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.

9. *What is the security here spoken of?*—274.

It is common to both writs, though it gives denomination only to the *si te fecerit securum;* but the whole of it is now a mere matter of form, and John Doe and Richard Roe are always returned as the standing pledges for this purpose.

10. *What was the ancient use of such pledges?*—275, 276.

To answer for the plaintiff, who, in case he brought an action without cause, or failed in the prosecution of it when brought, was liable to an amercement from the crown for raising a false accusation; and so the form of the judgment still is.

11. *What is the return?*—275.

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.

CHAPTER XIX.

OF PROCESS.

1. *What is process?*—279.

It is, or includes, the means of compelling the defendant to appear in court.

2. *What is meant by original process?*—279.

Process is sometimes called original process, being founded on the original writ; and also to distinguish it from *mesne*, or intermediate, process.

3. *What is understood by* mesne *process?*—279.

It issues pending the suit, upon some collateral interlocutory matter; as to summon juries, witnesses, and the like.

4. *What is final process?*—279.

Process of execution.

5. *What is the summons?*—279.

A verbal warning to appear in court at the return of the original writ.

6. *What is the writ of attachment, or* pone?—280.

It issues out of the court of common pleas, and is 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*, this is, certain of his goods, which he shall forfeit if he doth not appear; or by making him find safe pledges or securities, who shall be amerced in case of his non-appearance.

7. *What is the writ of* distringas?—280.

If, after attachment, the defendant neglects to appear, he not only forfeits his security, but is moreover to be further compelled by writ of *distringas*, or distress infinite; which is a subsequent process, issuing from the court of common pleas, commanding the sheriff to distrain the defendant from time to time, and continually afterward, by taking his goods and the issues of his lands, which, by the common law, he forfeits to the king if he doth not appear.

8. *When is a writ of* capias ad respondendum *now used*?—281, 282.

If the defendant, being summoned or attached, makes default, and neglects to appear; or if the sheriff returns a *nihil;* the *capias ad respondendum* now usually issues, commanding the sheriff to take the body of the defendant.

9. *Why does the practice, in almost all actions excepting actions of debt, of suing out an original writ of* quare clausum fregit, *continue?*—281, 282.

Through custom rather than necessity, and for saving some trouble and expense in suing out a special original adapted to the particular injury.

10. *What are the* capias, *and all other writs subsequent to the original writ, called; and whence do they issue?*—282.

They are called judicial writs, and issue from the court into

which the original was returnable, under the private seal of that court.

11. *What is now usual, as to the capias, in practice?*—282.

To sue out the *capias* in the first instance, upon a supposed return of the sheriff.

12. *When the plaintiff would proceed to an outlawry, can the capias be sued out without an original?*—283.

No; where the defendant absconds, and the plaintiff would proceed to an outlawry against him, an original writ must then be sued out regularly, and after that a capias.

13. *When does a writ of* testatum capias *issue?*—283.

When the sheriff of the county in which the injury is supposed to be committed, and the action is laid, cannot find the defendant in his jurisdiction, he returns that he is not found, *non est inventus*, in his bailiwick; whereupon another writ issues, called a *testatum capias*, directed to the sheriff of the county where the defendant is supposed to reside, reciting the former writ, and that it is testified, *testatum est*, that the defendant lurks or wanders in his bailiwick, wherefore he is commanded to take him as in the former *capias*.

14. *What are the proceedings to outlawry?*—283, 284.

When the sheriff returns a *non est inventus* upon the first writ of *capias*, there issues out an *alias* writ, and after that a *pluries*, to the same effect as the former, only after these words, "we command you," this clause is inserted, "as we have formerly," or "as we have often commanded you." And if *non est inventus* be returned upon all of them, then a writ of *exigent* or *exegi facias* may be sued out, which requires the sheriff to cause the defendant to be proclaimed, required, or exacted, in five county courts successively, to render himself; and if he does, then to take him as in a *capias;* but if he does not appear, and is returned *quinto exactus*, he shall then be outlawed by the coroners of the county. Also, by statute, whether the defendant dwells within the same or another county than that wherein the *exigent* is sued out, a writ of proclamation shall issue out, at the

same time with the *exigent*, commanding the sheriff of the county, wherein the defendant dwells, to make three proclamations thereof in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place.

15. *What is the effect of outlawry, and how may it be removed?*—284.

Such outlawry is putting a man out of the protection of the law, so that he is incapable to bring an action for redress of injuries; and it is also attended with a forfeiture of all one's goods and chattels to the king. If, after outlawry, the defendant appears publicly, he may be arrested by a writ of *capias utlagatum*, and committed till the outlawry be reversed. Which reversal may be had by the defendant's appearing personally in court, or by attorney.

16. *What is the usual method of proceeding in the court of king's bench?*—285.

By bill of Middlesex, without any original.

17. *When may the bailiff justify breaking open the house in which the defendant is, to take him?*—288.

After an arrest, which must be by corporeal seizing or touching the body of the defendant, and not before.

18. *Who are privileged from arrest?*—289.

Peers of the realm, members of parliament, and corporations; clerks, attorneys, and all other persons attending the courts of justice; clergymen performing divine service; suitors, witnesses, and other persons necessarily attending any courts of record upon business, which includes their necessary coming and returning.

19. *For what may an arrest be made, or process served, upon a Sunday?*—290.

Only for treason, felony, or breach of the peace.

20. *When the defendant is regularly arrested, what must he do?*—290.

Either go to prison for safe custody, or put in special bail to

the sheriff, that is, sufficient security for his appearance, called bail, from the French word *bailler*, to deliver, because the defendant is bailed, or delivered, to his sureties, upon their giving security for his appearance, and is supposed to continue in their friendly custody instead of going to jail.

21. *What if the sheriff does not keep the defendant safely, so as to be forthcoming in court?*—290.

An action lies against him for an escape.

22. *How is the defendant's appearance effected?*—291.

By putting in and justifying bail to the action, which is commonly called putting in bail above.

23. *How is bail to the action put in, and what do they undertake?*—291.

It must be put in either in open court, or before one of the judges thereof; or else in the country, before a commissioner appointed for that purpose by statute, which must be by him transmitted to the court. These bail, who must, at least, be two in number, must enter into a recognizance in court, or before the judge or commissioner, 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.

24. *What if the bail be excepted to?*—291.

It must be perfected, that is, they must justify themselves in court, or before the commissioner in the country, by swearing that they are house-keepers, and each of them worth the full sum for which they are bail, after the payment of all their debts.

25. *When shall special bail be required?*—292.

Special bail is required (as of course) only upon actions of debt, or actions on the case in trover, or for money due, where the plaintiff can swear that the cause of action amounts to ten pounds; in other cases no special bail is taken unless by a judge's order, or the particular directions of the court.

26. *When only is special bail demandable of heirs, executors, and administrators?*—292.

In actions for a *devastavit*.

27. *How may special bail be discharged?*—292.

By surrendering the defendant into custody within the time allowed by law.

CHAPTER XX.

OF PLEADING.

1. *What are pleadings?*—293.

Pleadings are the mutual altercations between the plaintiff and defendant.

2. *What is the first pleading?*—293.

The declaration, *narratio*, or count, anciently called the tale, in which the plaintiff sets forth his cause of complaint at length.

3. *In what actions must the plaintiff lay his declaration, or declare his injury to have happened, in the very county and place where it did really happen?*—294.

In local actions; but in transitory actions he may declare in what county he pleases.

4. *Which are local actions?*—294.

Actions where possession of land is to be recovered, or damages for an actual trespass, or for waste, &c., affecting land.

5. *Which are transitory actions?*—294.

Actions for injuries which might have happened anywhere, as debt, detinue, slander, and the like.

6. *What is venue?*—294.

Venue, or *visne*, is the *vicinia*, or neighborhood, in which the injury is declared to be done.

7. *When will the court direct a change of venue?*—294.

When the defendant will make affidavit that the cause of action arose not in that in which it is laid, but in another county.

8. *For what purpose are different counts introduced into the same declaration?*—295.

So that if the plaintiff fails in the proof of one, he may succeed in another.

9. *What was anciently understood by the word suit?*—295.

By suit, or *secta* (*a sequendo*), was anciently understood the witnesses or followers of the plaintiff.

10. *What is a nonsuit?*—295.

When the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law, in any subsequent stage of the action, he is adjudged not to follow or pursue his remedy as he ought to do, and thereupon a nonsuit, or *non prosequitur*, is entered, and he is said to be *nonpros'd.*

11. *What is a retraxit?*—296.

A retraxit is an open and voluntary renunciation of his suit in court: by this act he forever loses his suit.

12. *What is a discontinuance?*—296.

When the plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and from time to time, as he ought to do, the suit is discontinued.

13. *What is defense, in its true legal sense?*—296.

Merely an opposing or denial (from the French verb *defendre*) of the truth or validity of the complaint. It is the *contestatio litis* of the civilians; a general assertion that the plaintiff hath no ground of action, which assertion is afterward extended and maintained in his plea.

14. *What is claim of cognizance?*—298.

It is a claim to have the action tried in some special jurisdiction.

15. *When must cognizance be claimed or demanded?*—298.

Before defense made, if at all.

16. *What is an imparlance?*—299.

Imparlance, or *licentia loquendi*, is a continuance of the cause. Before he defends, if the suit is commenced without any special original, the defendant is entitled to demand an imparlance, or *licentia loquendi*; and, may, before he pleads, have more time granted by consent of the court, to see if he can end the matter amicably, without further suit, by talking with the plaintiff.

17. *When, and for what, may a view be demanded?*—299.

In real actions, the defendant may demand a view of the thing in question, in order to ascertain its identity and other circumstances.

18. *What is* oyer?—299.

The defendant may crave *oyer* of the writ, or of the bond, or other specialty, upon which the action is brought; that is, to *hear* it read to him; 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.

19. *What are praying in aid, and voucher?*—300.

In real actions the tenant may pray in aid, or call for assistance of another, to help him to plead, because of the feebleness or imbecility of his own estate; thus a tenant for life may pray in aid of him who hath the inheritance in remainder, or reversion. Voucher, also, is the calling in of some person to answer the action that hath warranted the title to the tenant or defendant.

20. *What is the writ of* warrantia chartæ?—300.

Warrantia chartæ is a writ allowed to the tenant in assises, against the warrantor, to compel him to assist him with a good plea or defense, or else to render damages and the value of the land, if recovered, against the tenant.

21. *Of what sorts are pleas?*—301.

Of two sorts: Dilatory pleas, and pleas to the action.

22. *What are dilatory pleas?*—301.

They are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy, rather than by denying the injury.

23. *What are pleas to the action?*—301.

They are such as dispute the very cause of suit, or answer to the merits of the complaint.

24. *Of what kinds are dilatory pleas?*—301, 302.

They are of three kinds: 1. To the jurisdiction of the court; alleging that it ought not to hold plea of the injury.

2. To the disability of the plaintiff, by reason whereof he is incapable to commence or continue the suit.

3. In abatement; which is either of the writ or the court, for some defect in one of them.

25. *What effect has the death of either of the parties, in a suit?*—302.

The death of either party is at once an abatement of the suit.

26. *When cannot the suit be revived?*—302.

In actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is *actio personalis moritur cum persona;* and it never shall be revived either by or against the executors or other representatives.

27. *How is a plea to the action made?*—303.

By confessing or denying the merits of the complaint.

28. *What is the effect of tender?*—303.

A tender by the debtor, and refusal by the creditor, will in all cases discharge the costs, but not the debt itself.

29. *Why is the complaint sometimes confessed in part?*—304.

In order to avoid the expense of carrying that part to a formal trial which the defendant has no ground to litigate.

30. *What is the effect of paying money into court; and how may it be done?*—404.

It is in itself a kind of tender to the plaintiff, and is for the most part necessary upon pleading a tender. This may be done upon what is called a motion.

31. *What is a motion?*—304.

It is an occasional application to the court, by the parties or their counsel, in order to obtain some rule, or order of court, which becomes necessary in the progress of a cause.

32. *What are the pleas that totally deny the cause of complaint?*—305.

Either the general issue, or a special plea in bar.

33. *What is the general issue?*—305.

The general issue, or general plea, is what traverses, thwarts and denies at once the whole declaration, without offering any special matter whereby to evade it. By importing an absolute and general denial of what is alleged in the declaration, it amounts at once to an issue.

34. *What is meant by an issue?*—305.

A fact affirmed on one side and denied on the another.

35. *What may be given in evidence on the general issue at the trial?*—305, 306.

Every defense which cannot be specially pleaded: this is an invariable rule.

36. *Are special pleas in bar various?*—306.

Special pleas in bar of the plaintiff's demand are very various, according to the circumstances of the defendant's case.

37. *What is limitation?*—306.

The time limited by statute, beyond which no plaintiff can lay his cause of action.

38. *What is an* estoppel?—308.

A special plea in bar, which happens where a man has done

some act, or executed some deed, which estops or precludes him from averring anything to the contrary.

39. *What are the conditions and qualities of a plea?*—308.

They are five: 1. That it be single, and contain only one matter.

2. That it be direct and positive, and not argumentative.

3. That it have convenient certainty of time, place, and persons.

4. That it answer the plaintiff's allegations in every material point.

5. That it be so pleaded as to be capable of trial.

40. *What are qualities of special pleas?*—309.

They are usually in the affirmative, sometimes in the negative; but they always advance some new fact not mentioned in the declaration; and then they must be averred to be true in the common form, "and this he is ready to verify."

41. *Are special pleas amounting to the general issue allowed?*—309.

They are not.

42. *What if the defendant, in an assise or action of trespass, be desirous to refer the validity of his title to the court rather than the jury?*—309.

He may state his title specially, and at the same time give color to the plaintiff, or suppose him to have an appearance or color of title, bad, indeed, in point of law, but of which the jury are not competent judges, and then refer himself to the judgment of the court.

43. *What is the replication?*—309.

When the plea is in, if it does not amount to an issue, but only evades it, the plaintiff may plead again, and reply to the defendant's plea; either traversing it, or alleging new matter consistent with the declaration.

44. *What subsequent pleadings are there?*—310.

The rejoinder, sur-rejoinder, rebutter, sur-rebutter.

45. *What is departure in pleading?*—310.

In the several stages in pleading, it must be carefully observed not to depart or vary from the title or defense which the party has once insisted on. The replication must support the declaration, and the rejoinder the plea.

46. *What is new or novel assignment?*—310.

In many actions the plaintiff, who has alleged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh, with all its specific circumstances, in such manner as clearly to ascertain and identify it, consistently with his general complaint.

47. *Must duplicity in pleading be avoided?*—311.

It must: 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.

48. *How is issue tendered?*—313.

When either side traverses or denies the facts pleaded by his antagonist, he usually tenders an issue, as it is called. If the traverse or denial comes from the defendant, the issue is tendered in this manner, "and of this he puts himself upon the country," thereby submitting himself to the judgment of his peers; but, if the traverse lies upon the plaintiff, he prays the judgment of the peers in another form, "and this he prays may be enquired of by the country."

49. *When are the parties said to be at issue?*—313.

When, in the course of pleading, they come to a point which is affirmed on one side and denied on the other; all their debates being at last contracted into a single point, which must now be determined either in favor of the plaintiff or of the defendant