CHAPTER XXVI.

OF PLEA AND ISSUE.

1. *What is the plea of the prisoner?*—332.

The plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess or stand mute, is either, 1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar; or, 5. The general issue.

2. *When is the plea to the jurisdiction interposed?*—333.

When an indictment is taken before a court that hath no cognizance of the offense, the prisoner may except to the jurisdiction of the court, by a plea to the jurisdiction, without answering at all to the crime alleged.

3. *What is a demurrer to the indictment?*—333, 334.

It is incident to criminal cases, as well as civil, when the fact as alleged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact as stated is no felony, treason, or whatever the crime is alleged to be.

4. *For what is the plea in abatement interposed?*—334.

It is principally for a *misnomer*, a wrong name, or a false addition to the prisoner.

5. *What rule is there upon all pleas in abatement?*—335.

That he who takes advantage of a flaw must, at the same time, show how it may be amended.

6. *What are special pleas in bar?*—335.

Special pleas in bar go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged.

7. *Of what kinds are they?*—335.

They are of four kinds: 1. A former acquittal; 2. A former conviction; 3. A former attainder; 4. A pardon.

8. *What is the general issue?*—338.

The general issue is the plea of not guilty; upon which plea alone the prisoner can receive his final judgment of death.

9. *Why is the general issue, not guilty, the most advantageous plea for a prisoner?*—338, 339.

In case of an indictment of felony or treason, there can be no special justification put in by way of plea; for pleas of justification do, in effect, amount to the general issue, since, if true, the prisoner is most clearly not guilty. The jury also take notice of any defensive matter, and give their verdict accordingly, as effectually as if it were, or could be, specially pleaded.

10. *By what words does the prisoner put himself upon his trial?*—341.

The prisoner puts himself upon his trial by answering that "he will be tried by God and the country," if a commoner; and, if a peer, "by God and his peers." The clerk answers, "God send thee a speedy deliverance." Then follows the trial.

CHAPTER XXVII.

OF TRIAL AND CONVICTION.

1. *What are the methods of trial and conviction of offenders?*—342-349.

They were formerly more numerous than at present. 1. The most ancient species of trial was that by ordeal. 2. Another was trial by the corsned, or morsel of execration. These two antiquated modes of trial were principally in use among our Saxon ancestors. 3. The trial by *battel*, duel, or single combat. This, which still remains in force, though not in use, owes its introduction to the princes of the Norman line. 4. Trial by high court of parliament, or the court of the lord high steward. 5. TRIAL BY JURY.

2. *What was trial by ordeal?*—342.

The trial by ordeal, which was peculiarly distinguished by the appellation of *judicium Dei*, and sometimes *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party, was of two sorts: either fire-ordeal or water-ordeal; the former being confined to persons of higher rank, the latter to the common people. When performed by deputy, the principal was to answer for the success of the trial.

3. *When was trial by ordeal abolished?*—345.

In the reign of Henry III.

4. *In what criminal cases may trial by battel be demanded?*—346.

It may be demanded, at the election of the appellee, in either an appeal or an approvement.

5. *When shall the trial take place in the court of parliament?*—348.

When a peer is capitally indicted; for, in case of an appeal, he shall be tried by jury.

6. *What is the sheriff's duty, when a prisoner has put himself upon the country?*—350.

The sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto*, that is, freeholders, without just exception, and of the *visne* or neighborhood, which is interpreted to be of the county where the fact is committed.

7. *How, and for what, are challenges to jurors made?*—352.

Challenges may be made, either on the part of the king, or on that of the prisoner, and either to the whole array, or to the separate polls, for cause; for the very same reasons that they may be made in civil causes.

8. *What other species of challenge, besides the challenge for cause, is allowed to the prisoner?*—353.

In criminal cases, or at least in capital ones, there is, *in favorem vitæ*, allowed to the prisoner an arbitrary and capricious

species of challenge to a certain number of jurors, without showing any cause at all, which is called a peremptory challenge.

9. *What number of peremptory challenges is the prisoner allowed?*—354.

Thirty-five.

10. *May a* tales *be awarded in criminal prosecutions?*—354, 355.

It may, if, by reason of challenges, or the default of the jurors, a sufficient number cannot be had of the original panel.

11. *What is done when the jury is sworn, if it be a cause of any consequence?*—355.

The indictment is usually opened, and the evidence marshalled, examined, and enforced, by counsel for the crown, or prosecution.

12. *When only shall counsel be allowed a prisoner upon his trial, upon the general issue, in any capital crime?*—355.

It is a settled rule, at common law, that the prisoner shall be allowed no counsel, unless some point of law shall arise proper to be debated.

13. *For what purposes do the judges allow a prisoner counsel?*—355, 356.

To instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact.

14. *What rules, as to presumptive evidence, does Sir Matthew Hale lay down?*—359.

Two rules, most prudent and necessary to be observed: 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods; and, 2. Never to convict any person of murder or manslaughter till at least the body be found dead.

15. *What is the difference, as to the form of verdict, in civil and criminal cases?*—360.

In a criminal case which touches life or member, the jury cannot give a privy verdict.

16. *May the verdict be either general or special?*—361.

It may be either general, guilty or not guilty; or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all.

17. *What if the verdict be notoriously wrong?*—361.

The jury may be punished, and the verdict set aside by attaint at the suit of the king, but not at the suit of the prisoner.

18. *What follows the verdict of the jury?*—361, 362.

If the jury find the prisoner not guilty, he is then forever quit and discharged of the accusation, except he be appealed of felony within the time limited by law. But if the jury find him guilty, he is then said to be convicted of the crime whereof he stands indicted.

CHAPTER XXVIII.

OF THE BENEFIT OF CLERGY.*

1. *After trial and conviction, what is the principal intervening circumstance that suspends or arrests judgment?*—365.

The benefit of clergy.

2. *In what had the benefit of clergy its origin?*—365.

Clergy, the *privilegium clericale*, or, in common speech, the benefit of clergy, had its origin in the exemption of the persons of clergymen from criminal process, before the secular judge, in a few particular cases.

3. *By what means, and how far were these exemptions extended?*—366.

By their canons and constitutions the clergy endeavored at,

* Learning upon this topic is a curiosity, but now of little use. The statute 7 and 8 George IV., c. 28, enacted, (s. 6,) that benefit of clergy, with respect to persons convicted of felony, shall be abolished, &c.

and obtained, a vast extension of these exemptions, as well in regard to the crimes themselves, of which the list became quite universal, as in regard to the persons exempted; among whom were at length comprehended, not only every little subordinate officer belonging to the church or clergy, but even many that were totally laymen.

4. *Was the* privilegium clericale *universally allowed?*—366.

A total exemption of the clergy from secular jurisdiction could never be thoroughly effected; and, therefore, though it was allowed in some capital cases, yet it was not universally allowed.

5. *What was the practice in those particular cases?*—366.

The use was for the bishop, or ordinary, to demand his clerks to be remitted out of the king's courts, as soon as they were indicted; concerning the allowance of which demand there was for many years a great uncertainty; till, at length, it was finally settled in the reign of Henry the Sixth, that the prisoner should first be arraigned; and might either then claim his benefit of clergy, by way of declinatory plea, or after conviction, by way of arresting judgment. This latter way was most usually practiced.

6. *To whom was the* privilegium clericale *extended?*—366, 367.

Originally, the law was held that no man should be admitted to it but such as had the *habitum et tonsuram clericalem*. But, in process of time, a much wider and more comprehensive criterion was established; every one that could read being accounted a clerk, or *clericus*, and allowed the benefit of clerkship.

7. *What restriction upon the privilege was enacted in the reign of Henry VII.?*—367.

It being found that as many laymen as divines were admitted to the privilege of clergy, by statute 4 Henry VII., c. 13, a distinction was drawn between mere lay scholars and clerks that were really in orders. And though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy;

being subjected to a slight degree of punishment, burning in the hand, and not allowed to claim the clerical privilege more than once.

8. *Was this distinction between learned laymen and real clerks in orders afterward abolished, and again restored?*—367.

Yes; it was abolished for a time by the statutes 28 Henry VIII., c. 1, and 32 Henry VIII., c. 3; but it is held to have been virtually restored by statute 1 Edward VI., c. 12.

9. *What was done with those who claimed benefit of clergy?*—368.

After the burning, the laity, and before it, the real clergy, were discharged from the sentence of the law in the king's courts, and delivered over to the ordinary, to be dealt with according to the ecclesiastical canons.

10. *What then took place?*—368.

The ordinary, in person, or by deputy, at once set himself formally to make a purgation of the offender by a new canonical trial; although he had been previously convicted by his country, or perhaps by his own confession. By this purgation (for he was usually acquitted), the party was restored to his credit, his liberty, his lands, and his capacity of purchasing afresh, and was entirely made a new and an innocent man.

11. *What was a consequence of this almost constant acquittal of felonious clerks by purgation?*—368, 369.

It was the occasion that, upon very heinous and notorious circumstances of guilt, the temporal courts would not trust the ordinary with the trial of the offender, but delivered over to him the convicted clerk, *absque purgatione facienda;* in which situation the clerk convict could not make purgation, but was to continue in prison during life, and was incapable of acquiring any personal property, or receiving the profits of his lands, unless the king should please to pardon him.

12. *What change was subsequently made, as to the treatment of the clerk convict?*—369.

The statute 18 Elizabeth, c. 7, enacted that, after the offender (not in orders) was allowed his clergy, he should not be delivered to the ordinary as formerly; but upon such allowance and burning in the hand, he should forthwith be enlarged and delivered out of prison; with the proviso, that the judge may, if he thinks fit, continue the offender in jail for any time not exceeding a year. And thus the law continued, for above a century, almost unaltered.

CHAPTER XXIX.

OF JUDGMENT, AND ITS CONSEQUENCES.

1. *What, upon a capital charge, is the prisoner asked by the court, when the jury have brought in their verdict of guilty?*—375.

When the jury have brought in their verdict, in presence of the prisoner, he is either immediately, or at a convenient time soon after, asked by the court if he has anything to offer why judgment should not be awarded against him.

2. *When the defendant is found guilty, in his absence, what issues?*—375.

In case the defendant be found guilty of a misdemeanor (the trial of which may, and does usually, happen in his absence, after he has once appeared), a *capias* is awarded and issued to bring him in to receive his judgment; and if he absconds, he may be prosecuted even to outlawry.

3. *But whenever he appears in person, what may he offer in arrest or stay of judgment?*—375.

He may at this period, upon either a capital or inferior conviction, as well as at his arraignment, offer any exceptions to the indictment, in arrest or stay of judgment. And if his objections be valid, the whole proceedings are set aside, but the party may be indicted again.

4. *What is the effect of a pardon, when pleaded in arrest of judgment?*—376.

It has the same advantage, when pleaded in arrest of judg-

ment, as when pleaded upon arraignment, viz., the saving the attainder, and, of course, the corruption of blood; which nothing can restore but parliament, when a pardon is not pleaded till after sentence.

5. *What if all motions in arrest of judgment fail?*—376.

Then the court must pronounce that judgment which the law has annexed to the crime.

6. *What has the* Bill of Rights *declared as to fines and punishments?*—379.

That excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted; which was only declaratory of the old constitutional law.

7. *What is the inseparable consequence of the sentence of death?*—380.

When sentence of death is pronounced, the immediate, inseparable consequence, by the common law, is attainder. The criminal is then called attaint, *attinctus*, stained, or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man; for, by an anticipation of his punishment, he is already dead in law.

8. *What are the consequences of attainder?*—381.

Forfeiture, and corruption of blood.

9. *What is forfeiture?*—381.

It is twofold: of real and of personal estates.

10. *When does forfeiture of real estates obtain?*—381.

By attainder in high treason, a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail; and all his rights of entry on lands and tenements, which he had at the time of the offense committed or afterwards; and, also, the profits of all lands and tenements which he had in his own right for life or years, so long as such interest shall subsist. In petit treason and felony, the offender forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life. These are the forfeitures of real estates created by the common law, as consequent upon attainders by judgment of death or outlawry, exclusive of forfeitures created by the statutes of *præmunire* and others.

11. *When does forfeiture of goods and chattels occur?*—386, 387.

In every one of the higher kinds of offense; in high treason or misprison thereof, petit treason, felonies of all sorts, self-murder or *felo de se*, petit larceny, standing mute, and some others.

12. *In what is the natural justice of forfeiture, or confiscation of property, for treason, founded?*—382.

In this consideration: that he who has thus violated the fundamental principles of government, and broken his part of the original contract between king and people, has abandoned his connections with society, and has no longer any right to those advantages which before belonged to him purely as a member of the community; among which social advantages, the right of transferring or transmitting property to others is one of the chief.

13. *What remarkable differences are there between the forfeiture of lands, and the forfeiture of goods and chattels?*—387.

The differences are: 1. Lands are forfeited upon attainder, and not before; goods and chattels are forfeited by conviction. 2. In outlawries for treason or felony, lands are forfeited by the judgment; but the goods and chattels are forfeited by a man's being first put in the *exigent*, without staying till he is finally outlawed. 3. The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and encumbrances; but the forfeiture of goods and chattels has no relation backward, so that those only which a man has at the time of conviction shall be forfeited.

14. *What is corruption of blood* ?*—388.

Besides forfeiture, another immediate consequence of attainder is the corruption of blood, both upward and downward, so

* By the 54 George III., c. 145, corruption of blood was abolished in all cases except the crimes of high treason and murder.

that an attainted person can neither inherit lands, or other hereditaments, from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir, but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture; and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remote ancestor.*

CHAPTER XXX.

OF REVERSAL OF JUDGMENT.

1. *In what ways may judgments be set aside?*—390.

Judgments, with their several connected consequences of attainder, forfeiture, and corruption of blood, may be set aside in two ways: by falsifying or reversing the judgment, or else by reprieve or pardon.

2. *How may the judgment be reversed?*—390–392.

In three ways: 1. Without a writ of error, for matter foreign to or *dehors* the record, that is, not apparent upon the face of it. 2. By writ of error. 3. By act of parliament.

3. *Where does a writ of error lie?*—391.

It lies from all inferior criminal jurisdictions to the court of king's bench, and from the court of king's bench to the house of peers.

4. *For what is writ of error brought?*—391.

It may be brought for notorious mistakes in the judgment, or other parts of the record.

* By the 3 and 4 William IV., c. 106, s. 10, it is enacted, that when the person, from whom a descent is to be traced, shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, his attainder shall not prevent any person from inheriting who would have been capable, by tracing his descent through such relation, if he had not been attainted, unless the land had escheated in consequence of such attainder before 1st January, 1834.

5. *What is the effect of falsifying or reversing an outlawry?*—392.

That the party shall be in the same plight as if he had appeared upon the *capias*. In case of reversal of judgment upon conviction, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused, restored in his credit, his capacity, his blood, and his estates.

6. *Is he liable to another prosecution for the same offense?*—393.

He is; for the first being erroneous, he never was in jeopardy thereby.

CHAPTER XXXI.

OF REPRIEVE AND PARDON.

1. *What is reprieve?*—394.

A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. It may be, first, *ex arbitrio judicis*, either before or after judgment; as, where the judge is not satisfied with the verdict, &c.; or, sometimes, if it be a small felony, &c., it may be in order to give room to apply to the crown for either an absolute or conditional pardon.

2. *What are reprieves* ex necessitate legis?—395, 396.

When a woman is capitally convicted, and pleads her pregnancy in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact. If the verdict be brought in "quick with child," execution shall be stayed, generally, till the next session, and so from session to session, till she is delivered, or proves by the course of nature not to have been with child at all.

3. *What if the woman hath had the benefit of this reprieve and been delivered, and afterward becomes pregnant again?*—395.

She shall not be entitled to the benefit of a farther respite

for that cause; for she may now be executed before the child is quick in the womb.

4. *What is another cause of regular reprieve?*—395.

If the offender become *non compos* between the judgment and the award of execution.

5. *What is invariably demanded of the prisoner, when any time intervenes between the attainder and the award of execution?*—396.

"What he hath to allege why execution should not be awarded against him."

6. *What may he then plead?*—396.

The party may plead, in bar of execution, pregnancy, the king's pardon, an act of grace, or diversity of person, or the like.

7. *When only, in these collateral issues, shall time be allowed the prisoner to make his defense, or produce his witnesses?*—396.

When he makes oath that he is not the person attainted.

8. *What, in these issues, are not allowed the prisoner?*—396.

No peremptory challenges shall be allowed him.

9. *What offenses may the king pardon?*—398, 399.

The king may pardon all offenses merely against the crown or the public; excepting, 1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm, is, by the *habeas corpus* act, made a *præmunire*, unpardonable even by the king. Nor, 2, can the king pardon where private justice is principally concerned in the prosecution of offenders. Neither can he pardon a common nuisance, while it remains unredressed, or so as to prevent an abatement of it. Neither, lastly, can the king pardon an offense against a popular or penal statute, after information brought.

10. *What will vitiate the whole pardon?*—400.

Any suppression of truth, or suggestion of falsehood, in a charter of pardon; for the king was misinformed.

11. *Will a pardon of all felonies, pardon a conviction or attainder of felony?*—400.

It will not.

12. *Is a man bound to plead his pardon by act of parliament?*—401, 402.

The pardon by act of parliament is more beneficial than by the king's charter, for a man is not bound to plead it, but the court must *ex officio* take notice of it; neither can he lose the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon, which must be specially pleaded, and at a proper time.

13. *When has a man waived the benefit of his pardon?*—402.

If he is indicted, and with a pardon in his pocket, afterward puts himself upon his trial by pleading the general issue.

CHAPTER XXXII.

OF EXECUTION.

1. *What is the completion of human punishment?*—403.

Execution.

2. *By whom, and under what warrant, must execution be performed?*—403.

By the sheriff, or his deputy, by precept under the hand of the judge. The usage now is for the judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff.

3. *Can the sheriff alter the manner of the execution by substituting one death for another?*—404.

He cannot without being guilty of felony himself.

4. *May the king change the punishment of the law?*—405.

The king cannot change the punishment of the law by altering the hanging or burning into beheading; though, when beheading is part of the sentence, the king may remit the rest.

5. *What if, upon execution of judgment to be hanged by the neck till he is dead, the criminal revives?*—406.

The sheriff must hang him again; for the former hanging was no execution of the sentence.

CHAPTER XXXIII.

OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENTS OF THE LAWS OF ENGLAND.

1. *Under what periods is it convenient to consider the state of the legal policy in English juridical history?*—407, 408.

Under five periods: 1. From the earliest times to the Norman conquest; 2. From the Norman conquest to the reign of King Edward the First; 3. From thence to the Reformation; 4. From the Reformation to the restoration; 5. From thence to the revolution of 1688.

2. *What, generally, did King Alfred effect for the constitution and laws of England?*—410, 411.

He new-modeled the constitution; rebuilt it on a plan to endure for ages, and out of its discordant materials he formed one uniform and well-connected whole. He collected the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system, or code of laws, in his Dom-bec, or *liber judicialis*.

3. *What principally did King Edgar accomplish for the same end?*—412.

Observing the ill effects of three distinct bodies of laws,

(the Dane-Lage, West-Saxon-Lage, and Mercen-Lage), prevailing at once in separate parts of the kingdom, a result of the Danish invasion and conquest, projected and begun what his grandson King Edward the Confessor afterwards completed, viz., one uniform digest or body of laws, to be observed throughout the whole kingdom, being probably no more than a revival of King Alfred's code, with some improvements suggested by necessity and experience; which is probably the origin of the common law.

4. *What are among the most remarkable of the Saxon laws?*—412–414.

1. The constitution of parliaments.
2. The election of their magistrates by the people.
3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever since continued.
4. The great paucity of capital punishments for the first offense.
5. The prevalence of certain customs; as heriots and military services, in proportion to every man's land.
6. That their estates were liable to forfeiture for treason.
7. The descent of their lands to all the males equally.
8. The courts of justice consisted principally of the county courts.
9. Trials, among a people who had a very strong tincture of superstition, were permitted to be by ordeal, by the corsned or morsel of execration, or by wager of law with compurgators, if the party chose it; but frequently they were also by jury.

5. *What principal alterations in our laws resulted from the Norman invasion?*—415–418.

1. The separation of the ecclesiastical courts from the civil.
2. The depopulation of whole counties for the purposes of the king's royal diversion.
3. Narrowing of the remedial influence of the county courts.
4. The introduction of trial by combat.
5. The engrafting on all landed estates, a few only excepted, the fiction of feodal tenure.