BOOK III.

OF PRIVATE WRONGS.

CHAPTER I.

OF THE REDRESS OF PRIVATE WRONGS BY THE MERE ACT OF THE PARTIES.

1. *Into what sorts are wrongs divisible?*—2.

Into two sorts: private wrongs and public wrongs.

2. *What are private wrongs, as distinguished from public wrongs?*—2.

Private wrongs are an infringement or privation of the private or civil rights belonging to individuals, and are frequently termed civil injuries. Public wrongs are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the appellation of crimes and misdemeanors.

3. *For what are courts of justice instituted?*—2.

They are instituted in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws by which rights are defined and wrongs prohibited.

4. *How is the remedy of private injuries principally to be sought?*—2, 3.

By application to the courts of justice; that is, by civil suit or action.

5. *Into what species may the redress of private wrongs be distributed?*—3.

Into three species: 1. That which is obtained by the mere act of the parties themselves.

2. That which is effected by the mere act and operation of law.

3. That which arises from suit or action in courts; which consists in a conjunction of the other two, the act of the parties co-operating with the act of the law.

6. *Of what two sorts is that redress of private wrongs which is obtained by the mere act of the parties?*—3.

It is of two sorts: 1. That which arises from the act of the injured party only.

2. That which arises from the joint act of all the parties together.

7. *What species of remedy are there by the mere act of the party injured?*—3–15.

There are six species: 1. The defense of one's self, or the mutual and reciprocal defense of such as stand in the relations of husband and wife, parent and child, master and servant.

2. Recaption or reprisal.

3. By entry on lands and tenements, when another person, without any right, has taken possession thereof.

4. The abatement or removal of nuisances.

5. That of distraining cattle or goods for non-payment of rent, or other duties; or distraining another's cattle *damage feasant*, that is, doing damage, or trespassing upon land.

6. The seizing of heriots when due on the death of a tenant.

8. *When is self-defense permitted?*—3.

If the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray.

9. *Why is it permitted?*—3, 4.

The law, in this case, respects the passions of the human mind, and, when external violence is offered to a man himself, or those to whom he bears a near connection, makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law

is by no means an adequate remedy for injuries accompanied with force. Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society.

10. *What does self-defense excuse?*—4.

In the English law particularly, it is held an excuse for breaches of the peace, nay, even for homicide itself.

11. *Should it exceed the bounds of mere defense and prevention?*—4.

It should not; for then the defender would himself become an aggressor.

12. *When may recaption or reprisal happen?*—4.

It happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child or servant; in which case the owner of the goods, and the husband, parent, or master, may lawfully reclaim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace.

13. *What is the reason for this?*—4.

It may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterward conveyed away or destroyed; and his wife, children, or servants concealed or carried out of his reach, if he had no speedier remedy than the ordinary process of law.

14. *What restraint is there upon this natural right of recaption?*—5.

It shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society.

15. *Must re-entry on land be peaceable and without force?*—5.

It must be peaceable and without force.

16. *What is a nuisance?*—5.

Whatever unlawfully annoys, or doth damage to, another is a nuisance.

17. *May it be abated?*—5.

It may be abated, that is taken away or removed, by the party aggrieved thereby, so he commits no riot in the doing of it.

18. *Why does the law allow this private and summary method of doing one's self justice?*—6.

Because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice.

19. *What is a distress?*—6.

A distress, *districtio*, is the taking of a personal chattel out of the possession of the wrong-doer into the custody of the party injured, to procure a satisfaction for the wrong committed.

20. *For what may a distress be taken?*—6, 7.

It may be taken: 1. The most usual injury for which a distress may be taken is that of non-payment of rent. 2. For neglecting to do suit to the lord's court, or other certain personal service. 3. For amercements in a court leet. 4. Another injury for which distress may be taken, is where a man finds beasts of a stranger wandering in his grounds, *damage feasant*. 5. For several duties and penalties inflicted by special acts of parliament.

21. *What may be distrained, or taken in distress?*—7.

All chattels personal are liable to be distrained, unless particularly protected or exempted.

22. *What things cannot be distrained?*—7–10.

The following: 1. Such things wherein no man can have an actual and valuable property, as dogs, cats, rabbits, and all animals *ferœ naturæ*.

2. Whatever is in the personal use or occupation of any man is, for the time, privileged and protected from any distress; as an axe with which a man is cutting wood, or a horse while a man is riding him.

3. Valuable things in the way of trade shall not be liable to

distress; as a horse standing in a smith's shop to be shod, or cloth at a tailor's.

4. A man's tools and utensils of his trade, the axe of the carpenter, the books of a scholar, and the like, are privileged by the ancient common law.

5. Nothing shall be distrained for rent which may not be rendered again in as good plight as when it was distrained; for which reason milk, fruit, and the like, cannot be distrained.

6. Things fixed to the freehold may not be distrained; as caldrons, windows, doors, and chimney-pieces, for they savor of the realty.

23. *Why are valuable things in the way of trade privileged from distress?*—8.

They are so privileged and protected for the benefit of trade; and are supposed, in common presumption, not to belong to the owner of the house, but to his customers.

24. *May the landlord distrain upon whatever goods and chattels he finds upon the premises?*—8.

He may; whether they, in fact, belong to the tenant or a stranger, and the stranger has his remedy over by action on the case against the tenant.

25. *When are cattle said to be levant and couchant* (levantes et cubantes) *on the land?*—9.

When they have been long enough there to have lain down and risen up to feed; which, in general, is held to be one night at least; and then the law presumes that the owner may have notice whether his cattle have strayed, and it is his own negligence not to have taken them away.

26. *Why are a man's tools and utensils of his trade privileged from distress?*—9.

They are said to be privileged for the sake of the public, because the taking them away would disable the owner from serving the commonwealth in his station. But perhaps the true reason why they were so privileged at common law, was because the distress was then merely intended to compel the payment of the rent, and not as a satisfaction for their non-payment; and, therefore, to deprive the party of the instruments and means of paying it, would counteract the very end of the distress.

27. *When must all distresses be made?*—11.

All distresses must be made by day, except in case of damage feasant.

28. *May the landlord distrain for goods carried off the premises clandestinely?*—11.

Formerly he could resort nowhere else. Now, by statute, he may distrain any goods of the tenant carried off the premises clandestinely, wherever he finds them within thirty days after, unless they have been *bona fide* sold for a valuable consideration.

29. *In what cases may a second distress for the same duty be made?*—11, 12.

When the landlord distrains for the whole, and there is not sufficient on the premises, or he happens to mistake in the value of the thing distrained, and so takes an insufficient distress, he may take a second distress to complete his remedy.

30. *How must the distress be disposed of; and when may it be rescued by its owner?*—12.

The thing distrained must in the first place be taken to some pound, and there impounded by the taker. But, in their way thither, they may be rescued by the owner, if the distress was taken without cause, or contrary to law.

31. *How long must beasts taken damage feasant, and distresses for suit or services, remain impounded?*—13.

Till the owner makes satisfaction, or contests the right of distraining by replevying the chattels; but beasts taken damage feasant cannot be replevied by common law.

32. *What is it to replevy?*—13.

To replevy, *replegiare*, that is, to take back the pledge, is when a person distrained upon applies to the sheriff or his officers, and has the distress returned into his own possession, upon giving good security to try the right of taking it.

33. *Is the remedy of seizing given with regard to any things that are said to lie in franchise?*—15.

It is given with regard to many things that are said to lie in franchise; as waifs, wrecks, estrays, deodands, and the like; all which the person entitled to may seize without the formal process of a suit or action.

34. *What remedies arise from the joint act of all the parties together?*—15.

Only two: accord and arbitration.

35. *What is accord?*—15, 16.

Accord is a satisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar of all actions upon this account.

36. *In what cases is a tender of sufficient amends, to the party injured, a bar of all actions?*—16.

By statute, in case of irregularity in the method of distraining, and in case of mistakes committed by justices of the peace, tender of sufficient amends to the party injured is a bar of all actions, whether he thinks proper to accept such amends or no.

37. *What is arbitration?*—16.

Arbitration is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more arbitrators, who are to decide the controversy, and if they do not agree, it is usual to add that another person be called in as umpire. The decision is called an award.

38. *What effect has the award?*—16.

Thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice.

39. *Can the right of real property pass by an award?*—16.

It cannot; yet doubtless an arbitrator may now award a conveyance, or a release of land; and it will be a breach of the arbitration bond to refuse compliance.

CHAPTER II.

OF REDRESS BY THE MERE OPERATION OF LAW.

1. *What are the remedies for private wrongs, which are effected by the mere operation of law?*—18.

Only two: that of retainer, where a creditor is made executor or administrator to his debtor; the other in case of what the law calls a remitter.

2. *What is retainer?*—18.

If a person indebted to another makes his creditor his executor, or if such creditor obtains letters of administration to his debtor, in these cases the law gives him a remedy for his debt, by allowing him to retain so much as will pay himself, before any other creditors whose debts are of equal degree.

3. *Upon what is this remedy by retainer grounded?*—18.

It is grounded on this reason, that the executor or administrator cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity, and so is in a worse condition than all the rest of the world. This doctrine of retainer is the necessary consequence of that other doctrine of the law, the priority of such creditor who first commences his action.

4. *May the executor retain his own debt in prejudice to those of a higher degree?*—19.

He shall not; for the law only puts him in the same situation as if he had sued himself as executor and recovered his debt, which he never could be supposed to have done while debts of a higher nature subsisted.

5. *What is a remitter?*—19, 20.

Remitter is where he who hath the true property, or *jus proprietatis*, in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath

afterward the freehold cast upon him by some subsequent, and of course defective, title; in this case he is remitted, or sent back, by operation of law, to his ancient and more certain title. The right of entry, which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good one; and his defeasible estate shall be utterly defeated and annulled by the instantaneous act of law, without his participation or consent.

6. *But what if the subsequent estate, or right of possession, be gained by a man's own act or consent?*—20.

Then he shall not be remitted; for the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right.

7. *What are the incidents to a remitter?*—20.

To every remitter there are regularly three 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, not gained by his own act or folly.

8. *What is the reason why this remedy of remitter to a right was allowed?*—20.

Because, otherwise, he who hath right would be deprived ot 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.

9. *But what if the party hath no remedy by action?*—21.

Then there shall be no remitter to a right.

CHAPTER III.

OF COURTS IN GENERAL.

1. *What is that redress of injuries wherein the act of the parties and the act of law co-operate?*—22.

The redress of injuries by suit in courts; the act of the parties being necessary to set the law in motion, and the process

of the law, being, in genera_, the only instrument by which the parties are enabled to procure a certain and adequate redress.

2. *Where the law allows an extra-judicial remedy does that exclude the ordinary course of justice?*—22.

It does not; it is only an additional weapon put into the hands of certain persons in particular instances, where natural equity, or the peculiar circumstances of their situation, required a more expeditious remedy than the formal process of any court of justice can furnish.

3. *Do accords and arbitrations suppose a previous right of obtaining redress some other way?*—23.

Yes, being in their nature merely an agreement or compromise, they most indubitably suppose a previous right of obtaining redress some other way; which is given up by such agreement.

4. *Why are the remedies by the mere operation of law given?*—23.

Because no remedy, there, can be administered by suit or action, without running into the palpable absurdity of a man's bringing an action against himself.

5. *In all other cases, what general and indisputable rule is there?*—23.

That where there is a legal right there is also a legal remedy by suit or action at law, whenever that right is invaded.

6. *What is a court?*—23.

It is defined to be a place wherein justice is judicially administered.

7. *Whence are all courts of justice derived?*—24.

From the power of the crown.

8. *What distinction runs throughout all courts of justice?*—24.

That some of them are courts of record; others not of record.

9. *What is a court of record?*—24, 25.

A court of record is that where the acts and judicial pro-

ceedings are enrolled in parchment for a perpetual memorial and testimony; which rolls are called the records of the court, and are of such high and super-eminent authority, that their truth is not to be called in question.

10. *What settled rule or maxim is there as to records?*—24.

That nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary.

11. *If the existence of a record be denied, how shall it be tried?*—24.

By nothing but itself; that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes.

12. *If there appear any mistake of the clerk in making up such record, how shall it be amended?*—24.

The court will direct him to amend it.

13. *Are all courts of record the king's courts, and what follows from this?*—24, 25.

They are, in right of his crown and royal dignity; and, therefore, no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with the power of fine and imprisonment makes it instantly a court of record.

14. *What is a court not of record?*—25.

A court not of record is the court of a private man, whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow-subjects. Such are the courts baron, and other inferior jurisdictions, where the proceedings are not enrolled or recorded.

15. *How is the existence of courts not of record, as well as the truth of matters contained in their proceedings, tried and determined?*—25.

If disputed, they shall be tried and determined by a jury.

16. *What constituent parts are there in every court?*—25.

In every court there must be at least three constituent parts,

the *actor*, *reus*, and *judex;* the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfation for it; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy.

17. *What usual assistants have the superior courts?*—25.

Attorneys, and advocates or counsel.

18. *What is an attorney at law?*—25.

He is one who is put in the place, stead, or turn of another, to manage his matters of law.

19. *Who cannot appear in court by attorney?*—25.

Defendants in criminal cases, and idiots.

20. *Why cannot an idiot appear by attorney?*—25, 26.

Because he hath not discretion to enable him to appoint a proper substitute: upon his being brought before the court in so defenceless a condition, the judges are bound to take care of his interests.

21. *Of what degrees are advocates or counsel?*—26.

Two: barristers and sergeants.

22. *Can a counsel maintain an action for his fees?*—28.

He cannot.

23. *Why not?*—28.

Because his fees are given not as *locatio vel conductio*, but as *quiddam honorarium;* not as a salary or hire, but as a mere gratuity, which a counselor cannot demand without doing wrong to his reputation.

24. *How far have counsel liberty of speech?*—28.

It hath been holden that a counsel is not answerable for any matter by him spoken relative to the cause 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, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured.

CHAPTER IV.

OF THE PUBLIC COURTS OF COMMON LAW AND EQUITY.

1. *Of what species are courts of justice?*—30.

They are, either such as are of public and general jurisdiction throughout the whole realm, or such as are only of a private and special jurisdiction in some particular parts of it.

2. *Of what sorts are public courts of justice?*—30.

Of four sorts: 1. The universally established courts of common law and equity.

2. The ecclesiastical courts.
3. The courts military.
4. Courts maritime.

3. *What are the public courts of common law and equity?*—32–59.

They are: 1. The court of *piepoudre.*
2. The court baron.
3. The hundred court.
4. The county court.
5. The court of common pleas, or common bench.
6. The court of king's bench.
7. The court of exchequer.
8. The high court of chancery.
9. The court of exchequer chamber.
10. The House of Peers.
11. The courts of assise and nisi prius.

4. *What is the court of* piepoudre?—33.

This court, *curia pedis pulverizati*, so called from the dusty feet of the suitors, is a court of record incident to every fair and market; of which the steward of him who owns or has the tolls of the market is the judge; and its jurisdiction extends to administer justice for all commercial injuries done in that very fair and market, and not in any preceding one. The injury must be done, complained of, heard, and determined within the compass of one and the same day, unless the fair continues longer. The court hath cognizance of all matters of contract that can possibly arise within the precinct of that fair or market. From this court a writ of error lies, in the nature of appeal to the court at Westminster. The practice and proceedings in the courts of *piepoudre* are in a manner forgotten. The reason of their original institution seems to have been to do justice expeditiously among the variety of persons that resort from distant places to a fair or market.

5. *What is the court baron?*—33.

It is a court incident to every manor in the kingdom, to be holden by the steward within the said manor. This court is of two natures: the one is a customary court, appertaining entirely to the copyholders, in which their estates are transferred by surrender and admittance, and other matters transacted relative to their tenures only; the other is a court of common law, and it is the court of the barons, by which name the freeholders were sometimes anciently called; for that it is held before the freeholders who owe suit and service to the manor, the steward being rather the registrar than the judge. These courts, though in their nature distinct, are frequently confounded together. The latter, the freeholders' court, was composed of the lord's tenants, who were the *pares* of each other, and were bound by their feodal tenure to assist their lord in the dispensation of domestic justice Its most important business was to determine, by writ of right, all controversies relating to the right of lands within the manor. It may also hold plea of any personal actions, of debt, trespass, or the like, where the debt or damages do not amount to forty shillings. But the proceedings on a writ of right may be removed into the county court; and the proceed-