vant before his time is expired; the other, the beating or confining him in such a manner that he is not able to perform his work.

71. *What remedies are there in case one man beats, confines or disables another's servant?*—142.

The servant has his action of battery or false imprisonment; the master his action of trespass *vi et armis*, as a recompense for his immediate loss.

CHAPTER IX.

OF INJURIES TO PERSONAL PROPERTY.

1. *What injuries may be offered to the rights of personal property in possession?*—144.

They are liable to two species of injuries: the amotion or deprivation of that possession, and the abuse or damage of the chattels while the possession continues in the legal owner.

2. *Into what branches is this deprivation of possession divisible?*—145.

Into two branches: the unjust and unlawful taking them away; and the unjust detaining them, though the original taking might be lawful.

3. *What remedy has the law given for the wrongful taking of goods?*—145, 146.

In the first place, the restitution of the goods themselves so wrongfully taken, with damages for the loss so sustained by such unjust invasion, is effected by the action of replevin.

4. *When does the action of replevin obtain?*—146.

Only in one instance of an unlawful taking, that of a wrongful distress.

5. *By what actions is the actual specific possession of the identical personal chattels restored to the proper owner?*—146.

The action of replevin, and the action of detinue, are almost the only actions by which it may be restored.

6. *What is replevin?*—147.

The action of replevin being founded upon a distress wrongfully taken, and without sufficient cause, is a re-delivery of the pledge, or thing taken in distress, to the owner, upon his giving security to try the right of the distress, and to restore it if the right be adjudged against him, after which the distrainor may keep it till tender made of sufficient amends, but must then redeliver it to the owner.

7. *If the distress be carried out of the county, or concealed, what may the sheriff return?*—149.

He may return that the goods or beasts are eloigned (*elongata*), carried to a distance, to places to him unknown.

8. *What shall the party replevying thereupon have?*—148.

A writ of *capias in withernam, in vetito namio;* a term which signifies a second or reciprocal distress, in lieu of the first which was eloigned.

9. *Can goods taken* in withernam *be replevied?*—149.

Not until the original distress is forthcoming.

10. *Upon action of replevin brought what does the distrainor do?*—150.

The distrainor who is now the defendant makes avowry, that is, he avows taking the distress in his own right, or the right of his wife, and sets forth the reason for it, as for rent arrere, damage done, or other cause; or else, if he justifies in another's right, as his bailiff or servant, he is said to make cognizance.

11. *If pending a replevin for a former distress, a man distrain again for the same rent or service, what is the remedy?*—151.

The party distrained upon is not driven to his action of replevin, but shall have a writ of recaption, and recover damages

for the defendant, the re-distrainor's, contempt of the process of the law.

12. *What other remedies, beside replevin, has the law given for the unlawful taking of goods?*—151.

Other remedies consist only in recovering a satisfaction in damages.

13. *By what actions is that satisfaction recovered?*—151.

By action of trespass *vi et armis;* or if the taking is committed without force, by action of trover and conversion.

14. *What remedies are there for the unjust detainer of goods lawfully taken?*—151, 152.

There are two remedies: one by action of replevin, in which he shall recover damages only for the detention, and not for the caption, because the original taking was lawful; the other by action of detinue, to recover the possession of the goods.

15. *What is it necessary to ascertain in the action of detinue?*—152.

It is necessary to ascertain the thing detained in such manner as that it may be specifically known and recovered.

16. *What are the points necessary to ground an action of detinue?*—152.

They are as follows: 1. That the defendant came lawfully into possession of the goods, as either by delivery to him, or finding them.

2. That the plaintiff have a property in the goods.
3. That the goods themselves be of some value.
4. That they be ascertained in point of identity.

17. *What is the judgment in detinue?*—152.

It is conditional, that the plaintiff recover the goods, or (if they cannot be had) their respective values, and also the damages for detaining them.

18. *What disadvantage attends the action of detinue?*—152.

The defendant is therein permitted to wage his law, that is,

to exculpate himself by oath, and thereby defeat the plaintiff of his remedy.

19 *Is the action of detinue much used?*—152.

No, it is not. It has given place to the action of trover

20. *What is the action of trover?*—152.

It was, in its origin, 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. The freedom of this action from wager of law, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over the action of detinue, that by a fiction of law actions of trover were, at length, permitted to be brought against any man who had in his possession, by any means whatsoever, the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the conversion.

21. *Is the fact of the finding, or* trover, *material in this action?*—153.

It is now totally immaterial, for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them.

22. *Must a conversion be clearly proved?*—153.

It must; and, then, in trover, the plaintiff shall recover damages equal to the value of the thing converted, but not the thing itself.

23. *What are the remedies given by law, to redress injuries offered to things personal while in the possession of the owner?*—153, 154.

They are in two shapes: by action of trespass *vi et armis*, where the act is in itself immediately injurious to another's property, and therefore necessarily accompanied with some degree of force; and by special action on the case, where the act is in itself indifferent, and the injury only consequential, and therefore arising without any breach of the peace.

24. *What species do express contracts include?*—154.

Three distinct species: debts, covenants, and promises.

25. *What is the legal acceptation of debt?*—154.

A sum of money due by certain and express agreement.

26. *Is the non-payment of money due by express contract an injury?*—154.

It is.

27. *What is the proper remedy for it?*—154, 155.

The proper remedy is by an action of debt, to compel the performance of the contract and recover the specific sum due.

28. *Is this the shortest and surest remedy?*—154.

It is; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal.

29. *Why are actions of debt now seldom brought but upon special contracts under seal, wherein the sum due is clearly and precisely expressed?*—154.

Because, in case of such an action upon a simple contract, the plaintiff labors under two difficulties: 1. The defendant has the advantage of waging his law; 2. The plaintiff must prove the whole debt he claims, or recover nothing at all.

30. *Wherein does an action on the case, on what is called an* in-debitatus assumpsit, *differ from an action of debt?*—155, 156.

As an action on the case is not brought to compel a specific performance of the contract, but to recover damages for its non-performance, the implied assumpsit, and consequently the damages for the breach of it, are in their nature indeterminate, and will, therefore, adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration. If any debt be proved, however less than the sum demanded, the law will raise a promise *pro tanto*, and the damages, of course, will be proportioned to the actual debt.

31. *In actions of debt, may the plaintiff, in any case, recover less than the sum expressed?*—156.

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.

32. *When is the form of the writ of debt in the* debet *and* detinet, *and when in the* detinet *only?*—155.

It is in the *debet* as well as *detinet*, when sued by one of the original contracting parties who personally gave the credit, against the other who personally incurred the debt, or against his heirs, if they are bound to the payment. But, if it be brought by or against an executor, for a debt due to or from the testator, this not being his own debt, shall be sued for in the *detinet* only.

33. *What is the remedy for the violation or breach of covenant?*—156, 157.

The remedy for breach of a covenant, contained in a deed, to do a direct act, or to omit one, is by a writ of covenant.

34. *What does this writ direct?*—157.

It directs the sheriff to command the defendant generally to keep his covenant with the plaintiff, or show good cause to the contrary.

35. *What is a covenant real, and what the remedy for breach of it?*—157.

It is a covenant to convey or dispose of lands, partly of a personal and partly of a real nature. The remedy for breach of this is by special writ of covenant, for a specific performance of the contract, concerning certain lands particularly described in the writ.

36. *Upon what process are fines usually levied at common law?*—157.

Upon writ of covenant.

37. *What was the ancient remedy of the lessee, in leases for years, if ejected?*—158.

By writ of covenant against the lessor, to recover the term and damages, or damages only; as leases for years were formerly considered only as contracts, or covenants for the enjoyment of the rents and profits, and not as the conveyance of any real interest in the lands

38. *Who may take advantage of a covenant?*—158.

No person could, at common law, take advantage of a covenant or condition, except such as were parties or privies thereto; and, of course, no grantee or assignee of any reversion or rent. But, by statute, the assignee of a reversion has the same remedies against the particular tenant, by entry or action, as the assignor himself might have had.

39. *What is a promise, and what the remedy for a breach of it?*—158.

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.

The remedy is by action on the case for what is called the *assumpsit*, or undertaking of the defendant, the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle.

40. *When is a promise an express contract as much as any covenant?*—158.

When it is to do any explicit act.

41. *What entitles a creditor, in the case of a debt by simple contract, to have an action on the case, instead of being driven to an action of debt?*—158.

Where the debtor promises to pay it and does not.

42. *In what cases does the statute of frauds and perjuries enact, that no verbal promise shall be sufficient to ground an action upon?*—158.

To prevent perjury, the statute 29 Car. II., c. 3, enacts that, in the five following cases, no verbal promise shall be sufficient to ground an action upon, but at least some note or memorandum of it shall be made in writing, and signed by the party to be charged therewith: 1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. 5. Where

there is any agreement that is not to be performed within a year from the making thereof. In all these cases a merely verbal assumpsit is void, except on sales where payment is made of the price or earnest of goods, where the value is over £10.

43. *What are implied contracts?*—159.

They 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.

44. *Of what classes are implied contracts?*—159–162.

They are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound, and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law. For it is a part of the original contract, entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member. Whatever, therefore, the laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge.

A second class of implied contracts are such as do not arise from the express determination of any court, or the positive directions of any statute; but from natural reason, and the just construction of law. Which class extends to all presumptive undertakings or *assumpsits;* which, though never perhaps actually made, yet constantly arise from this general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty, or justice, requires.

45. *What are* qui tam *actions?*—161, 162.

Usually, forfeitures, created by statute, are given at large to any common informer; or, in other words, to any such person or persons as will sue for the same; and hence such actions are called popular actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecu-

tor; and then the suit is called a *qui tam* action, because it is brought by a person, "*qui tam pro domino rege, &c., quam pro se ipso in hac parte sequitur.*

46. *If a man hath obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, what action may he afterwards bring upon this judgment?*—160.

He may afterward bring an action of debt upon this 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 yet unsatisfied, the law immediately implies that, by the original contract of society, the defendant hath contracted a debt, and is bound to pay it.

47. *When, and for what purpose, was this method of action of debt upon judgment invented?*—160.

This method seems to have been invented when real actions were more in use than at present, and damages were permitted to be recovered thereon; in order to have the benefit of a writ of *capias* to take the defendant's body in execution for these damages, which process was allowable in an action of debt, but not in an action real.

48. *What species are there of presumptive undertakings or* assumpsits?—162–165.

1. If I employ a person to transact any business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labor deserved.

2. There is also an implied *assumpsit* on a *quantum valebat*, which is very similar to the former, being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price.

3. A third species of implied *assumpsits* is when one has had and received money belonging to another, without any valuable consideration given on the receiver's part; for the law construes this to be money had and received for the use of the owner only, and implies that the person, so receiving, promised and undertook to account for it to the true proprietor.

4. Where a person has laid out and expended his own money

for the use of another, at his request, the law implies a promise of repayment, and an action will lie on this *assumpsit*.

5. Likewise, upon a stated account between two merchants, or other persons, the law implies that he, against whom the balance appears, has engaged to pay it to the other, though there be not any actual promise.

6. The law implies that every one who undertakes any office, employment, trust or duty, contracts with those who employ or intrust him, to perform it with integrity, diligence, and skill.

49. *How far is assumpsit for money had and received applicable?*—163.

It is a very extensive and beneficial remedy, applicable to almost every case, where the defendant has received money which, *ex æquo et bono*, he ought to refund. It lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where any undue advantage is taken of the plaintiff's situation.

50. *What is the action of account?*—164.

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 the court good cause to the contrary.

51. *If the plaintiff succeeds, what are the judgments?*—164.

Two: 1. That the defendant do account before auditors appointed by the court; 2. When such account is finished, that he do pay the plaintiff so much as he is found in arrear.

52. *Why are actions of account, now, very seldom used?*—164.

It is found, by experience, that the most ready and effectual way to settle matters of account is by bill in equity, where a discovery may be had on the defendant's oath.

53. *What remedy accrues for neglect or breach of duty in one who undertakes any office, employment, trust, or duty?*—165.

If, by his want of integrity, diligence, or skill, any injury

accrues to individuals, they have their remedy in damages by a special action on the case.

54. *When is an advocate, or attorney, liable to an action on the case?*—165.

When he betrays the cause of his client, or being retained, neglects to appear at the trial, by which the cause miscarries, he is liable to such action, for a reparation to his injured client.

55. *What contract is implied with a common inn-keeper?*—165.

To secure his guest's goods in his inn.

56. *What with a common carrier?*—165.

To be answerable for the goods he carries.

57. *In what case does the law imply no such general undertaking?*—164.

If a person be employed to transact any concerns, as a common carrier, farrier, tailor, or other workman, whose common profession and business it is not, the law implies no such general undertaking; but, in order to charge him with damages, a special agreement is required.

58. *If an innkeeper, or other victualler, hangs out a sign and opens his house for travelers, what engagement is implied?*—166.

To entertain all persons who travel that way; and, upon this universal assumpsit, an action on the case will lie against him for damages, if he, without good reason, refuses to admit a traveler.

59. *If one cheats with false cards, or dice, or by false weights and measures, or by selling one commodity for another, what action lies?*—166.

An action on the case for damages, upon the contract which the law always implies, that every transaction is fair and honest.

60. *In contracts for sales what is understood?*—166.

That the seller undertakes that the commodity he sells is his own.

61. *In contracts for provisions what is always implied?*—166.

That they are wholesome.

62. *If the seller, upon the sale, warrant the thing sold to be good, what tacit contract does the law annex to this warranty?*—166.

That, if it be not so, the seller shall make compensation to the buyer; else it is an injury to good faith, for which an action lies.

63. *Must this warranty be upon the sale, and why so?*—166.

It must be upon the sale; for if it be made after, it is a void warranty: it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor.

64. *Can the warranty reach things not in being?*—166.

It can only reach things in being at the time of the warranty made, and not to things *in futuro;* as, that a horse is sound at the buying of him, not that he will be sound two years hence.

65. *What artifice, in the sale of goods, is equivalent to an express warranty?*—166.

If the vendor knew the goods to be unsound, and hath used any art to disguise them, or if they are in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness.

66. *To what defects will a general warranty not extend?*—166.

Those defects that are plainly and obviously the object of one's senses.

67. *What other remedy, besides a special action on the case, is there in cases of fraud?*—166.

Besides the special action on the case, there is also a peculiar remedy, entitled an action of deceit, to give damages in some particular cases of fraud, and principally where one man does anything in the name of another, by which he is deceived or injured. But an action on the case, for damages, in nature of a writ of deceit, is more usually brought. There have been but a very few instances, for centuries, of prosecuting any *real* action for land by writ of entry, assise, formedon, writ of right, or otherwise

CHAPTER X.

OF INJURIES TO REAL PROPERTY; AND, FIRST, OF DISPOSSESSION, OR OUSTER OF THE FREEHOLD.

1. *What are real injuries, or injuries affecting real rights?*—167.

They are principally six: 1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; 6. Disturbance.

2. *What is ouster?*—167.

Ouster, or dispossession, is a wrong or injury that carries with it the amotion of possession; for thereby the wrong-doer gets into the actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy, in order to gain possession, and damages for the injury sustained. Ouster may either be of the freehold, or of chattels real.

3. *By what methods is ouster of the freehold effected?*—167.

By: 1. Abatement; 2. Intrusion; 3. Disseisin; 4. Discontinuance; 5. Deforcement.

4. *What is an abatement?*—167, 168.

It is where a person dies seized of an inheritance, and before the heir or devisee enters, a stranger, who has no right, makes entry, and gets possession of the freehold. This entry is called an abatement.

5. *What is an intrusion?*—169.

Intrusion is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or in reversion. An abatement is always to the prejudice of the heir, or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion.

6. *What is disseisin?*—169.

A wrongful putting out of him that is seized of the freehold. Abatement and intrusion were by a wrongful entry where the possession was vacant; but disseisin is an attack upon him who is in actual possession.

7. *How must disseisin of things corporeal be effected?*—170.

Disseisin of things corporeal, as of houses, lands, &c., must be by entry and actual dispossession of the freehold.

8. *What is disseisin of incorporeal hereditaments?*—170.

It cannot be an actual dispossession, but it depends on their respective natures and various kinds, being in general nothing more than a disturbance of the owner in the means of coming at, or enjoying them.

9. *What remedy has the proprietor for such ouster?*—198, 199.

For such ouster, though the estate be merely a chattel interest, the owner, or tenant, shall have the same remedy as for an injury to a freehold, viz., by assise and novel disseisin. Upon which account it is that such tenant is said to hold his estate *ut liberum tenementum*, until their debts be paid.

10. *In what actions is the title to lands now usually tried?*—197.

In actions of ejectment or trespass.

CHAPTER XI.

OF DISPOSSESSION, OR OUSTER, OF CHATTELS REAL.

1. *What is ouster of chattels real?*—198.

Ouster of chattels real is by amoving the possession of the tenant from an estate by statute-merchant, statute-staple, recognizance in the nature of it, or *elegit;* or, from an estate for years.