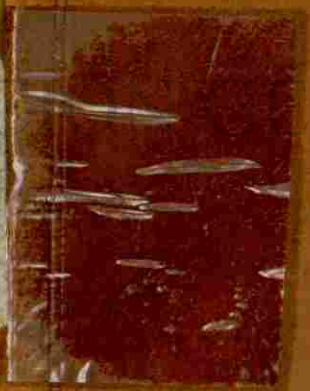

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THE

MOST MATERIAL PARTS

OF

BLACKSTONE'S COMMENTARIES,

REDUCED TO

QUESTIONS AND ANSWERS.

BY

JOHN C. DEVEREUX,
COUNSELLOR AT LAW.

UPON THE PLAN AND IN THE PLACE OF KINNE'S BLACKSTONE.

NEW EDITION.

REVISED AND CORRECTED BY A MEMBER OF THE NEW YORK BAR.

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PREFACE.

Not only the student of our Common Law, wherever he enters upon the task of acquiring its elementary parts, but its practitioners as well, and indeed all, of every pursuit in life, here, and in the mother land, who have occasion to know the obligations under which society places them, are largely indebted to Sir William Blackstone; whose proudest distinction it is, that, although a great lawyer and an eminent judge, he was the author of the "Commentaries on the Laws of England."

They were written and published between the years 1753 and 1770; when, we are assured, the way of the Common Law, to the student, was rough indeed, and obstructed with thorns and brambles, which, as yet, no other skillful and friendly hand had even attempted to remove.

The commentator was a *belles-lettres* scholar, of acquirement and taste—even a poet. About 1741, when, in his eighteenth year, he had just concluded upon the law as his profession, his own muse presents the contrast, not an inviting one, between pursuits he was to abandon and those which were, thenceforth, to form for him the serious business of life:

"Shakspeare no more, thy sylvan son,
Nor all the art of Addison,
Pope's heaven-strung lyre, nor Waller's ease,
Nor Milton's mighty self must please;
Instead of these, a formal band
In furs and coifs around me stand,

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In furs and coifs around me stand,

With sounds uncouth and accent dry,
That grate the soul of harmony.
Each pedant sage unlocks his store
Of mystic, dark, discordant lore;
And points with tottering hand the ways
That lead me to the thorny maze."

The forms of administering justice came to perfection, in England, at an early day; but Common Law, the fountain of that justice, as a pursuit, or a study, was not in general favor with the learned, or lovers of learning.

When it was enacted by Magna Charta: *communia placita non sequantur curiam regis*," and WESTMINSTER became permanently the "*aliquo loco certo*" in which they were held, the influx thither of the Common Lawyers, from all parts of the realm, gave rise to the Inns of Court. In this union was strength, that enabled the law itself to withstand the attacks of the canonists and civilians, who labored to extirpate and destroy it. Our law there, perhaps, began first to assume at all the proportions or features of a science.

The lawyers, assembled together at Westminster, naturally fell into a kind of collegiate organization; and, being excluded from Oxford and Cambridge, found it expedient to establish a university of their own. There, exercises were performed, lectures read, and degrees were conferred in the Common Law; those of "barrister," and "sergeant." For a time, this seminary of the law flourished; but afterward fell from its early purpose, and degenerated.

When Blackstone wrote, "Alfred and Edward were habitually sacrificed to the manes of Theodosius and Justinian; the edict of the prætor, and rescript of the emperor were preferred to the immemorial customs of Common Law, and sanctions of parliament. At that day, in most of the nations on the continent, where the civil or imperial law

under different modifications was, as now, closely interwoven with the municipal law, no gentleman, or at least scholar, thought his education completed, till he had attended a course or two of lectures upon the Institutes of Justinian, and the local constitutions of his native soil, under the very eminent professors that abounded in their several universities.* In England, also, civil law professorships existed in both universities; but the opportunities of gaining legal knowledge, through those channels, would seem to have been quite incomplete, as it was then usual, we are assured, to send the English youth to foreign schools, as better nurseries of the civil law.

But, at that time, it was the peculiar lot of the Common Law, in England, and here, the only guardian of natural rights and rule of civil conduct, to be neglected, and even unknown, by all but one practical profession.

There had been no Chair of Common Law in either University, when Mr. Viner left, by his will, the copyright of his ABRIDGMENT, with other property to a considerable amount, to Oxford, for the purpose of founding a professorship, fellowships, and scholarships of Common Law. In October, 1758, Blackstone was elected Vinerian professor. This appointment, we may here remark, led him, in the preparation of his lectures, to investigate the elements of Common Law, and the grounds of civil polity peculiar to England; and, to it we are, beyond doubt, indebted for his Commentaries on that law and polity. The plan favored by Mr. Viner, and which Blackstone strove to carry out, was not ratified in convocation; and, in consequence, his views of an established society for the study of the Common Law coming to an end, he resigned his professorship in 1766, and while the Commentaries were in course of publication.

* Black. Comm., Introd., s. 1, p. 4.

Superadded to this want of suitable schools, was another; perhaps a greater, at least a more immediate, impediment in the way of those who desired to acquire the Common Law. There were no proper text-books. The student was compelled to encounter "sounds uncouth and accents dry;" the "mystic, dark, discordant lore" of the only elementary works to which he had access. Finch's Common Law and Wood's Institutes were ill adapted to reconcile him to the profession he was about to enter.*

These, and the "harsh and forbidding pages" of Coke, were readily laid aside for a Manual, in which accurate learning, systematic arrangement, and comprehensive research were accompanied by an elegance of style to which, theretofore, the compositions of the English jurists had been strangers.

The Commentaries absorbed the ardent labors of several years. Not until sixteen years after Blackstone began to lecture on the law, at Oxford, were his lectures presented to the public under their new title of Commentaries. Their reception was of the most flattering description. The new work achieved at once a most decided success. The author anxiously sought to free it from errors, as far as possible, and with this purpose, we are informed, submitted it, in MS., to the scrutiny, or revision, of such men as Lord Mansfield and Chief Justice Wilmot.

The position of the Commentator upon some, as well as his very conservative ideas on most, topics treated of, subjected his work to the severest criticism. It passed the ordeal, for censure or approval, of the first minds of that day, in jurisprudence, statesmanship and letters—of Priestley, Furneaux, Fox, Sheridan, Bentham and others. Their strictures were a means of adding completeness to the work: they induced the Commentator to revise it, in

* Black. Comm., *Life*, p. 27.

respect to the particulars objected to by his "animadverters;" "to retract or expunge from it what appeared to be really erroneous; to amend or supply it when inaccurate or defective; to illustrate and explain it when obscure."

All, however, even Bentham, united in commending its literary excellence. Says he: "correct, elegant, unembarrassed, ornamented, the style is such as could scarce fail to recommend a work still more vicious in point of matter, to the multitude of readers."

Fox, the statesman, of distinguished authority also as a critic, esteemed the style in which the Commentaries are written, the very best among English modern writers; always easy and intelligible, far more exact than Hume, and less studied and made up than Robertson; distinguished as much for simplicity and strength as that of any writer in the English language.*

Lord Mansfield expressed, in strong terms, his admiration of the manner in which Blackstone had executed his task. Having been requested to point out the books proper for the perusal of a student, he is said to have replied, "till of late I could never, with any satisfaction to myself, answer that question; but since the publication of Mr. Blackstone's Commentaries, I can never be at a loss. There your son will find analytical reasoning diffused in a pleasing and perspicuous style. There he may imbibe, imperceptibly, the first principles on which our excellent laws are founded; and there he may become acquainted with an uncouth, crabbed, author, Coke upon Lyttleton, who has disappointed and disheartened many a tyro, but who cannot fail to please in a modern dress."†

In connection with his great work on bailments, Sir William Jones alludes to the Commentaries, as the most

* Trotter's Memoirs of Fox. † Halliday's Life of Mansfield, p. 89.

correct and beautiful outline that ever was exhibited of any human science.

The Commentator on American Law, also, placing Blackstone at the head of modern writers, adds this generous and beautiful tribute: "by the excellence of his arrangement, the variety of his learning, the justness of his taste, and the purity and elegance of his style, he communicated to those subjects which were harsh and forbidding in the pages of Coke, the attractions of a liberal science and the embellishments of a polite literature."

We might add largely to these testimonials from the most eminent sources, but general opinion, among the discriminating, has long since confirmed the sentiment they embody. We introduce them here, rather, in order that the student, at the outset, may have the fullest introduction to the author, whose great work he is to peruse, perhaps in connection with and aided by the following pages; and to excite, in advance, his admiration for a masterpiece, that must tell upon his application to its pages, and will, therefore, be well and profitably bestowed.

It is the first book given into his hands upon the threshold of legal studies; the grammar, from which he may derive the rudiments, to which he will constantly refer, as the rule and standard, his future acquisitions in legal lore. It is reported as the saying of a celebrated English judge, that every practitioner of the law should read yearly Blackstone's Commentaries; an observation to which the profession generally will assent. Upon their appearance, the Commentaries became, indeed, the lawyer's *vade mecum;* a position in which they have not been superseded. They not only held their ground, but have grown constantly in use and good repute, among men of the law, as the first and foremost of law books.

The Commentaries have affected a revolution in our

legal learning, at least as to the method of acquiring it. As a precedent, they have been abundantly followed in the style and construction of text-books, and elementary works generally. Indeed, through them,

"Grim visag'd *law* hath smooth'd her wrinkled front."

She is still "a jealous mistress," and exacts the greatest devotion in those who would addict themselves to her with success, but is no longer repulsive. Her service, wisely followed, with the more recent aids and appliances, is, compared with what it was when the Commentaries were projected, easy and pleasant. We are here again tempted to cite Blackstone's verse, as in point. In the "*Farewell to his Muse,*" he has prescience of a career (such as it then was), as follower of the law, which the student, now-a-days, cannot anticipate without gross exaggeration; even though ready to sacrifice as much for "fair justice."

"Then welcome business, welcome strife,
Welcome the cares, the thorns of life,
The visage wan, the pore-blind sight,
The toil by day, the lamp by night,
The tedious forms, the solemn prate,
The pert dispute, the dull debate,
The drowsy bench, the babbling hall,
For thee, fair *Justice*, welcome all!"

This volume, containing the most material parts of Blackstone's Commentaries, by way of question and answer, was intended, especially, to facilitate the student; but, it is hoped, will be found, also, of use to many outside of the profession.

The knowledge intended for practical, every day use, should be full and accurate. Cursory, even careful, perusal of its sources will not answer the purpose. What the

practitioner reads of necessity, should penetrate his memory, so as to remain there a fixture. To that end, masters in all branches of learning counsel the mode of acquisition by question and answer, as well calculated to impress the mind lastingly with what is read; and each one's experience, as a student, doubtless, confirms the piece of advice as wise and judicious.

But, in the following pages, the questions not merely draw and fix attention to the text of the Commentaries, but are fully answered apart from that text; so that, taking together question and answer, the information conveyed is complete, without any reference to the immediate source from which each is derived.

Thus, this volume may be of use, as a source of information, briefly and accurately conveyed, upon most important topics, in the absence of the Commentaries themselves; particularly to those, outside of the profession, who have no time to attack elaborate or ponderous volumes, but read for general information as to the reason, policy and justice of the law, to which they are subject; which they are bound to know, in order to obey.

Certainly, an acquaintance with the general principles and maxims of law is of great importance, in every well-regulated community; and some general knowledge of the municipal law, especially, is of use in nearly all situations of life. Few, in any position, can discharge properly their duty, either to the public or themselves, without some degree of that knowledge.

To a self-governed people such information is of the greatest moment. In this country, every one who votes is, in some degree, virtually a legislator; and is eligible to positions in which he would be one in fact. Apprenticeships are held necessary to almost every art and profession, but each man thinks himself born a legislator. It is self-

evident, that for the duties of law-giver a knowledge of the laws is necessary; for, in the words of the Commentator, "how unbecoming must it appear in a member of the legislature, to vote for a new law who is utterly ignorant of the old! What kind of interpretation can he be enabled to give who is a stranger to the text upon which he comments!" The confusion, perplexity, and litigation, introduced by ill-judging and unlearned legislators, are greatly to be lamented, as the source of lasting injury to the community's best interests.

A word, as to the origin of this book. Some years since, Mr. Asa Kinne, of this city, published a work, much smaller than this, with a title nearly similar, consisting of questions and answers from Blackstone's Commentaries, intended especially for the use of students. With a second edition, it went out of print. But it had proved serviceable; and the demand for it, or a work of similar character, continues—as became evident to the publishers of this volume.

It was at first proposed to revise and re-publish Mr. Kinne's work, but, on trial, a suitable revision of it proved to be quite out of the question. It was concluded, therefore, to re-write the whole, and furnish a new work, embracing much additional matter; with the main feature, the method by questions and answers, fully preserved. As already stated, the following pages are not merely a book of reference, but each question is accompanied by its corresponding answer, full and complete without consulting the text of any other volume.

In short, it may be considered an independent CATECHISM, *i. e.*, form of instruction by means of questions and answers, in the principles of the Common and Statute

Law of England as expounded in Blackstone's Commentaries.

J. C. D.

New York, *August*, 1858.

Note.—The twenty-first English Edition of the Commentaries, in four volumes, was used in the preparation of this work. That edition, the last and best, has been reprinted, in this city, by Harper & Brothers.

It contains, in the course of very full and accurate notes, the alterations in the law, mostly by statute, since the time of Blackstone, so far as they affect the text of the Commentaries. For obvious reasons, very slight reference is made herein to those alterations. Our design related to the Common Law; not, at all, to English Statutory Enactments of the last eighty-eight years, which are of no authority here.

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INTRODUCTION.

SECTION II.

OF THE NATURE OF LAWS IN GENERAL.

1. *What is law in its most general and comprehensive sense?*—38.

It signifies a rule of action, dictated by some superior, and which the inferior is bound to obey. It is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations.

2. *What is law in its more confined sense?*—39.

It denotes the rules, not of action in general, but of human action or conduct; that is, the precepts by which man, a creature endowed with both reason and free will, is commanded to make use of those faculties in the general regulation of his behavior.

comportamiento.

3. *Why must man conform entirely to his Maker's will?*—39.

Because he is entirely dependent upon the will of his Maker.

4. *What is this will of our Maker?*—39.

It is the law of nature, so called.

5. *In what is the law of nature founded?*—40.

In those relations of justice that existed in the nature of things antecedent to any positive precept.

6. *Is the Creator subject to this law of nature?*—40.

It is the eternal, immutable law of good and evil, to which the Creator himself in all his dispensations conforms.

7. *How do we discover this law?*—40.

The Creator has enabled human reason to discover the law of nature, so far as it is necessary for the conduct of human actions.

8. *What are the principles of that law?*—40.

That we should live honestly; should hurt nobody; should render to every one his due, are general precepts of the law of nature.

9. *Does the discovery of these first principles of the law of nature depend only upon the due exercise of right reason?*—40.

No: The Creator has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to enquire after and pursue the rule of right, but our own self-love, that universal principle of action.

10. *What is the foundation of ethics or natural law?*—41.

The paternal precept, "that man should pursue his own true and substantial happiness."

11. *Is the law of nature of superior obligation?*—41.

It is superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity if contrary to it, and they derive all their force and authority from it.

12. *What is revelation?*—42.

Divine Providence hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrine thus delivered we call the revealed or divine law, and it is to be found only in the Holy Scriptures.

13. *How is revelation connected with the law of nature?*—42.

Its precepts are a part of the original law of nature, as they tend in all their consequences to man's felicity, and are as to intrinsic obligation of equal strength and perpetuity with that law.

14. *Has the moral system denominated the natural law and the revealed law equal authority?*—42.

No. The revealed law is of infinitely more authenticity than that system framed by ethical writers and called the natural law. One is the law of nature expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law.

15. *Upon what foundations depend all human laws?*—42.

The law of nature, and the law of revelation.

16. *If man were to live in a state unconnected with other individuals, what laws only would there be occasion for?*—43.

The law of nature, and the law of God. Nor could any other law exist: for a law always supposes some superior who is to make it; and in a state of nature we are all equal, without any other superior but Him who is the author of our being.

17. *As mankind form separate states, is there not a third kind of law?*—43.

Yes; and it is called the law of nations.

18. *Upon what does the law of nations depend?*—43.

Entirely upon the rules of natural law, and upon mutual compacts, treaties, leagues, and agreements between the several communities.

19. *With reference to the law of nations, to what rule, or law, only, can we resort in the construction of compacts?*—43.

In the construction of national compacts we have no other rule to resort to but the law of nature; because it is the only one to which all the communities are equally subject; and therefore the civil law very justly observes, *quod naturalis ratio inter omnes homines constituit vocatur jus gentium.*

20. *What is that law by which particular nations are governed called?*—44.

Municipal or civil law.

21. *How does the commentator define that law?*—44.

He defines it to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong."

22. *For what reasons is municipal law called a rule?*—44, 45.

1st. It is not a transient or sudden order from a superior to, or concerning a particular person; but something permanent, uniform, and universal.

2d. It is called a rule to distinguish it from advice or counsel.

3d. It is called a rule to distinguish it from a compact or agreement; for a compact is a promise proceeding from us, law is a command directed to us.

23. *How does he define the difference between counsel and law?*—44.

Counsel is matter of persuasion only, law is matter of injunction; counsel acts upon the willing, law upon the unwilling also.

24. *What is the language of a compact, what of law?*—45.

The language of a compact is, "I will, or will not do this;" that of law is, "thou shalt, or shalt not do it."

25. *Why is municipal law called* "a rule of civil conduct?"—45.

To distinguish it from the natural and revealed law.

26. *Why is municipal law said to be a rule prescribed?*—45.

Because a bare resolution confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it.

27. *By what means may law be notified or prescribed?*—45, 46.

It may be notified by universal tradition and long practice,

which supposes a previous publication, and is the case with the common law of England. It may be notified *viva voce*, by officers appointed for that purpose, as is done with regard to proclamations and such acts of parliament as are appointed to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with acts of parliament. Yet whatever way is made use of, it is incumbent on the promulgators to do it in the most public and conspicuous manner; not like Caligula, who, (according to Dio Cassius,) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people. There is a still more unreasonable method than this, which is making of laws *ex post facto;* when, after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime and inflicts a punishment upon the person who has committed it. All laws should be made to commence *in futuro*, and be notified before their commencement, which is implied in the term prescribed.

28. *Why is municipal law prescribed by the supreme power in a state?*—46.

Because legislation is the greatest act of superiority that can be exercised by one being over another. Therefore it is requisite to the very essence of law that it be prescribed by the supreme power in the state.

29. *What are the only true and natural foundations of society?*—47.

The wants and fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society, either natural or civil; and that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion of an actual existing unconnected state of nature, is too wild to be seriously admitted.

But, though, society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the sense of their wants and weaknesses that keeps man-

kind together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation as well as the cement of civil society. This is what we mean by the original contract of society.

30. *When civil society is once formed what, of course, results?*—48.

Government; as necessary to preserve and to keep that society in order.

31. *As all the members which compose this society were naturally equal, to whose hands are the reins of government to be entrusted?*—48.

In general, all mankind will agree that government should be reposed in persons in whom those qualities are most likely to be found, the perfection of which is among the attributes of him who is emphatically styled the Supreme Being; the three grand requisites of wisdom, of goodness, and of power. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well constituted frame of government.

32. *What must there be in every form of government?*—49.

A supreme, irresistible, absolute, uncontrollable authority, in which the rights of sovereignty reside.

33. *What three forms of government are there?*—49.

The political writers of antiquity do not allow more than three regular forms of government—democracy, aristocracy, and monarchy. All other species of government, they say, are either corruptions of, or reducible to these three.

34. *What peculiar quality is each of these forms of government likely to possess?*—49, 50.

In a Democracy, it is probable, more public virtue, or goodness of intention exists, than in either of the other forms of government; but it may be deficient in wisdom to contrive, and strength to execute.

A Monarchy is the most powerful, and the most dangerous, of governments.

In Aristocracies it is supposed there is more wisdom than in the other forms of government, but less honesty than in a republic, and less strength than in a monarchy.

35. *What is the nature of the British form of government?*—50.

It partakes of the advantages of monarchy, aristocracy, and democracy. The legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other:—First, the King; secondly, the Lords spiritual and temporal, who are persons selected for their piety, their birth, their wisdom, their valor, or their property; and thirdly, the House of Commons, freely chosen by the people from among themselves. Here is lodged the sovereignty of the British constitution.

36. *With whom lies the right to make laws, in every government?*—52.

With the legislature resides the authority to make laws, *i. e.* to prescribe the rule of civil action.

37. *Is it the* duty, *as well as the right, of the legislature to make laws?*—52, 53.

Since the respective members are bound to conform themselves to the will of the state, it is expedient that they receive directions from the state declaratory of that its will.

38. *Of what four parts should every law consist?*—53, 54.

Every law should be declaratory, directory, remedial, and vindicatory.

39. *What part of a law is said to be declaratory.*—53.

That whereby the rights to be observed and the wrongs to be eschewed are clearly defined and laid down.

40. *What the directory; what the remedial; and what the vindicatory?*—54.

The directory is that whereby the subject is instructed and enjoined to observe rights, and to abstain from the commission of wrongs. The remedial is that whereby a method is pointed out to recover private rights, or redress private wrongs. The sanction or vindicatory part, is that whereby it is signified what evil

or penalty shall be incurred by such as commit any public wrongs and transgress or neglect their duty.

41. *What is the most effectual part of a law?*—55.

The vindicatory part: The main strength and force of a law consist in the penalty annexed to it.

42. *Wherein consists the difference between those things which are* mala in se, *and those which are* mala prohibita?—54–58.

Crimes and misdemeanors, as murder, theft and perjury, forbidden by the superior laws, are styled *mala in se*. But with regard to things in themselves indifferent, they become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of society, and more effectually carrying on the purposes of civil life.

43. *What municipal laws bind the conscience?*—57, 58.

Human laws, as to *rights*, are binding upon men's consciences. So, also, in regard to *natural duties* and such *offences* as are *mala in se*: here we are bound in conscience, because we are bound by superior laws, before those human laws were in being, to perform the one and abstain from the other. But, in relation to those laws which enjoin only *positive duties*, and forbid only such things as are not *mala in se*, but *mala prohibita* merely, without any intermixture of moral guilt, annexing a penalty to non-compliance, here conscience is no further concerned than by directing a submission to the penalty, in case of avowed breach of those laws.

44. *How is the intention of the legislator to be gathered?*—59.

The fairest and most natural method to interpret his will, is by exploring his intentions from the words, the context, the subject-matter, the effects and consequences of the law, or the spirit and reason of them all.

45. *In relation to the interpretation of laws, how are words generally to be understood, and how are terms of art or technical terms to be taken?*—59.

Words are, generally, to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf, which forbade a layman to lay hands on a priest, was adjudged to extend to him who hurt a priest with a weapon. Again, terms of art, or technical terms, must be taken according to the acceptation of the learned in art, trade, and science. So in the act of settlement, where the crown of England is limited "to the princess Sophia, and the heirs of her body, being protestants," it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words, "heirs of her body," which in a legal sense, comprise only certain of her lineal descendants.

46. *As to the subject matter, how are words always to be understood?*—60.

As to the subject-matter, words are always to be understood as having regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end.

47. *What is the rule, as to the effects and consequences?*—60.

As to effects and consequences, the rule is, that when words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, which enacted, "that whoever drew blood in the street should be punished with the utmost severity," was held, after a long debate, not to extend to the surgeon who opened the vein of a person that fell down in the street with a fit.

48. *What is the most universal and effectual way of discovering the true meaning of law, when words are dubious?*—61.

By considering the reason and spirit of it, or the causes which moved the legislature to enact it. For when the reason ceases, the law itself ought to cease. An instance of this is given by Cicero, or whoever wrote the treatise inscribed to Herennius. There was a law, that those who in a storm forsook the ship, should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous

tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agreed, that the sick man is not within the reason of the law, for the reason of making it was to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to its preservation.

From this method of interpreting the laws, by the reason of them, arises what is called equity.

49. *How is equity defined by Grotius?*—61.

He says it is "the correction of that wherein the law (by reason of its universality) is deficient."

50. *Why is a court of equity necessary?*—61.

Because it is necessary that when the general decrees of the law come to be applied to particular cases, there should be vested somewhere a power of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed.

51. *Upon what does equity essentially depend?*—62.

Upon the particular circumstances of each case. Hence there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law.

52. *Should or should not all cases be considered in an equitable light?*—62.

The liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge.

SECTION III.

OF THE LAWS OF ENGLAND.

1. *How may the municipal law of England be divided?*—63.

Into two kinds; the *lex non scripta*, the unwritten or common law—and the *lex scripta*, the written or statute law.

2. *What does the first kind include?*—63.

The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called, but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws* that are, by custom, observed only in certain courts and jurisdictions.

3. *Where is it to be found?*—63, 64.

In the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity.

4. *From whence is its binding power?*—64.

The *leges non scriptæ* receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.

5. *Of what degree of antiquity must customs be to entitle them to weight and authority?*—67.

They must have been used time out of mind; or in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary.

6. *Into what three kinds is the unwritten or common law distinguishable?*—67.

1st. General customs, or the common law properly so called; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification.

2d. Particular customs; which for the most part affect only the inhabitants of particular districts.

3d. Certain particular laws; which by custom are adopted

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2d. Particular customs; which for the most part affect only the inhabitants of particular districts.

3d. Certain particular laws; which by custom are adopted

and used by some particular courts of pretty general and extensive jurisdiction.

7. *How are maxims and customs of the common law to be known, and how is their validity to be determined?*—69.

By the judges in the several courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.

8. *What is the doctrine of the law as to following precedents?*—70.

They must be followed, unless flatly absurd or unjust; for though the reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose that they acted wholly without consideration.

9. *Does this rule admit of exception?*—69, 70

Yes; where the former determination is most evidently contrary to reason; much more, if it be clearly contrary to the divine law.

10. *What do the rules relating to particular customs regard?*—75.

Either the proof of their existence, their legality, when proved, or their usual method of allowance.

11. *Wherein do the customs of London differ from all others, as to the mode of trial?*—76.

If the existence of a custom be brought in question, it shall not be tried by a jury, but by a certificate from the lord mayor and aldermen by the mouth of their recorder; unless it be such a custom as the corporation is itself interested in, as a right of taking toll, &c., for the law permits them not to certify on their own behalf.

12. *What are the seven necessary requisites to make a particular custom good?*—77, 78.

1st. That it hath been used so long that the memory of man runneth not to the contrary.

2d. It must have been continued. Any interruption would cause a temporary ceasing; the revival would give it a new beginning, which will be within time of memory, and thereupon the custom will be void.

3d. It must have been peaceable, and acquiesced in; not subject to contention and dispute.

4th. Customs must be reasonable; or rather, taken negatively, they must not be unreasonable.

5th. Customs ought to be certain.

6th. Customs, though established by consent, must be (when established) compulsory, and not left to the option of every man, whether he will use them or not.

7th. Lastly, customs must be consistent with each other: one custom cannot be set up in opposition to another.

13. *To what, however, must all special customs submit?*—79.

To the king's prerogative.

14. *What are understood by those peculiar laws which, by custom, are adopted and used only in certain peculiar courts and jurisdictions?*—79.

The civil and canon laws.

15. *What is understood by each of these laws absolutely taken?*—80–82.

By the civil law is generally understood the civil or municipal law of the Roman empire, as comprised in the Institutes, the Code, and the Digest of the Emperor Justinian, and the novel constitutions of himself and some of his successors.

The canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over.

16. *What are the courts in which the civil and canon law are permitted to be used?*—83.

1st. The courts of the Archbishops and Bishops, and their derivative officers.

2d. The military courts.

3d. The courts of admiralty.

4th. The courts of the two universities.

17. *Under what superintendency are all these courts?*—84.

Under that of the courts of common law.

18. *To whom does an appeal lie in the last resort?*—84.

To the King; which proves that the jurisdiction exercised in courts is derived from the crown of England alone.

19. *Of what do the* leges scriptæ *consist?*—85.

Of statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled.

20. *Of what kinds are statutes?*—85, 86.

They are either general or special, public or private.

21. *How are statutes connected with the common law?*—86.

They are declaratory of the common law, or remedial of small defects therein.

22. *What rules are to be observed with regard to the construction of statutes?*—87–91.

1st. There are three points to be considered in the construction of all remedial statutes:—the old law; the mischief; and the remedy.

2d. A statute which treats of things or persons of an inferior rank cannot, by any general words, be extended to those of a superior

3d. Penal statutes must be construed strictly.

4th. Statutes against frauds are to be liberally and beneficially expounded.

5th. One part of a statute must be so construed by another, that the whole may (if possible) stand.

6th. A *saving*, totally repugnant to the body of the act, is void.

7th. Where the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one.

8th. If a statute that repeals another, is itself repealed afterwards, the first statute is thereby revived, without any formal words for that purpose.

9th. Acts of parliament derogating from the power of subsequent parliaments, bind not.

10th. Lastly; acts of parliament that are impossible to be performed, are of no validity.

23. *For what purposes are our courts of equity established, and in what matters are they only conversant?*—92.

To detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a relief, more specific and better adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive, or common law.

They are only conversant in matters of property.

BOOK I.

OF THE RIGHTS OF PERSONS

CHAPTER I.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

1. *What are the primary and principal objects of the law?*—122.

RIGHTS and WRONGS.

2. *How are rights subdivided?*—122.

Into, first, those rights which concern and are annexed to the persons of men, and are called *jura personarum*, or the *rights of persons;* secondly, such as a man may acquire over external objects or things unconnected with his person, which are styled *jura rerum*, or the *rights of things.*

3. *How are wrongs divisible?*—122.

They are divisible into, first, *private wrongs*, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries ; and, secondly, *public wrongs*, which, being breaches of general and public rights, affect the whole community, and are called crimes and misdemeanors.

4. *Of what sorts are the rights of persons which are commanded to be observed by the municipal law?*—123.

First, such as are due from every citizen, which are usually called civil duties ; and, secondly, such as belong to him, which is the more popular acceptation of rights or *jura.*

5. *How are persons divided by the law?*—123.

Into natural persons and artificial. Natural persons are such as the God of nature formed us ; artificial are such as are created

and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

6. *Of what two sorts are the rights of persons, considered in their natural capacities?*—123.

First, absolute, which are such as appertain and belong to particular men, merely as individuals or single persons. Secondly, relative, which are incident to them as members of society, and standing in various relations to each other.

7. *What is meant by the absolute rights of individuals?*—123.

Those rights which are so in their primary and strictest sense ; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.

8. *What is to be expected of the law as to the absolute duties of individuals?*—124.

It is not to be expected that human municipal law should at all explain or enforce them. It has no concern with any other but social or relative duties.

9. *What is the principal aim of society?*—124.

To protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature.

10. *What then is the first and primary end of human laws?*—124.

To maintain and regulate these absolute rights of individuals. Such rights as are social and relative result from, and are posterior to, the formation of states and societies ; so that to maintain and regulate these is clearly a subsequent consideration.

11. *What general appellation is there for the natural rights of man?*—125.

The natural liberty of mankind.

12. *In what does this natural liberty consist?*—125.

It consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature.

13. *What does every man, when he enters into society, give up?*—125.

A part of his natural liberty, as the price of so valuable a purchase.

14. *What is political or civil liberty?*—125.

It is no other than natural liberty, so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public.

15. *How have the absolute rights of Englishmen, usually called their liberties, been asserted?*—127, 128.

First, by the great charter of liberties, obtained from King John. Afterward, by the statute called *confirmatio chartarum*, whereby the great charter is directed to be allowed as the common law. Next, by a multitude of corroborating statutes. Then, by the Petition of Right, the *habeas corpus* act and other salutary laws passed under Charles the Second. Again, by the Bill of Rights of 1688; and lastly, by the Act of Settlement.

16. *To what principal or primary articles may these rights be reduced?*—129.

1. The right of personal security; 2. The right of personal liberty; 3. The right of private property.

17. *In what does the first consist?*—129.

In a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

18. *What are understood here by limbs?*—129.

By a man's limbs we understand only those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law.

19. *How is an infant in* ventre sa mere *considered in law?*—130.

For many purposes, it is supposed in law to be born. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterward, by such limitation, as if it were then actually born.

20. *What is meant by* duress per minas?—131.

If a man, through fear of death or mayhem, is prevailed upon to execute a deed, or do any other legal act, these may be afterward avoided, if forced upon him by a well-grounded apprehension of losing his life, or ever 'imbs, in case of his noncompliance.

21. *What is meant by civil death?*—132.

Civil death commenced, if any man was banished by the process of the common law, or abjured the realm, or entered into religion, that is, went into a monastery, and became there a monk professed; in which cases, he was absolutely dead in law, and his next heir should have his estate.

22. *How does the law of England regard personal liberty?*—134.

Next to personal security, it regards, asserts, and preserves the personal liberty of individuals.

23. *In what does this personal liberty consist?*—134.

In the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law.

24. *What is* habeas corpus?—135.

It is a writ requiring the body of a person imprisoned to be brought before the court of king's bench, or common pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain.

25. *When may it be sued out?*—135.

If any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council.

26. *What is imprisonment in law?*—136.

The confinement of the person in any wise. So that keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment.

27. *What does the law mean by duress of imprisonment?*—136.

A compulsion by an illegal restraint of liberty, until one seals a bond, or the like. In which case, he may allege the duress, and avoid the extorted bond.

28. *What is necessary to make an imprisonment lawful?*—137.

It must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison, which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into if necessary upon a *habeas corpus*.

29. *When is a jailor not bound to detain the prisoner?*—137.

When no cause of commitment is expressed in the process or warrant.

30. *What says Sir Edward Coke on the subject?*—137.

"The law judges," he says, "like Festus the Roman governor, that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him."

31. *Can an Englishman be restrained from leaving the kingdom?*—137.

He may. The king, by his royal prerogative, may issue out his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign parts without license.

32. *Can he be compelled to leave the kingdom?*—137.

He cannot, except in criminal cases, where the convicted are sometimes punished by exile or transportation. No power, except the authority of parliament, can send any subject of England out of the land against his will, not even a criminal; for exile and transportation are punishments unknown to the common law.

33. *What is the third absolute right of Englishmen?*—138.

That of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.

34. *Does the law authorize any violation of private property?*—139.

It will not authorize the least violation of private property, not even for the general good of the whole community.

35. *Is there any exception to this?*—139.

In case it would be beneficial to the public that a new road should be made through the grounds of a private person, the legislature can interpose to compel that person to acquiesce in its being made; not by stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained.

36. *What aids or taxes only can a subject of England be constrained to pay?*—140.

Only such as are imposed by his own consent, or that of his representatives in parliament.

37. *What are five secondary and subordinate rights of Englishmen?*—141–143.

1. The constitution, powers and privileges of parliament.
2. The limitation of the king's prerogative.
3. The right of applying to the courts of justice for redress of injuries.
4. The right of petitioning the king, or either house of parliament, for the redress of grievances, in case there should happen any uncommon injury, or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach.
5. The right of having arms for their defence, suitable to their condition and degree, and such as are allowed by law.

These are auxiliary rights, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights.

38. *What in England is the supreme arbiter of every man's life, liberty, and property?*—141.

The law.

39. *What is said as to the right of every Englishman to apply to the courts of justice for redress of injuries?*—141, 142.

That, for injury done to him *in bonis, in terris, vel persona,*

by any other subject, be he ecclesiastical or temporal, without any exception, he may take his remedy by the course of the law, and have justice and right for the injury done to him.

40. *Can the substantial part, or judicial decisions, of the law, or the method of proceeding, be altered except by parliament?*—142.

They cannot. The power to alter either rests in parliament alone.

41. *Can the king erect new courts of justice?*—142.

He can; but then they must proceed according to the established forms of the common law.

CHAPTER II.

OF THE PARLIAMENT.

1. *What is the most universal public relation by which men are connected together?*—146.

That of government; namely, as governors and governed, or, in other words, as magistrates and people.

2. *What is the distinction between supreme and subordinate magistrates?*—146.

Of magistrates, some are supreme, in whom the sovereign power of the state resides; others are subordinate, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere.

3. *In England how is the supreme magistracy divided?*—146, 147.

Into two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone.

4. *How ancient are parliaments in England?*—149.

Parliaments, or general councils, are coeval with the kingdom itself. It is generally agreed that, in the main, the constitution of parliament, as it now stands, was marked out so long ago as the seventeenth year of King John, A.D. 1215, in the great charter.

5. *How is parliament summoned?*—150.

By the king's writ or letter, by advice of the privy council, at least forty days before it begins to sit.* It is a branch of the royal prerogative, that no parliament can be convened by its own authority, or by the authority of any except the king alone.

6. *What are the constituent parts of a parliament?*—153.

They are, the king's majesty, sitting there in his royal political capacity; and the three estates of the realm; the lords spiritual and the lords temporal, who sit together with the king, in one house; and the commons, who sit by themselves in another.

7. *Of whom does the commons consist?*—158.

Of all such men of property in the kingdom as have not seats in the house of lords, every one of whom has a voice in parliament, either personally or by his representatives.

8. *What is the power and jurisdiction of parliament?*—160, 161.

To it is intrusted, by the constitution, that absolute despotic power, which must in all governments reside somewhere. It can do every thing that is not naturally impossible, and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament.

9. *In what consists the democratical part of the British constitution?*—170.

In the elections for parliament; for in a democracy, there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will.

10. *What reason is given for requiring a property qualification in voters?*—171.

It is required in order to exclude such persons as are in so mean a situation that they are esteemed to have no will of their

* The time is now uniformly extended to fifty days, (2 Hats., 290,) although no positive law has been made on the subject.

own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man a larger share in elections than is consistent with general liberty.

CHAPTER III.

OF THE KING AND HIS TITLE.

1. *In whom is the supreme executive power invested?*—190.

In a single person, the king or queen. The person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power.

2. *What is the grand fundamental maxim upon which the right of succession to the crown depends?*—191.

That the crown is, by common law and constitutional custom, hereditary, and this in a manner peculiar to itself; but that the right of inheritance may from time to time be changed or limited by act of parliament; under which limitations the crown still continues hereditary.

3. *Is the right to the throne defeasible?*—195.

It is, by act of parliament. The supreme legislative authority, the king and both houses of parliament, may defeat this hereditary right, and by particular entails, limitations, and provisions, exclude the immediate heir, and vest the inheritance in any one else.

4. *Is the crown always hereditary in the wearer of it?*—196.

Yes; however the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it.

5. *When began to be first taken the distinction of a king* de jure *and a king* de facto *?*—204.

In the reign of Edward IV.; in order to indemnify such as

had submitted to the then late establishment, and to provide for the peace of the kingdom by confirming all honors conferred and all acts done, by those who were now called the usurpers, not tending to the disherison of the rightful heir.

CHAPTER V.

OF THE COUNCILS BELONGING TO THE KING.

1. *What councils has the king to advise with?*—227.

To assist him in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law has assigned him, 1 the high court of parliament; 2. conventions of the peers, called to advise the king; 3. his judges of the courts of law, for law matters; 4. the privy council.

2. *How are privy counselors created?*—230.

They are made by the king's nomination, without either patent or grant; and on taking the necessary oaths, they become immediately privy counselors during the life of the king that chooses them, but subject to removal at his discretion.

CHAPTER VI.

OF THE KING'S DUTIES.

1. *What is the king's principal duty?*—233.

To govern his people according to law. This has always been esteemed an express part of the common law of England, even when prerogative was at the highest.

2. *What are the terms of the original contract between king and people?*—234, 235.

They are couched in the coronation oath. In the king's

part of this original contract are expressed all the duties that a monarch can owe to his people; viz., to govern according to law; to execute judgment in mercy; and to maintain the established religion.

CHAPTER VII.

OF THE KING'S PREROGATIVE.

1. *How is the royal prerogative limited?*—237.

By bounds so certain and notorious that it is impossible he should ever exceed them, without the consent of the people, on the one hand, or without, on the other, a violation of that original contract which, in all states impliedly, and in ours most expressly, subsists between the prince and the subject.

2. *What is usually understood by the word prerogative?*—239.

That special pre-eminence which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It is either direct or incidental.

3. *What are direct prerogatives?*—239, 240.

Such positive substantial parts of the royal character and authority as are rooted in and spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstances; as the right of sending ambassadors, of creating peers, and of making war and peace.

4. *What are incidental prerogatives?*—240.

They bear always relation to something else, distinct from the king's person, and are indeed only exceptions, in favor of the crown, to those general rules that are established for the rest of the community.

5. *Of what kinds are the direct prerogatives?*—240.

They are divided into three kinds; being such as regard

1. the king's royal character; 2. his royal authority; 3. his royal income.

6. *What are the several branches of the royal character or dignity?*—241–249.

I. The law ascribes to the king the attribute of sovereignty or pre-eminence. II. The law ascribes also to the king, in his political capacity, the attribute of perfection. III. A third attribute of the king's majesty is his perpetuity.

7. *Can suit or action be brought against the king?*—242.

It cannot, even in civil matters, because no court can have jurisdiction over him.

8. *Is the person of the king sacred?*—242.

By law, the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary.

9. *Are the subjects of England destitute of remedy, in case the crown should invade their rights?*—243.

The law has provided a remedy in cases both of private injury and public oppression.

10. *What remedy is there in cases of private injury?*—242.

If any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion.

11. *What remedy has the subject in cases of public oppression?*—244.

As to cases of ordinary public oppression, the law hath also assigned a remedy; for, as a king cannot misuse his power without the advice of evil counselors and the assistance of wicked ministers, these men may be examined and punished.

12. *Can the king do wrong?*—244.

It is a maxim of the law that the king can do no wrong, since it would be a great weakness and absurdity in any system

of positive law to define any possible wrong without any possible redress.

13. *What is meant by this maxim?*—246.

Two things: first, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people; and, secondly, that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people and cannot be exerted to their prejudice.

14. *Can Parliament remonstrate?*—247.

Yes; notwithstanding the personal perfection which the law attributes to the sovereign, the constitution in respect to both houses of Parliament, has allowed a latitude of supposing the contrary, each of which, in its turn, hath exerted the right of remonstrating and complaining to the king, even of those acts of royalty which are most properly and personally his own, such as messages signed by himself, and speeches delivered from the throne.

15. *Can* laches *be imputed to the king?*—247.

No; the law determines that in the king can be no negligence, or laches; and, therefore, no delay will bar his right.

16. *What is meant by the attribute of perpetuity?*—249.

The law ascribes to the king, in his political capacity, an absolute immortality. The king never dies. Immediately upon the decease of the reigning prince, in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir; who is, *eo instanti*, king to all intents and purposes.

17. *Is the king sole magistrate?*—250.

He is not only the chief, but properly the sole, magistrate of the nation; all others acting by commission from, and in due subordination to him.

18. *In what is the king absolute?*—250.

In the exertion of lawful prerogative, the king is, and ought

to be, absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him.

19. *What is the king in foreign affairs?*—252.

The delegate or representative of his people. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation; what is done without the king's concurrence, is the act only of private men.

20. *What are the branches of his power in foreign affairs?*—253–262.

I. He has the sole power of sending embassadors to foreign states, and receiving embassadors at home. II. It is also his prerogative to make treaties, leagues, and alliances, with foreign states and princes. III. He has the sole prerogative of making war and peace. IV. He grants letters of marque and reprisals. V. It is also his prerogative to grant safe-conducts or passports.

21. *What are prerogatives of the king in domestic affairs?*—262–281.

I. He is a constituent part of the legislature, and, as such, has the prerogative of rejecting such provisions in Parliament as he judges improper to be passed. II. He is considered as the generalissimo, or the first in the military command, within the kingdom. III. He is considered as the fountain of justice and general conservator of the peace of the kingdom. By the fountain of justice the law does not mean the author or original, but only the distributor. IV. He is the fountain of honor, of office, and of privilege; and this in a different sense from that wherein he is styled the fountain of justice, for here he is really the parent of them. V. The laws of England consider the king as the arbiter of commerce, that is, domestic commerce. VI. The king is also considered, by the laws, as the head and supreme governor of the nationa. church.

CHAPTER VIII.

OF THE KING'S REVENUE.

1. *What are the king's fiscal prerogatives?*—281.

Such as regard his revenue, which the constitution hath invested in the royal person, in order to support his dignity and maintain his power. This revenue is either ordinary or extraordinary.

2. *What is his ordinary revenue?*—281.

It is such as has either subsisted time out of mind in the crown, or else has been granted by Parliament, by way of purchase or exchange for such of the king's inherent hereditary revenues as were found inconvenient to the subject.

3. *What has the land tax, in its modern shape, superseded?*—309.

All the former methods of rating either property, or persons in respect of their property; whether by tenths or fifteenths, subsidies on land, hydages, scutages, or talliages.

4. *What are the usual annual taxes?*—309.

Those upon land and malt.

5. *What are the perpetual taxes?*—314–327.

I. The customs or duties on imports and exports. II. The excise duties. III. The duty on salt. IV. The post-office duty, for the carriage of letters. V. Stamp duties. VI. Duty on houses and windows. VII. Duty on servants. VIII. Licenses on hackney-coaches and chairs. IX. Duty on offices and pensions.

6. *What has been the general tendency of changes in the constitution as regards the royal prerogative?*—336.

Most of the laws for ascertaining, limiting, and restraining this prerogative, have been made within the compass of little more than a century past, from the Petition of Right in 3 Car. I to the present; so that the powers of the crown are to all appearance greatly curtailed and diminished since the reign of King James the First, particularly by the abolition of the Star Chamber and High Commission Courts in the reign of Charles the First, and by the disclaiming of martial law and the power of levying taxes on the subject by the same prince; by the disuse of forest laws; and by the many excellent provisions enacted under Charles the Second, especially the abolition of military tenures, purveyance, and pre-emption; the *Habeas Corpus* Act, and the act to prevent the discontinuance of Parliaments for above three years; and, since the Revolution, by the strong and emphatical words in which our liberties are asserted in the Bill of Rights and Act of Settlement; by the act for triennial, since turned into septennial, elections; by the exclusion of certain officers from the House of Commons; by rendering the seats of judges permanent, and their salaries liberal and independent; and by restraining the king's pardon from obstructing parliamentary impeachments.

CHAPTER X.

OF THE PEOPLE, WHETHER ALIENS, DENIZENS, OR NATIVES.

1. *What is the first and most obvious division of such persons as fall under the denomination of the people?*—366.

Into aliens and natural-born subjects.

2. *Who are natural-born subjects?*—366.

Such as are born within the dominions of the crown of England; that is within the ligeance, or, as it is generally called, the allegiance of the king.

3. *Who are aliens?*—366.

Such as are born out of that allegiance.

4. *What is allegiance?*—366.

It is the tie, or *ligamen*, which binds the subject to the

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4. *What is allegiance?*—366.

It is the tie, or *ligamen*, which binds the subject to the

king, in return for that protection which the king affords the subject.

5. *What difference was there between the oath of fealty and the oath of allegiance?*—367.

The former, by the feodal laws, was required to be taken by all tenants to their landlord, and was couched in almost the same terms as the usual oath of allegiance; except that in the usual oath of fealty, there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was, perhaps, only a tenant or vassal. But when the acknowledgment was made to the actual superior himself, who was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men without any saving or exception; *contra omnes homines fidelitatem fecit.*

6. *What was the term of allegiance at length brought to signify?*—367.

It becoming, in England, a settled principle of tenure, that all lands in the kingdom are holden of the king as their sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. By an easy analogy, the term of allegiance was soon brought to signify all other engagements which are due from subjects to their prince, as well as those duties which were simply and merely territorial.

7. *Is there an implied allegiance?*—368.

Yes; the law holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. The sanction of an oath does not increase the civil obligation to loyalty; it only strengthens the social tie by uniting it with that of religion.

8. *What sorts of allegiance are there?*—369.

There are two sorts or species of allegiance, the one natural,

the other local; the former being also perpetual, the latter temporary.

9. *What is natural allegiance?*—369.

It is such as is due to the king from all men born within his dominions, immediately upon their birth.

10. *Can natural allegiance be forfeited?*—369.

No: It cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature. For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, not even by swearing allegiance to another, put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive, and antecedent to the other, and cannot be divested without the concurrent act of that prince to whom it was first due.

11. *What is local allegiance?*—370.

It is such as is due from an alien, or stranger born, for so long a time as he continues within the king's dominion and protection; and it ceases the instant such stranger transfers himself from this kingdom to another.

12. *To what is the oath of allegiance applicable?*—371.

It, or rather the allegiance itself, is held to be applicable, not only to the political capacity of the king, or regal office, but to his natural person and blood-royal.

13. *Have alien enemies rights?*—372.

They have no rights, no privileges, unless by the king's special favor, during the time of war.

14. *Are the children of aliens, born in England, natural-born subjects?*—373.

They are, generally speaking, and entitled to all the privileges of such.

15. *What is a denizen?*—373.

He is an alien born, but who has obtained *ex donatione legis* letters patent to make him an English subject.

16. *How is naturalization performed?*—374.

Only by act of parliament; for by this an alien is put in the same state as if he had been born in the king's ligeance.

CHAPTER XII.

OF THE CIVIL STATE.

1. *How may the lay part of his majesty's subjects be divided?*—396.

Into three distinct states; the civil, the military, and the maritime.

2. *Of what does the civil state consist?*—396.

Of the nobility and the commonalty.

3. *What degrees of nobility are now in use?*—396.

Those of duke, marquis, earl, viscount, and baron.

4. *How is nobility now created?*—399.

Either by writ or by patent.

5. *Into what degrees are the commonalty divided?*—403–407.

They are divided into vidames, (now quite out of use,) knights, colonels, sergeants-at-law, doctors, esquires, gentlemen, yeomen, tradesmen, artificers, laborers.

6. *What constitutes the distinction of esquire?*—406.

It is a matter somewhat unsettled what constitutes the distinction, or who is a real *esquire;* for it is not an estate, however large, that confers this rank upon its owner. Camden reckons up four sorts of them: 1. The eldest sons of knights, and their eldest sons in perpetual succession. 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession. 3. Esquires created by the king's letters patent or other investiture, and their eldest sons. 4. Esquires

by virtue of their offices; as justices of the peace, and others who bear any office of trust under the crown.

7. *What constitutes the distinction of gentleman?*—406.

"As for gentlemen," says Sir Thomas Smith, "they be made good cheap in this kingdom; for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and (to be short) who can live idly, and without manual labor, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman."

8. *How does the law recognize these degrees?*—407.

Tradesmen, artificers, and laborers, as well as all others, must, in pursuance of statute I., Henry V., c. 5, be styled by the name and addition of their estate, degree, or mystery, and the place to which they belong, or where they have been conversant, in all original writs of actions personal, appeals and indictments, upon which process of outlawry may be awarded; in order, as it should seem, to prevent any clandestine or mistaken outlawry, by reducing to a specific certainty the person who is the object of such process.

CHAPTER XIV.

OF MASTER AND SERVANT.

1. *What are the three great relations in private life?*—422.

Those of master and servant; husband and wife; parent and child.

2. *What fourth relation hath the law provided?*—422.

That of guardian and ward; which is a kind of artificial parentage, to supply the deficiency, whenever it happens, of the natural.

3. *Of what sorts are servants, as acknowledged by the laws of England.*—425–427.

1. Menial servants, so called from being *intra mœnia,* or

domestics. 2 Apprentices (from *apprendre*, to learn), usually bound for a term of years. 3. Laborers, who are only hired by the day or the week, and do not live *intra mœnia*, as part of the family. 4. Stewards, factors, and bailiffs, whom the law considers as servants, *pro tempore*, with regard to such of their acts as affect their masters' or employers' property.

4. *If the hiring of menial servants be general, without any particular time limited, what period does the law construe it to be for?*—425.

For one year.

5. *What does a person gain by hiring and service for a year, or apprenticeship under indentures?*—427.

A settlement in that parish wherein he last served forty days.

6. *What right do persons serving seven years as apprentices to any trade acquire?*—427.

They have an exclusive right to exercise that trade in any part of England.

7. *At common law might every man use what trade he pleased?*—428.

He might.

8. *Is actual apprenticeship to a trade necessary to entitle a person to exercise that trade?*—428.

Following the trade seven years is sufficient.

9. *May the master correct his apprentice?*—428.

He may in moderation.

10. *What if a servant assault his master, or master's wife?*—428

He shall suffer one year's imprisonment, and other open corporeal punishment not extending to life or limb.

11. *How may a master behave towards others, on behalf of his servant?*—429.

He may maintain, that is, abet and assist his servant in any action at law against a stranger.

12. *What is maintenance?*—429.

To encourage suits and animosities, by helping to bear the expense of them: it is an offence against public justice.

CHAPTER XV.

OF HUSBAND AND WIFE.

1. *What is the second private relation of persons?*—433.

That of marriage, which includes the reciprocal rights and duties of husband and wife.

2. *In what light does the law regard marriage?*—433.

In no other light than as a civil contract.

3. *When does the law allow the marriage contract to be good and valid?*—433.

In all cases where the parties at the time of making it, in the first place, were willing to contract; secondly, were able to contract; and, lastly, actually did contract, in the proper forms and solemnities required by law.

4. *Of what sorts are the disabilities to marriage?*—434.

They are, first, canonical; second, civil.

5. *How do canonical impediments affect marriage?*—434.

They are sufficient, by the ecclesiastical law, to avoid the marriage in the spiritual court; but, in our law, they only make the marriage voidable, and not *ipso facto* void until sentence of nullity be obtained.

6. *What are disabilities of this nature?*—434.

Pre-contract; consanguinity, or relationship by blood; and affinity, or relationship by marriage; and some particular corporal infirmities.

7. *How do the civil disabilities affect marriage?*—435.

They render it void *ab initio* and not merely voidable.

8. *What is the first of these disabilities?*—436.

A prior marriage, or having another husband or wife living

9. *What is the second?*—436.

Want of age.

10. *What is the third?*—437.

Want of consent of parents or guardians.

11. *What is the fourth?*—438, 439.

Want of reason.

12. *In what manner may marriage be dissolved?*—440.

Either by death, or divorce.

13. *What kinds of divorce are there?*—441.

Two kinds: one *a vinculo matrimonii*, which is total; the other *a mensa et thoro*, which is partial.

14. *In case of divorce* a mensa et thoro, *what does the law allow to the wife?*—441.

It allows her alimony, sometimes called estovers.

15. *What is the writ* de estoveriis habendis?—441.

It is a writ at common law to recover alimony.

16. *In what case does the law allow no alimony?*—442.

In case of the wife's elopement and living in adultery.

17. *What is the legal consequence of marriage?*—442.

That the husband and wife are one person in law.

18. *For what debts of the wife is the husband liable?*—442, 443.

The husband is bound to provide his wife with necessaries, by law, as much as himself; and if she contracts debts for them, he is obliged to pay those debts. Also, if the wife be indebted before marriage, the husband is bound afterward to pay the debt.

19. *Is there not one case in which the wife shall sue and be sued as a* feme sole?—443.

Yes; when the husband has abjured the realm, or is banished; for then he is dead in law.

20. *What restraint may a husband now lay upon his wife in case of gross misbehavior?*—445.

The courts of law still permit a husband to restrain a wife of her liberty in case of any gross misbehavior.

CHAPTER XVI.

OF PARENT AND CHILD.

1. *What is the third, and most universal private relation of persons?*—446.

That of parent and child.

2. *Of what sorts are children?*—446.

They are of two sorts: legitimate and spurious, or bastards.

3. *Who is a legitimate child?*—446.

One that is born in lawful wedlock.

4. *What are the legal duties of parents to legitimate children?*—446.

Three: maintenance, protection, and education.

5. *When shall a second husband be charged to maintain his wife's child by her first husband?*—448.

If the wife, before the last marriage, was of sufficient ability to keep the child, the husband shall be charged to maintain it; but, at her death, the marriage relation being dissolved, the husband is under no farther obligation.

6. *In what case is a person bound to provide a maintenance for his issue?*—449.

Where the children are impotent and unable to work, either through infancy, disease, or accident.

7. *What is the law as to disinheriting children?*—450.

It has made no provision to prevent the disinheriting of children by will; leaving every man's property in his own disposal.

8. *What, among other things, may a parent do for his child, as its protector?*—450.

He may uphold and maintain his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defense of the persons of his children.

9. *From what is the power of parents over their children derived?*—452.

From their duty towards them; this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in discharging it.

10. *What power do our laws give the parent over his child?*—452, 453.

He may lawfully correct his child, being under age, in a reasonable manner. The consent or concurrence of the parent to the marriage of his child, under age, is absolutely necessary to its validity.

11. *When does this power cease?*—453.

When the child has arrived at the age of twenty-one years.

12. *Whence do the duties of children to their parents arise?*—453.

From a principle of natural justice and retribution; for to those who gave us existence we naturally owe subjection and obedience during our minority, and honor and reverence ever after.

13. *Who is a bastard?*—454.

One that is not only begotten, but born, out of lawful matrimony.

14. *Why is the reason of our law, on this head, superior to that of the Roman?*—455.

The civil and canon laws do not allow a child to remain a bastard if the parents afterwards intermarry; but the English law makes it an indispensable condition, to legitimacy, that the child shall be born after lawful wedlock. The main end and design of marriage, to ascertain and fix upon some certain person to whom the care, the protection, the maintenance and the education of the child should belong, is thus better answered by the English law.

15. *What rights has a bastard?*—459.

Very few; being only such as he can acquire, for he can inherit nothing. Yet he may gain a surname by reputation, though he has none by inheritance.

16. *What does the incapacity of a bastard consist in principally?*—459.

He cannot be heir to any one; neither can he have heirs, but of his own body.

17. *How may a bastard be rendered legitimate?*—459.

By an act of parliament, and not otherwise.

CHAPTER XVII.

OF GUARDIAN AND WARD.

1. *What is the fourth private relation of persons?*—460.

That of guardian and ward.

2. *What is the first species of guardians?*—461.

The guardian by nature, viz.: the father and, in some cases, the mother of the child.

3. *If the father assign no guardian to his daughter under the age of sixteen, who shall be her guardian?*—461.

The mother.

4. *What is the second species of guardian?*—461.

Guardians for nurture. They are the father and mother

till the infant attains the age of fourteen; and, in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education.

5. *What is the third species of guardian?*—461.

Guardians in *socage*, also called guardians by the common law.

6. *When does this third species of guardianship take place?*—461.

Only when the minor is entitled to some estate in lands, and then, by the common law, the guardianship devolves upon his next of kin.

7. *How long does guardianship in* socage *continue?*—462.

Only till the minor is fourteen years of age; for then, he is presumed to have discretion so far as to choose his own guardian.

8. *Is there another species of guardians?*—462.

Yes; guardians by statute, or testamentary guardians.

9. *How may they be appointed?*—462.

By deed or will.

10. *What is the power and reciprocal duty of a guardian and ward?*—462.

The same, *pro tempore*, as that of father and child.

11. *What is the guardian bound to do when the ward comes of age?*—463.

He is bound to give his ward an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence.

12. *Who is the general and supreme guardian of all infants?*—463.

The lord chancellor, by right derived from the crown.

13. *Are the ages of male and female different for different purposes?*—463.

Yes; a male at twelve years may take the oath of allegiance; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at seventeen may be an executor; and at twenty-one is at his own disposal, and may alien his lands, goods, and chattels.

A female at seven years of age may be betrothed or given in marriage; at nine is entitled to dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen is at years of legal discretion, and may choose a guardian; at seventeen may be executrix; and at twenty-one may dispose of herself and her lands.

14. *When is full age in male or female completed?*—463.

Full age in male or female is twenty-one years; which age is completed on the day preceding the anniversary of a person's birth, who till that time is an infant, and so styled in law. Among the ancient Greeks and Romans, women were never of age, but subject to perpetual guardianship, unless when married, "*nisi convenissent in manum viri*:" and, when that perpetual tutelage wore away in process of time, we find that, in females as well as males, full age was not till twenty-five years. Thus, by the constitution of different kingdoms, this period, which is merely arbitrary, and *juris positivi*, is fixed at different times.

15. *How only may an infant be sued?*—464.

Under the protection, and joining the name of his guardian; for he is to defend him against all attacks as well by law as otherwise.

16. *How may he sue?*—464.

Either by his guardian, or *prochein amy* or next friend who is not his guardian.

17. *Who may be* prochein amy?—464.

Any person who will undertake the infant's cause.

18. *At what age may an infant be capitally punished?*—464.

In criminal cases, an infant of the age of fourteen years, for any capital offense; but under the age of seven he cannot.

19. *What if an infant neglect to demand his right?*—465.

In general, an infant shall lose nothing by non-claim or neglect of demanding his right; nor shall any other *laches* or negligence be imputed to an infant, except in some very particular cases.

20. *What legal act is an infant capable of?*—465.

If he has an advowson, he may present to the benefice when it becomes void.

21. *Can an infant purchase lands?*—466.

He may purchase lands, but his purchase is incomplete; for when he comes to age, he may either agree or disagree to it, as he thinks prudent and proper, without alleging any reason.

22. *Can an infant make a deed which is not voidable?*—466.

In some cases he may bind himself apprentice by deed indented, or indentures, for seven years; and he may by deed or will appoint a guardian for his children, if he has any.

23. *May an infant in any case bind himself by contract?*—466.

Yes; he may bind himself to pay for necessaries; and for his good teaching and instruction, whereby he may profit himself afterward.

CHAPTER XVIII.

OF CORPORATIONS.

1. *What are corporations?*—467.

Artificial persons who may maintain a perpetual succession, and who enjoy a kind of legal immortality, are called bodies politic, bodies corporate, or corporations.

2. *For what purposes are they constituted?*—467.

For the advancement of religion, of learning, and of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct.

3. *What is the primary division of corporations?*—469.

Into aggregate and sole.

4. *What are corporations aggregate?*—469.

They consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever; of which kind are the mayor and commonalty of a city, the head and fellows of a college, &c.

5. *What are corporations sole?*—469.

They consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation; so is a bishop; so are some deans and prebendaries, distinct from their several chapters; and so is every parson and vicar.

6. *How are incorporations, either sole or aggregate, again divided?*—470.

Into ecclesiastical and lay.

7. *Of what sorts are lay corporations?*—470.

Civil and eleemosynary.

8. *What is absolutely necessary to the erection of any corporation?*—472.

The king's consent, either expressly or impliedly given.

9. *May Parliament incorporate?*—474.

Yes; it may perform this, or any other act whatsoever, and actually has performed it. But the king may prevent it when he pleases, as the royal assent is necessary.

10. *Is a name essential?*—475.

Yes; a name must be given to it, and by that name alone

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Yes; a name must be given to it, and by that name alone

it must sue and be sued, and do all legal acts. Such name is the very being of its constitution.

11. *What capacities are necessarily and inseparably incident to every corporation?*—475, 476.

1. To have perpetual succession.

2. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may.

3. To purchase lands, and hold them, for the benefit of themselves and their successors.

4. To have a common seal. It acts and speaks only by its seal.

5. To make by-laws or private statutes for the better government of the corporation.

12. *What privileges and disabilities attend aggregate corporations, and are not applicable to such as are sole?*—476, 477.

It must always appear by attorney, for it cannot appear in person, being, as Sir Edward Coke says, invisible, and existing only in intendment and consideration of law.

It can neither maintain, nor be made defendant to an action of battery, or such like personal injuries; for a corporation can neither beat, nor be beaten in its body politic.

A corporation cannot commit treason, or felony, or other crime, in its corporate capacity; though its members may in their distinct individual capacities.

Neither is it capable of suffering a traitor's or felon's punishment; for it is not liable to corporeal penalties, nor to attainder, forfeiture, or corruption of blood.

It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office.

It cannot be seised of lands to the use of another; for such kind of confidence is foreign to the end of its institution.

Neither can it be committed to prison; for, its existence being ideal, no man can apprehend or arrest it. And therefore, also, it cannot be outlawed; for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding, and that also a corporation cannot do: for which reasons, the proceedings to compel a corporation to appear to any suit by attorney, are always by distress on their lands and goods.

Neither can a corporation be excommunicated; for it has no soul, as is observed by Sir Edward Coke; and therefore it is not liable to be summoned into the ecclesiastical courts, upon any account.

13. *May corporations take goods and chattels for the benefit of themselves and their successors?*—477.

An aggregate corporation may, but a corporation sole cannot.

14. *What acts can aggregate corporations, that have by their constitution a head, as a dean, warden, master, or the like, do during the vacancy of the headship?*—478.

They cannot do any acts during the vacancy of the headship, except only appointing another: neither are they then capable of receiving a grant; for such corporation is incomplete without a head.

15. *What are the general duties of all bodies politic?*—480.

Their general duties may be reduced to this single one, that of acting up to the end, or design, whatever it be, for which they were created by their founder.

16. *How are irregularities that arise in such corporations corrected?*—480.

By visitations: of spiritual corporations by the ordinary; of lay corporations by the founder, his heirs, or assigns.

17. *Who is the founder, in the strictest and original sense, of all corporations?*—480.

The king; for he alone can incorporate a society.

18. *What does the law mean by the distinction of* fundatio incipiens *and* fundatio perficiens, *in eleemosynary foundations, such as colleges and hospitals?*—481.

By the former is meant, that the king is the incorporator, or general founder; by the latter the dotation, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder.

19. *Who is by law visitor of all civil corporations?*—481.

The king; and the law has appointed the court of king's bench as the place wherein he shall exercise this jurisdiction.

20. *Who are visitors of eleemosynary corporations?*—482.

By the dotation the founder and his heirs are, of common right, the legal visitors.

21. *Are colleges lay corporations?*—483.

It is now held as established common law, that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons.

22. *To whom do the lands and tenements of a corporation revert upon its dissolution?*—484.

To the person, or his heirs, who granted them.

23. *What becomes of the debts of the corporation, either to or from it, upon its dissolution?*—484.

They are totally extinguished.

24. *By what methods may a corporation be dissolved?*—485.

1st. By act of parliament.

2d. By the natural death of all its members, in case of an aggregate corporation.

3d. By surrender of its franchises into the hands of the king.

4th. By forfeiture of its charter, through negligence or abuse of its franchises.

25. *What is an information in the nature of a writ of* quo warranto?—485.

It is a proceeding to inquire by what warrant the members of a corporation exercise their corporate powers, having forfeited them by such and such proceedings.

26. *What is provided against the dissolution of corporations?*—485.

As, by the common law, corporations were dissolved in case the mayor or head officer was not duly elected on the day appointed in the charter, or established by prescription, it is now provided, by statute, that for the future no corporation shall be dissolved upon that account.

BOOK II.

OF THE RIGHTS OF THINGS.

CHAPTER I.

OF PROPERTY IN GENERAL.

1. *What are the rights of dominion or property?*—1.

Those rights which a man may acquire in and to such external things as are unconnected with his person.

2. *Are men in general well informed as to the nature and origin of these rights?*—2.

They are not: there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are few that will give themselves the trouble to consider the origin and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or, at best, we rest satisfied with the decision of the laws in our favor, without examining the reason, or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature, or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, be-

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cause his father had done so before him ; or why the occupier of a particular field, or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them shall enjoy it after him.

3. *Why has man dominion over external things?*—2.

In the beginning, we are informed by Holy Writ, that the all-bountiful Creator gave to man "dominion over all the earth ; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." This is the only true and solid foundation of man's dominion over external things.

4. *To whom does the earth belong?*—3.

The earth, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator.

5. *While the earth continued bare of inhabitants, were all things in common?*—3.

Yes ; every one took from the public stock to his own use such things as his immediate necessities required.

6. *Was this communion of goods ever applicable to the use of the thing?*—3.

No : it seems never to have been applicable, even in the earliest ages, to aught but the substance of the thing , nor could it be extended to the use of it.

7. *How was property first acquired?*—3.

By the law of nature and reason, he who first began to use anything, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer. The right of possession continued for the same time only that the act of possession lasted.

8. *How originated separate property in the substance of the thing?*—5.

When mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent

dominion, and to appropriate to individuals, not the immediate use only, but the very substance of the thing to be used.

9. *What species of property became first appropriated?*—5.

Movables, of every kind, became sooner appropriated than the soil.

10. *Was the article of food a matter of early consideration?*—5.

Yes ; such as were not contented with the spontaneous productions of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature ; and to establish a permanent property in their flocks and herds, in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle, made the article of water also a very important point. And, therefore, the book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells ; the exclusive property of which appears to have been established in the first digger or occupant, even in places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, "because he had digged that well." And Isaac, about ninety years afterwards, reclaimed that his father's property ; and after much contention with the Philistines, was suffered to enjoy it in peace.

11. *What was the origin of the right to land?*—6.

The soil and pasture of the earth remained in common, and open to every occupant ; except, perhaps, in the neighborhood of towns, where the necessity of a sole and exclusive property in lands, for the sake of agriculture, was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience upon one spot of ground, it was deemed a natural right to seize upon, and occupy such other lands as would more easily supply their necessi-

ties. This practice is still retained among wild and uncultivated nations.

12. *Upon what was founded the right of migration?*—7.

Upon the same principle, as the right to land, was founded the right of migration, or sending colonies to find out new habitations, when the mother-country was overcharged with inhabitants.

13. *What was the principal source of property in land?*—7.

Labor and agriculture. The art of agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil.

14. *How did property in land become actually vested?*—8.

Occupancy is that by which the title to land was, in fact, originally gained; every man seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.

15. *How long continues the property in land thus acquired by occupancy?*—9.

It remains in the first taker, by the principles of universal law, till such time as he does some other act, which shows an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant.

16. *What was the origin of conveyances, wills, and inheritances?*—13.

Mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance. All property must cease upon death, considering men as absolute individuals, and unconnected with civil society. The universal law of almost every nation, however, has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir, of the deceased.

17. *When does escheat take place?*—11.

In case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, to prevent the title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country, whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no title can be formed.

18. *What things are in common, notwithstanding the introduction and continuance of property?*—14.

The elements of light, air, and water, among other things. Also, the generality of those animals which are said to be *ferœ naturæ*, which any man may seize upon and keep for his own use and pleasure.

19. *Has everything a legal owner?*—15.

Yes; the legislature has steadily pursued that wise and orderly maxim, of assigning to everything capable of ownership a legal and determinate owner.

CHAPTER II.

OF REAL PROPERTY; AND, FIRST, OF CORPOREAL HEREDITAMENTS.

1. *What are the objects of dominion or property?*—16.

Things, as contradistinguished from persons.

2. *Into what kinds are things by the law of England distributed?*—16.

Into things real, and things personal.

3. *What are things real?*—16.

Things real are such as are permanent, fixed, and immoveable, which cannot be carried out of their place, as lands and tenements.

4. *What are things personal?*—16.

Things personal are goods, money, and other moveables, which may attend the owner's person wherever he thinks proper to go.

5. *What are things real usually said to consist in?*—16.

Lands, tenements, and hereditaments.

6. *What does the term land comprehend?*—16.

All things of a permanent, substantial nature; being a word of very extensive signification.

7. *What does the word tenement signify?*—17.

It is a word of still greater extent than land, and in its original, proper, and legal sense, it signifies anything that may be holden, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial, ideal kind.

8. *How does Sir Edward Coke define hereditament?*—17.

He says, "An hereditament is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be inherited, be it corporeal or incorporeal, real, personal, or mixed."

9. *Of what kinds are hereditaments?*—17.

Corporeal, and incorporeal. Corporeal hereditaments consist of such as affect the senses, such as may be seen and handled by the body; incorporeal are not the objects of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

10. *Of what do corporeal hereditaments consist?*—17.

They consist wholly of substantial and permanent objects; all of which may be comprehended under the general denomination of land only.

11. *Do structures pass with the land?*—18.

They do.

12. *How is water considered?*—18.

It is considered as a species of land; an action cannot be brought to recover possession of a pool or other piece of water, by the name of water only; it must be brought for the land that lies at the bottom, as so many acres of land covered with water.

13. *What extent has land in its legal signification?*—18.

It has an indefinite extent, upward as well as downward; so that the word "land" includes not only the face of the earth, but everything under it, or over it. *Cujus est solum, ejus est usque ad cœlum*, is a maxim of the law.

14. *What passes in law by a grant of water?*—19.

A right of fishing only.

CHAPTER III.

OF INCORPOREAL HEREDITAMENTS.

1. *What is an incorporeal hereditament?*—20.

It is a right issuing out of a thing corporate (whether real or personal,) or concerning, or annexed to, or exercisable within the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels.

2. *Of what sorts are incorporeal hereditaments?*—21.

They are principally of ten sorts: advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

3. *What is an advowson?*—21.

It is the right of presentation to a church, or ecclesiastical benefice.

4. *What are tithes?*—24.

They are defined to be the tenth part of the increase, yearly

arising and renewing from the profits of land, the stock upon lands, and the personal industry of the inhabitants.

5. *When does "time of memory" commence?*—23.

Time of memory hath been long ago ascertained, by the law, to commence from the beginning of the reign of Richard the First.

6. *How may any custom be destroyed?*—23.

By evidence of its non-existence in any part of the long period from that time to the present.

7. *What is right of common?*—32.

A profit which a man hath in the land of another; as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like. It is chiefly of four sorts: common of pasture, of piscary, of turbary, and of estovers.

8. *What is common of piscary?*—34.

It is a liberty of fishing in another man's water.

9. *What is common of turbary?*—34.

A liberty of digging turf upon another's ground.

10. *What is common of estovers?*—35.

A liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate.

11. *What is a right of way?*—35, 36.

It is a right of going over another man's ground, and has reference only to private ways, in which a particular man may have an interest and a right, though another be owner of the soil.

12. *How does private right of way arise?*—36.

It may be founded on a special permission, or grant. A way may be also by prescription. A right of way may also arise by act and operation of law.

13. *How may it arise by operation of law?*—36.

If a man grants me a piece of ground in the middle of his

field, he at the same time tacitly and impliedly gives me a way to come at it, and I may cross his land for that purpose without trespass; for when the law doth give anything to one, it gives impliedly whatsoever is necessary for enjoying the same.

14. *What are franchises?*—37.

Franchise and liberty are used as synonymous terms; and their definition is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.

15. *What is an annuity, and wherein does it differ from a rent-charge?*—40.

An annuity is a thing very distinct from a rent charge; a rent charge being a burden imposed upon and issuing out of lands, whereas, an annuity is a yearly sum chargeable only upon the person of the grantor.

16. *What are rents?*—41.

A certain profit issuing yearly out of lands and tenements corporeal.

17. *What are the requisites to a rent?*—41.

1st. It must be a profit. 2d. The profit must be certain. 3d. It must issue yearly. 4th. It must issue out of the thing granted. 5th. It must issue out of lands and tenements corporeal.

18. *What rents are there at common law?*—41.

Rent service, rent charge, and rent seck.

19. *What is rent service?*—42.

It is so called because it hath some corporeal service incident to it, as, at the least, fealty or the feodal oath of fidelity.

20. *What is rent charge?*—42.

It is where the owner of the rent hath no future interest, or reversion expectant in the land.

21. *What is rent seck?*—42.

It is in effect nothing more than a rent reserved by deed, but without any clause of distress, or a barren rent.

22. *What are rents of assise?*—42.

Rents of assise are the certain established rents of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied.

23. *What are chief-rents?*—42.

Those of the freeholders are frequently called chief-rents, *reditus capitales.*

24. *What are quit-rents?*—42.

Both those of freeholders and ancient copyholders are indifferently denominated quit-rents, *quieti reditus,* because thereby the tenant goes quit and free of all services.

25. *When quit-rents were reserved in silver, or white money, what were they called?*—42.

They were anciently called white rents, or blanch farms, *reditus albi;* in contradistinction to rents reserved in work, grain, or baser money, which were called *reditus nigri,* or black mail.

26. *What is rack-rent?*—43.

Rack-rent is only a rent of the full value of the tenement, or near it.

27. *What is fee-farm rent?*—43.

It is a rent charge issuing out of an estate in fee, of at least one-fourth of the value of the lands, at the time of its reservation.

28. *When and where is rent regularly due and payable?*—43.

It is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation; but in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country; and strictly, the rent is demandable and payable before the time of sunset of the day whereon it is reserved; though perhaps not absolutely due till midnight.

CHAPTER IV.

OF THE FEODAL SYSTEM.

1. *What is the origin of the constitution of feuds?*—45.

It had its origin from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards. It was brought by them from their own countries, at the declension of the Roman empire.

2. *What were feuds?*—45.

Large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels, allotments, to the inferior officers and most deserving soldiers. These allotments were called *feoda,* feuds, fiefs, or fees; which last appellation signifies a conditional stipend or reward.

3. *What condition was annexed to them?*—45.

That the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis,* or oath of fealty.

4. *At about what time was the feodal polity received in England?*—48.

Not universally and as a part of the national constitution, till the reign of William the Norman.

5. *What is the feodal acceptation of the word conquest?*—48.

It signifies no more than acquisition.

6. *What fundamental maxim of English tenures resulted from the reception in England of the feodal polity?*—51.

That the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth, or can, possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feodal services.

7. *How was the feodal system affected by the charter of King Henry the First?*—52.

He gave up the greater grievances, but still reserved the fiction of feodal tenure, for the same military purposes which engaged his father to introduce it.

8. *What were the grantor and grantee of a feud respectively styled?*—53.

The grantor was called the proprietor, or lord; the grantee was styled the feudatory, or vassal, which was only another name for the tenant or holder of the lands.

9. *What was the manner of granting a feud?*—53.

The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi*. This was perfected by the ceremony of corporeal investiture, or open and notorious delivery of possession in the presence of the other vassals.

10. *What were the oaths of fealty, and homage?*—53, 54.

The oath of fealty, was the parent of the oath of allegiance, or profession of faith to the lord. The vassal or tenant, upon investiture, usually did homage to his lord; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sat before him; and there professing that "he did become his man, from that day forth, of life and limb and earthly honor;" and then he received a kiss from his lord.

11. *What was the nature of the service of the vassal?*—54.

This, in pure, proper, and original feuds, was only two-fold: To follow, or do suit to, the lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field.

12. *Why were the feudatories called* pares curtis?—54.

The lord was, in early times, the legislator and judge over all his feudatories; and, therefore, the vassals of the inferior lords were bound, by their fealty, to attend their domestic courts baron, in order as well to answer such complaints as might be

alleged against themselves, as to form a jury or homage for the trial of their fellow-tenants; and upon this account, in the feudal institutions they are distinguished by the appellation of peers of the court; *pares curtis*, or *pares curiæ*.

13. *Were feuds hereditary?*—55, 56.

They were not yet hereditary, though frequently granted, by the favor of the lord, to the children of the former possessor; till in process of time it became unusual, and was therefore thought hard to reject the heir, if he were capable to perform the services. Infants, women, and professed monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud.

14. *What was the mode of descent of feuds?*—56.

They came by degrees to be universally extended, beyond the life of the first vassal, to his sons, who succeeded him in equal portions; and, as they died off, their shares reverted to the lord. But, when such a feud was given to a man and his heirs, in general terms, then, upon the death of the feudatory, his male descendants *in infinitum* were admitted to the succession.

15. *Why could neither the lord nor vassal alien his estate without the consent of the other?*—57.

Because the feudal obligation was looked upon as reciprocal.

16. *What were improper feuds?*—59.

The feudatories frequently found it necessary to commit part of their lands to inferior tenants, obliging them to returns in service, corn, cattle, or money; which returns were the original of rents. This demolished the ancient simplicity of feuds. In course of time they were subjected to greater innovations; they began to be bought and sold. Improper or derivative feuds comprised all such as were not genuine or original feuds; which latter were all of a military nature, and in the hands of military persons.

CHAPTER V.

OF THE ANCIENT ENGLISH TENURES.

1. *Why are the terms tenement, tenant, and tenure, so generally used?*—59.

Almost all the real property of England is, by the policy of her laws, supposed to be granted by, dependent upon, or holden of, some superior lord. The thing holden is styled a tenement, the possessors thereof tenants, and the manner of their possession a tenure.

2. *Who is the lord paramount, or above all?*—60.

The King is so styled.

3. *Who were tenants* paravail?—60.

Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king; and, thus partaking of a middle nature, were called *mesne*, or middle lords. The lowest tenant, he who was supposed to make avail or profit of the land, was called tenant *paravail*.

4. *Who were called tenants* in capite?—60.

Those who held their lands immediately under the king.

5. *What were the natures of the several services, or renders, that were due to the lords from their tenants?*—60.

In respect of quality, they were either free or base services; in respect of their quantity and the time of exacting them, they were either certain or uncertain.

6. *What were free services?*—60.

Such as were not unbecoming the character of a soldier or a freeman to perform; as, to serve under his lord in the wars, to pay a sum of money and the like.

7. *What were base services?*—61.

Such as were fit only for peasants, or persons of a servile rank; as, to plow the lord's land, to make his hedges, to carry out his dung, or other mean employments.

8. *What were certain services?*—61.

The certain services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as to pay a stated annual rent, or to plow such a field for three days.

9. *What were the uncertain services?*—61.

They depended upon unknown contingencies; as to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command, which is a base or villein service.

10. *What, according to Bracton, were the four principal kinds of lay tenure?*—61, 62.

First, tenure in chivalry per *servitium militare*, or by knight-service. Second, *liberum socagium*, or free socage, where the service was not only free, but also certain, as by fealty, &c. Third, *purum villenagium*, absolute or pure villenage, where the service was base in its nature, and uncertain as to time and quantity. Fourth, *villenagium privilegiatum*, or privileged villenage; where the service was base in its nature, but reduced to a certainty.

11. *What constituted tenure by knight-service?*—62.

It differed in very few points from a pure and proper feud, being entirely military, and the genuine effects of the feodal establishment in England: to make a tenure by knight-service a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*.

12. *What was the* reditus *of the tenant by knight-service?*—62.

He was bound to attend his lord to the wars, for forty days in every year, if called upon, as his *reditus*, rent, or service, for the land he claimed to hold.

13. *What were the incidents to knight-service?*—63.

Knight-service drew after it these seven fruits and consequences, as inseparably incident to the title in chivalry; viz., aids, reliefs, primer seizin, wardship, marriage, fines for alienation, and escheat: all these are of feodal original.

14. *What were the aids granted by the tenant?*—63.

They were principally three; First, to ransom the lord's person, if taken prisoner; secondly, to make the lord's eldest son a knight; thirdly, to marry the lord's eldest daughter, by giving her a suitable portion.

15. *What were reliefs?*—65.

Relief, *relevium*, was incident to every feodal tenure, by way of fine or composition with the lord for taking up the estate which was lapsed, or fallen in, by the death of the last tenant

16. *What was primer seizin?*—66.

It was a feodal burden, only incident to the king's tenants *in capite*, and not to those who held of inferior or *mesne* lords. It was a right which the king had, when any of his tenants *in capite* died seized of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion expectant on an estate for life.

17. *What was wardship?*—67.

If the heir was under the age of twenty-one, being a male, or fourteen, being a female, the lord was entitled to the wardship of the heir, and was called the guardian in chivalry. It consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females.

18. *When the heir came of full age was he obliged to receive knighthood?*—69.

Yes; provided he held a knight's fee *in capite*, he was compellable to take knighthood, or else pay a fine to the king.

19. *What were fines upon alienation?*—71.

They were fines due to the lord for every alienation, whenever the tenant had occasion to make over his land to another.

20. *What was attornment?*—72.

The lord could not alienate his seignory without the consent of the tenant, which consent was called an attornment.

21. *What was an escheat?*—72.

The last consequence of tenure in chivalry was escheat, which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means. In such cases the land *escheated*, or fell back to the lord of the fee; that is, the tenure was determined by breach of the original condition expressed or implied in the feodal donation.

22. *What was tenure by grand serjeanty, per* magnum servitium?—73.

That whereby the tenant was bound, instead of serving the king generally in his wars, to do some special honorary service to the king in person; as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer, at his coronation.

23. *What was tenure by cornage?*—74.

It was to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects. It was a species of grand serjeanty.

24. *What was escuage?*—74.

Personal attendance in knight-service growing troublesome, the tenants found means of compounding for it, by making a pecuniary satisfaction in lieu of it. This satisfaction at last came to be levied by assessments, at so much for every knight's fee; and, therefore, this kind of tenure was called *scutagium* and also *escuage*.

25. *What does* magna charta *say of escuage?*—74.

That no scutage should be imposed without consent of parliament.

26. *By what means were the advantages of the feodal constitution destroyed?*—75.

By the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments.

27. *What became of military tenures?*—77.

They were destroyed, at one blow, by the statute 12 Car II., c. 24 ; and all sorts of tenures, held of the king or others, were thereby turned into free and common *socage;* save only tenures in *frankalmoign*, copyholds, and the honorary services of grand serjeanty.

28. *What is said of this statute?*—77.

That it was a greater acquisition to the civil property of the kingdom than even *magna charta* itself.

CHAPTER VI.

OF THE MODERN ENGLISH TENURES.

1. *What is* socage *tenure?*—79.

Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service.

2. *Does it still subsist?*—79.

Yes ; it not only subsists to this day, but has in a manner absorbed and swallowed up, since the statute of Charles the Second, almost every other species of tenure.

3. *Of what sorts is socage?*—79.

Free and villein : free socage, where the services are not only certain but honorable ; and villein socage, where the services, though certain, are of a baser nature.

4. *What is the etymology of the word?*—80, 81.

It is derived from the Saxon appellation *soc*, which signifies liberty or privilege, and, being joined to a usual termination, is

called socage, in Latin *socagium*, signifying thereby a free or privileged tenure.

5. *What is the origin of socage tenure?*—81–83.

It seems probable that the socage tenures were the relics of Saxon liberty. Gavelkind, which prevails in Kent, is generally acknowledged to be a species of socage tenure, the preservation whereof is a fact universally known.

6. *Since the certainty of its services is the criterion of socage, what does this species of tenure include?*—81.

It includes under it all other methods of holding free lands, by certain and invariable rents and duties, and in particular, *petit sergeanty*, tenure in burgage, and gavelkind.

7. *What is petit sergeanty?*—82.

As defined by Littleton, it consists in holding lands of the king, by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. It bears a great resemblance to *grand sergeanty ;* for as the one is a personal service, so the other is a rent or render, both tending to some purpose relative to the king's person

8. *What is tenure in burgage?*—82.

It is a kind of town socage, where houses, or lands which were formerly the sites of houses in an ancient borough, are held of some lord, in common socage, by a certain established rent.

9. *What is the custom of Borough English?*—83.

That the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father.

10. *What are the distinguishing properties of gavelkind?*—84, 85.

1. The tenant is of age sufficient to alien his estate by feoffment at the age of fifteen. 2. The estate does not escheat in case of an attainder and execution for felony. 3. In most places the tenant had the power of devising lands, by will, before the statute for that purpose was made. 4. The lands descend to all the sons together.

11. *Was socage tenure of feodal origin?*—86.

Yes; as appears from a comparison of the incidents and consequences of socage tenure with those of tenure in chivalry.

12. *What species of our modern tenures has arisen from* pure villenage?—90.

Copyhold tenures, or tenure by copy of court roll at the will of the lord.

13. *What were villeins?*—92–94.

Sir William Temple says, there were a sort of people in a condition of downright servitude, under the Saxon government, used and employed in the most servile works, and belonging, both they, and their children, and effects, to the lord of the soil, like the rest of the cattle or stock upon it. They were either villeins regardant, or else they were in gross, or at large, that is, annexed to the person of the lord, and transferable by deed from one owner to another. The villein could acquire no property in land or goods. His children were also in the same state of bondage.

14. *What was the origin of copyhold?*—95, 96.

Copyholders are no other but villeins who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will.

15. *Did these encroachments grow to be general?*—96.

Yes; they grew to be so universal, that when tenure in villenage was virtually abolished, though copyholds were reserved, by the statute of Charles II., there was hardly a pure villein left in the nation.

16. *What was privileged villenage, or villein socage?*—99.

Such, according to Bracton, as has been held of the kings of England, from the conquest downwards. Tenants in villein socage could not aliene or transfer their tenements by grant, or feoffment, any more than pure villeins could. This tenure is no other than an exalted species of copyhold subsisting at this day, viz., the tenure in ancient demesne.

17. *Of what does ancient demesne consist?*—99.

Ancient demesne consists of those lands or manors, which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor, or William the Conqueror; and so appear to have been by Doomsday Book.

18. *What is tenure in frankalmoigne?*—101.

That whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors forever.

CHAPTER VII.

OF FREEHOLD ESTATES OF INHERITANCE.

1. *What does an estate in lands, tenements, and hereditaments, signify?*—103.

Such interest as the tenant hath therein: so that if a man grants all his estate in Dale to A, and his heirs, everything that he can possibly grant shall pass thereby.

2. *In what view may estates be considered?*—103.

First, with regard to the quantity of interest which the tenant has in the tenement; secondly, with regard to the time at which that quantity of interest is to be enjoyed; and thirdly, with regard to the number and connections of the tenants.

3. *What is the primary division of estates, with regard to the quantity of interest?*—103.

It is measured by its duration and extent. Thus, either his right of possession is to subsist an uncertain period, during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him; or it is circumscribed within a certain number of years, months, or days; or, lastly, it is infinite and unlimited, being vested in him and his representatives forever. And this occasions the primary

division of estates into such as are freehold, and such as are less than freehold.

4. *What is an estate of freehold?*—104.

A freehold, *liberum tenementum*, or frank tenement, is such an estate in lands as is conveyed by livery of seizin, or, in tenements of an incorporeal nature, by what is equivalent thereto. Britton defines it to be "the possession of the soil by a freeman." Such an estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, freehold.

5. *What is the division of estates of freehold (thus understood)?*—104.

Into estates of inheritance, and estates not of inheritance.

6. *How are estates of inheritance divided?*—104.

Into inheritances absolute, or fee-simple; and inheritances limited, one species of which we usually call fee-tail.

7. *Who is tenant in fee-simple, or tenant in fee?*—104.

He that hath lands, tenements, or hereditaments, to hold to him and his heirs forever, generally, absolutely, and simply; without mentioning what heirs, but referring that to his own pleasure, or the disposition of the law.

8. *What is the true meaning of the word fee?*—104, 105.

The true meaning of the word fee (*feodum*) is the same with that of feud or fief, and, in its original sense, is taken in contradistinction to *allodium*.

9. *What word is necessary in the grant, in order to make a fee, or inheritance?*—107, 108.

The word "heirs;" for if land be given to a man forever, or to him and his assigns forever, this vests in him but an estate for life. But this rule is now softened by many exceptions.

10. *What are these exceptions?*—108.

It does not extend to devises by will; or to fines and recoveries, considered as a species of conveyance; or to creations of nobility by writ, for the peer so created hath an inheritance in

his title, without expressing the word "heirs," for heirship is implied in the creation, but in creation of peers by patent the word "heirs" must be inserted; or in grants of land to sole corporations and their successors; or in case of the king, for a fee-simple will vest in him without the word "heirs" or "successors" in the grant.

11. *How are limited fees divided?*—109.

Limited fees are of two sorts: 1. Qualified or base fees; and, 2, fees conditional, so called at the common law; and afterward fees-tail, in consequence of the statute *de donis*.

12. *What is a base or qualified fee?*—109.

It is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end.

13. *What was a conditional fee at the common law?*—110.

It was a fee restrained to some particular heirs, exclusive of others; and was called a conditional fee, by reason of the condition, expressed or implied in the donation of it, if the donee died without such particular heirs, the land should revert to the donor.

14. *Whence is the origin of fee-tail and reversion?*—112.

From the construction given to the statute *de donis*. The judges determined that the donee had no longer a conditional fee-simple, which became absolute, and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a fee-tail, and vesting in the donor the ultimate fee-simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion.

15. *What estates may, and may not, be entailed by the statute* de donis?—113.

Tenements is the only word used in the statute; and this Sir Edward Coke expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments, which savor of the realty, that is, which issue out of corporeal ones,

or which concern, or are annexed to, or may be exercised within, the same, as rents, estovers, commons, and the like. Also offices and dignities which concern lands, or have relation to fixed and certain places, may be entailed; but mere personal chattels, which savor not at all of the realty, cannot be entailed. Neither can an office which merely relates to such personal chattels, nor an annuity, which charges only the person, and not the lands of the grantor be entailed under the statute.

16. *What are the several species of estates tail?*—113.

Estates tail are either general or special.

17. *What is tail-general?*—113.

Tail-general is where lands and tenements are given to one, and the heirs of his body begotten.

18. *What is tail-special?*—113, 114.

Tenancy in tail-special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general.

19. *By what distinction are estates in general, and special tail, further diversified?*—114.

By the distinction of sexes in such entails; for both of them may either be in tail-male, or tail-female.

20. *What word is necessary in order to make a fee-tail?*—114, 115.

The word body, or some other word of procreation, to ascertain to what heirs in particular the fee is limited.

21. *How was the statute* de donis *evaded?*—116.

By the application of common recoveries in the twelfth year of Edward IV., which were then openly declared by the judges to be a sufficient bar of an estate tail.

22. *What is the present state of estates tail?*—119.

They are now reduced again to almost the same state, even before issue born, as conditional fees were in, at common law, after the condition was performed by the birth of issue.

CHAPTER VIII.

OF FREEHOLDS, NOT OF INHERITANCE.

1. *Of what sorts are estates of freehold, not of inheritance, but for life?*—120.

Some are conventional, or expressly created by the acts of the parties; others, merely legal, or created by construction and operation of law.

2. *In what ways may the first be created?*—120.

By deed, or by grant.

3. *Who is a tenant* pur autre vie?—120.

He who holds an estate by the life of another.

4. *Against whom does the law say that all grants are to be taken most strongly?*—121.

Against the grantor, unless in the case of the king.

5. *Are there not some estates for life which may determine upon future contingencies, before the life for which they are created expires?*—121.

Yes; as if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet, while they subsist, they are reckoned estates for life.

6. *Why, in conveyances of estates for life, is the grant usually made for the term of a man's natural life?*—121.

In case an estate be granted to a man for his life, generally, it may also determine by his civil death, as if he enters into a monastery, whereby he is dead in law: for which reason, in such conveyances, the grant is usually made "for the term of a man's natural life," which can only determine by his natural death.

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7. *Who is intended by the words* cestuy que vie?—123.

He on whose life lands are held

8. *When is a tenant for life not entitled to emblements?*—123.

When he determines the estate by his own act.

9. *What is an estate tail after possibility of issue extinct?*—124.

This estate happens where one is tenant in special tail, and a person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct.

10. *What is tenancy by the curtesy of England?*—126.

Where a man marries a woman seized of an estate of inheritance, that is, of lands and tenements in fee-simple or fee-tail, and has by her issue, born alive, which was capable of inheriting her estate; in this case, he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England.

11. *What four requisites are necessary to make a tenancy by the curtesy of England?*—127.

Marriage, seizin of the wife, issue, and death of the wife.

12. *When is the husband said to be tenant by the curtesy initiate?*—127.

By the birth of the child the husband becomes tenant by the curtesy initiate: his estate is not consummate until the death of the wife.

13. *What are the four requisites to curtesy?*—127.

They are: 1. The marriage must be canonical and legal. 2. The seizin of the wife must be an actual seizin or possession of the lands. 3. The issue shall be born alive. 4. Death of the wife.

14. *What is tenancy in dower?*—129.

Where the husband of a woman is seized of an estate of inheritance, and dies: in this case, the wife shall have the third part of all the lands and tenements, whereof he was seized at any time during the coverture, to hold to herself for the term of her natural life.

15. *Who may, and may not, be endowed?*—130.

A woman, to be endowed, must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos.* But a divorce *a mensa et thoro* only doth not destroy the dower; no, not even for adultery itself, by the common law.

16. *For what is dower granted?*—130.

For the sustenance of the wife, and the nurture and education of the children.

17. *How is dower lost?*—131.

Widows of traitors are barred of their dower, except in the case of certain modern treasons relating to the coin. An alien also cannot be endowed, unless she be queen consort, for no alien is capable of holding lands.

18. *How long must the husband be seized of land, to entitle the widow to dower?*—132.

If the land abide in the husband but for the interval of a single moment, the wife shall be endowed thereof.

19. *What are the four species of dower subsisting?*—132, 133.

1. Dower by the common law, or that before described; 2. Dower by particular custom, as that the wife shall have half the husband's lands, or in some places the whole, and in some only a quarter; 3. Dower *ad ostium ecclesiæ;* 4. Dower *ex assensu patris.*

20. *What is now the only usual species of endowment?*—135.

Dower by the common law.

21. *How may dower be barred or prevented?*—136, 137.

By elopement, divorce, being an alien, the treason of her husband, and other disabilities; by detaining the title deeds, or evidences of the estate, from the heir, until she restores them; by levying a fine, or suffering a recovery of the lands, during coverture; and by jointure.

22. *What is the most usual method?*—137.

By jointure.

23. *How is jointure defined by Sir Edward Coke?*—137.

As "a competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least."

24. *What four requisites must be punctually observed, in order to make a jointure good?*—138.

1st. The jointure must take effect immediately on the death of the husband.

2d. It must be for the wife's own life at least, and not *pur autre vie*, or for any term of years, or other smaller estate.

3d. It must be made to herself, and no other in trust for her.

4th. It must be made, and so in the deed particularly expressed, to be in satisfaction of her whole dower, and not of any particular part of it.

25. *What if the jointure be made to the wife after marriage?*—138.

She has her election, after her husband's death, as in dower *ad ostium ecclesiæ*, and may either accept or refuse it, and betake herself to her dower at common law; for she was not capable of consenting to it during coverture.

26. *What, if by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession?*—138.

The statute has made provision, that, in such cases, she shall have her dower *pro tanto* at the common law.

27. *What are the comparative advantages of dower and jointure?*—138, 139.

Tenant in dower, by the old common law, is subject to no tolls or taxes; and hers is almost the only estate on which, when derived from the king's debtor, the king cannot distrain for his debt, if contracted during coverture. But, on the other hand, a

widow may enter at once, without any formal process, on her jointure land. Though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow.

CHAPTER IX.

OF ESTATES LESS THAN FREEHOLD.

1. *Of what sorts are estates less than freehold?*—140

Of three sorts: 1st. Estates for years; 2d. Estates at will; 3d. Estates by sufferance.

2. *What is an estate for years?*—140.

An estate for years is a contract for the possession of lands or tenements for some determinate period.

3. *What is a month in law?*—140.

It is a lunar month, or twenty-eight days, unless otherwise expressed. Therefore a lease for "twelve months" is only for forty-eight weeks; but if it be for "a twelve month," in the singular number, it is good for the whole year.

4. *How many hours does the law reckon in the space of a day?*—141.

All the twenty-four hours are usually reckoned; the law generally rejecting all fractions of a day, in order to avoid disputes.

5. *How might a lessee's estate be defeated?*—142.

By the ancient law, by a common recovery suffered by the tenant of the freehold.

6. *What is an estate for years?*—143.

Every estate which must expire at a period certain and prefixed, by whatever words created.

7. *Can an estate of freehold commence* in futuro?—143, 144.

No; because it cannot be created at common law without livery of seizin.

8. *What estate has a tenant for years?*—144.

He has no estate in, but only a right of entry on, the tenement, which right is called his interest in the term, or *interesse termini;* but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is possessed, not properly of the land, but of the terms of years, the possession or seizin of the land remaining still in him who hath the freehold.

9. *What is the legal difference between the term and the time of a lease for years?*—144.

The word term does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and, therefore, the term may expire during the continuance of the time; as by surrender, forfeiture and the like.

10. *What are incident to an estate for years?*—145.

Tenant for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers which the tenant for life is entitled to; that is to say, house-bote, fire-bote, plow-bote, and hay-bote.

11. *What is an estate at will?*—145.

An estate at will is where lands and tenements are let by one man to another, to have and to hold, at the will of the lessor; and the tenant by force of this lease obtains possession.

12. *In what case is a tenant at will entitled to emblements?*—146.

When he has sown the land, and the landlord, before the corn is ripe, or before it is reaped, puts him out.

13. *What acts amount to a determination of the will?*—146.

Any act of ownership by the lessor, as entering upon the premises and cutting timber, taking a distress for rent, and impounding it thereon, or making a feoffment, or lease for years to commence immediately; any act of desertion by the lessee, as

assigning his estate to another, or committing waste, which is an act inconsistent with such tenure, or, which is *instar omnium*, the death or outlawry of either lessor or lessee; puts an end to, or determines the estate at will.

14. *How have courts of law leaned in construing demises, where no certain term is mentioned?*—147.

They have leaned, as much as possible, against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please.

15. *What notice is required to determine a tenancy from year to year?*—147.

Reasonable notice, which is generally understood to be six months.

16. *In what species of estates at will is the will qualified by the custom of the manor?*—147, 148.

In copyhold estates, or estates held by copy of court roll. This custom, being suffered to grow up by the lord, is looked upon as the interpreter of his will.

17. *Why were copyholds not freeholds?*—148, 149.

The reason seems to have arisen from the nature of villenage tenure; in which a grant of any estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein.

18. *What kind of estate have customary freeholders?*—149.

They have a freehold interest, though not of a freehold tenure.

19. *What are the comparative advantages of a copyhold, and of an absolute freehold estate?*—150.

We may now look upon a copyholder of inheritance, with a fine certain, to be little inferior to an absolute freeholder in point of interest, and in other respects, particularly in the clearness and security of his title, to be frequently in a better situation.

20. *What is an estate at sufferance?*—150.

An estate at sufferance is where one comes into possession of land by lawful title, but keeps it afterward without any title at all.

21. *Against whom can no man be tenant at sufferance?*—150.

The King, to whom no *laches*, or neglect, in not entering and ousting the tenant, is ever imputed by law.

22. *How may an estate at sufferance be destroyed?*—150.

The true owner shall first make an actual entry on the land, and oust the tenant; for, before entry, he cannot maintain an action of trespass against the tenant by sufferance; as against a stranger he might.

CHAPTER X.

OF ESTATES UPON CONDITION

1. *What is an estate upon condition?*—152.

An estate upon condition is one whose existence depends upon the happening, or not happening, of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated.

2. *How are estates upon condition divided?*—152.

Into estates upon condition implied, and estates upon condition expressed: under the last division are included estates held *in vadio*, gage, or pledge; estates by statute merchant, or statute staple; and estates held by elegit.

3. *What are estates upon condition implied in law?*—152.

Estates upon condition implied in law are where a grant of an estate has a condition annexed to it inseparable from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally,

without adding other words; the law tacitly annexes thereto a secret condition, that the grantee shall duly execute his office.

4. *How may an office be forfeited?*—153.

By mis-user and non-user, both of which are breaches of the implied condition annexed to the grant of the office.

5. *What is an estate on condition expressed?*—154.

It is an estate granted, either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition.

6. *What is an estate to a man and his heirs, tenants of a certain manor?*—154.

It is an estate upon condition that he and his heirs continue tenants of that manor.

7. *Of what kinds are conditions expressed?*—154.

Precedent or subsequent.

8. *What is the distinction between a condition in deed, and a limitation, or condition in law?*—155.

When an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a limitation. But when an estate is, strictly speaking, upon condition in deed, (as if granted expressly *upon condition* to be void upon the payment of forty pounds by the grantor, or so that the grantee continues unmarried, or provided he goes to York,) the law permits it to endure beyond the time when such contingency happens, unless the grantor, or his heirs or assigns, take advantage of the breach of the condition, and make either an entry, or a claim, in order to avoid the estate.

9. *In instances of limitation or condition subsequent, what estate has the grantee so long as the condition remains unbroken?*—156.

The grantee may have an estate of freehold, provided the estate, upon which such condition is annexed, be in itself of a freehold nature. But where the estate is at the utmost a chat-

tel interest, which must determine at a time certain, and may determine sooner (as a grant for ninety-nine years, provided A, B, and C, or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by such its uncertainty, ranked among the estates of freehold.

10. *When are express conditions void?*—156.

If they be impossible at the time of their creation, or afterward become impossible by the act of God, or the act of the feoffer himself; or if they be contrary to law, or repugnant to the nature of the estate, they are void. In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant.

11. *Of what kinds are estates held* in vadio?—157.

They are of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or mortgage.

12. *What is* vivum vadium, *or living pledge?*—157.

It is when a man borrows a sum (say £200) of another; and grants him an estate, as of £20 per annum, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditional, to be void as soon as such sum is raised; and the land or pledge is said to be living, as it subsists and survives the debt, and, immediately on the discharge of that, results back to the borrower.

13. *What is* mortuum vadium, *or mortgage?*—157, 158.

It is where a man borrows of another a specific sum, (e. g. £200,) and grants him an estate in fee, on condition that if he, the mortgagor, shall pay the mortgagee the said sum of £200 on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in the pledge; or, as is now the usual way, that then the mortgagee shall re-convey the estate to the mortgagor. In this case, the land which is so put in pledge is, by law, in case of non-payment at the time limited, forever dead and gone from the mortgagor, and the mortgagee's estate in the lands is no longer conditional, but absolute.

14. *Who is called tenant in mortgage?*—158.

Between the time of borrowing the money and the time allotted for payment, the mortgagee is called tenant in mortgage.

15. *Whence is the origin of granting only a long term of years by way of mortgage?*—158.

Principally, because, on the death of the mortgagee, such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

16. *What is equity of redemption?*—159.

It is a reasonable advantage, allowed to mortgagors, by the Courts of Equity, which enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back, and account for the rents and profits received, on payment of his whole debt and interest.

17. *What is foreclosure?*—159.

The mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently, or, in default thereof, to be forever foreclosed from redeeming the same; that is, to lose his equity of redemption without possibility of recall.

18. *What are estates held by statute merchant, and statute staple?*—160.

They are very nearly related to the *vivum vadium*, an estate held till the profits thereof shall discharge a debt liquidated, or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 of Edward I. *de mercatoribus*, and thence called a statute merchant; the other pursuant to the statute 27 of Edward III., c. 9, before the mayor of the staple, that is to say, the grand mart of the principal commodities, or manufactures of the kingdom, formerly held by act of parliament in certain trading towns, from whence this security is called a statute staple.

19. *What is an Elegit?*—161.

It is another conditional estate, created by operation of law,

for security and satisfaction of debts. Elegit is the name of a writ founded on the statute of Westminster 2d, by which, after a plaintiff has recovered judgment for his debt at law, the sheriff gives him possession of one-half the defendant's lands and tenements, to be occupied and enjoyed until his debt and damages are fully paid; and, during the time he so holds them, he is called tenant by elegit.

20. *Why are estates by statute merchant, statute staple, and elegit, chattels and not freeholds?*—161, 162.

Because, though tenants by statute and elegit may hold an estate of inheritance, or for life, *ut liberum tenementum*, until their debt be paid; yet it shall go to their executors, which is inconsistent with the nature of a freehold.

21. *Why do these estates vest in the executors, and not the heir, of the tenant?*—162.

It is probably owing to this, that, being a security and remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has, therefore, thus directed their succession; as judging it reasonable, from a principle of natural equity, that the security and remedy should be vested in those to whom the debts, if recovered, would belong.

CHAPTER XI.

OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

1. *What may estates be with respect to the time of their enjoyment?*—163.

They may be either in possession, or in expectancy.

2. *What sorts of expectancies are there and how are they created?*—163.

Remainder and reversion. The one is created by the act of the parties; the other by act of law.

3. *What is the difference between estates executed and estates executory?*—163.

Those executed are in possession, whereby a present interest passes to and resides in the tenant; estates executory depend on some subsequent circumstance or contingency.

4. *What is an estate in remainder?*—164.

An estate in remainder may be defined to be an estate limited to take effect, and be enjoyed, after another estate is determined.

5. *When lands are granted to A for twenty years, with remainder to B and his heirs for ever, are there not two estates?*—164.

Both these interests are, in fact, but one estate; A is tenant for years, remainder to B in fee.

6. *What are the rules laid down by law, to be observed in the creation of remainders?*—165–168.

1st. There must necessarily be some particular estate, precedent to the estate in remainder.

2d. The remainder must commence, or pass out of the grantor, at the time of the creation of the particular estate.

3d. The remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines.

7. *What is the particular estate?*—165.

The precedent estate is called the particular estate, as being only a small part, or *particula*, of the inheritance.

8. *Why cannot an estate of freehold be created to commence* in futuro?—166.

Because, at common law, no freehold in lands could pass without livery of seizin, which must operate either immediately, or not at all.

9. *Is a remainder an estate commencing* in præsenti *or* in futuro?—166.

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10. *What particular estate will not support a remainder over?*—166, 167.

A lease at will is held not to be such a particular estate as will support a remainder over. For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a remainder.

11. *If the particular estate is void, or afterward defeated, is the remainder defeated?*—167.

Yes; as where the particular estate is an estate for the life of a person not *in esse;* or an estate for life on condition, on breach of which the grantor enters and avoids the estate.

12. *Must the remainder and particular estate pass out of the grantor at the same time?*—167.

Yes; they must commence, or pass out of the grantor, at the same time.

13. *Must the remainder vest instantly upon the determination of the particular estate?*—168.

It must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines.

14. *Of what sorts are remainders?*—168.

They are either vested or contingent.

15. *What are vested or executed remainders?*—168, 169.

They are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent.

16. *When are remainders contingent, or executory?*—169.

When the estate is limited to take effect, either to a dubious and uncertain person, or upon a dubious or uncertain event.

17. *How must contingent remainders, to a person not in being, be limited?*—170.

They must be limited to some one that may, by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines.

18. *How is this explained?*—169, 170.

If an estate be made to A for life, remainder for heirs of B, if A dies before B, the remainder is at an end; for during B's life he has no heir, "*nemo est hæres viventis;*" but if B dies first, the remainder then immediately vests in his heirs, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B's dying before A is *potentia propinqua*, and therefore allowed in law. But a remainder to the right heirs of B, (if there be no such person as B *in esse*,) is void. For here there must two contingencies happen; first, that such a person as B shall be born; and secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility.

19. *Why cannot a contingent remainder of freehold be limited on a particular estate less than freehold?*—171.

Because, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him without vesting somewhere, and, in the case of a contingent remainder, it must vest in the particular tenant, else it can vest nowhere.

20. *How may contingent remainders be defeated?*—171.

By destroying, or determining, the particular estate upon which they depend, before the contingency happens whereby they become vested.

21. *Is there a way of preventing this defeat?*—171.

Yes; trustees may be appointed to preserve the contingent remainders.

22. *What is an executory devise?*—172.

An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency.

23. *In what points does it differ from a remainder?*—172, 173.

1st. It needs not any particular estate to support it. 2d. By

it a fee-simple, or other less estate, may be limited after a fee-simple. 3d. By this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

24. *Why may a devise of freehold commence* in futuro?—173.

Because, a freehold may pass by devise, without corporeal tradition, or livery of seizin.

25. *Within what period must an executory devise take effect?*—174.

The utmost length of time that has been hitherto allowed for the contingency of an executory devise to happen in, is that of a life or lives in being, and one and twenty years afterward.

26. *What is an estate in reversion?*—175.

An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over.

27. *From whence is the doctrine of reversions derived?*—175.

It is plainly derived from the feodal constitution.

28. *What are the usual incidents to a reversion?*—176.

Fealty and rent.

29. *What is the doctrine of merger?*—177.

Whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, is said, in law phrase, to be merged, that is, sunk or drowned in the greater.

CHAPTER XII.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

1. *How may estates, with respect to the number and connections of their owners, be held?*—179.

They are held in four different ways: in severalty, in joint-tenancy, in coparcenary, and in common.

2. *What is an estate in severalty?*—179.

A tenant in severalty is he that holds lands in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein.

3. *What is an estate in joint-tenancy?*—179.

An estate in joint-tenancy is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. It is sometimes called an estate in jointure.

4 *How may this estate be created?*—180.

Its creation depends upon the wording of the deed, or devise, by which the tenants claim title; for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law.

5 *From what are the properties of a joint estate derived?*—180.

From its unity, which is fourfold: the unity of interest, the unity of title, the unity of time, and the unity of possession.

6. *What is meant by unity of interest?*—181.

That one joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different.

7. *What is meant by unity of title?*—181.

The estates of joint-tenants must be created by one and the

same act, whether legal or illegal; as, by one and the same grant, or by one and the same dis-seizin.

8. *What is meant by unity of time?*—181.

The estates of joint-tenants must be vested at one and the same period, as well as by one and the same title.

9. *What is meant by unity of possession?*—182.

Joint-tenants are said to be seized *per my et per tout*, by the half or moiety, and by all; that is, they each of them have the entire possession, as well of every parcel as of the whole.

10. *If an estate in fee be given to a man and his wife, are they joint-tenants, or tenants in common?*—182.

They are neither properly joint tenants, nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entirety, *per tout et non per my;* the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.

11. *What is the doctrine of survivorship?*—183, 184.

When two or more persons are seized of a joint estate of inheritance, or are jointly possessed of any chattel interest, the entire tenancy remains to the survivors, and at length to the last survivor. This is the nature and regular consequence of the union and entirety of their interest.

12. *Why cannot the king, or any corporation, be joint-tenant with a private person?*—184.

Because the right of survivorship, *jus accrescendi*, ought to be mutual; and the private person has not even the remotest chance of being seized of the entirety, by benefit of survivorship, for the king and the corporation can never die.

13. *How may an estate in joint-tenancy be severed and destroyed?*—185.

By destroying any of its constituent unities; as, by merely disuniting the joint-possession, as if joint-tenants agree to part

their lands and hold them in severalty, or by destroying the unity of title, as if one joint-tenant alienes and conveys his estate to a third person; or, by destroying the unity of interest, as if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure.

14. *Why is a devise of one joint-tenant's share, by will, no severance of the jointure?*—186.

Because no testament takes effect till after the death of the testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and has therefore, a priority to the other,) is already vested.

15. *When is it disadvantageous for joint-tenants to dissolve the jointure?*—187.

In the case of joint-tenants for life, and they make partition; for though before they each of them had an estate in the whole, for their own lives and the life of their companion, now they have an estate, in a moiety only, for their own lives merely; and on the death of either, the reversioner shall enter on his moiety.

16. *What is an estate in coparcenary?*—187.

An estate held in coparcenary is where lands of inheritance descend from the ancestor to two or more persons. It arises either by common law, or by particular custom.

17. *Who are parceners by common law?*—187.

Where a person seized in fee-simple or fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit; and these coheirs are called parceners.

18. *Who are parceners by particular custom?*—187.

Where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c., such coheirs are parceners by particular custom. All the parceners, put together, make but one heir, and have but one estate among them.

19. *What are the properties of estate in coparcenary?*—188.

The properties of parceners are in some respects like those of joint-tenants; they have the same unities of interest, title, and possession; they may sue and be sued jointly, for matters relating to their own lands; and the entry of one of them shall, in some cases, inure as the entry of them all.

20. *In what respects do parceners differ from joint-tenants?*—188.

First, they always claim by descent, whereas joint-tenants always claim by purchase. Secondly, there is no unity of time necessary to an estate in coparcenary. Thirdly, parceners, though they have a unity, have not an entirety of interest. Fourthly, in that they may be constrained to make partition.

21. *How may parceners make partition?*—189.

There are five methods of making it: First, where they agree to divide the lands in equal parts. Second, where they agree to choose some friend to make a partition for them. Third, where the eldest divides, and then she shall choose the last; for the rule of law is, *cujus est divisio alterius est electio.* Fourth, where the sisters agree to cast lots for their shares. Fifth, where one or more sue out a writ of partition against the others.

22. *What things are in their nature impartible?*—190.

The mansion house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided.

23. *What becomes of them?*—190.

The eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in the other parts of the inheritance; or, if that cannot be, then they shall have the profits of the thing by turns.

24. *What is the law of hotch-pot, incident to this estate?*—190, 191.

It is, in the words of Littleton, as follows: "It seems that this word hotch-pot, is in English, a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together." By this housewifery metaphor, our ancestors meant to inform us that the lands, both those given in frank-

marriage and those descending in fee-simple, should be mixed and blended together, and then divided in equal portions among the daughters. But this was left to the choice of the donee in frankmarriage.

25. *Who are tenants in common?*—191.

Tenants in common are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and, therefore, they all occupy promiscuously.

26. *Is unity of interest, of title, and of time, necessary to tenancy in common?*—191.

No; unity of possession, only, is necessary to it.

27. *How may tenancy in common be created?*—192, 193.

Either by the destruction of the two other estates, joint-tenancy and coparcenary, or by special limitation in a deed.

28. *Does the law, in its constructions, favor joint-tenancy, or tenancy in common?*—193.

It is apt to favor joint-tenancy rather than tenancy in common.

29. *What are the incidents attending tenancy in common?*—194.

Tenants in common (like joint-tenants) are compellable, by the statutes of Henry VIII. and William III. to make partition of their lands, which they were not at common law. They properly take by distinct moieties, and have no entirety of interest. Their other incidents are such as merely arise from unity of possession; and are, therefore, the same as appertain to joint-tenants.

30. *How can estates in common be dissolved?*—194.

In two ways: 1. By uniting all the interests and titles in one tenant, by purchase or otherwise. 2. By making partition between the several tenants in common.

31. *In what do tenancies in common differ from sole estates?*—195.

In nothing, but merely the blending and unity of possession.

CHAPTER XIII.

OF THE TITLE TO THINGS REAL, IN GENERAL.

1. *What is a title?*—195.

A title is the means whereby the owner of lands hath the just possession of his property.

2. *What are the several stages or degrees necessary to form a complete title to lands and tenements?*—195–199.

They are, progressively: 1st. Naked possession; 2d. Right of possession; 3d. Right of property; 4th. A complete title.

3. *What is the lowest and most imperfect degree of title?*—195.

The mere naked possession, or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, to hold and continue such possession.

4. *Does actual possession confer title?*—196.

No; it is only *prima facie* evidence of a legal title in the possessor.

5. *When may naked possession of lands happen?*—195.

When, for instance, one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a *dis-seizin*.

6. *May actual possession ripen into title?*—196.

It may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title.

7. *Of what sorts is the right of possession?*—196.

An apparent right of possession, which may be defeated by proving a better; and an actual right of possession, which will stand the test against all opponents.

8. *What is the right of property?*—197.

The mere right of property, *jus proprietatis*, without either possession, or even the right of possession, is frequently spoken of under the name of the mere right, *jus merum*. A person with this mere right, may have the true ultimate property of the lands in himself; but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favor of his antagonist, who has thereby obtained the absolute right of possession. By proving such better right, he may at length recover the lands.

9. *When is title complete?*—199.

No title is completely good, unless the right of possession be joined with the right of property. When to this double right the actual possession also is united, then is the title completely legal.

CHAPTER XIV.

OF TITLE BY DESCENT.

1. *What are the methods of acquiring on the one hand, and of losing on the other, the title to estates in things real?*—201.

They may be acquired by descent, where the title is vested in a man by the single operation of the law; and by purchase, where the title is vested in him by his own act or agreement.

2. *What is title by descent?*—201.

Title by descent, or hereditary succession, is where a man, on the death of his ancestor, acquires his estate by right of representation, as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate, so descending to the heir, is in law called the inheritance.

3. *What is to be said as to the importance of the doctrine of descents?*—201.

That it is the principal object of the laws of real property, in England.

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4. *Upon what does descent at common law depend?*—202.

It depends, not a little, on the nature of the kindred, and the several degrees of consanguinity.

5. *What is consanguinity?*—202.

It is the connection or relation of persons descended from the same stock, or common ancestor. This consanguinity is either lineal or collateral.

6. *What is lineal consanguinity?*—206, 207.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other; as between John Stiles and his father, grandfather, great-grandfather, and so upward in the direct ascending line; or between Stiles and his son, grandson, great-grandson, and so downward in the direct descending line. Collateral relations agree with the lineal in this, that they descend from the same stock or ancestor; but differ in this, that they do not descend one from the other.

7. *In what does the very being of collateral consanguinity consist?*—205.

In this descent from one and the same common ancestor.

8. *What is the method of computing the degrees of collateral consanguinity?*—205–207.

We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus Titius and his brother are related in the first degree; for from the father of each of them is counted only one. Titius and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor, viz., his own grandfather, the father of Titius. Collateral kinsmen are such, then, as lineally spring from one and the same ancestor, who is the *stirps*, or root, the trunk, or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them consanguineous.

9. *What is the first rule, or canon of descent?*—208–210.

The first rule is that inheritances shall lineally descend to the issue of the person who last died actually seized, *in infinitum*, but shall never lineally ascend.

10. *What is the difference between heirs apparent and heirs presumptive?*—208.

Heirs apparent are such whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must be heir to the father whenever he happens to die.

Heirs presumptive are such who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose hopes may be cut off by the birth of a son.

11. *Who cannot properly be an ancestor?*—209.

No person can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath had actual seizin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold; or unless he hath had what is equivalent to corporeal seizin in hereditaments that are incorporeal.

12. *Is the lineal ascent excluded?*—210.

Yes; the land shall never ascend, but shall rather escheat.

13. *What is the second rule, or canon of descents?*—212, 213.

It is, that the male issue shall be admitted before the female.

14. *What is the third rule, or canon of descents?*—214–216.

It is, that where there are two or more males, in equal degree, the eldest only shall inherit; but the females all together.

15. *As to what does succession by primogeniture take place among females?*—216.

As to the inheritance of the crown.

16. *As to what does the right of sole succession take place among females?*—216.

Female dignities and titles of honor.

17. *What is the fourth rule, or canon of descents?*—217.

It is, that the lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living.

18. *What is this taking by representation called?*—217.

It is called succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done.

19. *What is understood by sharing* per capita?—217, 218.

Among collaterals, if any person, of equal degree with the persons represented, were still subsisting (as, if the deceased left one brother, and two nephews, the sons of another brother), the succession was still guided by the roots; but if both the brethren were dead, leaving issue, then their representatives in equal degree became themselves principals, and shared the inheritance *per capita*, that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation.

20. *What is the fifth rule, or canon of descents?*—220.

That on failure of lineal descendants, or issue, of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules or canons. This is a rule almost peculiar to our own laws, and those of a similar origin.

21. *What is the great and general principle upon which the law of collateral inheritance depends?*—223.

That upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or, that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law to have, originally descended.

22. *What is the sixth rule, or canon of descents?*—224.

That the collateral heir of the person last seized must be his next collateral kinsman of the whole blood.

23. *How must he be his next collateral kinsman?*—224.

Either personally, or *jure representationis*. On failure of issue of the person last seized, the inheritance shall descend to the other subsisting issue of his next immediate ancestor.

24. *Are lineal ancestors the common stocks of collateral inheritance?*—226.

Yes; the lineal ancestors, though incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring.

25. *Must the heir be the nearest kinsman absolutely?*—227.

No; only *sub modo;* that is, he must be the nearest kinsman of the whole blood.

26. *Who is a kinsman of the whole blood?*—227.

He that is derived, not only from the same ancestor, but from the same couple of ancestors.

27. *Why is the half blood excluded?*—228–230.

The total exclusion of the half-blood from the inheritance, being almost peculiar to our own law, is looked upon as a strange hardship, by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule, which is not so much to be considered in the light of a rule of descent, as of a rule of evidence; an auxiliary rule to carry a former into execution. The universal principle of

collateral inheritances being this, that the heir to a *feudum antiquum* must be of the blood of the first feudatory or purchaser, that is, derived in a lineal descent from him. The doctrine of the whole blood was calculated to supply the frequent impossibility of proving a descent from this first purchaser, without some proof of which there can be no inheritance allowed of; and this purpose it answers, for the most part, effectually enough. It is not an injustice, nor always a hardship; since even the succession of the whole blood was originally a beneficial indulgence, rather than the strict right of collaterals; and though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before.

28. *What may descend to the half blood?*—233.

The Crown may descend to the half blood of the preceding sovereign. For the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock.

29. *In what kind of estates is half blood no impediment to the descent?*—233.

In estates tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent; because, when the lineage is clearly made out, there is no need of this auxiliary proof.

30. *What is the seventh and last rule, or canon of descents?*—234.

That in collateral inheritances the male stock shall be preferred to the female, (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near), unless where the lands have, in fact, descended from a female.

31. *What is probably the origin of this rule?*—235.

It was established in order to effectuate and carry into execution the fifth rule, or practical canon, of collateral inheritance; that every heir must be of the blood of the first purchaser

32. *When is this rule totally reversed?*—236.

Where lands have notoriously descended to a man from his mother's side. Then no relation of his by the father's side, as such, can ever be admitted to them; because he cannot be of the blood of the first purchaser.

CHAPTER XV.

OF TITLE BY PURCHASE—AND, FIRST, BY ESCHEAT.

1. *How is purchase defined?*—241.

Purchase, *perquisitio*, taken in its largest and most extensive sense, is defined by Littleton: the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred.

2. *What does it include?*—241.

Every other method of coming to an estate but merely that by inheritance.

3. *What is meant by "conquest" of the feudists?*—242, 243.

What we call purchase, *perquisitio*, the feudists called conquest, conquæstus or *conquisitio*; both denoting any means of acquiring an estate out of the common course of inheritance. The Norman jurists styled the first purchaser (that is, he who brought the estate into the family which at present owns it) the conqueror or *conquereur*. Which seems to be all that was meant by the appellation given to William the Norman, when his manner of ascending the throne of England was, in his own and his successors' charters, and by the historians of the times, entitled *conquæstus*, and himself *conquæstor*, or *conquisitor*; signifying that he was the first of his family who acquired the crown of England.

4. *In what consists the difference, in effect, between the acquisition of an estate by descent, and by purchase?*—243.

It consists principally in these two points: 1. That by pur-

chase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor.

2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will.

5. *What are the five methods of acquiring title to estates by purchase?*—244.

1. Escheat; 2. Occupancy; 3. Prescription; 4. Forfeiture; 5. Alienation.

6. *What is escheat?*—244.

It denotes an obstruction of the course of descent, and a consequent determination of the tenure by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor, or lord of the fee.

7. *Upon what principle is the law of escheats founded?*—245.

It is founded upon this single principle, that the blood of the person last seized in fee-simple, is, by some means or other, utterly extinct and gone; and, since none can inherit his estate but such as are of his blood and consanguinity, it follows, as a regular consequence, that when such blood is extinct the inheritance must fail; the land must become what the feudal writers denominate *feudum apertum*, and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

8. *How are escheats divided?*—245.

Frequently, into those *propter defectum sanguinis*, and those *propter delictum tenentis;* the one sort, if the tenant dies without heirs; the other, if the blood be attainted.

9. *What are the modes of failure of heritable blood?*—246, 247.

They are: 1. When the tenant dies without any relations on the part of any of his ancestors.

2. When he dies without any relations on the part of those ancestors from whom his estate is descended.

3. When he dies without any relations of the whole blood

4. A monster, which hath not the shape of mankind, but in any part bears the resemblance of the brute creation, hath no heritable blood.

5. Bastards are incapable of being heirs.

6. Aliens, also, are incapable of taking by descent, or inheriting.

7. By attainder, also, for treason or other felony, the blood of the person attainted is so corrupted as to be rendered no longer heritable.

The first three of these cases, wherein heritable blood is wanting, may be collected from the rules of descent.

10. *Is there an exception in case of bastards?*—248.

Yes; in one instance the law has shewn them some little regard; and that is usually termed the case of *bastard eigné* and *mulier puisné*.

11. *Can aliens hold by purchase?*—249.

No; they cannot.

12. *How does denization affect the rights of inheritance?*—249.

If an alien be made a denizen by the king's letter patent, and then purchase lands, (which the law allows such a one to do,) his son, born before his denization, shall not (by the common law) inherit those lands; but a son born afterward may, even though his elder brother be living. Yet if he had been naturalized by act of parliament, such eldest son might then have inherited.

13. *If an alien cometh into England, and there hath issue two sons, who are thereby natural born subjects, and one of them purchase land, and dies, can these brethren be heirs one to the other?*—250.

Formerly they could not, but now they can.

14. *Why is this so?*—250.

Reasonably enough, upon the whole; for as, (in common purchases) the whole of the supposed descent from indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestor, as suppose the requisite descent.

15. *What is the difference between forfeiture of lands to the king and this species of escheat to the lord?*—251.

Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law, as a part of the punishment for the offence; and does not at all relate to the feodal system. Escheat operates in subordination to this more ancient and superior law of forfeiture.

16. *Does corruption of blood obstruct the descent?*—254.

Yes; the person attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent to his posterity, in all cases where they are obliged to derive their title through him from any remote ancestor.

17. *How only can corruption of blood be absolutely removed?*—254.

By authority of parliament.

18. *If a man attainted be afterward pardoned by the king, can his son inherit?*—254.

He can never, if born before the pardon, inherit to his father, or father's ancestors; but if born after the pardon, he might inherit.

19. *If a man hath issue a son, and be attainted, and afterward be pardoned, and then have issue a second son, and die; why cannot either of these sons be his heir?*—255.

Because the corruption of blood is not removed from the eldest son, and therefore he cannot be heir; neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had the possibility of being heir; and, therefore, the youngest shall not inherit, but the land shall escheat.

20. *If the ancestor be attainted, may his sons be heirs to each other?*—255.

Sons born before the attainder may be heirs to each other, because the blood was inheritable when imparted to them from the father.

21. *In what instance are lands held in fee-simple not liable to escheat, even when their owner is no more, and has left no heirs to inherit them?*—256.

In the case of a corporation. For if that comes by accident to be dissolved, the donor, or his heirs, shall have the land again in reversion, and not the lord by escheat; which is, perhaps, the only instance where a reversion can be expectant on a grant in fee-simple absolute.

CHAPTER XVI.

OF TITLE BY OCCUPANCY.

1. *What is occupancy?*—258.

Occupancy is the taking possession of those things which before belonged to nobody.

2. *To what single instance have the laws of England confined the right of occupancy?*—258.

Where a man was tenant *pour autre vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestuy que vie*, or him by whose life it was holden; in this case, he that could first enter on the land might lawfully retain possession, so long as *cestuy que vie* lived, by right of occupancy.

3. *Why was no right of occupancy allowed where the king had the reversion?*—259.

Because the reversioner hath an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred: against the king, therefore, there could be no prior occupant, because *nullum tempus occurrit regi.*

4. *What if the estate* pur autre vie *had been granted to a man and his heirs, during the life of* cestuy que vie?—259.

There the heir might, and still may, enter and hold posses-

sion, and is called in law a special occupant: as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *hæreditas jacens* during the residue of the estate granted.

5. *Is the title of common occupancy abolished?*—260.

Almost by statute. Where there is no special occupant in whom the estate may vest, the tenant *pour autre vie* may devise it by will, or it shall go to the executors or administrators.

6. *Does the title of special occupancy continue?*—260.

The title of special occupancy, by the heir at law, continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, but as an occupant specially marked out and appointed by the original grant.

7. *What is the law as to islands rising in rivers?*—261.

Bracton tells us, that if an island arise in the middle of a river, it belongs in common to those that have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law.

8. *If an island rise in the sea, to whom does the law give it?*—261.

The civil law gives it to the first occupant, the common law gives it to the king.

9. *What is the law, as to ownership, as to lands gained from the sea, either by* alluvion, *by the washing up of sand and earth, so as in time to make* terra firma; *or by dereliction, as when the sea shrinks back below the usual watermark?*—262.

In these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for, as the king is lord of the sea, and owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry.

CHAPTER XVII.

OF TITLE BY PRESCRIPTION

1. *What is title by prescription?*—264.

Title by prescription is when a man can show no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it.

2. *What is the distinction between prescription and custom?*—263.

Custom is properly a local usage, and not annexed to any person; prescription is merely a personal usage.

3. *What is prescribing in a* que estate?—264.

All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath; which last is called prescribing in a *que estate.*

4. *What may be prescribed for?*—264.

Nothing but incorporeal hereditaments can be claimed by prescription.

5. *Why cannot prescription give a title to lands?*—264.

Because this is clearly another sort of title; a title by corporeal seizin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription.

6. *In whom must a prescription be laid?*—265.

In him that is a tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe.

7. *Can prescription be for a thing which cannot be raised by grant?*—265.

No; it cannot.

8. *Can what is to arise by matter of record be prescribed for?*—265.

It cannot; but must be claimed by grant, entered on record;

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The title of special occupancy, by the heir at law, continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, but as an occupant specially marked out and appointed by the original grant.

7. *What is the law as to islands rising in rivers?*—261.

Bracton tells us, that if an island arise in the middle of a river, it belongs in common to those that have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law.

8. *If an island rise in the sea, to whom does the law give it?*—261.

The civil law gives it to the first occupant, the common law gives it to the king.

9. *What is the law, as to ownership, as to lands gained from the sea, either by* alluvion, *by the washing up of sand and earth, so as in time to make* terra firma; *or by dereliction, as when the sea shrinks back below the usual watermark?*—262.

In these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for, as the king is lord of the sea, and owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry.

CHAPTER XVII.

OF TITLE BY PRESCRIPTION

1. *What is title by prescription?*—264.

Title by prescription is when a man can show no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it.

2. *What is the distinction between prescription and custom?*—263.

Custom is properly a local usage, and not annexed to any person; prescription is merely a personal usage.

3. *What is prescribing in a* que estate?—264.

All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath; which last is called prescribing in a *que estate.*

4. *What may be prescribed for?*—264.

Nothing but incorporeal hereditaments can be claimed by prescription.

5. *Why cannot prescription give a title to lands?*—264.

Because this is clearly another sort of title; a title by corporeal seizin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription.

6. *In whom must a prescription be laid?*—265.

In him that is a tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe.

7. *Can prescription be for a thing which cannot be raised by grant?*—265.

No; it cannot.

8. *Can what is to arise by matter of record be prescribed for?*—265.

It cannot; but must be claimed by grant, entered on record;

such as, for instance, the royal franchises of deodands, felons' goods, and the like.

9. *What distinction must be made with regard to the manner of prescribing?*—265, 266.

If a man prescribe in a *que estate*, nothing is claimable but such things as are incident, appendant, or appurtenant to lands. But, if he prescribe in himself and his ancestors, he may prescribe for anything whatsoever that lies in grant.

10. *How are estates gained by prescription descendible?*—266.

Not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule.

CHAPTER XVIII.

OF TITLE BY FORFEITURE.

1. *What is forfeiture?*—267.

It is a punishment annexed by law to some illegal act, or negligence in the owner of lands, tenements, or hereditaments; whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong, which either he alone, or the public together with himself, hath sustained.

2. *For what causes may lands, tenements, and hereditaments, be forfeited?*—267.

They may be forfeited in various degrees, and by various means: 1. By crimes and misdemeanors. 2. By alienation contrary to law. 3. By non-presentation to the benefice, when the forfeiture is denominated a lapse. 4. By simony. 5. By non-performance of conditions. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy.

3. *What are the offences which induce a forfeiture of lands and tenements to the crown?*—267, 268.

They are: 1. Treason. 2. Felony. 3. Misprision of treason. 4. Præmunire. 5. Drawing a weapon on a judge, or striking any one in the presence of the king's principal courts of justice. 6. Popish recusancy.

4. *Of what kinds is the alienation, contrary to law, which induces a forfeiture?*—268.

1. Alienation in mortmain. 2. Alienation to an alien. 3. Alienation by particular tenants.

5. *What is alienation in mortmain?*—268.

Alienation in mortmain, in *mortua manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal.

6. *Can corporations purchase lands without a license?*—269.

They cannot without a license in mortmain from the crown

7. *By whom, and why, were common recoveries invented?*—270.

By the religious houses, to evade the statute *De Religiosis*, 7 Edw. I.

8. *How are these recoveries obtained?*—271.

The religious houses set up a fictitious title to the land, which it was intended they should have, and brought an action to recover it against the tenant; who, by fraud and collusion, made no defence; and thereby judgment was given for the religious house, which then recovered the land by sentence of law upon a supposed prior title. Thus they had the honor of inventing those fictitious adjudications of right, which are since become the great assurance of the kingdom, under the name of common recoveries.

9. *What was the origin of uses and trusts?*—272.

They originated in ecclesiastical ingenuity, to evade the statutes in mortmain.

10. *How were uses created?*—271, 272.

By granting the lands, not to themselves directly, but to nominal feoffees, to the use of the religious houses; thus distinguishing between the possession and the use, and receiving

the actual profits, while the seizin of the lands remained in the nominal feoffee, who was held, by the courts of equity, to be bound, in conscience, to account to his *cestuy que use* for the rents and emoluments of the estate.

11. *What arose out of these inventions?*—272.

To them we are indebted for uses and trusts, the foundation of modern conveyancing.

12. *What is the consequence of alienations by particular tenants, when they are greater than the law entitles them to make, and divest the remainder or reversion?*—274.

They are forfeitures to him whose right is attacked thereby.

13. *What is disclaimer, in its nature and consequences?*—275, 276.

Equivalent to an illegal alienation by the particular tenant is the civil crime of disclaimer; as, where a tenant who holds of any lord, neglects to render him the due services, and, upon an action brought to recover them, disclaims to hold of his lord; which disclaimer of tenure, in any court of record, is a forfeiture of the lands to the lord, upon reasons most apparently feodal.

14. *What is forfeiture by lapse?*—276.

Lapse is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan.

15. *When can no right of lapse accrue?*—276.

In two cases: 1st. Where there is no right of institution. 2d. Where the original presentation is in the crown.

16. *What is simony?*—278.

It is the corrupt presentation of any one to an ecclesiastical benefice, for money, gifts, or reward.

17. *Of what kinds are conditions, the breach, or non-performance of which, induces a forfeiture?*—281.

There are two kinds: a condition annexed to the estate,

either expressly by deed, at its original creation; or a condition implied by law, from a principle of natural reason.

18. *What is waste?*—281.

Waste, *vastum*, is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail. It is either voluntary or permissive.

19. *What will amount to waste in houses, in timber, and in lands?*—281, 282.

Whatever does a lasting damage to the freehold or inheritance is waste. Therefore, removing wainscot, floors, or other things once fixed to the freehold of a house, is waste. Timber, also, is part of the inheritance; such as oak, ash, and elm, in all places; and in some particular counties, by local custom; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste. The conversion of land from one species to another, is waste; to convert wood, meadow, or pasture into arable; to turn arable into meadow, or pasture into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste. To open lands to search for mines is waste.

20. *Who are liable to be punished for waste, and who are not?*—282, 283.

By the feodal law, we find that the rule was general for all vassals or feudatories: "*si vasallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur.*" But in the ancient common law the rule was by no means so large; for not only he that was seized of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant, save only in the three persons: guardian in chivalry, tenant in dower, and tenant by the curtesy; and not in tenant for life or years.

21. *What is the punishment for committing waste?*—283, 284.

By common law and statute only single damages, except in the case of a guardian, who also forfeited his wardship by the provisions of the great charter: but the statute of Gloucester

directs, that the other four species of tenants shall lose and forfeit the place wherein the waste is committed, and also treble damages, to him that hath the inheritance.

22. *How may copyhold estates be forfeited?*—284.

By breach of the customs of the manor.

23. *Define a bankrupt?*—285.

He is a trader who secretes himself, or does certain other acts, tending to defraud his creditors.

24. *What becomes of a bankrupt's lands and tenements?*—285, 286.

By statute 13 Eliz. c. 7, the commissioners for that purpose, when a man is declared a bankrupt, shall have full power to dispose of all his lands and tenements; and to cause them to be appraised to their full value, and to sell the same by deed indented and enrolled, or divide them proportionably among the creditors. The statute 21 Jac. I. c. 19, enacts that the commissioners shall be empowered to sell or convey, by deed indented and enrolled, any lands or tenements of the bankrupt, wherein he shall be seized of an estate-tail in possession, remainder, or reversion, unless the remainder or reversion thereof shall be in the crown. And, also, by this and the former act, all fraudulent conveyances, to defeat the intent of these statutes, are declared void.*

CHAPTER XIX.

OF TITLE BY ALIENATION.

1. *What is alienation, conveyance, or purchase, in its limited sense?*—287.

Under it may be comprised any method wherein estates are voluntarily resigned by one man, and accepted by another; whether that be effected by sale, gift, marriage settlement,

* The provisions of the English bankrupt law have been simplified in some respects, and otherwise modified, by more modern statutes.

devise, or other transmission of property by the mutual consent of the parties.

2. *Who are capable of conveying, and who of purchasing?*—290.

All persons in possession are *prima facie* capable both of conveying and purchasing, unless the law has laid them under any particular disabilities.

3. *Must the alienor have an estate?*—290.

Yes; if a man has only in him the right of either possession or property, he cannot convey it to any other. Yet reversions and vested remainders may be granted.

4. *May contingencies and mere possibilities be assigned to a stranger?*—290.

They cannot, unless coupled with some present interest.

5. *What descriptions of persons are incapable of conveying?*—290–293.

Persons attainted of treason, felony, præmunire; idiots, and persons of nonsane memory; infants and femes covert; papists.

6. *Are conveyances and purchases by idiots and persons of nonsane memory, infants, and persons under duress, void?*—291.

They are voidable, but not actually void.

7. *May a non compos himself, afterward brought to a right mind, be permitted to allege his own insanity, in order to avoid his grants, or other acts?*—291, 292.

He may not. The king, on behalf of an idiot, may do so

8. *May his next heir, or other person interested, plead it?*—292.

The next heir, or other person interested, may, after the death of the idiot or non compos, take advantage of his incapacity and avoid the grant.

9. *May an infant waive his purchase, or conveyance, when he comes of full age?*—292.

He may; or, if he does not then actually agree to it, his heirs may waive it after him.

10. *May a feme covert purchase an estate without the consent of her husband?*—293.

She may purchase an estate without his consent, and the conveyance is good during the coverture, till he avoids it by some act declaring his dissent. And, though he does nothing to avoid it, or even if he actually consents, the feme covert herself may, after the death of her husband, waive or disagree to the same; nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement.

11. *What only can an alien purchase and hold?*—293.

He may purchase anything; but after purchase he can hold nothing, except a lease for years of a house for convenience of merchandise.

12. *What are the legal evidences of alienation, or transfer of property, styled?*—294.

The common assurances of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

13. *Of what kinds are these common assurances?*—294.

They are of four kinds: 1. By matter *in pais*, or deed; which is an assurance transacted between two or more private persons *in pais*, in the country; that is, according to the old common law, upon the very spot to be transferred.

2. By matter of record, or an assurance transacted only in the king's public courts of record.

3. By special custom, obtaining in some particular places, and relating only to some particular species of property.

4. By devise, contained in a last will and testament.

CHAPTER XX.

OF ALIENATION BY DEED.

1. *What is a deed?*—295.

A deed is a writing sealed, and delivered, by the parties.

2. *What is an indenture?*—295.

Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some words or letters of the alphabet written between them, through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part, and half on the other. But at length indenting only has come into use; without cutting through any letters at all; and it seems at present to serve for little other purpose than to give name to the species of deed.

3. *Which is the original, and which the counterpart, of a deed?*—296.

When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original; and the rest are counterparts.

4. *What is a deed-poll?*—296.

It is a plain deed, made by one party only, not indented, but polled or shaved quite even; and, therefore, called a deed-poll, or a single deed.

5. *What are the requisites of a deed?*—296–308.

They are eight: 1st. There must be persons able to contract and be contracted with, for the purposes intended by the deed; and also a thing, or subject matter, to be contracted for; all which must be expressed by sufficient names.

2d. The deed must be founded upon good and sufficient consideration.

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2d. The deed must be founded upon good and sufficient consideration.

3d. The deed must be written or printed, on paper or parchment.

4th. The matter written must be legally and orderly set forth.

5th. The deed must be read, if any of the parties desire it.

6th. The party whose deed it is should seal and sign it.

7th. It must be delivered by the party himself, or his certain attorney.

8th. It must be attested, or executed, in the presence of witnesses.

6. *What are the usual formal and orderly parts of a deed?*—298-304.

They are eight: 1st. The premises. 2d. The habendum. 3d. The tenendum. 4th. The reddendum. 5th. The conditions. 6th. Warranty. 7th. Covenants or conventions. 8th. The conclusion.

7. *What are the premises in a deed?*—298.

The premises may be used to set forth the number and names of the parties, with their additions or titles.

8. *What are the habendum and tenendum?*—298, 299.

The office of the habendum is properly to determine what estate or interest is granted by the deed.

The tenendum, "and to hold," is now of very little use, and is only kept in by custom.

9. *What is the reddendum?*—299.

The reddendum is a reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted, or rent.

10. *What is a condition?*—299.

It is a clause of contingency, on the happening of which the estate granted may be defeated.

11. *What is the clause of warranty?*—300.

It is that part whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted.

12. *What was the origin of express warranties?*—301.

They were introduced in order to evade the strictness of the feodal doctrine of non-alienation without the consent of the heir.

13. *What is an express warranty?*—301.

It is a kind of covenant real, and can only be created by the verb *warrantizo*, or warrant.

14. *What is the difference between lineal and collateral warranty?*—301, 302.

Lineal warranty was where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty.

Collateral warranty was where the heir's title to the land neither was, nor could have been derived, from the warranting ancestor.

15. *In case the warrantee was evicted, what was the obligation of the heir?*—302.

To yield him other lands instead of those from which the warrantee has been evicted.

16. *What are covenants?*—304.

They are clauses of agreement contained in a deed.

17. *What is a covenant real?*—304.

If the covenantor covenants for himself and his heirs, it is then a covenant real, and descends upon the heirs, who are bound to perform it, provided they have assets by descent, but not otherwise; if he covenants also with his executors and administrators, his personal assets, as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty.

18. *Of what does the conclusion of a deed consist?*—304.

It mentions the execution and date of the deed, or the time of its being given or executed, either expressly, or by reference to some day and year before mentioned.

19. *Is a deed good with no date, or a false one?*—304.

It is good, provided the real day of its being dated or given, that is, delivered, can be proved.

20. *When is the reading of it necessary for making a good deed?*—304.

When any of the parties desire it; and if it be not done on his request, the deed is void as to him. If he be blind or illiterate, another must read it to him.

21. *What if the deed be read falsely?*—304.

It will be void, at least for so much as is mis-recited; unless it be agreed, by collusion, that the deed shall be read false, on purpose to make it void, for in such a case it shall bind the fraudulent party.

22. *Is it necessary to sign as well as seal a deed?*—305, 306.

Signing seems to be, now, as necessary as sealing, though it hath been sometimes held that the one includes the other.

23. *By whom must the delivery of a deed be made?*—306, 307.

By the party himself, or his certain attorney.

24. *When does a deed take effect?*—307.

It takes effect only from its tradition or delivery; for if the date be false or impossible, the delivery ascertains the time of it.

25. *When is the delivery absolute?*—307.

When made to the party, or grantee, himself.

26. *What is the delivery as an escrow?*—307.

A delivery to a third person, to hold till some conditions be performed on the part of the grantee, is a delivery as an escrow; that is, as a scrowl or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes.

27. *What is the attestation of a deed?*—307.

It is the execution of it in the presence of witnesses.

28. *Of what use is this attestation?*—307, 308.

It is necessary rather for preserving the evidence, than for constituting the essence of the deed.

29. *What is the practice as to witnesses signing the deed?*—307, 308.

Ever since the reign of Henry VIII. the witnesses have usually subscribed their attestation, either at the bottom, or on the back of the deed.

30. *When is a deed void* ab initio?—308, 309.

When it wants either of these essential requisites:

1. Proper parties and a proper subject matter.
2. A good and sufficient consideration.
3. Writing on paper or parchment duly stamped.
4. Sufficient and legal words, properly disposed.
5. Reading, if desired, before the execution.
6. Sealing; and, by the statute, in most cases signing also.
7. Delivery.

31. *How may a deed be avoided by matter* ex post facto?—308, 309

1. By rasure, interlining, or other alteration in any material part unless properly noted. 2. By breaking off or defacing the seal. 3. By delivering it up to be cancelled. 4. By the disagreement of such, whose concurrence is necessary in order for the deed to stand. 5. By the judgment or decree of a court of judicature. In any of these cases the deed may be voided, either in part or totally, according as the cause of avoidance is more or less extensive.

32. *What species of deeds are generally used in the alienation of real estate?*—309.

Conveyances, commonly so called; which are either conveyances at common law, or such as receive their force and efficacy by virtue of the statute of uses.

33. *How are conveyances by the common law divided?*—309.

Some may be called original or primary conveyances, which are those by means whereof the benefit, or estate, is created, or first arises; others are derivative, or secondary, whereby the benefit, or estate, originally created, is enlarged, restrained, transferred, or extinguished.

34. *What are the original conveyances; and what the derivative conveyances?*—310.

The former are: 1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition.

The latter are: 1. Release; 2. Confirmation; 3. Surrender; 4. Assignment; 5. Defeasance.

35. *What is a feoffment?*—310.

It is a gift of any corporeal hereditament to another.

36. *What is necessary to the perfection of a feoffment?*—311.

Livery of seizin; without which the feoffee has but a mere estate at will.

37. *What if an heir dies before entry made?*—312.

His heir shall not be entitled to take the possession, but the heir of the person who was the last actually seized.

38. *By what delivery is conveyance of copyhold estates made?*—313.

To this day, it is usually made by the seller to the lord or his steward, by delivery of a rod or verge; and then, from the lord to the purchaser, by re-delivery of the same, in the presence of a jury of tenants.

39. *What is necessary, by the common law, to be made upon every grant of an estate of freehold in hereditaments corporeal?*—314.

Livery of seizin is necessary.

40. *Is livery of seizin necessary in leases for years, or other chattel interests?*—314.

It is not necessary; but, in leases for years, an actual entry is necessary, to vest the estate in the lessee, for the bare lease gives him only a right of entry.

41. *Can livery of seizin be made in grants of hereditaments incorporeal?*—314.

There it is impossible to make it; for hereditaments incorporeal are not objects of the senses.

42. *Why cannot freeholds be made to commence* in futuro?—314.

Because they cannot, at the common law, be made but by livery of seizin, which, being an actual manual tradition of the land, must take effect *in præsenti*, or not at all.

43. *Of what kinds is livery of seizin?*—315.

Two: it is either in deed, or in law.

44. *How is livery in deed performed?*—315.

The feoffor, lessor, or his attorney, if it be of land, delivers to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect: "I deliver these to you in the name of seizin of all the lands and tenements contained in this deed." But if it be a house, the feoffor must take the ring, or latch, of the door, the house being quite empty, and deliver it to the feoffee in the same form.

45. *What is livery in law?*—316.

It is where the same is not made on the land, but in sight of it only; the feoffor saying to the feoffee, "I give you yonder land; enter and take possession."

46. *What is the conveyance by gift*, donatio?—316.

It is properly applied to the creation of an estate-tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of the estate passing by it.

47. *What are grants*, concessiones?—317.

They are the regular method, by the common law, of transferring the property of incorporeal hereditaments, or such things whereof no livery can be had.

48. *What is a lease?*—317, 318.

A lease is, properly, a conveyance of any lands or tenements (usually in consideration of rent, or other annual recompense), made for life, for years, or at will, but always for a less time than the lessor hath in the premises; for if it be for the whole interest, it is more properly an assignment than a lease.

49. *To what species of leases is livery of seizin incident and necessary?*—318.

To leases for life of corporeal hereditaments; but to no other.

50. *Who may make leases?*—319, 320.

By the common law, all persons seized of any estate might let leases, to endure so long as their own interest lasted. Now, by restraining and enabling statutes, this power is restrained or enlarged.

51. *What is an exchange?*—323.

An exchange, at common law, is a mutual grant of equal interests, the one in consideration of the other.

52. *Is livery of seizin, or entry, necessary in order to perfect the grant in exchange?*—323.

No livery of seizin, even in exchanges of freehold, is necessary to perfect the conveyance; but entry must be made on both sides.

53. *What is partition?*—323.

It is when two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part.

54. *Can partition be made by parol only?*—324.

By the common law, coparceners might have made it by parol only; but joint-tenants and tenants in common must have done it by deed.

55. *What are releases?*—324.

They are a discharge or conveyance of a man's right in lands or tenements, to another that hath some former estate in possession.

56. *How may releases enure?*—324, 325.

They may enure: 1st. By way of enlarging an estate. 2d. By way of passing an estate. 3d. By way of passing a right. 4th. By way of extinguishment. 5th. By way of entry and feoffment.

57. *What is a confirmation?*—325, 326.

It is of a nature nearly allied to a release. Sir Edward Coke defines it to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unvoidable; or whereby a particular estate is increased; and the words of it are these, "have given, granted, ratified, approved, and confirmed."

58. *What is a surrender?*—326.

A surrender, *sursumredditio*, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate descending upon the less, a surrender is the falling of a less estate into a greater.

59. *Why is there not occasion for livery of seizin in a surrender?*—326.

Because there is a privity of estate between the surrenderor and the surrenderee; the one's particular estate, and the other's remainder, are one and the same estate; and livery having been once made at the creation of it, there is no necessity for having it afterward.

60. *What is an assignment?*—326, 327.

An assignment is, properly, a transfer, or making over to another, of the right one has in any estate; but it is usually applied to an estate for life or years; and it differs from a lease only in this; that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with the whole property.

61. *What is a defeasance?*—327.

A defeasance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated, or totally undone.

62. *What are uses?*—327, 328.

Uses and trusts are, in their origin, of a nature very similar, or, rather, exactly the same. A use is a confidence reposed in another, who was tenant of the land, or terre-tenant, that he should dispose of the land according to the intentions of *cestuy*

que use, or him to whose use it was granted, and suffer him to take the profits.

63. *How and when were uses introduced?*—328.

The notion was transplanted into England from the civil law, about the close of the reign of Edward III., to evade the statutes of mortmain by obtaining grants of lands, not to the religious houses directly, but to the use of the religious houses.

64. *What distinctions grew up with reference to the use itself, or interests of* cestuy que use?—330, 331.

Many elaborate distinctions: 1. It was held that nothing could be granted to a use whereof the use is inseparable from the possession. 2. A use could not be raised without a sufficient consideration. 3. Uses were descendible, according to the rules of the common law in the case of inheritances in possession. 4. Uses might be assigned by secret deeds, between the parties, or be devised by last will and testament. 5. Uses were not liable to any of the feodal burdens. 6. No wife could be endowed, or husband have his curtesy, of a use. 7. A use could not be extended by writ of *elegit*, or other legal process, for the debts of *cestuy que use*.

65. *How were uses finally transferred into possession?*—332.

By the statute 27 Henry VIII., c. 10, which is usually called the statute of uses. The statute "executes" the use, as it is termed.

66. *How are the old uses continued?*—336.

The doctrine of uses was revived under the denomination of trusts.

67. *How do the courts now consider a trust estate?*—337.

As equivalent to the legal ownership; governed by the same rules of property, and liable to every charge in equity which the other is subject to in law.

68. *To what species of conveyance has that to uses now given way?*—337.

To the covenant to stand seized to uses, by which a man,

seized of lands, covenants, in consideration of blood or marriage, that he will stand seized of the same, to the use of his child, wife, or kinsman, for life, in tail, or in fee. Here the statute executes at once the estate. But this conveyance can only operate when made upon consideration of blood or marriage.

69. *What other principal species of conveyance was introduced by the statute of uses?*—338.

That of a bargain and sale of lands.

70. *What others were so introduced?*—339.

1. The conveyance by lease and release. 2. Deeds to lead or declare uses. 3. Deeds of revocation of uses.

71. *What are the deeds used, not to convey, but to charge or discharge lands?*—340.

Obligations or bonds; recognizances; and defeasances.

72. *What is an obligation, or bond?*—340.

It is a deed whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a single one, *simplex obligatio;* but there is generally a condition added, that, if the obligor does some particular act, the obligation shall be void.

73. *On the forfeiture of a bond, or its becoming single, what sum is recoverable?*—341.

The principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed, and the damages sustained upon non-performance of covenants, and the like. The whole penalty was formerly recoverable at law.

74. *What is a recognizance?*—341.

A recognizance is an obligation of record, which a man enters into before some court of record, or magistrate duly authorized, with condition to do some particular act.

75. *What is a defeasance?*—342.

A defeasance on a bond, or recognizance, or judgment re-

covered, is a condition which, when performed, defeats or undoes it, and discharges the estate of the obligor.

76. *What species of conveyance is most in use?*—343.

The conveyance to uses is by much the most frequent of any.

77. *What palpable defect is there in the conveyance to uses?*—343.

The want of sufficient notoriety, so that purchasers or creditors cannot know, with any absolute certainty, what the estate and the title to it in reality are, upon which they are to lay out, or to lend, their money.

78. *How far does a system of registry prevail in England?*—343.

Only in the counties of York and Middlesex.

CHAPTER XXI.

OF ALIENATION BY MATTER OF RECORD.

1. *What are assurances by matter of record?*—344.

Assurances by matter of record are such as do not entirely depend on the act or consent of the parties themselves; but the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one man to another; or of its establishment, when already transferred.

2. *What are they?*—344.

1st. Private acts of parliament. 2d. The king's grants. 3d. Fines. 4th. Common recoveries.

3. *How are private acts of parliament a mode of assurance?*—344.

In many cases, the power of Parliament is necessarily called in to unfetter an estate, to give its tenants reasonable powers, or

to assure it to a purchaser against remote or latent claims of infants or disabled persons, by a particular law enacted for the purpose.

4. *How is such an act regarded?*—346.

It is looked upon rather as a private conveyance, than as the solemn act of the legislature. It is a mere private statute, and is not printed or published among the other laws of the session. No judge or jury is bound to take notice of it, unless the same be specially set forth and pleaded to them. It remains, however, enrolled among the public records of the nation, to be forever preserved as a perpetual testimony of the conveyance, or assurance, so made or established.

5. *How are the king's grants made?*—346.

They are contained in charters, or letters patent, that is, open letters, *literæ patentes*.

6. *What is a fine of lands and tenements?*—348.

It is an acknowledgment of a feoffment on record, and may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices, whereby the lands in question become, or are acknowledged to be, the right of one of the parties.

7. *What was the origin of a fine?*—349.

In its origin, it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained, by composition, was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced for the sake of obtaining the same security.

8. *Why is a fine so called?*—349.

Because it puts an end, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter.

9. *What classes of persons are bound by a fine?*—355.

Parties, privies, and strangers.

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9. *What classes of persons are bound by a fine?*—355.

Parties, privies, and strangers.

10. *What is necessary in order to make a fine of any avail?*—356.

That the parties should have some interest or estate in the lands to be affected by it.

11. *What is the nature of a common recovery?*—357.

A common recovery is so far like a fine, that it is a suit or action, either actual or fictitious; and in it the lands are recovered against the tenant of the freehold; which recovery being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror.

12. *Why is the issue in tail held to be barred by a common recovery?*—360.

The supposed recompense, of equal value, is the reason.

13. *In what light have our modern courts of justice considered common recoveries?*—360.

Only as a formal mode of conveyance by which tenant in tail is enabled to alien his lands.

14. *By what deeds may the uses of a fine or recovery be applied and directed?*—363.

By deeds to lead, or to declare, the uses of fines, or of recoveries.

CHAPTER XXII.

OF ALIENATION BY SPECIAL CUSTOM.

1. *To what are assurances by special custom confined?*—365.

To copyhold lands, and such customary estates as are holden in ancient demesne, or in manors of a similar nature.

2. *How are copyhold lands, and such customary estates, transferred?*—365.

Generally by surrender.

3. *What is a surrender?*—366.

Surrender, *sursumredditio*, is giving the estate into the hands of the lord, for such purposes as in the surrender are expressed

4. *Are surrenders of feodal origin?*—366.

They are.

5. *May a copyhold estate be transferred by any other assurance?*—367.

It cannot. No feoffment or grant has any operation thereupon.

6. *How may the copyholder devise his estate?*—367, 368.

He must surrender it to the use of his last will and testament; and, in his last will, he must declare his intentions, and name a devisee, who will then be entitled to admission.

7. *What are the several parts of the assurance by surrender?*—368.

Its parts are three: the surrender, the presentment, and the admittance.

8. *What part of it, in effect, is the surrender?*—368.

A surrender by an admittance, subsequent whereto the conveyance is to receive its perfection and confirmation, is rather a manifestation of the alienor's intention, than a transfer of any interest in possession.

9. *What if the lord refuse to admit the nominee?*—369.

He may be compelled to admit him by a bill in chancery, or mandamus; for he cannot, either by force or fraud, be deprived, or deluded, of the effect and fruits of the surrender.

10. *Can the surrenderor retract, or defeat, his grant?*—369.

He cannot.

11. *What is admittance?*—370.

It is the last stage, or perfection, of copyhold assurances.

12. *Of what sorts is admittance?*—370.

Of three sorts: 1 Admittance upon a voluntary grant from

the lord; 2. An admittance upon surrender by the former tenant; 3. An admittance upon a descent from the ancestor.

13. *To what is the lord bound in admittances upon a voluntary grant?*—370.

Even upon a voluntary grant from the lord, when copyhold lands have escheated or reverted to him, he is considered as an instrument. For though it is in his power to keep the lands in his own hands, or to dispose of them at his pleasure, by granting an absolute fee-simple, a freehold, or a chattel interest therein, and quite to change their nature from copyhold to socage tenure; yet, if he will continue to dispose of them as copyhold, he is bound to observe the ancient custom precisely in every point.

14. *Is it in the election of heirs of a copyhold to be admitted or not?*—372.

The heirs of copyholders are enforced, in every manor, to come into court, and be admitted according to the custom.

CHAPTER XXIII.

OF ALIENATION BY DEVISE.

1. *What is meant by devise?*—373.

By devise, is meant the disposition contained in a man's last will and testament.

2. *When did the restraint of devising lands take place?*—373.

Before the conquest, lands, it is clear, were devisable by will, but upon the introduction of the military tenures, the restraint upon devising lands naturally took place, as a breach of the feodal doctrine of non-alienation without the consent of the lord.

3. *What is the common law as to devises by will?*—374.

By the common law of England since the conquest, no estate, greater than for a term of years, could be disposed of by

testament; except only in Kent, and in some ancient burghs, and a few particular manors.

4. *What may be devised?*—375, 376.

When the statute of uses had annexed the possession to the use, uses, being now the very land itself, became no longer devisable. The "Statute of Wills," (32 Henry VIII., c. 1, explained by 34 Henry VIII., c. 5,) however, enacted that all persons being seized in fee-simple, except femes covert, infants, &c., might by will and testament devise to any other person, except to bodies corporate, two-thirds of their lands, tenements, and hereditaments held in chivalry, and the whole of those held in socage: which now, through the alteration of tenures by the statute of Charles II., amount to the whole of their landed property, except their copyhold tenements.

5. *Why were corporations excepted in the statute of wills?*—376.

To prevent the extension of gifts in mortmain.

6. *How may a will be revoked?*—376.

By burning, canceling, tearing, or obliterating it by the devisor, or in his presence with his consent; or impliedly by marriage and birth of a child.

7. *How is a will of lands now considered by the courts of law?*—378.

Not so much in the nature of a testament, as a conveyance declaring the uses to which the land shall be subject.

8. *In what respect do devises affecting lands and testaments of personal chattels differ?*—378.

There is this distinction: the latter will operate upon whatever the testator dies possessed of; the former only upon such real estates as were his at the time of executing and publishing his will.

9. *What are general rules and maxims, in construing deeds and wills, as laid down by the courts of justice?*—379–382.

They are as follows: 1. That the construction be favorable, and as near the minds, and apparent intents of the parties, as the rules of law will admit. For the maxims of law are, that "*verba*

intentioni debent inserviri;" and "*benigne interpretamur chartas propter simplicitatem laicorum.*" And therefore the construction must be reasonable, and agreeable to common understanding.

2. That *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est;* but that where the intention is clear, too minute a stress be not laid on the strict and precise signification of words; *nam qui hæret in litera, hæret in cortice.* Therefore, by a grant of a remainder a reversion may well pass, and *e converso.* And another maxim of law is, that "*mala grammatica non vitiat chartam;*" neither false English nor bad Latin will destroy a deed.

3. That the construction be made upon the entire deed, and not merely upon disjointed parts of it; and, therefore, that every part of it be, if possible, made to take effect; and that there be no word but what may operate in some shape or other.

4. That the deed be taken most strongly against him that is the agent or contractor, and in favor of the other party.

5. That if the words will bear two senses, one agreeable to, and another against law, that sense be preferred which is most agreeable thereto.

6. That, in a deed, if there be two clauses so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected: wherein it differs from a will; for there, of two such repugnant clauses, the latter shall stand.

7. That a devise be most favorably expounded to pursue, if possible, the will of the devisor, who, for want of advice or learning, may have omitted the legal or proper phrases.

CHAPTER XXIV.

OF THINGS PERSONAL.

1. *What are included under the name of things personal?*—384.

All sorts of things movable which may attend a man's person wherever he goes.

2. *When only are they objects of the law?*—384.

While they remain within the limits of its jurisdiction.

3. *Do things personal include things movable only?*—385.

Things personal do not only include things movable, but also something more; the whole of which are comprehended under the general name of chattels.

4. *How are chattels distributed by the law?*—386.

Into chattels real and chattels personal.

5. *What are chattels real?*—386.

Such as concern, or savour of, the realty.

6. *Why are they so styled?*—386.

As being interests issuing out of, or annexed to, real estates; of which they have one quality, viz., immobility, which denominates them real; but want the other, viz., a sufficient legal indeterminate duration, and this want it is that constitutes them chattels.

7. *What are chattels personal?*—387.

They are, properly and strictly speaking, things movable, which may be annexed to, or attendant on, the person of the owner.

CHAPTER XXV.

OF PROPERTY IN THINGS PERSONAL.

1. *How does property in chattels personal exist?*—389.

Either in possession, where a man hath not only the right to enjoy, but hath the actual enjoyment of the thing; or else it is in action, where a man hath only a bare right, without any occupation or enjoyment.

2. *Into what two sorts is property in chattels personal of the former nature divided?*—389.

Absolute and qualified property.

3. *When is property in possession absolute?*—389.

When a man hath, solely and exclusively, the right, and also the occupation, of any movable chattels, so that they cannot be transferred from him, or cease to be his, without his own act or default. Such may be all inanimate things, as goods, plate, money, jewels, implements of war, garments, and the like. Such, also, may be all vegetable productions, as the fruit or other parts of a plant, when severed from the body of it; or the whole plant itself when severed from the ground.

4. *Into what classes are animals distinguished?*—390.

Into such as are *domitæ*, and such as are *ferœ naturœ*, some being of a tame, and others of a wild disposition.

5. *What property can a man have in such animals as are* domitæ, *and what in such as are* ferœ naturœ?—390.

In the former an absolute; in the latter a qualified property.

6. *How may a man be invested with this qualified property in animals* ferœ naturœ?—391–395.

In three ways: 1. *Per industriam;* by a man's reclaiming and making them tame, or by so confining them within his own immediate power, that they cannot escape and use their natural liberty. 2. *Ratione impotentiæ*, on account of their own inability; as when birds build in a man's trees, or other creatures make their nests or burrows in his land, and have young ones there, he has a qualified property in those young ones, till they can fly or run away, and then it expires. 3. *Propter privilegium;* that is, a man may have the privilege of hunting, taking and killing them, in exclusion of other persons.

7. *Are bees* ferœ naturœ?—392.

They are; but, when hived and reclaimed, a man may have a qualified property in them

8. *What animals* ferœ naturœ *is it felony to steal?*—393.

It is as much a felony, at common law, to steal such of them as are fit for food, as it is to steal tame animals; but not so, if they are only kept for pleasure, curiosity or whim. Then stealing them is such an invasion of property as may amount to a civil injury, and be redressed by a civil action.

9. *How may property subsist in the elements of fire, air, earth and water?*—395.

A man can have no absolute permanent property in these. They admit only of a precarious and qualified ownership, which lasts only so long as they are in actual use and occupation. If a man disturbs another and deprives him of the lawful enjoyment of these; as if one obstructs another's ancient windows, corrupts the air of his house or gardens, fouls his water, or unpens and lets it out, or if he diverts an ancient water-course, the law will animadvert thereon as an injury, and protect the party injured in his possession.

10. *Hath a servant, in the care of his master's goods or chattels, any property in them?*—396.

He hath not any property, or possession, in them, either absolute or qualified, but only a mere charge or oversight.

11. *What is a chose in action?*—396, 397.

It is the mere right to a thing incorporeal, as an annuity: money due on a bond, is a chose in action.

12. *How may property in action be reduced to possession?*—396, 397.

The possession may be recovered by suit, or action, at law; from whence the thing so recoverable is called a thing, or *chose*, in action.

13. *Upon what does all property in action depend?*—397.

It depends entirely upon contracts, either express or implied; which are the only regular means of acquiring a chose in action.

14. *Are limitations of personal goods and chattels in remainder allowed?*—398.

Yes; in last wills and testaments, after a bequest for life, they are permitted.

15. *May things personal belong to their owners in joint-tenancy, in common, and in coparcenary?*—399.

They may so belong in joint-tenancy and in common, but not in coparcenary.

16. *Is stock used in a joint undertaking, as by way of partnership in trade, considered as common or joint property?*—399.

It shall always be considered as common property, and there shall be no survivorship therein.

CHAPTER XXVI.

OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

1. *What are the means of acquiring and losing such property as may be had in things personal?*—400.

The methods of acquisition and loss are principally twelve: 1. By occupancy; 2. By prerogative; 3. By forfeiture; 4. By custom; 5. By succession; 6. By marriage; 7. By judgment; 8. By gift; 9. By contract; 10. By bankruptcy; 11. By testament; 12. By administration.

2. *What restrictions are there upon the right to seize the goods and person of an alien enemy?*—401, 402.

The right of taking the goods of an alien enemy is restrained to such captors as are authorized by the public authority of the state, residing in the crown. As to his person, a man may acquire a sort of qualified property by taking him a prisoner of war; at least, till his ransom be paid.

3. *What is the doctrine of property arising from accession by natural or artificial means, (as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils,) grounded upon?*—404.

On the right of occupancy.

4. *What is understood by "confusion of goods"?*—405.

It is where the goods of two persons are so intermixed that the several portions can be no longer distinguished. If the intermixture be by consent, the proprietors have an interest in common, in proportion to their respective shares. But if one willfully intermixes his money, corn, or hay with that of another man, without his approbation or knowledge, our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded.

5. *What is property in copyright founded on?*—406.

Being grounded on labor and invention, it is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed, by Mr. Locke and many others, to be founded on the personal labor of the occupant. And this is the right which an author may be supposed to have in his own original literary compositions; so that no other person, without his leave, may publish or make profit of the copies.

6. *In what consists the identity of such a composition?*—406.

Entirely in the sentiment and the language; the same conceptions, clothed in the same words, must necessarily be the same composition; and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited.

7. *What hath the statute declared as to literary and other copyrights?*—407.

That the author and his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, and no longer. But if, at the end of the term, the author himself be living, the right shall then return to him for another term of the same duration.

CHAPTER XXVII.

OF TITLE BY PREROGATIVE AND FORFEITURE.

1. *May property be acquired in personal chattels by the king's prerogative?*—408.

Yes; a right in them may accrue to the crown, or to such as claim under the title of the crown; as by the king's grant, or by prescription, which supposes an ancient grant.

2. *Is there a property of this species in tributes, taxes and customs?*—408.

Yes; in these the king acquires, and the subject loses, a property the instant they become due; if paid, they are a *chose* in possession; if unpaid, a *chose* in action.

3. *What if the titles of the king and a subject, in a chattel, concur?*—409.

The king shall have the whole.

4. *In what books hath the king a prerogative copyright?*—410.

There is a kind of prerogative copyright subsisting in certain books, which is held to be vested in the crown: 1. Acts of parliament, proclamations, and orders of council; 2. Liturgies, and books of divine service; 3. Such law-books, and other compositions, as were compiled or translated at the expense of the crown.

5. *In whom is the property of such animals* feræ naturæ *as are known by the denomination of game, with the right of pursuing, taking, and destroying them?*—410.

It is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery. No person whatever, but he who has such derivative right from the crown, is by common law entitled to take or kill any beasts of chase, or other game whatsoever.

6. *Who can justify hunting or sporting on another man's soil?*—417.

No man but he only who has a chase or free warren, by grant from the crown or prescription, which supposes one, can justify hunting or sporting upon another man's soil; nor, indeed, in thorough strictness of common law, either hunting or sporting at all.

7. *For what are all the goods and chattels of the offender forfeited to the crown?*—421.

They are totally forfeited by: Conviction of high treason or misprision of treason, of petit treason, of felony in general, and particularly of felo de se, and of manslaughter; nay, even by excusable homicide, outlawry for treason or felony, &c.

8. *When does this forfeiture commence?*—421.

From the time of conviction; not the time of committing the fact, as in forfeitures of real property.

CHAPTER XXVIII.

OF TITLE BY CUSTOM.

1. *What is title by custom?*—422.

It is that whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom.

2. *What three sorts of customary interests obtain pretty generally throughout most parts of England?*—422.

Heriots, mortuaries, and heir-looms.

3. *What are heriots?*—422.

They are defined to be a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land.

4. *Into what sorts are heriots usually divided?*—422.

Into heriot-service, and heriot-custom.

5. *What is heriot-service?*—422.

It amounts to little more than a mere rent; it is due upon a special reservation in a grant or lease of lands.

6. *Upon what does heriot-custom arise?*—422.

Heriot-custom depends merely upon immemorial usage and custom, and arises upon no special reservation whatsoever.

7. *To what species of tenures is heriot-custom, now, for the most part confined?*—423.

To copyhold tenures; and is due by custom only, which is the life of all estates by copy.

8. *Of what does the heriot now consist?*—424.

Sometimes of the best live beast, or averium, which the tenant dies possessed of; sometimes, the best inanimate good, under which a jewel or piece of plate may be included; but it is always a personal chattel.

9. *Why can no heriot be taken on the death of a feme-covert?*—424.

Because she can have no ownership in things personal.

10. *Can a heriot be compounded for by the payment of money?*—424.

In some places there is a personal composition in money.

11. *What are mortuaries?*—425.

They are a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister, in very many parishes, on the death of his parishioners.

12. *What are heir-looms?*—427, 428.

Heir-looms are such goods and personal chattels as, contrary to the nature of chattels, shall go by special custom to the heir

along with the inheritance, and not to the executor of the last proprietor. They are, generally, such things as cannot be taken away without damaging or dismembering the freehold.

13. *What are heir-looms by special custom?*—428.

In some places, carriages, utensils, and other household implements may be heir-looms; but such custom must be strictly proved.

14. *What are heir-looms by general custom?*—428.

By almost general custom, whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, are heir-looms.

15. *What other personal chattels are there which descend to the heir in the nature of heir-looms?*—428, 429.

A monument or tombstone in a church, or the coat of armor of his ancestor there hung up, with the pennons and other ensigns of honor suited to his degree. Charters, likewise, and deeds, court-rolls, and other evidences of the land, with the chests in which they are contained.

16. *May heir-looms be devised away from the heir by will?*—429.

They cannot.

17. *Has the heir any property in the bodies or ashes of his ancestors?*—429.

He has none.

CHAPTER XXIX.

OF TITLE BY SUCCESSION, MARRIAGE, AND JUDGMENT.

1. *To what is title by succession applicable?*—430.

In strictness of law, only to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows,

4. *Into what sorts are heriots usually divided?*—422.

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In strictness of law, only to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows,

and the like; in which one set of men may, by succeeding another set, acquire a property in all the goods, movables, and other chattels of the corporation.

2. *What is the reason of this?*—430

The true reason is, because in judgment of law a corporation never dies; and, therefore, the predecessors who lived a century ago, and their successors now in being, are one and the same body corporate.

3. *What sole corporations, also, have this power of gaining a property in chattels by succession?*—431.

If such a corporation sole be the representative of a number of persons, as the master of an hospital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the reformation, who represented the whole convent, such sole corporations as these have the same power as corporations aggregate have, to take personal property in succession.

4. *Why cannot sole corporations, which represent no others but themselves, as bishops, parsons, and the like, take chattel interests in succession?*—431.

The reason is: the law looks upon goods and chattels as of too low and perishable a nature to be limited, and, if any interest in them were allowed to descend to successors, the property thereof must be in abeyance from the death of the present owner until a successor be appointed.

5. *Is this the case in corporations aggregate?*—432.

No; there the right is never suspended, or in abeyance.

6. *What exceptions are there to the rule, that no chattel can go to, or be acquired by, corporations merely sole, in succession?*—432.

There are two: one in the case of the king, in whom a chattel may vest, by a grant of it formerly made to a preceding king and his successors. The other exception is where, by a particular custom, some particular corporations sole have acquired a power of taking particular chattel interests in succession.

7. *How are those chattels, which belonged formerly to the wife, vested in the husband by marriage?*—433.

They are, by act of law, vested in the husband, with the same degree of property, and with the same powers, as the wife, when sole, had over them. Personal property differs from real estate, in this respect: whatever personal property belonged to the wife before marriage, is by marriage absolutely vested in the husband; in real estate he only gains a title to the rents and profits during coverture.

8. *How does a chattel real, and a chattel personal, or chose in action, vest in the husband?*—434.

A chattel real vests in the husband not absolutely, but *sub modo*. Chattels personal may vest absolutely in the husband, if he reduces them to possession by receiving, or recovering them at law: but if he dies before he has recovered or reduced them into possession, so that at his death they continue choses in action, they shall survive to the wife.

9. *What shall become of the chattels real and chattels personal, if the husband survive the wife, and she die before the husband hath reduced them into possession?*—435.

The husband shall have the chattels real by survivorship, but not the choses in action, except in the case of arrears for rent due to the wife before her coverture, which, in case of her death, are given to her husband by statute.

10. *How do chattels personal vest in the husband?*—435.

As to chattels personal in possession, which the wife hath in her own right, as money, jewels, household goods, and the like, they devolve to him by the marriage, not only potentially, but in fact, and never again revest in the wife.

11. *What are the wife's paraphernalia?*—436.

The apparel and ornaments of the wife, suitable to her rank and degree.

12. *Does the wife become entitled to these at the death of her husband?*—436.

Yes; she becomes entitled to her paraphernalia, at the death of her husband, over and above her jointure or dower.

13. *May property in chattel interests vest by means of a judgment?*—436, 437.

Yes; a judgment is frequently the means of vesting the right and property of chattel interests in the prevailing party.

14. *What species of property is there, to which a man has not any claim or title till after judgment obtained?*—437–439.

Of this nature are: 1. Such penalties as are given by particular statutes, to be recovered on an action popular; or, in other words, to be recovered by him or them that will sue for the same.

2. Damages given to a man by a jury, as a compensation and satisfaction for some injury sustained.

3. All title to costs and expenses of suit.

CHAPTER XXX.

OF TITLE BY GIFT, GRANT, AND CONTRACT.

1. *What is the distinction between a gift and a grant of personal property?*—440.

Gifts are always gratuitous; grants are upon some consideration or equivalent.

2. *What may be included under the head of gifts or grants of chattels real?*—440.

Under the head of gifts or grants of chattels real, may be included all leases for years of land, assignments and surrenders of those leases, and all other methods of conveying an estate less than freehold.

3. *What, in the eye of the law, will convert the gift, if executed, into a grant?*—440.

Any consideration; as if expressed to be made in consideration of blood, or natural affection, or of five shillings nominally paid to the grantor, or of a rent though it be but a peppercorn.

4 *What are grants or gifts of chattels personal?*—441.

They are the act of transferring the right and possession of them; which may be done either by writing, or by word of mouth.

5. *How may gifts or grants of chattels be made?*—441.

Either in writing, or by word of mouth attested by sufficient evidence, of which the delivery of possession is the strongest and most essential.

6. *By what is a true and proper gift or grant always accompanied, and when only may it be retracted?*—441.

It is always accompanied with delivery of possession, and takes effect immediately. It may not be retracted, unless it be prejudicial to creditors, or the donor were under any legal incapacity, as infancy or the like; or if he were drawn in, circumvented, or imposed upon.

7. *If the gift do not take effect by delivery of immediate possession, what then is it?*—441.

It is then not properly a gift, but a contract; and this a man cannot be compelled to perform but upon good and sufficient consideration.

8. *What is a contract?*—442.

An agreement upon sufficient consideration, to do or not to do a particular thing.

9. *What points are to be considered in all contracts?*—442.

Three: 1. The agreement; 2. The consideration; 3. The things to be done or omitted, or the different species of contracts.

10. *What is essential to an agreement?*—442.

As it is a mutual bargain or convention, there must be at least two contracting parties, of sufficient ability to make a contract.

11. *What does a contract usually convey?*—442.

It conveys an interest merely in action.

12. *Could a chose in action be assigned or granted over, at common law?*—442.

It could not. But this is now disregarded; though in compliance with the ancient principle, the form of assigning a chose in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession.

13. *What are express, and what implied contracts?*—443.

Express contracts are where the terms of the agreement are openly uttered and avowed at the time of the making; implied contracts are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform.

14. *Is there a species of implied contract which runs through and is annexed to all other contracts, conditions, and covenants?*—443.

There is, viz., that if one fails in his part of the agreement, he shall pay the other party such damages as he has sustained by such neglect or refusal.

15. *What are executed and what executory contracts?*—443.

In executed contracts the possession and right are transferred together. In executory contracts only the right vests. The former conveys a chose in possession; the latter conveys only a chose in action.

16. *What is a good and what a valuable consideration?*—444.

A good consideration is that of blood, or natural affection between near relations. A valuable consideration is for marriage, for money, for work done, or for the reciprocal contracts, and can never be impeached at law.

17. *May a good consideration be set aside, and, if so, when?*—444.

It may sometimes be set aside, and the contract become void, when it tends in its consequences to defraud creditors, or other third persons, of their just rights.

18. *Why cannot a valuable consideration be impeached?*—444.

Because the person contracted with has been given an

equivalent in recompense, and is, therefore, as much an owner, or a creditor, as any other person.

19. *Into what species are the valuable considerations divided?*—444, 445.

By the civilians, they are divided into four species: 1. *Do, ut des.* 2. *Facio, ut facias.* 3. *Facio, ut des.* 4. *Do, ut facias.*

20. *What is a nudum pactum?*—445.

It is an agreement to do or to pay anything on one side, without any compensation on the other. It is totally void in law.

21. *What will prevent a pact from being nude?*—445.

Any degree of reciprocity; nay, even if the thing be founded on a prior moral obligation, it is not *nudum pactum.*

22. *Does the rule, that a consideration is absolutely necessary, hold in all cases?*—446.

No; in some cases, where the promise is authentically proved by written documents, it does not hold.

23. *How far do courts of justice support a bond, or a promissory note, given voluntarily without consideration?*—446.

As every such instrument carries with it internal evidence of a good consideration, courts of justice will support them both, as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract.

24. *What are the most usual contracts whereby the right of chattels personal may be acquired?*—446.

They are four: 1. That of sale or exchange; 2. That of bailment; 3. That of hiring and borrowing; 4. That of debt.

25. *What is sale or exchange, and how are both regarded by the law?*—446, 447.

Sale or exchange is a transmutation of property from one man to another, in consideration of some price or recompense in value. If it be a commutation of goods for goods, it is more

properly an exchange; but if it be transferring of goods for money, it is called a sale. But with regard to the law of sales and exchanges, there is no difference.

26. *Where the vendor hath in himself the property of the things sold, when hath he the liberty of disposing of them?*—447.

He hath the liberty of disposing of them to whomsoever he pleases, at any time, and in any manner, unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff.

27. *What is necessary to a sale of goods?*—447, 448.

Payment, unless the contrary be expressly agreed.

28. *When is the vendor bound to answer for the goodness of his wares?*—451.

Only when he expressly warrants them to be sound and good.

29. *Is an implied warranty of title annexed to every sale?*—451.

Yes; a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose.

30. *What is bailment?*—451.

Bailment, from the French *bailler*, to deliver, is a delivery of goods in trust, upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee.

31. *If a man deliver any thing to his friend to keep for him, is the bailee answerable for any damages or loss it may sustain?*—452.

Yes; in case of gross neglect.

32. *What is delivered, together with the possession, from the bailor to the bailee?*—452.

A special qualified property in the goods.

33. *Are hiring and borrowing contracts by which such qualified property may be transferred?*—453.

Yes, they are: in which there is only this difference, that

hiring is always for a price, a stipend, or additional recompense; borrowing is merely gratuitous.

34. *What is the difference between interest and usury?*—456.

A capital distinction must be made between a moderate and exorbitant profit; to the former of which we usually give the name of interest, to the latter the odious appellation of usury.

35. *On what depends the exorbitance, or moderation, of interest for money lent?*—456.

Upon two circumstances: the inconvenience of parting with it for the present, and the hazard of losing it entirely.

36. *What species of securities are, in practice, allowed, where the hazard of lending may be greater than the rate of interest allowed by law will compensate?*—457.

Only three: 1. Bottomry, or *respondentia;* 2. Policies of insurance; 3. Annuities upon lives.

37. *What is bottomry?*—457, 458.

Bottomry is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship (*partem pro toto*) as a security for the re-payment. In which case it is understood that, if the ship be lost, the lender loses also his whole money; but if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest.

38. *What is* respondentia?—458.

If the loan is not upon the vessel, but upon the goods and merchandise, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who, therefore, is said to take up money at *respondentia.*

39. *What is a policy of insurance?*—458.

It is a contract between A and B, that upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event.

40. *Is insurance founded upon the same principles as the doctrine of interest on loans?*—458.

It is founded upon one of the same principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. As, upon an insurance, the insurer is never out of possession of his money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard.

41. *How are contracts of marine insurance regarded?*—460.

Being contracts, the very essence of which consists in observing the purest good faith and integrity, they are vacated by any the least shadow of fraud or concealment; and, on the other hand, they are greatly encouraged and protected, both by common law and acts of parliament.

42. *What is now the extremity of legal interest that can be taken?*—463.

Five per cent yearly.

43. *If a contract which carries interest be made in a foreign country, what interest is allowed to be recovered?*—463, 464.

Our courts will direct the payment of interest according to the law of that country in which the contract was made.

44. *What is debt?*—464.

It is a species of contract, whereby a chose in action, or right to a certain sum of money, is mutually acquired and lost. This may the counterpart of, and arise from, any of the other species of contracts.

45. *What does debt comprehend?*—465.

It comprehends a great variety of acquisition; being usually divided into debts of record, debts by special, and debts by simple, contract.

46. *What is a debt of record?*—465.

A debt of record is a sum of money which appears to be due by the evidence of a court of record.

47. *Is a judgment a contract?*—465.

Yes; it is a contract of the highest nature, being established by the sentence of a court of judicature.

48. *What is a debt upon recognizance?*—465.

It is a sum of money recognized, or acknowledged, to be due to the crown, or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behavior, or the like.

49. *What is a debt by specialty, or special contract?*—465.

Such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal.

50. *What are debts by simple contract?*—465, 466.

Such where the contract, upon which the obligation arises, is ascertained by mere oral evidence, the most simple of any, or by notes unsealed, which are capable of a more easy proof, and (therefore only) better than a verbal promise.

51. *What simple contract debts fall under the name of paper credit?*—466.

Debts by bills of exchange and promissory notes.

52. *What is a bill of exchange?*—466, 467.

It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account. He who writes this letter is called in law the drawer; he to whom it is written the drawee; and the third person to whom it is payable, whether specially named, or the bearer generally, the payee.

53. *Of what sorts are bills of exchange?*—467.

They are either foreign or inland. There is not in law any difference between them.

54. *What are promissory notes?*—467.

Promissory notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified, at the time

therein limited, to a person therein named, or sometimes to his order, or often to the bearer at large.

55. *Why is it usual, in bills of exchange, to express that the value thereof hath been received by the drawer?*—468.

In order to show the consideration upon which the implied contract of repayment arises.

56. *May a bill of exchange or promissory note be transferred and assigned?*—468, 469.

Yes; the property vested in the payee may be transferred and assigned from the payee to any other man; contrary to the general rule of the common law, that no chose in action is assignable; which assignment is the life of paper credit.

57. *How is this assignment made?*—468.

The payee may by indorsement, or writing his name *in dorso*, or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the indorsee; and he may assign the same to another, and so on *in infinitum*.

58. *Must the drawee accept the bill to make himself liable?*—469.

He must, either verbally or in writing.

59. *What is acceptance?*—469.

Acceptance is a contract by the drawee to pay the bill, grounded on an acknowledgment that the drawer has effects in his hands, or, at least, credit sufficient to warrant the payment.

60. *When may a bill of exchange, or a promissory note, be protested for non-payment?*—469.

Both a bill of exchange and a promissory note may be protested for non-payment, if not paid within three days after they become due.

61. *What are these three days called?*—469.

Days of grace.

62. *What follows upon such protest?*—469.

The drawer, in case of a bill, is bound to make good to the

indorsee, not only the amount of the bill, but also interest and all charges. In the absence of notification of such protest, the loss falls on the holder of the bill.

63. *When a bill is refused, how soon must it be demanded of the drawer?*—470.

As soon as conveniently may be.

CHAPTER XXXI.

OF TITLE BY BANKRUPTCY.

1. *Who may become a bankrupt, and who may not?*—471.

No one shall be capable of being made a bankrupt, but a trader.

2. *What privileges do the laws of bankruptcy confer on the creditors, and what on the debtor?*—472.

They confer privileges on the creditors, by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment; on the debtor, by exempting him from the rigor of the general law, and giving him liberty as to his person, or body.

3. *What is the definition of a bankrupt?*—477.

A bankrupt is a trader who secretes himself, or does certain other acts tending to defraud his creditors.

4. *By what acts may a man become a bankrupt?*—478, 479.

The particular acts of bankruptcy, which render a man a bankrupt, are:

1. Departing from the realm.
2. Departing from his own house, with intent to secrete himself and avoid his creditors.
3. Keeping his own house privately.
4. Procuring or suffering himself willingly to be arrested, or outlawed, or imprisoned, without just and lawful cause.

5. Procuring his money, goods, chattels, and effects, to be attached or sequestrated by any legal process.

6. Making any fraudulent conveyance of his property to a friend, or secret trustee.

7. Procuring any protection, not being himself privileged by parliament, in order to screen his person from arrest.

8. Endeavoring or desiring, by any petition to the king, or bill exhibited, in any of the king's courts, against any creditors, to compel them to take less than their just debts, or to procrastinate the time of payment originally contracted for.

9. Lying in prison for two months, or more, upon arrest, or other detention for debt without finding bail, in order to obtain his liberty.

10. Escaping from prison after an arrest for a just debt of £100, or upwards.

11. Neglecting to make satisfaction for any just debt to the amount of £100, within two months after service of legal process for such debt, upon any trader having privilege of parliament.

5. *What if the bankrupt is in default of either surrender of himself, or conformity to the statutes of bankruptcy?*—481.

He shall be guilty of felony without benefit of clergy, and shall suffer death, and his goods and estate shall be distributed among his creditors.

6. *What are the duties and powers of the commissioners?*—481.

They are to examine the bankrupt touching all matters relating to his trade and effects. They may also summon before them, and examine, the bankrupt's wife, and any other person whatsoever, as to all matters relating to the bankrupt's affairs. And, in certain cases, may commit the bankrupt to prison without bail.

7. *What if the bankrupt conceals or embezzles any effects to the amount of £20, or withholds any books or writings, with intent to defraud his creditors?*—482.

He shall be guilty of felony without benefit of clergy; and his goods and estates shall be divided among his creditors.

8. *What, unless it shall appear that his inability to pay his debts arose from some casual loss?*—482.

He may, upon conviction by indictment of such gross misdemeanor, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off.

9. *When shall no allowance or indemnity be given to the bankrupt?*—484.

Allowance or indemnity shall not be given him unless his certificate be signed and allowed; and, also, if any creditor produces a fictitious debt, and the bankrupt does not make discovery of it, but suffers the fair creditors to be imposed upon, he loses all title to these advantages.

10. *As to what only are persons who have been once cleared by the bankrupt, or by an insolvent act, indemnified, in case they become bankrupts again?*—484.

Unless they pay full fifteen shillings in the pound, they are only indemnified as to the confinement of their bodies.

11. *Who alone is not within the statutes of bankruptcy?*—486.

The king is not within the statutes of bankrupts; for if, after the act of bankruptcy committed, and before the assignment of the bankrupt's effects, an extent issues for the debt of the crown, the goods are bound thereby.

12. *What acts may, and may not, the assignees of a bankrupt do without the consent of the creditors?*—486.

The assignees may pursue any legal method of recovering property vested in them, by their own authority: but cannot commence a suit in equity, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them in value.

CHAPTER XXXII.

OF TITLE BY TESTAMENT AND ADMINISTRATION

1. *What is a testament; and what is an administration?*—490.

The method of acquiring the personal property, according to the express directions of the deceased proprietor, we call a testament. The method, which is also according to the will of the deceased proprietor, not expressed, indeed, but presumed by the law, we call an administration.

2. *Are testaments of antiquity?*—490, 491.

They are of very high antiquity. We find them in use among the ancient Hebrews. In England, the power of bequeathing is coeval with the first rudiments of the law, but it did not extend originally to all a man's personal estate.

3. *What was the law as to bequests?*—492, 493.

Glanvil informs us, that by the common law, as it stood in the reign of Henry the Second, a man's goods were divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so, *e converso*, if he had no children, his wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their reasonable parts. This was the law at the time of Magna Charta. In disposing of his third part or moiety, he was bound, by the custom of many places, to remember his lord and the church, by leaving them his two best chattels, which was the origin of heriots and mortuaries.

4. *What is the law, at present, as to bequests?*—492.

The ancient law became altered by imperceptible degrees, and the deceased may now, by will, bequeath the whole of his goods and chattels.

5. *When does a man die intestate?*—494.

When a person made no disposition of such of his goods as were testable, he was and is said to die intestate.

6. *To whom did the goods of an intestate formerly go?*—494.

The king was entitled to seize upon his goods, as the *parens patriæ*, and the general trustee of the kingdom. This prerogative the king continued to exercise for some time by his own ministers of justice, and it was granted out as a franchise to many lords of manors and others. Afterward the crown, in favor of the church, invested the prelates with this branch of the prerogative; which was done, saith Perkins, because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased.

7. *How far extended the power of the ordinary over the goods of intestates?*—494.

He might seize them and keep them without wasting, and also might give, alien, or sell them at his will, and dispose of the money in pious uses; and if he did otherwise, he broke the confidence which the law reposed in him. So that, properly, the whole interest and power which were granted to the ordinary, were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in pious uses. As he had thus the disposition of intestates' effects, the probate of wills followed of course.

8. *What abuse followed?*—495.

The clergy took to themselves (under the name of the church and poor) the whole residue of the deceased's estate, after the two-thirds of his wife and children were deducted; without paying even his lawful debts or other charges thereon.

9. *How was this abuse in part corrected?*—495.

By the statute of Westm. 2d, it was enacted, that the ordinary shall be bound to pay the debts of the intestate, so far as his goods will extend, in the same manner that executors were bound in case the deceased left a will.

10. *Whence is the origin of administrators?*—496.

The legislature again interposed, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents, by the Statute 31 Edward III., c. 11, which provides that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods. The "next and most lawful friend" is interpreted to be, the next of blood that is under no legal disabilities.

11. *Who hath full power and liberty to make a testament?*—497.

Every person hath full power and liberty to make a testament, or will, that is not under some special prohibition by law or custom.

12. *Who, now, have administration?*—496.

Administration is granted to the widow, or to the next of kin, or to both of them, at the discretion of the ecclesiastical judge.

13. *Upon what accounts are persons so prohibited?*—497.

Principally upon three accounts: 1. For want of sufficient discretion. 2. For want of sufficient liberty and free will. 3. On account of their criminal conduct.

14. *Who are to be reckoned in the first species?*—497.

Infants, under the age of fourteen, if males; and twelve, if females.

15. *Are prisoners, captives, and the like, absolutely intestable?*—497.

Not absolutely; but the law leaves it to the court to judge, upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animum testandi.*

16. *May a feme covert make a testament of chattels?*—498.

She is incapable of making a testament of chattels, without the license of her husband.

17. *Who is an exception to the general rule, that a feme covert cannot make a testament of chattels?*—498.

The queen consort.

18. *What if a feme sole make her will and afterward marry?*—499.

Such subsequent marriage is deemed a revocation in law, and entirely vacates the will.

19. *Who are incapable of making testaments, on account of their criminal conduct?*—499.

All traitors and felons, from the time of conviction. Neither can a *felo de se* make a will of goods and chattels. Outlaws, also, are incapable, so long as the outlawry subsists.

20. *Of what sorts are testaments?*—500.

Written, and verbal or nuncupative; of which the former are committed to writing, the latter depend merely upon oral evidence.

21. *What is a codicil?*—500.

It is a supplement to a will, or an addition made by the testator, and annexed to, and to be taken as part of, a testament. This may also be either written or nuncupative.

22. *What witness of their publication do written testaments of chattels need?*—501.

None at all. A testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witness present at its publication, is good; provided sufficient proof can be had that it is his hand-writing.*

23. *If there be testaments of different dates, which is preferred?*—502.

No testament is of any effect till after the death of the testator; and, therefore, if there be many testaments, the last over-

* It may here be observed, that, since the text of Blackstone was written, the law as to testaments of chattels has undergone alterations. Now, in England, every will, and every codicil to or alteration of a will, though only relating to personal estate, must be in writing, signed by the testator, and attested by two witnesses. The only exceptions to this are in favor of soldiers and the navy.

throws all the former ; but the republication of a former will revokes one of a later date, and establishes the first again.

24. *How may a testament be avoided?*—502.

In three ways ; 1. If made by a person laboring under certain incapacities. 2. By making another testament of a later date. 3. By canceling or revoking it.

25. *If a man make a will, irrevocable in terms, is he at liberty to revoke it?*—502.

Yes ; though it be irrevocable in the strongest terms, because the testator's own acts and words cannot alter the dispositions of law, so as to make that irrevocable which is in its own nature revocable.

26. *If a man who hath made his will, afterward marries and hath a child, is this a revocation of a former will made by him in his state of celibacy?*—502.

That, without an express revocation, is held to be a presumptive or implied revocation of his former will which he made in his state of celibacy.

27. *What is an executor?*—503.

An executor is he to whom another man commits, by will, the execution of that his last will and testament.

28. *Who are capable of being executors?*—503.

All persons are capable of being executors that are capable of making wills, and many others besides ; as femes covert and infants ; even infants unborn, or in *ventre sa mere*, may be made executors.

29. *Can an infant act as executor?*—503.

No infant can act as an executor till the age of seventeen years; till which time administration must be granted to some other.

30. *What if the testator makes an incomplete will, without naming any executors, or if he names persons incapable, or if the executors named refuse to act?*—503, 504.

The Ordinary must grant administration *cum testamento annexo*.

31. *What if the deceased dies wholly intestate, without making either will or executors?*—504.

Then general letters of administration must be granted by the ordinary, to such administrator as the statutes direct.

32. *Who may administer to a bastard?*—505, 506.

If a bastard, who has no kindred, being *filius nullius*, dies intestate and without wife or child, the usual course now is for some one to procure letters patent or other authority from the king ; and then the ordinary, of course, grants administration to such appointee of the crown.

33. *May the interests vested in the executor by the will of the deceased, be continued and kept alive by the will of the same executor?*—506.

They may ; so that the executor of that executor is, to all intents and purposes, the executor and representative of the deceased testator himself.

34. *Is a similar course observed in the case of the executor of an administrator, or the administrator of an executor?*—506.

It is not.

35. *How is this difference explained?*—506.

Because the power of an executor is founded upon the special confidence and actual appointment of the deceased ; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence ; but an administrator is merely the officer of the ordinary, in whom the deceased has reposed no trust at all ; and, therefore, on the death of the administrator, it results back to the ordinary to appoint another. And, with regard to the administrator of the testator's executor, he has no privity or relation to the testator, being only commissioned to administer the effects of the intestate executor, and not of the original testator.

36. *What is an administrator* de bonis non?—506.

Whenever the course of representation is interrupted, it is necessary to commit administration afresh, of the goods of the deceased *not* administered by the former executor or administrator.

37. *Are the offices and duties of executors the same as those of administrators?*—507.

The principal points of their office and duty, in general, are very much the same in both executors and administrators; except, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor. Secondly, an executor may do many acts before he proves the will; but an administrator may do nothing till letters of administration are issued.

38. *Who is executor* de son tort?—507.

A stranger who acts as executor without any just authority. He is liable to all the trouble of an executorship, without any of the profits or advantages.

39. *What are the powers and duties of a rightful executor or administrator?*—508–515.

They are: 1. He must bury the deceased in a manner suitable to the estate which he leaves behind him.

2. He must prove the will of the deceased.

3. He must make, and (if lawfully required) swear to an inventory of all the goods and chattels, whether in possession or action, of the deceased.

4. He is to collect all the goods and chattels so inventoried.

5. He must pay the debts of the deceased.

6. When the debts are all discharged, the legacies claim the next regard.

7. When all the debts and legacies are discharged, the surplus, or *residuum*, must be paid to the residuary legatee, if any be appointed by the will; and if there be none, it devolves to the executor's own use, or to that of the next of kin, according to the terms of the will and the circumstances in each case.

40. *If there be two or more executors or administrators, is a sale or release by one of them good against all the rest?*—510.

In the case of executors it is so; but in the case of administrators it is otherwise.

41. *What are assets?*—510.

Whatever is recovered of the goods and chattels of a deceased person, that is of a salable nature and may be converted into ready money, is called assets in the hands of the executor or administrator.

42. *In what order of priority must the debts of the deceased be paid?*—511.

They must be paid in this order: 1st. All funeral charges, and the expenses of proving the will, and the like.

2d. Debts due to the king on record or specialty.

3d. Such debts as are, by particular statutes, to be preferred to all others.

4th. Debts of record; as judgments, statutes, and recognizances.

5th. Debts due on special contracts; as for rent, or upon bonds, covenants, and the like, under seal.

Lastly. Debts on simple contract, viz., upon notes unsealed, and verbal promises.

43. *What if a creditor constitutes his debtor his executor?*—512.

This is a release or discharge of the debt, whether the executor acts or no, provided there be assets to pay the testator's debts.

44. *Is the executor or administrator allowed to pay himself first, by retaining in his hands so much as his debts amount to?*—511, 512.

Among debts of equal degree, he is so allowed; but an executor of his own wrong is not.

45. *What is a legacy?*—512.

A legacy is a bequest, or gift, of goods and chattels by testament: the assent of the executor is necessary to its perfection.

46. *Who is capable of being legatee?*—512.

Every person, unless particularly disabled by the common law, or by statute.

47. *In case of deficiency of assets, what legacies must abate?*—512, 513.

All the general legacies must abate proportionably, in order

to pay the debts; but a specific legacy (of a piece of plate, a horse, or the like) is not to abate at all, unless there be not sufficient without it.

48. *When is a legacy lapsed?*—513.

If the legatee dies before the testator, the legacy is a lost or lapsed legacy, and shall sink into the *residuum*.

49. *What legacies, contingent as to time, are liable to lapse?*—513.

A legacy left to any one *when* he attains, or *if* he attains the age of twenty-one, and he dies before that time lapses; but a legacy to one, *to be paid* when he attains the age of twenty-one, is a vested legacy, or interest, which commences *in præsenti*, although it be *solvendum in futuro*.

50. *But what if such legacies be charged upon a real estate?*—513.

Then, in both cases, they shall lapse for the benefit of the heir.

51. *When do legacies carry interest?*—514.

In case of a vested legacy, due immediately, and charged on land or money in the funds, which yield an immediate profit, interest shall be payable thereon from the testator's death; but if charged only on the personal estate, it shall carry interest only from the end of the year after the death of the testator.

52. *What is a donation* causa mortis?—514.

A death-bed disposition of property; that is, when a person in his last sickness, apprehending his dissolution near, delivers, or causes to be delivered, to another, the possession of any personal goods, to keep in case of his decease.

53. *What are incidents of this gift* causa mortis?—514.

If the donor dies, it needs not the assent of his executor, yet it shall not prevail against creditors; and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death.

54. *When shall the residuum go to the executor?*—514, 515.

When the executor has no legacy at all, the *residuum* shall, in general, be his own; yet whenever there is sufficient, on the face of a will, to imply that the testator intended his executor should not have the residue, the undivided surplus of the estate shall go to the next of kin, the executor then standing upon exactly the same footing as an administrator.

55. *What are the customs of the city of London and the province of York, as to the distribution of the intestate's effects?*—518.

There, though the restraint of devising is removed by statutes, their ancient customs remain in full force, with respect to the estates of intestates. The effects of the intestate, after the payment of his debts, are divided according to the ancient universal doctrine of the *pars rationabilis*.

BOOK III.

OF PRIVATE WRONGS.

CHAPTER I.

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

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

Into two sorts: private wrongs and public wrongs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Recaption or reprisal.

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

4. The abatement or removal of nuisances.

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

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

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

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

9. *Why is it permitted?*—3, 4.

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

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

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

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

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

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

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

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

13. *What is the reason for this?*—4.

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

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

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

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

It must be peaceable and without force.

16. *What is a nuisance?*—5.

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

17. *May it be abated?*—5.

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

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

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

19. *What is a distress?*—6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

therefore, to deprive the party of the instruments and means of paying it, would counteract the very end of the distress.

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

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

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

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

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

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

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

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

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

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

32. *What is it to replevy?*—13.

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

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

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

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

Only two: accord and arbitration.

35. *What is accord?*—15, 16.

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

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

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

37. *What is arbitration?*—16.

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

38. *What effect has the award?*—16.

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

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

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

CHAPTER II.

OF REDRESS BY THE MERE OPERATION OF LAW.

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

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

2. *What is retainer?*—18.

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

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

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

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

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

5. *What is a remitter?*—19, 20.

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

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

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

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

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

To every remitter there are regularly three incidents; an ancient right, and a new defeasible estate of freehold, uniting in one and the same person; which defeasible estate must be cast upon the tenant, not gained by his own act or folly.

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

Because, otherwise, he who hath right would be deprived ot all remedy; for, as he himself is the person in possession of the freehold, there is no other person against whom he can bring an action to establish his prior right.

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

Then there shall be no remitter to a right.

CHAPTER III.

OF COURTS IN GENERAL.

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

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

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

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

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

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

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

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

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

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

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

6. *What is a court?*—23.

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

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

From the power of the crown.

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

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

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

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

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

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

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

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

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

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

The court will direct him to amend it.

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

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

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

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

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

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

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

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

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

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

Attorneys, and advocates or counsel.

18. *What is an attorney at law?*—25.

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

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

Defendants in criminal cases, and idiots.

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

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

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

Two: barristers and sergeants.

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

He cannot.

23. *Why not?*—28.

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

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

It hath been holden that a counsel is not answerable for any matter by him spoken relative to the cause in hand, and suggested in his client's instructions, although it should reflect upon

the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured.

CHAPTER IV.

OF THE PUBLIC COURTS OF COMMON LAW AND EQUITY.

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

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

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

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

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

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

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

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

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

5. *What is the court baron?*—33.

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

the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured.

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ings in all other actions may be removed into the superior court by the king's writs. After judgment given, a writ of false judgment lies to the courts at Westminster, to rehear and review the cause, and not a writ of error; for this is not a court of record. This court has fallen into disuse, with regard to the trial of actions.

6. *What is the hundred court?*—34.

It is only a larger court baron, being held for all the inhabitants of a particular hundred instead of a manor. The free suitors are here also the judges, and the steward the registrar, as in the court baron. It is likewise no court of record. It is said to have been derived out of the county court, for the ease of the people, that they might have justice done to them at their own doors, without any charge or loss of time; but its institution was probably coeval with that of hundreds themselves. This court, as causes therein are equally liable to removal, and reviewal, as in the common court baron, is fallen into equal disuse with regard to the trial of actions.

7. *What is the county court?*—35, 36.

The county court is a court incident to the jurisdiction of the sheriff. It is not a court of record, but may hold pleas of debt or damages under the value of forty shillings. It may also hold plea of many real actions, and of all personal actions to any amount, by virtue of a special writ called a *justicies*. The freeholders of the county are the real judges in this court, and the sheriff is the ministerial officer. The same right of removal to, and reviewal in, the superior courts, as in the court baron and hundred court, has occasioned the same disuse of bringing actions therein.

8. *What was, at first, the only superior court of justice in the kingdom?*—37.

By the ancient Saxon constitution, only one, which had cognizance both of civil and spiritual causes, viz., the *witteneagemote*, or general council, which assembled annually, or oftener, wherever the king kept his Christmas, Easter, or Whitsuntide, as well to do private justice as to consult upon public business.

9. *What was the* aula regia *or* aula regis?—38.

At the conquest, the ecclesiastical jurisdiction of the *witteneagemote* was directed into another channel, and the conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counselors to the crown. He, therefore, established a constant court in his own hall, thence called *aula regia*, or *aula regis*. This great universal court was bound to follow the king's household in all his progresses and expeditions.

10. *When, and for what reason, was the* aula regia *in part permanently located?*—38.

King John who dreaded the power of his chief justiciar, very readily consented to that article which forms the eleventh chapter of *magna carta*, and enacts that "*communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo.*" This certain place was established in Westminster Hall, the place where the *aula regis* originally sat when the king resided in that city; and there it has ever since continued.

11. *What followed upon this location?*—39.

The court being thus, so far, rendered fixed and stationary, the judges became so too, and a chief, with other justices, of the common pleas, was thereupon appointed, with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject.

12. *What benefit did the common law derive from the establishment of this principal court?*—39.

The establishment of this principal court of common law, at that particular juncture and that particular place, gave rise to the inns of court in its neighborhood, and thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who labored to destroy it.

13. *What further changes in the frame of the judicial polity of the kingdom subsequently took place?*—40.

The several other offices of the chief justiciar were, under

Edward I., who new-modeled the whole frame of the judicial polity, subdivided and broken into distinct courts of judicature. The distribution of common justice, between man and man, was thrown into so provident an order, that the great judicial officers were made to form a check upon each other; the court of chancery issuing all original writs under the great seal to the other courts; the common pleas being allowed to determine all causes between private subjects; the exchequer managing the king's revenue; and the court of king's bench retaining all the jurisdiction which was not granted to other courts, and particularly the superintendence of all the rest by way of appeal, and the sole cognizance of pleas of the crown, or criminal cases.

14. *Into what sorts are pleas or suits regularly divided?*—40.

Into two sorts: pleas of the crown, which comprehend all crimes and misdemeanors wherein the king, on behalf of the public, is the plaintiff; and common pleas, which include all civil actions depending between subject and subject.

15. *What was the jurisdiction of the court of common pleas?*—40.

All common pleas or civil actions, between subject and subject, were the proper object of the jurisdiction of the court of common pleas, which is a court of record, and styled by Sir Edward Coke the lock and key of the common law: for herein only can real actions, that is, actions which concern the right of freehold, or the realty, be originally brought; and all other, or personal, pleas between man and man are likewise there determined. This court sits to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed and compounded of both. These it takes cognizance of, as well originally, as upon removal from the inferior courts.

16. *Does an appeal lie from the court of common pleas?*—41.

A writ of error, in the nature of an appeal, lies into the court of king's bench.

17. *What is the court of king's bench?*—41.

It is the supreme court of common law in the kingdom.

18. *Why is it called the court of king's bench?*—41.

Because the king used formerly to sit there in person, the style of the court still being *coram ipso rege*.

19. *What are the judges of the court of king's bench?*—41.

They are, by their office, the sovereign conservators of the peace, and supreme coroners of the land.

20. *For what reason is all process issuing out of this court, in the king's name, returnable* "ubicunque fuerimus in Anglia"?—41.

Because it is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the king's person wherever he goes. It has, for some centuries past, usually sat at Westminster.

21. *What is the jurisdiction of the court of king's bench?*—42, 43.

The jurisdiction of this court is very high and transcendant. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of civil and criminal causes; the former in what is called the crown side, or crown office, the latter in the plea side of the court. It hath on the plea side, all original jurisdiction and cognizance of all actions of trespass, or other injury alleged to be committed *vi et armis;* of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case which allege any falsity or fraud.

22. *By what fiction does the court of king's bench hold plea of all personal actions?*—43.

It being surmised that the defendant is arrested for a supposed trespass which he never has, in reality, committed; and being thus in the custody of the marshal of this court, the plaintiff is at liberty to proceed against him for any other personal injury; which surmise, of being in the marshal's custody, the defendant is not at liberty to dispute.

23. *Are fictions of law beneficial and useful?*—43.

Highly so; especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law. So true it is, that *in fictione juris semper subsistit æquitas.*

24. *What is the court of exchequer?*—44.

It is inferior in rank not only to the court of king's bench, but to the common pleas also. It is a very ancient court of record, set up by William the Conqueror as a part of the *aula regia*, though regulated and reduced to its present order by king Edward I., and intended principally to order the revenues of the crown, and to recover the king's debts and duties. It is called the exchequer, *scaccharium*, from the chequered cloth which covers the table there.

25. *Of what divisions does the exchequer consist?*—44.

Of two divisions: the receipt of the exchequer, which manages the royal revenue, and the court or judicial part of it, which is a court of common law.

26. *By what fiction may all kinds of personal suits be prosecuted in this court?*—45, 46.

The writ upon which all proceedings there are grounded is called a *quo minus;* in which the plaintiff suggests that he is the king's farmer or debtor, and that the defendant hath done him the injury or damage complained of; *quo minus sufficiens existit*, by which he is the less able to pay the king his debt or rent. And these suits are expressly directed, by what is called the statute of Rutland, to be confined to such matters only, as specially concern the king or his ministers of the exchequer But, now, by the suggestion of privilege, any person may be admitted to sue in the exchequer as well as the king's accountant.

27. *Whither lies an appeal from the common law side of the court of exchequer?*—46.

In appeal from the common law side of this court, in pursuance of the statute 31 Edward III. c. 12, a writ of error must be first brought into the court of exchequer chamber.

28. *What is the high court of chancery?*—47.

It is, in matters of civil property, by much the most important of any of the king's superior and original courts of justice. It has its name of chancery, *cancellaria*, from the judge who presides here, the lord chancellor, or *cancellarius*. The office of chancellor, or lord keeper, is created by the mere delivery of the king's great seal into his custody.

29. *What are the powers and authority of the chancellor?*—47.

He is an officer of the greatest weight and power of any now subsisting in the kingdom; and superior in point of precedency to every temporal lord. He is privy counselor by his office, and prolocutor of the house of lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic, and presiding over the royal chapel, he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of twenty marks *per annum* in the king's books. He is the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this, over and above the vast and extensive jurisdiction which he exercises, in his judicial capacity, in the court of chancery.

30. *Of what tribunals does the court of chancery consist?*—48.

Of two distinct tribunals: the one ordinary, being a court of common law; the other extraordinary, being a court of equity.

31. *Of what has the ordinary legal court of chancery jurisdiction?*—48.

Its jurisdiction is to hold plea upon a *scire facias* to repeal and cancel the king's letters patent, when made against law, or upon untrue suggestions; and to hold plea of petitions, *monstrans de droit*, traverses of offices, and the like, when the king hath been advised to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right. If any fact be disputed, the chancellor cannot try it, having no power to sum-

mon a jury. When judgment is given in chancery upon demurrer, or the like, a writ of error, in the nature of an appeal, lies out of this ordinary court to the court of king's bench. But little is now done on this common law side of the court.

In this ordinary, or legal court, is also kept the *officina justitiæ;* out of which issue all original writs that pass under the great seal, all commissions of charitable uses, sewers, bankruptcy, idiocy, lunacy, and the like.

32. *At what time began to be established the separate jurisdiction of the chancery as a court of equity?*—51.

About the end of the reign of Edward III., when uses of land were introduced, and, though totally discountenanced by the courts of common law, were considered as fiduciary deposits and binding in conscience by the clergy.

33. *When had the process by bill and* subpœna *become the daily practice of the court?*—53.

In king Edward IV.'s time

34. *Can a court of equity give relief after, or against, a judgment at the common law?*—54.

In 1616 arose that notable dispute, between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the king's bench, whether a court of equity could give relief after, or against, a judgment at the common law. This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a *præmunire* by questioning, in a court of equity, a judgment in the court of king's bench, obtained by gross fraud and imposition. This matter, being brought before the king, was by him referred to his learned counsel for their advice and opinion; who reported so strongly in favor of the courts of equity, that his majesty gave judgment in their behalf.

35. *What chancellor first built the system of equitable jurisprudence and jurisdiction upon wide and rational foundations?*—55.

Sir Heneage Finch, afterwards earl of Nottingham.

36. *Whither lies an appeal from the court of equity in chancery, and how do appeals from a court of equity differ from writs of error from a court of law?*—56.

From the court of equity in chancery an appeal lies to the house of peers.

There are these differences between appeals from a court of equity and writs of error from a court of law: 1. That the former may be brought upon any interlocutory matter, the latter upon nothing but a definite judgment. 2. That on writs of error the house of lords pronounces the judgment, on appeals it gives direction to the court below to rectify its own decree.

37. *What is the court of exchequer chamber?*—55.

It is only a court of appeal to correct the errors of other jurisdictions. It was first erected by statute of 31 Edward III. c. 12, to determine causes upon writs of error from the common law side of the court of exchequer. And to that end it consists of the lord chancellor and lord treasurer, taking unto them the justices of the king's bench and common pleas. In imitation of which, a second court of exchequer chamber was erected by 27 Eliz., c. 8, before which writs of error may be brought, to reverse judgments in certain suits originally begun in the court of king's bench.

38. *Whither lies an appeal from all the branches of the court of exchequer chamber?*—57.

To the house of peers, by writ of error.

39. *Is the house of peers a court of judicature?*—57.

It is the supreme court of judicature, having jurisdiction to rectify upon appeals and writs of error, any injustice or mistake of the law committed by the courts below. It has no original jurisdiction over causes. To this judicial authority the house of peers succeeded upon the dissolution of the *aula regia*. In all dubious cases they refer themselves to the opinions of the judges, who are summoned by writ to advise them.

40. *What are the courts of assise and* nisi prius?—58.

These are composed of two or more commissioners, who are

twice in every year, (once in the four northern counties,) sent by the king's special commission all over the kingdom, except London and Middlesex, which are specially provided for, to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster Hall. These judges of assise came into use in the room of the ancient justices in eyre who were established in 1176.

41. *By virtue of what commissions do these judges of assise sit?*—60.

They now sit, upon their circuits, by virtue of five several authorities: 1. The commission of the peace. 2. A commission of *oyer* and *terminer*. 3. A commission of general jail delivery. 4. A commission of assise. 5. That of *nisi prius*.

42. *What is a commission of assise?*—60.

A commission of assise is directed to the justices and sergeants therein named, to take assises in the several counties; that is, to take the verdict of a special species of jury, called an assise, and summoned for the trial of landed disputes.

43. *What is a commission of* nisi prius?—60.

That of *nisi prius*, which is a consequence of the commission of assise, being annexed to the office of those justices by statute, empowers them to try all questions of fact, issuing out of the courts at Westminster, that are then ripe for trial by jury These, by the course of the courts, are usually appointed to be tried at Westminister, in some Easter or Michaelmas term, by a jury returned in the county wherein the cause of action arises; but with this proviso, *nisi prius*, unless before the day prefixed the judges of assise come into the county in question. This they are sure to do in the vacations preceding each Easter and Michaelmas term.

CHAPTER V.

OF COURTS ECCLESIASTICAL, MILITARY, AND MARITIME.

1. *Who first separated the ecclesiastical court from the civil?*—62

William the First.

2. *Which are the ecclesiastical courts?*—64–67.

They are: 1. The archdeacon's court. 2. The consistory court. 3. The court of arches. 4. The court of peculiars. 5. The prerogative court. 6. The court of delegates. 7. The commission of review.

3. *Are the ecclesiastical courts, courts of record?*—67.

They are not allowed to be courts of record.

4. *What is the only court military known and established by the permanent laws of the land?*—68.

The court of chivalry. It was held before the earl-marshal, but is in disuse.

5. *Which are the maritime courts?*—68, 69.

The court of admiralty, and its courts of appeal.

6. *Before whom is the court of admiralty held?*—69.

Before the lord high-admiral of England, or his deputy, who is called the judge of the court.

7. *What power and jurisdiction have the maritime courts?*—68, 69.

They have power and jurisdiction to determine all maritime injuries, arising upon the seas, or in parts out of the reach of the common law.

CHAPTER VI.

OF COURTS OF A SPECIAL JURISDICTION.

1. *What are the courts of private and special jurisdiction?*—71–83.

The courts, whose jurisdiction is private and special, confined to particular spots, or instituted to redress only particular injuries, are :

1. The forest courts.
2. Courts of commissioners of sewers.
3. The court of policies of assurance.
4. The court of the Marshalsea and the palace court at Westminster.
5. Courts of the principality of Wales.
6. Court of the duchy chamber of Lancaster.
7. Courts of counties palatine.
8. Stannary courts.
9. Courts of London and other cities.
10. University courts.

2. *Whence is the origin of the several courts within the city of London?*—80.

From the favor of the crown.

3. *What are the jurisdiction and system of the chancellor's courts in the two universities of England?*—83, 84.

They enjoy the sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits whatsoever, when a scholar or privileged person is one of the parties, excepting in such cases where the right of freehold is concerned. By the university charter, they are at liberty to try and determine these causes, either according to the common law, or according to their own local customs, at their discretion.

CHAPTER VII.

OF THE COGNIZANCE OF PRIVATE WRONGS.

1. *By what laws are the ecclesiastical courts guided?*—100.

They are usually guided by the rules of the imperial and canon laws.

2. *What does the common law allow and permit to belong to their jurisdiction?*—87.

The ecclesiastical tribunals subsist and are admitted, in England, not by any right of their own, but upon bare sufferance and toleration from the municipal laws. They must have recourse to the laws of England, to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden, to be discussed or drawn in question before them.

3. *What is the one uniform rule to determine the jurisdiction of the courts, in England?*—88.

The common law.

4. *Under what heads are reduced wrongs or injuries cognizable by the ecclesiastical courts?*—87.

These wrongs or injuries, viz., such as are offered to private persons or individuals, which are cognizable by these courts, not for reformation of the offender himself or party injuring, *pro salute animæ*, but for the sake of the party injured, to make him a satisfaction and redress for the damage which he has sustained, are reducible under three general heads : 1. Causes pecuniary ; 2. Causes matrimonial ; 3. Causes testamentary.

5. *When will the courts of common law award a prohibition against proceedings of the spiritual court?*—100.

When the proceedings are manifestly repugnant to the fundamental maxims of the municipal law.

6. *What process have the ecclesiastical courts to enforce their sentences when pronounced?*—101.

No other process than that of excommunication.

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5. Courts of the principality of Wales.
6. Court of the duchy chamber of Lancaster.
7. Courts of counties palatine.
8. Stannary courts.
9. Courts of London and other cities.
10. University courts.

2. *Whence is the origin of the several courts within the city of London?*—80.

From the favor of the crown.

3. *What are the jurisdiction and system of the chancellor's courts in the two universities of England?*—83, 84.

They enjoy the sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits whatsoever, when a scholar or privileged person is one of the parties, excepting in such cases where the right of freehold is concerned. By the university charter, they are at liberty to try and determine these causes, either according to the common law, or according to their own local customs, at their discretion.

CHAPTER VII.

OF THE COGNIZANCE OF PRIVATE WRONGS.

1. *By what laws are the ecclesiastical courts guided?*—100.

They are usually guided by the rules of the imperial and canon laws.

2. *What does the common law allow and permit to belong to their jurisdiction?*—87.

The ecclesiastical tribunals subsist and are admitted, in England, not by any right of their own, but upon bare sufferance and toleration from the municipal laws. They must have recourse to the laws of England, to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden, to be discussed or drawn in question before them.

3. *What is the one uniform rule to determine the jurisdiction of the courts, in England?*—88.

The common law.

4. *Under what heads are reduced wrongs or injuries cognizable by the ecclesiastical courts?*—87.

These wrongs or injuries, viz., such as are offered to private persons or individuals, which are cognizable by these courts, not for reformation of the offender himself or party injuring, *pro salute animæ*, but for the sake of the party injured, to make him a satisfaction and redress for the damage which he has sustained, are reducible under three general heads : 1. Causes pecuniary ; 2. Causes matrimonial ; 3. Causes testamentary.

5. *When will the courts of common law award a prohibition against proceedings of the spiritual court?*—100.

When the proceedings are manifestly repugnant to the fundamental maxims of the municipal law.

6. *What process have the ecclesiastical courts to enforce their sentences when pronounced?*—101.

No other process than that of excommunication.

7. *Is excommunication two-fold?*—101.

Yes, it is described to be two-fold: the less and the greater excommunication. The less is an ecclesiastical censure, excluding the party from the participation of the sacraments; the greater proceeds further, and excludes him not only from these, but also from the company of all Christians.

8. *Does the common law aid the ecclesiastical jurisdiction?*—102.

It does, and lends a supporting hand to its authority.

9. *What acts is an excommunicated person, by the common law, disabled from doing?*—102.

He is disabled to do any act that is required to be done by one that is *probus et legalis homo.* He cannot serve upon juries; cannot be a witness in any court; nor can he bring an action, either real or personal, to recover lands or money due to him.

10. *What are the jurisdiction and power of courts maritime?*—106.

They have jurisdiction and power to try and determine all maritime causes; or such injuries which, though they are in their nature of common law cognizance, yet being committed on the high seas, out of the reach of ordinary courts of justice, are therefore to be remedied in a peculiar court of their own.

11. *Must admiralty causes arise wholly upon the sea?*—106.

Yes; they must be causes arising wholly upon the sea, and not within the precincts of any county.

12. *Has the admiralty court cognizance of any wreck of the sea?*—106.

No; for that must be cast on land before it becomes a wreck.

13. *Has it jurisdiction of things* flotsam, jetsam, *and* ligan; *and why?*—106.

It has, because they are in and upon the sea.

14. *If part of a contract, or other cause of action, arise upon the sea, and part upon the land, has the admiralty court jurisdiction?*—106.

No; there the common law excludes the admiralty court from its jurisdiction; for, part belonging properly to one cognizance, and part to another, the common or general law takes place of the particular.

15. *Can the admiralty court hold plea of any contract under seal?*—107.

It cannot.

16. *Upon what laws are the proceedings of the court of admiralty founded?*—108.

They have much resemblance to those of the civil law, but are not entirely founded thereon, and they likewise adopt and make use of other laws, as occasion requires.

17. *Does the law of England acknowledge, or pay any deference to, the civil law as such?*—108.

It does not, but merely permits its use in such cases where it judges its determinations equitable.

18. *What injuries are cognizable by the courts of common law?*—109.

All possible injuries whatsoever that do not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognizance of the common law courts of justice.

19. *Why is this so?*—109.

It is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.

20. *How is refusal, or neglect, of justice remedied?*—109.

It is remedied either by writ of *procedendo* or of *mandamus.*

21. *What is the writ of* procedendo ad judicium?—109.

It issues out of the court of chancery, where judges of any subordinate court do delay the parties; for that they will not give judgment, either on the one side or on the other, when they ought so to do.

22. *What is the writ of mandamus?*—110.

A writ of mandamus is, in general, a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions, requiring them to do some particular thing, therein specified, which appertains to their office and duty.

23. *When does it issue?*—110.

It issues in all cases where the party has a right to have anything done, and hath no other specific means of compelling its performance.

24. *What is the writ of prohibition?*—112.

A prohibition is a writ issuing properly out of the court of king's bench, being the king's prerogative writ; but, in some cases, may be had out of the court of chancery, common pleas, or exchequer. It is directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.

25. *What if the judge, or the party, shall proceed after prohibition?*—113.

An attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it; and an action will lie against them to repair the party injured, in damages.

26. *What if the fact that gave rise to the prohibition be afterward falsified?*—114.

Then the cause shall be remanded to the prior jurisdiction.

CHAPTER VIII.

OF WRONGS, AND THEIR REMEDIES, RESPECTING THE RIGHTS OF PERSONS.

1. *What things are to be considered in treating of the injuries cognizable by the courts of common law?*—115.

The several injuries, with the respective remedies applicable to each particular injury; and the method of pursuing and obtaining these remedies in the several courts.

2. *What is the plain natural remedy for every species of wrong?*—116.

The being put in possession of that right whereof the party injured is deprived.

3. *How may this be effected?*—116.

Either by a specific delivery, or restoration, of the subject matter in dispute to the legal owner; or, where that is not possible, or, at least, not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages: to which the party injured has acquired an incomplete, or inchoate, right the instant he receives the injury, though such right be not fully ascertained till they are assessed by the intervention of the law.

4. *By what instruments is this remedy obtained?*—116.

By a diversity of suits and actions.

5. *Into what kinds are the several suits distinguished?*—117.

The several suits, or remedial instruments of justice, are, from the subject of them, distinguished into three kinds: actions personal, real, and mixed.

6. *What are personal actions?*—117.

Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to

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Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to

his person or property. The former are said to be founded on contracts; the latter upon *torts* or wrongs.

7. *What are real actions?*—118.

Real actions, which concern real property only, are such whereby the plaintiff claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life.

8. *What are mixed actions?*—118.

They are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained.

9. *Of what kinds are all civil injuries?*—118.

Of two kinds: the one without force or violence, as slander or breach of contract; the other with force and violence, as batteries or false imprisonment.

10. *What are the injuries which affect the personal security of individuals?*—119.

They are either injuries against their lives, their limbs, their bodies, their health, or their reputations.

11. *What are absolute, and what relative, rights?*—119.

Absolute rights are such as appertain and belong to private men, considered merely as individuals or single persons; and relative, which are incident to them as members of society, and connected to each other by various ties and relations.

12. *How may the injuries affecting the limbs or bodies of individuals be committed?*—120, 121.

They may be committed: 1. By threats and menaces of bodily hurt, through fear of which a man's business is interrupted; 2. By assault; 3. By battery; 4. By wounding; 5. By mayhem.

13. *What is necessary to complete the injury by threats and menaces?*—120.

A menace alone, without a consequent inconvenience, makes

not the injury; but, to complete the wrong, they must be both of them together.

14. *What is the remedy for this?*—120.

In pecuniary damages, to be recovered by action of trespass *vi et armis;* this being an inchoate, though not an absolute violence.

15. *What constitutes an assault?*—120.

An assault is an attempt or offer to beat another, without touching him.

16. *How may the party injured by an assault have redress?*—120.

Though no actual suffering is proved, yet the party injured may have redress by action of trespass *vi et armis*, wherein he shall recover damages as a compensation for the injury.

17. *What constitutes battery?*—120.

The least touching of another's person willfully, or in anger, is battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it.

18. *When is battery justifiable?*—120.

It is justifiable, or lawful, in some cases: as where one who hath authority, a parent, or master, gives moderate correction to his child, his scholar, or his apprentice. So, if one strikes me first, or even only assaults me, I may strike in my own defence. So, likewise, in defence of my goods or possession, if a man endeavors to deprive me of them, I may justify laying hands upon him to prevent him. Thus, too, in the exercise of an office, as that of churchwarden or beadle, a man may lay hands upon another to turn him out of church, and prevent his disturbing the congregation.

19. *How is battery defined?*—121.

On account of the causes of justification, battery is defined to be the unlawful beating of another; for which the remedy is, as for assault, by action of trespass *vi et armis*, wherein the jury will give adequate damages.

20. *What is the plea of* son assault demesne?—120.

That it was the plaintiff's own original assault that occasioned the battery sued for.

21. *What is wounding?*—121.

It consists in giving another some dangerous hurt, and is only an aggravated species of battery.

22. *What is mayhem?*—121.

Mayhem consists in violently depriving another of the use of a member proper for his defence in fight. It is a battery attended with this aggravating circumstance, that thereby the party injured is forever disabled from making so good a defence against future external injuries as he otherwise might have done.

23. *What are the defensive members?*—121.

Among them are reckoned not only arms, and legs, but a finger, an eye, and a fore-tooth, and also some others; but the loss of one of the jaw-teeth, the ear, or the nose, is no mayhem at common law, as they can be of no use in fighting.

24. *What only motive can justify mayhem?*—121.

That of necessary self-preservation.

25. *For which of these injuries may an indictment be brought, as well as an action?*—121.

For assault, battery, wounding, and mayhem; and frequently both an indictment and action are prosecuted.

26. *What are injuries affecting health?*—122.

Injuries affecting a man's health are where, by any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution; as by selling him bad provisions or wine; by the exercise of a noisome trade, which infects the air in his neighborhood; or by the neglect or unskillful management of his physician, surgeon, or apothecary.

27. *What is the remedy for these wrongs or injuries affecting health?*—122.

For these wrongs and injuries, unaccompanied by force

there is a remedy in damages by a special action of trespass upon the case.

28. *Is* mala praxis *a misdemeanor and offense at common law?*—122.

It is a great misdemeanor and offense, whether it be for curiosity and experiment, or by neglect; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction.

29. *What is the action of trespass upon the case?*—122.

It is a universal remedy, given for all personal wrongs and injuries without force; so called, because the plaintiff's whole case, or cause of complaint, is set forth at length in the original writ.

30. *When is the remedy by action of trespass* vi et armis, *and when by action of trespass upon the case?*—123.

Where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis*. But where there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by consequence and collaterally, there no action of trespass *vi et armis* will lie, but an action on the special case, for the damages consequent on such omission or act.

31. *In what ways are injuries affecting a man's reputation or good name inflicted?*—123–126.

In three ways: 1. By malicious, scandalous, and slanderous words tending to his damage and derogation.

2. By printed or written libels, pictures, signs, and the like, which set him in an odious or ridiculous light, and thereby diminish his reputation.

3. By preferring malicious indictments or prosecutions; which, under the mask of justice and public spirit, are sometimes made the engines of private spite and enmity.

32. *What is* scandalum magnatum?—123.

Words spoken in derogation of a peer, a judge, or other great officer of the realm.

33. *What words are actionable without proving any particular damage to have happened?*—123.

For words that may endanger a man by subjecting him to the penalties of the law, may exclude him from society, may impair his trade, or may affect a peer of the realm, a magistrate, or one in public trust, an action on the case may be had, without proving any particular damage to have happened, but merely on the probability that it might happen.

34. *When is it necessary that the plaintiff should aver some particular damage to have happened?*—123.

With regard to words that do not apparently, and upon the face of them, import such defamation as will, of course, be injurious, it is necessary that the plaintiff should aver some particular damage to have happened; which is called laying his action with a *per quod*.

35. *How is* scandalum magnatum *redressed?*—124.

By action on the case founded on many ancient statutes; as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on behalf of the party, to recover damages for the injury sustained.

36. *What words are not actionable?*—124, 125.

Mere scurrility, or opprobrious words which neither in themselves import, nor are in fact attended with, any injurious effects, will not support an action. So scandals, which concern matters merely spiritual, as to call a man heretic or adulterer, are cognizable only in the ecclesiastical court, unless any temporal damage ensues which may be a foundation for a *per quod*. Words of heat and passion, as to call a man a rogue and rascal, if productive of no ill consequence, are not actionable: neither are words spoken in a friendly manner, by way of advice, admonition, or concern, without any tincture or circumstance of ill-will; for, in both these cases, they are not maliciously spoken, which is part of the definition of slander. Neither are any reflecting words, made use of in legal proceedings, and pertinent to the cause in hand, a sufficient cause of action for slander.

37. *When will no action for words lie, even though special damages have ensued?*—125.

If the plaintiff be able to justify and prove the words to be true, no action will lie, for, if the fact be true, it is *damnum absque injuria*.

38. *What are libels?*—126.

Injuries affecting a man's reputation by printing, writing, pictures, signs, or the like, which set a man in an odious or ridiculous light, and thereby diminish his reputation.

39. *What are the remedies for libel?*—125.

The law has given two remedies; one by indictment, and the other by action. The former for the public offense; for every libel has a tendency to the breach of the peace, by provoking the person libeled to break it: which offense is the same (in point of law) whether the matter be true or false; and therefore the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification.

But in the remedy by action on the case, which is to repair the party in damages for the injury done him, the defendant may, as for words spoken, justify the truth of the facts, and show that the plaintiff has received no injury at all.

40. *What is it necessary for the plaintiff to show in actions for libels by signs or pictures?*—126.

It seems necessary always to show, by proper *innuendos* and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed.

41. *What remedies does the law allow for malicious indictments or prosecutions?*—126.

The law has given a very adequate remedy in damages, either by an action of conspiracy, which cannot be brought but against two at the least; or, which is the more usual way, by a special action on the case for a false and malicious prosecution.

42. *In prosecutions for felony is it usual to deny a copy of the indictment?*—126.

It is, where there is any, the least, probable cause to found the prosecution upon.

43. *Why is this?*—126, 127.

Because it would be a very great discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried.

44. *What points are requisite to constitute the injury of false imprisonment?*—127.

Two: 1. The detention of the person; and 2. The unlawfulness of such detention.

45. *Is every confinement of the person an imprisonment?*—127.

It is; whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets.

46. *In what consists unlawful, or false imprisonment?*—127.

It consists in such confinement or detention without sufficient authority

47. *Of what sorts is the remedy for false imprisonment?*—128.

Of two sorts: the one removing the injury; the other making satisfaction for it.

48. *What are the means of removing the actual injury of false imprisonment?*—128.

They are four-fold: 1. By writ of *mainprize*. 2. By writ *de odio et atia*. 3. By writ *de homine replegiando*. 4. By writ of *habeas corpus*.

49. *What is the most celebrated writ in the English law?*—129.

The writ of *habeas corpus;* of which there are various kinds made use of by the courts at Westminster.

50. *What is the great and efficacious writ in all manner of illegal confinement?*—131.

The writ of *habeas corpus ad subjiciendum;* directed to the person detaining another, commanding him to produce the body of the prisoner, with the day and cause of his caption

and detention, and to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf.

51. *When is this species of* habeas corpus *a writ of right?*—133

If a probable ground be shown that the party is imprisoned without just cause, and, therefore, hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which may not be denied.

52. *What is the* habeas corpus ad respondendum?—130.

It is a writ, when a man hath a cause of action against one who is confined by the process of some inferior court, to remove the prisoner, and charge him with this new action in the court above.

53. *What is the* habeas corpus ad satisfaciendum?—130.

It is made use of when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution.

54. *What are the writs* ad prosequendum, testificandum, deliberandum?—130.

These writs of *habeas corpus* issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed.

55. *What is the common writ* ad faciendum et recipiendum?—130.

It issues out of any of the courts of Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated *habeas corpus cum causa*), to do and receive whatsoever the king's court shall consider in that behalf.

56. *What is it absolutely necessary to express upon every commitment?*—134.

The reason for which it is made.

57. *Why is this?*—134.

That the court, upon a *habeas corpus*, may examine into its validity, and according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner.

58. *What act is generally known as "the* habeas corpus *act"?*—135.

The Act 31 Car. II., c. 2, which, in its effects, has reduced the general method of proceeding on these writs to the true standard of law and liberty.

59. *What is the satisfactory remedy for the injury of false imprisonment?*—138.

An action of trespass *vi et armis*, usually called an action of false imprisonment.

60. *What is this action of false imprisonment usually accompanied with?*—138.

With a charge of assault and battery also.

61. *In what relations are persons to be considered, as to injuries which affect their relative rights as members of society?*—138, 139.

In the four relations: 1. Husband and wife. 2. Parent and child. 3. Guardian and ward. 4. Master and servant.

62. *What, principally, are the injuries which may be offered to a person, considered as a husband?*—139.

These three: 1. Abduction, or taking away his wife. 2. Adultery, or criminal conversation with her. 3. Beating, or otherwise abusing her.

63. *What does the law always suppose in case of abduction either by fraud and persuasion, or open violence?*—139.

In both cases, it supposes force and constraint, the wife having no power to consent.

64. *What remedy has the husband for this injury?*—139.

He has his remedy by writ of ravishment, or action of trespass *vi et armis, de uxore rapta et abducta*, at common law; and the husband is also entitled to recover damages, in an action on the case, against such as persuade and entice the wife to live separate from him without a sufficient cause.

65. *May the husband, by this action, recover the possession of his wife's person?*—139.

No; only damages for taking her away.

66. *What satisfaction does the law give a husband for adultery, considered as a civil injury?*—139.

By the common law, the husband has his action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary.

67. *How are the damages for this injury increased or diminished?*—140.

By circumstances, such as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the previous character of the wife, &c.

68. *In what cases must marriage in fact be proved?*—140.

In actions for adultery or criminal conversation, and upon indictments for bigamy.

69. *What is the usual remedy for the injury of beating a man's wife, or otherwise ill-using her?*—140.

If it be a common assault, battery or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife jointly; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a separate remedy by an action of trespass, in nature of an action upon the case, for this ill-usage, *per quod consortium amisit*, in which he shall recover a satisfaction in damages.

70. *What species of injury are incident to the relation between master and servant, and the rights accruing therefrom?*—142.

There are two: the one is, the retaining a man's hired ser-

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

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.

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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.

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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 tc 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.

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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

CHAPTER XXI.

OF ISSUE AND DEMURRER

1. *On what are issues in pleading formed?*—314.
Either upon matter of law, or matter of fact.

2. *What is an issue upon matter of law called?*—314.
A demurrer

3. *What is the office of a demurrer?*—314, 315.
It confesses the facts to be true, as stated by the opposite party, but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse. The party, who demurs, *demoratur*, rests or abides upon the point in question.

4. *What is joinder in demurrer?*—315.
Upon either general or special demurrer, the opposite party must aver that the matter demurred to is sufficient; which is called a joinder in demurrer, and then the parties are at issue on a point of law. Which issue must be determined by the judges of the court before which the action is brought.

5. *What is an issue of fact?*—315.
It is an issue where the fact only, and not the law, is disputed.

6. *When is an issue of fact joined?*—315.
When he that denies or traverses the fact pleaded by his antagonist has tendered the issue, thus: "and this he prays may be enquired of by the country;" or, "and of this he puts himself upon the country;" it may immediately be subjoined by the other party, "and the said A. B. doth the like." Which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause upon the truth of the fact in question.

7. *How is this issue of fact determined?*—315.
Generally by the country, *per pais* (in Latin, *per patriam*), that is, by jury.

8. *What is continuance?*—316.
After issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually given and entered upon the record, for the parties to appear on from time to time, as the exigence of the case may require. The giving of this day is called the continuance.

9. *What is discontinuance?*—316.
If such continuances are omitted, the cause is thereby discontinued, and the defendant is discharged *sine die*, without a day; for, by his appearance in court, he has obeyed the command of the king's writ, and, unless he be adjourned over to a day certain, he is no longer bound to attend upon that summons, but he must be warned afresh, and the whole must begin *de novo*.

10. *When is the plaintiff nonsuited?*—316.
In the course of pleading, if the plaintiff neglects to put in his declaration, replication, &c., within the times allotted by the standing rules of the court, he is said to be nonsuit, or not to follow and pursue his complaint

11. *What is a plea* puis darrein continuance?—317.
It sometimes happens that after the defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some new matter, which it is proper for the defendant to plead; here, he is permitted to plead it in what is called a plea *puis darrein continuance*, or since the last adjournment.

CHAPTER XXII.

OF THE SEVERAL SPECIES OF TRIAL

1. *What is trial?*—330.

Trial is the examination of the matter of *fact* in issue.

2. *What are the species of trial in civil cases?*—330.

They are seven: 1. By record.
2. By inspection or examination.
3. By certificate.
4. By witnesses.
5. By wager of *battel*.
6. By wager of law.
7. By jury.

3. *In what instance is trial by record used?*—330, 331.

Only where a matter of record is pleaded in any action.

4. *When shall trial by inspection take place?*—331.

When for the greater expedition of a cause, in some point or issue, being either the principal question, or arising collaterally out of it, but being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide upon the point in dispute.

5. *In what cases is trial by certificate allowed?*—333.

In cases, where the evidence of the person certifying is the only proper criterion of the point in dispute.

Thus, 1. If the issue be whether A was absent with the king, in his army, out of the realm, in time of war, this shall be tried by the certificate of the mareschal of the king's host in writing under his seal, which shall be sent to his justices. 2. If, in order to avoid an outlawry, or the like, it was alleged that the defendant was in prison, *ultra mare*, at Bourdeaux, or in the service of the mayor of Bourdeaux, this should have been tried by the certificate of the mayor. 3. For matters within the realm, the customs of the city of London shall be tried by the certificate of the mayor and aldermen, certified by the mouth of their recorder, upon a surmise from the party alleging it that the custom ought to be thus tried. 4. In some cases the sheriff of London's certificate shall be the final trial; as if the issue be, whether the defendant be a citizen of London, or a foreigner, in case of privilege pleaded to be sued only in the city courts. 5. In matters of ecclesiastical jurisdiction, as marriage, and, of course, general bastardy; and also excommunication orders, these and other like matters shall be tried by the bishop's certificate. 6. The trial of all customs and practice of the courts shall be by certificate from the proper officers of those courts respectively; and what return was made on a writ, by the sheriff or undersheriff, shall be only tried by his own certificate.

6. *What is trial by witnesses?*—336.

It is a trial without the intervention of a jury. It is very rarely used in our law, which prefers the trial by jury before it in every instance but one, viz, when a widow brings a writ of dower, and the tenant pleads that the husband is not dead; this being looked upon as a dilatory plea, is in favor of the widow, and, for greater expedition, allowed to be tried by witnesses examined before the judges.

7. *What is trial by wager of battel?*—337–341.

It is in the nature of an appeal to providence, under an apprehension and hope that heaven would give the victory to him who had the right.

8. *In what cases was it used?*—337, 338.

In only three: 1. In the court martial. 2. In appeals of felony. 3. Upon issue joined in a writ of right.

9. *What is trial by wager of law?*—341–348.

Wager of law, *vadiatio legis*, is where the defendant put in sureties, or *vadios*, that at such a day he would make his law, that is, take the benefit which the law had allowed him. It was considered that there were many cases where an innocent man, of good credit, might be overborne by a multitude of false witnesses, and, therefore was established this species of trial by the oath of the defendant himself, for if he will absolutely swear

himself not chargeable, and appears to be a person of reputation, he shall go free and forever acquitted of the debt, or other cause of action.

10. *When is it allowed?*—345.

Only in actions in debt upon simple contract, or for amercement, in actions of detinue, and of account, where the debt may have been paid, the goods restored, or the account balanced, without any evidence of either; so that wager of law does not lie but when the debt groweth by word only. In England it is never required, and is then only admitted where an action is brought upon such matters as may be supposed to be privately transacted between the parties, and wherein the defendant may be presumed to have made satisfaction without being able to prove it.

CHAPTER XXIII.

OF THE TRIAL BY JURY.

1. *How ancient is trial by jury?*—349.

It has been used time out of mind in England.

2. *Of what kinds are trials by jury in civil cases?*—351.

Of two kinds: extraordinary and ordinary.

3. *What is extraordinary trial by jury?*—351.

That of the grand assise, which was instituted by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the custom of duelling.

4. *What is the grand jury in attaint?*—351.

A species of extraordinary jury to try an attaint, which is a process commenced against a former jury for bringing in a false verdict.

5. *What is the writ of* venire facias?—352.

It is a writ commanding the sheriff to summon twelve free

and lawful men; and is awarded by the court, after issue of fact joined, to try that issue.

6. *What if the sheriff be not indifferent as between the parties?*—354.

In such case the *venire* shall be directed to the coroners.

7. *If the plaintiff intend to try the cause, what notice is he bound to give the defendant?*—358.

Eight days, if the defendant lives within forty miles of London; and if he lives a greater distance, then fourteen days' notice; and if the plaintiff then changes his mind, and does not countermand the notice six days before the trial, he shall be liable to pay costs to the defendant for not proceeding to trial.

8. *Of what sorts are jurors contained in the panel?*—357.

Either special or common jurors.

9. *How may the trial be deferred?*—357.

Either party, upon good cause shown to the court above, as sickness, or upon absence or sickness of a material witness, may obtain leave, upon motion, to defer the trial till the next assises.

10. *What is a special jury?*—357.

It was originally introduced, in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him.

11. *What is the sheriff's duty, upon motion in court, and rule granted thereupon for a special jury?*—357.

In such case, it is his duty to attend the prothonotary, or other proper officer, with his freeholder's book; and the officer is to take indifferently forty-eight of the principal freeholders, in the presence of the attorneys on both sides, who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel.

12. *What is a common jury?*—358.

A common jury is one returned by the sheriff according to

the directions of the statute, which appoints one and the same panel for every cause to be tried at the same assises, containing not less than forty-eight, nor more than seventy-two jurors.

13. *Of what sorts are challenges of jurors?*—358.

They are of two sorts: challenges to the array and challenges to the polls.

14. *What are challenges to the array?*—359.

Challenges to the array are at once an exception to the whole panel.

15. *Upon what account may challenge to the array be made?*—359.

Upon account of partiality, or some default, in the sheriff, or his under officer who arrayed the panel.

16. *When, now, is the jury* de medietate linguæ *allowed?*—361.

Only upon trials for felonies or misdemeanor.

17. *Can judges and justices be challenged?*—361.

They cannot.

18. *What are challenges to the polls?*—361.

Challenges to the polls, *in capita*, are exceptions to particular jurors.

19. *To what heads are challenges to the polls reduced?*—361–363.

To four heads: *propter honoris respectum; propter defectum; propter affectum; and propter delictum.*

20. *With regard to what causes of challenge may a juror be examined on oath of* voir dire?—364.

With regard to such causes of challenge as are not to his dishonor or discredit; but not with regard to any crime, or anything which tends to his disgrace or disadvantage.

21. *Are there exemptions from serving on juries?*—364.

Besides challenges to the polls, which are exceptions against the fitness of jurors, and whereby they may be excluded from serving, there are also other causes to be made use of by the

jurors themselves, which are matter of exemption, whereby their service is excused, and not excluded.

22. *Who are excused from serving as jurors?*—364.

Sick and decrepit persons, persons not commorant in the county, and men above seventy years old; infants under twenty-one; physicians, and other medical persons; counsel, attorneys, officers of the courts, and the like; clergymen.

23. *What is a tales?*—364.

If by means of challenges, or other cause, a sufficient number of unexceptionable jurors doth not appear at trial, either party may pray a tales; that is, a supply of such men as are summoned upon the first panel, in order to make up the deficiency.

24. *To what are the jurors sworn?*—365.

Well and truly to try the issue between the parties, and a true verdict to give according to the evidence.

25. *What is the course of proceedings in a trial?*—366, 367.

When the jury are ready to hear the merits, to fix their attention the closer to the facts which they are impanelled and sworn to try, the pleadings are opened to them, by counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question. The opening counsel briefly informs them what has been transacted in the court above; also, as to the parties, the nature of the action, the declaration, the plea, the replication, and other proceedings, and lastly, upon what point the issue is joined, which is there sent down to be determined. The nature of the case, and the evidence intended to be produced, are next laid before them by counsel, also, on the same side; and when their evidence is gone through, the advocate on the other side opens the adverse case, and supports it by evidence, and then the party which began is heard by way of reply.

26. *What is evidence?*—367.

Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on

the one side, or on the other; and no evidence ought to be admitted to any other point.

27. *Of what kinds is the evidence in the trial by jury?*—367.

Of two kinds; either that which is given in proof, or that which the jury may receive by their own private knowledge.

28. *Of what sorts is the former, proof or proofs?*—367.

Either written, or *parol*, that is, by word of mouth.

29. *What are written proofs?*—367, 368.

Written proofs, or evidence, are, 1. Records, and, 2. Ancient deeds of thirty years' standing, which prove themselves; 3. Modern deeds, and, 4. Other writings, which must be attested and verified by parol evidence of witnesses.

30. *Is the best available evidence always required?*—368.

One general rule runs through all the doctrine of trials, viz., that the best evidence the nature of the case will admit of shall always be required, if possible to be had.

31. *What witnesses are admissible?*—369.

All witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined, except such as are infamous, or such as are interested in the event.

32. *May the jury judge of the credibility of competent witnesses?*—369.

It may.

33. *Is one credible witness sufficient?*—370.

One witness, if credible, is sufficient evidence to a jury of any single fact, though undoubtedly the concurrence of two or more corroborates the proofs.

34. *When is positive proof required; and when is circumstantial evidence admitted?*—371.

Positive proof is always required where, from the nature of the case, it appears it possibly might have been had. But, next to positive proof, circumstantial evidence, or the doctrine of presumptions, must take place; for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact, is the proof of such circumstances which either necessarily or usually attend such facts; and these are called presumptions, which are only to be relied upon till the contrary be actually proved.

35. *What weight have, severally, violent presumption, probable presumption, and light presumption?*—371.

Violent presumption is, many times, equal to full proof.

Probable presumption, arising from such circumstances as usually attend the fact, hath also its due weight.

Light, or rash, presumptions have no weight or validity at all.

36. *Must the witness tell all he knows of the matter, whether interrogated or not?*—372.

He is not to conceal any part of what he knows.

37. *What if the judge, either in his directions or decisions, misstates the law by ignorance, inadvertence or design?*—372.

The counsel on either side may oblige him publicly to seal a bill of exceptions, stating the point wherein he is supposed to err.

38. *What is a demurrer to evidence?*—372.

It happens where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law; in which case the adverse party may, if he pleases, demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of them all, in point of law, to maintain or overthrow the issue.

39. *Are demurrers to evidence, and bills of exceptions, as much in use as formerly?*—373.

They are not, since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of the judge at *nisi prius*.

40. *What are the advantages of testimony* viva voce *?*—373.

The occasional questions of the judge, the jury, and the counsel, propounded to the witness on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses, is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.

41. *Might jurors formerly give their verdict according to their own knowledge?*—374.

As to such evidence as the jury had in their own consciences, by their private knowledge of facts, it was an ancient doctrine, that this had as much right to sway their judgment, as the written or parol evidence which is delivered in court.

42. *What practice now obtains as to this?*—375.

If a juror knows anything of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court.

43. *How is the verdict accelerated?*—375.

To avoid intemperance and causeless delay, the jury are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed.

44. *Must the plaintiff be present at the delivery of the verdict?*—376.

If he does not appear, no verdict can be given, and he is said to be *nonsuit*, *non sequitur clamorem suum*. Therefore, it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself.

45. *What circumstances will set aside the verdict?*—375, 376.

If the jurors eat or drink at all, or have any eatables about them, at his charge for whom they afterward find, it will set aside the verdict. Also, if they speak with either of the parties, or their agents, after they are gone from the bar; or if they receive any fresh evidence in private; or if, to prevent disputes, they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict.

46. *What is the form of a voluntary nonsuit?*—376, 377.

The crier is ordered to call the plaintiff, and if neither he, nor any body for him, appears, he is nonsuited. It is more eligible for the plaintiff than a verdict against him; for after a nonsuit, which is only a default, he may commence the same suit again for the same cause of action; but after a verdict had, and judgment consequent thereupon, he is forever barred from attacking the defendant upon the same ground of complaint.

47. *How are verdicts distinguished?*—377.

They are either privy, or public.

48. *What is a special verdict?*—377.

It is a verdict wherein the jurors state the naked facts as they do find them to be proved, and pray the advice of the court thereon. Another species of special verdict is when the jury find generally for the plaintiff, subject, nevertheless, to the opinion of the judge or the court above upon a special case, stated by the counsel on both sides, with regard to a matter of law.

49. *What, also, is the jury to do, if they find for the plaintiff?*—377.

Assess the damages sustained by the plaintiff, in consequence of the injury upon which the action is brought.

50. *What are the principal defects in the system of trial by jury?*—382, 383.

They seem to be: 1. The want of a complete discovery by the oath of the party. 2. Want of a compulsive power for the production of books and papers belonging to the parties. 3. Want of powers to examine witnesses abroad, and to receive their depositions in writing, where the witnesses reside, and especially when the cause of action arises in a foreign country. 4. The liability of the jury to prejudice, in local actions.

51. *What indirect method is there to obtain change of* venue *in local actions?*—383, 384.

The parties are driven to a court of equity; where, upon making out a proper case, it is done upon the ground of being necessary to a fair, impartial, and satisfactory trial.

CHAPTER XXIV.

OF JUDGMENT, AND ITS INCIDENTS.

1. *What follows after the trial?*—387.

The judgment of the court upon what has previously passed; both the matter of law and matter of fact being now fully weighed and adjusted.

2. *May judgment be suspended, or finally arrested?*—387, 388.

It may, for certain causes; for it cannot be entered till the next term after trial had, and that upon notice to the other party.

3. *What are, generally, the causes of suspending the judgment by granting a new trial?*—387.

If any defect of justice happen at the trial, by surprise, inadvertence, or misconduct, the party may have relief in the court above by obtaining a new trial.

4. *For what reasons does the court award a new trial?*—387.

For these reasons among others of a like kind, wholly extrinsic, arising from matter foreign to, or *dehors* the record, viz., want of notice of trial, or any flagrant misbehavior of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehavior of the jury among themselves: also, if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence; or if they have given exorbitant damages; or if the judge himself has misdirected the jury.

5. *What if two juries agree in the same or a similar verdict?*—387.

A third trial is seldom awarded.

6. *How has the court, in granting new trials, opportunity of supplying the defects in the mode of trial by jury?*—392.

By laying the party applying under all such equitable terms as his antagonist shall desire and mutually offer to comply with

such as the discovery of some facts upon oath; the admission of others not intended to be litigated; the production of deeds, books, and papers; the examination of witnesses, infirm or going beyond sea, and the like.

7. *From what causes do arrests of judgment arise?*—393.

From intrinsic causes, appearing upon the face of the record.

8. *What is the invariable rule with regard to arrests of judgment upon matter of law?*—394.

That whatever is alleged in arrest of judgment must be such matter as would, upon demurrer, have been sufficient to overturn the action or plea. But the rule will not hold *e converso*, "that every thing that may be alleged as cause of demurrer will be good in arrest of judgment."

9. *What are judgments?*—395.

The sentence of the law, pronounced by the court upon the matter contained in the record.

10. *Of what sorts are judgments?*—395, 396.

Of four sorts: 1. Upon demurrer.
2. On a verdict.
3. By confession or default.
4. By nonsuit or retraxit.

11. *Whose determination and sentence is the judgment?*—396.

Though pronounced or awarded by the judges, it is the determination and sentence of the law. It is the conclusion that necessarily and regularly follows from the premises of law and fact.

12. *Of what natures are all the four sorts of judgment?*—396.

Of two: interlocutory or final.

13. *What are interlocutory judgments?*—396.

They are such as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit.

14. *What is the judgment of* respondeat ouster?—397.

It is judgment, upon plea in abatement, that the defendant do answer over, that is, put in a more substantial plea ; and it is interlocutory, for there are afterwards further proceedings to be had.

15. *What is a writ of inquiry to assess damages?*—398.

It is a writ whereby the sheriff is commanded that, by the oaths of twelve honest and lawful men, he inquire into the damages, and return such inquisition into court.

16. *What is final judgment?*—398.

Such as at once puts an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for.

17. *Which party shall pay the costs of the suit?*—399.

The vanquished party ; it being a maxim of the common and civil laws, "*victus victori in expensis condemnandus est.*"

18. *As to whom are costs not incident to judgment?*—400.

The king, and any person suing to his use, shall neither pay nor receive costs.

19. *What follows immediately after judgment?*—401.

Execution, unless the party condemned avails himself of his remedy by writ in the nature of appeal.

CHAPTER XXV.

OF PROCEEDINGS IN THE NATURE OF APPEALS.

1. *What are the proceedings in nature of appeals from the proceedings of the courts of law?*—402–407.

They are principally four : 1. Writ of attaint ; 2. Writ of deceit, or action on the case in nature of it ; 3. An *audita querela;* 4. Writ of error.

2. *What is the writ of attaint?*—402.

A writ which lieth to enquire whether a jury of twelve men gave a false verdict, that so the judgment thereupon may be reversed ; and this must be brought in the lifetime of him for whom the verdict was given, and of two at least of the jurors who gave it.

3. *What jury are to try the false verdict?*—404.

The jury to try this false verdict must be twenty-four, and are called the grand jury.

4. *What was the judgment, by the common law, if this grand jury found the verdict a false one?*—404.

That the jurors should lose their *liberam legem* and become forever infamous ; should forfeit their goods and the profits of their lands ; should themselves be imprisoned, and their wives and children thrown out of doors ; should have their houses razed, their trees extirpated, and their meadows ploughed ; and that the plaintiff should be restored to all that he lost by reason of the unjust verdict.

5. *What has superseded writs of attaint?*—405.

The practice of setting aside verdicts upon motion and granting new trials.

6. *What is an* audita querela?—405, 406.

An *audita querela* is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party who hath a good defense is too late to make it in the ordinary forms of law. It lies, for the defendant, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It also lies for bail, when judgment has been obtained against them by *scire facias* to answer the debt of their principal, and it happens afterward that the original judgment against the principal is reversed.

7. *What has rendered this writ almost useless?*—406.

The indulgence now shown by the court in granting summary relief upon motion, in cases of evident oppression.

8. *What is the principal method of redress for erroneous judgments?*—406.

Writ of error

9. *Upon what matter only does writ of error lie?*—406.

For some supposed mistake in the proceedings of a court of record; and only upon matter of law arising upon the face of the proceedings.

10. *What writ lies to amend errors in a base court, not of record?*—407.

The writ of false judgment.

11. *Were writs of error formerly brought upon slight grounds?*—407.

They were, upon very slight and trivial grounds, as misspellings and other mistakes of the clerks, which, at common law, could not be amended after the term in which judgment was rendered.

12. *How was this remedied?*—407.

The courts now allow such amendments while the suit is depending, notwithstanding the record be made up, and the term be past.

13. *How, otherwise, are mistakes effectually helped?*—408, 409.

By the statutes of amendment and *jeofails;* so called, because, when a pleader perceives any slip in the form of his proceedings, and acknowledges such error, (*jeo faile*), he is at liberty by those statutes to amend it.

14. *For what mistakes only may writs of error, now, be brought?*—408.

Material mistakes.

CHAPTER XXVI.

OF EXECUTION.

1. *What is execution?*—412.

It is putting the sentence of the law in force.

2. *What is the writ of* habere facias seisinam?—412.

If the plaintiff recovers in an action real or mixed, whereby the seisin or possession of land is awarded to him, the writ of execution shall be an *habere facias seisinam*, or writ of seisin of the freehold, directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered.

3. *What is the writ of* habere facias possessionem?—412.

If the plaintiff recovers, in an action real or mixed, possession of a chattel interest, the writ of execution is a writ of *habere facias possessionem*, also directed to the sheriff of the county.

4. *When do special writs of execution issue to the sheriff?*—413.

In actions, where the judgment is that something in special be done or rendered by the defendant.

5. *Of what sorts are executions in actions where money only is recovered, as a debt or damages, and not any specific chattel?*—413.

They are of five sorts: 1. Against the body of the defendant.

2. Against his goods and chattels.
3. Against his goods and the profits of his lands.
4. Against his goods and the possession of his lands.
5. Against all three, his body, lands, and goods.

6. *What is the writ of* capias ad satisfaciendum?—414, 415.

It is an execution of the highest nature, which deprives a man of his liberty, till he makes the satisfaction awarded; and

the intent of it is to imprison the body of the debtor till satisfaction be made for the debt, costs, and damages. It, therefore, does not lie against any privileged person, nor against executors or administrators, nor against such other persons as could not be originally held to bail.

7. *To whom shall the capias issue, if judgment be recovered against a husband and wife for the debt of the wife when sole; and to whom, if the action was originally brought against herself, when sole, before her marriage?*—414.

In the former case, the capias shall issue to take both in execution; in the latter, against the wife only.

8. *What if the defendant die while charged in execution upon this writ?*—415.

The plaintiff may, after his death, sue out a new execution against his lands, goods, or chattels.

9. *What if judgment be recovered against a husband and wife for the contract, or the personal misbehavior, of the wife during her coverture?*—414.

The capias shall issue against the husband only.

10. *Against whom may this, and all other executory process for costs, be sued out?*—415.

Against a plaintiff as well as a defendant, when judgment is had against him.

11. *What if, after a person is once in custody upon this process, he be seen at large?*—415.

It is an escape, and the plaintiff may have an action thereupon against the sheriff for his whole debt.

12. *Of what natures are escapes?*—415.

They are either voluntary or negligent.

13. *Will the rescue of a prisoner in execution excuse the sheriff?*—415.

It will not excuse him from being guilty of, and answering for the escape.

14. *In what case may the plaintiff sue out a writ of* scire facias *against the bail?*—416, 417.

If a *capias ad satisfaciendum* is sued out, and a *non est inventus* is returned thereon, the plaintiff may sue out a writ of *scire facias* against the bail, if any were given, commanding them to show cause why the plaintiff should not have execution against them for his debt and damages.

15. *Against whom may the writ of* fieri facias *issue?*—417.

It lies as well against privileged persons, peers, &c., as common persons; and against executors or administrators with regard to the goods of the deceased.

16. *What doors may be broken open by the sheriff, in the execution of this writ of* fieri facias?—417.

He may not break open any outer doors, but must enter peaceably, and may then break open any inner door, belonging to the defendant, in order to take the goods.

17. *What may the sheriff sell to satisfy the* fieri facias?—417.

He may sell the goods and chattels (even an estate for years, which is a chattel real) of the defendant, till he has raised enough to satisfy the judgment and costs.

18. *What must the sheriff first pay?*—418.

He must first pay the landlord of the premises, upon which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole.

19. *What farther remedy has the plaintiff, if part only of the debt be levied on a* fieri facias?—417.

If part only be levied, the plaintiff may have a *capias ad satisfaciendum* for the residue of the debt.

20. *What does the writ of* levari facias *affect?*—417, 418.

It affects a man's goods and the profits of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant; whereby the sheriff may seize all his goods, and the rents and profits of his lands, till satisfaction be made to the plaintiff. Little use is made of this writ

21. *What is the nature and office of the writ of* elegit ?—418.

It is a judicial writ, given by statute, either upon a judgment for a debt, or damages; or upon the forfeiture of a recognizance taken in the king's court. By it the defendant's goods and chattels are not sold, but only appraised; and all of them (except oxen and beasts of the plow) are delivered to the plaintiff, at such reasonable appraisement and price, in satisfaction, either in whole or part, of his debt. If the goods are not sufficient, then the moiety or one-half of his freehold lands, which he had at the time of the judgment given, are also to be delivered to the plaintiff, to hold till out of the rents and profits thereof the elegit be satisfied. The plaintiff, while he holds the lands, is called tenant by *elegit*.

22. *When the plaintiff's demand is satisfied, what should be entered?*—421.

Satisfaction ought to be entered on the record.

23. *But within what time must all writs of execution be sued out?*—421.

Within a year and a day after the judgment is entered; otherwise the court concludes *prima facie* that the judgment is satisfied and extinct.

CHAPTER XXVII.

OF PROCEEDINGS IN THE COURTS OF EQUITY.

1. *How far is the jurisdiction of the courts of equity in chancery, and the exchequer, the same?*—426.

The same jurisdiction is exercised, and the same system of redress pursued, in the equity court of the exchequer as in the court of equity in chancery; with a distinction, however, as to some few matters peculiar to each tribunal, and in which the other cannot interfere.

2. *What matters are peculiar to the court of equity in chancery?*—426–428.

The court of chancery has: 1. The guardianship of infants; 2. The custody of idiots and lunatics; 3. The superintendence of charities; and 4. Jurisdiction in bankruptcy.

3. *When has the court of chancery the right to appoint a guardian?*—427.

When a fatherless child has no other guardian.

4. *What jurisdiction in bankruptcy is given to the court of chancery?*—428.

By the several statutes relating to bankrupts, a summary jurisdiction is given to the chancellor, in many matters consequential or previous to the commissions thereby directed to be issued, from which the statutes give no appeal.

5. *What matters of jurisdiction are peculiar to the equity court of the exchequer?*—428.

The exchequer has sole equitable jurisdiction in cases relative to crown property, and superstitious uses.

6. *What is equity?*—429.

Equity, in its true and genuine meaning, is the soul and spirit of all law; positive law is construed, and rational law is made, by it. In this, equity is synonymous to justice; in that, to the true sense and sound interpretation of the rule.

7. *In what consists the essential difference between courts of law and equity?*—437–439.

It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief.

8. *Upon what has been gradually erected that structure of jurisprudence which prevails in our courts of equity?*—436, 437.

Upon their peculiar mode of administering justice, and also two accidental grounds of jurisdiction, which were formerly driven into the courts of equity by narrow decisions of the courts

of law, viz., the true construction of securities for money lent, and the form and effect of a trust or second use.

9. *What is the mode of proof of a court of equity, when facts or their leading circumstances rest only in the knowledge of the party?*—437.

It applies itself to the conscience of the party, and purges him upon oath with regard to the truth of the transaction.

10. *In what class of cases does the want of this discovery give a concurrent jurisdiction to courts of equity?*—437.

In all cases of account, and matters which lead to or end in account.

11. *What is the peculiar mode of trial in courts of equity?*—438.

It is by interrogatories administered to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside.

12. *How is a suit in chancery commenced?*—442.

By preferring a bill to the chancellor, in the style of a petition. This is in the nature of a declaration at common law, setting forth the circumstances of the case at length. It prays relief at the chancellor's hands, and process of subpœna, and sometimes of injunction also.

13. *Whom must the bill call before the court?*—442.

All necessary parties, however remotely concerned in interest, otherwise no decree can be made against them.

14. *What is the process of subpœna?*—443.

A writ commanding the defendant to appear and answer to the bill, on pain of £100. If the defendant on service of this subpœna, does not appear within the time limited by the rules of the court, and plead, demur or answer to the bill, he is then said to be in contempt, and the respective processes of contempt are in successive order awarded against him.

15. *What are the processes of contempt?*—444.

The first is an attachment, which is a writ in the nature of a *capias*, directed to the sheriff, commanding him to attach, or take up, the defendant and bring him into court. If the sheriff returns that the defendant is *non est inventus*, then an attachment with proclamations issues. If this also be returned with a *non est inventus*, and he still stands out in contempt, a commission of rebellion is awarded against him, and four commissioners therein named, or any of them, are ordered to attach him wheresoever he may be found in Great Britain. If, upon this commission, a *non est inventus* is returned, the court sends a sergeant-at-arms in quest of him; and if he eludes the search of the sergeant also, then a sequestration issues to seize all his personal estate, and the profits of his real, and to detain them, subject to the order of the court. After the order for a sequestration issues, the bill is to be taken *pro confesso*, and a decree to be made accordingly.

16. *What is the process against a corporate body?*—445.

By distringas, to distrain them by their goods and chattels, rents and profits, till they shall obey the summons or directions of the court.

17. *What is a demurrer in equity?*—446.

Nearly of the same nature as a demurrer in law; being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill.

18. *Of what kinds are pleas?*—446.

They may be: 1. To the jurisdiction; 2. To the person; 3. Or in bar. A man may plead as to part of the bill, demur as to part, and answer to the residue.

19. *Are exceptions to formal* minutiæ *in the pleadings in equity allowed?*—446.

They are not, for the parties are at liberty, on the discovery of any errors in form, to amend them.

20. *What is an answer?*—446.

An answer is the most usual defense that is made to a plaintiff's bill; and is given upon oath, or the honor of a peer or

peeress ; but where there are amicable defendants, their answer is usually taken without oath by consent of the plaintiff.

21. *Before whom must the defendant be sworn to his answer ; by whom must it be signed ; and when may it be excepted to for insufficiency ?*—447, 448.

If the defendant lives within twenty miles of London, he must be sworn before one of the masters of the court ; if farther off, there may be a *dedimus potestatem*, or commission to take his answer in the country, where the commissioners administer to him the usual oath

An answer must be signed by counsel, and must either deny or confess all the material parts of the bill ; or it may confess and avoid, that is, justify or palliate the facts. If one of these is not done, the answer may be excepted to for insufficiency, and the defendant be compelled to put in a more sufficient answer.

22. *If the defendant has any relief to pray against the plaintiff, how must he proceed?*—448.

By an original bill of his own which is called a cross bill.

23. *When may the plaintiff amend his bill, and when may he have recourse to a supplemental bill?*—448.

After answer put in, the plaintiff, upon payment of costs, may amend his bill, by adding new parties, or new matter, or both. If matter arises which did not exist before, he must set it forth by a supplemental bill.

24. *What is a bill of revivor?*—448.

It is a bill to set the proceedings again in motion, after the suit is abated by the death of any of the parties.

25. *What is a bill of interpleader?*—448.

It is employed where a person owes a debt or rent to one of the parties in suit, but, till the determination of it, knows not to which, desires that they may interplead, that he may be safe in the payment.

26. *What if the plaintiff proceed to the hearing of the cause upon bill and answer only?*—448.

In that case, he must take the defendant's answer to be true in every part.

27. *What is the replication, and how is issue joined?*—448.

A reply generally to the answer made by the plaintiff, averring his bill to be true, certain and sufficient, and the defendant's answer to be the reverse, which he is ready to prove as the court shall award ; upon which the defendant rejoins, averring the like on his side ; which is joining issue.

28. *How may witnesses be compelled to appear and submit to examination?*—449.

By process of subpœna, as in the courts of common law.

29. *What is the bill to perpetuate testimony?*—450.

It is very usual to file a bill to perpetuate the testimony of those witnesses who are old and infirm. This is most frequent when lands are devised by will away from the heir at law ; and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will *verbatim* therein. This is what is usually meant by proving a will in chancery.

30. *When may the depositions be published?*—450.

When all the witnesses are examined, and not before.

31. *Before whom may the cause be set down for hearing?*—450.

At the procurement of the plaintiff, or defendant, before either the lord chancellor or the master of the rolls.

32. *What if the plaintiff, if subpœnaed, do not attend to hear judgment?*—451.

Then the plaintiff's bill is dismissed with costs ; if the defendant makes default, a decree will be made against him.

33. *May the plaintiff's bill be dismissed for want of prosecution?*—451.

It may, if he suffers three terms to elapse without moving forward in the cause.

34. *Of what kinds is the chancellor's decree?*—452.

It is either interlocutory or final.

35. *What course is usually taken by the court, if any matter of fact is strongly controverted?*—452.

The fact is usually directed to be tried by jury, in the king's bench, or at the assises, upon a feigned issue.

36. *If a question of mere law arises in the course of a cause, what practice prevails?*—452.

In that case, it is the practice of the court of chancery to refer it to the opinion of the judges of the king's bench or common pleas, upon a case stated for that purpose.

37. *What matters, upon a first hearing, are referred to a master in chancery?*—453.

Long accounts; incumbrances and debts to be inquired into, &c. These matters are always, by the decree on the first hearing, referred for examination to a master, who upon examination makes report to the court. This report may be excepted to, disproved, or overruled; or otherwise is confirmed, and made absolute, by order of the court.

38. *When is the final decree made?*—453.

When all issues are tried and settled, and all references to the master ended, the cause is again brought to hearing upon the matters of equity reserved, and a final decree made.

39. *Who may petition for a rehearing?*—453.

Either party may petition for a rehearing.

40. *What evidence is admitted upon the rehearing, and what may then be supplied?*—453, 454.

All the evidence taken in the cause, whether read before or not, is now admitted to be read; and all omissions of either evidence or argument may be supplied.

41. *When may a bill of review be had?*—454.

Upon apparent error in judgment appearing on the face of the decree, or by special leave of the court.

42. *After the decree is signed and enrolled, how only can it be rectified?*—454.

By bill of review, or by appeal to the House of Lords.

43. *How is appeal to the House of Lords effected, and what evidence is admitted there upon such appeal?*—454, 455.

An appeal to parliament, that is, to the House of Lords, the *dernier resort*, is effected by petition to the house, and not upon writ of error, as upon judgments at common law. No new evidence is admitted on appeal, upon any consideration.

BOOK IV.

OF PUBLIC WRONGS.

CHAPTER I.

OF THE NATURE OF CRIMES AND THEIR PUNISHMENT.

1. *What are to be considered in treating of public wrongs, or crimes and misdemeanors?*—1, 2.

1st. The general nature of crimes and punishments.

2d. The persons capable of committing crimes.

3d. The several degrees of guilt, as principals or accessaries.

4th. The several species of crimes, with the punishment annexed to each by the laws of England.

5th. The means of preventing their perpetration.

6th. The method of inflicting those punishments which the law has annexed to each several crime and misdemeanor.

2. *What do codes of criminal law embrace?*—2.

The discussion and admeasurement of crimes, and their punishment, form in every country the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the pleas of the crown; so called, because the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights, belonging to that community, and is therefore in all cases the proper prosecutor for every public offense.

3. *Is the knowledge of this branch of jurisprudence of general importance?*—2.

Yes; the knowledge of this branch of jurisprudence, which

teaches the nature, extent, and degrees of every crime, and adjusts to it its adequate and necessary penalty, is of the utmost importance to every individual in the state. For, (as a very great master of the crown law has observed) no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

4. *What considerations should influence in properly forming and enforcing the criminal law?*—3, 4.

In proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly forming and enforcing it. It should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind; though it sometimes (provided there be no transgression of these external boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition and revenge; from retaining the discordant political regulations, which successive conquerors or factions have established, in the various revolutions of government; from giving a lasting efficacy to sanctions that were intended to be temporary, and made (as Lord Bacon expresses it) merely upon the spur of the occasion; or from, lastly, too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offense; from some, or from all of these causes, it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I shall not here

enter into any minute inquiries concerning the local constitutions of other nations: the inhumanity and mistaken policy of which have been sufficiently pointed out by ingenious writers of their own. But even with us in England, where our crown law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accusations are public, and our trials in the face of the world; where torture is unknown, and every delinquent is judged by such of his equals, against whom he can form no exception nor even a personal dislike;—even here we shall occasionally find room to remark some particulars that seem to want revision and amendment. These have chiefly arisen from too scrupulous an adherence to some rules of the ancient common law, when the reasons have ceased upon which those rules were founded; from not repealing such of the old penal laws as are either obsolete or absurd; and from too little care and attention in framing and passing new ones. The enacting of penalties, to which a whole nation should be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill; but be calmly and maturely considered by persons who know what provisions the laws have already made to remedy the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil. It is never usual in the house of peers even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges, and hearing their report thereon. And surely equal precaution is necessary, when laws are to be established, which may affect the property, the liberty, and perhaps even the lives of thousands. Had such a reference taken place, it is impossible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciously) the mound of a fishpond, whereby any fish shall escape; or cut down a cherry-tree in an orchard. Were even a committee appointed, but once in an hundred years, to revise the criminal law, it could not have continued to this hour a felony, without benefit of clergy,

to be seen for one month in the company of persons who call themselves, or are called, Egyptians.

5. *What is a crime or misdemeanor?*—5.

It is an act committed, or omitted, in violation of the public law, either forbidding or commanding it.

6. *How has common usage distinguished the one from the other?*—5.

In common usage, the word "crimes" is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of "misdemeanors."

7. *In what does the distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, principally consist?*—5.

In this, that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes, or misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, in its social aggregate capacity.

8. *Does crime include an injury?*—6.

Yes; every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community.

9. *Wherein is the distinction of crimes from civil injuries apparent?*—6, 7.

In injuries of an atrocious character, the private wrong is swallowed up in the public: we seldom hear of any satisfaction made to the individual. But in those of an inferior nature, room is left for a private compensation also.

10. *What double view has the law in taking cognizance of wrongs or unlawful acts?*—7.

To redress the party injured, and to benefit society.

11. *What are punishments?*—7.

Evils or inconveniences consequent upon crimes and misdemeanors.

12. *In whom is the right of punishing crimes against the law of nature, as murder and the like, vested by that law?*—7.

In every individual.

13. *What is the end of human punishment?*—11.

To serve as a precaution against future offenses of the same kind.

14. *How is the end of human punishment attained?*—11, 12.

It is attained in three ways: 1. By the amendment of the offender himself. 2. By deterring others, by the dread of his example, from offending in the like manner. 3. By depriving the party injuring of the power to do future mischief.

15. *What is the measure of human punishment?*—12.

The quantity of punishment can never be absolutely determined by any standing invariable rule; but it must be left to the arbitration of the legislature, to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offenses.

16. *Why is death punished with death?*—13, 14.

Not because one is equivalent to the other, for that would be expiation and not punishment; but, for the reason that this is the highest penalty that man can inflict, and tends most to the security of mankind.

17. *Why is treason, in conspiring the king's death, punished with greater rigor than even actually killing any private subject?*—15.

The greater and more exalted the object of an injury is, the more care should be taken to prevent that injury, and the punishment should be more severe. In case of a treasonable conspiracy, the object whereof is the king's majesty, the bare intention will deserve the highest degree of severity.

18. *Why, generally, is a design to transgress not so flagrant an enormity as the actual completion of that design?*—15.

Because it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it.

19. *What crimes should be most severely punished?*—16.

Those which are the most destructive of the public safety and happiness; and, among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which, therefore, the offender has the strongest inducement to commit. Hence it is, that for a servant to rob his master is in more cases capital than for a stranger; if a servant kills his master it is a species of treason.

20. *Should crime be punished with great severity?*—17.

No; punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, than such as are more merciful in general, yet properly mixed with due distinctions of severity. Crimes are more effectually prevented by the certainty than the severity of punishment.

21. *What do a multitude of sanguinary laws prove?*—17.

They prove a manifest defect either in the wisdom of the legislature, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every species of difficulty.

22. *What is the result where no distinction is made in the nature and gradations of punishment?*—18.

The generality will be led to conclude there is no distinction in the guilt

CHAPTER II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

1. *Who are exempted from the censures of the law?*—20.

The general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

2. *To what single consideration may all the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, be reduced?*—20.

To this single consideration, the want or defect of will.

3. *What two things must there be to constitute a crime against human laws?*—21.

There must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

4. *In what cases does the will not join with the act?*—21.

In three cases: 1. When there is a defect of understanding; for where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing else but a determination of one's choice to do, or to abstain from a particular action. 2. Where there is understanding and will sufficient, residing in the party, but not called forth and exerted at the time of the action done; which is the case of all offenses committed by chance or ignorance. 3. Where the action is constrained by some outward force or violence.

5. *What species of defect in will fall under the first of these general heads?*—21.

Infancy, idiocy, lunacy, and intoxication.

6. *What may be referred to the second head?*—21, 22.

Misfortune, and ignorance.

7. *What ranks under the third head?*—22.

Compulsion, or necessity.

8. *How does the law privilege an infant?*—22.

In some cases, as to the common misdemeanors, the infant under twenty-one years is privileged, so as to escape fine, imprisonment, and the like, and particularly in cases of omission; but in cases of notorious breach of the peace, riot, battery, or the like, for these an infant, above the age of fourteen, is equally liable to suffer as a person of full age.

9. *By what is the capacity of doing ill, or contracting guilt, measured?*—23.

By the strength of the delinquent's understanding and judgment, as the law has stood since the time of Edward the Third.

10. *At what age may an infant be guilty of felony?*—23.

Under seven years of age an infant cannot be guilty of felony. Also, under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax;* yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death.

Thus a girl of thirteen has been burnt for killing her mistress; and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged; because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. And there was an instance in the last century (17th) when a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. Thus, also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behavior plain tokens of a mischievous discretion; and, as the sparing this boy, merely on account of his tender years, might be of dangerous consequence to the public, by propagating a notion

that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment. But, in all such cases, the evidence of that malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction.

11. *In criminal cases, are idiots and lunatics chargeable for their own acts?*—24.

They are not, for acts committed under the incapacities of idiocy, or lunacy. If a man in his sound memory commit a capital offense, and before arraignment for it he becomes mad, he ought not be arraigned for it. If after he has pleaded the prisoner becomes mad, he shall not be tried. If after he be tried, and found guilty, he loses his senses before judgment, judgment shall not be pronounced. And if he becomes of nonsane memory after judgment, execution shall be stayed; for, peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment and execution.

12. *How shall it be ascertained whether the party be* compos *or not?*—25.

It shall be tried by a jury.

13. *Does drunkenness excuse criminal misbehavior?*—25, 26.

It does not. The law looks upon it as an aggravation, rather than an excuse.

14. *Under what circumstances is a man excused for acts done through unavoidable force and compulsion?*—27, 28.

He is excused, in the first place, by the obligation of civil subjection, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest; as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality.

He is excused, secondly, by *duress per minas;* or threats and menaces which induce a fear of death or other bodily harm, and which take away, for that reason, the guilt of many crimes and misdemeanors; at least before the human tribunal.

And, thirdly, where a man has his choice of two evils set before him, and, being under a necessity of choosing one, he chooses the least pernicious of the two.

15. *What is the principal case, where constraint of a superior is allowed as an excuse?*—28, 29.

In that of the matrimonial subjection of the wife to her husband. In some cases the command or authority of the husband, either expressed or implied, will privilege the wife from punishment, even for capital offences. And therefore if a woman commit theft, burglary, or other civil offences against the laws of society, by the coercion of her husband, or even in his company, which the law construes a coercion, she is not guilty of any crime: being considered as acting by compulsion, and not of her own will. Which doctrine is at least a thousand years old in the kingdom, being to be found among the laws of king Ina, the West Saxon. And it appears that among the northern nations on the continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offence with a freeman; the male or freeman only was punished, the female or slave dismissed.

16. *Why, in treason, shall no plea of coverture or presumption of the husband's coercion, extenuate the offense of the wife?*—29.

As well because of the odiousness and dangerous consequences of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself, as a subject, has forgotten to pay.

17. *For what offense may a wife be indicted, and set in the pillory, with her husband?*—29.

For keeping a brothel; for this is an offense touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offense as the law presumes to be generally conducted by the intrigues of the female sex.

18. *When the wife offends alone, how far is she responsible for her offense?*—29.

In all cases where she offends alone, without the company

or coercion of her husband, she is responsible for her offense as much as any feme sole.

19. *If a man be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, may he kill that person?*—30.

No; the fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent man.

20. *When a man, by the commandment of the law, is bound to arrest another for any capital offense, or to disperse a riot, and resistance is made to his authority, may he kill the offenders?*—31.

It is here justifiable, and even necessary, to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue.

21. *May a man, in extreme want of food or clothing, justify stealing either, to relieve his present necessities?*—31, 32.

The law admits no such excuse.

22. *In whom does the law suppose an incapacity of doing wrong, from the excellence and perfection of the person?*—32, 33.

In the king.

CHAPTER III.

OF PRINCIPALS AND ACCESSARIES.

1. *What are the degrees of guilt among persons that are capable of offending?*—34.

They may offend as principals, or as accessaries.

2. *In what degrees may a man be principal in an offense?*—34.

In two degrees: a principal in the first degree is he that is the actor, or absolute perpetrator of the crime; and a principal

in the second degree is he who is present, aiding and abetting the act to be done.

3. *Must this presence of the principal in the second degree be an actual immediate standing by, within sight or hearing of the fact?*—34.

It need not; there may be a constructive presence.

4. *In cases of murder, committed in the absence of the murderer, by means which he had prepared beforehand, in what degree as principal is he guilty?*—34, 35.

He is guilty as principal in the first degree.

5. *What reason does the law assign for this?*—35.

That, in the case of preparing poison or laying a trap or pitfall for another, whereby he is killed; letting out a wild beast with an intent to do mischief, or exciting a madman to commit murder, so that death thereupon ensues, the party offending cannot be called an accessary, that necessarily presupposing a principal; and the poison, the pitfall, the beast, or the madman, cannot be held principals, being only the instruments of death. As, therefore, he must be certainly guilty, either as principal or accessary, and cannot be so as accessary, it follows that he must be guilty as principal, and if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist.

6. *Who is an accessary?*—35.

An accessary is he who is not the chief actor in the offense, nor present at its performance, but is some way concerned therein, either before or after the fact committed.

7. *Why are all principals in high treason?*—35.

Upon account of the heinousness of the crime.

8. *In what crimes may there be accessaries?*—36.

In *petit* treason, murder, and felonies, with or without the benefit of clergy; except only in those offenses which, by judgment of law, are sudden and unpremeditated, as manslaughter, and the like, which therefore cannot have any accessaries before the fact.

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9. *In petit larceny, and in all crimes under the degree of felony, why are all principals?*—36.

Because the law does not descend to distinguish the different shades of guilt in petit misdemeanors.

10. *If a servant instigates a stranger to kill his master, of what is he guilty?*—36.

He is accessary only to the crime of murder.

11. *Who may be an accessary before the fact?*—36.

Sir Matthew Hale defines him to be "one who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime."

12. *If A. command B. to beat C., and B. beats him so that he dies, in what degree is A. guilty?*—36, 37.

He is guilty as accessary.

13. *If A. command B. to burn C.'s house, and he in so doing commits a robbery, in what degree is A. guilty?*—37.

A. though accessary to the burning, is not accessary to the robbery.

14. *Who is an accessary after the fact?*—37, 38.

The one who assists a felon, knowing him to be such. To make an accessary *ex post facto*, it is in the first place requisite that he knows of the felony committed. In the next place, he must receive, relieve, comfort, or assist the felon.

15. *Is the relief of a felon, in jail, with clothes or other necessaries an offense?*—38.

It is not.

16. *What if one wounds another mortally, and, after the wound given but before death ensues, a person assists or receives the delinquent?*—38.

The latter does not become accessary to the homicide; for, till death ensues, there is no felony committed.

17. *Where a felony is actually complete, are the nearest relatives suffered to aid or receive one another?*—38, 39.

They are not. If the parent assists his child, or the child his parent; if the brother receives brother; the master his servant, or the servant his master; or even if the husband receives his wife, who have any of them committed a felony, the receivers become accessaries *ex post facto*. But a feme covert cannot become an accessary by the receipt and concealment of her husband.

18. *How were accessaries treated, considered distinct from principals?*—39.

The general rule of the ancient law (borrowed from the Gothic constitution) is this, that accessaries shall suffer the same punishment as their principals.

19. *For what reasons, then, are elaborate distinctions made between accessaries and principals?*—39, 40.

1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted; the commission of an actual robbery being quite a different accusation from that of harboring the robber.

2. Because, though by the ancient common law the rule is that both shall be punished alike, yet now, by the statute relating to the benefit of clergy, a distinction is made between them.

3. Because, formerly, no man could be tried as accessary til. after the principal was convicted, or, at least, he must have been tried at the same time with him; though that law is now much altered.

4. Because, though a man be indicted as accessary and acquitted, he may afterward be indicted as principal.

20. *Is an acquittal of receiving or counseling a felon, an acquittal of the felony itself?*—40.

It is not.

CHAPTER IV.

OF OFFENSES AGAINST GOD AND RELIGION.

1. *How are crimes to be estimated, in their relation to the municipal law?*—41.

They ought to be estimated merely according to the mischiefs which they produce in civil society.

2. *What is the difference between public and private vices?*—42.

Both public and private vices are subject to the vengeance of eternal justice; and public vices are besides liable to the temporal punishments of human tribunals.

3. *Under what heads are the several offenses, which are either directly, or by consequence, injurious to civil society, and therefore punishable by the laws of England, distributed?*—42, 43.

Under the following general heads: 1. Those which are more immediately injurious to God and his holy religion.

2. Such as violate and transgress the law of nations.

3. Such as more especially affect the sovereign executive power of the state, or the king and his government.

4. Such as more directly infringe the rights of the public or commonwealth.

5. Such as derogate from those rights and duties which are owing to particular individuals, and in the preservation and vindication of which the community is deeply interested.

4. *How do such crimes and misdemeanors as more immediately offend Almighty God, by transgressing the precepts of religion, either natural or revealed, transgress the law of society also?*—43.

Mediately, by their bad example and consequence.

5. *Of what species are they?*—43–64.

They are: 1. Apostacy. 2. Heresy. 3. Offenses against the established church. 4. Blasphemy. 5. The offense of profane and common swearing and cursing. 6. Witchcraft, conjuration, enchantment, or sorcery. 7. The offense of religious impostors. 8. Simony. 9. Profanation of the Lord's day 10. Drunkenness. 11. Open and notorious lewdness.

6. *What is apostacy?*—43.

It is a total renunciation of christianity, by embracing either a false religion, or no religion at all. This offense can only take place in such as have once professed the true religion.

7. *What is heresy?*—44, 45.

It consists, not in the total denial of Christianity, but of some of its essential doctrines, publicly and obstinately avowed.

8. *Of what kinds are the offenses against religion which affect the established church?*—50.

They are either positive or negative: positive, by reviling its ordinances; or negative, by nonconformity to its worship.

9. *How are non-conformists divided?*—52.

They are of two sorts: 1. Such as absent themselves from divine worship in the established church, through total irreligion, and attend the service of no other persuasion. 2. Those who offend through a mistaken or perverse zeal; as papists and protestant dissenters.

10. *Into what classes may papists be divided?*—55.

Into three: 1. Persons professing popery.

2. Popish recusants convict.

3. Popish priests.

11. *What were the penalties and disabilities of the first class?*—55.

Besides penalties for not frequenting their parish church, they were disabled from taking their lands, either by descent or purchase, after eighteen years of age, until they renounced their errors; they were incapable of presenting to any advowson, or granting to any other person any avoidance of the same; they might not keep or teach any school, under pain of perpetual imprisonment; and if they willingly said or heard mass, they for-

feited, for the one two hundred, for the other one hundred marks, and each suffered a year's imprisonment.

12. *What if these errors were aggravated by apostacy or perversion?*—55.

Where they were so aggravated, as where a person was reconciled to the see of Rome, or procured others to be reconciled, the offense amounted to high treason.

13. *To what additional disabilities, penalties, and forfeitures, were the second class of papists subject?*—56.

They were considered as persons excommunicated; they could hold no office or employment; they could not keep arms in their houses, but the same could be seized by the justices of the peace; they might not come within ten miles of London, on pain of £100; they could bring no action at law, or suit in equity; they were not permitted to travel above five miles from home, unless by license, upon pain of forfeiting all their goods; and they could not come to court under pain of £100. No marriage or burial of such recusant, or baptism of his child, could be had otherwise than by the ministers of the church of England, under other severe penalties. A married woman, when recusant, forfeited two-thirds of her dower or jointure, might not be executrix or administratrix to her husband, nor have any part of his goods; and, during the coverture, might be kept in prison, unless her husband redeem her at the rate of £10 a month, or the third part of all his lands. And, lastly, as a feme covert recusant might be imprisoned, so all others were obliged, within three months after conviction, either to submit and renounce their errors, or, if required to do so by four justices, abjure and renounce the realm; and if they did not depart, or if they returned without the king's license, they were deemed guilty of felony, and suffered death as felons without benefit of clergy.

14. *What is blasphemy, and how punishable at common law?*—59.

It is an offense against God and religion, by denying his being and providence; or by contumelious reproaches of our Saviour Christ. Whither also may be referred all profane scoffing at the Holy Scriptures, or exposing them to contempt and ridicule. These are offenses punishable at common law by fine and imprisonment, or other infamous corporeal punishment; for Christianity is part of the laws of England.

15. *How was the pretence of using witchcraft, telling fortunes, or discovering stolen goods by skill in the occult sciences, punished?*—62.

By a year's imprisonment, and standing four times in the pillory.

16. *Who are religious impostors?*—62.

Such as falsely pretend an extraordinary commission from heaven, or terrify and abuse the people with false denunciations of judgment.

17. *How are they punishable?*—62.

With fine, imprisonment, and infamous corporeal punishment, by the temporal courts.

18. *What is Simony?*—62.

The corrupt presentation of any one to an ecclesiastical benefice for gifts or reward. It is, also, to be considered an offense against religion.

CHAPTER V.

OF OFFENSES AGAINST THE LAW OF NATIONS.

1. *What is the law of nations?*—66.

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world, in order to decide all disputes, to regulate all ceremonies and civilities, and to ensure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. This general law is founded upon this

principle, that different nations ought, in time of peace, to do one another all the good they can, and in time of war, as little harm as possible, without prejudice to their own real interests.

2 *Is this law of nations adopted by the common law?*—67.

Yes; to its full extent, and is held to be a part of the law of the land.

3. *What is the remedy for offenses against this law by whole states or nations?*—68.

Recourse can only be had to war.

4. *What if the individuals of any state violate this general law?*—68.

It is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained.

5. *What are the principal offenses against the law of nations, animadverted on as such by the municipal laws of England?*—68.

They are three in number: 1. Violation of safe-conducts. 2. Infringement of the rights of ambassadors. 3. Piracy.

6. *What is piracy?*—71–73.

The offense of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony.

CHAPTER VI.

OF HIGH TREASON.

1. *Into what kinds may those offenses, which more immediately affect the royal person, his crown, or dignity, and which are in some degree a breach of the duty of allegiance, whether natural and innate, or local and acquired by residence, be distinguished?*—74.

They may be distinguished into four kinds: 1. Treason. 2. Felonies injurious to the king's prerogative. 3. Præmunire.

4. Other misprisions and contempts. Of which crimes the first and principal is that of treason.

2. *What is treason?*—75.

Treason, *proditio*, in its very name, imports a betraying, treachery, or breach of faith. It, therefore, happens only between allies; for treason is indeed a general appellation, made use of by the law, to denote, not only offenses against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation; and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord.

3. *What is high treason?*—75.

When disloyalty attacks even majesty itself, it is called, by way of eminent distinction, high treason, *alta proditio;* being equivalent to the *crimen læsæ majestatis* of the Romans.

4. *What statute defines treasonable offenses?*—76.

The statute 25 Edward III, c. 2, which defines what offenses for the future shall be held to be treason.*

5. *What is meant by compassing or imagining the death of the king?*—78.

To purpose or design his death.

6. *How must this act of the mind be demonstrated before it can possibly fall under any judicial cognizance?*—79.

By some open or *overt* act.

7. *What are held to be such* overt *acts?*—79.

To provide weapons or ammunition for the purpose of killing the king. To conspire to imprison him by force, and move toward it by assembling company. And, also, taking any measures to render such treasonable purposes effectual, as assembling and consulting on the means to kill the king.

* The provisions of this act are confirmed by the 36 George III., c. 7, which is made perpetual by the 57 George III., c. 6.

8. *Are words spoken treason?*—80.

Both by common law and statute, they are not.

9. *Are words written treason?*—80.

The bare words are not treason, but the deliberate act of writing them has been held to be treason.

10. *What if two subjects quarrel, and levy war against each other?*—82.

It is no treason, but a great riot and contempt.

11. *When does a bare conspiracy to levy war amount to high treason?*—82.

If particularly pointed at the king and his government.

12. *When shall a man's joining with rebels or enemies in the kingdom be excused?*—83.

If he be under circumstances of actual force and constraint, provided he leaves them when he has a safe opportunity.

13. *Of what does the punishment of high treason consist?*—92, 93.

The punishment is: 1. That the offender be drawn to the gallows. 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out and burned while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal. But the king may discharge all the punishment except beheading.

14. *Is the punishment milder for offenders in the case of coining?*—93.

In the case of coining, which is a treason of a different complexion from the rest, the punishment is milder for male offenders, being only to be drawn, and hanged by the neck till dead.

15. *What is the punishment of women for treason of every kind?*—93.

It is to be drawn to the gallows, and there to be burned alive.

CHAPTER VII.

OF FELONIES INJURIOUS TO THE KING'S PREROGATIVE.

1. *What is felony, in the general acceptation of the English law?*—94, 95.

It comprises every species of crimes which occasioned, at common law, the forfeiture of lands or goods.

2. *Is treason felony?*—94.

All treasons, strictly speaking, are felonies.

3. *What other offenses are felonies?*—95.

All offenses now capital are, in some degree or other, felony, but this is likewise the case with some other offenses which are not punished with death; as suicide; homicide by chance-medley, or in self-defense; and in petit larceny or pilfering, all which are (strictly speaking) felonies, as they subject the committers of them to forfeitures.

4. *What is probably the origin of the term "felony"?*—95.

Fe-lon, according to Sir Henry Spelman, is derived from the northern words, *fee*, which signifies the fief, feud, or beneficiary estate; and *lon*, which signifies price or value. Felony is, therefore, the same as *pretium feudi*, the consideration for which a man gives up his fief; as we say in common speech, such an act is as much as your life, or estate, is worth. Felony, and the act of forfeiture to the law, were thus synonymous terms in the feudal law.

5. *Does capital punishment enter into the true idea and definition of felony?*—97.

It does not; the idea of felony, however, is so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law now conform.

6. *What follows from this usage?*—98.

If a statute makes any new offense felony, the law implies that it shall be punished with death, viz., by hanging, as well as with forfeiture; unless the offender prays the benefit of clergy; which all felons are entitled once to have, provided the same is not expressly taken away by statute.

7. *What felonies are more immediately injurious to the king's prerogative?*—98.

They are: 1. Offenses relating to the coin, not amounting to treason. 2. Offenses against the king's council. 3. The offense of serving a foreign prince. 4. The offense of embezzling or destroying the king's armor or stores of war. 5. Desertion from the king's armies in time of war.

CHAPTER VIII.

OF PRÆMUNIRE.

1. *Why is the offense of* præmunire *so called, and what was its origin?*—103.

It is so called from the words of the writ preparatory to the prosecution thereof. It took its original from the exorbitant power claimed and exercised in England by the Pope.

2. *In what year was made the first statute against papal provisions?*—110.

In the thirty-fifth year of Edward I. was made the first statute against papal provisions, being, according to Sir Edmund Coke, the foundation of all the other statutes of *præmunire*.

3. *Is* præmunire *an offense against the king?*—111.

It is ranked as such, because every encouragement of the papal power was deemed a diminution of the authority of the crown.

4. *What statute is generally referred to as the "statute of* præmunire"?—112.

The statute 16 Ric. II. c. 5. It is generally referred to in all subsequent statutes by that designation.

5. *What is the original meaning of this offense?*—115.

Introducing a foreign power into the land, and creating *imperium in imperio*, by paying that obedience to papal process which constitutionally belonged to the king alone.

6. *Were the penalties of* præmunire *extended beyond the object of their original institution, to other offenses?*—116.

Up to the statute 1 and 2 Ph. and Mar., c. 8, the penalties of præmunire were kept within the bounds of their original institution, that of depressing the power of the pope. By that statute, and afterwards, it was thought fit to apply the same to other offenses of a heinous character, some of which bear more, and some less, relation to this original offense, and some no relation at all.

7. *What was the punishment of* præmunire?—118, 119.

From conviction, the defendant was out of the king's protection, his lands and tenements, goods and chattels, were forfeited to the king, and his body remained in prison at the king's pleasure, or during life.

8. *Was one convicted of this offense, out of the law's protection?*—118.

He was: though protected from public wrongs, he could bring no action for any private injury, how atrocious soever, being so far out of the protection of the law that it would not guard his civil rights, nor remedy any grievance which he, as an individual, might suffer.

6. *What follows from this usage?*—98.

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CHAPTER IX.

OF MISPRISIONS AND CONTEMPTS AFFECTING THE KING AND GOVERNMENT.

1. *What are misprisions and contempts against the king and government?*—119.

They are, in the acceptation of our law, generally understood to be all such high offenses as are under the degree of capital, but nearly bordering thereon. They are negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought not to be done.

2. *Of what kinds are misprisions negative?*—120, 121.

They are of three kinds: 1. Misprision of treason. 2. Misprision of felony. 3. The concealing of treasure-trove.

3. *What is misprision of treason?*—120.

It consists in the bare knowledge and concealment of treason, without any degree of assent thereto; for any assent makes the party a principal traitor.

4. *What is the punishment for misprision of treason?*—120.

Loss of the profits of lands during life, forfeiture of goods, and imprisonment during life.

5. *What is misprision of felony?*—121.

It is the concealment of a felony which a man knows, but never assented to; for if he assented, this makes him either principal or accessary.

6. *What is the punishment for concealing treasure-trove?*—121.

It was formerly punished by death, but now only by fine and imprisonment.

7. *What are misprisions which are merely positive generally denominated?*—121.

Contempts or high misdemeanors.

8. *What are they?*—121–126.

They are: 1. The maladministration of such high officers as are in public trust and employment. 2. Contempts against the king's prerogative. 3. Contempts and misprisions against the king's person and government. 4. Contempts against the king's title, not amounting to treason or *præmunire*. 5. Contempts against the king's palaces and courts of justice. Lastly, To endeavor to dissuade a witness from giving evidence; to disclose an examination before the privy council, or to advise a prisoner to stand mute, (all which are impediments to justice) are high misprisions, and contempts of the king's courts.

9. *What are contempts against the king's prerogative?*—122.

Refusing to assist him for the good of the public; either in his councils by advice, if called upon, or in his wars by personal service.

10. *How are those guilty of any injurious treatment to persons, immediately under the protection of a court of justice, punished?*—126.

By fine and imprisonment.

11. *How is endeavoring to dissuade a witness from giving evidence punished?*—126.

It is a contempt of the king's courts, and punished by fine and imprisonment.

CHAPTER X.

OF OFFENSES AGAINST PUBLIC JUSTICE.

1. *Into what species may the crimes and misdemeanors that more especially affect the commonwealth be divided?*—127, 128.

Into five species: 1. Offenses against public justice
2. Offenses against the public peace.
3. Offenses against public trade
4. Offenses against the public health.
5. Offenses against the public police or economy.

2. *What are the offenses against public justice, beginning with those that are most penal?*—128–141.

They are as follows: 1. Embezzling or vacating records, or falsifying certain other proceedings in a court of judicature.

2. Where any jailor, by too great duress of imprisonment, makes any prisoner that he hath in ward, become an approver or appellor against his will, that is, to accuse and turn evidence against some other person.

3. Obstructing the execution of legal process.

4. An escape of a person arrested upon criminal process, by eluding the vigilance of his keepers before he is put in hold.

5. Breach of prison by the offender himself, when committed for any cause.

6. Rescue.

7. Returning from transportation, or being seen at large in Great Britain, before the expiration of the term for which the offender was ordered to be transported, or had agreed to transport himself.

8. Taking a reward under pretense of helping the owner to his stolen goods.

9. Receiving of stolen goods, knowing them to be stolen.

10. Theft bote, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute.

11. Common barratry, or the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise.

12. Maintenance.

13. Champerty.

14. Compounding informations.

15. A conspiracy to indict an innocent man of felony.

16. Wilful and corrupt perjury.

17. Bribery in a judge, or other person concerned in the administration of justice.

18. Embracery, or an attempt to influence a jury corruptly.

19. The false verdict of jurors.

20. Negligence of public officers intrusted with the administration of justice.

21. Oppression and tyrannical partiality of judges, justices,

and other magistrates, in the administration and under the color of their office.

22. Extortion, or an officer's unlawfully taking, by color of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due.

3. *What is the offense of obstructing an arrest upon criminal process?*—129.

It has been held that the party opposing such arrest is an accessary in felony, and a principal in high treason.

4. *Who are punishable for the escape of a person arrested upon criminal process, before he is put in hold?*—129, 130.

The prisoner is punishable by fine and imprisonment. Officers who, after arrest, negligently permit a felon to escape, are punishable by fine; but, where the escape is voluntary, by consent and connivance of the officer, they are punishable (after the conviction of the prisoner), in the same degree, as the offense of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass.

5. *Is the officer, in case of such neglect of duty, punishable before the conviction of the prisoner?*—130.

Yes; he may be fined and imprisoned for a misdemeanor.

6. *What is rescue?*—131.

It is the forcibly and knowingly freeing another from an arrest or imprisonment; and is generally the same offense in the stranger so rescuing, as it would have been in a jailor to have voluntarily permitted an escape.

7. *Must the principal, in case of a rescue, be attainted or receive judgment before the rescuer can be punished?*—131.

Yes; because, perhaps, in fact, it may turn out that there has been no offense committed by the principal.

8. *What is theft bote frequently called?*—133.

Compounding of felony; and formerly was held to make a man an accessary, but is now punished only with fine and imprisonment.

9. *What is the punishment for suing in the name of a fictitious plaintiff, in any of the king's superior courts?*—134.

This offense is left, as a high contempt, to be punished at their discretion.

10. *What is maintenance?*—134.

It bears a near relation to common barratry; being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it.

11. *When is maintenance not an offense?*—135.

Where a man maintains the suit of his near kinsman, servant, or poor neighbor, out of charity and compassion.

12. *What, by common law, was the punishment of maintenance?*—135.

Fine and imprisonment.

13. *What is champerty?*—135.

Champerty, *campi partitio*, is a species of maintenance, and punished in the same manner; being a bargain with a plaintiff or defendant, *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense.

14. *How may a conspiracy to indict an innocent man of felony be punished?*—136, 137.

A conspiracy to indict an innocent man of felony, falsely and maliciously, who is accordingly indicted and acquitted, is an abuse and perversion of public justice, for which the party injured may either have a civil action, by writ of conspiracy, or the conspirators may be indicted at the suit of the king.

15. *How is perjury defined?*—137.

It is defined to be a crime committed when a lawful oath is administered, in some judicial proceeding, to a person who swears wilfully, absolutely, and falsely, in a matter material to the issue or point in question.

16. *What is subornation of perjury?*—137, 138.

Subornation of perjury is the offense of procuring another to take such false oath as constitutes perjury in the principal.

17. *What is the punishment of perjury and subornation of perjury?*—138.

The punishment of both, at common law, has been various; anciently it was death; afterward banishment or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony.

18. *What is bribery?*—139.

Bribery is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behavior in his office.

19. *In what instance did the Roman law tacitly encourage the practice of bribery?*—139.

In allowing the magistrates to receive small presents, provided they did not, in the whole, exceed a hundred crowns in the year.

20. *How is the offense of taking bribes, in inferior officers, punished?*—140.

With fine and imprisonment.

21. *How is the offense of offering a bribe, though not taken, punished?*—140.

With fine and imprisonment.

22. *How is the offense of taking bribes by judges looked upon?*—140.

It hath always been looked upon as so heinous an offense, that the chief justice, Thorpe, was hanged for it in the reign of Edward the Third.

23. *How is embracery punished?*—140.

The punishment for the person embracing is by fine and imprisonment; and for the juror so embraced, if it be by taking

money, the punishment is, by statute, perpetual infamy, imprisonment for a year, and forfeiture of tenfold the value.

24. *How was the false verdict of jurors considered?*—140.

Whether occasioned by embracery, or not, it was anciently considered as criminal, and punished by attaint.

25. *How is the negligence of public officers, as sheriffs, coroners, constables, and the like, punishable?*—140.

By fine; and in very notorious cases, by forfeiture of the offender's office if it be a beneficial one.

26. *How is the oppression of officers punished?*—141.

The oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the color of their office, when prosecuted, either by impeachment in parliament, or by information in the court of king's bench, (according to the rank of the offenders,) is sure to be severely punished with forfeiture of their offices (either consequential or immediate), fines, imprisonment, or other discretionary censure regulated by the nature and aggravations of the offense committed.

27. *What is the punishment for the offense of extortion?*—141.

The punishment is fine and imprisonment, and sometimes a forfeiture of the office.

CHAPTER XI.

OF OFFENSES AGAINST THE PUBLIC PEACE.

1. *Of what species are offenses against the public peace?*—142.

Offenses against the public peace are either such as are an actual breach of the peace, or constructively so, by tending to make others break it. Both of these species are, also, either felonious, or not felonious.

2. *What are felonious breaches of the peace?*—142–153.

They are, by statute: 1. Riotous assembling; 2. Hunting in the night; 3. Threatening letters; 4. Destroying flood-gates, &c., on navigable rivers. The following are merely misdemeanors: 5. Affrays; 6. Riots, routs and unlawful assemblies; 7. Tumultuous petitioning; 8. Forcible entry or detainer; 9. Going armed with weapons; 10. Spreading false news; 11. False prophesying; 12. Challenges to fight; 13. Libels.

3. *What is forcible entry or detainer?*—148.

Violently taking or keeping possession of lands and tenements, with menaces, force, and arms, and without the authority of law.

4. *How is riding or going armed with dangerous or unusual weapons a crime?*—149.

It is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by the statute of Northampton, 2 Edward III., c. 3, upon pain of forfeiture of the arms, and imprisonment during the king's pleasure.

5. *What libels tend to the breach of the public peace?*—150.

Malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, or ridicule.

6. *What is publication of a libel, in the eye of the law?*—151.

The communication of the libel to any one person.

CHAPTER XII.

OF OFFENSES AGAINST PUBLIC TRADE.

1. *Of what two degrees are offenses against public trade?*—154.

They are either felonious, or not felonious.

2. *What are the felonious offenses against public trade?*—154-160.

They are: 1. Owling. 2. Smuggling. 3. Fraudulent bankruptcy. 4. Usury. 5. Cheating. 6. Forestalling. 7. Regrating. 8. Engrossing. 9. Monopolies. 10. Exercising a trade without an apprenticeship. 11. Transporting and seducing our artists to settle abroad.

3. *What is owling?*—154.

Owling, so called from its being usually carried on in the night, is the offense of transporting wool or sheep out of this kingdom, to the detriment of its staple manufacture.

4. *What is smuggling?*—154, 155.

The offense of importing goods without paying the duties imposed thereon.

5. *What is the penalty for usury?*—157.

Contracts for more than legal interest are totally void.

6. *What is regrating?*—158.

It is, by statute, the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place; for this enhances the price of provisions.

7. *What is engrossing?*—158.

The getting into one's possession, or buying up, large quantities of corn, or other dead victuals, with intent to sell them again.

8. *What are monopolies?*—159.

They are much the same offense in other branches of trade that engrossing is in provisions.

9. *Why was transporting and seducing artists to settle out of England forbidden?*—160.

To prevent the destruction of home manufactures.

CHAPTER XIII.

OF OFFENSES AGAINST THE PUBLIC HEALTH, AND THE PUBLIC POLICE OR ECONOMY.

1. *What are the offenses against the public health of the nation?*—161, 162.

They are two: 1. Spreading the plague, which is a felony. 2. Selling unwholesome provisions.

2. *What is meant by the public police and economy?*—162.

The due regulation and domestic order of the kingdom, whereby the individuals of the state, like the members of a well-governed family, are bound to conform in their general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.

3. *Is this head of offenses miscellaneous?*—162.

Yes, very miscellaneous; as it comprises all such crimes as especially affect public society, and are not comprehended under the four species heretofore treated of.

4. *What are the offenses against the public police and economy?*—162-174.

They are: 1. Clandestine marriages. 2. Bigamy. 3. Idle soldiers and mariners, or persons pretending so to be, wandering about the realm. 4. Outlandish persons, calling themselves

Egyptians, or Gipsies. 5. Common nuisances. 6. Idleness. 7. Luxury and extravagant expenses. 8. Gaming. 9. Destroying game.

5. *What are common nuisances?*—167, 168.

Common nuisances are such inconvenient or troublesome offenses as annoy the whole community in general, and therefore are indictable only, and not actionable. Of this nature are: 1. Annoyances to highways, bridges, rivers, &c. 2. Offensive trades, &c. 3. Disorderly houses. 4. Lotteries. 5. The making and selling fireworks, or throwing them about. 6. Eaves-droppers. 7. Common scolds.

6. *What if inns refuse to entertain a traveler, without a very sufficient reason?*—167.

They may be indicted, suppressed, and the inn-keepers fined

7. *How are eaves-droppers punishable?*—168.

By fine, and finding sureties for their good behavior.

8. *Into what classes are idle persons and vagrants divided?*—169.

The statute 17 George II., c. 5, divides them into three classes: 1. Idle and disorderly persons. 2. Rogues and vagabonds. 3. Incorrigible rogues.

CHAPTER XIV.

OF HOMICIDE.

1. *Of what three kinds are crimes and misdemeanors which, in a more peculiar manner, affect and injure individuals, or private subjects?*—177.

They are principally of three kinds: injuries against their persons, their habitations, and their property.

2. *Of crimes injurious to the persons of private subjects, what is the principal and most important?*—177.

The offense of taking away life, or homicide.

3. *Of what kinds is homicide?*—177, 178.

Justifiable, excusable, and felonious. The first has no share of guilt at all; the second very little; but the third is the highest crime against the law of nature that man is capable of committing.

4. *Of what kinds is justifiable homicide?*—178.

It is of divers kinds: 1. Homicide owing to some unavoidable necessity; 2. Homicide committed for the advancement of public justice; 3. Homicide committed to prevent crime.

5. *When is homicide justifiable, as of necessity?*—178, 179.

When it is owing to some unavoidable necessity, without any will, intention, or desire, and without any inadvertence or negligence in the party killing, and therefore without any shadow of blame; as, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death. This is an act of necessity and even of civil duty.

6. *What if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly?*—178.

The judge is guilty of murder.

7. *What if an officer beheads one who is adjudged to be hanged, or* vice versa?—179.

It is murder.

8. *Of what kinds are justifiable homicides committed for the advancement of public justice?*—179, 180.

Of six kinds: 1. When an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him.

2. If an officer, or any private person, attempts to take another charged with felony, and is resisted; and, in the endeavor to take him, kills him.

3. In case of a riot or rebellious assembly, the officers endeavoring to disperse the mob are justifiable in killing them, both at common law and by statute.

4. Where a prisoner in a jail, or going to a jail, assaults the jailer or officer, and he in his defense kills him.

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3. In case of a riot or rebellious assembly, the officers endeavoring to disperse the mob are justifiable in killing them, both at common law and by statute.

4. Where a prisoner in a jail, or going to a jail, assaults the jailer or officer, and he in his defense kills him.

5. If trespassers in forests, parks, chases, or warrens, would not surrender themselves to the keeper they might be slain.

6. If the champions in a trial by battel killed either of them the other.

9. *In the first five of these cases what necessity must there be on the officer's side?*—180.

Absolute necessity.

10. *To prevent what crime is homicide justifiable?*—180.

Any forcible and atrocious crime; as if any person attempts a robbery or murder of another, or attempts to break open, or burn a house in the night time, and shall be killed in such attempt, the slayer shall be acquitted and discharged.

11. *Does this reach to any crime unaccompanied with force?*—180.

It does not: it does not reach to the offense of picking pockets, or to the breaking open of any house in the daytime, unless it carries with it an attempt of robbery also.

12. *When was homicide justifiable, by the Jewish law?*—181.

The Jewish law, which punished no theft with death, makes homicide justifiable only in case of nocturnal house-breaking: "If a thief be found breaking up, and he be smitten that he die, no blood shall be shed for him; but if the sun be risen upon him, there shall blood be shed for him, for he should have made full restitution." (*Exod.* xxii. 2.)

13. *What was the law at Athens, as to theft by night?*—181.

It was lawful to kill the criminal, if taken in the fact.

14. *What was the Roman law of the twelve tables in regard to thieves?*—181.

That a thief might be slain by night with impunity; or even by day, if he armed himself with any dangerous weapon.

15. *Did the Roman and Jewish laws justify homicide when committed in defence of chastity?*—181.

Yes; when committed in defense of the chastity either of

one's self or relations; and so, also, according to Selden, stood the law in the Jewish republic.

16. *When does the English law justify homicide in defence of chastity?*—181.

It justifies a woman killing one who attempts to ravish her; and so, too, the husband or father may justify in killing a man who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other.

17. *What principle runs through all laws, as to preventing crimes by homicide?*—181.

The one uniform principle that runs though our own, and all other laws, seems to be this: that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting.

18. *What doctrine does Mr. Locke hold on this subject?*—181.

"That all manner of force, without right, upon a man's person puts him in a state of war with the aggressor; and, of consequence, that, being in such a state of war, he may lawfully kill him that puts him under this unnatural restraint."

19. *Will the law of England suffer with impunity any crime to be prevented by death?*—182.

It will not; unless the crime, if committed, would also be punished by death.

20. *Wherein does excusable differ from justifiable homicide?*—182.

In justifiable homicide the slayer is in no kind of fault whatsoever, not in the minutest degree; but that is not quite the case in excusable homicide, the very name whereof imports some fault, some error or omission; so trivial, however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment.

21. *Of what sorts is excusable homicide?*—182.

Excusable homicide is either *per infortunium*, by misadventure; or *se defendendo*, upon a principle of self-preservation.

22. *When does homicide by misadventure happen?*—182.

Where a man, doing a lawful act, without any intention of hurt, unfortunately kills another; where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure, for the act of correction is lawful; but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases murder; for the act of immoderate correction is unlawful.

23. *Where one whips another's horse, whereby it runs over a child and kills him, what offense is it in the rider; what in the person who whipped the horse?*—183.

It is held to be accidental in the rider, for he has done nothing unlawful; but manslaughter in the person who whipped the horse, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence.

24. *If death ensues in consequence of an idle, dangerous, and unlawful sport, what offense is it?*—183.

In general, it is held to be manslaughter, and not misadventure.

25. *When is homicide in self-defense excusable?*—184.

Defending one's self upon a sudden affray, is excusable, rather than justifiable. Chance-medley is such killing as happens in self-defense upon a sudden rencounter. To excuse homicide by the plea of self-defense, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.

26. *Does this natural right of self-defense imply a right of attacking?*—184.

It does not; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice.

27. *What is the true criterion between homicide upon chance-medley, in self-defense, and manslaughter in the proper legal sense of the word?*—184.

It seems to be this: when both parties are actually combatting at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer hath not begun the fight, or (having begun) endeavors to decline any further struggle, and afterward, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defense.

28. *How far does the law require the person assaulted to retreat before he turns upon the assailant?*—185.

As far as he conveniently or safely can, to avoid the violence of the assault; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood.

29. *What if the assault be so fierce as not to allow the party assaulted to yield a step?*—185.

If he may not so yield without manifest danger of his life, or enormous bodily harm, he may kill his assailant instantly.

30. *If two persons, A. and B., agree to fight a duel, and A. gives the first onset, and B. retreats as far as he safely can, and then kills A.; is it murder in B.?*—185.

It is murder, because of the previous malice and concerted design.

31. *What if A., upon a sudden quarrel, assaults B. first, and upon B.'s returning the assault, A. really and* bona fide *flees; and, being driven to the wall, turns again upon B. and kills him?*—185, 186.

This may be *se defendendo*, according to some of our writers; though others have thought this opinion too favorable, inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault.

32. *What civil and natural relations are comprehended under this excuse of self-defense?*—186.

The principal civil and natural relations are comprehended; therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary defense of each other

respectively, are excused ; the act of the relation assisting being construed the same as the act of the party himself.

33. *Is there not one species of homicide* se defendendo, *where the party slain is equally innocent as he who occasions his death?*—186

Yes ; where one of them must inevitably perish ; as where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrust the other from it, whereby he is drowned. This homicide is excusable through unavoidable necessity, and the principle of self-defense.

34. *Wherein do the two species of homicide, by misadventure and self-defense, agree?*—186.

They agree in their blame and punishment ; for the law sets so high a value upon the life of a man, that it always intends some misbehavior in the person who takes it away, unless by the command or express permission of the law.

35. *What does the law always presume in homicide by misadventure?*—186.

Negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it ; who, therefore, is not altogether faultless.

36. *What does Lord Bacon entitle that necessity which excuses a man who kills another* se defendendo?—187.

He entitles it *necessitas culpabilis*, and thereby distinguishes it from the necessity of killing a thief, or a malefactor.

37. *In case of homicide* se defendendo, *what does the law intend?*—187.

That the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed ; and since in quarrels, both parties may be, and usually are, in some fault, and it scarce can be tried who was originally in the wrong, the law will not hold the survivor entirely guiltless.

38. *What further view may our law have in ordaining, that he who slays his neighbor, without an express warrant from the law so to do, shall in no case be absolutely free from guilt?*—187.

It may have a further view to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment.

39. *Is the English law singular in this respect?*—187.

It is not. Even the slaughter of enemies required, among the Jews, a solemn purgation ; which implies that the death of a man, however it happens, will leave some stain behind it. And the Mosaical law appointed certain cities of refuge for him "who killed his neighbor unawares ; as if a man goeth into the wood with his neighbor to hew wood, and his hand fetcheth a stroke with the axe to cut down a tree, and the head slippeth from the helve, and lighteth upon his neighbor that he die, he shall flee unto one of these cities and live." But it seems he was not held wholly blameless, any more than in the English law ; since the avenger of blood might slay him before he reached his asylum, or if he afterward stirred out of it till the death of the high priest. In the imperial law, likewise, casual homicide was excused, by the indulgence of the emperor, signed with his own sign-manual, "*annotatione principis:*" otherwise the death of a man, however committed, was in some degree punishable. Among the Greeks, homicide by misfortune was expiated by voluntary banishment for a year. In Saxony, a fine is to be paid to the kindred of the slain ; which, also, among the Western Goths, was little inferior to that of voluntary homicide ; and in France, no person was absolved, in cases of this nature, without a largess to the poor, and the charge of certain masses for the soul of the party killed.

40. *What is the penalty for homicide?*—188.

In cases where the death has plainly happened by misadventure, or in self-defense, the judges will usually permit, if not direct, a general verdict of acquittal.

41. *What is felonious homicide?*—188.

It is the killing a human creature, of any age or sex, without justification or excuse. This may be done by killing one's self or another man.

42. *Who is a* felo de se?—189.

He that deliberately puts an end to his own existence, or

commits any unlawful malicious act, the consequence of which is his own death.

43. *What, by the Athenian law, was the punishment for attempting self-murder?*—189.

Cutting off the hand which committed the desperate deed.

44. *How does the law of England regard self-murder?*—189.

It wisely and religiously considers that no man hath power to destroy life but by commission from God, the author of it; and, as the suicide is guilty of a double offense, one spiritual, in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects, the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self.

45. *Does self-murder admit of accessaries before the fact?*—189.

It does, as well as other felonies, admit of such accessaries, for if one persuade another to kill himself, and he does so, the adviser is guilty of murder.

46. *When is* felo de se *a crime, and when not?*—189, 190.

The party must be of years of discretion, and in his right mind, else it is no crime. The law judges that every melancholy or hypochondriac fit does not deprive the man of the capacity of discerning right from wrong, which is necessary to form a legal excuse; and, therefore, if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as any other man.

47. *How is self-murder punished?*—190.

Human laws can only act upon what the *felo de se* has left behind him, his reputation and fortune; on the former, by an ignominious burial in the highway, with a stake driven through his body; on the latter, by a forfeiture of all his goods and chattels to the king.

48. *What motive has the law in thus punishing self-murder?*—190.

It hopes that care for either his own reputation, or the welfare of his family, would be some motive to restrain one from so desperate and wicked an act.

49. *To what time has the forfeiture, in case of self-murder, relation back?*—190.

To the time of the act done in the felon's life time, which was the cause of his death; as if husband and wife be possessed jointly of a term of years in land, and the husband drowns himself; the land shall be forfeited to the king, because the wife's title by survivorship could not accrue till her husband's death.

50. *What other species of criminal homicide is there?*—190.

That of killing another man.

51. *How does the degree of guilt in killing another divide the offense?*—190.

Into manslaughter, which, when voluntary, arises from the sudden heat of the passions; and murder, which arises from the wickedness of the heart.

52. *How is manslaughter defined?*—191.

The unlawful killing of another without malice, either express or implied. It may be either voluntary, upon a sudden heat; or involuntary, but in the commission of some unlawful act.

53. *Can there be accessaries before the fact, in manslaughter?*—191.

There can be no accessaries before the fact, because it must be done without premeditation.

54. *When is manslaughter voluntary?*—191.

If upon a sudden quarrel two persons fight, and one of them kills the other, this is voluntary manslaughter; and so it is if they, upon such an occasion, go out and fight in a field, for this is one continued act of passion. But, in every case of homicide upon provocation, if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterward kills the other, this is deliberate revenge, and not heat of blood, and amounts to murder.

55. *What if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the agressor?*—191.

This is not excusable *se defendendo*, since there is no absolute necessity for it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter.

56. *What if a man takes another in the act of adultery with his wife?*—191.

If a man takes another in the act of adultery with his wife, and kills him directly upon the spot; though this was allowed by the laws of Solon, as likewise by the Roman civil law (if the adulterer was found in the husband's own house), and also among the ancient Goths; yet, in England, it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape, but it is manslaughter, yet in the lowest degree.

57. *In what does voluntary manslaughter, on a sudden provocation, differ from excusable homicide* se defendendo?—192.

In this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other, no necessity at all, it being only a sudden act of revenge.

58. *In what does involuntary manslaughter differ from homicide excusable by misadventure?*—192.

Misadventure always happens in consequence of a lawful, involuntary manslaughter in consequence of an unlawful act.

59. *What if a person does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection, and thereby kills a man?*—192.

This may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done.

60. *What kind of homicide is it when an involuntary killing happens in consequence of an unlawful act?*—192.

In general it will be either murder or manslaughter, according to the nature of the act which occasioned it

61. *Under what circumstances will involuntary killing amount to murder?*—192, 193.

If it be committed in the prosecution of a felonious intent, or in its consequences naturally tend to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter.

62. *What is the punishment of manslaughter?*—193.

The crime amounts to felony, but within the benefit of clergy, and the offender shall be burned in the hand, and forfeit all his goods and chattels.

63. *What species of manslaughter is punishable as murder, the benefit of clergy being taken away from it by statute?*—193.

The offense of mortally stabbing another, though done upon sudden provocation.

64. *Is the king excluded, in any case, from the power of pardoning murder?*—194.

The English law has provided one course of prosecution (that by appeal) wherein the king himself is excluded from the power of pardoning murder.

65. *How is murder defined?*—195.

Murder is thus defined, or rather described, by Sir Edward Coke: "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied.

66. *How is a bare assault with intent to kill regarded?*—196.

Formerly it was held to be murder; now it is only a great misdemeanor.

67. *If a person be indicted for one species of killing, can he be convicted by evidence of a totally different species of death?*—196.

If a person be indicted for one species of killing, as by poisoning, he cannot be convicted by evidence of a totally different species of death, as by shooting with a pistol, or starving. But

where they only differ in circumstance, as if a wound be alleged to be given with a sword, and it proves to have arisen from a staff, an axe, or a hatchet, this difference is immaterial.

68. *Of all species of deaths, which is considered, by the law, the most detestable?*—196.

That of poison; because it can, of all others, be the least prevented either by manhood or forethought.

69. *May a man be guilty of murder, although no stroke be struck by himself, and no killing was primarily intended?*—196.

If a man does such an act of which the probable consequence may be, and eventually is death, such killing may be murder.

70. *Within what time after the stroke received, or cause of death administered, must the party die, in order to make the killing murder?*—197.

Within a year and a day.

71. *When is it murder to kill a child in its mother's womb?*—198.

If the child be born alive, and dies by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.

72. *What is the grand criterion which, now, distinguishes murder from other killing?*—198.

The killing must be with malice aforethought to make it the crime of murder.

73. *Of what kinds is this malice aforethought, or prepense?*—198, 199.

It may be either express, or implied in law.

74. *What constitutes malice express?*—199, 200.

Express malice is when one, with a sedate, deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention. In many cases where no malice is expressed, the law will imply it; as where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved.

75. *Who are guilty of murder, in deliberate duelling?*—199.

The law has justly fixed the crime and punishment of murder on the parties, and on their seconds also.

76. *If two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed, and one of them kills a man; in whom is it murder?*—200.

In them all, because of the unlawful act, the *malitia præcogitata*, or evil intended beforehand.

77. *Can an affront, by words or gestures only, be a sufficient provocation to excuse or extenuate such acts of violence as manifestly endanger the life of another?*—200.

No, it cannot.

78. *If the person so provoked had unfortunately killed the other, by beating him in such a manner as showed only an intent to chastise and not to kill him, what would the law adjudge?*—200.

The law so far considers the provocation, as to adjudge it only manslaughter, and not murder.

79. *What if one intends to do another felony, and undesignedly kills a man?*—201.

It is murder.

80. *May it be taken for a general rule that all homicide is malicious, and of course amounts to murder?*—201.

Yes, it may; unless where the homicide is justified by the command or permission of the law; excused on the account of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. For all homicide is presumed to be malicious until the contrary appeareth upon evidence

81. *What is the punishment of murder?*—201.

Death.

82. *How is the crime of parricide regarded by the law of England?*—202, 203.

Parricide, or the murder of one's parents or children, is treated no otherwise than as simple murder.

83. *What is petit treason* ?*—203.

Parva proditio, or petit treason, is nothing else but an aggravated degree of murder; although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treason.

84. *In what ways may petit treason happen ?*—203.

In three ways: by a servant killing his master, a wife her husband, or an ecclesiastical person his superior, to whom he or she owes faith and obedience.

85. *What crime is that of the servant who kills his master, whom he has left, upon a grudge conceived against him during his service?* 203.

Petit treason; for the traitorous intention was hatched while the relation subsisted between them, and this is only an execution of that intention.

86. *If a wife be divorced* a mensa et thoro, *and she killed her divorced husband, what was her crime?*—203.

She was guilty of petit treason, as the *vinculum matrimonii* still subsisted.

CHAPTER XV.

OF OFFENSES AGAINST THE PERSONS OF INDIVIDUALS.

1. *Of what degrees of guilt are offenses affecting the security of the person of a private subject while living ?*—205.

Of these, some are felonious, and in their nature capital; others are simple misdemeanors, and visited with a lighter punishment.

* The distinction between petit treason and murder was abolished by 9 George IV., c. 31, s. 2.

2. *What are the felonies ?*—205–215.

The felonious offenses more immediately against the personal security of the subject, are: 1. Mayhem. 2. Forcible abduction and marriage. 3. Rape. 4. The crime against nature.

3. *What is the crime of rape ?*—210.

The carnal knowledge of a woman forcibly, and against her will.

4. *Who is presumed by law incapable to commit a rape?*—212.

A male infant under the age of fourteen years.

5. *May rape be committed upon a concubine or harlot ?*—212, 213.

The law of England holds it to be felony to force even a concubine or harlot, because the woman may have forsaken that unlawful course of life.

6. *What is the punishment of the crime against nature ?*—216.

It is capital.

7. *What are the inferior offenses or misdemeanors against the personal security of the subject ?*—216.

They are: 1. Assault. 2. Battery. 3. Wounding. 4. False imprisonment. 5. Kidnapping.

8. *How are assaults, batteries, and wounding punishable ?*—216, 217.

As private wrongs, or civil injuries, a satisfaction or remedy is given to the party aggrieved; but, as a breach of the king's peace, or affront to his government, and a damage done to his subjects, they are also indictable and punishable with fine and imprisonment; or with other ignominious corporeal penalties, where they are committed with any very atrocious design, as in case of an assault with intent to murder.

9. *What species of battery is there more atrocious and penal than the rest ?*—217.

The beating of a clerk in orders, or clergyman.

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9. *What species of battery is there more atrocious and penal than the rest ?*—217.

The beating of a clerk in orders, or clergyman.

10. *What are its penalties?*—217, 218.

It is subject to three kinds of prosecution, all of which may be pursued for one and the same offense: an indictment for the assault and battery; a civil action for the special damage sustained; and a suit in the ecclesiastical court.

CHAPTER XVI.

OF OFFENSES AGAINST THE HABITATIONS OF INDIVIDUALS.

1. *What are the offenses that more immediately affect the habitations of individuals or private subjects?*—220.

Two: Arson and burglary.

2. *What is arson?*—220.

Arson is the malicious and wilful burning of the house or outhouse of another man.

3. *Why is arson much more pernicious to the public than simple theft?*—220.

Because, first, it is an offense against that right of habitation, which is acquired by the law of nature as well as by the laws of society; next, because of the terror and confusion that necessarily attend it; and, lastly, because in simple theft the thing stolen only changes its master, but still remains *in esse* for the benefit of the public, whereas by burning the very substance is absolutely destroyed.

4. *Is not arson frequently more destructive than murder itself?*—220.

It is; since murder, atrocious as it is, seldom extends beyond the felonious act designed; whereas fire too frequently involves in the common calamity persons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies.

5. *What, by the civil law, is the punishment of arson?*—220.

It punishes with death such as maliciously set fire to houses in towns, and contiguous to others, but is more merciful to such as only fire a cottage, or house, standing by itself.

6. *What kind of house may be the subject of arson?*—221.

Not only the bare dwelling-house, but all outhouses, that are parcels thereof, though not contiguous thereto, nor under the same roof, as barns and stables.

7. *When is willfully setting fire to one's own house arson?*—221.

It is arson, provided one's neighbor's house is thereby also burned; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's.

8. *What if a landlord or reversioner sets fire to his own house, of which another is in possession, under a lease from himself, or from those whose estate he hath?*—221.

It shall be accounted arson; for during the lease the house is the property of the tenant.

9. *What shall be said to be a burning, so as to amount to arson?*—222.

The burning and consuming of any part is sufficient, though the fire be afterward extinguished.

10. *How is arson punished?*—222.

With death, as a capital felony.

11. *How was arson punished in the reign of Edward the First?*—222.

With death; and this sentence was executed by a kind of *lex talionis*, for the incendiaries were burned to death.

12. *How was arson punished by the Gothic constitutions?*—222.

In like manner, with death by burning.

13. *Can outer doors be broken open to execute process, in criminal cases?*—223.

Yes; because the public safety supersedes the private.

14. *How is a burglar defined by Sir Edward Coke?*—224.

"He that by night breaketh and entereth into a mansion-house, with intent to commit a felony."

15. *In this definition what things are to be considered?*—224.

Four things: the time, the place, the manner, and the intent.

16. *Can burglary be committed by day?*—224.

It cannot: the time must be by night, and not by day; for in the day time there is no burglary.

17. *In respect of burglary, what is reckoned night, and what day?*—224.

Anciently the day was accounted to begin only at sun-rising, and to end immediately upon sunset: but the better opinion seems to be, that if there be daylight, or *crepusculum*, enough, begun or left, to discern a man's face withal, it is no burglary.

18. *Does the same rule extend to moonlight?*—224.

It does not; for then many midnight burglaries would go unpunished; and, besides, the malignity of the offense does not so properly arise from its being done in the dark, as at the dead of night, when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenseless.

19. *May burglary be committed in a barn, stable, or warehouse?*—225.

It may not, if they are distant from the mansion or dwelling-house; but if they be parcel of the mansion-house, and within the same common fence, though not under the same roof, or contiguous, a burglary may be committed therein.

20. *May burglary be committed in a college or an inn of court?*—225.

Yes; for a chamber in a college or an inn of court, where each inhabitant hath a distinct property, is, to all other purposes as well as this, the mansion-house of the owner.

21. *Is the house of a corporation, inhabited in separate apartments by the officers of the body corporate, the mansion-house of the corporation, or of the respective officers?*—225.

It is the mansion-house of the corporation.

22. *If one hires a shop, parcel of another man's house, and work or trade in it, but never lie there, can burglary be committed therein?*—226.

No; it is no dwelling-house, for by the lease it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part.

23. *Can burglary be committed in a tent or booth erected in a market or fair?*—226.

It cannot; though the owner may lodge therein; for the law regards thus highly nothing but permanent edifices; a house or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstances.

24. *What is required to complete burglary?*—226.

There must be both a breaking and an entry to complete it.

25. *Need the breaking be done, and the entry made, at one time?*—226.

They need not; for if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars.

26. *What constitutes a breaking in case of burglary?*—226.

There must, in general, be an actual breaking; not a mere legal *clausum fregit* (by leaping over invisible ideal boundaries, which may constitute a civil trespass), but a substantial and forcible irruption; as, at least, by breaking or taking out the glass of, or otherwise opening, a window; picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided.

27. *If a person leaves his doors or windows open, and another enters therein, is it burglary?*—226.

It is not; yet, if he afterward unlocks an inner or chamber door it is so.

28. *Is coming down the chimney a burglarious entry?*—226.

It is; for that is as much closed as the nature of things will permit.

29. *What is sufficient to constitute burglarious entry?*—227.

Any the least degree of it with any part of the body, or with an instrument held in the hand, is sufficient; as to step over the threshold, to put a hand or a hook in at the window to draw out goods, or a pistol to demand one's money.

30. *What as to the intent of burglary?*—227.

The breaking and entry must be with a felonious intent, otherwise it is only a trespass.

31. *How is burglary punished?*—228.

It is felony at common law, but within the benefit of clergy. The statutes, however, take away clergy from the principals, and from all abettors and accessaries before the fact.

CHAPTER XVII.

OF OFFENSES AGAINST PRIVATE PROPERTY.

1. *What are the offenses against private subjects which more immediately affect their property?*—229.

Three: 1. Larceny, or theft. 2. Malicious mischief. 3. Forgery. Of which, the two first are attended with a breach of the peace; the latter, though equally injurious to the rights of property, is attended with no act of violence.

2. *Into what two sorts is larceny distinguished by the law?*—229

Into simple larceny, or plain theft unaccompanied with any

other atrocious circumstance, and mixed or compound larceny, which also includes in it the aggravation of a taking from one's house or person.

3. *What is simple larceny?*—229.

The felonious taking and carrying away of the personal goods of another.

4. *When is simple larceny grand, and when petit larceny?*—229.

If the value of the thing stolen be above twelve pence, it is called grand larceny; if of, or under, that value, it is called petit larceny.

5. *Does the taking, in larceny, imply the consent of the owner of the goods to be wanting?*—230.

It does.

6. *Can any delivery of the goods from the owner to the offender, in trust, ground a larceny?*—230.

It cannot.

7. *How may a carrier of goods commit the offense of larceny?*—230.

If he opens a bale or pack of goods, or pierces a vessel of wine, and takes part thereof away; or if he carries it to the place appointed, and afterward takes away the whole.

8. *What is the offense of embezzling goods, of which the offender had not the possession, but only the care and oversight?*—231.

It is felony at the common law.

9. *Under what circumstances may a man be guilty of felony in taking his own goods?*—231.

By stealing them from a pawnbroker, or any one to whom he hath delivered and intrusted them, with the intent to charge such bailee with the value.

10. *What is a sufficient carrying away of goods to constitute a larceny?*—231.

A bare removal from the place in which he found the goods.

though the thief does not quite make off with them, is a sufficient asportation.

11. *As to the taking and carrying away, what must be established to constitute larceny?*—232.

That it was done *animo furandi;* or, as the civil law expresses it, *lucri causâ.*

12. *Whom does this requisite excuse, and whom indemnify?*—232.

Besides excusing those who labor under incapacities of mind or will, it indemnifies mere trespassers, and other petty offenders.

13. *What is the ordinary criterion of a felonious intent?*—232.

Where the party doth it clandestinely; or, being charged with the fact, denies it.

14. *Is this the only criterion of criminality?*—232.

By no means; for in cases that may amount to larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent, or *animum furandi;* wherefore, they must be left to the due and attentive consideration of the court and jury.

15. *Of what kind of goods only may larceny be committed?*—232.

Of the personal goods of another.

16. *Could larceny, at common law, be committed of things that adhere to the freehold?*—232.

No larceny could be committed of things that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house. But if the thief severs them at one time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid, and comes again at another time and takes them away, it is larceny. And so it is, if the owner, or any one else, has severed them.

17. *Could larceny, at common law, be committed of bills, bonds, and notes?*—234.

These, which concern mere choses in action, being goods of

no intrinsic value, and not importing any property in possession of the person from whom they are taken, were held not to be such goods whereof larceny might be committed; but, by statute, they are now put upon the same footing with respect to larcenies, as the money they were meant to secure.

18. *Can larceny be committed as to goods of which the owner is unknown?*—236.

If there be a property in them it may; and an indictment will lie for stealing the goods of a person unknown.

19. *Might a prosecution for theft be carried on without the intervention of the owner?*—236.

It might.

20. *Is it felony to steal a shroud out of a grave?*—236.

Yes; it is the property of those who buried the deceased.

21. *Is it felony to steal the corpse itself?*—236.

It is not, for it has no owner, unless some of the grave-clothes be stolen with it.

22. *What was the law of the Franks in this respect?*—236.

It directed, that a person who had dug a corpse out of the ground in order to strip it, should be banished from society, and no one suffered to relieve his wants, till the relations of the deceased consented to his re-admission.

23. *How was theft punished by the Jewish law?*—236.

Only with a pecuniary fine, and satisfaction to the party injured.

24. *How by the civil law?*—236.

Till some very late constitutions, we never find the punishment capital.

25. *How by the laws of Draco?*—236.

With death; but Solon afterward changed the penalty to a pecuniary mulct, which remained the Attic law, in general, except that once, in a time of dearth, it was made capital to break into a garden and steal figs; but this law, and the

informers against the offense, grew so odious, that from them all malicious informers were styled sycophants.

26. *What seems to be the natural punishment for injuries to property?*—236, 237.

The loss of the offender's own property; which ought to be universally the case, were all men's fortunes equal. But as those who have no property themselves, are generally the most ready to attack the property of others, it has been found necessary, instead of a pecuniary, to substitute a corporeal punishment; yet how far this corporeal punishment ought to extend is what has occasioned the doubt. Sir Thomas More and the Marquis Beccaria, at the distance of more than two centuries from each other, have proposed that kind of corporeal punishment which approaches the nearest to a pecuniary satisfaction, *viz.*, a temporary imprisonment, with an obligation to labor, first for the party robbed, and afterward for the public, in works of the most slavish kind; in order to oblige the offender to repair, by his industry and diligence, the depredations he has committed upon private property and public order. But, notwithstanding all the remonstrances of speculative politicians and moralists, the punishment of theft still continues, throughout the greatest part of Europe, to be capital; and Puffendorf, together with Sir Matthew Hale, are of opinion that this must always be referred to the prudence of the legislature, who are to judge, say they, when crimes are become so enormous as to require such sanguinary restrictions. Yet both of these writers agree that such punishment should be cautiously inflicted, and never without the utmost necessity.

27. *How was theft punished by the ancient Saxon laws?*—237.

With death, if above the value of twelve pence; but the criminal was permitted to redeem his life by a pecuniary ransom; as, among their ancestors the Germans, by a stated number of cattle. But, in the ninth year of Henry the First, this power of redemption was taken away, and all persons guilty of larceny, above the value of twelve pence, were directed to be hanged.

28. *What is mixed, or compound, larceny?*—240.

It is such as has all the properties of simple larceny, but is accompanied with either one or both of the aggravations of a taking from one's house or person.

29. *Is larceny from one's house distinguished from simple larceny, at common law?*—241.

It is not, unless where it is accompanied with the circumstance of breaking the house by night; and then it is burglary.

30. *Of what sorts is larceny from the person?*—242.

It is either by privately stealing, or by open and violent assault, which is usually called robbery.

31. *How is robbery defined?*—243.

Open or violent larceny from the person, or robbery, the *rapina* of the civilians, is the felonious and forcible taking from the person of another of goods, or money, to any value, by violence or putting him in fear.

32. *What are the requisites of robbery?*—243.

1. There must be a taking, otherwise it is no robbery. If the thief, having once taken a purse, returns it, still it is a robbery; and so it is whether the taking be strictly from the person of another, or in his presence only; as, where a robber, by menaces and violence, puts a man in fear, and drives away his sheep or his cattle before his face. But if the taking be not either directly from his person, or in his presence, it is no robbery. 2. It is immaterial of what value the thing taken is; a penny as well as a pound, thus forcibly extorted, makes a robbery. 3. The taking must be by force, or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing.

33. *What is the criterion that distinguishes robbery from other larceny?*—243.

Previous violence, or putting in fear.

34. *What is the malicious mischief which the law considers as a public crime?*—243.

Such as is done, not *animo furandi*, or with an intent of

gaining by another's loss; but either out of a spirit of wanton cruelty, or black and diabolical revenge.

35. *What is forgery, at common law?*—247.

Forgery, or the *crimen falsi*, is the fraudulent making or alteration of a writing, to the prejudice of another man's right.

36. *How was forgery punished by the civil law?*—247.

With deportation or banishment, and sometimes with death.

37. *How is forgery punished by the laws of England?*—247.

At common law, it was punished with fine, imprisonment, and the pillory. In many cases, it was punishable with death, by statute.

CHAPTER XVIII.

OF THE MEANS OF PREVENTING OFFENSES.

1. *Is preventive justice to be preferred to punishing justice?*—251.

It is, upon every principle of reason, of humanity, and of sound policy.

2. *In what does this preventive justice consist?*—252.

It consists in obliging those persons whom there is a probable ground to suspect of future misbehavior, to stipulate with, and to give full assurance to, the public that such offense as is apprehended shall not happen, by finding pledges or securities for keeping the peace, or for their good behavior.

3. *What is, generally, the form of this assurance to the public?*—252.

A recognizance or obligation to the king, with one or more sureties, entered on record, and taken in some court, or by some judicial officer, to keep the peace, or for good behavior.

4. *In a large and extended view of human punishments, what is their object?*—252.

We shall find them all rather calculated to prevent future crimes, than to expiate the past.

5. *Under what heads may all punishments inflicted by temporal laws be classed?*—352.

Under three heads: Such as tend to the amendment of the offender himself; or to deprive him of any power to do future mischief; or to deter others by his example.

6. *In what four ways may a recognizance be discharged?*—254.

Either by the demise of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or, by order of the court; or by the applicant's release or default.

7. *How should femes covert and infants give security to keep the peace?*—254.

By their friends only, for they are incapable of engaging themselves to answer any debt, which is the nature of these recognizances or acknowledgments.

8. *Is a justice of the peace bound to grant surety of the peace?*—255.

He is, when he who demands it will make oath that he is actually under fear of death or bodily harm, and will show that he has just cause to be so. This is called swearing the peace against another.

9. *What follows if the party complained of do not find such sureties as the justice in his discretion shall require?*—255.

He may be immediately committed till he does.

10. *How may a recognizance for keeping the peace be forfeited?*—255.

By any actual violence, or even an assault, or menace, to the person of him who demanded it, if it be a special recognizance; or, if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace.

11. *Will a bare trespass upon the lands and goods of another, which is a ground for a civil action, forfeit a recognizance?*—256.

It will not, unless accompanied with a wilful breach of the peace.

12. *Will mere reproachful words forfeit a recognizance?*—256.

They will not, unless they amount to a challenge to fight; merely reproachful words, as calling a man knave or liar, being looked upon to be merely the effect of unmeaning heat and passion.

CHAPTER XIX.

OF COURTS OF A CRIMINAL JURISDICTION.

1. *What distinction obtains among the several courts of criminal jurisdiction?*—258.

They are either such as are of a public and general jurisdiction, or such as are of a private and special jurisdiction.

2. *Can a man be tried twice, in a criminal way, for the same offense?*—259.

No; especially if acquitted upon the first trial.

3. *What is the high court of parliament?*—259.

The supreme court in the kingdom, not only for the making, but also for the execution of the laws, by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment.

4. *What are the courts of criminal jurisdiction, as designated according to their dignity, beginning with the highest?*—258-275.

They are: 1. The high court of parliament.

2. The court of the lord high steward of Great Britain, for the trial of peers, indicted for treason or felony, or for misprision of either.

3. The court of king's bench.

4. The court of chivalry.

5. The high court of admiralty.

6, 7. The courts of oyer and terminer, and general jail delivery.

8. The court of general quarter sessions.

9. The sheriff's tourn.

10. The court leet.

11. The court of the coroner.

12. The court of the clerk of the market.

Of the preceding courts, the five first named are of public and general jurisdiction; the others of local jurisdiction and confined to particular districts.

5. *In what degree are the criminal courts independent of each other?*—259.

At least, so far as that the sentence of the lowest of them can never be controlled, or reversed, by the highest jurisdiction in the kingdom, unless for error in matter of law, apparent upon the face of the record; though sometimes causes may be removed from one to the other before trial.

6. *What offenders are tried by the high court of parliament?*—259.

Great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment.

7. *What criminal cognizance has the court of admiralty?*—268.

It has cognizance of all crimes and offenses committed either upon the sea or on the coasts, out of the body or extent of any English county.

8. *Before whom are the courts of oyer and terminer and general jail delivery held?*—269.

Before the king's commissioners, among whom are usually two judges of the courts at Westminster.

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CHAPTER XX.

OF SUMMARY CONVICTIONS.

1. *Into what kinds are proceedings in the courts of criminal jurisdiction divisible?*—280.

Two kinds: summary and regular.

2. *What is meant by a summary proceeding?*—280.

Such as is directed by several acts of parliament for the conviction of offenders, and the inflicting of certain penalties created by those acts of parliament.

3. *By whom are all trials of offenses and frauds contrary to the laws of the excise, and other branches of the revenue, inquired into and determined?*—281.

By the commissioners of the respective departments, or by justices of the peace in the country.

4. *Of what sorts are the contempts immemorially punished in the summary way of attachment, by the superior courts of justice?*—283.

They are either direct, or consequential.

5. *What contempts are direct, and what consequential?*—283, 284.

Those are direct which openly insult or resist the powers of the courts, or the persons of the judges who preside there; and those consequential which, without gross insolence or direct opposition, plainly tend to create a universal disregard of their authority.

6. *What are the principal instances, of either sort, that have been usually punishable by attachment?*—284, 285.

They are chiefly of the following kinds: 1. Those committed by inferior judges and magistrates; by acting unjustly, oppressively, or irregularly. 2. Those committed by sheriffs, bailiffs,

jailors, and other officers of the court; by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behavior, or culpable neglect of duty. 3. Those committed by attorneys and solicitors; by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice. 4. Those committed by jurymen in collateral matters relating to the discharge of their office; such as making a default when summoned, refusing to be sworn or to give any verdict, &c. 5. Those committed by witnesses; by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. 6. Those committed by parties to any suit or proceeding before the court; as by disobedience to any rule or order, made in the progress of a cause, by non-payment of costs awarded by the court upon a motion, &c. 7. Those committed by any other persons under the degree of a peer, and even by peers themselves, when enormous and accompanied with violence; such as forcible *rescous* and the like; or when they import a disobedience to the king's great prerogative writs of prohibition, *habeas corpus*, and the rest.

7. *How is the attachment for contempts, by parties to suits and proceedings, to be regarded?*—285.

The attachment for most of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. And, therefore, it has been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by a general act of pardon.

8. *What if the contempt be committed in the face of the court?*—286.

The offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination.

9. *From what results this power, in the supreme courts of justice, to suppress contempts by an immediate attachment of the offender?*—286.

From the first principles of judicial establishments; and it must be an inseparable attendant upon every superior tribunal.

10. *How ancient is the exercise of this power of attachment?*—286.

We find it actually exercised as early as the annals of our law extend.

11. *What is the course of proceeding, as to matters of contempt that arise at a distance?*—286, 287.

The judges either make a rule on the suspected party to show cause why an attachment should not issue against him; or, in very flagrant instances, the attachment issues in the first instance.

12. *For what is the process of attachment intended?*—287.

Merely to bring the party into court.

13. *When there, what follows?*—287.

He must either stand committed, or put in bail, in order to answer on oath to such interrogatories as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt.

14. *What is the nature of these interrogatories?*—287.

They are in the nature of a charge or accusation.

15. *What if any of the interrogatories is improper?*—287.

The defendant may refuse to answer it, and move the court to have it struck out.

16. *What if the party can clear himself of the contempt upon oath?*—287.

He is discharged, but, if perjured, may be prosecuted for the perjury.

17. *What if he confesses the contempt?*—287.

The court will proceed to correct him by fine or imprisonment, or both, and sometimes by a corporeal or infamous punishment.

18. *What if the party wilfully and obstinately refuses to answer the interrogatories of the court, or answers in an evasive manner?*—287.

He is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court.

19. *What if he clears himself by his answers?*—288.

The complaint is totally dismissed.

CHAPTER XXI.

OF ARRESTS.

1. *Under what general heads may the regular and orderly method of proceedings, in the courts of criminal jurisdiction, be distributed?*—289.

They may be distributed under these twelve general heads, (following each other progressively): 1. Arrest.

2. Commitment and bail.
3. Prosecution.
4. Process.
5. Arraignment, and its incidents.
6. Plea and issue.
7. Trial and conviction.
8. Clergy.
9. Judgment, and its consequences.
10. Reversal of judgment.
11. Reprieve or pardon.
12. Execution.

2. *What is an arrest?*—289.

It is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime.

3. *What charge only will justify an arrest?*—289.

Such as will, at least, justify holding the party to bail when taken.

4. *How may an arrest be made?*—289.

In four ways: 1. By warrant. 2. By an officer without warrant. 3. By a private person, also, without warrant. 4. By a hue and cry.

5. *By whom may a warrant be granted?*—289.

In extraordinary cases by the privy council, or secretaries of state; but, ordinarily, by justices of the peace.

6. *In what cases may justices of the peace issue warrants?*—290.

In any cases where they have a jurisdiction over the offense, in order to compel the person accused to appear before them. And this extends to all treasons, felonies, and breaches of the peace; and also to all such offenses as they have power to punish by statute.

7. *How has Sir Edward Coke stated the power of a justice of the peace, in issuing warrants to apprehend for felony?*—290.

That a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found.

8. *What has Sir Matthew Hale maintained upon the same point?*—290.

As the doctrine of Sir Edward Coke would in most cases give a loose to felons to escape without punishment, Sir Matthew Hale has combated it with invincible authority and strength of reason, maintaining, 1. That a justice of the peace has power to issue a warrant to apprehend a person accused of felony, though not yet indicted; and, 2. That he may also issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion.

9. *How is the justice to proceed before issuing a warrant for felony?*—290.

In both cases, as last stated, it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there

is a felony or other crime actually committed, without which no warrant should be granted; as, also, to prove the cause and probability of suspecting the party against whom the warrant is prayed.

10. *What is the proper form of a warrant by a justice of the peace?*—290, 291.

It ought to be under the hand and seal of the justice; should set forth the time and place of making, and the cause for which it is made; and should be directed to the constable, or other peace officer (or, it may be, to any private person by name), requiring him to bring the party either generally before any justice of the peace for the county, or only before the justice who granted it; the warrant in the latter case being called a special warrant.

11. *Is a general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, illegal and void; and why?*—291.

It is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion.

12. *Is a warrant to apprehend all persons guilty of a crime therein specified, a legal warrant?*—291.

It is not; for the point upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. It is, therefore, in fact, no warrant at all, for it will not justify an officer who acts under it; whereas a warrant, properly penned (even though the magistrate who issues it should exceed his jurisdiction), will, by statute, at all events, indemnify the officer who executes the same ministerially.

13. *Where may warrants be executed?*—291, 292.

A warrant from the chief, or other justice of the court of king's bench, extends all over the kingdom, and is teste'd, or dated, England; not of any particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed by a justice of the peace in another, as Middlesex, before it can be executed there.

14. *By what officers may arrests without warrant be executed?*—292.

By, 1. A justice of the peace; 2. The sheriff; 3. The coroner; 4. The constable; 5. Watchmen.

15. *May any private person that is present when a felony is committed, arrest the felon?*—292, 293.

Yes, he is bound by law to do so, on pain of fine and imprisonment, if the felon escapes through his negligence as a stander-by. And he may justify breaking open doors upon following such felon.

16. *May a private person, upon probable suspicion, arrest a felon, or other person suspected of felony?*—293.

Yes; but he cannot justify breaking open doors to do it.

17. *If either party kill the other in such attempt, why is it no more than manslaughter?*—293.

It is no more, because there is no malicious design to kill; but it amounts to so much, because it would be of most pernicious consequence, if, under pretense of suspecting felony, any private person might break open a house, or kill another; and, also, because such arrest upon suspicion is barely permitted by the law, and not enjoined, as in the case of those who are present when a felony is committed.

18. *What is arrest by a hue and cry?*—293.

It is a species of arrest, wherein both officers and private men are concerned, made when a hue and cry is raised upon a felony committed. A hue (from *huer*, to shout) and cry, *hutesium et clamor*, is the old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another.

CHAPTER XXII.

OF COMMITMENT AND BAIL.

1. *What is the justice, before whom a prisoner is brought, bound at once to do?*—296.

To examine the circumstances of the crime alleged, by taking in writing the examination of such prisoner, and the information of those who bring him.

2. *What should, then, be done with the prisoner?*—296.

If upon the examination of the party arrested, it manifestly appears either that no such crime as alleged was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him; otherwise he must either be committed to prison, or give bail, that is, put in securities for his appearance to answer the charge against him.

3. *When should bail be taken?*—297, 298.

The commitment being only for safe custody, whenever bail will answer the same intention, it ought to be taken, as in most of the inferior crimes; but in felonies, and other offenses of a capital nature, no bail can be a security equivalent to the actual custody of the person.

4. *What offense is it to refuse or delay to bail any person bailable?*—297.

It is an offense against the liberty of the subject in any magistrate, by the common law, as well as by statute.

5. *What if the magistrate take insufficient bail?*—297.

He is liable to be fined, if the criminal does not appear: on the other hand, excessive bail ought not to be required.

6. *Why, in cases where the imprisonment is only for safe custody before the conviction, and not for punishment afterward, is bail ousted or taken away, whenever the offense is of a very enormous nature?*—298.

Because then the public is entitled to demand nothing less

than the highest security that can be given, viz., the body of the accused, in order to insure that justice shall be done upon him, if guilty.

7. *Before the conquest what offenses were bailable?*—298.

All felonies, till murder was excepted by statute.

8. *What court may bail for any crime whatsoever?*—299.

The court of king's bench; be it treason, murder, or any other offense, according to the circumstances of the case.

9. *In imprisonment for safe custody only, how should the prisoner be treated?*—300.

He should be used with the utmost humanity, and not subjected to other hardships, than such as are absolutely requisite for the purpose of confinement only.

CHAPTER XXIII.

OF THE SEVERAL MODES OF PROSECUTION.

1. *In what ways are offenders prosecuted?*—302.

Their prosecution, or the manner of their formal accusation, is either upon a previous finding of the fact by an inquest or grand jury, or without such previous finding.

2. *In what ways do grand juries find?*—301.

Either by presentment or indictment.

3. *What is a presentment, properly speaking?*—301.

It is the notice taken by a grand jury of any offense, from their own knowledge or observation, without any bill of indictment laid before them; as the presentment of a nuisance, a libel, and the like.

4. *What is an inquisition of office?*—301.

The act of a jury, summoned by the proper officer to inquire of matters relating to the crown, upon evidence laid before them.

5. *What is an indictment?*—302.

It is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury.

6. *Of what number may the grand jury consist?*—302.

Of twelve at the least, and not more than twenty-three, that twelve may be a majority.

7. *Who instructs the grand jury?*—303.

The judge who presides upon the bench.

8. *Of what nature is the finding of an indictment?*—303.

Only in the nature of an inquiry or accusation, which is afterward to be tried and determined, and the grand jury are only to inquire, upon their oaths, whether there be sufficient cause to call upon the party to answer it.

9. *Should a grand jury be thoroughly persuaded of the truth of an indictment?*—303.

They should so far as their evidence goes.

10. *Where, in general, must all offenses be inquired into, as well as tried?*—303.

In the county where the act was committed.

11. *If larceny be committed in one county, and the goods carried into another, where may the offender be indicted?*—305.

In either, for the offense is complete in both.

12. *To find a bill, what number of the grand jury must agree?*—306.

At least twelve.

13. *What things must be precisely and sufficiently ascertained in an indictment?*—306.

All indictments must set forth the christian name, surname,

and addition of the state and degree, mystery, town or place, and the county of the offender; and all this to identify his person. The time and place are also to be ascertained, by naming the day, and township, in which the fact was committed. The offense itself must be set forth with clearness and certainty.

14. *When must particular words of art, which are so appropriated by the law to express the precise ideas which it entertains of the offense, that no other words, however synonymous they may seem, are capable of doing it, be employed?*—307.

In indictments for murder, it is necessary to say that the party indicted "murdered," not killed, or slew, the other. In all indictments for felonies, the adverb "feloniously" must be used; and for burglaries "burglariously." In rapes, the word "ravished" is necessary. So, in larcenies, the words "feloniously took and carried away," are necessary to every indictment, for these only can express the very offense.

15. *In indictments for murder, should the length and depth of the wound be expressed?*—307.

The length and depth of the wound should, in general, be expressed, in order that it may appear to the court to have been of a mortal nature; but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death.

16. *Of what sorts are informations?*—308.

Of two sorts: first, those which are partly at the suit of the king and partly at that of a subject; and, secondly, such as are only in the name of the king.

17. *Is there not another species of informations?*—312.

Yes, that in the nature of a writ of *quo warranto*. The modern information tends to the same purpose as the ancient writ.

18. *What is an appeal, as a criminal prosecution?*—312.

It denotes an accusation by a private subject against another for some heinous crime, demanding punishment on account of the particular injury suffered, rather than for the offense

against the public. This private process for the punishment of public crimes, had probably its origin in those times when a private pecuniary satisfaction, called a *weregild*, was paid to the party injured, or his relations, to expiate enormous offenses.

19. *What are the only appeals now in force?*—314.

Appeals of felony and mayhem.

20. *If the appellee be acquitted, can he afterwards be indicted for the same offense?*—315.

He cannot.

CHAPTER XXIV.

OF PROCESS UPON AN INDICTMENT.

1. *Can the indictment be tried in the absence of the defendant?*—318.

It cannot be tried unless he personally appears.

2. *What is the proper process, on an indictment for any petty misdemeanor, or on a penal statute, to cause the offender to appear?*—318.

A writ of *venire facias*, which is in the nature of a summons to cause his appearance.

3. *On indictments for treason or felony, and in the case of misdemeanors, what is the usual process?*—319.

A *capias* is the first process; and in the case of misdemeanors, upon certificate of an indictment found, a writ of capias is awarded immediately by any judge of the court of king's bench, to bring in the defendant.

4. *What is the punishment for outlawries upon indictment for misdemeanors?*—320.

Forfeiture of goods and chattels.

5. *What does an outlawry in treason or felony amount to?*—319.

To a conviction and attainder of the offense charged in the indictment, as much as if the offender had been found guilty by his country.

6. *Who may arrest an outlaw on a criminal prosecution?*—320.

Any person.

7. *How may an outlawry be reversed?*—320.

It may frequently be reversed by writ of error; the proceedings therein being exceedingly nice and circumstantial.

8. *During what stage of the prosecution may a writ of* certiorari facias *be had, and with what effect?*—320, 321.

It may be had at any time before the trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench.

9. *For what purpose is the indictment so removed by* certiorari facias?—320.

For one of four purposes: 1. To consider and determine the validity of appeals or indictments and the proceedings thereon, and to quash or confirm them as there is cause; 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below; 3. To plead the king's pardon there; 4. To issue process of outlawry against the offender in those counties, or places, where the process of the inferior judges will not reach him.

10. *At whose instance may a* certiorari *be granted?*—321.

At the instance of either the prosecutor or the defendant of the former as a matter of right, of the latter as a matter of discretion.

CHAPTER XXV.

OF ARRAIGNMENT, AND ITS INCIDENTS.

1. *What is arraignment?*—332.

To call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment.

2. *Why is the prisoner then called upon, by name, to hold up his hand?*—323.

Because thereby he acknowledges himself to be of the name by which he is called. If he refuse to do so, however, any other acknowledgment that such is his name will answer as well.

3. *What does the accused when arraigned?*—324.

He either stands mute, or confesses the fact; or else he pleads to the indictment.

4. *When is the party arraigned said to stand mute?*—324.

Regularly, a prisoner is said to stand mute when, being arraigned for treason or felony, he either, 1. Makes no answer at all; or, 2. Answers foreign to the purpose; or, 3. Upon having pleaded not guilty, refuses to put himself upon the country.

5. *To what does standing mute amount?*—328.

It, by statute, now, in all cases, amounts to a constructive confession of the charge.

6. *What is the consequence of the prisoner's actual confession of the indictment?*—329.

In such case the court has nothing to do but to award judgment.

7. *But what is confession by approvement?*—329, 330.

It is when a person indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded, and appeals or accuses others, his accomplices, of the same crime, in order to obtain his pardon. It can only be made in capital offenses, and has been long disused.

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.

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6. *What was the course of William Rufus?*—420.

William Rufus proceeded on his father's plan, and in some points extended it, particularly with regard to the forest laws.

7. *What course was pursued by Henry the First?*—420.

Henry the First found it expedient, when first he came to the crown, to ingratiate himself with the people, by restoring (as the monkish historians tell us) the laws of King Edward the Confessor.

8. *What event dates from the reign of Stephen?*—421.

During this usurper's reign, the Roman civil and canon laws were introduced into the realm; and, at the same time, was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

9. *For what is the reign of Henry the Second remarkable?*—421–423.

In this prince's reign much was done to methodize the laws, and reduce them into a regular order. Throughout it, also, was continued the important struggle between the laws of England and Rome.

During the reign of Henry the Second, there are four things which peculiarly merit the attention of the legal antiquarian:—

1. The constitutions of the parliament at Clarendon, A.D. 1164.

2. The institution of the office of justices in eyre, *in itinere;* the king having divided the kingdom into six judicial circuits.

3. The introduction and establishment of the grand assize, or trial by a special kind of jury in writ of right, instead of the trial by battel.

4. The introduction of *escuage*, or pecuniary commutation for personal military service.

10. *What is to be remarked of Richard the First?*—423.

He enforced the forest laws with some rigor; and composed a body of naval laws, which are still extant, and are of high authority, called the laws of Oleron.

11. *What of Kings John and Henry the Third?*—423.

In King John's time, and that of his son Henry the Third,

the rigors of the feodal tenures, and the forest laws, were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories; which, at last, had this effect, that, first, King John, and afterward his son, consented to the two famous charters of English liberty, *magna carta* and *carta de foresta*. The effect of these was to redress many grievances.

12. *What of the reign of Edward the First, styled the English Justinian?*—425–427.

In his time the law received so sudden a perfection, that Sir Matthew Hale does not scruple to affirm, that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together. The principal regulations established by this king, may be reduced under the following general heads:—

1. He established, confirmed, and settled the great charter and charter of forests.

2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction; and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased.

3. He defined the limits of the several temporal courts of the highest jurisdiction.

4. He settled the boundaries of the inferior courts in counties, hundreds, and manors.

5. He secured the property of the subject, by abolishing all arbitrary taxes and talliages levied without consent of the national council.

6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes.

7. He settled the form, solemnities, and effect of fines levied in the court of common pleas, though the thing itself was of Saxon origin.

8. He first established a repository for the public records of the kingdom.

9. He established watch and ward, for preserving the public peace, and preventing robberies.

10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property, by the statute of *quia emptores*.

11. He instituted a speedier way for the recovery of debts, by granting the writ of *elegit*.

12. He effectually provided for the recovery of advowsons, as temporal rights.

13. He effectually closed the great gulf, in which all landed property of the kingdom was in danger of being swallowed, by his reiterated statutes of mortmain.

14. He established a new limitation of property, by the creation of estates-tail.

15. He reduced all Wales to the subjection, not only of the crown, but in a great measure of the laws, of England.

From his time to that of Henry the Eighth, there happened very few, and those not very considerable, alterations in the legal forms of proceedings.

13. *What is to be remarked of the period between the reigns of Edward the Third and Henry the Seventh?*—428, 429.

The civil wars and disputed titles to the crown, gave no leisure for further juridical improvement: "*nam silent leges inter arma.*" To this period is due the method of barring entails by the fiction of common recoveries, invented originally to evade the statutes of mortmain, but introduced under Edward the Fourth, for the purpose of unfettering estates, and making them more liable to forfeiture.

14. *What is to be remarked of the reigns of Edward the Second and Edward the Third?*—428.

During their reigns, the old Gothic powers of electing the principal subordinate magistrates, the sheriff, and conservators of the peace, were taken from the people, and justices of the peace were established instead of the latter. In the reign of Edward the Third, the parliament is supposed, most probably, to have assumed its present form, by a separation of the commons from the lords.

15. *What is characteristic of the reign of Henry the Seventh?*—429.

The distinguishing character of this king was that of amassing treasure in the royal coffers, by every means that could be devised; and almost every alteration in the laws, however salutary or otherwise in their future consequences, had this, and this only, for their great and immediate object.

16. *What was effected, with regard to the civil polity, by the Reformation and Henry the Eighth?*—430.

The Reformation, under Henry the Eighth and his children, opens an entirely new scene in ecclesiastical matters: the usurped powers of the pope being now forever routed and destroyed, his connections with England cut off, the crown restored to its supremacy over spiritual men and causes, and the patronage of bishoprics being once more indisputably vested in the king. With regard also to civil polity, the statute of wills and the statute of uses made a great alteration, as to property.

17. *What is to be said of the reign of Queen Mary?*—431, 432.

Many salutary and popular laws, in civil matters, were made under her administration.

18. *What did Queen Elizabeth accomplish for the liberties of the nation?*—432.

The measures and schemes to re-establish religious slavery were defeated by her accession. The administration of civil rights, in the courts of justice, was carried on in a regular course, according to the wise institutions of King Edward the First, without any material innovations. All the principal grievances introduced by the Norman conquest seem, about this period, to have been finally shaken off, and the Saxon constitution restored, with considerable improvements, except in the continuation of the military tenures, and a few other points.

19. *When, after the period of the conquest, was the time of greatest despotism in England?*—435.

The latter years of Henry the Eighth.

20. *What is to be remarked, especially, of the reign of Charles the Second?*—439.

That the constitution of England had arrived to its full vigor, and the true balance between liberty and prerogative was, then, happily established by law.

21. *What, generally, has been effected from the revolution in* 1688 *to the present time, with respect to the administration of private justice and the public polity?*—440–442.

In this period many laws passed; as the bill of rights, the toleration act, the act of settlement with its conditions, the act for uniting England and Scotland, and some others, which have asserted the English liberties in more clear and emphatic terms; have regulated the succession of the crown by parliament; have confirmed and exemplified the doctrine of resistance when the executive magistrate endeavors to subvert the constitution; have maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal; have indulged tender consciences with every religious liberty consistent with the safety of the state; have established triennial, since turned into septennial, elections of members to serve in parliament; have excluded certain officers from the House of Commons; have restrained the king's pardon from obstructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow peers; have regulated trials for high treason; have afforded posterity a hope that corruption of blood might one day be abolished and forgotten; and have made the judges completely independent of the king and his ministers.

22. *What is a summary of the matters contained in the commentaries?*—442.

We have seen, in the course of the inquiries contained in them, that the fundamental maxims and rules of the law, which regard the rights of persons and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are fraught with the accumulated wisdom of ages; that the forms of administering justice came to perfection under Edward the

First, and have not been much varied, nor always for the better, since; that the religious liberties were fully established at the Reformation; but that the recovery of our civil and political liberties was a work of longer time, they not being thoroughly and completely regained till after the restoration of King Charles, nor fully and explicitly acknowledged and defined till the era of the revolution of 1688.

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