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.

2. *How is ouster from estates held by statute, recognizance, or elegit, liable to happen?*—198.

It is only liable to happen by a species of disseisin, or turning out of the legal proprietor, before his estate is determined by raising the sum for which it is given him in pledge.

3. *What methods are there to work a disseisin of freehold rent?*—170.

Our ancient law books mention five such methods: 1. By inclosure. 2. By forestaller. 3. By *rescous.* 4. By replevin. 5. By denial.

4. *What are the remedies for ouster?*—174.

The remedy for the several species and degrees of injury by ouster is, universally, the restitution or delivery of possession to the right owner; and, in some cases, damages also for the unjust amotion.

5. *How does ouster from an estate for years happen?*—199.

The amotion of possession from an estate for years happens only by a like kind of disseisin, ejection, or turning out of the tenant from the occupation of the land, during the continuance of his term.

6. *What remedies are there for ouster from an estate for years?*—199.

For this injury the law has provided the tenant with two remedies: 1. By writ of *ejectione firmæ*, which lies against any one, the lessor, reversioner, remainder-man, or any stranger who is himself the wrongdoer, and has committed the injury complained of. 2. By the writ of *quare ejecit infra terminum*, which lies not against the wrongdoer or ejector himself, but his feoffee or other person claiming under him.

7. *Why are these mixed actions?*—199.

Because therein two things are recovered, as well restitution of the term of years, as damages for the ouster or wrong.

8. *When lieth a writ of* ejectione firmæ, *or action of trespass in ejectment?*—199.

Where lands or tenements are let for a term of years; and

afterward the lessor, reversioner, remainder-man, or any stranger, doth eject or oust the lessee of his term. By this writ the plaintiff shall recover back his term, or the remainder of it, with damages. Since the disuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements.

9. *When was this action of ejectment first applied to its present principal use, that of trying title to the land?*—201.

Probably, under Henry VII.

10. *In order to maintain the action, what points must the plaintiff make out?*—202.

He must, in case of any defense, make out four points, viz., title, lease, entry, and ouster.

11. *What shall he, thereupon, recover?*—202.

He shall have judgment to recover his term and damages; and shall, in consequence, have a writ of possession.

12. *Does ejectment lie for incorporeal hereditaments?*—206.

It does not; for on those things whereon an entry cannot, in fact, be made, no entry shall be supposed by any fiction. It lies, however, for tithes, by statute.

13. *When did lease, entry and ouster, in ejectment, become fictions?*—202, 203.

As much trouble and formality were found to attend the actual making of the lease, entry and ouster, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant, or occupier, of the premises in dispute, was invented by the lord chief justice Rolle. It depends entirely 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.

14. *Upon what condition is the tenant in possession allowed to be made defendant?*—203.

Upon this condition, that he enter into a rule of court to

confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action; viz., the lease, the entry, and the ouster.

15. *But what if the new defendant, after entering into the common rule, fail to appear at the trial?*—204, 205.

The plaintiff must be then nonsuited, for the want of proving these requisites; but judgment will, in the end, be entered against the casual ejector; for the condition on which the tenant, or his landlord, was admitted a defendant is broken.

16. *The damages in actions of ejectment being merely nominal, what other action lies to complete the remedy, when the possession has been long detained from him who had the right to it?*—503.

An action of trespass, after the recovery in ejectment, to recover the *mesne* profits which the tenant in possession has wrongfully received.

17. *In case this action for* mesne *profits is brought, of what is the judgment in ejectment conclusive evidence?*—205.

As against the defendant, it is conclusive evidence for all profits which have accrued since the date of the demise, stated in the former declaration of the plaintiff. If the plaintiff sues for any antecedent profits, the defendant may make a new defense, and thereby save all but six years' rents and profits.

18. *Is ejectment a remedy where rent is in arrear?*—206.

Yes; it is rendered, by statute, a very easy and expeditious remedy to landlords whose tenants are in arrear.

19. *Has the writ of* quare ejecit infra terminum *fallen into disuse?*—207.

Yes, it has fallen into disuse, since the introduction of fictitious ousters and the action for *mesne* profits.

CHAPTER XII.

OF TRESPASS.

1. *What is trespass?*—208.

Trespass, in its largest and most extensive sense, signifies any transgression or offense against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property.

2. *What is trespass in its limited and confined sense?*—209.

It signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property.

3. *Why does the law entitle a trespass, of this nature, a breach of another's* close?—209, 210.

Because every man's land is, in the eye of the law, enclosed and set apart from his neighbor's; and that either by a visible and material fence, or by an ideal invisible boundary, existing only in contemplation of law. The words of the writ of trespass command the defendant to show cause *quare clausum querentis fregit.*

4. *What is necessary to maintain an action of trespass?*—210.

One must have a property, either absolute or temporary, in the soil, and actual possession by entry, to be able to maintain an action of trespass; or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land.

5. *In case of trespass by cattle, what remedy has the party injured?*—211.

The law affords him a double remedy, in this case, by permitting him to distrain the cattle thus *damage feasant*, or doing damage, till the owner shall make him satisfaction; or else, by leaving him to the common remedy *in foro contentioso*, by action.

6. *In either case of trespass committed upon another's land, by a man himself or his cattle, what action lies?*—211.

The action of trespass *vi et armis.*

7. *What is laying the action with a continuance?*—212.

In trespass of a permanent nature, where the injury is continually renewed (as by spoiling or consuming the herbage with the defendant's cattle,) the declaration may allege the injury to have been committed by continuation from one given day to another; which is laying the action with a *continuando*, and the plaintiff shall not be compelled to bring separate actions for every day's separate offense.

8. *In what cases is trespass justifiable?*—212.

In some cases trespass is justifiable; or, rather entry on another's land or house shall not in those cases be accounted trespass; as if a man come thither to demand or pay money there payable; or to execute, in a legal manner, the process of the law.

9. *When shall a man be accounted a trespasser* ab initio, *though he may have lawfully entered?*—212–214.

In cases where he misdemeans himself, or makes ill use of authority with which the law entrusts him, he shall be accounted a trespasser *ab initio.*

CHAPTER XIII.

OF NUISANCE.

1. *What is nuisance?*—216.

Nuisance, *nocumentum*, or annoyance, signifies anything that worketh hurt, inconvenience, or damage.

2. *Of what kinds are nuisances?*—216.

Of two kinds: public or common nuisances, which affect the public, and are an annoyance to all the king's subjects; and private nuisances, which may be defined, anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another.

3. *What are the nuisances which affect corporeal hereditaments?*—216.

They are chiefly nuisances to houses, to lands, and to water-courses.

4. *To what species may nuisances that affect a man's dwelling be reduced?*—217.

To these three: 1. Overhanging it; which is also a species of trespass, for *cujus est solum, ejus est usque ad cœlum.* 2. Stopping ancient lights. 3. Corrupting the air with noisome smells. For light and air are indispensable requisites to every dwelling.

5. *How does nuisance to lands arise?*—217, 218.

If one does any act, in itself lawful, which yet, being done in that place, necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act, where it will be less offensive.

6. *What are nuisances which affect incorporeal hereditaments?*—218.

They arise, chiefly, by obstructing one in the use of a way, of a fair or market, or of an ancient ferry.

7. *If one is entitled to hold a fair or market, how may a nuisance to it arise?*—218.

If I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that he does a prejudice, it is a nuisance to the freehold which I have in my market or fair. But, in order to make this out to be a nuisance, it is necessary: 1. That my market or fair be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine.

8. *Is it a nuisance to set up any trade, or a school, or a mill, in a neighborhood or rivalship with another?*—219.

It is not; for by such emulation the public are like to be

gainers, and, if the new mill or school occasion a damage to the old one, it is *damnum absque injuria.*

9. *Does the law give a private remedy for anything but a private wrong?*—219.

It does not; therefore no action lies for a public or common nuisance, but an indictment only.

10. *Why is this?*—219.

Because the damage being common to all, no one can assign his particular portion of it, or, if he could, it would be extremely hard if every subject in the kingdom were allowed to harass the offender with separate actions.

11. *Does the rule, that no person, natural or corporate, can have an action for a public nuisance, or punish it, admit of an exception?*—219, 220.

The rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance, in which case he shall have a private satisfaction by action.

12. *What are the remedies by suit for a private nuisance?*—220-222.

The remedies by suit are: 1. By action on the case for damages.

2. An assise of nuisance.

3. The writ *quod permittat prosternere.*

The two latter are now out of use, and have given way to the action on the case.

13. *How far is the action on the case a remedy for nuisances?*—220.

By action on the case for damages, the party injured only recovers a satisfaction for the injury sustained, but cannot thereby remove the nuisance. Indeed, every continuance of a nuisance is held to be a fresh one; and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it.

CHAPTER XIV.

OF WASTE.

1. *What is waste?*—223.

Waste is a spoil and destruction of 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; which the common law expresses by the word *vastum.* Waste is either voluntary or permissive; the one by an actual and designed demolition, the other arising from mere negligence, and want of sufficient care.

2. *What persons may be injured by waste?*—223.

Those, only, who have some interest in the estate wasted.

3. *Is the absolute tenant in fee simple, without any incumbrance or charge on the premises, accountable for waste?*—223, 224.

He may commit waste, in his discretion, without being impeachable, or accountable for it, to any one. And though his heir is sure to be the sufferer, yet *nemo est hæres viventis;* no man is certain of succeeding him. Into whose hands soever, therefore, the estate wasted comes, after a tenant in fee simple, though the waste is *damnum*, it is *damnum absque injuria.*

4. *How is a person, who has a right of common of estovers in the place wasted, injured by the waste?*—224.

Here, if the owner of the wood demolishes the whole wood, and thereby destroys all possibility of taking estovers, this is an injury to the commoner, amounting to no less than a disseisin of his common of estovers, if he chooses so to consider it: for which he has his remedy to recover possession and damages by assise, if entitled to a freehold in such common; but if he has only a chattel interest, then he can only recover damages by action on the case, for this waste and destruction of the woods out of which his estovers were to issue.

5. *What is the most usual and important interest that is hurt by waste?*—225.

That of him who hath the remainder or reversion of the inheritance, after a particular estate for life, or years in being.

6. *Can he who has the remainder, for life only, sue for waste?*—225.

He cannot; since his interest may never, perhaps, come into possession, and then he has suffered no injury.

7. *What remedy is given for this injury of waste?*—225.

The redress for this injury is of two kinds: preventive and corrective; the former of which is by writ of *estrepement*, the latter by that of waste.

8. *What is the writ of* estrepement?—225, 226.

Estrepement is an old French word, signifying waste or extirpation; and the writ of *estrepement* lay at the common law, after judgment obtained in any action real, and before possession was given by the sheriff, to stop any waste which the vanquished party might be tempted to commit in lands, which were to be no longer his. But as in some cases the demandant may be justly apprehensive, that the tenant may make waste or *estrepement* pending the suit, well knowing the weakness of his title, therefore, the statute of Gloucester gave another writ of *estrepement, pendente placito*, commanding the sheriff firmly to inhibit the tenant "*ne faciat vastum vel estrepementum pendente placito dicto indiscusso.*" And, by virtue of either of these writs, the sheriff may resist them that do, or offer to do waste; and, if he cannot otherwise prevent them, he may lawfully imprison the wasters, or if necessity require, he may take the *posse comitatus* to his assistance.

9. *When may this writ be had?*—226.

It may be had in every stage, as well of such actions wherein damages are recovered, as of those wherein only possession is had of the lands. The writ will lie as well before as after judgment.

10. *Besides the preventive redress at common law, what will the courts of equity do to stay waste?*—227.

Upon a bill, complaining of waste and destruction, they will grant an injunction; which is now become the most usual way of preventing waste.

11. *What is a writ of waste, and against whom may it be brought?*—227.

It is an action partly founded upon the common law, and partly upon the statute of Gloucester; and may be brought by him who hath the immediate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by curtesy, or tenant for years. Or, by statute, by one tenant in common against another, who makes waste in the estate holden in common.

12. *Of what nature is the action of waste?*—228.

It is a mixed action; partly real, so far as it recovers land, and partly personal, so far as it recovers damages. If the waste be proved, the plaintiff shall recover the thing or place wasted, and also treble damages by the statute of Gloucester.

13. *What if the defendant makes default?*—228.

If the defendant makes default, or does not appear at the day assigned him, then the sheriff is to take with him a jury of twelve men, and go in person to the place alleged to be wasted, and there inquire of the waste done, and the damages; and make a return or report of the same to the court, upon which report the judgment is founded. But if the defendant appears to the writ, and afterward suffers judgment to go against him by default, or upon a *nihil dicit* (when he makes no answer, puts in no plea in defense,) this amounts to a confession of the waste.

CHAPTER XV.

OF SUBTRACTION

1. *What is subtraction?*—230.

It happens when any person who owes any suit, duty, custom, or service to another, withdraws or neglects to perform it.

2. *In what does it differ from disseisin?*—230.

It differs from a disseisin, in that this is committed without any denial of the right, consisting merely of non-performance; that strikes at the very title of the party injured, and amounts to an ouster or actual dispossession.

3. *Is subtraction remediable?*—230–234.

It is, by due course of law; but the remedy differs according to the nature of the services, whether they be due by virtue of any tenure, or by custom only. The general remedy is by distress. Other remedies are: 1. By action of debt; 2. By assise of *mort d'ancestor* or novel disseisin; 3. By writ *de consuetudinibus et servitiis;* 4. By writ of *cessavit;* 5. By writ of right *sur disclaimer.*

4. *What is the remedy by writ of right* sur disclaimer?—232.

To recover the land, instead of the duty withheld. It takes place when a tenant, upon a writ of assise for rent, or on a replevin, disowns or disclaims his tenure, whereby the lord loses his verdict; in which case the lord may have a writ of right *sur disclaimer,* grounded on this denial of tenure.

CHAPTER XVI.

OF DISTURBANCE.

1. *What is disturbance?*—236.

It is usually a wrong done to some incorporeal hereditament, by hindering or disquieting the owners in their regular and lawful enjoyment of it. This injury is of five sorts: 1. Disturbance of franchises. 2. Disturbance of common. 3. Disturbance of ways. 4. Disturbance of tenure. 5. Disturbance of patronage.

2. *What is disturbance of tenure?*—242.

It is breaking that connection which subsists between the lord and his tenant.

CHAPTER XVII.

OF INJURIES PROCEEDING FROM, OR AFFECTING THE CROWN.

1. *What are injuries to which the crown is a party?*—254.

These injuries are either where the crown is the aggressor, or else is the sufferer.

2. *What are the common law methods of obtaining possession, or restitution from the crown, of either real or personal property?*—256.

They are two: 1. By *petition de droit,* or petition of right.
2. By *monstrans de droit,* manifestation or plea of right.

3. *What are the methods of redressing such injuries as the crown may receive from the subject?*—257–264.

There are six methods: 1. By such usual common law actions as are consistent with the royal prerogative and dignity.
2. By inquisition, or inquest of office.
3. By writ of *scire facias* in chancery to repeal patents.
4. By information on behalf of the crown, in the exchequer.
5. By writ of *quo warranto.*
6. By writ of *mandamus.*

4. *What action may not the king maintain?*—257.

He can maintain no action which supposes a dispossession of the plaintiff; such as an assise or an ejectment.

5. *What remedy has the subject to avoid the possession of the crown acquired by office found?*—260.

He may not only have his petition of right, which discloses new facts not found by the office, and his *monstrans de droit*, which relies on the facts as found; but also he may (for the most part) traverse or deny the matter of fact itself, and put it in a course of trial by the common law process of the court of chancery.

6. *Is* quo warranto *now applied to the decision of corporation disputes?*—264.

It is, without any intervention of the prerogative, by statute, which permits an information in nature of *quo warranto* to be brought, with leave of the court, at the relation of any person desiring to prosecute the same, (who is then styled the *relator*), against any person usurping, intruding into, or unlawfully holding any franchise, or office in any city, borough, or town corporate

CHAPTER XVIII.

OF THE PURSUIT OF REMEDIES BY ACTION—AND FIRST, OF THE ORIGINAL WRIT.

1. *What are the general and orderly parts of a suit?*—272.

The general and orderly parts of a suit (in the court of common pleas at Westminster, that being the court originally constituted for the prosecution of all civil actions), are these:

1. The original writ.
2. The process.
3. The pleadings.
4. The issue or demurrer.
5. The trial.
6. The judgment, and its incidents.
7. The proceedings in nature of appeals.
8. The execution.

2. *Are the methods and forms of proceeding the same in the courts of the king's bench and exchequer as in the common pleas?*—271.

They are, in all material respects.

3. *What is an* original, *or original writ?*—272.

It is the beginning or foundation of the suit; and is a mandatory letter from the king, on parchment, sealed with the great seal, and directed to the sheriff of the county wherein the injury is committed, or supposed so to be, requiring him to command the wrong-doer, or party accused, either to do justice to the complainant, or else to appear in court and answer the accusation against him.

4. *From whence is it obtained?*—273.

From the court of chancery, which is the *officina justitiæ*, the shop or mint of justice, wherein all the king's writs are framed.

5. *Are the original writs demandable of common right?*—273.

They are.

6. *Of what kinds are original writs?*—274.

They are either optional or peremptory; or, in the language of the law, they are either a *præcipe*, or a *si te fecerit securum*.

7. *What is the form of a præcipe?*—274.

It is in the alternative, commanding the defendant to do the thing required, or show the reason wherefore he hath not done it.

8. *Why is the* si te fecerit securum *so called?*—274.

It is so called from the words of the writ, which direct the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gives the sheriff security effectually to prosecute his claim. This writ is in use where nothing is specifically demanded, but only a satisfaction in general; to obtain which, and minister complete redress, the intervention of some judicature is necessary.