in the time of Henry II, that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear; saving to the land-holder his land, to the trader his merchandize, and to the countryman his team and instruments of husbandry. The great charter directed, that the amercement shall be reduced to a certainty by the oath of good men in the vicinity. Since the disuse of this inquest, it is not customary to assess a larger fine than a man is able to pay, without touching the implements of his livelihood; but to inflict corporal punishment or a limited imprisonment in lieu thereof.

Attainder. When sentence of death is pronounced, the immediate consequence from the common law is attainder. The man is then called attaint, *attinctus*, stained or blackened, and is dead in law. This is after judgment; for there is a marked difference between a man convicted and attainted. After conviction only, a man may still be a witness in a case, and may be liable to none of the disabilities, which exist after attainder. There still remains a possibility of his innocence. Something may be offered in arrest of judgment; the indictment may be erroneous, and hence the present conviction may be quashed; or he may obtain a pardon, or be allowed the benefit of clergy. But when judgment is once pronounced, both law and fact combine to prove him guilty. Upon judgment of death, and not before, the attainder of a criminal begins, as also upon judgment of outlawry on a capital crime, pronounced for fleeing from justice, which is a tacit admission of guilt. Hence, either upon judgment of outlawry or of death, for treason or felony, a man shall be said to be attainted.

Consequence. The consequences of attainder are:

1. *Forfeiture.*
2. *Corruption of blood.*

I. FORFEITURE.

Two-fold. This is two-fold; of real and personal estates.

Effect on Real Estate. As to real estate; by attainder in high treason, a man forfeits to the king all his lands and tenements of inheritance, whether in fee-simple or fee-tail, and all his rights of entry therein, which he had at the date of the offence, or since, to be forever vested in the crown; and also the profits of such lands or tenements, which he had in his own right for life or years, so long as such interest shall exist.

Dates Back to the Treason. This forfeiture relates back to the time of the treason committed, so as to avoid all intermediate sales and encumbrances, but not prior ones; hence, a wife's fortune is not forfeitable for the treason of her husband, because settled upon her prior thereto. But her dower is forfeited; although the husband shall be tenant by the curtesy of the wife's lands, if the wife be attainted of treason. The forfeiture does not take effect, until an attaint be had, of which it is one of the fruits; and therefore if a traitor died before judgment was pronounced, or is killed in open rebellion, or hanged by martial law, it constitutes no forfeiture of his lands, for he never was attainted of treason.

Justice of Confiscation. The natural justice of the confiscation of property for treason is founded on this consideration: that he, who has violated the principles of government, has abandoned his connection with society, and has no longer any claim to even social advantages, of which the right of transmitting property to others is one of the chief. Such forfeitures, whereby his posterity must suffer as well as himself, will help to restrain a man, when a dread of personal punishment may not.

Foreign History of Confiscation. A Roman lawyer, in the time of the triumvirate, boasted, that he had two reasons for despising the power of the tyrants; his old age and his want of children; for children are pledges to the prince of the father's obedience. Yet many nations have thought, that this posthumous punishment is a hardship to the innocent; especially for crimes, that do not strike at the foundation of society, as treason does. Confiscations were very common under the earlier Roman emperors, but were restricted to cases of treason, under Arcadius and Honorius. In Germany, by the famous golden bull, copied from Justinian's code, the lives of the sons of political conspira-

tors were spared; but they were deprived of their estates, and right of succession, and were rendered incapable of any honor, ecclesiastical or civil, to the end, that "being always poor, they may forever be accompanied by the infamy of their father; may languish in continual indigence; and may find," says the merciless edict, "their punishment in living, and their relief in dying."

Confiscation. English History. In England, forfeiture of lands to the crown for treason was antecedent to the establishment of the feudal policy in the island, being transmitted from our Saxon ancestors, and forming part of the Scandinavian constitution. In certain treasons relating to the coin, it is provided by some modern statutes, that they shall work no forfeiture of lands, save only for the life of the offender, and by all, that such offence shall not deprive the wife of her dower. By statute of Anne, in order to abolish such hereditary punishment entirely, it was enacted, that no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person, other than the traitor himself. This apparently ended all forfeitures for high treason, had not a subsequent statute prolonged them.

Union with Scotland. Effect on Confiscation Laws. At the date of the union, the crime of treason in Scotland differed, by the Scotch law, from treason in England, and particularly in the English doctrine of forfeitures, yet it seemed necessary to put this important crime on an equal footing in both countries. In new modeling the laws, the two nations strove to acquire a total immunity from forfeiture and corruption of blood, which the house of lords as firmly resisted. At length a compromise was effected: that the same crimes should be treason in both countries, and that the English forfeitures and corruption of blood should take place in Scotland, until the death of the then pretender, and then cease throughout Great Britain.

Right of the Crown to Commit Waste. 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 in fee-tail, to the crown for a year and a day; in which time, the king may commit therein what waste he please; which is called the king's year, day and waste. Formerly, the king had only a liberty of committing waste on the lands of felons, by pull-

ing down their houses, extirpating their gardens, ploughing their meadows, and felling their woods. But in the reign of Henry I, it was agreed that the king should in lieu thereof have the profits for a year and a day, and then restore them to the lord of the fee. By statute of Edward II, the king shall have his waste also. This year, day and waste are now usually compounded for, otherwise they belong to the crown.

Forfeitures Relate Back. Forfeitures for felony also arise upon attainder, and therefore a *felo de se* forfeits no lands of inheritance or freehold, for he never is attainted as a felon. They relate back to the time of the offence committed, as well as do forfeitures for treason, so as to avoid all intermediate charges and conveyances.

Additional Causes of Forfeiture. As a part of the forfeiture of real estate and of the profits of land during life, there are to be added misprision of treason, and striking any one in Westminster Hall, or drawing a weapon upon a judge there sitting in court.

Forfeiture of Goods. The forfeiture of goods and chattels accrues in all the higher grade of offences; in high treason or misprision thereof, petit treason, felonies of all sorts, whether clergyable or not, suicide, petit larceny, standing mute and striking any one in Westminster Hall. For flight also, on accusation of treason, felony or even petit larceny, whether the party be found guilty or acquitted; if the jury find the flight, which it seldom does, the party shall forfeit his goods and chattels; for the very flight is an offence, carrying with it a presumption of guilt.

Difference between Forfeiture of Lands and of Goods. There is a great difference between the forfeiture of lands and the forfeiture of goods:

(1) Lands are forfeited upon attainder, and not before, goods and chattels are forfeited by conviction. In many cases, where goods are forfeited, there is no attainder; which happens, only where judgment of death or outlawry is given; therefore, in those cases the forfeiture must be upon conviction only.

(2) In outlawries for treason or felony, lands are forfeited only by the judgment.

Relates back to Date of Act as to Lands only. The forfeiture of lands has relation to the date of the act committed, so as to avoid all subsequent sales and encumbrances; but the

forfeiture of goods and chattels has no relation backwards, so that only those which a man has at the time of conviction shall be forfeited. Hence a traitor or felon may *bona fide* sell any of his goods for the sustenance of himself and family, between the fact and the conviction; yet where collusively parted with, they may be reached by the crown.

II. CORRUPTION OF BLOOD.

Result as to Property. This is another immediate consequence of attainder, and works both upward and downward,[1] so that an attainted person can neither inherit lands 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.

Its Antiquity and Origin. This idea was adopted from the feudal constitutions, at the time of the Norman conquest, and was unknown in Saxon tenures, where treason resulted in forfeiture of estate, but not in corruption of blood or impediment of descent; and on judgment of mere felony, no escheat accrued to the lord. And now, as every other oppressive mark of feudal times is happily removed in England, it is to be hoped that this corruption of blood, with all its connected consequences, may in time be abolished, as it stands on a different footing from the forfeiture of lands for high treason.[2]

CHAPTER XXX.—REVERSAL OF JUDGMENT.

Modes. A judgment may be set aside in two ways:

1. *By falsifying or reversing the judgment.*
2. *By reprieve or pardon.*

Without a Writ of Error. A judgment may be falsified, reversed or avoided, in the first place, without a writ of error, for

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[1] By statute of William IV, descents are not thus obstructed.—*Cooley.*

[2] By statute of George III, corruption of blood was abolished in all cases, except the crimes of high treason and murder.

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 appears in the record itself. Therefore, if the whole record be not certified, or truly certified by the inferior court, the party injured thereby in both civil and criminal cases, may allege a diminution of the record. Thus, if a judgment 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.

By Writ of Error. This lies from all inferior criminal jurisdictions to the court of king's bench, and from there to the house of peers; and may be brought for mistakes in the judgment, or other parts 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 irregularity, omission or want of form in the process of outlawry, the want of a proper addition to the defendant's name; for not properly naming the sheriff, or the location of the county court, &c.

Not Allowed, as of Course. These writs of error, to reverse judgments in cases of misdemeanors, are not to be allowed, of course, but on sufficient probable cause shown to the attorney general; and then they are understood to be granted of common right, and *ex debito justitiae.* But writs of error, to reverse attainders in capital cases, are only allowod *ex gratia*, and not without express warrant, under the king's sign manual, or by consent of the attorney general. This, therefore, can rarely be brought by the attainted party, but may be brought by his heir or executor after his death.

Reversal of Attainder by Parliament. This may be done from compassion, or after a revolution in the government; or on account of the merits of the family of the criminal, who seek, after his death, to obtain a restitution in blood, honors and estate, by act of parliament; which in reversing the attainder, casts no reflection upon the justice of the preceding sentence.

Reversing an Outlawry. 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 upon 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 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 accused; restored in his credit, his capacity, his blood and his estates. Even if the estates have been granted away by the crown, he may enter upon them, 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.—REPRIEVE AND PARDON.

Difference. The former is temporary only, the latter permanent.

I. REPRIEVE.

Defined. A reprieve, from *reprendre*, to take back, is the withdrawal 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 insufficient, or he is doubtful, whether the offence be within clergy, or any favorable circumstances appear in the criminal's character, which might be efficacious in procuring a pardon. These arbitrary reprieves may, by usage, be granted by the justices of gaol delivery.

Pregnant Woman. As, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution, till she be delivered. This is mercy dictated by the law of nature, *in favorem prolis*. When a plea for this cause is made in stay of execution, the judge must direct a jury of twelve discreet women to inquire the fact, and if they bring in their verdict, "quick with child," for "barely with child," will not suffice, unless it be alive in the womb, execution shall be stayed until the next session, and until she be delivered, or proves not to have been with child. But if she once was reprieved on this ground, and afterwards

again become pregnant, she shall not have the benefit of a further respite for that cause.

Person non Compos Mentis. Another cause of reprieve is, where the offender becomes *non compos* between the judgment and the award of execution. It is a rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner, what he has 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.

Error as to the Person. Or the party may plead in bar of execution; which plea may be either pregnancy, the king's pardon, or diversity of person, viz: that he is not the same as was attainted, and the like. In the last case, a jury shall be empanelled to try the collateral issue, viz: the identity of his person, and not whether guilty or innocent, for that has been decided before. This 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.

II. PARDON.

King's Prerogative. This the prerogative of the crown. The king himself condemns no man; this task belongs to the courts of justice. It is his privilege to display mercy. No other person has power to pardon or remit any treason or felonies whatever. This is one of the great advantages of monarchy, that there is a magistrate who has it in his power to extend mercy, wherever he deems it deserved. In democracies, nothing higher is acknowledged than the magistrate, who administers the laws; and it would be impolitic for the power of judging and pardoning to centre in one and the same person.

1. Object of Pardon. The king may pardon all offences merely against the crown or the public, excepting:

Power Restricted in Certain Cases.

(1.) That to preserve the liberty of the subject, the committing of a man to prison out of the realm, is, by the *habeas corpus* act, made a *praemunire*, unpardonable even by the king.

(2.) Nor can the king pardon, where private justice is principally concerned in the prosecution of offenders. 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.

(3.) Nor can he pardon a common nuisance, while it remains unabated, though he may remit the fine.

(4.) Nor can he pardon an offence against a penal statute, after information brought; for thereby the informer has acquired a private property in his part of the penalty.

In Impeachments. The king's pardon cannot be pleaded in cases of parliamentary impeachments, so as to impede the inquiry, and stop the prosecution of notorious offenders. By statute of William III, no pardon shall be pleadable to an impeachment by the commons in parliament. But after the impeachment has been solemnly heard and determined, the king may, in his discretion, grant a pardon.

2. Manner of Pardoning. (1) It must be under the great seal. A warrant under the privy seal or sign manual, though it may suffice to admit a party to bail, in order to plead the king's pardon, is not of itself a pardon.

(2) If the king has been 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 will have an imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony, but the conviction or attainder must be particularly mentioned; and a pardon of felonies will not include piracy, for that felony is not punishable at common law.

(4) No pardon for treason, murder or rape, shall be allowed, unless the offence be particularly specified therein; and particularly in murder shall it be expressed, whether it was committed by lying in wait, assault or malice prepense. There is no precedent of a pardon in the register for any other homicide, than that which happens *se defendendo* or *per infortunium*. It is a 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. Which prerogative is frequently exerted in the pardon of felons, on condition of being confined to hard labor for a stated time, or of transportation for life, or for a term of years.[1]

3. Manner of Allowing Pardons. 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 laches or negligence, as he may of the king's charter of pardon. The king's pardon must be specially pleaded at the proper time, otherwise it will be deemed waived. The judges have a discretionary power to bind the criminal, pleading such pardon, to his good behavior, for a term not exceeding seven years.

4. Effect of Pardon. A pardon by the king makes the offender a new man, and acquits him of all corporal penalties and forfeitures annexed to that offence, for which he obtains his pardon. But nothing can restore the blood, when once corrupted, if the pardon be not allowed until after attainder, but the high power of parliament. Yet if a person attainted receives the king's pardon, and afterwards has a son, that son may be heir to his father; because the father being made a new man, might transmit new inheritable blood; but if he had been born before the pardon, he would never have inherited at all.

CHAPTER XXXII.—EXECUTION.

Order of the Judge. In all cases, capital as otherwise, the execution 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; though in the court of peers in parliament, it is done by writ from the king. The present 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. In a capital felony, it is writ-

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[1] These statutes are repealed.

ten opposite the prisoner's name, "*suspendatur per collum*," let him be hanged by the neck.

The Gallows. The sheriff, upon receipt of his warrant, is to do execution within a convenient time. It is of great importance, that the punishment should follow the crime as early as possible. The sheriff cannot alter the manner of execution, by substituting one death for another, without being guilty of felony himself Even the king cannot do this, in the opinion of both Coke and Hale. If the hanging do not result in death, and the criminal revives, the sheriff must hang him again.

CHAPTER XXXIII.—RISE AND PROGRESS OF THE LAWS OF ENGLAND.

Six Periods. 1. *To the Norman conquest.*

2. *To the reign of Edward I.*
3. *To the Reformation.*
4. *To the restoration of Charles II.*
5. *To the Revolution of* 1688.
6. *To the present time.*

I. ANCIENT BRITONS.

Who they were. These were the aborigines of the island, of whom we know but little. We learn, from Caesar's account, of the tenets and discipline of the ancient Druids in Gaul, in whom centered all the learning of these western parts; and who were sent over to Britain, at least to the island of Mona or Anglesea, to be instructed.

The Druids. The tenets of the Druids on some points bear a resemblance to some of the modern doctrines of English law. The very notion of an oral, unwritten law, handed down from age to age by custom and tradition merely, seems derived from the practice of the Druids, who committed no instructions to writing, possibly for want of letters. In all the British antiquities, no trace of a character or letter appears. The partible quality also of lands by the custom of gavelkind, is of British original.

So likewise is the ancient division of the goods of an intestate, between his widow and children, or next of kin, which has since been revived by the statutes of distribution.

Result of Invasions. The variety of nations, that successively invaded England, the Romans, the Picts, and afterwards the Saxons and Danes, must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom. As they soon became blended, they probably mutually communicated their usages, in regard to the rights of property and the punishment of crimes; hence it is impossible to trace with accuracy the several mutations of the common law, and tell from which of these nations any special custom was derived.

Blending of Different National Customs. Such investigation is impracticable from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice, rendering it impossible to define the precise period of the alterations. It is also impracticable from the antiquity of the kingdom and its government, unless we had authentic monuments thereof, as the Jews had by the hand of Moses. Another reason for this uncertainty of the true origin of particular customs, must in part have arisen from the means whereby Christianity was propagated among our Saxon ancestors in this island; by learned foreigners, brought from Rome and elsewhere, who carried with them their own national customs. They probably prevailed upon the state to abrogate such usages as were inconsistent with religion, and to introduce many that were conformable thereto. Hence, we find some rules of the Mosaical, and also of the imperial and pontifical laws adopted in our system.

The English Heptarchy. Another reason for the great variety and uncertain original of our ancient, established customs, even after the Saxon government was formed, was the subdivision of the kingdom into the heptarchy; composed of seven independent kingdoms, governed by different clans and colonies, which created an infinite diversity of laws. This was true, even though the colonies of Angles, Jutes, Anglo-Saxons and the like originally sprang from the same mother country, the great northern hive, which swarmed all over Europe in the sixth and seventh centuries.

Alfred the Great. When therefore the West Saxons had

swallowed up the rest, and Alfred succeeded to the monarchy of England, which his grandfather Egbert had founded, his mighty genius prompted him to new model the constitution, so that it should endure for ages, and out of discordant materials to form one uniform whole. This he effected, by reducing the entire kingdom under one regular and gradual subordination of government, wherein every man was answerable to his immediate superior for his own conduct and that of his nearest neighbors. To him we owe that masterpiece of judicial polity, the subdivision of England into tithings and hundreds, if not into counties; all under the influence and administration of one supreme magistrate, the king, in whom all the executive authority of the law lodged, and from whom justice was dispersed to every part of the nation; which wise institution has been preserved to the present time.

Institution of Courts by Alfred. Like Theodosius, he collected the various customs in the kingdom, and reduced and digested them into one uniform system or code of laws in his *Dom-bec* or *liber judicalis*. This he compiled for the use of the court-baron, hundred and county court, the court-leet and sheriff's tourn; tribunals, established by him for the trial of all causes, civil and criminal, in the districts where the complaint arose; all of them subject to the inspection and control of the king's own courts, under the universal or common law. The king's courts were then itinerant; being kept in the king's palace, and removing with his household from one end of the kingdom to the other.

Danish and Saxon Laws. The Danish invasion, which introduced foreign customs, was a severe blow to this noble fabric; but upon the expulsion of these intruders, the English returned to their ancient law, retaining a few customs of their late visitants, which were termed *Dane Lage*, as the code compiled by Alfred was called *West-Saxon Lage*, and the laws of the kingdom of Mercia, which obtained in the countries next to Wales, were termed the *Mercen Lage*.

Origin of the Common Law. Edgar, who founded the English navy, and was also an excellent civil governor, observing the ill effect of three distinct bodies of laws in separate parts of his kingdom, projected, what his grandson, Edward the Confessor, completed; one uniform digest of laws, being a revival of

Alfred's code, with some improvements added. This is the original of that admirable system of maxims and unwritten customs, now known by the name of common law, which is of Saxon parentage.

Remarkable Saxon Laws. Among the most remarkable of the Saxon laws were:

1. The constitution of parliaments or general assemblies of the wisest men of the nation; the *wittena gemote* or *commune consilium* of the ancient Germans.

2. The election of magistrates by the people, and originally even that of their kings.

3. The descent of the crown upon hereditary principles; only that perhaps, in case of minority, the next of kin of full age would ascend the throne as king, and not as protector, though after his death, the crown immediately reverted to the heir.

4. The great paucity of capital punishments for the first offence; even the most notorious offenders being allowed to commute it for a fine or weregild; or in default of payment, perpetual bondage, to which our benefit of clergy has in some measure succeeded.

5. The prevalence of certain customs, as heriots and military services, in proportion to every man's land; which resembled the feudal constitution, yet were exempt from its rigorous hardships

6. That their estates were liable to forfeiture for treason, but that the doctrine of escheats and corruption of blood for felony or any other cause, was utterly unknown among them.

7. The descent of their lands to all the males equally, without any right of primogeniture; a custom, which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons, until the Norman conquest.

8. The courts of justice consisted principally of the county courts, and in cases of weight, the king's court, held before himself in person at the time of his parliaments; which were usually held at different places, where the king kept the three great festivals of Christmas, Easter and Whitsuntide. The ecclesiastical and civil jurisdiction were blended together in these county courts.

9. Trials among this superstitious people were permitted to be by ordeal, by the corsned or morsel of execration, or by wager

of law with compurgators, if the party chose it; but frequently they were also by jury.

II. THE NORMAN INVASION.

Effect. This event wrought a great alteration in our laws, which were effected rather by the consent of the people, than by any right of conquest; yet that consent was apparently partly extorted by fear, and partly from a misapprehension of consequences.

1. Separation of Ecclesiastical and Civil Courts. This was effected, in order to ingratiate the king with the clergy, who had been endeavoring all over Europe to exempt themselves from the secular power. Many of the episcopal sees were filled by the king with Italian and Norman prelates.

2. Forest Laws. Another violent alteration of the English constitution consisted in the depopulation of entire counties for the purposes of the king's royal diversion. The forest laws were imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man.

3. Original Jurisdiction of the King's Courts. This was greatly extended, and the remedial influence of the county courts, the seats of Saxon justice, narrowed. To this end the *aula regis* was erected; and a capital justiciary appointed with tyrannical powers. It was ordered, that proceedings in the king's courts be conducted in the Norman language, which was a badge of slavery imposed upon a conquered people. This lasted, until Edward III had gained his victories over France.

Subtleties of Norman Jurisprudence. But there was one mischief the king could not eradicate; which were the chicanes and subtleties of Norman jurisprudence, that had taken possession of the king's courts. That age was the era of refinement and subtleties. The northern conquerors of Europe were emerging from the grossest intellectual ignorance; the scholars were cloistered in monasteries, the rest being soldiers or peasants. The first rudiments of science they imbibed were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators, brought from the east by the Saracens of Palestine and Spain, and translated into barbarous Latin.

Metaphysical Distinctions. The divinity and the law of those times were frittered into logical distinctions, and drawn out into metaphysical subtleties. Law became a science of the

greatest intricacy; especially when blended with the refinements engrafted upon feudal property introduced by Norman practitioners. Statutes in later times have remedied these excrescences, but the scars are still visible; and our modern courts often have recourse to fictions and circuities to recover the justice so long buried under the niceties of Norman jurisprudence.

4. Introduction of Trial by Combat. This trial was for the decision in the last resort of all civil and criminal questions of fact. This was the immemorial practice of all the northern nations; but was first reduced to stated forms among the Burgundians, about the close of the fifth century, and from them it passed to the Franks and Normans.

5. Feudal Burdens. This was the most important alteration of our law. It drew after it a numerous and oppressive train of servile fruits and appendages, aids, reliefs, primer seisins, wardships, marriages, escheats, and fines for alienation; all based upon the maxim, that lands in England were derived from and held of the crown.

Degeneracy of the Times. The nation at this period groaned under an absolute slavery. The ecclesiastics were devoted to a foreign power, and unconnected with the civil state, under which they lived. The prayers, as well as the law, were administered in an unknown tongue. The ancient trial by jury gave way to the impious decision by *battel*. The forest laws restrained rural pleasures. In towns, all companies had to disperse, and the fires in the houses be extinguished at eight o'clock, in the night, at the sound of the melancholy *curfew*.

General Demoralization. The ultimate property of all lands, and a share of the profits, were vested in the king, or by him granted to his Norman favorites, who were vassals to the crown, and tyrants to the commons. Forfeitures, talliages, aids and fines were arbitrarily exacted. The king had at his command an army of sixty thousand knights. Trade was carried on mainly by the Jews and Lombards, and there was no English fleet. The nation consisted of the clergy, who were also the lawyers, the barons or great lords of the land, and the burghers or inferior tradesmen; who in their socage tenure, still retained some points of their ancient freedom. All the rest were villeins or bondsmen.

Early Norman Reigns. It has been the work of generations, for our ancestors to redeem themselves from this scheme

of servility; for the work of restoring the ancient constitution has been gradual. William Rufus proceeded on his father's plan, and extended the forest laws. Henry I found it expedient to restore some of the laws of Edward, the Confessor. He gave up the grievances of marriage, ward and relief, and abolished the *curfew*, and for a time united the civil and ecclesiastical courts; which union was soon dissolved by the Norman clergy. In the reign of Richard I, the civil and canon laws were introduced in the realm.

Reigns of Henry II and Edward I. In the reign of Henry II, the claims of marriage, ward and relief were revived, but much was done to methodize the laws, and to reduce them to regular order. A struggle was maintained, which continued until the reign of Edward I, between the laws of England and Rome; in which the English law was victorious. Four important things in this reign merit attention: the check given to the power of the clergy, which was stopped by the fatal dispute with Archbishop Becket; the institution of justices in *eyre in itinere*, the kingdom being divided into six circuits: the establishment of the grand assize, or trial by a special jury at the action of the defendant in a writ of right, instead of trial by *battel*; and the introduction of escuage or pecuniary commutation for military service.

Reign of Richard I. Richard I enforced the forest laws with rigor, which occasioned discontent, though he repealed the penalties of castration, loss of eyes, and cutting off the hands and feet, inflicted on transgressors in hunting. He composed a body of naval laws at the Isle of Oleron, which are still extant and of high authority. His thoughts, however, were mainly concentrated on the crusade against the Saracens.

Magna Carta. Public Benefits. In the reign of John, the rigors of the feudal tenure and the forest laws caused insurrections of the barons, which finally brought about the *magna carta* and the *carta de foresta*, in John's reign, which were ratified by his son and successor, Henry III. The *magna carta* confirmed many liberties of the church, and redressed many grievances incident to feudal tenures; and care was taken therein to protect the subject against other oppressions, as unjust amercements and illegal distresses. It settled the law of forfeitures for felony, established an uniformity of weights and measures, encouraged

commerce, and forbade the alienation of lands in mortmain. It continued the liberties of the cities and towns.

Other Blessings of the Great Charter. With respect to private rights, it established the testamentary power of the subject over part of his personal estate; the rest being distributed among his wife and children. It also laid down the law of dower. With regard to the administration of justice; besides prohibiting denials or delays of it, it fixed the court of common pleas at Westminster, that suitors might not be harassed with following the king's person from place to place; and brought the trial of issues home to the very doors of the freeholder, by directing assizes to be taken in the proper counties, and establishing annual circuits. Lastly, it protected every individual in the nation in the free enjoyment of his life, liberty and property, unless declared to be forfeited by the judgment of his peers or the law of the land.

III. REIGN OF EDWARD I TO THE REFORMATION.

Acts of Edward I. Edward I has justly been styled our English Justinian. Sir Matthew Hale asserts, that more was done in the first thirteen years of his reign to establish the distributive justice of the kingdom, than in all the ages since that time.

1. He confirmed the great charter, and that of forests.
2. He limited the bounds of ecclesiastical jurisdiction.
3. He defined the limits of the several highest courts.
4. He settled the jurisdiction of the inferior courts.
5. He abolished arbitrary taxes and talliages.
6. He discontinued the prerogative of interfering by mandates.
7. He settled the form and effect of fines.
8. He established a repository for the public records.
9. He introduced a method of preserving the public peace.
10. He removed restraints on alienation by the statute *quia emptores*.
11. He instituted a speedy execution, by writ of elegit.
12. He provided for the recovery of advowsons.
13. He benefitted landed property by statutes of mortmain.
14. He limited property, by the creation of estates tail.
15. He reduced Wales to the subjection of England.

Writs and Pleadings. The forms of preliminary writs were perfected in his reign; and are models. The pleadings were made brief and conspicuous, Britton, Fleta and Hengham wrote valuable legal treatises, which are law to this day. From his time to the reign of Henry VIII, very few alterations took place in the legal forms of proceedings.

Reign of Edward III. The power of electing subordinate magistrates was taken from the people during the reigns of Edward II and Edward III; and justices of the peace were established. In the latter reign, the parliament assumed its present shape, by a separation of the commons from the lords. Much was done to establish domestic manufactures, and the statute staple enlarged the credit of the merchant. In the case of intestacies, more care was taken in the appointment of administrators to distribute property among creditors and kindred of the deceased, which had in part before been devoted to pious uses. The statutes of *praemunire*, and the establishment of a parochial clergy, added lustre to this close of the fourteenth century.

Result of Civil Wars. From this time, to the reign of Henry VII, the civil wars gave no leisure for further juridical improvement, "*nam silent leges inter arma.*" By these disputed titles to the crown, the dominions of the English in France were happily lost; which resulted in turning attention to our domestic concerns. To these, likewise, we owe the method of barring entails by the fiction of common recoveries; originally invented by the clergy to evade the statutes of mortmain, but introduced under Edward IV to unfetter estates, and render them more liable to forfeiture; while on the other hand, the owners tried to to protect them by the introduction of uses, another clerical invention.

Reign of Henry VII. But few new and beneficial regulations were framed during the reign of Henry VII. The distinguishing feature of this reign was to amass treasure in the king's coffers by every means that could be devised. To this end, the court of star-chamber was remodelled, and armed with unconstitutional powers over the persons and properties of the subject. The statute of fines for landed property was craftily contrived to facilitate the destruction of entails, and render forfeiture and alienation easier. The benefit of clergy was allowed only once to lay offenders, and writs of *capias* were permitted in all actions on

the case. A defendant, in consequence, might be outlawed, because then his goods would become the property of the crown.

IV. PERIOD OF THE REFORMATION.

Ecclesiastical Polity. The reign of Henry VIII and his children opens a new scene in ecclesiastical matters; the crown restored to supremacy over spiritual men and causes, and the patronage of bishoprics vested in the king. Had the spiritual courts at that time been reunited to the civil, the Saxon constitution, with regard to ecclesiastical polity, would have been completely restored.

Changes in Civil Polity. As to our civil polity, the statute of wills and the statute of uses, passed in this reign, made a great alteration as to property; the former by allowing the devise of real estate by will, which before was usually forbidden; the latter, by endeavoring to destroy the intricate nicety of uses. Courts of equity also assumed a jurisdiction, which in time matured into an excellent system of rational jurisprudence. The statute of uses caused a remarkable alteration in the mode of conveyancing; the ancient assurance of feoffment and livery upon land being now seldom practiced, since the easier mode of transferring property by secret conveyance to uses and long terms of years was now created in mortgages and family settlements.

Laws which Aided Commerce. Estates-tail were reduced to a little more than the conditional fees at the common law, before the passing of the statute *de donis*. The establishment of recognizances in the nature of a statute staple, for facilitating the raising of money upon landed security, and the introduction of the bankrupt law, to punish fraudulent and to relieve unfortunate traders, were excellent alterations of our legal polity, and aided in making the English a great commercial people.

Features in the Reign of Henry VIII. The incorporation of Wales with England, and the more uniform administration of justice, by destroying or abridging counties-palatine, added strength to the monarchy; and the redress of many grievances and oppressions made the administration of Henry VIII a marked era in juridical history. In his later years, the royal prerogative was strained to a tyrannical height; and its encroachments were established by law, under the sanction of cowardly parliaments; one of which passed a statute, that the king's proclamations should have the force of acts of parliament.

Edward VI and Mary. Happily for the nation, this arbitrary reign was succeeded by the minority of an amiable prince, during which brief period, many of those extravagant laws were repealed. During the shorter reign of queen Mary, many salutary and popular laws in civil matters were enacted.

Under the Tudor Family. During the reign of the Tudor family, the religious liberties of the nation were established, by laws, that however were too sanguinary; the forest laws fell into disuse; the administration of civil rights in the courts of justice were conducted according to the wise institutions of Edward I; the principal grievances introduced by the Norman conquest were gradually removed, and our Saxon constitution restored and much improved; except in the continuation of military tenures and a few other points, which still armed the crown with a dangerous prerogative. The princes of the house of Tudor and their favorites had seized the spoils of the church, and a decent maintenance was hardly left to the bishops and clergy; and the indigent poor suffered greatly. This produced the restraining statutes, to prevent the alienation of lands and tithes belonging to the church and universities.

Reign of Elizabeth. Though, in general, this queen was a wise and excellent princess; though in her reign, trade flourished, riches increased, the laws were duly administered, the nation respected abroad, and the people happy at home; yet the increase of the power of the star chamber, and the erection of the high commission court in ecclesiastical matters, were the work of her reign. At times, she would carry the prerogative as far as her most arbitrary predecessors. The tranquillity of her reign depended more on her want of opportunity and inclination, than want of power to play the tyrant.

Condition of the People. The great revolutions in manners and in property slowly paved the way for a revolution in government. Till the close of the Lancastrian wars, the property and power of the nation were chiefly divided between the king, the nobility and the clergy. The commons were in a state of ignorance; their personal wealth small, and from the nature of their landed property, they were in continual dependence upon their feudal lord, who was usually some powerful baron or some opulent abbey, or the king himself. Liberty and personal independence were little regarded; nay, even to assert them was deemed sedition. Sentiments, resulting in the violence of a Cade

and a Tyler, were viewed with horror; which subsequently were applauded, when softened by the arguments and moderation of a Sidney, a Locke and a Milton.

Nobility and Clergy Impoverished. But with the invention of printing and the progress of reform, with the increase in trade and navigation, as the result of the compass and the discovery of the Indies, the minds of men entertained a more just opinion of the rights of mankind. Wealth flowed in upon the merchants and the middle ranks, while the nobility and clergy were impoverished; the latter being stripped of their lands and revenues, while the former, to meet the expenses of dissipated living, alienated much of their overgrown estates. This gradually reduced their power; while the king, by the spoil of the monasteries and the great increase of the customs, grew rich and independent. The latter years of Henry VIII were the times of the greatest despotism known in England since the death of William I.

Policy of Elizabeth. Elizabeth had almost the same legal powers as her father, but the critical situation of the queen, with regard to her legitimacy, her religion, her enmity to Spain, and her jealousy of the queen of Scots, necessitated caution on her part. She and her able advisers had wisdom not to provoke the commons. Hence she veiled the odious part of the prerogative, and though the royal treasury no longer overflowed with the wealth of the clergy, which had contributed to enrich the people, she asked for supplies with such moderation, and managed them with such economy, that the commons were happy to oblige her.

Reign of James I. No new degree of royal power was added to or exercised by her successor, James I; but the sceptre was too weighty to be wielded by such a hand. The unreasonable exertion of the prerogative on trivial occasions, and the claim of absolute kingly power, awakened discontent. The people examined into the merits of this royal claim, and discovered its weakness. They found that the nation had the ability, as well as the inclination to resist it; and on exercising this power of resistance, they obtained some slight victories in the cases of concealments, monopolies and the dispensing power. Meanwhile, but little was done for the improvement of private justice; except the abolition of sanctuaries, the extension of the bankrupt laws, the limitation of suits and actions, and the regulation of informations upon penal statutes.

Reign of Charles I. When Charles I succeeded to the crown of his father, and attempted to revive some enormities, which had been dormant in the reign of king James, such as loans extorted from the subject, with imprisonment for refusal, the exertion of martial law in time of peace, and other domestic grievances, the people rebelled, and the king's life was the forfeit. It must be acknowledged, that by the petition of right, enacted to abolish these encroachments, the English constitution was improved. But the forest laws were revived, and the power of the star chamber and high commission courts was unreasonably great.

The Overthrow of Monarchy. These oppressions were actually abolished by the king in parliament before the breaking out of the rebellion; but the people were not conciliated, as they doubted the king's sincerity. Though he formerly strained his prerogative, he now consented to reduce it below the point consistent with monarchical government. The people, however, flushed with this success, fired with resentment for past oppression, and dreading the consequences, if the king should regain his power, became desperate, overthrew the church and monarchy, and slew their sovereign.

V. EFFECT OF THE RESTORATION.

Military Tenure Abolished. On the accession of Charles II, the principal remaining grievance, the doctrine of military tenure, was abolished; except in the instance of corruption of inheritable blood, upon attainder of treason and felony. And though this monarch deserves no commendation from posterity; yet in his reign we may date not only the re-establishment of the church and monarchy, but also the complete restitution of English liberty for the first time since its abolition at the conquest.

Habeas Corpus Act. In his reign was obtained the great bulwark of our constitution, the *habeas corpus* act, which was an additional security of a man's person from imprisonment. The *magna carta* had pruned the luxuriances of the feudal system; but the statute of Charles II extirpated all its slaveries, except perhaps in copyhold tenure. *Magna carta*, in general terms, declared, that no man should be imprisoned contrary to law; the *habeas corpus* act discloses effectual means, as well to release himself, as to punish those who had misused him.

Other Important Statutes. To these may be added the abolition of the prerogatives of purveyance and preemption, the

statute for holding triennial parliaments, the test and corporation acts, which secure our civil and religious liberties, the abolition of the writ *de heretico comburendo*, the statute of frauds and perjuries, a necessary security to private property, the statute for distribution of intestates' estates, and that of amendments and jeofails, which cut off those superfluous niceties which had disgraced the courts, together also with acts benefitting commerce; all which statutes established the constitution in full vigor.

Power of the People. While there were many iniquitous proceedings in the reign of Charles II, which were contrary to all law; yet the people had as large a portion of real liberty, as was consistent with a state of society; and sufficient power to preserve that liberty, if invaded by the royal prerogative. But when his deluded brother, James II, attempted to enslave the nation, he found it was beyond his power; and as a result of the people's resistance, he lost his throne.

VI. SINCE THE REVOLUTION OF 1688.

Beneficent Acts. In this period many laws have been passed; as the bill of rights, the toleration act, the act of settlement, the act uniting England with Scotland; which have asserted our liberties in clear terms, have regulated the succession of the crown by parliament, as the exigencies of civil and religious freedom required, have confirmed the doctrine of resistance to attempts to subvert the constitution, have maintained the superiority of the laws above the king, have established religious liberty, have set bounds to the civil list, and have made the judges independent of the king and his ministers. Though these provisions have apparently reduced the strength of the executive power; yet in reality, the crown has gradually gained as much in influence, as it has apparently lost in prerogative.

Alterations in the Administration of Justice. The chief alterations in the administration of justice during this period are the recognition of the rights of ambassadors; the cutting off by statute of many excrescences; the protection of corporate rights by improvements in writs of *mandamus*, and informations *quo warranto*; the regulation of trials by jury, and the admitting witnesses for prisoners upon oath; the further restraints upon alienation of lands in mortmain; the annihilation of the terrible judgment of *peine fort et dure*: the extension of the benefit of clergy; new methods for the recovery of rents; improvements in

ejectments for trying titles, the introduction of paper credits, by endorsements upon bills and notes, which have shown the possibility of assigning a *chose* in action; the translation of all legal proceedings into the English language; the reformation of county courts; the great system of marine jurisprudence; and lastly, the liberal spirit of our courts of law, in introducing the same principles of redress, as prevail in our courts of equity.

Biography of Lawgivers and Writers

REFERRED TO BY BLACKSTONE.

Alfred the Great. King of England, 871-901. One of the most perfect characters in history. Having expelled the invading Danes, he organized a thorough administration of justice within his dominions, and contributed greatly to the intellectual improvement of his people.

Aristotle. Greatest of Greek Philosophers. Fourth century B. C.

Aulus Gelius. Roman judge and writer. Second century.

Bacon, Lord Francis. High chancellor of England, and one of the most illustrious philosophers of modern times. A biographer terms him "the wisest, brightest, meanest of mankind." Lord Campbell asserts, that he was a complete master of the common law. His career as a jurist was terminated by his conviction for receiving bribes. 1561-1626.

Bacon, Sir Nicholas. An eminent statesman during a portion of Elizabeth's reign, who contributed much to the prevalence of the reformed religion. He was the father of Lord Francis Bacon.

Barbeyrac, Jean. A prominent French jurist and law writer. 1674-1744.

Beccaria. Eminent Italian political writer. Author of a treatise on crimes and punishments.

Blackstone, Sir William. Son of a London silk mercer. He was a professor at Oxford for seven years. Subsequently, after a term in parliament, he became a judge of the king's bench, and of the common pleas. 1723-1780.

Bracton, Henry de. One of the earliest English writers of law. He wrote under Henry III a complete treatise on legislation and jurisprudence, which was freely cited by Blackstone in his Commentaries.

Britton, John. Bishop of Hereford, who wrote a digest of the laws of England, in the reign of Edward I.

Brooke, Sir Robert. An English magistrate and legal writer. Died 1558.

Camden, Charles Pratt, Earl of. Chancellor of England. He was a powerful champion of constitutional liberty, and was termed the right arm of William Pitt, Lord Chatham. 1714-1794.

Cicero. Illustrious Roman orator and statesman. First century B. C.

Clarendon, Edward Hyde, Earl of, Chancellor and prime minister of England under Charles II. He was impeached and exiled. Two of his grand-daughters, Mary and Anne Stuart, became queens of England. He was eminent both as a historian and as a statesman. 1608-1674.

Coke, Sir Edward. One of the most eminent of English jurists and writers of law. He was a leader in parliament of the popular party, and suffered a brief imprisonment in the tower for his opinions. 1552-1633.

Comyns, Sir John. A British jurist, and author of an excellent digest of the laws of England. Died, 1740.

COWELL, JOHN. An English jurist, and author of "The Interpreter." Died, 1611.

COWPER, LORD WILLIAM. Chancellor of England, and chief adviser of George I. He attained great distinction in parliament as a debater on the side of the Whigs. He was a great uncle of the poet Cowper. 1644–1723.

CROKE, SIR GEORGE. A justice of the king's bench, and the author of "Reports of Select Cases." 1539–1641.

DIODORUS, SICULUS. Eminent Sicilian historian in the first century B. C.

DODDRIDGE, SIR JOHN. An English lawyer, jurist and author. 1555–1628.

DRACO. An Athenian legislator, whose penal code was so severe, that his laws were said to have been written in blood. Lived in the seventh century B. C.

DUNSTAN, Archbishop. An ambitious and eminent British prelate, who attained great power under king Edgar, the Saxon monarch. 925–988.

DYER, SIR JAMES. A jurist, and a writer of authoritative reports. 1511–1582.

EDWARD THE CONFESSOR. A Saxon king of England, who republished the laws of Alfred. On an invasion by the Danes, he took refuge in Normandy. 1040–1066.

EDWARD I. King of England; nicknamed Longshanks, from the length of his limbs. Blackstone terms him the English Justinian. He was an able, ambitious and politic prince. He participated in one of the crusades, and on his return to England subjugated Wales and invaded Scotland. In his reign, the house of commons was instituted, and great improvements were made in the common law. 1239–1307.

FINCH, HENEAGE, Earl of Nottingham. Chancellor of England and writer of reports. 1621–1682.

FITZHERBERT, SIR ANTHONY. A distinguished English lawyer in the reign of Henry VIII, and a justice of the court of common pleas. He was the writer of several able legal works, including a digest of the cases in the year books.

FLEETWOOD, WILLIAM. An eminent bishop and chaplain of William III. He was the most prominent preacher of his age and country, and a writer of marked ability.

FLETA. This work was written in the Fleet prison by some learned lawyer or jurist, in the reign of Edward I, under this assumed name.

FORTESCUE, SIR JOHN. Chancellor under Henry VI, whose adverse fortunes he shared, as he was a zealous Lancastrian. He fled to the continent with queen Margaret and her son, and on his return became the prisoner of Edward IV, after the battle of Tewksbury. The most celebrated of his works is his treatise *De Laudibus Legum Angliae*, written in the form of a dialogue. Died, 1485.

FOSTER, SIR MICHAEL. Judge of the court of king's bench. Blackstone termed him a great master of the crown law. 1689–1763.

GERVASE. A historian of the thirteenth century, who wrote a history of the kings of England.

GILBERT, SIR GEOFFREY. Chief baron of the exchequer. Author of the "Forum Romanum" and the "History and Practice of Chancery." 1674–1726.

GLANVILLE RANULPH DE. Chief justice under Henry II, and author of one of the earliest legal treatises that appeared in England. Having accompanied Richard I to Palestine, he lost his life at the siege of Acre, 1190.

GRATIAN. An Italian monk, who in 1151 made a compilation of the canon law.

GROTIUS, HUGO. An eminent Dutch jurist and theologian. His book on international law has been translated into nearly all European languages, and is a work of great merit. He left numerous works on jurisprudence. 1583-1645.

HALE, SIR MATTHEW. A prominent judge under Cromwell, and lord chief justice under Charles II. He is considered one of the greatest, wisest and best jurists England ever produced. His "History of the Common Law" and "Pleas of the Crown," are esteemed as very high authority. 1609-1676.

HAWKINS, WILLIAM. An English lawyer, who wrote on the subject of crown law in 1716.

HENGHAM, SIR RALPH DE. Chief justice under Edward I. Wrote a treatise on English law.

HERMOGENES. A celebrated Greek rhetorician in the second century.

HERODOTUS. The father of Greek History. Fifth century, B. C.

HOBART, SIR HENRY. Chief justice under James I. Author of Reports.

HOLT, SIR JOHN. An eminent English judge under William III.

HOVEDEN, ROGER DE. An English historian, lawyer and divine of the twelfth century.

HYDE, NICHOLAS. Chief justice of the king's bench, and uncle of the earl of Clarendon. 1572-1631.

INA. King of the West Saxons. Prominent as a legislator.

JONES, SIR THOMAS. Chief justice of the common pleas under James II.

JONES, SIR WILLIAM. An English judge under Charles I and James I, and the author of several legal works.

JOSEPHUS. The most celebrated of Hebrew historians. Lived in the first century.

JUSTINIAN. The celebrated emperor of the East. The greatest work of his reign was the revision of the Roman law, and the publication of his Codes, Pandects or Digests, and Institutions. He also framed many new laws, which are embraced in his Novels. He was aided in this great labor by the eminent jurist, Tribonian. 483-565.

LAMBARDE, WILLIAM. An eminent English master in chancery, who wrote a work on the Saxon laws. 1536-1601.

LITTLETON, THOMAS. A celebrated English judge. His treatise on tenures, written in Norman French, is regarded as the principal basis of the English law of property. Coke's commentary on Littleton is a widely known volume. 1420-1481.

LOCKE, JOHN A. A famous philosopher, whose most noted work was an "Essay on the Human Understanding." 1632-1704.

LYCURGUS. The renowned Spartan law giver, who introduced into his country social and political changes of a most radical kind. An equal division or

community of property was ordered, the use of gold and silver as money was prohibited, mechanical and menial employments were assigned to slaves, and the only profession allowed a Spartan was that of arms. Having exacted an oath from his people not to alter their laws until his return, he voluntarily exiled himself. He probably lived in the ninth century, B. C.

LYNDEWOOD, WILLIAM. Divinity professo at Oxford, and writer on ecclesiastical law under Henry V.

MONTESQUIEU, BARON. A popular French author, whose most noted work was the "Spirit of Laws," the success of which has been unprecedented in legal literature. 1689–1755.

MORE, SIR THOMAS. Eminent English statesman and chancellor. Beheaded, 1535.

MOSES. The great lawgiver, and leader of the children of Israel. He compiled a code of laws, and prescribed to the Hebrew people a theocracy as a form of government. Born, 1560, B.C.

MUNSTER, SEBASTIAN. German theologian and orientalist. 1489–1552.

PAPINIAN. A celebrated Roman jurist of marked integrity. He was executed by the emperor Caracalla in the year 212.

PAPIRIUS. Author of a collection of laws enacted in Rome during the reigns of the kings. He lived in the time of Tarquinius Superbus.

PARIS, MATTHEW. An English chronicler, who enjoyed the patronage of Henry III. He died in 1259.

PATERCULUS. A Roman historian, who wrote a valuable compendium of universal history. He lived under Augustus and Tiberius.

PIGOTT, NATHANIEL. Writer of a valuable work on common recoveries in 1739.

PITTACUS. One of the seven wise men of Greece. Died B. B. 569.

PLOWDEN, EDMUND. An eminent lawyer, who died in 1585. He left reports of important cases tried in the reigns of Edward VI, Mary and Elizabeth. His works were in high repute.

POLLEXFEN, SIR HENRY. Chief justice of the common pleas court of England in 1689.

POYNINGS. An Englishman, who, in the reign of Henry VII, aided in the suppression of a rebellion in Ireland. Laws were enacted at the time, termed "Poynings' Laws."

PRIDEAUX, HUMPHREY D.D. English ecclesiastical writer at the beginning of the 18th century.

PRYNNE, WILLIAM. Author of several volumes of records, and of a scurrilous pamphlet, for which he was sentenced to the pillory. He was a member of the long parliament, and an opponent of Cromwell.

PUFFENDORF, BARON SAMUEL. An eminent German jurist, and writer on international law. His works gave him a durable reputation throughout Europe. 1632–1694.

QUINTILIAN, MARCUS FABIUS. A celebrated Roman rhetorician in the reign of Domitian.

ROLLE, HENRY. An English judge, who refused to preside at the trial of Charles I. He compiled a digest, with the title of "Rolle's Abridgment."

RUSHWORTH, JOHN. An English compiler of materials for history. 1607–1690.

SAUNDERS, SIR EDWARD. Chief justice of the court of king's bench under Charles II, and writer of reports.

SELDEN, JOHN. A prominent lawyer and law writer. He was a member of the long parliament, in which he pursued a moderate course. He wrote a work on international law, and also a commentary upon English law. 1584–1654.

SENECA. An eminent Roman philosopher, who committed suicide, A. D. 65.

SMITH, SIR THOMAS. An English statesman and scholar, and for a time professor at Cambridge. He was the author of a work entitled, "The English Commonwealth." 1512–1577.

SOLON. An illustrious Athenian legislator. Both parties in the city tendered him the title of king, but he refused to accept supreme power. He repealed the sanguinary laws of Draco, and is ranked among the seven sages of Greece. Died 558 B. C.

SOPHOCLES. Greek tragic poet. Fifth century B. C.

SPELMAN, SIR HENRY. An eminent English antiquary, who wrote a valuable work on ecclesiastical decrees and laws. 1562–1641.

ST. GERMAIN, CHRISTOPHER. Author of the "Doctor and Student," or dialogues between a doctor of divinity and a student on the laws of England. Died 1540.

STATHAM, NICHOLAS. Author of an abridgement of the year books, published during the reign of Edward IV.

STAUNDEFORDE, SIR WILLIAM. This writer published in queen Mary's reign a work on the pleas of the crown.

SULPICIUS. A prominent Roman jurist, and author of legal works. Lived in the first century, B. C.

TACITUS. A celebrated Roman historian. His famous annals record the history of the empire from the death of Augustus to the death of Nero. His style is concise and vigorous. He lived at the close of the first century.

TALBOT, LORD CHARLES. A prominent jurist and an eloquent debater in parliament. He afterwards became lord chancellor. 1684–1737.

TEMPLE, SIR WILLIAM. A celebrated statesman, diplomatist and writer during the reign of Charles II. He was offered the position of secretary of state by William III, but declined the office.

THEODOSIUS II, the Younger. Emperor at Constantinople. The most important event of his reign was the compilation of the Theodosian code of laws. 401–450.

TRIBONIAN. An eminent Roman jurist, who, with nine other commissioners aided the emperor of the east in framing the famous Justinian code. 475–545.

ULPIAN. Roman author of several legal treatises, which were highly esteemed. He was secretary of the emperor Alexander Severus, and was killed in a mutiny of the praetorian guards.

VACARIUS. The first teacher of the civil law in England. He compiled an abstract of the Justinian code and digests. He lived in the twelfth century.

VAUGHAN, SIR JOHN. Chief justice of the common pleas court, and writer of reports. 1608–1674.

VERNON, THOMAS. Author of reports of chancery cases. Died, 1726.

VINER, CHARLES. An English lawyer and compiler, who published in 1751 an "Abridgement of Law and Equity," in twenty-four volumes. He bequeathed 12,000*l.* to establish a professorship of common law at Oxford, which chair was first filled by Blackstone.

WALSINGHAM, SIR FRANCIS. A statesman and diplomatist under queen Elizabeth. He was one of the commissioners in the trial of Mary, queen of Scots.

WILLIAM OF MALMESBURY. An early English historian, whose history of his country from 450 to 1137 is highly prized. 1095–1143.

WRIGHT, SIR MARTIN. Author of an excellent work on the law of tenures, which was largely cited by Blackstone in the second book of the Commentaries.

ZENO. A famous Greek philosopher, who founded the school of Stoics. Lived in the fourth century B. C.

GLOSSARY.

Ab antiquo—anciently.
Ab ardendo—from burning.
Abatement—reduction of debt or legacy; removal of a nuisance; wrongful entry upon a freehold; suspension of defective legal proceedings.
Abavus—great, great grandfather.
Abet—to encourage a crime.
Abdication—renunciation of office.
Abduction—the removal of a person by force or fraud.
Abeyance—expectation in law.
Ab ingressu ecclesiae—from entering church.
Ab initio—from the beginning.
Abjuration—allegiance renounced by oath.
Ab olim—formerly.
Aborigines—first inhabitants.
Abrogation—annulling a law.
Absque purgatione—without purifying.
Abutting—bordering, adjoining.
Accedas ad curiam—that you come to court.
Accessory—abettor to a crime.
Accord—satisfaction agreed upon.
Ac etiam—"and also;" term used in pleading.
Acquittal—discharge deliverance.
Actio personalis moritur cum persona—a personal action dies with the person.
Actores fabulae—actors of the fiction.
Actus Dei nemini facit injuriam—the act of God injures no man.
Ad aliud examen—to another examination.
Ad audiendum—for hearing.
Ad colligendum bona defuncti—for collecting the goods of the deceased.
Ad damnum—to the damage.
Ad exheredationem—to disinheriting.
Adjudication—a judgment in a cause.
Ad libitum—at pleasure.
Ad litem—for the suit.
Admeasurement—apportionment of dower.
Administration—management of intestates' estates.
Admiralty—of maritime jurisdiction.
Admittance—possession of copyhold estate.
Ad nocumentum—to the damage.
Ad ostium ecclesiae—at the church door.
Ad prosequendum—for prosecuting.
Ad respondendum—to answer.
Ad quod damnum—at what loss.
Ad satisfaciendum—to satisfy.
Ad studendum et orandum—for study and prayer.
Ad subjiciendum—to submit.
Ad terminum qui praeterit—for the term which has passed.
Ad testificandum—for witnessing.
Ad tractandum et consilium impendendum—for consulting and weighing advice.
Adultery—unfaithfulness of a married person.
Ad valorem—according to the value.
Advancement—gift by parent, in anticipation of an inheritance.
Adventitious—extrinsic, incidental.
Advowson—patronage of a vacant church.
Aedile—a Roman magistrate.
Aequitas sequitur legem—equity follows law.
Aetas infantiae proxima—age nearest infancy.
Affinity—relationship by marriage.
Affirmation—a solemn legal declaration.
A fortiori—by a stronger reason.
Affray—fighting in a public place.
Agistment—keeping cattle for hire.
Agnati—relations on the father's side.
Aids—occasional tribute to lords
A latere—at the side; attendants.
Alias—"other;" a second writ.

Alien—foreign born.
Alienation—transfer of property.
Alimony — allowance to a divorced or separated wife out of the husband's property.
Allegation—statement of facts.
Allegiance—obligation of each citizen.
Allodial—land not held of a superior.
Allotment—an assigned share.
Alluvion—increment to the bank of a river.
Almoner—distributor of charity.
A manendo—from remaining.
Amenable—answerable; responsible.
A mensa et thoro—from board and bed.
Amittere liberam legem—to lose free law; to become infamous.
Amnesty—oblivion of past offences.
Amotion—removal; ouster.
Anarchy—without government.
A nativitate—from his birth.
Ancient demesne—lands reserved to the crown.
Animo furandi—with design of stealing.
Animum revertendi—intent to return.
Animum testandi—testamentary discretion or intent.
Annuity—a yearly allowance.
Annul—abrogate; make void.
Antiquum—ancient.
A patre—from the father.
Appeal—an accusation under criminal law; submission to a superior decision.
Appearance—coming into court.
Appraisement—valuation of property.
Apprentice—indentured employee.
Approver—confessing guilt and accusing another.
Appurtenant—belonging or incident to.
Arbitrary—dependent on the will of the judge.
Arbitration—reference to umpires.
Arcana imperii—secrets of the empire.
Armigeri natalitu—esquires by birth.
Asportation—carrying away.
Assault—a violent attack.
Assets—fiduciary property.
Assignment—transfer of property.
Assize—ancient court or jury; a writ.
Assumpsit—he undertook; a promise.
Armistice—cessation of hostilities.
Arraignment — calling a criminal to answer in court.
Arson—burning another's house.
Articuli cleri—articles of the clergy.
A sequendo—from following.
Assurance—evidence of a conveyance.
Astuti—cunning.
Attachment—summary writ for contempt of court; seizure of debtor's property.
Attainder—corruption of blood.
Attaint—stained or blackened.
Attestation — witnessing an instrument.
Attorney—in another's turn.
Attornment—agreement of a vassal to receive a new lord.
Audita querela — complaint having been heard; a writ.
Auditors—parties appointed to adjust accounts.
Aula regis—hall of the king.
Aurum reginae—gold of the queen.
Autrefois—at another time.
Autre vie—another's life.
Averment—positive statement of fact.
A vinculo matrimonii—from the bond of matrimony.
Avoidance—special matter in pleading.
Avowry—an admission in replevin.
Avus—a grandfather.
Award—judgment of arbitrators.

Backing warrant—endorsement by a second justice of the peace.
Bail—surety for appearance.
Bailiff—an officer empowered to serve writs, and to distrain.
Bailiwick—the district of a bailiff or sheriff.
Bailment—delivery of goods in trust.
Ban—a proclamation; excommunication.
Bankrupt—"broken bench;" unfortunate debtor.
Bar—estoppel to an action; enclosed place in court for attorneys.
Baron—husband; title of nobility.
Baronet—a dignity above a knight.
Barratry—instigating law suits.
Barrister—legal counsellor.
Barter—contract to exchange goods.
Bastard—child born out of wedlock.

Battery—unlawful beating of another.
Bench warrant — writ of a criminal court.
Benefice—an ecclesiastical preferment.
Beneficiary—party benefitted.
Beneficium—feud or fief.
Benefit of clergy — exemption from death penalty.
Bequest—personalty left by will.
Bigamy — having two wives or husbands at the same time.
Bill—plaintiff's statement of action in courts of equity.
Billa vera—"true bill," endorsement on an indictment.
Bill of exchange—open letter of request to pay money.
Black-mail — rent paid in work or grain; extortion of money.
Bona confiscata—confiscated goods.
Bona dea—the good goddess.
Bona fide—in good faith.
Bona notabilia—goods of a decedent elsewhere.
Bona vacatia — goods lost or abandoned.
Bona waviata—goods abandoned by a thief.
Bond—sealed obligation to pay money or to perform some act.
Breach—violation of a duty.
Brehon—ancient Irish law.
Breve—a writ briefly stated.
Brevia testata—short proofs.
Bribery—giving or taking corrupt reward.
Borough—an incorporated town.
Borough English—an ancient custom.
Bottomry—mortgage on a ship.
Bull—edict or rescript of the pope.
Burg—a borough; a castle.
Burgage—a tenure in socage.
Burgesses—magistrates of boroughs.
Burglary—felonious breaking into a dwelling-house at night.

Caesarian operation—extracting the foetus through an incision made in the abdomen.
Cancelli—lattice work; cancelling.
Canon—ecclesiastical law.
Capias ad respondendum—that you take him to answer; a writ.
Capias utlagatum—that you take the outlaw.
Capiatur—that he be taken.
Capital punishment—death penalty.
Caput lupinum—head of wolves.
Caput, principium et finis—the head, beginning and end.
Cassetur breve — let the writ be quashed.
Casus omissus—omitted or unsettled case.
Catalla otiosa—cattle unworked.
Causa mortis—in view of death.
Caveat—that he beware; a warning.
Caveat emptor—let the buyer beware.
Census regalis—royal revenue.
Centenarius—head of a hundred.
Ceorl—a Saxon peasant.
Cepi corpus—"I have taken the body;" return by sheriff to writ of *capias*.
Cepit et asportavit—he took and carried away.
Certiorari—to be certified or informed of; a writ from a higher to a lower court.
Cessante ratione, cessat et ipsa lex—the reason ceasing, the law itself ceases.
Cestui que use or trust—one to whose use land is granted.
Cestui que vie—one for whose life a grant is made.
Challenge—exception to a juror.
Champerty—contingent interest in a suit.
Chance-medley—homicide in self-defence.
Chancellor—chief judge in chancery.
Chancery—court of equity.
Charter—a grant from a sovereign power.
Chase—space reserved for hunting; acquiring animals "ferae naturae."
Chattel—property other than freehold.
Chaud-medley—killing in hot blood.
Chicane—trickery.
Chivalry—tenure by knight's service.
Choses in action—things to be obtained by suit, not being in possession.
Chronicon pretiosum—valuable chronicle.
Church-warden—guardian of a church.
Circa ardua regni—concerning the weighty affairs of the kingdom.
Circumspecte agatis—act cautiously.

Citation—order of court to appear and show cause.
Civilian—one versed in the civil law.
Civiliter mortuus—civilly dead.
Civil law—ancient Roman law.
Civil list—schedule of royal revenue.
Clausum fregit—"he broke the enclosure."
Clerk—one in ecclesiastical orders.
Close—enclosure; interest in the soil.
Code—a compilation of laws.
Codicil—a supplement to a will.
Coercion—constraint; force
Coeval—of the same age.
Cognati—relations by the mother.
Cognizable—under judicial notice.
Cognizance—acknowledgement in replevin.
Cognovit actionem—he acknowledged the action or debt.
Cohabitation—living together.
Collateral—indirect side issue.
Collatio bonorum — assessment of goods.
Collation—bestowing a benefice; comparison of a copy.
Collegia—colleges.
Colloquium—conference; discourse.
Collusion—illegal secret agreement.
Comes—a count or earl.
Comitatus—a county.
Comites—earls; attendants.
Commendam—a recommendation.
Commendam recipere—to receive a trust.
Commitment—order of imprisonment.
Committee—guardian of a lunatic.
Commodatum—a lending.
Common—profit in another's lands.
Commonalty—untitled people.
Common law—immemorial customs of England.
Common recoveries—judgments in fictitious suits for entailed lands.
Commune concilium — the general council.
Commune vinculum—common bond.
Communibus annis—in ordinary years.
Communion of goods—personal property in common.
Community—the people; in civil law, corporations; profits acquired by husband and wife.
Commutation—change of punishment.
Compassing—contriving, plotting.
Competency—legal fitness of the evidence.
Compiling —summary of the works of others.
Composition—agreement with creditors.
Compos mentis—sound of mind.
Compounding—unlawful settlement of a crime.
Compurgators—witnesses to clear an accused party.
Concessi—I have granted.
Concurrent—joint and equal.
Conditor—founder.
Condonation—marital forgiveness.
Confession—admission of criminal act; in pleading, admission of opponent's averment.
Confirmation—making a voidable estate sure; species of conveyance.
Confiscation—forfeiture of property, as punishment for a crime.
Conge d'eslire—permission to elect.
Conjuration—a sworn compact.
Connivance—consent to an unlawful act.
Consanguinity—blood relationship.
Consensus, non concubitus facit nuptias — consent, not cohabitation, makes marriage.
Conservatores pacis—keepers of the peace.
Consideratum est per curiam—it is considered by the court.
Consistory—ecclesiastical tribunal.
Conspiracy—agreement to do an unlawful act.
Constable—a ministerial officer.
Constat de persona—there is proof of the person.
Constitutions of Clarendon — under Henry II, checking the clergy.
Contempt—disobedience of an order of court.
Contestatio litis—joinder of issue in a suit.
Contingency—a doubtful event.
Contingent remainder—an estate dependent upon an uncertain person or uncertain event.
Continuance—adjournment of a cause.
Contra—otherwise.
Contra bonos mores—against good morals.

Contra pacem—against the peace.
Contra praeceptum Dei—against God's command.
Conversion—unlawful application of another's goods.
Conveyance—transfer of title to land.
Convocation—an assembly.
Coparcenary—estate held in common by female heirs.
Copyhold—an estate held by the will of the lord.
Copyright—temporary property in a literary composition.
Coram non judice—before one not sitting as a judge.
Coram paribus—before the peers.
Cornage—tenure, by blowing a horn for the lord during war.
Corody—allowance for sustenance.
Coroner—a crown officer, who examines cases of sudden death.
Corporal—bodily; a military officer.
Corporeal—palpable, tangible.
Corpus juris civilis—body of civil law.
Corruption of blood—incapacity to inherit.
Corsned—accursed bread, swallowed by an accused party.
Couchant—lying down.
Counties-palatine—four English counties with special charters.
Court-leet—an ancient criminal court.
Covenant—contract under seal; an action thereon.
Coverture—state of a married woman.
Covin—fraud.
Cozening—cheating.
Creamus, erigimus, fundamus—we create, erect, found.
Crepusculum—twilight.
Crimen falsi—crime of forgery.
Crimen laesae majestatis—the crime of high treason.
Criminal conversation—adultery.
Criteria—standards of judging.
Cross-bill—cross action by defendant in chancery.
Cucking-stool—for ducking common scolds.
Cujus est divisio, alterius est electio—whoever has the division, the other has the election.
Cujus est solum, ejus est usque ad coelum—whose soil it is, it is his even to heaven.
Cum testamento annexo—with the will annexed.
Curate—a clergyman, having the care of a church.
Curator—a guardian.
Curia advisare vult—the court will consider.
Curia christianitas—ecclesiastical court.
Curialitas—tenancy by the curtesy.
Curia magna—great court.
Curfew—Norman law, to cover fires, and retire at eight o'clock.
Curtesy—a husband's interest in the property of his deceased wife.
Curtilage—ground adjoining a house.
Custodiam comitatus—custody of the county.
Custos morum—keeper of the morals.
Custuma—customs.
Cy pres—"as near as" it is possible to execute the will of a testator as to perpetuities.

Damage feasant—doing damage.
Damnum absque injuria—damage without injury.
Dane-lage—Danish law.
Darrein—last.
Days of grace—three days additional time given to pay notes and bills.
De avo—from the grandfather.
Dean—ecclesiastical officer.
De bene esse—conditionally.
Debet et detinet—he owes and detains.
De bonis non—of the goods not" administered.
De bono et malo—of good and evil.
Debt—a special form of action.
Decedent—a deceased person.
Decem tales—a tales of ten.
Decemviri—ten Roman legislators.
Declaration—written statement of the plaintiff's case.
Declaratory—explanatory.
De credulitate—on their belief.
Decree—judgment of an equity court.
Decretals—canonical epistles.
De debitore in partes secando—of cutting the debtor into pieces.
Dedi et concessi—I have given and granted.

Dedimus potestatem—we have given power.
De donis—of gifts.
Deed—a contract under seal.
Deed-poll—a deed made by one party and not indented, but polled or shaved.
De estoveriis habendis—of having estovers.
De facto—in fact.
Defalcation—cross demand or set off made by a defendant; act of a defaulter.
Defeasance—a deed to defeat another deed.
Defeasible—may be defeated.
Deforcement—wrongful detention of realty.
De heretico comburendo—burning a heretic.
De homine replegiando—of replevying a man.
Dehors—out of; foreign to.
De idiota inquirendo—inquiry of idiocy.
De jure—by right or law.
De la plus belle—of the most beautiful.
Delegated—chosen or empowered.
Demagogue—factious popular leader.
De medietate linguae—"as to a moiety of the language;" jury partly of foreigners.
De mercatoribus—of merchants.
Demesne—land retained by the lord.
De militibus—of soldiers.
De minimis non curat lex—the law cares not for small things.
Demise—death; a conveyance.
Demissio regis—demise of the king.
De modo decimandi—manner of tithing.
Demurrer—an objection in pleading.
Denizens—aliens made English subjects.
De non decimando—exempt from tithes.
De novo—anew.
Deodand—"gift to God," forfeited instrument which caused death.
De odio et atia—of hatred and ill-will.
De pace et legalitate tuenda—for maintaining peace and law.
Depose—to testify by deposition.
Deposition—written testimony.
De prerogativo regis—king's prerogative.
De proprietate probanda—proving ownership.
De rationabili parte bonorum—of the reasonable part of the goods.
Derelict—land left by the sea; abandoned goods.
De religiosis—of religious persons.
De retorno habendo—"of having a return;" writ issued after a judgment in replevin.
Dernier resort—the last resort.
De son tort—"of his own wrong;" having no authority to act.
Detainer—detention of person or property.
Determine—to end or terminate.
Detinue—action to recover chattels.
De uxore rapta et abducta—for seizing and abducting his wife.
Devastation—waste.
Devenio vester homo—"I become your man;" feudal investiture.
De ventre inspiciendo—for inspecting pregnancy.
Devisavit—he devised.
Devise—gift of realty by will.
Dies juridice—court days.
Diet—an assembly of officials.
Digests—compilations; works of Justinian.
Dignities—titles of honor.
Dilapidation—neglect to repair.
Diminution of record—incomplete record.
Diocese—a bishop's district.
Disclaimer—renunciation of claim.
Discontinuance—an interrupted suit; wrongful enlargement of an estate tail.
Disfranchise—deprivation of rights.
Disherison—disinheritance.
Dispensation—permit or immunity.
Disseisin—ouster of the freehold.
Dissenters—seceders from the established church.
Distraint—making a distress.
Distress—seizure of chattels for a debt, as for rent.
Distribution—division of the estate of an intestate.
Districtio—a distress.
Distringas—that you distrain.

Disturbance — disquieting the owner of an incorporeal hereditament.
Dividend—division of profits or principal.
Divisum imperium — divided authority.
Divorce — dissolution of marriage by act of law.
Doarium—dower.
Docket—a court record.
Doli capax—capable of deceit.
Dome-book—Alfred's code of customs.
Domesday book — William the Conqueror's survey of English lands.
Dominium utile — beneficial ownership.
Dominus ligius—liege lord.
Dominus manerii—lord of the manor.
Domitae naturae—of tame nature.
Domus mansionalis Dei—the mansion house of God.
Donatio feudi—gift of a feud.
Donatio mortis causa—gift in prospect of death.
Donor and donee—giver and recipient.
Dos rationabilis—a reasonable dower.
Dotalitum—dower.
Dotation—endowment of a person or charity.
Do ut des—I give, that you may give.
Do ut facias—I give, that you may do.
Dowager—a widow endowed.
Dower — widow's estate in her husband's property.
Drawer and drawee.—parties to a bill of exchange.
Droit d'aubaine—right of escheat.
Droits—rights.
Druids—ancient priests of Britain.
Duces tecum—that you bring with you.
Dum bene se gesserit—while he shall have acted well.
Dum sola—while unmarried.
Duplex querela—a double complaint.
Duplicem valorem maritagii—double the value of the marriage.
Duplicity—double and defective pleading.
Durante absentia—during absence.
Durante bene placito — during our good pleasure.
Durante minore aetate—during minority.
Durante viduitate — during widowhood.
Duress—restraint.
Duties—customs or imposts.

Earnest—part payment of price.
Easement—liberty in another's lands.
Ecclesiastical—pertaining to the church.
E converso—on the other hand.
Edict—a proclaimed law.
Ejectione firmae—by ejection of farm.
Ejectment—action to recover realty with damages.
Eleemosynary—almsgiving.
Elegit—"he has chosen;" a writ to seize a moiety of lands.
Eligible—capable of office.
Elisors—officers returning a jury.
Eloign—a return in replevin, when the goods have been removed.
Embargo—prohibition of departure of ships during war.
Emblements—growing crops.
Embracery—attempt to corrupt a jury.
Eminent domain—public right to appropriate private property.
Empanel—to make a jury list.
En auter droit—"in another's right."
Encumbrance—a charge on property.
Endorse—"on the back;" signature on a note or bill.
Endowment—bestowment of dower; provision for an institution.
Enfeoff—to transfer land.
Enfranchise—to make free.
Engrossing—controlling the market to increase prices.
Enjoin—to command.
Enrol—to register; enter of record.
Entail—to create an estate-tail.
Entirety—estate jointly to husband and wife.
Entry — taking possession of land; breaking into a house.
Eo instanti—from that instant.
Equity—justice; a graft upon the law.
Equity of redemption—time allowed a mortgagor to redeem.
Equivalent—of the same value.
Erasure—obliteration of a writing.
Eriach — recompense to the wife or child of a murdered party.
Error, vide—writ of error.

Escape—premature deliverance of a prisoner.
Escheat—claim of the state or lord to property of decedent dying without heirs.
Escrow—conditional delivery of a deed to a third party.
Essoin—excuse for absence from court.
Estate-tail—limited to heirs of body.
Esto perpetua—do thou endure forever.
Estoppel—an act which precludes a man from averring to the contrary.
Estovers—right of taking wood from another's forest.
Estrays—cattle without known owner.
Estrepement—a writ to prevent waste on an estate.
Ethics—doctrines of morality.
Et hoc paratus est verificare—and this he is ready to verify.
Eviction—ejection; deprivation of rights.
Ex aequo et bono—by equity and right.
Ex arbitrio judicis—at the judge's will.
Ex assensu patris—by assent of the father.
Exchequer—ancient English court.
Excise duty—an inland tax.
Excommunication—ecclesiastical sentence.
Ex contractu—by way of contract.
Ex debito justitiae—by debt of justice.
Ex delicto—from wrong done.
Ex donatione regis—by gift of the king.
Executive—branch of supreme power.
Executor—appointee of a testator to execute his last will.
Executory—what may be executed.
Executory devise—limitation by will of a future contingent interest in lands.
Exemplification—copy or transcript.
Exemption—immunity; privilege.
Ex facto oritur jus—the law arises from the fact.
Ex gratia—as matter of favor.
Exigi facias—you cause to be required.
Exile—banishment.
Ex necessitate rei—from the urgency of the affair.
Ex nudo pacto non oritur actio—from a barren contract no action arises.
Ex officio—by virtue of office.
Ex parte paterna—by the father's side.
Ex post facto—after the fact.
Expressio unius est exclusio alterius—the expression of one thing is the exclusion of another.
Extent—an exchequer process.
Extortion—oppression under color of right.
Extra quatuor maria—beyond four seas.
Ex visitatione Dei—by God's visitation.
Ex vi termini—by force of the term.
Eyre—"journey;" itinerant justices.

Facio, ut des—I do, that you may give.
Facio, ut facias—I do, that you may do.
Factor—agent employed to sell goods.
Factum—a deed.
Fallo, fefelli—I deceive, I have deceived.
Fas—lawful.
Favor—challenge of jury for partiality or prejudice.
Fealty—fidelity to a feudal lord.
Feasant—doing.
Fee simple—highest estate in lands.
Fee-tail—limited to heirs of the body.
Feigned issue—framed to try disputed facts.
Felo de se—a suicide; a felon of himself.
Feme—a woman or wife.
Feme-covert—married woman.
Feme-sole—single woman.
Feoda—feuds, fiefs or fees.
Felony—offence involving forfeiture.
Feodum militare—knight's fee.
Feoffment—a conveyance of land.
Ferae naturae—of wild nature.
Festinum remedium—speedy remedy.
Feud—land granted by feudal lord.
Feuda individua—impartible fee.
Feudatory—feudal tenant.
Feudum antiquum—ancient fee.
Feudum apertum—an open fee.
Feudum avitum—ancestorial fee.
Feudum ligium—a liege fee.
Feudum novum—a new fee.

Fiat—an order.
Fidei commissum—a trust.
Fidei jussores—sureties of faith.
Fidelitas—fealty.
Fiduciary—in trust.
Fief—land granted to a feudatory.
Fieri facias—that you cause to be made; a writ of execution, directed to the sheriff.
Filii nobilium—sons of nobles.
Filius nullius—son of no one.
Finalis concordia—final agreement.
Fines—ancient mode of conveyance; sum ordered paid under decree of court; payment to feudal lord.
Finesse—artifice, stratagem.
Fire-bote—fuel allowed to tenants.
Fiscus—the public treasury.
Fit juris et seisinae conjunctio—there is a joining of law and seisin.
Fixtures—articles attached to the freehold.
Flagrante delicto—in open crime.
Flotsam—goods floating on the sea.
Foenus nauticum—naval usury.
Folk-land—held at the lord's pleasure.
Folk-mote—a Saxon court.
Forcible entry—the violent taking of realty.
Foreclosure—execution on a mortgage.
Forestalling—device to increase the price of provisions.
Forgery—the fraudulent making or alteration of a writing.
Forisfacta—confiscated goods.
Forma et figura judicii—the form and manner of judgment.
Formedon—ancient writ to recover entailed property.
Fornication—sexual intercourse of an unmarried party with any person.
Forum—tribunal; court of justice.
Franchise—right or privilege.
Frankalmoign—"free alms;" tenure of lands by religious corporations.
Franking—privilege of using the mails without cost.
Frank-marriage—lands given with a wife to a man.
Frank-tenure—tenancy of a freehold.
Frater uterinus—brother on the mother's side.
Frauds — statute of, passed under Charles II (1677).
Fraunke ferme—tenure by socage.
Free-bench—widow's interest in husband's land.
Freehold—land held by free tenure.
Free socage—feudal tenure, where the service was both free and certain.
Free-warren—a free enclosed space for animals.
Fundamental—at the foundation.
Funds-public—a sum secured to pay the interest on the national debt.

Gage—pledge or security.
Gaolers—keepers of a jail.
Gavelkind—a tenure in Kent, by which lands were equally divided between the sons.
Gemote—an assembly in Saxon times.
Generali senatus et populi conventu—by the general assembly of the senate and people.
Gestation—time of pregnancy.
Glebe—church land.
Grand jury—a body of men, to whom indictments are referred.
Grand serjeanty—an ancient military tenure.
Grantor and grantee—the giver and receiver of a grant.
Gratis—without reward or consideration.
Gross—entire.
Guardian—custodian of the person or property of a minor.

Habeas corpus—that you have the body; a writ to produce a person in court.
Habendum et tenendum—to have and to hold; a clause in a deed.
Habere facias possessionem—that you cause him to have possession; a writ of execution in an action of ejectment.
Habiles ad matrimonium—fit for marriage.
Habiliments—garments.
Habitum et tonsuram clericale—clerical attire and tonsure.
Haereditas jacens—unoccupied inheritance.
Haereditas nunquam ascendit—the inheritance never ascends.
Haeres natus—the heir born.

Half-blood—children having but one parent in common.
Hame-secken—invasion of a dwelling.
Hamlet—a small village.
Haven—a harbor for ships.
Heir—one who succeeds by descent and right of blood.
Heir-loom—chattel annexed to an inheritance.
Helots—Spartan slaves.
Heptarchy—seven English kingdoms united under king Egbert.
Heraldry—armorial ensigns.
Hereditament—anything capable of being inherited.
Hereditary—what is inherited.
Heresy—adoption of false religious views.
Heretical—erroneous religious views.
Homagium—manhood.
Homicide—killing of a human being.
Honoris causa—as a mark of honor.
Hostis humani generis—enemy of the human race.
Hotch-pot—mingling of property to effect an equal division.
House-bote—allowance of timber to tenant for house purposes.
Hundred—district of country containing one hundred families.
Hypothecation—pledge of a security.

Ibi est poena, ubi et noxia est—where the crime is, there is also the punishment.
Id certum est, quod certum reddi potest—that is certain, which can be made certain.
Idem sonans—"sounding the same;" where a name is mis-spelled.
Ides, nones and calends—Roman mode of computing time.
Ignoramus—"we know nothing;" endorsement by a grand jury on an unfounded indictment.
Ignorantia legis excusat neminem—ignorance of law excuses no man.
Illicitum collegium—unlawful college.
Imbecility—mental weakness.
Immunity—exemption.
Immutable—unchangeable.
Immemorial—time out of mind.
Impanel—to draw a jury.
Imparl—to confer in private.
Imparlance—time granted to plead.
Impartible—not subject to partition.
Impeachment—punishment of an official.
Imperator—commander; emperor.
Imperial law—civil law of the Roman empire.
Imperium in imperio—a government within a government.
Impertinent—matter not pertaining to.
Implead—to sue.
Implication—inference.
Imports—goods brought into a country.
Imposts—duties on imported goods.
Impotence—incapacity for copulation.
Impotentia excusat legem—want of power excuses the law.
Impressing—compelling into service.
In arcta custodia—in close custody.
In auter droit—in another's right.
In bonis, in terris, vel persona—in his goods, lands or person.
In capite—in chief, or of the king.
In casu consimili—in a similar case.
Incest—copulation by parties closely related.
Inchoate—not finished.
In clientelam recipere—to receive in protection.
Incolae territorii—inhabitants of the land.
In commendam—in trust.
Incorporeal—not objects of sense.
Incrementum—an increase.
Incumbent—occupant of an office.
Indebitatus, assumpsit—being indebted, he undertook.
Indefeasible—cannot be defeated.
Indemnity—security against damage.
Indenture—conveyance or contract with indented edges.
Indicavit—he showed.
Indictment—written accusation before a grand jury.
Indorsement—name on the back of a bill or note.

Inducement—introductory matter in a declaration or plea.
Induction—possession of the temporalties of a benefice.
Ineligible—incapable of election.
In esse—in being.
In extremis—in his last moments.
In facie ecclesiae—in the presence of the church.
Infamy—loss of honor, through conviction of crime.
Infant—one under twenty-one years.
In favorem prolis—in favor of offspring.
In favorem vitae—in favor of life.
Infeudation—granting a feud.
In feudis antiquis—in ancient fees.
In feudis novis—in new fees.
In fictione juris consedit aequitas—a legal fiction is consistent with equity.
In fieri—in being done.
Information—ancient mode of accusation.
Informer—one who prefers an accusation; the party informing.
In foro conscientiae—in the court of conscience; conscientiously.
In foro seculari—in the secular court.
Infra annum luctus—within the year of mourning.
Infra sex annos—within six years.
Infra tempus semestre—within half a year.
In fraudem legis—contrary to law.
Infringement—violation.
In futuro—in the future.
In gross—entire.
Inheritance—property inherited.
Inhumanum erat, spoliatum fortunis suis, in solidum damnari—it was inhuman, being deprived of his fortune, to be utterly ruined.
In infinitum—forever.
In itinere—on the circuit.
In judicio, non creditur nisi juratis—no one is believed in court unless sworn.
Injunction—a restraining writ.
In libero maritagio—in frank-marriage.
In loco parentis—in the place of a parent.
In manu—in his hand; in possession.
In mortua manu—in a dead hand.
Inns of court—colleges of the students of common law.
In nubibus—in the clouds.
Innuendo—explanatory averment.
Innovation—change to something new.
Inops consilii—without counsel.
In pais—in the country; in fact.
In pari delicto—in equal fault.
In perpetuum rei testimonium—in perpetual testimony of the fact.
In personam—in respect to the person.
In pios usus—to pious uses.
In potentia—in possibility.
In potestate parentis—in a parent's power.
Inquest—examination by an official.
Inquisition—examination by a sheriff's jury.
Inquisitio post mortem—an inquisition after death.
In rem—in respect to the thing.
Insignia—badges of office or honor.
Insimul computassant—they had accounted together.
Insolvency—inability to pay debts.
Instar dentium—like teeth.
In statu quo—in the condition in which it was.
Institutes—writings of Justinian.
Inter alia—among other things.
Interdict—prohibitory ecclesiastical censure.
Interesse termini—interest in the term.
Interest reipublicae, ut sit finis litium—it is for the interest of the republic, that there should be an end of suits.
Interlocutory—not a final decision.
Internecine—destructive.
Interpleader—to decide the claim of a third party.
Intra moenia—within the walls.
In transitu—in passage.
In vadio—in pledge.
Inventory—schedule of personal property.

In ventre sa mere—in his mother's womb.
Investiture—possession of lands by actual seisin.
Invito domino—the owner being unwilling.
Involuntary—acting without will.
Ipso facto—by the fact itself.
Irrelevant—not material.
Irrevocable—cannot be revoked.
Is qui cognoscit—he who acknowledges.
Issue—children, heirs; material point involved.
Ita lex scripta est—so the law is written.
Itinerant—traveling.

Jactitation—boasting of marriage.
Jeofails—"I have failed;" a statute correcting errors.
Jeopardy—peril, danger.
Jetsam—sunken goods thrown from a vessel.
Joinder—several counts in the same declaration; a joining.
Joint tenants—joint holders of land.
Jointure—wife's life interest in her husband's lands, under a contract.
Judicatum solvere—to pay what is adjudged.
Judices delegati—delegated judges.
Judicium Dei—judgment of God.
Judicium ferri aquae et ignis—the judgment of iron, water and fire.
Jura rerum—the rights of things.
Jure divino—by divine right.
Jure ecclesiae—by right of the church.
Jure gentium—by the law of nations.
Jure uxoris—in right of his wife.
Juridical—in conformity with law.
Jurisdiction—power of a judge or court.
Juris et seisinae conjunctio—a joining of right and seisin.
Juris positivi—of positive law.
Jurisprudence—the science of law.
Jus accrescendi—right of survivorship.
Jus ad rem—right to the thing.
Jus commune—the common law.
Jus coronae—right of the crown.
Jus dare—to enact the law.
Jus dicere—to declare the law.
Jus duplicatum—a double right.
Jus et seisina—a right and seisin.
Jus fiduciarum—right held in trust.
Jus in re—a right in the thing.
Jus legitimum—a legal right.
Jus non scriptum—unwritten law.
Jus patronatus—right of advowson.
Jus postliminii—law of reprisal.
Jus precarium—right by courtesy.
Jus proprietatis—right of property.
Justiciarii in itinere—justices on a circuit.
Justification—defence of an act.

Kidnapping—forcible abduction of a person.
Kindred—relations by blood.
King's bench—the supreme court of England.
Knight's service—the most honorable species of feudal tenure.

Laches—delay through negligence.
Lage—laws in early Saxon times.
Laity—distinct from the clergy.
Lapse—a slip or failure.
Larceny—fraudulent taking of another's goods.
Larzaret—quarantine for infected vessels.
Latitat—"he lies concealed;" a writ.
Lay—not ecclesiastical.
Lease—contract for rent of lands and tenements.
Legacy—bequest of goods or money.
Leges non scriptae—unwritten laws.
Leges posteriores priores contrarias abrogant—later laws repeal former contrary ones.
Leges scriptae—written laws.
Legislator—one who makes laws.
Legitimacy—born in wedlock.
Le grand costumier—the great book of customs.
Legum Anglicarum conditor—founder of the English laws.
Lessor and lessee—landlord and tenant.

Letters of marque and reprisal—permission to attack foreign ships.
Letters patent—rights granted to an inventor.
Levant et couchant—rising up and lying down.
Levari facias—"that you cause to be levied;" a writ of execution.
Levy—an official seizure of property.
Lewdness—licentiousness.
Lex et consuetudo—law and custom.
Lex non scripta—unwritten law.
Lex scripta—written law; statutes.
Lex talionis—law of retaliation.
Libel—written or printed defamation; petition in admiralty or divorce.
Libelli famosi—notorious libels.
Liberam legem—free law.
Liber et legalis homo—a free and lawful man.
Liber judicalis—judgment book.
Liberi eleemosyna—free alms.
Liberi sokemanni—free socage-men.
Liberos homines de vicineto—freemen of the neighborhood.
Liberum animum testandi—free will in bequeathing.
Liberum et commune socagium—free and common socage.
Liberum tenementum—frank tenement; freehold.
Licentia loquendi—liberty of speaking.
Liege—bond between lord and vassal.
Lien—an encumbrance upon property; right of detaining a chattel, until a claim be paid.
Ligamen—tie.
Ligan—goods cast into the sea, and fastened to a buoy.
Ligeance—allegiance.
Limitation—bar to an action, by lapse of time; an estate contingent as to time.
Lineal—in a direct line of descent.
Liquidated—ascertained.
Literae clausae—writs close or concealed.
Litigation—suit in court.
Litigious—disposition to sue.
Liturgy—ritual of worship.
Livery of seisin—delivery of possession of lands and tenements.
Locatio—a hiring.
Lollards—sect of religious reformers.
Loyalty—adherence to government.
Lucid interval—space between two attacks of insanity.
Lucri causa—for the sake of gain.
Lunacy—unsound of mind.

Magis fit de gratia, quam de jure—it is more of favor than of right.
Magister census—officer of valuations.
Magna carta—great charter.
Magnum concilium regis—great council of the king.
Mainour—a stolen article in the hand of the thief.
Mainpernor—surety in a criminal suit.
Mainprise—custody of a man with his surety.
Maintenance—interference of a third party with a suit.
Majora et minora—greater and lesser.
Mala grammatica non vitiat chartam—bad grammar does not vitiate a deed.
Mala in se—crimes in themselves.
Mala praxis—bad practice.
Mala prohibita—crimes (because) forbidden.
Malfeasance—wrongful act.
Malitia praecogita—malice aforethought.
Malitia supplet aetatem—malice supplies age.
Malo animo—with evil intent.
Malus usus abolendus est—a bad custom should be abolished.
Mandamus—"we command;" a peremptory order of court.
Mandate—an order.
Manerium—a manor.
Manors—lands granted by the king.
Manslaughter—unlawful killing without malice.
Manu forti—with strong hand.
Manumission—agreement to free a slave.
Marche—limit or border.
Mareschal—military commander.

Maritagium—marriage.
Maritime—relating to the sea.
Marque and reprisal—commission to seize property of an enemy of the nation.
Marshalsea—prison of king's bench.
Martial law—military rule.
Master—an employer; commander of a ship; an officer in chancery.
Maternum—the mother's side.
Matter in pais—in fact, and not in law.
Maxim—an accepted proposition.
Mayhem—violent deprival of a member useful in fight.
Membrum pro membro—limb for limb.
Memento—a reminder.
Merger—sinking a lesser estate into a larger.
Mesne—middle; between original and final process in ejectment cases.
Messuage—dwelling and grounds.
Metropolitan—an archbishop.
Meum et tuum—mine and thine.
Michel-gemote—great meeting.
Miles—a knight; a soldier.
Ministerial—by command of another.
Minor—child under twenty-one years
Misdemeanor—inferior crime to felony.
Misfeasance—rightful act, wrongly performed.
Misjoinder—actions or parties wrongly joined.
Misnomer—wrong name.
Misprision—concealment of a crime.
Misuser—unlawful use of a right.
Mittimus—"we send;" a commitment.
Modus—manner.
Moiety—the half of anything.
Monastery—a house of religious retirement.
Monoply—combination to raise prices.
Mons sacer—the sacred mount.
Monstrans de droit—showing of right.
Mort d'ancestor—the death of the ancestor.
Mortgage—conveyance of lands as a pledge for a debt.
Mortgagor and mortgagee—giver and receiver of a mortgage or "dead pledge."
Mortis causa—in view of death.
Mortmain—unlawful alienation of land to a corporation.
Mortuaries—gifts to the clergy on the death of a parishioner.
Mortuum vadium—"dead pledge;" mortgage.
Mulier—woman or wife.
Municipal—law of a city or state.
Murder—wilful killing with malice.
Mutiny—revolt in the army or on a ship.
Mystery—a trade or occupation.

Nam de minimis non curat lex—for the law cares not for trifles.
Nam leges vigilantibus, non dormientibus subveniunt—for the laws aid the vigilant, not the inactive.
Nam omne crimen ebrietas, et incendit et detegit—for drunkenness excites and discloses every crime.
Nam qui facit per alium, facit per se—for he who does a thing by another, does it himself.
Nam qui haeret in litera, haeret in cortice—for he who sticks to the letter, sticks in the bark.
Nam silent leges inter arma—for laws are silent midst arms.
Nativi—male villeins.
Naturalization—making aliens citizens.
Ne exeat regno—he shall not leave the kingdom.
Nefas—unlawful.
Negotiable—assignable by endorsement.
Neife—a feudal bondwoman.
Ne injuste vexes—do not unjustly oppress.
Nemo bis punitur pro eodem delicto—no one is punished twice for the same offence.
Nemo est haeres viventis—no one is heir to the living.
Nemo potest exuere patriam—no one can renounce his country.
Nemo tenetur seipsum accusare—no one is bound to accuse himself.
Nemo testis esse debet in propria

causa—no one should be a witness in his own cause.
Next of kin—nearest blood relations.
Nient culpable—not guilty.
Nihil dicit—he says nothing.
Nihil habet—he has nothing; return to a writ.
Nil debet—he owes nothing.
Nisi prius—"unless before" tried.
Noli or nolle prosequi—to be unwilling to prosecute or proceed.
Nomen generalissimum—the most general name.
Non-age—under legal age.
Non assumpsit—he did not undertake.
Non compos—not sound of mind.
Non-conformity—disagreement with the established church.
Non constitit—it has not been shown.
Non est inventus—he is not found.
Non jus, sed seisina, facit stipitem—not right, but seisin makes the stock.
Non obstante—notwithstanding.
Non scriptae—not written.
Non suit—stoppage of action by default of the plaintiff.
Non sum informatus—I am not informed; I am ignorant.
Non user—neglect to use.
Non vult prosequi—he will not prosecute.
Novation—substitution of a new debt.
Novel disseisin—new disseisin.
Novels—works of Justinian.
Nudum pactum—naked agreement; a contract without consideration.
Nuisance—an annoyance.
Nul disseisin—no ouster.
Null—void, not existing.
Nullius filius—son of no one.
Nullum tempus occurit regi—no time runs against the king.
Nullus clericus, nisi causidicus—no clergyman, unless a lawyer.
Nul tiel record—no such record.
Nul tort—no wrong.
Nunc pro tunc—now for then; act done now, which previously should have been done.
Nuncupative—a verbal will.
Nuper obiit—he lately died.

Obiter—unauthoritatively.
Obligation—duty; a sealed instrument.
Obligor and obligee—parties to a bond.
Obsolete—fallen into disuse.
Occupancy—title by mere possession.
Officina justitiae—depository of justice.
Oligarchy—government by a few.
Omni exceptione majores—above all exception.
Omnium rerum immunitatem—exemption from all duties.
Onus probandi—the burden of proof.
Oracles—media of divine communication.
Ordeal—superstitious form of trial.
Ordinance—a municipal law.
Ordinary—an ecclesiastical judge.
Original entry—the first entry of charge made in an account book.
Original writ—an order on the sheriff to summon the defendant.
Ouster—dispossession from realty.
Ousterlemain—"remove the hand;" demand of an adult ward upon a guardian to deliver property.
Overt—open.
Owling—offence of transporting sheep or wool.
Oyer—"to hear;" prayer to examine a document referred to.
Oyer and terminer—"to hear and and determine;" a criminal court.

Pais or pays—"a country;" matter of fact, and not of law or record.
Palatine—three or four English counties, specially mentioned.
Palladium—shield of Minerva.
Pandects—Justinian's compilation of the civil law.
Panel—schedule of jurors.
Par—of equal value.
Paramount—superior.
Paraphernalia—a widow's clothing, jewels and ornaments.
Paravail—lowest tenant of the fee.

Parceners—certain female co-heirs.
Parens patriae—parent of the country.
Pares curiae—peers of the court.
Pari passu—in equal degree.
Parish—an ecclesiastical district.
Parler lement—to speak the mind.
Parochial—belonging to a parish.
Parol—by word of mouth.
Parricide—murder of a parent.
Partem pro toto—part for the whole.
Partes rationabiles—reasonable parts.
Particeps criminis — partaker of the crime; a paramour.
Particular estate—preceding a remainder interest.
Partition—division of property.
Partnership — association of persons for sharing profits.
Partus sequitur ventrem — the offspring follows the womb.
Parvum servitium—petit serjeanty.
Passim—everywhere.
Pastoral—pertaining to shepherds.
Patent—"open;" exclusive grant to an inventor.
Pater familias—father of a family.
Patrimony—inherited estate.
Patron—disposer of a benefice.
Patronage — aid; right of appointment.
Pawnee—receiver of a pledge.
Payee—party to a bill of exchange.
Peculium—stock; property.
Peers—equals; nobility.
Peine forte et dure—strong and hard punishment.
Penal—punishable.
Penal statute—inflicting a penalty.
Penalty—punishment.
Penance—ecclesiastical punishment.
Pendente lite—pending a suit.
Pension—annual allowance to a person by the government.
Per annulum et baculum—by ring and staff or crosier.
Per annum—by the year.
Per capita—by the heads.
Per diem—by the day.
Peremptory—positive, absolute.
Per forman doni—by the form of the gift.
Per industriam, propter impotentiam propter privilegium—by industry, by impotency, by privilege.
Per infortunium—by mischance.
Perjury—wilful false oath in judicial proceedings.
Per minas—by threats.
Per my et per tout—in half and in all.
Pernancy—taking or receiving.
Perpetuity—endless duration.
Perquisite—an extra fee.
Perquisitio—purchase.
Per quod servitium amisit—by which he lost his service.
Persona ecclesiae—parson of a church.
Per stirpes—by the stock or root.
Per testes—by witnesses.
Pertinent—relating to the subject.
Per totum triennium—for three whole years.
Per tout, et non per my—by all and not by half.
Per verba de praesenti tempore—by words of the present tense.
Per visum ecclesiae—by inspection of the church.
Petitio principii—begging the question.
Petit jury—the trial jury.
Petit serjeanty—tenure of lands by military gift.
Pia fraus—pious fraud.
Piepoudre—a court of dusty feet.
Pignus—a pledge.
Pin-money—a wife's spending money.
Pios usus—pious uses.
Piracy—robbery on the high seas.
Plea—special answer of defendant.
Pledge—a deposit as security.
Plegios de retorno habendo—pledges to have the return.
Plena probatio—full proof.
Plenary—full, complete.
Plenum dominium—absolute ownership.
Pluries—very often; a third writ.
Policy of insurance—the written contract.
Polity—form of government.
Poll—"head;" a tax on each person.
Polygamy—having many wives.
Pondus regis—the king's weight.
Pone—"put;" a writ in replevin.

Pontifical—ecclesiastical.
Posse comitatus—power of the county; assistance called by the sheriff.
Possessory—an action for possession of real estate.
Postea—"afterwards;" endorsement on a verdict.
Posthumous—child born after the death of the parent.
Posting—giving notice; transferring an account to a ledger.
Postliminium—restoration or recovery
Post mortem—after death.
Potentia propinqua—probable possibility.
Poundage—sheriff's commissions.
Poyning's law—an Irish statute in the reign of Henry VII.
Prae—before.
Praecipe—order of attorney on prothonotary to issue a writ.
Predial—issuing out of land.
Praefectus praetorii—judge of the court.
Praemunire—"to forewarn;" a writ barring certain offenders from the protection of the law.
Praetor—Roman municipal officer.
Praetor fidei commissarius—the judge of trusts; a chancellor.
Prava consuetudo—a bad custom.
Preamble—a preface or introduction.
Prebendaries—ecclesiastics with salaries.
Precedents—former decisions of courts.
Precepts—writs directed to sheriffs.
Pre-emption—first right of purchase.
Preferment—advancement.
Prelate—ecclesiastical officer.
Premeditation—design to commit crime.
Prepense—aforethought.
Prerogativa regis—king's prerogative.
Prerogative—arbitrary power vested in the king.
Prerogative court—having charge of wills and administrations.
Prescription—right by long possession.
Presentation—gift of a benefice.
Presentment—accusation presented by a grand jury.
Presumption—inference of a fact.
Prima facie—on the first view.
Primariae preces—first suits.
Prima seisina—first possession.
Primate—an archbishop.
Primer seisin—right of king to first year's profits of an heir.
Primitae—first fruits.
Primogeniture—descent to the first born.
Principalities—sovereignties.
Priory—a religious house.
Prisage—ancient duty on wines.
Privies—partakers; interested parties.
Privilegium clericale—the benefit of clergy.
Privy council—council of state.
Proavus—a great grandfather.
Probate—proof of a will.
Pro bono publico—for the public good.
Probus et legalis homo—true and lawful man.
Procedendo—proceeding; writ to proceed.
Process—mode of bringing defendant into court.
Prochein ami or amy—next friend.
Pro confesso—as acknowledged.
Pro correctione—for amendment.
Procreation—begetting of children.
Proctor—a proxy or attorney.
Procurator—a proctor or agent.
Pro dignitate regali—for royal dignity.
Pro et con—for and against.
Pro hac vice—for this occasion.
Prohibition—writ to check legal proceedings.
Pro laesione fidei—for a breach of faith.
Pro opere—for work.
Prope finem—near the end.
Propinquity—next of kin.
Propositus—the person proposed.
Propria manu—with his own hand.
Proprietary—free owner of a domain.
Propter defectum sanguinis—through failure of issue or blood.
Propter impotentiam—through weakness.

Propter odium delicti—on account of the odium of the offence.
Propter privilegium—by privilege.
Pro rata—in proportion.
Pro re nata—according to circumstances.
Prorogation—postponement.
Pro salute animae—for the health of the soul.
Prosequitur—he is prosecuted.
Pro tanto—for so much.
Pro tempore—for the time.
Protest—dissent, notarial act, where a note or bill is unpaid.
Prothonotary—chief clerk of a court.
Proxies—persons acting for others.
Puberty—age where procreation is possible.
Publici juris—of public right.
Pueritia—childhood.
Puis darrein continuance—since the last continuance.
Puisne—younger, later.
Pulsation—wilful touching of a person.
Pur auter vie—for the life of another.
Purchase—acquisition of lands, other than by descent.
Purgation—denying guilt by oath.
Purpresture—illegal enclosure.
Purum villenagium—pure villenage.
Purus idiota—a complete idiot.
Purveyance—procuring provisions.
Put—in pleading; to select; demand.
Putative—reputed, but not actual.

Quae de minimis non curat—which cares not for trifles.
Quae relicta sunt—which have been left.
Quaestor—Roman magistrate.
Qualified—a limited estate.
Quamdiu bene se gesserint—so long as they shall have acted well.
Quantum—the quantity.
Quantum meruit—as much as he deserved.
Quantum valebat—as much as it was worth.
Quarantine—forty days; in which vessels may be inspected, or a widow remain in the mansion house.
Quare clausum fregit—wherefore he broke the close or enclosure.
Quare ejecit infra terminum—wherefore he ejected within the term.
Quare impedit—wherefore he hinders.
Quarto die post—the fourth day afterward.
Quash—overthrow or annul.
Quasi ex contractu—as of a contract.
Quatenus—as.
Quays—wharves.
Que estate—whose estate; where a man prescribes an estate to himself.
Querela inofficiosi testamenti—complaint of an improper will.
Quia emptores—because purchasers; a statute of Edward I.
Qui arma gerit—who bears arms.
Quid pro quo—this for that; value for value.
Qui non habet in crumena, luat in corpore—who has nothing in purse, must pay in person.
Quinto exactus—required for the fifth time.
Qui prior est tempore, potior est jure—he who is prior in time, is stronger in right.
Qui tam—an action imposing a penalty.
Quit claim—release of claim.
Quit rent—rent which discharges an obligation.
Quoad hoc—as to this.
Quod computet—that he account.
Quod libera sit cujuscunque ultima voluntas—that the last will of every one be free.
Quo minus—by which the less; a writ.
Quorum—the number required in a society to transact business.
Quota—portion.
Quo warranto—by what warrant or authority.

Rack—an instrument of torture.
Rack rent—value of leased land.
Ransom—redemption of person or property.
Rape—forcible carnal knowledge of a woman.
Ratification—adoption of another's act
Ratione soli—by reason of the soil.

Realm—kingdom, country.
Realty—lands and tenements.
Rebut—to contradict.
Rebutter—answer of defendant to a rejoinder.
Recaption — peaceable regaining of person or property.
Receiver—appointee in chancery to receive rents and profits.
Reciprocity—mutual engagements between states.
Recitals — repetition of writings, or statements of acts.
Reclaim—to demand again; to restore.
Recognizance—conditional obligation of record.
Records—official memoranda of acts and proceedings.
Recordari facias—you cause to be recorded.
Recovery—restoration of rights by a judgment of court.
Recovery—common, vide "common recoveries."
Recreant—a coward.
Rector—a clergyman.
Rectory—certain real estate of the church.
Recusancy—non-conformity with the established religion.
Recusatio judicis — objection to the judge.
Reddendum—a clause in a deed, reserving something to the grantor.
Redemption—repurchase, as of lands mortgaged.
Reditus siccus — barren rent; rent seek.
Redress—reparation for wrong.
Redundancy—superfluous matter.
Re-entry — retaking possession of lands.
Reference—submission to arbitration.
Refund—to repay money.
Regalia—ensigns of royalty.
Regent—ruler in another's stead.
Regicide—the killing of a king.
Register—a recorder; the record itself.
Regrating — enhancing the price of food.
Regress—returning.
Rejoinder—reply to a replication.
Relator—one who brings an information or charge.
Release—discharge, quittance.
Relevant—pertinent, applicable.
Relief—payment to a feudal lord by a new tenant.
Remainder—estate expectant upon the termination of a particular estate.
Remainder-man—one entitled to an estate in remainder.
Remand—to send back; recommit.
Remedial statute—affording a remedy.
Remission—release, pardon.
Remitter—placed back in possession.
Rent—a certain profit issuing out of lands and tenements.
Rent-charge—lands charged in the deed with a distress.
Rent-seck—rent reserved, with charge of distress.
Rent-service—where the right of distress is inseparable.
Repeal—abrogation of a law.
Repleader—pleading anew.
Replegiari facias—you cause to be replevied.
Replevin—action to recover goods.
Replication — answer to defendant's plea.
Reports—printed judicial decisions.
Reprieve—suspension of sentence.
Reprisal—retaliatory seizure of the goods of an enemy.
Repugnant—inconsistent pleading.
Rescous—a rescue of a prisoner.
Residuary legatee—one to whom the balance of an estate is bequeathed.
Residue—the balance or remainder.
Respite—reprieve; suspension of act.
Respondeat onster—that he may answer over; judgment on a dilatory plea.
Respondent—the defendant in a chancery action.
Respondentia—a maritime loan.
Responsa prudentium — opinions of wise men.
Restitution—a return to the owner.
Restitutor—the restorer.
Resulting trust—an use which returns to its creator.
Retainer—withholding property; consulting fee of a lawyer.

Retinue—attendants of a prince.
Retraxit—he has withdrawn.
Return day—the time fixed for defendant's appearance to a writ.
Reus—the defendant.
Revenue—government income.
Reversion—the residue of an estate left in the grantor, after the end of a particular estate.
Revest—to again give possession.
Review—a second examination.
Revival—renewal of a debt.
Revivor—a bill to revive an abated suit.
Revoke—to call back; to annul.
Rider—amendment tacked to a bill.
Rien—nothing.
Robbery—forcible taking from another's person.
Rogo—I ask, or entreat.
Role—part or character assigned.
Rubric—ornamented title of a law.

Sacramentum decisionis—oath of decision in a wager of law.
Sacrilege—stealing consecrated articles.
Safe-conduct—a passport.
Sages—wise men of antiquity.
Saladin's tenth—tax imposed to aid the crusade against Saladin, emperor of the Saracens.
Salic law—excludes females from the throne of France.
Salvage—compensation for preserving a vessel from wreck.
Sanction—ratification, confirmation.
Sanity—sound mental condition.
Sapientes, fideles et animosi—wise, faithful and brave.
Satisdatio—giving sufficient security.
Satisfaction—entry of payment on record.
Scandalum magnatum—scandal of the nobles.
Scholastic—adherence to the forms of schools.
Scienter—knowingly.
Scintilla juris—a spark of law or right.
Scire facias—that you make known; a judicial writ.
Scribere est agere—to write is to act.
Scutage—an army tax on tenants by knight-service.
Secta—witnesses following the allegations of the plaintiff.
Secular—not bound by monastic rules.
Secundum formam doni—according to the form of the gift.
Secundum subjectam materiam—according to the subject matter.
Se defendendo—in self defence.
Sedition—revolt against authority.
See—seat of ecclesiastical power.
Seigniory—the lord's right in lands.
Seisin—possession of a freehold.
Seisina facit stirpitem—seisin makes the stock.
Selecti judices—chosen judges.
Semiplena probatio—half proof.
Senatus consulta—acts of the senate.
Senatus decreta—decrees of the senate.
Sequence—that which follows.
Sequestration—official seizure of the property of a defendant.
Serjeant—practitioner of law, of high professional rank.
Serjeanty—service from a tenant to the king; grand or petit.
Service de chevelier—chivalry service.
Servientis ad legem—of a serjeant at law.
Servitium militare—military service.
Servitium scuti—service tax.
Servitude—subjection to another; charge on an estate to the use of another estate.
Set-off—cross demand by the defendant to defalk the plaintiff's claim.
Settlement—residence; ante-nuptial agreement.
Severalty—estate to one person only.
Severance—disuniting persons or property
Shelley's case—contains the law in relation to the heirs of a freehold.
Sheriff, shire-reeve—the chief officer of the county.
Shire—a division of a country.
Shrievalty—the office of a sheriff.
Sic utere tuo, ut alienum non laedas so use your own, that you do not injure another's.
Significavit—he signified or indicated.
Sign manual—one's own signature; that of the prince.

Simony—illegal traffic in holy orders.
Simplex obligatio—simple obligation or bond.
Sinecure—no cure of souls; a clergyman without a church.
Sinking fund—devoted to pay the interest on the national debt.
Si te fecerit securum—if he shall have made you secure.
Slander—spoken defamation.
Smuggling—fraudulent importation or exportation of goods.
Socage—tenure of land by certain inferior service.
Socagium—free and certain tenure.
Sodomy—the crime against nature.
Sokemans—tenants in socage.
Sole—alone, single.
Solicitor—one having the care of a suit in chancery.
Solvendum in futuro—to be paid in the future.
Son assault demesne—his own assault.
Specialty—an agreement under seal.
Spoliation—waste of church property.
Spoliatus debet, ante omnia, restitui the party robbed should be reimbursed before all things.
Springing use—on a future event, when no preceding estate is limited.
Star chamber—ancient criminal court, without a jury.
Stare decisis—to stand by decisions.
Statute merchant—by which lands of a debtor were temporarily held by a creditor.
Statute staple—confined the sale of foreign goods to certain English towns.
Stipend—salary; settled compensation.
Stirpes—descent or root.
Stocks—perforated wooden instrument of punishment.
Stricti juris—of strict right.
Subinfeudation—division of estate by inferior lord.
Sub modo—under a condition.
Subornation—procuring another to commit an offence.
Subpoena—"under penalty;" process to compel a witness or party to appear.
Subpoena duces tecum—that, under penalty, you bring with you.
Subrogation—substituting a person or thing to the rights of another.
Subsidies—money granted by parliament to the king on urgent occasions.
Sub silentio—in silence; tacitly.
Subtraction—unlawful withholding.
Subversion—overthrow; ruin.
Sufferance—amicable retention of possession, after expiration of tenancy.
Suffragan—an assistant bishop.
Sui generis—of his own kind or race.
Sui juris—of his own right; capable of making a contract.
Summa providentia—the greatest prudence.
Summary conviction—usually before a justice on a penal statute.
Summons—writ to the defendant to appear.
Supersedeas—"that you forbear;" stop all proceedings.
Super visum corporis—on view of the body.
Supplemental—added to a thing.
Suppletory oath—one given on half proof in the ecclesiastical court.
Supplicavit—a writ for taking sureties of the peace.
Suppositious—spurious; fraudulently put in another's place.
Sur concessit—on his yielding up or granting.
Sur disseisin—on ouster or dispossession.
Sur done—upon gift.
Surety—one who binds himself for the act of another.
Surplusage—superfluous statement of a case.
Sur-rebutter—plaintiff's reply to defendant's rebutter.
Surrender—yielding up an estate.
Sycophant—"fig eater;" flatterer or parasite.
Symbolum animae—passport of the soul.

Tail—an estate to one and the heirs of his body.
Tale—in ancient pleadings, the declaration or count.
Tales de circumstantibus—schedule of jurors from the bystanders.

Talliage—customs or taxes.
Tarde venit—it came too late; return of sheriff to a delayed writ.
Tariff—table of duties or customs, on imported goods.
Technical—pertaining to an art or profession.
Temporalties—ecclesiastical revenues.
Tenant—holder of lands in fee for life, for years, or at will.
Tenant paravail—lowest tenant.
Tenants in common—holding by distinct title, but by unity of possession.
Tender—offer of payment in money or goods.
Tenement—that may be held; permanent property.
Tenendum—the clause of "holding" in a deed.
Tenths—income paid to the clergy.
Terminus a quo—the limit from which.
Termor—holder of lands for years.
Terra firma—firm land.
Terrene—earthy; terrestrial.
Terre tenant—having actual possession of land.
Testament—will; last disposition of property by a testator.
Testari—to show or testify.
Testator or testatrix—the maker of a will or testament.
Testatum—writ from the court to the sheriff of another county.
Testatum capias—you take the one testified; a writ to the sheriff of another county.
Teste—the date of issuing process; the concluding clause of a writ.
Teste comitatu—witness the county.
Theft-bote—receiving stolen goods.
Thesaurus inventus—treasure found.
Tilt—military horseback exercise.
Tipstaff—officer of court with staff tipped with silver.
Tithes—right of the church to one-tenth of the produce of land.
Tithing—district of ten families.
Toga virilis—manly robe.
Toll—a tax for some privilege.
Tolt—a removal.
Tonnage—capacity of a ship.
Tort—wrong or injury.
Tourn—sheriff's court of criminal jurisdiction.
Traals—peasants of Sweden.
Tradition—delivery to another.
Transcript—copy of an original writing.
Transitory action—where the venue may be laid in any county.
Transmission—a right of heirs to an ancestor's property.
Transportation—banishment for felony.
Trans Tiberim—beyond the Tiber.
Traverse—denial of matter pleaded.
Treason—breach of allegiance.
Treasure-trove—found treasure.
Treatise—written composition.
Treaty—compact between nations.
Trebucket—an engine of punishment for common scolds.
Tres faciunt collegium—three make a college.
Trespass—wrong committed with force.
Tribunal—court of justice.
Triens, tertia—the third.
Trina admonitio—a third warning.
Tripartite—consisting of three parts.
Trover—action to recover the value of goods alleged to have been found.
True bill—endorsement by a grand jury on an indictment.
Trust—an estate held for another's benefit.
Tumbril—instrument of punishment; ducking stool; dung cart.
Turbary—right to dig turf.
Tutelage—state of guardianship.
Twelve tables—a Roman code of laws.

Ubi nullum matrimonium, ibi nulla dos—where no marriage, there is no dower.
Ubiquity—presence everywhere.
Ultimatum—last proposition.
Ultimum supplicium—the last punishment.
Ultra mare—beyond sea.
Unde nihil habet—whereby she has nothing; a writ of dower.
Un disposition a faire un male chose—a disposition to do a bad act.

Unilateral—one-sided contract.
Usage—long and uniform practice.
Use—land entrusted to a party for another's benefit.
Usufruct—right of enjoying property which is vested in another.
Usurp—to seize without right.
Usury—excessive interest on money.
Ut antiquum—as ancient.
Ut liberum tenementum—as a freehold.
Ut novum—as recent.
Ut res magis valeat quam pereat—that the matter may rather be valid than be lost.
Uttering—putting into circulation.

Vadium—a pledge.
Validity—legal strength or force.
Valor beneficiorum—value of benefices.
Valor maritagii—the value of the marriage.
Valvasor—tenant of a baron.
Variance—disagreement between the declaration, writ and evidence.
Vassal—tenant of a feudal lord.
Vastum—waste.
Venary—relating to hunting.
Venditioni exponas—that you expose for sale; a writ of execution.
Vendor and vendee—seller and purchaser.
Venire—"to come;" writ to appear.
Venire facias—that you cause to come.
Venue—the county of the jury.
Verba fortius accipiuntur contra preferentem—words are received more strongly against him who utters them.
Verbatim—word for word.
Verberation—a beating
Verderor—keeper of forests.
Verdict—decision of a jury.
Versus—against.
Vest—to give a right of possession.
Vested remainder—estate to be enjoyed in the future.
Veto—"I forbid;" an authoritative prohibition.
Vicarius—a vicar.
Vice-comes—a sheriff;" deputy of an earl or count.
Vice versa—on the contrary.
Vicinage—the neighborhood.
Vidame—a species of feudal noble.
Vi et armis—by force and arms.
Viewers—appointees of court to examine realty.
Villein—feudal tenant of the lowest grade.
Villein-socage—feudal service both base and certain.
Vills—villages, towns.
Vinculum—bond or connection.
Vinculum personarum ab eodem stirpe descendentium—connection of persons descended from the same stock.
Viri magnae dignitatis—men of great dignity.
Visitation—examination of corporations.
Visne—the neighborhood.
Viva voce—by living voice; by word of mouth.
Vivum vadium—living pledge.
Voidable—capable of being avoided.
Voir, dire, veritatem dicere—to see, to tell, to speak the truth; preliminary examination of a witness.
Volenti non fit injuria—the willing receive no injury.
Volunteer—receiver of an estate without consideration.
Voucher—in common recoveries, the warrantor of title.
Vulgaris purgatio—common purgation.

Wagering policy—in which the insured has no insurable interest.
Wager of battel—a former superstitious mode of trial.
Wager of law—an ancient mode of trial.
Waifs—abandoned stolen goods.
Waiver—relinquishment of a right.
Wapentakes—"taking weapons;" English hundreds.
Ward—infant under care of guardian.

Wardship—control by feudal lord of infant tenant.

Warrant—a writ of arrest.

Warranty—guaranty of title or condition.

Warren—place set apart for hunting.

Waste—injury to realty, by tenant for life or for years.

Weregild—the Saxon fine paid by a murderer.

Will—direction for disposing of a man's property after his death.

Withernam—a second distress for goods eloigned.

Wittena-gemote—wise man's assembly; Saxon parliament.

Writ—mandatory precept of a court.

Writ of error—writ from a superior to a lower court.

Writ of inquiry—to determine the damages on an unliquidated judgment.

Yeoman—a freeman with limited landed property.

Yoke—a badge of servitude.

INDEX.

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