The student's Blackstone

Sir William Blackstone, Robert Malcolm Kerr


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THE STUDENT'S BLACKSTONE;

BEING THE

COMMENTARIES

ON

THE LAWS OF ENGLAND

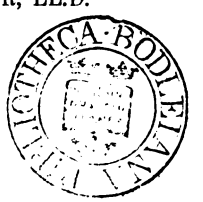
OF SIR WILLIAM BLACKSTONE, KNT.

ABRIDGED AND ADAPTED TO

THE PRESENT STATE OF THE LAW.

BY

ROBERT MALCOLM KERR, LL.D.



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PREFACE.

"THE STUDENT'S BLACKSTONE" is, as the title-page imports, an abridgment of the Commentaries of Sir William Blackstone, with such alterations as the legislative changes of the last century have made necessary. The reader ought, therefore, to find in the following pages an outline of the existing law of England, however concisely it may be stated. Of the success of the Editor in accomplishing his task, those for whose hands the book is intended will be best able to judge.

TEMPLE, *January* 1877.

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INTRODUCTION.

SECTION I.

OF LAWS IN GENERAL.

Law, in its general and comprehensive sense, signifies a rule of action; and 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. And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey.

This is the general signification of law; and in those creatures that have neither the power to think nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, denote the rules 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 behaviour.

Man, considered as a creature, must necessarily be subject to the will of his Creator, which is called the *law of nature*. For God, when he created man, and endued him with free-will to conduct himself in all parts of life, laid down certain rules, whereby that free-will is regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws. These rules are the eternal laws of good and evil, to which the Creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. They are binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to their precepts; and such

of them as are valid derive all their authority, mediately or immediately, from this original.

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other rules than those prescribed by the law of nature. But man was formed for society; and is neither capable of living alone, nor indeed has the courage to do it. As however, it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a second kind of law to regulate this mutual intercourse, called the *law of nations*; which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any; but depends entirely upon the rules of natural law, or upon mutual agreements between these several communities: in the construction of which we have no other rule to resort to but the law of nature; being the only one to which all communities are equally subject, and therefore the civil law very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*

Thus much I think it necessary to premise concerning the law of nature, and the law of nations, before treating of *municipal law*; that is, the rule by which particular communities are governed; and which is usually defined to be "a rule of civil conduct pre-" scribed by the supreme power in a state, commanding what is " right, and prohibiting what is wrong."

It is a *rule:* not a transient, sudden order from a superior, to or concerning a particular person; but something permanent, uniform, and universal. It is called a *rule*, to distinguish it from *advice* or *counsel*, which we are at liberty to follow or not, as we see proper: our obedience to the *law* depends not upon *our approbation*, but upon the *maker's will.* It is also 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.

Municipal law is also "a rule *of civil conduct*;" for municipal law regards man as a citizen, bound to other duties towards his neighbour besides those prescribed by the law of nature.

It is likewise "a rule *prescribed*." Because a bare resolution, confined in the breast of the legislature, without manifesting itself by some external sign, can never be properly a law. All laws should therefore be notified to those who are to obey; which is implied in the term "*prescribed*."

But, further: municipal law is "a rule of civil conduct prescribed *by the supreme power in a state*;" it being obviously requisite that it be made by the person or body in whom the sovereignty of the state is lodged.

This may justify a short inquiry concerning the nature of society and civil government, the foundations of which are the wants and fears of individuals. For though society may not have had its formal beginnings from any convention of individuals, actuated by their wants or fears; yet it is the *sense* of weakness that *keeps* mankind together, and is, therefore, the natural foundation of civil society. This is what we mean by the original contract of society; that the whole shall protect all its parts, and that every part shall pay obedience to the will of the whole.

When civil society is once formed, government at the same time results, as necessary to keep that society in order: for unless some superior be constituted, whose commands all the members are to obey, they would still remain as in a state of nature.

In what manner, however, the several forms of government we now see in the world at first actually began, it is not here necessary to discuss. For by whatever right they subsist, there must be in all a supreme authority, in which the rights of sovereignty reside. And this authority ought to be placed in those hands, wherein the qualities requisite for supremacy, wisdom, goodness, and power, are most likely to be found.

Political writers allow three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly, consisting of all the free members of a community, which is *democracy*; the second, when it is lodged in a council, composed of select members, and then it is an *aristocracy*; the last, when it is intrusted in the hands of a single person, and then it is a *monarchy*. By the sovereign power is meant the making of laws; for wherever that power resides, all others

must conform to, and be directed by it, whatever appearance the outward form of the government may be. The legislature may at any time alter that form, and put the execution of the laws into whatever hands it pleases; and all the other powers of the state must obey the legislature, or else the constitution is at an end.

In a democracy, public virtue is more likely to be found than in either of the other forms of government. In aristocracies there is more wisdom, but less honesty than in a republic, and less strength than in a monarchy. A monarchy is the most powerful of any; for the legislative and executive powers are united in the hand of the prince, subject to the imminent danger of his employing that strength to improvident or oppressive purposes.

These three species of government have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of the law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution.

The British constitution is supposed to combine the advantages of each. For the executive power being lodged in a single person, has all the advantages of monarchy: and the legislature is intrusted to three distinct powers, entirely independent of each other; first, the crown; secondly, the lords spiritual and temporal, persons selected for their piety, their birth, their wisdom, their valour, or their property; and thirdly, the house of commons, chosen by the people from among themselves, which is a kind of democracy. This aggregate body composes the parliament, wherein is lodged the sovereignty of the constitution; that is to say, the right *to prescribe the rule of civil action.*

From what has been advanced, it is sufficiently evident; that "*municipal law is a rule of civil conduct prescribed by the* "*supreme power in a state.*" It is also a rule, "*commanding what* "*is right, and prohibiting what is wrong.*"

Now, when once the boundaries of right and wrong are ascertained by law, it follows of course that it is the business of the law to enforce these rights, and to restrain or redress those wrongs. How, then, does the law ascertain the boundaries of right and wrong; and what are the methods which it takes to command the one and prohibit the other?

Every law may be said to consist of several parts: one *declaratory*; whereby the rights to be observed, and the wrongs to be eschewed, are defined: another, *directory*; whereby the subject is enjoined to observe those rights, and to abstain from the commission of those wrongs: a third, *remedial*; whereby a method is pointed out to recover a man's rights, or redress his wrongs: to which may be added a fourth, usually termed the *sanction*, or *vindicatory* branch, of the law; whereby it is signified what penalty shall be incurred by such as commit any wrong.

The *declaratory* part of the municipal law, depends upon the will of the legislator. Natural rights, such as life and liberty, need not human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by law to be inviolable. On the other hand, no legislature has power to abridge or destroy them, unless the owner shall commit some act that amounts to a forfeiture. Neither do natural *duties*, such as the maintenance of children and the like, receive any sanction from being declared to be duties by law. The case is the same as to crimes that are forbidden by the law of nature and styled *mala in se*, such as murder; which contract no additional turpitude from being declared unlawful by any legislature. But with regard to things in themselves indifferent, the case is different as these become right or wrong, according as the legislator sees proper, for promoting the welfare of the community. Thus at common law the goods of the wife upon marriage become the property of the husband; and by statute all monopolies are a public offence: yet that right and this offence have no foundation in nature. And so, as to injuries or crimes, the legislature must decide in what cases the seizing of another's cattle shall amount to a trespass or a theft; and where it shall be justifiable, as when a landlord takes them as a distress for rent.

The *directory* part of a law stands upon the same footing. Thus the law that says, "thou shalt not steal," implies a declaration that stealing is a crime.

The *remedial* part of the law is a necessary consequence of it; for in vain would rights be declared if there were no method of asserting them, when withheld or invaded. When, for instance, the *declaratory* part of the law says, "the field which belonged "to Titius's father, is vested by his death in Titius;" and the

directory part "forbids any one to enter on another's property," if Gaius, after this, presumes to take possession of the land, the *remedial* part of the law interposes, and makes Gaius restore the possession to Titius, and also pay him damages for the invasion.

With regard to the *sanction* of laws, human legislators have generally chosen to make it *vindicatory* rather than *remuneratory*, to consist rather in punishments than in rewards. The law seldom, if ever, proposes any privilege or gift to such as obey it; but constantly comes armed with a penalty denounced against transgressors.

Having now gone through the definition of municipal law, I proceed to consider the origin and nature of the laws of England.

SECTION II.

OF THE LAWS OF ENGLAND.

THE municipal law of England may be divided into two kinds: the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law.

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.

When I call these parts of our law *leges non scriptæ*, I would not be understood as if all those laws were at present merely *oral*, or communicated from former ages to the present by word of mouth. All laws were originally traditional, because the nations among which they prevailed had no idea of writing. But the evidences of our legal customs are now contained in the records of our courts, in books of reports, and in the treatises of the sages of the profession, handed down to us from early times. These parts of our law are styled *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power,

and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.

Our ancient lawyers insist that these customs are as old as the primitive Britons. This assertion must be understood only to signify that there never was any formal exchange of one system of laws for another: for unquestionably the Romans, the Saxons, the Danes, and the Normans, who successively occupied parts of England, must have insensibly introduced and incorporated many of their own customs with those that were before established. And our early historians all assure us, that our body of laws is of this compounded nature. They tell us, that in the time of Alfred the local customs of the kingdom were compiled for general use in his *dome-book*, or *liber judicialis*; but the establishment of the Danes in England, which followed soon after, introduced new customs, and caused this code to fall into disuse; or at least to be mixed with other laws. So that about the beginning of the eleventh century, there were three principal systems of laws prevailing in different districts. 1. The *Mercen-Lage*, observed in the midland counties, and those bordering on Wales. 2. The *West-Saxen-Lage*, which obtained in the south and west of the island, from Kent to Devonshire. 3. The *Dane-Lage*, or Danish law, the very name of which speaks its origin and composition.

Out of these, Edward the Confessor extracted one uniform law or digest of laws; which seems to have been no more than a new edition of Alfred's dome-book, with such improvements as experience had suggested. These are the laws which our historians mention as the laws of Edward the Confessor; which our ancestors struggled so hardly to maintain under the first Norman princes; and which subsequent kings so frequently promised to restore. They are the laws which gave rise to that collection of maxims and customs, known as the common law, the *jus commune* or *folk-right*; in contradistinction to other laws, as the statute law, the civil law, the law merchant, and the like.

This unwritten law is distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter signification. 2. Particular customs; which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom are adopted by particular courts.

1. As to general custom, or the common law, properly so called; this is that law by which proceedings in the ordinary courts of justice are directed. For example, that the eldest son alone is heir to his ancestor;—that a deed is of no validity until delivered;—that wills shall be construed favourably, deeds strictly;—that breaking the public peace is an offence punishable by fine and imprisonment;—all these doctrines are not set down in any written ordinance, but depend upon immemorial usage, that is, upon common law, for their support.

But here a very natural question arises: how are these customs to be known, and by whom is their validity to be determined? The answer is, 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 to decide according to the law of the land. Their decisions are carefully preserved in *records*, to which when any question arises reference may be made. For it is an established rule to abide by former precedents, where the same points come again into litigation; as well to keep the scale of justice even and steady; as also because the law in that case being solemnly determined, what before was uncertain is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary. The decisions, therefore, of our courts are held in the highest regard, and are not only preserved in the several courts, but are handed out to public view in the numerous volumes of Reports which furnish the lawyer's library.

II. The second branch of the unwritten laws of England are particular customs or laws which affect only the inhabitants of particular districts.

These particular customs, or some of them, are without doubt the remains of that multitude of local customs out of which the common law, as it now stands, was collected at first by the Saxon kings. But for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large; which privilege is confirmed to them by several acts of parliament.

Such is the custom of *gavelkind* in Kent and some other parts

of the kingdom, which ordains that not the eldest son only of the father shall succeed to his inheritance, but all the sons alike. Such is the custom that prevails in divers ancient boroughs, and therefore called *borough-english*, that the youngest son shall inherit the estate, in preference to all his elder brothers. Such is the custom in other boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas at the common law she shall be endowed of one third part only. Such also are the special and particular customs of manors, which bind all the copyhold and customary tenants that hold of the same manors. Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, and a variety of other matters. All these are contrary to the general law of the land, and are good only by special usage; though the customs of London are also confirmed by act of parliament.

To this head may most properly be referred a particular system, called the custom of merchants, or *lex mercatoria:* which however different from the general rules of the common law, is yet engrafted into it, and made a part of it; being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions: for it is a maxim of law, that "*cuilibet in sua arte credendum est.*"

III. The third branch of the *leges non scriptæ* are those peculiar laws used only in certain peculiar courts and jurisdictions; by which I understand the civil and canon laws.

It may seem improper to rank these under the head of *leges non scriptæ*, seeing they are set forth by authority in the Pandect, the Code, the decrees of councils, and the decretals of popes. But it is plain, that it is not on account of their being *written* laws that either the canon or civil law, have any obligation within this kindom: neither does their efficacy depend upon their own intrinsic authority; which is the case of our acts of parliament. They bind not the subjects of England, because their materials were digested by Justinian, or declared authentic by Gregory. These considerations give them no authority here: all the strength that either the papal or imperial laws have obtained in this realm is only because they have been received by immemorial usage in some particular cases; and then they form a branch of the *leges non scriptæ*, or

customary laws. If they are in some other cases introduced by consent of parliament, they owe their validity to the *lex scripta* or statute law.

By the *civil law* is generally understood the municipal law of the Roman Empire, as comprised in the institutes, the digest, and the code of Justinian, and the *novellæ*, or new constitutions of himself and some of his successors. These form the *Corpus Juris Civilis*. The *canon law* is a body of Roman ecclesiastical law, compiled from the opinions of the Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see. These form the *Corpus Juris Canonici*, or body of the Roman canon law.

Besides these collections, there is also a national canon law, composed of *legatine* and *provincial* constitutions, adapted only to the exigencies of the church of England. These *legatine* constitutions were enacted in national synods, held under Otho and Othobon, legates from Gregory IX. and Clement IV. in the reign of Henry III. The *provincial* constitutions are the decrees of synods, held under divers archbishops of Canterbury, from Langton to Chichele; and adopted by the province of York in the reign of Henry VI. At the Reformation, it was enacted that a review should be had of the canon law; and, till such review should be made, all canons, ordinances, and synodals provincial, being then already made, were to be used and executed. As no such review has yet been perfected, upon this statute now depends the authority of the canon law in England.

There are three species of courts, in which the civil and canon laws are used. 1. The ecclesiastical courts. 2. The military courts, now entirely obsolete. 3. The courts of the University of Oxford. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom. For,

1. The High Court of Justice has the superintendence over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, and to restrain and prohibit such excess.

2. The common law reserves to itself the exposition of all such

acts of parliament as concern either the extent of these courts or the matters depending before them. And,

3. An appeal lies from all of them to the crown, in the last resort; their jurisdiction being in theory derived from the Crown of England, and not from any foreign potentate, or intrinsic authority of their own.

And, from these three strong marks and ensigns of superiority, it appears beyond a doubt, that the civil and canon laws are only subordinate, *leges sub graviori lege*, and inferior branches of the unwritten laws of England.

The *leges scriptæ*, the written laws of the kingdom, are statutes, made by the sovereign, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled. The oldest of these now extant, and printed in our statute books, is the famous *Magna Charta*; as confirmed in parliament 9 Henry III.: though doubtless there were many acts before that time, the records of which are now lost. And these statutes are spoken of as *general* or *special*, *public* or *private*. A general or public act is a universal rule, that regards the whole community. Special or private acts operate upon particular persons, and private concerns, and are hence called *local* and *personal*. Statutes also are said to be either *declaratory* or *remedial*. Declaratory, where the old law is fallen into disuse, and parliament has thought proper to declare what the common law is and ever has been. Thus the Statute of Treasons does not make any new treason; but only specifies those offences which before were treason at the common law. Remedial statutes are made to supply defects in the common law itself, either by enlarging the law where it was too narrow, or restraining it where it was too lax. Hence another division of remedial acts into *enlarging* and *restraining* statutes. To instance again in the case of treason. Clipping the coin was not sufficiently guarded against by the common law: therefore it was at one time thought expedient to make it high treason, so that this was an *enlarging* statute. At common law spiritual corporations might lease out their estates for any term of years, till prevented by a statute of Queen Elizabeth: this was therefore a *restraining* statute.

These are the several grounds of the laws of England: over

and above which, equity is also frequently called in to assist, to moderate, and to explain them; from which has arisen the phrase that a particular interpretation is said to be *within the equity* of a statute. This doctrine is not to be confounded with the system of Jurisprudence which has grown up under the fostering care of our Chancellors, and has now been incorporated with the common law, and which in contradistinction therefrom has hitherto been known as *equity*. What equity is will be shown hereafter. It took its rise from the necessity of creating a method of detecting latent frauds and concealments, which the process of the common law was formerly not adapted to reach; to enforce the execution of matters of trust and confidence which are considered binding in conscience, though not cognizable in courts of law; and to give a more specific relief, and one more adapted to the circumstances of the case, than could until recently be obtained by the generality of the rules of the common law.

THE LAWS OF ENGLAND.

THE RIGHTS OF PERSONS.

CHAPTER I.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

THE objects of the laws of England are so very numerous and extensive, that in order to consider them with any tolerable perspicuity, it will be necessary to distribute them methodically under proper and distinct heads.

Now, as municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong; it follows, that the principal objects of the law are RIGHTS and WRONGS. I shall follow this very simple division; and consider firstly, the *rights* that are commanded, and, secondly, the *wrongs* that are forbidden by the laws of England.

Rights are firstly, those which are annexed to the person, and are then called *jura personarum*, or the *rights of persons*; or secondly, such as man may acquire over external objects, and are thence styled *jura rerum*, or the *rights of things*. Wrongs also are divisible into, firstly, *private wrongs*, which concern individuals merely, and are called civil injuries; and secondly, *public wrongs*, which affect the whole community, and are called crimes and misdemeanors.

The present commentaries will therefore consist of the four following parts:—1. *The rights of persons*; with the means whereby such rights may be either acquired or lost. 2. *The rights of things*; with the means also of acquiring and losing them. 3. *Private wrongs*, or civil injuries; with the means of redressing them by

law. 4. *Public wrongs*, or crimes and misdemeanors; with the means of prevention and punishment.

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

Persons also are divided by the law into either natural persons or artificial. Natural persons are such as nature formed us: artificial are such as are devised by human laws for the purposes of government, which are called corporations or bodies politic.

The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute are such as belong to particular men, merely as individuals: relative, such as are incident to them as members of society. The first, that is, absolute rights, will be the subject of the present chapter.

The absolute *rights* of individuals, are such as belong to them merely in a state of nature. The absolute *duties*, which man is bound to perform, considered as a mere individual, no human municipal law can at all explain or enforce; for the intent of such laws being only to regulate the behaviour of mankind, as they are members of society, they have no concern with any other but social or relative duties. Let a man, therefore, be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, as drunkenness, or the like, they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case. *Public* sobriety is a relative duty, and therefore enjoined by law; *private* sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore can never enforce. With respect to *rights*, it is different, for human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him as a member of society.

The absolute rights of man are usually denominated the *natural liberty* of mankind. This natural liberty consists in a

power of acting as one thinks fit, without any control, unless by the law of nature. But every man, when he enters into society, gives up a part of his natural liberty as the price of so valuable a purchase; and obliges himself to conform to those laws which the community has thought proper to establish. For no man would wish to retain the uncontrolled power of doing whatever he pleases: the consequence of which would be, that every other man would also have the same power; and there would then be no security to individuals in any of the enjoyments of life. Political, therefore, or *civil liberty*, which is that of a member of society, is no other than natural liberty so far, and no further, restrained by human laws, as is expedient for the general advantage. Hence the law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind. For laws, when prudently framed, are by no means subversive, but rather introductive of liberty; seeing that where there is no law there is no freedom. On the other hand, that system of laws is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.

The absolute rights of every Englishman, which, in a political sense, are usually called their liberties, are coeval with our form of government. At some times they have been depressed by tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

First, by the Great Charter of Liberties, obtained from King John, and confirmed by Henry III. Afterwards by the *Confirmatio Cartarum*, whereby the Great Charter is directed to be allowed as the common law. Next, by a multitude of statutes, from the first Edward to Henry IV. Then, after a long interval, by the Petition of Right; which was followed by the *Habeas*

Corpus Act; passed under Charles II. To these succeeded the Bill of Rights, delivered to the Prince and Princess of Orange; and afterwards enacted in parliament. Lastly, these liberties were again asserted in the Act of Settlement, which declares them to be "the birthright of the people of England."

Thus much for the *declaration* of our rights, which are indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil advantages, which society has engaged to provide, in lieu of the natural liberties so given up by individuals. And these may be reduced to three principal or primary articles; the right of *personal security*, the right of *personal liberty*, and the right of *private property*.

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life is a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, kills it in her womb; or, if any one beat her, whereby the child dies in her body, and she is delivered of a dead child; this is a heinous misdemeanor.

2. A man's limbs enable him to protect himself from external injuries in a state of nature. To these therefore he has a natural, inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty. And both the life and limbs of a man are of such high value, in the estimation of the law, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done by the highest necessity and compulsion. Therefore if a man through fear of death or personal injury, which is called in law *duress*, is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all the requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs. And the law not only regards life and member, but also furnishes everything necessary for their support. For there is no man so indigent but he may demand a supply

sufficient for all the necessaries of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor.

These rights, of life and member, can only be determined by death; which was formerly accounted either a civil or a natural death. Civil death took place if any man was banished or abjured the realm, or became a monk; in which cases he was dead in law, and his next heir should have his estate; for which reason leases were usually made to have and to hold for the term of one's *natural* life. And this natural life cannot legally be destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority; but it may be forfeited for the breach of those laws of society which are enforced by the sanction of capital punishment, which the law now only inflicts upon the highest necessity.

3. Besides his limbs, the rest of his person is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding.

4. The preservation of a man's health from such practices as may prejudice or annoy it; and,

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other right.

II. Next to personal security, the law of England regards, asserts, and preserves the *personal liberty* of individuals; a right strictly natural; which the laws of England have never abridged without sufficient cause; and which cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws.

Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison whomsoever he or his officers thought proper, there would soon be an end of all other rights and immunities. The confinement of the person, in any wise, is in law an imprisonment. So that the keeping a man against his will in a private house, arresting or forcibly detaining him

in the street, is an imprisonment. And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment*, until he seals a bond or the like, he may allege this duress, and avoid the extorted bond. For imprisonment, to be lawful, must either be under process from the courts of justice, or by warrant from some legal officer having authority to commit to prison.

A natural consequence of this personal liberty is, that every man may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. For exile or transportation is a punishment unknown to the common law; and whenever inflicted, it is by the express direction of an act of parliament.

And the law is in this respect so liberally construed for the benefit of the subject, that, though *within* the realm the sovereign may command the service of all the lieges, yet he cannot send any man *out of* the realm, even upon the public service; (excepting sailors and soldiers, whose employment implies an exception): he cannot even constitute a man lord lieutenant of Ireland against his will, nor make him a foreign ambassador. For this might in reality be no more than a honourable exile.

III. The third absolute right is that of *property:* which consists in the free use and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land, which are extremely watchful in protecting this right. So great indeed is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. All that the law ever does, is to oblige the owner to alienate his possessions for a reasonable price; an exertion of power which the legislature, or those to whom it commits its exercise, ought always to indulge with caution.

Nor is this the only instance in which the law postpones even public necessity to the right of private property. For no subject can be constrained to pay any taxes, but such as are imposed by the consent of his representatives in parliament; the *Confirmatio Cartarum*, the acts of parliament before referred to, and the Act of Settlement expressly declaring that levying money for the use of the crown, by pretence of prerogative, without grant of parlia-

ment, or for longer time, or in other manner, than the same is granted, is illegal.

But in vain would be the dead letter of the law, if the constitution had not established certain auxiliary subordinate rights in the subject, which serve to protect these great and primary rights, of personal security, personal liberty, and private property. These are,

1. The constitution, powers, and privileges of parliament.

2. The limitation of the royal prerogative, by bounds so certain and notorious, that it is impossible the sovereign should either mistake or legally exceed them without the consent of the people.

3. The right of applying to the courts of justice for redress. For since the law is the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein, according to the emphatic words of *Magna Charta*, spoken in the person of the king, who in judgment of law is ever present and repeating them in all his courts; *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam:* and therefore every subject, "for injury done to him, *in bonis, in terris, vel persona,* "by any other subject, be he ecclesiastical or temporal, without "any exception, may take his remedy by the course of the law, "and have justice and right for the injury done to him, freely "without sale, fully without any denial, and speedily without "delay."

4. If there should happen any uncommon injury, or infringement of his rights, which the ordinary course of law cannot reach, there still remains a fourth subordinate right, namely, that of petitioning the sovereign, or either house of parliament, for the redress of grievances; which by the statute 1 W. & M. st. 2, c. 2, the subject has a right to do; all commitments and prosecutions for such petitioning being illegal.

5. The fifth auxiliary right of the subject, is that of having arms for his defence, which is also declared by the same statute.

In these several articles consist the rights, or, as they are frequently termed, *the liberties of Englishmen.* So long as these

remain inviolate, the subject is perfectly free; for every species of oppression must be in opposition to one or other of these rights. To preserve them from violation, it is necessary that the constitution of parliament be supported in its full vigour; and limits, certainly known, be set to the royal prerogative. And lastly, to vindicate these rights when attacked, every subject is entitled to the regular administration of justice; to petition the sovereign or parliament for redress, and to have arms for self-preservation and defence.

CHAPTER II.

OF THE PARLIAMENT.

THE rights and duties of persons, as members of society, are either public or private.

The most universal public relation, by which men are connected together, is that of government, or in other words, as magistrates and people. Of magistrates some also are *supreme*, in whom the sovereign power of the state resides; others are *subordinate*, deriving all their authority from the supreme magistrate, and accountable to him for their conduct.

In tyrannical governments the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united, there can be no public liberty. In England this supreme power is divided into two branches; the one legislative, to wit, the parliament; the other executive, consisting of the sovereign alone.

The origin of parliament is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. The word *parliament*, which is of modern date, was first applied to general assemblies of the states in France, about the middle of the twelfth century. But with us and long before the Norman Conquest, all matters of importance were settled in the great council of the realm; which was generally called *witena-gemote* or the meeting of wise men. We have instances of this so early as the reign of Ina

king of the West Saxons, Offa king of the Mercians, and Ethelbert king of Kent, in the several realms of the heptarchy. After their union, Alfred ordained that these councils should meet twice in the year; and there is no doubt but that similar great councils were occasionally held under the first princes of the Norman line. Parliaments, or general councils are thus coeval with the kingdom itself. How they were composed is another question; and particularly, whether the commons were summoned at all; or if summoned, at what period they began to form a distinct assembly. But it is not intended here to enter into controversies of this sort. I shall content myself with explaining, firstly, the manner and time of its assembling; secondly, its constituent parts; thirdly, the laws and customs relating to parliament, considered as one aggregate body; fourthly and fifthly, the laws and customs relating to each house; sixthly, the method of proceeding in both houses; and lastly, the manner of the parliament's adjournment, prorogation, and dissolution.

I. The parliament is summoned by the sovereign's writ, for no parliament can be convened by its own authority, or by the authority of any except the sovereign alone. Supposing it had a right to meet spontaneously, it is impossible to conceive that all the members and each of the houses, would agree unanimously upon the time and place of meeting, and if half met and half absented themselves, who could determine which was really the legislative body? It is therefore necessary that parliament be called together at a determinate time and place: and highly becoming its dignity, that it should be called together by none but one of its own constituent parts,—the sovereign,—a single person whose will may be uniform and steady,—and the only branch of the legislature that is capable of performing any act at a time when no parliament is in being. The sovereign only, then, can convoke a parliament; and this he is practically compelled to do every year, or oftener, if need be, as the supplies are voted only for one year at a time, and the Mutiny Acts are passed for one year only.

II. The constituent parts of parliament are, the sovereign in his political capacity, and the three estates of the realm; the lords spiritual, the lords temporal, and the commons; the sovereign

and these three estates form the corporation or body politic of the kingdom.

It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislative. The total union of them would be productive of tyranny; the total disjunction of them would in the end produce the same effects, by causing that union against which it seems to provide. The legislative would soon become tyrannical, by gradually assuming to itself the rights of the executive power. To hinder, therefore, any such encroachments, the sovereign is a necessary part of parliament; and, as this is the reason of his being so, the share of the legislation, which the constitution has placed in the crown, consists in the power of *rejecting*. For the crown cannot begin of itself any alteration in the law; it may only approve or disapprove of the alterations consented to by the two houses. The legislative, therefore, cannot abridge the executive power of any of its rights, without its own consent.

In the legislature, again, the people are a check upon the nobility, and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved: while the sovereign is a check upon both. And this very executive is kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct, not, indeed, of the sovereign, which would destroy his independence; but of his evil councillors.

Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest: for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together by the mixed nature of the crown which is a part of the legislative, and the sole executive magistrate.

The next in order are the spiritual lords. These consist of the Archbishops of Canterbury and York, the Bishops of London, Durham, and Winchester, and twenty-one other bishops of dioceses in England, according to their priority in consecration. These lords spiritual are in law a distinct estate from the lords

temporal, yet in practice they are usually blended together under the one name of *the lords;* they intermix in their votes; and the majority binds both estates.

The *lords temporal* consist of all the peers of the realm, by whatever title distinguished. Some sit by descent, as do all ancient peers; some by creation, as do all new-made ones; and others since the Union with Scotland, by election; viz., the sixteen peers who represent the Scots nobility for the parliament for which they are elected; and, since the union with Ireland the twenty-eight peers, elected for life, to represent the Irish nobility. The number of *lords temporal* is thus indefinite, for it may be increased by the crown, by the creation of peers of the United Kingdom.

The commons consist of all such men 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. In a free state, every man who is a free agent, ought to be in some measure his own governor; and, therefore, a branch of the legislative power should reside in the body of the people. And this power, when the territories of the state are small, and its citizens easily known, should be exercised by the people collectively; as in the petty republics of Greece, and the first rudiments of the Roman state. But this will be inconvenient when the public territory is extensive, and the number of citizens large. With us the people do that by their representatives, which it is impracticable to perform in person. The counties are represented by knights elected by the proprietors and occupiers of land; the cities and boroughs are represented by citizens and burgesses, chosen by the mercantile part, or trading interest of the nation, and the universities by persons chosen by the graduates. But every member serves for the whole realm; not to advantage his constituents, but the *common* wealth; and therefore is not bound to consult with his constituents unless he himself thinks it prudent so to do.

III. Next as to the laws and customs of parliament, as one aggregate body.

The power of parliament is so transcendent that it cannot be confined within any bounds. It has sovereign authority in the making, repealing, and expounding of laws, concerning all

matters, ecclesiastical or temporal, civil or criminal: this being the place where that absolute power, which must in all governments reside somewhere, is entrusted by the constitution. All mischiefs and grievances, that transcend the ordinary course of law, are within the reach of this extraordinary tribunal. It can new-model the succession to the crown; it can alter the established religion: it can change the constitution of the kingdom and of parliaments themselves; it can, in short, do everything that is not naturally impossible; and, therefore some have not scrupled to call its power, the omnipotence of parliament.

In order to prevent the mischiefs that might arise, by placing this authority in hands either incapable, or improper, to manage it, the custom of parliament provides that no one shall sit in either house, unless he be *twenty-one years of age*; and several statutes, that no member sit or vote in the House of Commons, except for the choosing of a speaker, till he has taken the prescribed oaths. *Aliens* are likewise incapable of being members of either house. And there are not only these standing incapacities; but if any person is made a peer, or elected to the House of Commons, yet may the respective houses upon proof of any crime in such person, adjudge him incapable to sit as a member; and this by the law and custom of parliament. For, as every court of justice has laws and customs for its direction, some the canon, some the common law, others their own customs, so the high court of parliament has also its own peculiar law, called the *lex et consuetudo parliamenti*; a law which has its origin from this one maxim, "that whatever matter arises concerning either house of "parliament, ought to be examined, discussed, and adjudged in "that house to which it relates, and not elsewhere." Hence, for instance, the lords will not suffer the commons to interfere in the election of a peer of Scotland; the commons will not allow the lords to alter a money bill; nor will either house permit the courts of law to examine the merits of either case.

The *privilege* of parliament is likewise very indefinite. It was principally established to protect its members not only from being molested by their fellow-subjects, but more especially from being oppressed by the crown. If, therefore, all the privileges were set down and ascertained, and no privilege allowed but

what was so defined, it were easy for the executive to devise some new case, not within the line, and under pretence thereof, to harass any refractory member and violate the freedom of parliament. The dignity and independence of the two houses are therefore preserved by keeping their privileges indefinite. Some of the more notorious are, privilege of speech and of person. As to the first, it is declared by 1 W. & M., st. 2, c. 2, as one of the liberties of the people, "that the freedom of speech, and debates, "and proceedings in parliament, ought not to be impeached "or questioned in any court or place out of parliament." The privilege of person is as ancient as Edward the Confessor, and included formerly not only privilege from illegal violence, but also from legal arrests, and seizures by process from the courts of law. No member of either house can be now taken into custody, unless for some offence, without a breach of privilege; so that all privileges which derogate from the common law are at an end, save only as to freedom of the person; which in a peer is for ever inviolable; and in a commoner for forty days after every prorogation, and forty days before the next meeting.

IV. The laws and customs relating to the *House of Lords in particular*, if we exclude their judicial capacity, will take up but little of our time.

One very ancient privilege, now obsolete, is declared by the charter of the forest; viz., that every lord summoned to parliament, and passing through the royal forests, may, both in going and returning, kill one or two of the deer without warrant; in view of the forester, or on blowing a horn; that he may not seem to take the royal venison by stealth. The peers have a right also to be attended by the judges and the Queen's serjeants; for their advice in points of law, and the greater dignity of their proceedings. The secretaries of state, with the attorney and solicitor-general, also used to attend the House, and have to this day their writs of summons; but their attendance has now fallen into disuse.

Each peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent; which is usually styled his protest. All bills likewise, that may affect the peerage, are by the custom of parliament to have their

beginning in this House, and to suffer no change in the Commons.

V. The peculiar laws and customs of the Commons relate to the raising of taxes, and the election of members.

First with regard to taxes; it is the indisputable privilege and right of the House of Commons, that all grants of subsidies or parliamentary aids do begin in their house, and are first bestowed by them; although their grants are not effectual until they have the assent of the other branches of the legislature. The lords are supposed more liable to be influenced by the crown, and when once influenced to continue so, than the commons, a temporary body, nominated by the people. It would therefore be dangerous to give the lords any power of framing new taxes: it is sufficient that they have a power of rejecting, if they think the commons improvident. But so jealous are the commons of this privilege, that they will not suffer the other house to exert any power but that of rejecting; they will not permit the least alteration in a money bill; under which appellation are included all bills by which money is to be raised upon the subject, for any purpose whatsoever; either for the exigencies of government, as the property-tax; or for private benefit, as by turnpikes, local rates, and the like.

Next with regard to the election of members; herein consists the exercise of the democratic part of our constitution: for in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. It is therefore of the utmost importance to regulate by whom, and in what manner, the suffrages are to be given. In England, where the people debate by representation, the exercise of this sovereignty consists in the choice of representatives. The law therefore guards against abuse of this power, by many provisions, which may be considered under: 1. The qualifications of electors. 2. The qualifications of the elected. 3. The proceedings at elections.

1. Qualifications of electors. The true reason of requiring any qualification, is to exclude such persons as are esteemed to have no will of their 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. If every man would give his vote freely and without influence of any kind, then every member of the community, however poor, should have a vote in electing those to whose charge is committed his property, his liberty, and his life. But since that can hardly be expected, all popular states have been obliged to establish certain qualifications; whereby some are no doubt excluded from voting, but others set more thoroughly upon a level with each other.

As to the qualifications of electors for knights of the shire; by statute 8 Hen. VI. c. 7, and subsequent acts, they are to be chosen by people whereof every man shall have freehold to the annual value of forty shillings, because that sum would then, with proper industry, have rendered the freeholder an independent man. This continued to be the sole qualification of a county elector, long after leasehold property had become of great importance, and copyhold tenure as unobjectionable as freehold. For the owners of these two kinds of property were only admitted to the franchise by the Reform Act of 1832, when a great change was made, not only in the qualifications of electors, but also in the distribution of seats; the electors of counties being of four classes, *freeholders*, *copyholders*, *leaseholders*, and *occupiers*.

1. A freehold of forty shillings' annual value is still the distinguishing qualification of a county elector.

2. The owner of an estate for life was qualified if it were of the value of ten pounds. This was one of the chief features of the act of 1832, which conferred the franchise on all *owners* of property of the annual value of ten pounds.

3. Leaseholders for any term created originally for not less than sixty years, of the value of ten pounds; or for any term created originally for not less than twenty years, of the value of fifty pounds, were admitted to the franchise in 1832. Finally,

4. Occupiers of property at a rent of not less than fifty pounds, became in 1832 entitled to vote in counties.

The Representation of the People Act of 1867, extended the franchise to *owners* of property of five pounds' value, and to occupiers rated at not less than twelve pounds.

The electors of citizens or burgesses are supposed to be the mercantile interest of the kingdom. But as trade is seldom

long fixed in a place, it was formerly left to the crown to summon the most flourishing towns to send representatives; so that as towns grew populous, they were admitted to a share in the legislature. But the deserted boroughs continued to be summoned, as well as those to whom their trade was transferred; except a few which petitioned to be eased of the expense of maintaining their members: four shillings a day being allowed for a knight of the shire, and two shillings for a citizen or burgess; the wages established in the reign of Edward III. The act of 1832 disfranchised most of the decayed boroughs, and the Representation of the People Act of 1867 has made some steps in the same direction. The Universities of Oxford and Cambridge were empowered to send burgesses by James I. to protect in the legislature the rights of the republic of letters. A similar privilege is conferred by the Act of 1867 on the University of London.

The right to vote in boroughs still depends to some extent on the several constitutions of the respective places; the act of 1832, however, introduced something like uniformity.

1. Every burgess or freeman possessing the right at the time was declared entitled to the franchise.

2. The franchise was preserved to the resident freeholders or burgage tenants in cities or towns, counties of themselves.

3. The right of voting was conferred on every occupier of the value of ten pounds, rated for the relief of the poor. This was the principal feature of the statute of 1832, so far as regards the borough electors; and in the boroughs created by it, such as Birmingham and Manchester, the electors consisted entirely of persons thus qualified.

The Act of 1867 has removed the restriction as to the value of the premises in the case of *occupiers* who are qualified by being rated, and by payment of the rates, which is called Household Suffrage; and has extended the franchise to *lodgers*, that is, to the occupiers in a dwelling-house of lodgings which, if let unfurnished, are of the value of ten pounds. It has also created new boroughs, deprived others of one member, disfranchised a few for bribery; and provided what are called three cornered constituencies, by giving electors returning three members only two votes.

Formerly, the right of each elector was ascertained as he tendered his vote; so that, unless prepared with evidence of his title, his vote, if objected to, might be refused altogether, the polling not unfrequently extending through fourteen days and the election forming the subject of a scrutiny, involving enormous expense. This method of taking votes was put an end to in 1832; and a register of electors is now made up annually; the appearance of a person's name on the register being decisive of his right to vote; its absence equally conclusive as to his want of qualification.

These lists are annually revised by barristers, who hold courts for the purpose; at which the overseers, claimants, and objectors attend; the barrister, on hearing the parties, adding or expunging names, and making alterations as he finds the claims or objections to be well founded. An appeal from his decision may be allowed by him to the Common Pleas Division of the High Court of Justice.

II. The qualifications of persons to be *elected* depend some upon the law and custom of parliament, others upon statute. 1. They must not be aliens born, or minors, idiots, lunatics, or outlaws in criminal prosecutions. 2. Among others, they must not be of the judges, nor of the representative peers, nor police magistrates, nor revising barristers; nor of the clergy, for they sit in the convocation; nor persons convicted of treason or felony, for they are unfit to sit anywhere. 3. Returning officers are not eligible in their respective jurisdictions. 4. No persons concerned in the management of any taxes created since 1692, except the commissioners of the Treasury, nor any of a long list of public officials mentioned in different statutes are capable of being elected. 5. No person holding a contract on account of the public service, is capable of sitting as a member. 6. No person having a pension under the crown is capable of being elected or sitting. 7. If any member accepts an office of profit under the crown, his seat is void; but he is capable of being re-elected. This rule does not extend to an officer of the army or navy accepting a new commission; nor to a member accepting any office which is usually vacated on a change of government, if he held office when he was elected. 8. Any candidate declared guilty of bribery, is incapable of being

elected, or sitting in parliament for seven years. Subject to these standing disqualifications, every subject of the realm is eligible of common right: though there are instances where persons have been declared ineligible *for that parliament*, by a vote of the House of Commons, or *for ever* by an act of the legislature.

3. *The proceedings at elections* are now regulated by the Ballot Act.

As soon as parliament is summoned, the lord chancellor (or if a vacancy happens during the sitting of parliament, the speaker) sends his warrant to the clerk of the crown; who thereupon issues writs to the proper returning officers, commanding them to elect their members. Elections of knights of the shire must be proceeded to, not later than the ninth day after the receipt of the writ, and with an interval of not less than three days between the *notice* and day of election. In cities and boroughs the day of election must be not later than the fourth day after the receipt of the writ, with an interval of two days between the *notice* and the election.

The next step is the *Nomination*, a form which the returning officer provides, and attends to receive at the time and place fixed by him, such nomination being made by two electors and concurred in by seven. The nomination ends in election if there be no opposition. If there be other candidates, the nominations are published and a day fixed for taking the votes.

And, as it is essential to the very being of parliament, that elections should be free, all undue influence upon the electors is illegal. All soldiers within two miles of the place of nomination or taking of the poll, are accordingly required to remain within their barracks. Riots likewise have been frequently determined to make an election void. By vote also of the Commons, no lord of parliament, or lord lieutenant of a county, has any right to interfere; and, by statute, the lord warden of the cinque ports shall not recommend any members there. If any officer of the revenue intermeddles in an election, by persuading any voter, or dissuading him, he forfeits 100*l.*, and is disabled to hold any office.

Thus are the electors of one branch of the legislature secured from any undue influence of the other, and from all external violence. But the greatest danger is that in which themselves co-operate, by the infamous practice of bribery and corruption; to prevent which various statutes have been passed from time to time; by which bribery and the using of undue influence are made misdemeanors; candidates offending are disqualified from sitting in parliament, and other guilty persons from being admitted to or continuing on the register of electors.

Undue influence being thus, I wish the depravity of mankind would permit me to say, effectually, guarded against, the election is proceeded to on the day appointed; the returning officer providing places for receiving the votes, and taking proper measures for securing secrecy, while the voter fills up the Balloting paper, which is given to him by the returning officer.

In all elections, except in the universities, only one day is allowed for recording the votes, this being found in practice very conducive to the purity of elections. In the universities, on account of the distance many of the electors may have to travel, the polling may continue for five days. If, however, the proceedings are obstructed by riot or violence, the returning officer may adjourn the taking of the votes until the following day, and so on from time to time until the interruption has ceased.

At the polling, the only duty of the returning officer now is to receive the papers on which the electors have inscribed their votes and deposit them in the Ballot Boxes, which are kept closed till four o'clock; when the returning officer opens them, casts up the number of votes, and declaring the state of the poll, makes proclamation of the member or members chosen.

The election being closed, the returning officer returns the writ, with the names of the persons elected, to the clerk of the crown, the members returned by him being the sitting members, until the House of Commons shall otherwise determine. In the reign of Queen Mary the House of Commons usurped,—in the reign of Queen Elizabeth maintained,—and in the reign of James I. finally asserted successfully their right to try and determine the validity of all elections. From that time till quite recently, these inquiries gave occupation to a Committee appointed and sworn to inquire into the allegations of any petition, claiming

the seat or alleging the illegality of the election. The incompetency of a Committee to determine such questions at last became apparent; and the trial of election petitions was transferred to the judges at Westminister, whose decision the House is bound to carry into effect. If the member returned is unseated, there is either a new election, or if corrupt practices are reported an inquiry by a Royal Commission, which may lead to disfranchisement.

VI. The method of making laws is much the same in both houses. For despatch of business each house has its *speaker*. The speaker of the Lords is the lord chancellor, or keeper of the great seal, or any other appointed by royal commission: and if none be so appointed, the House may elect. The speaker of the Commons is chosen by the house; but must be approved by the sovereign. In each house the act of the majority binds the whole; and this majority is declared by votes openly given.

To bring a bill into either house, if the relief sought is of a private nature, it is first necessary to prefer a petition; which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition, when founded on facts that may be in their nature disputed, is referred to a committee who examine the matter alleged, and report to the house; and then, or otherwise upon the mere petition, leave is given to bring in the bill. In public matters the bill is brought in upon motion.

The persons directed to bring in the bill present it, drawn out and printed, with a multitude of italics, where anything occurs that is dubious, or necessary to be settled by parliament, such especially as dates, penalties, or any sums of money to be raised, which italics are theoretically blanks. In the House of Lords, if the bill begins there, it is, when of a private nature, referred to two of the judges, to settle all points of technical propriety.

The bill is read a first time, and at a convenient distance a second time; and after each reading the speaker opens to the house the substance thereof, and puts the question whether it shall proceed any further. The introduction of the bill may be originally opposed, as the bill itself may at either of the readings; and, if the opposition succeeds, the bill must be dropped for that

session; as it must also, if opposed with success in any of the subsequent stages.

After the second reading it is committed, that is, referred to a committee, which is either selected in matters of small importance or else, upon a bill of consequence, the house resolves itself into a committee of the whole house: to form which, the speaker quits the chair, the chairman of committees, an officer appointed every session, being appointed chairman. In committee the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new-modelled. After it has gone through the committee, the chairman reports it to the house with such amendments as the committee have made; and then the house reconsiders the whole bill again, and the question is put upon every clause and amendment. When the house has agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then in due course read a third time, and amendments are sometimes then made to it, and new clauses added. The speaker then again opens the contents, and holding it up in his hands, puts the question, whether the bill shall pass? If this is agreed to, the title to it is then settled; after which one of the members is directed to carry it to the lords, and desire their concurrence; who, attended by several more, carries it to the bar of the House of Peers, and there delivers it to their speaker, who comes down from his woolsack to receive it.

It there passes through the same forms, and, if rejected, no more notice is taken, but it passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the lords send a message that they have agreed to the same: and the bill remains with the lords if they have made no amendment to it. But if any amendments are made, such amendments are sent down with the bill, to receive the concurrence of the commons. If the commons disagree to the amendments, a conference usually follows between members deputed from each house; who, for the most part, settle and adjust the difference: but, if both houses remain inflexible, the bill is dropped. If the commons agree to the amendments, the bill is sent back to the lords by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill

begins in the House of Lords. And when both houses have done with any bill, it always is deposited in the House of Peers, to wait the royal assent; except in the case of a bill of supply, which, after receiving the concurrence of the lords, is sent back to the House of Commons.

The royal assent may be given in two ways: 1. In person; when the sovereign comes to the House of Peers, and sending for the commons to the bar, the titles of all the bills that have passed both houses are read; and the royal answer is declared by the clerk of the parliament. If the sovereign consents to a public bill, the clerk usually declares, "*le roy* (or *la reine*) *le veut*," if to a private bill, "*soit fait comme il est desiré.*" If the sovereign refuses his assent, it is in the gentle language of "*le roy s'avisera.*" When a bill of supply is passed, it is presented to the sovereign by the speaker of the House of Commons; and the royal assent is thus expressed, "*le roy remercie ses loyal sujets, accepte leur benevolence, et aussi le veut.*" The crown may, however, give its assent to bills by commission. And, when the bill has received the royal assent, it is then, and not before, a statute or act of parliament.

This statute is placed among the records of the kingdom, there needing no formal promulgation to give it the force of a law, because every man is, in judgment of law, party to making an act of parliament, being present thereat by his representatives. A statute thus made is the exercise of the highest authority that this kingdom acknowledges upon earth; and cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of parliament.

VII. Lastly as to the manner in which parliaments may be adjourned, prorogued, or dissolved.

An *adjournment* is no more than a continuance of the session from one day to another, as the word signifies: and this is done by the authority of each house separately every day; and sometimes for a fortnight or a month together, as at Christmas or Easter. But the adjournment of one house is no adjournment of the other.

A *prorogation* is the continuance of the parliament from one

session to another, as an adjournment is the continuation of the session from day to day. This is done by the royal authority, expressed either by the lord chancellor in the presence of the sovereign, or by commission, or proclamation.

A *dissolution* is the civil death of the parliament; and this may be effected: 1. By the sovereign's will, or 2. By lapse of time.

It is a branch of the royal prerogative, either to prorogue the parliament for a time, or to put a final period to its existence. If nothing had a right to prorogue or dissolve a parliament but itself, it might happen to become perpetual. It is, therefore, necessary that the crown should be empowered to regulate its duration, under the limitations which the English constitution has prescribed; so that, on the one hand, it may frequently and regularly meet for the redress of grievances; and may not, on the other, even with the consent of the crown, be continued to an unconstitutional length.

A dissolution formerly happened immediately upon the death of the reigning sovereign; for he being considered its head, that failing, the whole body was held to be extinct. But calling a new parliament immediately on the inauguration of the successor being found inconvenient, it is now provided that the parliament in being shall continue so long as it would have continued but for such demise, unless sooner prorogued or dissolved by the successor.

2. A parliament may expire by length of time. For if the legislative body might last for the life of the prince who convened it, as formerly; and were to be supplied, by filling the occasional vacancies with new representatives; in these cases, if once corrupted, the evil would be past remedy: but when different bodies succeed each other, if the people disapprove of the present, they may rectify its faults in the next. As our constitution now stands, parliament must die a natural death, at the end of every seventh year, if not sooner dissolved.

CHAPTER III.

OF THE SOVEREIGN AND HIS TITLE.

THE supreme executive power of these kingdoms is vested in a single person, the king or queen; for it matters not to which sex the crown descends: the person entitled to it being immediately invested with all the rights and prerogatives of sovereign power. This power being thus vested in a single person, it is necessary to the peace of the state, that a rule should be laid down, to mark out with precision *who* is that single person, to whom is committed the protection of the community; and to whom, in return, the allegiance of every individual is due.

The fundamental maxim upon which the *jus coronæ* depends, I take to be this: "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."

1. *Firstly*, it is *hereditary*, or descendible to the next heir, on the death of the last proprietor. By a hereditary, I by no means intend a *jure divino* title to the throne. Such a title may have subsisted under the theocratic establishment of the children of Israel in Palestine. The hereditary right which our laws acknowledge, owes its origin to the founders of our constitution, and to them only. They might have made it an elective monarchy; they rather chose to establish a succession by inheritance. This was acquiesced in; and ripened by degrees into common law: the very same title that every private man has to his own estate. Lands are not naturally descendible any more than thrones; but the law has established hereditary succession in the one as well as the other.

2. *Secondly*, this mode of inheritance corresponds with the feudal path of descents in landed estates. Like estates, the

crown descends lineally to the issue of the reigning monarch, as it did from John to Richard II., through six lineal generations. As in common descents, the preference of males to females, and the right of primogeniture among males, are adhered to. Thus Edward V. succeeded in preference to Richard his younger brother, and Elizabeth his elder sister. Like lands or tenements the crown, on failure of the male, descends to the female issue.

Thus Mary succeeded to Edward VI., and the line of Margaret Queen of Scots, daughter of Henry VII., succeeded on failure of the line of Henry VIII. But among females, the crown descends to the eldest only and her issue; and not, as in common inheritances, to all the daughters at once; the necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect; and therefore Mary succeeded alone, and not in partnership with Elizabeth. Again, the doctrine of representation prevails here, as in other inheritances; whereby the lineal descendants of a deceased stand in the same place as their ancestor, if living, would have done. Thus Richard II. succeeded his grandfather Edward III., in right of his father the Black Prince, to the exclusion of his uncles. Lastly, on failure of lineal descendants the crown goes to the next collateral relations of the late king; provided they are lineally descended from the royal stock which originally acquired the crown. Thus Henry I. succeeded to William II., John to Richard I., and James I. to Elizabeth, being all derived from the Conqueror, then the only regal stock.

3. *Thirdly, Hereditary* right by no means implies an *indefeasible* right to the throne. For the supreme legislative authority may defeat this hereditary right; and, by particular limitations and provisions, exclude the immediate heir, and vest the inheritance in any one else.

4. *Fourthly,* however the crown may be limited or transferred it retains its descendible quality, and becomes hereditary in the wearer. Hence the king never dies, in his political, though he is subject to mortality in his natural capacity; because immediately upon the natural death of Henry, William, or Edward, the sovereign survives in his successor. For the right of the crown vests, *eo instanti,* upon his heir; either the *hæres natus,* if the course of descent remains unimpeached, or the

hæres factus, if the inheritance be under any particular settlement. There can be no *interregnum*; the right of sovereignty is fully vested in the successor by the very descent of the crown; and becomes in him hereditary, unless it has been otherwise determined.

In these four points consists the constitutional notion of hereditary right to the throne; which will be still further elucidated by a short historical view of the succession and the several statutes that have from time to time declared limited or barred the hereditary title to the throne.

King Egbert, about A.D. 800, found himself in possession of the throne of the West Saxons by an undisturbed descent of above three hundred years. How his ancestors acquired their title, it matters not now to inquire; his right must be supposed good, because we know no better.

From Egbert to the death of Edmund Ironside, a period of above two hundred years, the crown descended regularly through fifteen princes; the sons of Ethelwolf succeeding to each other without regard to the children of the elder branches, according to the rule prescribed by their father, and confirmed by the witena-gemote, in the heat of the Danish invasions: and Edred, the uncle of Edwy, holding the throne for about nine years, in right of his nephew, a minor, with a view to preserve the succession to Edwy, who succeeded.

Edmund Ironside was obliged, by the irruption of the Danes, at first to divide his kingdom with Canute; and Canute, after his death, seized the whole of it, Edmund's son being driven into foreign countries. Here the succession was suspended by force, and a new family placed upon the throne: in whom it continued hereditary for three reigns; when, upon the death of Hardicanute, the Saxon line was restored in the person of Edward the Confessor.

He was not, indeed, the true heir to the crown, being the younger brother of Edmund Ironside, who had a son Edward, surnamed the Outlaw, still living. But this son was then in Hungary: and, the English having shaken off the Danish yoke, it was necessary that somebody on the spot should mount the throne; and the Confessor was the next of the royal line then in

England. On his decease without issue, Harold I. was elected king to fill the vacancy; and almost at the same instant came on the northern invasion: the *right* to the crown being still in Edgar Atheling, son of Edward the Outlaw, and grandson of Edmund Ironside.

William the Norman claimed the crown by virtue of a grant from the Confessor which, if real, was invalid; because it was made, as Harold observed in his reply to William's demand, "*absque generali senatus et populi conventu et edicto;*" which very plainly implies, that it then was generally understood that the king, with consent of the general council, might change the line of succession.

This conquest was, like that of Canute, a forcible transfer of the crown into a new family; but, the crown being so transferred, all its inherent properties were transferred also. For, the victory at Hastings not being a victory over the nation but only over Harold, the only right that the Conqueror could acquire was the right to possess the crown, not to alter the nature of the government. And, therefore as the laws remained in force, he necessarily took the crown subject to those laws, and with all its inherent properties; the first and principal of which was its descendibility.

Accordingly, it descended from him to William II. and Henry I. Robert, his eldest son, was kept out of possession by the violence of his brethren: who might proceed upon a notion that he was already provided for as Duke of Normandy. But, as he died without issue, Henry had a good title to the throne at last, whatever he might have had at first.

Stephen of Blois, who succeeded, was the grandson of the Conqueror, by Adelicia, his daughter, and claimed the throne by a feeble kind of hereditary right: not as the nearest of the male line, but as the nearest male of the blood royal, excepting his elder brother Theobald, who was Earl of Blois, and therefore seems to have waived, as he never insisted on, so precarious a claim. The real right was in the Empress Matilda, daughter of Henry I.; the rule being that the daughter of a son shall be preferred to the son of a daughter. So that Stephen was little

better than a usurper; and therefore, he chose to rely on a title by election, while the empress asserted her hereditary right by the sword; which dispute ended at last in the compromise made at Wallingford, that Stephen should keep the crown, but that Henry, the son of Maud, should succeed him, as he afterwards did.

Henry, the second of that name, was, next after Matilda, the undoubted heir of the Conqueror;* and from him the crown descended to his eldest son, Richard I., who dying childless, the right vested in his nephew Arthur, son of Geoffrey his next brother. But John, the youngest son of Henry, seized the throne; claiming it by hereditary right: that is to say, he was next of kin to the deceased king, being his surviving brother: whereas Arthur was removed one degree further, being his brother's son, though by right of representation he stood in the place of his father. And however flimsy this title, and those of William Rufus and Stephen of Blois may appear to us, after the law of descents has been settled for many centuries, they were sufficient to puzzle our ancestors. However, on the death of Arthur and his sister Eleanor without issue, an indisputable title vested in Henry III., the son of John: and from him to Richard II., six generations, the crown descended in the true hereditary line.

Upon Richard's resignation, he having no children, the right reverted to the issue of his grandfather, Edward III. That king had many children, besides Edward the Black Prince, father of Richard II.: but I shall only mention three: William, his second son, who died without issue; Lionel, Duke of Clarence, his third son; and John of Gaunt, Duke of Lancaster, his fourth. By the rules of succession the posterity of Lionel were entitled to the

* He had also another connexion in blood, which endeared him still further to the English. He was lineally descended from Edmund Ironside, the last of the Saxon race of hereditary kings. For Edward the Outlaw, son of Edmund Ironside, had, besides Edgar Atheling, who died without issue, a daughter Margaret, who was married to Malcolm, King of Scotland; and in her the Saxon hereditary right resided. She had several children, and among the rest Matilda, wife of Henry I., who by him had the Empress Matilda, the mother of Henry II. Upon which account the Saxon line is frequently said to have been *restored* in his person: though, in reality, that right subsisted in the *sons* of Queen Margaret; King Henry's best title being as heir to the Conqueror.

throne upon the resignation of Richard. But Henry, Duke of Lancaster, the son of John of Gaunt, having then a large army in the kingdom, the pretence of raising which was to recover his patrimony from the king, and to redress the grievances of the subject, it was impossible for any other title to be asserted with any safety; and he became king under the title of Henry IV.; yet not until he had declared that he claimed, not as a conqueror but as a successor, descended of the royal blood.

However, as in Edward III.'s time we find the parliament approving and affirming the law of the crown, so in the reign of Henry IV., they actually exerted their right of new-settling the succession by the statute 7 Hen. IV. c. 2, enacting "that the "inheritance of the crown and realm of England shall be *set and* "*remain* in the person of our sovereign lord and king, and in "the heirs of his body issuing;" which shows that it was then generally understood that the king and parliament had a right to regulate the succession.

The crown now descended regularly from Henry IV. to his son and grandson, Henry V. and VI.; in the latter of whose reigns the house of York asserted their dormant title; and at last established it in the person of Edward IV. At his accession, after a breach of the succession that continued for three descents, the distinction of a king *de jure* and a king *de facto* began to be taken; in order to indemnify such as had submitted to the late establishment, and to provide for the peace of the kingdom by confirming all honours conferred and all acts done, by those who were now called usurpers.

Edward IV. left two sons and a daughter; the eldest of which sons, Edward V., enjoyed the regal dignity for a short time, and was then deposed by Richard, who usurped the throne; having previously insinuated to the populace a suspicion of bastardy in the children of Edward IV., to make a show of hereditary title; after which he is said to have murdered his two nephews, upon whose death the right to the crown devolved to their sister Elizabeth.

The tyrannical reign of Richard III. gave occasion to Henry Earl of Richmond to assert his claims to the crown; a claim the most remote and unaccountable ever set up, and which nothing could have given success to, but the universal detestation of Richard. For, besides that he claimed from John of Gaunt,

whose title was now exploded, the claim, such as it was, was through John Earl of Somerset, a bastard son, begotten by John of Gaunt upon Catherine Swinford. Notwithstanding all this, immediately after the battle of Bosworth Field, he assumed the regal dignity; and his possession was established by parliament, in the first year of his reign. Wherein parliament seems to have copied the caution of their predecessors in the reign of Henry IV.; and therefore avoided any recognition of Henry VII.'s right, which indeed was none at all; and the king would not have it by way of new law or ordinance, whereby a right might seem to be conferred upon him; and therefore a middle way was chosen, by way of *establishment*, and that under covert and indifferent words, "That the inheritance of the crown should "*rest*, *remain*, and *abide* in King Henry VII. and the heirs of his "body:" thereby providing for the future, and acknowledging his present possession; but not determining either way, whether that possession was *de jure* or *de facto*. However, he soon after married Elizabeth of York, the undoubted heiress of the Conqueror, and thereby gained by much his best title to the crown.

Henry VIII., the issue of this marriage, succeeded to the crown by indisputable hereditary right, and transmitted it to his three children in successive order. But in his reign we find parliament busy in regulating the succession. The crown was finally limited to Prince Edward by name, after that to Mary, and then to Elizabeth, and the heirs of their respective bodies; which succession took effect accordingly, being indeed no other than the usual course of law.

Upon Mary's marriage with Philip of Spain, the hereditary right to the crown was again declared in parliament; and on Elizabeth's accession, her right is recognised in still stronger terms than her sister's.

On the death of Elizabeth, without issue, the line of Henry VIII. became extinct. It therefore became necessary to recur to the other issue of Henry VII. by Elizabeth of York his queen; whose eldest daughter Margaret having married James IV. king of Scotland, James the Sixth of Scotland, and of England the First, was the lineal descendant from that alliance. So that in his person, as clearly as in Henry VIII., centred all the claims of different competitors, from the Conquest downwards, he being

indisputably the lineal heir of the Conqueror. And, what is more remarkable, in his person centred the right of the Saxon monarchs which had been suspended by the Conquest. For Margaret, the sister of Edgar Atheling, the daughter of Edward the Outlaw, and grand-daughter of Edmund Ironside, was the person in whom the hereditary right of the Saxon kings, supposing it not abolished by the Conquest, resided. She married Malcolm king of Scotland, by whom she had several sons; and the royal family of Scotland from that time were the offspring of Malcolm and Margaret. Of this royal family James I. was the direct heir, and therefore united in his person every possible claim by hereditary right to the English throne, being the heir both of Egbert and William the Conqueror.

And it is no wonder that a prince of more learning than wisdom, who could deduce a hereditary title for eight hundred years should be taught by the flatterers of his time to believe there was something divine in this right, and that the finger of Providence was visible in its preservation. Whereas, though a wise, it was clearly a human institution; and the right inherent in him no natural, but a positive right. And in no other light was it taken by parliament.

But, wild and absurd as is the doctrine of divine right, it is still more astonishing, that when so many hereditary rights had centred in this king, his son and heir Charles I. should be told that he was a prince, elected by his people, and therefore accountable to them for his conduct. The confusion which followed will long be a standing argument in favour of hereditary and constitutional monarchy. After the death of the Protector, a parliamentary convention restored the lineal heir, and acknowledged that immediately upon the decease of Charles, "the imperial crown of these realms did by inherent "birthright, and lawful and undoubted succession, descend "and come to Charles II., as being lineally, justly, and lawfully, "next heir of the blood royal of this realm; and thereunto "they did submit and oblige themselves, their heirs, and "posterity for ever."

It thus clearly appears that the crown of England is a hereditary crown; though subject to limitation by parliament; as

will appear in those instances wherein parliament has exercised the right of altering the succession.

The first instance is the famous *Bill of Exclusion*, which in the end of the reign of Charles II. passed the commons, but was rejected by the lords; the king having declared beforehand, that he never would consent to it. And from this transaction we may collect: 1. That the crown was acknowledged to be hereditary; and the inheritance indefeasible unless by parliament: 2. That parliament had power to defeat the inheritance: else such a bill had been ineffectual. James II. succeeded and might have enjoyed the throne during the remainder of his life, but for the Revolution in 1688.

The true principle upon which that event proceeded, was a new case in politics. It was not a defeasance of the right of succession, and a new limitation of the crown, by the king and both houses of parliament; it was the act of the nation alone, upon a conviction that there was no king in being. For in a full assembly of the lords and commons, both houses came to the resolution that the throne was vacant. Thus ended the old line of succession. The facts appealed to, the king's endeavour to subvert the constitution by breaking the original contract, his violation of the fundamental laws, and his withdrawing himself out of the kingdom, were notorious; and the consequence drawn from these facts, it belonged to our ancestors to determine, they alone having a competent jurisdiction to decide this important question.

The vacancy of the throne being once established, the rest followed almost of course. For, if the throne be vacant, the right of disposing of this vacancy seems naturally to result to the lords and commons, as trustees and representatives of the people. For there are no other hands in which it can properly be intrusted; and there is a necessity for its being intrusted somewhere, else the whole frame of government must be dissolved. The lords and commons having therefore determined that there was a vacancy of the throne, they proceeded to fill up that vacancy in such a manner as they judged most proper.

Upon the principles before established, the convention might no doubt have vested the regal dignity in an entirely new family, but they knew too well the benefits of hereditary

succession, and the influence which it has over the minds of the people, to depart further from the ancient line than temporary necessity required. They therefore settled the crown, first on William and Mary, James's eldest daughter, for their joint lives: then on the survivor of them, and then on the issue of Mary: upon failure of such issue, it was limited to the Princess Anne, James's second daughter, and her issue; and lastly, on failure of that, to the issue of William, who was the grandson of Charles I., and nephew as well as son-in-law of James II., being the son of Mary his eldest sister. This settlement included all the Protestant posterity of Charles I., except such other issue as James might at any time have, which was totally omitted, through fear of a popish successor. And this order took effect accordingly. These three princes, William, Mary, and Anne, did not take the crown by hereditary right or *descent*, but by way of donation or *purchase*, as the lawyers call it; by which they mean any method of acquiring an estate otherwise than by descent.

Towards the end of William's reign, when all hopes of issue died with the Duke of Gloucester, the king and parliament thought it necessary again to limit the succession, in order to prevent another vacancy of the throne. Parliament had previously excluded from the crown every person who should be reconciled to, or hold communion with, the see of Rome. To act consistently, and pay as much regard to the old hereditary line as their former resolutions would admit, they turned their eyes on the Princess Sophia, electress and Duchess Dowager of Hanover, the youngest daughter of Elizabeth Queen of Bohemia, daughter of James I., nearest of the ancient blood royal who was not incapacitated by being in communion with the Church of Rome. On her therefore, and the heirs of her body, being Protestants, the remainder of the crown, expectant on the death of William and Anne, without issue, was settled; and at the same time it was enacted that whosoever should hereafter come to the possession of the crown should join in the communion of the Church of England as by law established.

This is the last limitation of the crown that has been made by parliament. The Princess Sophia dying before Queen Anne, the inheritance descended on her son and heir George I.; from him to George II.; and from him to his grandson and heir, George III. From him it descended to his eldest son, George IV., who dying

without issue was succeeded by William IV., the third son of George III.; the second son Frederick, Duke of York, having previously died without issue. On the death of William IV., the inheritance descended to the only child of Edward Duke of Kent, the fourth son of George III., our present sovereign Queen Victoria.

Hence it is easy to collect, that the title to the crown is at present hereditary, though not so absolutely hereditary as formerly. For formerly the crown went to the next heir without any restriction; now the inheritance is conditional, being limited to such heirs only of the Princess Sophia as are members of the Church of England, and are married to none but Protestants. In this due medium consists the true constitutional notion of the right of succession to the imperial crown of these kingdoms.

CHAPTER IV.

OF THE ROYAL FAMILY.

THE first person of the royal family, regarded by the laws of England, supposing the sovereign to be a king, is the *queen*; who is either *regent*, *consort*, or *dowager*. The queen *regent*, or *sovereign*, holds the crown in her own right; and has the same powers, prerogatives, and duties as a king.

The queen *consort* is the wife of the reigning king; and is participant of divers prerogatives above other women. She is a public person, distinct from the king; and may purchase and convey lands, and do other acts of ownership, without his concurrence. She may take a grant from the king, which no other wife can from her husband. She has separate courts and offices not only in matters of ceremony, but even of law; and her attorney and solicitor general are entitled to a place within the bar. She may sue and be sued alone; and may have a separate property in goods as well as lands, and has a right to dispose of them by will. She had formerly a separate revenue, consisting of certain rents out of the demesne lands of the crown; and certain ancient perquisites such as this: that on the taking of a

whale on the coast, which is a royal fish, it should be divided between the king and queen: the head only being the king's property, and the tail of it the queen's; the reason alleged being to furnish the queen's wardrobe with whale-bone!

The queen consort is a subject, yet, in point of the security of her life and person, she is on the same footing with the king. It is equally treason to compass or imagine her death; and to violate or defile her amounts to the same high crime; as well in the person committing the fact, as in the queen herself if consenting. And if she be accused of any species of treason, she shall be tried by the peers of parliament, as Ann Boleyn was in 28 Henry VIII.

The husband of a queen regnant is her subject; and may be guilty of high treason; but in the case of conjugal infidelity, he is, for obvious reasons, not subjected to the same penalties.

A queen *dowager* is the widow of the king, and enjoys some of the privileges belonging to a queen consort. It is not high treason however to conspire her death, or to violate her chastity, because the succession is not thereby endangered. But no man can marry her without special licence from the sovereign, on pain of forfeiting his lands and goods; and a queen dowager, when married again to a subject, does not lose her regal dignity as peeresses dowager, when commoners by birth, do their peerage, when they marry commoners.

The Prince of Wales, and his consort, and the princess royal or eldest daughter of the king, are likewise peculiarly regarded by the laws. To compass the death of the former, or to violate the chastity of either of the latter, are as much high treason as to conspire the death of the king, or violate the chastity of the queen. The heir apparent to the crown is usually made Prince of Wales and Earl of Chester, by special creation and investiture; but as the king's eldest son, he is by inheritance Duke of Cornwall.

The rest of the royal family may be considered in two different lights, according to the sense in which the term is used. The larger sense includes all who are by any possibility inheritable to the crown; which, since the Act of Settlement, means the issue of the Princess Sophia. The more confined sense includes only

those in near propinquity to the reigning prince, and to whom, therefore, the law pays an extraordinary respect.

Their education while minors, and the approbation of their marriages, when grown up, belong of right to the king; a rule applying to grandchildren as well as children of the sovereign. And no descendant of George II., other than the issue of princesses married into foreign families, is capable of contracting matrimony, without the consent of the sovereign under the great seal; and any marriage contracted without such consent is void. But lest this consent be arbitrarily withheld, any of these descendants, above the age of twenty-five, may, after twelve months' notice to the privy council, contract marriage without the consent of the crown, unless both houses of parliament shall expressly declare their disapprobation thereof.

CHAPTER V.

OF THE ROYAL COUNCILS.

To assist the sovereign in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law has assigned him several councils to advise with.

1. The first of these is the high court of parliament.

2. Secondly, the peers of the realm are by birth hereditary councillors of the crown, being created: 1. *Ad consulendum*; 2. *Ad defendendum, regem*: on which account the law gives them certain high privileges; such as freedom from arrest, &c., even when no parliament is sitting; because it intends that they are alway assisting the sovereign with their counsel for the commonwealth, or keeping the realm in safety by their valour.

Conventions of the peers, to advise the crown, in former times frequent, have now fallen into disuse. Indeed, the convoking of them had been so long left off, that when Charles I., in 1640, issued writs to call a council of peers, at York, the Earl of Clarendon mentions it as a thing not before heard of. A peer is said, however, to have a right to demand an audience, and to lay before the king such matters as he shall judge of importance to the public weal. Thus, in the reign of Edward II., it was an

article of impeachment against the Spencers, that they would not suffer the great men of the realm to speak with the king, or to come near him.

3. But the principal council of the sovereign is *the Privy Council*; which consists of such persons as he wills to be of his council; and is presided over by the lord president, who has precedence next after the lord chancellor and lord treasurer.

The *duty* of a privy councillor appears from his oath of office: 1. To advise the crown according to the best of his discretion. 2. To advise for the king's honour and good of the public, without partiality through affection, doubt, or dread. 3. To keep the king's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be resolved. 6. To withstand all persons who would attempt the contrary. And lastly, in general, 7. To observe, keep, and do all that a true councillor ought to do to his sovereign lord.

The *office* of a privy councillor is to advise the sovereign in the discharge of those *executive*, *legislative*, and *judicial* duties which the constitution has reposed in him. The former have, since the accession of Queen Anne, been entrusted to responsible advisers; and it has consequently become the practice to summon to the meetings of the council those members of it only, who are the ministers of the crown.

Its *legislative* functions are exercised with reference to our colonies and other dependencies. Ordinances are made here for those colonies and settlements which do not possess representative assemblies; and the legislative acts of most of the other dependencies are herein approved or disallowed.

From some of our courts, and in matters of lunacy or idiocy, an appeal lies to the sovereign in council; and from all the dominions of the crown, excepting Great Britain and Ireland, a similar *appellate* jurisdiction. This authority is exercised by *the judicial committee of the privy council*; who make their report to the sovereign, by whom the judgment is finally given.

The privy council may inquire into all offences against the government, and commit the offenders for trial; but their jurisdiction is only to inquire, and not to punish.

Its *dissolution* depends upon the sovereign's pleasure; and he

may, whenever he thinks proper, discharge any particular member, or the whole of it, and appoint another. At common law it was dissolved *ipso facto* by the demise of the crown; but to prevent the inconvenience of having no council in being at the accession of a new prince, it is enabled by statute to continue for six months after, unless sooner determined by the successor.

CHAPTER VI.

OF THE SOVEREIGN'S DUTY.

Of the duties incumbent on the sovereign by our constitution the most important is to govern his people according to law. "The King," says Bracton, who wrote under Henry III., "ought "not to be subject to man, but to God, and to the law; for the "law maketh the king. Let the king therefore render to the "law, what the law has vested in him with regard to others; "dominion and power: for he is not truly king, where will "and pleasure rules, and not the law." And again, "the king "also hath a superior, namely, God, and also the law, by which "he was made a king." For "the laws of England, 12 & 13 "Will. III., c. 2, are the birthright of the people thereof; and "all the kings and queens who shall ascend the throne of this "realm ought to administer the government of the same ac-"cording to the said laws."

The terms of what is called the *original contract* between king and people, are contained in the coronation oath, administered by one of the prelates, to every sovereign who succeeds to the crown in the following terms:—

"Will you solemnly promise and swear to govern the people of this kingdom of England, and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same? *The king or queen shall say:* I solemnly promise so to do. *Archbishop or bishop:* Will you to your power cause law and justice, in mercy, to be executed in all your judgments? *King or queen:* I will. *Archbishop or bishop:* Will you to the utmost of your power maintain the laws of God, the true profession of the gospel, and the Pro-

testant reformed religion established by the law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them? *King or queen:* All this I promise to do. *After this, the king or queen, laying his or her hand upon the Holy Gospels, shall say:* The things which I have here before promised I will perform and keep: So help me God: *and then shall kiss the book.*'

This is the coronation oath. But in what form soever it be conceived, it is a fundamental and express contract; though doubtless the duty of protection is impliedly as much incumbent on the sovereign before coronation as after: in the same manner as allegiance becomes the duty of the subject immediately on the descent of the crown, before he has taken the oath of allegiance, or whether he ever takes it at all. The reciprocal duty of the subject will be considered in its proper place. In the sovereign's part of this contract are expressed all 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 ROYAL PREROGATIVE.

One of the bulwarks of civil liberty, is the limitation of the prerogative by bounds so certain and notorious, that it is impossible the sovereign should ever exceed them, without the consent of the people, on the one hand; or without, on the other, a violation of the original contract between prince and subject. We shall consider this prerogative minutely, to demonstrate its necessity, and mark out its extent and restrictions: from which this conclusion will follow, that the powers vested in the crown by the law are necessary for the support of society, and do not intrench any further on our *natural*, than is expedient for the maintenance of our *civil* liberties.

By *prerogative* we understand that special pre-eminence which the crown has, above all other persons, and out of the ordinary

course of the law, in right of the regal dignity. It signifies something that is required or demanded before, or in preference to, all others. And hence it can only be applied to those rights and capacities which the sovereign enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects.

Prerogatives are either *direct* or *incidental*. The *direct* are such positive parts of the royal authority, as spring from the sovereign's political person; as, the right of sending ambassadors, of creating peers, and of making war. The *incidental* bear a relation to something else distinct from the person of the sovereign, and are exceptions, in favour of the crown, to those rules that are established for the rest of the community; such as, that the sovereign can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects.

These *direct* prerogatives which we are, at present, to consider, may be divided into three kinds: being such as regard, first, the royal *character*; secondly, the royal *authority*; and, lastly, the royal *income*. In the present chapter we shall confine ourselves to the two first, which relate to the sovereign's political *character* and *authority*; or, in other words, his *dignity* and regal power. The royal *revenue* will receive a distinct examination.

Under every monarchical establishment, it is necessary to distinguish the prince from his subjects, not only by outward pomp, but by ascribing to him certain qualities, distinct from and superior to those of any other individual. The law therefore ascribes to the sovereign in his political character, certain attributes of a transcendent nature, which enable him to carry on the business of government.

1. The law ascribes to the king the *attribute* of *sovereignty* or pre-eminence. He is said to have *imperial* dignity; his realm is said to be an *empire*, and his crown *imperial*. Hence it is, that no action can be brought against the sovereign, even in civil matters, because no court can have jurisdiction over him. Hence it is, likewise, that the person of the sovereign is sacred, even though the measures of his reign be tyrannical: for no jurisdiction upon earth has power to try him; much less to condemn him to punishment.

Are then, the subjects of England without remedy, if the

crown should invade their rights, either by private injuries, or public oppressions? Certainly not; for the law provides a remedy in both cases.

As to *private injuries*; if any person has a just demand upon the crown, he must petition him in one of his courts, where his judges will administer right as a matter of grace, though not upon compulsion. For the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him. And, as to personal wrongs, it is well observed by Locke, "the harm "which the sovereign can do in his own person not being likely "to happen often, nor to extend itself far; nor being able, by "his single strength, to subvert the laws, nor oppress the body "of the people, the inconveniency, therefore, of some particular "mischiefs, that may happen sometimes when a heady prince "comes to the throne, are well recompensed by the peace of the "public and security of the government, in the person of the "chief magistrate being thus set out of the reach of danger."

As to cases of ordinary *public oppression*, where the constitution itself is not attacked, the law also assigns a remedy. For, as a sovereign cannot misuse his power without the advice of evil counsellors; the constitution provides, by means of indictments and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land.

2. The law ascribes to the king, in his political capacity, absolute *perfection*. The king can do no wrong; which means, first, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the sovereign, nor is he answerable for it personally; and, secondly, that the prerogative extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

For the sovereign is not only incapable of *doing* wrong, but even of *thinking* wrong. And therefore, if the crown is induced to grant any privilege to a subject prejudicial to the commonwealth or to a private person, the law will not suppose the sovereign to have meant either an unwise or an injurious action, but declares that he was deceived in his grant; and thereupon such grant is rendered void, upon the ground of fraud and practised deception either by or upon those agents whom the crown has thought proper to employ.

On this same principle, there can be on the part of the sovereign, no negligence, or *laches*, and therefore no delay bars his right. *Nullum tempus occurrit regi.* For the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects. Neither can the king in judgment of law, as king, ever be a minor; and therefore his grants and assents to acts of parliament are good, though he has not attained the legal age of twenty-one. But it has been usual when the heir-apparent has been very young, to appoint a regent for a limited time: the necessity of such extraordinary provision being sufficient to demonstrate the truth of that maxim of the law that in the king is no minority; and therefore he has no legal guardian.

3. A third *attribute* of the sovereign is his *perpetuity*. The king never dies. Henry, Edward, or George may die; but the king survives them all. For, immediately upon the decease of the reigning prince in his natural capacity, his kingship by act of law is vested at once in his heir; who is, *eo instanti*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is called his *demise*; an expression which signifies merely a transfer of property. The demise of the crown means that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual.

The law also invests the sovereign with certain authorities and powers; in the exercise whereof consists the executive part of government. These prerogatives respect either the nation's intercourse with *foreign* nations, or its own *domestic* polity.

1. The individuals of a state in their collective capacity cannot transact the affairs of that state with another community equally numerous as themselves. The sovereign, therefore, is in foreign affairs the representative of his people and has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home.

An ambassador represents the person of his sovereign; and as that sovereign owes no subjection to any laws but those of his own country, his envoy is not subject to the control of the private law of that state wherein he is appointed to reside. If

he makes an ill use of his character, he may be sent home and accused before his master, who is bound either to do justice upon him, or avow himself the accomplice of his crimes. But there is great dispute whether this exemption of ambassadors extends to all crimes, as well natural as positive, or whether it only extends to such as are *mala prohibita*, and not to those that are *mala in se*, as murder. Our law takes in the restriction, as well as the exemption; holding that an ambassador is privileged by the law of nations; and yet, if he commit any offence against the law of nature, he shall lose his privilege.

In respect to *civil* suits, all jurists agree, that neither an ambassador, nor any of his train, can be prosecuted for any debt or contract in the kingdom wherein he is sent to reside. Our law-books are silent upon this subject previous to the reign of Anne; when an ambassador from Peter the Great was arrested in London for a debt of fifty pounds, which he had there contracted. Instead of relying upon his privilege, he gave bail to the action, and complained to the queen. The persons concerned in the arrest were prosecuted in the Queen's Bench, and convicted of the facts, the question of law, how far those facts were criminal, being reserved to be argued before the judges. In the mean time the Czar resented this affront very highly, and demanded that the sheriff of Middlesex and all others concerned should be punished with instant death. But the queen directed her secretary to inform him, "that she could inflict no punishment upon any, "the meanest, of her subjects, unless warranted by the law of "the land; and therefore was persuaded that he would not "insist upon impossibilities." A bill was, however, brought into parliament, and afterwards passed into a law, to prevent such insolence for the future. And a copy of this act, elegantly engrossed and illuminated, accompanied by a letter from the queen, was sent to Moscow, and accepted as a satisfaction by the Czar. This act, 7 Ann. c. 12, recites the arrest as contrary to the law of nations, and in prejudice of the privileges of ambassadors, &c.; and enacts, that for the future all process against the person of any ambassador shall be void; but provides, that no trader within the description of the bankrupt laws, who shall be in the service of any ambassador, shall be thereby protected; nor shall any one be punished for arresting

an ambassador's servant, unless his name be registered with the secretary of state, and by him transmitted to the sheriffs of London and Middlesex.

2. It is also the prerogative of the crown to make treaties and alliances with foreign states. Whatever contract, therefore, the sovereign engages in, is binding upon the whole community; and no other power in the kingdom can delay, resist, or annul it. Lest this authority should be abused, the constitution interposes a check, by means of impeachment, for the punishment of such ministers, as advise or conclude any treaty, which derogates from the honour and interest of the nation.

3. Upon the same principle rests the prerogative of making war and peace. For the right of making war, which by nature subsisted in every individual, is given up by all who enter into society, and is vested in the sovereign power. Whatever hostilities, therefore, may be committed by private citizens, the state is not affected thereby: and such unauthorized volunteers in violence are properly treated like pirates and robbers. And the reason why a denunciation of war ought always to precede the commencement of hostilities, is not so much that the enemy may be put upon his guard, which is matter rather of magnanimity than right, but that it may be certainly clear that the war is undertaken by the community. Wherever the right resides of beginning, there also must reside the right of ending it, or making peace. And the same check of impeachment, for misconduct, in beginning, conducting, or concluding a war, restrains the ministers of the crown from a wanton exercise of this great prerogative.

4. But as delay in making the war may be detrimental to individuals, who suffer by depredations from foreign potentates, our law arms the subject with power to impel the prerogative; by directing ministers to issue letters of marque and reprisal upon due demand: this prerogative being plainly derived from that of making war. But letters of marque have long been disused; and the conference which met at Paris in 1856, after the close of the war with Russia, having recommended the entire abolition of privateering, may possibly lead to treaties by which this branch of the prerogative will become merely matter of history.

5. Upon exactly the same grounds stands the prerogative of granting safe-conducts, without which no member of one society has a right to intrude into another. Great tenderness is shown by our laws, however, not only to foreigners in distress, whose goods are cast on our shores, but with regard also to strangers who come spontaneously. For so long as their nation is at peace with us, and they behave peaceably, they are under the protection of the law. But no subject of a nation at war with us can come into the realm, travel upon the high seas, or send his merchandise from one place to another, without danger of seizure, unless he has letters of safe-conduct, for which passports are now usually substituted.

In *domestic* affairs the sovereign is considered in a variety of characters, and from thence there arise several other prerogatives.

1. He is a part of the supreme legislative power; and may reject such bills in parliament, as he judges improper to be passed.

2. He is *generalissimo*, or first in military command; and has the sole power of raising fleets and armies. This prerogative was claimed by the long parliament of Charles I.; but, upon the restoration, was solemnly declared to be in the king alone.

It extends to the erecting, as well as manning and governing of places of strength; whence formerly all lands were subject to a tax, for building of castles wherever the king thought proper. This was one of the three things, from contributing to the performance of which no lands were exempted: and therefore called by our Saxon ancestors the *trinoda necessitas: sc. pontis reparatio, arcis constructio, et expeditio contra hostem.* But parliament now provides the means of making defensive works, and has practically obtained the control of their construction.

Upon the same foundation, the sovereign has the prerogative of appointing *ports* and *havens*, or places for persons and merchandise to pass into and out of the realm. By the feudal law all navigable rivers and havens are among the *regalia*; and in England the sovereign is lord of the whole shore, and particularly is the guardian of the ports and havens, which are the

inlets and gates of the realm. These legal ports were undoubtedly at first assigned by the crown; since to each a court of portmote is incident. But as the king had not the power of resumption, or of confining the limits of a port once established, any person had a right to load or discharge his merchandise in any part thereof; whereby the revenue was much diminished. This occasioned those statutes which enable the crown to ascertain the limits of all ports, and to assign proper *wharfs* and *quays* in each port, for the exclusive landing and loading of merchandise; a power now vested in the Treasury, who in certain cases must consult the Admiralty.

The erection of beacons, lighthouses, and sea-marks, was anciently a branch of the prerogative. The superintendence and management of all lighthouses, buoys, and beacons, is now however vested in the Trinity-house.

But to this branch of the prerogative may be referred the power of licensing the importation of utensils of war, of prohibiting the exportation of military and naval stores, and of confining his subjects to stay within the realm, or recalling them when beyond seas. At common law, every man may go out of the realm for whatever cause he pleases; but, because every man ought to defend the realm, the sovereign may command him by his writ that he go not out of the realm; and, if he does, he shall be punished for the disobedience. The writ of *ne exeat regno* was at first employed to prevent the clergy from going to Rome; it was afterwards extended to laymen concerting measures against the state; and has at length become a part of the ordinary process of the High Court in order to get bail from any person who is about to go abroad, so as to withdraw from the jurisdiction. The legality of this application of the writ was settled in the time of Charles II., and the granting of it has long been considered a matter of right.

The sovereign is the *fountain of justice* and general conservator of the peace. The original power of judicature is lodged in the nation at large; but as it would be impracticable to render justice to every individual, by the people in their collective capacity, every nation has committed that power to magistrates; and in England this authority is exercised by the sovereign or his substitutes, the judges, to whom he has delegated his whole

judicial power. Hence his legal *ubiquity*. In law he is present in all his courts, though he cannot personally distribute justice. And from this ubiquity it follows, that he can never be nonsuit: for a nonsuit is the desertion of the action by the non-appearance of the plaintiff in court.

In prosecutions for offences, the sovereign appears in another capacity, that of *prosecutor*; for all offences are theoretically against either his peace, or crown and dignity. As the public has delegated its power, with regard to the execution of the laws, to one visible magistrate, all affronts to that power are offences against him to whom they are so delegated. And he is therefore the proper person to prosecute for all offences. Hence also the prerogative of *pardoning* offences; for it is reasonable that he only who is injured should have the power of forgiving.

From the same theory of the sovereign being the fountain of justice, may be deduced the prerogative of issuing proclamations; which have a binding force only when grounded upon the laws. The making of laws is the work of the legislature; yet the manner, time, and circumstances of putting those laws in execution are frequently left to the discretion of the executive magistrate.

4. The sovereign is the *fountain of honour, of office*, and *of privilege*; the constitution entrusting him with the sole power of conferring dignities and honours, in confidence that he will bestow them upon none but such as deserve them. And therefore all degrees of nobility, of knighthood, and other titles, are by grant from the crown; and he can erect corporations, whereby a number of private persons are united together, and enjoy many powers and immunities in their political, of which they were incapable in their natural, capacity.

5. The sovereign is the *arbiter of commerce*, the affairs of which are regulated by the law merchant, or *lex mercatoria*, which all nations take notice of. Our law, therefore, decides the causes of merchants by the general rules which obtain in commercial countries; and that even in matters relating to domestic trade, as, for instance, with regard to the drawing, the acceptance, and transfer of bills of exchange.

In exercise of this branch of the prerogative the sovereign

appoints the Board of Trade, which superintends all government measures brought before parliament relating to trade and commerce; exercises a general superintendence over merchant ships and seamen; lays down rules as to the examination and qualification of masters and mates; investigates cases of incompetency and misconduct on the part of masters, and appoints officers to report on the condition and efficiency of steam-vessels and their machinery. It exercises a supervision also over railways and railway companies, not only with respect to their original formation, but also as to their subsequent working; inquires into the circumstances of accidents, and provides, if need be, for the greater safety of the public. This board also registers all joint-stock companies. A similar duty with respect to copyright in designs is imposed on it; and under its immediate control are placed the schools of design. One of its departments is charged with the publication of information with respect to the revenue, trade, commerce, wealth, population, and statistics of the realm; and another department collects and prepares the tables of the prices of corn which regulate the rent-charges now paid in lieu of tithes.

Under this branch of the prerogative fell formerly *the establishment of public marts*, or places of buying and selling; such as markets and fairs, with the tolls thereunto belonging;—and *the regulation of weights and measures*; but neither can now with propriety be referred simply to the prerogative, any more than the ancient prerogative to give money authority, or make it current. The *regulation of the coinage* is now within the domain of Parliament only.

6. The sovereign is the general conservator of his people, and as such is *guardian of all infants and lunatics*, an authority exercised by his judges. In this capacity, also, he is *guardian of the Public Health*, and appoints the *Local Government Board*,—to which is committed its protection, by means of the powers conferred on them to regulate the proceedings of the local authorities, whose duty it is to carry out the provisions of the Public Health Act. On the crown in council also is devolved the duty of protecting the *public safety*, by laying down rules for the storage, carriage, and sale of gunpowder and other explosive and dangerous substances.

7. The sovereign is, lastly, the head and supreme governor of the national church.

To enter into the reasons upon which this prerogative is founded, is matter rather of divinity than of law. I shall therefore only observe, that it is in virtue of this authority that the crown convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical synods or convocations;—nominates to vacant bishoprics, and certain other ecclesiastical preferments; and is the *dernier ressort* in all ecclesiastical causes, an appeal lying ultimately to him from the sentence of every ecclesiastical judge. In the sovereign in council is also vested the power of giving effect to any scheme or recommendation of the Ecclesiastical Commissioners.

CHAPTER VIII.

OF THE ROYAL REVENUE.

We proceed now to examine the *fiscal* prerogatives of the sovereign, or such as regard his *revenue*; that portion which each subject contributes of his property in order to secure the remainder.

This is either *ordinary* or *extraordinary*. The *ordinary* revenue is such as has either subsisted time out of mind in the crown, or else has been granted by parliament by way of exchange for such of the sovereign's inherent hereditary revenues as were found inconvenient to the subject. Not that the crown is at present in possession of the whole of this revenue. Much, nay the greatest part, of it is in the hands of subjects; so that I must recount, as part of the royal revenue, what lords of manors look upon to be their own absolute rights; because they have been vested in them and their ancestors for ages, though originally derived from our ancient princes.

I. *The custody of the temporalities of bishops*, means the lay revenues, which belong to an archbishop's or bishop's see; and which, upon a vacancy, are immediately the right of the sovereign, as a consequence of his prerogative in church matters. But this revenue, formerly considerable, is now reduced to

nothing: for as soon as the new bishop is consecrated and confirmed, he receives restitution of his temporalities entire and untouched.

II. The sovereign is entitled to a *corody* out of every bishopric; that is, to send one of his chaplains to be maintained by the bishop, till the bishop promotes him to a benefice. This is now fallen into disuse.

III. The sovereign is entitled to the *tithes arising in extra-parochial places*. It may be doubted how far either this or the last can be considered revenue: since a corody supports a chaplain, and these tithes ought to be distributed for the good of the clergy.

IV. The *first-fruits and tenths* of all spiritual preferments, that is, the first year's profits, were formerly part of the royal revenue. The tenths, or *decimæ*, that is the tenth part of the annual profit of each living, was originally claimed by the pope, under the Levitical law, that the Levites "should offer the tenth part of "their tithes as a heave-offering to the Lord, and give it to "Aaron the *high* priest." But this claim met with a vigorous resistance from parliament; and a variety of acts were passed to restrain it, particularly 6 Hen. IV. c. 1, which calls it a horrible mischief, and damnable custom. But the clergy still kept it on foot; and, as they thus expressed their willingness to contribute so much to the head of the church, it was thought proper, when the king was declared to be so, to annex this revenue to the crown: and so it remained till Queen Anne restored it; not by remitting the tenths and first-fruits entirely, but by applying these superfluities of the larger benefices to make up the deficiencies of the smaller. This is usually called *Queen Anne's Bounty*.

V. The next branch of the ordinary revenue is the *rents and profits of the demesne lands of the crown*. These lands were anciently very extensive, comprising divers manors, honours, and lordships. But at present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. The management of what remains is vested in the Commissioners of Woods, Forests, and Land Revenues. The parks to which the public has access, are managed by the Commissioners of Works and Public Buildings

VI. The *profits of the military tenures*, to which most lands in the kingdom were subject, were till abolished by 12 Car. II. c. 24, a part of the royal revenue; and under this head might have been placed the prerogatives of *purveyance* and *pre-emption*: a right of buying up provisions for the royal household, at a valuation, in preference to all others: and also of impressing carriages and horses to do the sovereign's business, in the conveyance of baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price. Having fallen into disuse during the Commonwealth, Charles II. at his restoration consented to resign them entirely; and parliament, in recompense, settled on the crown the hereditary excise on all beer and ale sold in the kingdom, and a proportionable sum for certain other liquors.

VII. A revenue formerly arose from *wine licences*, first settled on the crown by 12 Car. II. c. 25, to make up for the loss sustained in the abolition of the military tenures. Abolished in the reign of George II., these licences have been recently revived as a source of revenue by 23 Vict. c. 27.

VIII. The profits arising from the *royal forests* was a branch of revenue consisting principally in amercements levied for offences against the forest laws. But as few, if any, forest courts have been held since 1632, this revenue is practically extinct.

IX. The *profits* arising from the *ordinary courts of justice* make a ninth branch of the royal revenue. These consist in fines imposed upon offenders, and in fees payable in a variety of legal matters. As none of these can be done without the intervention of the sovereign, or his officers, the law allows him certain profits, as a recompense for his trouble. These, in process of time, were almost all granted out to private persons; so that, though our law proceedings were long loaded with their payment, very little of them was ever returned into the Exchequer.* The judges and officers of the court are now almost universally paid by salary out of the consolidated fund.

X. A tenth branch of the royal revenue, the right to *mines*

* The late Earl of Ellenborough had 7700*l.* per annum, as compensation for his office of chief clerk of the Court of Queen's Bench.

arises from the prerogative of coinage. By the common law, if gold or silver be found in mines of base metal, the whole, according to some, belonged to the crown: though others held that it only did so if the quantity of gold or silver was of greater value than the quantity of base metal; but this is now immaterial, as the crown can only have the ore on paying for the same a price fixed by statute.

XI. A branch of the ordinary revenue, said to be grounded on the consideration of the crown protecting the seas from pirates and robbers, is the right to *royal fish*, viz., whale and sturgeon; which, when either thrown ashore, or caught near the coast, are the property of the sovereign.

XII. Another maritime revenue, founded on the same reason, is that of *Wreck*, which was where any ship was lost at sea, and the goods or cargo were thrown upon the land. These belonged to the crown, for by the loss of the ship all property was gone out of the original owner. But this was adding sorrow to sorrow, and was consonant neither to reason nor humanity. Wherefore by various statutes numerous exceptions were made to prevent goods being treated as wreck; and now if any live thing escape, or if proof can be made of the property, the goods are not forfeited. And the sheriff is bound to keep them a year and a day; though, if of a perishable nature, he may sell them, and the money shall be as in their stead.

XIII. To the crown belongs also *treasure-trove*, which is, where any money, gold, silver, plate, or bullion, is found hidden *in* the earth, or other private place, the owner being unknown. If it be found in the sea, or *upon* the earth, it does not belong to the sovereign, but to the finder, if no owner appears.

XIV. Waifs, *bona waivata*, goods stolen and waived or thrown away by the thief in his flight, are given to the crown as a punishment upon the owner for not pursuing the felon and taking them from him. If, therefore, any party robbed do immediately follow and apprehend the thief, which is called making *fresh suit*, or convict him afterwards, he shall have his goods again; for if the party robbed can seize them first, the crown shall never have them.

XV. *Estrays* are such valuable animals as are found wandering in any manor or lordship, and no man knows the owner, in which case the law gives them to the sovereign as the general owner, in recompense for the damage which they may have done therein. They now generally belong to the lord of the manor.

XVI. Another branch of the ordinary revenue arises from *escheats* of lands, which happen upon the defect of heirs to succeed to the inheritance; whereupon they in general revert to the sovereign, who is, in law, the original proprietor of all the lands of the kingdom.

This may suffice for a short view of the sovereign's *ordinary* revenue, which was very large formerly, and capable of being increased to a magnitude truly formidable. But this hereditary revenue is now sunk almost to nothing; and in order to supply the deficiency, we have recourse to new methods of raising money, unknown to our ancestors; which constitute the *extraordinary* revenue. These are called aids, subsidies, or supplies, and are granted by the commons in parliament; who, when they have voted a supply, and settled the *quantum*, usually resolve themselves into what is called *a committee of ways and means*, to consider the mode of raising the same. The resolutions of this committee, when approved by the house, are esteemed conclusive; for, though the supply cannot be raised till directed by act of parliament, yet no monied man will scruple to advance any amount to the government, on the credit of a bare vote of the House of Commons.

The taxes, which are raised upon the subject, are—

I. The *land-tax*, which in its modern shape, superseded, at least until recently, all the former methods of rating either property or persons, whether by tenths or fifteenths, subsidies on lands, hidages, scutages, or talliages.

Tenths and fifteenths were formerly the real tenth or fifteenth part of all the movables belonging to the subject. Originally the amount was uncertain, but was reduced to a certainty under Edward III., when new taxations were made of every township, borough, and city in the kingdom. So that when, afterwards

the commons granted the crown a fifteenth, every parish immediately knew its proportion of it.

Scutages were derived from the military tenures; when every tenant of a knight's fee was bound to attend the king for forty days in every year. This personal attendance growing troublesome, the tenants compounded for it, by first sending others in their stead, and in process of time by making, in lieu of it, a pecuniary satisfaction, which at last came to be levied by assessment, at so much for every knight's fee, under the name of scutages. Of the same nature were hidage upon lands not held by military tenure, and talliage upon cities and boroughs. But they all fell into disuse upon the introduction, under Richard II. and Henry IV., of subsidies, which were a tax, not immediately imposed upon property, but upon persons in respect of their reputed estates.

The grant of scutages, talliages, or subsidies did not extend to spiritual preferments; which were taxed by convocation, which, therefore, sat as regularly as parliament: but since 15 Car. II. another method of taxation has prevailed, which takes in the clergy as well as the laity.

In the beginning of the civil war, parliament imposed weekly and monthly assessments upon the counties, to be levied by a pound-rate on lands and personal estates; and from this time forwards we hear no more of subsidies, but occasional assessments were granted as the national emergencies required, which were called a *land-tax*. This was made perpetual by 38 Geo. III. c. 60, at 4*s*. in the pound; but subject to redemption by the owner of the property buying so much government stock as yields a dividend exceeding by a tenth the amount thereof.

II. *The customs*; or the duties paid by the merchant, at the quay, upon all imported as well as exported commodities, into the history of which I cannot at present enter. The tendency of modern legislation is to make trade as free as it possibly can be made, consistently with the raising of the necessary revenue; and the result of numerous recent statutes has therefore been to reduce to a very small number indeed the articles on which duties are now levied.

III. The *excise duties*; within which category fall what are called the *assessed taxes*,* were first established by parliament in 1643; the royalists at Oxford soon following the example of their brethren at Westminster; both sides protesting that it should be continued no longer than to the end of the war, and then be utterly abolished. Afterwards, when the nation had become accustomed to them, they were continued, and remain with us to the present day; although, from the first, the very name has been odious to the people of England. An excise duty has been imposed at one time or another on almost every conceivable article of consumption, to support the enormous expenses occasioned by our wars on the continent; and though the variety of articles subjected to duty has been of late years greatly reduced, a sufficient number still remain to preserve the original unpopularity of the tax.†

IV. A branch of revenue levied with greater cheerfulness is the *post-office duty* for the carriage of letters. As we have assigned the excise to the parliament of 1643, it is but justice to observe that this useful invention owes its first legislative establishment to the same assembly. The conveyance of letters for fixed rates was at first farmed; but in 1657, a regular post-office was erected. The rates were altered from time to time, and regulations made and penalties enacted to confine the carriage of letters to the public office; but the high charges led to numerous petty frauds and evasions. Finally, in 1840, a uniform rate was established; and facilities have since been given for the transmission of printed periodical publications and other works. The *money-order office* has been constituted; *savings banks* established in connection with the post-office; and *the telegraph service* put under its authority.

V. The *stamp duties* are a tax imposed upon all parchment and paper whereon private instruments of almost any nature whatsoever are written; on probates of wills and letters of administration; and on various licences, as marriage licences,

* Under this head are comprised the duties payable on private carriages, horses and dogs, hair-powder, armorial bearings, and game certificates.

† The *malt-tax*, raised since 1697, by a duty on malt, and made perpetual by 3 Geo. IV. c. 18, is now practically an excise duty.

and licences to practise and exercise various callings, such as that of a solicitor; and on admissions to offices and degrees. This tax is of service to the public in general, by authenticating instruments, and rendering it more difficult than formerly to forge deeds of any standing.

VI. *The legacy and succession duties* form an important branch of revenue.

The legacy duty is payable by every person who succeeds, whether he takes under a will or as next of kin, to personal property; and varies in amount according to the consanguinity of the next of kin, or the absence of any relationship between the legatee and the testator. The succession duty is imposed on every succession to property, according to the value and the relationship of the parties to the person from whom the property comes.

VII. The *inhabited house duty* is also a large branch of revenue. Mention is made in Domesday of fumage or fuage, vulgarly called smoke farthings; paid by custom to the king for every chimney in the house. But the first parliamentary establishment of this tax was by 13 & 14 Car. II., c. 10, whereby a hereditary revenue of 2*s.* for every hearth was granted to the king for ever. Upon the Revolution, hearth-money was declared to be "not only a great oppression to the poorer sort, but a badge "of slavery upon the whole people;" "and therefore to erect a "lasting monument of their majesties' goodness, hearth-money "was abolished." This monument of goodness remains among us to this day: but the prospect of it was somewhat darkened, when, in six years afterwards, a tax was laid upon all houses, and a tax also upon all windows, if they exceeded nine, in each house. These rates were varied, and extended, until, in the reign of Will. IV., the house tax was abolished, the duties on windows remaining. Finally, the duties on windows were abolished; but in lieu thereof, a tax was imposed not on hearths, but on what amounts to the same thing, on inhabited houses.

VIII. There is a duty payable for every male servant, except such as are employed in husbandry, trade or manufactures.

IX. The ninth branch of revenue is a tax of comparatively recent introduction, and which, although at present imposed

from year to year, may not improbably become perpetual in fact, viz., the *property and income tax.* A tax of this kind was imposed in 1797, and continued till 1802, and was again revived in 1803, and continued until 1816. The present tax originated in 1842, and has varied in amount from time to time.

X. The tenth and last branch of the extraordinary revenue is the *duty upon offices* and *pensions;* consisting in an annual payment out of all salaries, fees, and perquisites of offices and pensions payable by the crown, exceeding the value of 100*l.* per annum.

The respective produces of the several taxes before mentioned were originally separate and distinct funds; but since the union with Ireland, have formed *The Consolidated Fund;* pledged, in the first place, for the payment of the interest of the *National Debt.* That done, the surplus may be applied in reduction of the capital. But before any part of the revenue can be thus used, it stands mortgaged by parliament to raise an annual sum for the maintenance of the royal household and the *civil list.*

The expenses formerly defrayed by the civil list were those that in any shape relate to civil government; as the expenses of the royal household; the salaries of the judges, officers of state, and sovereign's servants; the appointments to foreign ambassadors; the maintenance of the royal family; the sovereign's private expenses, or privy purse; and other very numerous outgoings, as secret service money, pensions, and other bounties. But in the reign of William IV. various payments previously charged on the civil list, were made directly chargeable on the consolidated fund: in consequence of which a sum of 500,000*l.* a year at present suffices for the maintenance of the royal family, and for the payment of such other sums as are still charged on the civil list. Of the whole revenue, it may be stated shortly, that one moiety is required for the interest of the national debt; and that the greater portion of the residue is applied to the maintenance of the army and navy. *Two Sinking Funds* have been created for the gradual extinction of the Debt by the application of surplus revenue to its redemption.

We now come to those subordinate officers to whom the administration of public affairs is entrusted.

CHAPTER IX.

OF SUBORDINATE MAGISTRATES.

MAGISTRATES are either supreme, or those in whom the sovereign power resides; or subordinate, or those who act in an inferior or secondary sphere, whose rights and duties are now to be considered.

And herein we are not to investigate the powers and duties of the great officers of state; because they are not in that capacity in any considerable degree the object of our laws. Neither shall I here treat of the office of the judges; because they will find a more proper place in the third part of these commentaries. But the magistrates and officers, whose rights and duties we are now to consider, are such as have a jurisdiction and authority dispersedly throughout the kingdom, viz., sheriffs, coroners, justices of the peace, constables, surveyors of highways, and overseers and guardians of the poor.

I. The sheriff is an officer of great antiquity, his name being derived from two Saxon words—scire gerefa, the reeve, bailiff, or officer of the shire. He is called in Latin *vice-comes*, as being the deputy of the earl or *comes*; to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties. But the earls, in process of time, were delivered of that burden, and the labour was laid on the sheriff; the king committing *custodiam comitatus* to the sheriff, and him alone.

Sheriffs were originally chosen by the inhabitants of the counties.* But these popular elections growing tumultuous, were put an end to, and under various statutes the sheriffs are now assigned by the chancellor, treasurer, and the judges, who meet for that purpose on the morrow of St. Martin, in the exchequer. The judges then and there propose three persons, to be reported to the sovereign, who afterwards appoints one

* In some the sheriffs were hereditary. The corporation of London still has the shrievalty of Middlesex vested in it by charter.

of them to be sheriff, which ceremony is called *pricking* the sheriffs.

Sheriffs continue in their office one year: but till a new sheriff be named, his office is not determined, unless by his own death.

His functions are either as a judge, as the keeper of the peace, as a ministerial officer of the high court, or as the bailiff of the sovereign.

He presides, by his deputy, on writs of inquiry to assess damages in undefended actions; and in assessing the compensation to be paid to the owners for lands taken for making railways and other public works. He likewise decides the elections of knights of the shire, of coroners, and of verderers of the forest.

As keeper of the peace, he is the first man in the county. He may apprehend all persons who break the peace; he is bound to take all traitors, felons, and other misdoers; he is also to defend his county against the queen's enemies; and for these purposes may command the *posse comitatus* to attend him; and this summons every person above fifteen, and under the degree of a peer, is bound to attend, under pain of fine and imprisonment.

In his ministerial capacity he executes all process issuing from the high court and summons and returns juries at the assizes. In criminal matters he can arrest and imprison; and he executes sentence of death.

As the bailiff of the sovereign he is to preserve the rights of the crown within his bailiwick, as his county is called in the writs; a word introduced by the Normans, whose territory was formerly divided into bailiwicks. He must seize all lands devolved to the crown by escheat, levy all fines and forfeitures, and seize all waifs, wrecks, estrays, and the like, unless they be granted to some subject.

To execute these various offices, the sheriff has an *under-sheriff*, who usually performs all the more important duties of the office, those only excepted where the personal presence of the sheriff is necessary; and *bailiffs* to summon juries, attend the judges and justices at the assizes and quarter sessions, and execute writs.

II. The coroner's is also a very ancient office, so called, *coronator*, because he has principally to do with pleas of the crown. The chief justice of the queen's bench division is the principal coroner in the realm, and may exercise the jurisdiction of a coroner in any part of the kingdom. The coroner is chosen by the freeholders of the county. In boroughs which have a court of quarter sessions, the town council appoints and pays the coroner for the borough. In other boroughs the coroner of the county has jurisdiction. He is chosen for life; but may be removed, either by being made sheriff, which is an office incompatible with the other, or for cause, such as extortion, neglect, inability, or misbehaviour in office. His office and power are also, like those of the sheriff, either judicial or ministerial, but principally judicial. This consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be "*super visum corporis*:" for, if the body be not found, the coroner cannot sit. His inquiry is made by a jury of twelve at least; and he may require the attendance of medical witnesses or assessors, and order a *post mortem* examination of the body. If any person be found guilty by this inquest of murder or other homicide, he is to commit him to prison for further trial. Another branch of his office is to inquire concerning shipwrecks and treasure trove. For the holding of all which inquests he may appoint a fit and proper person to act as his deputy.

His ministerial duty is only as the sheriff's substitute. For when just exception can be taken to the sheriff, the process is then to be executed by the coroner.

III. The justices of the peace, the principal of whom is the *custos rotulorum*, or keeper of the records of the county, are next in order.

The sovereign is the principal conservator of the peace; and may give authority to any person to see the peace kept, and to punish such as break it; hence it is usually called the queen's peace. The coroner is a conservator of the peace within his own county, as is also the sheriff. But the principal conservators of the peace are the justices nominated by commission under the great seal, which appoints them all, jointly and separately, to keep the peace, and any two or

more of them to inquire of and determine felonies and other misdemeanours.

These justices ought to be of the best reputation, and most worthy men in the county, and must have in real property 100*l.* per annum clear of all deductions, or a reversion or remainder with reserved rents amounting to 300*l.* per annum, or occupy in the county a house rated at 100*l.* per annum.

Their office is determinable, 1. By the demise of the crown; that is, in six months after. 2. By writ discharging any particular person from being any longer justice. 3. By writ of *supersedeas*. 4. By a new commission, which discharges all the former justices not included therein. 5. By accession to the office of sheriff or coroner.

The office and duty of a justice depend on the several statutes which have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace. It also empowers any two or more to hear and determine felonies and other offences; which is their jurisdiction at sessions. And as to the powers given to them by the several statutes, which have heaped upon them such a variety of business, that few care to undertake, and fewer understand, the office; they are such, that the country is greatly obliged to any magistrate, that without sinister views of his own will engage in this troublesome service. And therefore, if a justice makes any slip, great indulgence is shown to him in the courts; for he cannot be sued for any oversight, without notice; so as to have an opportunity of making amends.

IV. The office of *constable* is of considerable antiquity. They were originally appointed at the court-leets of the franchise or hundred over which they preside, or, in default, by the justices, for the better keeping of the peace. They were called *high*, to distinguish them from the *petty* constables, instituted in the reign of Edward III. These latter have two offices: one ancient, the other modern. Their ancient office is that of headborough, tithing man, or borsholder; an office as ancient as the time of Alfred; their more modern office is that of constable merely, to assist the high constable. Both high and petty constables are now abolished, unless expressly continued; and chosen by the justices at a petty session holden yearly for that purpose.

The general duty of all constables, both high and petty, when appointed, as well as of the other officers, is to keep the peace in their several districts. The justices may swear-in *special* constables if disturbances exist or are apprehended; and a secretary of state may order persons to be sworn in, though exempt by law from serving.

But these ancient officers have been entirely superseded in the keeping of the peace by the *police force*; which consists of a chief constable appointed by the justices, and other constables appointed by the chief constable; the whole, when sworn in, having all the powers, privileges, and duties which any constable duly appointed has within his constablewick.

V. The office of surveyor of the highway dates from the reign of Queen Mary. Every parish is bound of common right to keep its high-roads in repair; unless, by tenure of lands or otherwise, this care is consigned to some particular person. From this burden no man was exempt by our ancient laws, whatever other immunities he might enjoy: this being part of the *trinoda necessitas* to which every man's estate was subject: viz., *expeditio contra hostem, arcium constructio, et pontium reparatio.* The surveyors were originally appointed by the constable and churchwardens of the parish; afterwards by the inhabitants, or by the justices. But now the local authority, whether urban or rural, under the Public Health Act 1875, is to act as surveyor, and to put in execution the laws for the repair of the public highways. The powers conferred for this purpose are very extensive; the expense being paid by a rate, levied in the same manner as the rates for the relief of the poor.

VI. The last of the subordinate magistrates are the overseers and guardians of the poor.

The poor of England, till the time of Henry VIII., subsisted entirely upon private benevolence, the monasteries being their principal resource. Upon their dissolution, the consequence of indulging people in habits of indolence and beggary was quickly felt; and several statutes were made in the reign of Henry VIII. and his children, for providing for the poor; who were principally of two sorts: sick and impotent, and therefore unable to work; idle and sturdy, and therefore able, but not willing to exercise any honest employment. After many fruitless

experiments, overseers of the poor were, under 43 Eliz. c. 2, appointed in every parish, by the justices; their duties being to raise competent sums for the relief of the impotent, old, blind, and such as were not able to work; and secondly, to provide work for such as were, and could not otherwise get employment; for which purposes they were empowered to levy rates upon the inhabitants.

One defect in this measure was confining the management of the poor to parishes, which are frequently incapable of furnishing proper work. However, those who were willing were then at liberty to seek employment wherever it was to be had; none being obliged to reside in the places of their settlement but such as were unable or unwilling to work, and those places of settlement being only such where they were *born*, or had made their *abode*.

After the Restoration a different plan was adopted, which rendered the employment of the poor more difficult, by authorising the subdivision of parishes; greatly increased their number, by confining them to their districts; gave birth to the intricacy of our poor laws, by multiplying and rendering more easy the methods of gaining *settlements*; and, in consequence, created an infinity of expensive lawsuits between contending parishes about settlements and removals.

A remedy was attempted by 22 Geo. III. c. 83, enabling parishes to unite with others, in order to provide poor-houses, and directing the appointment of guardians, who were authorized to contract for supplying the poor with diet and clothing, or, as it was termed, *farming the poor*.

By other statutes, restrictions were imposed on the obtaining of settlements, which gave rise to more litigation; and further facilities were given for the erection of workhouses. The gravest abuses nevertheless pervaded the whole administration of these laws. The erroneous views of the local authorities led in many cases to an indiscriminate expenditure; and from this there resulted a marked demoralization of the labouring classes; until the amount annually expended in relief became such a serious burden on the rest of the community, that it was found necessary not only to reconstruct the machinery for its distribution, but to revise the principles of previous legislation.

This was effected, in 1834, by the Poor Law Amendment Act.

Commissioners were appointed, to whose direction and control the administration of relief to the poor was made subject. They were authorized to unite parishes into *Unions*; relief being then vested in a *board of guardians*, elected by the ratepayers, of which the resident justices are *ex officio* members. *Relieving officers* were appointed to assist in the administration of the relief and employment of the destitute poor; and the overseers left to collect the poor rates, and keep the accounts.

The practice of giving out-door relief to the able-bodied poor, which had been found to be productive of much evil, was, unless under special circumstances and in cases of emergency, put an end to; the law of settlement was simplified and improved, if such a phrase may be applied to a system thoroughly vicious in principle; and provision was made for the more equitable assessment of property and the collection of the poor-rates; for compelling putative fathers to maintain their illegitimate children; for the proper election of guardians; the care of pauper lunatics; and the regulation of schools.

The powers of the commissioners continued till 1847, were then transferred to *The Poor Law Board*; whose functions have been recently transferred to the *Local Government Board*.

Several acts have been passed since the Poor Law Amendment Act, leaving the statutes on this subject in such a state of complexity, as to render their speedy consolidation a work rather of necessity than of convenience. The most recent legislation tends to the breaking up of that exclusive parochial system which has so long fostered and preserved the laws of settlement, the most mischievous that have ever appeared in the statute rolls of the empire.

CHAPTER X.

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

HAVING treated of *magistrates*, I am now to consider the *people*; the most obvious division of whom is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England; within the legiance, or allegiance of the queen: and aliens, such as are

born out of it. Allegiance is the tie or *ligamen*, which binds the subject to the sovereign, in return for that protection which the sovereign affords the subject; the oath of *allegiance*, as it was administered for upwards of six hundred years, containing a promise "to be true and faithful to the king and his heirs, and "truth and faith to bear of life and limb and terrene honour, "and not to know or hear of any ill or damage intended him, "without defending him therefrom." At the Revolution, a more general form was introduced; the subject only promising "that "he will be faithful and bear *true* allegiance to the king," without mentioning "his heirs," or specifying wherein that allegiance consists. The oath of *supremacy* was calculated as a renunciation of the pope's pretended authority; and the oath of *abjuration*, introduced in the reign of William III., supplied the loose texture of the oath of allegiance. For these several declarations, however, has now been substituted one single oath, recognising the right of the sovereign, according to law. And this oath may be tendered by two justices of the peace to any person whom they suspect of disaffection. Modern legislation has provided particular forms of oaths for Roman Catholics and Jews; has permitted affirmations to be made by persons who object to take an oath; and has relieved the queen's subjects generally from the penalties and disabilities formerly resulting from neglect or refusal to take certain formal oaths.

But besides this express engagement, the law holds that there is an implied, original, and virtual allegiance, owing from every subject, antecedently to any express promise. For as the sovereign, by the very descent of the crown, is fully invested with all the rights, and bound to all the duties of sovereignty, before his coronation; so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds.

Allegiance is consequently distinguished into *natural* and *local*; the former, unless renounced, being perpetual, the latter temporary. *Natural allegiance* is such as is due from all men born within the sovereign's dominions immediately upon their birth; it cannot at common law be forfeited, cancelled, or altered by any change of time, place, or circumstance; but may now be renounced by certain formal declarations.

Local allegiance is such as is due from an alien, or stranger born, for so long time only as he continues within the queen's dominions and protection; it ceases the instant such stranger transfers himself from this kingdom to another.

Natural-born subjects have, as we have seen already, a great variety of rights, which they acquire by being born within the queen's legiance; aliens possess also certain rights, though more circumscribed, some acquired by residence here, and lost whenever they remove.

An alien born may now, by statute, purchase lands or other estates. Formerly he could not do so; the crown being at once entitled to them by forfeiture. At common law, could he always acquire a property in goods, money, and other personal estate, or in a house for habitation; this indulgence being necessary for the advancement of trade; for aliens may trade as freely as other people; and an alien may bring an action concerning personal property, and may make a will, and dispose of his personal estate. I speak of alien friends only, or such whose countries are in peace with ours; for alien enemies have no rights, no privileges, unless by the special favour of the crown, or express legislative enactment, during the time of war.

The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such, unless they choose another nationality. A *denizen* is an alien born, but who has obtained *ex donatione legis* letters-patent to make him an English subject. He may take lands by purchase or devise, which an alien might not do; but he could not take by inheritance: for his parent, being an alien, had no inheritable blood, and therefore could convey none to the son. Aliens are now authorized to take and hold as freely as natural-born subjects.

Naturalization, properly so called, cannot be performed but by act of parliament: for by this an alien is put in exactly the same state as if he had been born in the queen's legiance; except only that he is incapable, as well as a denizen, of being a member of the privy-council or of parliament. The Home Secretary may

now, however, grant to alien friends, resident in this country, a certificate of neutralization; which confers on the grantee, on his taking an oath of allegiance, all the rights and capacities of a natural-born British subject.

CHAPTER XI.

OF THE CLERGY.

THE people are divisible into two kinds; the clergy and the laity: the former will be the subject of the following chapter.

This body of men, being set apart from the people, in order to attend to the service of God, have large privileges allowed them. A clergyman cannot be compelled to serve on a jury; nor can he be chosen to any temporal office; as bailiff, constable, or the like. During his attendance on divine service he is privileged from arrest, the infraction of this privilege being an indictable misdemeanour. But as they have their privileges, so also they have their disabilities. Clergymen are incapable of sitting in the House of Commons, or of being councillors or aldermen in boroughs. They are not allowed to farm more than eighty acres, nor to be a partner in any trade or dealing for profit, unless it be carried on by the other partners. No spiritual person can be a director or managing partner; but he may carry on the business of a schoolmaster or be a director or partner in any benefit or insurance society, and he may buy or sell to the extent incidental to his occupation of land, but not in person or at a public market.

In the constitution of our ecclesiastical polity there are divers ranks and degrees.

I. An archbishop or bishop is elected by the chapter of his cathedral church, by virtue of a licence and nomination from the crown. Election was, in early times, the usual mode of elevation to the episcopal chair; and in this the laity as well as the clergy participated; the king reserving the right of confirming the election, and granting investiture of the temporalities. Hence the right of appointing to bishoprics is said to

have been in the crown of England, in Saxon times: because confirmation and investiture were in effect a donation. The popes, however, excepted to the granting these investitures, by the delivery of a ring, and pastoral staff or crosier: contending that this was an attempt to confer spiritual jurisdiction: and long and eager were the contests thus occasioned. At length, the Emperor Henry V. agreed to confer investitures *per sceptrum* and not *per annulum et baculum*; and when the kings of England and France consented also to alter the form, and receive only homage from the bishops for their temporalities, the court of Rome was practically successful. Our King John was prevailed upon afterwards to give up, to the monasteries and cathedrals, the free right of electing their prelates, whether abbots or bishops: reserving only the custody of the temporalities during vacancy. But the ancient right of nomination if it ever existed, was, in effect, restored to the crown by the statute 25 Hen. VIII. c. 20; which enacts that the king may send the dean and chapter his *congé d'élire*, to proceed to election; which is always to be accompanied with a letter containing the name of the person whom he would have them elect; disobedience to which recommendation involves the penalties of a *præmunire*.

An archbishop is the chief of the clergy in a province; and has the inspection of the bishops of that province, as well as of the inferior clergy. In his own diocese, he exercises episcopal jurisdiction; as in his province he exercises archiepiscopal. As archbishop he, upon receipt of the sovereign's writ, calls the bishops and clergy of his province to meet in convocation; and to him all appeals are made from inferior jurisdictions within his province. During the vacancy of any see in his province, he is guardian of the spiritualities thereof, as the crown is of the temporalities; and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of prior of Canterbury was abolished at the Reformation. The archbishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months; and he has a customary prerogative, like the royal corody, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan

bishop. The archbishop of Canterbury has also, by statute 25 Hen. VIII. c. 21, the power of granting dispensations in any case, not contrary to the Holy Scriptures and the law of God, where the pope used formerly to grant them; which is the foundation of his granting special licences to marry at any place or time; and on this also is founded the right he exercises of conferring degrees, in prejudice of the universities.

The authority of a bishop, besides the administration of certain ordinances peculiar to that order, consists principally in inspecting the manners of the clergy, and punishing them if necessary, by suspension and deposition, his jurisdiction over the laity being obsolete. For this purpose he has several courts under him, and may visit at pleasure every part of his diocese; his chancellor being appointed to hold his courts for him, and to assist him in matters of ecclesiastical law. The clergy can now only be prosecuted under the *Church Discipline Act*, which enables the Bishop to issue a commission, and on its report to proceed either personally or send the case by *Letters of Request* to the court of the province. But in certain cases where complaint is made of non-obedience to the Rubric on the details of Divine Worship, the offending minister is to be prosecuted under the Public Worship Regulation Act, 1875.

It is also the business of a bishop to institute and induct to all livings in his diocese, to execute writs of sequestration issued by the high court, and to license, and, if necessary, withdraw, subject to appeal to the archbishop, the licence, and regulate the stipend, of curates.

Archbishoprics and bishoprics may become void by death, deprivation for any very gross and notorious crime, and also by resignation; which may be made with the reservation of a pension out of the emoluments of the see.

II. A dean and chapter are the council of the bishop, to assist him in affairs of religion, and also in the temporal concerns of his see. When the rest of the clergy were settled in their parishes these were reserved for the celebration of divine service in the cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or dean, being probably at first

appointed to superintend *ten* canons or prebendaries. All deans were formerly elected by the chapter, but are now appointed directly by the crown. The canons or prebendaries, constituting the chapter, are sometimes appointed by the crown, sometimes by the bishop, and sometimes elected by each other.

Deaneries and prebends may become void, like a bishopric, by death, by deprivation, or by resignation. Also I may here mention once for all, that if a dean, prebendary, or other spiritual person, be made bishop of a see in England, all the perferments of which he was before possessed are void; and the crown may present to them in the right of the prerogative royal.

III. An archdeacon is usually appointed by the bishop himself; and has a kind of jurisdiction in his archdeaconry, originally derived from the bishop, but now independent and distinct from his. He therefore *visits* the clergy; and has his separate court for punishment of offenders by spiritual censures, and for hearing causes of ecclesiastical cognizance.

IV. The rural deans are very ancient officers of the church, but almost grown out of use. They were deputies of the bishop, to inspect the conduct of the clergy, report dilapidations, examine candidates for confirmation, and to exercise in minuter matters, an inferior degree of judicial and coercive authority.

V. The next, and the most numerous, order are parsons and vicars. A parson, *persona ecclesiæ*, is one that has full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person the church is represented; and he is in himself a body corporate, in order to protect and defend its rights by a perpetual succession. A parson has the freehold of the parsonage-house, the glebe, the tithes, and other dues. But these are sometimes *appropriated*; that is to say, the benefice is annexed to some corporation, either sole or aggregate, being the patron of the living; a contrivance which seems to have sprung from the policy of the monks.

At the first establishment of parochial clergy, the tithes were distributed in a fourfold division; one for the bishop, another for the fabric of the church, a third for the poor, and the fourth for the incumbent. When the sees became amply

endowed, the bishops were prohibited from demanding their share; and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities, subject to the burden of repairing the church, and providing for its constant supply. And therefore they bought all the advowsons within their reach, and appropriated the benefices to the use of their own corporation. The tithes and the glebe they kept in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church.

Thus were most, if not all, of the appropriations at present existing originally made; being annexed to bishoprics, prebends, and religious houses, including nunneries and certain military orders, all of which were spiritual corporations. Under Henry VIII., the appropriations which belonged to those religious houses, were given to the king. And from this have sprung all the lay appropriations or secular parsonages in the kingdom; they having been afterwards granted by the crown.

These appropriating corporations were wont to depute one of their own body to perform divine service in those parishes of which the society was the parson. This officiating minister was called *vicarius* or *vicar*, and his stipend was at the discretion of the appropriator; who was compelled from time to time, by various statutes, to make a proper provision for him; which endowment has usually been by a portion of the glebe, and a particular share of the tithes which the appropriator found it most troublesome to collect, and which is therefore generally called privy or small tithes. But no particular rule having been observed, some vicarages are liberally, some scantily, endowed: and hence also the tithes of many things, are in some parishes rectorial, and in some vicarial rights. The distinction, therefore, of a parson and vicar is this: the parson has for the most part the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an appropriator over him, entitled to the best part of his profits, to whom he is in effect perpetual curate, with a standing salary.

The method of becoming a parson or vicar is the same. To both there are four requisites: holy orders, presentation, insti-

tution, and induction. The method of conferring holy orders is foreign to the purpose of these commentaries, except so far that no person can be admitted a deacon before twenty-three, or a priest before twenty-four years of age, as required by the canons of 1603, which in this point are enforced by the statute 44 Geo. c. 43.

When a person has been admitted to holy orders, he may be presented to a parsonage or vicarage; that is, the patron may offer his clerk to the bishop to be instituted. The bishop may refuse him upon many accounts, as, if the patron is excommunicated, and remains in contempt forty days, or if the clerk be unfit: which unfitness is of several kinds. First, with regard to his person; as, if he be under age, or unfit to discharge the pastoral office for want of learning; of which last the bishop is sole judge. If the bishop admits the patron's presentation, the clerk is next to be instituted by him; which is a kind of investiture of the spiritual part of the benefice: for by institution the care of the souls of the parish is committed to the charge of the clerk. When the bishop is also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a *collation* to a benefice. And by institution or collation the church is full, so that there can be no fresh presentation till another vacancy. Upon institution, also, the clerk may enter on the parsonage-house and glebe, and take the tithes. But he cannot grant or let them, or bring an action for them, till induction, which is performed in virtue of a mandate from the bishop to the archdeacon, and is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling the bell, or the like: a form required by law, to give all the parishioners due notice, and sufficient certainty of their new minister, to whom their tithes are to be paid. A clerk thus presented, instituted, and inducted is then, and not before, in complete possession, and is called *persona impersonata*, or parson imparsonee.

The rights of a parson or vicar, in his tithes and ecclesiastical dues, fall more properly under the second book of these commentaries: and as to his duties, they are principally of ecclesiastical cognizance; those only excepted which are laid upon him by statute. And those are indeed so numerous, that with

the exception of *residence*, to which it is enough to allude, I must refer to such authors as have compiled treatises expressly upon this subject.

A parson or vicar may cease to be so, 1, by death; 2, by cession, in taking another benefice; 3, by consecration; for, as was mentioned before, when a clerk is promoted to a bishopric all his other preferments are void the instant that he is consecrated; 4, by resignation, accepted by the ordinary; 5, by deprivation, for fit and sufficient causes allowed by the law, which it is unnecessary here to enumerate; 6, by renunciation of his orders; that is, by relinquishing by deed enrolled in Chancery, as far as he can, all the privileges of his order.

Besides *parsons* and *vicars*, properly so called, there are numerous ministers of the church who have many of the rights, and are subject to most of the disabilities, of the beneficed clergy. These are the incumbents of districts, constituted parishes by special acts of parliament, or formed from time to time by virtue of the powers conferred on the Church Building Commissioners, appointed by 58 Geo. III. c. 45, all of whom are subject to the visitation and correction of the bishop. These ministers were for some time called *perpetual curates*, but are now designated *vicars*.

VI. A curate is the same that a vicar was formerly, an officiating temporary minister. This section of the clergy are the objects of several statutes, which ordain, that they shall be paid such stipend as the bishop thinks reasonable; he alone also having authority to grant, and, subject to appeal to the metropolitan, withdraw their licences.

Of certain inferior ecclesiastical officers the common law takes notice, viz.:

VII. Churchwardens, the guardians of the church, and representatives of the body of the parish, who are sometimes appointed by the parson, sometimes by the parish, sometimes by both together, as custom directs. As to the church, churchyard, &c., they have no sort of interest therein; but if any damage is done thereto, the parson only or vicar shall have the action. Lands, however, given for the benefit of the parish, the churchwardens and overseers hold in the nature of a body corporate. Their office also is to repair the church, if they have funds, and to

make rates for that purpose; of which, however, they have no means of enforcing payment from those who refuse. They are to keep all persons orderly while in church, and formerly might levy a shilling forfeiture on all such as did not repair to church on Sundays and holidays.

VIII. Parish clerks and sextons are also regarded by the common law as persons who have freeholds in their offices. They may be punished, but cannot be deprived by ecclesiastical censures; a parish clerk may be removed by the archdeacon.

CHAPTER XII.

OF THE CIVIL, MILITARY, AND MARITIME STATES.

THE lay part of the community, or such as are not of the clergy, may be divided into the civil, the military, and the maritime.

I. The civil state consists of the nobility and the commonalty. Of the nobility, those now in use are dukes, marquises, earls, viscounts, and barons.

A *duke*, though he be with us, in respect of his title of nobility, inferior in point of antiquity to many others, yet is superior to all of them in rank; his being the first title of dignity after the royal family.

A *marquis, marchio*, is the next degree of nobility. His office formerly was to guard the frontiers of the kingdom; in particular, the marches of Wales and Scotland. The title has long been a mere ensign of honour.

An *earl* is a title of nobility so ancient that its origin cannot clearly be traced out. Among the Saxons they are called *ealdormen*, signifying *senior* or *senator* as among the Romans; and also *schiremen*, because they had the civil government of a shire. On the irruption of the Danes, they changed the name to *eorles*, and in Latin were called *comites*, from being the king's attendants. After the Conquest they were called *counts* or *countees*, from the French; but did not long retain that name, though their shires

are called counties to this day; and the name has long been a mere title, they having now nothing to do with the government of the county.

The name of *vice-comes* or *viscount* was afterwards made use of as an arbitrary title of honour by Henry VI., when he created John Beaumont a peer, by the name of Viscount Beaumont, which was the first instance of the kind.

A *baron's* is the most general and universal title of nobility; for originally every one of the peers of superior rank had also a barony annexed to his other titles. Barons originally were the same with our present lords of manors, to which the name of court baron, incident to every manor, gives some countenance. All lords of manors, or barons, had seats in parliament, till, about the reign of John, the conflux of them became so troublesome, that the king was obliged to divide them, and summon only the greater barons in person, leaving the small ones to sit by representation in another house; which gave rise to the separation of the two houses of parliament. By degrees the title came to be confined to the lords of parliament only; and there were no other barons among the peerage, till Richard II. first made it a mere title of honour, by conferring it on divers persons by letters-patent.

The right of peerage seems to have been originally territorial, and when the land was alienated, the dignity passed with it as appendant. Thus the bishops still sit in the House of Lords in right of certain ancient baronies supposed to be annexed to their episcopal lands. But when alienations grew frequent, the dignity of peerage was confined to the lineage of the party ennobled; and instead of territorial, became, and has long been, exclusively personal.

A nobleman, in cases of treason and felony, is tried by his peers. This privilege does not extend to bishops, who are not ennobled in blood, and consequently not peers with the nobility. Peeresses, either in their own right or by marriage, are entitled to be tried by the peers. If a woman, noble in her own right, marries a commoner, she remains noble, and shall be tried by her peers; but if only noble by marriage, then by a second

marriage with a commoner she loses her dignity; for as by marriage it is gained, by marriage it is lost. A peer cannot be arrested in civil cases; and sitting in judgment gives his verdict not upon oath, but upon his honour: but when examined as a witness he must be sworn. A peer cannot lose his nobility but by death, and cannot be degraded but by act of *parliament.*

The commonalty are divided into several degrees; yet all are in law peers, in respect of their want of nobility.

The first personal dignity after nobility is a *knight of the Garter*; first instituted by Edward III., A.D. 1348. Next follows a *knight banneret*, created by the king in person, in the field, under the royal banner, in time of open war. Else he ranks after *baronets*, who are the next order. This is a dignity of inheritance, created by letters-patent, and descendible to issue male. It was first instituted by James I., A.D. 1611, and sold at a fixed price, in order to raise a sum for the reduction of the province of Ulster in Ireland; for which reason all baronets have the arms of Ulster superadded to their family coat. Next follow *knights of the Bath*, instituted by Henry IV., and revived by George I. in 1725. The last of these inferior nobility are *knights bachelors*, the most ancient, though the lowest, order of knighthood; for we have an instance of Alfred's conferring this order on his son Athelstan. Formerly every one who held a knight's fee, or 20*l.* per annum, was obliged to be knighted, or pay a fine for his non-compliance. The exertion of this prerogative to raise money in the reign of Charles I., gave great offence, and it was consequently abolished by 16 Car. I. c. 16; and this kind of knighthood has, since that time, fallen into great disregard.

These are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship*. But before these last the heralds rank colonels, serjeants-at-law, and doctors in the three learned professions. Esquires and gentlemen are confounded together by Sir Edward Coke, who observes, that esquire is a gentleman, and a gentleman is one *qui arma gerit*, who bears coat armour, the grant of which adds gentility to a man's family. It is a matter now of no importance whatever, what constitutes the distinction, or who is a real *esquire*. A

yeoman is he that hath free land of forty shillings by the year; who was anciently thereby qualified to serve on juries, vote for knights of the shire, and do acts where the law required a *probus et legalis homo*. And the rest of the commonalty are in law *tradesmen*, *artificers*, and *labourers*.

II. The military state includes the whole of the soldiery, or such persons as are peculiarly appointed for the defence of the realm.

It seems agreed that King Alfred first settled a national militia in this kingdom, and made all the subjects of his dominion soldiers; but we are left in the dark as to the particulars of this his so-celebrated regulation. Upon the Norman Conquest the feudal law was introduced, and all the lands in the kingdom were divided into knights' fees, in number above sixty thousand; and for every knight's fee a knight or soldier, *miles*, was to attend the king for forty days in a year; in which space of time, before war was reduced to a science, the campaign was generally finished. This personal service in time degenerated into pecuniary commutations or aids, and at last all military tenures were abolished at the Restoration.

In the meantime the assize of arms, 27 Hen. II., and afterwards the statute of Winchester, under Edward I., obliged every man, according to his degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace. The weapons were changed by 4 & 5 Ph. & M. c. 2, into others of more modern service; before which, however, in the reign of Henry VIII., *lieutenants* had been introduced, as standing representatives of the crown, to keep the counties in military order.

Thus things stood till the repeal of the statutes of armour, under James I.; after which, when Charles I. issued commissions of lieutenancy, it became a question in the Long Parliament how far the power of the militia did inherently reside in the crown. This question became the cause of the rupture between the king and parliament, the two houses not only denying this prerogative of the crown, but also seizing into their own hands the entire power of the militia. Soon after the Restoration, however, when the military tenures were abolished, the right of the crown was recognised; and the order by which the militia

now stands is principally built upon the statutes which were then passed. The general scheme is to discipline a certain number of the inhabitants of every county, chosen if necessary by ballot; but as the militia force has generally been sufficiently supplied with volunteers, the ballot is annually suspended by parliament. The militia are not compellable to march out of their counties, unless in case of invasion or actual rebellion within the realm, nor in any case compellable to march out of the kingdom. They are to be exercised at stated times: and when in actual service, are subject to the *Mutiny Act* and *articles of war*.

When the nation was engaged in war, more veteran troops and more regular discipline were esteemed necessary. And therefore for raising armies, more rigorous methods were put in use; but these are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent laws. For martial law, which is entirely arbitrary in its decisions, is in truth no law, but something indulged rather than allowed as a law. The necessity of discipline in an army is the only thing which gives it countenance; and therefore it ought not to be permitted in time of peace, when the courts are open for all persons to receive justice according to law.

It has, however, for many years been judged necessary by the legislature to maintain a standing body of troops, under the command of the crown; who are *ipso facto* disbanded at the expiration of every year, unless continued by parliament; and to keep this body of troops in order, an annual act passes, which commences with the important recital, "that the raising or "keeping a standing army in time of peace, unless it be with "the consent of parliament, is against law;" but that it is adjudged necessary that a body of forces should be continued for the safety of the kingdom and the defence of the possessions of the crown. This statute confers power on the crown to make "articles of war for the better government of the forces;" with the limitation that no person shall by such articles be subject to suffer any punishment extending to life or limb, or be kept in penal servitude, except for crimes which are expressly made punishable in this way, by the statute itself. It authorizes the calling together of *courts martial*; prescribes their procedure;

specifices the offences of which they may take cognizance, and the punishments they may inflict; and makes minute regulations as to the enlistment of recruits, the billeting of troops and the supply of carriages, the enactments of the Petition of Right being suspended in that respect.

Besides the militia and regular army, numerous corps of yeomanry and volunteers were organized during the war with France; several of which still muster for drill. But they are few in number when compared with the rifle and artillery volunteers, which have sprung into existence of late years, and whose organization is also regulated by recent statutes.

From both the militia and the army there are *reserve forces.*

III. The *maritime* state is nearly related to the former. The navy has ever been the greatest defence and ornament of the realm; it is its ancient and natural strength; the floating bulwark of the island; an army, from which no danger can be apprehended to liberty: and accordingly it has been assiduously cultivated, even from the earliest ages.

The power of impressment by royal commission was long a matter of dispute, and was submitted to only with great reluctance; but it is part of the common law, and its legality cannot be doubted. The voluntary enlistment of seamen is now, however, so effectually encouraged, that the navy is manned without any recourse to the revolting system of kidnapping which was formerly resorted to. There is also a *reserve* volunteer and artillery force open to seafaring people.

The discipline of the fleet is directed by orders first enacted by parliament soon after the Restoration, and revised a few years ago. In these *articles of the navy* almost every offence is set down, and the punishment annexed: in which respect the seamen have the advantage over their brethren in the land service; whose articles of war are not enacted by parliament, but framed from time to time at the pleasure of the crown.

The *marine forces* are subject to the discipline of the navy while on board ship; but are regulated, while on shore, by an annual Marine Mutiny Act, containing a similar recital, and corresponding provisions to those contained in the annual act applicable to the army.

CHAPTER XIII.

OF THE PEOPLE IN THEIR PRIVATE RELATIONS.

I HAVE now to consider the rights and duties of the people in their *private* relations; which are

1. That of *master and servant*; 2. That of *husband and wife*; and 3. That of *parent and child*. But since parents may be snatched away before they have completed their duty to their children, the law has provided a fourth relation, 4. That of *guardian and ward*.

I. Of *master and servant*. Slavery cannot subsist in England. A slave, the instant he lands in England, or puts his foot on the deck of a British man-of-war, becomes a freeman; that is, the law protects his person and his property. But the law also recognises that contract whereby one freeman surrenders to another for a certain time his natural right of free action, by becoming his servant.

1. The first sort of servants are *menial servants*; so called from being *intra mœnia*, or domestics. The contract between them and their masters, if the hiring be general, is for a year. But the contract may be made for any larger or smaller term; and is by custom determinable by a month's notice, or what is an equivalent in the case of the servant, a month's wages.

Another species of servants are *apprentices*, from *apprendre* to learn, who are usually bound for a term of years, to serve their masters, and be maintained and instructed by them. This is usually done to persons in trade; and disputes between them may, in certain cases, be settled by the justices.

A third species are *workmen, labourers, handicraftsmen*, &c., &c., who are hired by the day or the week, and do not live *intra mœnia*, concerning whom many statutes have been passed, on principles of legislation which have long been abandoned. The County

Court and the Justices now exercise a summary jurisdiction in enforcing performance of contracts of service.

The labour of children in factories is regulated by statute; the employment of women and girls in mines is prohibited; and that of children in agriculture under eight prohibited, and above that age made conditional, on their having previously received a certain amount of education.

A servant may be dismissed without notice for a reasonable cause, as, in the case of domestics, moral misconduct, and in all cases, wilful disobedience to a lawful order, or neglect of duty. He is not then entitled to any wages from the day he is discharged, except those then due; but if wrongfully discharged, he is entitled to wages up to the end of the current period of his service. If, again, a servant who is paid quarterly, or yearly, or at any other fixed time, improperly leave his service, or is guilty of such misconduct as to justify his dismissal during the currency of the period, he is not entitled to wages for any part thereof, even to the day he quits.

Merchant seamen must be classed as a distinct species of servants, their contracts and conduct being in a great measure regulated by the acts of parliament relating to merchant shipping.

There is yet a fifth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as *stewards*, *factors* and *bailiffs*: whom however the law considers as servants, *pro tempore*, with regard to such of their acts as affect their master's or employer's property.

By service, all servants become entitled to wages; which must be paid in money, payment in goods or otherwise than in current coin being prohibited by the Truck Act. And the law, in some respects, places this right to wages very high. Thus in the payment of the debts of a testator or intestate they rank before specialty debts; and in a bankruptcy the wages of the clerks or servants, labourers or workmen of the bankrupt, may, up to a certain amount, be paid in full. It remains but to notice one important incident to the relationship of master and servant, viz., that the latter cannot in general recover damages from his

master for a mere nonfeasance on his part, nor for the negligence of a fellow-servant in the course of his employment; for he is, as it were, rowing in the same boat with them, and is supposed on entering the service to agree to incur any danger attaching to his position.

Let us now see how strangers may be affected by this relation. And, first, the master may *maintain*, that is, assist his servant in an action against a stranger; whereas, in general, it is an offence to encourage suits, which is called maintenance. A master likewise may justify an assault in defence of his servant, and a servant in defence of his master. And if any person retain my servant, for which the servant departeth from me, and goeth to serve the other, I may have an action against both the new master and the servant, or either of them: but if the new master did not know that he was my servant, no action lies; unless he afterwards refuse to restore him upon information and demand.

The master is answerable for the act of his servant, if done by his command, either expressly given or implied: *nam, qui facit per alium, facit per se.* Therefore, if the servant commit a trespass by the command of his master, the master shall be guilty of it, though the servant is not thereby excused; for he is only to obey his master in matters that are lawful. If an innkeeper's servants rob his guests, the master is bound to restitution, for he ought to provide honest servants; and whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it; if I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. A wife, a friend, a relation, that usually transacts business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct: for the law implies, that they act under a general command. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes upon trust, for here is no implied order to the tradesman to trust my servant; but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up;

for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority.

If a servant, again, by his negligence does any damage to a stranger, the master shall answer for his neglect. If a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant; but in these cases the damage must be done while he is actually employed in the master's service, otherwise the servant shall answer for his own misbehaviour. In all these cases the master may be a loser by the trust reposed in a servant, but never can be a gainer; he may be answerable for his servant's misbehaviour, but never can shelter himself by laying the blame on his agent: for the wrong done by the servant is in law the wrong of the master himself; and no man shall be allowed to take advantage of his own wrong.

II. The second private relation of persons is that of *husband and wife*; arising from marriage, which our law regards solely as a civil contract. The *holiness* of the matrimonial state is left to the ecclesiastical law; the civil courts not having jurisdiction to consider unlawful marriage as a sin. In a civil light, then, the law allows marriage to be valid where the parties were *willing* to contract, *able* to contract, and *did* contract, in the form required by law.

Consensus non concubitus faciat nuptias, the maxim of the civil law, is therefore to that extent adopted by our law; which considers all persons able to contract who do not labour under certain disabilities or incapacities.

These *disabilities* were formerly either canonical or civil. Consanguinity or relationship by blood, affinity or relationship by marriage, and corporeal infirmity were *canonical* disabilities, making the marriage voidable, but not *ipso facto* void, until sentence of nullity had been obtained. The last of these is now the only *canonical* disability on which marriages can be declared void. The others have by statute been made civil disabilities, which make the contract void *ab initio*.

Besides consanguinity and affinity, now *civil* disabilities, there are three others of a like natre; *firstly*, a prior marriage, or having another husband or wife living; in which case the second marriage is to all intents void;—*secondly*, want of age; which

being sufficient to avoid all other contracts in the parties contracting ought, *à fortiori*, to avoid this, the most important of any. Therefore, if a boy under fourteen, or a girl under twelve, marries, this marriage is imperfect; and either, when of the age of consent, may declare the marriage void. But it is so far a marriage that, if at the age of consent they agree to continue together, they need not be married again. The *third* incapacity is want of reason; without a competent share of which, as no other, so neither can the matrimonial contract be valid.

The want of consent of parents or guardians, where either party is a minor, is treated as a civil disability; but to this it can scarcely be said to amount. The consent required by law is that of the father, or if he be dead, of the guardian; or if there be no guardian, of the mother; or if there be no mother, then of any guardian appointed by the High Court. But the marriage of a minor without the requisite consent is, nevertheless, valid; the provisions of the statute in this respect being only *directory*. If, however, the marriage was solemnized by means of the false oath or fraudulent procurement of one of the parties, the party so offending is liable to forfeit all the property which would otherwise accrue from the marriage.

Finally, to constitute a valid marriage, the parties must not only be willing and able to contract, but actually must contract in due form of law. Any contract made, *per verba de præsenti*, and in case of cohabitation *per verba de futuro*, was before the time of George II. so far valid that the parties might be compelled in the Courts Christian to celebrate it *in facie ecclesiæ*.* But these verbal contracts are now of no force to compel a future marriage; their only operation being to give the party who is willing to perform his promise a right of action against the one who refuses to do so.

Until the reign of William IV., no marriage was valid that was not celebrated in church, unless by dispensation from the Archbishop of Canterbury—after publication of banns—or by licence from the ordinary; and it was essential that it should be performed by a person in holy orders.

* In the time of the grand rebellion, all marriages were performed by the justices of the peace; and these marriages were declared valid, without any fresh solemnization, by statute 12 Car. II. c. 33.

The statute 6 & 7 William IV. c. 35, was passed for the benefit of those who objected to the services of the National Church; and was the result of a long struggle, carried on in and out of parliament; the bitterness of which, the question being polemical, has not yet subsided. It provides for places of worship being registered for the solemnization of marriage; and permits of this contract being entered into before a registrar of marriages without any religious sanction whatever; so that it is no longer essential, either that a marriage should be solemnized in church, or by a person in orders. But whether solemnized in church, performed in a place of worship, or entered into before the registrar, a marriage must in all cases be preceded and accompanied by certain circumstances of publicity, or be entered into in virtue of a licence, which is obtainable only on a solemn declaration, equivalent as regards the penalty for falsity to an oath, that there is no legal impediment.

Marriages are dissolved by death or divorce. There are two kinds of divorce, the one for the canonical impediment of incapacity existing *before* the marriage, the other for *adultery*, committed *after* the marriage. In divorces for corporeal infirmity the marriage is null *ab initio*; and the issue, if any, of such marriage are bastards. In cases of divorce for adultery no such result takes place, for the marriage was lawful *ab initio*.

The canon law considering marriage as in the nature of a sacrament, does not allow it to be unloosed for any cause whatsoever, that arises after the union is made; and with us, adultery is at common law only a cause of separation from bed and board; for if divorces be allowed to depend upon a matter within the power of either of the parties, they must, so long as men and women are governed by their passions, be extremely frequent.

Hence arose the practice of dissolving marriages by special acts of parliament, or *privilegia*, a remedy which, from its very nature, was within the reach only of the wealthy. It became, consequently, a subject of natural and just complaint by those who could not pay for a divorce, that the law favoured the rich only; and the *Court for Divorce and Matrimonial Causes* was constituted to grant divorces as a right, not as a *privilegium*. Its jurisdiction has been transferred to the High Court of Justice.

Lastly, what are the legal consequences of marriage, or its dissolution?

By marriage, the husband and wife are one person; the legal existence of the woman is incorporated into that of the husband; under whose *cover*, she performs everything; and is therefore called a *feme-covert*, her condition during marriage being called her *coverture*. Upon this principle depend the rights, duties, and disabilities, that either of them acquire by marriage. Hence a man cannot grant anything to his wife, or enter into a covenant with her, for this would suppose her separate existence; and therefore also compacts made between husband and wife, when single, are voided by the marriage. A woman may be attorney or agent for her husband; for that implies no separation from, but rather a representation of her lord. And a husband may bequeath to his wife by will; for that cannot take effect till the coverture is determined by his death.

The husband is bound to provide his wife with necessaries; and if she contract debts for them, he must pay them, unless he supplies her with necessaries himself; but for anything besides necessaries, he is not chargeable, unless she had authority to contract for him. If a wife elopes, or lives with another man, the husband is not chargeable even for necessaries; and if the person who furnishes her with goods, is apprised that she has no authority to pledge her husband's credit, he cannot recover. If the wife be indebted before marriage, the husband is not bound to pay her debts; except to the extent of the property he has received with her. If she be injured in person or property, she can bring no action except in his name as well as her own; neither generally can she be sued, without the husband being made a defendant. The cases where she may sue and be sued as a *feme sole*, are 1. Where the husband is banished, for then he is dead in law. 2. Where she has obtained a judicial separation; and 3. Where she sues or is sued in respect of her separate property. In seeking a divorce or other redress for a matrimonial injury, the woman must necessarily sue or be sued without her husband.

In criminal prosecutions the wife may be indicted and punished separately, for the union is only civil. A husband or wife may give evidence for or against each other in a civil action,

but not in a criminal proceeding; unless the offence is against the person of either, for then this rule does not apply.

And in some instances the wife is considered as inferior to the husband, and acting by his compulsion. Thus all deeds executed, and acts done by her during coverture, are void, except deeds properly acknowledged; in which case she must be separately examined, to learn if her act be voluntary. She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion. And in some crimes, committed by her through constraint of her husband, the law excuses her; but this extends not to treason or murder.

The husband by the old law, might give his wife moderate correction, but in the polite reign of Charles II., this power began to be doubted; and a wife may now have security of the peace against her husband, or, a husband against his wife. Yet the lower classes still exert their ancient privilege; and the courts permit a husband to restrain a wife of her liberty, in case of gross misbehaviour.

III. The next, and the most universal relation in nature, is derived from the preceding, that between parent and child.

Children are of two sorts: legitimate, and bastards.

1. A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards; and to him the parents owe maintenance, protection, and education.

The duty of parents to *maintain* their children is a principle of natural law, which our municipal law enforces, by the statutes 43 Eliz. c. 2, and 5 Geo. I. c. 8; the result being that no person is bound to provide a maintenance for his issue, unless where the child is impotent and unable to work, either through infancy, disease, or accident, and then is only obliged to find it with necessaries, the penalty on refusal being 20*s.* a month. Our law makes no provision to prevent the disinheriting of children by will, leaving every man's property in his own disposal, upon a principle of liberty in this as well as every other action.

Protection is also a natural duty, rather permitted than enjoined by municipal law; nature, in this respect, working so

strongly as to need rather a check than a spur. A parent may maintain his children in their lawsuits without being guilty of maintenance; and he may also justify an assault and battery in defence of their persons.

The duty of parents to give the children an *education* suitable to their station in life, the municipal laws of most countries have been defective in enforcing. Our interference till recently was limited to annual grants by parliament for promoting the education of the children of the poor, under the control of the *Committee of Privy Council for Education*. But the attendance of children at an efficient school may now be enforced, under the statute providing for the creation of *school boards*.

The *power* of a parent over his children is derived from their duty to him. He may lawfully correct his child, being under age, in a reasonable manner; and this power he may delegate, during his life, to the tutor or schoolmaster, who is then *in loco parentis*, so far as is necessary to fulfil the purposes for which he is employed. The parent's consent to the marriage of the child while under age is also required, although the want of it does not invalidate the marriage. A father has no other power over his son's *estate* than as his trustee or guardian; he may have the benefit of his children's labour while they live with, and are maintained by him; and his authority ceases at the age of twenty-one, when the children are supposed to arrive at years of discretion.

During the father's life, the mother, as such, is entitled to no power, but only to reverence and respect; and until the beginning of the present reign might have been excluded from all access to them. The High Court of Justice may now direct that a mother shall have access to her children; and if such children are within the age of *sixteen* years, that they be delivered to her until they attain that age.

The *duties* of children to their parents arise also from natural justice. For to those who gave us existence we naturally owe subjection and obedience during minority, and honour and reverence ever after. This tie of nature the law does not hold to be dissolved by any misbehaviour of the parent; and therefore a child is equally justifiable in defending the person, or maintaining the suit, of a bad parent as a good one; and is

equally compellable to maintain and provide for a wicked and unnatural progenitor, as for one who has shown the greatest tenderness and parental affection.

2. Illegitimate children, or bastards, are such as are not only begotten, but born, out of lawful matrimony; or so long after the death of the husband that by the usual course of gestation they could not be begotten by him. Children born during wedlock may indeed, in some circumstances, be bastards; as if the husband be out of the kingdom of England, or, as the law phrases it, *extra quatuor maria*, for above nine months, so that no access to his wife can be presumed. So in case of divorce for corporeal imbecility, the issue born during the coverture are bastards, the marriage having been null from the beginning.

The only duty of parents to their bastard children which our law recognises, is that of maintenance, which may be directed by two justices, and enforced by distress and imprisonment.

The rights of a bastard are few, being only such as he can *acquire*, for he can *inherit* nothing, being looked upon as the son of nobody, and called *filius nullius*, or sometimes *filius populi*. He may gain a surname by reputation; for he has none by inheritance; and he cannot be heir to any one, neither can he have heirs, but of his own body; for he has no ancestor from whom any inheritable blood can be derived.*

IV. The only private relation remaining is that of *guardian and ward*, which bears a near resemblance to the last, and is plainly derived out of it; the guardian being only a temporary parent.

Of the several species of guardians, the first are guardians *by nature*; viz., the father and, in some cases, the mother of the child. This guardianship is a right to the custody of the *person* of the infant, until he or she attains twenty-one. For if an estate be left to an infant, the father is at common law the guardian, and must account for the profits. There are also guardians *for nurture*, which are the father, or, if he be dead, the mother, till the infant attains the age of fourteen; a guardianship which has no reference to the infant's property, but relates merely to his person.

* A bastard is also, in strictness, incapable of holy orders; and though that were dispensed with, yet was he utterly disqualified from holding any dignity in the church; but this doctrine seems obsolete.

Next are guardians *in socage*, an appellation to be explained afterwards, called guardians *by the common law*; for when the minor is entitled to lands, the guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descend. For the law does not trust the person of an infant to him who may by possibility be heir to him, that there may be no temptation for him to abuse his trust. These guardians in socage, like those for nurture, continue only till the minor is fourteen; for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian.

This he may do, unless a *testamentary guardian* be appointed by the father, by virtue of the statute 12 Car. II. c. 24; the guardian so chosen, hence called *by election*, having no power beyond giving a consent to the ward's marriage. The infant's election, also, in no case supersedes the jurisdiction of the Sovereign, the general and supreme guardian of all the infants in the kingdom. This authority is exercised by the High Court of Justice, which therefore appoints a suitable guardian for an infant where there is no other, or no other who will or can act; these guardians being treated as officers of the court, and responsible to it accordingly.

The Court will also remove a guardian, however appointed, whenever sufficient cause can be shown for so doing. This jurisdiction extends to the care of the person of the infant, so far as is necessary for his protection and education, and to the care of his property, for its management and preservation, and proper application for his maintenance. Upon the former ground the court interferes with the ordinary rights of parents, as guardians by nature or by nurture; for when a father is guilty of gross cruelty to his children, or is in constant habits of drunkenness, or professes irreligious principles, or his domestic associations are such as tend to the corruption of his children, the court will deprive him of the custody of the infants, appointing at the same time a suitable person to act as guardian, and superintend their education. Any of the friends or relatives of the infant, nay a mere stranger, may set the machinery of the court in motion, the infant then becoming a ward in chancery, and under the special protection of the court. No act can then be done affecting the minor's person or property, unless under its direction, every

act done without such direction being considered a contempt, exposing the offender to be attached. Thus it is a contempt to withdraw the person of the infant from the proper custody, or to marry the infant without the approbation of the court; which usually gives directions how the powers which it has conferred are to be exercised; prescribes the residence, and education of the infant; regulates his choice of a profession or trade; approves or prohibits his marriage; and performs all the other duties of a guardian.

A guardian *ad litem*, or, as he is termed, a *prochein amy*, or next friend, is one appointed by the court to prosecute the suit, or manage the defence of an infant. He has no authority over the infant's person or property, but is responsible for the costs of the action.

The power and reciprocal duty of a guardian and ward are the same, *pro tempore*, as that of a father and child; and therefore I need only add, that the guardian, when the ward comes of age, is bound to give him an account of all that he has transacted on his behalf, and must answer for all losses by wilful default or negligence.

Let us next consider the ward, for whose assistance these guardians are constituted. The ages of male and female are different for different purposes. A male at *twelve* may take the oath of allegiance; at *fourteen* may consent to marriage, may choose his guardian, may be an executor, although he cannot act until of age, and at *twenty-one* may alien and devise his lands, goods, and chattels. A female at *seven*, may be betrothed or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and may consent to marriage; at *fourteen* may choose a guardian; at *seventeen* may be executrix, and at *twenty-one* is of full age; which age is completed on the day preceding the anniversary of the birth of the person, who till that day is an infant, and so styled in law.

Infants have various privileges, and various disabilities; but their very disabilities are privileges, to secure them from hurting themselves by their own improvidence. An infant cannot be sued but under the protection, and joining the name, of a guardian;

but he may sue by his guardian, or *prochein amy*, or alone for wages in the county courts. In criminal cases, an infant of the age of *fourteen* may be punished; but under the age of *seven* he cannot. The period between *seven* and *fourteen* is a subject of much uncertainty. Generally he shall be considered *primâ facie* innocent: yet if *doli capax*, he may be convicted, and undergo punishment though he has not attained to years of puberty or discretion. With regard to property an infant has many privileges, which will be better understood when we come to treat more particularly of those matters.

CHAPTER XIV.

I.—OF CORPORATIONS.

HITHERTO of persons in their natural capacities; but, as all personal rights die with the person, and as the necessary form of investing a series of individuals, one after another, with the same rights, would be very inconvenient, if not impracticable, it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality, which are called bodies corporate, *corpora corporata*, or corporations. To show the advantages of such institutions, let us consider the case of a college founded *ad studendum et orandum*. If this was a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercise together, so long as they could agree to do so; but they could not frame any rules of conduct which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they retain any privileges; for if such privileges were attacked, which of all this unconnected assembly would have the right to defend them? And, when they were dispersed by death, how should they transfer these advantages to another set of students? So with regard to holding estates, they could only continue the property to other persons, for the same

purposes, by endless conveyances from one to the other, as often as the hands were changed.

But when united into a corporation, they and their successors are one person in law: they have one will; this one will may establish rules for the whole body, or statutes may be prescribed to it at its creation; the privileges, the possessions of the corporation, when once vested in them, will be for ever vested without any new conveyance to new successors; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

The honour of inventing these political constitutions is ascribed to the Romans; they were afterwards much considered by the civil law, in which they were called *universitates*, as forming one whole out of many individuals; or *collegia*, from being gathered together; and they were adopted also by the canon law, for the maintenance of ecclesiastical discipline. From them our spiritual corporations are derived, and the law of England now recognises several sorts of them.

Thus corporations are said to be *aggregate*, or such as consist of many persons united in one society; as the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral. Corporations *sole* consist of one person only and his successors, 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. The sovereign 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. For the parson, *quatenus* parson, never dies, any more than the sovereign. The present incumbent, and his predecessor who lived seven centuries ago, are one and the same person, and what was given to the one was given to the other also.

Corporations are also *ecclesiastical* and *lay*. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons; such as bishops, parsons, and vicars, which are sole corporations; and deans and chapters, which are bodies aggregate. Lay corporations, again, are either *civil* or *eleemosy-*

nary. The civil are such as are erected for temporal purposes. The sovereign, for instance, is made a corporation to prevent the possibility of an *interregnum*; other lay corporations are erected for the good government of a town, and some for the better carrying on of special purposes; as the Colleges of Physicians and Surgeons in London; The Royal Society, and the Society of Antiquaries. The eleemosynary sort are constituted for the perpetual distribution of the free alms, or bounty, of the founder, to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent: and all colleges, both *in* our universities, and *out* of them.

I shall treat of these different bodies separately; mentioning, —First, corporations *in general*; Secondly, *municipal* corporations; and Thirdly, *trading* corporations.

1. Corporations, by the civil law, seem to have been created by the mere voluntary association of their members: provided such convention was not contrary to law, for then it was *illicitum collegium.* But in England, the consent of the crown is absolutely necessary to the erection of any corporation, either impliedly or expressly given. The sovereign's implied consent is to be found in corporations which exist at *common law*, to which our former kings are supposed to have given their concurrence; of which sort are the sovereign himself, all bishops, parsons, vicars, and some others. Another species, wherein the consent of the crown is presumed, is as to all corporations by *prescription*, such as the City of London, and many others; which have existed as corporations, time whereof the memory of man runneth not to the contrary. And the methods by which the consent of the crown is expressly given, are either by act of parliament or charter; although till of late years most of those statutes, which have been usually cited as having created corporations, either confirmed such as had been before created by the sovereign; as in the case of the College of Physicians erected by Henry VIII.; or enabled the sovereign to erect a corporation *in futuro* with such and such powers: as in the case of the Bank of England.

In recent times corporations have been usually created by act of parliament; many powers being required by our modern corporations, such as the right to levy tolls and purchase land

compulsorily, which the crown cannot, and which parliament alone can confer.

When a corporation is erected, a *name* must be given to it; and by that name alone it must do all legal acts. When so formed, it acquires many powers, rights, capacities and incapacities, which we are next to consider. As, 1. To have perpetual *succession*, which is the very end of its incorporation. 2. To sue or be sued, 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. For a corporation being an invisible body, acts and speaks only by its common seal. 5. To make bye-laws or private statutes for the better government of the corporation. These five powers are inseparably incident to every corporation, at least to every corporation *aggregate*: for two of them are very unnecessary to a corporation *sole*; viz., to have corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.

There are also certain privileges and disabilities that attend an aggregate corporation. Thus, it must always appear by attorney; for it cannot appear in person, being invisible, and existing only in intendment of law. It may take goods and chattels for the benefit of existing members and their successors, which a sole corporation cannot do; but it cannot do any acts, or even receive a grant, during the vacancy of the headship, except only appointing another head, for a corporation is incomplete without a head.

It is also incident to every corporation to have a capacity to purchase lands for themselves and successors; and this is regularly true at the common law. But they are excepted out of the statute of wills: so that no devise of lands to a corporation by will is good; except for charitable uses, by statute 43 Eliz. c. 4: which exception is again greatly narrowed by the statute 9 Geo. II. c. 36. And their privilege of purchasing from a living grantor is much abridged by a variety of statutes, which are generally called the *statutes of mortmain*: the more particular exposition of which I shall defer till the next book, when we shall consider the nature and tenures of estates.

I proceed, therefore, to inquire how corporations may be *visited*; for being composed of individuals subject to human frailties, they are liable to deviate from the end of their institution.

Of all ecclesiastical corporations, the ordinary is the visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the sovereign, as supreme ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops; and the bishops in their several dioceses are in ecclesiastical matters the visitors of all deans and chapters, of all parsons and vicars, and all other spiritual corporations.

Of all lay corporations, the founder, his heirs, or assigns, are the visitors, whether the foundation be civil or eleemosynary. And the crown being, in general, the sole founder of all civil corporations and the endower, the perficient founder, of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the sovereign; and of the latter to the patron or endower. The sovereign being thus visitor of all civil corporations, the law has also appointed the place wherein he shall exercise this jurisdiction, which is the High Court of Justice; where, and where only, all misbehaviours of this kind of corporations are inquired into and redressed, and all their controversies decided.

Of eleemosynary corporations, the founder and his heirs are the legal visitors, to see that such property is rightly employed as might otherwise have descended to themselves: but, if the founder has appointed any other person to be visitor, then he is invested with all the founder's power. If no visitor has been appointed by the founder, the right of visitation devolves upon the crown.

We come now to consider how corporations may be dissolved. Any particular member may be disfranchised, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land; or he may resign it by his own voluntary act. But the body politic may also itself be dissolved in several ways; as, 1. By act of parliament, which is boundless in its operations. 2. By the natural death of all its members, in case of an aggregate corporation. 3. By surrender of its

franchises into the hands of the sovereign, which is a kind of suicide; and, 4. By forfeiture of its charter, through negligence or abuse of its franchises; in which case the law holds that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void; the regular course to obtain this judgment being an information in nature of a *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings.

II.—MUNICIPAL CORPORATIONS.

Among corporations in general, might formerly have been classed all those boroughs which are now chiefly regulated by the Municipal Corporations Reform Act. That statute applies to one hundred and seventy-eight corporate towns; the remainder—including the City of London—sixty-eight in number, were not brought within its operation. London, the greatest of all, with its many wealthy trading companies, each a corporation in itself, was reserved for separate legislation; the others, being inconsiderable either in extent or population, still continue to be governed by their charters or prescriptive usages, like corporations existing at the common law. The statute also applies to those towns which have since obtained charters of incorporation; the crown being thereby expressly enabled to grant charters extending to the householders of certain populous places, the powers, privileges, and authorities conferred by the act.

The principal objects of municipal government have usually been the appointment and superintendence of the police, the administration of justice, the lighting and paving of the town, and, in a few cases, the management of the poor. The statute I refer to was directed solely to the improvement of the means by which these objects were thereafter to be attained. It, therefore, left untouched those local laws which relate merely to the objects of municipal government; but rendered the functionaries of the municipalities eligible by, and consequently directly responsible to, the persons whose interests they are appointed to protect; and created a constituency, which ought, in ordinary cases, to include all those who are interested

in the proper performance of their public duties by their municipal officers.

The constituents of the old corporations were known by the name of the *freemen*; and were usually admitted by the ruling body, which was in turn elected by the freemen. The freedom was obtainable by birth, or by marriage with the daughter or widow of a freeman, or by servitude or apprenticeship; and the rights attached to it were in many cases of considerable value, especially when they conferred a title to the enjoyment of funds derivable from corporate property. The rights of the freemen *in esse* were consequently preserved by the statute; which at the same time enacted that no freedom should thenceforth be acquired by gift or purchase; and then proceeded to provide, for the reformed corporations, a constituency consisting of every person of full age, who had occupied premises within the borough for three previous years, now reduced to one year, and who, being resident within seven miles, was rated to the relief of the poor. Lists of persons thus qualified are accordingly made up annually by the overseers; corrected and published by the town-clerk; and revised by the mayor and his assessors in the same manner as the lists of parliamentary electors. The mayor and aldermen, with the constituency, constitute the *corporation*; and collectively with the councillors form the *town-council*; to which is intrusted its whole deliberative and administrative functions. The council appoints the town-clerk, treasurer, and other executive officers; and a chief and other constables to preserve the peace by day and night. The council may undertake the superintendence of the lighting of the borough, provided no local act exists for the purpose; and constitutes the *rural sanitary authority* of the borough.

In the council is vested the power, incident to all corporations, of making bye-laws for the good government of the borough, and the prevention and suppression of all such nuisances as are not punishable in a summary manner. It has also the control of the borough fund; which, if insufficient for municipal purposes, may be supplemented by a borough rate. The accounts of the borough rates are audited, printed, and published.

Further, the town-council may, on voting a suitable salary,

have one or more *stipendiary magistrates* appointed by the crown; and on complying with certain preliminaries as to the gaol and the salary of the judge, may also obtain a separate court of quarter sessions; for which the crown appoints a *recorder*, who is the sole judge of the court.

These municipal corporations, it will be observed, possess some peculiar powers, and are subject, on the other hand, to some peculiar restrictions not applicable to corporations in general; an observation which will apply to another species of corporations, possessing many of the municipal functions usually intrusted to the town councils of boroughs. I refer to the numerous *local boards*, now called *rural sanitary authorities*, which, by special legislation, are invested with extensive powers for the conservation of the public health; and are for that purpose enabled to provide for the effective drainage of the towns or other populous places over which their authority extends, the removal of nuisances arising within their districts, the regulation of new buildings, the construction of streets, the supply of water, and many other matters of local importance, too numerous to mention.

III.—TRADING CORPORATIONS.

I HAVE reserved for separate consideration that class of corporations consisting of individuals associated together for the purposes of trade or business, and with a view to profit. This system of association, which has received such gigantic development in modern times, is by no means of recent origin. Institutions founded on the same principle seem to have existed among the Saxons; and soon after the Conquest, *gilds* of different trades were established in the various sea-ports and other towns in the kingdom. These fraternities generally became in time chartered corporations; and in this position they seem to have continued till about the time of the Reformation, when they mostly became merged in the municipal corporations, the franchises of which could in many cases be enjoyed by those only who were *free* of one or other of the companies into which the community was divided. Soon after the Revolution, the principle of association began to be applied to a variety of purposes

besides those of trade. Numerous projects were started, the execution of which could only be compassed by raising capital on the *joint-stock principle*. Hence arose, in the early part of the eighteenth century, the frauds and panics, which are remembered in connection with the famous *South Sea Company*; and of which counterparts have been exhibited more than once in our own times. More recently the joint-stock principle has been more usefully applied in the development of our national wealth; and many useful public undertakings have been carried into effect by companies incorporated by acts of parliament. In these undertakings, the assistance of the legislature was necessary to enable the company to carry out the project for which it was formed, by the compulsory purchase of property necessary for the purpose, and to make bye-laws binding on the public, for protecting the rights and interests of the corporation.

It would serve no useful purpose to trace here the history of trading corporations down to the present time, or the numerous modifications to which the law relating to them has been subjected. And I content myself with alluding merely to the extension to all those associations that see fit to adopt it—of the principle of *limited liability*, or the restriction of the responsibility of each member to the amount of the capital subscribed by him, which had long been conceded to companies incorporated by act of parliament. There now exist four classes of joint-stock companies, viz.:

1. Trading companies incorporated by special acts of parliament, a class including railway, dock, harbour, and canal companies, a great many insurance companies, and a vast number of other bodies engaged in every species of profitable employment.

2. Joint-stock companies established under the statute 1 Vict. c. 73, or the preceding act, 6 Geo. IV. c. 91; which enables the crown in granting charters of incorporation to limit the liability of the members.

3. Banking companies, which are mentioned separately, simply because they are regulated by different statutes from ordinary joint-stock associations; and

4. Registered joint-stock companies; either with unlimited or *limited liability*, as the articles of association may prescribe.

These corporations may be dissolved by being wound up either voluntarily or compulsorily. A voluntary winding-up may take place whenever the period, if any, fixed for the duration of the company expires; or the event, if any, occurs upon which it is to be dissolved; or whenever the company has passed a special resolution requiring its winding-up.

A company may be wound up compulsorily: by virtue of a special resolution to that effect:—whenever it does not commence business within a year of its incorporation, or suspends business for a year:—whenever the shareholders are less than seven in number:—or whenever the company is unable to pay its debts.

BOOK THE SECOND.

OF THE RIGHTS OF THINGS.

CHAPTER I.

OF PROPERTY IN GENERAL.

THE objects of our next inquiry are the *jura rerum*, or those rights which a man may acquire in or to such external things as are unconnected with his person; or what the writers on natural law style the rights of dominion, or property; concerning the nature and origin of which I shall premise a few observations.

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property. And yet few give themselves the trouble to consider its origin and foundation. 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 of the dying owner; not caring to reflect that, strictly speaking, there is no foundation in nature, why words upon parchment should convey the dominion of land; why the son should exclude his fellows from a spot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when on his death-bed and no longer able to maintain possession, should tell the rest of the world which of them should enjoy it after him. But when law is to be considered as a rational science, it cannot be useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the beginning of the world, as we are informed, the 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." The earth, therefore, and all things therein, are the general property of mankind, from the immediate gift of the Creator. And, while it continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that each one took from the public stock such things as his immediate necessities required. But 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. Otherwise tumults must have arisen, and the good order of the world been continually disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life grew more refined, conveniences were devised to render it more commodious and agreeable; as habitations for shelter, and raiment for warmth. But no man would provide either, so long as he had only an usufruct in them, which was to cease the instant he quitted possession; if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by had a right to inhabit the one, or to wear the other. Hence a property was soon established in every man's house, before any right to the soil itself was created.

The article of food was a more early consideration. Such as were not contented with the spontaneous produce of the earth, sought for the flesh of beasts, which they obtained by hunting; until the frequent disappointments incident thereto, led 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, partly by the milk of the dams, and partly by the flesh of the young.

All this while the soil and pasture of the earth remained in common as before, open to every occupant; so that when men and cattle had consumed every convenience on one spot, it was deemed a natural right to occupy such other lands as supplied their necessities. This practice is still retained among those

nations that have never been formed into civil states; and upon this principle alone is founded the right of sending colonies to find out new habitations, when the mother-country is overcharged with inhabitants.

As the world grew more populous, it became more difficult to find out new spots to inhabit, without encroaching upon former occupants; and, by constantly occupying the same spot, the fruits of the earth were consumed, and its spontaneous produce destroyed, without any provision for a future supply. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced the art of agriculture. And agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage: but who would till, if another might seize upon and enjoy the produce of his labour? Necessity thus begat property; and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants: states, government, laws, and punishments. It was then found that a part only of a society was sufficient to provide, by their labour, for the subsistence of all; and leisure was given to others to cultivate the mind, to invent useful arts, and to lay the foundations of science.

The only question remaining is, how property became actually vested; or what it is that gave a man an exclusive right to retain in a permament manner that specific land, which before belonged generally to everybody, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary *use* of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the *substance* of the earth itself; which excludes every one else but the owner from the use of it.

Property, both in lands and movables, being thus originally acquired by the first taker, it remains in him, till he shows an intention to abandon it; for then it becomes, naturally speaking, liable to be again appropriated by the next occupant. But such a practice, however well founded in theory, could not long subsist in fact. It necessarily ceased among the complicated

interests of established governments; especially when it was found, that what became inconvenient or useless to one, was highly convenient and useful to another; who was ready to give for it some equivalent, equally desirable to the former proprietor. Thus convenience introduced traffic, and the transfer of property by sale, grant, or conveyance; which may be considered either a continuance of the original possession, or as an abandonment of the thing by the present owner, and an immediate successive occupancy by the new proprietor.

The most effectual way of abandoning property, is by the death of the occupant; whereupon considering men as absolute individuals and unconnected with civil society, the next occupant would acquire a right in all that the deceased possessed. But as, under civilized governments, such a constitution would produce endless disturbances, the law of every nation either gives the dying person a power of continuing his property, by disposing of it by will; or, in case he neglects to do so, steps in, and declares who shall be the representative or heir of the deceased. Hence the right of inheritance in the relatives of the deceased, which seems to have been allowed much earlier than the right of devising by will; and which we are apt to conceive at the first view has nature on its side. Yet we often mistake for nature what is merely inveterate custom. For a man's children or near relations being usually about him on his death-bed, are the earliest witnesses of his decease, and became therefore the next occupants of his property, till at length, in process of time, this usage ripened into law. So that to municipal and not to natural law we owe not only the right of inheritance, but the right to bequeath by will. For while property continued only for life, as at first, testaments were unknown: when it became inheritable, the inheritance was long indefeasible, and the heirs could not be excluded by will; and when at length it was found, that this rule made heirs disobedient, defrauded creditors of their debts, and prevented provident fathers from dividing their estates as the exigence of their families required, the right of disposing by will was introduced. So that the rights of inheritance and succession are creatures of the municipal law, and in all respects regulated by it.

Some few things, however, must unavoidably remain in

common. Such are light, air, and water; which a man may occupy by means of his windows, his gardens, and his mills; such also are animals of a wild and untameable disposition; which any man may seize upon and keep for his own pleasure. All these, so long as they remain in his possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, they return to the common stock, and any man has an equal right to seize and enjoy them afterwards.

CHAPTER II.

OF REAL PROPERTY.

THE objects of property are *things*, as contradistinguished from *persons*; and things are of two kinds; things *real* and things *personal*. Things real are such as are permanent, fixed, and immovable, which cannot be carried out of their place, as lands and tenements; things personal are goods, money, and all other movables, which may attend the owner's person wherever he thinks proper to go. Things real are usually said to consist in lands, tenements, or hereditaments. *Land* comprehends all things of a permanent, substantial nature; *tenement* is a word of still greater extent, signifying everything 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. Thus, *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands but also to offices, rents, and the like: and as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements. But a *hereditament* is by much the 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. Thus, an heir-loom, which by custom descends to the heir, is neither land nor tenement, but a mere movable; yet, being inheritable, is comprised under the general word hereditament.

Hereditaments then are of two kinds, corporeal and incor-

poreal. Corporeal consist of such as affect the senses; such as may be seen and handled: incorporeal are not the object of sensation, can neither be seen nor handled, and exist only in contemplation of law.

I. Corporeal hereditaments may thus be comprehended under the denomination of *land*, which legally signifies any ground, or earth whatsoever; arable, meadow, wood, water, marsh, heath. *Water* being here mentioned as land, may seem a kind of solecism; but such is the language of the law: and therefore I cannot bring an action to recover possession of a pool or piece of water; I must sue for the land that lies at the bottom, and call it *land covered with water*.

Land has also, legally, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cœlum*; therefore no man may erect any building to overhang another's land: and whatever is in a direct line between the surface and the centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. And therefore if a man grants all his lands he grants thereby all his mines, his woods, and his waters, as well as his houses, fields and meadows.

II. An incorporeal hereditament 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; but something collateral thereto, as a rent issuing out of land or an office relating thereto. And these incorporeal hereditaments are principally advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

1. *Advowson* is the right of presentation to an ecclesiastical benefice. For, when lords of manors first built churches, and appointed the tithes of those manors to be paid to the ministers, the lord had a power annexed of nominating such minister as he pleased to officiate in that church of which he was the founder, endower, or, in one word, the patron.

This instance will illustrate the nature of an incorporeal hereditament. It is not itself the possession of the church, but a right to give some other man a title to such possession. The

advowson is the object of neither sight nor touch; and yet it perpetually exists in contemplation of law. It cannot be delivered by any visible transfer, nor can corporeal possession be had of it. If the patron takes corporeal possession of the church, the glebe, or the like, he intrudes on another's property; for to these the parson has an exclusive right. The patronage can therefore be only conveyed by operation of law, viz., by writing under seal, which is evidence of an invisible mental transfer: and being so vested it lies dormant and unnoticed, till occasion calls it forth, when it produces a visible corporeal fruit, by entitling some clerk, whom the patron nominates, to enter, and take possession of the lands and tenements of the church.

2. *Tithes* are incorporeal hereditaments; being the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock thereupon, and the personal industry of the inhabitants: the first being usually called *predial*, as of corn, hops, and wood: the second *mixed*, as of wool, milk, pigs, &c., natural products, nurtured in part by the care of man: the third *personal*, as of manual occupations, trades, fisheries, and the like.

I will not put the title of the clergy to tithes upon any divine right; municipal laws have in many cases provided a liberal maintenance for the national clergy; and so does the law of England. At what precise time however tithes were first introduced here cannot be precisely ascertained. They may have been contemporary with Augustin; but the first mention of them in any written law, is in a decree, made in a synod held A.D. 786, wherein their payment is strongly enjoined. The next authentic mention of them is about A.D. 900, in the Anglo-Saxon laws, where this payment is not only *enjoined* but a *penalty* added upon non-observance: and this law is seconded by the laws of Athelstan, about the year 930.

Upon their first introduction, every man might give them to what priest he pleased; but, when the country was divided into parishes, the tithes of each were allotted to its own minister; first by common consent, or the appointments of lords of manors, and afterwards by the written law. The first step towards this

result was taken by Innocent III., about 1200, who in an epistle to the Archbishop of Canterbury, enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited. This epistle bound not the lay subjects of this realm; but, being reasonable and just, it was allowed of, and so became *lex terræ*; so that tithes are due, of common right, to the parson of the parish, unless there be a special exemption; which may be either by a real composition, or by custom or prescription.

A real composition was when an argreement was made between the owner of the lands, and the parson or vicar, that such lands should for the future be discharged from payment of tithes, by reason of some land or other real recompense given to the parson, in lieu and satisfaction thereof.

A discharge by custom or prescription, was where time out of mind such persons or such lands had been, either partially or totally, discharged from the payment of tithes. And this immemorial usage or prescription, was either *de modo decimandi*, or *de non decimando*. A *modus decimandi*, commonly called by the simple name of a *modus*, was where there was by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind; such as a pecuniary compensation, as twopence an acre, or a compensation in labour, as, that the parson should have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him. A prescription *de non decimando* was a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them; whence have sprung all the lands which, being in lay hands, do at present claim to be tithe-free: for if a man can show his lands to have been immemorially discharged of tithes, this is a good prescription *de non decimando*.

Tithes, however, have already to a considerable extent, and will very soon indeed become mere matter of history, through the operation of the statutes, which have been passed for their commutation into rent-charges. These are payable half-yearly, and are recoverable by distress and sale, like ordinary rents.

3. *Common*, or right of common, appears from its very definition to be an incorporeal hereditament: being a profit which a man has in the land of another; as, to feed his beasts, to catch

fish, to dig turf, to cut wood, or the like; and is chiefly of four sorts: common of pasture, of piscary, of turbary, and of estovers.

Common of pasture is a right of feeding one's beasts on another's land: for in those waste grounds, which are called commons, the property of the soil is generally in the lord of the manor. *Common of piscary* is a liberty of fishing in another man's water; as *common of turbary* is a liberty of digging turf upon another's ground. There is also a common for digging for coals, minerals, stones, and the like. *Common of estovers*, or *estouviers*, that is, *necessaries*, from *estoffer*, to furnish, is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word *bote*, is used by us as synonymous to the French *estovers*: and therefore house-bote is a sufficient allowance of wood to repair or to burn in the house; plough-bote and cart-bote are to be employed in making and repairing instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing of hays, hedges, or fences.

4. *Ways*, or the right of going over another man's ground, are a fourth species of incorporeal hereditament. I speak not here of the public highways, nor yet of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil.

5. *Offices*, which are a right to exercise an employment and to take the emoluments thereunto belonging, are also incorporeal hereditaments; whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like; for a man may have an estate in them. A *judicial* office cannot be granted in reversion; because, though the grantee may be able to perform it at the time of the grant; yet before the office falls, he may become unable. *Ministerial* offices may be so granted; for those may be executed by deputy. But no *public* office can be sold; for the law presumes that he who buys an office will by bribery, extortion, or other unlawful means, make his purchase good, to the detriment of the public.

6. *Dignities* bear a near relation to offices, being incorporeal hereditaments, wherein a man may have a property or estate.

7. *Franchises* or liberties are synonymous; their definition being a royal privilege or branch of the prerogative, in the hands of a subject; and there are various kinds of them. To be a county palatine is a franchise, vested in a number of persons. So it is to be incorporated and subsist as a body politic. Other franchises are to have a manor or lordship; to have estrays or royal fish; to have a fair or market; or to have a forest, warren, or fishery.

8. *Corodies* are a right of sustenance, or to receive victual and provision for one's maintenance, in lieu of which a sum of money is sometimes substituted. To these may be added,

9. *Annuities*, which are very distinct from rent-charges, with which they are frequently confounded; for a rent-charge issues out of *lands*; an annuity is a yearly sum chargeable only upon the *person* of the grantor. Finally,

10. *Rent* is an incorporeal hereditament, and signifies an acknowledgment given for the possession of some corporeal inheritance, being defined a profit issuing yearly out of lands and tenements corporeal. It must be a *profit*; yet it need not be money: for capons, corn, and other matters may be rendered by way of rent. It must issue out of *lands and tenements corporeal*; that is, from some inheritance whereunto the owner of the rent may have recourse to distrain, and therefore a rent cannot regularly be reserved out of an advowson, an office, or the like. Rent is payable upon the land whence it issues, and strictly it is demandable before sunset of the day whereon it is reserved, though not absolutely due till midnight.

CHAPTER III.

OF THE FEUDAL SYSTEM.

It is impossible to understand, with any accuracy, either our civil constitution, or the laws which regulate our landed property, without some acquaintance with the feudal law: a system universally received throughout Europe upwards of twelve centuries ago. It had its origin in the military policy

of the northern nations, who poured over Europe upon the decline of the Roman empire, and was introduced by them in their respective colonies as the most likely means to secure their new acquisitions. To that end, large districts were granted by the conquering general to his superior officers, and by them dealt out in smaller parcels to the inferior officers and deserving soldiers. These allotments were called *feoda*, fiefs or fees; which last appellation signifies a conditional reward; the condition annexed to them being, that the possessor should do service to him by whom they were given; for which purpose he took the *juramentum fidelitatis*, or oath of fealty: and in case of a breach of this oath, by not performing the stipulated service, or by deserting the lord in battle, the lands reverted to him who granted them.

Allotments, thus acquired, engaged such as accepted them to defend them; and, as they all sprang from conquest, no part could subsist independently of the whole, wherefore all givers as well as all receivers were mutually bound to defend each other's possessions. But as that could not be done in a tumultuous, irregular way, subordination was necessary, and every feudatory was therefore bound, when called upon by his immediate lord, to defend him. Such lord was subordinate to his immediate superior; and so upwards to the prince himself: all being reciprocally bound in their respective gradations to protect the possessions they had given. An army of feudatories was thus always ready, not only in defence each of his own property, but in defence of the whole of the newly-acquired country.

Scarce had these conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valour, alarmed all the princes of those countries which had formerly been Roman provinces; most of which, if not all, thought it necessary to adopt a similar policy. For whereas, before, the possessions of their subjects were *allodial*, that is, wholly independent, and held of no superior at all, now they parcelled out their territories, or persuaded their subjects to surrender up and retake their own property, under the feudal obligations of military fealty. And thus, in a very few years, the feudal system extended itself over the western world; drew after it necessarily an alteration of laws and customs; and

drove out the Roman laws which had hitherto universally obtained, but now became for many centuries forgotten.

This feudal polity was not, however, received by us till the reign of William the Norman; and even then it seems to have been introduced, not by the arbitrary will of the King, but gradually by the Norman barons, and at first in such forfeited lands only as they received from the crown. Their regard for the law under which they had lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, probably induced its establishment here. But, be this as it may, in consequence of this change it became a fundamental maxim though in reality a fiction of our tenures, that all lands were originally granted out by the sovereign, and therefore holden mediately or immediately of the crown. The supposed grantor, was called the *lord*, and the grantee the feudatory or *vassal*, another name only for the tenant or holder of the lands. The grant itself was perfected by investiture, or open delivery of possession in the presence of the other vassals; who, in case of a disputed title, afterwards decided the difference, not only according to external proofs, but also by the internal testimony of their own private knowledge.

Besides an oath of *fealty*, which was the parent of our oath of allegiance, the 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 honour:" and then he received a kiss from his lord. Which ceremony was denominated *homagium*, or *manhood*, by the feudists, from the stated form of words, *devenio vester homo*.

The next consideration was the *service*, which, in pure and original feuds, was only twofold: to follow, or do *suit* to the lord in his courts in time of peace; and in his warlike retinue when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories; and, therefore, the vassals were bound to attend their 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. In like manner the barons themselves were bound to attend the king upon summons, to hear causes in the king's presence, and under the direction of his grand justiciary. The military branch of service consisted in attending the lords to the wars, if called upon, with such a retinue, and for such a number of days, as were originally stipulated.

At first, feuds, as they were gratuitious, so also they were precarious, and held at the *will* of the lord, who was the sole judge whether his vassal performed his services faithfully. Then they became certain for one or more *years*, and finally began to be granted for the *life* of the feudatory. For a long time, however, they were not *hereditary*, though frequently granted to the children of the former possessor; till in process of time it became unusual to reject the heir, if he were capable to perform the services; and, therefore, infants, women, and monks, who were incapable of bearing arms, were also incapable of succeeding to a feud. But the heir, when admitted, used to pay a fine or acknowledgment to the lord, in horses, arms, and the like, for such renewal of the feud, which was called a relief, because it raised up and re-established the inheritance; and when, afterwards, feuds became hereditary, these reliefs continued on the death of the tenant, though the original reason of them had ceased.

Other qualities of feuds were, that the feudatory could not alien or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord. For the reason of conferring it, being the personal abilities of the feudatory, it was not fit he should transfer this gift to another who might prove less able; and as the feudal obligation was reciprocal, the lord could not, on the other hand, transfer his seignory without consent of his vassal.

These qualities of feuds being all of a military nature, the feudatories soon found it necessary to commit the cultivation of their lands to inferior tenants; obliging them to such returns in corn, cattle or money, as might enable the chief feudatories to attend their military duties; which returns were the origin of rents. The feudal polity was thus greatly extended; these inferior feudatories being bound to do suit of court, and to pay the stipulated rent-service. But this demolished the ancient

simplicity of feuds; and subjected them, in time, to great innovations. Feuds were bought and sold, and tenures began to be called *feoda propria et impropria*; the former comprehending such only of which we have spoken; and the latter all such as did not fall within the other description.

This introduces us to a consideration of the *ancient English tenures*, the peculiarities of which are to be accounted for upon feudal principles. The criteria being the natures of the services due to the lords, which, in respect of their quality, were either *free* or *base* services; and in respect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character of a freeman; as, to serve in the wars, to pay a sum of money, and the like. *Base* services were such as were fit only for persons of a servile rank; as to plough the lord's land, or to make his hedges. The *certain* services, were such as were stinted in quantity; as, to pay a stated rent, or to plough a field for three days. The *uncertain* depend upon contingencies; as, to do military service in person, or pay an assessment in lieu thereof, or to wind a horn when the Scots invaded the realm, which are free services; or to do whatever the lord should command, which is a base or villein service.

From the various combinations of these services have risen the four kinds of lay tenure which subsisted with us till the middle of the seventeenth century, and three of which subsist to this day.

1. The first, most universal, and esteemed the most honourable species of tenure, was that by knight-service, which differed little from a proper feud. To make this, a determinate quantity of land was necessary, which was called a knight's fee, the value of which, in the reigns of Edward I. and Edward II., was 20*l.* per annum, and the tenant was bound to attend his lord to the wars for forty days in every year, if called upon.

But this tenure drew after it aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat.

Aids, or benevolences granted by the tenant to his lord, in times of difficulty, grew in time to be considered rights, and were principally three: first, to ransom the lord if taken

prisoner; secondly, to make the lord's eldest son a knight; and thirdly, to marry the lord's eldest daughter, by giving her a suitable portion; for daughters' portions were in those days extremely slender, and the lords, by their tenure, could not charge their lands with any incumbrance.

Relief, relevium, or the composition for taking up the estate, which had fallen in by the death of the last tenant; and which, by an ordinance in 27 Hen. II., called the assize of arms, was fixed at 100*s.* for every knight's fee.

Primer seisin, only incident to the king's tenants *in capite,* was a right which the king had, when any of his tenants died seised of a knight's fee, to receive a year's profit of the lands. This gave a handle to the pope, to claim from every clergyman the first year's profits of his benefice, by way of firstfruits.

Relief and primer seisin, were only due if the heir was of full age. If he was under age the lord had the *wardship,* and was called guardian in chivalry; which gave him the custody of the body and lands of the heir, without any account of the profits, till twenty-one in males and sixteen in females. For the law supposed the heir-male unable to perform knight-service till twenty-one; but the female was supposed capable at fourteen to marry, and then her husband might perform the service.

When the heir came of age, he was, provided he held a knight's fee, compellable to take upon him knighthood or else pay a fine to the king. This prerogative was exerted as an expedient for raising money by Charles I.; and was abolished by statute 16 Car. I. c. 20.

But, before they came of age, the guardian had authority over his wards, in respect of their *marriage,* having the power of tendering him or her a suitable match, without *disparagement,* which if the infants refused, they forfeited the value of the marriage, *valorem maritagii,* to their guardian; and if the infants married without the guardian's consent, they forfeited double the value, *duplicem valorem maritagii.* This was one of the greatest hardships of our ancient tenures; and one cannot read without astonishment, that such should have continued to be law till the year 1660.

Another attendant of tenure by knight-service was the *fines on alienation.* A feudatory could not originally substitute a new tenant, without the consent of the lord: and, the lord could not alienate his seignory without the consent of his tenant, which was called *attornment.* The restraint on the lord soon wore away; that on the tenant continued longer. For, when everything came in time to be bought and sold, the lords would not grant a licence to alien, without a fine being paid; for if it was reasonable for the heir to pay a relief, it was more reasonable that a stranger should make an acknowledgment on his admission to a newly-purchased feud.

Escheat took place if the tenant died without heirs of his blood, or if his blood was corrupted by attainder of treason or felony. The land thereupon escheated or fell back to the lord, the tenure being determined by breach of the original condition. In the one case, there were no heirs of the blood of the first feudatory; in the other, the tenant forfeited the feud, which he held under the implied condition that he should not be a traitor or a felon.

These were the principal consequences of knight-service: of which nature was *grand serjeanty, magnum servitium,* whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special service to him in person; as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer, at his coronation. Tenure by *cornage* which was to wind a horn when the Scots entered the land, was a species of grand serjeanty.

The personal attendance in knight-service growing inconvenient, the tenants found means of compounding for it; first by sending others in their stead, and in time by making a pecuniary satisfaction in lieu thereof; which at last came to be levied by assessments, at so much for every knight's fee; and was called *scutagium,* or *escuage.* This was first taken in the reign of Hen. II., for his expedition to Toulouse; but soon came to be universal; our kings, when they went to war, levying scutages to defray their expenses, and to hire troops. Which prerogative being greatly abused, it became matter of national clamour; so that King John was obliged to consent, by *Magna Charta,* that no scutage should be imposed without consent of parliament.

These scutages became ultimately the groundwork of all succeeding subsidies, and the land-tax of later times.

Knight-service thus degenerating into assessment, all the advantages of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, the system was nothing else but a means of raising money to pay mercenaries. The families of all our nobility and gentry groaned under the burdens which were laid upon them by the Norman lawyers. For, besides scutages, they might be called upon for *aids*, whenever the eldest son of the lord was to be knighted or his eldest daughter married. The heir was plundered of the first emoluments of his inheritance, by way of *relief* and *primer seisin*; and if a minor, he found, after he was out of *wardship*, his woods decayed, houses fallen down, lands barren; and yet to reduce him still further, he had to pay half-a-year's profits as a fine for suing out his *ouster le main*, or *livery*; that is, the delivery of his lands from his guardian's hands; and also the price or value of his *marriage*, if he refused such wife as his guardian had bartered for, and imposed upon him; or twice that value if he married another woman. Add to this, the honour of *knighthood*, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *licence of alienation*.

A slavery so complicated, and so extensive, called aloud for a remedy in a nation that boasted of its freedom. James I. consented to abolish all the feudal grievances, receiving as compensation for the loss which the crown and other lords would sustain, an annual fee-farm rent, to be inseparably annexed to the crown and assured to the inferior lords, out of every knight's fee. An expedient much more just than the hereditary excise, which was afterwards made the principal equivalent. For at length the military tenures were, by 12 Car. II. c. 24, destroyed at one blow; the *Court of Wards and Liveries*, which ascertained by *inquisitio post mortem* the value and tenure of estates and age of the wards, so as to fix the relief and primer seisins, was abolished; values and forfeitures of marriages and fines for alienations were taken away, and all tenures, with some excep-

tions, turned into free and common socage; not at the expense of the crown and inferior lords, but, as it has since turned out at the expense of the people.

CHAPTER IV.

OF THE MODERN ENGLISH TENURES.

ALTHOUGH the oppressive part of the feudal constitution was done away by 12 Car. II. c. 24, socage and frankalmoign, grand serjeanty, and the tenure by copy of court-roll, were reserved; all tenures, indeed, except frankalmoign, grand serjeanty, and copyhold, were reduced to free and common socage.

Socage, in its general signification, denotes a tenure by any determinate service; being put in opposition to knight-service, where the render was precarious; and is generally considered to be a relic of Saxon liberty; retained by such persons as had neither forfeited their estates to the crown, nor been obliged to exchange their tenure for the more honourable, but more burdensome tenure of knight-service. As its distinguishing mark is the having its services ascertained, it includes all other methods of holding land by invariable rents or duties: and, in particular, *petit serjeanty*, tenure in *burgage*, and *gavelkind*.

Grand serjeanty is not abolished by the statute of Charles II., but only its appendages. *Petit serjeanty* resembles it; for as the former is a personal service, so the other is a rent or render, both tending to some purpose relative to the person of the sovereign. Thus, the Dukes of Marlborough and Wellington hold the estates granted to their ancestors for their public services, by the tenure of petit serjeanty, and by the annual render of a small flag.

Tenure in *burgage* is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain, and is indeed only a kind of town socage; as common socage, by which other lands are holden, is usually of a rural nature.

Tenure in *gavelkind* is met with in Kent, and its properties

are various. The principal one was, that the estate did not escheat in case of attainder; the maxim being, "the father to "the bough, the son to the plough." Gavelkind lands also descend, not to the eldest, youngest, or any one son only, but to all the sons together.

This socage tenure will also be seen to partake of a feudal nature, if we compare its incidents with those of knight-service.

1. Both were held of superior lords. 2. Both were subject to the feudal return, or service of some sort arising from the original grant to the tenant.' 3. Both were subject to the oath of fealty. 4. Socage was subject to aids for knighting the son and marrying the eldest daughter. 5. Relief was due upon socage, as upon tenure in chivalry: socage relief being one year's rent, be the same either great or small: and due even though the heir was under age, because the lord had no wardship over him. 6. Primer seisin was incident to the king's socage tenants, but was entirely abolished by the statute of Charles II. 7. Wardship is also incident to socage; but differently from that incident to knight-service. For if the inheritance descends to an infant under fourteen, the wardship of him does not, nor ever did, belong to the lord of the fee; but his nearest relation shall be his *guardian in socage*, and have the custody of his land and body till he arrives at the age of fourteen, at which age this wardship ceases; and the heir may call his guardian to account; for at this age the law supposes him capable of choosing a guardian for himself. It was in this particular of wardship, as also in that of marriage, that socage had so much the advantage of military tenure. But there was this disadvantage: that heirs, being left to choose their own guardians, might make an improvident choice. And, therefore, when nearly all our other tenures were turned into socage, the 12 Car. II. c. 24, enacted, that it should be in the power of any father by will to appoint a guardian, till his child should attain the age of twenty-one. And, if no such appointment be made, the Chancery Division of the High Court will name a guardian, to prevent an infant heir from exposing himself to ruin. 8. The *valor maritagii* was not in socage any advantage to the guardian, but rather the reverse. For if he married his ward under fourteen, he was bound to account to him for the value of the

marriage, even though he took nothing for it, unless he married him to advantage. 9. *Fines* for *alienation* were due for lands holden of the king *in capite* by socage, as well as knight-service. 10. *Escheats* are equally incident to socage, as to knight-service.

This much for the two species of tenure, under which almost all the lands of the kingdom were holden till the Restoration; when knight-service was abolished and one universal tenure of *free and common socage* introduced.

The other great division of tenure, is villein socage, or *villenage*, which is either *pure* or *privileged*; whence have arisen two other modern tenures.

From pure villenage has sprung *copyhold*; or tenure by copy of court-roll at the will of the lord: in order to obtain a clear idea of which, let us take a short view of the origin of manors, which are in substance as ancient as the Saxon constitution.

A manor, *manerium, a manendo*, because the usual residence of the owner, seems to have been a district of ground, held by great personages, who kept in their own hands so much land as was necessary for the use of their families, hence called *terræ dominicales*, or *demesne* lands; the other, or *tenemental*, lands being distributed among their tenants. The latter was either *book-land*, held by deed for certain rents and free services, from which have arisen the freehold tenants who hold of particular manors; or *folk-land*, which was held by no assurance in writing, but distributed among the common folk at the pleasure of the lord, and resumed at his discretion. The residue of the manor was the lord's waste, and served for common of pasture to the lord and his tenants.

In early times the great barons granted out smaller manors to be holden of themselves: and these still are held under a lord, whose seignory is frequently termed an *honour*. In imitation whereof these inferior lords carved out to others still more minute estates, to be held of themselves, and were so proceeding downwards *in infinitum*, till the superior lords observed that by this subinfeudation they lost all their feudal profits. This occasioned, first, a provision in *Magna Charta*, that no man should either give or sell his land, without reserving sufficient to answer the demands of his lord; and, afterwards, the statute

Quia Emptores, 18 Edw. I. c. 1, which directs, that, upon all sales of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. All manors existing at this day must therefore have existed as early as Edward I.

With regard to the folk-land, this was a tenure neither feudal, Norman, nor Saxon; but compounded of all: and, on account of the heriots that attend it, may have something Danish in its composition. Under the Saxon government there were people in downright servitude, belonging to the lord, like the rest of the cattle or stock upon the manor. These seem to have been those who held what was called the folk-land, from which they were removable at the lord's pleasure. The Normans, who were strangers to any other than a feudal state, may have given some sparks of enfranchisement to such of these persons as fell to their share, by admitting them to the oath of fealty; which raised the tenant to a state superior to downright slavery. This they called villenage, and the tenants villeins, probably *a villa*, because they lived chiefly in villages, which they could not leave without the lord's permission. If they ran away, or were purloined from him, they might be recovered by action, like beasts or other chattels. They held small portions of land for sustaining themselves and families; but it was at the will of the lord, who might dispossess them when he pleased. But they might be enfranchised by manumission, which was either express or implied: express, as where a man granted to the villein a deed of manumission: implied, as where a man bound himself in a bond to his villein, or gave him an estate, or brought an action against him, for this was dealing with his villein on the footing of a free-man. So that villeins, in time, gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest fully as good, in some cases better than their lords. For many lords having permitted their villeins and children to enjoy their possessions without interruption, the common law, of which custom is the life, gave them a title to prescribe against their lords; and, on performance of the same services, to hold their lands in spite of any determination of the lord's will. For though in genera they are still said to hold their estates *at the will of the lord*, yet it is such a will as is *agreeable to the custom*

of the manor; which customs are evidenced by the rolls of the courts-baron in which they are entered, or kept on foot by the immemorial usage of the several manors in which the lands lie. And, as such tenants had nothing to show for their estates but these customs, and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they are called *tenants by copy of court-roll*, and their tenure itself a *copyhold*, the villein services due to the lord having been long commuted for a small pecuniary quit-rent.

The appendages of copyhold tenure, are fealty, services, as well in rents as otherwise, reliefs, and escheats. But, besides these, copyholds have also heriots, wardship, and fines. Heriots are a render of the best beast or other chattel, as the custom may be, to the lord on the death of the tenant. Wardship, in copyholds partakes both of that in chivalry and that in socage, for the lord is the legal guardian, but he may assign some relation of the infant to act in his stead; and he, like guardian in socage, is accountable for the profits. Of fines, some are in the nature of primer seisins, due on the death of each tenant, others are mere fines for alienation of the lands; in some manors only one of these sorts can be demanded, in some both, and in others neither; all depends upon the custom.

The tenure described by our ancient writers as *privileged* villenage, is such as has been held of the king since the Conquest; being no other than an exalted copyhold, viz., the tenure in *ancient demesne*. It applies to those lands or manors, which were in the hands of the crown in the time of William the Conqueror; and the tenants therein have some peculiar privileges now of little if of any value, and which it is unnecessary to detail. Thus all lay tenures are now in effect reduced to two: *free* tenure in socage, and *base* tenure by copy of court-roll.

I say *lay* tenures, because there is one reserved by the statute of Charles II., which is of a *spiritual* nature, tenure in *frankalmoign, in libera eleemosyna*, or free alms; whereby a religious corporation holds lands of the donor to them and their successors for ever. This is the tenure by which almost all the ancient monasteries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day. It was an old Saxon

tenure; and continued under the Norman revolution, through the great respect that was shown to religion and religious men in ancient times. If the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden; but merely a complaint to the ordinary or visitor to correct it. I only mention it because *frankalmoign* is excepted in the statute of Charles II., and therefore subsists in many instances at this day.

CHAPTER V.

FREEHOLD ESTATES.

THE next objects of our disquisitions are the nature and properties of *estates*; and to ascertain this with precision, estates may be considered: firstly, with regard to the *quantity of interest*; secondly, with regard to the *time* at which the quantity of interest is to be enjoyed; and thirdly, with regard to the *number* and *connections* of the tenants.

The *quantity of interest* which the tenant has may be measured by its duration and extent. Thus, either his right of possession is to subsist for 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 for ever. Hence the primary division of estates into such as are *freehold*, and such as are *less than freehold*.

An estate of freehold, *liberum tenementum* is defined "the *possession* of the soil by a freeman." Such estate, therefore, and no other, as requires actual possession of the land, is legally speaking, *freehold*: which actual possession could, at common law, only be given by livery of seisin, which is the same as the feudal investiture. As, therefore, estates of inheritance and estates for life could not by the common law be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates.

Estates of freehold, thus understood, are either estates *of*

inheritance, or estates *not of inheritance*. The former are again divided into, I. Inheritances *absolute* or fee-simple; and, II. Inheritances *limited*, one species of which is called fee-tail.

I. Tenant in fee-simple is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever: without mentioning *what* heirs, but referring that to his own pleasure or to the disposition of the law. This is property in its highest degree; and the owner thereof is said to be seised *in dominico suo*, in his demesne, *as of fee*. It is his *demesne*, or property, since it belongs to him and his heirs for ever: yet this *dominicum* is strictly not absolute, but feudal: it is his demesne, *as of fee*; that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

The word "heirs" is necessary in order to make a fee or inheritance. For, if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life; a rule subject however to two exceptions. For it does not extend to gifts by *will*, or to grants in favour of corporations, or to the sovereign, who is a corporation.

II. Limited fees are of two sorts:—1. *Qualified*, or *base* fees; and 2. Fees *conditional*, hence fees-*tail*.

1. A base, or qualified, fee is such a one as has a qualification subjoined thereto, and which must be determined whenever that qualification is at an end. As a grant to A and his heirs, *tenants of the manor of Dale*; here, whenever the heirs of A cease to be tenants of that manor, the grant is defeated. This estate is a fee, because by possibility it may endure for ever; yet, as that duration depends upon the concurrence of a collateral circumstance, it is therefore a qualified or base fee.

2. A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others: as to the heirs *of a man's body* by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs *male of his body*, in exclusion both of collaterals, and females. It was called a conditional fee, because of the condition implied in the donation that, if the donee died without such particular heirs, the land should revert to the donor.

Now, when a condition is performed, it is thenceforth gone; and the thing to which it was annexed, becomes unconditional. So that as soon as the grantee had any issue born, his estate became absolute, by the performance of the condition; at least for these three purposes: 1. To enable him to alien the land, and thereby to bar not only his own issue, but also the donor, of his interest in the reversion. 2. To subject him to forfeit it for treason; which he could not do, till issue born, longer than for his own life; lest thereby the inheritance of the issue, and reversion of the donor, might have been defeated. 3. To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue. If the tenant did not alien the land, the course of descent was not altered; for if the issue afterwards died, and then the original grantee died, the land, by the donation, could descend to none but the heirs *of his body*, and therefore, in default of them, reverted to the donor. For which reason the donees of these conditional fee-simples took care to alien as soon as they had performed the condition by having issue; and afterwards repurchased the lands, which gave them a fee-simple absolute, that would descend according to the course of law.

The inconveniences which attended these fettered inheritances induced the judges to give way to this subtle finesse of construction, in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who wished to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of West. II., called the statute *de donis conditionalibus*, to be made; which enacted that from thenceforth the will of the donor should be observed; and that the tenements so given, to a man and the heirs of his body, should at all events go to the issue, if there were any; or, if none, should revert to the donor.

Upon the construction of this act, 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

* *Feodum talliatum*, from the barbarous verb *talliare*, to cut, *i.e.*, a fee from which the heirs general were cut off.

land, expectant on the failure of issue; which expectant estate is what is now called a reversion.

And as the word "*heirs*" is necessary to create a fee, so in further limitation of the strictness of the feudal donation, the word *body*, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular the fee is limited. If therefore, either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and the *issue of his body*, to a man and his *children*; these are only estates for life, there being no words of inheritance. So a gift to a man, and his *heirs male* or *female*, is an estate in fee-simple, and not in fee-tail; for there are no words to ascertain the body out of which they shall issue. In wills, greater indulgence is allowed, and an estate-tail may be created by a devise to a man and his *seed*, or by other modes of expression.

Thus much for estates-tail: the establishment of which family law occasioned infinite difficulties and disputes. Children grew disobedient when they knew they could not be set aside: farmers were ousted of leases made by tenants-in-tail; for, if such leases had been valid, under colour of long leases the issue might have been virtually disinherited: creditors were defrauded of their debts; for, if a tenant-in-tail could have charged his estate with their payment, he might also have defeated his issue by mortgaging it for as much as it was worth. But as the nobility were fond of the statute, because it preserved their estates from forfeiture, there was little hope of procuring a repeal by the legislature; and therefore, by the connivance of an acute and politic prince, a method was devised to evade it.

Two centuries intervened between the statute *De Donis*, and the application of common recoveries to this intent in 12 Edward IV. The courts had, temp. Edward III., hinted their opinion that a bar might be effected upon these principles, yet it never was carried into execution; till Edward IV., observing how little effect attainders for treason had on entailed estates, countenanced this proceeding, and suffered *Taltarum's case* to be brought before the court: wherein it was determined, that a common recovery suffered by tenant-in-tail should be an effectual destruc-

tion thereof, in consequence of which this fictitious proceeding introduced to elude the statute *De Donis*, became the most common assurance of lands; and was looked upon as the legal mode of conveyance, by which the tenant-in-tail might dispose of estate.

This expedient having greatly abridged estates-tail with regard to their duration, others were invented to strip them of other privileges. The next that was attacked was their freedom from forfeiture for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently resettled in a similar manner to suit the convenience of families, had address enough to procure a statute, whereby all estates of inheritance, under which general words estates-tail were covertly included, were declared to be forfeited upon a conviction of high treason.

The next attack which they suffered was by the statute 32 Hen. VIII. c. 36, which declared a fine duly levied by tenant-in-tail to be a complete bar to him and heirs, and all other persons claiming under such entail. This was agreeable to the intention of Henry VII., whose policy it was to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favourably as possible for defeating entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *De Donis* had expressly declared, that they should *not* be a bar to estates-tail. But the statute of Henry VIII., when the doctrine of alienation was better received, avowed and established that intention.

Lastly, by a statute of the succeeding year, all estates-tail were rendered liable to be charged for payment of debts due to the king by record or special contract; as since, by the bankrupt laws, they are also subjected to be sold for the debts contracted by a bankrupt; and now are chargeable by a judgment in favour of creditors, to the exclusion of the issue and re-

mainder-men to the same extent as the debtor himself might have charged them.

So much for freehold estates of inheritance. Estates of freehold not of inheritance, are *for life* only; and are either *conventional*, that is, created by the act of the parties; or *legal*, that is, created by operation of law.

I. Estates for life are where a grant is made to a man, to hold for his own life, or for that of another person, or for more lives than one: in which cases he is styled *tenant for life*; only when he holds by the life of another, he is called tenant *pur auter vie*; and the *incidents* to such an estate are the following:—

1. Every tenant for life, unless restrained by agreement, may take *reasonable estovers* or *botes*. He has a right to the full enjoyment of the land, and all its profits, during his estate therein; but is not permitted to cut down timber or do other waste.

2. Tenant for life, or his representatives, is not to be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain. Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executors shall have the *emblements*, or profits of the crop: for the estate was determined by the *act of God*, and it is a maxim in the law, that *actus Dei nemini facit injuriam*. So it is also, if a man be tenant for the life of another, and *cestui que vie*, or he on whose life the land is held, dies after the corn sown, the tenant *pur auter vie* shall have the emblements. The rule is the same if a life-estate be determined by the *act of law*. But if an estate for life be determined by the tenant's *own act*, as by forfeiture for waste committed, in these, and similar cases, the tenant, having thus determined the estate by his own act, shall not be entitled to take the emblements.

3. A third incident to estates for life relates to the undertenant, or lessee. For he has the same, nay greater indulgence than his lessor, the original tenant for life. The same; for the law of estovers and emblements is also law with regard to him: and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own

act, the exception shall not reach his lessee, who is a third person. Instead of emblements, the under-tenant, on the determination of a lease or tenancy under a landlord entitled as tenant for life or for an uncertain interest, now holds until the expiration of the current year, paying the succeeding landlord a fair proportion of the rent.

II. The next estate for life is legal; that of a tenant-*in-tail after possibility of issue extinct;* which happens where one is tenant in special tail, and the person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue is extinct. As, where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue: in this case the man has an estate-tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, to give an adequate idea of his estate, he being a tenant for life, but with some of the privileges of a tenant-in-tail, as not to be punishable for waste, &c.

III. Tenant *by the courtesy of England,* is where a man marries a woman seised of an estate of inheritance, 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 courtesy of England; for which there are four requisites. 1. The marriage must be legal. 2. The seisin of the wife must be an actual possession, not a bare right to the lands. 3. The issue must be born alive during the life of the mother. For if the mother dies in labour, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the courtesy: because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child, while he was yet in his mother's womb; and the estate being once so vested, shall not afterwards be taken from him. 4. Such issue must be also capable of inheriting the mother's estate. Therefore, if the grant be to a woman and her heirs *male,* and she has only a *daughter* born, the husband is not entitled to be tenant by the courtesy; because such issue female can never inherit the estate.

IV. Tenancy in *dower* is where a widow takes a third of such lands as her husband *died* entitled to, for seisin is not here

necessary, and in which her title to dower has not been barred. Some have ascribed dower to the Normans, but it was first introduced into the feudal system by the Emperor Frederick II., who was contemporary with Henry III. It may indeed be a Danish custom: since dower was introduced into Denmark by Swein, the father of our Canute, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals.

At common law a widow was endowed of all the lands, tenements, and hereditaments of which her husband was seised *at any time during* the coverture, but under certain restrictions.* And it mattered not though the husband alienated the lands during the coverture; for he alienated them liable to dower. This law was altered nearly fifty years ago; and lands to which the husband is merely *entitled*, or in which his interest is merely *equitable*, were made subject to the dower of the widow. On the other hand the title to dower does not attach upon lands of which the husband was seised *during* the coverture; for the widow can only be endowed out of lands of or to which he *dies* seised or entitled; and the absolute disposition of lands by him during his life or by his will, defeats the widow's right; nor is she entitled to dower out of land purchased by the husband, where, in the deed of conveyance to him, or in any deed executed by him, it is declared that she shall not be so entitled. So that whether a wife shall be endowed or not, is now entirely in the will of the husband.

Upon preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom: for the claim of the wife to dower is a great clog to alienations, and otherwise inconvenient to families, so that *jointures* are now universally resorted to.

* Copyhold estates are not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the widow's free-bench.

CHAPTER VI.

OF ESTATES LESS THAN FREEHOLD.

Of estates that are less than freehold, there are: 1. Estates for years; 2. Estates at will; 3. Estates by sufferance.

I. An estate for *years* is where one has the possession of lands for some determinate period: as where a man letteth lands to another for a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon.

These estates were originally granted to farmers or husbandmen, who every year rendered some equivalent, or rent, to the landlord. In order to encourage them to manure and cultivate the ground, they had afterwards a permanent interest granted them; but their possession was esteemed of so little consequence that they were rather considered as the lord's bailiffs than as having any property of their own. And their interest vested after death in their executors, who were to make up the accounts of their testator with the lord, and were entitled to the stock upon the farm.

While estates for years were thus precarious, they were very short, like our modern leases at rack-rent; but when by 51 Hen. VIII. c. 15, the termor, that is, he who is entitled to the term, was protected against fictitious actions brought to evict the landlord (which common recoveries were), and his interest rendered permanent, long terms were introduced, being found extremely convenient for family settlements and mortgages: continuing subject, however, to the same rules of succession, as when they were little better than tenancies at the will of the landlord.

Every estate which must expire at a period certain and prefixed, is an estate for years. And therefore this estate is frequently called a term because its duration is bounded, and determined; and having a certain end, it is inferior to any freehold; for an estate for life, even if it be *pur auter vie*, is a free-

hold; but an estate for a thousand years is only a chattel, and part of the personal estate. And, because no livery of seisin was ever necessary to a lease for years, such lessee is not said to be *seised*; nor, indeed, does the lease vest any estate in him. It gives him only a right of entry, which is called his *interest in the term*, or *interesse termini*: when he has entered, the estate is then, and not before, vested in him, and he is *possessed*, not of the land, but of the term of years therein.

Tenant for years has incident to his estate, unless by special agreement, the same estovers as tenant for life. But with regard to emblements, there is this difference: that when the term depends upon a certainty, as if the tenant holds from midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before midsummer, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of. But where the lease for years depends upon an uncertainty: as, if the term be determinable upon a life or lives, the tenant, or his executors, shall have the emblements in the same manner that a tenant for life or his executors is entitled thereto. If the lease be determined by himself: as if the tenant does anything that amounts to a forfeiture: here the emblements go to the lessor and not to the lessee, who has determined his estate by his own default.

II. An estate at will is where lands are let by one man to another, to hold at the will of the lessor; and the tenant by force of this lease obtains possession. Such estate is at the will of both parties; so that either of them may determine his will, and quit his connection with the other at his own pleasure. Yet if the tenant sows his land, and the landlord, before the corn is ripe or before it is reaped, puts him out, the tenant shall have the emblements. It is otherwise where the tenant himself determines the will, for in this case the landlord shall have the profits of the land.

The courts of law have long inclined against construing demises, where no certain term is mentioned, to be tenancies at will. They have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved: in which case they will not suffer either party

to determine the tenancy even at the end of the year, without reasonable notice to the other, which is generally six months.

An estate held by copy of court-roll, or, *copyhold*, was, in its origin, nothing better than a mere estate at will. But this has long been nothing but a name; and every copyhold tenant may have, so far as the custom of the manor warrants, any other of the estates which have been considered, or may be hereafter mentioned, and hold them united with this customary estate at will. He may be tenant in fee-simple, in fee-tail, for life, by the courtesy, in dower, for years, at sufferance, or on condition: subject, however, to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, as established by immemorial custom, has declared to be a forfeiture or determination of those interests; as in some manors the want of issue male, in others the cutting down timber, the non-payment of a fine, and the like.

In legal parlance, however, copyhold estates are still ranked among tenancies at will; though custom has established a permanent property in the copyholders, equal to that of the lord himself, in the tenements holden of the manor. And the law has provided for the determination of this mutual will, regulated by custom, in its own way; by providing that a copyhold tenure may be put an end to, by a grant from the lord of the freehold, which is called *enfranchisement*, the tenant by this means becoming seised in common socage of the lands; or by the copyhold and freehold titles becoming united in one person, whereupon *extinguishment* takes place, the copyhold interest merging in the superior estate. And as enfranchisement is now, on the application of either lord or tenant, compulsory, and obtainable on terms which, in case of dispute, are fixed by the Enclosure commissioners, these tenancies at the will of the lord will in course of time cease to exist.

III. An estate at *sufferance*, is, where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As, if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh lease from the owner of the estate. This estate may be destroyed whenever the true owner makes an entry and ousts the tenant; for before entry, he cannot maintain an action of trespass against

the tenant by sufferance, as he might against a stranger: and the reason is, because the tenant being once in by a lawful title the law will suppose him to continue upon a title equally lawful; unless the owner by some public and avowed act, such as entry, will declare his continuance to be wrongful. By statute 2 Geo. II. c. 19, a tenant wilfully holding over after the determination of the term, and demand of possession made by the landlord, shall pay for the time he detains the lands, double their yearly *value*; and a tenant, having given notice to quit, not delivering up the possession at the proper time, shall pay double the former *rent*; so that tenancy by sufferance, unless with the tacit consent of the owner, is almost unknown.

CHAPTER VII.

OF ESTATES UPON CONDITION.

BESIDES these several estates, there is another species, estates *upon condition*, which are more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may be an estate upon condition. These estates are either:—I. Estates upon condition *implied*; or, II. Estates upon condition *expressed*; under which last may be included—1. Estates held in *vadio*, *gage*, or *pledge*; 2. Estates by *elegit*.

I. Estates upon condition implied are where a grant of an estate has a condition annexed to it inseparably 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 hereto a condition that the grantee shall duly execute his office. For an office, either public or private, may be forfeited by *mis-user* or *non-user*, both of which are breaches of this implied condition: 1. By *mis-user*, or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By *non-user*, or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture. Franchises also, being regal privileges in the hands

of a subject are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect.

II. An estate on condition expressed is where an estate is granted, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated upon performance or breach of such condition. And these conditions are either *precedent* or subsequent. Thus, if an estate be limited to A, upon his marriage with B, the marriage is a *precedent* condition, and till that happens, no estate is vested in A. Or, if a man grant to his lessee for years, that upon payment of a hundred pounds within the term he shall have the fee, this also is a condition *precedent*, and the fee-simple passeth not till the hundred pounds be paid. So, if a man grant an estate, reserving to himself a certain rent; and that if such rent be not paid, it shall be lawful for him to re-enter, and avoid the estate, in this case the grantee and his heirs have an estate upon condition *subsequent*, which is defeasible if the condition be not strictly performed. But so long as the condition remains unbroken, the grantee may hold the estate.

Some estates defeasible upon condition *subsequent*, require however a more peculiar notice. Such are,—

1. Estates held *in vadio*, in *gage*, or pledge; as where a man borrows of another a specific sum, *e.g.*, 200*l.*, and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the 200*l.* on a certain day, that then the mortgagee shall reconvey the estate to the mortgagor: in this case, the land which is so put in pledge, is by law, in case of nonpayment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute.

As soon as the estate is created, the mortgagee may at law enter on the lands; but is liable to be dispossessed upon performance of the condition. And therefore it is usual to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here equity interposes, and though

a mortgage be forfeited, and the estate thus absolutely vested in the mortgagee, yet equity considers the real value of the lands compared with the sum borrowed. And, if the estate be of greater value than the sum lent, the mortgagor is allowed at any time within twenty years, to redeem his estate; paying to the mortgagee his principal, interest, and expenses. This reasonable advantage is called the *Equity of Redemption:* and 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. On the other hand, 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 for ever *foreclosed* from redeeming the same; that is, to lose his equity of redemption, without possibility of recall. And in mortgages it is accordingly usual to give the mortgagee a power of sale, which indeed is now, unless expressly excluded, incident to every mortgage, whereby he may realise his security much more conveniently than by a foreclosure; for equity does not interfere with the exercise of such powers, the mortgagee being only bound to account for the residue of the proceeds of the sale, after paying himself principal, interest, and the expenses of the sale. Nor is it usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious or small; or where the mortgagor neglects even the payment of interest: when the mortgagee is frequently obliged to take the land into his own hands.

2. Estates also defeasible on condition subsequent, are those held *by elegit;* which are created by operation of law, for satisfaction of a debt. For after a plaintiff has obtained judgment, the sheriff will, under a writ of execution, give him possession of the defendant's lands, to be by him enjoyed, until his debt and damages are fully paid: and during that time he so holds them, he is called tenant by *elegit.* From this it would seem that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier, and much more effectually for the benefit of trade and commerce than for any other consideration.

CHAPTER VIII.

OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

ESTATES may be considered in another view; viz., with regard to the *time of their enjoyment*, and in this way may be regarded as, 1, in *possession*, or, 2, in *expectancy*: and of expectancies there are two sorts; one created by the act of the parties, called a *remainder*; the other by act of law, and called a *reversion*.

I. Of estates in *possession* there is little or nothing peculiar to be observed. All the estates hitherto spoken of are of this kind; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenants' possession.

II. An estate *in remainder* may be defined to be, an estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee-simple granted lands to A for twenty years, and, after the determination of the said term, then to B and his heirs for ever: here A is tenant for years, remainder to B in fee. In the first place, an estate for years is created or carved out of the fee, and given to A; and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee. They are different *parts*, but they constitute one *whole*; they are carved out of one and the same inheritance: they are both created, and may both subsist, together; the one in possession, the other in expectancy.

In the creation of a remainder by deed much nicety is required; but it is not within the scope of these commentaries to explain the particular refinements into which this doctrine of remainders has been spun out and sub-divided. Devises by will, being often drawn up when the party is *inops consilii*, are more favoured in construction than formal deeds, which are presumed to be made with great caution and advice, and in them remainders may be created in some measure contrary to the first rules of law,

though the lawyers will not allow such dispositions to be remainders; but call them *executory devises*, or devises hereafter to be executed.

III. 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. As, if there be a gift in tail, the reversion of the fee is, without any reservation, vested in the donor by act of law: and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never therefore created, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates *in præsenti*, though taking effect *in futuro*.

The usual *incidents* to reversions are said to be *fealty* and *rent*. When no rent is reserved, fealty results of course, as an incident quite inseparable; and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion. The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; by *special* words: but by a *general* grant of the reversion, the rent will pass with it, as incident thereunto, though by the grant of the rent generally, the reversion will not pass.

Before concluding the doctrine of remainders and reversions, it may be proper to observe that 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; *merged*, that is, sunk or drowned in the greater. Thus if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; thus, if the freehold be in his own right, and he has a term in right of

another, *en auter droit*, there is no merger. An estate-tail is an exception to this rule: for a man may have in his own right both an estate-tail and a reversion in fee; and the estate-tail, though a less estate, shall not merge in the fee, being preserved by the statute *De Donis*. And there can be no merger in law where the *beneficial interest* is *not extinguished in equity*.

CHAPTER IX.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

ESTATES, considered with respect to the number and connections of their owners, may be held in severalty,—in joint-tenancy,—in coparcenary,—or in common.

I. He that holds lands or tenements in *severalty*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. All estates being of this sort, unless where declared to be otherwise.

II. An estate in *joint-tenancy* is where lands are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will.

Its *creation* depends on the wording of the deed or devise by which the tenants claim title; for this estate can only arise by the act of the parties, and never by the act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As, therefore, the grantor has thus united their names, the law gives them a thorough union in all respects.

For, the *properties* of a joint estate are derived from its unity, which is fourfold: unity of *interest*, unity of *title*, unity of *time*, and the unity of *possession*.

Joint-tenants have one and the same *interest*. One cannot be entitled to one period of duration, and the other to a different; one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail. They must also have an unity of *title*. Joint-tenancy cannot arise by descent or act of law, but merely by purchase, or acquisition by the act of the party; and unless that act be one and the same, the two tenants would have different titles; and if they had different titles, there would be no jointure. There must also be an unity of *time*. As in case of a present estate made to A and B; or a remainder in fee to A and B after a particular estate; in either case A and B are joint-tenants of this present estate, or this vested remainder. Lastly, there must be an unity of *possession*; for joint-tenants are said to be seised *per my et per tout*, by the *moiety* and by *all:* that is, they each of them have the entire possession, as well of every *parcel* as of the *whole*. They have not, one of them, a seisin of one-half, and the other of the other; neither can one be seised of one acre and his companion of another, but each has an undivided moiety of the whole, and not the whole of an undivided moiety.

Upon these principles depend the incidents of a joint-tenants' estate. Thus, if two joint-tenants let a verbal lease of their estate, reserving rent to be paid to one of them, it enures to both, in respect of the joint reversion; and if their lessee surrenders his lease to one of them, it enures to both, because of the privity of their estate. In all actions relating to their joint estate, one joint-tenant cannot sue or be sued without joining the other. Neither can one joint-tenant have an action against the other for trespass, in respect of his land, for each has an equal right to enter on any part of it. Yet if any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other. So the one may maintain an action against the other for receiving more than his due share of the profits. And so one joint-tenant may maintain ejectment against the other, if he can show any *actual ouster*, as if one were to retain the whole of the rents.

From the same principle also arises another incident, viz., *survivorship*; by which the tenancy, upon the decease of any of the joint-tenants, remains to the survivors, and at length to

the last survivor, who is then entitled to the whole estate. This right is called the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates to the survivors. But there is no survivorship of a capital, or a stock in trade, among merchants and traders; for this would be ruinous to the family of the deceased partner; and it is a legal maxim, *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. And as this *jus accrescendi* ought to be mutual, neither the king, nor any corporation, can be a joint-tenant with a private person. For here is no mutuality; the private person has not even the remotest chance of being seised of the entirety, by benefit of survivorship, for the king and the corporation can never die.

Joint-tenancy may be destroyed without any alienation, by merely disuniting the *possession*. And therefore, if the joint-tenants agree to part their lands, and hold them in severalty, they are no longer joint-tenants, and the right of survivorship is at once destroyed. And any joint-tenant may now enforce *partition*. The joint-tenancy may also be destroyed by destroying the unity of *title*; as if one joint-tenant conveys his estate to a third person: here the joint-tenancy is severed, and turned into tenancy in common; for the grantee and the remaining joint-tenant hold by different titles, though, till partition made, the unity of possession continues. Joint-tenancy may also be destroyed by destroying the unity of *interest*. And therefore, 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. So that when, by any act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated, so that the tenants have no longer these four indispensable properties, a sameness of interest, and undivided possession, a title vesting at one and the same time, and by one and the same act or grant, the jointure is instantly dissolved; which in general it is advantageous to effect, since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs.

III. 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 particular custom. By common law: as where a person seised in fee-simple, or in fee-tail dies, and his next heirs are two or more females; in this case they shall all inherit, as will be shown hereafter; and these coheirs are then called *coparceners*, or, for brevity, *parceners* only. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree. And, in either of these cases, all the parceners put together make but one heir, and have but one estate among them.

The *properties* of parceners are in some respects like those of joint-tenants, they having the same unities of *interest*, *title*, and *possession*. They may sue and be sued jointly for matters relating to their own lands, and they cannot have an action of trespass against each other. But they differ from joint-tenants, in that they are excluded from maintaining an action of waste. Parceners also differ from joint-tenants in four other points:— 1. They always claim by descent, whereas joint-tenants always claim by purchase. 2. There is no unity of *time* necessary; for if a man has two daughters, to whom his estate descends, and one dies before the other, the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners. 3. Parceners, though they have an *unity*, have not an *entirety* of interest. They are properly entitled each to the whole of a distinct moiety, and of course there is no *jus accrescendi*, or survivorship, between them; for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners. But if the possession be once severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener aliens her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common*.

Parceners are so called because they were always obliged to make *partition*, which joint-tenants formerly were not; and if this was not done voluntarily, it might be compulsorily, as it is now often effected, by an action. There are some things, however, in their nature impartible. The mansion-house and common of estovers shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable

satisfaction in other parts of the inheritance: or, if that cannot be, then they shall have the profits of the thing by turns, and in the same manner they take an advowson.

The estate in coparcenary may be *dissolved*, either by partition, which disunites the possession; by alienation of one parcener, which disunites the title, and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty.

IV. 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. This tenancy, therefore, happens where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no necessary unity of interest: one may hold by descent, the other by purchase; or the one by purchase from A, the other by purchase from B; so that there is no unity of title: one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time.

Tenancy in common may be created by the destruction of the two other estates, joint-tenancy and coparcenary, or by special limitation in a deed. By such destruction I mean as does not sever the unity of possession, but only the unity of title or interest: as, if one of the two joint-tenants in fee aliens his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they now have several titles; the other joint-tenant by the original grant, the alienee by the new alienation; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So if one of two parceners aliens, the alienee and the remaining parcener are tenants in common, because they hold by different titles, the parcener by descent, the alienee by purchase. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, it is turned into a tenancy in common.

A tenancy in common may also be created by express limitation in a deed: but here care must be taken not to insert words which imply a joint estate. For the law is apt, in its construc-

tions, to favour joint-tenancy rather than tenancy in common, because the services issuing from land, as rent, &c., are not divided, nor the entire services, as fealty, multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common; and therefore it is the safest way, when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to A and B, to hold *as tenants in common and not as joint-tenants.*

As to its *incidents*, tenants in common, like joint-tenants, are compellable to make partition of their lands; yet there is no survivorship between them, as properly they take distinct moieties of the estate. The other incidents are such as merely arise from the unity of possession, and are therefore the same as appertain to joint-tenants: such as being liable to reciprocal actions of waste, and to account for the property; and if one actually turns the other out of possession, an ejectment will lie against him. But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest, such as joining or being joined in actions, unless in the case where some entire or indivisible thing is to be recovered, these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint but several. It follows that tenancies in common can only be *dissolved* two ways: 1. By uniting all the interests in one tenant, which brings the whole to one severalty. 2. By making partition between the several tenants in common, which gives them all respective severalties.

CHAPTER X.

OF THE TITLE TO THINGS REAL.

I COME now to consider the *title* to things real, with the manner of acquiring and losing it.

The lowest kind of title consists in *naked possession*, or the actual occupation of the estate, without any apparent right to such possession. This may happen when one man invades the possession of another, and turns him out of the occupation of his lands; or it may happen when, after the death of the ancestor

and before the entry of the heir, or after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger gets possession, and keeps out him that has a right to it. Here the wrongdoer has a mere *possession*, which the rightful owner may put an end to. But till some act be done by the rightful owner to assert his title, such actual possession is *primâ facie* evidence of a legal title in the possessor.

To constitute a perfect title more is necessary, namely, the *right of possession*, which may reside in one man, while the actual possession is in another. For if a man be kept out of possession, though the *actual* possession be lost, yet he has still the *right* of possession; and this right he may exert by turning the intruder out of that occupancy which he has illegally gained. Yet if he omit to do so within the time fixed by law, the intruder may gain an actual right of possession, which is in itself perfect and complete, so that no further remedy remains.

By our old law, if a man was turned out of possession, the intruder thereby gained a *mere naked* possession, and the owner retained the *right of possession* and *right of property*. If the intruder died, and the lands descended to his son, the son gained an *apparent* right of *possession*, but the owner still retained the *actual* right both of *possession* and *property*. If he acquiesced, however, for thirty years without bringing any action to recover possession, the son gained the *actual right of possession*, and the owner retained nothing but the *mere right of property*. And even this right of property failed, or became without remedy, unless pursued within sixty years. Hence one man might have the *possession*, another the *right of possession*, and a third the *right of property*.

But the law now recognises only the *possession*, and the *right of possession*, ignoring altogether any *right of property*, as distinct from these symbols of ownership. To an explanation of the modern law, I shall accordingly confine myself; the great change I allude to having been effected upwards of forty years ago by the statute 3 & 4 Will. IV. c. 27; which provided that, at the determination of the period which it limits, the *right and title* of the person, who might within that time have pursued his remedy for the recovery of his property, *shall be extinguished*; so that *right* is made dependent on *possession*, by a limitation of

the period, within which that right can be asserted, to *twenty years*,* from the time at which it first accrued.

This right is deemed to have first accrued when the person who claims the land, or some person through whom he claims, was *dispossessed*, or discontinued his possession or receipt of rent, in case he was previously in possession; but as this limitation might produce hardship in cases where the person entitled laboured under disability at the time of his right accruing, infants, women under coverture, idiots, lunatics or persons of unsound mind, and those who were beyond seas, have ten years further allowed them, from the time of their ceasing to be under their several disabilities. To prevent, however, the title of an actual possessor being held too long in suspense, the extreme period of *forty years* is fixed, beyond which no person, whether under disability or no, can have any remedy; so that if a right accrue to a person under disability, who continues so during forty years, he is wholly barred.

As to advowsons a longer period is fixed, during which the right may be recovered; namely, sixty years, or three successive incumbencies. But here also the extreme period of a hundred years is fixed, beyond which no remedy remains to the person claiming.

As a general rule, then, possession for a period of twenty years, without payment of rent, or acknowledgment of the title of any other person, constitutes a sure and sufficient title. And, therefore, where the overseer of parish let a person into possession of a cottage, a part of the parish property, at the rent of 1*s.* 6*d.* a-week, to quit at a month's notice, and the tenant remained for twenty years without paying rent or making any acknowledgment, his title was held to be unassailable. Bare possession had here, by effluxion of time, matured into a right of property, which constituted a complete title against all the world.

* After 1st January, 1879, *twelve* years.

CHAPTER XI.

OF TITLE BY DESCENT.

THE several manners in which *real property* may be lost and acquired, are, by our law, two in number: *descent*, where the title is vested in a man by the operation of law; and *purchase*, where the title is vested in him by his own act or agreement.

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation. An heir, therefore, is he upon whom the law casts the estate on the death of the ancestor; and an estate, so descending, is in law called the inheritance. The doctrine of descent is accordingly the principal object of the laws of real property. For all the rules relating to purchases, whereby the legal course of descents is altered, perpetually refer to this law of inheritance, as a *datum* or first principle universally known, and upon which their subsequent limitations are to work. In order therefore, to treat a matter of this consequence more clearly, I shall lay aside such matters as tend to embarrassment or confusion; and confine my remarks in this place to the common law doctrine of descents, as modified by the statute 3 & 4 Will. IV. c. 106, which is now the law of inheritance in England.

These modern rules or canons of inheritance, operate upon no descent which took place before the 1st January, 1834. When therefore, an heir is to be sought for a succession which opened up previously to that date, the old rules of inheritance must be consulted; to which I must shortly allude, not only on that account, but also to enable the student to understand more readily the alterations which been made therein.

Firstly, then, by law no inheritance can vest, nor can any person be the heir of another, till the ancestor is dead. *Nemo est hæres viventis.* Before that time the person next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son, who must be heir to the father whenever he dies. Heirs presumptive

are such who, if the ancestor should die immediately, would in the present state of things be his heirs; but whose right of inheritance may be defeated by a 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 present hopes may be cut off by the birth of a son. Nay, even if the estate has descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases, the estate shall be divested and taken away by the birth of a posthumous child; and, in the latter, it shall also be divested by the birth of a posthumous son.

Now, it was formerly a rule of law, that no person could be such an ancestor, as that an inheritance could be derived from him, unless he had had *actual seisin* of the lands, either by his own entry, by the possession of his own or his ancestor's lessee, or by receiving rent. The law required this notoriety of possession, as evidence that the ancestor had that property in himself which was to be transmitted to his heir; and he was not accounted an ancestor, therefore, who had had only a bare right to enter or be otherwise seised. *Seisin* therefore made a person the root or stock, from which inheritance by right of blood was to be derived. *Seisina facit stipitem.* The *right* was not regarded, until the rule was altered by the statute already mentioned; and the person *last entitled* made the root of descent.

Under the old law, again, when a person died seised, the inheritance first went to his issue. Thus, if there were Geoffrey, John, and Matthew, grandfather, father, and son; and John purchased lands, and died; Matthew succeeded him as heir; but in no case whatever could the grandfather Geoffrey do so. The land could never *ascend*, but was rather allowed to escheat to the lord; the rule being, 1, that inheritances should lineally descend to the issue of the person who last died *actually seised, in infinitum*; but, 2, should *never lineally ascend.* So far as it relates to descents, this rule is almost universally adopted by all nations. But the total exclusion of lineal ancestors was peculiar to our own laws; and after being long and loudly censured, was entirely abrogated. Two ancient rules of law have, therefore, yielded to what I call the modern canons of descent, viz.:—

I. "Descent shall be traced from the purchaser; the person

" last entitled being considered to have been the purchaser " unless he be proved to have inherited."

II. " Inheritances shall lineally descend to the issue of the " purchaser."

The next three canons of descent are the same as the old rules of law, viz.:—

III. " The male issue shall be admitted before the female."

Thus sons shall be admitted before daughters; or, as our male lawgivers have expressed it, the worthiest of blood shall be preferred; a preference which seems to have arisen entirely from the feudal law. For though our British ancestors appear to have given a preference to males, yet our Danish predecessors seem to have admitted all the children to the inheritance. This preference may possibly therefore be a relic of that imperfect system of feuds, which obtained before the Conquest; but the reason of it must be deduced from feudal principles: for no female could ever succeed to a proper feud, being incapable of performing those military services, for the sake of which that system was established. Our law, however, does not totally exclude females, as the Salic law, and others, where feuds were most strictly retained: it only postpones them to males; for, though daughters are excluded by sons, yet they succeed before any collaterals. For,

IV. " Where there are two or more males, in equal degree, the " eldest only shall inherit; but the females all together."

This right of primogeniture in males seems anciently to have only obtained among the Jews, among whom the eldest son had a double portion. The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally; some among all the children at large, some among the males only. But when honorary feuds, or titles of nobility began it was found necessary, in order to preserve their dignity, to make them impartible, and descendible to the eldest son alone; who succeeded consequently to the whole of the lands in military tenure: and thus it was established by William the Conqueror.

Socage estates often descended to all the sons equally, so lately

as the reign of Henry II.; and it is said in the Mirror, that knights' fees should descend to the eldest son, and socage fees should be partible among the male children. In the time of Henry III., however, socage lands, in imitation of lands in chivalry, had almost entirely fallen into the line of succession by primogeniture; except in Kent, where they preserved their ancient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons; and, except in some particular manors where the local custom continued the descent sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.

As to the females, they are still left as they were: for they were all equally incapable of performing any personal service; and, therefore, one main reason of preferring the eldest ceasing, such preference would have been injurious to the rest. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown. And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honour. For, if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldest shall not of course be countess, but the dignity is in abeyance till the crown shall declare its pleasure; for the sovereign being the fountain of honour, may confer it on which of them he pleases.

V. "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."

Thus, the child, grandchild, or great-grandchild, either male or female, of the eldest son, succeeds before the younger son, and so *in infinitum*. And these representatives shall take neither more nor less, but just so much as their principals would have done; which is called succession *per stirpes*, according to the roots.

This is a necessary consequence of the double preference given, first, to the male issue, and next to the first-born among the males. For, if all the children of three deceased sisters were to claim the grandfather's estate, *per capita*, without any

respect to the stocks from whence they sprang, and those children were partly male and partly female; then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law must be inconsistent with itself, and depart from the preference which it constantly gives to the males, and the first-born. Whereas, by dividing the inheritance according to the roots, or *stirpes*, the rule of descent is kept uniform: the issue of the eldest son excludes all others, as the son himself, if living, would have done; but the issue of two daughters divide the inheritance between them, provided their mothers, if living, would have done the same: and among these several issues, or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves.

The remaining canons of descent apply to collateral succession; in respect of which the modern differ in two main respects from the ancient rules of inheritance. The first point of difference relates to the lineal succession of parents, and other ancestors; the second to the succession of relatives by the *half*, in default of those related by the *whole* blood to the person last entitled.

It will be necessary to refer shortly to the old rule, which still affects descents that took place previously to the year 1834, —"that, on failure of lineal descendants or issue, of the person "last seised, the inheritance shall descend to his collateral "relations, being of the blood of the first purchaser."

If, then, Geoffrey Stiles purchased land, and it descended to John Stiles his son, and John seised thereof without issue; whoever succeeded to this inheritance must have been of the blood of Geoffrey the first purchaser, he who first acquired the estate, whether the same was transferred to him by sale or by gift, or by any other method, except that of descent.

When feuds first began to be hereditary, it was made a necessary qualification of the heir, that he should be of the blood of, that is, lineally descended from, the first feudatory or purchaser. In consequence thereof, if a vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer

But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. The feudal reason for which was: that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person.

However, in process of time, a method was invented to let in collateral relations of the grantee, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed *in infinitum*, because they might have been of the blood of the first imaginary purchaser. And of this nature ultimately became all the estates in fee simple in the kingdom.

Yet, when an estate had really descended to the person last seised, the strict rule was still observed; and none were admitted but the heirs of those through whom the inheritance had passed. Therefore, if lands came to a man by descent from his mother, no relation of his father could ever be heir; and *vice versâ*, if they descended from his father, no relation of his mother could ever be admitted thereto.

This, then, was one of the general principles of collateral inheritances; that, upon failure of issue in the last proprietor, the estate should descend to the blood of the first purchaser; or result back to the heirs of the body of that ancestor from whom it either really had, or was supposed to have originally descended. To give full effect to which, another rule provided that "the collateral heir should be his next collateral kinsman, "of the *whole* blood;"—for if there were a much nearer kinsman of the *half* blood, a distant kinsman of the whole blood was admitted, and the other entirely excluded; nay, the estate was allowed to escheat to the lord sooner than the half blood should inherit.

This total exclusion of the half blood was long regarded as a strange hardship; and has now been altered, so that any discussion of the feudal principles on which it was founded would be profitless, unless as matter of legal history, which is not the object of these commentaries.

The only other rule of the old law which has been superseded, was that which gave the preference to the *paternal* over the *maternal* line; where the lands had, in fact, descended from a female. For the relations on the father's side were admitted *in infinitum*, before those on the mother's side were admitted at all; and the relations of the father's father, before those of the father's mother; and so on.

This rule was necessary to carry into execution the principal canon of collateral inheritance, that every heir must be of the blood of the first purchaser. For, when such first purchaser was not to be discovered after several descents, the law not only took the next relation of the whole blood; but, considering that a preference had throughout been given to males, judged it more likely that the lands should have descended to the last tenant from his male than from his female ancestors; and, therefore, hunted back the inheritance through the male line, on the theory that this was the most probable way of continuing it in the line of the first purchaser. This rule, also, has been modified to some extent by the legislature; so that it now remains for me simply to add the modern canons regulating collateral descents, after premising a few words on the leading changes introduced in our law of inheritance.

Firstly, then, we have seen that in every case descent shall now be traced from the *purchaser*; who is to be *the person last entitled* to the land, unless he inherited the same:—the person *last entitled*, including the last person *who had a right thereto*, whether he did or did not obtain the possession or the receipt of the rents and profit thereof. The maxim, *seisina facit stipitem*, is thus annulled.

Secondly, under the old law, there being no lineal ascent, a brother or sister was considered to have inherited *immediately* from a brother or sister; and the common ancestor need not have been named. This rule has been set aside; so that every descent from a brother or sister must now be traced through the parent; this being a necessary consequence of one of the alterations effected in the ancient law, that, namely, which provides that a father or other lineal ancestor may succeed to his son or other lineal descendant.

Thirdly, the rule that in collateral inheritances the male stock

shall be preferred to the female, unless where the estate has actually descended in the maternal line, remains intact, although modified in detail.

Lastly, a relation by the half blood stands in the order of inheritance, so as to be entitled to inherit, next after any relation in the same degree of the whole blood, and his issue, when the common ancestor is a male, and next after the common ancestor when the common ancestor is a female; so that the brother of the half blood, on the part of the father, inherits next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother inherits next after the mother.

These rules of the law will be found expressed in the following canons, viz.:—

VI. "On failure of issue of the purchaser, the inheritance "shall go to his nearest lineal ancestor or the issue of such "ancestor, the ancestor taking in preference to his or her issue." Thus, if the purchaser dies without issue, the father takes before the brothers or sisters of that purchaser; and a grandfather, not before the father or the father's issue, but before the uncles or aunts or their issue.

VII. "Paternal ancestors and their descendants shall be "preferred to maternal ancestors and their descendants, male "paternal ancestors and their descendants to female paternal "ancestors and their descendants, and male maternal ancestors "and their descendants to female maternal ancestors and their "descendants, and the mother of a more remote female ancestor "on either side and her descendants to a mother of a less remote "female ancestor and her descendants." Thus the mother of the paternal grandfather, and her issue, shall be preferred to the father's mother and her issue.

VIII. "Relations of the half blood shall inherit; those related "*ex parte paternâ*, taking next in order to the relations male and "female of the same degree of whole blood; those related *ex* "*parte maternâ*, taking next in order after their mother."

These *general rules* apply to lands both of freehold and copyhold tenure, and whether descendible according to common law or the custom of gavelkind, Borough-English, or other custom.

But the peculiarities of descent which belong to these customary tenures, are not interfered with. Thus the rule of gavelkind by which all the sons take equally is unaltered; but the new canon which enables a father of the purchaser to inherit in preference to the uncles, holds equally in this tenure,—as also the rule admitting kindred of the half blood.

CHAPTER XII.

OF TITLE BY PURCHASE, AND FIRST BY ESCHEAT.

PURCHASE, *perquisitio*, taken in its largest sense, is defined the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent. In its vulgar acceptation it is applied only to such acquisitions of lands as are obtained by way of bargain and sale. But this falls short of the legal idea of purchase: for, if I *give* land freely to another, he is in law a purchaser; as he comes to the estate by his own agreement, that is, he consents to the gift. And a man who has his father's estate settled upon him in tail, before he was born, is also a purchaser; for he takes quite another estate than the law of descents would have given him.

But if an estate be made to A for life, remainder to his right heirs in fee, his heirs take by descent; for it is an ancient rule that wherever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by *purchase* but only by *descent*.

What we call *purchase*, the feudist called *conquest*, both denoting any means of acquiring an estate otherwise than by inheritance. Hence the appellation given to William the Norman, signifying that he was the first of his family who acquired the crown of England. This is the legal signification of the word, purchase; and in this sense it includes.—1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation.

I. Escheat was one of the consequences of feudal tenure; being founded upon this principle, that the blood of the person last seised in fee-simple was, by some means or other, utterly extinct:

and, since none could inherit his estate but such as were of his blood, it followed, that when such blood was extinct, the inheritance itself failed; and the land resulted back to the lord of the fee, by whom, or by those whose estate he had, it was originally given. These escheats are *propter defectum sanguinis*, or *propter delictum tenentis:* the first, if the tenant dies without heirs; the other, if his blood were attainted. But the first denomination only now exists.

Bastards have no inheritable blood; and therefore, if there be no other claimant, the land escheats to the lord. The civil and canon laws differ from ours in this point, and allow a bastard to succeed to an inheritance, if after its birth the mother was married to the father. But our law is much less indulgent to bastards. And as bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For, as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And, therefore, if a bastard purchases land, and dies without issue and intestate, the land escheats to the lord of the fee.*

By attainder for treason or other felony, the blood of the person attainted was formerly held to be so corrupted, as to be rendered no longer inheritable. Let us distinguish, however, between *forfeiture* of lands to the crown and *escheat* to the lord. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the Saxon law, as a part of punishment for the offence; and being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures. The doctrine of escheat upon attainder was very different; being simply this: that the blood of the tenant, by the commission of any felony, was corrupted, and the original donation of the feud thereby determined, it being always granted on the implied condition of *dum bene se gesserit.* By attainder, therefore, the feudal covenant and mutual bond of fealty were broken, the estate fell back from the offender to the lord of the fee,

* Aliens were until recently incapable of taking by descent, or inheriting: being not allowed to have any inheritable blood in them; rather indeed upon a principle of civil policy, than upon reasons strictly feudal. But this disability has now been entirely removed by statute.

and the inheritable quality of his blood was extinguished for ever. In consequence of this extinction of hereditary blood, the land of all felons would immediately have revested in the lord, but that the superior law of forfeiture intercepted it in its passage: in case of treason for ever; in case of other felony, for only a year and a day; after which time it went to the lord in a regular course of escheat, as it would have done to the heir of the felon in case the feudal tenures had never been introduced. No forfeiture whatever now follows conviction, and there is, consequently, no escheat *propter delictum tenentis.*

Before concluding, I must mention one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and has left no heirs to inherit them. And this is the case of a corporation; for if that comes to be dissolved, the donor or his heirs shall have the land again, 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 XIII.

OF TITLE BY OCCUPANCY.

II. OCCUPANCY is the taking possession of those things which before belonged to nobody; a right which, so far as it concerns real property, was confined within a very narrow compass. It extended only to a single instance: namely, where a man was tenant *pur auter 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 the possession, so long as *cestuy que vie* lived, by right of occupancy. This was like recurring to first principles, and calling in the law of nature to ascertain the property of the land, when left without a legal owner. For, had the estate *pur auter vie* been granted to a man *and his heirs* during the life of *cestuy que vie,* there the heir might have entered as a *special occupant.* The title of common occupancy

is now reduced to nothing by statute, an estate *pur auter vie* after payment of debts going in course of distribution like a chattel interest. That of *special* occupancy, by the heir-at-law, continues; such heir being held to succeed to the ancestor's estate, not by descent, but as an occupant specially appointed by the original grant. If no special occupant be named, when the estate *pur auter vie* is of a freehold or any other tenure, it goes to the personal representative of the person that had the estate thereof by virtue of the grant, and is distributed in the same manner as the personal estate of the testator or intestate.

In some cases, where the laws of other nations give a right by occupancy, as in lands newly created, by the rising of an island in the sea or in a river, our law assigns them an immediate owner. If an island arise in the *middle* of a *river*, it belongs in common to those who have lands on each side; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore. In case a new island rise in the *sea*, though the civil law gives it to the first occupant, yet ours gives it to the crown. And 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 water-mark; in these cases, if this gain be by small and imperceptible degrees, it goes to the owner of the land adjoining. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the crown; for, as the sovereign is lord of the sea, and so 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 XIV.

OF TITLE BY PRESCRIPTION.

III. A THIRD method of acquiring real property by purchase is by prescription; which means when a man can show no other title to what he claims, than that he and those under whom he claims have immemorially enjoyed it. This immemorial usage, or usage from time whereof the memory of man runneth not

to the contrary, was formerly held to be when such usage had commenced not later than the beginning of the reign of Richard I. But as it was generally impossible to bring proof of any usage at this early date, the courts presumed the fact, upon proof only of its existence for some reasonable time back, as for twenty years or more; unless indeed the person contesting the usage produced proof of its non-existence at some period subsequent to the reign of Richard I., in which case the usage necessarily fell to the ground. The proof even of a shorter continuance than for twenty years raised the presumption, if other circumstances were brought in corroboration. But the prescription was defeated by proof that the enjoyment, at any period within legal memory, took place by virtue of a grant or licence from the party opposing it, or that it was without his knowledge during the time that it was exercised. The legislature ultimately interfered, and by 2 & 3 Will. IV. c. 71, called the Prescription Act, provided for all the ordinary cases in which property may be claimed by prescription.

It is to be observed, firstly, that nothing but incorporeal hereditaments can be claimed by prescription: as a right of way, a common, &c.; for no prescription can give a title to lands, of which more certain evidence may be had. A man cannot prescribe that he and his ancestors have immemorially used to hold the castle of Arundel: for this is clearly another sort of title. But as to a right of way, a common, or the like, a man may be allowed to prescribe; for of these there is no corporeal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy can depend on nothing else but usage.

Secondly, a prescription cannot be for a thing which cannot be raised by grant; for the law allows prescription only to supply the loss of a grant, every prescription presupposing a grant to have existed.

Thirdly, what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record: but the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record.

Finally, no claim by custom, prescription, or grant to any

right of common or other profit or benefit, with certain exceptions, can, when such right has been enjoyed for thirty years, be defeated by showing only that it was first enjoyed at a time prior to such thirty years. When the right has been enjoyed for sixty years, it is indefeasible, unless it appears that it was enjoyed by some agreement expressly made for the purpose in writing. For claims to any way, or other easement, or to any watercourse, or the use of any water, the shorter terms of twenty and forty years are sufficient. And for claims to the use of light, an enjoyment of twenty years constitutes an indefeasible title; unless it appears that the right was enjoyed by agreement for the purpose in writing.

With regard to claims to a modus in lieu of tithes, and prescriptions *de non decimando*, or total exemption therefrom, the statute 2 & 3 Will. IV. c. 100, provides that the proof of a modus or exemption during thirty years shall, except in some particular cases, be sufficient; while the proof of its existence for sixty years gives an indefeasible title, unless it is proved that the modus or exemption originated in some agreement for the purpose in writing.

CHAPTER XV.

OF TITLE BY FORFEITURE.

IV. FORFEITURE is a punishment annexed to some illegal act, or negligence, in the owner of lands; 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, has sustained.

This forfeiture may arise:—1. By alienation contrary to law. 2. By disclaimer. 3. By non-presentation to a 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.*

I. Lands may be forfeited by *alienation*, or conveying them to

* There was till recently a forfeiture for *crime*; but treason or felony are no longer causes of forfeiture.

another, contrary to law; that is in *mortmain*; this forfeiture arising from the incapacity of the alienee to take.*

1. Alienation in *mortmain, in mortuâ manu,* is an alienation to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this occasioned the apellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in framing the statutes of mortmain: in deducing the history of which, it will be curious to observe the address of the ecclesiastics in eluding from time to time the laws in being, and the zeal with which successive parliaments pursued them through all their finesses: how new remedies were still the parents of new evasions: till the legislature at last, though with difficulty, obtained a decisive victory.

By the common law any man might dispose of his lands to any other private man at his own discretion, when the feudal restraints on alienation were worn away. Yet, in consequence of these it was always and is still necessary, for corporations to have a licence in mortmain from the crown or parliament to enable them to purchase lands; for as the sovereign is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats, by the vesting of lands in tenants that can never die. It was also requisite, whenever there was a mense or intermediate lord between the crown and the alienor, to obtain his licence also, upon the same feudal principles, for the alienation of the specific land. If no such licence was obtained, the sovereign or other lord might respectively enter on the land so aliened in mortmain as a forfeiture; which forfeiture necessarily accrued in the first place to the immediate lord of the fee. When, therefore, a licence could not be obtained, the contrivance of the clergy seems to have been this: the tenant who meant to alienate first conveyed his lands to the religious house, and instantly took them back again, to hold as

* Alienation to an *alien* was formerly a cause of forfeiture to the crown of the lands so alienated; not only on account of his incapacity to hold them, but likewise on account of his presumption in attempting, by an act of his own, to acquire any real property. An alien may now, however, take and hold real property as freely as a natural-born subject.

tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture: and then, by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands in right of such their newly-acquired seigniory, as immediate lords of the fee. But, when these dotations grew numerous, the feudal services were every day visibly withdrawn, and the lords were curtailed of the fruits of their seigniories; to prevent which, it was ordained by the second of Henry III.'s great charters, that all such attempts should be void, and the land forfeited to the lord of the fee.

But, as this prohibition extended only to religious *houses*, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies, who, in this were to be commended, that they ever had of their counsel the best learned men that they could get, found many means to creep out of this statute, by buying in lands that were *bonâ fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which are now used in conveyances. This produced the statute *de religiosis*, 7 Edw. I., which provided that *no person*, religious or other whatsoever, should buy, or sell, or receive under a pretence of a gift, or term of years, or any other title whatsoever, nor should, by any art or ingenuity, appropriate to himself any lands or tenements in mortmain, upon pain that the immediate lord of the fee, or, on his default for one year, the lord paramount, and in default of all of them, the king might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in mortmain: but as these statutes extended only to gifts and conveyances between the parties, the religious houses now set up a fictitious title to the land, which it was intended they should have, and to bring 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. And thus they had the honour of inventing those fictitious adjudications of right, which, until recently, remained the great assurances of the kingdom, under the name of *common*

recoveries. But upon this the statute, 13 Edw. I. c. 32, enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it should be forfeited. And the like provision was made in case the tenants set up crosses upon their lands, the badges of knights templars and hospitallers, in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, 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 seisin of the lands remained in the nominal feoffee, who was held by the courts of equity, then under the direction of the clergy, to be bound in conscience to account to this *cestuy que use* for the rents and emoluments of the estate. And it is to these inventions that we are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device; for the statute 15 Ric. II. c. 5, enacted, that the lands which had been so purchased to uses should be amortised by licence from the crown, or else be sold to private persons, and that, for the future, uses should be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of churchyards, such subtle imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And, lastly, as lands were frequently given to superstitious uses, though not to any corporate bodies, or were made liable in the hands of heirs and devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore, the statute 23 Hen. VIII. c. 10, declares, that all future grants of

lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

During all this time, it was in the power of the crown, by granting a licence of mortmain, to remit the forfeiture, so far as related to its own rights, and to enable any corporation to purchase and hold any lands in perpetuity. But, as doubts were conceived at the time of the Revolution how far such licence was valid, since the king had no power to dispense with the statutes of mortmain by a clause of *non obstante*, which was the usual course, though it seems to have been unnecessary; and as, by the gradual declension of mesne seignories through the long operation of the statute of *Quia Emptores*, the rights of intermediate lords were reduced to a very small compass; it was therefore provided by 7 & 8 Will. III. c. 37, that the crown for the future at its own discretion may grant licences to alien or take in mortmain of whomsoever the tenements may be holden.

The statute of Henry VIII. did not extend to anything but *superstitious* uses; and therefore a man might still give lands for the maintenance of a school, an hospital, or any other *charitable* use. But as it was apprehended that persons on their deathbeds might make improvident dispositions even for these good purposes, and so defeat the political ends of the statutes of mortmain; it is therefore enacted by 9 Geo. II. c. 36, that no lands or money to be laid out thereon, shall be given for or charged with any *charitable* uses whatsoever, unless by deed indented, executed in the presence of two witnesses, twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six months after its execution, (except stocks in the public funds, which may be transferred within six months previous to the donor's death), and unless such gift be made to take effect immediately, and be without power of revocation: and that all other gifts shall be void. The two universities, their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, are excepted out of this act; and other statutes have created a similar exception in favour of other public institutions, as the British Museum, Greenwich Hospital, and the Foundling Hospital.

II. A forfeiture is also the result of the civil crime of *dis-*

claimer; which occurs 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. Thus if a tenant sets up a title hostile to his landlord, it is a forfeiture of his term; and it is the same if he colludes with another person to do so. So if a tenant for years pay rent to a stranger, it is a forfeiture; and no notice to quit by the real landlord is necessary, but he may treat the tenant as a trespasser and eject him.

III. 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 crown by neglect of the metropolitan. The term, in which the title to present by lapse accrues from the one to the other successively, is six *calendar* months; but if the bishop be both patron and ordinary, he has not a double time allowed him; for the forfeiture accrues by law whenever the negligence has continued six months in the same person.

When the benefice becomes void by death or cession, the patron is bound to take notice of the vacancy, for these are matters of equal notoriety to the patron and ordinary; but in case of a vacancy by resignation, or deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is cognizant, he is required to give notice to the patron, otherwise he can take no advantage by lapse. And, if the right of presentation be contested, no lapse incurs till the question is decided.

IV. By *simony*, the right of presentation to a living is forfeited to the crown *pro hac vice*. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward, and is by the canon law a grievous crime. With us, however, the law has established so many exceptions that there is no difficulty whatever in avoiding the forfeiture.

V. The next kind of forfeiture are those by *breach* or non-performance of a *condition* annexed to the estate, either expressly, by deed, at its original creation, or impliedly, by law, from a principle of natural reason. Both which were considered in a former chapter.

VI. I, therefore, proceed to another species of forfeiture, viz., by *waste*, *vastum*, 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. And this waste is either *voluntary*, which is a crime of commission, as by pulling down a house, or it is *permissive*, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste; but, otherwise, if the house be burnt by the carelessness or negligence of the lessee; though now by 14 Geo. III. c. 78, no action lies against a tenant for an accident of this kind. Timber is part of the inheritance, and therefore to cut down trees is waste; but underwood the tenant may cut, and he may take sufficient estovers for house-bote and cart-bote. To open the lands to search for mines of metal, coal, &c., is waste, for that is a detriment to the inheritance; but if the pits or mines were open before, it is no waste to continue them; as the produce is part of the profit of the land. These three, then, are the general heads of waste, viz., in houses, in timber, and in land; and for waste in either, all tenants for life or for any less estate are punishable or liable to be impeached, unless their leases be made without impeachment of waste, *absque impetitione vasti*: that is, with a provision or protection that no man shall *impetere*, or sue him for waste committed. Yet even here the Courts will interfere, if the tenant attempt to commit *spoil* and *destruction* upon the estate.

VII. A seventh species of forfeiture is that of *copyhold* estates, by *breach* of the *customs* of the manor. For copyhold estates are liable to peculiar forfeitures annexed to this species of tenure; which are incurred by the breach of either the general customs of all copyholds, or the peculiar local customs of certain particular manors. Enfranchisement being now compulsory alike on lord and tenant, if either party desire it, will in course of time do away altogether with this species of forfeiture.

VIII. The last method whereby lands may become forfeited, is that of *bankruptcy*, the nature of which will be better considered in a subsequent chapter. I shall only here add that all the lands of a bankrupt become by the bankruptcy vested in the trustee on behalf of the creditors without any deed or conveyance. So that in this way a bankrupt loses all his real estate, without his participation or consent.

CHAPTER XVI.

OF TITLE BY ALIENATION.

THE usual method of acquiring a title to real estate is alienation, or purchase in its limited sense; under which is comprised any sale, gift, marriage settlement, devise, or other transmission of property.

This mode of taking estates is not of equal antiquity with that of taking them by descent. For, by the feudal law, a feud could not be transferred without the consent of the lord, lest thereby a feeble or suspicious tenant might have been imposed upon him to perform the feudal services. And, as he could not alien it in his lifetime, so neither could he by will devise his feud to another family. Nor, in short, could he alien the estate unless with the consent of his next heir. And therefore it was usual in ancient feoffments to express that the alienation was made by consent of the heirs of the feoffor. On the other hand, the feudal obligation being considered reciprocal, the lord could not transfer his seigniory without the consent of his vassal; for it was unreasonable to subject a feudatory to a new superior, with whom he might be at enmity, without his consent; or even to transfer his fealty, without his being apprised of it, that he might know to whom his services were due. This consent of the vassal was expressed by what was called *attorning*, or professing to become the tenant of the new lord; which attornment was afterwards extended to all lessees for life or years.

By degrees this feudal severity wore off; and experience has shown, that property best answers the purposes of civil life when its transfer is free and unrestrained. The road was cleared in the first place by a law of Henry I., which allowed a man to sell lands which he himself had purchased. Afterwards, he seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his *assigns* by name. At that time he might part with one-fourth of the inheritance of his ancestors without the consent of his heir; afterwards

with a moiety, and finally with the whole. By statutes of Henry VII. & VIII., persons attending the king in his wars were allowed to alien without licence; and finally, fines for alienations were abolished by 12 Car. II. c. 24. The power of *charging* lands with debts was introduced by the stat. West. 2, and they are now not only subject to be *pawned* for the debts of the owner, but likewise to be absolutely *sold*, either for the payment of debts, or for division among creditors under the statutes of bankruptcy. The restraint of *devising* lands by will, except in some places by particular custom, lasted longer, that not being totally removed till the abolition of the military tenures. *Attornments* continued till made unnecessary by 4 & 5 Ann. c. 16.

In considering, title by alienation, then, let us see first *who* may alien, and to *whom*; and then *how* a man may alien, or the several modes of conveyance.

I. Who may alien, and to whom. And herein we must consider rather the incapacity, than capacity, of the parties; for all persons* are *primâ facie* capable both of conveying and purchasing, unless the law has laid them under any disabilities. A corporation may purchase lands; but unless it has a licence to hold in mortmain, it cannot retain such purchase, but it is forfeited to the lord of the fee. Lay corporations, other than municipal, have, in general, power to alien their lands as freely as private owners; but municipal corporations are, by the statute 5 & 6 Will. IV. c. 76, s. 94, restrained from alienation for any term exceeding thirty-one years. Ecclesiastical and eleemosynary corporations, both sole and aggregate, are restrained, except under certain conditions, from alienation beyond the life of the person constituting the corporation sole,

* Till recently, persons attainted of treason and murder were incapable of conveying, from the time of the offence committed, provided attainder followed, for such conveyance by them tended to defeat the crown of the forfeiture, or the lord of his escheat. But they might *purchase* for the benefit of the crown, or the lord of the fee, though they were disabled to *hold*: the lands so purchased, if after attainder, being subject to immediate forfeiture; if before, to escheat, as well as forfeiture, according to the nature of the crime. In other felonies, no attainder extended to the disinheriting of any heir nor to the prejudice of the right of any person other than the offender during his natural life.

or of him who is head of the corporation aggregate, except by lease for not exceeding twenty-one years, or three lives.

Idiots, infants, and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only. Their conveyances and purchases are voidable, but not always void. It has been said, that a *non compos*, though he be afterwards brought to a right mind, shall not be permitted to allege his own insanity in order to avoid his grant; for that no man shall be allowed to stultify himself, or plead his own disability; but it has been held to be clear law that a party may come forward to maintain his own past incapacity. And, clearly, 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. And so, too, if he purchases under this disability, and does not afterwards, upon recovering his senses, agree to the purchase, his heir may either waive or accept the estate at his option. In like manner, an infant may waive such purchase or conveyance, when he comes to full age; or, if he does not then actually agree to it, his heirs may waive it after him. Persons, also, who purchase or convey under duress may affirm or avoid such transactions, whenever the duress has ceased. For all these are under the protection of the law, which will not suffer them to be imposed upon, through the imbecility of their present condition; so that their acts are only binding, in case they be afterwards agreed to, when such imbecility ceases.

The case of a feme-covert is different. She may *purchase* without the consent of her husband, 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. But the *conveyance* or other contract of a feme-covert, unless it be made under the provisions of 3 & 4 Will. IV. c. 75, is absolutely void, and not merely voidable, and therefore cannot be affirmed by any subsequent agreement. The law, however, recognises the power of a feme-covert to deal at her own pleasure with her *separate property*.

An alien formerly could purchase anything; but could *hold* nothing except a lease for years of a house for convenience of *merchandise*, all other purchases, when found by an inquest of office, being immediately forfeited to the crown. But aliens are now enabled to take and hold lands as freely as a natural-born subject.

II. The second head of title by alienation is, *how* a man may alien or convey, in other words, the several modes of conveyance recognised by our law. These are:—1. By matter *in pais*, or deed. 2. By matter of *record*. 3. By special *custom*. 4. By *devise*; that is by last will and testament. Of each, in its order, separately, in the succeeding chapters.

CHAPTER XVII.

OF ALIENATION BY DEED.

In treating of deeds I shall consider, first, their general nature; and, next, the several kinds of deeds, with their respective incidents. And, in explaining the former, I shall examine, first, what a deed is; secondly, its requisites; and thirdly, how it may be avoided.

I. First, then, a deed is a writing sealed and delivered by the parties; sometimes called a charter, *carta*, from its materials; but most usually a deed, *factum*, because it is the most authentic act that a man can perform with relation to the disposal of his property. Therefore a man shall be *estopped* by his own deed, that is not permitted to aver anything in contradiction to what he has once so solemnly avowed. If a deed be made by more parties than one, there ought regularly to be as many copies as there are parties, and each was formerly cut or indented to correspond with the other; which deed, so made, was called an indenture. This name is retained, though indenting has been abandoned. A deed by one party, not being indented, but *polled* or shaved quite even, is called a *deed-poll*.

II. The *requisites* of a deed are, *firstly*, that there be persons able to contract and be contracted with, and also a subject-

matter to be contracted for. In every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised.

Secondly, the deed must be founded upon good and sufficient *consideration*, not upon an illegal contract, nor upon fraud or collusion, any of which will vacate the deed. A deed also, or other grant, made without any consideration, is, as it were, of no effect; for it is construed to enure only to the use of the grantor himself. The consideration may be either a *good* or a *valuable* one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, or natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant, and is therefore founded on motives of justice. Deeds upon good consideration only, are considered voluntary, and are frequently set aside in favour of creditors and *bonâ fide* purchasers.

Thirdly, the deed must be *written* or *printed*, upon paper or parchment. It must also have the proper stamps, else it cannot be given in evidence. Formerly, many conveyances were made by parol, or word of mouth only, without writing; but this giving a handle to a variety of frauds, produced the 29 Car. II. c. 3, usually called the Statute of Frauds, which enacts, that no interest in lands, made by livery of seisin, or by parol only, except leases not exceeding three years from the making, shall be looked upon as of greater force than a lease or estate at will, unless the same be put in writing, and signed by the party granting, or his agent lawfully authorized in writing. And by 8 & 9 Vict. c. 106, all the other deeds ordinarily used in conveying property must be in writing.

Fourthly, the matter should be *legally* and *orderly* set forth; that is, there should be words sufficient to specify the agreement and bind the parties. And the usual forms it is prudent not to depart from, without good reason or urgent necessity. These are:—

1. The *premises*, used to set forth the number and names of the parties; and the recital of such matters as are necessary to

explain the transaction, including the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted.

2, 3. Next come the *habendum* and *tenendum*; the former to determine what estate or interest is granted; as, if a grant be "to A. and the heirs of his body," here A. has an estate-tail; the latter, "and to hold," is now only kept in by the custom. It was formerly used to signify the tenure of the estate, but as all tenures are now reduced to socage, it is never specified.

4. Next follow the terms, if any, upon which the grant is made: the first being the *reddendum*, whereby the grantor reserves some thing to himself out of what he had before granted, as "rendering therefore yearly the sum of ten shillings or a "peppercorn, or the like."

5. Another term may be a *condition*, on the happening of which the estate may be defeated; as "provided always," that if the mortgagor shall pay the mortgagee 500*l.* upon such a day, the estate granted shall determine; and the like.

6. Next follow *covenants*, whereby either party stipulates for the truth of certain facts, or binds himself to perform, or give, something to the other. Thus, the grantor may covenant that he has a right to convey; the grantee that he will pay his rent, or keep the premises in repair, &c. 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 for his *executors* and *administrators*, his personal assets, as well as his real, are pledged for the performance of the covenant.

7. Lastly, comes the *conclusion*, which mentions the execution and date of the deed. Not but a deed is good, although it mention no date; or has a false date; or even if it has an impossible date, as the thirtieth of February; provided the real day can be proved. For the date which a deed bears is merely *primâ facie* evidence of the date, the true date being the day on which it was delivered by the grantor.

The *fifth* requisite for making a good deed is the *reading* of

it; wherever any of the parties desires it; and, if it be not done on his request, the deed is void as to him.

Sixthly, it is requisite that the party, whose deed it is, should *seal*, and now in most cases should *sign* it also. The use of seals prevailed among the Jews and Persians in the earliest records of history. And in the book of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase. In the civil law also seals were used. But in the times of our Saxon ancestors they were not much known in England. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross; which custom our illiterate people to this day keep up.

The Normans introduced the use of seals, and the neglect of signing remained long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed: and so the common form of attesting deeds—"*sealed* and delivered," continues to this day.

A *seventh* requisite to a good deed is that it be *delivered*, which is also expressed in the attestation, "sealed and *delivered*." A deed takes effect only from this delivery; for if the date be false or impossible, the delivery ascertains the time of it. A delivery may be either absolute; or conditional, that is, to a third person, to hold till some condition be performed on the part of the grantee; when it is delivered not as a *deed*, but as an *escrow*; that is, as a scroll or writing, not to take effect as a deed till the condition be performed; and then it is a deed to all intents and purposes.

The *last* requisite is the *attestation*, or execution of the deed *in the presence of witnesses*: though this is rather for preserving the evidence, than of the essence of the deed.

III. A deed may be *avoided*, or rendered of no effect, by matter *ex post facto*: as, 1. By rasure or other alteration in any material part. 2. By breaking off, or defacing the seal, with the intention of avoiding the deed, for accidental defacement is of no effect. 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: as, the husband, where a feme-covert is concerned; an infant, or person under duress, when those disabilities are removed, and the like. 5. By the judgment or decree of a court of justice. This was anciently the province of the Star Chamber; it is now the province of every court when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute forgery.

We are next to consider the several species of deeds, and their respective incidents, used in the alienation of *real* estates; which are either conveyances at *common law*, or such as receive their force and efficacy by virtue of the *statute of uses*.

Of conveyances by the common law, some may be called *original* or *primary* conveyances; which are those by means whereof the estate is created; others are *derivative*, or *secondary*; whereby the estate, originally created, is enlarged, restrained, transferred, or extinguished.

Original conveyances are the following: 1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition: *Derivative* are, 7. Release; 8. Confirmation; 9. Surrender; 10. Assignment; 11. Defeazance.

1. A feoffment, *feoffamentum*, is derived from *feoffare* or *infeudare*, to give a feud; and is therefore *donatio feudi*, the most ancient method of conveyance; he that gives, being called the *feoffor*; and the person enfeoffed the *feoffee*.

But by the mere deed the feoffment is by no means perfected; there remains a very material ceremony to be performed, called *livery of seisin*, without which the feoffee has but a mere estate at will; this livery being no other than the feudal investure which is absolutely necessary to complete the donation.

Among the ancient Goths and Swedes, a sale of lands was made in the presence of witnesses, who extended the cloak of the buyer while the seller cast a clod of the land into it, in order to give possession; and a staff or wand was sometimes passed from the vendor to the vendee, through the hands of the witnesses. With our Saxon ancestors the delivery of a turf was a necessary solemnity, to establish the conveyance of lands. And, to this day, the conveyance of a copyhold is usually made from 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.

For many years feoffments have been little used. This conveyance had the effect of passing a fee, if purporting to do so, even though the feoffor had a less estate, and was sometimes used because it also destroyed contingent remainders and powers appendant. There was this risk, however, that it might create a forfeiture of the grantor's estate. It was called a *tortious conveyance*, while other assurances, such as bargain and sale, lease and release, were styled innocent conveyances, having no operation beyond passing such estate as the grantor had to convey. The tortious operation of feoffments has been abolished, and corporeal hereditaments made transferable by *grant*, livery of seisin has ceased to exist, and feoffments are scarcely ever resorted to.

2. The conveyance by *gift*, *donatio*, is properly applied to the creation of an estate-tail, and differs in nothing from a feoffment but in the nature of the estate passing by it.

3. Grants, *concessiones*, are the regular method of transferring *incorporeal* hereditaments, or such things whereof no livery can be had. Hence all corporeal hereditaments, as lands and houses, were said to lie *in livery*; and the others, as advowsons, commons, reversions, &c., to lie *in grant*. These, therefore, pass merely by the delivery of the deed. And now that the immediate freehold lies *in grant*, and that a feoffment has no tortious operation, there is practically no difference whatever between these two kinds of conveyance.

4. A lease is a conveyance, usually in consideration of rent, for life, for years, or at will, but always for a *less* time than the lessor has in the premises; for if it be for the *whole* interest, it is more properly an assignment than a lease.

Whatever restriction, by the feudal law, might in former times be observed with regard to leases, by the common law, all persons seised of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore tenant in fee-simple might let leases of any duration, for he had the whole interest; but tenant in tail, or for life, could make no leases which should bind the issue in tail or reversioner; nor

could a husband seised *jure uxoris*, make a valid lease for any longer term than the joint lives of himself and his wife. Yet some tenants for life might make leases of equal duration with those granted by tenants in fee-simple, such as parsons and vicars with consent of the patron and ordinary. So bishops and deans, and such other sole ecclesiastical corporations, might, with the concurrence and confirmation of such persons as the law requires, have granted their lands without any limitation or control. And corporations aggregate might have made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now, by several statutes, this power is restrained; and, where in the other cases the restraint by the common law seemed too hard, it is in some measure removed. The former statutes are called *restraining*, the latter *enabling* statutes. The enabling statutes specify the conditions on which leases granted by tenants in tail or for life, or tenants by the courtesy or in dower, or persons seised in right of their churches, may grant leases, valid as against their successors. The *disabling* or *restraining* statutes were passed to prevent bishops, deans, and chapters, colleges, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars, from making improvident leases; which they were always ready to do, in consideration of a fine or premium paid to themselves, the interests of their successors being entirely disregarded. But to ascertain in what manner and to what extent these persons and bodies corporate are restrained, the student must consult the statutes themselves.

5. An *exchange* is a mutual grant of *equal* interests, the one in consideration of the other; which must be followed by entry on both sides; for, if either party die before entry, the exchange is void. And if either party be evicted of the lands taken in exchange, through defect of the other's title, he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges.

The inconveniences attending this kind of exchange have led to its entire disuse; mutual conveyances being in ordinary cases resorted to. A simpler method is provided by 8 & 9 Vict., c. 118, enabling the Inclosure commissioners to effect exchanges on the application of the persons interested therein; the great

advantage of which is, that the order of the commissioners cannot be impeached by reason of any infirmity of estate in the persons on whose application it is made; and that the property on each side taken in exchange, enures to the same uses, intents, and purposes, and is subject to the same charges as that given in exchange.

6. A partition, 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. This, too, can best be effected under the authority of the Inclosure commissioners.

These are the several *primary* or *original* conveyances. Those which remain are of the *secondary* or *derivative* sort.

7. Releases; which are a discharge or conveyance of a man's right in lands to another that has some former estate therein. And these may enure either, 1. By way of *enlarging an estate*, or *enlarger l'estate:* as, if there be tenant for life, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee. 2. By way of *passing an estate*, or *mitter l'estate:* as when one of two coparceners releases all her right to the other, this passes the fee-simple of the whole. 3. By way of *passing a right*, or *mitter le droit:* as if a man be disseised, and releases to his disseisor all his right; hereby the disseisor acquires a new right, which renders that lawful which before was tortious. 4. By way of *extinguishment:* as if my tenant for life makes a lease to A for life remainder to B and his heirs, and I release to A; this extinguishes my right to the reversion, and shall enure to the advantage of B's remainder as well as of A's particular estate.

8. A confirmation is allied to a release, being a conveyance of an estate or right *in esse* whereby a voidable estate is made unavoidable; as if tenant for life leases for forty years, and dies during that term, here the lease for years is voidable by him in reversion; yet, if he has confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure and unavoidable.

9. A surrender, *sursumredditio*, or rendering up, is of a nature directly opposite to a release; that operates by the greater

estate's descending upon the less, a surrender is the falling of a less estate into a greater. There may also be a surrender *in law* by the acceptance by the tenant of a new estate inconsistent with his prior estate. Thus a new lease made to a person in possession under an old lease, and accepted by him, operates as a surrender in law of the old one; for from such acceptance the law implies his intention to yield up the estate which he had before, though he may not by express words of surrender have declared as much

10. 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, and the assignee stands for most purposes in the place of the assignor. The assignee is, however, not bound by all the covenants of the assignor, the general rule being that he is bound by all covenants which *run with the land*, but not by collateral covenants which do not run with the land. Covenants for quiet enjoyment, to pay rent and taxes, to repair and leave repaired, to cultivate the lands in a particular manner, not to carry on certain trades, are all covenants running with the land.

An assignment does not discharge the original lessee or his representatives from the covenant for payment of rent, or any other, but he still remains liable to the lessor: and this, although the latter may have recognised the assignee as his tenant. The assignee, again, is only liable on the covenants so long as his ownership lasts; and if he re-assigns to another he is completely discharged, although the assignee be a pauper, and utterly unable to perform the covenants.

But if, instead of assigning, the lessee make an under-lease out of his interest, the under-lessee is not liable to the original lessee for rent or covenants, as an assignee of the whole term would have been. He cannot, however, take irrespective of the covenants in the original lease, which run with the land; for a person contracting for an under-lease is bound to inform himself of what the covenants in the original lease are, otherwise if he enter and take possession he will be bound by them.

11. A defeazance is a collateral deed, made at the same time with another conveyance, containing conditions, upon the performance of which the estate may be defeated. In this manner mortgages were, in former times, usually made; the mortgagor enfeoffing the mortgagee, and he, at the same time, executing a deed of defeazance, whereby the feoffment was rendered void on repayment of the money borrowed, at a certain day; but this method of mortgaging has long been out of use.

There yet remain to be spoken of some few conveyances which have their force and operation by virtue of the *statute of uses*.

Uses and *trusts* are the same: being 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 *cestui que use*, or him to whose use it was granted, and suffer him to take the profits. As, if a feoffment was made to A and his heirs, to the use of, or in trust for, B and his heirs; here, at the common law, A the *terre-tenant* had the legal property of the land, but B the *cestui que use* was, in conscience, to have the profits and disposal of it.

This notion was transplanted into England from the civil law, about the close of the reign of Edward III., by means of the foreign ecclesiastics; who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to their religious houses directly, but to *the use of* the religious houses: which the clerical chancellors of those times held to be binding in conscience; and, therefore, compelled the execution of such trusts in the court of chancery. And, as it was easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet, if a testator had enfeoffed another to his own use, and so was possessed of the use only, such use was devisable by will. We have seen how this evasion was crushed in its infancy with respect to religious houses.

Yet, the idea being once introduced, it was afterwards applied to a number of civil purposes; particularly as it removed the restraint on alienations by will, and permitted the owners of lands to make various designations of their profits, as prudence, or justice, or family convenience, might require. Till, at length,

during the commotions between the houses of York and Lancaster, uses grew almost universal; through the desire that men had of securing their estates from forfeitures; when each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore, about the reign of Edward IV., the courts of equity began to reduce them to a regular system.

Originally, the chancery would give no relief but against the very person himself intrusted for *cestui que use*, and not against his heir or alienee. This was altered in the reign of Henry VI., with respect to the heir; and afterwards the rule was extended to such alienees, as had purchased without consideration, or with express notice. A purchaser for value without notice might hold the land discharged of any trust. And, if the feoffee to uses died without an heir, or committed a forfeiture or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the courtesy, nor the wife to whom dower was assigned, were liable to perform the use: because they were not parties to the trust, but came in by act of law; though doubtless their title in reason was no better than that of the heir.

On the other hand, the use itself, or interest of *cestui que use*, was learnedly refined upon with many elaborate distinctions. And, 1. It was held that nothing could be granted to a use, whereof the use is inseparable from the possession: as ways or commons, or whereof the seisin could not be instantly given. 2. A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another without consideration, equity presumes that he meant it to the use of himself, unless he expressly declares it to be the use of another, and then nothing shall be presumed contrary to his own expressions. 3. Uses were descendible according to the rules of the common law, in the case of inheritances in possession; for in this and many other respects *equitas sequitur legem*. 4. Uses might be assigned by secret deeds between the parties, or be devised by last will and testament: for, as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary. 5. Uses did not escheat for felony or other defect of blood; for escheats, &c., are the consequences of *tenure*

and uses are *held* of nobody; but the land itself was liable to escheat, and the lord might hold it discharged of the use. 6. No wife could be endowed, or husband have his courtesy, of a use: for no trust was declared for their benefit, at the original grant of the estate. And therefore it became customary, when estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives, which was the origin of modern jointures. 7. A use could not be taken under legal process, for the debts of *cestui que use*. For, being merely a creature of equity, the common law, which looked no further than to the person actually seised of the land, could award no process against it.

It is impossible here to pursue the doctrine of uses through all those refinements which gave rise to Lord Bacon's complaint, that this course of proceeding "was turned to deceive many of "their just and reasonable rights. A man that had cause to "sue for land, knew not against whom to bring his action, or "who was the owner of it. The wife was defrauded of her "dower; the husband of his courtesy; the lord of his wardship, "relief, heriot, and escheat; the creditor of his extent for debt; "and the poor tenant of his lease." To remedy which many statutes were enacted, which made the lands liable to be extended by the creditors of *cestui que use;* allowed actions for the freehold to be brought against him, if in the actual enjoyment of the profits; made him liable to actions of waste; established his conveyances and leases made without the concurrence of his feoffees; and gave the lord the wardship of his heir, with certain other feudal perquisites.

These provisions all tended to consider *cestui que use* as the real owner; and at length that idea was carried into effect by 27 Hen. VIII. c. 10, usually called the *Statute of Uses;* which enacts, that "when any person shall be *seised* of lands, &c., to "the use, confidence, or trust, of any other person or body "politic, the person or corporation entitled to the use, shall "from thenceforth stand and be seised or possessed of the land, "&c., of and in the like estates as they have in the use; and "that the estate of the person so seised to uses shall be deemed "to be in him or them that have the use." The statute thus *executes* the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession;

thereby making *cestui que use* complete owner of the lands, as well at law as in equity.

The statute having thus annihilated the intervening estate of the feoffee, and turned the interest of *cestui que use* into a *legal* instead of an *equitable* ownership, the courts of common law had to take cognizance of uses. And, considering them now as merely a mode of conveyance, many of the rules of equity were adopted by the judges of the common law. The same persons were held capable of being seised to a use, the same considerations were necessary for raising it, and it could only be raised of the same hereditaments as formerly. But as the statute, the instant it was raised, converted the use into an actual possession, a great number of the incidents, that formerly attended it, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to a purchaser discharged of the use, nor be liable to dower or courtesy, on account of the seisin of the feoffee; because the legal estate never was in him for a moment, but was instantaneously transferred to *cestui que use* as soon as the use was declared. And, as the use and the land were now convertible terms, they became liable to dower, courtesy, and escheat, in consequence of the seisin of *cestui que use*, who was now become the *terre-tenant* also; and they likewise were no longer devisable by will.

The judges were soon compelled also to depart from the rigour and simplicity of the common law, and to allow a more complex construction upon conveyances to uses, than upon others. Hence, the recognition of *contingent* or *springing uses*, *shifting uses*, *resulting uses*, and other details necessary to be known of the conveyancer, but which would only confuse the student.

The first effect of this equitable train of decision in the courts of law was that the power of the chancery over landed property was greatly diminished. But one or two scruples, which the judges found it impossible to get over, restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use;" and, therefore, on a feoffment to A and his heirs to the use of B and his heirs, *in trust for C and his heirs*, they held that the statute executed only the first use, and that the second was a mere nullity: not adverting that the instant the first use was executed in B, he became seised to the use of C, which

second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down through a hundred uses upon uses, till finally executed in the last *cestui que use*. Again, as the statute mentions only such persons as were *seised* to the use of others, this was held not to extend to term of years or other chattel interests, whereof the termor is not *seised*, but only *possessed*; and, therefore, if a term of one thousand years be limited to A, to the use of B, the statute does not execute this use, but leaves it as at common law. Lastly, where lands are given to one and his heirs, in trust to receive and pay over the profits to another, this use is not executed by the statute; for the land must remain in the trustee to enable him to perform the trust.

Of the two more ancient distinctions the courts of equity quickly availed themselves. In the first case, it was evident that B was never intended by the parties to have any beneficial interest: and, in the second, the *cestui que use* of the term was expressly driven into the chancery to seek his remedy; and therefore that court determined, that though these were not *uses* which the statute could execute, yet still they were *trusts* in equity, which in conscience ought to be performed. To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of *trusts*; and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, had no other effect than to add a few words to a conveyance.

The courts of equity, however, in the exercise of their new jurisdiction, avoided those mischiefs which made uses intolerable. They consider a *trust-estate* 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: and, by a long series of uniform determinations, with some assistance from the legislature, they have raised a system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds. The trust will descend, may be aliened, is liable to debts, to executions, to forfeiture, to leases and other incumbrances, nay, even to the courtesy of the husband, as if it was an estate at law.

The only service, therefore, to which the statute of uses is

now consigned, is in giving efficacy to the various kinds of deeds which have supplanted those recognised by the common law, viz.:

12. The *covenant to stand seised to uses:* by which a man seised of lands, covenants that he will stand seised 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; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land, without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate, when made upon such weighty and interesting considerations as those of blood or marriage, and it is now very seldom used.

13. A *bargain and sale,* whereby the bargainor bargains and sells the land to the bargainee, and thereby becomes seised to the use of the bargainee; the statute of uses completing the purchase, or, as it has been expressed, the bargain vests the use, and the statute the possession. It was foreseen that conveyances thus made would want all the notoriety which the old common law assurances were calculated to give; and in order therefore to prevent clandestine conveyances, it was enacted by 27 Hen. VIII. c. 16, that such bargains and sales should not enure to pass a freehold, unless the same be made by indenture, and *enrolled* within six months in one of the courts of Westminster-hall or with the *custos rotulorum* of the county. Clandestine bargains and sales of chattel interests, or leases for years were then thought not worth regarding; on which ground, indeed, they were overlooked in framing the statute of uses, and therefore such bargains and sales are not directed to be enrolled. But how impossible it is to foresee and provide against *all* the consequences of innovations! This omission gave rise to

14. The conveyance by *lease and release,* first invented by Serjeant Moore soon after the statute of uses, and until recently the most common of any. It was thus contrived: a lease, or rather bargain and sale, upon some pecuniary consideration, for one year, was made by the tenant of the freehold to the lessee or bargainee. Now, this, without any enrolment, made the bargainor stand seised to the use of the bargainee, and vested in the bargainee

the *use* of the term for a year, and then the statute immediately annexed the *possession*. He therefore, being thus in possession, was capable of receiving a release of the freehold and reversion, which, by law, must be made to a tenant in possession, and, accordingly, the next day, a release was granted to him. This was held to supply the place of livery of seisin, and so a conveyance by lease and release was said to amount to a feoffment. The lease for a year, on which the title was founded, and which was a mere form, was made unnecessary by 4 & 5 Vict. c. 21; and a release only was thus required. But this statutory release has been in its turn superseded by the 8 & 9 Vict. c. 106; which permits freeholds to be transferred without livery of seisin; and thus, although a deed, by which a freehold is conveyed, is usually denominated a release, it is really a grant; and might with perfect propriety be considered an original assurance, and not a derivative conveyance operating under the statute of uses.

15. Deeds of *appointment or of revocation and new appointment of uses*, one of the many methods in which uses have been utilized, are founded on a power, reserved at the raising of the uses, to revoke such as were then declared. It is usual, in marriage settlements, for instance, to declare the uses, after those given to the husband and wife, to be for the children of the marriage, in such proportions and for such estates as the husband and wife, or the survivor, shall appoint; and to confer power on the husband and wife, or survivor, to revoke any appointment that may be so made. This power, thus given, is carried into effect by a deed of appointment, which itself *conveys* no estate, but merely designates the person to take the use. Thus, if land were conveyed to A, the feoffee to uses, and his heirs, to such uses as B, the purchaser, should appoint, and in default of appointment, to B in fee, here B, if he wished to sell, might, by exercising the power of appointment, exclude his wife's dower, which would have attached at once had the estate been limited to the use of him and his heirs. For the purchaser C came in under the original conveyance, and took, upon the appointment of B, the use to which A, the feoffee or releasee to uses stood seised; and which the statute executed in C, to the exclusion altogether of B, whose estate in fee, being in default only of appointment by him, never came into existence.

16. Another kind of assurance is that founded upon a power given by a will or by an act of parliament, on which, although the words of conveyance are usually "bargain and sell," the estate passes by force of the will or act of parliament, the person who executes the power, merely nominating the party to take the estate. It is therefore not strictly a conveyance, though it has the operation of vesting an estate in the appointee.

17. There is an anomalous class of deeds, operating as conveyances, which cannot be said to fall under any of the preceding heads, those, namely, which owe their entire efficacy to some act of parliament. Thus, the promoters of any undertaking, who have contracted for the purchase of lands in conformity with the Lands Clauses Consolidation Act, 1845, and cannot afterwards obtain a conveyance, are enabled, after depositing the purchase-money in the Bank of England, to execute a deed-poll, containing a recital of the transaction, and conveying the land to themselves, upon the execution of which deed, the estate of the party with whom the agreement was made becomes vested absolutely in the promoters of the undertaking.

Before concluding, a few remarks upon such deeds as are used not to *convey*, but to *charge* or incumber, lands, and to *discharge* them again, may not be out of place. Of this nature are, *obligations* or bonds, *recognizances*, and *defeazances* upon them both.

1. An *obligation* or bond 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, or else shall remain in full force: for instance, repayment of a principal sum of money borrowed of the obligee, with interest. In case this condition is not performed, the bond becomes forfeited, or absolute, at law, and charges the obligor, while living; and after his death the obligation descends upon his heir, who, on defect of personal assets, is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, though not a *direct*, yet a *collateral*, charge upon the lands.

2. A *recognizance* is an obligation *of record*, which a man enters into before some court of record or magistrate duly authorised, with condition to do some particular act; as, to keep the peace, to pay a debt, or the like. It is in most respects like any other bond, the form of it being, "that A B doth acknow-"ledge to owe to our lady the queen, to the plaintiff, to C D, or "the like, the sum of ten pounds," with condition to be void on performance of the thing stipulated. This is witnessed only by the record of the court, and not by the party's seal: so that it is not in strict propriety a deed, though the effects of it are greater than a common obligation, being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrolment on record.

Of a nature somewhat similar to a recognizance, is a judgment of the High court, which operates as a charge upon all the property of the person against whom it is entered up. The mode usually resorted to of giving a creditor a lien upon his debtor's real property, is, where an action has been commenced, by giving a *cognovit actionem* or confession of the plaintiff's right, or by giving a warrant of attorney to confess a judgment, which, when entered up, in pursuance either of the cognovit or warrant of attorney, becomes a charge upon the lands of the debtor. It is of no avail, however, against *bonâ fide* purchasers or mortgagees of the lands, or creditors having a charge thereon, unless a memorandum be registered in the proper office, process of execution issued thereon, and similarly registered, *before* the date of the conveyance, mortgage, or charge; the writ put in force within three months after its registration; and the land actually delivered in execution or pursuance thereof. The registration of the judgment itself only holds good for five years, when it must be re-registered, in order to be binding. But as between the debtor and his creditor, to whom he executes the warrant, it is a valid charge, binding the debtor's lands, and comes properly under the head of matter *in pais*, by which estates may be affected.

3. A defeazance, on a bond recognizance or judgment recovered, is a condition, which, when performed, defeats or undoes it, in the same manner as a defeazance of an estate before mentioned.

These are the principal deeds, by which estates may be con-

veyed. There is one palpable defect applicable to all, the want of notoriety; so that purchasers or creditors cannot know with any certainty, what the estate and the title to it in reality are, upon which they are to lay out or to lend their money. It has often been proposed to establish a general registry of deeds affecting real property; but no serious or well considered attempt to do so has yet been made. A *Land Registry*, as it is called, has been established; but its operations are confined to such property only as the owners who are so advised choose to enter in its books.

CHAPTER XVIII.

OF ALIENATION BY MATTER OF RECORD.

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 preserve, and be a perpetual testimony of the transfer of the property. Of this nature are, 1. Private acts of parliament; and 2. Grants by the crown. To this class belong, 3. *Disentailing Deeds*, now substituted for Fines and Recoveries; and to the same class must now be referred,—4. Vesting orders of the court of chancery; orders of the court of bankruptcy, deeds executed and awards made by public boards under the authority of acts of parliament, and conveyances of property recorded in the land registry.

I. Private *acts of parliament* have of late years become a very common mode of assurance. For it may sometimes happen, that by the ingenuity of some, and the blunders of other practitioners, an estate is so grievously entangled, that it is out of the power of any court to relieve the owner. Or it may sometimes happen, that, by the strictness or omissions of family settlements, the tenant is abridged of some reasonable power, which cannot be given him by any court. In such cases, the power of parliament is called in, to cut the knot; and by a particular law to unfetter an estate; to give its tenant reasonable powers; or to assure it to a purchaser, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred.

II. The *sovereign's grants* are also matter of record. For, no freehold may be given to the king, nor derived from him, but by matter of record. And for this several offices exist, through which all the grants of the crown must pass, and be enrolled; that the same may be narrowly inspected by the officers, who are to inform the sovereign if anything contained therein ought not to be granted. These grants are contained in letters *patent*, that is, open letters, *literæ patentes:* so called because they are not sealed up, but exposed to open view, and are usually addressed by the sovereign to all his subjects at large. And therein they differ from letters sealed also with the great seal, but directed to particular persons, and for particular purposes; which, not being proper for public inspection, are closed up, and are called writs *close*, *literæ clausæ*, and recorded in the *close-rolls*, in the same manner as the others are in the *patent-rolls*.

III. *Disentailing Deeds*, which have replaced *Fines* and *Common Recoveries*, call for some more detailed explanation.

A fine, formerly a very usual method of transferring a freehold, was neither more nor less than an amicable agreement of a suit, actual or fictitious, whereby the lands, the subject of the action, were acknowledged to be the right of one of the parties. Originally it was founded on an actual suit, commenced at law for recovery of the land; and the possession thus gained was found to be so sure and effectual, that fictitious actions were introduced for the sake of obtaining the same security. It was so called because it put an *end*, not only to the suit, but also to all other suits and controversies concerning the same matter. The party to whom the land was to be conveyed, commenced an action at law against the other, the foundation of which was a supposed agreement that the one should convey the lands to the other; on the breach of which the action was brought. On this there was a *primer fine*, or fee due to the crown. The suit being thus commenced, then followed the *licentia concordandi*, or leave to agree the suit. For, as soon as the action was brought, the defendant, knowing himself to be in the wrong, was supposed to make overtures of peace and accommodation to the plaintiff. Who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangered if he now deserted it without licence, he therefore applied to the court for

leave to make the matter up. This leave was readily granted, but for it there was also another fine due to the king, called the *king's silver*, or sometimes the *post fine*, with respect to the *primer fine* before mentioned.

Next came the *concord*, or agreement itself, which was an acknowledgment from the defendants that the lands in question were the right of the plaintiff. And from this recognition of right, the party levying the fine was called the *cognizor*, and he to whom it was levied, the *cognizee*. If there were any feme-covert among the cognizors, she was privately examined whether she did it willingly and freely, or by compulsion of her husband. By these acts all the essential parts of a fine were completed; and, if the cognizor died the next moment, still the fine might be carried on in all its remaining parts; of which the next was the *note* of the fine, or an abstract of the concord; naming the parties, the parcels of land, and the agreement, which was duly enrolled in the proper office; after which came the last part, or *foot* of the fine, or conclusion of it; which recited the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there were indentures engrossed and delivered to the cognizor and the cognizee; usually beginning thus, "*hæc est finalis concordia*, this is the final agreement," and then reciting the whole proceeding at length. And thus the fine was completely levied at common law.

Various statutes regulated the mode in which these proceedings were to be taken, and especially provided for the fine being openly read and proclaimed in court sixteen times, and for a list of all fines levied being duly published. For the *effect* of a fine duly levied was that the right of all strangers was barred, unless they made claim within *five* years after the proclamations made. Feme-coverts, infants, prisoners, persons beyond the seas, and such as were not of whole mind, had five years allowed to them and their heirs, after the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind.

The proceeding by *common recovery* was invented by the ecclesiastics to elude the statutes of mortmain; and afterwards encouraged by the courts of law, in order to bar not only estates-tail, but also remainders and reversions expectant there-

on. It was an action, either actual or fictitious; and in it the lands were *recovered* against the tenant of the freehold; which recovery, being a supposed adjudication of the right, bound all persons, and vested an absolute fee-simple in the plaintiff. Thus, supposing David Edwards to be tenant of the freehold, and desirous to suffer a common recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to Francis Golding: to effect this, Golding brought an action against him for the lands, alleging that Edwards, here called the tenant, had no legal title to them; but that he came into possession after one Hugh Hunt had turned the plaintiff out. Hereupon the tenant appeared, and called upon one Jacob Morland, who was supposed, at the original purchase, to have warranted the title to the tenant; and thereupon he prayed, that Morland might be called in to defend the title which he had so warranted. This was called the *voucher*, *vocatio*, or calling of Jacob Morland to warranty; and Morland was called the *vouchee*. Upon this, Morland appeared, and defended. Whereupon Golding, the plaintiff, desired leave of the court to *imparl*, or confer with the vouchee in private, which was allowed him. And soon afterwards Golding returned to court, but Morland made default. Whereupon judgment was given for the plaintiff, Golding, now called the recoverer, to recover the lands in question against the tenant, Edwards, who was now the recoveree: and Edwards had judgment to recover of Morland lands of equal value, in recompense for the lands so warranted by him, and now lost by his default. This was called the recompense, or *recovery in value*. But, Morland having no lands of his own, being usually the crier of the court, who, from being frequently thus vouched, was called the *common vouchee*, it is plain that Edwards had only a nominal recompense for the lands so recovered against him by Golding; which lands were now absolutely vested in the said recoverer by judgment of law, and seisin thereof was delivered by the sheriff of the county. So that this collusive recovery operated merely in the nature of a conveyance in fee-simple, from Edwards, the tenant-in-tail, to Golding, the purchaser.

The supposed recompense in value was the reason why the issue in tail and remainder were barred by a recovery. For, if the recoveree had obtained a recompense in lands from the

common vouchee, which there was a possibility in contemplation of law, though no probability of his so doing, these lands would have supplied the place of those so recovered from him by collusion, and would have descended to the issue in tail and in remainder; who thus sustained no actual loss by the proceedings of the tenant-in-tail; who by this fictitious proceeding might convey the lands held in tail to the recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions.

To such awkward shifts were our ancestors obliged to have recourse, in order to get the better of that stubborn statute *De Donis*. The design, for which these contrivances were set on foot, was certainly laudable, the unriveting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth. But, while we applaud the end, we cannot admire the means; and many expedients were accordingly suggested to get rid of these empty forms; the most obvious remedy being to vest in every tenant-in-tail of full age the same absolute fee-simple at once, which he might obtain whenever he pleased, by the collusive fiction of a common recovery. But fines and recoveries continued nevertheless to flourish in unabated exuberance until the reign of William IV.; when the Fines and Recoveries Act was passed; which enables every actual tenant-in-tail to dispose of the lands entailed, either for a fee-simple absolute or any less estate, as against all persons claiming either under the entail, or in remainder, or reversion, including the crown, by a simple *disentailing deed*; the exercise of the power thus given being subject only to certain necessary restrictions, for the preservation of existing interests. The explanation of this being matter more for the practising conveyancer than for the student, need not be entered into here except on one point; viz.: the passing of the estates and interests of married women, which could not, on account of the incapacity arising from coverture, have been otherwise effectually bound. The statute enables every married woman effectually to dispose of any estate; but her husband must concur in the deed; and it must be acknowledged by her before a judge, or before commissioners appointed for the purpose;

on which occasion she is examined, apart from her husband, as to her knowledge of the deed, and whether she voluntarily and freely consents to it, a ceremony which was used when a married woman was cognizor in a fine; and the object of which is too obvious to call for comment.

4. Another kind of assurances which may be classed among those by *matter of record*, are the orders of the High Court; by which property may be transferred from one individual to another; such, as the orders vesting property in trustees, substituted for others who have become incapacitated, as by lunacy. The same principle applies in bankruptcy, the real property of the bankrupt now vesting at once in the trustee by virtue of his appointment only.

The awards of the Inclosure commissioners, and commutations of tithes by the Tithe commissioners, or of manorial rights by the Copyhold commissioners, may also be classed among assurances by matter of record. The proceedings do not depend on the act and consent of the parties themselves, but must be ratified by the commissioners; documents sealed with whose common seal are receivable in evidence without further proof, and are also conclusive as to every formality required for their validity, having been duly observed.

5. Under this head also may be placed the short conveyances in a statutory form, used to transfer property by an entry merely on the Land Registry, which thus exhibits a species of record of the transmissions of the property.

CHAPTER XIX.

OF ALIENATION BY SPECIAL CUSTOM.

ALIENATION by special custom is confined to copyhold lands, and such customary estates as are holden in ancient demense, or in manors of a similar nature; which were originally no more than tenancies in villenage, and never alienable by deed; for, as that might tend to defeat the lord of his seigniory, it

is therefore a forfeiture of a copyhold. Nor are they transferable by matter of record; but only in the court-baron of the lord, and by a proceeding called *surrender* and *admittance*.

Surrender, *sursum redditio*, is the yielding up of the estate by the tenant into the hands of the lord, for such purposes as in the surrender are expressed. As, to the use of A and his heirs; to the use of his own will; and the like. In most manors, the tenant comes to the steward, or else to two customary tenants of the same manor, provided there be a custom to warrant it; and there, by delivering up a rod, a glove, or other symbol, as the custom directs, resigns into the hands of the lord, by the hands and acceptance of his said steward, or of the said two tenants, all his interest and title to the estate; in trust to be again granted out by the lord, to such persons and for such uses as are named in the surrender and the custom of the manor will warrant. If the surrender be made out of court, then, at the next or some subsequent court, the jury or homage present and find it upon their oaths; which presentment is an information to the lord or his steward of what has been transacted out of court. Immediately upon such surrender, in court, or upon presentment of a surrender made out of court, the lord by his steward grants the same land again to *cestui que use*, who is sometimes called the surrenderee, to hold by the ancient rents and customary services; and thereupon admits him tenant to the copyhold, according to the form and effect of the surrender which must be exactly pursued. And this is done by delivering up to the new tenant the rod, or glove, or the like, in the name, and as the symbol, of corporal seisin of the lands and tenements. Upon which *admittance* he pays a fine to the lord according to the custom of the manor, and takes the oath of fealty.

In this manner of transferring copyhold estates, we may plainly trace the feudal institutions. The fief is inalienable without the lord's consent. For this purpose it is surrendered into his hands. Custom, and the law, which favours liberty, now gives the tenant a right to name his successor. Yet, even to this day, the new tenant cannot be admitted but by composition with the lord, and paying him a fine by way of acknowledgment for the licence of alienation. Add to this the investiture, by delivering the symbol of seisin in presence of

the other tenants in open court; and, to crown the whole, the oath of fealty, the bond of feudal subjection.

This method of conveyance is so essential to the nature of a copyhold, that it cannot be transferred by any other assurance. No feoffment or grant has any operation thereupon. Formerly, indeed, if a man would devise a copyhold he must have surrendered it to the use of his will; and therein he must have declared his intentions, and named a devisee, who would then be entitled to admission. But wills are now by statute as effectual without a previous surrender as they would have been with one. And the lord cannot refuse to admit when a surrender is made; the surrender and admittance being now merely forms to complete the investiture; and by 4 & 5 Vict., c. 35, *actual* presentment is not necessary, and admittance may be made at any time or place without holding any court for the purpose.

CHAPTER XX.

OF ALIENATION BY DEVISE.

THE last method of conveying real property is by *devise*, or disposition contained in a man's last will.

It seems sufficiently clear that, before the Conquest, lands were devisable by will. But, upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feudal doctrine of non-alienation without the consent of the lord. The ancient Athenian law directed that the estate of the deceased should descend to his children; or, on failure of descendants, to the collaterals; which kept up an equality, and prevented the accumulation of estates. When Solon made a slight alteration, by permitting testators, on failure of issue, to dispose of their lands by testament, this produced an excess of wealth in some, and of poverty in others; which led to popular dissensions; and these in due course to tyranny, and the extinction of liberty; quickly followed by a subversion of the state. It would seem hard, however, on account of some abuses, to debar the owner of lands from distributing

them after his death. And this power, if prudently managed, has with us a peculiar propriety; by preventing the very evil which resulted from Solon's institution, the too great accumulation of property: which is the natural consequence of our doctrine of succession by primogeniture, to which the Athenians were strangers. Of this accumulation the ill effects were severely felt even in the feudal times: but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

Be this as it may, by the law of England after the Conquest, no estate, greater than for term of years, could be disposed of by testament; except only in Kent, and in some ancient burghs, and a few particular manors, where their Saxon immunities subsisted. And though the feudal restraint on alienation by deed vanished very early, yet this on wills continued for some centuries after; from an apprehension of infirmity and imposition on the testator *in extremis*, which made such devises suspicious.

But when ecclesiastical ingenuity had invented the doctrine of uses, these began to be devised, and the devisee of the use could in chancery compel its execution. But when the statute of uses had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable: which might have occasioned a great revolution in the law, had not the *statute of wills* been made, 32 Hen. VIII. c. 1, explained by 34 Hen. VIII. c. 5, which enacted, that all persons seised in fee-simple might by will in writing devise to any other *person*, except to bodies corporate, two-thirds of their lands, held in chivalry, and the whole of those held in socage: which, on the alteration of tenures under Charles II., amounted to the whole of their landed property, except their copyholds.

With regard to devises in general, experience soon showed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this

act by the courts of law, that bare notes in the handwriting of another person were allowed to be good wills within the statute. To remedy which, the *statute of frauds and perjuries*, 29 Car. II. c. 3, directed, that all devises of lands and tenements should not only be in writing, but be signed by the testator, or some other person in his presence, and by his express direction; and be subscribed, in his presence, by three or four credible witnesses; a number which, by 1 Vict. c. 26, has been reduced to two. A similar solemnity is requisite for revoking a devise; though the same may be also revoked by the burning, tearing, or destroying thereof by the devisor by his direction or in his presence and with the intention on his part to effect such revocation; as likewise by the marriage of the testator.

In the construction of the statute of Charles, it was adjudged that the testator's name, written with his own hand, at the beginning of his will, as, "*I John Mills do make this my last will and testament*," was a sufficient signing, without any name at the bottom; though the other were the safer way. It was also determined, that though the witnesses must all have seen the testator sign, or at least acknowledge the signing, yet they might do it at different times. But they must all have subscribed their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument. But the testator's signature, made by himself or some one in his presence must now be at the *foot or end* of the will, and must be made or acknowledged in the presence of two witnesses, present at the same time, who must attest and subscribe the will in the presence of the testator.

Many questions were raised under the old law, as to the *competency* of the witnesses to a will. In one case, the judges were extremely strict in regard to the competency of the witnesses; for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination, however, alarmed many purchasers and creditors, and threatened to shake

most of the titles in the kingdom that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues, and these are the persons most likely to be present in the testator's last illness, and if, in such case, the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6, which restored the competency and credit of such *legatees*; by declaring void all legacies given to witnesses, thereby removing all possibility of their interest affecting their testimony. The same statute established the competency of *creditors*; by directing their testimony to be admitted, but leaving their credit to be considered by the court before whom such will should be contested.

The statute 1 Vict. c. 26, having repealed the act of Geo. II., re-enacts and extends some of its provisions. It avoids bequests, not only to an attesting witness, but to the husband or wife of such witness; and expressly provides that the incompetency of a witness to prove the execution of a will, shall not render it invalid. It further enacts that any *creditor*, or the wife or husband of any creditor, whose debt is charged upon the property devised or bequeathed by the will, may be admitted to prove the execution thereof as an attesting witness; and that an *executor* of a will may be admitted to prove its execution, a point on which some doubts had previously existed.

Another inconvenience was, soon after its introduction, found to attend the method of conveyance by devise; in that creditors by specialties which affected the *heir*, provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the *devisee* of their debtor. This was remedied by 3 & 4 W. & M. c. 14, since repealed; but the payment of simple contract as well as specialty debts, out of the real estate of the deceased debtor, has been provided for by other statutes.

A will of lands, made under the earlier statutes, was considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land should

be subject. And upon this notion was founded a distinction between such devises and testaments of personal chattels; the latter operating upon whatever the testator died possessed of, the former only upon such real estates as were his at the time of publishing his will. No after-purchased lands therefore passed under such devise, unless, subsequent to the purchase or contract, the devisor re-published his will; but the 1 Vict. c. 26, has abolished this distinction; and all property of whatever kind, of or to which a man is possessed or entitled, *at the time of his death*, passes by his will; as the instrument now takes effect as if executed immediately before the testator's death, unless a contrary intention appears by the document itself.

This concludes what fell to be said on the *title* to things real; a subject of extensive use, and of as extensive variety. The many alterations which the doctrine of real property has undergone from the Conquest to the present time; and the multiplicity of acts of parliament which have altered the common law, have made the study of this branch of our national jurisprudence a little perplexed and intricate. Such parts of it only have accordingly been selected as were of the most general use, where the principles were the most simple, the reasons of them the most obvious, and the practice the least embarrassed. And "albeit "the student shall not at any one day, do what he can, reach to "the full meaning of all that is here laid down, yet let him no "way discourage himself, but proceed; for on some other day, in "some other place," or perhaps on a second perusal of the same, "his doubts will be probably removed."

CHAPTER XXI.

OF THINGS PERSONAL.

Among things *personal* are included all sorts of things *movable*, which may attend a man's person wherever he goes; and, therefore, being only the objects of the law while they remain within its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to, as things that are in their nature more permanent and *immovable*, as

lands and houses, and the profits issuing thereout. These, being constantly under the protection of the law, were the principal favourites of our first legislators: who took all imaginable care in ascertaining the rights, and directing the disposition, of such property as they imagined to be lasting; but entertained a very low opinion of all personal estate. The amount of it, indeed, was comparatively trifling during the feudal ages. Hence it was, that a tax of the *fifteenth*, *tenth*, or sometimes a much larger proportion, of all the movables of the subject, was frequently laid without scruple, though now it would alarm our merchants and stock-holders. And hence, likewise, may be derived the frequent forfeitures, inflicted by the common law, of *all* a man's goods and chattels.

Our ancient law-books do not therefore condescend to regulate this species of property. There is not a chapter in Britton or the Mirror that can fairly be referred to this head; and the little that is to be found in Glanvil, Bracton, and Fleta, seems principally borrowed from the civilians. But since the extension of commerce, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light quite equal to his realty: and have adopted a less technical mode of considering the one than the other; frequently drawn from what they found already established by the Roman law, but principally from reason and convenience, adapted to the circumstances of the times.

But things personal do not only include things *movable*, but also something more: the whole of which is comprehended under the general name of *chattels*, from the Latin *catalla*; which primarily signified only beasts of husbandry, or *cattle*, but in its secondary sense was applied to all movables in general. In the *Grand Coustumier* of Normandy, a *chattel* is described as a mere movable, but at the same time it is set in opposition to a feud: so that, not only goods, but whatever was not a feud, were accounted chattels. And it is in this latter more extended sense that our law adopts it; the idea of goods, or movables only, being not sufficiently comprehensive to take in everything that the law considers a chattel interest.

Chattels, therefore, are of two kinds, chattels *real*, and chattels *personal*.

1. Chattels *real* are such as savour of the realty; as terms for

years of land, the next presentation to a church, an estate by *elegit*, or the like; and are so called, as being interests issuing out of real estates; of which they have one quality, viz., immobility, which denominates them *real*; but want the other, duration: and this want it is that constitutes them *chattels*. The utmost period for which they can last is fixed, so that they are not equal in law to the lowest estate of freehold; a lease for a thousand years is not equal to a lease for another's life.

2. Chattels *personal* are, properly speaking, things *movable*; which may be annexed to or attendant on the person of the owner. Such are animals, household stuff, money, and everything that can be transferred from place to place.

Chattel interests, thus distributed, will now be considered: first, in regard to the nature of the *property* to which they are liable; and, secondly, the *title* to that property, or how it may be lost and acquired.

CHAPTER XXII.

OF PROPERTY IN THINGS PERSONAL.

PROPERTY, in chattels personal, may be either in *possession*; which is where a man has not only the right to enjoy, but has the actual enjoyment of the thing: or else it is in *action*; where a man has only a bare right, without any occupation or enjoyment. And of these the former, or property in *possession*, is divided into two sorts, an *absolute* and a *qualified* property.

I. Property in *possession absolute* is where a man has, solely and exclusively, the right, and also the occupation, of 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, and the like; such also may be all *vegetable* productions, as the fruit of a plant, when severed from the body of it; or the whole plant itself, when severed from the ground.

But with regard to *animals*, there is a difference made with respect to their several classes. They are distinguished into

such as are *domitæ*, and such as are *ferœ naturæ:* some being of a *tame* and others of a *wild* disposition. In such as are of a nature tame and domestic, as horses, kine, sheep, poultry, and the like, a man may have as absolute a property as in any object whatever.

Other animals, that are not of a tame and domestic nature, are either not the objects of property at all, or else fall under our other division, namely, that of *qualified, limited,* or *special* property.

One may have a qualified, but not an absolute property in all creatures that are *ferœ naturæ,* either *per industriam, propter impotentiam,* or *propter privilegium.*

1. A qualified property may subsist in animals *ferœ naturæ, per industriam hominis:* by a man's *reclaiming* and making them tame by art, industry, and education; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty. Such are deer in a park, hares or rabbits in an enclosed warren, doves in a dovehouse, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man, than while they continue in his keeping or actual possession: for if at any time they regain their natural liberty, his property instantly ceases; unless they have *animam revertendi,* which is only to be known by their usual custom of returning.

2. A qualified property may also subsist with relation to animals *ferœ naturæ, ratione impotentiæ,* on account of their own inability. As when hawks, herons, or other birds build in my trees, or rabbits or other creatures make their burrows in my land, and have young ones there; I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires: but, till then, it is in some cases a trespass, and in others a misdemeanor for a stranger to take them away.

3. A man may, lastly, have a qualified property in animals *ferœ naturæ, propter privilegium:* that is, he may have the privilege of hunting, taking, and killing game, in exclusion of other persons.

This qualified property extends only to animals *ferœ naturæ,*

when either reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can obviously have no absolute permanent property in these, as he may in the earth and land. Yet if a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's ancient windows, corrupts the air of his house or garden, fouls his water, or if he diverts an ancient water-course that used to run to the other's mill; the law will protect the party injured in his possession. But the property in them ceases the instant they are out of possession: for then they become again common, and every man has an equal right to appropriate them to his own use.

These kinds of qualification in property depend upon the peculiar circumstances of the subject-matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. As in case of *bailment*, or delivery of goods to another person for a particular use; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering or him to whom it is delivered: for the bailor has only the right, and not the immediate possession; the bailee has the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee on account of his immediate possession; the bailor, because the possession of the bailee is, mediately, his possession also. And so in other cases, as of goods pawned or distrained or taken in execution. But a servant, who has the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, has not any property or possession, either absolute or qualified, but only a mere charge or oversight.

Thus much of property in *possession*. Property is said to be in *action*, where a man has not the occupation, but merely a bare right to occupy the thing in question; which right may be enforced by an action; whence the thing so recoverable is called a

thing, or *chose in action*. Thus, money due on a bond is a *chose* in action; for a property in the debt vests at the time mentioned in the obligation, but there is no possession till recovered by law. If a man promises to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a *chose* in action; for though a right to some recompense vests in me at the time of the damage done, yet what such recompense shall be, can only be ascertained by action; and possession can only be given me by judgment and execution. In the former case, the property, or right of action, depends upon an *express* contract or obligation to pay a stated sum: in the latter upon an *implied* contract, that, if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant.

Besides actions thus arising upon contracts express or implied, there are also those which arise from some wrong or injury done by one man to another, *ex delicto*. For any such injury the law awards a compensation to the party aggrieved; as for an assault on, or wrongful imprisonment of, the person, or for an injury by libel or slander to reputation. So for a trespass on the lands, or for carrying away the goods of another, the wrongdoer must compensate the party injured, if he demand it in an action. To such compensation the party injured is entitled the instant he receives the injury; and such damages therefore constitute a thing to be recovered by suit, a *chose in action*. And the suit when brought is therefore said to be an action of *tort*.

There are thus two sources of property in action, namely, injuries arising from non-fulfilment of contracts expressed or implied, that is, *ex contractu* or *quasi ex contractu*; and injuries to the person or to property arising from an infringement of the natural or relative rights of the individual wronged, that is, *ex delicto* or *quasi ex delicto*.

Upon all contracts or promises, either express or implied, the law gives an action to the party injured, in case of non-performance, to compel the wrongdoer to do justice to the party with whom he has contracted; and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained. But while the thing, or its equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a *chose* in action;

being a thing rather in *potentiâ* than in *esse:* though the owner may have as absolute a property in, and be as well entitled to, such things in action, as to things in possession. Just as for all infringements of the natural or relative rights of another, the law gives redress by action against the wrongdoer by an action to recover the damage sustained; this redress, until recovered by action, constituting a *chose in action*, precisely as do the damages sustained by a breach of contract.

Finally, things personal may belong to their owners, not only in severalty, but also in joint-tenancy, and in common. They cannot indeed be vested in co-parcenary; because they do not descend from the ancestor to the heir, which is necessary to constitute co-parceners. But if a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants thereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in real estates. And, in like manner, if the jointure be severed, as, by either of them selling his share, the vendee and the remaining part owner shall be tenants in common, without any *jus accrescendi* or survivorship.

But the stock on a farm, though occupied jointly, and also the stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property, and there shall be no survivorship therein. For here, "the wares or merchandises which they have as joint-tenants or "partners, shall not survive, but shall go to the executors of "him that deceaseth, and this *per legem mercatoriam*, which is "part of the laws of this realm for the advancement and con-"tinuance of commerce and trade."

CHAPTER XXIII.

OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

THE *title* to things personal, or the means of *acquiring*, and of *losing*, such property as may be had therein, is next to be considered. And the methods of acquisition or loss are, 1. By occupancy. 2. By prerogative. 3. By custom. 4. By succession.

5. By marriage. 6. By judgment. 7. By gift or grant. 8. By contract. 9. By bankruptcy. 10. By testament. 11. By administration.

A property in chattels may be acquired by *occupancy*: the original method of acquiring any property at all, but which has since been restrained by the laws of society, in order to maintain peace and harmony among mankind. For this purpose, gifts, contracts, testaments, and administrations have been introduced; in order to transfer and continue that property in things personal, which has once been acquired by the owner. And, where such things are found without any other owner, they for the most part belong to the sovereign by prerogative; except in some few instances, wherein the original right of occupancy is still permitted to subsist.

1. Thus, firstly, anybody may seize to his own use such goods as belong to an alien enemy. But this must be restrained to such captors as are authorized by the state, and to such goods as are brought into this country by an alien enemy, after a declaration of war, without a safe-conduct or passport. For where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized. If an enemy take the goods of an English merchant, which are afterwards retaken by another subject, the former owner lost his property therein, and it was vested in the second taker, unless they were retaken the same day, and the owner before sunset put in his claim of property. This was the law of nations, as understood by Grotius, even with regard to captures made at sea, which were held to be the property of the captors after a possession of twenty-four hours. Modern authorities, however, required that, before the property could be changed, the goods must have been brought into port, and continued a night in a place of safe custody, so that all hopes of recovering them were lost. And now, in order to vest the property in the captors, a sentence of condemnation is deemed necessary.

2. Secondly, whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such,

return into the common stock, and belong, as in a state of nature, to the first occupant, unless they fall within the description of waifs, wreck, or hidden treasures; which are vested in the crown.

3. Again, light, air, and water, can only be appropriated by occupancy. If I have an ancient window, overlooking my neighbour's ground, he may not erect any blind to obstruct the light: but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall: for there the first occupancy is rather in him than in me. So, if my neighbour makes a tanyard, which renders less salubrious the air of my house, the law will furnish me with a remedy; but, if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue.

4. With regard to animals *ferœ naturœ*, when a man has seized them, they become while living his *qualified*, or, if dead, his *absolute* property: so that to steal them is sometimes a criminal offence, sometimes only a civil injury. The restrictions upon this right, relate to royal fish, and *game*. But the animals not so reserved, are still liable to be appropriated by any one upon their own territories; in the same manner as they might have taken game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly.

5. To occupancy also must be referred the personal property in corn growing on the ground, or other *emblements*, by a *possessor* of the land who has sown it; which emblements are distinct from the real estate in the land, and subject to many of the incidents attending personal chattels.

6. Property from *accession* is also grounded on occupancy. By the Roman law, if any corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, or the conversion of wood or metal into vessels and utensils, the original owner was entitled to the property under such its state of improvement; but if the thing itself, by such operation, was changed into a

different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted. These doctrines are adopted by Bracton, and have since been confirmed by the courts.

7. But in the case of *confusion* of goods, where those of two persons are so intermixed, that the several portions can be no longer distinguished, our law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, in both laws the proprietors have an interest in common, in proportion to their shares. But if one wilfully intermixes his money, corn, or hay, with that of another man, without his knowledge, or casts gold in like manner into another's melting-pot or crucible, the civil law, though it gives the property of the whole to him who has not interfered, yet allows a satisfaction to the other for what he has so improvidently lost. Our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded without his own consent.

8. There is another species of property, which, being grounded on labour and invention, is properly reducible to the head of occupancy; viz. the right which an author has in his own original compositions: so that no other person, without his leave, may publish or make profit of the copies. The law on this subject is entirely statutory. The *copyright* in books is for *forty-two* years, or for the life of the author and seven years following, whichever may be the longer; and facilities are given for its preservation, by the establishment of a public register of copyrights, at the Hall of the Stationers' Company in London. The copyright of engravings and of sculpture is provided for by other statutes; while conventions for the mutual protection of such copyrights have been entered into with France, Prussia, Belgium, Spain, and other powers. Copyright has also been granted to *designs* for articles of manufacture for *nine months, a year, or three years*, according to the nature of the manufacture; provided they are registered in the mode provided by the different statutes; and *trade marks* are also afforded special protection by means of a registry.

Our early sovereigns assumed the right of granting to favoured subjects the monopoly, or sole right, of selling and dealing in particular commodities. This prerogative was carried to a most injurious length in the reign of Elizabeth, and led to the *Statute of Monopolies*, 21 Jac. I. c. 3; which, while declaring the illegality of such grants in general, contained an exception in favour of new and original inventions; and enacted that the declaration against the monopolies should not extend to letters-patent and grants of privilege for the term of fourteen years or under, for the sole working of any manner of new manufactures within the realm, to the true and first inventor thereof, provided such manufactures were not in use by others at the time of granting the letters-patent. Upon this exception, which, to a certain extent, recognizes the prerogative, the modern law of patents for inventions may be considered to rest. It has been the subject of considerable but hitherto unsatisfactory legislation. For experience has shown that no sooner is a patent granted than every species of ingenuity is at once exerted to obtain the advantages of the invention in another way; so that the patentee has usually, from the outset, either to defend his patent from attack, or resort to an endless variety of actions, in order to assert his right against a host of depredators.

9. Ships constitute personal property of very great importance, and subject to very special laws. They have, from time immemorial, passed by *bill of sale*, or grant in writing, and not as in the case of most other chattels, by simple delivery of possession; but the statute law further imposes the necessity of registration, in order to complete this title. Mortgages must in like manner be entered in the register; the priority of entry therein, when there are several mortgagees, and not the date of the mortgages themselves, determining absolutely the priority of right.

CHAPTER XXIV.

OF TITLE BY PREROGATIVE, AND CUSTOM.

II. A PROPERTY in personal chattels may be acquired by the *royal prerogative:* whereby a right may accrue either to the crown itself, or to such as claim under the title of the crown.

Such, firstly, are all *tributes*, *taxes*, and *customs*, whether inherent in the crown, or created by authority of parliament. In these the sovereign 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. And in these several methods of acquiring property by prerogative, there is this peculiar quality, that the crown cannot have a *joint* property with any person in one entire chattel; but where the titles of the crown and a subject concur, the sovereign shall have the whole: in like manner as the crown cannot, either by grant or contract, become a joint-tenant of a chattel real with another person, but by such grant or contract shall become entitled to the whole in severalty.

This doctrine has no place in other instances of title by prerogative, as in the acquisition of property in wreck, in treasure-trove, in waifs, in estrays, in royal fish, in swans, and the like, which are not *transferred* to the sovereign from any former owner, but are originally *inherent* in the crown by law.

There is also prerogative *copyright* in certain books, vested in the crown upon different reasons. As 1. The right of promulgating all acts of state and government; hence the exclusive privilege of printing all *acts of parliament*, *proclamations* and *orders of council*. 2. As head of the church, the right to publish all *liturgies*, and books of *divine service*. 3. The right, by purchase, to the copies of such *law-books*, *grammars*, and other compositions, as were compiled or translated at the expense of the crown; and upon these two last principles, the exclusive right of printing the translation of the *Bible*. Both the Bible and the statutes may however be printed by others than

those deriving right from the crown, provided such editions comprise *bonâ fide* notes; but with this exception, the sole right to print these works is now in the universities of Oxford and Cambridge, and those deriving right from the crown.

Until lately there was another species of prerogative property, that namely in *game*; which, at common law, was vested in the crown alone, and thence derived to such subjects as had received grants of a chase, a park, a free warren, or free fishery. The statute 1 & 2 Will. IV. c. 32, has put this branch of law upon a new footing; the right to kill game upon land being now vested in the owner, or in the occupier thereof, in the absence of a reservation of the right by the landlord. Persons pursuing game are required, besides, under penalties, to take out a yearly certificate; and dealers in it must also obtain a licence.

III. A third method of acquiring property in chattels, is by *custom*: 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. I shall here mention three customary interests only, as these obtain pretty generally; viz., *heriots*, *mortuaries*, and *heir-looms*.

1. Heriots are of two sorts: heriot-*service* and heriot-*custom*. The former is a mere *rent*: the latter depend upon immemorial usage, and are a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land.

The first establishment of compulsory heriots was by the Danes: the laws of Canute prescribing the several *heregeates*, or heriots, which were exacted by the king on the death of divers of his subjects, according to their respective dignities; from the highest *eorl* down to the most inferior *thegn*, or landholder. These consisted in arms, horses, and habiliments of war; which the word itself signifies; and were delivered up to the sovereign on the death of the vassal, who could no longer use them, to be put into other hands for the service and defence of the country. And upon this plan did William the Conqueror fashion his law of reliefs; when he ascertained the precise relief to be taken of every tenant in chivalry, and, contrary to feudal custom and the

usage of his own duchy of Normandy, required arms and implements of war to be paid instead of money.

The Danish heriots being thus transmuted into reliefs, underwent the same vicissitudes as the feudal tenures, and in socage estates do frequently remain to this day in the shape of a double rent, payable at the death of the tenant; the heriots which now continue among us seeming rather to be of Saxon parentage. These are now confined to copyholds, and are the only instance where custom has favoured the lord. For this payment was originally a gratuitous legacy of the tenant; perhaps in acknowledgment of his having been raised a degree above villenage, when all his goods and chattels were at the mercy of the lord; and custom, which has on the one hand confirmed the tenant's interest in exclusion of the lord's will, has on the other hand established this piece of gratitude into a permanent duty. A heriot may also appertain to free land, that is held by service and suit of court; in which case it is most commonly a copyhold enfranchised, whereupon the heriot is still due by custom.

This heriot is sometimes 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; which on the death of the tenant, who was the owner, being ascertained by the option of the lord, becomes vested in him as his property; and is no charge upon the lands, but merely on the chattels. Heriots will, in course of time, cease to be exigible; one of the statutes, for the enfranchisement of copyholds, having at last enabled either lord or tenant to compel the extinguishment of this ancient feudal burden.

2. Mortuaries are a sort of ecclesiastical heriots, being a customary gift due to the minister in many parishes on the death of a parishioner. They seem originally to have been a voluntary bequest to the church; being intended, as a kind of amends to the clergy for the personal tithes which the laity in their lifetime might have forgotten to pay. For this purpose, *after* the lord's heriot was taken, the second-best chattel was reserved to the church as a mortuary, and is, therefore, in the laws of Canute called soul-scot. It was anciently usual to bring the mortuary to church along with the corpse when it came to be buried; and

thence it is sometimes called a *corse-present:* a term which bespeaks it to have been a voluntary donation. This custom varies in different places. In Wales a corse-present was due upon the death of every clergyman to the bishop; till abolished by 12 Ann., st. 2, c. 6. And in the archdeaconry of Chester, a custom prevailed, that the bishop, who is also archdeacon, should have, at the death of every clergyman dying therein, his best horse or mare, bridle, saddle and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring. By 28 Geo. II. c. 6, this mortuary was also put an end to. The claim of the sovereign to many goods, on the death of a prelate, seems to be of the same nature; the crown, according to Coke, being entitled to the bishop's best horse or palfrey; his cloak, or gown, and tippet; his cup and cover; his basin and ewer; his gold ring; and lastly, his *muta canum,* his mew or kennel of hounds. *Mortuaries,* which are not to be confounded with *burial fees,* are now, however, almost unknown.

3. Heir-looms are such goods and personal chattels, as, contrary to the nature of chattels, go by special custom to the heir and not to the executor. The termination, *loom,* is of Saxon origin, and signifies a limb or member; so that an heir-loom is nothing else but a limb or member of the inheritance. Deer in a real park, fishes in a pond, doves in a dove-house, &c., though in themselves personal chattels, are so annexed to the inheritance, that they accompany the land whether by descent or purchase. For this reason the jewels of the crown are held to be heir-looms. Charters, court-rolls, and other evidences of the land, together with the chests in which they are contained, pass to the heir, as heir-looms, and not to the executor. And whatever is affixed to the freehold, and cannot be severed without damage, is a part of the inheritance, and passes to the heir; such as chimney-pieces, pumps, old fixed or dormant tables, benches, and the like.

Other personal chattels there are, which also descend to the heir as heir-looms, such as a monument or tombstone, in a church, or the coat-armour of his ancestor there hung up, with the pennons and other ensigns of honour, suited to his degree. In this case, albeit the freehold of the church is in the parson,

and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but if he do so is liable to an action by the heir.

Again, heir-looms, though they be chattels, cannot be devised away from the heir by will; but such a devise is void, even by a tenant in fee-simple. For, though the owner might, during his life, have sold or disposed of them, as he might of the timber of the estate, yet, they being at his death instantly vested in the heir, the devise, which is subsequent and not to take effect till *after* his death, is postponed to the custom, whereby they have already descended.

CHAPTER XXV.

OF TITLE BY SUCCESSION, MARRIAGE, AND JUDGMENT.

IV. The fourth method of gaining a property in chattels, either personal or real, is by *succession:* which is, in strictness of law, only applicable to corporations aggregate, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding another, acquire a property in all the chattels of the corporation. The reason is, that in law a corporation never dies; and, therefore, the predecessors, who lived a century ago, and their successors now in being, are the same body corporate. So that a gift to such a corporation, without naming their successors, vests an absolute property in them so long as the corporation subsists.

But, with regard to sole corporations, a distinction must be made. For, if such sole corporation be the representative of a number of persons; as the master of an hospital, or the dean of an ancient cathedral; such sole corporations have, in this respect, the same powers as corporations aggregate to take personal chattels in succession. And, therefore, a bond to such a master, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the society, of which he is the representative. Whereas, in the case of sole corporations, which represent themselves, as bishops, parsons, and the like, no chattel interest can regularly go in

succession; and, therefore, if a lease for years be made to the Bishop of Oxford and his successors, his executors or administrators, and not his successors, shall have it. For, the word *successors*, when applied to a person in his political, is equivalent to the word *heirs* in his natural, capacity; and as such a lease for years, if made to John and his heirs, would not vest in his heirs but in his executors; so if it be made to John Bishop of Oxford and his successors, who are the heirs of his body politic, it shall still vest in his executors and not in such his successors.

Yet, to this rule there are two exceptions. One in the case of the crown, in whom a chattel may vest by a grant made to a preceding sovereign 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. Thus, the Chamberlain of London, who is a corporation sole, may, by the custom of London, take *bonds* and *recognizances* to himself and his successors, for the benefit of the orphan's fund: but it will not follow from thence, that he has a capacity to take a *lease for years* to himself and his successors for the same purpose; for the custom extends not to that: nor that he may take a *bond* to himself and his successors, for any other purpose than the benefit of the orphan's fund; for that also is not warranted by the custom.

V. A fifth method of acquiring property in chattels is by *marriage;* whereby those chattels which belonged formerly to the wife, are vested in the husband. In a real estate, he only gains a title to the rents and profits during coverture: for that, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless, by the birth of a child, he becomes tenant for life by the courtesy. But, in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them: for, unless he *reduces them to possession*, by exercising some act of ownership, no property vests in him, but they remain to the wife, or to her representatives, after the coverture is determined.

There is, therefore, a difference in the acquisition of this species of property by the husband, according to the subject-matter, viz., whether it be a chattel *real*, or a chattel *personal;*

and, of chattels personal, whether it be in *possession* or in *action* only. A *chattel real* vests in the husband, not absolutely, but *sub modo*. As, in case of a lease for years, the husband shall receive all the rents, and may, if he pleases, sell, surrender, or dispose of it during the coverture: it is liable to execution for his debts; and, if he survives his wife, it is to all intents and purposes his own. Yet, if he has made no disposition thereof in his lifetime, and dies before his wife, he cannot dispose of it by will; for, the husband having made no alteration in the property during his life, it never was transferred from the wife; but after his death she shall remain in her ancient possession, and it shall not go to his executors. So it is also of chattels personal, or *choses in action*; as debts upon bond, contracts, and the like: these the husband may have if he pleases; that is, if he *reduces them into possession* by receiving or recovering them at law. For the mere *intention* on the part of the husband to reduce the wife's choses in action is not sufficient. Thus an agreement to sell a fund to which the wife is entitled is not a reduction into possession; the acts to effect this must be such as to divest the wife's property, and make that of the husband absolute; such as a judgment recovered in an action by him alone, or receipt of the money, or the decree of a court for payment to him or for his use. If he dies before he has reduced them into possession, so that, at his death, they still continue *choses in action*, they survive to the wife; for the husband never exerted the power he had of obtaining an exclusive property in them. Thus, in both these species of property the law is the same, in case the wife survives the husband. But in case the husband survives the wife, the law is very different with respect to *chattels real* and *choses in action*: for he shall have the *chattel real* by survivorship, but not the *chose in action*. And the reason is this: that the husband is in possession of the *chattel real* during the coverture, by a kind of joint-tenancy with his wife; which the law will not wrest out of his hands. But a *chose in action* shall not survive to him, because he never was in possession of it at all, during the coverture. Yet he still will be entitled to be her administrator; and may, in that capacity, recover such things in action as became due to her before or during the coverture. With regard to a wife's *reversionary choses in action*, these cannot from their nature be reduced into possession; and

consequently could not, until recently, be assigned or affected by the husband even with the concurrence of the wife; but this rule of law has now been altered.

As to *chattels personal in possession*, which the wife has in her own right, as ready money, jewels, household goods and the like, the husband has therein an absolute property, by the marriage, not only potentially, but in fact, which never can again revest in the wife or her representatives. But in one instance the wife may acquire a property in some of her husband's goods; which shall remain to her after his death, and not go to the executors; viz., her *paraphernalia*; a term borrowed from the civil law, to signify the apparel and ornaments of the wife, suitable to her rank and degree. Thus the jewels of a peeress, usually worn by her, have been held to be *paraphernalia*. Neither can the husband devise by his will such ornaments and jewels of his wife; though during his life he has the power to sell them or give them away. But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors where there is a deficiency of assets. And her necessary apparel is protected even against the claim of creditors.

VI. A judgment in a court of justice, is frequently the means of vesting chattel interests in the prevailing party. 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. Such as the penalty of 500*l.* which those persons are liable to forfeit, that, being in particular offices or situations in life, neglect to take the oaths to the government: which penalty is given to him or them that will sue for the same.

2. Another species of property that is acquired and lost by action and judgment, is that of *damages*. Here the plaintiff has no certain demand till after the damages have been assessed, and judgment is given; whether they amount to twenty pounds or twenty shillings; whereupon he instantly acquires, and the defendant loses at the same time, a right to that specific sum.

3. Hither also may be referred, upon the same principle, all

title to *costs*, which are generally arbitrary, and rest entirely on the determination of the court. These, when awarded by the court to either party, may be looked upon as an acquisition made by the judgment of law.

CHAPTER XXVI.

OF TITLE BY GIFT, GRANT, AND CONTRACT.

VII. GIFTS or *grants*, the seventh method of transferring personal property, are thus to be distinguished from each other, that *gifts* are gratuitous, *grants* upon some consideration or equivalent. And they may be divided, with regard to their subject-matter, into gifts or grants of chattels *real*, and gifts or grants of chattels *personal*. The former head includes all leases for years of land, assignments, and surrenders of those leases; and all other methods of conveying an estate less than freehold. Yet these very seldom carry the outward appearance of a gift, being usually expressed to be made in consideration of blood or natural affection, or of five or ten shillings nominally paid to the grantor; and in case of leases, always reserving a rent, though it be but a peppercorn; any of which considerations will, in law, convert the gift, if executed, into a grant; if not executed, into a contract.

Grants or gifts of chattels *personal*, may be either in writing, or by word of mouth accompanied by an actual delivery of possession to the donee. But this conveyance, when merely voluntary, is somewhat suspicious, and is usually construed to be fraudulent, if creditors or others become sufferers thereby. Accordingly by 13 Eliz. c. 5, every grant or gift of chattels, with an intent to defraud creditors or others, shall be void as against such persons to whom such fraud would be prejudicial; but, as against the grantor himself, shall stand good and effectual. And by 17 & 18 Vict. c. 36, *bills of sale*, the usual denomination of a grant of chattels personal, must be filed in the proper office within twenty-one days after the making or giving them; otherwise they will, as against creditors, be null and void to all intents and purposes.

VIII. A contract which usually conveys an interest merely in action is thus defined: "an agreement upon sufficient con- "sideration to do or not to do a particular thing."

Firstly. It is an *agreement*, a mutual bargain or convention; and, therefore, there must at least be two contracting parties, of sufficient ability to make a contract; as where A contracts with B to pay him 100*l.*, and thereby transfers a property in such sum to B: which property is, however, not in possession, but in action merely. It could not, therefore, by the strict rule of the common law, be transferred to another person, because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law. But this nicety had long been disregarded in equity before the law was altered; and a *chose in action* may now be assigned and sued for in the name of the assignee.

This contract or agreement may be either express or implied. *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten loads of timber, or to pay a stated price for certain goods. *Implied* are such as justice dictates, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work, the law implies that I undertook, or contracted, to pay him as much as his labour deserves. If I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their value. And there is also one species of implied contracts which runs through and is annexed to all other contracts, conditions, and covenants, viz., that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal.

A contract may also be either *executed*, as if A agrees to change horses with B, and they do it immediately; in which case the possession and the right are transferred together: or it may be *executory*, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract *executed*, which differs in nothing from a grant, conveys a *chose in possession*; a contract *executory* conveys only a *chose in action*.

Secondly. A contract is an agreement upon *sufficient consideration*. The civilians hold, that, in all contracts there must be something given in exchange, something mutual or reciprocal. This thing, which is the price or motive of the contract, we call the consideration: and it must be lawful in itself, or else the contract is void. A *good* consideration is that of blood or natural affection; yet it may be set aside, and the contract avoided when it tends to defraud creditors or other third persons of their just rights. But a contract for *valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached: for the person contracted with has given an equivalent in recompense, and is therefore as much an owner, or a creditor, as any other person.

A consideration is so absolutely necessary to a contract, that a *nudum pactum*, or agreement to do or pay anything on one side, without any compensation on the other, is void; and a man cannot be compelled to perform it. As if one man promises to give another 100*l.*, here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it, in honour or conscience, which municipal laws do not take upon them to decide, certainly our municipal law does not compel the execution of what he had no visible inducement to engage for: its maxim being *ex nudo pacto non oritur actio*.

Thirdly. A contract is an agreement, upon sufficient consideration, *to do or not to do a particular thing;* the most usual being, 1. *Sale* or *exchange*. 2. *Bailment*. 3. *Hiring* and *borrowing*. 4. *Debt*.

1. Sale or *exchange* is a transmutation of property from one man to another, in consideration of some price or recompense in value: for there is no sale without a recompense; there must be *quid pro quo*. If it be a commutation of goods for goods, it is more properly an *exchange;* but, if it be a transferring of goods for money, it is called a *sale:* which is a method of exchange introduced for the convenience of mankind, by establishing a universal medium, which may be exchanged for all sorts of other property; whereas if goods were only to be

exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome.

If a man agrees with another for goods at a certain price, he may not carry them away before he has paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And therefore, if the vendor says the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases. But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of *earnest*, the property of the goods is absolutely bound by it: and the vendee may recover the goods by action, as well as the vendor may the price of them. And such regard does the law pay to earnest as an evidence of a contract, that, by the *Statute of Frauds*, 29 Car. II. c. 3, no contract for the sale of goods, to the value of 10*l.* or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of earnest on his part; or unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing of the bargain be made and signed by the party, or his agent, who is to be charged with the contract. And this enactment is, by *Lord Tenterden's Act*, 9 Geo. IV. c. 14, extended to all contracts for the sale of goods of the value of 10*l.* sterling, or upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made or provided, or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery. With regard to goods under the value of 10*l.* no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party, or his agent, who is to be charged therewith.

As soon as the bargain is struck, the property of the goods is

transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on. Yet, if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A sells a horse to B for 10*l.* and B pays him earnest, or signs a note in writing of the bargain; and afterwards, before the delivery of the horse or money paid, the horse dies in the vendor's custody; still he is entitled to the money, because by the contract the property was in the vendee.

But in one particular instance, where the act of transfer is not completed, the right of property transferred by the sale to the vendee may be divested by an act of the vendor, this occurring when the vendor exercises that right conferred on him by the Law Merchant, which is termed the right of *stoppage in transitu*. For where the parties deal on credit, that is, when the contract is in fact for the immediate delivery of the goods, but for the future payment of the money, it may sometimes happen that before the delivery has been completed, the vendor may discover that the vendee is insolvent, and that he will consequently be unable to perform his part of the contract, when the time arrives for so doing. And the law, therefore, allows the vendor, if he can, to prevent the goods coming into the possession of the vendee. For if he has not parted with the goods at all, he may retain them; but if they have already been put into the hands of some third party, as a carrier, for delivery, he may give notice to such party, who thereupon becomes bound to retain them; and after notice, should he by mistake deliver them, the vendor may bring an action for them even against the assignees of the vendee, if he have in the meantime become bankrupt. Nor will partial payment destroy this right, for the effect of the stoppage *in transitu* is not to rescind the contract, which cannot be done after part-payment; its operation is to create a lien upon the goods, which may be retained until full payment be made, the vendee or his assigns being then entitled to the goods. This right ceases entirely, and cannot be exercised, when the goods have come actually or constructively into the hands of the vendee; as if after the goods

have been sold, they remain in the vendor's warehouse, he receiving warehouse rent for them. In such a case the vendor holds the goods as the agent of the vendee, the delivery is considered complete, and the right of stoppage is gone.

This right of an unpaid vendor to stop the goods cannot, however, be exercised where the goods have been consigned by a bill of lading, and that instrument has been indorsed over by the consignee. A *bill of lading* is an acknowledgment signed by the master of a ship of the receipt of goods, which he undertakes to deliver at some foreign port, to a person therein named or to his assigns, upon payment of freight and other dues. And by the custom of merchants, which is part of the *Lex Mercatoria*, this acknowledgment is transferable by indorsement, and thereby by the right of property in the goods passes to the indorsee; against whom, if he be an assignee for value, and without notice of the insolvency, the unpaid vendor cannot stop the delivery of the goods, a doctrine at variance with the general principle of our law, which does not permit any one to transfer a greater right than he has himself.

Hitherto of the transfer of property in goods by sale, where the vendor *hath* such property in himself. But property may also in some cases be transferred by sale, though the vendor *hath none at all* in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase, otherwise all commerce between man and man must soon be at an end. And therefore the general rule of the law is, that all sales and contracts of anything vendible, in fairs or markets *overt*, that is, open, shall not only be good between the parties, but also be binding on all those that have any right of property therein. Market overt in the country is only held on the special days provided for particular towns by charter or prescription; but in London every day, except Sunday, is market-day. The market-place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt; but in London every shop in which goods are exposed publicly to sale, is market overt, for such things only as the owner professes to trade in. But if my goods are stolen from me, and sold out of market overt, my property is not altered, and I may take them wherever I find them.

By the civil law an implied warranty was annexed to every sale, in respect to the title of the vendor: and so too, in our law, 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. But, with regard to the goodness of the wares so purchased, the vendor is not bound to answer, unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise and has used any art to disguise them, or unless they turn out to be different from what he represented to the buyer.

2. Bailment, from the French *bailler*, to deliver, is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee. As if cloth be delivered, or bailed, to a tailor to make clothes, he has it upon an implied contract to render it again when made, and that in a workmanlike manner. If money or goods be delivered to a common carrier, to convey from Oxford to London, and no condition be imposed on either side, he is under a contract in law to pay or carry them to the person appointed. If goods be delivered to an innkeeper or his servants, he is bound to keep them safely, and restore them when his guest leaves the house; unless he protects himself by requiring their deposit with him, and gives a proper notice to his guest that he does so. If a man takes in a horse or other cattle to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them on demand to the owner. If a pawnbroker receives plate or jewels as a pledge or security, for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledger performs his part by redeeming them in due time. If a friend delivers anything to his friend to keep for him, the receiver is bound to restore it on demand: and it was formerly held that in the meantime he was answerable for any damage or loss it might sustain, whether by accident or otherwise; unless he expressly undertook to keep it only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But the law seems now to be settled, that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud:

but, if he undertakes specially to keep the goods safely and securely, he is bound to take the same care of them as a prudent man would take of his own.

In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his contract for restitution: the bailor having still left in him the right to a *chose* in action, grounded upon such contract. And, on account of this qualified property, the bailee may, as well as the bailor, maintain an action against such as injure the chattels. The tailor, the carrier, the innkeeper, the pawnbroker may all of them vindicate, in their own right, their possessory interest, against any stranger or third person. For, being responsible to the bailor, it is reasonable that he should have a right of action against any other person who may purloin or injure them, that he may always be ready to answer the call of the bailor.

Bailees have in some cases what is called a *lien*, or right to detain some chattel from the owner thereof until a debt due to the person retaining has been satisfied. The lien may be either *particular* or *general*; the former is where the retainer is made upon the goods themselves, in respect of which the debt arises, a claim which the law favours. The general lien, is where goods are retained in respect of a general balance of account, which is less favoured. Thus a trainer who has a horse delivered to him to train, has a lien for his charges of keep and training; and in general, when the goods are delivered to a person to be improved or altered in character, this right arises; as when cloth is delivered to a tailor to convert into clothes; or corn to a miller to be returned in the shape of flour. The right may, however, be regulated by special agreement, and then its operation depends upon the terms of the contract. In the absence of express contract, the law implies a lien wherever the usage of trade or the previous dealings of the parties give ground for such an implication.

3. Hiring and *borrowing* are also contracts by which a qualified property may be transferred to the hirer or borrower: in which there is only this difference, that hiring is always for a price or recompense; borrowing is gratuitous. The law in both cases is

the same. They are both contracts, whereby the possession and a transient property is transferred for a particular time or use, on condition to restore the goods so hired or borrowed, as soon as the time is expired or use performed; together with the price, in case of hiring, either expressly agreed on by the parties, or left to be implied by law according to the value of the service. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use it with moderation and not abuse it; and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward. Thus, if a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period; on the expiration of which his qualified property determines, and the owner becomes, in case of hiring, entitled also to the price for which the horse was hired.

There is one species of this price or reward, concerning which many learned men have in former times much perplexed themselves and other people, by raising doubts about its legality *in foro conscientiæ*. That is when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use; which generally is called *interest* by those who think it right, and *usury* by those who think it wrong. For the enemies to interest in general make no distinction between that and usury, grounding their objection as well on the prohibition of it by Moses, as also upon what is said by Aristotle, that money is naturally barren, and to make it breed money is preposterous, and a perversion of the end of its institution, which was only to serve the purposes of exchange, and not of increase. Hence, divines have branded the practice of taking interest as contrary to the divine law; and the canon law has proscribed the taking the least increase for the loan of money as a mortal sin. With us, however, the taking of *legal* interest, has long been recognised. But until recently, it was considered desirable to regulate by law the rate at which it should be taken, interest beyond this limit being stigmatised as usury; and it is only within the last few years that parliament has carried out a principle which political economists had preached for a century, and permitted the rate of interest to

regulate itself according to the exigencies of the time and the nature of things.

So long as the rate of interest was fixed by law, the hazard was often greater than the interest allowed would compensate. This gave rise to the practice of 1. Bottomry, or *respondentia*. 2. Policies of insurance. 3. Annuities upon lives.

1. *Bottomry* originally arose from permitting the master of a ship, in a foreign country, to hypothecate the ship in order to raise money to refit, and 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 repayment. 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. 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, in this case is said to take up money at *respondentia*.

2. *Insurance* 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. This is founded upon the same principle as the doctrine of interest upon loans. For if I insure a ship to the Levant, and back again, at *five per cent.*; here I calculate the chance that she performs her voyage to be twenty to one against her being lost: and, if she be lost, I lose 100*l.* and get 5*l.* Now, this is much the same as if I lend the merchant, whose whole fortunes are embarked in this vessel, 100*l.* at the rate of *eight per cent.* For, by a loan, I should be immediately out of possession of my money, the inconvenience of which we may suppose equal to *three per cent.*; if, therefore, I had actually lent him 100*l.* I must have added 3*l.* on the score of inconvenience, to the 5*l.* allowed for the hazard, which together would have made 8*l.* Thus too, in a loan, if the chance of repayment depends upon the borrower's life, it is frequent, besides the usual rate of interest, for the borrower to have his

life insured till the time of repayment; for which he is loaded with an additional premium, suited to his age and constitution.

3. The practice of purchasing *annuities for lives* at a certain price or premium, instead of advancing the same sum on an ordinary loan, arose usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time. He therefore stipulates, in effect, to repay annually, during his life, some part of the money borrowed; together with interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run, of losing that principal entirely by the contingency of the borrower's death: all which considerations, being calculated and blended together, constitute the just proportion or *quantum* of the annuity which ought to be granted. The real value of that contingency must depend on the age, constitution, situation, and conduct of the borrower; and therefore the price of such annuities cannot, without the utmost difficulty, be reduced to any general rules.

4. *Debt* is a contract whereby a *chose* in action, or other right to a certain sum of money, is mutually acquired and lost. This may be the counterpart of, and arise from, any of the other species of contracts. As in case of a sale, where the price is not paid, the vendee becomes indebted to the vendor for the sum agreed on; and the vendor has a property in this price, as a *chose* in action, by means of this contract of debt. In bailment, if the bailee loses a sum of money bailed to him, he becomes indebted to the bailor in the same sum, upon his implied contract, that he should execute the trust reposed in him, or repay the money to the bailor. Upon hiring or borrowing, the hirer or borrower, at the same time that he acquires a property in the thing lent, may also become indebted to the lender, upon his contract to restore the money borrowed, to pay the price or premium of the loan, the hire of the horse, or the like. Any contract, in short, whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of acquisition; being usually divided into debts of *record*, debts by *specialty*, and debts by *simple* contract.

A debt of *record* is a sum of money which appears to be due

by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, this is a contract of the highest nature, being established by the sentence of a court of judicature. Debts upon recognizance I have already referred to. They are properly ranked among debts of record; since the contract on which they are founded is witnessed by matter of record.

Debts by *specialty*, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due, by deed or instrument under seal. Such as, by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation: which last were explained in a previous chapter. These are looked upon as the next class of debts after those of record, being confirmed by special evidence, under seal.

Debts by *simple contract* are 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. This last class may be branched out into a vast variety, through the numerous contracts for money, which are not only expressed by the parties, but implied in law. Some of these have been hinted at; and the rest, to avoid repetition, must be referred to those particular heads in the third book, where the breach of such contracts will be considered. At present, it will be noted, that, by 29 Car. II. c. 3, no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon any promise to answer for the debt or default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not to be performed within one year from the making; unless the agreement, or some memorandum thereof, be in writing, and signed by the party himself, or by his authority. These enactments are extended by 9 Geo. IV. c. 14, which provides that no action shall be maintained, whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by

some writing signed by the party to be charged therewith; and that no action shall be brought, whereby to charge any person by reason of any representation given relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent that such other person may obtain credit, money, or goods, unless such representation be made in writing, signed by the party to be charged therewith.

There is one species of debt upon simple contract, which calls for a more particular regard. These are debts by *bills of exchange*, and *promissory notes*.

A bill of *exchange* is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. 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: by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A lives in Jamaica, and owes B, who lives in England, 1000*l*., now if C be going from England to Jamaica, he may pay B this 1000*l*., and take a bill of exchange drawn by B in England upon A in Jamaica, and receive it when he comes thither. Thus does B receive his debt, at any distance of place, by transferring it to C; who carries over his money in paper credit, without danger of robbery or loss. In common speech such a bill is frequently called a *draft*, but a *bill of exchange* is the more legal as well as mercantile expression. The person who writes this letter, is called in law the *drawer*, and he to whom it is written the *drawee*; and the third person, or negotiator, to whom it is payable, whether specially named or the *bearer* generally, is called the *payee*. A cheque is a bill of exchange addressed to a banker, and payable to a person named or *the bearer*. Such a cheque is, from the promise implied from the banking contract, binding on the banker having assets of the drawer, without acceptance, and if he does not pay it, he is liable to an action by the drawer.

Bills of exchange are either *foreign* or *inland*; *foreign*, when drawn by a merchant residing abroad upon his correspondent in England, or *vice versâ*; and *inland*, when both the drawer

and the drawee reside within the kingdom. There is not in law any difference between them, except that inland bills do not require to be *protested*, as is the case with foreign bills. *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. These are assignable and indorseable in like manner as bills of exchange.

The payee, either of a bill of exchange or promissory note, has a property vested in him, not indeed in possession but in action by the *express* contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his *implied* contract, viz., that, provided the drawee does not pay the bill, he will: for which reason it is usual, in bills of exchange, to express that the *value* thereof has been *received* by the drawer, in order to show the consideration upon which the implied contract of repayment arises. And this property, so vested, may be transferred and assigned from the payee to any other man; contrary to the old rule of the common law, that a *chose* in action was not assignable; which assignment is the life of paper credit. A few of the incidents attending this transfer may therefore be useful.

In the first place, then, the payee, or person to whom or whose *order* such bill of exchange or promissory note is payable, may, by indorsement, or writing his name *in dorso*, or on the back of it, and delivery, 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*. A promissory note or cheque, payable to A, or *bearer*, is negotiable without any indorsement, and payment thereof may be demanded by any bearer of it. But, in case of a bill of exchange, if it be payable at some time after sight, the payee, or the indorsee, whether it be a general or particular indorsement, is to go to the drawee, and offer his bill for acceptance, which acceptance, so as to charge the drawer with costs, must be in writing, under or on the back of the bill. If the drawee accepts the bill, which must in all cases be in writing, he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgment that the drawer

has effects in his hands, or at least credit sufficient to warrant the payment. If the drawee refuses to accept the bill, and it be of the value of 20*l.* or upwards, and expressed to be for value received, the payee or indorsee may, and in the case of a foreign bill ought to, protest it for *non-acceptance*; which protest must be made in writing, under a copy of such bill of exchange, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses; and notice of such protest must immediately be given to the drawer and indorsers. An *inland bill* need not be protested; but *notice of its non-acceptance* must be at once given.

But, in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due, which three days are called *days of grace*, the payee or indorsee is then, in the case of a foreign bill, to get it protested for *non-payment*, in the same manner, and by the same persons who are to protest it in case of non-acceptance, and such protest must also be notified, within fourteen days after, to the drawer. A *protest for non-payment* is not required in the case of an *inland bill*; but *notice of dishonour* must be given immediately to the drawer and indorsers, in order to preserve the holder's remedy against them. And the drawer, on such protest being produced in the case of foreign bills, or on demand in the case of inland bills, is bound to make good to the payee, or indorsee, not only the amount of the said bill, but also interest and all charges, to be computed from the time of making such protest. But if no protest be made or notified, or notice of dishonour be given, to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. The bill, when refused, must be demanded of the drawer as soon as conveniently may be; for though, when one draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid, when due, the person to whom it is payable shall in convenient time give the drawer notice thereof, for otherwise the law will imply it paid; since it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time; when in the mean

time all reckonings and accounts may be adjusted between the drawer and the drawee.

If the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer or the indorser, or, if the bill has been negotiated through many hands, upon any of the indorsers; for each indorser is a warrantor for the payment of the bill, which is frequently taken in payment as much, or more, upon credit of the indorser, as of the drawer. And if such indorser, so called upon, has the names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction, and so upwards. But the first indorser has nobody to resort to but the drawer only.

What has been said of bills of exchange is applicable also to promissory notes, that are indorsed over, and negotiated from one hand to another; only that, in this case, as there is no drawee, there can be no protest for non-acceptance; or rather the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the maker, the several indorsers of a promissory note have the same remedy, as upon bills of exchange against the prior indorsers.

CHAPTER XXVII.

OF TITLE BY BANKRUPTCY.

IX. A NINTH method of transferring property, is that of *bankruptcy*; a title before touched upon, so far as it relates to the transfer of the real estate of the bankrupt. It is now to be treated more minutely, as it principally relates to the disposition of chattels, in which the property of persons concerned in trade generally consists.

1. A bankrupt is defined to be a "trader who secretes himself "or does certain other acts, with intent to defeat or delay his "creditors." He was formerly looked upon as a criminal or offender: and in this spirit we are told by Sir Edward Coke, that

we have fetched as well the name as the wickedness of bankrupts from foreign nations. But at present the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. 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 annoyance of legal proceedings when he has nothing to satisfy the debt. Till quite recently the law allowed the benefit of bankruptcy to none but *traders*; justly considering, that if persons in other situations of life ran in debt without the power of payment, they should take the consequences of their own indiscretion, even though they met with sudden accidents that might reduce their fortunes. And the position of those debtors who were not entitled to the benefit of the bankrupt laws, was, consequently, one of great hardship. For as a judgment creditor had a right to cause the person of the debtor to be detained in prison until he satisfied the claim, the unhappy debtor might possibly be detained for years in hopeless confinement. This, indeed, became so common an occurrence, that special acts of parliament were passed for the liberation of these insolvents. These statutes were at first only temporary in their nature, and partial in their operation; and the evil remained unabated until 1813, when the relief of insolvent prisoners was permanently provided for, and ultimately administered according to a regular system in the *court for the relief of insolvent debtors*.

The proceedings therein were analogous to those in a bankruptcy, with one essential point of difference; that whereas the bankrupt was relieved from all claims upon him whatever, the insolvent remained burdened with the whole of the debts, which his property was unequal to discharge; and all future acquisitions which he might make were for the benefit of his creditors until they were fully paid. The result was that a *trader*, however reckless, could, as a bankrupt, be freed from all his obligations; while a *non-trader*, however unfortunate, had no means of escape from the pressure of his liabilities.

The palpable injustice which in many cases resulted from this state of the law, led at last to the subjection of all *debtors*, what-

ever to the bankrupt laws: the sole distinction between traders and non-traders now consisting in this, that what constitutes an act of bankruptcy in the one, is not necessarily an act of bankruptcy in the other. I shall not, however, examine by what *acts* a man may become a bankrupt, but content myself with referring the reader to the several statutes on this subject, and the resolutions formed by the courts thereon.

The first proceeding is the filing of the *petition for adjudication*, on which the court either adjudicates the trader to be a bankrupt, or dismisses the petition. When an adjudication is made the property of the bankrupt becomes divisible among his creditors; to effect which the creditors elect a trustee, by whom the whole property is to be divided. The bankruptcy may then be closed: and the bankrupt discharged.

A petition must be prosecuted in the court of the district in which the debtor resides or carries on his business; but the proceedings may be transferred from any one court to any other, or may be prosecuted in London at the request of the creditors, or if the London Court shall so order.

The petition must be verified by affidavit, and *served* upon the debtor; that he may have an opportunity of disputing the statements therein contained, at the hearing. These statements are usually the debt, the trading, if the debtor be a trader, and the act or acts of bankruptcy; and they are to be carefully investigated, and, if they cannot be sworn to, proved by witnesses, before the debtor is called upon to answer.

The debtor if he intends to dispute any of the statements in the petition, must give notice, stating which of the matters he intends to dispute; and, if disputed, all these matters must be again proved, the attendance of all witnesses, and the production of all documents being enforced by process of the court if necessary. The order of adjudication if then made may be suspended by appeal. But at any time after presentation of the petition, the Court may stop all legal proceedings against the debtor; and, upon sufficient grounds being stated, may appoint a receiver or manager of his property or business, so as to protect it for the creditors.

If the adjudication is submitted to, or sustained, notice thereof is given in the Gazette, and advertised locally; and at

the same time a general meeting of the creditors is called to elect a trustee. At this meeting, a *trustee* is to be appointed by the creditors, who takes the place of the registrar of the court, who immediately on adjudication, becomes the trustee of all the bankrupt's property, and who has power to sell or dispose of goods of a perishable nature, or other property, the holding of which until the choice of the trustee by the creditors would prejudice the bankrupt's estate.

When a trustee has been chosen, all the bankrupt's estate and effects vest in him for the benefit of the creditors. He calls meetings, collects debts, audits the accounts of any receiver who may have been appointed; receives all rents, interest, proceeds of sales, or other monies which may accrue from the bankrupt's estate; brings and defends actions; sells book-debts; and compromises claims. All books, papers, and accounts relating to the estate must be delivered up to him if required, and the bankrupt must attend him at all reasonable times, to assist in getting in and protecting the estate.

The bankrupt has next to pass his public examination upon the statement of his affairs, which he is required to lay before his creditors at their first meeting. At its close he must sign a declaration, on oath, that the statement of accounts filed by him contains a just and true discovery of all his estates and effects; that he has delivered up to the trustee all goods, merchandise, money, and effects in his power, custody, and possession; and that he has not, with intent to defraud his creditors, removed, concealed, or destroyed any part of his estate or effects.

If the bankrupt has conformed in all points to the directions of the law by passing his public examination, he is now in a position to obtain his order of discharge; to which he is not entitled, except with the assent of his creditors, testified by a special resolution, until the bankruptcy is closed.

When granted, the order of discharge releases him from all debts owing by him at the time he became a bankrupt, and from all claims and demands provable under the bankruptcy, even though judgment shall have been obtained against him; except such arise from any fraud or breach of trust, or are due to the crown. For that, among other purposes, all proceedings in bankruptcy are entered of record as a perpetual bar against

actions to be commenced on this account: and the production of the order of discharge is sufficient evidence of the bankruptcy, and of the validity of all the proceedings therein. Thus, the bankrupt becomes a clear man again: and, by his own industry, may become a useful member of the commonwealth; which is the rather to be expected, as he cannot be entitled to these benefits, unless his failure has been owing to misfortune rather than to misconduct and extravagance.

The position of a bankrupt who is undischarged is very different. He so remains, unless he pays or until he has paid ten shillings in the pound, for which a period of three years is allowed him; during which time, he cannot be sued for any debt provable under the bankruptcy. But after the lapse of that period any balance unpaid, in respect of any debt proved in the bankruptcy, is deemed a subsisting judgment debt; and, with the sanction of the court, may be enforced against any of the debtor's subsequently acquired property; which in the case of a discharged bankrupt is entirely free from any claim on the part of his creditors.

Let us next see how such proceedings affect the *property* of the bankrupt.

By the order of adjudication all the personal effects of the bankrupt vest at once in the registrar of the court, whether they be goods in actual *possession*, or debts, contracts, and other choses in *action*: and the court may consequently cause any house or tenement of the bankrupt to be broke open, in order to enter upon and seize the same. And when the trustee is chosen and his election is confirmed, the property of every part of the estate is transferred from the registrar, and as fully vested in him as it was in the bankrupt himself, and he has the same remedies to recover it.

The property thus vested in the trustee is all that the bankrupt had in himself at the commencement of the bankruptcy, or that has been vested in him since, or that may be acquired by or devolve on him during its continuance. It includes all such powers in, over, or in respect of property as might have been exercised by him for his own benefit, and not only all goods and chattels in the possession of the bankrupt, but in his order or disposition, *if he be a trader*, by the consent or permission of

the true owner, of which he is, therefore, the *reputed owner*, or of which he has taken upon himself the sale or disposition as owner. Therefore, it is usually said, that once a bankrupt, and always a bankrupt; by which is meant, that a plain direct act of bankruptcy once committed cannot be purged, or explained away, by any subsequent conduct, as a dubious equivocal act may be; but that, if an order of adjudication is afterwards made, the property of the creditors shall have a relation, or reference, back to the first and original act of bankruptcy, that occurred within the preceding twelve months. All transactions are for that time null and void, either with regard to the alienation of his property or the receipt of his debts, from such as are *privy to his bankruptcy*; for they are no longer his property, or his debts, but belong to his creditors. And, therefore, if legal proceedings be taken by a creditor, he may be restrained from pursuing them; nothing in this nature being protected except a *bonâ fide* execution or attachment, executed against the real property by seizure, or against his personal property by seizure and sale; before the order for adjudication. But as these acts of bankruptcy may sometimes be secret to all but a few, and it would be prejudicial to business to carry this notion to its utmost length, no money paid to a *bonâ fide* creditor, even after an act of bankruptcy previous to the petition, provided the creditor had no notice of the act of bankruptcy, is liable to be refunded. And all contracts or dealings with or payments to him, under the same circumstances, are valid; the intention of this relative power being only to reach fraudulent transactions, and especially to render void all *preferences* given by the bankrupt to one creditor over another.

Any settlement, indeed, made by a *trader*, unless in consideration of marriage, or *bonâ fide* for valuable consideration, or, if made on a wife or children, of property acquired in right of the wife, is void as against the creditors, if he become a bankrupt within ten years. A settlement so made may also be questioned in the event of a bankruptcy within ten years, and the person claiming the benefit of it put to proof of the solvency of the bankrupt at the time he made it. And a covenant made by a *trader*, in consideration of marriage, for a future settlement upon wife or children, of any money or property not coming to him through the wife, and wherein he has not at the time a vested

interest, is in the event of bankruptcy before such money or property is actually paid over or transferred, void as against the creditors.

It is the duty of the trustee to realize the property; and from time to time, to declare a dividend. When he has converted all the property into money, he is to declare a final dividend; and if there be any surplus the bankrupt is entitled to it. When this has been done, it is reported to the court, and the court, if satisfied, orders that the bankruptcy be closed; after which comes the discharge of the bankrupt, and the *release of the trustee.*

These dividends must be made equally, and in a rateable proportion, to all the creditors, according to the *quantity* of their debts; no regard being had to the *quality* of them. Mortgages, indeed, for which the creditor has a real security in his own hands, are entirely safe: for the adjudication reaches only the equity of redemption. So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment. But a distress for rent made and levied after an act of bankruptcy, whether before or after the filing of the petition, is available only for one year's rent, prior to the adjudication; though the landlord may come in as a creditor for the surplus. Parochial and other rates, and assessed and other taxes, not exceeding one year's assessment must be first paid in full. The trustee may also return part of a fee paid with an apprentice; and may allow interest on such claims as interest may be allowed on by a jury. But, otherwise, judgments and recognizances, and also debts by specialty, are all on a level with debts by mere simple contract, and all paid *pari passu.* The clerks or servants of the bankrupt are allowed their wages or salary, for a period not exceeding four months, labourers and workmen for a period not exceeding two months.

If any surplus remains after the final dividend, it is restored to the bankrupt. This is a case which sometimes happens to men, who unwarily commit acts of bankruptcy while their effects are more than sufficient to pay their creditors. In such a case a composition may be offered, or a scheme of settlement proposed; and it may be made a part of the arrangement that the order of adjudication shall be annulled.

Hitherto of bankruptcy; in which a dividend of ten shillings

must, as a rule, be paid, in order to *entitle* the debtor to a discharge. The improbability, and, in some cases, impossibility, of paying this dividend induces a debtor to resort to a *liquidation*; which may be either a liquidation *by arrangement* or a liquidation *by composition*.

To effect a liquidation by arrangement the debtor summons a meeting of his creditors; who may, by *special* resolution declare that his affairs are to be liquidated by arrangement and not by bankruptcy. At the meeting, or at one held within a week, the trustee is elected; in whom all the debtor's property vests, his powers and duties being the same as that of a trustee in bankruptcy. The estate being then divided, the debtor's discharge, the close of the liquidation, and the release of the trustee are effected by *special* resolution of the creditors; reported to the court; and a certificate thereof given to the debtor.

In a liquidation by composition the creditors must, by *extraordinary* resolution, agree to accept a composition in satisfaction of the debts due to them. If the debtor makes default in payment thereof, he may be sued for the whole balance due; and if difficulties ensue, the court may adjudge the debtor a bankrupt, and convert the proceedings into a bankruptcy.

CHAPTER XXVIII.

OF TITLE BY WILL AND ADMINISTRATION.

X. XI. THERE yet remain to be examined two other methods of acquiring personal estates, viz., by *testament* and *administration*; which are so connected and blended together, that it is impossible to treat of them distinctly, without tautology and repetition.

When property came to be vested in individuals by the right of occupancy, it became necessary, for the peace of society, that this occupancy should be continued, not only in the present possessor, but in those to whom he should think proper to transfer it; which introduced alienations, gifts, and contracts. But these precautions would be very imperfect, if they were

confined to the life of the occupier; for upon his death all his goods would again become common, and create infinite confusion. The law therefore gives to the proprietor a right of continuing his property, after his death, in such persons as he shall name; and, in defect of such appointment, directs the goods to be vested in certain individuals, exclusive of all others. The former method of acquiring personal property is called a *testament:* the latter, an *administration*.

Testaments are of very high antiquity; and with us, indeed, the power of bequeathing is coeval with the first rudiments of the law. It did not extend originally to *all* a man's personal estate. In the reign of Henry II., a man's goods were to be divided into three equal parts; of which one went to his heirs, 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. This was law at the time of *Magna Charta*, and for some time afterwards. But it has been imperceptibly altered; and the testator may now dispose of the whole of his goods and chattels.

In case a person make no disposition of his goods, he is said to die intestate; and in such cases, by the old law, the king was entitled to seize upon his goods, as the *parens patriæ* and general trustee of the kingdom. This prerogative the king exercised for some time by his ministers of justice; and probably in the county court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, who had till recently a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron. Afterwards the crown, in favour of the church, invested the prelates with this branch of the prerogative; which was done 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.

The goods of the intestate being thus vested in the ordinary upon the most solemn trust, the reverend prelates were not accountable to any, but to God and themselves, for their conduct. But this trust was so grossly abused, that as early as the statute of Westm. 2, it was enacted that the ordinary should

pay the debts of the intestate so far as his goods extended. Though the prelates were now made liable to the creditors for their just and lawful demands, yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, and therefore the 31 Edw. III. c. 11, took it out of their hand, and directed that, in case of intestacy, the ordinary should depute the nearest friends of the deceased to administer his goods. This is the origin of *administrators*, who were at first only the officers of the ordinary. And though the authority of the prelates has now been transferred to the crown, upon this footing stands the general law of administrations at this day.

I proceed now to inquire who may, or may not, make a testament. And this law is entirely prohibitory; for every person has full power and liberty to make a will, that is not under some special prohibition by law or custom, which prohibitions are principally—for want of sufficient discretion; or for want of sufficient liberty and free will.

1. In the first species are to be reckoned *infants*, that is, persons under twenty-one, who are incapable of making a will. Madmen, idiots or natural fools, persons grown childish by reason of old age or distemper, such as have their senses besotted with drunkenness—all these are incapable, by reason of mental disability, to make any will so long as such disability lasts.

2. Such persons, as are intestable for want of liberty or freedom of will, are by the civil law of various kinds; as prisoners, captives, and the like. But the law of England does not make such persons absolutely intestable; but only leaves it to the court to decide whether or no such persons could be supposed to have *liberum animum testandi*. A married woman is incapable of devising *lands*, and also incapable of making a testament of *chattels*, without the licence of her husband. For all her personal chattels are absolutely his; and he may dispose of her chattels real, or shall have them to himself if he survives her. Yet by her husband's licence she may make a testament;

and the husband, upon marriage, frequently covenants with her friends to allow her that licence. The queen consort is an exception to this general rule, for she may dispose of her chattels by will without the consent of her lord: and any femé-covert may make her will of goods, which are in her possession *in autre droit*, as executrix or administratrix; for these can never be the property of the husband: and if she has any pin-money or separate maintenance, it is said she may dispose of her savings thereout by testament, without the control of her husband, as she may of personal property given to her for her sole and separate use.

Testaments were formerly divided into two sorts; *written*, and *verbal* or *nuncupative*; the former were in writing, the latter depended upon oral evidence, being declared by the testator in *extremis* before a sufficient number of witnesses, and afterwards reduced to writing. A *codicil* is a supplement to a will, and to be taken as part of a testament: and this might also have been either written or nuncupative. But as *nuncupaive* wills are liable to great impositions, and may occasion many perjuries, the Statute of Frauds laid them under many restrictions; and the 1 Vict. c. 26, finally did away with all nuncupative wills, except in the case of soldiers in actual service and mariners or seamen at sea; who may still dispose of their personal estate in this manner.

Every will, with this exception, whether of personal or real estate, must now be signed by the testator, or by some person in his presence, and by his direction, in the presence of two witnesses at least, present at the same time, who must subscribe and attest the will in the testator's presence.

No testament is of any effect till after the death of the testator; and hence it follows that testaments may be avoided; —1. if made by a person labouring under incapacity: 2. by making another testament of a later date: and, 3. by cancelling or revoking it. 4. Marriage, also, is an express revocation of a prior will.

We are next to consider what is an executor, and what an administrator, and how they are both to be appointed.

An *executor* is he to whom another man commits by will the execution of that his last will and testament. And all persons

are capable of being executors, that are capable of making wills, and many others besides; as feme-coverts, and infants. This appointment of an executor is essential to the making of a will. If the testator does not name executors, or names incapable persons, or the executors named refuse to act; in any of these cases the court grants administration *cum testamento annexo* to some other person; and then the duty of the administrator is very little different from that of an executor.

But if the deceased died wholly intestate, without making either will or executors, then general *letters of administration* must be granted to the nearest friends of the deceased to administer his goods. And this leads us to a consideration of the rules followed in tracing consanguinity, whereby the nearest friends are ascertained.

Consanguinity is the connection or relation of persons descended from the same stock or common ancestor; and is either lineal or collateral.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between a man and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between a man and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards; the father is related in the first degree, and so likewise is the son; the grandsire and grandson in the second; the great-grandsire and great-grandson in the third.

Collateral kinsmen are such as lineally spring from one and the same ancestor, who is the *stirps*, or root, from whence these relations are branched out. As if a man has two sons, who have each a numerous issue; both these issues are lineally descended from 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 *consanguineos*. And the degrees in which they are related, we compute by beginning at the common ancestor, and reckoning 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 to 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*.

The Court in granting administration is guided by these rules: 1. It grants administration of the goods of the wife to the husband or his representatives; and of the husband's effects, to the widow or next of kin; but it may grant it to either, or both, in its discretion. 2. Among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the court may take which it pleases. And, therefore, 3. In the first place, the children or, on failure of children, the parents of the deceased, are entitled to the administration; both which are indeed in the first degree; though the children are generally allowed the preference. Then follow brothers, grandfathers, uncles, or nephews, and the females of each class respectively, and lastly, cousins. 4. The half blood is admitted to the administration as well as the whole. 5. If none of the kindred take out administration, a creditor may, by custom, do it. 6. If the executor refuses, or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin. 7. And, lastly, the court may, in defect of all these, commit administration to such discreet person as it approves of.

Let us now see what are the principal points of the office and duty of an executor or administrator. These in general are very much the same; except that an executor may do many acts before he proves the will; but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will, the latter owes his to the appointment of the court. If a stranger acts as executor, without any just authority, as by intermeddling with the goods of the deceased, he is called in law an executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship; but merely locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling as will charge a man as executor of his own wrong. The powers and duties of a rightful executor or administrator, are—

1. To *bury* the deceased in a manner suitable to the estate which he leaves behind him; necessary funeral expenses being allowed, previous to all other debts and charges.

2. To prove the *will* of the deceased: which is done either in *common form*, which is only upon his own oath before the court or its registrar; or *per testes*, in solemn form of law, in case the validity of the will be disputed. In defect of any will, the person entitled to be administrator must also, at this period, *take out letters of administration*, whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must enter into a bond with sureties, faithfully to execute his trust.

3. To make an *inventory* of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in to the court upon oath, if thereunto lawfully required.

4. To *collect* all the goods and chattels so inventoried. Whatever is so recovered, that is of a saleable nature and may be converted into ready money, is called *assets*, that is, sufficient, from the French *assez*, to make him chargeable to a creditor or legatee, so far as such goods and chattels extend.

5. To *pay* the *debts* of the deceased; observing therein the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the crown on record or specialty. Thirdly, such debts are by particular statutes to be preferred to all others; as money due upon poor rates, for letters to the post-office, and some others. Fourthly, debts of record; as registered judgments and decrees in equity. Fifthly, all other debts whether due on special contract as for rent, or on simple contract.

What has been stated as to the *order* in which the debts of the deceased are to be paid refers only to *legal* assets, between which and *equitable* assets a distinction is made, the latter comprising every kind of property which comes to an executor's hands in any other than his legal capacity, and so can only be reached in equity. These are applicable in payment of all debts of whatever degree *pari passu*. And where the administration

of assets falls into the hands of the court, they are distributed in equal proportion, without regard to their nature or degree, except that voluntary bonds, or other special contracts without consideration, are postponed to other debts.

6. To pay the *legacies*, when the debts are all discharged, so far as the assets extend.

A legacy is a bequest or gift of goods and chattels by testament, and the person to whom it was given is styled the legatee. This bequest transfers an inchoate property to the legatee; but the right is not perfect without the assent of the executor; for, if I have a *general* or *pecuniary* legacy of 100*l.*, or a *specific* one of a piece of plate, I cannot in either case take it without the consent of the executor. For in him all the chattels are vested, and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator; the rule of equity being, that a man must be just before he is permitted to be generous. And in case of a deficiency of assets, 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, or allow anything by way of abatement, unless there be not sufficient without it. Upon the same principle, if the legatees have been paid their legacies, they are afterwards bound to refund a rateable part, in case debts come in more than sufficient to exhaust the *residuum* after the legacies paid.

If the legatee dies before the testator, the legacy is a *lapsed* legacy, and sinks into the *residuum*, except it be a gift to a child or other issue of the testator, which does not lapse if the legatee die leaving issue which survives the testator. And if a *contingent* legacy be left to any one, as *when* he attains, or *if* he attains, the age of twenty-one, and he dies before that time, it is a lapsed legacy. But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy; an interest which commences *in præsenti* although it be *solvendum in futuro*; and if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable, in case the legatee had lived.

Besides these formal legacies, contained in a man's will and testament, there is also permitted another death-bed disposition

of property, which is called a donation *causâ mortis.* And 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. This gift, if the donor dies, 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, or *mortis causâ.*

7. When all the debts and particular 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, to the next of kin, who are to be investigated by the same rules of consanguinity as those who are entitled to letters of administration; of whom we have sufficiently spoken.

BOOK THE THIRD.

OF PRIVATE WRONGS.

CHAPTER I.

OF THE REDRESS OF PRIVATE WRONGS.

MUNICIPAL law was defined at the outset to be, "a rule of civil conduct commanding what is right, and prohibiting what is wrong." The primary objects of the law are therefore the establishment of rights, and the prohibition of wrongs. In the preceding book were considered the *rights* that were established; we are now to define the *wrongs* that are forbidden and redressed by the laws of England.

These are divisible into *private wrongs* and *public wrongs*; the former being an infringement of the private rights of individuals, considered as individuals, which are therefore termed *civil injuries*: the latter a violation of public rights and duties, which are distinguished by the harsher appellation of *crimes* and *misdemeanors*. It is to the first of these species of wrongs that our attention is now to be directed.

The more effectually to accomplish the redress of private injuries, courts of justice are instituted in order to protect the weak from the insults of the stronger, by enforcing those laws, by which rights are defined and wrongs prohibited. This remedy is therefore *principally* to be sought by application to these courts of justice; that is, by civil action. But as there are injuries of such a nature, that some furnish and others require a more speedy

remedy than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial remedy; of which I shall first treat: and to that end, shall distribute the redress of private wrongs in three species: first, that obtained by the *mere act* of the *parties* themselves: secondly, that effected by the *mere act* and operation of *law*; and, thirdly, that which arises from *action* in courts, the act of the parties herein co-operating with the act of law.

First. The redress obtained by the *mere* act of the *parties* is of two sorts; viz., first, that which arises from the act of the injured party only; and, secondly, that which arises from the joint act of all the parties together.

Of the first sort is,

I. The *defence* of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or *any* of these his relations, be attacked in his person or property, it is lawful to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray. The law in this case makes it lawful in a man to do himself that immediate justice, to which he is prompted by nature; but the resistance must not exceed the bounds of mere defence; for then the defender would himself become an aggressor.

II. Recaption or *reprisal*, which happens when any one has deprived another of his property in chattels personal, or wrongfully detains one's wife, child, or servant: here the owner of the goods, and the husband, parent, or master, may lawfully retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace. If, for instance my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action.

III. *Entry* on lands and tenements, is a remedy given to the owner when another person without any right has taken possession of his lands. In this case the party entitled may make a formal entry thereon, declaring that thereby he takes possession.

Should he in possession resist such entry, he is entitled to do so; and in that event, it is attended with no effect whatever. But if the person in possession acknowledges the right of the person making the entry, for instance, by admitting himself to be his tenant in the premises entered upon, the possession of the tenant becomes at once the possession of the landlord; and such an entry makes him complete owner of the property. This remedy must be pursued peaceably and without force; for if one turns or keeps another out of possession forcibly, this is an injury both of a civil and criminal nature. The civil injury is remedied by immediate restitution by a justice of the peace under the statute 8 Henry VI. c. 9; which puts the ancient possessor *in statu quo*; the criminal or public wrong is punishable by fine.*

IV. Another remedy by the mere act of the party injured, is the *abatement* or removal of *nuisances*. Whatsoever unlawfully annoys or does damage to another, is a nuisance, and may be abated, that is, removed by the party aggrieved, so as he commits no riot in doing so. If a house or wall is erected so near to mine that it stops my ancient light, which is a *private* nuisance, I may enter my neighbour's land, and peaceably pull it down. Or if a new gate be erected across the public highway, which is a *common* nuisance, any private individual passing that way may remove it. For injuries of this kind require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice.

V. A fifth case, in which the law allows a man to be his own avenger or to minister redress to himself, is that of *distraining* cattle or goods for nonpayment *of rent*; or, distraining another's cattle *damage-feasant*, that is, doing damage upon his land. The former is for the benefit of landlords, to prevent tenants from withdrawing their effects to his prejudice; the latter arises from necessity, as it might otherwise be impossible, at a future time, to ascertain whose cattle they were that committed the damage.

The law of distress being a point of great consequence, I must consider it with some minuteness.

* The case of a tenant, wrongfully holding over, and forcibly dispossessed by the landlord, is not within the statute. For if it were, the justices would be compellable to restore possession to the tenant, although under his previous possession he could not have maintained an action of trespass against the landlord.

1. 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, the most usual injury for which a distress may be taken being non-payment of rent. A distress may also be taken where a man finds beasts of a stranger wandering in his grounds, *damage-feasant*; that is, doing him damage, by treading down his grass, or the like, in which case the owner of the soil may distrain them till satisfaction be made him for the injury. And for several rates made by act of parliament, as for assessments for the relief of the poor, or for parochial or district works of a public nature, remedy by distress and sale is given.

2. As to the things which may be distrained, it is a general rule, that all chattels personal are liable, unless exempted. It is easier, therefore, to recount these exemptions. And, 1. As everything which is distrained is presumed to be the property of the wrong-doer, it follows that such things wherein no man can have a property, as dogs and cats, and animals *ferœ naturæ*, cannot be distrained. 2. Whatever is in personal use or occupation, is for the time protected from distress; as an axe with which a man is cutting wood, or a horse while a man is riding him. 3. Things on the premises in the way of trade are not liable to distress. As a horse standing in a smith's shop to be shod, or in a common inn; cloth at a tailor's; corn sent to a mill or market; or goods intrusted to a carrier, auctioneer, or commission agent.

But, as a rule, whatever goods the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are generally distrainable, for otherwise a door would be open to infinite frauds upon the landlord. A stranger has *his* remedy over by action in such a case against the tenant, if by the tenant's default his chattels are distrained, so that they cannot be rendered to him: and a sub-tenant who is a lodger in part of a house may claim and retain his own goods on payment of the rent due by himself, if any.

With regard, however, to a stranger's beasts, some distinctions are to be taken. If the beasts have been put on the land by consent of the owner, they are distrainable immediately afterwards: but if they were on their way to a fair or market,

and had been put in only to graze for a night, they are privileged. If, again, a stranger's cattle break the fences, and come on the land, they are distrainable immediately as a punishment for the wrong committed through the owner's negligence. But if the lands were not sufficiently fenced, the landlord cannot distrain, till they have been *levant* and *couchant*, *levantes et cubantes*, on the land, which is held to be one night at least, so that the owner may have notice.

To continue, 4. There are also other things which are privileged for the sake of the public; as tools and utensils of trade, the axe of a carpenter, the books of a scholar, and the like: because the taking of them would disable the owner from serving the commonwealth. But even these may be distrained if not in actual use, and there is not sufficient property to satisfy the demand of the landlord. So, beasts of the plough, *averia carucæ*, and sheep are privileged; unless there is no other sufficient distress; while dead goods, or other sort of beasts, which Bracton calls *catalla otiosa*, may be distrained. But as beasts of the plough may be taken in execution for debt, so they may be for distresses by statute, which partake of the nature of executions. 5. Nothing shall be distrained for rent, which may not be rendered again in as good plight as when it was taken: for which reason, milk, fruit, and the like, cannot be distrained, a distress being only in the nature of a pledge, to be restored when the debt is paid. So, anciently, sheaves of corn could not be distrained, but a cart loaded with corn might, as that could be safely restored. By statute, corn in sheaves, or loose in the straw, or hay in barns or ricks, or otherwise, may now be distrained, as well as other chattels. 6. Things fixed to the freehold may not be distrained; as windows, doors, and chimney-pieces: for they savour of the realty. And for this reason growing corn could not be distrained; till landlords were authorized by statute to distrain corn, grass, or other products of the earth, and to cut and gather them when ripe. 7. Lastly, things *in custodiâ legis*, as a distress taken *damage-feasant*, or goods taken in execution, cannot, though remaining on the premises, be distrained; they are already in the custody of the law.

3. Distresses were formerly looked upon as a mere pledge for payment of rent, or satisfaction for damage done. And so the

law remains with regard to distresses of beasts *damage-feasant*, and for other causes, not altered by parliament. But distresses for rent-arrear being found effectual in compelling payment, many statutes have been made to regulate this proceeding.

Thus all distresses must be made *by day*, unless in the case of *damage-feasant*; an exception being there allowed, lest the beasts should escape. And when a person intends to make a distress, he must, by himself or his bailiff, enter on the premises, and there distrain the goods he finds, and which are not privileged, giving notice thereof to the tenant, and stating what are the goods distrained. The landlord may not break open a house to make a distress, for that is a breach of the peace; though when in the house, he may break open an inner door. But he may, by the assistance of a peace-officer break open in the day-time any place, whither the goods have been fraudulently locked up to prevent a distress; oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that the goods are concealed therein. And the distress must be proportioned to the thing distrained for, otherwise he incurs the risk of an action for an excessive distress.

4. When taken, the things distrained must in the first place be carried to some pound, and there impounded. A pound is either pound-*overt*, that is, open overhead; or pound-*covert*, that is, close. No distress of cattle can be driven out of the hundred where it is taken, unless to a pound-overt within the same shire, and within three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to replevy; and the taker must provide the cattle with sufficient food, the value being recoverable from the owner,—or sell at the expiration of seven days. By 11 Geo. II. c. 19, any person distraining for rent may turn any part of the premises, upon which a distress is taken, into a pound, *pro hâc vice*, for securing of such distress; which is also for the advantage of tenants, as a distress of household goods, which are liable to be stolen or damaged by weather, ought to be impounded in a pound-covert, else the distrainor must answer for the consequences.

5. When impounded, the goods were formerly only a pledge to compel the performance of satisfaction, the distrainor not being at liberty to work or use a distrained beast. And thus the

law continues with regard to beasts taken damage-feasant, and distresses for suit or services; which must remain impounded till the owner makes satisfaction, or contests the right of distraining by replevying the chattels. To *replevy, replegiare*, that is, to take back the pledge, is, when a person distrained upon has the distress returned into his own possession, upon giving good security to try the right of taking it in an action; and, if that be determined against him, to return the cattle or goods once more into the hands of the distrainor. This is called a replevin; and it answers the same end to the distrainor as the distress itself, since the party replevying gives security to return the distress, if the right be determined against him.

6. This kind of distress therefore, if the owner continues obstinate, and will make no satisfaction or payment, is no remedy at all to the distrainor. But for a debt due to the crown, the distress was always saleable at common law. And so, in the several statute-distresses, the power of sale is usually given to complete the remedy. And in all cases of distress for *rent*, if the tenant or owner do not, within five days after, replevy the distress with sufficient security, the distrainor may cause the same to be appraised, and sell the same towards satisfaction of the rent and charges; rendering the overplus, if any, to the owner himself. And by this means a full satisfaction is had for rent in arrear by the mere act of the party himself; viz., by distress, the remedy given at common law; and sale consequent thereon, which is added by statute.

VI. The seizing of heriots, when due on the death of a tenant, is also another species of self-remedy; not much unlike that of taking goods in distress; which the enfranchisement of copyholds will in time render unknown.

The remedies which arise from the *joint act of the parties*, are only two, *accord* and *arbitration*.

I. 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.

II. Arbitration is where the parties, injuring and injured, submit all matters in dispute to the judgment of two *arbitrators*, who are to decide the controversy; and if they do not agree,

that another person be called in as *umpire*, to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed. This decision is called an *award*; and thereby the question is as fully determined, as it could have been by the agreement of the parties or the judgment of a court of justice.

Secondly. Of that redress which is effected by the mere operation of law, there are two instances only: *retainer* and *remitter*.

I. If a person indebted to another makes his creditor his executor, or if such creditor obtains letters of administration to his debtor; in either case the law allows him to *retain* so much as will pay himself. For the executor cannot commence an action against himself as representative of the deceased, to recover that which is due to him in his own private capacity; but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation, as if he had sued himself as executor, and recovered his debt. And an executor of his own wrong is in no case permitted to retain.

II. Remitter is where he who has the true property or *jus proprietatis* in lands, but is out of possession thereof, and cannot recover possession without an action, has the freehold cast upon him by some subsequent, and of course defective, title; in this case he is remitted, or sent back to his ancient and more certain title. The reason is that otherwise he who has right would be deprived of all remedy. For as he himself is the person in possession, there is no other against whom he can bring an action. So the law adjudges him in by *remitter*; that is, in such plight as if he had recovered the land by action.

Thirdly. In the redress of injuries by *suit in court*, the act of the parties and the act of law co-operate; the act of the parties to set the law in motion, the process of the law being the instrument by which the parties procure redress.

Although in the cases already mentioned, the law allows an extra-judicial remedy, yet that does not exclude the ordinary course of justice. Though I may defend myself from violence,

I yet am entitled to recover damages for the assault; though I may retake my goods, this power of reception does not debar me from my action: I may either abate a nuisance by my own authority, or call upon the law to do it for me. And with regard to accords and arbitrations, these being an agreement or compromise, suppose a previous right of obtaining redress some other way; which is given up by such agreement.

In all other cases it is a general rule, that where there is a right there is also a remedy by action, whenever that right is invaded. And in treating of these remedies by action I shall consider *firstly* the nature and several species of courts of justice; and, *secondly*, in which of these courts, the proper remedy may be had for any private injury.

A *court* is a place wherein justice is judicially administered. And, as the sole executive power is vested in the sovereign, it follows that all courts of justice are derived from the crown. For, whether created by act of parliament, or subsisting by prescription, the consent of the crown in the former is expressly, and in the latter impliedly, given. In all the sovereign is supposed to be present; but as that is impossible, the crown is there represented by the judges, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law has appointed a variety of courts, some with a limited, others with an unlimited jurisdiction; one distinction, I must mention, that runs throughout them all; *viz.*, that some are courts of *record*, others *not of record*.

A *court of record* is that where the proceedings are enrolled or recorded; which rolls are the records of the court, and are of such high authority, that their truth cannot be called in question. Nothing can be averred against a record, nor shall any plea, or even proof, be admitted to the contrary. And if its existence be denied, it shall be tried by nothing but itself: that is, upon bare inspection whether there be any such record or no; else there will be no end of disputes.

A *court not of record* is defined to be the court of a private man; such as the courts-baron incident to every manor, and such other inferior jurisdictions: where the proceedings are not enrolled or

recorded; but as well their existence as their truth shall be tried and determined in course of law. The court of Chancery in Equity, now merged in the High Court, was a court not of record, and the Spiritual Courts are courts not of record; the county courts and many other inferior courts, have been by statute constituted courts of record.

In every court there must be 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 satisfaction 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 apply the remedy. It is also usual to have solicitors, and counsel, as assistants.

A solicitor answers to the *procurator*, or proctor, of the civilians and canonists. Formerly every suitor was obliged to appear in person, unless by special licence under letters patent. This is still the law in criminal cases. But, it is now permitted by divers statutes, whereof the first is Westm. 2, c. 10, that attorneys may be put in the place or *turn* of another to prosecute or defend any action in his absence. These attorneys, or, as they are now called, solicitors, are admitted to the execution of their office by the High Court; and are in all points officers of the courts. They are privileged, on account of their attendance there, from serving on juries, and are, on the other, peculiarly subject to the animadversion of the judges in the exercise of their professional duties.

Of advocates, or, as we generally call them, counsel, there are two species or degrees: barristers, and serjeants. The former are admitted, after certain preliminaries, in the inns of court; and are, in our old books, styled apprentices, *apprenticii ad legem*, having been at that time looked upon as merely learners, and not qualified to execute the office of an advocate till they were of considerable standing. A barrister of seven years' standing is considered entitled to be called to the degree of serjeant, a separate body at the bar, bound by a solemn oath to do their duty to their clients: and into which order the judges of the courts of Westminister were formally admitted before they were advanced to the bench. From the bar generally some are

selected to be *her majesty's counsel learned in the law*, as they are by courtesy styled: the two principal of whom are her attorney and solicitor general. They must not be employed in any cause against the crown without special licence, which, however, is never refused. Together with the serjeants, they sit within the bar of the respective courts. All of them may take upon them the protection and defence of any suitor, whether plaintiff or defendant; who are therefore called their *clients*, like the dependents upon the ancient Roman orators. Those indeed practised *gratis*, for honour merely, or at most for the sake of gaining influence: and with us a counsel can maintain no action for his fees; which are given, not as *locatio vel conductio*, but as *quiddam honorarium;* not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation.

CHAPTER II.

OF THE COURTS.

Our several courts of justice are either such as are of public and general jurisdiction throughout the realm; or such as are only of a private or special jurisdiction in some particular parts of it.

The policy of our ancient constitution, as established by Alfred, was to bring justice home to every man's door, by constituting as many courts as there were manors in the kingdom; wherein injuries were redressed in any expeditious manner, by the suffrage of neighbours and friends. These little courts communicated with others of a larger jurisdiction, and those with others of a still greater power; ascending gradually from the lowest to the supreme courts, which were constituted to correct the errors of the inferior ones, and to determine such causes as by reason of their weight and difficulty demanded a more solemn discussion. These inferior courts still continue in our legal constitution; but as the superior courts obtained, at a very early period in our legal history, a concurrent original jurisdiction with them, they soon fell into decay, and have now fallen almost into oblivion.

I. The lowest court of justice known to the law of England, is the court of *piepoudre;* so called from the dusty feet of the

suitors; or, according to Coke, because justice is there done as speedily as dust can fall from the foot. It is now entirely obsolete.

II. The *court-baron* is incident to every manor; is holden by the steward; and is of two natures: the one a *customary court*, still existing, appertaining to the copyholders, in which their estates are transferred by surrender and admittance:—the other. a court of common law, was held anciently every three weeks; and its most important business was to determine all controversies relating to the right of lands within the manor. It is now obsolete, as is also the *Hundred Court*, which was for the hundred what the court-baron was for the manor. The next in order is

III. The *Schyremote*, or ancient county court, a court not of record, incident to the jurisdiction of the sheriff, which formerly held pleas of debt or damages and of many real actions. The freeholders were and are the judges, so far as it still exists as a court, and the sheriff is the ministerial officer. All acts of parliament were anciently published in the county court by the sheriff; all outlawries of absconding offenders are still there proclaimed; and all popular elections which the freeholders are to make, as of the coroner, are still made *in pleno comitatu*.

All these courts, however, having fallen into disuse as courts of civil jurisdiction, their place has been supplied by—

IV. The *County Court*, established by 9 & 10 Vict. c. 95, to supply the place of the Courts of Requests and Courts of Conscience, which to a certain extent superseded the local Courts, and were intended solely for the recovery of small debts. The first of these was established in London in the reign of Henry VIII., and gave so much satisfaction, that divers trading towns and other districts afterwards obtained acts of parliament for establishing in them courts upon nearly the same plan as that in London. This clearly proved that the nation was sensible of the great inconvenience arising from the disuse of their ancient courts; wherein causes of small value were always decided with very little trouble and expense to the parties. But no general establishment of local tribunals took place till 1847; when upwards of one hundred courts of request were abolished, the

county courts established, and the jurisdiction in civil actions of the old schyremotes transferred to them.

Their success has been so great that the jurisdiction of the county court has been repeatedly extended, and the procedure therein gradually improved. The county court may entertain suits for the recovery of all debts and demands, where the sum sued for does not exceed 50*l.* and by consent of the parties to any amount; its jurisdiction, where *title* comes in question, is limited to property of 20*l.* annual value.

A jurisdiction in matters which had previously been cognizable only in chancery, has also been conferred on it. In *administration suits*, or for the *execution of trusts*, in suits for *specific performance* of contracts, or *foreclosure of mortgages*, and in questions of *partnership*, and certain other cases which need not be detailed, the suitor may resort to the county court, if the subject matter does not exceed in amount or value the sum of five hundred pounds. The suit may, however, be removed into and further prosecuted in the High Court; to which an appeal may be made from the decree of the county court judge. Similar suits and the *winding up of companies* may also be transferred from the High Court to the county court.

For the benefit of the subject the Crown is enabled to sue in this court, for customs duties or penalties, when the amount does not exceed one hundred pounds, and for succession duties when the amount does not exceed fifty pounds,—the decision of the judge being in all such cases final. An extensive admiralty jurisdiction has likewise been conferred on certain county courts, in cases of salvage and towage, claims for necessaries supplied to a ship, and wages, damage to cargo, and damage by collision, in the hearing of which the judge may be assisted by the nautical assessors attached to the court.

Like its prototype, the county court is essentially a *local* tribunal; for to give it jurisdiction in any action the defendant must dwell or carry on business within the district of the court at the time of the action being brought. But as this rule might impose hardship on plaintiffs, who had given only a reasonable credit to persons residing in their neighbourhood, by compelling them to follow their debtors, an action may, by leave of the judge or registrar, be brought in the court of the district where

any part of the cause of action arose, or in which the defendant dwelt or carried on business within the previous six months. It has an authority in the grant of probate of wills or of letters of administration which is equally local, being confined to those cases in which the testator or intestate resided within the district of the court at the time of his death. This observation also applies to the powers conferred on the judge to determine the claims and settle the disputes of the members and officers of Friendly Societies, of Building Societies, and of Literary and Scientific Institutions, and in the regulation of those charities whose revenue does not exceed 50*l*.

The jurisdiction of the county court is in every way exceptional. That which relates to the recovery of debts and the possession of property has for centuries been the province of the courts of common law; suits for custom or succession duties are, in strictness, cognizable only in the Exchequer; the probate of wills and the grant of administrations were the privileges of the Courts Christian from the time of the Conqueror till transferred in our own time to the Court of Probate; suits for legacies, questions of partnership, and the regulation of charities have always constituted a large portion of the business of the Court of Chancery; while the nautical questions of salvage and damage by collision were appropriated to the Admiralty.

Complicated and extensive, however, as are its powers, the proceedings of the county court, although of *record*, partake of the simplicity which distinguished those of the ancient schyremote. A suit is begun by the entry of a *plaint*, setting out the names of the parties and the nature of the plaintiff's claim; upon which a *summons* is issued and *served* on the defendant; who is thereby required to defend the action at the court to which he is summoned, or otherwise judgment may be given against him. If defence is made, the matter in dispute is, on the trial, inquired into, and disposed of summarily by the judge; who decides all questions as well of fact as of law, unless one of the parties has demanded a jury, which has long been considered the appropriate tribunal to determine questions of fact. The costs of the suit are entirely in the discretion of the court; and the judgment is enforced, if necessary, by execution against the goods of the unsuccessful party. But as experience has demonstrated that

this does not always afford a means of obtaining the fruits of a suit, and that the fraudulent debtor will never fail to find means to defeat a just demand, the court has power, if the unsuccessful party has no goods from which the judgment may be satisfied, but has the means of paying otherwise, to commit him to prison for a period not exceeding forty days. A judgment for more than 20*l.* may also be removed into the High Court, and there enforced by its ordinary process of execution.

No writ of error or other proceeding can be brought to reverse the judgment of the county court, in a matter of common law cognizance, except by leave of the judge, unless the amount sued for exceeds 20*l.* In cases in which an appeal lies or is allowed, the appeal is to one of the judges of the High Court of Justice; and then only against the decision of the judge of the county court in matter of law, or in the reception or rejection of evidence. No appeal lies against his decision on a matter of fact. In equitable and admiralty causes, an appeal lies as well on fact as on law. There is no farther appeal, except by leave of the divisional court itself, and then it is to the Court of Appeal.

Finally, the county court is also a court of bankruptcy; having within its district the same original power and authority as the London Court of Bankruptcy.

I now proceed to describe

V. The High Court of Justice; to which has been transferred all the jurisdiction heretofore exercised by the Superior Courts of law and equity, the High Court of Admiralty, the Courts of Probate and Divorce, and the Courts of assize. All causes and matters pending, or that might have been originated, in these other courts, are nevertheless continued, if pending, or begun in a divisional court having a similar designation. Thus all suits that might have been brought in the Court of Chancery are commenced in the Chancery division of the High Court; an information that might have been filed in the Queen's Bench, is taken to the Queen's Bench division; a suit for divorce, or an action arising out of a collision in the Channel, brought in the Probate, Divorce, and Admiralty division; while the Exchequer division retains the special cognizance of suits by the Crown; and the Common Pleas division a similarly special jurisdiction in con-

troverted elections. But in every civil cause in any division of the High Court in which there is any conflict or variance between the rules of equity and the rules of law, the rules of equity prevail.

Looking upon these changes as only the first steps towards a reorganization of our tribunals, it may without much impropriety be said that we have so far returned towards the ancient Saxon constitution, according to which there was only one superior court of justice in the kingdom, which had cognizance both of civil and spiritual causes; viz., the *witenagemote*, 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. At the Conquest the ecclesiastical jurisdiction was diverted 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 counsellors to the crown. He therefore established a constant court in his own hall, thence called by Bracton and other ancient authors, the *aula regis:* which was composed of the king's great officers of state, who were assisted by his justiciars; and by the barons of parliament, all of whom had a seat therein, and over whom presided the *capitalis justiciarius totius Angliæ:* who was also the principal minister of state, and, by virtue of his office, guardian of the realm in the king's absence.

This great court being bound to follow the king in all his progresses and expeditions, the trial of causes therein was very burdensome to the subject. Wherefore King John, who dreaded also the power of the justiciar, readily consented to that article of *Magna Charta*, which 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, and there it has ever since continued. And the court being thus rendered stationary, the judges became so too, and a chief, and other justices of the *common pleas*, were appointed; with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject. Which critical 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 neighbourhood; 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, it is said, laboured to extirpate and destroy it.

The *aula regis* being thus stripped of so much of its jurisdiction and the power of the chief justiciar being also curbed by many articles in the great charter, the authority of both began to decline under the long and troublesome reign of King Henry III. And in farther pursuance of this example, the other several offices of the chief justiciar were under Edward I., who new modelled the whole frame of our judicial polity, subdivided and broken into distinct courts of judicature. A *court of chivalry*, to take cognizance of contracts and other matters touching deeds of arms and war, was erected over which the constable and mareschal presided; it has long been obsolete. The steward of the household presided over another court, constituted to regulate the king's domestic servants, out of which, in the reign of Charles I., sprang *the palace court*, abolished in 1849. The High Steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers; and the Barons reserved to themselves, in parliament, the right of reviewing the sentences of other courts in the last resort, from which we have now the appellate jurisdiction of the House of Lords. The distribution of common law 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 cantoned out to other courts, and the sole cognizance of pleas of the crown or criminal causes.

For pleas or suits are regularly divided into two sorts: *pleas of the crown*, which comprehend all crimes and misdemeanours, wherein the sovereign, on behalf of the public, is the plaintiff; and *common pleas*, which include all civil actions depending between subject and subject. The former of these were the proper object of the jurisdiction of the King's Bench; the latter of

The *Court of Common Pleas*, which was a court of record, and styled by Sir Edward Coke, the lock and key of the common law; for herein only could real actions, that is, actions which concerned the right of freehold or the realty, be originally brought. All other, or personal, pleas between man and man were likewise there determined; though in all of them the other courts soon obtained a concurrent authority. This court, now merged in the High Court of Justice, constitutes the *Common Pleas Division* thereof. To it are presented petitions complaining of the illegal returns of members of the House of Commons; and to it also lies an appeal from the decisions of the revising barristers, the judgment of the court therein being final and conclusive.

The *Court of Queen's Bench*, called, in the reign of a king, King's Bench, was till its jurisdiction was vested in the High Court of Justice, the supreme court of common law in the kingdom.

Its jurisdiction, which was very high and transcendent, has been vested in the High Court of Justice; but, until the business of that tribunal is otherwise distributed, all the powers and authorities of the Queen's Bench are exercised in the *Queen's Bench Division*; whose special duty it is therefore to keep all inferior jurisdictions within the bounds of their authority, and either to remove their proceedings to be determined there, or prohibit their progress below; to superintend all civil corporations in the kingdom; to command magistrates and others to do what their duty requires in every case where there is no other specific remedy; and to protect the liberty of the subject, by speedy and summary interposition.

The Queen's Bench division thus takes cognizance both of criminal and civil causes; the former in what is called the crown side or *crown office*; the latter in the *plea side* of the court. The jurisdiction of the crown side it is not our present business to consider;—that will be more properly discussed in the next book. On the plea side, or civil branch, the Queen's Bench had an *original* jurisdiction and cognizance of all actions of trespass or other injury alleged to be committed *vi et armis*; of actions for forgery, conspiracy, or which alleged any falsity or fraud;

all of which savoured of a criminal nature, although the action was brought for a civil remedy, and made the defendant liable in strictness to pay a fine to the crown, as well as damages to the injured party. No mere civil action, could at *common law* have been prosecuted therein. But as the Court might always hold plea of any civil action, other than actions real, provided the defendant was an officer of the court, or in the custody of the marshal of the court, for a breach of the peace or any other offence; in process of time it began by a fiction to hold plea of all personal actions whatsoever. For this purpose it was suggested in the pleadings that the defendant had been arrested for a supposed trespass, which he never had in reality committed; and being thus in the custody of the marshal, the plaintiff was at liberty to proceed against him for any other personal injury; which surmise, of being in the marshal's custody, the defendant was not at liberty to dispute. So that by this fiction the Queen's Bench had an *acquired* jurisdiction in all actions whatever.

To the High Court of Justice has also has been transferred all the jurisdiction of the *Court of Exchequer*, a very ancient court of record, set up by William the Conqueror, as a part of the *aula regis*, and whose primary and original business was to call the king's debtors to account; and to recover any lands, goods, or other profits or benefits, belonging to the crown. But, as by a fiction civil actions were brought in the King's Bench, in like manner by another fiction personal suits were prosecuted in the Exchequer. For as all the officers and ministers of this court had, like those of other superior courts, the privilege of suing and being sued only in their own court; so also the king's debtors and farmers, and all accomptants of the exchequer, were privileged to sue and implead all manner of persons in the same court that they themselves were called into. This gave rise to the *common law* jurisdiction of the court of Exchequer; the plaintiff in his proceedings, which were begun by a *quo minus*, as it was called, suggesting that he was the king's farmer or debtor, and that the defendant had done him the injury or damage he complained of; *quo minus sufficiens existit*, by which he was the less able to pay the king his debt or rent; this surmise soon became matter of form and mere words of course, and the court was open to all the nation equally.

These three courts, the Common Pleas, Queen's Bench, and Exchequer, were styled the *Superior Courts of Common Law*, in contradistinction to the High Court of Chancery, with its vice-chancellors' courts, which was understood to be referred to, when the *Courts of Equity* were spoken of. This High Court of Chancery was, in matters of civil property, by much the most important of any of the original courts of justice. It had its name from the judge who presided, the lord chancellor or *cancellarius*; so termed *a cancellando*, because it is his duty to cancel the king's letters patent when granted contrary to law. But this office and name was certainly known to the courts of the Roman emperors: where it originally seems to have signified a chief scribe or secretary, who was afterwards invested with judicial powers, and a general superintendence over the rest of the officers of the prince. From the Empire it passed to the Church, and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters, and such other public instruments of the crown, as were authenticated in the most solemn manner: and therefore when seals came in use, he had always the custody of the great seal. So that the office of chancellor, or lord keeper, whose authority is exactly the same, is with us at this day created by the mere delivery of the great seal into his custody: whereby he becomes, without writ or patent, 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 a privy councillor by his office, and prolocutor of the House of Lords by prescription, and to him belongs the appointment of all justices of the peace. Being formerly an ecclesiastic, for none else were originally capable of an office so conversant in writings, and presiding over the royal chapel, he became keeper of the royal conscience; visitor in right of the crown of all hospitals and colleges of royal foundation; and patron of many of the crown livings. He is the 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 extensive jurisdiction annexed to his *judicial* capacity in the court of Chancery; wherein, as in the Exchequer, there were, until both were merged in the High Court, two distinct tribunals: the one ordinary, being a court of common law; the other extraordinary, being a court of equity.

The ordinary or legal court was the more ancient. Its jurisdiction was to cancel letters patent, when made against law; and to hold plea of petitions, traverses of offices, and the like; when the sovereign has been advised to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right. On a proof of which, as the sovereign can never be supposed to do any wrong, the law questions not but he will immediately redress the injury; and refers that conscientious task to the chancellor, the keeper of his conscience.

The extraordinary court, or *court of equity*, was the court of the greatest judicial consequence. This distinction between law and equity, as administered in different courts, is not at present known, nor seems to have ever been known, in any other country at any time: and yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans; the *jus prætorium* being distinct from the *leges* or standing laws. Among the Romans, however, the power of both centered in one and the same magistrate: who was equally intrusted to pronounce the rule of law, and to apply it to particular cases, by the principles of equity. But with us the application of the rules of equity fell solely into the hands of the chancellor; for when the courts of law, proceeding merely upon the king's original writs, and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person, assisted by his privy council; and they were wont to refer the matter either to the chancellor and a select committee, or by degrees to the chancellor only; who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case; and in this way obtained by degrees the equitable jurisdiction which occupies so large a field in English jurisprudence. Its growth was regarded with great jealousy by parliament. Various efforts were made from time to time to restrain and limit the authority of the chancellor. But the crown steadily supported it; and the invention by John

de Waltham, who was bishop of Salisbury and master of the rolls to King Richard II., of the writ of *subpœnâ*, returnable in the court of chancery only, gave great efficiency if not expansion to the jurisdiction. This process was afterwards extended to other matters wholly determinable at the common law; so much so, that in the reigns of Henry IV. and V., the commons were repeatedly urgent to have the writ of *subpœnâ* entirely suppressed. But though Henry IV., being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the statute 4 Henry IV. c. 23, whereby judgments at law are declared irrevocable unless by attaint or writ of error, yet his son put a negative at once upon their whole application: and in Edward IV.'s time, the process by bill and *subpœnâ* was the daily practice of the court.

In the time of Lord Ellesmere, A.D. 1616, arose the notable dispute between the courts of law and equity, whether a court of equity could give relief after or against a judgment at 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 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; who reported so strongly in favour of the courts of equity, that his majesty gave judgment on their behalf: but, not contented with the irrefragable reasons produced by his counsel, he chose rather to decide the question by referring it to the plenitude of his royal prerogative.

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the Court of Chancery into a more regular system; but did not sit long enough to effect any considerable revolution in the science itself. His successors, in the reign of Charles I., did little to improve upon his plan: and after the Restoration the seal was committed to the Earl of Clarendon, who had withdrawn from practice as a lawyer nearly twenty years; and afterwards to the Earl of Shaftesbury, who had never practised at all. But with Lord Nottingham, in 1673, a new era commenced. In the course of nine years, he built up a system of jurisprudence upon wide and rational foundations, which served

as a model for succeeding judges, and hence he has been emphatically called "The Father of Equity." His immediate successors availed themselves very greatly of his profound learning and judgment. But a successor was still wanted, who should hold the seals for a period long enough to enable him to widen the foundation, and complete the structure, begun and planned by that illustrious man. Such a successor at length appeared in Lord Hardwicke; who presided in the Court of Chancery for twenty years; and his numerous decisions evince the most thorough learning, the most exquisite skill, and the most elegant juridical analysis. Few judges have left behind them a reputation more bright and enduring; few have had so favourable an opportunity of conferring lasting benefits upon the jurisprudence of their country; and still fewer have improved it by so large, so various, and so important contributions.

The Lord Chancellor has from the time of Henry VIII., had the assistance of the Master of the Rolls in administering justice according to the rules of equity. This great officer, who is now the custodier of the public records of the kingdom, was formerly the chief merely of the masters in chancery, who carried out the decrees and performed the ministerial functions of that court; Cardinal Wolsey having been, it is said, the first chancellor who devolved on the Master of the Rolls the exercise of a considerable branch of the equity jurisdiction of the court. In the course of the present century, however, the business of the Court so much increased, that it was found necessary to add considerably to its judicial power. In 1813 a vice-chancellor was appointed; and in 1841, two additional vice-chancellors; and a third was afterwards added. These several judges, the Master of the Rolls and vice-chancellors, heard and determined all matters pending in the Chancery; not as independent courts, but as representing the Lord Chancellor, or Court of Chancery itself; whose jurisdiction, both as a common law court and as a court of equity, has been merged in the High Court of Justice, and is exercised in the *Chancery Division* thereof.

This great court has also absorbed the Court of Admiralty, the Court of Probate, and the Court for Divorce and Matri-

monial Causes. The several jurisdictions, thus transferred, are exercised in a divisional court, styled the *Probate, Divorce, and Admiralty Division.*

The High Court of Admiralty had jurisdiction to determine all maritime injuries, arising upon the seas, or in parts out of the reach of the common law; and its proceedings were according to the method of the civil law, like those of the ecclesiastical courts. It was usually called the *Instance Court*, in contradistinction to a separate court called the *Prize Court;* which was constituted by a special commission, under the great seal, in time of war, to decide questions concerning booty of war. This jurisdiction exists by virtue of treaties with foreign nations; whereby particular courts are established in the maritime countries of Europe for the decision of the question, whether lawful prize or not: for this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country, to determine it.

The Court of Probate was created in 1857, to exercise, in the name of the crown, all the jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons then vested in any court or person, with full authority to hear and determine all questions relating to matters and causes testamentary; it possessed the same powers throughout England as the Prerogative Court of the Archbishop of Canterbury previously had in that province; and was bound to perform all the duties which were imposed on or should be performed by ordinaries generally, or by the Prerogative Court, within their respective jurisdictions. It thus collected into itself all the authority of the local ecclesiastical courts in matters testamentary, whose duties indeed were principally *administrative;* for where the deceased left *bona notabilia* within two different dioceses, the jurisdiction belonged to the archbishop of the province, by way of special prerogative; from which, indeed, the court in which these causes were determined was called *The Prerogative Court.* The *contentious* jurisdiction is now either in the County Court or in the High Court.

The only other Court of original *civil*, as distinguished from

criminal jurisdiction, whose authority has been transferred to the High Court, is the Court for Divorce and Matrimonial Causes, created also in 1857, to exercise in the name of the Crown all the jurisdiction theretofore vested in any ecclesiastical court or person in matters matrimonial. What these matters matrimonial are I shall have occasion to explain hereafter.

VI. From each judge or Division of the High Court, as the case may be, an appeal lies to the *Court of Appeal.*

The appeal from the superior courts of common law was formerly to the Court of *Exchequer Chamber*, in which the judges of two of the Superior Courts of Common Law reviewed the decisions of the other court. The appeal from the Master of the Rolls and from the vice-chancellors was to the Court of Appeal in Chancery; which was either the Lord Chancellor, or the two Lords Justices of Appeal, or these three judges collectively. The appeal from the Court of Admiralty was to the Judicial Committee of the Privy Council, whose decision was final. From the Court of Probate the appeal was directly to the House of Lords. The appeal from the judge ordinary of the Court for Divorce and Matrimonial Causes was, in certain cases, to the full court, as it was termed, consisting of the Lord Chancellor, and certain other judges; in other cases there might be an appeal to the House of Lords.

These several appellate jurisdictions have been transferred to the Court of Appeal; which thus becomes also a court of intermediate appeal from the Courts of Probate and Divorce. For from the judgment of this Court, an appeal lies, *in form*, to

VII. The House of Lords; but *in reality* to judges designated Lords of Appeal, who need not be peers. They, therefore, constitute our supreme court of judicature, having *no original* jurisdiction over *causes*, but only upon appeal, to rectify any mistake in law, committed by the courts below. They thus exercise the authority to which the House of Peers succeeded upon the dissolution of the *aula regis*. For, as the barons of parliament were constituent members of that court and the rest of its jurisdiction was dealt out to other tribunals, the right of receiving appeals remained in the residue of that assembly, from which the other great courts were derived. This court is

therefore, in all causes the last resort, from whose judgment no further appeal is permitted; but every subordinate tribunal must conform to its determinations; since upon its decision all property must finally depend.

VIII. Before I conclude this chapter, I must also mention another species of courts, of general jurisdiction and use, which act as auxiliaries to, though each is in law a divisional court of the High Court of Justice, I mean, the courts of *assize* and *nisi prius*.

These are composed of two or more commissioners, who are twice, or oftener, in every year sent by special commission under the Great Seal all round the kingdom, except London and Middlesex, to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the various divisions of the High Court. They exercise their functions by virtue of five several authorities. 1. The commission of the *peace*. 2. A commission of *oyer* and *terminer*. 3. A commission of general *gaol-delivery*; the consideration of all which belongs properly to the subsequent book of these commentaries. 4. A commission of *assize*, directed to the justices, and others therein named, to take, together with their associates, assizes in the several counties; that is, to take the verdict of a peculiar species of jury, called an assize, which was formerly summoned for the trial of *landed* disputes, but which species of jury, by the abolition of real actions, no longer exists. 5. The other authority, that of *nisi prius*, is a consequence of the commission of *assize*, being annexed to the office of those justices by the statute 13 Edw. I. c. 30, and empowers them to try all questions of fact issuing out of the courts at Westminster. These by the ancient practice were to be tried at Westminister in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arose; but with this proviso, *nisi prius, unless before* the day prefixed the judges of assize came into the county in question; which they were sure to do in the vacations preceding each Easter and Michaelmas term.

The function of these commissioners of assize and *nisi prius* being only to try issues of fact, all they had to do formerly was to return to the court above, that is, the Court at Westminster wherein the actions were pending, the findings of the jury on

the matters of fact submitted to them; whereupon the court above proceeded either to give judgment, or to hear the parties further on the question for whom judgment was to be given. These Courts of *Nisi Prius* were thus distinct tribunals, having their duties defined by the commissions under which they sat; but as every judge, and every commissioner of assize when engaged in the exercise of any jurisdiction assigned to him, is now deemed to constitute a divisional court of the High Court of Justice, he may at once, upon the finding of the jury, give judgment and award execution.

These are the several courts of public and general jurisdiction throughout the kingdom; but a portion of the judicial business of the country is done in certain special courts, the nature of which will be explained in the following chapter.

CHAPTER III.

OF COURTS OF A SPECIAL JURISDICTION.

Of those courts which have a special or peculiar jurisdiction, the first to be mentioned are those which take cognizance of injuries of an ecclesiastical nature.

In the time of our Saxon ancestors there was no distinction between the lay and the ecclesiastical jurisdiction: the county court was as much a spiritual as a temporal tribunal: the rights of the church were asserted at the same time, and by the same judges, as the rights of the laity. For this purpose the bishop of the diocese, and the sheriff of the county, sat together in the county court, and had there the cognizance of all causes, as well ecclesiastical as civil: a superior deference being paid to the bishop's opinion in spiritual matters, and to that of the lay in temporal.

William the Conqueror, it is generally said, to please the clergy, by whom his claims had been warmly espoused, separated the ecclesiastical courts from the civil; and prohibited any spiritual cause from being tried in the secular courts, commanding the suitors to appear before the bishop only, whose decisions

were thenceforth to conform to the canon law. King Henry I. revived the union of the civil and ecclesiastical courts; but the clergy, having in their synod at Westminster, 3 Hen. I., ordained that no bishop should attend the discussion of temporal causes, soon dissolved this newly-effected union. And when Stephen was brought in by the clergy, one article of the oath which they imposed upon him was, that ecclesiastical persons and ecclesiastical causes should be subject only to the bishop's jurisdiction.

Ecclesiastical *persons* are so still; but the cognizance of the two largest divisions of *ecclesiastical causes* have in our day been transferred to civil courts; testamentary causes to the Court of Probate, and matrimonial causes to the Court of Divorce. So that in speaking of the ecclesiastical courts, or, as they are often styled, Courts Christian, *curiæ christianitatis*, I must premise one observation, viz.; that their jurisdiction is now so very limited, that they possess little, if any, of that importance which formerly attached to their proceedings.

1. The *Archdeacon's* Court, then, is the most inferior court in the whole ecclesiastical polity. It is held, in the archdeacon's absence, before his official, a judge appointed by himself, and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the bishop's court of the diocese. From hence, an appeal lies to that of the bishop; viz.,

2. The *Consistory* Court held in the cathedral, for the trial of all ecclesiastical causes arising within the diocese. The bishop's chancellor, or commissary, is the judge; and from his sentence an appeal lies to the court of the archbishop of each province respectively.

3. The Court of *Arches* belongs to the Archbishop of Canterbury, whereof the judge is called the *Dean of the Arches*; because he anciently held his court in the church of Saint Mary *le Bow*, *Sancta Maria de arcubus*. His proper jurisdiction is only over the thirteen peculiar parishes belonging to the Archbishop in London; but his office having been long united with that of the Archbishop's principal official, he now, in right of the last-mentioned office, receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province;

and entertains original suits sent up to him from the inferior ecclesiastical court by *Letters of Request.* The official principal or auditor of the Chancery Court of York is the judge of the Court of the Archbishop of York. The judge of each court was formerly appointed by the Archbishop;—and such court was an ecclesiastical court. The judge is now appointed under an Act of Parliament, to which no previous consent of the Church in convocation was obtained, as was done when the supreme appellate jurisdiction was transferred from the Bishop of Rome to the Crown; and the Arches and York Courts are therefore said to be lay tribunals, and no longer ecclesiastical courts; although still so called.

From the judgment of both, an appeal lies to the queen, as supreme head of the Church in England, in the place of the Bishop of Rome, who formerly held this jurisdiction. This appeal is heard by

4. The *Judicial Committee of the Privy Council,* a civil court which has been substituted for the Court of *Delegates, judices delegati,* who were formerly appointed by commission under the Great Seal, to represent the royal person, and hear all appeals to the sovereign, made by virtue of the statute 25 Henry VIII. c. 19.

Appeals to Rome were always looked upon by the nation with an evil eye, as being contrary to the liberty of the subject, the honour of the crown, and the independence of the realm; and were first introduced in the reign of Stephen, A.D. 1151, at the same period that the civil and canon laws were first imported into England. But, in a few years afterwards, to obviate this growing practice the Constitutions made at Clarendon, 11 Hen. II., expressly declare, that appeals ought to lie from the archbishop to the king; and are not to proceed any further without special licence from the crown. But the advantage given to the Roman Curia in the reigns of John, and his son Henry III., riveted the custom of appealing to Rome in causes ecclesiastical so strongly, that it never could be thoroughly broken off, till the grand rupture happened in the reign of Henry VIII., when all the jurisdiction previously possessed by the pope in matters ecclesiastical was by Convocation, ratified by Parliament, transferred to the crown. Thenceforth these

appeals were heard by the Court of Delegates, till the statute of Henry VIII. was in this respect repealed; and the appellate jurisdiction of the crown *in Chancery* directed to be exercised by the king *in council*, by 3 & 4 Will. IV. c. 41. For that purpose the *Judicial Committee of the Privy Council*, consisting of the lord chancellor, and other official and paid judges, was constituted; and made a court of record, with power to punish contempts, and award costs.

It cannot be called an ecclesiastical court, although it exercises an appellate ecclesiastical jurisdiction, and may, in so doing, have the assistance of some of the bishops as assessors; and no one of these courts, except the Judicial Committee, is a court of record; no more than was another much more formidable jurisdiction, but now deservedly annihilated, viz., the court of *High Commission* in causes ecclesiastical, erected to vindicate the dignity and peace of the church, by reforming ecclesiastical persons, and all manner of errors, heresies, schisms, offences, and enormities. Under the shelter of which very general words, means were found to vest in the commissioners almost despotic powers of fining and imprisoning, which they exerted much beyond the degree of the offence itself, and frequently over offences by no means of spiritual cognizance. For these reasons the court was justly abolished by statute 16 Car. I. c. 11; and the attempt that was made to revive it, during the reign of James II., served only to hasten that infatuated prince's ruin.

The courts which remain to be mentioned are either such as are instituted to prevent particular wrongs; or those whose jurisdiction is either confined to particular spots, or private and special in its nature. Of the first species are the London Court of Bankruptcy, and the County Courts, as local courts of bankruptcy, and the Court of the Railway Commissioners. The second class, or those courts whose jurisdiction is confined to particular spots, comprises the courts of the Stannaries, of the Universities, and of the cities and great towns of the kingdom; the Forest courts; and the courts of the Commissioners of Sewers.

5. The London Court of Bankruptcy is a court of law and equity, and a principal court of record; the chief judge having all the powers, jurisdiction, and privileges possessed by any

judge of the High Court. It is also a court of appeal in bankruptcy, from the county courts; and from its decision an appeal lies to the Court of Appeal.

6. A certain number of the county courts are *Local Courts of Bankruptcy*,—every judge of such court having in Bankruptcy, in addition to his powers as county court judge, all the powers of a judge of the High Court. In these local courts must be instituted all proceedings in bankruptcy against persons residing or carrying on business in the district of the Court; but these proceedings may be removed to the London Court; to which also an appeal lies.

7. *The Court of the Railway Commissioners* was established to carry into effect the Railway and Canal Traffic Act, 1854; which prohibits any railway or canal company from withholding reasonable facilities for receiving, forwarding, and delivering traffic thereon, and from giving any undue or unreasonable preference or advantage to any particular person or company, or to any particular description of traffic, and from subjecting any person or company, or any particular traffic, to any undue or unreasonable prejudice or disadvantage. Complaints may be made not only by a company, but by a municipal or other corporation, or a local or harbour board. Its decisions are generally final: but in certain cases there is, and in others there may be, an appeal on questions of law to the High Court.

8. The *Stannary Court* for the administration of justice among the tinners in Devonshire and Cornwall is a court of record, of a private and exclusive nature. It is held before the vice-warden of the stannaries, in virtue of a privilege granted to the workers in the tin mines there, to sue and be sued only in their own courts, that they may not be drawn from their business, which is highly profitable to the public, by attending their law suits in other courts.

9. The several courts within the city of London, and other cities, boroughs, and corporations throughout the kingdom, held by prescription, charter, or Act of Parliament, are also of a private and limited character; but it would exceed the design and compass of this treatise, if I were to enter into a particular detail of these, and to examine the nature and extent of their

several jurisdictions. They arose originally from the favour of the Crown to particular districts, wherein we find them erected, upon the same principle that hundred-courts, and the like, were established; for the convenience of the inhabitants, that they may prosecute their suits and receive justice at home. An appeal lies from them to a divisional court of the High Court of Justice.

10. The *Chancellor's Courts* in the two Universities have jurisdiction in civil actions, when a scholar or privileged person is one of the parties; except where the right of freehold is concerned. And these by the university charters they are at liberty to try and determine, either according to the common law of the land, or according to their own local customs, at their discretion.

11. The *Forest Courts* were instituted for the government of the royal forests in the different parts of the kingdom, and for the punishment of all injuries done to the deer or *venison*, to the *vert* or greensward, and to the *covert* in which such deer are lodged. These are the Courts of *Attachments*, of *Regard*, of *Swainmote*, and of *Justice-seat*. But since the Revolution the forest laws have fallen into entire disuse; and will soon become of interest only to the antiquary, the policy of modern legislation being to remove all traces of the ancient forests and the obnoxious privileges formerly attached to them. Finally there are

12. The *Court of the Commissioners* of *Sewers*, whose jurisdiction is to overlook the repairs of sea banks and sea walls; and the cleansing of rivers, public streams, ditches and other conduits, whereby any waters are carried off: and is confined to such county or particular district as the commission constituting the court shall expressly name. The court is a court of record, and may fine and imprison for contempts; and in the execution of its duty may proceed by jury, or upon view, and may take order for the removal of any annoyances, or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney Marsh, or otherwise at their own discretion. They may also assess such rates, or scots, upon the owners of lands within their district, as they

shall judge necessary; and if any person refuses to pay them, the commissioners may levy the same by distress on his goods and chattels; or they may by statute sell his freeholds and copyholds also, in order to pay such scots or assessments.

This court, will soon, however, be classed with the many other tribunals known to law, which have become obsolete. The duties of these commissioners, when appointed, are obviously so much more of an administrative than of a judicial nature, that in modern times powers similar to those possessed by the courts of sewers have been freely conferred on vestries, borough councils, and other local representative bodies, charged with the improvement and police of towns and other populous places. And the functions of the commissioners of sewers are thus so effectually superseded, that these courts are not likely to be ever again called into active operation.

These are all our private, or special courts; concerning which it is to be observed: that these jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever strictly restrained, and cannot be extended further than the express letter of their privileges most explicitly warrants.

CHAPTER IV.

OF THE COGNIZANCE OF PRIVATE WRONGS.

We are now to consider in which of the courts, mentioned in the preceding chapters, every possible injury that can be offered to a man's person or property is certain of meeting with redress. And the order, in which I shall pursue this inquiry, will be by showing—1. What actions may be brought, or what injuries remedied in the ecclesiastical courts. 2. What in the Probate, Divorce, and Admiralty division of the High Court of Justice. And, 3. What in the several divisions of the High Court of Justice itself. I adopt this course, because each of the divisions of the High Court retains the special jurisdiction of the court whose designation it bears; and I shall point out as I proceed what other remedies are, in particular cases, open to the parties

injured, and especially when it may be more desirable to resort to the Chancery division, whose jurisdiction will form the subject of a separate chapter.

With regard then to the ecclesiastical courts, I shall not consider what has at any time been *claimed* to belong thereto; but what the common law permits to be so. For these tribunals subsist, not by any right of their own, but upon the sufferance of the municipal laws, and must have recourse to those laws to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden, to be drawn in question before them.

Having premised this general caution, I proceed to consider,

I. The injuries cognizable by the Ecclesiastical courts—such, I mean, as are offered to private persons, or individuals; which are here cognizable, not for reformation of the offender, *pro salute animæ*, as is the case with immoralities in general, but for the sake of the party *injured*, to make him a satisfaction for the damage which he has sustained. These wrongs were formerly treated of under three heads—causes *pecuniary*, causes *matrimonial*, and causes *testamentary*; but the jurisdiction of the latter branches having been transferred to other tribunals, the Courts Christian now take cognizance only of

Pecuniary causes, which arise either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrues to the plaintiff; towards obtaining a satisfaction for which he may institute a suit in the spiritual court. The principal of these is the subtraction or withholding of *tithes* from the parson or vicar, whether the former be a clergyman or a lay appropriator, where the *right* does not come into question, but only the *fact*, whether or no the tithes allowed to be due are really subtracted. But it now seldom happens that tithes are sued for in this way; for various statutes have provided a summary method of proceeding before magistrates in petty sessions, except where the actual title to the tithe or the actual liability or exemption of the land is in question. And tithes themselves will ere long be a thing of the past, those not previously commuted by agreement being

now convertible into rent-charges, recoverable by distress, in the same manner as rent reserved on a lease.

Another pecuniary injury, cognizable in the spiritual court, is the *non-payment* of ecclesiastical *dues* to the clergy; as pensions, mortuaries, compositions, offerings, and whatsoever falls under the denomination of *surplice fees*, for marriages or other ministerial offices of the church: all which injuries are redressed by a decree for their actual payment. For *fees* also, settled and acknowledged to be due to the officers of the ecclesiastical courts, a suit will lie therein; but not if the *right* of the fees is at all disputable; for then it must be decided by the common law.

Under this head of pecuniary injuries may also be classed *spoliation and dilapidation.*

Spoliation is an injury done by one clerk or incumbent to another, in taking the fruits of his benefice without any right, but under a pretended title, which is remedied by a decree to account for the profits so taken. For *dilapidations*, which are a kind of ecclesiastical waste, either voluntary, by pulling down, or permissive, by suffering the chancel, parsonage, or other buildings to decay, an action also lies, either in the spiritual court, or in the ordinary courts of law: and it may be brought by the successor against the predecessor, if living, or, if dead, then against his executors. But under a modern statute, diocesan surveyors are appointed who have authority to inspect ecclesiastical buildings, and to report what repairs are necessary, and these repairs the incumbent must execute; otherwise the benefice may be sequestered, and the repairs made by the bishop. In case of a vacancy, the cost of the repairs is a debt due from the late incumbent, recoverable either at law or in equity, so that the spiritual court is not likely to be much resorted to.

This court formerly took cognizance of the *neglect of reparations* of the church, churchyard, and the like, and a suit might have been brought therein for non-payment of a rate made by the churchwardens for that purpose. But after years of controversy, suits for *church rates* were prohibited, and such rates therefore practically abolished.

The *method of proceeding* in these courts is according to the

civil and canon laws. The ordinary course is—first, by *citation*, to call the party injuring before them. Then by *libel*, or formal *allegation*, to set forth the ground of complaint. To this succeeds the *defendant's answer* upon oath; when, if he denies or extenuates the charge, they proceed to *proofs* either in open court, or by having witnesses examined, and their depositions taken down by an officer of the court. If the defendant has any circumstances to offer in defence, he may make a *defensive allegation*, to which he is entitled in his turn to the *plaintiff's answer* upon oath, and may from thence proceed to *proof*. When the pleadings and proofs are concluded, they are referred to the consideration of a single judge; who *takes information* by hearing advocates on both sides, and thereupon forms his *interlocutory decree or definite sentence* at his own discretion: from which there generally lies an *appeal*, in the several stages already mentioned.

But the point in which these jurisdictions are defective, is that of enforcing their sentences; for which they have no other process but *excommunication*; the less and the greater. The less excludes the party from the participation of the sacraments: the greater excludes him not only from these, but also from the company of all Christians. Heavy as this penalty is, considered in a serious light, there are many obstinate or profligate men who would despise ecclesiastical censures, for non-payment of fees, costs, or other trivial causes. The common law, therefore, steps in to the aid of the ecclesiastical jurisdiction, by giving the writ *de contumace capiendo*, upon which the person who is contumacious may be imprisoned, until released by a writ of deliverance, or discharged from custody in due course of law.

II. The matters of which the Probate, Divorce, and Admiralty division of the High Court of Justice takes cognizance, are either *testamentary*, *matrimonial*, or *maritime* causes.

Testamentary suits were until recently appropriated to the *Court of Probate*; whose jurisdiction in this respect previously belonged to the ecclesiastical courts. These causes were originally cognizable in the county court; but afterwards transferred to the jurisdiction of the church, by the favour of the crown, as a natural consequence of granting to the bishops the administration of intestates' effects.

This spiritual jurisdiction was for nearly eight centuries a peculiar constitution of this island; and was principally exercised in the consistory courts of every diocesan bishop, and in the prerogative court of the metropolitan; and was, and still is divisible into two branches; the probate of wills, and the granting of administrations. These, when no opposition is made, are granted merely *ex officio et debitio justitiæ*, and are then the object of what is called the *voluntary*, and not the *contentious* jurisdiction. But when a *caveat* is entered against proving the will or granting administration, and a suit thereupon follows to determine either the validity of the testament, or who has a right to administer; this claim and obstruction by the adverse party are an injury to the party entitled, and as such are remedied by a decree, either establishing the will or granting the administration.

Matrimonial causes, or injuries respecting the rights of marriage, formerly constituted also a branch of the ecclesiastical jurisdiction. They are now cognizable in the Probate, Divorce, and Admiralty division of the High Court, and of these the first and principal is,

1. The suit for a *divorce*, on the ground of adultery, which is brought either by the husband against the wife and her paramour; or by the wife against the husband; being maintainable by the husband in respect of the simple adultery of the wife; but not by the wife against the husband, unless his adultery has been coupled with desertion, without reasonable excuse, for two years, or with such cruelty as would entitle the wife to a judicial separation, or he has been guilty of bigamy, incestuous adultery, rape, or an unnatural offence.

2. The suit for a *judicial separation*, which lies, when it becomes improper that the parties should live together any longer; as through intolerable cruelty, adultery, a perpetual disease, and the like. This unfitness for the marriage state is looked upon as an injury to the suffering party; and for this the law administers the remedy of a *judicial separation*.

3. The next species of matrimonial cause is a consequence drawn from one of the two former, which is the suit for *alimony*, or maintenance: which suit the wife may have against her

husband, if he neglects or refuses to make her an allowance suitable to her station in life.

4. The suit for *restitution of conjugal rights* is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case they will be compelled to come together again, if either party be weak enough to desire it, contrary to the inclination of the other.

5. The *suit for nullity* may be brought if sufficient cause existed previous to the marriage, such as rendered it unlawful *ab initio*, that is to say, corporal imbecility.

6. A suit may also be brought for *declaring the validity* of a marriage, or the legitimacy of the offspring; in order that the plaintiff may have his legitimacy, or his right to be deemed a natural born subject, or the validity of his own marriage, or that of his father and mother, or grandfather and grandmother, ascertained and declared. Finally, there is,

7. The suit *causa jactitationis matrimonii*; which may be brought when one maliciously gives out that he or she is married to the other, in order that he or she may be enjoined perpetual silence upon that head; the only remedy that can be given for this injury.

The interference of the court in these cases is sought by *petition*, filed in the registry; on which a *citation* issues to the respondent, requiring him to *appear* and *answer* the matters alleged against him. To this answer, when made, the complainant *replies*; the respondent, if need be, making further answer; the *issues* ultimately joined between the parties being next ordered for *trial*, either by the court itself or by a jury if either of the parties so require.

Maritime causes, which constitute the third branch of the jurisdiction of the Probate, Divorce, and Admiralty division of the High Court, are such injuries, which though they are in their nature of common law cognizance, yet being committed on the high seas, out of the reach, as was supposed, of our ordinary courts of justice, were therefore remedied in the High Court of Admiralty. If part of any contract, or other cause of action, arose

upon the sea, and part upon the land, the common law excluded the Admiralty court; for, part belonging properly to one cognizance and part to another, the common or general law took place of the particular. Therefore, though pure maritime acquisitions, which are earned and become due on the high seas, as seamen's wages, were one proper object of the admiralty jurisdiction, even though the contract for them had been made upon land; yet, in general, if there had been a contract made in England, and to be executed upon the seas, as a charter-party or covenant that a ship should sail to Jamaica, or should be in such a latitude by such a day; or a contract made upon the sea to be performed in England, as a bond made on shipboard to pay money in London or the like; these kinds of mixed contracts belonged, not to the admiralty jurisdiction, but to the courts of common law. These and similar nice questions can no longer arise, as the divisional court, by which the jurisdiction of the Admiralty is now exercised, has all the powers and authority of the High Court of Justice; and has therefore, in cases of *prize*, in time of war between our own nation and another, or between two other nations, which are taken at sea, and brought into our ports, an undisturbed and exclusive jurisdiction to determine the same according to the law of nations.

III. I am next to consider such injuries as are cognizable by the High Court of Justice. And herein I shall for the present only remark, that all possible injuries whatsoever that do not fall within the exclusive cognizance of the other tribunals, are for that very reason within the cognizance of this court. For it is a settled and invariable principle, that every right when withheld must have a remedy, and every injury its proper redress. The explanation of these injuries, and their remedies, will occupy many subsequent chapters. But before concluding the present, it is desirable to mention two species of injuries, whose nature justifies our immediate consideration: and these are, either when justice is delayed by an inferior court that has proper cognizance of the cause; or when such inferior court takes upon itself to examine a cause without authority.

1. The first of these injuries, refusal or neglect of justice, is remedied either by writ of *procedendo*, or of *mandamus*. A writ of *procedendo ad judicium* issues, where judges of any subordinate

court 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. In this case a *procedendo* is awarded, commanding them to proceed to judgment; but without specifying any particular judgment, for that, if erroneous, may be set aside on an appeal: and upon farther neglect or refusal, the judges of the inferior court may be punished for their contempt, by writ of attachment. A *procedendo*, however, is rarely resorted to, the remedy by *mandamus* being preferable.

The writ of *mandamus* is a command issuing in the name of the sovereign, and directed to any person, corporation, or inferior court of judicature requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the Queen's Bench division has previously determined, or at least supposes to be consonant to right and justice. A *mandamus* lies, for instance, to compel the admission or restoration of the party applying to any office or franchise of a public nature; to academical degrees; to the use of a meeting-house, &c.; for the surrender of the *regalia* of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it is impossible to enumerate. It issues to the judges of an inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed; as to enter up judgment; to hear an appeal; to swear a churchwarden, and the like. This writ is grounded on the oath of the party injured, of his own right, and the denial of justice below: whereupon a rule is made, directing the party complained of to show cause why a writ of *mandamus* should not issue: and, if he shows no sufficient cause, the writ itself is issued, at first in the alternative, either to do thus, or signify some reason to the contrary; to which a return, or answer, must be made at a certain day. And, if the inferior judge, or other person returns an insufficient reason, then there issues a *peremptory mandamus*, to do the thing absolutely: to which no other return is admitted, but obedience. If the inferior judge or other person makes no return, or fails in his obedience, he is punishable for his contempt by attachment. If, however, he returns a sufficient cause, although it should be false in fact, the court

will not try the truth of the fact on affidavit; but will for the present believe him, and proceed no further on the *mandamus*; in which case the party injured may adopt one of two courses. He may either have an action against the defendant for his false return, and, if it be found to be false, he shall in such action recover damages equivalent to the injury sustained; or he may plead to the return as if it were a defence to an ordinary action. The plaintiff, if ultimately successful in either course has a *peremptory* mandamus to the defendant to do his duty.

2. The other injury, which is that of encroachment of jurisdiction, or calling one *coram non judice*, to answer in a court that has no legal cognizance of the cause, is also a grievance, for which the law has provided a remedy by the writ of *prohibition*; directed to the judge and parties to 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. And if either the judge or the party shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the Divisional Court that awarded it; and an action will lie against them, to repair the party injured in damages.

So long as the idea continued among the clergy, that the ecclesiastical state was wholly independent of the civil, great struggles were constantly maintained between the temporal courts and the spiritual, concerning the writ of prohibition and the proper objects of it, even from the time of the Constitutions of Clarendon to the exhibition of certain articles of complaint to the king by Archbishop Bancroft in 3 Jac. I., from which, and from the answers to them, much may be collected concerning the reasons of granting and methods of proceeding in prohibition.

The mode of obtaining and following out this writ has been much simplified by modern legislation. The party, who seeks the prohibition, makes an application, founded on affidavit, for a rule calling upon the party to be prohibited, and the other party interested in the question between them, to show cause why a writ of prohibition should not issue. This rule is made

absolute at the expiration of the time allowed for showing cause, unless cause be shown; in which case the rule is discharged, the writ issues, or the party applying for it is directed to declare in prohibition. In the latter event the party seeking the intervention of the court must set out the proceedings in the court below to which he objects, and after trial of facts disputed, or argument as to the law involved, as in the case of an ordinary action, judgment is given that the writ of prohibition do or do not issue. When issued there is no course open to the parties but obedience, which will, if necessary, be enforced by attachment.

Thus careful has the law been, in compelling the inferior courts to do ample and speedy justice; in preventing them from transgressing their due bounds; and in allowing them the undisturbed cognizance of such causes as by right properly belong to their jurisdiction.

CHAPTER V.

OF WRONGS, AND THEIR REMEDIES, RESPECTING THE RIGHTS OF PERSONS.

I COME now to consider in a more particular manner, the remedies obtainable in the High Court of Justice for injuries or private wrongs of any denomination whatsoever. The superior courts of common law and the Court of Chancery have as we have seen been merged in the High Court of Justice; but each of the four divisions which may be said to have succeeded to these courts, possesses the same general and special authorities as the tribunal, which it represents, exercised before this fusion took place. It will therefore be convenient, *firstly*, to define the several injuries hitherto cognizable by the courts of common law, with the respective remedies applicable to each particular injury, pointing out in what cases relief was more appropriately sought in equity; *secondly*, describe the several branches of jurisdiction hitherto exercised by the Court of Chancery; and, *thirdly*, explain the method of obtaining these various remedies by action. And in dealing with the first branch of this inquiry, I shall confine myself to such wrongs as may be committed in

the mutual intercourse between subject and subject: reserving such injuries as may occur between the crown and the subject to be separately considered hereafter, as the remedy in such cases is generally of a peculiar nature.

Now, since all wrong may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner; as when lands or goods are unjustly withheld: or, where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages: as in case of assault, breach of contract, &c.: to which damages the party injured has acquired an inchoate right, the instant he receives the injury, though such right be not fully ascertained till the damages are assessed by the intervention of the law.

But in order to apply the remedy, it is necessary to ascertain the complaint. I proceed therefore to enumerate the several kinds of private wrongs which may be afforded to the rights of either a man's person or his property. For as rights were divided into those of *persons*, and those of *things*, so the same general distribution of injuries must be made into such as affect the *rights of persons*, and such as affect the *rights of property*.

The rights of *persons* are either *absolute* or *relative*: *absolute*, being such as belong to private men, considered merely as individuals, or single persons; and *relative*, such as are incident to them as members of society. And the absolute rights of each individual are the right of personal security, the right of personal liberty, and the right of private property.

I. The injuries which affect the *personal security* of individuals, are either against their lives, their limbs, their bodies, their health, or their reputations.

1. Injuries affecting the life of man constitute one of the most atrocious species of crimes, and will be considered in the next book. Until recently, these could not be made the subject of complaint in a civil suit; but an action now lies for the

benefit of the wife, husband, parent, or child of the deceased. And the jury may direct in what proportion the damages shall be divided among those for whose benefit it is brought.

2, 3. Injuries affecting the limbs or bodies of individuals may be committed—1. By *threats* of bodily hurt. Here the party menaced may either apply to a magistrate, to have the offender bound over in recognizances to keep the peace; or he may sue for damages in a civil action. 2. By *assault*; which is an attempt or offer to beat another, without touching him: as if one lifts up his cane, or his fist, in a threatening manner at another; or strikes at him, but misses him: here the party injured may have redress by an action for damages. 3. By *battery*; which is the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner. But battery is, in some cases, justifiable; as where one who has 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; and, if sued for it, may plead *son assault demesne*, or that it was the plaintiff's own original assault that occasioned it. So in defence of my goods or possession: if a man endeavours to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away. 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. And, if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this purpose. On account of these causes of justification, battery is defined to be the *unlawful* beating of another; for which the remedy is for the assault, by action for damages. 4. By *wounding*; which consists in giving another some dangerous hurt, and is an aggravated species of battery. 5. By *mayhem*; which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defence

in fight. The same remedial action lies to recover damages for this injury; an injury which, when wilful, no motive can justify but necessary self-preservation.

These injuries are all in their nature *direct*. There are others which are termed *consequential*, as resulting from wrongful acts or neglects. Thus, if a passenger is injured by the want of care of the driver of a coach, or one sustains an injury owing to the negligence of a carman, the owner of the coach in the first case, the carman's master in the second, is liable in an action for damages; for it was the duty of the owner and master in each case to employ careful servants. If, on the other hand, the driver or the carman did the injury *wilfully*, even if in the master's service, he and not the owner or master, is liable. Consequential injuries may also be sustained from a bull, ram, monkey, or other animal being left at large, or not properly taken care of; and the owner will in such case be liable to the party injured, provided he can be shown to have been aware of the mischievous propensities of the animal. But if the party injured have imprudently exposed himself, or by his own negligence have conduced to the accident, he cannot maintain an action.

4. Injuries affecting a man's health may be occasioned by any one selling him bad provisions or wine; by the exercise of a noisome trade, which infects the air in his neighbourhood; or by the neglect or unskilful management of his physician, surgeon, or apothecary. The remedy is by action for damages; and in some cases, as in that of nuisances, the party injured may proceed by complaint to the local authorities, or by indictment.

5. Lastly; injuries affecting a man's *reputation* are, first, by slanderous *words*, tending to his damage; as if a man maliciously utter any false tale of another, which may either endanger him in law, by impeaching him of some heinous crime, as to say that a man has poisoned another, or is perjured; or which may exclude him from society, as to charge him with having an infectious disease; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave. But with regard to *words*, that do not upon the face of them import such defamation as will 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*. As if I say of an agent that he is an unprincipled man, he cannot for this bring any action against me, unless he can show some special loss by it, as that it was said to a person about to employ him, but who in consequence did not do so; in which case he may bring his action against me for saying he was an unprincipled man, *per quod* he lost the profits of the intended employment. 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 a heretic, will not afford ground for an action; unless any temporal damage ensues, which may be the foundation for a *per quod*. Words of heat and passion, as to call a man a rogue and a rascal, if productive of no ill consequence, and not of any of the dangerous species before mentioned, are not actionable: neither are words spoken in a friendly manner, as 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. Within which last category fall communications as to the character of servants, advice as to dealing with tradesmen, and other statements of a like nature, which constitute what are called *privileged communications*. These the law supposes to have been *not maliciously* spoken, a presumption which may, however, be rebutted by proof of express malice on the part of the defendant. If the defendant be able to justify, and prove the words to be true, no action lies, even though special damage has ensued: for then it is no slander or false tale. As if I can prove the tradesman a bankrupt, the physician a quack, the lawyer a knave, this will destroy their respective actions: for though there may be damage sufficient accruing from it, yet, if the fact be true, it is *damnum absque injuriâ*; and where there is no injury, the law gives no remedy.

A second way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like; which set him in an odious or ridiculous light, and thereby diminish his reputation, as by publishing of an attorney *ironically*, that he was "an honest lawyer." With regard to libels in general, there are,

as in many other cases, two remedies; one by indictment, and another by action. The former is for the *public* offence; for every libel has a tendency to a breach of the peace, by provoking the person libelled to break it. This offence was formerly the same, in point of law, whether the matter contained in the libel were true or false; and the defendant, on an indictment for publishing a libel, was therefore not allowed to allege the truth of it by way of justification. But the law in this respect has been altered, and the defendant may allege the truth of the matters charged, and that it was for the public benefit that they should be published. For the truth of the libel is not a defence, unless the publication was for the public benefit. And if, after such a plea being maintained, the defendant is convicted, the court may, in pronouncing sentence, consider whether the guilt of the defendant is aggravated or mitigated thereby.

In the remedy by action, the defendant might always, on the other hand, as for words *spoken*, justify the truth of the facts, and show that the plaintiff had received no injury at all. And he may now give in evidence, in mitigation of damages, that he offered an apology before action, or as soon afterwards as he had an opportunity in case the action was commenced before. To encourage a wholesome independence in the press, a newspaper, or other periodical publication, has the further privilege of pleading that the libel was inserted without malice, and without negligence, and that before action, or at the earliest opportunity afterwards, a full apology was inserted; or if the paper be ordinarily published at intervals exceeding one week, that an offer had been made to publish the apology in any newspaper selected by the plaintiff. With such a plea money may be paid into court by way of amends; and if the jury consider the sum sufficient, they must find their verdict for the defendant.

What has been said with regard to words spoken, will also hold with regard to libels by writing or printing. But many words which, spoken merely, are not actionable, become so if written. Thus, to say of a man that he is a swindler, unless in relation to his trade or business, is not actionable, whilst to print or write of him, that he is so, is actionable. For speaking the words "rogue" and "rascal" an action will not lie; but if

these are *written and published*, an action will lie. As to signs or pictures, it seems necessary always to show the import and application of the scandal; otherwise it cannot appear, that such libel by picture was understood to be levelled at the plaintiff.

A third way of destroying or injuring a man's reputation is by preferring an indictment against him; which, under the mask of public spirit, may be made the engine of private enmity. For this, however, the law gives a remedy in damages, either by an action of *conspiracy*, which cannot be brought but against two at the least; or, by a special action for a malicious prosecution.

II. The violation of the right of personal liberty, may be effected by a false imprisonment, which the law not only punishes as a crime, but gives also a private reparation to the party; as well by removing the actual confinement for the present, as, after it is over, by subjecting the wrongdoer to an action.

To constitute the injury of false imprisonment there are two points requisite: 1. The detention of the person; and, 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or even by forcibly detaining one in the public streets. Unlawful or false imprisonment consists in such confinement or detention without sufficient authority. The remedy is of two sorts: the one *removing* the injury; the other *making satisfaction* for it. And the means of *removing* the actual injury is by writ of *habeas corpus*.

Of this writ, the most celebrated in the English law, there are various kinds, *ex. gra.*, the *habeas corpus ad respondendum*, when a man has a cause of action against one who is in prison, in order to remove the prisoner, and charge him with the action. There are also the *habeas corpus ad prosequendum, testificandum, deliberandum*, &c.; which 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.

The great and efficacious writ, in all manner of illegal

confinement, is, however, the *habeas corpus ad subjiciendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum subjiciendum et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. This is a high prerogative writ, and therefore at common law, issues only out of the Queen's Bench; for the sovereign is at all times entitled to have an account, why the liberty of any of her subjects is restrained, whenever that restraint may be inflicted. But it may now be issued by any of the courts; and in vacation by a judge at chambers. If it is issued in vacation, it is usually returnable before the judge himself who has awarded it, and he proceeds by himself thereon; unless the sittings of the court intervene, and then it may be returned in court.

It is necessary to show some probable cause for the writ being issued; for when once granted, the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner. If it issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the queen's service, a wife, a child, a relation, or a domestic, confined for insanity, or other prudential reasons, might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court. But if, on the other hand, a probable ground be shown, that the party is imprisoned without just cause, and therefore has a right to be delivered, the writ of *habeas corpus* is then a writ of right, which "may not be denied, but ought to be granted to every "man that is committed, or detained in prison, or otherwise "restrained, though it be by the command of the king, the privy "council, or any other."

In the outset of this treatise the personal liberty of the subject was shown to be a natural inherent right, which could not be forfeited unless by the commission of crime, and which ought not to be abridged without the special permission of the law. Yet early in the reign of Charles I. the King's Bench, relying on some arbitrary precedents, determined that they could not upon a *habeas corpus* either bail or deliver a prisoner, though im-

prisoned without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. This produced the *petition of right*, 3 Car. I., which enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Selden and others were committed by the lords of the council, in pursuance of the king's special command, under a general charge of "notable "contempts and stirring up sedition against the king and govern- "ment," the judges delayed for two terms to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they annexed a condition of finding sureties for good behaviour, which still protracted their imprisonment; the chief justice, Sir Nicholas Hyde, at the same time declaring, "that if they were again remanded for that cause, perhaps the "court would not afterwards grant a *habeas corpus*, being already "made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present; according to Selden's own account of the matter, whose resentment was not cooled at the distance of four-and-twenty years.

These evasions gave rise to the statute 16 Car. I. c. 10, which enacts, that if any person be committed by the king, or privy council, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*, upon demand or motion made to the King's Bench or *Common Pleas*; who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner. Yet still in the case of Jenks, who in 1676 was committed by the king in council for a turbulent speech at Guildhall, new shifts were made use of to prevent his enlargement by law; and in other cases vexatious devices were practised to detain state-prisoners in custody. But whoever will attentively consider English history, may observe, that the flagrant abuse of any power, has always been productive of a struggle; which either discovers the exercise of that power to be contrary to law, or, if legal, restrains it for the future. This was the case in the present instance. The oppression of an obscure individual gave birth to the *Habeas Corpus* Act, 31 Car. II. c. 2; which requires the chancellor or any of the judges,

when applied to by, or on behalf of, any person committed for any *crime*, unless for treason or felony expressed in the warrant, or unless he is convicted or charged in execution by legal process, to award a *habeas corpus* for such prisoner returnable immediately; and upon the return to discharge the party, if bailable, upon his giving security to appear and answer to the accusation in the proper court of judicature. The statute requires the writ to be returned and the prisoner brought up, within a limited time, according to the distance, not exceeding in any case twenty days;—2, imposes a penalty on officers and keepers neglecting to make a due return;—3, enacts that no person once delivered by *habeas corpus* shall be committed for the same offence, on penalty of 500*l.*; and provides for every person committed for treason or felony being, if he requires it, in the first week of the next term, or on the first day of the next session of *oyer* and *terminer*, indicted in that term or session, or else admitted to bail: unless the king's witnesses cannot be produced at that time; and if acquitted, or if not indicted and tried in the second term or session, that he shall be discharged from his imprisonment for such imputed offence. Finally, the lord chancellor or any judge denying the writ forfeits to the party aggrieved the sum of 500*l.*

This is the substance of that great statute, which extends only to the case of commitments for such criminal charge as can produce no inconvenience to public justice by a temporary enlargement of the prisoner; all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But even upon writs at the common law it is expected by the court that the writ shall be immediately obeyed. So that the remedy is now complete for *removing* the injury of illegal confinement; a remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention of government: for it frequently happens that persons apprehended upon suspicion suffer a long imprisonment, merely because they are forgotten.

The operation of the writ of *habeas corpus* is by no means confined to the liberation of the person on whose behalf it is issued from illegal confinement in prison; it also extends its influence to remove every unjust restraint of personal freedom in private life, though imposed by a husband or a father. When,

however, a woman or children are brought up by a *habeas corpus*, the court will only set them free from an improper or unreasonable confinement;—it cannot and will not, for instance, determine the validity of a marriage, or the right to the guardianship of infants, but will leave the person whose liberty is infringed to choose where he will go: and if there be any ground to fear that he will be seized in returning from the court, he will be sent home under the protection of an officer. If a child is too young to have any discretion of its own, the court will deliver it into the custody of its parents, or the person who appears to be its legal guardian.

The remedy, by way of *satisfaction*, for a false imprisonment, is by an action: which is generally, and almost unavoidably, accompanied with a charge of assault and battery also: and therein the party shall recover damages for the injury he has received.

III. With regard to the third absolute right of individuals, or that of private property, the enjoyment of it, when acquired, is strictly a *personal* right. Its nature and origin, and the means of its acquisition or loss, were considered in the second book, which related to the *rights of things*. As the wrongs, then, that affect these rights must be referred to the corresponding division in the present book, it will be more easy to consider together, rather than in a separate view, the injuries that may be offered to the *enjoyments*, as well as to the *rights*, of property. I therefore here conclude the head of injuries affecting the *absolute* rights of individuals.

We are next to consider those which affect their *relative* rights, as husband and wife, parent and child, guardian and ward, master and servant.

I. Injuries that may be offered to a person, considered as a *husband*, are principally three: *abduction*, or taking away a man's wife; *adultery*, or criminal conversation with her; and *beating* or otherwise abusing her. 1. As to the first sort, *abduction*, or taking her away, this may either be by fraud and persuasion, or open violence: though the law in both cases supposes force and restraint, the wife having no power to consent, and here the law gives a remedy by action of damages for taking her away. 2. *Adultery*, or criminal conversation with a man's wife

is, as a public crime, left to the coercion of the spiritual courts; yet, for the civil injury, the law gives a species of satisfaction to the husband, by enabling him to claim damages in a suit for a divorce against the adulterer. These damages are increased and diminished by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife, founded on her previous behaviour and character: and the profligacy of the husband. 3. The third injury is that of *beating* a man's wife, or othewise ill-using her; for which the law gives the usual remedy to recover damages.

II. The injury that may be offered to a person in the relation of a *parent* is that of *abduction*, or taking away of the child, for which the law allows an action for the value of the lost services of the child, who is, in this instance, regarded as a servant; for it is only in the character of *master* that the suit is maintainable. In such an action, however, damages may be given, not only as compensation for the lost services, but also for the wounded feelings of the parent.

III. Of a similar nature to the last is the relation of *guardian* and *ward*; and the like action which is given to a father, the guardian also has for recovery of damages, when his ward is taken away from him. But the usual method of redressing all complaints relating to wards and guardians is by an application to the Chancery division of the High Court, which is the supreme guardian, and has the superintendent jurisdiction of all the infants in the kingdom.

IV. To the relation between *master* and *servant*, and the rights accruing therefrom, there are two species of injuries incident. The one is, retaining a man's hired servant before his time has expired; the other is beating or confining him in such a manner that he is not able to perform his work. And for either injury the law gives him a remedy by action for the damages which he has sustained, or for the value of the servant's labour. The master may also have an action against the servant for the non-performance of his agreement. In these relative injuries, notice is only taken of the wrong done to the superior of the parties related, while the loss to the inferior is totally un-

regarded. One reason for which may be this: that the inferior has no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she has no separate interest in anything during her coverture. And so the servant, whose master is disabled, does not thereby lose his maintenance or wages. He had no property in his master; and if he receives his part of the stipulated contract he suffers no injury, and is therefore entitled to no action.

CHAPTER VI.

OF INJURIES TO PERSONAL PROPERTY.

We are now to consider the injuries that may be offered to the rights of *personal* property; and, of these, firstly, to the rights of personal property in *possession*, and then to those that are in *action* only.

I. The rights of personal property in *possession* are liable to two species of injuries: 1. The amotion or deprivation of that possession: and 2. The abuse or damage of the chattels, while the possession continues in the legal owner.

The former, or deprivation of possession, is also devisable into branches: the unlawful *taking* them away; and the unlawful *detaining* them, though the original taking might be lawful.

And first of an unlawful *taking*. When I once have gained a rightful possession of any goods or chattels, whoever either by fraud or force dispossesses me of them, is guilty of a transgression against the law of society, which is a kind of secondary law of nature. For there must be an end of all social commerce unless private possessions be secured from unjust invasions; and, if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning: and the weak and simple-minded

part of mankind, which is by far the most numerous division, could never be secure of their possessions.

The wrongful taking of goods being thus an injury, the next consideration is, what particular remedy the law has given for it. And this is, firstly, the restitution of the goods themselves wrongfully taken, with damages for the loss sustained. This is effected by an action of *replevin*, which is chiefly resorted to in one instance of an unlawful taking, that of a wrongful distress, but lies upon *any* unlawful taking whatever. This and the action of *detinue* are the only actions, in which the specific possession of the identical chattel is restored to the owner.

A replevin is founded upon a distress taken wrongfully: being 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. These replevins, or re-deliveries of goods detained from the owner to him, are granted by the registrar of the county court of the district, in which the distress is taken, upon security being given to him by the replevisor, 1, that he will pursue his action against the distrainor, and, 2, that if the right be determined against him he will return the distress. And as the end of all distresses is only to compel the party distrained upon to satisfy the debt or duty owing from him, this end is as well answered by such security as by retaining the very distress, which might frequently occasion great inconvenience to the owner. The registrar, therefore, on receiving security, causes the chattels taken in distress to be restored to the party distrained upon, making use of force, if necessary; and the party replevying is then bound to bring his action of replevin either in the High Court or in the county court of the district wherein the distress was taken. He therein complains of the trespass committed upon him by the seizure of his goods; and the distrainor, who is now the defendant, makes *avowry*; that is, he *avows* taking the distress in his own right, and sets forth the reason of it, as for rent arrear, 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*; that is, he *acknowledges* the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain. On the merits of either avowry or

cognizance, the action is determined. If it be determined for the plaintiff, viz., that the distress was wrongfully taken, he has already got his goods back into his own possession, and shall keep them, and moreover recover damages: if the defendant prevails, then he shall have a writ *de retorno habendo*, whereby the goods or chattels, which were distrained and then replevied, are returned again into his custody, to be sold or otherwise disposed of, as if no replevin had been made.

Deprivation of possession may also be by an unlawful *detainer*, though the original *taking* was lawful. As if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking, and the regular method for me to recover possession is by action of *detinue*. In this action of *detinue*, it is necessary to ascertain the thing detained, in such manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn, or the like: for that cannot be known from other money or corn; unless it be in a bag or sack, for then it may be marked. In order therefore to ground this action which is only for *detaining*, these points are necessary: 1, that the defendant came lawfully into possession of the goods; 2, that the plaintiff have a property; 3, that the goods themselves be of some value; and, 4, that they be ascertained in point of identity. Upon this the court, if judgment be for the plaintiff, assesses the value of the goods detained, and also damages for the detention. If a re-delivery is impossible, damages only may be assessed. So if the chattels have been re-delivered to the owner, after action brought, damages for the detention only need be assessed; the judgment in this action being generally conditional; that the plaintiff recover the goods, or if they cannot be had, their value, and damages for the detention.

There is another action by which to obtain a satisfaction for the wrongful taking, or detention of chattels, viz., the action of *trover and conversion*, which was originally an action 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; from which finding and converting, it was called an action of *trover* and *conversion*. In this action it was not requisite to describe the goods; and ultimately actions of *trover* were per-

mitted 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: for any man may take the goods of another into his possession if he finds them; but no finder is allowed to acquire a property therein, unless the owner be unknown: and therefore he must not convert them to his own use, which the law presumes him to do, if he refuses to restore them to the owner: for which reason such refusal alone is *primâ facie* evidence of a conversion. The fact of the finding, or *trover*, is therefore totally immaterial: for if the plaintiff proves that the goods are *his* property, and that the defendant had them in his possession, it is sufficient. But a conversion must be proved: and then the plaintiff shall recover damages, equal to the value of the thing converted.

As to the damage that may be offered to things personal, while in the possession of the owner, as hunting a man's deer, shooting his dogs, poisoning his cattle, or in anywise taking from the value of any of his chattels, or making them in a worse condition than before, these are injuries too obvious to need explanation. The owner's remedy is by an action for damages, which ought to bear proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction; for the action will lie against the master as well as the servant. And if a man keeps a dog or other brute animal, used to do mischief, as by worrying sheep, or the like, the owner must answer for the consequences, if he knows of such evil habit.

II. We are next to consider injuries affecting the right of things in *action* only; or such rights as arise from *contracts*; the nature of which were explained in the preceding book. The violation, or non-performance, of these contracts might be extended into as great a variety of wrongs, as the rights which we then considered: but I shall now consider them in a twofold division only; viz., contracts *express*, and contracts *implied*.

Express contracts include three species: debts, covenants, and promises.

1. The legal acceptation of *debt* is, a sum of money due by certain and express agreement: as by a bond for a determinate sum; a bill or note, or a rent reserved on a lease; where the quantity is fixed, and does not depend upon any subsequent valuation to settle it. The non-payment of these is an injury, for which the proper remedy is by an action of debt, to recover the specifical sum due. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of *debt* lies against me; for this is also a *determinate* contract: but if I agree for no settled price, I am liable not to an action of debt, but to a special action, according to the nature of my contract.

2. A covenant also, contained in a deed, to do a direct act, or to omit one, is an express contract, the violation of which is a civil injury. As if a man covenants to be at York by such a day, or not to exercise a trade in a particular place, and is not at York at the time appointed, or carries on his trade in the place forbidden: these are direct breaches of his covenant; and may be greatly to the disadvantage and loss of the covenantee. The remedy is by an action on the *covenant:* in which must be set forth the covenant, the breach, and the loss which has happened thereby; in order that damages may be given in proportion to the injury sustained by the plaintiff. The covenant must be one which the law allows; for covenants which are in themselves unreasonable, or in restraint of trade, cannot be enforced.

No person can at common law take advantage of any covenant or condition, except such as are parties or privies thereto, and, of course, no grantee or assignee of any reversion or rent. To remedy which, and more effectually to secure to the king's grantees the spoils of the monasteries, a statute of Henry VIII. gives the assignee of a reversion the same remedies against the tenant, as the assignee himself might have had; and makes him equally liable, on the other hand, for acts agreed to be performed by the assignor.

3. A promise is a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If therefore it be to do any explicit act, it is an express contract, as much as any covenant; and the breach of it is an equal injury. The remedy is by an action on what is called the

assumpsit or undertaking of the defendant. As if a builder promises, undertakes, or assumes to Caius, that he will build and cover his house within a time limited, and fails to do it; Caius has an action against the builder for this breach of his express promise, undertaking, or *assumpsit;* and shall recover a pecuniary satisfaction for the injury sustained by such a delay. So also in the case before mentioned, of a debt by simple contract, if the debtor promises to pay it and does not, this breach of promise entitles the creditor to his action on the *assumpsit*, or implied promise to pay the debt sued for. Thus likewise a promissory note, or note of hand not under seal, to pay money at a day certain, is an express *assumpsit;* and the payee at common law, or by custom and act of parliament the indorsee, may recover the value of the note in damages, if it remains unpaid.

Some agreements, however, though never so expressly made, are deemed of so important a nature, that they ought not to rest on verbal promise only, which cannot be proved but by the memory, which sometimes will induce the perjury, of witnesses. To prevent which, the Statute of Frauds enacts that 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. And lastly, where there is any agreement that is not to be performed within a year from the making thereof. And Lord Tenterden's Act further enacts that no action shall be maintained, 6, whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. And 7, that no action shall be brought, whereby to charge any person by reason of any representation given relating to the character, conduct, credit, ability, trade, or dealings of any person, to the intent that such person may obtain credit, money, or goods, unless such repre-

sentation be made in writing, signed by the party to be charged therewith.

From these *express* contracts the transition is easy to those that are only *implied* by law. Which 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.

Of this nature 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 has 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. And this implied agreement it is that gives the plaintiff a right to institute a second action in order to recover such damages, or sums of money, as are adjudged by the court to be due from the defendant to the plaintiff in a former action. But such actions are discountenanced by the courts, as being vexatious and oppressive.

On the same principle it is, of an implied original contract to submit to the rules of the community whereof we are members, that a forfeiture imposed by the bye-laws and private ordinances of a corporation upon any that belong to the body, immediately creates a debt in the eye of the law: for which the remedy is by action of debt.

The same reason may with equal justice be applied to all penal statutes, that is, such acts of parliament whereby a forfeiture is inflicted for trangressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the direction of the legislature and pay the forfeiture incurred to such persons as the law requires. Thus an action may be maintained against a sheriff for the penalty imposed on him for extortion, in levying greater fees in the execution of the process of the courts than the law allows; or against a member of parliament for voting without having taken the proper oaths. The usual application of these penalties or forfeitures is either to the party aggrieved, or else to any of the queen's subjects in general. But more usually the

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 crown, to the poor, or to some public use, and the other part to the informer or prosecutor: 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 hâc parte sequitur.*"

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 general intendment of the law, that every man has engaged to perform what his duty or justice requires. Thus,

1. If I employ a person to transact any business for me, or perform any work, the law implies that I undertook or promised to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing an action upon this implied *assumpsit*; wherein he suggests that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was worth such a particular sum, which the defendant has omitted to pay. This is called an *assumpsit* on a *quantum meruit*.

2. There is also an implied *assumpsit* on a *quantam 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. There the law concludes, that both parties did intentionally agree, that the real value of the goods should be paid; and an action may be brought accordingly, if the vendee refuses to pay that value. This action is usually for *goods sold*; its converse, by the vendee against the vendor, is for his breach of contract in *not delivering* the goods.

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 to account for it to the true proprietor. This action 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.

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. And from this implication actions are brought, in which the plaintiff sues for money found to be due to him from the defendant *on accounts stated between them*, the legal effect of these words being an allegation, that the plaintiff and defendant had settled their accounts together, *insimul computassent*, and that the defendant engaged to pay the plaintiff the balance, but had since neglected to do it.

6. The last class of contracts, implied by reason and intendment of law, arises upon this supposition, that every one who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence, and skill. And if, by his want of either of those qualities, any injury accrues to individuals, they have therefore their remedy in damages by an action. A few instances will fully illustrate this matter. If an officer of the public is guilty of neglect of duty, or of a palpable breach of it, of non-feasance or of mis-feasance; as, if the sheriff does not execute a writ sent to him, or if he wilfully makes a false return thereof; in both these cases the party aggrieved shall have an action for the damages he has sustained. A solicitor that betrays the cause of his client, or being retained, neglects to appear at the trial, by which the cause miscarries, is liable to an action for a reparation to his injured client. There is also an implied contract with a common innkeeper, to secure his guest's goods in his inn, which, however the innkeeper may exclude by notice; with a common carrier, or bargemaster, to be answerable for the goods he carries, which, however, may be excluded by a special contract; with a common farrier, that he shoes a horse well, without laming him; with a common tailor, or other workman,

that he performs his business in a workmanlike manner; in which, if they fail, an action lies to recover damages for such breach of their general undertaking. But if I employ a person to transact any of these concerns, 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. Also, if an innkeeper, or other victualler, hangs out a sign, and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action will lie against him for damages, if he without good reason refuses to admit a traveller. If any one cheats me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action also lies against him for damages, upon the contract which the law always implies, that every transaction is fair and honest.

In contracts likewise for the sale of goods in a shop, it is understood that the seller undertakes that the commodity he sells *is his own*, and if it proves otherwise, an action lies against him, to exact damages for this deceit. But except in special circumstances, as when the vendor affirms, directly or indirectly, that the goods sold are his property, there is no implied warranty of *title* on the sale of goods. If the article be bought expressly for a particular purpose, there is an implied warranty that it shall be reasonably fit for that purpose. Thus in contracts for provisions, it is always implied that they are wholesome; and, if they be not, an action will lie.

But the law does not in general imply any warranty by the seller as to the *quality* of goods sold by him. The rule is *caveat emptor*; so that no liability is incurred by the seller by reason of bad quality or defects, unless there be an express warranty or fraud. But if he that sells anything does upon the sale warrant it to be good, the law annexes a tacit contract to this warranty, that if it be not so, he shall make compensation to the buyer: else it is an injury to good faith, for which an action will lie to recover damages. The warranty must be *upon the sale*; for if it be made *after*, and not *at* the time of the sale it is a void warranty: for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor

Yet if the vendor knew the goods to be unsound, and 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 will be answerable for their goodness. A general warranty will not extend to guard against defects that are the object of one's senses, as if a horse be warranted perfect, and wants either a tail or an ear. But if cloth is warranted to be of such a length, when it is not, there an action lies for damages; for that cannot be discerned by sight, but only by a collateral proof, the measuring it. So if a horse be warranted sound, and he wants the sight of an eye, though this seems to be the object of one's senses, yet as the discernment of such defects may be matter of skill, an action lies to recover damages for this imposition.

CHAPTER VII.

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

THE *injuries* that affect real property are principally six:— I. Ouster; II. Trespass; III. Nuisance; IV. Waste; V. Subtraction; VI. Disturbance.

Ouster, or dispossession, is an injury that carries with it the amotion of possession; for thereby the wrong-doer gets into the actual occupation of the land, and obliges him that has a right to seek his legal remedy, in order to regain *possession*, the importance of which, as the sole foundation of *title*, was pointed out in the second book of this treatise.

In every complete title to lands, there are two things necessary; the possession, and the right or property therein: or as it is expressed in Fleta, *juris et seisinæ conjunctio*. Now if the possession be severed from the property, if A has the *jus proprietatis*, and B by some unlawful means has gained possession of the lands, this is an injury to A, for which the law gives a remedy, by putting him in possession. This it now effects in one way, applicable to every species of dispossession.

The same result was formerly attained, by different means applicable to the particular circumstances of each case. Thus, if B, the wrong-doer, had obtained the possession either by fraud or force, he had only a *bare* or *naked possession*, without any shadow of right; A, therefore, who had both the *right* of property and the *right* of possession, might, as he still may, put an end to his title at once, by the summary method of *entry*. But if B the wrongdoer had died seised of the lands, then B's heir was considered to have advanced one step further towards a good title: he had not only a *bare* possession, but also an apparent *jus possessionis*, or *right* of possession, the law presuming that the possession which is transmitted from the ancestor to the heir is a rightful possession, until the contrary be shown; and therefore A was not allowed by mere entry to evict the heir of B. The *descent cast*, as it was called, was said to *toll* or defeat the right of entry, and A was driven to his action to remove the possession of the heir, though his entry alone would have dispossessed the ancestor. This was effected either by a *writ of entry*, or an *assize*, which were thence termed *possessory* actions; serving only to regain that possession, whereof the demandant or his ancestors had been unjustly deprived by the tenant or possessor of the land, or those under whom he claimed. They decided nothing with respect to the *right of property*; only restoring the demandant to that situation, in which he had been, or by law ought to have been, before the dispossession committed.*

But the right of *possession*, which was thus recovered, though it carries with it a strong presumption, is not always conclusive evidence of the right of *property*, which may still subsist in another man. For as one man may have the *possession*, and another the *right of possession*, so one man may have the *right of possession*, and so not be liable to eviction, and another may

* On this subject, I must refer the student to our ancient books, in which he will find frequent mention of the *degrees* within which such writs were brought; reminding him, in passing that it was upon one of them that *common recoveries* were grounded; these, being fictitious actions brought against the tenant of the freehold, usually called the tenant to the *præcipe*, or writ of entry, in which by collusion the demandant recovered the land. And I may add, that it was by another form of this writ that a widow recovered her dower.

have the *right of property*. This *right of property* could not formerly be otherwise asserted than by a *writ of right*; which lay *concurrently* with the other actions: and also lay *after* them, being as it were an appeal to the mere *right*, when judgment had been had as to the *possession*. If, indeed, the right of possession had been lost by lapse of time, or by judgment against the true owner in a *possessory* action, there was no other choice: this was the only remedy that could be had; and it was of so forcible a nature, that it overcame all obstacles, and cleared all objections that might have arisen to cloud and obscure the title.

The *writ of right* lay only to recover lands in fee simple. There were other writs *in the nature of* a writ of right in which the fee simple was not demanded; and in others not land, but some incorporeal hereditament. But they all applied to estates of freehold; and formerly, therefore, *Ouster*, or dispossession, was treated as either of the *freehold* or of *chattels real*: a distinction then of the utmost importance, not only because the remedies for an ouster of the freehold were confined in their use to that species of property, but because those which the law afforded for recovery of the possession of *chattels real* were totally inapplicable to all estates of freehold. The modern action simply to recover possession, has come to supply the place of all these different remedies; and how this result has been obtained we shall find by considering briefly the method in which the law remedied an ouster of *chattels real*, that is, of an estate for years.

Ouster, then, or amotion of possession, from an *estate for years*, happens only by an ejection, or turning out, of the tenant from the occupation of the land during the continuance of his term. For this injury there was formerly provided the writ of *ejectione firmæ*, which was an action of trespass in *ejectment*, and lay where lands were let for a term of years: and afterwards the lessor, reversioner, remainder-man, or any stranger, ejected or ousted the lessee of his term. He could thereby call the defendant to answer for entering on the lands so demised to him for a term that was not yet expired, and ejecting him; and in this action he recovered back his term, or the remainder of it, with damages.

This mode of proceeding became in time the common method of

trying the title to lands, and it may not, therefore, be improper to delineate with some minuteness its history, the manner of its process, and the principles whereon it was grounded.

An action for the damage sustained by reason of the breach of the contract contained in his lease was originally the only remedy which the tenant had for recovering against the lessor a term from which he had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger, claiming under a title superior to that of the lessor, though the lessee might still maintain this action against the lessor, yet he could not by any means recover the term itself. But when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party injured, the courts of law also adopted the same method of doing complete justice: and in the prosecution of a writ of ejectment, introduced a new species of remedy, viz., a judgment to recover the term, and a writ of possession thereupon.

The better to apprehend the contrivance, we must recollect that ejectment was in its origin an action brought by one who had a lease for years, to repair the injury done him by dispossession. In order, therefore, to convert it into a method of trying titles to the freehold, it was first necessary that the claimant should take possession of the lands, to empower him to constitute a lessee for years, who might be capable of receiving this injury of dispossession. For it was an offence, called *maintenance*, to convey a title to another when the grantor was not in possession of the land. When, therefore, a person who had a right of entry into lands determined to acquire that possession which was wrongfully withheld by the tenant therein he made, as by law he may, a formal entry on the premises; and being so in the possession of the soil, he there, upon the land, sealed and delivered a lease for years to some third person or lessee: and having thus given him entry, left him in possession of the premises. This lessee was to stay upon the land till the prior tenant, or he who had the previous possession, ousted him; or till some other person, either by accident or by agreement beforehand, came upon the land, and turned him out or ejected him. For this injury the lessee was entitled to his action of ejectment against the tenant, or this *casual ejector*,

whichever it was that ousted him, to recover back his term and damages. But where this action was brought against such a *casual ejector* as is before mentioned, and not against the very tenant in possession, the court would not suffer the tenant to lose his possession without an opportunity to defend it. Wherefore it was a standing rule, that no plaintiff should proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession, if any there were, and making him a defendant if he pleased. And, in order to maintain the action, the plaintiff must, in case of any defence, have made out four points before the court, viz., *title, lease, entry,* and *ouster*. First, he must have shown a good *title* in his lessor, which brought the matter of right entirely before the court; then, that the lessor, being possessed by virtue of such title, had made him the *lease* for the term; thirdly, that he, the lessee or plaintiff, had *entered* or taken possession under such lease; and then, lastly, that the defendant had *ousted* or ejected him. Whereupon he had judgment to recover his term and damages, and, in consequence, had a *writ of possession*, which the sheriff executed by delivering him the peaceable possession of his term.

This was the regular method of bringing an action of ejectment, in which the title of the lessor came collaterally and incidentally before the court, in order to show the injury done to the lessee by this ouster. But as much trouble and formality were found to attend the actual making of the *lease, entry,* and *ouster*, a more easy method of trying titles was invented, which depended entirely upon a string of legal fictions; no actual lease was made, no actual entry by the plaintiff, no actual ouster by the defendant, but all were merely ideal, for the sole purpose of trying the title. To this end in the proceedings a lease for a term of years was stated to have been made, by him who claimed title, to the plaintiff who brought the action, as by John Rogers to John Doe; it was also stated that Doe, the lessee, entered, and that the defendant, Richard Roe, who was called the *casual ejector*, ousted him: for which ouster he brought this action. As soon as this action was brought, Roe, the casual ejector or defendant, sent a written notice to the tenant in possession of the lands, as George Saunders, informing him of the action brought by John Doe; assuring him that he, Roe, the defendant, had no title at all to the premises, and should make no defence;

and, therefore, advising the tenant to appear in court and defend his own title, otherwise he, the casual ejector, would suffer judgment to be had against him, and thereby the actual tenant, Saunders, would inevitably be turned out of possession. On receipt of this friendly caution, if the tenant in possession did not within a limited time apply to the court to be admitted a defendant in the stead of Roe, he was supposed to have no right at all, and, upon judgment being had against Roe, the casual ejector, Saunders, the real tenant, was turned out of possession by the sheriff.

But if the tenant in possession applied to be made a defendant, it was allowed him upon this condition: that he entered into a rule of court to confess, at the trial, three of the four requisites for the maintenance of the action, viz., the *lease* of Rogers the lessor, the *entry* of Doe the plaintiff, and his *ouster* by Saunders himself, now made the defendant instead of Roe: which requisites being wholly fictitious, should the defendant put the plaintiff to prove them, he must, of course, be nonsuited for want of evidence. But by such stipulated confession of *lease*, *entry*, and *ouster*, the trial now stood upon the merits of the *title* only. This done, the name of George Saunders was substituted for Richard Roe, and the cause went down to trial under the name of Doe, the plaintiff, on the demise of Rogers the lessor, against Saunders, the new defendant. And therein the lessor of the plaintiff was bound to make out a clear title, otherwise his fictitious lessee could not obtain judgment to have possession of the land for the term supposed to be granted. But if the lessor made out his title in a satisfactory manner, then judgment and a writ of possession were awarded to John Doe, the nominal plaintiff, who by this trial had proved the right of John Rogers, his supposed lessor.

But if the new defendant, Saunders, after entering into the common rule, failed to appear at the trial, and to confess lease, entry, and ouster, the plaintiff, Doe, must, indeed, have been there nonsuited, for want of proving those requisites; but judgment would in the end be entered against the casual ejector Roe; for the condition on which Saunders was admitted a defendant had been broken, and therefore the plaintiff was put again in the same situation as if he never had appeared at all; the consequence of which was, that judgment would be entered

for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would turn out Saunders and deliver possession to John Doe. The same process, therefore, as would have been had, provided no conditional rule had been ever made, must have been pursued as soon as the condition was broken.

The method of recovering real property was attended however with certain objections, which, notwithstanding the supervision of the courts, occasionally gave rise to well-founded complaints. Accordingly, when the procedure of the superior courts of common law was reconstructed in 1852, advantage was taken of the opportunity; a new action for the recovery of land was created, and the old action of ejectment came to be numbered among the relics of the past.

Both the old action and that substituted for it in 1852, were valuable in one respect, in that no question could be raised except that of *title;* for it was justly considered that if the plaintiff had a right to the possession of the land claimed, he was entitled to recover, whether the person in possession or who defended the action had ousted him or not. But there was this disadvantage, that it was the right of the claimant *at law* which could alone be put in issue. If the defendant, or tenant in possession, had *an equitable right* to that possession, this constituted no defence. He must have applied to the Court of Chancery to restrain the proceedings at law, and to protect his equitable interest against a legal claimant. When therefore the rules of equity were made a part of our law, it became necessary to provide a procedure by which this could be effected in trying the right to real property; the common law action of ejectment accordingly ceased to exist; and claims to possession of real property are now asserted by the one universal remedy of an action.

The damages recovered in the old action of ejectment, though originally its only intent, were, when title was the only question, very small; amounting commonly to a shilling. In order therefore to complete the remedy, when the possession has been long detained from him that had the right to it, a second action lay to recover the *mesne profits* which the tenant in possession had wrongfully received. The judgment in the first action was herein conclusive evidence against the defendant, for all profits

which had accrued since the date alleged as the period at which the plaintiff's right accrued to him; for if he sued for any antecedent profits, the defendant might make a new defence. Thus he might plead the Statute of Limitations, and by that means protect himself from the payment of all mesne profits, except those which had accrued within the previous six years. The claim for mesne profits may now, however, be combined with the claim for possession, and thus be included in the same action.

Such is the modern way of trying either the legal or equitable right to lands and tenements. It is founded on the same principle as the ancient writs of assize, being calculated to try the mere *possessory* title to an estate; possession for a prescribed period, as we have already seen, now constituting *title*.

Ejectment was not an adequate means to try the title of all estates; for it lay only for the recovery of that species of property, on which an entry could be made, and an ouster effected. On those things, whereon an entry could not in fact be made, no entry could be supposed; therefore ejectment did not lie of an advowson, a common, or any incorporeal hereditament. Nor did it lie in such cases, where the entry of him that had right was taken away by twenty years' dispossession, or otherwise. And this period of dispossession may now accordingly be set up by the defendent as an answer to the claimant, and a good title against all the world. It is, however, subject to qualification in the case of persons under disability; for if at the time at which the right of any person first accrued, such person was an infant, under coverture, of unsound mind, or absent beyond seas, he, or the person claiming through him, may bring an action, within ten years next after such disability shall have ceased. But no action can be brought when forty years have expired after the right has accrued, although the person may have remained under disability during the whole period, or although the above mentioned term of ten years shall not have expired.

This action has, it may be added, been rendered a very expeditious remedy to landlords whose tenants are in arrear, or who hold over after their term has expired or been determined. And a recovery therein is final and conclusive, both

in law and equity, unless the rent and all costs be paid or tendered within six calendar months afterwards. A landlord, also, on serving a writ on a tenant holding over after his term has expired or been determined, may give him notice that he will be required to give bail, if ordered so to do by the court or a judge, conditioned to pay the costs and damages to be recovered in the action. And, if bail is thereafter ordered to be given, and the tenant fails to do so, the claimant obtains immediate judgment for recovery of possession and for his costs.

It is in cases between landlord and tenant that the claimant after proving his right to recover, usually gives evidence of the *mesne profits*, so that judgment may be given both as to the title and mesne profits; in such cases, of course, a second action for mesne profits is unnecessary. Besides these remedies a landlord may, in cases where the rent or value of the premises does not exceed 50*l*., and no fine has been paid, proceed summarily in the county court. If the rent does not exceed 20*l*., and no fine has been paid, he may proceed before justices in petty sessions.

CHAPTER VIII.

OF INJURIES TO REAL PROPERTY.

II. The second species of wrongs that affect real property is that of *trespass*. Trespass, in its most extensive sense, signifies any transgression or offence 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. Therefore beating another is a trespass; taking or detaining a man's goods are trespasses; so also non-performance of promises or undertakings is technically a trespass: and, in general, any misfeasance or act of one man whereby another is injuriously treated and damnified, is a trespass in its largest sense.

But in the limited sense, in which it is at present to be considered, it signifies an entry on another man's ground without authority, and doing some damage, however inconsiderable, which the law entitles a trespass *by breaking his close*. For every man's land is in the eye of the law enclosed and set apart from

his neighbour's: and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for if no other special loss can be assigned, yet one general damage may in any case be specified, viz., the treading down and bruising his herbage.

One must have actual possession to be able to maintain an action of trespass. Thus if a meadow be divided annually among parishioners by lot, then after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes; for they have an exclusive interest therein for the time. And a man is answerable for not only his own trespass, but for that of his cattle also: for, if by his negligent keeping they stray upon the land of another, and much more if he permits, or drives them on, and they there tread down his neighbour's herbage, and spoil his corn or his trees, this is a trespass, for which the owner must answer in damages; and the law gives the party injured a double remedy in this case, by permitting him to distrain the cattle thus *damage-feasant*; or else by leaving him to the common remedy *in foro contentioso*, by action.

In some cases trespass is justifiable; or rather entry on another's land or house shall not be accounted trespass: as if a man comes thither to demand or pay money, there payable; or to execute, in a legal manner, the process of the law. Also a man may justify entering into an inn or public-house, without the leave of the owner first specially asked; because when a man professes the keeping of such inn or public-house, he thereby gives a general licence to any person to enter his doors. So a commoner may justify entering to attend his cattle, commoning on another's land; and a reversioner, to see if any waste be committed on the estate, from the apparent necessity of the thing.

But in cases where a man misdemeans himself, or makes an ill use of the authority with which the law intrusts him, he is accounted a trespasser *ab initio*; as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night

contrary to the will of the owner; this wrongful act has relation back to his first entry, and makes the whole a trespass. So if a reversioner, who enters on pretence of seeing waste, breaks the house; or if the commoner who comes to tend his cattle cuts down a tree; in these and similar cases the law considers that he entered for the unlawful purpose, and therefore, as the act which demonstrates such his purpose is a trespass, he shall be esteemed a trespasser *ab initio*.

A man may also justify in an action of trespass, on account of the freehold and right of entry being in himself; and this defence brings the title of the estate in question. This is therefore one way of trying the property of estates; though not so usual as the action which gives possession of the land; nothing being herein recovered but damages for the trespass committed. It is, however, the proper method of trying the title to some incorporeal hereditaments, as a right of way, or of common. For as any entry on the property of another is *primâ facie* a trespass, it is for the defendant to show that such entry was lawful; that is, to prove that the apparent trespass was no trespass at all, as it cannot be if the defendant was only using a right of way over the plaintiff's property, or exercising a right of common.

The ordinary remedy for a trespass then, is by an action to recover damages. In those cases in which the injury is threatened an injunction may be had to prevent its being committed; or, if begun, continued.

III. A third species of injuries to real property is by *nuisance*, which signifies anything that works hurt, inconvenience, or damage. And nuisances are of two kinds: public or *common* nuisances, which affect the community, for which reason they must be refered to the fourth part of the treatise; and *private* nuisances, which are the objects of our present consideration, and may be defined, anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. These therefore may affect either corporeal or incorporeal hereditaments.

1. First, as to *corporeal* inheritances. If a man builds a house so close to mine that his roof overhangs my roof, and throws the water off his roof upon mine, this is a nuisance, for which an

action will lie. Likewise to erect a house or other building so near to mine, that it obstructs my ancient lights and windows, is a nuisance of a similar nature. But in this latter case it is necessary that the windows be *ancient*; that is, have subsisted there for twenty years at least, without interruption; otherwise there is no injury done. For he has as much right to build a new edifice upon his ground as I have upon mine; since every man may erect what he pleases on his own soil, so as not to prejudice what has long been enjoyed by another, and it was my folly to build so near another's ground. Also, if a person keeps his hogs, or other noisome animals, or allows filth to accumulate on his premises, so near the house of another, that the stench incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. A like injury is, if one's neighbour sets up and exercises any offensive trade; as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, "*sic utere tuo, ut alienum non lædas*:" this therefore is an actionable nuisance. And on a similar principle, a constant ringing of bells in one's immediate neighbourhood may be a nuisance. But depriving one of a mere matter of pleasure, as of a fine prospect by building a wall, or the like; this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not actionable.

As to nuisances to one's *lands*: if one erects a smelting-house for lead so near the land of another, that the vapour kills his corn and grass, and damages his cattle, this is a nuisance. And by consequence it follows, that if one does any other 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. So, also, if my neighbour ought to scour a ditch and does not, whereby my land is overflowed, this is an actionable nuisance.

With regard to *other* corporeal hereditaments: it is a nuisance to stop or divert water that ought to run to another's meadow or mill; to corrupt or poison a water-course, by erecting a dye-house or a lime-pit, for the use of trade, in the upper part of the

stream; to pollute a pond, from which another is entitled to water his cattle; to obstruct a drain; or in short to do any act in common property, that in its consequences must necessarily tend to the prejudice of one's neighbour.

2. As to *incorporeal* hereditaments, the law is the same. If I have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it or putting logs across it, or ploughing over it, it is a nuisance, for in the first case I cannot enjoy my right at all, and in the latter I cannot enjoy it so commodiously as I ought. Also, 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 me a prejudice, it is a nuisance to the freehold which I have in my market or fair. If a ferry is erected on a river, so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the queen's subjects; it would therefore be extremely hard, if a new ferry were suffered to share his profits, which does not also share his burthen. But where the reason ceases, the law also ceases with it: therefore it is no nuisance to erect a mill so near mine as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade or a school, in a neighbourhood or rivalship with another; for by such emulation the public are likely to be gainers; and if the new mill or school occasion a damage to the old one, it is *damnum absque injuriâ*.

As to the remedies for these injuries; I must premise that the law gives no *private* remedy for anything but a *private* wrong. Therefore no *action* lies for a public or common nuisance, but an *indictment* only, because the damage being common to *all*, no *one* can assign his particular proportion of it; or if he could it would be extremely hard if every subject in the kingdom were allowed to harass the offender with a separate action. Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the community, by a public nuisance; in which case he shall have a private satisfaction by action. As if, by means of a ditch dug across a public way, which is a common nuisance, a man or his

horse suffer injury by falling therein; there, for this particular damage, which is not common to others, the party has his action. But if a man has abated or removed a nuisance, as we may remember that the party injured has a right to do, in this case he is entitled to no action. For he had choice of two remedies; either without suit, by abating it himself, by his own act; or by suit to recover damages for the injury sustained by him;—having made his election of one remedy, he is totally precluded from the other.

The ordinary remedy is by action for damages, in which an injunction against the continuance of the nuisance may be obtained; in some cases, also, the Chancery Division will interfere and grant *preventive* relief; to stop irreparable mischief for instance. Thus, where a party builds so near the house of another, as to darken his windows, an injunction will be granted to prevent the nuisance, as well as to remedy it, if already done. And on the same principle the court will prevent the obstruction of water-courses, the diversion of streams from mills, the pulling down of the banks of rivers, or the erection of a new ferry.

IV. The fourth species of injury to real property, is by *waste*, or destruction in lands and tenements, which the law expresses by the word *vastum*.

The persons who may be injured by waste, are such as have some *interest* in the estate wasted; for if a man be the absolute tenant in fee simple, he may commit whatever waste his own folly may prompt him to, without being impeachable, or accountable for it to any one. One species of interest, which is injured by waste, is that of a person who has a right of common in the place wasted; especially if it be common of *estovers*, or a right of carrying away wood for horse-bote, plough-bote, &c. Here, if the owner of the wood demolishes it, this is an injury to the commoner, for which he can recover damages by an action for this destruction of the woods out of which his estovers were to issue.

The most usual interest that is hurt by waste is that of him who has the remainder or reversion of the *inheritance*, after the particular estate for life or years in being. Here, if the particular tenant commits or suffers any waste, it is an injury

to him that has the inheritance, as it tends to dismember it of its most desirable incidents, among which timber and houses may justly be reckoned the principal. To him, therefore, in remainder or reversion, to whom the *inheritance* appertains in expectancy, the law gives an action for the damages he has sustained.

But the courts will always interfere, not only in these cases, but in any similar case in which it is necessary to preserve the property. Thus, a landlord may have an injunction to stay waste against an under-lessee; or against a tenant from year to year, after notice to quit, to restrain him from removing the crops, manure, &c.; or against a lessee, to prevent him from making material alterations in a dwelling-house, as by changing it into a shop or a warehouse. So where a mortgagor or mortgagee in possession commits waste, or threatens to commit it, an injunction may be obtained; and if a tenant for life, even without impeachment for waste, should pull down houses, or do other waste *maliciously*, he will be restrained; for in such cases, the party is deemed guilty of an unconscientious abuse of his rights, ruinous to the interests of others.

V. Subtraction is the fifth species of injuries affecting real property, and happens when any person who owes any suit, duty, custom, or service to another, withdraws, or neglects to perform it.

1. Fealty, suit of court, and rent, are duties and services usually issuing and arising *ratione tenuræ*, being the conditions upon which the ancient lords granted out their lands to their feudatories: whereby it was stipulated that they and their heirs should take the oath of fealty or fidelity to their lord, which was the feudal bond or *commune vinculum* between lord and tenant; that they should do suit, or duly attend and follow the lord's courts, and, lastly, that they should yield to the lord certain annual stated returns, in military attendance, in provisions, in arms, in rustic employments, or, which is *instar omnium*, in money, which will provide all the rest; all which are comprised under the one general name of *reditus*, return, or rent. And the subtraction or non-observance of any of these conditions, is an injury to the freehold of the lord, by diminishing and depreciating the value of his seignory.

The general remedy for all these is by *distress*; and it is the only remedy at the common law for the two first of them. And although distresses should as a rule be reasonable; in the case of distress for fealty or suit of court, no distress can be unreasonable or too large: for this is the only remedy to which the party aggrieved is entitled, and therefore it ought to be such as is sufficiently compulsory; and, be it of what value it will, there is no harm done, especially as it cannot be sold or made away with, but must be restored immediately on satisfaction made. A distress of this nature is called a *distress infinite*.

The other remedy for subtraction of rents or services is by an action for the breach of contract. And this is the usual remedy when recourse is had to any action at all for the recovery of pecuniary rents; to which species of render almost all free services are now reduced.

2. Thus far of the remedies for subtraction of rents or other services due by *tenure*. There are also other services, due by ancient *custom* and *prescription* only. Such is that of doing suit to another's mill: where the persons, resident in a particular place, by usage, time out of mind have been accustomed to grind their corn at a certain mill; and afterwards any of them go to another mill, and withdraw their suit, their *secta, a sequendo,* from the ancient mill. This is not only a damage, but an injury to the owner; because this prescription might have a very reasonable foundation; viz., upon the erection of such mill by the ancestors of the owner for the convenience of the inhabitants, on condition, that when erected they should all grind their corn there only. For this injury the owner formerly had a writ *de sectâ ad molendinum,* commanding the defendant to do his suit at the mill, or show good cause to the contrary. In like manner, and for like reasons, a man might have had a writ of *secta ad furum, secta ad torrale, et ad omnia alia hujusmodi,* for suit due to his public oven or bakehouse; or to his kiln or malthouse. But these special remedies for subtractions, to compel the specific performance of services due by custom, or prescription, have all been abolished; and the only mode of redress which can now be resorted to, is the universal remedy of an action to repair the party injured in damages.

VI. The sixth and last species of injuries to real property is *disturbance*; which is usually a wrong done to some incorporeal hereditament, by hindering or disquieting the owner in his lawful enjoyment of it. Of this injury there are five sorts; viz., 1. Disturbance of *franchise*. 2. Disturbance of *common*. 3. Disturbance of *ways*. 4. Disturbance of *tenure*. 5. Disturbance of *patronage*.

1. Disturbance of *franchise* happens when a man has the franchise of keeping a fair, of free-warren, of seizing estrays, or any other species of franchise whatsoever; and he is disturbed in the lawful exercise thereof. As if another, by menaces, or persuasions, obstructs the passage to my fair; or hunts in my free-warren; or hinders me from seizing the estray, whereby it escapes or is carried out of my liberty; in every case of this kind there is an injury done to the legal owner; his property is damnified, and the profits arising from his franchise are diminished. To remedy which he is therefore entitled to sue for damages by an action.

2. Disturbance of *common* occurs where any act is done, by which the right of another to his common is incommoded or diminished. This may happen where one who has no right of common, puts his cattle into the land; and thereby robs the cattle of the commoners of their respective shares of the pasture. Or if one, who has a right of common, puts in cattle which are not commonable, as hogs and goats; which amounts to the same inconvenience. Another disturbance of common is by *surcharging* it; or putting more cattle therein than the pastures and herbage will sustain, or the party has a right to do. In this case he that surcharges does an injury to the rest of the owners, by depriving them of their respective portions, or at least contracting them into a smaller compass. The usual remedies are either by distraining so many of the beasts as are above the number allowed, or else by an action for the trespass, both which may be had by the lord: or lastly, by an action for damages, in which any commoner may be plaintiff.

There is yet another disturbance of common, when the owner of the land, or other person, so encloses or otherwise obstructs it, that the commoner is precluded from enjoying the benefit to

which he is by law entitled. Thus, if the lord erect a wall, hedge or fence round the common, so as to prevent the commoner's cattle from going into it, the commoner may abate the enclosure, because it is inconsistent with the grant. And disturbance may be done not only by erecting fences, but also by driving the cattle off the land, or by ploughing up the soil of the common. Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities, that they devour the whole herbage, and thereby destroy the common. For in such case, though the commoner may not destroy the rabbits, yet the law looks upon this as an injurious disturbance of his right, and has given him his remedy by action against the owner. There is, indeed, in this case no remedy but by action, for the commoner cannot fill up the cony-burrows, as that would be meddling with the soil and itself a trespass.

There are cases, indeed, in which the lord may by several statutes enclose and abridge the common. But there are many difficulties, some risk, and considerable expense in so doing, and most enclosures are accordingly effected under special acts of parliament, or under the General Inclosure Acts.

3. Disturbance of *ways* principally happens when a person who has a right to a way over another's grounds, is obstructed by enclosures, or other obstacles, or by ploughing across it; by which means he cannot enjoy his right of way, or at least cannot in so commodious a manner as he might have done. If this be a way annexed to his estate, and the obstruction is made by the tenant of the land, this brings it to another species of injury; for it is then a *nuisance*, for which an action will lie. But if the right of way, thus obstructed by the tenant, be only *in gross*, that is annexed to a man's person and unconnected with any lands or tenements, or if the obstruction of a way belonging to a house or land is made by a stranger, it is then in either case merely a disturbance; the remedy being an action to recover damages.

4. Disturbance of *tenure* consists in breaking that connection which subsists between the lord and his tenant, and to which the law pays so high regard, that it will not suffer it to be wantonly dissolved by the act of a third person. So that if there be a

tenant-at-will of any lands, and a stranger contrives to drive him away, or inveigle him to leave his tenancy, this the law very justly construes to be a wrong and injury to the lord, and gives him a reparation in damages against the offender.

5. The fifth and last species of disturbance is that of disturbance of *patronage*; which is a hindrance or obstruction of a patron to present his clerk to a benefice.

This injury is to be distinguished from another species of injury called *usurpation*; which is an absolute ouster or dispossession of the patron, and happens when a stranger, that has no right, presents a clerk, and he is thereupon admitted and instituted. In which case of usurpation the patron, being thus put out of the only kind of possession of which this kind of property is capable, lost, at the common law, not only his turn of presenting *pro hâc vice*, but also the inheritance of the advowson; so that he could not present again upon the next avoidance, unless in the meantime he had recovered his right by a writ of *right of advowson*; which was a peculiar writ of right, framed for this special purpose, finally deciding the question of *property*.

But bishops in ancient times, either by carelessness or collusion, frequently instituting clerks upon the presentation of usurpers, and thereby defrauding the real patrons of their right of presentation, it was enacted by the statute of Westm. 2, that if a possessory action were brought within six months after the avoidance, the patron should, notwithstanding such usurpation and institution, recover that very presentation, which gave back to him the seisin of the advowson. Yet still, if the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and the patron, to recover it, was driven to the writ of right. To remedy which it was further enacted by 7 Ann. c. 18, that no usurpation shall displace the estate of the patron, or turn it to a mere right; but that the true patron may present upon the next avoidance, as if no such usurpation had happened. So that usurpation is now narrowed, and the law stands upon this foundation: that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church and as a punishment for my own negligence; but that turn is the only one I shall lose thereby.

Disturbers of a right of advowson may therefore be the pseudo-patron, his clerk, and the ordinary; the pretended patron, by presenting to a church to which he has no right, and thereby making it litigious or disputable; the clerk, by demanding or obtaining institution, which tends to and promotes the same inconvenience; and the ordinary, by refusing to admit the real patron's clerk, or admitting the clerk of the pretender. Those disturbances are injurious to him who has the right: and therefore if he be not wanting to himself, the law gives him an action of *quare impedit*; in which the patron is always the plaintiff, and not the clerk. For the law supposes the injury to be offered to him only, by obstructing or refusing the admission of his nominee, and not the clerk, who has no right in him till institution, and of course can suffer no injury.

This action is of a somewhat peculiar nature.

Upon the vacancy of a living, the patron is bound to present within six calendar months, otherwise it will lapse to the bishop. But if the presentation be made within that time, the bishop is bound to admit and institute the clerk, if found sufficient; unless the church be full, or there be notice of litigation. For if any opposition be intended, it is usual for each party to enter a *caveat* with the bishop, to prevent his institution of his antagonist's clerk. An institution after a *caveat* entered is void by the ecclesiastical law; but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity. But if two presentations be offered to the bishop upon the same avoidance, the church is then said to be *litigious*; and, if nothing further be done, the bishop may suspend the admission of either, and suffer a lapse to incur: yet if the patron or clerk on either side request him to award a *jus patronatûs*, he is bound to do it. A *jus patronatûs* is a commission from the bishop, directed usually to his chancellor and others of competent learning; who are to summon a jury of six clergymen and six laymen, to inquire into and examine who is the rightful patron; and if, upon such inquiry made and certificate thereof returned to the commissioners, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events from being a disturber.

The clerk refused by the bishop may also have a remedy

against him in the spiritual court, denominated a *duplex querela*; which is a complaint in the nature of an appeal from the ordinary to his next immediate superior; as from a bishop to the archbishop, or from an archbishop to the crown: and if the superior court adjudges the cause of refusal to be insufficient, it will grant institution to the appellant.

Thus far matters may go on in the mere ecclesiastical course, but they seldom go so far: for, upon the first refusal of the bishop to admit his clerk, the patron may bring his action of *quare impedit* against the bishop, for the temporal injury done to his property, in disturbing him in his presentation. And, if the delay arises from the bishop alone, as upon pretence of incapacity, or the like, then he only is named in the writ; but if there be another presentation set up, then the pretended patron and his clerk are also joined in the action; or it may be brought against the patron and clerk, leaving out the bishop; or against the patron only; but it is the safer way to proceed against all three.

If the plaintiff in this action suspects that the bishop will admit the defendant's or any other clerk, pending the suit, he may have a prohibitory writ, called a *ne admittas*, which forbids the bishop to admit any clerk whatsoever till such contention be determined; and if the bishop does, after the receipt of this writ, admit any person, even though the patron's right may have been found in a *jure patronatûs*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may have an action against the bishop, to recover satisfaction in damages for the injury done him by incumbering the church with a clerk pending the suit.

In the proceedings *quare impedit*, the plaintiff must set out his title, and show a disturbance before action brought. Upon this the bishop and the clerk may disclaim all title: save only, the one as ordinary, to admit and institute; and the other as presentee of the patron, who is left to defend his own right. And upon failure of the plaintiff in making out his own title, the defendant is put upon the proof of his, in order to obtain judgment for himself, if needful. But if it be found that the plaintiff has the right, and has commenced his action in due time, then he shall have judgment to recover the presentation;

and if the church be full by institution of any clerk, to remove him. But if the church remains still void at the end of the suit, then whichever party the presentation is found to belong to, whether plaintiff or defendant, shall have a writ directed to the bishop *ad admittendum clericum;* and if upon this order he does not admit him, the patron may sue the bishop for damages.

There was formerly no limitation with regard to the time within which any actions touching advowsons were to be brought; at least none later than the times of Richard I. and Henry III. And this upon very good reason: because it may very easily happen that the title to an advowson may not come in question within sixty years; the longest period of limitation assigned by the statute of Henry VIII. A period of limitation has now, however, been established, which is to bar an action of *quare impedit;* that, namely, during which three clerks in succession shall have held the benefice, all of whom shall have obtained possession thereof adversely to the right of the plaintiff, or of some person through whom he claims, provided the times of such incumbencies taken together amount to the full period of sixty years. After an adverse possession of one hundred years, although three incumbencies have not taken place, the alleged right of the claimant is completely barred.

In *quare impedit,* the patron only, and not the clerk, is allowed to sue the disturber. But there is one species of presentation, in which a remedy, to be sued in the temporal courts, is put into the hands of the clerks presented, as well as of the owners of the advowson; the presentation, namely, of such benefices as belong to Roman Catholic patrons,—which are vested in the two universities. Besides the *quare impedit,* which the universities as patrons are entitled to bring, they, or their clerks, are at liberty to commence an action against any person presenting to such livings, and disturbing their right of patronage, or his *cestui que trust,* or any other person whom they have cause to suspect; in order to compel a discovery of any secret trusts, for the benefit of Papists, in evasion of those laws whereby this right of advowson is vested in those learned bodies. This is a particular law, and calculated for a particular purpose: for in no instance but this, does the law permit the clerk himself to

interfere in recovering a presentation, of which he is afterwards to have the advantage. When he is in full possession of the benefice, the law gives him the same possessory remedies to recover his glebe, his rents, his tithes, and other ecclesiastical dues, which it furnishes to the owners of lay property.

CHAPTER IX.

OF EQUITY.

HAVING defined the several injuries hitherto cognizable in the superior courts of common law, I am now, according to the arrangement of our subject, to explain the several branches of that vast jurisdiction which has till recently been the peculiar province of the High Court of Chancery; and which is now administered in the several tribunals constituting the Chancery division of the High Court of Justice. In so doing I shall consider, *firstly*, the general nature of equity; and *secondly*, the matters more especially cognizable in courts of equity.

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. But the very terms of a court of *equity*, and a court of *law*, as contrasted to each other, are apt to confound and mislead us; as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which sets law and equity in opposition to each other, will be found either totally erroneous, or erroneous to a certain degree.

It has been said, that it was the business of our courts of equity to abate the rigour of the common law. But no such power was contended for. Hard was the case of bond-creditors, whose debtor devised away his real estate; rigorous and unjust the rule, which put the devisee in a better condition than the heir; yet a court of equity could not interpose. Hard was the common law that land devised, or descending to the heir, should

not be liable to the simple contract debts of the ancestor or devisor, although the money had been laid out in purchasing the very land; and that the father should never immediately succeed as heir to the real estate of the son, but a court of equity gave no relief. In all such cases courts of equity, as well as the courts of law, said with Ulpian, "*hoc quidem perquam duram est sed ita lex scripta est.*"

Again it has been said, that a court of equity determined according to the spirit of the rule, and not according to the strictness of the letter; but so also does a court of law. Both, for instance, are equally bound to interpret statutes according to the intent of the legislature. In general laws all cases cannot be foreseen; or if foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are said to be within the equity of the statute; and so cases within the letter are frequently out of the equity. Here, by *equity*, is meant nothing but the sound interpretation of the law.

It has also been said, that *fraud*, *accident*, and *trust*, were the peculiar objects of a court of equity. And for a considerable period there was some foundation for this statement. But for many years past every kind of *fraud* has been cognizable in a court of law; and many *accidents* have been there supplied, as, loss of deeds, wrong payments, and deaths, which made it impossible to perform a condition literally. A technical *trust* indeed was forced into the courts of equity, and there remained till our own day in the manner already described. But there are other trusts, cognizable in a court of law, as deposits, and all manner of bailments; and especially that implied contract of having undertaken to account for money received to another's use; so that had it not been for the technical view taken by the courts of law, all trusts might long ago have come under their cognizance.

Once more, it has been said that a court of equity was not bound by rules or precedents, but acted from the opinion of the judge, founded on the circumstances of every particular case. In point of fact, however, our system of equity has long been governed by

established rules, and bound by precedents, which cannot be departed from. And the jurisprudence of all our courts, whether of law or equity, has long been founded on the same principles of justice and positive law. Our rules of property, rules of evidence, and rules of interpretation are always the same, in whatever court administered. No court whatever can vary a man's will or agreement, or, in other words, make a will or agreement for him. Every court must equitably construe, no one can pretend to control or change, a lawful stipulation or engagement. Every court must follow the law of nations where the question is the object of that law, as in case of the privileges of ambassadors. In mercantile transactions the *law merchant*, which is part of the common law, must prevail. And if a question arises which is properly the object of a foreign municipal law, every court must take information what is the rule of the country, and decide accordingly.

Such, then, being the parity of law and reason which have long governed our courts, both of law and equity, wherein, it may be asked, did they differ? In three points only; in the mode of proof, the mode of trial, and the mode of relief.

1. As to the mode of *proof*. When facts, or their leading circumstances rested only in the knowledge of the party, a court of equity applied itself to his conscience, and purged him upon oath with regard to the truth of the transaction; and that being once discovered, the judgment was the same in equity as it would have been at law. All our courts may now *interrogate* a party.

2. As to the mode of *trial*. This was not by a jury, but by the court alone, and usually by means of affidavits or written depositions, and not the oral testimony of witnesses in open court. Every branch of the High Court may now direct the mode of trial; and in most cases the suitor has his choice.

3. It was with respect to the mode of *relief* that courts of equity differed most from the courts of common law. In courts of law as a rule a general and unqualified judgment only could be given for the plaintiff or for the defendant, as the case might be. Courts of equity adjusted their decrees; and thereby varied, qualified, and modelled the remedy so as to suit it to mutual and

adverse claims, controlling equities, and the real and substantial rights of the parties. And this every division of the High Court may now do.

The courts of equity, however, administered remedies for rights which courts of law did not recognize at all; as in the case of trusts and, confidences which therein were called *equitable estates.* But such estates are now recognized at law, as we have seen in reference to the action of ejectment. And in the case of impending injuries, or meditated mischief, and some others which need not be enumerated, in which equity interfered to prevent a wrong for which the common law only awarded damages when it had been committed, all our courts have similar powers to protect the property and rights of the subject.

This will be better understood by an examination in detail of the matters cognizable specially in a court of equity. They have hitherto, in consequence of the entire separation of the two systems of law and equity, been treated of as either *exclusive* of, *concurrent* with, or *auxiliary* to, that of the courts of common law. The *first* head referred to those branches of jurisdiction which were the peculiar property of the Court of Chancery; the *second* comprised those matters which were and are equally entertained by courts of law and equity; the *third*, or auxiliary jurisdiction of Chancery, was so denominated with reference to those cases in which equity lent its aid to remove impediments to the obtaining of relief in a court of law.

I. This *exclusive* jurisdiction comprises the guardianship which the Chancery Division now exercises over the person and property of infants and lunatics, the peculiar protection it affords to married women, the superintendence it possesses over charities, and such matters as statutory enactments have expressly confided to its administrative care. Equitable estates and interests are necessarily the particular objects of this branch of the High Court.

1. Upon the abolition of the Court of Wards, the care which the crown was bound to take as guardian of its infant tenants, was extinguished in every feudal view, but resulted to the crown in Chancery, together with the general protection of all other *infants* in the kingdom. When, therefore, a child has

no other guardian, or the father, by his conduct, such as gross cruelty or immorality, has disqualified himself for the charge of his child, the Chancery Division has a right to appoint one.

2. As to *idiots* and *lunatics*, the crown used formerly to commit the custody of them to committees, in every particular case; but now a warrant is issued by the sovereign, under the sign manual, to the chancellor and certain judges of the Chancery Division, to perform this office for him.

3. The protection afforded to married women is with reference to their property. The law gives to a husband the possession and control of his wife's personal estate, including her *choses in action*, but this doctrine does not find favour in equity; and the Court of Chancery accordingly seized upon every opportunity to control and modify its rigour. The law considers the wife merged in the husband; equity, for many purposes, treats the husband and wife, not as one, but as separate persons, having distinct rights and interests. And one of the most peculiar of these rights is the *equity of the wife to have a settlement of her own property*. Not that any court can restrict the legal rights with which the law clothes the husband. For when he has reduced the personal estate of his wife into possession, he may dispose of it at his pleasure without restraint or interference. But when he is obliged to seek the aid of equity in regard to the wife's property, as for instance when it is vested in *trustees* for her benefit, equity lays hold of the occasion, and upon the ground that he who seeks equity must do equity, requires the husband to make a settlement on the wife out of that or some other property, for her due maintenance and support.

4. The sovereign, as *parens patriæ*, has the general superintendence of all *charities*, which he exercises by the keeper of his conscience, the chancellor. And therefore, whenever it is necessary, the attorney-general, at the relation of some informant, who is usually called the *relator*, may file *ex officio* an information in the Chancery Division to have the charity properly established. Great administrative powers with reference to charities have latterly, however, been conferred on *the Charity Commissioners for England and Wales*, who have authority to inquire into all charities, their nature, and administration, and

the condition of the estates and funds belonging to them; and to take or direct such proceedings as are necessary to carry out beneficially the objects of the founders.

5. The form of a *trust* gave the courts of equity an exclusive jurisdiction over all settlements and devises in that form, and over the long terms created in the present complicated mode of conveyancing. But the trust is now governed by the same rules as would govern the estate in a court of law, if no trustee was interposed; and the doctrine of trusts is thus reduced to as great a certainty as that of legal estates.

A considerable jurisdiction was created under this head upon the construction of *securities* for money lent, which at an early period of our legal history gave employment to the courts of equity. They held the penalty of a bond to be the form, and that in substance it was only a pledge to secure the repayment of the sum *bonâ fide* advanced, with a proper compensation for the use; and thus settled gradually the doctrine of personal pledges or securities, which are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it; but this ownership is mutually transferred, and the mortgagor is barred from redemption, if, when called upon by the mortgagee, he does not redeem within a time limited by the court. This is called *foreclosure;* but until then the *equity of redemption* or right which the mortgagor has to redeem his pledge upon payment of his debt is treated in equity as a distinct estate; and now possesses all the same properties which a legal estate has in the eye of the law; the mortgagee being regarded as a kind of trustee.

For equity recognises not only *express* trusts, but also *implied,* trusts. The latter are said to spring out of the presumed intention of the parties; as in the conveyance of property without any consideration, or any distinct trust being declared where it is consequently presumed that the intention was that it should be held by the grantee for the benefit of the grantor—or, no such presumption of intention being raised, the trust is fixed upon the conscience of the party by operation of law, as where a party having notice of [a] trust purchases the property

from the trustee, in violation thereof; in which case equity compels the purchaser to carry out the trust.

Trusts of all kinds thus became an extensive branch of equitable jurisdiction, their administration constituting the chief occupation of Chancery; so much so, indeed, that special facilities have been provided for obtaining the interference of the Court without suit. The Trustee Relief Act, for instance, enables trustees who suppose that there will be difficulty in the administration of the trust funds at once to discharge themselves from all liability by paying the money into court; which thereupon undertakes the administration of it amongst the parties beneficially interested, according to their respective rights and interests.

II. The *concurrent* jurisdiction of the courts of equity was held to extend to all cases of a breach or infringement of legal right, when there was not a plain, adequate, and complete remedy at law.

1. The first peculiar remedy now obtainable on this ground is the writ of *Injunction*, the most ordinary species of which, is that which operates as a restraint upon the defendant in the exercise of his real or supposed rights. This writ may be had to restrain alienations of property *pendente lite*, and tenants for life and others having limited interest from committing waste. It may be granted to restrain the negotiation of bills of exchange, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel, to prohibit assignees from making a dividend, to prevent parties from removing out of the jurisdiction, or from marrying, or having any intercourse, which the court disapproves of, with a ward. The infringement of a copyright or a patent frequently calls for the exercise of this beneficial process; which may also be had to restrain the fraudulent use of trade marks, or of the names, labels, or other *indicia* of the makers or vendors of goods and merchandize, and in a large class of cases, far too numerous to be mentioned here.

2. The second remedy which was long obtainable only in a court of equity, but now in any division of the High Court, is the *specific performance* of executory agreements. And hence a fiction has been established, that what ought to be done shall,

in equity, be considered as having been actually done, and shall relate back to the time when it ought to have been done originally. This fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. Our courts will, therefore, if necessary, not only enforce a contract, but award damages to the injured party. The most ordinary action of this kind is for the performance of a contract for the sale of land, which may be brought either by the seller to compel the other party to complete the purchase to which he has agreed, or by the buyer to compel the seller to make a conveyance of the land. But of almost all agreements whatever, specific performance may be had, though the extent to which it can be given must be in a great degree determined by the circumstance of each particular case.

3. The powers of obtaining a *discovery*, which all our courts now possess, were at one time the peculiar feature of the courts of equity, and gave them a concurrent jurisdiction with the other tribunals in a large number of cases. This remedy of a discovery still constitutes in many cases the main ground on which an action is brought.

4. It was for want of this discovery at law, that the courts of equity early acquired a concurrent jurisdiction in all matters of *account*. And, as incident to accounts, they took cognizance of the *administration of assets*, consequently of *debts, legacies*, the *distribution of the residue*, and the *conduct of executors and administrators*. The first application in a suit for administration, is often made by the executor or adminstrator himself, when he finds the affairs of his testator or intestate so much involved, that he cannot safely administer the estate, except under its direction; but an administration suit may be instituted by creditors, or by a single creditor, on behalf of himself and all other creditors, who shall come in under the decree.

And in this administration of assets the courts now deal not only with the property of the deceased, which is by law directly liable to the payment of debts and legacies, but also with all the funds, which are, in equity, chargeable with the payment of debts or legacies, and are then called *equitable assets*; because, in

obtaining payment out of them, they can be reached only by the aid of equity. Thus, if a testator devises land to trustees to sell for the payment of debts, the assets resulting from the execution of the trust are equitable assets upon the plain intent of the testator, notwithstanding the trustees are also made his executors; for by directing the sale to be for the payment of debts generally, he excludes all preferences; and the property would not otherwise be primarily liable to the payment of simple contract debts. And the same principle applies, if the testator merely charges his lands with the payment of his debts. The *marshalling of these assets*, as it is termed, in the course of administration, is merely such an arrangement of the different funds, as shall enable all the parties having equities therein to receive their due proportions, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of these funds.

As incident to accounts, the courts of equity also obtained a concurrent jurisdiction with the courts of law over all dealings in *partnership*; and this because the remedies furnished by the latter in disputes arising between partners were totally inadequate to meet the varied difficulties which ordinarily present themselves in such cases. The courts of law could long only award damages for breach of any particular stipulation entered into between the parties; equity adapted the remedy it afforded to the ever-varying exigencies of each particular case. The Chancery has for this reason long possessed an almost exclusive jurisdiction over questions between partners, and this Division has consequently the dissolution and *winding up of joint-stock companies*; for which purpose peculiar powers have been conferred by several statutes.

5. But it would be endless to point out the several avenues in human affairs, which lead to or end in accounts; and I proceed, therefore, to the next head of concurrent jurisdiction, that, namely, which the courts of equity early acquired over almost all matters of *fraud*; which were said to be the peculiar care of the Courts of Equity. What *fraud* is is difficult to define; for all our courts have most judiciously avoided laying down any minute rules as to what shall, or shall not, constitute fraud.

Actual and intentional fraud, to cozen or cheat another is readily recognized. But there is besides what is called *constructive fraud*, or such acts or contracts as, although not originating in any evil design to defraud or injure another, yet have a tendency to deceive, or to violate public or private confidence. Marriage brokage-bonds, for instance, by which one party engages to compensate another for negotiating an advantageous marriage for him, are considered fraudulent, as injurious to public policy; and against them equity relieves the party bound, and even assists him to recover money already paid. Among constructive frauds, equity also classes a settlement made secretly by a woman, in contemplation of marriage, of her own property to her separate use, without her intended husband's privity; which is held void, as in derogation of the marital rights of the husband, and a fraud upon his just expectations. And a secret conveyance made by a woman, under the like circumstance, in favour of a person for whom she is under no moral obligation to provide, is similarly treated. But if she only reasonably provide for her children by a former marriage, such an arrangement will, in the absence of any deception practised on the intended husband, stand good. Conditions annexed to gifts, legacies, and devises in restraint of marriage, if they be of a general nature, are also looked upon as against public policy, and have been placed by equity among constructive frauds.

Bargains in *restraint of trade* are also frandulent and void, if general and unlimited in their nature; but are not so considered if they only apply to particular places and persons. The former are construed to be a fraud upon the public, as tending to promote monopoly and to discourage enterprise and fair competition. But a contract with another that he shall not carry on a particular trade within a particular limit or for a specified time may be good. All agreements, however, founded upon corrupt considerations and all contracts for buying, selling, or procuring of public offices, are fraudulent and void, as having a tendency to diminish the respectability and purity of officers, and thus to injure the public interest.

Under this branch of jurisdiction may be mentioned two grounds which led to the interference of the Court of Chancery,

so long as courts of law could not relieve against them, viz., *accident* and *mistake*; the former applying in cases of such unforeseen events, acts, or omissions as were not the result of any negligence or misconduct of the party seeking relief; the latter where something has been done or omitted, from ignorance, surprise, imposition, or misplaced confidence. Thus in the case of the loss or destruction of a deed or other instrument, all our courts, following the rule of equity, will interfere on a proper indemnity being given, to prevent the *accident* being taken advantage of by the party liable. So our courts will alter and reform a written agreement; when, by *mistake*, it contains either less or more than the parties intended.

6. The last, and a wholly distinct head of concurrent jurisdiction is that in reference to a widow's claim to *dower*: in the *partition of lands* between joint-tenants, tenants in common, or coparceners; and in *settling of the boundaries of estates*, where a confusion of these has taken place.

In the first case, the courts assisted the widow by a discovery of lands or title deeds, and removed impediments to her rendering her legal title available; in the *partition of estates*, the remedy afforded by equity was always so much more effectual than that obtainable under a writ of partition, that the Chancery early obtained, and has long possessed, an almost exclusive jurisdiction: the settling of the boundaries of estates is obviously calculated to prevent a multiplicity of suits, as well as to remedy the mischiefs that must inevitably arise from any confusion arising at the boundaries of property.

III. The *auxiliary* jurisdiction of the Chancery was so called, because it comprised those cases in which this court interposed, in order to enable a party to assert his right at common law. Equity always interfered to prevent a party to any proceeding at law taking an inequitable advantage of some circumstance, which must have determined the judgment of the court of law, irrespective of the merits of the case. Thus a defendant in ejectment, was restrained from setting up as a defence an outstanding term of years or other interest in a trustee, lessee, or mortgagee; for the party in possession ought not, in conscience, to use an accidental advantage, to protect his possession against

a real right in his adversary. This interference is no longer necessary.

Under this head, also, might be placed the cancellation of documents, and the remedy equity affords to suitors, by the proceedings known as bills *quia timet*, bills of peace, bills for the perpetuation of testimony, and bills of interpleader. Thus,

1. Equity cancels agreements and other instruments, however solemn in their form or operation, which justice or public policy require to be annulled.

2. A court acting on the principles of equity will entertain a proceeding *quia timet*, that is, an action seeking its interference to prevent a wrong or anticipated mischief. Thus it will appoint a receiver to take rents; or will order a fund to be paid into court; will direct securities to be given up, or money to be paid over; or will confine itself to the mere injunction or other remedial process.

3. A *Bill of Peace* was, and the modern action is, to some extent, of the same nature. It may be brought to establish and perpetuate a right claimed by the plaintiff, which, from its nature, may be controverted by different persons, at different times, and by different actions: or where separate attempts have been already made unsuccessfully to overthrow the same right, and justice requires that the party should be quieted therein. For,

4. Equity not only interferes to ascertain a right, but in order to preserve the evidence of it, whenever it is in danger of being lost. If, for instance, witnesses to a disputable fact are old and infirm, proceedings may be taken to *perpetuate the testimony* of those witnesses; for, it may be, a man's antagonist only waits for the death of some of them to begin his suit. This may be resorted to 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, brings an action against the heir, and setting forth the will *verbatim* therein, suggests that the heir is inclined to dispute its validity: and then, the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will; after which the cause is at

an end, without proceeding to any decree, no relief being prayed by the bill: but the heir is entitled to his costs, even though he contest the will. This is what is usually meant by *proving a will in chancery*; and it may be added here that by statute 5 & 6 Vict. c. 69, a similar proceeding may be resorted to by any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honours, titles, estate, &c., praying the perpetuation of any testimony, which may be material for establishing such claim or right.

5. Finally, Equity has always afforded, when necessary, a remedy similar to that now obtainable in all courts under the name of *Interpleader*. Such are the matters long peculiarly cognisable in the courts of equity. They are now in one shape or other cognisable in every division of the High Court.

CHAPTER X.

OF INJURIES PROCEEDING FROM, OR AFFECTING THE CROWN.

I HAVE now, following out the division of my subject, to inquire into the mode of redressing those injuries to which the crown itself is a party; which injuries are either where the crown is the aggressor, and which therefore cannot without a solecism admit of the same kind of remedy; or else is the sufferer, and which then are usually remedied by peculiar forms of process, appropriated to the prerogative.

1. That the king can do no wrong, is a fundamental principle of the Constitution. Whenever therefore it happens, that, by misinformation, or inadvertence, the crown has been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign, yet the law has furnished the subject with a decent and respectful mode of removing that invasion, by informing the crown of the true state of the matter in dispute: and, as it presumes that to *know of* any injury and to *redress* it are inseparable in the royal breast, the sovereign then

issues as of course, in his own name, his orders to his judges to do justice to the party aggrieved.

The distance between the sovereign and his subjects is such, that it rarely can happen that any *personal* injury can immediately and directly proceed from the prince to any private man; and, as it can so seldom happen, the law in decency supposes that it never will or can happen at all. But injuries to the rights of *property* can scarcely be committed by the crown without the intervention of its officers; for whom the law in matters of right entertains no respect or delicacy, but furnishes various methods of detecting the errors or misconduct of those agents, by whom the sovereign has been deceived, and induced to do a temporary injustice.

The common law methods of obtaining possession or restitution from the crown, of either real or personal property, are, 1. By *petition de droit*, or petition of right: which is said to owe its origin to Edward I. 2. By *monstrans de droit*, manifestation or plea of right. The former is of use where the sovereign is in possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself; in which case, upon this answer being endorsed by the sovereign, *soit droit fait al partie*, let right be done to the party, a commission shall issue to inquire of the truth of this suggestion: after the return of which, the attorney-general is at liberty to plead in bar; and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. But where the right of the party, as well as the right of the crown, appears upon record, there the party shall have *monstrans de droit*, which is putting in a claim of right grounded on facts already acknowledged and established, and praying the judgment of the court, whether upon those facts the crown or the subject has the right. But as this seldom happens, and the remedy by *petition* was extremely tedious and expensive, that by *monstrans* was much enlarged and rendered almost universal by several early statutes. And, if upon either of them the right be determined against the crown, the judgment is, *quod manus domini regis amoveantur et possessio restituatur petenti, salvo jure domini regis.* And by such judgment the crown is instantly out of possession; so that there needs not

the indecent interposition of his own officers to transfer the possession from the sovereign to the party aggrieved.

The common law petition of right, in which the subject, if successful, must nevertheless defray his own costs, has been superseded by a similar method of obtaining redress from the crown provided by a recent statute, under which a petition may be prosecuted in any division of the High Court; and be served on the solicitor to the Treasury; who must then appear and answer it, in the name of the attorney-general, according to the ordinary course of pleading. The proceedings after appearance also follow the ordinary practice in actions between subject and subject; and the effect of the judgment is the same as in petitions of right at common law; but costs may be recovered both by and from the crown, and in the latter case are defrayed from the public treasury.

II. The method of redressing such injuries as the crown may receive from the subject are,

1. By such usual common law actions, as are consistent with the royal prerogative and dignity. But it would be tedious to run through the distinctions that might be gleaned from our ancient books with regard to this matter; nor is it necessary, as much easier remedies are usually obtained by the prerogative modes of process, peculiarly confined to the crown.

2. Such is that of *inquisition* or *inquest of office:* which is an inquiry made, with the assistance of a jury, by the sovereign's officer, his sheriff, coroner, or escheator, *virtute officii* or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the crown to the possession of lands or tenements, goods or chattels. These inquests were more frequent during the continuance of the military tenures: when, upon the death of every tenant of the crown, an *inquisitio post mortem* was held, in order to entitle the king to the marriage or wardship of the heir, and the relief, *primer seisin*, or other advantages, as the circumstances of the case might justify. To superintend these inquiries, there was the *Court of Wards and Liveries*, abolished at the restoration of Charles II., together with the oppressive tenures upon which it was founded.

With regard to other matters, inquests of office still remain in force, and are taken upon proper occasions;* as an authentic means to give the sovereign his right by solemn matter of record; without which he in general can neither take nor part from anything. For it is a part of the liberties of England, and greatly for the safety of the subject, that the crown may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury.

With regard to real property, if an office be found for the sovereign, it puts him in immediate possession; and he shall receive all the mesne profits from the time that his title accrued. In order to avoid the possession of the crown, acquired by the finding of such office, the subject 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 in general *traverse* or deny the matter of fact itself, and put it in a course of trial like the issue joined in an ordinary action.

3. When the crown has unadvisedly granted anything by letters patent, which ought not to be granted, or where the patentee has done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of *scire facias*. This may be brought either on the part of the crown, in order to resume the thing granted; or, if the grant be injurious to a subject, the sovereign is bound of right to permit him to use his royal name for repealing the patent in a *scire facias*; the proceedings on which resemble those in an ordinary action.]

4. An *information* in the Exchequer Division is a method of recovering money or other chattels, or of obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the crown. It differs from an information in the Queen's Bench Division, of which we shall treat in the fourth book; in that *this* is instituted to redress a private wrong,

* Until forfeitures were abolished, every jury which tried a man for treason or felony, every coroner's inquest that sat upon a *felo de se*, was not only with regard to chattels, but also as to real interests, in all respects an inquest of office; and if they found the treason or felony, the sovereign was thereupon, by virtue of this *office found*, entitled to have his forfeitures.

by which the property of the crown is affected; *that* is calculated to punish some public wrong, or heinous misdemeanour in the defendant. The most usual informations are those of *intrusion* and *debt; intrusion*, for any trespass committed on the lands of the crown; and *debt*, upon any contract for moneys due to the crown, or for any forfeiture due to the crown upon the breach of a penal statute.

An information of intrusion may also be resorted to in the case of a *purpresture* upon public property; which occurs when one encroaches, or makes that several to himself, which ought to be common to many. Informations of *debt* are commonly used to recover forfeitures occasioned by transgressing the revenue laws; in which cases the crown now recovers and is liable to pay costs, if unsuccessful, as if the suit were between subject and subject.

5. A writ of *quo warranto* is a writ issuing from the Queen's Bench Division against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right. It lies also in case of non-user, or long neglect of a franchise, or misuser, or abuse of it; and commands the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. In case of judgment for the defendant, he shall have an allowance of his franchise; but in case of judgment for the crown, for that the party is entitled to no such franchise, or has disused or abused it, the franchise is either seized into the sovereign's hands, to be granted out again to whomever he shall please; or, if it be not such a franchise as may subsist in the hands of the crown, there is merely judgment of *ouster*, to turn out the party who usurped it.

The judgment on a writ of *quo warranto* is final and conclusive, even against the crown. Which, together with the length of its process, probably occasioned the introduction of a simpler method of prosecution, by *information* in the nature of a *quo warranto*. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the crown; but has long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor; the fine being

nominal only. And this method of proceeding is now applied to the decision of corporation disputes between party and party, without any intervention of the prerogative, by virtue of the statute 9 Ann. c. 20; 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; provides for its speedy determination, and directs that, if the defendant be convicted, judgment of ouster, as well as a fine, may be given against him, and that the relator shall pay or receive costs according to the event of the suit.

6. The prerogative writ of *mandamus* is also an effectual remedy, in the first place, for refusal of admission where a person is entitled to an office or place in any such corporation; and, secondly, for wrongful removal, when a person is legally possessed. These are injuries for which, though redress for the party interested may be had by action, yet as the franchises concern the public, and may affect the administration of justice, this prerogative writ issues; commanding, upon good cause shown, the party complaining to be admitted or restored to his office.

We have now gone through the whole circle of civil injuries, and the redress which the law has provided for each. In which the student cannot but observe that the main difficulty attending their discussion arises from their variety, which is apt at first to breed a confusion of ideas, and a kind of distraction in the memory. But this difficulty will shrink to nothing upon a nearer and more frequent approach; and indeed be rather advantageous than of any disservice, by imprinting on the student's mind a clear and distinct notion of the nature of these several remedies.

CHAPTER XI.

THE WRIT OF SUMMONS.

HAVING explained the *nature* and several *species* of our courts of justice; and what wrongs are *cognizable* by one court, and what by another; I endeavoured, under the title of *injuries cognizable by the courts of law*, to define the remedies which were therein provided for every possible degree of wrong. I then explained in detail *in what cases equity afforded relief*; and I am now, in the last place, to examine the *manner* in which these several remedies are *pursued* and applied.

What, therefore, the student may expect in the succeeding chapters, is a brief account of the method of prosecuting an action in any of the divisions of the High Court of Justice. And the most natural way of considering the subject will be, I apprehend, to pursue it in the order wherein the proceedings themselves follow each other. The general, therefore, and orderly parts of an action are these: 1. The writ; 2. The pleadings; 3. The issue or demurrer; 4. The trial; 5. The judgment, and its incidents; 6. The proceedings in nature of appeals; 7. The execution.

The *original*, or original writ, was formerly the foundation of every action. When a person has received an injury, and thinks it worth his while to demand a satisfaction for it, he is to consider what redress the law has given for that injury; and thereupon is to make application to the crown, as the fountain of justice, for that particular remedy. To this end he formerly sued out from the Chancery, or purchased by paying the stated fees, an *original*, or original writ, which was directed to the sheriff of the county wherin the injury was committed or supposed so to have been, and required him to command the wrongdoer either to do justice to the complainant or else to appear in the Court of Common Pleas, which formerly entertained *all* suits between subject and subject, and answer the accusation against him. The day on which the defendant was to appear, and on which the sheriff was to bring in the writ and report how far he had obeyed it, was called the *return* of the writ, it being then

returned by him to the court at Westminster, with a statement of the manner in which he had obeyed it, this being also called his *return*. And it was always made returnable upon some day in one of the four *terms* in which the court then sat for the despatch of business.

These terms were gradually formed from the canonical constitutions of the church; being no other than those leisure seasons of the year, which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. In very early times, the whole year was one continual term for hearing and deciding causes; until the church interposed, and exempted certain holy seasons from being profaned by the tumult of forensic litigation. As, particularly, the time of Advent and Christmas, which gave rise to the winter vacation; the time of Lent and Easter, which created that in the spring; the time of Pentecost, which produced the third; and the long vacation between Midsummer and Michaelmas, which was allowed for the harvest. All Sundays also, and some particular festivals, as the days of the Purification, Ascension, and some others, were included in the same prohibition.

The portions of time, not included within these prohibited seasons, fell naturally into a fourfold division, and from some festival that immediately preceded their commencement, were denominated the terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael. Their commencement and termination were afterwards regulated by several statutes; and they are now superseded by *sittings*,—the commencement and termination of which are prescribed by Orders of Court.

The next step for carrying on the action was called the *process*; which was to compel a compliance with the original writ; the first step of which was to give the party notice to obey it *by summons*, to appear in court at the return of the original writ. If the defendant disobeyed this verbal monition, the next process was by writ of *attachment* or *pone*, whereby the sheriff was commanded either to attach him, by taking *gage*, that is, certain of his goods, which he should forfeit if he did not appear; or by making him find *safe pledges* or sureties who should be amerced in case of his non-appearance. If after *attachment* the defendant neglected to appear, he not only forfeited this security, but was

moreover to be further compelled by writ of *distringas*, or *distress infinite*; which was a subsequent process to distrain the defendant from time to time by taking his goods and the profits of his lands, which he forfeited to the crown if he did not appear. The issues might be sold, if the court should so direct, in order to defray the reasonable costs of the plaintiff.

And here by the common law the process ended, the defendant, if he had any substance, being gradually stripped of it all by repeated distresses, till he rendered obedience to the original writ. But, in cases of injury accompanied with force, the law provided also a process against the defendant's *person* in case he neglected to appear; subjecting his body to imprisonment by the writ of *capias ad respondendum*. Whence arose a practice of commencing the action by bringing an original writ of trespass *quare clausum fregit*, for breaking the plaintiff's close *vi et armis*; which subjected the defendant's person to be arrested by writ of *capias*; and then afterwards, by connivance of the court, the plaintiff prosecuted him for any other less forcible injury. This practice ultimately became the ordinary mode of commencing an action; and in course of time it became usual in practice, to sue out the *capias* in the first instance, upon a supposed return of the sheriff; and afterwards a fictitious original was drawn up, in order to give the proceedings a colour of regularity. When this *capias* was delivered to the sheriff, he by his under-sheriff granted a warrant to his inferior bailiffs, to execute it on the defendant. And if the sheriff of Oxfordshire, in which county the injury, we may suppose, was committed and the action was laid, could not find the defendant in his jurisdiction, he returned that he was not found, *non est inventus*, in his bailiwick: whereupon another writ issued, called a *testatum capias*, directed to the sheriff of the county where the defendant was supposed to reside, as of Berkshire, reciting the former writ, and that it was *testified*, *testatum est*, that the defendant lurked or wandered in *his* bailiwick, wherefore he was commanded to take him, as in the former *capias*. But here also, when the action was brought in one county, and the defendant lived in another, it was usual, for saving trouble, time, and expense, to make out a *testatum capias* at the first, supposing not only an original, but also a former *capias*, to have been granted, which in fact never

had been. And this fiction also soon became the settled practice.

But where a defendant absconded, and the plaintiff would proceed to an outlawry against him, an original writ must then have been sued out regularly, and after that a *capias*. And if the sheriff could not find the defendant upon the first writ of *capias*, and returned a *non est inventus*, there issued out an *alias* writ, and after that a *pluries*, to the same effect as the former. And, if a *non est inventus* was returned upon all of them, then a writ of *exigent* or *exigi facias* might be sued out, which required the sheriff to cause the defendant to be proclaimed, required, or exacted, in five county courts successively, to render himself; and if he did, then to take him as in a *capias*: but if he did not appear, and was returned *quinto exactus*, he should then be outlawed by the coroners of the county. *Outlawry* is putting a man out of the protection of the law. Formerly it was attended with a forfeiture of all his goods and chattels to the crown; but it might be reversed as a matter of course, on the defendant's entering an appearance, it being then considered only as a process to compel appearance.

Such was the process in the *Common Pleas*. In the *King's Bench* a plaintiff might have proceeded by *original* writ, but the usual method was by *Bill of Middlesex*; so entitled, because the court generally sat in that county. This bill was always founded on a *plaint* of trespass *quare clausum fregit*, which accusation gave the King's Bench jurisdiction in civil causes, and it must have been served on the defendant, if found by the sheriff; but, if he returned *non est inventus*, then there issued out a writ of *latitat*, to the sheriff of another county, as Berks; which recited the bill of Middlesex, and testified that the defendant *latitat et descurrit*, lurked and wandered about in Berks; and therefore commanded the sheriff to take him, and have his body in court on the day of the return; but in the King's Bench, as in the Common Pleas, it ultimately became the practice to sue out a *latitat* upon a supposed, and not an actual, *bill of Middlesex*.

In the Exchequer the first process was by a writ of *quo minus*, in order to give the court a jurisdiction over pleas between party and party, in which the plaintiff was alleged to be the king's farmer or debtor, and that the defendant had done him

the injury complained of, *quo minus sufficiens existit*, by which he was the less able to pay the king his rent or debt. And upon this the defendant might have been arrested as upon a *capias* from the Common Pleas.

Thus differently did the three common law courts set out at first, in the commencement of a suit, in order to entitle the King's Bench and Exchequer to hold plea in causes between subject and subject. The multiplicity of these proceedings occasioned great inconvenience in practice, and the use of different kinds of process in personal actions was therefore put an end to in the reign of William IV.

Five other forms of writs were then substituted; and the names of *John Doe* and *Richard Roe*, who had hitherto been the pledges of prosecution for the plaintiff, and also the common bail for the defendant, were no longer required. The different writs of summons thus provided remained in use until the procedure to compel appearance was further modified in the beginning of the present reign, when the practice of commencing an action by the arrest of the defendant was entirely abolished.

These changes in procedure were confined to personal actions. The proceedings in *Dower*, *right of dower*, and *quare impedit*, which were still commenced by original writ sued out of Chancery, were next assimilated to those in other actions; and finally in 1852 *outlawry* on *mesne* process was abolished; and one uniform method of commencing an action at common law provided; a plaintiff being then for the first time enabled, on the non-appearance of a defendant, to proceed at once to judgment and execution.

The first commencement of a suit in Chancery was by preferring a bill to the Lord Chancellor, in the nature of a libel in the spiritual courts, setting forth the circumstances of the case, as some fraud, trust, or hardship; and praying relief at the chancellor's hands, against the defendant; upon filing which, a *subpœna* was taken out, commanding the defendant to appear and answer, on pain of 100*l*. If the defendant, on service of the *subpœna*, did not appear within the time allowed him and plead, demur, or answer, he was then said to be in *contempt*; and process of contempt was awarded against him. The first was an *attachment*, and if the sheriff returned *non est inventus*, then

an *attachment with proclamations* issued; and if this was also returned *non est inventus*, a *commission of rebellion* was awarded; and four commissioners were ordered to attach the defendant as a rebel. If upon this a *non est inventus* was returned, the court then sent a *serjeant-at-arms* in quest of him; and if he eluded the search of the serjeant, then a *sequestration* issued to seize all his personal estate, and the profits of his real, and to detain them, subject to the order of the court. After an order for a sequestration, the plaintiff's bill was taken *pro confesso*, and a decree was made accordingly. This long process was abolished in the beginning of the present reign; and, if upon being served with a copy of the bill, the defendant did not appear, the plaintiff might *enter an appearance* for him, and then proceed as on a default.

In the High Court of Admiralty, the first proceeding was either *in rem*, or *in personam*; that is, either by arrest of the ship, or citation of the defendant; the object of arresting the ship being merely to obtain the appearance of the defendant and bail to meet the plaintiff's claim, if he were successful.

The modern process, by which all *actions* must now be commenced, is the *writ of summons*; which is a *judicial* writ, issuing in the name of the sovereign, under the seal of the divisional court in which the action is brought; and directed to the defendant, whom it commands to cause an appearance to be entered for him in the divisional court therein mentioned; warning him, at the same time, that in default of his so doing, the plaintiff may proceed to judgment and execution. It must be dated of the day on which it is issued, and be *teste'd* or witnessed in the name of the Lord Chancellor, or if the office of Lord Chancellor be vacant, in the name of the Lord Chief Justice of England; and it remains in force for twelve months.

The time allowed to a defendant to enter this appearance depends on circumstances. If he resides *within* the jurisdiction of the court, it is *eight days* inclusive of the day on which the writ is served; if *beyond* the jurisdiction, he must be allowed such further time as is reasonably necessary in the circumstances. For the plaintiff is not allowed to obtain a judgment in default of appearance, against a defendant who is resident out of England, except by the express leave of a judge; who must

above all things be satisfied that the defendant has had proper time allowed him to appear to the action.

Not less careful is the law in securing for the defendant full information as to the person who is suing him; so that he may know not only whether the plaintiff's claim is just, but also to whom to address himself for a settlement of the action, if such a course be desirable; for every writ must have endorsed on it the name and abode of the solicitor actually suing it out; or if no solicitor is employed, then the name and abode of the plaintiff himself. The court has thus also an opportunity of ascertaining who is responsible for any irregularity in the execution of its process; as on a writ without this indorsement, a judgment by default would be set aside; the defendant having, through the plaintiff's own negligence, been deprived of the information and opportunity of avoiding litigation which the law affords him.

It is with the same view of affording the defendant the fullest information as to the nature of the proceedings, that the plaintiff is further required to state on the back of the writ, by what is called *an endorsement of claim*, the nature of his demand; so as to give the defendant an opportunity of putting an end to the action at once.

The writ of summons is thus a letter missive from the sovereign, notifying to the defendant that the plaintiff demands from the crown, as the fountain of justice, redress for some injury which he has received, and therefore commanding the defendant to appear in the sovereign's High Court of Justice, there to abide the determination of the judges, to whom the crown has delegated its whole judicial authority.

The defendant is made acquainted with the exact nature of the plaintiff's claim, by the *service of the writ*, which is usually effected by the delivery to him of a copy. And this service ought always, if practicable, to be *personal*, and to be made by some one who knows the defendant and can swear to his identity, For, as a general rule, there is no equivalent for personal service, except an undertaking by a solicitor to appear; which is, if necessary, enforced by attachment.

If, however, the defendant keeps out of the way, so that personal service cannot be effected, the plaintiff may, upon satisfying the court, or a judge, that he is unable to effect prompt

personal service, obtain an order for substituted service, or for the substitution of such notice for service as may seem just. If it appears, for instance, that the defendant wilfully evades service of the writ, authority may be obtained to proceed as if personal service had been effected.

If, however, the plaintiff has reason to suppose that the defendant will keep out of the way, another course is open to him. On the ancient process by *capias*, the sheriff, by the connivance of the courts, instead of arresting the defendant, gave him notice to appear to the action; no actual arrest was required, and merely nominal bail were taken. But if the plaintiff would make *affidavit* as to a debt, he might arrest the defendant, and compel him to put in substantial sureties for his appearance, called *special bail*; the sheriff, or his officer the bailiff, being then obliged to take the body of the defendant, and, having so done, to return the writ with a *capi corpus* indorsed thereon. This was the practice until arrest on *mesne* process was abolished in all civil actions, in the beginning of the present reign, when a new system was substituted, which, slightly modified, is that now in use. For where a plaintiff can prove at any time before final judgment that he has good cause of action against the defendant to the amount of 50*l.* or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and that his absence from England will materially prejudice the plaintiff in the prosecution of his action, the defendant may be arrested and kept in prison for a period not exceeding six months, unless and until he give security that he will not go out of England without the leave of the court. Where the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, it is not necessary to prove that the defendant's absence will prejudice the plaintiff; and the security required, instead of being that the defendant will not go out of England, is that any sum recovered in the action shall be paid, or that the defendant shall be rendered to prison. Upon this order of committal, the sheriff proceeds to arrest the defendant, who may be kept in custody until he gives the required security.

It is only, however, in actions *in which the defendant would have been liable to arrest* that this procedure can be resorted to,

and these actions may be briefly enumerated as those in which a debt, or demand in the nature of debt, is claimed. The *arrest* itself, must be by corporal seizing or touching the defendant's body; after which the bailiff may justify breaking open the house in which he is to take him: otherwise he has no such power, but must watch his opportunity to arrest him. For every man's house is looked upon by the law to be his castle of defence and asylum, wherein he should suffer no violence. Which principle is carried so far in the civil law, that for the most part not so much as a common citation or summons, much less an arrest, can be executed upon a man within his own walls.

The queen's chaplains, the lords of the bedchamber, the clerk of the kitchen, &c., are privileged from arrest; and the servants in ordinary of the sovereign cannot be arrested unless upon leave obtained from the lord chamberlain. The servants of a queen dowager or queen consort are not privileged, nor does the privilege extend to a herald. Ambassadors and ministers of foreign states, and their domestics, are privileged from arrest; but consuls and their servants are not; nor are the couriers or messengers of foreign ministers. Peers of the realm, and peeresses by birth, creation, or marriage, and members of parliament are privileged, as already explained. The judges of the supreme court cannot be arrested; and barristers or solicitors attending any court upon business cannot be arrested during their actual attendance, which includes their necessary going to, waiting in, and returning from court. Clergymen performing divine service, and not merely staying in the church with a fraudulent design, are for the time privileged from arrest, as are likewise members of convocation actually attending thereon. Suitors, witnesses, and other persons, necessarily attending any courts of record upon business, are not to be arrested during their actual attendance, which includes their necessary coming and returning. And no arrest can be made in the presence of the sovereign, nor in any place where the queen's justices are actually sitting. Lastly, no arrest can be made, nor process served upon a Sunday, except for treason, felony, or breach of the peace.

When the defendant is arrested, he cannot be detained in any case for a period exceeding six months: and he may claim his discharge when judgment is given, or by at once consenting to judgment, in the action.

The *service of the writ* is in all cases the most important step in the cause, as it is the foundation of all the future proceedings therein; and, the law, accordingly, in many cases specially provides how service is to be effected. Thus, service on a husband is deemed good service on the wife, unless the wife is to be served separately. So where an infant is defendant, service on the father or guardian is in general good service on the infant. Where a firm is sued, the writ may be served upon a partner or on a manager at the principal place of business. And whenever provision is made for service of process upon a corporation, or on the inhabitants of a hundred, or any society or fellowship, the writ must be served in the manner so provided. In an action to recover land, a copy of the writ, in case of vacant possession, may be posted upon the door of the dwelling-house or other conspicuous part of the property. In admiralty actions *in rem*, service is effected usually at the same time that a warrant of arrest, whether against ship, freight, or cargo, is executed. This is done by the marshal or his officer nailing or affixing the writ for a short time on the mast, and, on taking it off, leaving a true copy fixed in its place. A similar proceeding is resorted to where the cargo has been landed; but if it is in the custody of a person who will not permit access to it, service may be made upon the custodian.

Upon the service of the writ, the next step taken in a defended action is the *entry of an appearance* by or on behalf of the defendant. If this be not done, the plaintiff may sign *judgment by default*, and proceed to recover the debt or damages, or the possession of the property to which he is entitled, the administration of the estate of which he is a creditor, the dissolution of his partnership, or whatever else he may have claimed by his writ. Should the defendant have inadvertently neglected to appear, so that judgment by default has been signed, he is not necessarily debarred from still disputing the justice of the plaintiff's claim; for it has long been a matter of course to allow a defendant to appear on an *affidavit of merits*. He must, however, account in some way for not having entered an appearance; he must also pay the costs of the application; and as he is obtaining an interference of the court on his behalf calculated to delay the plaintiff, conditions may be imposed on his being allowed to appear; for instance, that he shall plead within a fixed time, or that he bring money into court.

The *judgment in default of appearance* necessarily varies according to the nature of the claim made by the writ. In cases where a debt is claimed, judgment by default is usually final. Where *damages* are sought to be recovered, the plaintiff's claim cannot be endorsed on the writ; for how, in an action for breach of promise of marriage, for a nuisance, or the like, can any court permit the plaintiff to be a judge in his own cause by allowing him to assess his own damages, as it would do if he were permitted to obtain judgment for any amount he chose to claim? But as by failing to appear, the defendant has admitted that the plaintiff is entitled to redress of some kind, the court therefore gives *interlocutory* judgment, *quod recuperit*, that is, that the plaintiff do recover the damages sustained by him; and then proceeds to inform its conscience of the amount for which *final* judgment is to be given, either by a writ of inquiry directed to the sheriff to assess the plaintiff's damages, or, if the plaintiff's claim is substantially a matter of calculation, by one of its own officers.

If no appearance be entered in an action for the recovery of land, the judgment will be that the person whose title is asserted in the writ shall recover possession. Where a claim for mesne profits or arrears of rent has been made, the plaintiff will proceed to assess his damages. Indeed, in most actions, and in those not specially provided for by law, if the defendant does not appear, the action proceeds as if he had appeared.

There is, however, an exceptional procedure which may be adopted by the holder of an unpaid bill of exchange or promissory note, which is closely connected with the subject of judgment by default. Formerly a plaintiff must have sued out a writ of summons, on which, in case of non-appearance, he obtained a judgment by default. But it was always open to the defendant to appear and plead a variety of fictitious defences, the sole effect of which was to compel the plaintiff to proceed to trial, and thus create delay and expense. This practice became so much of a reproach to the administration of justice, that the judges became ashamed of it, and the legislature was induced to place under restriction the right even of a defendant to appear to the action. All actions on bills or notes, brought *within six months* after the same have become payable, *may* now be commenced by a writ of

summons in a special form; which, instead of commanding the defendant to enter an appearance, *warns* him that, unless he obtains leave to appear, and do appear accordingly, the plaintiff may proceed to judgment and execution. And when served with this species of writ, a defendant, if he has a defence, must apply for and obtain leave to appear, without which he cannot do so; and unless he obtains such leave within the time allowed, judgment by default may be signed, and execution issued.

Leave to appear may, however, be obtained, as a matter of right, on the defendant paying into court the sum indorsed on the writ;—or upon affidavits which disclose a *legal* defence, as that the note was given to the plaintiff by way of accommodation and without value;—or an *equitable* defence, as that the bill was accepted by the defendant, as chairman of a company, and not on his own account;—or such facts as would make it incumbent on the holder of the instrument to prove that he gave value for it, as that it had been obtained from the defendant by fraud, or was tainted with illegality. But terms may also be imposed on the defendant, for instance, that he shall give security for the amount claimed.

Thus much for the writ of summons, which is only meant to bring the defendant into court, in order to contest the suit, and abide the determination of the law. When he does not appear, he is considered to admit the justice of the demand; and the sovereign then, by his delegates the judges, sitting in his courts of justice, awards to the plaintiff that redress to which he is by law entitled, and which by his writ he has demanded. When the defendant does appear, it must be either in person or by a solicitor. In probate actions, and admiralty causes *in rem*, a person not named in the writ may intervene, on filing an affidavit showing how he is interested, in the former class of cases, in the estate of the deceased; in the latter, in the *res* under arrest. And in an action, also, for the recovery of land, a person not named as a defendant may appear, on filing an affidavit that he is in possession of the land either by himself or his tenant, just as in the old action of ejectment the landlord was admitted to defend.

Both parties being thus before the court, next follow the pleadings, which are to be considered in the next chapter.

CHAPTER XII.

OF PLEADING.

THE *pleadings* of the plaintiff and defendant were formerly put in by their respective counsel *ore tenus*, or *viva voce*, in court, and minuted down by the chief clerks or prothonotaries; whence in our old law French they are frequently denominated the *parol*. That practice gave way in time to the more convenient course of producing previously prepared written pleadings; which innovation was in its turn supplanted by the modern system, all the pleadings in an action being now simply interchanged between the solicitors of the parties.

There is a course open to the parties, however, which may render formal pleadings unnecessary. For as the object of all pleading is to ascertain what is in issue between the litigants, whether they disagree upon a matter of *fact* or on a question of *law*, there is no reason, if they can ascertain this without pleadings, why these should be resorted to. And they are accordingly allowed to take the simplest mode of stating the question at issue, by what is called a *special case*, for the decision of the proper tribunal. If the question is one of *fact*, it may be sent for trial by a jury; if one of law, the court can decide between the parties.

But if, as is most usual, the parties do not agree that the matters in dispute betwixt them shall be decided in this way, these must be evolved by the pleadings: the first of which is the *statement of claim*; in which the plaintiff sets forth as concisely as may be the material facts on which he relies.

In *local* actions, as for an actual trespass, or for waste, &c., affecting land, the plaintiff has hitherto been obliged to allege his injury to have happened in the very county in which it really did happen; but in *transitory* actions, for injuries that might have happened anywhere, as debt, slander, and the like, the plaintiff might have selected whatever county he pleased as

the *venue*, the *visne*, *vicinia* or neighbourhood from which the jury was to come; and then the trial must have been had in that county. If the defendant, however, made affidavit that the cause of action, if any, arose not in that but in another county, the court directed a change of the *venue*, unless the plaintiff showed good cause for retaining the *venue* where he had laid it. There is now, however, no local venue for the trial of any action; but where the plaintiff proposes to have the action tried elsewhere than in Middlesex, he must in his statement of claim name the county in which he proposes that the action shall be tried, and this, unless altered, will be the venue; the result being that it is for the court to determine, in case of dispute, where the action shall be tried. The *venue* will always be changed on an affidavit of *special facts*, as that a fair trial cannot be had in the county where it is laid, or that the witnesses live in the county to which it is proposed to change it.

The *original writ*, which has been described already, was the authority to the judges to give the plaintiff that redress which the law awarded, for the particular injury of which he complained, and no more. He could not consequently join different causes of action in one suit. But the operation of the *writ of summons* is not limited in any way; it calls on the defendant simply to answer the plaintiff in an action: and therein he may seek redress for every complaint he has to make against the defendant. If it should afterwards appear that any such complaint cannot be conveniently tried or disposed of together with another, separate trials may be had.

The statement of claim must conclude with a demand of the relief which the plaintiff seeks. In claims for a debt or for damages, it is a sum of money: in *detinue* it is a return of his goods, and damages for their detention; or if they have been returned, damages only. In administrations and dissolutions of partnership it is to have the accounts taken, and, if necessary, a receiver appointed; in some cases an injunction, in others a mandamus may be claimed.

If in actions at law the plaintiff neglected to deliver his statement of claim, or as it was formerly called, his declaration

by the end of the term next after the defendant appeared, or was guilty of other delays in any subsequent stage, he was adjudged *not to follow* or pursue his remedy, and thereupon a *nonsuit*, or *non prosequitur*, was entered; and he was said to be *nonpros'd*. And for thus deserting his complaint, after making a false claim, he must have paid costs to the defendant. In suits in equity, the defendant might, in similar circumstances, apply to have the plaintiff's bill dismissed. This is now the practice in all cases.

Formerly, if a plaintiff did not wish to proceed with his action, he could enter a *retraxit*, which differed from a nonsuit, in that the one was negative, and the other positive; a nonsuit being a mere default of the plaintiff, he was allowed to begin his suit again, upon payment of costs; but a *retraxit* was an open and voluntary renunciation of his suit, in court, and by this he for ever lost his action. A *discontinuance* was somewhat similar to a nonsuit, for when a plaintiff at law left a chasm in the proceedings of his cause, as by not continuing it as he ought to have done, the suit was discontinued, and the defendant was no longer bound to attend: but the plaintiff must have begun again, by suing out a new writ. Thus if the plaintiff took no step in the cause for *a year*, he was out of court, and his action entirely gone. Discontinuance in this sense no longer holds. But the plaintiff may, at any time before receipt of defendant's statement of defence, or after the receipt thereof before taking any other formal step, by notice in writing, wholly discontinue his action or withdraw any part of his cause of complaint. He must thereupon pay the defendant's costs; and such discontinuance or withdrawal, as the case may be, is not then a defence to any subsequent action.

When the plaintiff has stated his case, it is incumbent on the defendant to make his *defence*, else the plaintiff will recover judgment by *default*. But before defence made, if at all, *cognizance* of the suit must be *claimed*; which arises when any person has, within a particular jurisdiction, the *cognizance of pleas*; as when a scholar of the Universities is impleaded at Westminster, for any cause of action, unless upon a question of freehold. In these cases, the vice-chancellor may put in a claim of cognizance; which if duly made, is allowed; but, it may be added, is almost unknown in practice.

The defendant must in general deliver his *statement of defence* within eight days from the delivery of the statement of claim; unless he has obtained further time; which can only be had by the order of the court, or of a judge; who will generally put the defendant under such terms, that the plaintiff shall not be delayed by reason of any indulgence accorded to the defendant.

There are, however, some proceedings which may be taken by a defendant, if need be, before he puts in his defence. Thus, if the plaintiff resides out of England the defendant may apply for and obtain *security for costs*. He may also in certain cases obtain *further and better particulars* of the plaintiff's demand, in order that he may know the precise nature of the claim against him, and be better enabled to prepare his answer to it. He may obtain *inspection* of the bond, or other instrument upon which the action is brought, or he may administer *interrogatories* to the plaintiff, as to facts or documents which are required for his defence. So if he does not claim any interest in the money or goods for which the plaintiff is suing, and they are claimed by some other party, he may *interplead*; that is, call upon the third party to appear and state the nature of his claim, and either maintain or relinquish it, or be substituted as defendant. One of several defendants may apply for the *consolidation* of several actions, they undertaking to abide the event of one of them, as in the case of underwriters sued individually on a policy of insurance. *Inquiries* or *accounts* may be ordered and taken, although other relief may be sought in the action. The defendant may in some cases demand a *view* of the thing in question, in order to ascertain its identity and other circumstances. And when he claims to be entitled to *contribution or indemnity*, from any other person, such other person may be made a party to the action. When any of these steps are taken, *a stay of proceedings* must be obtained, for on the expiration of the eight days, if no stay shall have been obtained, the defendant must put in his *statement of defence*; which, like the plaintiff's claim, ought to set out concisely the material facts on which the defendant relies, but not the evidence by which they are to be proved. It ought also either to dispute the allegations of the plaintiff, or, admitting these allegations to be true, avoid the effect thereof by stating some fresh matter in answer. In the former case, the defendant is

said to *traverse:* in the latter he is said to plead in *confession and avoidance.*

A confession of the whole complaint is not usual, for in such cases the defendant suffers judgment to go by default. Yet sometimes, after tender and refusal of a debt, if the creditor harasses his debtor with an action, it is necessary for the defendant to acknowledge the debt, and plead the tender; adding that he has always been ready, *tout temps prist,* and still is ready, *uncore prist,* to discharge it: for a tender by the debtor and refusal by the creditor will in general discharge the costs, but not the debt itself.

A species of confession is the *payment of money into court;* which is necessary upon pleading a tender, and is itself a kind of tender to the plaintiff, by paying into the hands of the proper officer of the court as much as the defendant acknowledges to be due, either as debt or damages, together with the costs hitherto incurred, in order to prevent the expense of further proceedings. And if after the money is paid in, the plaintiff proceeds in his suit, it is at his own peril; for if he does not prove more to be due than is so paid into court, he must fail in his action, and pay the defendant costs; but he shall still have the money so paid in, for that the defendant has acknowledged to be his due.

To this head may also be referred the pleading of a *set-off,* whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand; but on the other sets up a demand of his own, to counterbalance that of the plaintiff, either in the whole or in part: as, if the plaintiff sues for ten pounds due on a note of hand, the defendant may set off nine pounds due to himself for merchandise sold to the plaintiff, and, in case he *pleads* such set-off, he ought to pay the remaining balance into court, or plead some other plea in regard to it. A plea of set-off was first authorised in the reign of George II., where there were mutual debts between the parties, and was therefore limited to *debts,* properly so called. A claim for damages could not be set off in answer to a claim for a debt, or a debt be pleaded in answer to a claim for damages, nor damages be set off as against damages; but now the defendant may *set off,* or set up by way of *counter-claim,* any right or claim, whether such set-off or counter-claim sound in damages or not; and such set-off or counter-claim has the same effect as a

statement of claim in a cross action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross claim.

If the defendant's answer on the merits be neither a set-off nor a counter-claim, he must state some other defence, according to the general rule of pleading, either by way of traverse or in confession and avoidance; the latter category including not only all matters which may be urged by way of discharge from the claim, but those which show it to be either void, as arising from an illegal transaction, or voidable, such as fraud or deceit practised on the defendant in the transaction itself.

What was formerly called *the general issue* traversed and denied at once the whole of the plaintiff's claim, without offering any special matter whereby to evade it. As in trespass, *non culpabilis*, not guilty; in debt upon contract, *nunquam indebitatus*, that he never was indebted; in debt on bond, *non est factum*, it was not his deed; on an *assumpsit*, *non assumpsit*, he made no such promise: or in an action on a warranty, that he did not warrant, or on an agreement, that he did not agree. These pleas were called the general issue, because, by importing an absolute denial of what was alleged by the plaintiff, they amounted at once to an issue: by which is meant a fact affirmed on one side and denied on the other. Such defences may still, in similar cases, be set up, but not in the form of a general denial. The defendant must as a rule specifically deny each allegation of fact, of which he does not admit the truth.

The general issue may thus be considered as prohibited. It was pleaded, when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what was called a *special* plea; which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. And this may consequently now be considered the rule on which the statement of defence is to be framed; except in one particular instance, viz., the defence of *not guilty, by Statute*; which not only puts in issue all that is charged against the defendant, but enables him to justify it as fully as if the justification itself were fully and circumstantially stated. This defence

may be set up in actions brought against justices of the peace, constables, officers of courts and local boards, and other persons holding public offices, for anything done or supposed to be done by them in virtue of their office. In these cases the defendant is in general not only entitled to notice of action, but is also privileged to defend himself by *the general issue*, and under it to give special matter of justification in evidence.

The defences which may be set up in answer to, or *in bar*, of the plaintiff's claim, are very various. As, in actions on contract, a general release, an accord and satisfaction, an award made in an arbitration, conditions unperformed, payment before action, or some other fact which precludes the plaintiff from his action; all the facts in each case being specifically stated, so as to admit of a categorical denial. Thus, in an action on a bill of exchange by an indorsee, the defendant may allege that the bill was accepted in anticipation of the delivery to him of a cargo; that the cargo had not been delivered; that thereby the consideration for the bill had wholly failed; and that the plaintiff had taken the bill with notice of the facts, and after it had become due, and without giving for it any consideration; every one of which averments permits of a distinct traverse. And so in actions of assault and battery, the defendant may set up, *son assault demesne*, that it was the plaintiff's own original assault: in an action for false imprisonment, he may detail the circumstances under which he had probable cause for suspecting the plaintiff of having committed a felony: in trespass to real property, the defendant may point out that he was using his right of way; or that he entered to abate a nuisance after notice had been given to the plaintiff to do so; or, in an action of slander, that the plaintiff is really as bad a man as the facts stated by the defendant show.

In an action for the recovery of land, inasmuch as the plaintiff can recover only by the strength of his own title, it is sufficient for the defendant to allege his possession, unless he relies on some equitable estate or right, or claims relief on some equitable ground against the title asserted by the plaintiff; when, as in other cases, he must state specifically the facts on which he relies.

In an action for the administration of an estate, the defence may be that the plaintiff was illegitimate; or that the estate was

not sufficient for the payment of the debts of the deceased, and had been already applied as far as it would go to that purpose; either of which amounts to an answer. In actions where only an account, or the dissolution of partnership is claimed, the defendant can rarely offer a good reason for refusing the one or objecting to the other, as the question between the parties generally resolves itself into one of account only.

It would be tedious, however, to describe, however briefly, the actions that may be brought, or the defences that may be set up; and I must, therefore, refer the reader to the books on this subject, contenting myself with alluding to one or two grounds of defence of not unfrequent occurrence; the first being *the statute of limitations*, or the time limited by law, beyond which no plaintiff can lay his cause of action.

Twenty years, the period within which an entry must be made or an action brought to recover the *possession* of land, is also that within which rights that affect the realty, or that were created by deed or matter of record, may be enforced. Thus, actions for money secured by a mortgage, or otherwise charged upon *land*, must be brought within twenty years; so actions for *rent* on a *lease by deed*, or on a *bond* or other *specialty*, must be brought within a like period. If there has been a payment of principal or interest, or an acknowledgment in writing, the date of the last payment or of the acknowledgment in writing, is that from which this period of limitation runs.

All actions of trespass, *quare clausum fregit*, or for injuries to personal property, and of debt on simple contract, must be brought within *six years* after the cause of action accrued. The same period of limitation applies where the claim is for arrears of *rent*, in cases in which the demise is *not by deed*, for arrears of the *interest* of money charged upon land, for arrears of *dower*; and for actions upon an *award*, where the submission is *not by specialty*.

Actions for assault, or false imprisonment, must be brought within *four years*, and actions for *words* within *two years* after the injury committed.

If, however, the party entitled to sue, or liable to be sued, labours under any disability, the time of limitation does not begin to run till that disability is removed. The period of limitation applicable to suits for sums of money charged upon land,

or secured by bond or other specialty and for rents secured by deed in actions, begins to run afresh from the time of any payment of principal or interest, or the date of any acknowledgment in writing. Debts on simple contract, likewise are, in legal phrase, taken *out of the statute*, by any *payment* on account of principal or interest, or by an *acknowledgment in writing*, any one of which is sufficient to raise a fresh *assumpsit* or implied promise to pay the debt itself. It was at one time held that a mere *verbal* promise to pay a debt, or a bare acknowledgment of its existence, if it were such that a promise might be inferred from it, was sufficient. But no acknowledgment or promise by *words* only is now sufficient evidence of a new or continuing contract; it must be *in writing*, signed by the party chargeable thereby.

All actions upon penal statutes, where the forfeiture is to the crown alone, must be sued within *two* years; and where the forfeiture is to a subject, or to the crown and a subject, within *one* year after the offence committed.

Actions against judges of the county courts, justices of the peace, constables, the local authorities of districts, and other persons holding public offices, must be brought within *six*, in some cases *twelve*, in some instances *three*, months after the cause of action arose.

The use of these statutes of limitation is to preserve the peace of the kingdom, and to prevent those innumerable perjuries which might ensue, if a man were allowed to bring an action for any injury committed at any distance of time. Upon both these accounts the law holds that *interest reipublicæ ut sit finis litium*. If therefore the injury or cause of action happened earlier than the period expressly limited by law, the defendant may set up the statute of limitation applicable to the particular wrong complained of in defence. So that in order to prevent a defendant from availing himself of the statute of limitations, the plaintiff must within the time limited commence an action by issuing a writ, which it is not necessary to serve, provided the plaintiff be careful to renew it from time to time, so as to keep it in force till served, the date of the first writ being the commencement of the action.

Another defence in certain cases is the want of the *notice of action*; to which, by various statutes, justices of the peace, con-

stables, officers of the local boards, officers of the revenue, surveyors of highways, and other persons having public duties to perform, are entitled, when sued for anything done by them, in virtue or in execution or supposed execution of their office. This notice of action, which is necessary in many other instances, is required that the defendant may have an opportunity of tendering amends; and it must, in general, be given one calendar month at least before the action is brought.

An *estoppel* may likewise be set up as a defence; where a man has done some act, or executed some deed, which estops or precludes him from averring anything to the contrary; as where a distinct statement of a particular fact is made in the recital of a bond or other instrument, and a contract is made with reference to that recital, it is not, as between the parties to the instrument, competent to the party bound to deny the recital.

The requisites of a statement of defence are, 1. That it deny every one of the plaintiff's allegations of fact specifically, or by necessary implication: every allegation not so denied or stated to be not admitted, being taken to be admitted. 2. That each averment of fact or denial of fact be so pleaded as to be capable of trial, that is to say, that it take or tender an issue; with which object, every statement of claim and of defence is required to be divided into distinct paragraphs, numbered consecutively, and each containing a separate allegation. So that, 3. each averment or denial may be single and contain only one matter; for duplicity begets confusion. Hence, 4. every denial of an allegation must be direct and positive and not evasive or argumentative. Thus, if it be alleged that the defendant received a certain sum of money, it is not sufficient to deny that he received that particular amount, but it must be stated that he did not receive that sum or any part thereof, or else set out how much he did receive. So the bare denial of a contract is construed only as a denial of the making of it *in fact;* not of its legality or its sufficiency in law, for its illegality or insufficiency, if relied upon as a defence, must be directly asserted, so as to be capable of being as directly denied.

The allegations in a statement of defence, as distinguished

from the denials of the plaintiff's averments, are, therefore, in the affirmative; and always advance some new fact not mentioned in the statement of claim. To these denials or allegations, as the case may be, the plaintiff must make answer in his *reply*. In a simple denial he *joins issue*; but if the defendant's allegation does not amount to an issue or total contradiction of the plaintiff's allegation, but only evades it, the plaintiff may reply by setting up some new matter in confession and avoidance, which must, however, be consistent with his former statement. Thus in an action for trespassing upon land whereof the plaintiff is possessed, if the defendant shows a title to the land by descent, and that therefore he had a right to enter, the plaintiff may either deny the fact of the descent; or he may confess and avoid it, by replying, that true it is that such descent happened, but that since the descent the defendant himself demised the lands to the plaintiff for a term not yet expired. To this reply the defendant can obviously only answer by a joinder of issue; and as a rule, no pleading subsequent to reply other than a joinder of issue can be pleaded, unless by leave of the court or a judge, and then only upon such terms as the court or judge shall think fit.

The whole of this process is denominated the *pleading*; in the several stages of which the party must not depart or vary from the title or defence which he has once insisted on. For this, which is called a *departure* in pleading, might occasion endless altercation. Therefore the reply must support the statement of claim, and the rejoinder, if it be allowed, must support the statement in defence, without departing out of it. As in the case of setting up no award made, in an action thereon, to which the plaintiff replies, setting forth an actual award; now the defendant cannot say that he has performed this award, for this statement would be an entire departure from his original defence, which alleged that no such award was made; therefore he has now no other choice, but to traverse the fact alleged in the reply; demur upon the law of it; or amend his pleading.

In any stage of the pleadings, when either side advances or affirms any matter, he is understood to *aver it to be true*. So when either side traverses or denies any matter alleged by his antagonist, he is understood to *tender an issue*, as it is called.

Thus sooner or later the parties come to a point which is affirmed on one side and denied on the other. They are then said to be *at issue*, all their debates being at last contracted into a single point, which must now be determined either in favour of the plaintiff or of the defendant.

CHAPTER XIII.

OF ISSUE AND DEMURRER.

ISSUE, *exitus*, the end of all the pleadings, is the fourth stage of an action, and is either upon matter of *law* or matter of *fact*.

An issue upon matter of law is called a *demurrer*. It confesses the facts as stated by the opposite party to be true; but denies that those facts show any cause of action or ground of defence; according as the party which first demurs, *demoratur*, rests or abides on the point in question. As, if the matter of the plaintiff's complaint be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the whole claim; if, on the other hand, the defendant's excuse be invalid, as if he pleads that he committed the trespass by authority from a stranger, without making out the stranger's right; here the plaintiff may demur to the defence. When therefore either party perceives an objection in law upon which he may rest his case, he may demur by averring the statement of claim or of defence, or the alleged set-off or counter-action, as the case may be, to be *bad in substance*, that is, insufficient to maintain the action or the defence. The party demurring is thereupon understood to pray judgment for want of sufficient matter alleged; and the opposite party is understood to maintain that his pleading is *good in substance*, so that the parties are at issue in point of law. Which issue in law, or demurrer, it is for the court to determine.

An issue of fact is where the fact only, and not the law, is disputed. And when he that denies or traverses the fact pleaded by his antagonist has tendered the issue, the other party may immediately *join issue;* or if affirmative matter be set out in the

pleading, he may at once *take issue* thereon. 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. This issue of fact has hitherto, in the courts of common law, been determined by the country, *per pais*, in Latin *per patriam*, that is, by a jury. In the courts of equity the facts as well as the law were usually determined by the court, on the hearing of the cause. There are now various modes of trial applicable to the different kinds of issues raised in the action, as shall be pointed out hereafter.

Demurrers, or questions concerning the *sufficiency* of the matters alleged in the pleadings, are determined by the court, upon argument by counsel on both sides; and to that end a demurrer book is made up, containing all the proceedings at length, which are afterwards entered on *record;* and copies thereof, called *paper-books*, are delivered to the judges to peruse. The *record* is a history of the proceedings in the cause; in which must be set out the writ of summons and all the pleadings, *verbatim*, and also the issue or demurrer, and joinder therein.

These were formerly all written, as indeed all public proceedings were, in Norman or law-French, and so continued till the reign of Edward III., in whose reign it was enacted, that for the future all pleas should be pleaded, answered, debated, and judged in the English tongue; but be entered and enrolled in Latin. This Latin, which continued in use for four centuries, answers so nearly to the English, oftentimes word for word, that it is not at all surprising it should generally be imagined to be totally fabricated at home, with little more art or trouble, than by adding Roman terminations to English words. Our law-Latin, is, however, in reality a mere technical language; and, as Sir John Davis observes of the law-French, "so very easy to be "learned, that the meanest wit that ever came to the study of "the law, doth come to understand it almost perfectly in ten "days without a reader." It continued in use from its first introduction, till the time of Cromwell; when the language of our records was altered into English. But at the Restoration this novelty was no longer countenanced; and thus it continued without any sensible inconvenience, till 1730, when it was again thought proper that the proceedings in the courts of law should be done into English, and it was accordingly so ordered by a

statute of George II.—"That the common people might have "knowledge and understanding of what was alleged or done for "and against them in the process and pleadings, the judgment "and entries in a cause." Which purpose has not been answered: the people being now, after many years' experience, altogether as ignorant in matters of law as before.

When the substance of the record is completed, and copies are delivered to the judges, the matter of law upon which the demurrer is grounded is determined by the court; and judgment is thereupon accordingly given. As, in an action of trespass, if the defendant in his plea confesses the fact, but justifies it *causâ venationis*, for that he was hunting; and to this the plaintiff demurs, that is, he admits the truth of the plea, but denies the justification to be legal: now, on arguing this demurrer, if the court be of opinion that a man may not justify trespass in hunting, they will give judgment for the plaintiff; if they think that he may, then judgment is given for the defendant. Thus is an issue in law, or demurrer, disposed of.

An issue of fact takes up more form and preparation to settle it; for here the truth of the matters alleged must be solemnly examined and established by proper evidence in the channel prescribed by law. To which examination of facts, the name of *trial* is usually confined, which will be treated of at large in the succeeding chapter.

CHAPTER XIV.

OF THE TRIAL.

TRIAL is the examination of the matter of fact in issue; of which there are many different species, according to the difference of the subject, or thing to be tried. For the law so industriously endeavours to investigate truth at any rate, that it will not confine itself to one, or to a few, manners of trial, but varies its examination of facts according to the nature of the facts themselves; this being the one invariable principle pursued, that as well the best method of trial, as the best evidence upon that trial

which the nature of the case affords, and no other, shall be admitted.

The species of trials in civil cases are six in number: by *record*; by *inspection*, or *examination*; by *certificate*; by *witnesses*; by *jury*; and by *the court* or the delegate of the court, *an official* or *special referee*. Trials by inspection, by certificate, and by witnesses are very unusual, but are still recognised modes of trial in certain cases.

I. The trial by *record* is only used in one instance; and that is where a matter of record is pleaded in any action, a judgment or the like; and the opposite party pleads, *nul tiel record*, that there is no such matter of record existing. Hereupon the party pleading the record has a day given him to bring it in; and, on his failure, his antagonist shall have judgment. The trial, therefore, of this issue is merely by the record; for a record importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, or otherwise, but only by itself. Thus titles of nobility, as whether earl or no earl, baron or no baron, shall be tried by the sovereign's writ or patent only, which is matter of record; and whether a manor be held in ancient demesne or not, shall be tried by the record of *domesday* in the Exchequer.

II. The trial by *inspection* or *examination* is almost unknown. It occurs when some point, either the principal question or one arising collaterally out of a cause, being the object of sense, the judge, upon the testimony of his own sense, decides it. As to set aside a recognizance by an infant; here a writ issues to the sheriff, commanding him that he constrain the party to appear, that it may be ascertained by the view of his body by the justices whether he be of full age or not. If, however, the court has, upon inspection, any doubt of the age of the party, as may frequently be the case, it may proceed to take proof of the fact; and, particularly, may examine the infant himself upon an oath of *voire dire, veritatem dicere*, that is, to make true answer to such questions as the court shall demand of him; or the court may examine his mother, his godfather, or the like. All such points when disputed are however usually decided upon affidavits.

III. The trial by *certificate* is allowed in cases where the evidence of the person certifying is the only proper criterion of the point in dispute. For, when the fact in question lies out of the cognizance of the court, the judges must rely on the solemn averment or information of persons in such a station as affords them the most clear and competent knowledge of the truth. As therefore such evidence must have been conclusive, the law, to save trouble and circuity, permits the fact to be determined upon such certificate merely. Thus the customs of the city of London are tried by the certificate of the mayor and aldermen, certified by the mouth of their recorder. So when the Chancellor of his university claims cognizance of a cause because one of the parties is a privileged person; here the charters, confirmed by act of parliament, direct the trial of the question, whether a privileged person or no, to be determined by the certificate and notification of the Chancellor under seal, to which it is usual to add an *affidavit* of the fact. In certain matters also of ecclesiastical jurisdiction, as *excommunication* and *orders*; these are tried by the bishop's certificate. *Ability* of a clerk presented, *admission*, *institution* and *deprivation* of a clerk, are also tried by certificate from the ordinary or metropolitan, because of these he is the most competent judge: but *induction* must be tried either by the court or by a jury, because it is a matter of public notoriety, and is likewise the corporal investiture of the temporal profits. *Resignation* of a benefice may be tried in either way, but it seems most properly to fall within the bishop's cognizance. The trial of all customs and practice of the courts is by certificate from the proper officers of those courts respectively; and, what return was made on a writ by the sheriff or under-sheriff, can only be tried by his own certificate.

IV. Trial by *witnesses*, *per testes*, without the intervention of a jury, like that of *inspection*, is very unusual. It is not to be confounded with the usual mode of trial in the county courts, or with the trial in certain cases by the court or a judge, which is to be described afterwards. One instance may be given. When a widow brings an action of dower, and the tenant pleads that the husband is not dead, this being looked upon as a dilatory plea, is in favour of the widow, and for greater expedition, allowed to be tried by witnesses examined before the judges;

and so, says Finch, shall no other case in our law. But Sir Edward Coke mentions others: as to try the validity of a challenge to a juror; so that Finch's observation must be confined to trial of direct, and not collateral issues. And in every case Sir Edward Coke lays it down that the affirmative must be proved by two witnesses at the least.

V. The trial *by jury, per pais,* or *by the country,* has been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof. Some authors have endeavoured to trace the origin of juries to the Britons themselves, the first inhabitants of our island; but certain it is that they were in use among the earliest Saxon colonies, their institution being ascribed to Woden himself, their great legislator and captain. Hence it is, that traces of juries are found in the laws of those nations which adopted the feudal system, as in Germany, France, and Italy; who had all of them a tribunal composed of twelve good men, *boni homines,* usually the vassals or tenants of the lord, the equals or peers of the parties litigant: who, as the lord's vassals, judged each other in the lord's courts, as the king's vassals, or the lords themselves, judged each other in the king's court. The invention of the jury, which in the Teutonic language is denominated *nembda,* is ascribed to Regner, king of Sweden and Denmark, who was contemporary with Egbert; just as with us the invention of this, and other parts of our juridical polity, is imputed to the superior genius of Alfred; to whom, on account of his having done much, it is usual to attribute everything; in like manner as the traditions of ancient Greece placed to the account of Hercules whatever achievement was performed superior to the ordinary prowess of mankind. The truth seems to be, that this tribunal was universally established among all the northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other. Its use with us has always been so highly valued by the people, that no change of government could ever prevail to abolish it, and although rarely resorted to by suitors in the county courts, it is still the *right* of every litigant in the High Court of Justice.

Formerly, when an issue of fact was joined, the court awarded a *venire facias* upon the record in these words: "*Therefore let a*

jury come, &c.;" which *award of the venire* was the authority to the sheriff to summon the jury. This is now done on his receiving a precept issued to him for that purpose by the judges.

If the sheriff be not an indifferent person, as if he be a party to the action, or be related by either blood or affinity to either of the parties, he is not then trusted to return the jury, but the precept is directed to the coroner, who in this, as in other instances, is the substitute of the sheriff, to execute process when he is deemed an improper person. If any exception lies to the coroner, the precept is directed to two clerks of the court, or two persons of the county named by the court, and sworn. And these two, who are called *elisors*, or electors, indifferently name the jury, and their return is final; no challenge being allowed to their array.

The plaintiff, as has been pointed out, if he desires the action to be tried elsewhere than in Middlesex, must, in his statement of claim, suggest some other county, which, if not changed, will be the *venue* for trial. Assuming the venue to be fixed, the plaintiff's next step is, either with his reply, or at any time after the close of the pleadings, to give *notice of trial;* and therein to state in what way he desires to have the issues of fact tried—whether by a judge alone, or by a judge sitting with assessors, or by a special or official referee, or by a jury. In all actions in the courts of common law, trial by jury has hitherto been the rule; any other mode of trial was exceptional; and in such actions, trial by jury continues, and will probably for some time continue, to be the rule.

When, therefore, the general day of trials is fixed, the plaintiff or his solicitor *brings down the record* to the assizes, and *enters it* with the proper officer, in order to its being called on in course. If it be not so entered, it cannot be tried; therefore it is in the plaintiff's breast to delay any trial by not carrying down the record: unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, himself brings down the record, and enters the action for trial.

Formerly a plaintiff could *countermand* his notice of trial, being then liable to pay costs to the defendant for not proceeding to trial. But this he cannot now do without the leave of the court;

which will, however, upon good cause shown, such as the absence or sickness of a material witness, defer the trial of the cause at the request of either party till the next assizes, or to some future day.

Assuming all previous steps to be regularly settled, the cause is called on in court; and the record is then handed to the judge, to observe what issues the parties are to maintain and prove, while the jury is called and sworn. To this end the sheriff returns his execution of the precept issued to him to summon jurors, with the panel of jurors annexed, to the judge's officer in court. The jurors contained in the panel are either *special* or *common* jurors. *Special* juries were originally introduced in trials at the bar of the courts at Westminster, 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. But now if either of the parties desire it, *special* jurors are summoned upon a *notice* to that effect given to the sheriff, by the party who wishes to have his cause so tried, he paying, in the first instance, the extra expense thereby involved, which becomes part of his costs, if the judge certifies afterwards that the cause required a special jury.

The names of the jurors, being written on tickets, are put into a box or glass, and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, are sworn upon the jury, unless absent, challenged, or excused; or unless a previous *view* of the place in question shall have been thought necessary, in which case *six* or more of the jurors returned, to be agreed on by the parties, or named by a judge or other proper officer of the court, are appointed to have the place in question shown to them; and then such of the jury as have had the view, or so many of them as appear, are sworn on the inquest previous to any other jurors.

As the jurors appear, when called, they are sworn, unless *challenged* by either party. Challenges are of two sorts: challenges to the *array*, and challenges to the *polls*.

Challenges to the array are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff

in his return; and they may be made upon account of partiality, or some default in the sheriff, or his under-officer, who arrayed the panel. And generally speaking, the same reasons that were sufficient to have the precept directed to the coroner or elisors, will be also sufficient to quash the array, when made by a person or officer of whose partiality there is any tolerable ground of suspicion. Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination, or under the direction of either party, this is good cause of challenge to the array.

Challenges to the polls, *in capita*, are exceptions to particular jurors, and are either: *propter honoris respectum*; *propter defectum*; *propter affectum*; or *propter delictum*.

1. *Propter honoris respectum*; as if a lord of parliament be impanelled on a jury, he may be challenged by either party, or he may challenge himself.

2. *Propter defectum*; as if a juryman be an alien born, this is defect of birth. He must also be *liber et legalis homo*, therefore no man convicted of any infamous crime, can, unless he has obtained a free pardon, be a juror; and no man under outlawry or excommunication is qualified to serve on any inquest whatever. But the principal deficiency is defect of estate, sufficient to qualify him to be a juror, which qualifications are defined by several statutes. A juror must also be twenty-one years of age; and if above sixty he may be exempted, though not disqualified, from serving.

3. Jurors may be challenged *propter affectum* for suspicion of bias or partiality. This may be either a *principal* challenge, or *to the favour*. A *principal* challenge is such, where the cause assigned carries with it *primâ facie* evident marks of suspicion, either of malice or favour: as that a juror is of kin to either party; that he has been arbitrator on either side; that he has an interest in the cause: that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or of the same society or corporation with him: all these are principal causes of challenge, which, if true, cannot be overruled, for jurors must

be *omni exceptione majores*. Challenges *to the favour*, are where the party has no principal challenge, but objects only some probable circumstance of suspicion, as acquaintance and the like, the validity of which must be left to the determination of *triors*, whose office it is to decide whether the juror be favourable or unfavourable. The triors, in case the first man called be challenged, are two indifferent persons named by the court; and if they try one man and find him indifferent, he shall be sworn; and then he and the two triors shall try the next, and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest.

4. Challenges *propter delictum* are for some crime or misdemeanor that affects the juror's credit and renders him infamous. This was formerly the case after a conviction of several different kinds of offences, or if he had been outlawed or excommunicated. But the grounds of challenge *propter delictum* are now simply those stated as grounds of challenge *propter defectum*, viz., having been convicted of an infamous offence, which stain, however, a free pardon will obliterate, or being outlawed, or excommunicated. A juror may be examined on oath of *voire dire*, with regard to such causes of challenge, as are not to his dishonour or discredit, but not with regard to any crime, or anything which tends to his disgrace or disadvantage.

Besides these challenges, there are causes which may be made use of by persons otherwise qualified, as matter of exemption, in the first instance, from being put on the jury lists. These exemptions now extend to the judges, clergymen and dissenting ministers, barristers, solicitors, officers of the courts, physicians, surgeons and apothecaries, officers in the army or navy, and the like.

If by means of challenges, or other cause, a sufficient number of unexceptionable jurors do not appear at the trial, either party may pray a *tales*, in order to make up the deficiency: and the judge may then, at the prayer of either party, award a *tales de circumstantibus*, of persons present in court, to be joined to the other jurors to try the cause; who are liable, however, to the same challenges as the principal jurors.

When a sufficient number of persons impanelled, or *tales*-men, appear, they are then separately sworn well and truly to try the issue between the parties, and a true verdict to give according to the evidence; and hence they are denominated the jury, *jurata*, and jurors, *sc. juratores*.

The jury are now ready to hear the merits; and 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 who are the parties, the particulars of the pleadings, and upon what point the issue is joined, which it is their function to determine. 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, and summed up if necessary, the advocate on the other side opens the adverse case, and supports it by evidence, and sums up if necessary; and then the party which began is heard by way of reply.

It is impossible in an elementary outline like the present to explain the numberless niceties and distinctions of what is, or is not, legal *evidence* to a jury; but a few of the general heads and leading maxims of this branch of the law, together with some observations on the manner of giving evidence, will not be out of place.

And, first, 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. Therefore when the defendant denies his bond by the plea of *non est factum*, and the issue is, whether it be the defendant's deed or no; he cannot give a release of this bond in evidence: for that does not destroy the bond, and therefore does not prove the issue which he has chosen to rely upon viz., that the bond has no existence.

Again, evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowledge. The former, or *proofs*, to which in common speech the name of evidence is usually confined, are

either written, or *parol*, that is, by word of mouth. Written proofs, or evidence, are, 1. Records, and 2. Ancient deeds of thirty years' standing, which prove themselves; a rule which applies generally to deeds concerning lands, to bonds, receipts, letters, and all other ancient writings; but 3. Modern deeds, and 4. Other writings, must, in general, be verified by the *parol* evidence of witnesses.

And the one general rule that universally prevails is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed. Thus, in order to prove a lease for years, nothing else shall be admitted but the very deed of lease itself, if in being: but if that be positively proved to be burnt or destroyed, not relying on any loose negative, as that it cannot be found, or the like, then an attested copy may be produced, or *parol* evidence be given of its contents. So, no evidence of a discourse with another is admitted, but the man himself must be produced. Yet in some cases, as in proof of any general customs, or matters of common tradition or repute, the courts admit of *hearsay* evidence, or an account of what persons deceased have declared in their lifetime: but such evidence is not received of any particular facts. So, too, books of account, or shop books, are not allowed to be given in evidence *for* the owner; but the owner or the person who made the entry may have recourse to them to refresh his memory; and, if a servant who was accustomed to make those entries be dead, and his hand be proved, the entry, if it be one against his own interest, as for instance, charging himself with the receipt of money, may be read in evidence.

Documents offered as proofs must in general be proved by the *parol evidence* of witnesses; but to save the expense of such proof, the party intending to produce the documents may, by a formal *notice to admit*, call on his opponent to admit them, saving all just exceptions; and if he refuses or neglects to do so, the costs of proving the documents at the trial must then be borne by him, whatever the result may be, unless the judge certify his

refusal to have been reasonable. But if the documents are in the possession of his adversary, the party desiring their production at the trial may give him *notice to produce* them, and if he fails or refuses to do so, may then give *secondary evidence of their contents*, which will be admitted on proof of the service of the notice to produce. He need not, however, wait till the trial. For the court may at any time during the pendency of an action order the *production upon oath*, by any party thereto, of documents relating to the matter in controversy, the other party being thus enabled to ascertain what the effect of these documents will be. This power to compel a party to produce documents can only be exercised where the applicant has reason to suppose that the documents, of which he seeks the production, are in the possession of his adversary. To ascertain this, he may obtain an order directing the other party to make *discovery on oath* of any documents which are or have been in his possession or power relating to the matters in question. If the other party objects to produce the documents, he must state the grounds on which he does so; and the court will make such further order as is just; for the party may have the documents, and yet have good grounds on which to object to their production.

If, again, the documents are in the hands of third persons, their production at the trial can be obtained by adding a clause of requisition to the writ of *subpœna*, which is then called a *subpœna duces tecum.*

But, in mercantile transactions especially, the sight of the party's own books is frequently decisive; as the day-book of a trader, where the transaction was recently entered, as really understood at the time; though subsequent events may tempt him to give it a different colour. The court may, therefore, on application by any of the litigants, compel any other party to allow *inspection* of the documents in his custody, or under his control, relating to the action.

With regard to *parol* evidence or *witnesses*, there is a process to bring them in, viz., the writ of *subpœna ad testificandum:* which runs into Scotland and Ireland; and which commands them, laying aside all pretences and excuses, to appear at the trial on pain of 100*l.* to be forfeited to the crown; to which the statute 5 Eliz. c. 9, has added a penalty of 10*l.* to the party

aggrieved, and damages equivalent to the loss sustained by want of the evidence. But no witness, unless his reasonable expenses be tendered him, is bound to appear at all; nor, if he appears, is he bound to give evidence till such charges are actually paid him. If a witness is abroad, the party requiring his testimony may, after issue joined, apply to the court for a commission to examine him; and so if a witness residing within the jurisdiction is so ill as to be unable to attend and give evidence, he may be examined by a commissioner appointed by the court. In either case the evidence of such witnesses is taken by interrogatories or *vivâ voce*, as it may be ordered, and is read at the trial.

All witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined, for all such are *competent* witnesses; though the jury from other circumstances will judge of their *credibility*. The law formerly excluded not only such persons as were *infamous*, but all who were interested in the event of the cause: thus carefully shutting out the evidence not only of the *parties* to the cause, but any one who had the most minute interest in the result; for every person so circumstanced, however insignificant his interest, was presumed incapable of resisting the temptation to perjury; and every judge and juryman was presumed incapable of discerning perjury committed under circumstances especially calculated to excite suspicion. The stringent rules of the common law on this subject have been gradually relaxed by a series of modern statutes; and the parties to the action, and all other persons, whatever may be their interest in the result, are now *competent* and *compellable* to give evidence.

No person charged with an offence is, however, competent or compellable to give evidence against himself, nor is any person compellable to answer any question tending to criminate himself. A husband is not *competent* or *compellable* to give evidence for or against his wife, or a wife competent or compellable to give evidence for or against her husband in any *criminal* proceeding; but a husband or a wife may be witnesses in proceedings instituted in consequence of adultery, that is, they are *competent* witnesses. And so are the parties in an action for breach of promise of marriage; but the testimony of the plaintiff in such a case is not

of itself sufficient; it must be corroborated in some material particular. All rules tending to the exclusion of evidence have thus been practically abrogated. But no counsel, solicitor, or other person intrusted with the secrets of the cause by the party himself shall be compelled, or allowed, if the party objects, to give evidence of such conversation or matters of privacy as came to his knowledge by virtue of such trust and confidence: though he may be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowledge without being interested in the cause.

One witness, if credible, is *sufficient* evidence of any single fact, though undoubtedly the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy; and therefore does not *always* demand the testimony of two, as the civil law universally requires.

Proof is always required, where from the nature of the case it appears it might possibly 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. *Violent* presumption is many times equal to full proof: for there those circumstances appear which *necessarily* attend the fact. As if a landlord sues for rent due at Michaelmas 1876, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands, this is a violent presumption of his having paid the former rent, and, in the absence of explanation that the acquittance was given by mistake or obtained by fraud, is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without such payment; and it thereby induces so forcible a presumption, that a jury is justified in acting on it, and returning a verdict accordingly. A *probable* presumption, arising from such circumstances as *usually* attend the fact, has also its due weight: as if, in an action for rent due in 1875, the tenant proves

the payment of the rent due in 1876; this prevails to exonerate the tenant, unless it be clearly shown that the rent of 1875 was retained for some special reason, or that there was some fraud or mistake: for otherwise it will be presumed to have been paid before that in 1876, as it is most usual to receive first the rents of longest standing. *Light* or rash presumptions have no weight or validity at all.

The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the *whole* truth as to the matter in question: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their solicitors, the counsel, and all bystanders; each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge publicly allowed or disallowed. And if, either in his directions or decisions, he mis-states the law, the counsel on either side may require him publicly to *note the exception*; stating the point wherein he is supposed to err; so that the exception may be examined on appeal. Either party may also *demur to this evidence*, which happens, where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt: 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: which draws the question of law from the cognizance of the jury, to be decided by the judge. But neither exceptions nor demurrers to evidence are much in use, since it is in the power of the court of appeal to grant a *new trial*, which may always be had for the mis-direction of the judge. Besides which it not unfrequently happens that the whole cause depends on some *point* of law, which has to be decided by the judge; who may therefore, if necessary, adjourn the cause for further argument thereon, and afterwards direct a *nonsuit* or *verdict* to be entered; his judgment in this case being open to appeal by the party against whom it is given. It sometimes happens also that both parties, when neither feel confident of success, agree to *withdraw a juror*, which puts an end to the proceedings, leaving each party to pay his own costs; and another not unusual proceeding

is a *reference of the cause to arbitration*, which takes place generally where the question involved in the cause is matter of account, or is unfit to be litigated in open court.

This open examination of witnesses, *vivâ voce*, in the presence of all mankind, is more conducive to the clearing up of truth, than the secret examination taken down in writing before an officer, which is the practice of the courts that have borrowed their procedure from the civil law; where a witness may frequently depose that in private which he would be ashamed to testify in a public tribunal. The occasional questions of the judge, propounded to the witnesses on a sudden, and the cross-examination of the counsel, 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. Nor is the presence of the judge during the examination a matter of small importance: for, besides the respect with which his presence naturally inspires the witness, he is able, by use and experience, to keep the evidence from wandering from the point in issue. In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them. For as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it; one, and not the least important, of the advantages attending this way of giving testimony, *ore tenus*.

As to such evidence as the jury may have 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. And therefore it has often been held, that though no proofs were produced on either side, yet the jury might bring in a verdict. This seems to have arisen from the ancient practice in taking assizes, where the sheriff was bound to return such jurors as knew the truth of the facts. But this doctrine was gradually

exploded, and is obviously quite incompatible with the grounds upon which new trials are every day awarded, viz., that the verdict was given *without*, or *contrary to*, evidence. And therefore, together with new trials, the practice seems to have been introduced, which now universally obtains, that if a juror knows anything of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court.

When the evidence is gone through on both sides, the judge in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.

The jury, then, unless the case be very clear, withdraw to consider their verdict: and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed; a method of accelerating unanimity not wholly unknown in other constitutions of Europe, and in matters of great concern. For by the golden bull of the empire, if, after the congress was opened, the electors delayed the election of a king of the Romans for thirty days, they were to be fed only with bread and water till the same was accomplished. But if our juries eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also if they speak with either of the parties or their agents, after they have 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. If after reasonable deliberation, the jury cannot agree, it is usual to discharge them, in which case the action will have to be tried by another jury.

When they are all agreed, the jury return to the court; and, before they deliver their verdict, the plaintiff is bound to appear in court, by himself, solicitor, or counsel. The object of compelling his attendance was that he might answer the amercement to which, by the old law, he was liable, in case he failed in his

suit, as a punishment for his false claim. If the plaintiff do not appear no verdict can be given, and therefore it is usual for a plaintiff, when he perceives or is advised that he has not given evidence sufficient to maintain his issue, to be, with the consent of the judge, voluntarily nonsuited, that is, to withdraw himself: whereupon the crier is ordered to *call the plaintiff:* and if neither he, nor anybody for him, appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant has judgment to recover his costs. The reason of this practice is that a nonsuit, if entered with the consent of the judge, is more eligible for the plaintiff, than a verdict against him: for after a nonsuit, which is theoretically only a default, he may commence the action again; but after a verdict he is for ever barred from attacking the defendant upon the same ground of complaint.

In case the plaintiff appears, the jury by their foreman deliver in their verdict, their *vere dictum*; which is either *privy*, or *public*. A *privy* verdict is when the judge has left or adjourned the court: and the jury being agreed, obtain leave to give their verdict privily to the judge out of court; which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in court. The only effectual and legal verdict, therefore, is the *public* verdict; in which they openly declare to have found the issue for the plaintiff, or for the defendant: and if for the plaintiff, they assess the damages, if any be claimed, sustained by the plaintiff, in consequence of the injury upon which the action is brought.

Sometimes, if there arises in the case any difficult matter of law, a jury will find a *special verdict*, stating the naked facts, as they find them to be proved, and praying the advice of the court thereon; concluding conditionally, that if upon the whole matter the court is of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. Another species of special verdict, is when a jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the court on a *special case* stated by the counsel on both sides with regard to a matter of law; the judgment in this event being stayed till the question is determined, when the verdict is entered for the plaintiff or defendant, as the case may be. But in both these instances a jury may, if they think proper, take upon them-

selves to determine, at their own hazard, the complicated question of fact and law; and, without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant.

When the jury have delivered in their verdict, and it is recorded in court, they are then discharged; and so ends the trial by jury.

VI. The last species of trial is that by the court itself; that is to say, by a *judge*, or by a judge sitting with assessors, or by an official or special referee with or without assessors, as may be ordered. For when neither plaintiff nor defendant has given notice that he desires to have the issues of fact tried by a jury, the one or the other must get an order directing in what other mode the action is to be tried. And herein the powers of the court are practically unlimited; as it may at any time order different questions of fact to be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials.

There are many cases in which the intervention of a jury is unnecessary. In actions, for instance, in which the question turns on the legal effect of evidence or of undisputed facts, the presence of the jury is a useless form, for the verdict must depend entirely on the direction of the judge. In such cases, accordingly, the court may order a trial before a judge of any question or issue of fact, or partly of fact and partly of law; the proceedings being the same as on a trial by jury, and the finding of the judge as to facts of the same effect as a verdict; except that it cannot be questioned afterwards, as being against the weight of the evidence, on which ground the verdicts of juries are not unfrequently set aside and a new trial granted.

Those actions in which there are complicated questions of account are properly sent for trial to an *official referee* appointed by the court, or to a *special referee*, agreed upon by the parties; whose report on a question of fact is equivalent to a verdict. The assistance of a referee is also desirable in actions where any scientific or local investigation is required, which cannot

conveniently be made by a jury, or conducted by the court through its ordinary officers.

The actions tried by a *judge sitting with assessors* are admiralty causes, in which questions of seamanship arise, and in which, therefore, the judge has the advice of two of the elder brethren of the Trinity House. Issues of fact in divorce and matrimonial causes are tried by a judge or by a jury, according as the court, on the application of either party, may direct; and in probate actions a similar rule prevails.

The cases which have hitherto been determined by a judge alone, were suits in chancery in which questions of fact were litigated. According to the practice of that court, which still prevails, if the plaintiff finds sufficient matter confessed in the defendant's statement to ground a judgment upon, he may proceed to the hearing of the action. But in this case he must take the defendant's statement to be true in every point. Otherwise, that is, if the facts be not admitted, he must reply, and join issue as in ordinary cases, and then proceed to proof.

This was formerly done by taking the *depositions* of witnesses in writing, according to the manner of the civil law. And for that purpose *interrogatories* were framed, or questions in writing; which were to be proposed to, and asked of, the witnesses in the cause; either by an examiner in London, or by commissioners in the country. When these depositions had been taken, they were transmitted to the court; and when all the witnesses had been examined, then, and not before, the depositions were allowed to be published, by a rule to pass publication; after which they were open for the inspection of all the parties, and copies might be taken of them. This method of taking evidence having been considered inefficient and objectionable, an oral examination of the witnesses at the hearing of the cause has been substituted; but, as in the County Courts, a jury is rarely called for. So that here, as heretofore, the *trial* is *by a judge*.

The evidence, or some part of it, may have been taken by an examiner; but he has no power to decide any question involved, but only to report the evidence. And in like manner, facts may have been allowed to be proved by *affidavit*; but, cross-examination being the great test of truth, no order authorizing the

evidence of a witness to be given by affidavit is made, when the party objecting *bonâ fide* desires the production of the witness for cross-examination; and even where evidence has been given by affidavit, the attendance of the witness may still be obtained for cross-examination at the trial.

CHAPTER XV.

OF JUDGMENT AND ITS INCIDENTS.

Upon the argument of the demurrer, or the finding of the issues of fact, follows the judgment of the court; which, upon a demurrer, is usually then and there given, unless time be taken to consider what judgment shall be given. After a trial, the judge either gives judgment simply for the party who appears entitled to it;—or else adjourns the case for further consideration;—or he abstains from giving judgment, so as to leave the party who considers himself entitled to it to apply for the proper judgment. And what may thus be done by a judge, either when trying a cause alone, or with the assistance of a jury, may be done, in the case of a trial, by a referee.

If, however, any defect of justice happen at a trial by surprise, inadvertence, or misconduct, the party may have relief, by obtaining a new trial; or if, notwithstanding the issues of fact be regularly decided, it appears that the complaint was not actionable in itself, the defendant may apply to have judgment entered for him.

A *new trial* may be obtained for causes wholly *extrinsic*, arising from matter foreign to, or *dehors* the record. Of this sort are want of notice of trial; or any misbehaviour of the prevailing party towards the jury, which influenced their verdict: or any misbehaviour of the jury among themselves: also if the jury have brought in a verdict without or contrary to evidence; or have given exorbitant damages; or if the judge has misdirected the jury, so that they found an unjustifiable verdict; for these, and other reasons of the like kind, it is the practice to award a *new*, or second, *trial*.

The exertion of these superintendent powers, in setting aside the verdict of a jury and granting a new trial, is of a date extremely ancient; and no rule is now better understood than the maxim on which the courts act, that where justice is not done upon one trial, the injured party is entitled to another. A new trial is a re-hearing of the cause before another jury; but with as little prejudice to either party as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the order of the court awarding such second trial on the other: and the subsequent verdict, though contrary to the first, imports no blame upon the former jury; who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case.

A sufficient ground must however be stated to satisfy the court that it is necessary to justice that the cause should be further considered. If the matter be such as did not or could not appear to the judge who presided at the trial, it is disclosed by *affidavit:* if it arises from what passed at the trial, it is taken from the judge's information. Counsel are heard on both sides to impeach or establish the verdict, and the court gives its reasons at large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are upon full deliberation clearly explained and settled.

Nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice of the case. For new trial is not granted upon nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right or *summum jus,* where the rigorous exaction of extreme legal justice is hardly reconcilable to conscience. Nor is it granted where the scales of evidence hang nearly equal: that which leans against the former verdict ought always to preponderate.

And in granting such further trial, which is matter of sound

discretion, the court has an opportunity of laying the party applying under such equitable terms, as his antagonist shall desire and mutually offer to comply with: such as the admission of facts not intended to be litigated; the production of deeds, books, and papers; the examination of witnesses, infirm or going beyond sea; and the like. A new trial has accordingly become the shortest, cheapest, and most effectual cure for all imperfections in a verdict, whether they arise from the mistakes of the parties, of their counsel, of their solicitors, of the jury, or even of the judge.

A mistake, however, on the part of the judge does not necessarily entitle the party who conceives himself injured to a new trial. For although granted as of right when there has been a misdirection to the jury, or the improper admission or rejection of evidence in the course of the trial, it is not granted unless some substantial wrong or miscarriage has been thereby occasioned.

Nor will a mistake on the part of the judge in the giving of judgment involve a new trial, if the error admits of remedy. For if the judge has directed a judgment to be entered which the party thereby affected considers wrong, he may apply to set it aside and have what he contends the proper judgment entered. Thus if, in an action for slander in calling the plaintiff a Jew, the defendant denies the words, and issue is joined thereon; now if a verdict be found for the plaintiff, that the words were actually spoken, whereby the fact is established, and the court thereupon directs a judgment for the plaintiff to be entered, the defendant may apply to have this judgment set aside on the ground that to call a man a Jew is not actionable: and if the court be of that opinion, the judgment must be set aside without any new trial, no facts being in dispute. For in every case, whether upon an application for judgment or for a new trial, the court, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, is bound to give judgment accordingly. If it has not sufficient materials, as if there be any fact still undetermined, it may direct the application to stand over, and order such questions to be tried or such inquiries made as it thinks fit, so as to obtain such materials and give final judgment thereon.

Applications for a new trial have generally been in common law actions; because these were usually tried by a jury, and the issues raised frequently depended on very complicated questions, as well of fact as of law. In the other matters now within the cognizance of the High Court, new trials have been rare, probably because the issues raised were comparatively simple. For instance, in determining who is entitled to probate or administration, the fact to be decided is generally the execution of a will merely, or the sanity of a testator. And in a suit for divorce, the question whether or not the defendant has committed adultery, though provable by perhaps numerous witnesses, is in itself a single and determinate issue. A new trial was unknown in the High Court of Admiralty, whose procedure was founded on the civil law; the remedy there was an appeal. In the Court of Chancery the trial was, as a rule, not by a jury, nor even by the examination of witnesses in court, but ordinarily upon affidavits verifying the allegations of the several parties to the suit upon which the decree was made; and there was here, consequently, no new trial; but a proceeding somewhat of the same nature, viz., a rehearing; which had the same effect, of suspending the judgment of the court.

For if the judgment be not suspended, it is next entered or enrolled at the office of the court. Judgments are the sentence of the law, upon the matter contained in the record, and are of four sorts. Firstly, where the facts are confessed by the parties, and the law determined by the court, as in case of judgment upon *demurrer:* secondly, where the law is admitted by the parties, and the facts disputed, as in case of judgment on the *verdict* of a jury, or the findings in fact of a judge or referee: thirdly, where both the fact and the law arising thereon are admitted by the defendant, which is the case of judgments by *confession* or *default:* or, lastly, where the plaintiff is convinced that either fact, or law, or both, are insufficient to support his action, and therefore discontinues or withdraws his claim.

This judgment, though pronounced or awarded by the court, is not the determination or sentence of the judges, but the determination and sentence of *the law.* It is the conclusion that naturally and regularly follows from the premises of law and fact, which stands thus: against him who has rode over my corn,

I may recover damages by law: but A. has rode over my corn; therefore I shall recover damages against A. If the major proposition be denied, this is a demurrer in law: if the minor, it is then an issue of fact; but if both be confessed, or determined, to be right, the conclusion or judgment of the court cannot but follow. Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries; and the action is the vehicle or means of administering it.

Judgments again are either *interlocutory* or *final*. By an *interlocutory* judgment the *right* of the plaintiff is generally established, but the *quantum* of damages sustained by him, or the full relief to which he is entitled, remain to be ascertained. A final judgment disposes of the action, and leaves nothing to be done. An interlocutory judgment happens as a rule where the plaintiff recovers. When judgment is given for the defendant it is generally complete as well as final. Thus the judgment is final where the defendant suffers judgment to go against him by default, by non-appearance, or by *nihil dicit*, as if he puts in no defence to the plaintiff's claim: or by confession, *cognovit actionem*, where he acknowledges the plaintiff's demand to be just. If these, or any of them, happen in an action where the specific thing sued for is recovered, as in an action for a sum certain, the judgment is also complete as well as final. And therefore it is very usual, in order to strengthen a creditor's security, for a debtor to execute a *warrant of attorney* to some solicitor named by his creditor, empowering him to confess a judgment by either of the ways just mentioned, in an action to be brought by the creditor against the debtor for the specific sum due; which judgment, when confessed, is absolutely complete and binding.

Where, however, the plaintiff's claim is for damages properly so called, that is, damages which are not simply a matter of computation, a jury must generally be called in to assess them, The judgment in such cases is interlocutory, "that the plaintiff "ought to recover his damages, but because the court know not "what damages the said plaintiff has sustained, therefore the "sheriff is commanded, that by the oaths of twelve honest and "lawful men he inquire into the said damages, and return such

"inquisition into court." This process is called a *writ of inquiry:* in the execution of which the sheriff sits as judge, and tries by a jury what damages the plaintiff has really sustained; and when their verdict is given, the sheriff returns the inquisition, which is entered upon the record in the action; and thereupon it is adjudged by the court that the plaintiff do recover the exact sum of the damages so assessed. In like manner, when a demurrer is determined for the plaintiff in an action wherein damages are recovered, the judgment is also incomplete, without the aid of a writ of inquiry.

So where the relief to which a plaintiff is found entitled cannot be ascertained upon the hearing; the judgment must be *interlocutory.* And therefore where accounts are to be settled, or incumbrances and debts to be inquired into; these matters are, by an interlocutory order, referred to chambers for examination, the result being afterwards reported to the court. This report may then be excepted to, disproved, and overruled; or otherwise confirmed, and made absolute, by order of the court; after which the final decree or judgment is made.

To final judgments, which put an end to the action by awarding to the plaintiff what he has claimed, or has proved himself entitled to, or otherwise dismissing the suit altogether, *costs* are a necessary appendage; it being now as well the maxim of ours as of the civil law, that "*victus victori in expensis condemnandus est.*"

The common law did not allow any costs until by a great variety of statutes, beginning with the statute of Gloucester, costs were allowed in all cases, except those in which the successful party was by statute expressly deprived of them; as in trifling and malicious actions, for words, for assault and battery and for trespass, where the plaintiff recovered by verdict less than 40*s.* Here he was not entitled to any costs whatever, unless the judge certified that the action was brought to try a right, besides the mere right to recover damages, or that the trespass or grievance was wilful and malicious. And in all actions for an alleged wrong, in which less than 5*l.* was recovered, the judge might certify to deprive the plaintiff of costs altogether. In actions upon judgments, the plaintiff recovered no costs; and when he recovered in *contract* less than 20*l.*, or in

tort less than 10*l.*, here, as he might have sued in the county court, he was deprived of his costs, unless in either class of cases the court otherwise ordered.

As a general rule, again, the sovereign, and any person suing to his use, neither paid nor received costs; for, besides that he is not included under the general words of the statutes relating to costs, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them.

Paupers, that is, such as swear themselves not worth 5*l.*, have writs and subpœnas *gratis*, and counsel and solicitor assigned them without fee; and are excused from paying costs, when plaintiffs. It was formerly usual to give such paupers, if nonsuited, their election either to be whipped or pay the costs; though that practice is now disused. But a pauper may recover costs, though he pays none; for the counsel and clerks are bound to give their labour to *him*, but not to his antagonist.

In the courts of *equity*, the costs were always in the discretion of the court. The same rule prevailed in the High Court of Admiralty; and was adopted by the legislature when it transferred the jurisdiction of the ecclesiastical courts in testamentary and matrimonial causes to the courts of probate and divorce.

In the High Court of Justice, the *costs* of and incident to all proceedings are *in the discretion of the court*; except in one instance, and that is in the case of any action or issue tried by a jury; here the costs follow the event, unless for good cause shown, either to the judge who tries the case, or to the court itself in which the action is pending, it be otherwise ordered.

After *judgment* is entered, *execution* may follow to enforce it, unless the party condemned thinks himself aggrieved; and then he has his remedy to reverse the judgment, if it be erroneous, on appeal.

CHAPTER XVI.

APPEAL.

THE method of redressing erroneous judgments in the courts of common law at Westminster, was formerly by alleging, or, as it was called, bringing *error* in some superior court of appeal. Error lay for some supposed mistake in the proceedings of a court of record; for to amend errors in an inferior court, not of record, a writ of *false judgment* lay. And error only lay upon matter of *law* arising upon the face of the proceedings; so that no evidence was required to substantiate or support it: there being no method of reversing an error in the *determination* of *facts* but by a new trial.

Now the court, in giving judgment, is always supposed to examine the whole record, and thereupon to decide for the plaintiff or defendant, according to the law as it appears on the face of the record, irrespective of the findings on the issues in fact; because immaterial issues may be raised, and the facts found may, therefore, be of no moment. Consequently, where judgment has been given for one party, when, on the whole record, it ought to have been for the other, there is error *in law*. And, therefore, in the cases already referred to, as those in which a defendant may apply to set aside the judgment, error would have lain, for no judgment for the plaintiff can stand, when his claim does not state a good cause of action. So where judgment was given for a defendant on a defence which was bad in law, error lay, and an appeal may now be resorted to.

In order to bring error, the suitor who conceived himself aggrieved and who was called the *plaintiff in error*, sued out of Chancery a writ of error; which, in an action at law at Westminster, was addressed to the chief justice or chief baron, and commanded him to send a transcript of the record and other proceedings in his court under his seal to the Court of Exchequer Chamber, which was till recently the Court of Appeal, in order

that the same being examined by the judge of that Court, they might cause to be farther done thereupon, what of right ought to be done. To this writ, the Lord Chief Justice or Chief Baron, or in case of error brought upon the judgment of inferior courts, the judge of the court to which the writ of error was directed, made a return of a transcript as directed, and the record and proceedings were thus at once brought before the court of error for review.

A simpler method was provided in 1852 for bringing error on the judgments of the superior courts of law, by making error a step in the cause; the party aggrieved merely alleging error in a memorandum, which was filed in court, with *a statement of the grounds of error* intended to be argued, and both served on the opposite party, so as to supersede execution, until default in putting in bail in error—affirmance of the judgment—discontinuance by the plaintiff in error—or the proceedings being otherwise disposed of.

The mode of appealing from a decree in equity was by an application for rehearing. And this procedure is now of general application in the High Court. Proceedings in *error* in actions therein are abolished; and all appeals are by way of *rehearing*, and brought before the court of Appeal in a summary way by *notice of motion*.

The *appellant* produces to the proper officer of the court of Appeal an office copy of the judgment or order complained of, and leaves with him a copy of the notice of appeal to be filed; and the appeal is thereupon set down in a list of appeals, and comes on to be heard according to its order in that list. The notice of appeal is next served upon all parties directly affected by the appeal. It is not necessary to serve parties not so affected; but the court of Appeal, under whose control the action, by the entry of the appeal, is now brought, may direct notice to be served on all or any parties to it, or upon any person not a party, and in the meantime postpone or adjourn the hearing of the appeal, or give such judgment and make such order as might have been given or made, if the persons served with such notice had been originally parties.

The respondent has thus notice that the judgment in his favour is complained of. He is not called upon to join issue in

any way with the appellant; nor is it necessary that he should give any notice of motion by way of cross appeal; unless he intends upon the hearing, to contend that the decision of the court below should be varied; in which case, he must give notice to any parties who may be affected by such contention. For in order that every matter in controversy between the parties may not only be determined in the existing action, but may be determined finally and conclusively, the powers of the court of Appeal have been greatly extended.

The judgment of a court of error might have been either in affirmance of the former judgment; or that it should be reversed for error in law; or that the plaintiff should be barred of his right to bring error, as when a plea of the statute of limitations had been found for the defendant. The court of appeal in equity had somewhat more extensive powers; the courts of appeal from the courts of Probate, Divorce, and Admiralty, could only consider the cases before them.

The court of Appeal, as now constituted, has not only all the powers and duties of the court of first instance; but also full power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

It has also power not only to give any judgment and make any order which ought to have been given or made; but to make such further or other order as the case may require. And all these powers may be exercised, notwithstanding the notice of appeal may be against part only of the decision of the court below, and may be so exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision.

The *costs* of appeal are also entirely in the discretion of the court of Appeal; which, however, generally follows the rule of law. For there, when the judgment of the court below was affirmed, or the plaintiff in error *non pros'd*, the defendant was entitled to damages and costs, as well as to interest upon the sum awarded him by the court below for the time that execution has been delayed; but if the judgment of the court below was reversed, each party must have paid his own costs.

If, as may happen, execution has been levied on the appellant

for debt or damages, he is entitled to a writ of restitution, in order that he may recover all that he has thereby lost. For his appeal does not operate as a *stay of execution* or of proceedings under the decision appealed from, except so far as the court appealed from, or any judge thereof, or the court of Appeal, may so order.

No appeal against a judgment of the court of Appeal can be brought, except by the special leave of the court itself, after the expiration of one year from the date of such judgment; and no appeal lies, except by leave of the court or of the judge making the order, against an order as to costs only. But no judgment in this Court of Appeal is final on the merits of a cause. For from hence a further appeal lies to the House of Lords, which is strictly a court of Appeal, having none of the powers of the courts below, as courts of first instance. And therefore, if anything further is to be done in the cause of the action, it must be remitted with directions to the court in which it was originally brought.

To the decisions of the House of Lords all other tribunals must submit and conform their own.

CHAPTER XVII.

OF EXECUTION.

THE last step in an action is the *execution* of the judgment, or putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is given therein.

If the plaintiff recovers in an action, whereby the possession of land is awarded to him, the writ of execution is a *habere facias possessionem;* which directs the sheriff to give actual possession to the claimant of the land recovered; in the execution of which the sheriff may take with him the *posse comitatus*, or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. But, if it be peaceably yielded up,

the delivery of a twig, a turf, or the ring of the door is sufficient execution of the writ.

Upon a presentation to a benefice recovered in a *quare impedit*, the execution is by a writ *de clerico admittendo*; directed to the bishop or archbishop, and requiring him to admit and institute the clerk of the plaintiff.

In other actions, where the judgment is that something in special be done or rendered, a special writ of execution issues to the sheriff according to the nature of the case.

Thus after judgment in an action by a replevisor, the writ of execution to obtain a return of the goods is the writ *de retorno habendo*: and, if the distress be eloigned, the defendant shall have a *capias in withernam*; but on the plaintiff's tendering the damages the process *in withernam* is stayed.

In *detinue*, after judgment, the plaintiff may have a special writ for the delivery of the property; and if the chattel cannot be found, the sheriff shall distrain the defendant by all his lands and chattels till he render the same. Of the same nature is the writ of execution, which may be had after judgment in an action for breach of a contract to deliver specific goods for a price in money. The plaintiff, either by the same or a separate writ of execution, is entitled to have also levied the damages, costs, and interest, if any, recovered in the action.

A judgment for the recovery of any property other than land or money, may also be enforced by writ of attachment, or writ of sequestration.

A *writ of attachment* commands the sheriff to attach the person against whom it is issued, and to have him in court to answer as well touching the contempt, which he is alleged to have committed, as to such other matter as shall be laid to his charge, and to abide and perform such order as the court may make; which writ the sheriff is to obey and return like all other writs, reporting its execution to the court. This was the ordinary process of the court of Chancery against the person; as was the *capias* in the courts of common law, until imprisonment, as a means of enforcing payment of debt, was abolished. Where it is now allowed, an attachment cannot issue without

the leave of the court or of a judge, and then only after notice to the party against whom it is to be issued.

A *writ of sequestration*, which is not to be confounded with the *sequestrari facias de bonis ecclesiasticis*, is directed to commissioners therein named, commanding them to take possession of all the property, real and personal, of the person against whom it is issued. Originally it was a process, in the nature of the repeated distresses at common law, to compel appearance in Chancery; but as final process it soon became, and has long been, a means of obtaining obedience to a decree of the court. It issues where any person is directed to pay any money into court or to do any other act in a limited time, after due service of the order, and refusal or neglect to obey the same within the time limited. It authorizes the commissioners to enter upon the land, collect the rents, and realize the effects of the person against whom it is issued, the proceeds being paid into court to abide its further order; in other words, to be applied in satisfying the judgment.

This writ is not applicable to enforcing a judgment, where money only is recovered, as a debt or damages. In such cases the execution is either against the goods and chattels of the debtor; or against his goods and the *profits* of his lands; or against his goods and the *possession* of his lands.

The writ of execution against the goods and chattels of a judgment debtor is called a *fieri facias*, from the words in it whereby the sheriff is commanded, *quod fieri facias de bonis*, that he cause to be made of the goods and chattels of the defendant the sum or debt recovered. The sheriff may not break open any outer doors, to execute this writ; but must enter peacably; and may then break open any inner door in order to take the goods, which includes money, cheques, bank notes, bills of exchange, bonds, &c. And he may sell the goods and chattels, even an estate for years, which is a chattel real, till he has raised enough to satisfy the judgment and costs: first paying 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.

If any claim be made by a third party to the goods seized, the sheriff may *Interplead*, that is, obtain from a judge at chambers, a summons calling upon the execution creditor and the claimant

to appear and maintain their respective claims; which if the claimant fail to do, his claim is barred. But if both parties appear, the judge decides between them, or an interpleader issue to try the right of property, is directed, on which the parties go to trial. If the question be one of law, a case may be stated for the court;—the costs of these proceedings being in the discretion of the court, or of the judge by whom the matter is disposed of.

If part only of the debt be levied on a *fieri facias*, the creditor may resort to the other means with which the law provides him to realize his claim. For under this writ the goods, money and securities only of the debtor may be taken. In order to get at any *stock* in the public funds, or stock or *shares* in public companies, which cannot be reached by the writ, the creditor may obtain a judge's order, charging such property with payment of the amount for which judgment has been recovered. This order may be made in the first instance *ex parte*, and on notice being given to the bank or company whose stock or shares are to be charged, it operates as a *distringas*; the creditor having thereupon such remedies as he would have been entitled to, if the charge had been made in his favour by the debtor himself. No proceedings can, however, be taken by him to have the benefit of it, till six calendar months have elapsed. For the order does not give him any direct right to the property; it simply prevents the debtor from disposing of it to others; and the court will compel the debtor either to redeem the property, or allow the creditor to become possessed of it, subject of course to the claims, if any, of prior incumbrancers.

By neither of these methods, however, can *debts* not secured by bills, bonds, or other tangible securities, be made available to the creditor. The law, therefore, further enables him not only to discover, but to attach and compel payment to himself of, the debts due to his debtor; as a judge may order all debts, owing to a debtor by any third person, who is designated a *garnishee*, to be attached to answer the judgment debt; and in order to discover the existence and amount thereof, may direct the oral examination of the debtor himself. The order of attachment on being served on the garnishee, binds the debts owing by him, if any, in his hands; and he may then be ordered to appear, and

show cause why he should not pay the same to the judgment creditor. If the garnishee does not dispute the debt being due from him to the judgment debtor, he may safely pay the amount into court; but if he fails to do so, or to appear to the summons, execution may be sued out against him, without any previous writ or process. If he disputes his liability, he must appear upon the summons and do so; any question necessary to determine his liability being tried in the ordinary way; the result being, if the question be decided against him, that payment made by, or execution levied upon him, is a valid discharge, as against the judgment debtor, to the extent of the amount paid or levied.

So that either by a writ of *fieri facias*, an order charging stock or shares with the amount of the judgment, or an attachment of moneys owing to the judgment debtor, may the creditor obtain satisfaction out of the goods and chattels of his debtor.

The writ of *levari facias* commands the sheriff to seize all the goods of the debtor, and receive the profits of his lands, till satisfaction be made to the creditor. Little use is now made of this writ; the remedy by *elegit*, which takes possession of the lands themselves, being more effectual. But of this species is the writ of execution proper only to ecclesiastics; which is given when the sheriff, upon a common writ of execution issued, returns that the defendant is a beneficed clerk, not having any lay fee. In this case a writ goes to the bishop of the diocese, in the nature of a *levari* or *fieri facias*, to levy the debt and damages *de bonis ecclesiasticis*, which are not to be touched by lay hands: and thereupon the bishop sends out a *sequestration* of the profits of the clerk's benefice, directed to the churchwardens, to collect the same and pay them to the plaintiff, till the full sum be raised.

The writ of *elegit* is so called because it is in the election of the plaintiff whether he will sue out this writ or the former one, by which the defendant's goods and chattels are not sold, but only appraised; and all of them, except oxen and beasts of the plough, are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then his lands are also to

be delivered to the plaintiff; to hold, till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired; as till the death of the defendant, if he be tenant for life or in tail. During this period the plaintiff is called tenant by *elegit*.

The debtor may, however, have an estate or interest which cannot be delivered under an *elegit*, as, for instance, a *remainder* or *reversion*, or an *equity of redemption*. But the judgment itself by statute now operates as a charge, which the Court will realize if necessary, on all lands to which the defendant is entitled for any estate or interest whatever, whether in possession, reversion, remainder, or expectancy, or over which he had any disposing power, &c., and is thus binding against him and all claiming under him after the judgment.

By these several writs and proceedings, the whole of the judgment debtor's property, real and personal, may be resorted to, in satisfaction of the judgment.

In some cases, as on recognizances, the lands and goods may be taken by the process called an *extent* or *extendi facias*, because the sheriff is to cause the lands, &c., to be appraised to their full extended value, before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied. Hence crown process of execution is usually the writ of extent; for the debts of the crown, in suing out execution, are preferred to that of every other creditor, who has not obtained judgment before the sovereign commenced his suit; and a judgment for the crown at common law affects all lands which his debtor has at or after the time of contracting his debt. As this rule of law might be productive of very great hardship and injustice, it is now however provided by statute, that no judgment, statute, recognizance, &c., shall avail against purchasers, mortgagees, or creditors, unless and until a memorandum thereof be registered in the proper office of the Common Pleas division; so that everybody has notice thereof, and it is his own fault if any one purchases or lends money on mortgage, without searching for judgments against the seller or mortgagor.

What was formerly considered the most effectual writ of execution, was that under which the *body* of the defendant was

taken, viz., the *capias ad satisfaciendum;* so called because the intent of it was to imprison the body of the debtor till satisfaction were made for the debt, costs, and damages. This was an execution of the highest nature, inasmuch as it deprived a man of his liberty, till he made the satisfaction awarded; and therefore, when a man was once taken upon this writ, no other process could be sued out against his lands or goods. If the debtor did not make satisfaction, he remained in prison till he did, or until he was discharged as a bankrupt or insolvent. And at one time he might have remained in custody for life, if his creditors chose to allow him so to do; a state of the law which gave rise to a kind of gaol delivery of debtors, which, recently, was effected once a month by the registrar of the court of Bankruptcy or of the county court of the district within which the prison was situated.

In 1869 imprisonment for debt was abolished, except on: 1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of a contract; 2. Default in payment of any sum recoverable summarily before justices of the peace; 3. Default by a trustee ordered to pay any sum in his possession or under his control; 4. Default by a solicitor in payment of costs, when ordered to pay costs for misconduct as a solicitor or in his character as an officer of the court; 5. Default by a debtor in paying for the benefit of his creditors any portion of a salary or other income, ordered to be paid by a court of bankruptcy; and 6. Default in payment of sums in respect of the payment of which orders are by the Debtors Act, 1869, authorized to be made.

In these excepted cases a person may still be committed to prison, but no person can be imprisoned, in any case, for more than a year. If therefore in the first, third, or fourth of these excepted cases there is a default, the defaulter may be attached. In all other cases of default in paying money, under an order or judgment, the plaintiff may take proceedings under the Debtors Act, which enables any court to commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment of that or any other competent court. It must be proved

that the person making default either has or has had, since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.

Hitherto of writs of execution, which put the party who has obtained judgment in possession of the lands or chattels, or of the debt, damages, or costs recovered in an action. When the judgment requires any person to do any act, other than the payment of money, or to abstain from doing any act, it may be enforced by attachment. If, therefore, the repetition or the continuance of a wrongful act is prohibited, or the performance of a contract or duty is required, an *injunction*, in the nature of a writ of execution, may be obtained, which in case of disobedience will be followed by attachment. This method of proceeding has superseded the *writ of mandamus*, formerly in use to compel obedience to an order of the superior courts of common law; but which is not to be confounded with the *prerogative* writ of mandamus, the nature and objects of which were explained in a previous chapter. Instead, however, of proceeding by injunction and attachment, the court may direct that the act required to be performed shall be done by the plaintiff, or some other person appointed by the court, *at the expense of the defendant*; and upon its being done, the amount of the expense may be ascertained either by writ of inquiry or otherwise, and payment thereof enforced in the ordinary way.

Judgments between subject and subject related, in respect of the *lands* of the debtor, at common law, no farther back than the first day of the term in which they were recovered; for the term being one day in contemplation of law, all judgments signed during term, related to the first day of the term. The Statute of Frauds, however, enacted that the judgment should not bind the land in the hands of a *bonâ fide* purchaser, but only from the day of actually signing the same; which is directed by the statute to be punctually entered on the record; and must now be entered of the very day of the month and year when signed, and has no relation to any other day.

The law has been further modified by recent legislation. No judgment now affects any lands so as to avail against *bonâ fide* purchasers, mortgagees, or creditors, unless a memorandum

thereof be registered in the proper office; execution issued and similarly registered; and the lands actually delivered in execution before the date of the conveyance, mortgage, or charge.

The object of this legislation, was to put judgments on the same footing as to *land*, which they previously had as to *chattels*. A judgment did not bind the debtor's *goods* and *chattels*, but from the date of the writ of execution: which, by the Statute of Frauds, binds the goods in the hands of a stranger or a purchaser, only from the actual delivery of the writ to the sheriff, who is therefore ordered to indorse on the back of it the day of his receiving the same. No writ of execution, however, affects goods and chattels, *bonâ fide* sold for valuable consideration to a purchaser, who had no previous notice that the writ was in the hands of the sheriff.

These are the methods which the law of England has pointed out for the execution of judgments: and when the plaintiff's demand is satisfied, either by the voluntary payment of the defendant or performance by him of what he is commanded to do or by this compulsory process or otherwise, *satisfaction* ought to be entered on the record, that the defendant may not be liable to be hereafter harassed a second time on the same account.

BOOK THE FOURTH.

OF PUBLIC WRONGS.

CHAPTER I.

OF THE NATURE OF CRIMES; AND THEIR PUNISHMENT.

In the consideration of public wrongs, with the means of their prevention and punishment, it is desirable to consider, *firstly*, the general nature of crimes and punishments; *secondly*, the persons capable of committing crimes; *thirdly*, their several degrees of guilt, as principals, or accessories; *fourthly*, the several species of crimes, with the punishment annexed to each; *fifthly*, the means of preventing their perpetration; and, *sixthly*, the method of inflicting those punishments.

Firstly, as to the general nature of crimes and their punishment; or the doctrine of the *pleas of the crown*; so called, because the sovereign is in law the person injured by every infraction of the public rights of the community, and is therefore the proper prosecutor for every public offence.

I. A crime is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are synonymous terms. But in common usage the word "crimes" is made to denote such offences as are of a deeper dye; while smaller faults are comprised under the gentler name of "*misdemeanors*" only; and are so designated in contradistinction to *felonies*: the former class comprehending

all indictable offences which do not fall within the other, such as assaults, nuisances, non-repair of a highway, and the like.

The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement of the civil rights which belong to individuals; public wrongs, or crimes and misdemeanors, are a violation of the public rights and duties due to the community. A crime includes an injury; every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community. Thus murder is an injury to the life of an individual; but the law considers the loss which the state sustains by being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery is an injury to *private* property; were that all, a civil satisfaction in damages might atone for it: the *public* mischief is the thing, for the prevention of which our law makes it a felony. In these atrocious injuries the private wrong is swallowed up in the public: mention is seldom made of satisfaction to the individual. There are crimes, however, of an inferior nature, in which the punishment is not so severe but that it affords room for a private compensation also; and herein the distinction of crimes from civil injuries is apparent. In the case of an assault, the aggressor may be punished criminally; and the party beaten may also have his action for damages. So that upon the whole, the law has a double view: viz., not only to redress the party injured, but also to secure to the public the benefit of society, by punishing every violation of those laws which have been established for its government and tranquillity.

II. *Punishments* are evils or inconveniences consequent upon crimes and misdemeanors; being devised, and inflicted by human laws, in consequence of disobedience or misbehaviour in those to regulate whose conduct such laws were respectively made.

1. The *right* of punishing crimes against the law of nature, as murder and the like, is, in a state of nature, vested in every individual. It must be vested in somebody; for the laws of nature would be fruitless, if no one could put them in execution:

and if that power is vested in any *one*, it must also be vested in *all* mankind; since all are by nature equal. In a state of society this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes, which is one of the evils that civil government is intended to prevent. Whatever power, therefore, individuals had of punishing offences against the law of nature, is vested in the magistrate, who bears the sword of justice by the consent of the community.

Offences against the laws of society, which are *mala prohibita*, and not *mala in se*, the magistrate is also empowered to punish; and this by the consent of individuals, who, in forming societies, invested the sovereign power with the right of making laws, and of enforcing obedience to them when made. The lawfulness, therefore, of punishing such offenders is founded upon this principle, that the law by which they suffer was made by their own consent; being a part of the original contract into which they entered when first they engaged in society.

2. The *end* of human punishment is not expiation for the crime committed, but precaution against future offences of the same kind. This is effected, either by the amendment of the offender, for which purpose all corporal punishments, fines, and temporary imprisonments are inflicted: or, by deterring others by the dread of his example, which gives rise to all ignominious punishments: or by depriving the offender of the power to do future mischief; which is effected by either putting him to death, or condemning him to perpetual confinement or exile.

The *measure* of human punishments, therefore, can never be determined by any invariable rule; but it must be left to the legislature to inflict such penalties as are warranted by the laws of nature and society, and as appear to be the best calculated to prevent a repetition of the offence. Yet some general principles may be of assistance in allotting adequate punishment. Thus the greater and more exalted the object of an injury is, the more care should be taken to prevent that injury. Treason is therefore punished with greater rigour than even actually killing a private subject. On the other hand, the violence of passion, or temptation, may sometimes alleviate crime. Theft, in case of

hunger, is more worthy of compassion than when committed through avarice; and to kill a man upon sudden resentment, is less penal than upon deliberate malice. The age, education, and character of the offender; the repetition of the offence; the time, the place, the company wherein it was committed; all these, and a thousand other incidents, may aggravate or extenuate the crime. Finally, punishments of unreasonable severity have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. Crimes are more effectually prevented by the *certainty* than by the *severity* of punishment; for the severity of laws hinders their execution; and when the punishment surpasses all measure, the public out of humanity prefers impunity.

CHAPTER II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

Secondly, what persons are, or are not, *capable* of committing crimes; or, which is the same thing, who are exempted from the censures of the law upon the commission of those acts which in others would be punished.

The general rule is, that no person is excused from punishment, except such as are expressly exempted. And all the excuses, which protect the committer of a forbidden act from punishment, may be reduced to this single consideration—the want or defect of *will*. An involuntary act, as it has no claim to merit, so neither can it induce guilt; the concurrence of the will being the only thing that renders human actions either praiseworthy or culpable. To make a crime, there must be both will and act. For though, *in foro conscientiæ*, a design to do an unlawful act is as heinous as the commission of it, yet as no temporal tribunal can fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason, in all temporal jurisdictions, an *overt* act is necessary to demonstrate the depravity of the will, before the individual is

liable to punishment. And as a vicious will without a vicious act is no crime, so neither is an unwarrantable act without a vicious will. To constitute a crime, therefore, there must be, *first*, a vicious will; and, *secondly*, an unlawful act consequent upon such vicious will.

Now in three cases the will does not join with the act: 1. Where 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. He, therefore, that has no understanding, can have no will to guide his conduct. 2. Where there is understanding and will sufficient, but not called forth and exerted at the time of the act done, as in the case of offences committed by chance or in ignorance. Here the will sits neuter; and neither concurs with the act, nor disagrees to it. 3. Where the act is constrained by outward force. Here the will so far from concurring with the act, disagrees to what the individual is obliged to do. Infancy, idiocy, lunacy, fall under the first head; misfortune and ignorance, the second; and compulsion or necessity the third.

The law sometimes privileges an *infant* under twenty-one, as to misdemeanors: and particularly in cases of omission, as not repairing a bridge or a highway; for, not having the command of his fortune, he cannot do that which the law requires of him. But where there is any breach of the peace, a riot, battery, or the like, for these an infant is equally liable to suffer as a person of full age.

With regard to felonies, the capacity of doing ill, or contracting guilt, is not so much measured by years, as by the strength of the delinquent's understanding and judgment. For one lad of eleven may have as much cunning as another of fourteen; and in these cases, *malitia supplet ætatem*. The evidence of malice ought to be clear beyond all doubt or contradiction.

A second case of deficiency in will, which excuses from guilt, arises also from a defective understanding, viz., in an *idiot* or a *lunatic*. The rule of law here is that *furiosus furore solum punitur*. Idiots and lunatics are therefore not punishable for their acts, if committed when under these incapacities.*

* The insanity of a prisoner is ordinarily ascertained before trial, a jury

Artificial or voluntary contracted madness by *drunkenness*, our law looks upon as an aggravation of the offence, rather than as an excuse. The Roman law made great allowances for this vice: *per vinum delapsis capitalis pœna remittitur*; but our law, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, will not suffer any man thus to privilege one crime by another.

Another deficiency of will is where a man commits an unlawful act by *misfortune* or *chance*, and not by design. This, when it affects the life of another, will be treated of hereafter; at present it is enough to observe, that if any accidental mischief happens to follow from the performance of a *lawful* act in a lawful manner, the party is excused from all guilt; but if a man be doing anything *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight is no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally liable for whatever consequence follow his first misbehaviour.

Ignorance or *mistake* is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here, the deed and the will acting separately, there is not that conjunction between them which is necessary to constitute a criminal act.

The last species of defect of will to be mentioned is that arising from *compulsion* and inevitable *necessity*. Of this nature is the obligation of *civil subjection*, whereby the inferior is constrained by the superior to act contrary to what his own reason would suggest: as when a legislator establishes iniquity by law, and commands the subject to do an act contrary to morality. Thus the sheriff who burnt Latimer under Mary was not liable to punishment from Elizabeth for executing so horrid an office.

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being impannelled on his arraignment to try the question, whether he is capable of understanding and pleading to the charge. If found insane, he is thereafter detained in custody during the pleasure of the crown; for if he recovers, he may be tried for his offence, when his insanity at the time of its commission must be proved, in order to save him from the consequences.

But the principal case where this constraint of a superior is allowed as an excuse for crime is in the case of a wife; for neither a son nor a servant is excused by the command or coercion of the parent or master. If a woman commit theft, burglary, or other civil offence by the coercion of her husband —or in his company, which the law construes coercion—she is not guilty of any crime, being considered as acting by compulsion, and not of her own will. But this rule admits of exception in crimes *mala in se*, as murder and the like; because it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements of civil society. And in all cases where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence as much as any feme-sole.

Another species of compulsion or necessity is what the law calls *duress per minas:* or threats and menaces, which induce a fear of death or other bodily harm. Therefore, if a man be violently assaulted, and has no other means of escaping death, he is permitted to kill the assailant; for here the law of nature, and self-defence its primary canon, make him his own protector.

There is a third *necessity*, viz., when a man has his choice of two evils, and being obliged to choose one, he chooses the least pernicious of the two: Where, for instance, a man, by the command of the law, is bound to arrest another for a capital offence, and resistance is made; here it is justifiable and even necessary to wound or perhaps to kill the offender, rather than permit the murderer to escape.

There has been much speculation whether a man in extreme want of food or clothing may justify stealing either, to relieve his present necessities? But our law admits no such excuse; for sufficient provision is made for the poor by the power of the civil magistrate.

One other instance only need be added in which the law supposes an incapacity of doing wrong, from the perfection of the person; viz., in the case of the sovereign; whom the law will not suppose capable of committing a folly, much less a crime.

CHAPTER III.

OF PRINCIPALS AND ACCESSORIES.

THE degrees of guilt among persons that are capable of offending, viz., as *principal*, or as *accessory*, vary.

I. A man may be *principal* in an offence in two degrees. A principal in the first degree is he that is the perpetrator of the crime; in the second degree, he is who is present, aiding and abetting the act to be done. Which *presence* need not be an actual standing by, within sight or hearing; but may be constructive, as when one commits a robbery or murder, and another keeps watch or guard at a convenient distance. This rule has also other exceptions: for, in case of murder by poisoning, a man may be a principal felon, by preparing the poison, or persuading another to drink it; and yet not administer it himself, nor be present when the deed of poisoning is committed.

II. An *accessory* is he who is not the chief actor in the offence, nor present at its performance, but is in some way concerned therein, either *before* or *after* the fact. In considering these different degrees of guilt, it will be convenient *firstly*, to examine what offences admit of accessories, and what not: *secondly*, who may be an accessory *before* the fact: *thirdly*, who may be an accessory *after* it: and, *lastly*, how accessories, considered as such, and distinct from principals, are treated.

1. In high treason there are no accessories, but all are principals: the same act that makes a man accessory in felony, making him a principal in high treason. In murder and other felonies, there may be accessories: except only in those offences which are sudden and unpremeditated, as manslaughter and the like; which, therefore, cannot have any accessories *before* the fact. So too in misdemeanors and all crimes under felony, there are no accessories either *before* or *after* the fact; but all persons concerned, if guilty at all, are principals.

2. An accessory *before* the fact, is one, who being absent at

the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory; for if such procurer be present, he is a principal. If A advises B to kill another, and B does it in the absence of A, B is principal, and A is accessory in the murder. And whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact.

3. An accessory *after* the fact may be where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. Therefore, to make an accessory *ex post facto*, it is, *firstly*, requisite that he knows of the felony committed; and, *secondly*, he must receive, relieve, comfort, or assist him. Any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessory. To convey instruments to a felon to enable him to break gaol, makes a man an accessory to the felony. But to relieve a felon in gaol with necessaries is no offence; for the crime imputable to this kind of accessory is the hindrance of public justice, by assisting the felon to escape. To buy or receive stolen goods, knowing them to be stolen, is at common law a misdemeanor, and made not the receiver an accessory, because he received the *goods* only, and not the *felon*. By statute all such receivers are now accessories and felons; and may be indicted either as accessories after the fact, or for a substantive felony.

The felony must be complete at the time of the assistance given, else it makes not the assistant an accessory. As if one wounds another mortally, and a person assists the delinquent before death ensues, this does not make him an accessory; for, till death ensues, there is no felony committed. But where a felony is complete, the nearest relations may not aid or receive one another. If the parent assists his child, or the child his parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who have any of them committed a felony, the receivers become accessories *ex post facto*. But a feme-covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion.

4. The rule of the ancient law was that accessories should suffer the same punishment as the principal. But this is now altered as to accessories *after* the fact, whose offence is obviously of a lower degree of guilt to that of the principal, as tending chiefly to evade public justice. Accessories *before* the fact may be indicted and punished in all respects like the principal.

CHAPTER IV.

OF OFFENCES AGAINST GOD AND RELIGION.

HUMAN laws, as has been already pointed out, have no concern with any but social and relative duties, being intended only to regulate the conduct of man as a member of society. All crimes ought, therefore, to be estimated merely according to the mischief which they produce in society; and consequently private vices or the breach of absolute duties, cannot be the object of any municipal law, any further than as by their evil example, or other pernicious effects, they prejudice the community, and thereby become public crimes. Drunkenness, if committed privately, is beyond the knowledge, and, of course, beyond the reach of human tribunals; but if committed publicly, its evil example makes it liable to temporal censures.

On the other hand, there are some misdemeanors, not in themselves criminal, which are unlawful by the positive constitutions of the state, such as poaching, smuggling, and the like. These are naturally no offences at all; their criminality consists in their disobedience to the supreme power, which has the right of making some things unlawful which are in themselves indifferent. Considering, therefore, all offences as deriving their particular guilt from the law of man, the several offences punishable by our laws may be distributed under the following heads: *firstly*, those which are injurious to religion; *secondly*, such as violate the laws of nations; *thirdly*, such as affect the executive power of the state; *fourthly*, such as infringe the rights of the public or commonwealth; and, *lastly*, such as derogate from the rights and duties of individuals.

I. Of offences against religion, the first is *apostasy*; or a total

renunciation of Christianity, by embracing either a false religion, or no religion at all. This offence is within the cognizance only of the ecclesiastical courts, which correct the offender *pro salute animæ*.

II. A second offence is *heresy*; which consists not in a total denial of Christianity, but of some of its essential doctrines, publicly and obstinately avowed. The doctrines which are to be considered heresy are left to the determination of the ecclesiastical judge; and what ought to have alleviated the punishment, the uncertainty of the crime, seems in the early Christian centuries rather to have enhanced it. For to the blind zeal of the age only, can be attributed the capital punishments inflicted on the Donatists and Manichæans by the emperors Theodosius and Justinian; and the constitution of the emperor Frederic, adjudging all persons to be burnt with fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, indeed, ordained that if any temporal lord, when admonished by the church, should neglect to clear his territories of heretics within a year, it should be lawful to seize and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power, so long claimed and so fatally exerted by the Roman Curia, of disposing even of the kingdoms of refractory princes to more dutiful sons of the church.

It is not to be expected that our island should be free from the persecutions which deformed Christianity; and we find, accordingly, among our ancient precedents a writ *de hæretico comburendo*, which is thought to be as old as the common law itself. A conviction could not be had, however, in any ecclesiastical court, but only before the archbishop himself in a provincial synod; till in the reign of Henry IV., the clergy obtained an act of parliament, which sharpened the edge of persecution by enabling the diocesan alone to convict of heretical tenets; and unless the convict abjured his opinions, the sheriff was bound *ex officio*, if required by the bishop, to commit the unhappy victim to the flames. The power of the ecclesiastics was afterwards somewhat moderated; the statute 25 Hen. VIII. c. 14, declaring that offences against the see of Rome are not heresy; and the ordinary being thereby restrained from pro-

ceeding in any case upon mere suspicion. And yet the spirit of persecution was not then abated, but only diverted into a lay channel. For in six years afterwards, the Six Articles were enacted; and a new and mixed jurisdiction of clergy and laity established for the trial of heretics.

In the time of Edward VI. and Mary there were repeals and revivals of these sanguinary laws; and finally by 1 Eliz. c. 1, all these statutes were repealed and the jurisdiction of heresy left as at common law, viz., as to the infliction of censures in the ecclesiastical courts; and in case of burning the heretic, in the provincial synod only. The writ *de hæretico comburendo* remained in force; and there are instances of its being put in execution, upon two Anabaptists, in 17 Eliz., and upon two Arians in 9 James I. But it was totally abolished, and heresy again subjected only to ecclesiastical correction *pro salute animæ*, by 29 Car. II. c. 9.

III. The third species of offences against religion are those affecting the *Church*, which are either positive or negative: positive, by reviling its ordinances; or negative, by non-conformity to its worship.

The offence of *reviling the ordinances* of the church is provided for by the statutes of 1 Edw. VI. c. 1, and 1 Eliz. cc. 1 and 2. These acts were passed at a time when the disciples of Rome and Geneva united in inveighing with the utmost bitterness against the Liturgy; but, being inconsistent with the tolerant spirit of the present age, they have been so far repealed that they have in effect ceased to be a part of the law. The other, or negative branch of this offence is, 2, *nonconformity*, or the absenting of one's self from divine worship. Those who did so formerly forfeited one shilling to the poor for every Lord's Day they so absented themselves, and 20*l.* to the crown, if they continued such default for a month together.

The nonconformists, against whom these penal laws were directed, were those who offended through a mistaken or perverse zeal; viz., *papists* and *Protestant dissenters*; both of which classes were supposed to be equally schismatics in not communicating with the national church. Our ancestors were mistaken in their plans of compulsion and intolerance. The sin of schism, as such, is by no means the object of temporal

coercion and punishment. If men differ with an ecclesiastical establishment, the civil magistrate has nothing to do with it, unless their tenets and practice are such as threaten disturbance to the state. All *persecution* for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy and civil freedom.

With regard to *Protestant dissenters*, the legislature first interposed, by conditionally suspending the operation of the statutes which imposed penalties, by the *Toleration Act*, 1 W. and M. c. 18. But it was not thought fit at that time to extend any indulgence to papists or unitarians; as to whom the disabilities created by these acts of parliament were not removed till the reign of George III. By several statutes of the last and present reign, permitting the marriages of dissenters in their own places of worship, and providing for a civil registration of births, deaths, and marriages, independently of the Church, every person is now at full liberty to act as his conscience directs him, in the matter of religious worship.

As to *papists*, what has been said of the Protestant dissenters holds equally strong for a general toleration of them; nevertheless it was long before the amelioration of the laws accorded to Protestant dissenters was followed by the grant of a corresponding relief to the adherents of the church of Rome. In justification of this treatment, it was said that their position differed from that of the dissenters, whose principles did not extend to a subversion of the civil government; and that so long as they acknowledged a foreign power, superior to the sovereignty of the kingdom, they could not complain if the law did not treat them as good subjects. The disabilities under which they so long laboured have, however, been at last removed after a long and arduous struggle; the restrictions which have been retained, being apparently such only as can be justified on the ground either of policy or of justice. A Roman Catholic cannot vote or advise the crown on ecclesiastical appointments, nor present to a benefice; the establishment of any religious order of males is prohibited; and Jesuits may be banished the kingdom, and if they return transported for life.

Two of the most important statutes which have been repealed in deference to this modern spirit of toleration, were the *Corpora-*

tion and *Test* Acts. By the former no person could be legally elected to any office relating to the government of any city or corporation, unless within a twelvemonth before he had received the sacrament of the Lord's supper according to the rites of the Church. The Test Act directed all officers, civil and military, to take the oaths and make a declaration in open court against transubstantiation within six months after their admission; and also within the same time to receive the sacrament according to the usage of the Church upon forfeiture of 500*l.*, and disability to hold the office. By the repeal of these and the other statutes referred to, the offence of nonconformity has practically ceased to exist.

There are some other impieties and immoralities, which are, however, rarely if ever publicly punished; of this nature is,

IV. *Blasphemy* against the Almighty, by denying his being, or providence; or by contumelious reproaches of our Saviour. Whither also may be referred all profane scoffing at the Holy Scripture, or exposing it to contempt and ridicule, which are offences punishable at common law by fine and imprisonment. But whatever may be the law on this subject, no attempt has been made in modern times to enforce it.

V. Somewhat allied to this, though in an inferior degree, is the offence of profane and common *swearing* and *cursing*, which is punishable in a labourer, sailor, or soldier, by a fine of 1*s.*; in every other person under the degree of a gentleman, of 2*s.*; and in every other gentleman or person of superior rank, of 5*s.* Any justice of the peace may convict on his own hearing or the testimony of one witness.

VI. A sixth species of offences against religion, of which our ancient books are full, is the offence of *witchcraft, conjuration, enchantment*, or *sorcery*. This was prohibited, under severe penalties by several statutes, which continued in force until nearly the middle of the eighteenth century; many poor wretches being sacrificed thereby to the prejudice of their neighbours and their own illusions; not a few having, by some means or other, been led to confess their supposed offence at the gallows. Our legislature at length, in the reign of George II., followed the wise example of Louis XIV. of France, who restrained the

tribunals from receiving information of witchcraft, by enacting that no prosecution should for the future be carried on against any person for any of those charges. But people pretending to tell fortunes, or using any means or device, by palmistry or otherwise, to impose on any person, are deemed rogues and vagabonds, and punishable accordingly.

VII. A seventh species of offenders to be mentioned under this head are *religious impostors:* such as pretend an extraordinary commission from heaven, or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion, by bringing it into ridicule and contempt, are punishable by the temporal courts with fine and imprisonment; but are never prosecuted, and generally flourish on the means furnished by their dupes entirely unmolested.

VIII. *Simony,* or the corrupt presentation of any one to an ecclesiastical benefice for gift or reward, may also be considered an offence against religion; but it is a crime which there are so many methods of avoiding, that simony, however universal a practice, is quite unknown as a criminal offence.

IX. Profanation of the Lord's Day, vulgarly, but improperly, called *sabbath-breaking,* is another offence against religion; but in what it consists must be gathered from the various statutes relating to this subject. These, among other things, provide that no fair or market shall be held on the principal festivals, Good Friday, or any Sunday, on pain of forfeiting the goods exposed to sale; that no person shall assemble *out of* their own parishes for any sport whatsoever upon this day, nor use *unlawful* pastimes *in* them; that no person shall *work* on the Lord's Day, or expose any goods to sale; the selling of meat in public-houses, milk at certain hours, and works of necessity or charity, being excepted; and that no drover, carrier, or the like shall travel on Sunday; nor shall any house or place be opened for public paid entertainments, under pain of being considered a disorderly house. The service of process on Sunday is also illegal; and so is the keeping open of any public-house during the hours of Divine service:

X. *Drunkenness* is punished by a forfeiture of 5*s*. The old law awarded sitting six hours in the stocks, if the offender was

not able to pay the penalty; by which time it was presumed the offender had regained his senses, so as not to be able to do mischief to his neighbours.

XI. The last offence against religion cognisable by the temporal courts and punishable by fine and imprisonment, is that of open and notorious *lewdness*, either by keeping, or, it has been said, frequenting, houses of ill fame; or by some grossly scandalous and public indecency. To undress in order to bathe in a place exposed to public view is an offence *contra bonos mores:* so is the exposure for sale of immoral pictures or prints; and generally whatever openly outrages decency, and is injurious to public morals, is a misdemeanor at common law.

CHAPTER V.

OF OFFENCES AGAINST THE LAW OF NATIONS.

THE offences more immediately repugnant to that universal law of society which regulates the mutual intercourse between one state and another and is usually termed the Law of Nations, are: 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; 3. Piracy; and 4. Trading in slaves.

I. The *violation* of *safe-conducts* or *passports* granted by the sovereign or his ambassadors to the subjects of a foreign power in time of war, or committing acts of hostilities against such as are in amity, league, or truce with us, and who are here under an implied safe-conduct, are breaches of the public faith, without the preservation of which there can be no intercourse between one nation and another. And such offences may accordingly be just ground of a national war; for as it is not in the power of the foreign prince to cause justice to be done to his subjects by the individual delinquent, he must require it of the whole community. During the continuance of any safe-conduct, express or implied, a foreigner is under the protection of the sovereign and the law; indeed it is one of the articles of *Magna Charta*, that foreign merchants should be entitled to safe-conduct and security throughout the kingdom; there is therefore no

question, but that any violation of either the person or property of such foreigner may be punished. And it is expressly enacted by 31 Hen. VI. c. 4, that if any of the king's subjects attempt or offend, upon the sea, or in any port within the king's obeysance, against any stranger in amity, league, or truce, or under safe-conduct; and especially by attacking his person, or spoiling him or robbing him of his goods; the lord chancellor, with any of the justices of either the King's Bench or Common Pleas, may cause full restitution and amends to be made to the party injured.

II. The rights of *ambassadors*, being established by the law of nations, are matter of universal concern, and the law accordingly recognises them to their full extent, by stopping all legal process sued out through the ignorance or rashness of individuals, which may intrench upon the immunities of a foreign minister or any of his train. And by 7 Ann. c. 12, all persons prosecuting or executing such process are deemed violators of the laws of nations, and disturbers of the public repose; and are to suffer such penalties and corporal punishment as the lord chancellor and the chief justices, or any two of them, shall think fit.

III. *Piracy*, or robbery upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*. This offence consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would amount to felony. But other offences have, by various statutes, been made piracy, and liable to the same penalty; which was formerly death, whether the guilty party were a principal or an accessory. Modern legislation has modified this severity, and greatly reduced the punishment in the case of accessories after the fact.

The capture of piratical vessels was formerly encouraged by bounties on pirates taken or killed; and seamen wounded in piratical engagements were entitled to the pension of Greenwich Hospital. The statutes on this subject are no longer in force; but property captured from pirates may be condemned as *droits of the Admiralty*, to be restored, if private property, to the owners, on payment of one-eighth of the value as salvage; while fitting rewards are assigned for services against pirates.

IV. Traffic in slaves may be regarded as an offence against

the law of nations. Not merely is it a crime against the victims of the trade, but, happily for the interests of humanity, it is now in many instances an offence against express treaties entered into between this country and other states. Any British subject who conveys or removes any person as a slave, is now by statute guilty of piracy, felony, and robbery; for which penal servitude for life may be awarded.

CHAPTER VI.

OF HIGH TREASON, AND OTHER OFFENCES AFFECTING THE SUPREME EXECUTIVE POWER.

THE crimes affecting the supreme executive power, are: I. Treason; II. Felonies injurious to the royal prerogative; III. *Præmunire*; IV. Other misprisions and contempts. Of which crimes,

I. The first and principal is treason, *proditio*, a betraying, treachery, or breach of faith; the highest civil crime, which, as a member of the community, any man can commit. It ought, therefore, to be the most precisely ascertained; and yet, at common law, there was great latitude left to the judges in determining what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and abitrary constructions, offences into treason, which never were suspected to be such. The inconveniences arising from this laxity, were put an end to by 25 Edw. III. c. 2, which defines what offences should for the future be held to be treason: comprehending all kinds of treason then known, under several branches.

1. *When a man doth compass or imagine the death of our lord the king, of our lady his queen, or of their eldest son and heir.* Under this description a queen regnant, such as Queen Elizabeth, or Queen Victoria, is within the words of the act; but the husband of such a queen is not. And the king here intended is the king in possession; for a king *de facto* and not *de jure*, or in other words, a usurper that has got possession of the throne, is a king

within the statute. The most rightful heir of the crown, or king *de jure* and not *de facto*, who has never had possession, as was the case of the house of York during the three reigns of the line of Lancaster, is not a king within the statute.

The offence consists in compassing or imagining the death of the king, &c., which are synonymous terms; the word *compass* signifying the purpose or design of the mind or will, and not, as in common speech, the carrying such design to effect. And, therefore, an accidental stroke, which may mortally wound the sovereign, without any traitorous intent, is no treason: as when Sir Walter Tyrrel, accidentally killed William Rufus. As this compassing or imagination again is an act of the mind, it cannot fall under any judicial cognizance, unless it be be demonstrated by some open, or *overt* act. And therefore in this, and the three next species of treason, it is necessary that there appear an open or *overt* act upon which to convict the traitor.

How far mere *words*, spoken by an individual, and not relative to any treasonable act or design, amount to treason, was formerly matter of doubt. There are two instances in the reign of Edward IV., of persons executed for words: the one a citizen of London, who said he would make his son heir of the *Crown*, being the sign of the house in which he lived; the other a gentleman, whose favourite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly. These were esteemed hard cases; and Chief Justice Markham left his place rather than assent to the latter judgment. It is now agreed that words spoken amount only to a high misdemeanor.

But if the words be set down in writing, it argues more deliberate intention. Writing is an overt act, for *scribere est agere*. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason: particularly in the cases of Peacham, a clergyman, for treasonable passages in a sermon never preached; and of Algernon Sydney, for some papers found in his closet; which, had they plainly related to a previously-formed design of dethroning or murdering the king, might have been properly read in evidence as overt acts of the treason which was laid in the indictment. Peacham was pardoned; and though Sydney was executed, his attainder was afterwards reversed by Parliament.

2. *If a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir.* By the king's companion is meant his wife; and by violation, carnal knowledge, as well without force as with it; and this is high treason in both parties, if both be consenting, as some of the wives of Henry VIII. by fatal experience evinced. The intention is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious; and therefore, when the reason ceases, the law ceases with it, for to violate a queen or princess-dowager is no treason.

3. *If a man do levy war against our lord the king in his realm;* which may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or remove evil counsellors, or other grievances real or pretended. For the law does not permit any man, or set of men, to interfere forcibly in matters of such importance, as it has established a sufficient power, for these purposes, in parliament. An insurrection to pull down *all* inclosures, *all* brothels, and the like, is treason; the universality of the design making it a rebellion against the state, usurpation of the powers of government, and an invasion of the royal authority. But a tumult, with a view to pull down a particular house, is only a riot.

4. *If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere,* he is guilty of high treason; which must be proved by some overt act, as by giving them intelligence, sending them provisions, selling them arms, or treacherously surrendering a fortress.

The next species of treason mentioned in the statute, is the counterfeiting the king's great or privy seal. But this offence, which has been extended to all the seals in use by the Crown, is now a felony only; as is also the one which follows, viz., "if a "man counterfeit the king's money; and if a man bring false "money into the realm counterfeit to the money of England, "knowing the money to be false, to merchandise and make pay-"ment withall."

5. The last species of treason ascertained by the statute, is *If a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places*

doing their offices. The actual killing, and not the wounding or a bare attempt to kill, is treason; and the statute extends only to the officers therein specified. The barons of the exchequer, therefore, as such, were not within the protection of the act.

Thus careful was the legislature, in the reign of Edward III., to reduce to a certainty the vague notions of treason that had formerly prevailed. But in the unfortunate reign of Richard II., it was extremely liberal in declaring new treasons; the most arbitrary and absurd of which was the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it. And yet so little effect have over-violent laws to prevent crime, that within two years this very prince was both deposed and murdered; and in the first year of his successor's reign, an act was passed, which at once swept away the whole load of extravagant treasons which had been recently introduced.

But afterwards, between the reigns of Henry IV. and Mary, and particularly in the reign of Henry VIII., the spirit of inventing new treasons was revived; among which may be reckoned clipping money; breaking prison or rescue, when the prisoner was committed for treason; burning houses to extort money; stealing cattle by Welchmen; counterfeiting foreign coin; wilful poisoning; execrations against the king; calling him opprobrious names by public writing; counterfeiting the sign manual or signet; refusing to abjure the pope; deflowering or marrying, without the royal licence, any of the king's children, sisters, aunts, nephews, or nieces; bare solicitation of the chastity of the queen or princess, or advances made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him such her unchaste life; judging or *believing* the king to have been lawfully married to Anne of Cleves; derogating from the king's royal style and title; and impugning his supremacy; and assembling riotously to the number of twelve, and not dispersing upon proclamation; all which new-fangled treasons were totally abrogated by the statute 1 Edw. VI. c. 12, which once more reduced all treasons to the standard of the statute of Edw. III. Since which time the legislature has been more cautious in creating new offences of this kind.

To the treasons already enumerated, have to be added:—

6. Endeavouring to deprive or hinder any person, being the next in succession to the crown, according to the Act of Settlement, from succeeding to the crown, and maliciously and directly attempting the same by any overt act.

7. Maliciously, advisedly, and directly, by writing or printing, maintaining and affirming that any other person hath any right or title to the crown of this realm, otherwise than according to the Act of Settlement; or that the kings of this realm with the authority of parliament are not able to make laws and statutes, to bind the crown and the descent thereof.

8. In case the crown shall descend on any issue of her present Majesty while under the age of eighteen, persons aiding or abetting the marriage of the king or queen without the consent of the regent and parliament, and the person married to such king or queen while under the age of eighteen, are guilty of high treason.

Under one or other of these eight heads may the offences now constituting high treason be ranged. The reader would, however, derive a very incorrect notion of the course of legislation on this subject, if he were left to suppose that the statutes, to which reference has been made, comprised the whole law relating to this offence. It is impossible here to review this legislation at length; but a passing allusion may be permitted to—1. the treasons which were created in the reign of Elizabeth, relating to *papists*; and 2. to those created for the security of the house of Hanover.

The first offence which the legislature of Elizabeth thought fit to declare treason, was the defending of the pope's alleged jurisdiction; and the next the crime committed by any popish priest, born in the dominions of the crown, who came over hither from beyond the seas, unless driven by stress of weather, and tarried here three days without conforming to the Church. In the reign of James I. the parliament went a little further, and declared that if any natural-born subject withdrew from his allegiance, and became reconciled to the pope or see of Rome, or any other prince or state, both he and all such as procured such reconciliation should incur the guilt of high treason.

The other obsolete treason was that created for the security of the *Hanoverian succession*, whereby the pretended Prince of Wales, who was then thirteen years of age, and had assumed the title of James III., was attainted of high treason; and it was made high treason for any of the king's subjects to hold correspondence with him. A similar penalty was afterwards, in the reign of George II., attached to any recognition of his son, Charles Edward Stuart.

The old punishment of high treason was very terrible. The offender was drawn to the gallows, and there hanged by the neck, but cut down alive. His entrails were then taken out, and burned, while he was yet alive. His head was next cut off, and his body divided into four parts; and the whole was at the king's disposal.† The punishment of women differed from that of men. For, as the decency due to the sex forbade the exposing and publicly mangling their bodies, their sentence was to be drawn to the gallows, and there to be burned alive.

All this has been altered, however, and the judgment in all cases now is, that the offender be drawn on a hurdle to the place of execution, and be there hanged by the neck until he be dead, and that afterwards his head be severed from his body, and his body, divided into four quarters, be disposed of as the crown shall think fit.

Before closing this chapter, it is necessary to refer to a class of offences, which in former times ranked as high treason: viz., 1. Sedition; and 2. Attempts to injure or alarm the sovereign.

The insults publicly offered to George III., at the period of the French revolution, the ferment then created among the people by publications advocating a change in the institutions of the country, and the frequent assemblies held under the pretext of deliberating on public grievances, led to the passing of two statutes, the one, 36 Geo. III. c. 7, "for the safety and "preservation of his Majesty's Person and Government against

* As an instance of how the Bible may be quoted in support of almost any practice, good, bad, or indifferent, it may be observed that this punishment for treason is warranted by divers examples in Scripture; for Joab was drawn, Bigthan was hanged, Judas was embowelled, and so on of the rest.

"treasonable and seditious practices and attempts;" and the other, 36 Geo. III., c. 8, "for the more effectually preventing "seditious meetings and assemblies."

By the first it was made treason to compass the destruction, bodily harm, or deposition of the king; and any one using words to excite the people to hatred and contempt of his Majesty, or of the government and constitution of the realm, was guilty of a high misdemeanor. This act was partially repealed by 11 & 12 Vict. c. 12; passed to meet the attempts made shortly before its enactment, to effect a repeal of the legislative union between Great Britain and Ireland. It was felt that to dignify such proceedings with the name of high treason, was only to encourage their continuance, by endowing the foolish persons who engaged in them with the name of patriots or martyrs; and the offence is accordingly reduced to *felony*, and punishable as such.

The other statute, 36 Geo. III. c. 8, was of a temporary character; but at the same period other provisions still in force were made to repress *mutinous* and *seditious practices*, and the *administration of unlawful oaths*. Secret societies were condemned, and public meetings of more than fifty persons prohibited from assembling in any open place within a mile of Westminster Hall, for the purpose of petition, remonstrance, or address to the crown or either house of parliament.

The only other statute to be mentioned is one of the present reign, 5 & 6 Vict. c. 51, passed to prevent a repetition of the annoyances to which the queen was exposed soon after her accession to the throne, by idle youths discharging fire-arms in her presence. As this was done apparently from a love of notoriety, it was considered that a disgraceful punishment would be appropriate; and the wisdom of this legislation has been evinced by the complete cessation of the offence.

CHAPTER VII.

OF OFFENCES AGAINST THE PREROGATIVE.

II. As the *felonies* which more especially affect the supreme executive power are next to be considered, it will not be amiss here to explain briefly the nature and meaning of *felony*.

Felony, then, comprises every species of crime which occasioned at common law the forfeiture of lands or goods. This most frequently happened in those crimes for which a capital punishment either is or was liable to be inflicted. Not only therefore are all offences formerly capital in some degree or other felony, but this is likewise the case with some other offences which never were punished with death—as suicide; homicide by chance-medley, or in self-defence; and the small thefts formely termed *petit* larceny or pilfering: all which are, strictly speaking, felonies, as they subjected the committers of them to forfeitures.

The idea of felony was, indeed, until modern times, so generally connected with that of capital punishment, that it was hard to separate them; and to this usage the interpretations of the law conformed. And therefore, if a statute made any new offence felony, the law implied that it should be punished with death; viz., by hanging, as well as with forfeiture. But the criminal law has been considerably ameliorated in this respect, every person convicted of a felony, for which *no* punishment is expressly provided, being now punishable with penal servitude or imprisonment. So that felony is reducible to its original signification, a crime which originally involved forfeiture; and to which death or other punishment might or might not be superadded. Forfeiture for crime has been abolished, but this does not affect the definition of felony.

This being premised, the felonies that are more immediately injurious to the royal prerogative are: 1. Offences relating to the coin. 2. The serving of a foreign prince. 3. The embezzling

or destroying stores of war. 4. Desertion from the armies in time of war.

1. Offences relating to the *coin*, under which may be ranked some inferior misdemeanors not amounting to felony, have been the subject of a series of statutes, commencing in the reign of Edward I.; nearly all of which have now been consolidated by 24 & 25 Vict. c. 99. To that statute, therefore, the reader may be referred, and he will find that the law provides a gradual scale of punishment for offences relating to the coin, the making or counterfeiting of the coin itself being the crime most severely punished.

Tampering with the genuine coin of the realm is almost as penal; but the law deals much more mildly with the *utterer* of base coin, who is often led into the commission of the offence by the more guilty counterfeiter or seller. He is guilty only of a *misdemeanor*, unless he has been previously convicted of a similar offence; in which event the crime amounts to *felony*, involving, of course, severity of punishment.

The same statute facilitates the trial and punishment of accessories, and contains other provisions directed against the making, buying or selling, or being in possession of, coining tools, each of which offences is made a *felony*. It is also a misdemeanor to deface the coin by stamping it, a practice often resorted to by tradesmen for advertising purposes. The offence of counterfeiting *foreign coin*, and bringing it into this country to circulate, is also provided for.

2. *Serving* in *foreign states*, which is generally inconsistent with natural allegiance, was at one time punished by 3 Jac. I. c. 4; which made it felony for any person to go out of the realm, to serve a foreign prince, without having first taken the oath of allegiance. This statute was amended by subsequent acts, since repealed; the one now in force being the *Foreign Enlistment Act*, 59 Geo. III. c. 69, which makes the entering into the aid of a foreign prince or people, in any warlike capacity whatever, or going abroad with that intent, or attempting to get others to do so without the royal licence, a misdemeanor, punishable by fine or imprisonment, or both. The same statute imposes a penalty of 50*l.* on masters of ships and owners assisting

in this offence; while persons fitting out armed vessels to aid the military operations of any foreign powers, without licence from the crown, or aiding the warlike equipment of vessels of foreign states, are guilty of a misdemeanor, punishable by fine or imprisonment, or both.

3. *Embezzling* or *destroying* warlike *stores*, was felony by 31 Eliz. c. 4. The 22 Car. II. c. 5, made the offence capital; but gave power to the judge after sentence to transport the offender for seven years. Both statutes have been repealed by 4 Geo. IV. c. 53; which, nevertheless, leaves this offence still highly penal. Inferior embezzlements and misdemeanors that fall under this denomination, are punishable under other enactments. The Mutiny Acts also contain provisions for the punishment by court-martial of persons embezzling military or naval stores. The much more serious crime of setting fire to or destroying ships of war, arsenals, dockyards, victualling offices, —or military or naval stores or ammunition,—or causing, procuring, or assisting in such offence, is still a capital felony.

4. *Desertion* from the army in time of war, whether by land or sea, in England or in parts beyond the sea, is felony. These and other military offences are usually punished under the Mutiny Acts.

CHAPTER VIII.

OF PRÆMUNIRE.

III. *Præmunire* is so called from the words of the writ preparatory to the prosecution thereof: "*præmunire facias A B*," cause A B to be forewarned that he appear before us to answer the contempt wherewith he stands charged: which contempt is particularly recited in the preamble to the writ. It took its origin from the exorbitant power claimed and exercised in England by the Roman Curia, which was too heavy for our ancestors to bear.

The conversion of this country to Christianity by Augustin the monk, and other missionaries from Pope Gregory, naturally introduced into this kingdom some of the *ecclesiastical* organiza-

tion of the see of Rome, But there is no trace of any *civil* authority claimed by the pope till after the Norman conquest; the then pontiff, having favoured William in his projected invasion, by blessing his host and consecrating his banners, being permitted by the policy of the Conqueror and his immediate successors to assert claims, which previously he had had no opportunity of presenting.

The establishment of the feudal system in most of the governments of Europe, had already suggested a means to the Roman Curia of usurping a similar authority over all the preferments of the church; which began first in Italy, and gradually spread itself to England. The pope became a feudal lord; and all ordinary patrons were to hold their right of patronage under this universal superior. Estates held by feudal tenure, being originally gratuitous donations, were at that time denominated *beneficia:* their very name as well as constitution, was borrowed, and the care of the souls of a parish thence came to be denominated a *benefice.* Lay fees were conferred by investiture or delivery of corporal possession; and spiritual benefices, which at first were universally donative, now received in like manner a spiritual investiture, by institution from the bishop and induction under his authority. As lands escheated to the lord, in defect of a legal tenant, so benefices lapsed to the bishop upon non-presentation by the patron, in the nature of a spiritual escheat. The annual tenths collected from the clergy were equivalent to the feudal render, or rent reserved upon a grant; the oath of canonical obedience was copied from the oath of fealty required from the vassal by his superior; the *primer seisins* of our military tenures gave birth to first-fruits from the beneficed clergy; and aids and talliages suggested Peterpence and other taxations.

At length the pope went a step beyond any example of either emperor or feudal lord. He reserved to himself, by his own apostolical authority, the presentation to all benefices, which became vacant while the incumbent was attending the court of Rome; and moreover such also as became vacant by his promotion to a bishopric or abbey. This last, the canonists declared, was no detriment to the patron, being only like the change of a life in a feudal estate by the lord. Dispensations to avoid these vacancies begat the doctrine of *commendams:* and

provisions were the previous nomination to such benefices by a kind of anticipation, before they became actually void; in consequence of which the best livings were filled by Italian and other foreign clergy, who were of course looked upon as intruders. The nomination to bishoprics, taken from Henry I., and afterwards from his successor John, was conferred on the chapters belonging to each see; but, by means of frequent appeals to Rome was practically vested in the pope. Finally, by a transaction quite unparalleled, Innocent III. obtained from John a resignation of his crown; which was regranted to him; whereby England was to become for ever St. Peter's patrimony; the dastardly monarch re-accepting his sceptre, to hold as the vassal of the holy see, at the annual rent of a thousand marks.

Another engine of the Roman Curia was a masterpiece of policy. Not content with the ample provision of tithes, they endeavoured to grasp at the lands of the kingdom, and, had not the legislature withstood them, would by this time have probably been masters of every foot of ground in the realm. To this end they introduced different orders of monks; by whom the great lords and their adherents were taught to believe, that founding a monastery a little before their deaths would atone for a life of incontinence, disorder, and bloodshed. Hence innumerable abbeys and religious houses were built within a century after the Conquest, and endowed, not only with the tithes of parishes which were taken from the secular clergy, but also with lands, manors, lordships, and baronies.

Other contrivances will occur to the recollection of the reader, set on foot by the court of Rome for effecting an entire exemption of its clergy from any intercourse with the civil magistrate: such as the separation of the ecclesiastical courts from the temporal; the appointment of judges thereof by merely spiritual authority; the exclusive jurisdiction claimed by them over all ecclesiastical persons and causes; and the *privilegium clericale*, or benefit of clergy, which delivered all clerks from any trial or punishment except before their own tribunal.

The statutes of *præmunire* were framed to encounter these attempts of the court of Rome to establish an independent authority. Edward I., a wise and magnanimous prince, was the first to oppose in earnest these usurpations. He would not

suffer his bishops to attend a general council, till they had sworn not to receive the papal benediction. He made light of all bulls and processes; attacked Scotland in defiance of one, and seized the temporalities of his clergy, who under pretence of another refused to pay a tax imposed by parliament. He strengthened the statutes of mortmain; thereby closing the great gulf, in which all the lands of the kingdom were in danger of being swallowed. And, one of his subjects having obtained a bull of excommunication against another, he ordered him to be executed as a traitor. In the 35th year of his reign was made the first statute against papal provisions, the foundation all the subsequent statutes of *præmunire;* which is ranked as an offence immediately against the sovereign, because every encouragement of the papal power is a diminution of the authority of the crown.

In the weak reign of Edward II., the court of Rome again endeavoured to encroach, but parliament manfully withstood the attempt. Edward III. was of a different temper. He first tried gentle means. He wrote an expostulation to the pope; but, receiving a menacing and contemptuous answer, withal acquainting him that the emperor, who a few years before at the Diet of Nuremburg, A.D. 1323, had established a law against provisions, and also the king of France had lately submitted to the holy see, the king replied, that if both the emperor and the French king should take the pope's part, he was ready to give battle to them both, in defence of the liberties of the crown. Hereupon more sharp and penal laws were devised against provisors; and when the court of Rome resented these proceedings, and Urban V. attempted to revive the vassalage and annual rent to which John had tried to subject the kingdom, it was unanimously agreed by the estates of the realm, that John's donation was null and void, being without the concurrence of parliament, and contrary to his coronation oath.

In the reign of Richard II. it was found necessary to strengthen these laws, by prohibiting aliens from being presented to any ecclesiastical preferment, and declaring all liegemen of the king, accepting of a foreign provision, out of the king's protection. Persons bringing citations or excommunications from beyond sea, were also to be imprisoned, forfeit their goods and lands,

and suffer pain of life and member. The next statute, however, 16 Rich. II. c. 5, is generally called *the* Statute of *præmunire*. It enacts, that "whoever procures at Rome, or elsewhere, any "translations, processes, excommunications, bulls, instruments, or "other things, which touch the king, against him, his crown, and "realm, and all persons aiding and assisting therein, shall be put "out of the king's protection, their lands and goods forfeited to "the king's use, and they shall be attached by their bodies to "answer to the king and his council: or process of *præmunire* "*facias* shall be made out against them as in other cases of "provisors."

By 2 Hen. IV. c. 3, all persons who accept any provision from the pope, to be exempt from canonical obedience to their proper ordinary, are also subjected to the penalties of *præmunire*. This is the last statute touching this offence; the usurped civil power of the bishop of Rome being broken down by these statutes; and the spirit of the nation so much raised against foreigners, that about this time, in the reign of Henry V., the alien priories, or abbeys for foreign monks, were suppressed, and their lands given to the crown.

This, then, is the original meaning of the offence called *præmunire*: viz., introducing a foreign power into the realm, and creating *imperium in imperio*, by paying that obedience to process from the court of Rome which constitutionally belonged to the crown alone long before the reign of Henry VIII.: at which time the penalties of *præmunire* were considerably extended; several statutes of that monarch, enacting that to appeal to Rome from any of the king's courts, to sue to Rome for any licence or dispensation, or to obey any process from thence, makes the parties who do so liable to the pains of *præmunire*. One of these statutes, the 25 Hen. VIII. c. 20, further provides that if the dean and chapter refuse to elect to a vacant bishopric, under the *congé d'élire* sent to them, the person named by the king, or any archbishop or bishop to confirm or consecrate him, they shall fall within the penalties of the statutes of *præmunire*.

Thus far the penalties of *præmunire* were kept within the bounds of their original institution. By subsequent acts the same penalties were applied to other offences; some of which

bore more, and some less, relation to the original offence; and some no relation at all. Most of these statutes have since been repealed; and it is therefore for the student to pursue this subject further if he shall see fit. It must be added here, however, that the penalties of *præmunire* are still incurred by any one who asserts, maliciously and advisedly, that both or either house of parliament have a legislative authority without the king; or that the king and parliament cannot make laws to limit the descent of the crown; or who sends any subject of this realm a prisoner into parts beyond the seas. The like penalty is incurred by the assembly of peers of Scotland, convened to elect their sixteen representatives in the British parliament, if they presume to treat of any other matter save only the election. Finally, the penalties of *præmunire* attach to all who knowingly and wilfully solemnize, assist, or are present at, any forbidden marriage of such of the descendants of the body of King George II. as are by law prohibited to contract matrimony without the consent of the crown.

These penalties of a *præmunire* are "that from the conviction, "the defendant shall be out of the king's protection, and his "lands and tenements, goods and chattels, forfeited to the king; "and that his body shall remain in prison *at the king's pleasure:* "or, as other authorities have it, *during life:*" both amounting to the same thing; as the sovereign may remit the whole, or any part, of the punishment, *i.e.*, except in the case of transgressing the statute of *Habeas Corpus*, by sending a subject of the realm a prisoner into parts beyond seas. The forfeitures here inflicted do not, by the way, bring this offence within the definition of felony; being inflicted by particular statutes, and not by the common law. But so odious was this offence of *præmunire*, that a man that was attainted of the same might have been slain without danger; to obviate which savage notion, the 5 Eliz. c. 1, provided, that it should not be lawful to kill any person attainted in a *præmunire*, any law, statute, opinion, or exposition of law to the contrary notwithstanding. This statute was repealed by 9 & 10 Vict. c. 59; but it can scarcely be suggested that a man convicted upon a *præmunire* is out of the pale of the law. He can bring no action, however, for any private injury; being so far out of its protection, that it will not guard his civil

rights, nor remedy any grievance which he as an individual may suffer. And no man, knowing him to be guilty, can safely give him comfort, aid, or relief.

In conclusion it may be observed, that prosecutions upon a *præmunire* are unknown. There is only one instance in the State Trials; in which case the penalties of a *præmunire* were inflicted upon some persons, for refusing to take the oath of allegiance in the reign of Charles II. The crime may be considered obsolete; but the offence still remains a title in our criminal law.

CHAPTER IX.

OF MISPRISIONS AND CONTEMPTS AFFECTING THE SOVEREIGN AND GOVERNMENT.

IV. MISPRISIONS, from the French, *mespris*, a contempt, are such high offences as are under the degree of capital, but border thereon. A misprision is therefore contained in every treason and felony whatsoever: and it is said that, if the crown so please, the offender may be proceeded against for the misprision only. Upon this principle, while the Star-chamber subsisted, it was held that the crown might remit a prosecution for treason and cause the delinquent to be censured in that court, merely for a high misdemeanor; as happened with the Earl of Rutland, in 43 Eliz., who was concerned in Essex's rebellion. Misprisions are either negative, consisting in the concealment of something which ought to be revealed; or positive, consisting in the commission of something which ought not to be done.

I. Of the first kind is *misprision of treason*: consisting in the bare knowledge and concealment of treason, without any degree of assent thereto: for any assent makes the party a traitor. The punishment is loss of the profits of lands, during life, forfeiture of goods, and imprisonment during life.

Misprision of felony is the concealment of a felony which a man knows, but never assented to; for if he assent, he is either principal or accessory. The punishment is imprisonment and fine at the royal pleasure: which royal pleasure must be stated,

once for all, not to signify any extra-judicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice; *voluntas regis in curia, non in camera.*

Concealing treasure-trove is also a misprision, formerly punishable by death, but now only by fine and imprisonment.

II. Misprisions, which are positive, are denominated *contempts* or *high misdmeanors:* of which,

The *first* and principal is the *mal-administration* of such high *officers* as are in public employment. This is usually punished by parliamentary impeachment; wherein such penalties, short of death, are inflicted, as to the wisdom of the House of Lords shall seem proper. Hitherto also may be referred the offence of *embezzling public money,* which is felony and highly penal. Officers concerned in the receipt or management of the revenue, giving in *false statements* of money in their hands, are guilty of a misdemeanor.

Other misprisions are,

Secondly, Contempts against the *prerogative:* as, by refusing to assist the sovereign in his councils if called upon; or in his wars, by personal service against a rebellion or invasion. Under which may be ranked neglecting to join the *posse comitatus,* when duly required; or disobeying a statute where no particular penalty is assigned; for then it is punishable, like the rest of these contempts, by fine and imprisonment, at the discretion of the court.

Thirdly, Contempts against the royal *person* and *government,* by speaking or writing against him, giving out scandalous stories concerning him, or doing anything that may tend to lessen him in the esteem of his subjects; as to assert falsely that he labours under mental derangement, or to drink to the pious memory of a traitor. For this offence the delinquent may be fined and imprisoned.

Fourthly, Contempts against the sovereign's *title,* not amounting to treason or *præmunire,* which are the denial of his right to the crown in common and unadvised discourse, a heedless species of contempt which is punished with fine and imprisonment. A contempt of this kind may also arise from refusing or neglecting to take the proper oaths; and yet acting in a public

office or place of trust, for which these oaths are required to be taken. This is so common, that an act of indemnity is passed annually, to relieve all such persons as have innocently omitted to do so.

Lastly, *contempts* against the royal *palaces* or *courts of justice*, which are high misprisions; *striking* in the superior courts of justice, or at the assizes, being still more penal than even in the royal palace. This offence was at one time punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of the delinquent's lands during life; but can not now be so dealt with. A *rescue* of a prisoner comes under this head, being a high contempt, punishable by a fine and imprisonment at the discretion of the court.

Not only such as are guilty of actual violence, but those who use threatening or reproachful words to a judge sitting in court, are guilty of a high misprision. Likewise all such as are guilty of any injurious treatment of those who are immediately under the protection of a court of justice, are punishable by fine and imprisonment: as if a man assaults or threatens his adversary for suing him, a counsellor or solicitor for being employed against him, a juror for his verdict, or endeavours to dissuade a witness from giving evidence.

CHAPTER X.

OF OFFENCES AGAINST PUBLIC JUSTICE.

THE offences to be next considered, those namely which more especially affect the *commonwealth*, or public polity of the kingdom, may be classed under five heads: viz., as against 1. public *justice*, 2. the public *peace*, 3. public *trade*, 4. the public *health*, and 5. the public *police* or *economy*.

Offences against public *justice*, are some of them felonious, others only misdemeanors.

1. Embezzling or vacating *records*, or falsifying the proceedings of a court of justice, is a felonious and highly penal offence; for no man's property would be safe, if records might be sup-

pressed or falsified or persons' names be falsely usurped in courts, or before their public officers.

2. *Obstructing* the execution of *process* is at all times an offence of a very serious nature; but more particularly so when it is an obstruction of an arrest upon criminal process. Any resistance or obstruction to, or assault committed upon, a peace officer in the execution of his duty is highly penal; and the refusal of any person to aid a peace officer in the execution of his duty in preserving the peace, is an indictable misdemeanor at common law.

3. An *escape* of a person arrested upon criminal process, by eluding the vigilance of his keepers before he is put in hold, is also an offence against public justice, punishable by fine or imprisonment. A public officer permitting such escape, either by negligence or connivance, is more culpable than the prisoner; but *private individuals*, who have persons lawfully in their custody, are not less guilty of this offence if they suffer them illegally to depart, for they may at any time protect themselves from liability by delivering over their prisoner to a peace-officer.

4. *Breach of prison* by the offender himself, when committed for *any* cause, is felony at common law; and to break prison and escape, when lawfully committed for any treason or felony, still so remains. But to break prison, whether it be the county gaol, the stocks, or other usual place of security when lawfully confined upon any inferior charge, is now punishable only as a misdemeanor by fine and imprisonment.

5. *Rescue* is the forcibly freeing another from arrest or imprisonment; and is generally the same offence in the stranger so rescuing, as it would have been in a gaoler *voluntarily* permitting an escape. Aiding a prisoner to escape from gaol is equally and in some respects more penal.

6. *Returning from transportation*, or being 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 is also severely punishable.

7. *Taking a reward*, under pretence of *helping* the owner to his *stolen goods*, was a contrivance carried to a great length of

villany in the reign of George I., the confederates of the felons thus disposing of stolen goods, at a cheap rate, to the owners themselves, and thereby stifling all further inquiry. The famous Jonathan Wild had under him a well-disciplined corps of thieves, who brought in all their spoils to him; and he kept a sort of public office for restoring them to the owners at half price. To prevent which, such an offender was by 4 Geo. I. c. 11, made liable to suffer as the principal felon, unless he caused him to be apprehended and brought to trial, and also gave evidence against him. Wild, continuing his old practice, was convicted and executed upon this very statute; which has, however, been superseded by modern enactments, making the offence a felony, punishable with penal servitude or with imprisonment, with or without hard labour and solitary confinement.

8. *Receiving stolen goods, knowing them to be stolen*, which is only a misdemeanor at common law, has also been the subject of several enactments. A receiver is now guilty of felony; and may be indicted either as an accessory after the fact, or for a substantive felony; and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. Where the original stealing is a misdemeanor, the receiver is guilty of a misdemeanor, and where it is punishable on summary conviction, the receiver may be punished the same way.

9. *Theft bote* is of a nature somewhat similar to the two last offences; and happens where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. This is frequently called *compounding a felony*; and was formerly held to make a man an accessory; but is now punished only with fine and imprisonment. To advertise a reward for the return of things stolen, or lost, with no questions asked, or words to the same purport, subjects the advertiser and the printer or publisher to a forfeiture of 50*l.* to any person who will sue for the same, who is entitled also to his full costs of suit.

10. Common *barretry* is the offence of exciting and stirring up suits and quarrels, either at law or otherwise, the punishment for which, in a common person, is fine and imprisonment; but

if the offender, as is too frequently the case, belongs to the profession of the law, a barretor, who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future. Many such offenders flourish among us, as it seems to be next to impossible to prosecute or convict them. Hereunto may also be referred another offence, of equal malignity, that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in the High Court, may be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is punishable by six months' imprisonment, and treble damages to the party injured.

11. *Maintenance* bears a near relation to the former; being an officious intermeddling in a suit that no way belongs to one, by assisting either party with money or otherwise, to prosecute or defend it. A man may however maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity. Otherwise the punishment is fine and imprisonment; and by 32 Hen. VIII. c. 9, a forfeiture of ten pounds.

12. *Champerty, campi partitio,* is a species of maintenance, and punishable 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; whereupon the champertor is to carry on the party's suit at his own expense. These last two offences relate chiefly to *civil* actions.

13. The *compounding of an information* upon a penal statute is an offence of the same nature in *criminal* causes. Accordingly, to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, any person making any composition without leave of the court, or taking any money or promise from the defendant to excuse him, forfeits 10*l.*, and is liable to fine and imprisonment.

14. A *conspiracy* to indict an innocent man of felony falsely and maliciously, is a perversion of public justice; for which the party injured may either have a civil action; or the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the crown; and were by the ancient common law to receive what is called the *villenous* judgment;

viz., to lose their *liberam legem*, whereby they were discredited and disabled as jurors or witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses rased, their trees rooted up, and their own bodies committed to prison. But the villenous judgment is by long disuse become obsolete; it not having been pronounced for some ages: but instead thereof the delinquents are sentenced to imprisonment, with or without hard labour, and fine.

It is no excuse that the indictment was insufficient, or that the court had no jurisdiction to try it, and the party was never really brought into danger; nor will it avail the defendant that he intended only to give evidence on a trial not then commenced. For the law makes the mere *intent* in such case criminal; this *intent* being the essence of the offence.

All confederacies to prejudice a third person, as to cheat him in the purchase of a horse; to charge him with being the reputed father of a bastard child; or to injure his reputation by preferring a complaint before a magistrate, though no complaint be preferred, are indictable. The combination among brokers usually called a "knock out," is a conspiracy; the difficulty is to prove it. Bankers may conspire to cheat their creditors by false balance-sheets; horsedealers to defraud a purchaser by selling him an unsound horse; traders to cheat an intending partner by false representations of their profits; and persons to defraud tradesmen by causing themselves to be reputed men of property. There have been conspiracies to hiss and so condemn a play; to marry a girl for her fortune; to get a pauper married by unlawful means, so as to shift the burden of supporting her from one parish to another; to commit an offence; and to prevent the prosecution of an offence.*

* It is laid down, that journeymen confederating and refusing to work for certain wages may be indicted for a conspiracy, the offence consisting in the *conspiracy*, and not in the refusal; all conspiracies being illegal, although the subject-matter may be lawful. The conviction, in 1874, of certain gas stokers, as of a conspiracy to abstain from work, upon this view of the law, led to the statute 38 & 39 Vict. c. 86; whereby it is enacted that an agreement or combination by two or three persons, to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as a crime.

15. *Perjury* is 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. A great many statutes, too numerous to be mentioned here, expressly provide that persons making false statements or declarations on oath, relating to the subject matter of these acts, shall be liable to the penalties of perjury, and punished accordingly.

The perjury must be corrupt, that is, committed *malo animo*, wilful, positive, and absolute; not upon surprise, or the like; it also must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid, it is not penal.

Subornation of perjury is the procuring another to take such a false oath as constitutes perjury in the principal. The punishment of either offence was anciently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment, with or without hard labour, as the court shall award.

16. *Bribery* is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office. This offence is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe the same. But in judges it has been always looked upon as so heinous that chief justice Thorpe was hanged for it in the reign of Edward III. At the present day the species of bribery to which public attention is chiefly directed, is that which destroys the purity of the elections for members of the House of Commons. Professedly to prevent this crime, for in no other light can it be regarded, numerous statutes have been passed, but hitherto without success.

17. *Embracery* is an attempt to influence a juror corruptly to one side by promises, money, entertainments, and the like, the punishment of which is fine and imprisonment. Connected with which was another offence, the *false verdict* of jurors; which, whether occasioned by embracery or not, was anciently considered criminal, and exemplarily punished. A wrong verdict can now, and in civil cases only, be set aside; but a

corrupt juror may always be proceeded against, and punished as for a misdemeanor.

18. The *negligence of public officers*, intrusted with the administration of justice, is an offence subjecting the offender to fine; and in very notorious cases, to a forfeiture of his office, if it be a beneficial one.

19. *Oppression* on the part of judges, justices, and other *magistrates*, in the administration and under the colour of their office, is an offence, happily unknown, but when it occurs, severely punishable; as is,

20. Lastly, *Extortion*; which consists in an officer's unlawfully taking, by colour of his office, any money or thing of value, that is not due to him, or more than is due, or before it is due. The punishment for this offence, which is fortunately equally rare, is fine and imprisonment, and sometimes a forfeiture of the office; the defendant being also made to render double to the party aggrieved.

CHAPTER XI.

OF OFFENCES AGAINST THE PUBLIC PEACE.

OFFENCES against the public peace are some of them felonies, and some merely misdemeanors.

1. The *riotous assembling of twelve persons*, or more, *and not dispersing upon proclamation*, was made high treason by 3 & 4 Edw. VI. c. 5, when the king was a minor, and a change in religion to be effected. That statute was repealed by 1 Mar. c. 1, but the prohibition in substance re-enacted by 1 Mar. st. 2, c. 12, which made the offence felony; and indemnified peace officers and their assistants, if they killed any of the mob. This act was made at first only for a year, and was afterwards continued for the queen's life. By statute 1 Eliz. c. 16, when a change in religion was again to be made, it was revived and continued during her life. From the accession of James I. to the death of Anne, it was never once thought expedient to revive it; but, in the first year of George I., it was judged necessary to renew it,

and at one stroke to make it perpetual. The capital punishment has been taken away, but the offence is still punishable with great severity.

2. The *riotous destruction* of churches or other buildings, or of machinery, which under George I. was a capital felony, is so no longer. The court has a large discretion as to punishment.

In these cases of *felonious* destruction of property the law gives to the parties injured a civil remedy against the *hundred* in which the premises are situated, provided the persons damnified go within seven days before a justice of the peace, state upon oath the names of the offenders, if known, and become bound to prosecute.

3. The offence of *sending* or *delivering a letter demanding with menaces property* or *money*, is a felony punishable with penal servitude, it may be, for life. The analogous offence of publishing or threatening to publish a libel upon any person, with intent to extort any money, or obtain some other advantage, is a misdemeanor and punishable by imprisonment.

4. Lastly, *Destroying any lock, sluice, flood-gate,* erected by authority of parliament on a navigable river, has long been a felony, and highly penal.

Removing any piles or other materials used for securing any sea-bank, &c., or doing any other injury so as to obstruct navigation, is also a felony; the punishment extending to penal servitude, in the former case, for life, and in the latter for seven years. Equally penal is the offence of destroying public bridges, which is likewise a felony.

The remaining offences are misdemeanors; viz.:

5. *Maliciously destroying turnpike-gates and toll-bars:* or,

6. *Maliciously destroying or damaging any book, print, statue, or other article,* in any museum, library, or other public repository, or any public picture, statue, or monument.

7. *Affrays*; from *affraier,* to terrify; that is to say, the fighting of two or more persons in some *public* place; for, if the fighting be in private, it is no *affray,* but an *assault.* These

may be suppressed by any person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue. But more especially the constable, or other similar officer, however denominated, is bound to keep the peace. The punishment is by fine and imprisonment. Affrays in a church or churchyard are esteemed heinous offences; and therefore by 5 & 6 Edw. VI. c. 4, if any clerk in orders shall, by words only, quarrel, chide, or brawl, in a church or churchyard, the ordinary shall suspend him from the ministration of his office during pleasure. But if he, in such church or churchyard, proceeds to smite or lay violent hands upon another person, he shall be excommunicated *ipso facto*. *Laymen* guilty of riotous or indecent behaviour in any church or chapel, churchyard or burying ground, or who molest, disturb, or mimic any preacher or any clerk in holy orders, incur on conviction a penalty of five pounds for each offence, or an imprisonment not exceeding two months. *Two* persons may be guilty of an affray: but

8. *Riots*, *routs*, and *unlawful assemblies* must have *three* at least to constitute them. Unlawfully assembling, if to the number of twelve, may constitute a felony; but, from the number of three to eleven, the offence is a misdemeanor, punishable by fine and imprisonment only, to which hard labour may be added. Moreover, any two justices, with the sheriff or under-sheriff, may come with the *posse comitatus*, and suppress any such riot, arrest the rioters, and record upon the spot the nature and circumstances of the transaction; which record alone shall be a sufficient conviction of the offenders. And all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; any battery, wounding, or killing of the rioters, that may happen in suppressing the riot being justifiable.

9. *Forcible entry* or *detainer* is an offence which is committed by violently taking or keeping possession of lands and tenements, without the authority of law. This was formerly allowable to every person disseised, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances. But this being prejudicial to the public peace, it became necessary by statute to restrain all persons from the

use of such violent methods of doing themselves justice, so that the entry now allowed by law is a peaceable one only. Two justices may also summarily restore the possession to the person entitled thereto.

10. Acts tending to produce a *breach of the peace* also constitute an offence. Therefore *challenges to fight*, either by word or letter, are punishable by fine and imprisonment, according to the circumstances of the offence.

11. *Libel*, or the malicious defamation of any person, and especially of a magistrate, made public by either printing, writing, signs, or pictures, in order to expose him to public hatred, contempt, or ridicule, is an offence of the same nature. The communication of a libel to any one person is a publication in law: and therefore the sending an abusive letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace. For the same reason it is immaterial with respect to the essence of a libel, whether the matter of it be true or false; since the provocation, and not the falsity, is the thing to be punished criminally; though, doubtless, the falsehood of it may aggravate its guilt, and enhance its punishment.

In a civil action, a libel must appear to be false, as well as scandalous; for, if the charge be true, the plaintiff has received no injury. In a criminal prosecution, on the other hand, the tendency which all libels have to disturb the public peace, is what the law considers; and at common law, therefore, the truth of the libel not only constitutes no defence to the charge, but cannot even be given in evidence in mitigation of punishment. A defendant is now enabled, however, to plead and to prove its truth; but this does not amount to a defence, unless it was for the public benefit that the facts should be published. And after such a plea, if the defendant is convicted, the punishment imposed for his offence may be more severe, if in the opinion of the court his guilt is aggravated by the defence which he has set up, or the evidence given in support of it.

This statute applies only to libels of a private and personal character, and not to those denominated *seditious* or *blasphemous*. In these, therefore, and in all cases in which there is no plea or justification, the only points to be inquired into, are, first, the

making or publishing of the book or writing: and, secondly, whether the matter be criminal: and if both these points are against the defendant, the offence against the public is complete. But upon both points the jury must exercise their judgment and pronounce their opinion, as a question of fact, as required by 32 Geo. III. c. 60, which was passed expressly to specify the functions of juries in cases of libel. This measure, which, from its author, is usually called Fox's Act, was the result of a lengthened discussion between Government, backed by the judges on the one hand, and the advocates of popular rights with whom the juries generally sympathised, on the other: the courts holding that the jury had no question to determine but the mere fact of writing, printing or publishing, the latter contending that the guilt or innocence of the defendant would be thus taken away entirely from that tribunal, whose proper function it was to determine that very question.

The punishment on conviction for maliciously publishing a defamatory libel is fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year. If however the defendant publish the libel *knowing* it to be *false*, the imprisonment may be for two years. And it is to be observed, that the defendant is entitled, on judgment given for him, to recover costs from the prosecutor: who on the other hand, if the issue upon a plea of justification is found for him, is entitled to recover his costs from the defendant.

CHAPTER XII.

OF OFFENCES AGAINST PUBLIC TRADE.

OFFENCES relating to public *trade*, which, like those of the preceding classes, are either felonious or not felonious, are,

Firstly. *Smuggling*, or the importing of goods without paying the duties imposed thereon, an offence restrained by several statutes inflicting pecuniary penalties and seizure of the goods for clandestine smuggling; and affixing the guilt of felony, with penal servitude for life, upon more open, daring, and avowed practices. Thus, three persons assembling with fire-arms to

assist in the illegal exportation or importation of goods, or in rescuing the same after seizure, or in rescuing offenders in custody for such offences, are guilty of felony, and liable to penal servitude for life. Shooting at, maiming, or dangerously wounding any officer employed in the prevention of smuggling, is equally penal. Assaulting or obstructing an officer of the revenue in the execution of his duty, is only a misdeameanor; but it is, nevertheless, an offence for which a very severe punishment may be imposed.

Secondly. *Fraudulent bankruptcy;* such as a bankrupt's not fully and truly discovering all his estate, or concealing his effects to the value of 10*l.*, which, with many other like offences which might be mentioned, are misdemeanors. Till recently they were felonious, all offences against the policy of the Bankrupt laws being long and justly considered as atrocious species of the *crimen falsi*, which might properly be put upon a level with those of forgery and falsifying the coin.

Thirdly. The *malicious destruction of machinery*, or of goods in the process of manufacture; an offence which may involve penal servitude for life.

Fourthly. *Unlawful combinations among workmen;* which have formed the subject of several statutes, that now in force being 38 & 39 Vict. c. 86. The result is, that workmen may meet together for the purpose of determining the wages they will accept, or the hours they will work, and may make any arrangements among themselves for giving effect to their resolutions, which they think fit. But they must carry out their object by lawful means, and not attempt by violence, intimidation, molestation, or obstruction to prevent masters from employing or workmen from taking employment at any wages they may agree for.

Fifthly and lastly. *Cheating;* for trade cannot be carried on without a punctilious regard to common honesty, and faith between man and man. Hither, therefore, may be referred that multitude of statutes made to restrain and punish deceits in particular trades, which are now either repealed or in desuetude. The obsolete offence also of *breaking the assize* of bread, or the rules laid down by law for ascertaining its price in every given

quantity, was reducible to this head of cheating; as is likewise in a peculiar manner the common offence of selling by *false scales* or *false weights and measures*. The general punishment for all frauds of this kind, if indicted at common law, is fine and imprisonment, to which by statute hard labour may be added; but the easier and more usual way is by levying, on a summary conviction, by distress and sale, the forfeitures imposed by the several Acts of Parliament.

Under this head of cheating, however, may be ranked one or two other crimes of a more serious nature. Thus, *Obtaining money or goods by false pretences*, is a misdemeanor, punishable it may be with penal servitude for five years, or imprisonment with or without hard labour and solitary confinement, not exceeding two years. *Incurring a debt* or *obtaining credit under false pretences*, or by means of any other fraud, is also a misdemeanor, and punishable with imprisonment not exceeding one year, with or without hard labour. The *personation* of another, or of an heir, executor, administrator, wife, widow, next of kin or relation, with intent fraudulently to obtain any land, estate, money, chattel, or valuable security, which at common law is only a misdemeanor, is now a felony, punishable with penal servitude for life or not less than five years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement. *Obtaining the signature* of any person to any bill, note, or valuable security *with intent to cheat* or *defraud* is a misdemeanor, and subjects the offender to be kept in penal servitude for five years, or to be imprisoned for two years, with or without hard labour.

Indeed, any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise, is punishable with fine or imprisonment. Thus, *concealing from the purchaser or mortgagee* any settlement, will, or other instrument material to the title of or any incumbrance affecting the property, or *falsifying any pedigree* upon which a title does or may depend, in order to induce the acceptance of the title with intent to defraud, is a misdemeanor, punishable, at the discretion of the court, by fine, or imprisonment for any time not exceeding two years, with or without hard labour, or by both. *Giving a false character* to a servant, is a kind of cheat, and exposes the offender to a fine of 20*l.*, and in default to imprisonment and hard

labour for not less than one or more than three months. A similar punishment may be inflicted on any person *offering himself as a servant with a false character*. The offence of *fraudulently using trade marks* is punishable by imprisonment, with or without hard labour, and with or without a fine, not exceeding two years, besides the forfeiture of all the falsely marked goods. Knowingly *selling* or *exposing for sale goods falsely marked* is punishable by fine; all of these offences being a kind of *cheating*.

CHAPTER XIII.

OF OFFENCES AGAINST THE PUBLIC HEALTH.

THE public *health* of the nation is a concern of the highest importance, and for the preservation of it there has been much and varied legislation.

1. By statute 1 Jac. I. c. 31, any person infected with the plague, who was commanded by the mayor or constable to keep his house, and ventured to disobey it, might be forced, by the watchman appointed on such melancholy occasions, to obey such command. And if such person went abroad, he was, if he had no plague sore upon him, punishable by whipping; but if he had any infectious sore upon him, uncured, he was then guilty of felony. This statute, long obsolete, has, with all the acts continuing it, been repealed. But it is a misdemeanor at common law to expose a person labouring under an infectious disorder in the streets or other public places; and it is an offence punishable by imprisonment to produce, by *inoculation* or otherwise, the disease of small-pox. The guardians of the poor have now power to contract with the medical officers of parishes for the *vaccination* of the children of all persons there resident; and this vaccination is compulsory, under penalties summarily recoverable before two justices of the peace.

By 6 Geo. IV. elaborate provisions are made for securing the performance of *quarantine*, and obedience to regulations issued by the privy council with respect to vessels suspected of having the plague or other infectious disease on board. Offences are in ordinary cases punishable by a heavy fine.

The Local Government Board have also power, whenever any part of the country is threatened with or affected by any epidemic, to make regulations, which may be enforced by penalties, for the speedy interment of the dead, for house to house visitation, and for providing medical aid, and otherwise guarding against the spread of disease.

2. The selling of *unwholesome provisions* is an offence to prevent which the 51 Hen. III. prohibited the sale of corrupted wine, contagious or unwholesome flesh, or flesh that was bought of a Jew. The usual mode of proceeding has been a prosecution before magistrates under some one of the statutes passed to prevent the adulteration of articles of consumption. The sending of diseased meat to market for sale is a serious misdemeanor; the exposure of meat that is unfit for food, for sale, is also highly penal. The sale of adulterated wine in a licensed house, is much less penal, a small fine being imposed for the first offence —a larger penalty and a disqualification from selling any wine by retail for five years being attached to its repetition.

3. *Allowing premises to remain uncleansed*, or permitting any gutter, privy, drain, ashpit, to be so foul, or any animal to be so kept, as to be injurious to health, are not only *nuisances* which may be abated by the local authorities, at the expense of the delinquent, but offences which may be punished by penalties.

4. *Carrying on any noxious trade or manufacture*, within the limits of any city, town, or populous district, is also a nuisance and an offence which may be dealt with in the same way.

5. *Over-crowding places of labour* and *common lodging-houses*; and *Employing* beyond the times allowed by law *children under* certain ages, or females, in mines and factories, are all within the category of offences against the public health, which may be punished by penalties The *Pollution of rivers and streams*, whereby the water intended by nature for the use of the community may be rendered unwholesome, may be regarded as an offence against the public health. This may be prohibited by action in the county court, and the continuance of the offence prevented by the imposition of pecuniary penalties.

CHAPTER XIV.

OF OFFENCES AGAINST THE PUBLIC POLICE OR ECONOMY.

By the public *police* and *economy* is meant the due regulation and domestic order of the kingdom; whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations. Of the offences which fall under this head, some are felonies and others misdemeanors only.

1. *Clandestine marriages* are the offences arising from the solemnizing of marriages in other places, or at other times, or without the publicity required by law, all of them matters of great public concern, and therefore felonies punishable by fourteen years' penal servitude.

2. *Bigamy*, which signifies being twice married; but is more correctly denominated *polygamy*, or having a plurality of wives at once, is a felony punishable by penal servitude not exceeding seven years, or imprisonment with or without hard labour not exceeding two years.

3. *Common nuisances* are misdemeanors, and consist in either the doing a thing to the annoyance of all the queen's subjects, or the neglecting to do a thing which the common good requires. Of this nature are,—1. Annoyances in *highways*, *bridges*, and public *rivers*, by rendering the same inconvenient or dangerous to pass, either positively, by actual obstructions; or negatively, by want of reparations. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse them, or in default of these last, the parish at large, may be indicted, distrained to repair and amend them, and in some cases fined. 2. Those nuisances, which when injurious to a private man are actionable, are, when detrimental to the public,

punishable by prosecution, and subject to fine. 3. All disorderly *inns*, or *ale-houses*, *bawdy-houses*, *gaming-houses*, *stage-plays* unlicensed, booths and stages for *rope-dancers*, *mountebanks*, and the like, are public nuisances, and may upon indictment be suppressed and fined. 4. *Lotteries* are also public nuisances. 5. The making and selling of *fireworks* and *squibs*, or throwing them about in any street, which is an offence at common law, is also a common nuisance, punishable by fine. And to this head may be referred the making, keeping, or carriage, of too large a quantity of *gunpowder* at one time, or in one place or vehicle; which is prohibited under heavy penalties and forfeiture. Erecting powder-mills or keeping powder-magazines near a town, is a nuisance at common law.

4. *Idleness* in any person whatsoever is also a high offence against the public economy. In China it is a maxim, that if there be a man who does not work, or a woman that is idle, in the empire, somebody must suffer cold or hunger. The Areopagus punished idleness, and the civil law expelled all sturdy vagrants from the city. In our law, all idle persons or vagabonds, whom our ancient statutes describe to be "such as wake on the night, and sleep on the day, and haunt customable taverns, and ale-houses, and routs about; and no man wot from whence they come, ne whither they go;" all these are offenders against the good order, and blemishes in the government, of any kingdom.

Offences of this character formerly amounted, indeed, in some cases, to felony. Thus it was felony in idle *soldiers* and *mariners wandering* about the realm, or persons pretending so to be, and abusing the name of that honourable profession. Such a one, not having a testimonial or pass from a justice, limiting the time of his passage; or exceeding the time limited for fourteen days, unless he fell sick; or forging such testimonial, was guilty of a capital felony, a sanguinary law which remained on the statute-book till the end of the reign of George III.

Outlandish persons, calling themselves *Egyptians*, or *gypsies*, were long another object of legislative severity. In 1530, they are described by 22 Hen. VIII. c. 10, as "outlandish people, calling themselves Egyptians, using no craft nor feat of merchandize, who have come into this realm and gone from shire to

shire and place to place in great company, and used great, subtil, and crafty means to deceive the people; bearing them in hand, that they by palmestry could tell men's and women's fortunes; and so many times by craft and subtilty have deceived the people of their money, and also have committed many heinous felonies and robberies." Wherefore they are directed to avoid the realm, and not to return under pain of imprisonment and forfeiture of their goods and chattels. Other statutes made Egyptians, who remained one month in the kingdom, or any person, fourteen years old, whether natural-born subject or stranger, who had been seen or found in their fellowship, or who had disguised him or herself like them, who remained in the same one month, at one or several times, guilty of a capital felony, and at one Suffolk assizes no less than thirteen gypsies were executed upon these statutes, a few years before the Restoration. There are no instances more modern than this, of carrying these laws into practice; and gypsies are now only punishable as vagrants, in common with other disorderly persons; who are now divided into three classes, *idle* and *disorderly* persons, *rogues* and *vagabonds*, and *incorrigible rogues*, by the *Vagrant Act*; which carefully defines what offenders shall fall within each of these three classes, and provides a precise scale of punishment for each offence. Several statutes, however, have since added to the list. Most of these offenders are punishable summarily by justices of the peace.

5. Under the head of public economy might formerly have been ranked the sumptuary laws against *luxury*, and extravagant expenses in dress, diet, and the like; all of which have been repealed. But luxury and extravagant expenses in dress, diet, and the like, naturally lead to *gaming*, which is generally introduced to supply or retrieve the expenses occasioned by the former: it being a kind of tacit confession that the company engaged therein do, in general, exceed the bounds of their respective fortunes; and therefore they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer.

For the suppression of *gaming-houses* many statutes have been passed, and special provisions passed against any gaming whatever in a public-house. A licence is also required, under a

penalty, to be obtained annually, by such persons as keep public billiard-tables and bagatelle-boards, or instruments used in any game of a like kind—a provision framed to permit of complaint and refusal of the licence, if gaming be permitted. All *private lotteries* by tickets, cards, or dice, are prohibited under a penalty of 200*l.* for him that shall erect such lotteries, and 50*l.* a time for the players; and *little-goes* are declared to be common and public nuisances, and a penalty of 500*l.* is imposed on persons keeping any office or place for that game, or for any other lottery whatsoever, not authorized by parliament. *Art-unions* are excepted by a special act.

To prevent the multiplicity of horse-races, another fund of gaming, it was enacted in the reign of Geo. II. that no matches under 50*l.* value should be run, upon penalty of 200*l.* to be paid by the owner of each horse running, and 100*l.* by such as advertised the plate. A number of vexatious actions having been brought under this statute, it was afterwards repealed; and all bargains relating to horse-racing placed on the same footing as other contracts. But no sooner were contracts as to horse-racing legalized, than an immense number of petty gaming-houses sprang up, under the name of *betting-offices*. This led to the interference of the legislature, and a statute was accordingly passed, expressly for the suppression of these haunts of vice; but it is scarcely necessary to say, it is easily disregarded and publicly evaded.

6. *Refusing to serve a public office*, without lawful cause, when duly appointed thereto, is a misdemeanor at common law, and as such punishable, if necessary, by fine and imprisonment. A vacancy in the office of sheriff, for instance, may occasion a stop of public justice; and the same principle applies when duties are imposed by statute, as in the case of a town councillor, or an overseer of the poor.

7. *Furious driving*, or riding on the highway, so as to endanger persons passing, is also an offence punishable by fine.

8. *Cruelty to an animal*, either by over-driving, beating or torturing it, or by carrying it or causing it to be carried in such a manner as to create unnecessary pain or suffering, are offences punishable on summary conviction before a magistrate;

and any peace-officer, on his own view, or on complaint of any other person, who shall give his address, is authorized to secure the offender. *Fighting* or *baiting* of any *bull*, *bear*, *badger*, *dog*, *cock*, or other animal, is an offence falling under this head; and so are cruelties in the slaughtering of horses and other animals not intended for food. *Vivisecting*, or experiments on living animals for scientific purposes is only allowed under strict supervision.

9. *Taking up dead bodies* is a misdemeanor at common law unless done by lawful authority. It was formerly committed in order to obtain subjects for dissection in the schools of anatomy, but is now quite unknown, regulations having been made for this purpose by statute. It is also an offence in those whose duty it is to bury the dead, to refuse to do so, and one cognizable by the temporal courts as well as by the courts-Christian.

10. Lastly, there is the offence which the sportsmen of England seem to think of the highest importance; and a matter, perhaps the only one, of general and national concern; *viz.*, the destroying of such beasts and fowls as are ranked under the denomination of *game:* which was formerly an offence in all persons alike, who had not authority from the crown to kill game, by the grant of either a free warren, or at least a manor of their own. But the game-laws also inflicted additional punishments on persons guilty of this general offence, unless they were people of such rank or fortune as were therein particularly specified. All persons, therefore, of what property or distinction soever, that killed game out of their own territories, or even upon their own estates, without a franchise, were guilty of the first original offence, of encroaching on the royal prerogative. And those indigent persons who did so, without having such rank or fortune as was generally called a *qualification*, were guilty not only of the original offence, but of the agravations also, created by the statutes for preserving the game; which aggravations were so severely punished, and those punishments so implacably inflicted, that the offence against the crown was seldom thought of, provided the miserable delinquent could make his peace with the lord of the manor. The offence, thus aggravated, is ranked under the present head, because the only rational footing upon which it can be considered as a crime is, that in

low and indigent persons it promotes idleness, and takes them away from their proper employments and callings, which is an offence against the public police and economy of the realm.

The statutes for preserving the game are many and various, and not a little obscure and intricate; it being remarked that in one statute only, 5 Ann. c. 14, there is false grammar in no fewer than six places, besides other mistakes; the occasion of which, or what denomination of persons were probably the penners of the statutes, need not at present be inquired into. Neither is it necessary to trace the legislation on this subject, for the possession of any *qualification* to kill game is now unnecessary; the right to do so depending simply on the payment of a tax, usually called a game *certificate*.

The offence of trespassing by night in pursuit of game, or in other words *night-poaching*, is, however, highly penal, and will probably remain so, until the game-laws have, by the advancing intelligence of the people, been entirely swept away.

CHAPTER XV.

OF HOMICIDE.

THE offences which in a more peculiar manner affect *individuals* are principally of three kinds—against their *persons*, their *habitations*, and their *property*.

Of crimes injurious to the *persons* of individuals, the most important is the offence of taking away life; or *homicide*; which is of three kinds; *justifiable*, *excusable*, and *felonious*. The first has no share of guilt at all; the second very little; but the third is the highest crime that man is capable of committing.

I. Justifiable homicide is of divers kinds.

1. Such as is owing to *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 when the sheriff, in the execution of public justice, puts to death a malefactor; this is an act of necessity, and even of civil duty; and, therefore, not only justifiable, but commendable where the

law requires it. But the law must *require* it, otherwise it is not justifiable: wantonly to kill the greatest malefactor, a felon, or a traitor is murder.

Homicide is also justifiable, rather by the *permission*, than the *command*, of the law, when for the *advancement* of public *justice*, which occurs,—*firstly*, where an officer, in the execution of his office, kills a person that assaults and resists him. *Secondly*, if an officer, or any private person, attempts to take a man charged with felony, and is resisted; and, in the endeavour to take him, kills him. *Thirdly*, in case of a riot, or rebellious assembly. *Fourthly*, where the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he in his defence kills any of them. In all these cases, there must be an apparent necessity on the officer's side, viz., that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, unless such homicide were committed: otherwise, without such necessity, it is not justifiable.

3. Homicide committed for the *prevention* of *crime* is justifiable; as if any person attempts a robbery or murder of another, or attempts to break open a house *in the night-time*, and is killed in the attempt, the slayer shall be acquitted and discharged. The law likewise justifies a woman killing one who attempts to ravish her: and so the husband or father is justified in killing a man who attempts a rape upon his wife or daughter.

II. Excusable homicide is either *per infortunium*, by misadventure; or *se defendendo*, for self-preservation.

1. Homicide *per infortunium* is where a man doing a lawful act, without any intention of hurt, unfortunately kills another; as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by; or where a person is shooting at a mark, and undesignedly kills a man; for the act may be lawful, and the effect accidental. So 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; for immoderate correction is un-

lawful. Likewise, to whip another's horse, whereby he runs over a child and kills him, is accidental in the rider, for he has done nothing unlawful; but manslaughter in the person who whipped him, for the act was a trespass of inevitably dangerous consequence. And in general, if death ensues in consequence of a dangerous, and unlawful sport, as shooting or casting stones in a town, and similar cases, the slayer is guilty of manslaughter.

2. Homicide *se defendendo*, upon a sudden affray, is also excusable. It must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a crime, which is not only a matter of excuse, but of justification. Self-defence is that whereby a man may protect himself from an assault, or the like, in the course of a sudden broil or quarrel, by killing him who assaults him. This is expressed by the word *chance-medley*; in which it must appear that the slayer had no other possible, or, at least probable means of escaping from his assailant.

It is frequently difficult to distinguish this species of homicide from manslaughter. The true criterion seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter: but if the slayer has not begun to fight, or, having begun, endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide in self-defence. And as the *manner* of the defence, so is also the *time* to be considered: for if the person assaulted does not fall upon the aggressor till the fray is over, or when he is running away, this is revenge, and not defence.

There is one species of homicide, *se defendendo*, where the party is equally innocent as he who occasions his death. As in the case where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another's is excusable through unavoidable necessity and the principle of self-defence: since their both remaining on the same plank is a mutual, though innocent, attempt upon, and endangering of, each other's lives.

III. Felonious homicide is an act of a very different nature from the former, being the killing of a human creature, of any

age or sex, without justification or excuse. This may be done either by killing one's self, or another man.

Self-murder is ranked among the highest crimes. A *felo de se* is he that deliberately puts an end to his own existence. The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length to which our coroners' juries have been apt to carry it,* *viz.*, that the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law considers that every melancholy fit does not deprive a man of the capacity of discerning right from wrong, which is necessary to form a legal excuse. And therefore if a lunatic kills himself in a lucid interval he is a *felo de se*.

But what punishment can human laws inflict on one who has withdrawn himself from their reach? They can act solely upon what he has left behind him, his reputation; and that only by an ignominious interment by night, and without the rites of Christian burial.

The other species of criminal homicide is that of killing another man; in which there are also degrees of guilt, which divide the offence into *manslaughter* and *murder*.

1. *Manslaughter* is the unlawful killing of another without malice either express or implied: which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act. And hence in manslaughter there can be no accessories before the fact, because it must be done without premeditation.

As to the first, or *voluntary* branch: if upon a sudden quarrel two persons fight, and one of them kills the other, this is 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: and the law pays that regard to human frailty as not to put a hasty and a deliberate act upon the same footing with regard to guilt. But if there be a sufficient cooling time for passion to subside

* Probably from the consideration that a verdict of *felo de se* involved a forfeiture of all the offender's goods and chattels to the crown, a forfeiture which no longer exists.

and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder.

The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure, in this, that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances. If in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if in a populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind.

The crime of manslaughter amounts to felony, but the law gives the judge an unlimited discretion as to punishment, that depending necessarily on the special circumstances of each particular case.

2. Murder is "*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 expressed or implied.*"

From which definition it will be observed: first, that it must be committed by a *person of sound memory and discretion*: for lunatics or infants are incapable of committing any crime: unless in such cases where they show a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil.

Next, it happens when a person of such sound discretion *unlawfully killeth*. The unlawfulness arises from the killing without warrant or excuse: and there must also be an actual killing to constitute murder; for a bare assault with intent to kill, is only a great misdemeanor. The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome. If a man, indeed, does an act of which the probable consequence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself, and no killing may be primarily

intended: as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died; of the harlot, who laid her child under leaves in an orchard, where a kite struck it and killed it: and of the parish officers, who shifted a child from parish to parish till it died for want of care and sustenance. And so if a master refuse his apprentice necessary sustenance, or treat him with such continued harshness and severity, that his death is occasioned thereby, the law will imply malice, and the offence may be murder. So if a prisoner die by duress of imprisonment, the person actually offending is guilty of murder. In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which the whole day upon which the hurt was done shall be reckoned the first.

Further, the person killed must be "*a reasonable creature in "being, and under the king's peace,*" at the time of the killing. Therefore to kill an alien or an outlaw, who are all under the king's peace and protection, is murder, except he be an alien enemy in time of war.

Lastly, the killing must be *with malice aforethought.* This is the grand criterion which now distinguishes murder from other killing: and this malice prepense, *malitia præcogitata,* is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart; and it may be either *express* or *implied* in law. 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; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. Also, if even upon a sudden provocation one beats another in a cruel and unusual manner so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia.* As when a park-keeper tied a boy, that was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar; and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died; these were held to be murders,

because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act as shows him to be an enemy to all mankind in general; as coolly discharging a gun among a multitude of people; for this is universal malice.

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. And if one intends to do another felony, and undesignedly kills a man, this is said to be murder; as, if one shoots at A and misses *him*, but kills B. The previous felonious intent, the law here transfers from one offence to the other.

It were needless to go through all the cases of homicide, which have been adjudged either expressly, or impliedly malicious. It may be taken for a general rule that all homicide is malicious, and of course amounts to murder, unless where *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. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate the guilt.

The punishment of murder, or of an accessory *before* the fact, is now in all cases, death; accessories *after* the fact may be punished by penal servitude for life.

CHAPTER XVI.

OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

THE offences which more peculiarly affect the security of the person are some felonious, others simply misdemeanors, and punishable with a lighter animadversion.

I. Mayhem is an offence tending to deprive the sovereign of the aid and assistance of his subjects; and by the ancient law he that maimed any man whereby he lost any part of his body, was sentenced to lose the like part; *membrum pro membro.* This went out of use: partly because the law of retaliation is at best an inadequate rule of punishment; and partly because upon a repetition of the offence, the punishment could not be repeated. Several statutes were accordingly passed to put the crime and punishment of mayhem out of doubt, the most severe and effectual of which was the Coventry Act; passed in the reign of Charles II. on the occasion of an assault on Sir John Coventry in the street, and slitting his nose, in revenge for some obnoxious words uttered by him in Parliament. But this offence has entirely lost its distinctive character in the more general provisions of the law for the protection of the person from acts of violence, the leading principle of which is to make the offence, and of course its punishment, to depend, in a great measure, on the intent of the offender.

II. The next offence to be mentioned under this head relates to the female part of the community, being that of their *forcible abduction* and *marriage,* which is vulgarly called *stealing an heiress.* This offence was first made a felony by 3 Hen. VII. c. 2. It remained capital till the reign of George IV.; and is still a felony, and may be punished with penal servitude for a term not exceeding fourteen years.

An inferior degree of the same kind of offence, *taking away any woman child unmarried,* was first punished by 4 & 5 Ph. & Mar. c. 8. It is now a misdemeanor, punishable by fine or imprisonment, or both; and the offence is complete, although the girl goes voluntarily.

III. A third offence also against the female part of the community, but attended with greater aggravation is *rape, raptus mulierum,* or the carnal knowledge of a woman forcibly and against her will.

This crime was punished by the Saxon laws with death, but this was afterwards thought too hard, and in its stead another severe, but not capital punishment, was inflicted by William the Conqueror, *viz.,* castration and loss of eyes, which continued till the reign of Henry III. Under Edward I., the punishment was

mitigated; but this lenity being productive of terrible consequences, it was in 13 Edw. I. found necessary to make the offence felony. And afterwards, by 18 Eliz. c. 7, it was made capital; and so remained till the reign of George IV., the extreme limit of punishment being now penal servitude for life. To abuse a girl under the age of *twelve* is felony, punishable in the same manner; the same offence committed on a girl above twelve and under thirteen, whether with or without her consent is, by 38 & 39 Vict. c. 91, s. 4, a misdemeanor, and much less penal; but on what ground this extraordinary distinction has been made, it is impossible to imagine.

As to the material facts requisite to be given and proved upon an indictment of rape, and other offences against women, they are not to be publicly discussed, except only in a court of justice. But with regard to the credibility of the chief witness, how far she is to be believed must be left to the jury. Thus: if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give probability to her evidence. On the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances, if unexplained, carry a strong, but not conclusive, presumption, that her testimony is false or feigned.

A charge of rape can only be sustained when the offence was committed *against the will* of the woman. If the consent be obtained by fraud, it is no rape; but the law extends its protection to females under twenty-one, against such frauds; whoever by false pretences, or other fraudulent means, procures a female to have illicit connection with a man, being guilty of a misdemeanor, punishable by imprisonment, accompanied with hard labour, for two years.

IV. What has been observed with regard to the proof of *rape*, may be applied to another offence, the very mention of which is a disgrace to human nature. It will be better to imitate in this respect the delicacy of the law, which treats it, in its very

indictments, as a crime not fit to be named: *peccatum illud horribile, inter christianos non nominandum.*

The inferior offences against the personal security of the subject are *assaults, batteries, wounding, false imprisonment,* and *kidnapping.*

V. VI. VII. *Assaults, batteries,* and *wounding,* as breaches of the peace, are indictable and punishable at common law with fine and imprisonment. Some of these, however, although unlawful when committed on any person, acquire a higher degree of guilt when committed on persons in particular situations, or exercising peculiar duties, and to them consequently the law affords greater protection. Thus, by the *articuli cleri,* 9 Edw. II., to lay violent hands upon a clergyman, exposed the delinquent to three kinds of prosecution; an indictment for the breach of the peace; a civil action, for the damage sustained by the party injured; and a suit in the ecclesiastical court, first, *pro correctione et salute animæ,* by *enjoining* penance, and then again for such sum of money as should be agreed on for *taking off* the penance enjoined. The statute of Edward II. is repealed; and the only special protection now given to the clergy consists in its being made a misdemeanor to obstruct a clergyman in, or *arrest* him upon civil process, while he is performing or about to perform, or returning from the performance of, divine service.

Assaults on magistrates and gamekeepers are in certain cases severely punishable, as are likewise assaults on officers of workhouses, and on relieving and other officers acting under the poor laws. So are assaults committed in pursuance of a conspiracy to raise the rate of wages; assaults by masters on apprentices or servants, by husbands on their wives, and by parents and others on children.

The punishment for an assault is usually imprisonment, or fine, or both; but the court may, in cases of indecent assault, and assaults occasioning actual bodily harm, add hard labour. Common assaults and batteries usually are dealt with by the magistrates, under their summary jurisdiction, committing the offender to the house of correction, or imposing a fine.

VIII. *False imprisonment* is a misdemeanor at common law; the most atrocious degree of it, that of sending any subject of this realm a prisoner into parts beyond the seas, is a *præmunire*; inferior degrees of it are punishable, on indictment, if need be, by fine and imprisonment.

IX. *Kidnapping*, or the forcible abduction or stealing away of a man, woman, or child, from their own country, and sending them into another, was capital by the Jewish and civil laws. It was formerly as a misdemeanour punished with fine, imprisonment, and the pillory; but the offence of *child-stealing* is now a felony, for which penal servitude for seven years may be imposed. The cognate offence of forcing a seamen on shore from a vessel, and leaving him, is also punishable. The wrongful discharge of seamen, whether in British or foreign ports is prevented by masters of vessels being required, under the penalty of being guilty of a misdemeanor, to obtain formal certificates as to the grounds of the discharge from consular officers, or merchants resident in the place where the discharge takes place.

CHAPTER XVII.

OF OFFENCES AGAINST THE HABITATIONS OF INDIVIDUALS.

THE only two offences that affect the *habitations* of individuals are *arson* and *burglary*.

I. Arson, *ab ardendo*, is the malicious and wilful burning of the house or outhouse of another man; for not only the bare dwelling-house, but all outhouses that are parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables, may be the subject of arson; and this by the common law. Setting fire to a dwelling-house, *any person being therein*, till recently a capital felony, is now punishable, it may be, by penal servitude for life. Setting fire to a church or chapel, office, shop, mill, malthouse, or granary; or to any building used in trade or manufacture; or to farm buildings, or to any station or other building belonging to a railway, dock, or canal, or to any public building, is also felony, punishable in the same manner.

As to what shall be said to be a *burning*, so as to amount to arson, a bare intent, or attempt to do it, by actually setting fire to a house, unless it absolutely *burns*, did not fall within the description of *incendit et combussit*; which were words necessary, in the days of law-Latin, to all indictments of this sort. The burning and consuming of any part was, however, sufficient; though the fire were afterwards extinguished; but the offence now consists in *setting fire* to the building, and consequently it is not necessary that it should be burnt or actually consumed. And it must be a *malicious* burning; otherwise it is only a trespass, and therefore no negligence or mischance amounts to it.

The *punishment* of arson was death by the Saxon laws. And in the reign of Edward I. this sentence was executed by a kind of *lex talionis:* for the incendiaries were burnt to death. A statute of Henry VI. made the wilful burning of houses in some cases high treason; but it was reduced to felony under Edward VI. and Mary; and for a long period afterwards was subject to the punishment of all felonies, namely, hanging. No offence of this description is now capital.

Some cognate offences, however, are highly penal. Thus whoever by gunpowder, or other explosive substance, destroys, or damages a dwelling-house, *any person being therein*; or destroys or damages a building, whereby the life of any person is endangered, is guilty of felony, and may be sent to penal servitude for life. The law indeed looks upon offences of this nature so seriously, that diverging from the usual rule as to attempts, it has made the attempt to blow up buildings, although it fails, also a felony, but not so penal in its consequences.

II. Burglary, or nocturnal housebreaking, *burgi latrocinium*, which by our ancient law was called *ham-socn*, or, as it is in Scotland to this day, *hame-sucken*, has always been looked upon as a very heinous offence; the law paying so tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity. A burglar, then, is *he that by night breaketh and entereth into a mansion-house, with intent to commit a felony.*

The *time* must be by night; for in the daytime there is no burglary; and *night* now, with reference to this offence, com-

mences at nine of the clock, and concludes at six of the clock in the morning of the next day.

The *place* must be a *mansion*-house; breaking open a church being burglary, according to the sages of the law, because it is *domus mansionalis Dei*. No distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence: nor is a breaking open of houses wherein no man resides, and which, therefore, for the time being, are not mansion-houses, attended with the same circumstances of midnight terror. But a chamber in a college or an inn of court, where each inhabitant has a distinct property, is, to all other purposes as well as this, the mansion-house of the owner.

In the *manner* of committing burglary, there must be both a *breaking* and an *entry* to complete it. And in general it must be an actual breaking, not a mere legal *clausum fregit* by leaping over ideal boundaries, but a substantial irruption, as by breaking, or taking out the glass of, or otherwise opening, a window: picking a lock, or opening it with a key, lifting the latch of a door, or unloosing any other fastening which the owner has provided. If a person leaves his doors or windows open, it is his own folly, and if a man enters therein it is no burglary: yet, if he afterwards unlocks an inner or chamber door, it is. But to come down a chimney is a burglarious entry, for that is as much closed as the nature of things will permit. So, if a servant conspires with a robber, and lets him into the house by night, this is burglary in both, for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt. As for the *entry*, 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, or to put a hand or a hook in at a window to draw out goods. And it may be *before* the breaking as well as after: for if a person enters a dwelling-house with intent to commit felony, or being in a dwelling-house, commits a felony, and in either case breaks *out* of the dwelling-house in the night time, this by statute is burglary.

As to the *intent*, it is clear that such breaking must be with a felonious intent, otherwise it is only a trespass. And it is

the same, whether such intention be carried into execution, or only demonstrated by an attempt. And therefore a breach and entry with intent to commit a murder or a rape, is burglary, whether the thing be actually perpetrated or not.

Thus much for burglary, an offence made capital by 1 Edw. VI. c. 12; which it remained till quite recently, being now punishable at the utmost by penal servitude for life.

Housebreaking also affects the habitations of individuals, but does not amount to burglary. So do the breaking and entering of a warehouse, or shop; or a church or chapel, and stealing therein. These crimes are punishable with great severity; as is likewise the offence of *sacrilege*, or the breaking and entering a church or other place of worship, and committing felony therein.

Somewhat less penal, though of not less dangerous tendency, are the misdemeanors of being *found by night* armed with any dangerous or offensive weapon, with intent to break or enter a dwelling-house or other building, and to commit felony therein; or *found by night* in possession, without lawful excuse, of any implement of housebreaking;—or *found by night* with the face blackened or otherwise disguised, with intent to commit any felony;—or *found by night* in any dwelling-house or other building, with intent to commit any felony therein. A repetition of any of these offences is punishable with penal servitude.

CHAPTER XVIII.

OF OFFENCES AGAINST PRIVATE PROPERTY.

Of the offences against individuals, which affect their property, two are attended with a breach of the peace: *larceny* and *malicious mischief*; the third one, equally injurious to the rights of property, is attended with no violence: *forgery*.

I. Larceny, from *latrocinium*, or *theft*, is distinguished by the common law into two sorts: *simple* larceny, or plain theft unaccompanied with any other atrocious circumstance; and *mixed* or *compound* larceny, which includes the aggravation of a taking from one's house or person.

Simple larceny is *the felonious taking and carrying away of the personal goods of another.*

1. There must be a *taking*, which implies the consent of the owner to be wanting. Therefore no delivery of the goods from the owner to the offender, upon trust, can at common law ground a larceny. As if A lends B a horse, and he rides away with him; or, if I send goods by a carrier, and he carries them away; these are no larcenies at common law. But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, these are larcenies; for here the *animus furandi* is manifest; since he had otherwise no inducement to open the goods. Where, therefore, the possession of goods has been obtained *bonâ fide*, in the first instance, the subsequent conversion is not larceny; but where the original possession is obtained by a trick for the purpose of converting the goods to the taker's use, it is larceny. The voluntary loan of a horse to a person who afterwards rides off with it, is not larceny; but if the possession of the horse was parted with under colour of a hiring, the intention to steal it existing from the first, it is larceny.

The *taking*, to constitute larceny, may thus be a *taking* in contemplation of law only. If a servant having, not the possession, but only the care and oversight of the goods, as the butler of plate or the shepherd of sheep, steals them, it is felony at common law. And so, if a guest robs his inn or tavern of a piece of plate, it is larceny; for he has not the possession delivered to him, but merely the use.

But it required a statute to make a lodger who runs away with the goods from his ready-furnished lodgings, guilty of larceny. And not only in that, but in many other similar cases, has the legislature been obliged to interfere to remedy a palpable defect in the law. Thus it was no larceny, at common law, in a servant to run away with the goods committed to him by third persons for delivery to his master, and of which his master never had possession. It was only a breach of civil trust. And it was necessarily the same in the case of agents, brokers, bankers, trustees, and others intrusted with property.

The case of a servant misappropriating property delivered to

him for his master, was first dealt with in the time of Henry VI.; the 7 & 8 Geo. IV. c. 29, was the first which provided for the punishment of embezzlements committed by *agents intrusted with property*. The 20 & 21 Vict. c. 54, applied the law to *trustees*, fraudulently disposing of trust property, and to *directors of public companies*, fraudulently appropriating the property under their control, keeping fraudulent accounts, or publishing fraudulent statements, offences unhappily of much too frequent occurrence. All these statutes have been repealed; but their various provisions have been re-enacted by 24 & 25 Vict. c. 96, which consolidates the statute law relating to larcency and other similar offences; and to which it may therefore be sufficient to refer the reader.

2. There must not only be a taking, but a *carrying away; cepit et asportavit* was the old law-Latin. A bare removal from the place is, however, enough. As if a thief, intending to steal plate, takes it out of a chest, and lays it upon the floor, but is surprised before he can make his escape with it; this is larceny.

3. This taking, and carrying away, must also be *felonious*; that is, *animo furandi*: the ordinary evidence of which is that the party does it clandestinely; or, being charged with the fact, denies it. But this is by no means the only criterion of criminality: 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, wherefore they must be left to the attentive consideration of the jury.

4. This felonious taking and carrying away must also, at common law, be *of the personal goods of another*: for if they were things *real*, or savoured of the realty, larceny could not be committed of them. Lands, tenements, and hereditaments cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed; and the severance of them was merely a trespass. Yet if the thief severed anything from the freehold at *one* time, whereby it was converted into a *personal chattel*, in the constructive posses-

sion of him on whose soil it was left; and came again at *another* time, and took it away; it was larceny. But these refinements have been entirely swept away; and larceny may now be committed of lead, iron, and other things, fixed to buildings; of trees, shrubs, and underwood; of roots, plants, and vegetables, and of ore from mines, as if they were no part of the freehold whatever.

Upon the same principle, the stealing of writings relating to a real estate is no felony at common law, because they *savour* of the *realty*, and are considered as a part of it. The legislature has consequently again interfered, and has made this offence a felony, and highly penal.

Bonds, bills, and notes, which are *choses in action*, were also at common law not goods whereof larceny might be committed; being of no intrinsic value; and not importing any property in *possession* of the person from whom they are taken. But they are now upon the same footing, with respect to larcenies, as the money they are meant to secure. *Treasure trove* and *wreck*, which at common law could not be the subject of larceny till seized by the sovereign or him who had the franchise, for till such seizure no one has a property therein, are now upon the same footing as *choses in action*.

Of animals, *ferœ naturæ*, and unreclaimed, such as deer, hares, and conies, in a forest, chase or warren; fish in an open river or pond; or wild fowls at their natural liberty, no larceny can be committed, no one having any *property* therein, either absolute or qualified. But if they are reclaimed or confined, and may serve for food, it is otherwise; for of deer so enclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larceny may be committed. Taking or destroying fish is, in certain cases, an indictable misdemeanor; in other circumstances, punishable by fine on summary conviction. Stealing *oysters* or oyster-brood from a private oyster-bed is felony, and punishable as larceny.

Stealing *hawks* in disobedience to 37 Edw. III. c. 19, has been called felony; but this may be doubted. It is also said that, if swans be lawfully marked, it is felony to steal them, though at large in a public river: and that it is likewise felony to steal

them, though unmarked, if in any private river or pond; otherwise it is only a trespass. But of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitæ naturæ*, which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool, larceny may be committed; and also of the flesh of such as are either *domitæ* or *ferœ naturæ* when killed.

As to those animals which do not serve for food, and which therefore, the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation, as that the crime of stealing them amounts to larceny. But *dog-stealing* has been for many years a misdemeanor; and penalties have been imposed for the protection of birds and beasts kept for pleasure or merely domestic purposes.

Notwithstanding, however, that no larceny can be committed, unless there be some property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larceny to steal it; and an indictment will lie for the goods of a person unknown. This is the case of stealing a shroud out of a grave, which is the property of those, whoever they were, that buried the deceased; but stealing the corpse itself which has no owner, though a matter of great indecency, is no felony, unless some of the grave-clothes be stolen with it.

The Saxon laws punished theft with death, if above the value of twelvepence; 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. In 9 Hen. I. this power of redemption was taken away, and all persons guilty of larceny above the value of twelvepence were directed to be hanged. The mercy of jurors accordingly made them often strain a point, and bring in the value of the article stolen to be less than twelvepence, when it was really much greater. The punishment then was imprisonment or whipping. But in cases in which the jury could not, or did not, adopt this course, the criminal

only escaped death by the merciful extension to him of the *benefit of clergy.** This again could only be for the *first* offence; and in innumerable cases of simple larceny the benefit of clergy was afterwards taken away by statute: so that many persons now living can recollect the frequency of executions for offences which are now punished with a few months' imprisonment. For it was not till the reign of George IV. that, through the exertions of Sir Samuel Romily, who was opposed by all the judges, the severity of our penal code was at all materially diminished; and the attention of the public called to the frightful catalogue of crimes for which death might be inflicted. The punishment for simple larceny was soon after declared to be imprisonment, or transportation beyond seas, for which penal servitude has now been substituted.

Mixed or *compound* larceny has all the properties of the former, but is accompanied with either one or both of the aggravations of a taking from one's *house* or *person*.

1. Larceny from the *house*, though it seems to have a higher degree of guilt than simple larceny, yet is not distinguished from the other at common law; unless where it is accompanied with the circumstance of breaking the house by night; and then it is burglary. By several acts of parliament the benefit of clergy was taken away from larcenies committed in a house in almost every instance; and it remained therefore a capital offence till comparatively recently; when the punishment was assimilated to that of larceny.

2. Larceny from the *person* is either by *privately* stealing, or by open and violent assault, which is called *robbery*; to constitute which offence, the thing taken must be *completely*, although it be only *momentarily*, removed from the person.

Privately stealing from the *person*, as by picking a pocket, was debarred the benefit of clergy so early as 8 Eliz. c. 4. This

* This was a solemn mockery, which was gone through at the bidding of the gaoler, who directed the convict, when called up for judgment, to kneel down and *pray his clergy*. This the convict did by repeating a verse of the New Testament, which he had previously learned for the purpose, which was thence called the "neck verse." The reader who is curious on this subject will find a long dissertation in the original work of Sir W. Blackstone.

severity seems to have been owing to the ease with which such offences are committed, the difficulty of guarding against them, and the boldness with which they were practised at the time when this statute was made. The offence may now be punished by penal servitude for any term not exceeding fourteen years, or by an imprisonment not exceeding two years; but if confessed by the accused, it may form the subject of a summary conviction: and in that case is punishable by imprisonment not exceeding six months.

Open and violent larceny from the *person*, or *robbery*, 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. 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. The taking must be by force, or a previous putting in fear; which makes the violation of the person more penal than privately stealing. This previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcenies; for if one privately steals sixpence from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent. Yet if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be *put in fear*, yet this is undoubtedly a robbery. Or, if a person with a sword drawn begs an alms, and it is given to him through mistrust and apprehension of violence, this is a robbery. So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him.

This species of larceny was debarred the benefit of clergy by 23 Hen. VIII. c. 1, and other subsequent statutes, not indeed in general, but only when committed in a dwelling-house, or in or near the public highway. A robbery, therefore, in a distant field, or footpath, was not punished with death, till the 3 & 4 W. & M. c. 9, took away clergy from both principals and acces-

sories before the fact, in robbery, wheresoever committed. This crime has, however, ceased to be capital, the punishment of the offender now depending on the circumstances accompanying its commission. Flogging may be inflicted for robbery or an attempt to rob.

One species of crime not attended with any actual or attempted violence, at common law, and by statute, constituted robbery, viz., the offence of obtaining property by accusation of unnatural practices. This detestable crime may involve penal servitude for life. And it is not less penal to accuse or threaten to accuse any person of an infamous crime, with intent to extort money, or to send or to deliver, with a similar object, any letter or writing containing menaces.

In all these cases of mixed or compound larceny, if any part of the charge necessary to bring the offence within the statute cannot be proved, the accused may be convicted of the minor offence. Thus, if the force necessary to constitute robbery cannot be proved, the offender may be convicted of stealing from the person, or of the attempt. And so, if the property does not appear to have been taken from the person, he may yet be convicted of simple larceny, or of the attempt to commit that offence.

II. *Malicious mischief* is 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 revenge. In which it bears a near relation to arson; for as that affects the habitation, so this does the other property of individuals. And, therefore, any damage arising from this mischievous disposition, though only a trespass at common law, is now highly penal.

Some of the offences which may be thus classed have been already noticed; so that a concise reference to the others is all that need now be attempted.

By 22 Hen. VIII. c. 11, to destroy the powdike in the fens of Norfolk and Ely, was made felony; and by 6 Geo. II. c. 37, and 10 Geo. II. c. 32, it was felony without benefit of clergy, maliciously to cut down any river or sea bank, whereby lands might be overflowed or damaged. These statutes have been superseded by 24 & 25 Vict. c. 97.

By 1 Ann. st. 2, c. 9, captains and mariners destroying ships to the prejudice of the owners, and by 4 Geo. I. c. 12, to the prejudice of insurers, were guilty of felony without benefit of clergy. And by 12 Ann. st. 2, c. 18, making a hole in a ship in distress, or doing anything tending to her immediate loss, was also felony without benefit of clergy. These, and similar offences relating to shipping are provided for in the statute just referred to; which also makes it highly penal to injure, remove, sink, or destroy the *buoys* of vessels; or to exhibit false signals with intent to lead vessels into danger. These last offences may involve penal servitude for life.

By 43 Eliz. c. 13, to burn any *barn* or *stack* of *corn* or grain; or to imprison or carry away any subject, in order to ransom him, or to make prey or spoil of his person or goods upon deadly feud or otherwise, in the four northern counties of Northumberland, Westmoreland, Cumberland, and Durham; or to give or take *blackmail*, was felony without benefit of clergy. This, and a statute of Charles II. relating to the burning of *ricks* or *stacks* of corn or grain; a statute of William and Mary, relating to the burning of goss or fern, a statute of George II. providing for the same offences, and a statute of George I. relating to the burning of underwood or coppice, have all been repealed; the 24 & 25 Vict. c. 97, regulating the punishment of these, and of all similar offences, or attempts to commit them.

By 6 Geo. I. c. 23, the wilful and malicious tearing, spoiling, burning or defacing of the garments of any person passing in the streets or highways, was made felony. This was occasioned by the insolence of certain weavers and others; who, upon the introduction of some Indian fashions prejudicial to their own manufactures, made it their practice to deface them; either by open outrage, or by privily cutting, or casting *aqua fortis* in the streets upon such as wore them. Such offenders are now punishable under the 24 & 25 Vict. c. 97.

By the Waltham Black Act, 9 Geo. I. c. 22, occasioned by the devastations committed near Waltham in Hampshire, by persons in disguise or with their faces blackened, to set fire to any house, barn, or outhouse, stack of corn or wood; or unlawfully and maliciously to break down the head of any fish-pond whereby the fish should be destroyed, were made felonies

without benefit of clergy; and the hundred was to be chargeable for the damages, unless the offender were convicted. *Wilful fire-raising*, is now provided for by the 24 & 25 Vict. c. 97; and the *breaking down of fish-ponds* is no longer a felony, but a misdemeanor, punishable under the same statute.

To *kill, maim, or wound cattle*, was felony without benefit of clergy by the Black Act. It is still felony, only subjecting the offender, however, to penal servitude or imprisonment. *Cattle* includes horses, as well as oxen, &c., pigs, and asses; but does not comprise dogs or other animals not the subject of larceny at common law.

The *cutting of hop-binds* was a capital felony by statutes of George II. The Black Act made the *cutting down* or *destroying* of any *trees* also a capital felony. Statutes of George III. next provided against the *destroying roots, shrubs*, or *plants*. All these acts have been repealed; and the offences they referred to are now punishable simply as injuries to property.

By statutes of George II. it was a capital felony to *set fire to any mine* or depth of coal; and by a statute of George III. to *burn* or *destroy mine engines*. These acts have been repealed; the setting fire to a mine, the *attempting* to do so, the drowning of a mine, the obstructing, or damaging of the air or waterway of a mine being all offences of a highly penal character.

To the crimes above enumerated may be added, the destruction of any bridge, viaduct, or aqueduct; and the cutting down of telegraphic apparatus, which are all more or less penal.

It only remains to be added, that in any case of damage to property not specially provided for, the offender, when the damage exceeds five pounds, may be convicted of a misdemeanor, for which penal servitude or imprisonment may be awarded, according as the offence is committed by day or by night; when the value of the property injured does not exceed five pounds, the offender may be compelled, on summary conviction, to make compensation, or be imprisoned and kept to hard labour for two months.

III. Forgery, or the *crimen falsi*, is *the fraudulent making or alteration of a writing to the prejudice of another man's right*; for

which the offender may at common law suffer imprisonment, and might have been put in the pillory. By a variety of statutes, a more severe punishment was inflicted on the offender in particular instances; and statutes to the same effect have become so multiplied of late as almost to become general.

By 5 Eliz. c. 14, the offender, for certain cases of this nature was to stand in the pillory, and have both his ears cut off, and his nostrils slit, and seared; for others, the pillory, the loss of one ear only, and a year's imprisonment; a second offence being felony without benefit of clergy. From the Revolution, when paper credit was first established, till the reign of George III., capital punishment was multiplied for forgeries to an extent which is scarcely credible; every act of parliament striking at some newly discovered forgery making it felony without benefit of clergy. So that there was hardly a case possible to be conceived, wherein forgery, that tended to defraud, whether in the name of a real or fictitious person, was not a capital crime. And so it remained till the reign of William IV., when most of these statutes were repealed; and the punishment of death taken away in all except the more serious and important cases. Offenders, who would then have been liable to suffer death, were subjected to transportation for life, or not less than seven years, or a long imprisonment.

The forgery of the great or privy seal, privy signet or sign manual remained high treason, and punishable accordingly; and the forgery of exchequer bills, bank-notes, wills, bills of exchange, and transfers of stock were all by special enactment still punishable with death. This punishment was, however, afterwards confined to the offence of forging a will or power of attorney for the transfer of stock; and, before long, the capital punishment for these as well as for certain other forgeries, which had been introduced by some intermediate statutes, was abolished.

Not a session of parliament now passes without some document being protected by provisions rendering its fabrication highly penal. But offences of this nature may usually be prosecuted under 24 & 25 Vict. c. 98, which consolidates the law on this subject; and provides minutely for the punishment of every class of offence which can be placed under this head.

CHAPTER XIX.

OF THE MEANS OF PREVENTING OFFENCES.

It is an honour to our laws, that they furnish the means of *preventing* the commission of crimes; since *preventive* justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to *punishing* justice.

This preventive justice consists in obliging those persons, whom there is a probable ground to suspect of future misbehaviour, to give assurance to the public, that such offence as is apprehended shall not happen; by finding securities for keeping the peace, or for their good behaviour. By the Saxon constitution these sureties were always at hand, by means of the decennaries or frank-pledges, wherein the whole neighbourhood of freemen were mutually pledges for each other's good behaviour. But this general security falling into disuse, there succeeded to it the method of making suspected persons find special securities for their future conduct: of which mention is made in the laws of Edward the Confessor.

This security consists in being bound, with one or more sureties, in a recognizance or obligation to the crown, entered on record, whereby the parties acknowledge themselves to be indebted to the crown in the sum required, for instance, 100*l*., with condition to be void, if the party shall appear in court on such a day, and in the meantime shall keep the peace; either generally, towards the sovereign and all his liege people; or particularly also, with regard to the person who craves the security. Or, if it be for good behaviour, then on condition that he shall demean and behave himself well, either generally or specially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a justice of the peace, is certified to the next sessions; and if the condition be broken by any breach of the peace in the one case, or any misbehaviour in the other, the recognizance becomes forfeited or absolute; and being *estreated* or extracted, taken out from among the other records, and sent up to the Exchequer; the party and his

sureties, having now become absolute debtors of the crown, are sued for the several sums in which they are respectively bound.

Any justices of the peace, by virtue of their commission, or those who are *ex-officio* conservators of the peace, may demand such security according to their own discretion; or it may be granted at the request of any subject, upon due cause shown, provided such demandant be under the protection of the crown. Wives may demand it against their husbands, or husbands, if necessary, against their wives.

A recognizance may be discharged by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which such recognizance is certified; or in case he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued.

Thus far what has been said is applicable to both species of recognizances, for the *peace*, and for the *good behaviour*. But as these securities are in some respects different, especially as to the cause of granting, or the means of forfeiting them, they must be briefly considered separately.

1. Any justice of the peace may, *ex-officio*, bind all those to keep the peace who in his presence make any affray; or threaten to kill or beat another; or contend together with angry words; or are brought before him by the constable for a breach of the peace in his presence; and all such persons as, having been before bound to the peace, have broken it and forfeited their recognizances. Also, whenever any private man has just cause to fear that another will do him a corporal injury, or procure others so to do; he may demand surety of the peace against such person: and every justice of the peace is bound to grant it, if he who demands it will make oath that he is actually under fear of death or bodily harm. This is called *swearing the peace* against another; and, if the party does not find such sureties as the justice in his discretion shall require, he may immediately be committed till he does, or until the expiration of a year; for persons committed to prison for not entering into recognizances or finding securities to keep the peace, can in no case be detained for more than twelve months.

Such recognizance, when given, may be forfeited by any actual violence, or menace even, 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. But a bare trespass upon the lands or goods of another, which is a ground for a civil action, is not of itself a forfeiture of the recognizance. Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace, so as to forfeit one's recognizance, being looked upon to be merely the effect of unmeaning heat and passion, unless they amount to a challenge to fight.

The recognizance for *good behaviour* includes security for the peace, and somewhat more.

First, then, the justices are empowered by 34 Edw. III. c. 1, to bind over to good behaviour towards the king and his people, all them *that be not of good fame*, wherever they be found; to the intent that the people be not troubled nor endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, *that be not of good fame*, it is held that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem*. Thus a justice may bind over all night-walkers; such as keep suspicious company, or are reported to be pilferers or robbers; common drunkards; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame: an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself. But, if he commits a man for want of sureties, he must express the cause thereof with certainty; and take care that such cause be a good one.

A recognizance for good behaviour may be forfeited in the same way as one for the security of the peace; and also by some others; especially by committing any of those acts of misbehaviour which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen; for, though it is just to compel suspected persons to give security against misbehaviour

that is apprehended, yet it would be hard, upon suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.

CHAPTER XX.

OF COURTS OF A CRIMINAL JURISDICTION.

In explaining the method of *inflicting* those *punishments* which the law has annexed to particular offences, the same method will be pursued as in the preceding book, with regard to the redress of civil injuries; *viz.*, first, by a description of the several *courts* of criminal jurisdiction; and secondly, by deducing down, in their natural order, and explaining, the several *proceedings* therein.

In the civil tribunals, *courts* which take cognizance of crimes, some of them are of a *public* and *general* jurisdiction throughout the realm; others of a *private* and *special* jurisdiction. The latter are now confined to London and the two universities.

The civil courts have a gradual subordination to each other, the superior correcting the errors of the inferior; but it is contrary to the spirit of the law to suffer any man to be tried twice for the same offence, and therefore the criminal courts may be said to be all independent of each other; so far at least, that the sentence of the lowest of them can never be reversed by the highest jurisdiction in the kingdom, unless for error in law, though sometimes causes may be removed from one to the other before trial. As therefore in these courts of criminal cognizance there is not the same dependence as in the others, they must be ranked according to their dignity. The highest of all is

1. The High Court of *Parliament*, or, popularly, the House of Lords, which is the supreme court for the execution of laws; by the trial of great offenders, whether lords or commoners, in the method of parliamentary impeachment.

This method of proceeding is derived to us from the ancient Germans, who in their great councils sometimes tried capital accusations relating to the public; and it has a peculiar propriety in the British constitution. For, though in general, a

union of the legislative and judicial powers ought to be avoided, yet it may happen that a subject, intrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes, as the ordinary magistrate either dares not or cannot punish. Of these the representatives of the people, or house of commons, cannot properly *judge*; because their constituents are the parties injured; and can therefore only *impeach*. But before what court shall this impeachment be tried? Not before the ordinary tribunals, which might possibly be swayed by the authority of so powerful an accuser. Reason therefore will suggest, that this branch of the legislature, which represents the people, must bring its charge before the other branch, which consists of the nobility, who may for this purpose be assumed to have neither the same interests nor the same passions as popular assemblies. It is proper that the nobility should judge, to insure justice to the accused; as it is proper that the people should accuse, to insure justice to the commonwealth. And therefore, among other extraordinary circumstances attending the authority of this court, there is one of a very singular nature, which was insisted on by the house of commons in the case of the earl of Danby in the reign of Charles II., and is now enacted by the Act of Settlement, that no pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in Parliament.

In the House of Lords also an appeal may be brought against the judgments of the Court of Appeal in criminal cases; but this appeal is only *nominally* to the House of Lords; and must be heard and determined by the Lord Chancellor and judicial lords of parliament, the latter of which are judges and need not be peers.

2. The court of the *Lord High Steward* is a court instituted for the trial of peers, indicted for treason or felony, or for misprision of either. When such an indictment is found, it is removed by *certiorari* into the court of the Lord High Steward, which alone has power to determine it; the sovereign in such a case creating a lord high steward by commision under the great seal; which recites the indictment so found, and gives his grace power to receive and try it, *secundum legem et consuetudinem Angliæ*. Then, when the indictment is removed, the

lord high steward directs a precept to a serjeant-at-arms, to summon the lords to attend and try the indicted peer. Formerly only eighteen or twenty, selected from the body of the peers were summoned; then the number came to be indefinite; and finally the custom was for the lord high steward to summon such peers as he thought proper. Accordingly, when the Earl of Clarendon fell into disgrace, a design was formed to prorogue the parliament, in order to try him by a select number of peers, it being doubted whether the whole house could be induced to fall in with the views of the court. But now, by 7 Will. III. c. 3, all the peers who have a right to sit and vote in parliament must be summoned; and every lord appearing shall vote in the trial of such peer.

3. The *Court of Appeal*, to which has been transferred all the anthority of the *Exchequer Chamber*, has no original jurisdiction over crimes or offences, but only upon writ of error, to rectify any injustice or mistake of the law, committed by

4. The *Queen's Bench* Division of the High Court of Justice, which, it may be recollected, is divided into a *Crown* side, and a *Plea* side; and on the crown side, or crown office, takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace. Into this division also indictments from all inferior courts may be removed by *certiorari*, and tried either at bar, or at *nisi prius*, by a jury of the county out of which the indictment is brought; or, by order of the court in the case of certain offenders, at the Central Criminal Court. The judges of this court are the supreme coroners for the kingdom; and the court itself the principal court of criminal jurisdiction known to the laws.

These three courts may be held in any part of the kingdom, and their jurisdiction extends over crimes that arise throughout the whole of it, from one end to the other. The courts now to be mentioned are also of a general nature, and universally diffused over the nation, but yet are of a local jurisdiction, and confined to particular districts.

5. The courts of *oyer* and *terminer*, and general *gaol delivery*: which are branches or divisional courts of the High Court of Justice, and are held before the Queen's commissioners twice, and sometimes thrice in every year in every county of the kingdom,

except London and Middlesex, wherein the Central Criminal Court exercises the same jurisdiction. At what are usually called the *assizes*, the judges sit by virtue of five several authorities: two of which, the commission of *assize* and its attendant jurisdiction of *nisi prius*, are of a civil nature. The third, which is the commission of the *peace*, was treated of in the first book. The fourth authority is the commission of *oyer* and *terminer*, to hear and determine all treasons, felonies, and misdemeanors, the words being *to inquire, hear, and determine*: so that by virtue of this commission they can only proceed upon an indictment found at the same assizes; for they must first *inquire* by means of the *grand jury* or inquest, before they are empowered to *hear* and *determine* by the help of the petit jury. Therefore they have, besides, fifthly, a commission of general *gaol delivery*; which empowers them to try and deliver every prisoner, who shall be in the gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted, or for whatever crime committed. So that, one way or other, the gaols are in general cleared, and all offenders tried, punished, or delivered, twice, and latterly, in populous districts, thrice in every year.

6. The court of general *quarter sessions* of the peace is a court that must be held in every county once in every quarter of a year, before two or more justices of the peace, whose jurisdiction extends to the trying and determining all felonies and misdemeanors whatsoever, except treason, murder, blasphemy, or offences against religion; perjury; forgery; wilful fire-raising; bigamy; abduction; concealment of birth; libel; bribery; night poaching; offence committed by fire, or by explosive or destructive substances; and some others of a heinous nature.

But there are many offences and particular matters which by special statutes belong properly to this jurisdiction, and ought to be prosecuted in this court: as the smaller felonies and misdemeanors; and certain matters rather of a civil than a criminal nature, such as the regulation of weights and measures; questions relating to the settlement of the poor; and appeals against a multitude of orders or convictions, which may be made in petty sessions, within the laws relating to the revenue, the highways, and other matters of a local nature. In some few of these last-mentioned cases, the parties are entitled to

a jury, but in the great majority, whether as appeals or as applications of an original nature, they are disposed of by the justices; whose orders therein may, for the most part, unless guarded against by particular statutes, be removed into the Queen's Bench division by *certiorari*, and be there either quashed or confirmed.

The records or rolls of the sessions are committed to the custody of a special officer denominated the *custos rotulorum*, whose nomination, he being the principal *civil* officer in the county, as the lord lieutenant is the chief in *military* command, is by the sign manual. To him the nomination of the clerk of the peace belongs; and this office he is expressly forbidden to sell for money.

In many corporate towns there are quarter sessions kept before justices of their own, within their respective limits: which have exactly the same authority as the general quarter sessions of the county, except in a very few instances: one of the most considerable of which is the matter of appeals for orders of removal of the poor, which, though they be from the orders of corporation justices, must be to the sessions of the county. And in all the most important towns, this court is presided over by the *recorder* of the borough, who must be a barrister of not less than five years' standing, and is immediately on his appointment *ex-officio* a justice of peace for the borough.

In both corporations and counties at large there are generally kept special and *petty sessions*, by a few justices, for despatching the smaller business of the neighbourhood, as for granting and renewing licences to keep publichouses, slaughterhouses and billiard-rooms; passing the accounts of the parish officers, and the like; for which and other objects, counties are usually divided into districts. Extensive powers of a similar nature are vested in the *stipendiary magistrates*; one of whom may exercise the jurisdiction for which the presence of two justices is required. But from the determination of all justices in petty sessions *an appeal* may generally be had to the next court of quarter sessions; unless, indeed, a *special case* has been stated for the opinion of a divisional court of the high court; for when this is done an appeal is incompetent.

7. The court of the *coroner* is also a court of record, to inquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end; which he is only entitled to do *super visum corporis*. This court is only mentioned here by way of regularity, as among the criminal courts of the nation.

II. The special courts of criminal jurisdiction are now few in number; for within that category are not included here any ecclesiastical courts; which punish spiritual sins, rather than temporal crimes, by penance, contrition, and excommunication, *pro salute animæ*; or, which is looked upon as equivalent to all the rest, by a sum of money to the officers of the courts by way of commutation of penance. The special courts are—

1. The *Central Criminal Court*, which has jurisdiction to hear and determine all treasons, murders, felonies, and misdemeanors, committed in London and Middlesex, and certain parts of the surrounding counties, and also all offences committed on the high seas, and which formerly were, for that reason, within the jurisdiction of the Admiralty.

2. The chancellors' courts of the two universities may try all criminal offences or misdemeanors under the degree of treason, felony, or mayhem; the trial of these crimes being reserved for another court, namely, the court of the *lord high steward* of the university.

When, therefore, an indictment is found at the assizes, or elsewhere, against any scholar of either university, or other privileged person, the vice-chancellor may claim the cognizance of it; and then it comes to be tried in the high steward's court. But the indictment must first be found by a grand jury, and then the cognizance claimed; for the high steward cannot proceed originally *ad inquirendum*, but only *ad audiendum et determinandum*. When the cognizance is allowed, if the offence be *inter minora crimina*, or a misdemeanor only, it is tried in the chancellor's court by the ordinary judge. But if it be for treason, felony, or mayhem, it is then, and then only, to be determined before the high steward, under a special commission of the crown to try the same. If execution be necessary to be

awarded, in consequence of finding the party guilty, the sheriff executes the university process; to which he is annually bound by an oath.

CHAPTER XXI.

OF SUMMARY CONVICTIONS.

THE proceedings in courts of criminal jurisdiction are either *summary* or *regular*. The former may be briefly described; the latter will require a more particular examination.

By a *summary* proceeding is meant such as is directed by several acts of parliament, for the conviction of offenders, and the inflicting of certain penalties created by those acts. There is no intervention of a jury, but the accused is acquitted or condemned by the suffrage of such person only as the statute has appointed for his judge.

I. Of this summary nature are all trials of offences and frauds contrary to the laws of the *excise*, and other branches of the *revenue:* which are to be inquired into and determined by the commissioners of the respective departments, or by justices of the peace in the country; officers, who are all of them appointed and removable at the discretion of the crown.

II. Another branch of summary proceedings is that before *justices of the peace*, in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many disorderly offences; such as petty trespasses, assaults, swearing, drunkenness, vagrancy, and others.

In all these cases, when an *information* is laid before a justice that any person has committed an offence for which he is liable to be punished, or a *compluint* is made, upon which the justice has authority to make any order, a *summons* is to be issued; which must be *served* on the person to whom it is directed; the constable or other person by whom such service is effected attending at the return of the summons, to *prove the service* thereof, if necessary. If the person summoned does not appear, a *warrant* may be issued for his apprehension. In the case of an information being laid, and substantiated by proper evidence

a warrant may be issued in the first instance; and upon this warrant, which may be executed in any other district than that in which it is issued, after being *backed* or indorsed by a justice of that district, the person charged may be taken, and brought before the justices; who have authority to issue summonses, and to compel the attendance, at the hearing, of *witnesses* for the prosecutor, complainant, or defendant, as the case may be.

The information or complaint must then be *heard* and adjudicated upon by the justices, according to the ordinary course of legal procedure, the complainant *proving his case*, the defendant making his *answer*, and the complainant examining witnesses in *reply*, if need be; the room in which all this is transacted being deemed *an open court*, to which the public are, therefore, entitled to have free access.

This is, in general, the method of summary proceedings before justices; but, in many cases, they must have recourse to the particular statutes which create the offence or inflict the punishment, and which usually chalk out the method by which offenders are to be convicted. Otherwise the offences fall under the general rule, and can only be prosecuted by indictment or information at the common law.

Thus, as regards *juvenile offenders*, that is, persons whose age does not exceed *sixteen years*, the justices may convict summarily in any case where an offence is by law deemed to be *simple larceny*; and pass a sentence not exceeding three months or impose a fine not exceeding three pounds. They have power, if they think it not expedient to inflict any punishment, to dismiss the accused, even if the offence be proved. And he, on the other hand, may object to the case being summarily disposed of, and insist on being sent for trial by a jury.

In certain other cases, the justices may, *with the assent of the accused*, hear and determine the charge in a summary way; and pass a sentence of three months' imprisonment, with hard abour. And in another class of cases may *punish*, where the accused *confesses* the charge, by an imprisonment not exceeding *six* months. But as hardened offenders would, in either case, inevitably embrace such an opportunity of escaping with a comparatively light punishment, it is provided, that if it appear that the accused has been previously convicted of felony, the

justices shall have no jurisdiction so to dispose of the case; but it must be sent for trial.

III. To this head may be referred the method, immemorially used, of punishing contempts by *attachment*, and the subsequent proceedings thereon.

The contempts that are thus punished are either *direct*, which openly insult or resist the powers of the courts, or the persons of the judges who preside there; or else are *consequential*, which, without such gross insolence or direct opposition, plainly tend to create a disregard of their authority. The principal instances, of either sort, that have been usually punishable by attachment, are chiefly of the following kinds:—1. Those committed by inferior judges and magistrates: as by proceeding in a cause after it is put a stop to or removed by prohibition, *certiorari*, or the like. 2. Those committed by sheriffs, bailiffs, gaolers, and other officers of the court: by abusing the process of the law, or deceiving the parties, by any act of oppression, or culpable neglect of duty. 3. Those committed by solicitors who are officers of the courts: by fraud and corruption, injustice to their clients, or other dishonest practice. 4. Those committed by jurymen in the discharge of their office: as making default, when summoned; refusing to be sworn; and other misbehaviours of a similar kind; but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict. 5. Those committed by witnesses: by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence. 6. Those committed by the parties to a suit: as by disobedience to an order; or by non-observance of an award. 7. Those committed by other persons: as by rude and contumelious behaviour in court; by disobeying the queen's writ, or the orders or process of the court; by speaking or writing contemptuously of the court, or of the judges acting in their judicial capacity; or by printing false accounts, or even true ones, in defiance of the prohibition of the court, of causes then depending in judgment.

The process of attachment, for these and the like contempts, must necessarily be as ancient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and

nugatory. A power therefore to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every tribunal.

CHAPTER XXII.

OF ARRESTS.

THE *regular* method of proceeding in the courts of criminal jurisdiction may be distributed under ten general heads; viz., 1. Arrest; 2. Commitment, and bail; 3. Prosecution; 4. Process; 5. Arraignment, and its incidents; 6. Plea, and issue; 7. Trial, and conviction; 8. Judgment, and its consequences; 9. Reversal of judgment, reprieve, or pardon; 10. Execution.

An *arrest* is the apprehending or restraining of the person of an alleged delinquent, in order that he may be forthcoming to answer an alleged or suspected crime; and it may be made:— 1. By warrant;—2. By an officer without warrant;—3. By a private person also without warrant;—4. By a hue and cry.

1. A warrant may be granted in extraordinary cases by the privy council, or secretaries of state; but ordinarily by justices of the peace. This they may do in any case where they have a jurisdiction over the offence, in order to compel the person accused to appear before them; for it would be absurd to give them power to examine an offender, unless they had also a power to compel him to attend and submit to such examination. And this extends to all treasons, felonies, and breaches of the peace; and also to all such offences as they have power to punish by statute.

Upon an *information*, therefore, or a *complaint*, in writing and upon oath, a justice may issue his *warrant* to apprehend the person charged or suspected, and cause him to be brought before him or any other justice or justices, to answer the charge and be dealt with according to law. The justice may, in his discretion, and on a mere charge or complaint, without a written information or oath, issue a *summons* in the first instance; and

if that be disobeyed by the person charged, then a warrant for his apprehension.

This warrant ought be under the hand and seal of the justice, and should set forth the time and place of making, and the cause for which it is made. A *general* warrant to apprehend all persons suspected, without describing any person in special, is 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. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant: 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 the officer who acts under it: whereas a warrant, properly penned, even though the magistrate should have exceeded his jurisdiction, indemnifies the officer who executes the same.

When a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the chief or other judge of the Queen's Bench division extends all over the kingdom. But the warrant of a justice of the peace in one county, as Yorkshire, must, except in the case of fresh pursuit, be *backed*, that is, signed by a justice of the peace in another, as Middlesex, before it can be executed there.

A warrant may be granted on a Sunday, as well as on any other day; and need not be made returnable at any particular *time*, for it remains in force until executed; and the person against whom it is issued may be apprehended in the night as well as the day, and on a Sunday; for the 29 Car. II. c. 7, s. 6, which prohibits arrests on Sundays, excepts treason, felonies, and breaches of the peace.

2. Arrests by *officers, without warrant*, may be executed, 1. By a justice of peace, who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence. 2. The sheriff; and, 3. The coroner, may apprehend any felon within the county without warrant. 4. The constable may, without warrant, arrest any one for a breach of the peace committed in his view, and carry him

before a justice; and, in case of felony actually committed, or a dangerous wounding, whereby felony is like to ensue, he may upon probable suspicion arrest the felon; and for that purpose is authorized, as upon a warrant, to break open doors, and even to kill the felon, if he cannot otherwise be taken; and if he be killed in attempting such arrest, it is murder in all concerned. 5. Watchmen, or beadles, or assistants to the constable, may *virtute officii* arrest all offenders, and particularly night-walkers, and commit them to custody till the morning.

8. Any private person, and *à fortiori* a peace-officer, that is present when any felony is committed, is bound to arrest the felon, on pain of fine and imprisonment, if he escapes through the negligence of the standers-by. And they may justify breaking open doors upon following such felon; and if *they kill him*, provided he cannot be otherwise taken, it is justifiable; though if *they are killed* in endeavouring to make such arrest, it is murder.

Upon probable suspicion also a private person may arrest the felon, or other person so suspected; but he does so at his own peril. A *constable*, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected, until inquiry can be made by the proper authorities; in order to justify a *private individual* in causing the imprisonment of any one, he must not only make out a *reasonable* ground of suspicion, but he must prove that a felony has actually been committed. A private individual may, however, apprehend any person found *by night* committing an indictable offence, or armed with an offensive weapon, or having in his possession an implement of housebreaking, or having his face blackened or otherwise disguised, or *in* any dwelling-house, if in either of these cases there is an intent to commit felony. And any person to whom any property is offered to be sold, pawned, or delivered if he has reasonable cause to suspect that it has been *stolen*, is authorized, and if in his power required, to apprehend, and forthwith to take before a justice the party offering the same, together with such property, to be dealt with according to law. A private person cannot, upon probable suspicion merely, justify breaking open doors to arrest a felon or other suspected person; and if either party kill the other in the attempt, it is man-

slaughter, and no more. 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 pretence 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.

4. There is yet another species of arrest, wherein both officers and private men are concerned, and that is, upon a *hue* and *cry* 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. That it might be made effectually, the hundred was bound to answer for all robberies therein committed unless they took the felon, which is the foundation of an *action against the hundred*, in case of any loss by robbery. If a man wantonly or maliciously raises a hue and cry, without cause, he shall be severely punished, as a disturber of the public peace.

CHAPTER XXIII.

OF COMMITMENT AND BAIL.

WHEN a delinquent is arrested, he ought to be taken before a justice of the peace, who is bound immediately to *examine* the circumstances of the crime alleged: and to this end, before committing the accused person to prison for trial, or admitting him to bail, is in his presence to take the statements on oath, or affirmation, of those who know the facts of the case; these statements, when signed and authenticated by the justice, constituting what are termed the *depositions*. The person accused has a right to question the witnesses, and is usually allowed legal assistance; but this is in the discretion of the magistrate, for the place where the examination takes place is not an open court; and the public may be excluded, if such a course will conduce to the ends of justice.

If, from the absence of witnesses, or other cause, it is

necessary or advisable to *adjourn* the examination, this may be done, the accused person being *remanded* to prison, or allowed to go at large, upon his recognizance, at the discretion of the magistrate.

After the examination of the witnesses for the prosecution has been completed, the *depositions* are read over to the accused, and he is then asked whether he wishes to say anything in answer to the charge, being warned that he is not obliged to do so, but that whatever he does say will be taken down in writing, and may be given in evidence against him upon the trial. If it appear that some inducement or threat has previously been held out to him, he should be given clearly to understand, that he has nothing to hope from any promise of favour held out, and nothing to fear from any threat made to him, as an inducement to make any admission or confession of his guilt; but that whatever he shall then say may be given in evidence, notwithstanding any such promise or threat.

Whatever he then says in answer, is to be taken down in writing, and after being read over to him, to be signed by the magistrate, and transmitted to the court by which he is to be tried. The magistrate is also to ask the acused whether he desires to call any witnesses; and if he does so, their statements must be taken down in writing in the same way as those of the witnesses for the prosecution.

If, upon this inquiry the magistrate is of opinion that the evidence is not sufficient to put the accused party upon his trial, he may forthwith, if in custody, be discharged. Otherwise, or if the evidence given raise a strong or probable presumption of his guilt, he must either be committed to prison, or give bail: that is, put in securities for his appearance, to answer the charge against him. This commitment, therefore, being only for safe custody, wherever bail will answer the same intention, as in most of the inferior crimes, it ought to be taken. Indeed, to refuse or delay to bail any person bailable, is an offence against the liberty of the subject, and in no case ought excessive bail to be required. Yet in offences of a serious nature, no bail can be a security equivalent to the actual custody of the person. Still the Queen's Bench division or any judge in vacation, may bail for any crime whatever, be it treason, murder, or any other

offence. And herein the wisdom of the law is manifest. To allow bail to be taken commonly for such enormous crimes would greatly tend to elude public justice: and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The law therefore provides one court, which has a discretionary power of bailing in any case: except only such persons as are committed by either house of parliament; or such as are committed for contempts by any division of the high court.

If the offence be not bailable, or the party cannot find bail, he is to be committed to gaol, there to abide till delivered by due course of law; but whether held to bail or committed to prison, in order to trial, he is entitled to have furnished to him, on demand, copies of the depositions on which he is held to bail or committed; and in either case the prosecutor and witnesses both for the prosecutor and for the accused may be bound over in recognizances to appear at the trial in order to prosecute or give evidence. The original information, if any; the depositions any recognizances taken by the justices; the statement, if any, made by the accused; and his recognizances, if he has been released on bail, must all be delivered to the proper officer on or before the first day of the assizes or sessions to which the accused is sent for trial.

CHAPTER XXIV.

OF THE SEVERAL MODES OF PROSECUTION.

THE next step towards the punishment of offenders is their formal accusation; which is either upon a previous finding of the fact by an inquest or grand jury, or without such previous finding. The former is either by *presentment* or *indictment*.

I. A *presentment* is a comprehensive term; including not only presentments properly so called, but also inquisitions of office and indictments by a grand jury. Properly speaking, it is the notice taken by a grand jury of any offence from their own knowledge, without any indictment laid before them; as the

presentment of a nuisance, a libel, and the like; upon which an indictment must be afterwards framed, before the party presented can be put to answer it. An *inquisition of office* is the act of a jury summoned to inquire of matters relating to the crown, upon evidence laid before them. Such inquisitions may be afterwards traversed and examined; as particularly the coroner's inquisition of the death of a man, when it finds any one guilty of homicide, for in such cases the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it; which brings it to a kind of indictment.

II. An *indictment* is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer* and *terminer* and general gaol delivery, twenty-four good and lawful men of the county, having the qualification required by the law, to inquire, present, do, and execute all those things which shall then and there be commanded them. As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty-three; that a majority may be twelve.

This *grand jury*, having chosen their foreman, are instructed as to their duties by a *charge* from the judge or chairman of sessions, and then withdraw to receive indictments. They are only to hear evidence on behalf of the prosecution; for the finding of an indictment is only in the nature of an accusation, which is afterwards to be tried; and the grand jury are only to inquire whether there be sufficient cause to call upon the party to answer it.

When the grand jury have heard the evidence, if they think it a groundless accusation, they indorse on the back of the indictment, *not a true bill;* and then the party is discharged. If they are satisfied of the truth of the accusation, they then indorse upon it, *a true bill.* The indictment is then said to be *found*, and the party stands indicted. But to find a bill there must at least twelve of the jury agree; for no man can be convicted upon an indictment of any offence, unless by the unanimous voice of twenty-four of his equals and neighbours: that is, by twelve at least of the grand jury, in the first place, assenting to

the accusation; and afterwards, by the whole petit jury, of twelve more, finding him guilty, upon his trial. If twelve of the grand jury assent, it is a good presentment, though some of the rest disagree: and, when so found, it is publicly delivered into court.

III. The other method of prosecution is, without any previous finding by a jury. Such, by the common law, was when a thief was taken *with the mainour*, that is, with the thing stolen upon him *in manu*. For he might, when so detected *flagrante delicto*, be brought into court, arraigned, and tried, without indictment. But this method of proceeding was put an end to in the reign of Edward III., so that the only species of proceeding at the suit of the crown, without a previous indictment or presentment, now is an *information*.

Informations, in criminal cases in the Queen's Bench division, are of two kinds: first, those filed *ex officio* by the attorney-general; secondly, those in which, though the crown is the nominal prosecutor, yet it is at the relation of some private person, the latter being filed by the master of the Crown-office, who is for this purpose the standing officer of the public.

The objects of an *ex officio information* are properly such great misdemeanors as peculiarly tend to disturb or endanger the government; the law giving to the crown, in such cases, the power of an immediate prosecution, without waiting for any previous application to any other tribunal. The objects of the other, or *criminal informations*, are any gross and notorious misdemeanors, such as libels, not tending to disturb the government, but which, on account of their pernicious example, deserve public animadversion. Either species of information, when filed, must be tried by a petit jury of the country where the offence arises; after which, if the defendant be found guilty, the court must be resorted to for his punishment.

This mode of prosecution is as ancient as the common law itself. For as the sovereign was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a grand jury informed him that there was a sufficient ground for instituting a criminal suit: so, when his immediate officers, the attorney-general and master of the Crown-office, were otherwise sufficiently assured that a man had committed a gross mis-

demeanor, they were at liberty to convey that information to the court, and to carry on the prosecution in the name of the crown. But these informations are confined to misdemeanors only: for wherever any *felonious* offence is charged, the law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it. And to prevent any oppressive use of the proceeding by information by a private subject, the 4 & 5 W. & M. c. 18, expressly enacts, firstly, that the clerk of the crown shall not file any criminal information without an express direction from the court, which can only be obtained on an application by *counsel*, founded upon affidavit; and secondly, that every relator shall give security not only to prosecute the information with effect, but also to pay costs to the defendant in case he be acquitted thereon; and, at all events, to pay costs, unless the information shall be tried within a year after issue joined.

CHAPTER XXV.

OF PROCESS UPON AN INDICTMENT.

HITHERTO the offender has been supposed to be in custody before the finding of the indictment. But if he has fled, or secretes himself; or has not been bound over to appear at the assizes or sessions, still an indictment may be preferred against him in his absence; since, were he present, he could not be heard before the grand jury against it. And, if it be found, *process* must issue to bring him into court; for the indictment cannot be tried until he appears.

Any court before which an indictment is found may issue a *bench warrant* for arresting the party charged; but the more usual course is to apply to a justice of the peace; who, upon production of a certificate of the indictment having been found, is bound to issue his warrant for the apprehension of the alleged delinquent, that he may be brought before him, to be dealt with according to law; that is, to be committed for trial or admitted to bail as in ordinary cases.

If the accused has fled, so that he cannot be arrested, and the prosecutor desires to proceed to outlawry, he must resort to

the ancient process; viz., first, a *venire facias*, in the nature of a summons to appear, enforced, if necessary, by a *distress infinite* till he do appear. But if he has no lands, then a *capias* issues; and, if need be, a second and third, called an *alias* and a *pluries capias*.

After the several writs of *venire facias*, *distringas* and *capias* have issued without effect, the offender shall be put in the *exigent* in order to his outlawry; that is, he shall be exacted, proclaimed, or required to surrender, at five county courts; and if he be returned *quinto exactus*, and does not appear at the fifth exaction, then he is *outlawed*, or put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise. The punishment for outlawries upon indictments for misdemeanors is the same as for outlawries upon civil actions, viz., forfeiture of goods and chattels. An outlawry in treason or felony amounts to a conviction of the offence, as if the offender had been found guilty. But such outlawry may be reversed by writ of error; the proceedings therein being, as it is fit they should be, exceedingly nice and circumstantial; and, if any single minute point be omitted or misconducted, the whole outlawry is illegal, and may be reversed: upon which reversal the party accused is admitted to plead to, and defend himself against, the indictment.

It is at this stage that writs of *certiorari* are usually had, though they may be had at any time before trial, unless taken away by statute, to remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the Queen's Bench division. And this is done; either, 1. To determine the validity of the indictment; and to quash or confirm it as there is cause: or, 2. Where it is surmised that a partial or insufficient trial will be had in the court below; or, 3. In order to plead the royal pardon; or, 4. To outlaw the offender in those counties or places where the process of the inferior court will not reach him. *Certiorari*, when issued, supersedes the jurisdiction of the inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the Queen's Bench division remands the record to the court below, to be there tried and determined.

At this stage of prosecution also it is that indictments found

by the grand jury against a peer must be certified and transmitted into the House of Lords, or the court of the lord high steward; and that, in places of exclusive jurisdiction, as the two universities, indictments must be delivered, upon claim of cognizance, to the courts therein established, to be there respectively tried and determined.

CHAPTER XXVI.

OF ARRAIGNMENT, AND ITS INCIDENTS.

WHEN the offender either appears voluntarily to an indictment, or is brought in to answer it in court, he is immediately to be *arraigned* thereon; which is nothing else but to call the prisoner to answer the matter charged upon him in the indictment. When he is brought to the bar, the indictment is to be read to him distinctly in the English tongue, which was law, even while all other proceedings were in Latin, that he may fully understand his charge. After which it is to be demanded of him, whether he be *guilty* of the crime whereof he stands indicted, or *not guilty*.

When thus arraigned, he either *stands mute*, or *confesses* the fact; which circumstances may be called *incidents* to the arraignment; or else he *pleads* to the indictment, which is the next stage of the proc eedings.

I. 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 with such matter as is not allowable; and will not answer otherwise.

If he says nothing, the court *ex officio* empanels a jury to inquire whether he be dumb *ex visitatione Dei*, or whether he stands *mute of malice*. If he be found to be dumb *ex visitatione Dei*, the judge who is to be of counsel for the prisoner, and to see that he has law and justice, shall proceed to the trial, and examine all points as if he had pleaded not guilty.

If it be found that he stands mute of malice, or will not answer directly to the indictment, the court orders a plea of

"*not guilty*" to be entered, on which the trial proceeds in the same way as in ordinary cases.*

II. The other incident to arraignment, exclusive of the plea, is the prisoner's actual *confession* of the indictment. Upon a simple and plain confession, the court has nothing to do but to award judgment: but it is usually very backward in receiving such confession in a capital felony out of tenderness to the life of the subject, and will generally advise the prisoner to retract it, and plead to the indictment.

CHAPTER XXVII.

OF PLEA AND ISSUE.

THE plea of the prisoner 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.

I. A plea to the *jurisdiction* is where an indictment is taken before a court that has no cognizance of the offence. If, for example, a man be indicted for a rape at the quarter-sessions, he may except to the jurisdiction of the court without answering to the charge. But this plea is rarely resorted to, as the defendant may take advantage of it under the general issue; or if the objection appear on the record, he may demur, move in arrest of judgment, or bring error. If the offence was committed within its jurisdiction, but the court has not cognizance of it, the defendant may either demur, or the Queen's Bench Division, upon the indictment being removed by *certiorari*, will quash it.

II. A demurrer is incident to criminal cases, as well as civil,

* Standing mute of malice was, in treason, petit larceny, and in all misdemeanors equivalent to conviction. But in felonies the prisoner received the terrible sentence of *peine forte et dure*, that is, he was pressed to death (hence the *press-yard* in Newgate); unless in the meantime he pleaded. By being pressed to death, attainder and the consequent forfeiture were avoided. By 12 Geo. III. c. 20, standing mute in felony was made equivalent to conviction; but it was not till 7 & 8 Geo. IV. c. 28, that the courts were authorized to enter a plea of "not guilty."

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, or whatever the crime is alleged to be. Thus, if a man be indicted for *feloniously* stealing a cat, he may demur to the indictment; denying it to be felony, though he confesses the act of taking it. And if, on demurrer, the point of law be adjudged *against* him, he shall have judgment as if convicted by verdict. But the court may, and generally does, permit an accused to plead over after judgment against him on demurrer.

III. A plea in *abatement* may be for a *misnomer*, or a false addition to the prisoner. As, if *James* Allen, *gentleman*, is indicted by the name of *John* Allen, *esquire*, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an esquire. Formerly, if either fact was found by the jury, the indictment abated; but, in the end, there was little advantage accruing to the prisoner; because a new indictment might be framed. And such pleas are in practice unknown; as the court may now amend all such defects.

A good answer to the charge may be made by one or other of

IV. Three *special pleas in bar*; which allege a reason why the prisoner ought not to answer the indictment at all, nor put himself upon his trial for the crime alleged. These are,

Firstly, the plea of *auterfois acquit*, or a former acquittal, grounded on the maxim of the law, that no man is to be brought into jeopardy more than once for the same offence. And therefore, when a man is once fairly found not guilty, he may plead such acquittal in bar of any subsequent accusation for the same crime.

Secondly, the plea of *auterfois convict*, or a former conviction for the same identical crime, though no judgment was ever given. This depends upon the same principle as the former, that no man ought to be twice brought in danger for one and the same crime. A conviction of manslaughter is accordingly a bar to a subsequent indictment of murder; for the fact prosecuted is the same in both, though the offences differ in degree. On the same principle, certificates of conviction or discharge for assaults or batteries, or under the statutes giving magistrates summary

jurisdiction in the case of juvenile offenders, and over petty larcenies, are a bar to further proceedings, and are in the nature of pleas of *auterfois convict* or *auterfois acquit*.

Thirdly, a *pardon* at once destroys the end and purpose of the indictment, by remitting that punishment which the prosecution is calculated to inflict.

V. The substantial answer to the charge is usually the general issue, or plea of *not guilty*. In case of an indictment of felony or treason, there can be no *special* justification put in by way of plea. On an indictment for murder, for instance, a man cannot *plead* that it was in his own defence against a robber on the highway, or a burglar; he must plead not guilty, and give this special matter in evidence. For as the facts in treason are said to be done *proditorie et contra ligeantiæ suæ debitum*, and in felony, that the killing was done *felonice*; these charges are the very *yist* of the indictment, and must be answered directly, by the general negative; and the jury will take notice of any defensive matter, and give their verdict accordingly, as effectually as if it were, or could be, specially pleaded.

When the prisoner has thus pleaded *non culpabilis*, the clerk of the court, on behalf of the crown, is supposed to reply that the prisoner is guilty, and that he is ready to prove him so, whereby the crown and the prisoner are at once *at issue*; for by that plea the prisoner, without further form, is deemed to put himself upon the country for trial.

CHAPTER XXIII.

OF TRIAL AND CONVICTION.

THE different kinds of trial recognized by law were formerly more numerous than at present, through the superstition of our Saxon ancestors; who were extremely addicted to divination, a character which Tacitus observes of the ancient Germans. They had several methods of purgation, to preserve innocence from the danger of false witnesses, in consequence of a notion that God would always interpose miraculously to vindicate the guiltless. The most ancient of these was that by *ordeal*: which

was either the *fire-ordeal* or the *water-ordeal*; both of which were abolished in 3 Hen. III. Another species of purgation, was the trial by the *corsned*, or morsel of execration; which gradually fell into disuse; though the remembrance of it still subsists in certain phrases of abjuration retained among the common people. The other species of ordeal, the trial by *battel*, was introduced by the Normans, and was not formally abolished till 1818. There remain now only two species of trial, viz., that by parliament and that by jury.

A trial by the peers in the high court of parliament, or in the court of the lord high steward, is to be had when a peer is *indicted* for treason, misprision of treason, or felony; for in all other criminal prosecutions a peer shall be tried by jury. Of this trial, it need now only be said that, in the method of its proceedings, it differs little from the trial by jury, except that no *special verdict* can be given; because the lords of parliament are supposed to be judges sufficiently competent of the law that may arise from the fact; and except also that the peers need not all agree in their verdict; but the greater number, consisting of twelve at the least, will conclude and bind the minority.

The trial by jury, or the country, *per patriam*, is that trial by the peers of every Englishman. which, as the grand bulwark of his liberties, is secured to him by the great Charter: *nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale judicium parium suorum, vel per legem terræ.*

When therefore a prisoner on his arraignment has pleaded *not guilty*, and for his trial has put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto*; that is, jurors possessed of the requisite qualification, without just exception, and of the *visne* or neighbourhood; which is the body of the county where the fact was committed. This, before commissioners of *oyer* and *terminer* and gaol delivery, the sheriff does by virtue of a general precept directed to him beforehand; and therefore it is there usual to try all felons immediately or soon after their arraignment. But the court may always adjourn the trial upon such terms as to bail or otherwise as seems meet; and in cases of high treason some delays must take place; in

order that the prisoner may have a copy of the indictment, and of the panel of jurors, and a list of the witnesses against him, the better to prepare him to make his challenges and defence.

But no person indicted for felony is entitled to copies of the indictment and lists of witnesses and jurors, before the time of his trial. Yet any person committed for trial, or admitted to bail, may require and is entitled to have copies of the depositions on which he has been committed or bailed. And in offences not amounting to felony, the defendant is entitled to a copy of the indictment. In prosecutions for misdemeanors instituted by the attorney-general, the court is bound to order a copy of the information or indictment to be delivered, after appearance, to the party prosecuted, free of expense to him.

When the case is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by either party.

Challenges may be made, either on the part of the crown, or on that of the prisoner; and either to the whole array, or to the separate polls, for the same reasons that they may be made in civil causes. For it is here at least as necessary as there, that the sheriff be totally indifferent; and that the particular jurors should be *omni exceptione majores;* not liable to objection either *propter honoris respectum, propter defectum, propter affectum,* or *propter delictum.*

Challenges upon any of these accounts are styled challenges *for cause;* which may be without stint in both criminal and civil trials. But in criminal cases, or at least in capital ones, there is, *in favorem vitæ,* allowed to the prisoner an arbitrary and capricious challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge: a provision grounded on two reasons. 1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice. 2. Because upon challenges for cause shown, if the reason assigned prove

insufficient to set aside the juror, perhaps the bare questioning his indifference may provoke resentment; to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

This privilege of peremptory challenges, though granted to the prisoner, is denied to the crown, who can challenge no jurors without assigning cause; but the crown need not assign cause till all the panel is gone through, and unless there cannot be a full jury without the person so challenged. And then, and not sooner, the counsel for the crown must show cause: otherwise the juror shall be sworn.*

The peremptory challenges of the prisoner must, however, have some reasonable boundary; which was by the common law thirty-five; that is, one under the number of three full juries: the law considering that he who peremptorily challenged a greater number, could have no intention to be tried at all. This number has been reduced to *twenty*, and every peremptory challenge beyond it is void, so that the trial then proceeds as if no such challenge had been made.

If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded as in civil causes, till the number of twelve is sworn, "well and truly to try, and true deliverance make, between our "sovereign lady the queen, and the prisoner whom they have "in charge; and a true verdict to give, according to the "evidence."

When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled by the counsel for the crown, or prosecution; the prisoner or his council being permitted to cross-examine the witnesses as in civil cases.*

* Where there is a challange for cause, two persons in court, not of the jury, are sworn to try whether the juryman challenged will try the prisoner indifferently. Evidence is then produced to support the challenge; and according to the verdict of the two tryers, the juryman is admitted or rejected. A juryman was thus set aside in O'Coigly's trial for treason, because, upon looking at the prisoners, he had uttered the words "damned rascals."

† It was only by 6 and 7 Will. IV. c. 14, that prisoners charged with *felony* were permitted the assistance of *counsel*, it being a settled rule at common law that no counsel should be allowed such prisoners, unless some

The doctrine of evidence upon pleas of the crown is, in most respects, the same as that upon civil actions. There are, however, a few leading points wherein a difference is made between civil and criminal evidence.

Firstly, in all cases of treason, and misprision of treason, *two* lawful witnesses are required to convict a prisoner. And both witnesses must be to the same overt act of treason, or one to one overt act, and the other to another overt act, of the same species of treason: and no evidence is admitted to prove any overt act not expressly laid in the indictment. And therefore in Sir John Fenwick's case, in the time of William III., where there was but one witness, an act of parliament was made on purpose to attaint him of treason, and he was executed.

Secondly, it has long been usual in criminal courts to admit an accomplice to become a witness, or, as it is termed, *queen's evidence*, against his fellows; upon an implied confidence, that if such accomplice makes a full and complete discovery, without prevarication or fraud, he shall not himself be prosecuted. There is no positive rule for distinguishing between the weight to be given to the evidence of accomplices in comparison with other witnesses; but juries are always recommended not to convict prisoners on their uncorroborated testimony.

Thirdly, in criminal proceedings, husbands and wives are not admitted to give evidence for or against each other. Thus the wife cannot be called to prove her marriage when the husband is indicted for bigamy, so a husband is not admissible to prove that his wife and others conspired to procure his marriage without the consent of his parents. But on this rule a necessary exception is engrafted, in those cases, namely, where a crime has been committed by the one against the other. A wife therefore is a competent witness to prove a forcible abduction and marriage; or an assault upon her by the husband; or that he assisted at a rape committed on her person; or in general for any offence against her liberty or person.

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point of law arose proper to be debated, when they were *entitled* to the assistance of counsel. It seems difficult to believe that such ever was the law; and the change, it may be added, was opposed by nearly all the judges.

Fourthly, the depositions of witnesses duly taken before the committing justices are admissible in evidence on the trial of the accused, if it is proved that the person making such deposition is dead, or is so ill as not to be able to travel, and also that the deposition was taken in the presence of the accused, and that he or his counsel or solicitor had a full opportunity of cross-examining the witness.

Fifthly, all presumptive evidence of felony is to be admitted cautiously: for the law holds that it is better that ten guilty persons escape, than that one innocent suffer. Two rules are specially 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.

Sixthly, confessions or acknowledgments of guilt, as distinguished from admissions in civil transactions, from a distinct head of evidence in criminal trials. The requisite formalities which must be attended to, in order to render the statements of accused persons made before the committing justices admissible in evidence against them on the trial, have been mentioned. Other statements of the accused, *voluntarily* made to any person either before or after his apprehension, and whether verbal or in writing, may be proved against him; although, as a rule, evidence of oral confessions of guilt ought to be received *with great caution*.

Seventhly, dying declarations form a species of evidence admissible only in the single instance of *homicide*, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration. The principle on which this evidence is admitted is, that such declarations made in extremity, when the party is at the point of death and every hope of this world gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, have, although made in the absence of the accused, the weight of testimony given on oath in his presence. And it is accordingly essential to the admissibility of these declarations, firstly, that at the time they were made the declarant should have been in actual danger of death;

secondly, that he should then have had a full apprehension of his danger: and thirdly, that death should have ensued.

Lastly, the defendant in criminal cases is allowed to call witnesses to prove that he has previously borne a general good character—for honesty, if the charge be one involving larceny, embezzlement, or fraud, or for peaceable demeanor, if it include an accusation of personal violence. Such testimony is important, as leading to the inference that a man of those previous habits would refrain from any such violation of the law. But it is, from its very nature, evidence to which the jury ought only to attach weight, when that adduced for the prosecution is not of a decisive character; for the crown cannot contradict it by affirmative proof of particular immoral acts, but only by calling witnesses to give a general bad character.

It occasionally happens during the trial, and more particularly at the close of the case for the prosecution, that objections are taken on behalf of the prisoner, that the facts proved do not amount to the offence charged; or that the evidence in support of the indictment does not justify a conviction. At an earlier stage of the case, objections are not unfrequently offered to the admissibility or to the rejection of evidence; any one of which may give rise to questions too difficult for the immediate determination of the court. If so, the question may be reserved for the consideration of the judges of the High Court, who are required to hold a *Court for the consideration of crown cases reserved*, and in open court to deliver their judgment, reversing, affirming, or amending that already given, or where the conviction is affirmed and no judgment has been already given, directing when and where it shall be given. The reservation of a question in this way does not interfere with the course of the trial, for it is only in the event of a conviction that it becomes necessary. Nor does it clash, with the corrective jurisdiction of the courts of appeal; for the judges who determine these reserved questions merely assist with their opinion, the determination of the court below, in whose discretion is vested the reservation of the question, and to which the judgment, if the conviction be affirmed, is wholly left.

When the evidence for the prosecution is closed, the counsel for the crown, in the event of the prisoner expressing his inten-

tion to adduce evidence, is at liberty to address the jury. The case for the defence is then opened, and the evidence adduced, the counsel for the prisoner recapitulating its effect to the jury at the close; and the counsel for the crown then replies. If the prisoner does not intend to adduce evidence, his counsel is heard immediately on the close of the evidence for the prosecution; the counsel for the crown rarely, in such cases replying. The judge next sums up the whole to the jury; who cannot then be discharged, unless in cases of evident necessity, till they have given in their verdict; but are to consider of it, and deliver it in, with the same forms, as upon civil causes: only they cannot, in a criminal case which touches life or member, give a *privy* verdict. And such verdict 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. This is where they *doubt* the matter of the law, and therefore *choose* to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths.

If the jury find the prisoner not guilty, he is then for ever quit and discharged of the accusation. And upon such his acquittal, or discharge for want of prosecution, he shall be immediately set at large. But if the jury find him guilty, he is then *convicted* of the crime whereof he stands indicted. Which conviction, therefore, may accrue in two ways; either by his confessing the offence and pleading guilty, or by his being found so by the verdict of his country.

If a prisoner, charged with a felony not punishable with death, has been before convicted of felony, the indictment generally charges him with having committed the offence *after having been previously convicted of felony*; the legislature having, in order to secure the more exemplary punishment of such offenders, conferred powers on the courts to pass a sentence of greater severity than that which may be imposed for the single offence. But although a prisoner is so charged, the jury are only directed to inquire whether he is guilty or not guilty o

the particulaar crime alleged; and it is only when they have found the prisoner guilty of the subsequent offence, that they are then, if the prisoner disputes it, further informed of, or charged to inquire concerning the previous conviction.

When the offender is convicted, there are two collateral circumstances that immediately arise, the first relating to the *costs of the prosecution*; the second, in cases of larceny, to the *restitution of the stolen property.*

1. On a conviction, or even upon an acquittal where there was a reasonable ground to prosecute for any larceny or other felony, the reasonable expenses of the prosecutor and witnesses are allowed. These include the expenses incurred in their attendance before the magistrate; which latter may be allowed even if no bill of indictment be preferred. The same rule prevails in prosecutions for those *misdemeanors* which partake of the nature of *crimes.*

No costs or expenses were allowed to an accused or his witnesses out of the public purse, until quite recently; notwithstanding repeated complaints by prisoners, that they were unable by reason of poverty to call witnesses on their behalf. This injustice has now been remedied. In all cases where the accused calls witnesses before the magistrate and their evidence is reduced to writing, and made part of the depositions, and they are bound by recognizance to appear at the trial, and do so appear, the court has the same power to order payment to them for their expenses and loss of time as in the case of witnesses for the prosecution.

2. By the common law there was no restitution of goods upon an indictment, because it is at the suit of the crown only; and therefore it was provided by 21 Hen. VIII. c. 11, which has been re-enacted and extended by modern statutes, that if any person was convicted of larceny, by the evidence of the party robbed, he should have full restitution of his money, goods, and chattels; or the value of them out of the offender's goods, if he had any. Upon which it is held that upon indictments of larceny, a writ of restitution reaches the goods so stolen, notwithstanding the property of them is endeavoured to be altered by sale in market overt. And though this may seem somewhat

hard upon the buyer, yet the rule of law is, that *spoliatus debet, ante omnia restitui*; especially when he has used all the diligence in his power to convict the felon. The case being reduced to this hard necessity, that either the owner or the buyer must suffer, the law prefers the right of the owner, who has done a meritorious act by pursuing a felon to punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction. And it is therefore usual for the court upon the conviction of the offender to order the immediate restitution of the stolen property to the prosecutor. But such restitution cannot be directed in the case of any valuable security *bonâ fide* paid or discharged by any person liable to the payment thereof, or of any negotiable instrument *bonâ fide* taken for a valuable consideration, without any reasonable cause to suspect that the same has been stolen. Without any writ of restitution, however, the party whose property has been stolen may peaceably retake his goods, wherever he happens to find them; or may bring an action and recover satisfaction in damages. But such action lies not before prosecution; for so felonies would be made up and healed; and also recaption is unlawful, if it be done with intention to smother or compound the larceny; it then becoming the offence of theftbote, mentioned in a former chapter. The hardship on the innocent buyer may be mitigated in cases where the convict is possessed of means, by the power conferred on the court of ordering a sum not exceeding 100*l.* to be paid as compensation to any person who has suffered loss through the felony.

It is not uncommon, when a person is convicted of a misdemeanor immediately affecting the individual, as a battery, imprisonment, or the like, for the court to permit the defendant to *speak with the prosecutor*, before any judgment is pronounced; and if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuity of a civil action. But it is a dangerous practice. For even a forgiveness, by the party injured, ought not in true policy to intercept the stroke of justice. "This," says the Marquis Beccaria, who pleads with equal strength for the *certainty* as for the *lenity* of punishment, "may be an act of

"good-nature and humanity, but it is contrary to the good of "the public; for, although a private citizen may dispense with "satisfaction for his private injury, he cannot remove the "necessity of public example. The right of punishing belongs "not to any one individual in particular, but to the society in "general, or the sovereign who represents that society: and a "man may renounce his own portion of this right, but he "cannot give up that of others."

CHAPTER XXIX.

OF JUDGMENT AND ITS CONSEQUENCES.

When, upon a charge of *felony*, the jury have brought in their verdict of guilty, in the 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.* Where the defendant has been found guilty of a *misdemeanor*, the trial of which may, and sometimes does, happen in his absence, after he has once appeared, a *capias* may be awarded to bring him in to receive judgment; and if he absconds, he may be prosecuted to outlawry; or if he is under recognizances to appear, and makes default, the recognizances may be estreated, and a warrant issued for his apprehension.

But where the defendant appears in person, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, in *arrest* or stay of judgment. And if his objection be valid; if, for instance, he has been found guilty of what does not constitute an offence in point of law, the judgment will be arrested, and the whole proceedings be set aside. A *pardon* also may be pleaded in arrest of judgment.

If these resources fail, the court must pronounce that judgment which the law has annexed to the crime. Of these some are capital, and consist in being hanged by the neck till dead. Other circumstances of terror, pain, or disgrace, were formerly superadded, as in high treason, being drawn to the place of

* It was at this point of the proceedings that the prisoner was entitled to *pray his clergy*.

execution, beheaded and quartered. In treason and murder, burial within the precincts of the prison is part of the sentence. Some punishments consists in loss of liberty, by perpetual or temporal *penal servitude* or *imprisonment;* and some induce a disability of holding offices or employments. Thus any person convicted of treason or felony and sentenced to death, penal servitude, or an mprisonment, with hard labour, exceeding twelve months, thereby forfeits any military, naval, or civil office he holds under the crown, or any other public employment he had, or any ecclesiastical benefice, or any office or emolument in any university or college which he holds, or any pension or superannuation allowance he is entitled to, unless he receives a free pardon within two months of his conviction, or before the vacancy, if it be an office, is filled up. He remains, until he shall have suffered his punishment or been pardoned, incapable of holding any public office or benefice, or of exercising any parliamentary or municipal suffrage. Some punishments are merely pecuniary, by stated or discretionary *fines;* and there are others, that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; such as *whipping* and *hard labour.* The latter for almost all offences now accompanies a sentence of imprisonment. *Solitary confinement* may also be ordered in almost every case of felony, and in many of the more aggravated misdemeanors; but can in no case exceed in duration one month at a time, or three months in the space of one year. *Flogging,* it will be recollected, may be ordered in cases of robbery with violence.

In almost all cases in which a criminal has been previously convicted of a similar offence, the punishment is usually much more severe; and in all cases in which a criminal is twice convicted, though it may be of different crimes, he may be subjected to the *supervision of the police,* for a period not exceeding seven years. This compels him to notify his residence, and every change of residence, to the chief officer of police of the district, and to report himself every month to that officer, or to such other person as he may direct; otherwise he may be taken up, and imprisoned for a year.

There were formerly some offences which involved mutilation or branding, but all these are now unknown to the law. The pillory has long ceased to be a punishment, fine and imprison-

ment, or both, having been substituted for it in cases where it was the only punishment to be inflicted. The stocks and ducking-stool have long been disused; the whole tendency of modern legislation being to obtain, if possible, the reformation of the offender.

For this purpose *Reformatory Schools* have been established; to which *juvenile offenders*, that is, convicted prisoners who appear to be less than sixteen years of age, may be sent, if necessary, for a period of five years, their parents, if able, being obliged to contribute to their support; the managers of these institutions having power, after a certain time, to grant licences permitting the offender to live with a trustworthy and respectable person, and afterwards, with his own consent, to apprentice him to some trade or calling or service, so as to enable him, if so disposed, to return to and become a useful member of society; benefits which he may forfeit by a disregard of the regulations of the school.

It is a special feature of the law of England, that the species, though not always the quantity or degree, of punishment is *ascertained* for every offence. If judgments were to be the private opinions of the judge, men would be slaves to the magistrates. Where an established penalty is annexed to crime the criminal may read its certain consequence in that law; which ought to be the unvaried rule, as it is the inflexible judge, of his actions. The discretionary fines and discretionary length of imprisonment, which may be imposed, may seem an exception to this rule. But the *discretion* of the court is regulated by law. The Bill of Rights expressly declares that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted. The same statute adds that all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void. And the reasonableness of fines in criminal cases is also regulated by *Magna Charta*, c. 14, that "no man shall have a larger amercement imposed upon "him than his circumstances or personal estate will bear; saving "to the landholder his contenement, or land; to the trader his "merchandize; and to the countryman his wainage, or team "and instruments of husbandry."

Formerly, when sentence of death was pronounced, the criminal was said to be *attainted*, attinctus, stained, or blackened:

he was no longer of any credit; he could not be a witness; neither was he capable of performing the functions of another man: for he was dead in law. And the consequences of this attainder were *forfeiture* and *corruption of blood.*

Forfeiture was twofold; of real and personal estates.

As to *real* estates, by attainder in *high treason* a man forfeited to the crown all his lands and tenements of inheritance, and all his rights of entry; and also the profits of all lands and tenements, which he had for life or years. This forfeiture related backwards to the time of the treason committed: so as to avoid all intermediate sales and incumbrances, but not those before the fact; and was founded in this consideration, that he who had violated the fundamental principles of government, had abandoned his connections with society; and had 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.

By attainder for *felony*, the offender forfeited the profits of all estates of freehold during life; and by attainder for *murder* he forfeited after his death all his lands and tenements in fee simple, but not those in tail, to the crown, for a very short period of time: say for a year and a day, during which time the crown might commit therein what waste he pleases; which was therefore called the king's *year, day,* and *waste.*

This forfeiture for felony arose upon attainder; and, therefore, a *felo de se* forfeited no lands of inheritance or freehold, for he never was attainted. It likewise related back to the time of the offence committed; so as to avoid all intermediate charges and conveyances.

As to *personal* estates; a forfeiture accrued in every one of the higher kinds of offence: in treason or misprision thereof, felonies of all sorts, self-murder or felony *de se*, larceny, and the offence of striking, &c., in Westminster Hall; and the property vested in the crown *without office found.*

The other consequence of attainder was the *corruption of blood*, both upwards and downwards; so that an attainted person could neither inherit lands from his ancestors, nor retain those

he was already in possession of, nor transmit them by descent to any heir; but the same escheated to the lord of the fee, subject to the sovereign's superior right of forfeiture: and the person attainted obstructed all descents to his posterity, wherever they were obliged to derive a title through him to a remoter ancestor. This was one of those notions adopted from the feudal constitutions, at the time of the Norman Conquest; as appears from its being unknown in those tenures which are indisputably Saxon. When almost every other oppressive mark of feudal tenure had been happily worn away, it was high time that this *corruption of blood*, with all its connected consequences, not only of present escheat, but of future incapacities of inheritance even to the twentieth generation, should likewise be abolished. Nevertheless, it was only by 3 & 4 Will. IV. c. 106, that this object was effected; so that the attainder of any ancestor no longer prevents any person from inheriting, who would otherwise have been capable of doing so.

This modification of the law has been followed by still more extensive changes, whereby the law of forfeiture has been altogether superseded by more lenient and merciful provisions; attainder, corruption of blood, forfeiture, and escheat in cases of treason or felony have been entirely abolished, and the crown enabled to appoint an administrator of the convict's property, who may deal with it by lease, sale, mortgage, or transfer during the time he is undergoing his sentence, pay his debts and liabilities, compensate persons who have sustained injury by his crime, and make allowances to his family and relatives dependent on him for support. Upon his death, bankruptcy, or having undergone his punishment or received a pardon, his property is to revert to him or his representatives, or other person entitled.

The forfeiture consequent on *outlawry* still remains, for an offender cannot be allowed to set the laws of his country at defiance, and yet remain in the enjoyment of the property which those laws give him.

CHAPTER XXX.

OF REVERSAL OF JUDGMENT, REPRIEVE AND PARDON.

JUDGMENTS may be set aside; either, 1. By falsying or reversing the judgment; 2. By reprieve; 3. By pardon.

1. A judgment may be reversed, either *without* or *by* a writ of error. It may be reversed or avoided *without a writ of error*, for matters foreign to or *dehors* the record, that is, not apparent upon the face of it; so that they cannot be assigned for error. Thus, if judgment be given by persons who had no good commission to proceed against the person condemned, it is void; and may be falsified by showing the special matter without writ of error. As, where a commission issues to A and B, and twelve others, or any two of them, of which A or B shall be one, to take and try indictments; and any of the other twelve proceed without the interposition or presence of either A or B; in this case all proceedings, and judgments are void for want of authority in the commissioners, and may be falsified upon bare inspection without a writ of error.

Judgment may be reversed *by writ of error:* which lies from all inferior criminal jurisdictions to the Queen's Bench division; from the Court of Appeal; from which there is a further appeal to the House of Lords. Error may be brought for mistakes in the indictment, as when the offence is improperly or insufficiently described therein, or in the judgment or other parts of the record; as where a man is found guilty of perjury and receives the judgment of felony. Writs of error, to reverse judgments in cases of *misdemeanor*, are not allowed of course, but on probable cause shown to the attorney-general; and then they are understood to be grantable of common right, *ex debito justitiæ*. But writs of error to reverse judgments in cases of felony are only allowed *ex gratiâ*; and not without express warrant under the royal sign manual, or at least by the consent of the attorney-general.

The effect of reversing an *outlawry*, is that the party is in the

same plight as if he had appeared; and, if it be before plea pleaded, he shall be put to plead; if after conviction, he shall receive sentence. But when judgment pronounced upon conviction, is reversed, all former proceedings are absolutely set aside; and the party stands as if he had never been at all accused. He still remains liable to another prosecution for the same offence; for the first being erroneous, he never was in jeopardy thereby.

2. The execution of the judgment may be avoided by a reprieve, which from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time; whereby its execution is suspended. This may be, first, *ex arbitrio judicis;* either before or after judgment; as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give time to apply for a pardon. Or, secondly, *ex mandato regis*, from the mere pleasure of the crown; which is the mode in which reprieves are generally granted, through the intervention of one of the secretaries of state.

Reprieves may also be *ex necessitate legis:* as, where a woman is capitally convicted, and pleads pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons to inquire into the fact; and if they bring in their verdict *quick with child*, execution shall be stayed generally till either she is delivered, or proves by the course of nature not to have been with child at all.

Another cause of regular reprieve is, if the offender become *non compos* between the judgment and the award of execution; for though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution; for the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule, when any time intervenes between the conviction and the award of execution, to demand of the prisoner what he has to allege, why

execution should not be awarded against him; and if he appears to be insane, the judge in his discretion may and ought to reprieve him.

3. The last resort is a *pardon*. Law cannot be framed on principles of compassion to guilt; yet justice is bound to be administered in mercy. And the crown, therefore, may pardon directly all offences that are merely against itself or the public. Against the crown or the public, be it observed, because, 1. The committing any man to prison out of the realm is, by the *Habeas Corpus* Act, a *præmunire* and *unpardonable*. 2. The crown cannot pardon where private justice is principally concerned in the prosecution; therefore the crown cannot pardon a common nuisance, while it remains unredressed, or so as to prevent an abatement of it, though the fine may afterwards be remitted. Neither can the crown pardon an offence against a popular or penal statute, after information brought: for thereby the informer has acquired a private property in the penalty; but here also the crown can remit the penalty, and thereby deprive the informer of the proceeds of his judgment.

There is also a restriction on the prerogative of pardoning in the case of parliamentary impeachments; viz., that the royal pardon cannot be *pleaded* to any such impeachment, so as to stop the prosecution of great offenders; it being enacted by the Act of Settlement, "that no pardon under the Great Seal of England "shall be *pleadable* to an impeachment by the commons in "parliament." But, after the impeachment has been determined it is not understood that the royal grace is further restrained: for, after the attainder of the rebel lords in 1715, three of them were from time to time reprieved, and at length received a pardon.

A pardon must, formerly, have been issued under the great seal; but it is now granted by warrant under the sign manual, countersigned by one of the secretaries of state. It may be *absolute* or *conditional*: that is, the sovereign may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend: and this by the common law. When granted, it may be pleaded, as has been pointed out, upon arraignment, or in arrest of judgment, or finally in bar of execution, as the circumstances require.

CHAPTER XXXI.

OF EXECUTION.

Execution is the completion of human punishment. In all cases not capital, the custody of prisoners under sentence is now in the gaoler, who is for this purpose the officer of the Government and under its direction and control. In capital cases, executions must be performed by the sheriff or his deputy. His warrant was anciently by precept under the hand and seal of the judge, as it still would be in the court of the lord high steward, in the execution of a peer, though in the court of the peers in parliament, it is done by writ from the crown. It is now the usage for the judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, a copy of which is left with the sheriff. For a capital felony, the verdict of death is written opposite to the prisoner's name; and this is the only warrant that the sheriff has for so material an act as taking away the life of another.

The sheriff is to do execution within a convenient time; the time being by law no part of the judgment. The *place* of execution is within the walls of the prison in which the criminal is confined.

The sheriff cannot alter the manner of the execution by substituting one death for another, without being guilty of felony himself. Even the crown could not change the punishment of the law, by altering hanging into beheading; though when beheading was part of the sentence, the king might remit the rest.

When Lord Stafford was executed in the reign of Charles II., the sheriffs of London, having received the King's writ for beheading him, petitioned the House of Lords for a command from their Lordships how the said judgment should be executed; for, he being prosecuted by impeachment, they professed to entertain a notion which is said to have been countenanced by Lord Russel, that the King could not pardon any part of the sentence. The lords resolved that the scruples

of the sheriffs were unnecessary, and declared that the King's writ ought to be obeyed. Disappointed of raising a flame in that assembly, they immediately signified to the House of Commons by one of the members, that they were not satisfied as to the power of the said writ. That house took two days to consider of it; and then sullenly resolved that the house was *content* that the sheriffs do execute Lord Stafford by severing his head from his body. It is related, that when afterwards the said Lord Russel was condemned for high treason upon indictment, the King, while he remitted the ignominious part of the sentence, observed, "that his lordship would now find he was possessed of "that prerogative which in the case of Lord Stafford he had denied "him." One can hardly determine which most to disapprove of, the indecent and sanguinary zeal of the subject, or the cool and cruel sarcasm of the sovereign.

To conclude: it is clear that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the sheriff must hang him again. For the former hanging was no execution of the sentence; and if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue.

This is the *last* stage of criminal proceedings, or execution, the end and completion of human *punishment*, which was the sixth and last head to be considered under the division of *public wrongs* the fourth and last object of the laws of England.

CHAPTER XXXII.

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

In the following chapter an attempt is to be made to mark out some outlines of English juridical history, by a chronological review of the state of our laws, and their successive mutations at different periods of time. And the several periods, under which our legal polity may be best considered seem to be the following six: 1. From the earliest times to the Norman Conquest; 2. From the Norman Conquest to the reign of Edward I.; 3.

From thence to the Reformation; 4. From the Reformation to the Restoration; 5. From thence to the Revolution in 1688; 6. From the Revolution to the present time.

1. And, first, with regard to the ancient Britons, the *aborigines* of our island, so little has been handed down to us concerning them with any tolerable certainty, that our inquiries here must needs be very fruitless and defective. However, from Cæsar's account of the tenets of the ancient Druids in Gaul, in whom centred all the learning of these western parts, and who were as he tells us, sent over to Britain to be instructed, we may collect a few points, which bear a great affinity and resemblance to some of the modern doctrines of our law. Particularly, the very notion itself of an oral unwritten law, delivered down from age to age, by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing; possibly for want of letters; since it is remarkable that in all the antiquities, unquestionably British, which modern industry has discovered, there is not in any of them the least trace of any character or letter to be found. The partible quality of lands by the custom of gavelkind is undoubtedly of British origin. So likewise is the ancient division of the goods of an intestate between his widow and children, or next of kin; and so is an instance of a slighter nature of a custom continued from Cæsar's time almost to the present day; that of burning a woman guilty of the crime of petit treason by killing her husband.

The great variety of nations that successively broke in upon the British inhabitants, the Romans, the Picts, and, after them, the Saxons and Danes, must have caused great confusion and uncertainty in the laws of the kingdom; as they were very soon incorporated and blended together, and therefore it may be supposed mutually communicated to each other their respective usages, in regard to the rights of property and the punishment of crimes. So that it is next to impossible to trace out, with accuracy, *when* the several mutations of the common law were made, or what was the origin of the several customs at present used. It can seldom be said that *this* custom was derived from the Britons; *that* was left behind by the Romans; *this* was a necessary precaution against the Picts; *that* was introduced by

the Saxons, discontinued by the Danes, but afterwards restored by the Normans.

Wherever this can be done, it is matter of great curiosity and some use; but this can very rarely be the case; not only from the reason above mentioned, but also from many others. *Firstly*, from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice: so that, though upon comparison the alteration of the law from what it was five hundred years ago may be plainly discerned, yet it is difficult to define the precise period in which that alteration accrued. *Secondly*, this becomes impracticable from the antiquity of the kingdom and its government; which alone, though it had been disturbed by no foreign invasions, would make it impossible to search out the origin of its laws. *Thirdly*, this uncertainty of the origin of particular customs must also in part have arisen from the means whereby Christianity was propagated in this island; viz., by learned foreigners brought over from Rome and other countries, who undoubtedly carried with them many of their own national customs, and probably prevailed upon the state to abrogate such usages as were inconsistent with religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cause of the existence of some rules not only of the Mosaic, but also of the imperial and pontifical laws, blended and adopted into our system.

A farther reason may also be given for the great variety, and of course the uncertain origin, of our ancient customs; even after the Saxon government was firmly established in this island; viz., the subdivision of the kingdom into a heptarchy, consisting of seven independent kingdoms, peopled and governed by different races. This must necessarily have created an infinite diversity of laws; even though all those colonies of Jutes, Angles, Anglo-Saxons, and the like, originally sprung from the same mother-country, the great northern hive, which poured forth its warlike progeny and swarmed all over Europe in the sixth and seventh centuries. This multiplicity of laws will necessarily be the case in some degree, where any kingdom is cantoned out into provincial establishments, and not under one common dispensation of laws, though under the same sovereign power. Much more will it happen, where seven

unconnected states are to form their own constitution and superstructure of government, though they all begin to build upon the same or similar foundations.

When, therefore, the West Saxons had swallowed up all the rest, and Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a great and necessary work, which he is said to have executed in as masterly a manner: no less than to new model the Constitution; to rebuild it on a plan that should endure for ages; and out of its old discordant materials, which were heaped upon each other in rude irregularity, to form one uniform and well-connected whole. This he effected by reducing the whole kingdom under one regular and gradual subordination or government, wherein each man was answerable to his immediate superior for his own conduct and that of his nearest neighbours; for to him is owing that masterpiece of judicial polity, the subdivision of England into tithings and hundreds, if not into counties; all under the influence and administration of one supreme magistrate, the king; in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet communicating, ducts and channels; which wise institution has now been preserved for upwards of a thousand years. He also, like another Theodosius, collected, it is said, the various customs that he found dispersed in the kingdom, and digested them into one uniform system or code of laws, in his Dom-boc, or *liber judicialis*. This he compiled for the use of the court-baron, hundred, and county-court, the court leet, and sheriff's tourn; tribunals which he established for the trial of all causes, civil and criminal, in the very districts wherein the complaint arose: all of them subject, however, to be controlled, and kept within the bounds of the universal or common law by the king's own courts; which were then itinerant, being kept in the king's palace, and removing with his household in those royal progresses, which he continually made from one end of the kingdom to the other.

The Danish invasion, which introduced new customs, was a severe blow to this noble fabric: but a plan so excellently concerted could never be long thrown aside. So that, upon the expulsion of these intruders, the English returned to their

ancient law; retaining, however, some few of the customs of their late visitants; which went under the name of *Dane-Lage*; as the code compiled by Alfred was called the *West-Saxon-Lage*; and the local constitutions of the ancient kingdom of Mercia, which obtained in the counties nearest to Wales, and were called the *Mercen-Lage*. And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm: the provincial polity of counties, and their subdivisions, having never been altered or discontinued through all the shocks and mutations of government, from the time of its first institution; though the laws and customs therein used have often suffered considerable changes.

For Edgar, observing the ill effects of three distinct bodies of laws prevailing at once in separate parts of his dominions, projected and begun what his grandson the Confessor afterwards completed, viz., one uniform digest to be observed throughout the whole kingdom; being probably no more than a revival of Alfred's code, with some improvements suggested by necessity and experience; particularly the incorporating some of the Mercian customs, and also such of the Danish as were approved into the *West-Saxon-Lage*, which was still the ground-work of the whole. And this appears to be the most plausible conjecture of the origin of that admirable system of maxims and unwritten customs, which is now known by the name of the *common* law, as extending its authority universally over all the realm.

Among the most remarkable of the Saxon laws we may reckon, 1. The constitution of general assemblies of the principal and wisest men in the nation: the *witena-gemot*, or *commune consilium* of the ancient Germans, which was not yet reduced to the forms and distinctions of our modern parliament; without whose concurrence, however, no new law could be made, or old one altered. 2. The election of their magistrates by the people; originally even that of their kings, till experience evinced the convenience and necessity of establishing a hereditary succession to the crown. But that of all subordinate magistrates, their military officers, their sheriffs, the conservators of the peace, their coroners, their portreeves (since changed into mayors and bailiffs), and even their tythingmen and borsholders at the leet, continued, some till the Norman Conquest, others for two centuries after, and some remain to this day. 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; only that, perhaps, in case of a minority, the next of kin of full age would ascend the throne as king, and not as protector: though, after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the first offence, even the most notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment, perpetual bondage. 5. The prevalence of certain customs, as heriots and military services in proportion to every man's land, which resembled the feudal constitution; but yet were exempt from its hardships: and which may be well enough accounted for, by supposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and simplicity of the feudal law; before it got into the hands of the Norman jurists, who extracted the most slavish doctrines and oppressive consequences out of what was originally a law of liberty. 6. That their estates were liable to forfeiture for treason, but that the doctrine of escheats and corruption of blood for felony, or any other cause, was utterly unknown amongst them. 7. The descent of their lands to all the males equally, without any right of primogeniture; a custom which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman Conquest. 8. The courts of justice consisted principally of the county courts, and in cases of weight or nicety the king's court held before himself in person, at the time of his parliaments; which were usually holden in different places, accordingly as he kept the three great festivals of Christmas, Easter, and Whitsuntide. These county courts, however, differed from the modern ones, in that the ecclesiastical and civil jurisdiction were blended together, the bishop and the ealdorman or sheriff, sitting in the same county court; and also that the decisions and proceedings therein were much more simple and unembarrassed; an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. Trials among a people who had a very strong tincture of superstition, were permitted to be by *ordeal*, by the *corsnæd* or morsel of execration, or by *wager of law* with compurgators, if the party chose it; but frequently they were also by *jury*. Whether or

not their juries consisted precisely of twelve men, or were bound to strict unanimity, yet the general constitution of this most important guardian both of public and private liberty, we owe to our Saxon ancestors. Thus stood the general frame of our polity at the time of the Norman invasion.

II. This remarkable event wrought as great an alteration in our laws as it did in our ancient line of kings: and though the alteration of the former was effected rather by the consent of the people than by any right of conquest, yet that consent seems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards ensued.

1. Among the first of these alterations was the separation of the ecclesiastical courts from the civil: effected in order to ingratiate the new king with the clergy, who for some time before had been endeavouring all over Europe to exempt themselves from the secular power; and whose demands the Conqueror, like a politic prince, though it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people; and because all the little learning of the times was engrossed into their hands, which made them necessary men, and by all means to be gained over to his interests. And this was the more easily effected, because the disposal of all the episcopal sees being then with the king, he had taken care to fill them with Italian and Norman prelates.

2. Another violent alteration of the English constitution consisted in the depopulation of whole countries for the purpose of royal diversion; and subjecting both them and all the ancient forests of the kingdom to the unreasonable severities of forest laws imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man. In the Saxon times, though no man was allowed to kill or chase the king's deer, yet he might start any game, pursue, and kill it upon his own estate. But these new laws vested the sole property of all game in the king alone; and no man was entitled to disturb any fowl of the air, or any beast of the field, of such kinds as were specially reserved for the amusement of the sovereign, without express licence from the king, by a grant of a chase or free-warren; and those franchises were granted as

much with a view to preserve the breed of animals as to indulge the subject. From a similar principle to which, though the laws were long ago mitigated, and by degrees grew entirely obsolete, yet from this root sprung a bastard slip, known by the name of the game laws, until lately wantoning in the highest vigour; both founded upon the same unreasonable notions of permanent property in wild creatures, and both productive of the same tyranny to the commons; but with this difference, that the forest laws established only one mighty hunter throughout the land, the game laws raised a little Nimrod in every manor. And in one respect the ancient law was much less unreasonable than the modern: for the king's grantee of a chase or free-warren might kill game in every part of his franchise; but previously to 1831, though a freeholder of less than 100*l.* a year was forbidden to kill a partridge upon his own estate, yet nobody else, not even the lord of the manor, unless he had a grant of free-warren, could do it without committing a trespass, and subjecting himself to an action.

3. A third alteration in the English laws was by narrowing the remedial influence of the county courts, the great seats of Saxon justice, and extending the *original* jurisdiction of the king's justiciars of all kinds of causes, arising in all parts of the kingdom. To this end the *aula regis*, with all its multifarious authority, was erected; and a chief justiciary appointed, with powers so boundless, that he became at length a tyrant to the people, and formidable to the crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy: and the consequence was, the ordaining that all proceedings in the king's courts should be carried on in the Norman, instead of the English language. A provision the more necessary, because none of his Norman justiciars understood English: but as evident a badge of slavery as ever was imposed upon a conquered people. This lasted till Edward III. obtained a double victory, over the armies of France in their own country, and their language in our courts here at home. But there was one mischief too deeply rooted thereby, and which this caution of Edward came too late to eradicate. Instead of the plain and easy method of determining suits in the county courts, the chicanes and subtilties of Norman jurisprudence

had taken possession of the king's courts; to which every cause of consequence was drawn. Indeed that age, and those immediately succeeding it, were the era and refinement of subtilty. There is an active principle in the human soul that will ever be exerting its faculties to the utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and manners of the age and country, it may happen to find itself engaged. The northern conquerors of Europe were then emerging from the grossest ignorance in point of literature; and those who had leisure to cultivate its progress were such only as were cloistered in monasteries, the rest being all soldiers or peasants. And, unfortunately, the first rudiments of science which they imbibed, were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators; which were brought from the east by the Saracens into Palestine and Spain, and translated into barbarous Latin. So that, though the materials upon which they were naturally employed in the infancy of a rising state, were those of the noblest kind—the establishment of religion and the regulations of civil polity; yet having only such tools to work with, their execution was trifling and flimsy. Both the divinity and the law of those times were therefore frittered into logical distinctions, and drawn out into metaphysical subtilties, with a skill most amazingly artificial. Hence law, in particular, which ought to be a plain rule of action, became a science of the greatest intricacy; especially when blended with the refinements introduced by the Norman practitioners, with a view to supersede the more homely, but more intelligible, maxims of distributive justice among the Saxons. And, to say the truth, these scholastic reformers have transmitted their dialect and finesses to posterity, so interwoven in the body of our legal polity, that it is difficult now to take them out without a manifest injury to the substance. Statute after statute has been made, to pare off these troublesome excrescences, and restore the common law to its pristine simplicity and vigour, and the endeavour has partly succeeded; but still the scars are deep and visible, and the liberality of our modern courts of justice has frequently been obliged to have recourse to unaccountable fictions and circuities, in order to recover that equitable and substantial justice which for a long time was totally buried under the narrow

rules and fanciful niceties of metaphysical and Norman jurisprudence.

4. A fourth innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the northern nations; but first reduced to regular and stated forms among the Burgundi about the close of the fifth century; and from them it passed to other nations, particularly the Franks and the Normans; which last had the honour to establish it here, though clearly an unchristian, as well as most uncertain, method of trial.

5. But the last and most important alteration, both in our civil and military polity, was the engrafting on all landed estates, a few only excepted, the fiction of feudal tenure, which drew after it a numerous and oppressive train of servile fruits and appendages; aids, reliefs, primer seisins, wardships, marriages, escheats, and fines for alienation; the consequences of the maxim then adopted, that all the lands in England were derived from and holden, mediately or immediately, of the crown.

The nation at this period seems to have groaned under as absolute a slavery as was in the power of a warlike, an ambitious and a politic prince to create. The laws were administered in an unknown tongue; trial by jury gave way to the decision by battel; the forest laws restrained all rural pleasures and manly recreations: and in cities and towns, all company were obliged to disperse, and fire and candle to be extinguished, by eight at night, at the sound of the *curfeu*. The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites, who by a gradual progression of slavery were absolute vassals to the crown, and as absolute tyrants to the commons. Unheard-of forfeitures, talliages, aids, and fines were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And, to crown all, as a consequence of the tenure by knight-service, the king had always ready at his command an army of sixty-thousand knights or *milites:* who were bound upon pain of forfeiting their estates, to attend him in time of invasion, or to quell any domestic insurrection. Trade or foreign merchandize, such as it then was, was carried on by the Jews

and Lombards, and the very name of an English fleet, which Edgar had rendered so formidable, was utterly unknown to Europe: the nation consisting wholly of the clergy, who were also the lawyers; the barons, or great lords of the land; the knights or soldiery, who were the subordinate landholders; and the burghers or inferior tradesmen, who from their insignificance happily retained, in their socage and burgage tenure, some points of their ancient freedom. All the rest were villeins or bondmen.

From so complete a scheme of servility, it has been the work of generations to redeem themselves and their posterity into that liberty which we now enioy; and which, therefore, is not to be looked upon as consisting of mere encroachments on the crown, and infringements on the prerogative, as some writers in the seventeenth century endeavoured to maintain: but as a gradual restoration of that ancient constitution whereof our Saxon forefathers had been unjustly deprived, partly by the policy and partly by the force of the Norman. How that restoration has, in a long series of years, been step by step effected, is next to be explained.

William Rufus proceeded on his father's plan, and in some points extended it, particularly with regard to the forest laws. But his brother, and successor, Henry I., found it expedient when first he came to the crown, to ingratiate himself with the people, by restoring the laws of Edward the Confessor. He gave up by charter the great grievances of marriage, ward, and relief, the beneficial pecuniary *fruits* of his feudal tenures; but reserved the tenures themselves for the same military purposes that his father introduced them. He also abolished the *curfeu*; for, though it is mentioned in our laws a full century afterwards, yet it is rather spoken of as a known *time* of night than a still subsisting custom. There is extant a code of laws in his name, consisting partly of those of the Confessor, but with great additions and alterations of his own, and chiefly calculated for the regulation of the county courts. It contains some directions as to crimes and their punishments (theft being then made capital) and a few things relating to estates, particularly as to the descent of lands: which being by the Saxon laws equally to all the sons, by the feudal or Norman to the eldest only, Henry

here moderated the difference; directing the eldest son to have only the principal estate, "*primum patris feudum*," the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots: reserving, however, these ensigns of patronage, *congé d'élire*, custody of the temporalities when vacant, and homage upon their restitution. He lastly united again for a time the civil and ecclesiastical courts, which union was soon dissolved by his Norman clergy; and upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained as in his father's time; whence it may easily be perceived how far short this was of a thorough restitution of the Saxon laws.

Stephen promised much at his accession, especially with regard to redressing the grievances of the forest laws, but performed no great matter either in that or in any other point. It is from his reign, however, that is to be dated the introduction of the Roman civil and canon laws 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.

By the time of Henry II., if not earlier, the charter of Henry I. seems to have been forgotten: for the claims of marriage, ward, and relief, then flourished in full vigour. The right of primogeniture seems also to have been tacitly revived, being found more convenient for the public than the parcelling of estates into a multitude of minute subdivisions. However, in this prince's reign much was done to methodize the laws, and reduce them into a regular order; as appears from the treatise of Glanvil, which, though some of it be now antiquated and altered, yet, when compared with the code of Henry I., it carries a manifest superiority. Throughout his reign, also, was continued the struggle between the laws of England and Rome: the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter by the clergy. Which dispute was kept on foot till the reign of Edward I.; when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the present reign of Henry II., there are four things which peculiarly merit the attention of a legal antiquarian:

1. The constitutions of the parliament at Clarendon, A.D. 1164, whereby the king checked the power of the Roman Curia, and greatly narrowed the total exemption the clergy claimed from the secular jurisdiction: though his farther progress was stopped by the fatal event of the disputes between him and Archbishop à-Becket. 2. The institution of the offices of justices in eyre, *in itinere*; the king having divided the kingdom into six circuits, and commissioned these new-created judges to administer justice in the several counties. These remedies are said to have been then first invented; before which all causes were usually terminated in the county courts, according to the Saxon custom, or before the king's justiciaries in the *aula regis*, in pursuance of the Norman regulations. The latter of which tribunals, travelling about with the king's person, occasioned intolerable expense and delay to the suitors; and the former, however proper for little debts and minute actions, where even injustice is better than procrastination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of considerable moment. 3. The introduction and establishment of the grand assize, or trial by a special kind of jury in a writ of right, at the option of the tenant or defendant, instead of the trial by battel. 4. To this time must also be referred the introduction of escuage, or a pecuniary commutation for military service, which in time was the parent of the subsidies granted to the crown by parliament, and of the modern land-tax.

Richard I. enforced the forest laws with some rigour, which occasioned many discontents among his people; though he repealed the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed in hunting, probably finding that their severity prevented prosecutions. He is said to have composed a body of naval laws at the Isle of Oleron, which are still extant, and of high authority; for in his time it began again to be considered that, as an island, England was naturally a maritime power. But with regard to civil proceedings, nothing remarkable occurred in this reign, except a few regulations regarding the Jews, and the justices in eyre; the king's thoughts being chiefly taken up by the knight errantry of a Crusade.

In John's time, and that of his son Henry III., the rigours of

the feudal 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 John, and afterwards his son, consented to the two famous charters of English liberties, *Magna Charta* and *Charta de Forestâ*. Of these the latter was well calculated to redress many grievances and encroachments of the crown, in the exertion of forest law: and the former confirmed many liberties of the church, and redressed many grievances incident to feudal tenures, of no small moment at the time; though now, unless considered attentively and with this retrospect, they seem but of trifling concern. But besides these feudal provisions, care was also taken therein to protect the subject against other oppressions then frequently arising from unreasonable amercements, from illegal distresses, or other process for debts or services due to the crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in nearly the same manner as it remained till our own day; prohibited for the future the grants of exclusive fisheries; and the erection of new bridges so as to oppress the neighbourhood. With respect to private rights: it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; it laid down the law of dower; and prohibited appeals by women, unless for the death of their husbands.* In matters of public police and national concern: it enjoined an uniformity of weights and measures; gave new encouragements to commerce, by the protection of merchant strangers; and forbade the alienation of lands in mortmain. With regard to the administration of justice; besides prohibiting all denials or delays of it, it fixed the court of Common Pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits; it also corrected some abuses then incident to the trials by wager of law and of battel; directed the regular awarding of inquest for life or

* These appeals were a kind of prosecution for homicide by the person most aggrieved, in which the defendant might *wage battel*, an event which actually occurred in 1817.

member; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's tourn, and court-leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, lastly, which alone would have merited the title that it bears of the *great* charter, it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land.

However, by means of these struggles, the pope in the reign of John gained a still greater ascendant here than he ever had before enjoyed; which continued through the long reign of his son Henry III., in the beginning of whose time the old Saxon trial by ordeal was abolished. And by this time may be perceived, in Bracton's treatise, a still farther improvement in the method and regularity of the common law, especially in the point of pleadings. Nor must it be forgotten, that the first traces which remain of the separation of the greater barons from the less, in the constitution of parliaments, are found in the great charter of John; though omitted in that of Henry III.: and that it is towards the end of the latter of these reigns, that is found the first record of any writ for summoning knights, citizens, and burgesses to parliament. This concludes the second period of English legal history.

III. The third commences with the reign of Edward I., who has justly been styled the English Justinian. For the law now receives 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.

It would be endless to enumerate all the particulars of these regulations; but the principal 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 Roman Curia, 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, those of the King's Bench, Common Pleas, and Exchequer; so as they might not interfere with each other's proper business. 4. He settled the boundaries of the inferior courts in counties, hundreds, and manors: confining them to causes of no great amount, according to their primitive institution. 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, few of which are more ancient than the reign of his father, and those were by him collected. 9. He improved upon the laws of Alfred, by that great and orderly method of watch and ward, for preserving the public peace and preventing robberies, established by the statute of Winchester. 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 execution, not only upon goods and chattels, but also upon lands, by writ of *elegit*, which was of signal benefit to a trading people; and upon the same commercial idea he also allowed the charging of lands in a statute merchant, to pay debts contracted in trade, contrary to all feudal principles. 12. He effectually provided for the recovery of advowsons as temporal rights, in which before the law was extremely deficient. 13. He also effectually closed the great gulf in which all the landed property in 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; concerning the good policy of which modern times have, however, entertained a very different opinion. 15. He reduced all Wales to the subjection, not only of the crown, but in great measure of the laws of England (which was thoroughly completed in the reign of Henry VIII.); and seems to have entertained a design of doing the like by

Scotland, so as to have formed an entire and complete union of the island of Great Britain.

This catalogue might be much farther enlarged; but, upon the whole, it may be observed that the very scheme and model of the administration of common justice between party and party, was entirely settled by this king; and has continued nearly the same, in all succeeding ages to this day; abating some few alterations, which the humour or necessity of subsequent times has occasioned. The forms of original writs, by which actions were formerly commenced, were perfected in his reign and established as models for posterity. The pleadings consequent upon the writs, were then short, nervous, and perspicuous; not intricate, verbose, and formal, as they afterwards became. The legal treatises written in his time, as Britton, Fleta, Hengham, and the rest are, for the most part, law at this day; or at least *were* so, till the alteration of tenures took place. And, to conclude, it is from this period, from the exact observance of *Magna Charta*, rather than from its *making* or *renewal*, that the liberty of Englishmen began again to rear its head: though the weight of the military tenures hung heavy upon it for many ages after.

No better proof can be given of the excellence of his constitutions, than that from his time to that of Henry VIII. there happened very few, and those not very considerable, alterations in the legal *forms* of proceedings. As to matter of *substance*: the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and conservators of the peace, were taken from the people in the reigns of Edward II. and Edward III.; and justices of the peace were established instead of the latter. In the reign also of Edward III. the parliament is supposed most probably to have assumed its present form; by a separation of the Commons from the Lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly; and the translation of the law proceedings from French into Latin another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging clothworkers from other countries to settle here. Nor was the legislature inattentive to

many other branches of commerce, or indeed to commerce in general: for, in particular, it enlarged the credit of the merchant, by introducing the statute-staple; whereby he might the more readily pledge his lands for the security of his mercantile debts. And as personal property now grew, by the extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law, to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of *præmunire*, for effectually depressing the civil power claimed by the court of Rome, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century: though the seeds of the general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution introduced into the laws of the land by the influence of the regular clergy.

From this time to that of Henry VII., the civil wars and disputed titles to the crown gave no leisure for farther juridical improvement; *nam silent leges inter arma.* And yet it is to these very disputes that may be attributed the happy loss of all the dominions of the crown on the continent of France, which turned the minds of our subsequent princes entirely to domestic concerns. To these likewise was owing the method of barring entails by the fiction of *common recoveries*; invented originally by the clergy, to evade the statutes of mortmain, but introduced under Edward IV., for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand. the owners endeavoured to protect them by the universal establishment of *uses*, another of the clerical inventions.

In the reign of Henry VII., his ministers, not to say the king himself, were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new beneficial regulations. For the distinguishing character of this reign was that of amassing treasure in the king's 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. To this end the court of Star-chamber was new-modelled, and armed with powers, most dangerous and unconstitutional, over the persons and properties of the subject. Informations were allowed to be received, in lieu of indictments, at the assizes and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived, to facilitate the destruction of entails, and make the owners of real estates more capable to forfeit as well as to alien. The benefit of clergy, which so often intervened to stop attainders and save the inheritance, was now allowed only once to lay offenders, who alone could have inheritances to lose. A *capias* was permitted in all actions on the case, and the defendant might in consequence be outlawed; because upon such outlawry his goods became the property of the crown. In short, there is hardly a statute in this reign, introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

IV. This brings us to the fourth period of our legal history, viz., the reformation of the church under Henry VIII. and his children, which opens an entirely new scene in ecclesiastical matters; appeals to the court of Rome being now prohibited; the supremacy of the crown over spiritual men and causes asserted; and the patronage of bishoprics once more vested in the king.

With regard also to our civil polity, the Statute of Wills, and the Statute of Uses, both passed in the reign of this prince, made a great alteration as to property: the former, by allowing the *devise* of real estates by will, which before was in general forbidden; the latter, by endeavouring to destroy the intricate nicety of *uses*, though the narrowness and pedantry of the judges of the courts of common law prevented this statute from having its full beneficial effect. And thence the courts of equity assumed a jurisdiction, dictated by common justice and common sense: which, however arbitrarily exercised or productive of jealousies in its infancy, has at length been matured into a most elegant system of rational jurisprudence; the principles of which are now adopted by all our courts of justice. From the

statute of uses, and another statute of the same antiquity, which protected estates for years from being destroyed by the reversioner, a remarkable alteration took place in the mode of conveyancing: the ancient assurance by feoffment and livery upon the land being now very seldom practised, since the more easy and more private invention of transferring property, by secret conveyances to uses, and long terms of years being now continually created in mortgages and family settlements, which may be moulded to a thousand useful purposes by the ingenuity of an able artist.

The farther attacks in this reign upon the immunity of estates-tail, which reduced them to little more than the conditional fees at the common law, before the passing of the Statute *de Donis*; the establishment of recognizances in the nature of a statute-staple, for facilitating the raising of money upon landed security; and the introduction of the bankrupt laws, as well for the punishment of the fraudulent as the relief of the unfortunate trader; all these were capital alterations of our legal polity, and highly convenient to that character which the English began now to re-assume, of a great commercial people. The incorporation of Wales with England, and the more uniform administration of justice, by destroying some counties palatine, and abridging the unreasonable privileges of such as remained, added dignity and strength to the monarchy: and, together with the numerous improvements above noticed, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the reign of Henry VIII. a distinguished era in the annals of juridical history.

It must be, however, remarked, that in the later years of this prince the royal prerogative was strained to a very tyrannical and oppressive height; and, what was the worst circumstance, its encroachments were established by law, under the sanction of those pusillanimous parliaments, one of which, to its eternal disgrace, passed a statute, whereby it was enacted that the king's proclamations should have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and new-fangled treasons, which were slightly touched upon in a former chapter. Happily for the nation, this arbitrary reign was succeeded by the minority of an amiable prince; during the short sunshine of which great part of these extravagant laws

were repealed. And to do justice to the shorter reign of Mary many salutary and popular laws, in civil matters, were made under her administration.

By the accession of Elizabeth, the religious liberties of the nation were re-established; though obliged in their infancy to be guarded against papists and other nonconformists, by laws of too sanguinary a nature. The forest-laws had fallen into disuse; and the administration of civil rights in the courts of justice was now carried on in a regular course, according to the wise institutions of Edward I., without any material innovations. All the principal grievances introduced by the Norman Conquest seem also by this time to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements: except only in the continuation of the military tenures, and a few other points, which still armed the crown with a very oppressive and dangerous prerogative. It is also to be remarked, that the spirit of enriching the clergy and endowing religious houses had, through the former abuse of it, gone over to such a contrary extreme, and the princes of the House of Tudor and their favourites had fallen with such avidity upon the spoils of the church, that a decent and honourable maintenance was wanting to many of the bishops and clergy. This produced the *restraining* statutes, to prevent the alienations of lands and tithes belonging to the church and universities. The number of indigent persons being also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in this reign more humane and beneficial than even feeding and clothing of millions; by affording them the means, with proper industry, to feed and to clothe themselves. And, the farther any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved.

However, considering the reign of Elizabeth in a great and political view, we have no reason to regret many subsequent alterations in the constitution. For, though in general she was a wise and excellent princess, and loved her people; though in her time trade flourished, riches increased, the laws were duly administered, the nation was respected abroad, and the people happy at home; yet the increase of the power of the Star-chamber, and the erection of the High Commission Court in matters

ecclesiastical, were the work of her reign. She also kept her parliaments at a very awful distance: and in many particulars she, at times, would carry the prerogative as high as her most arbitrary predecessors. It is true she very seldom exerted this prerogative, so as to oppress individuals, but still she had it to exert: and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power, to play the tyrant. This is a high encomium on her merit; but at the same time it is sufficient to show that these were not those golden days of genuine liberty that we have been taught to believe: for the true liberty of the subject consists not so much in the gracious behaviour, as in the limited power, of the crown.

The great revolutions that had happened, in manners and in property, had paved the way, by imperceptible, yet sure degrees, for as great a revolution in government: yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progress of those very means which afterwards reduced its power. It is obvious to every observer, that, till the close of the Lancastrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a state of great ignorance; their personal wealth, before the extension of trade, was comparatively small; and the nature of their landed property was such, as kept them in continual dependence upon their feudal lord, being usually some powerful baron, some opulent abbey, or sometimes the king himself. Though a notion of general liberty had strongly pervaded and animated the whole constitution, yet the particular liberty, the natural equality, and personal independence of individuals, were little regarded or thought of; nay, even to assert them was treated as the height of sedition and rebellion. Our ancestors heard, with detestation and horror, those sentiments rudely delivered, and pushed to most absurd extremes, by the violence of a Cade and a Tyler; which have since been applauded, with a zeal almost rising to idolatry, when softened and recommended by the eloquence, the moderation, and the arguments of a Sidney, a Locke, and a Milton.

But when learning, by the invention of printing, began to be universally disseminated; when trade and navigation were suddenly carried to an amazing extent, by the use of the

compass and the discovery of the Indies; the minds of men, thus enlightened by science and enlarged by observation and travel, began to entertain a more just opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants and middling rank; while the two great estates of the kingdom, which formerly had balanced the prerogative, the nobility and clergy, were greatly impoverished and weakened. The clergy, detected in their abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury, which knowledge, foreign travel, and the progress of the politer arts, are too apt to introduce with themselves, and fired with disdain at being rivalled in magnificence by the opulent citizens, fell into enormous expenses; to gratify which they were permitted, by the policy of the times, to dissipate their overgrown estates, and alienate their ancient patrimonies. This gradually reduced their power and their influence within a very moderate bound: while the king, by the spoil of the monasteries and the great increase of the customs, grew rich, independent, and haughty; and the commons were not yet sensible of the strength they had acquired, nor urged to examine its extent by new burdens or oppressive taxations, during the sudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamt of opposing the prerogative to which they had been so little accustomed; much less of taking the lead in opposition, to which by their weight and their property they were now entitled. The latter years of Henry VIII. were therefore the times of the greatest despotism that have been known in this island since the death of William the Norman: the prerogative as it then stood by common law, and much more when extended by act of parliament, being too large to be endured in a land of liberty.

Elizabeth, and the intermediate princes of the Tudor line, had almost the same legal powers, and sometimes exerted them as roughly, as Henry VIII. But the critical situation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealousy of the Queen of Scots, occasioned greater caution in her conduct. She probably, or her able

advisers, had penetration enough to discern how the power of the kingdom had gradually shifted its channel, and wisdom enough not to provoke the commons to discover and feel their strength. She therefore threw a veil over the odious part of prerogative; which was never wantonly thrown aside but only to answer some important purpose; and, though the royal treasury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with so much economy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, her wisdom, and her good disposition, that never did a prince so long and so entirely, for the space of half a century together, reign in the affections of her people.

On the accession of James I., no new degree of royal power was added to, or exercised by, him; but such a sceptre was too weighty to be wielded by such a hand. The unreasonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon awaking the sleeping lion. The people heard with astonishment doctrines preached from the throne and the pulpit, subversive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciously supported; and common reason assured them, that if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it. The leaders felt the pulse of the nation, and found they had ability as well as inclination to resist it; and accordingly resisted and opposed it, whenever the pusillanimous temper of the reigning monarch had courage to put it to the trial; and they gained some little victories in the cases of concealments, monopolies, and the dispensing power. In the meantime, very little was done for the improvement of private justice, except the abolition of sanctuaries, and the extension of the bankrupt laws, the limitation of suits and actions, and the regulating of informations upon penal statutes. For the laws against witchcraft and conjuration cannot now be classed under the head of improvements; nor did the dispute between Lord Ellesmere and

Sir Edward Coke, concerning the powers of the court of chancery, tend much to the advancement of justice.

Indeed, when Charles I. succeeded to the crown, and attempted to revive some enormities, which had been dormant in the reign of his father, the loans and benevolences extorted from the subject, the arbitrary imprisonments for refusal, the exertion of martial law in time of peace, and other domestic grievances, clouded the morning of that misguided prince's reign; which, though the noon of it began a little to brighten, at last went down in blood, and left the whole kingdom in darkness. It must be acknowledged that, by the Petition of Right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest-laws, which the crown most unseasonably revived. The legal jurisdiction of the Star-chamber and high commission courts was also extremely great; though their usurped authority was still greater. And if we add to these the disuse of parliaments, the ill-timed zeal and despotic proceedings of the ecclesiastical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship-money, and other projects, we may see grounds most amply sufficient for seeking redress in a legal constitutional way. This redress, when sought, was also constitutionally given; for all these oppressions were actually abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the Star-chamber and high commission courts, for ascertaining the extent of forests and forest-laws, for renouncing ship-money and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* in consequence of their feudal tenures; though it must be acknowledged that these concessions were not made with so good a grace as to conciliate the confidence of the people. Unfortunately, either by his own mismanagement, or by the arts of his enemies, the king had lost the reputation of sincerity; which is the greatest unhappiness that can befal a prince. Though he formerly had strained his prerogative, not only beyond what the genius of the present times would bear, but also beyond the examples of former ages, he had now consented to reduce it to a lower ebb than was consistent with monarchial government. A conduct so opposite to his temper and principles, joined with

some fresh actions and unguarded expressions, made the people suspect that this condescension was merely temporary. Flushed therefore with the success they had gained, fired with resentment for past oppressions, and dreading the consequences if the king should regain his power, the popular leaders, who in all ages have called themselves the *people*, began to grow insolent and ungovernable; their insolence soon rendered them desperate; and despair at length forced them to join with a set of military hypocrites and enthusiasts, who overturned the church and monarchy, and proceeded with deliberate solemnity to the trial and execution of the sovereign.

The many schemes for amending the laws in the times of confusion which followed proved abortive, but some of the most promising and sensible, such as the establishment of new trials, the abolition of feudal tenures, the act of Navigation, and some others were adopted in the

V. Fifth period, viz. after the restoration of Charles II. Immediately upon which, the principal remaining grievances, the doctrine and consequences of military tenures, were taken away and abolished, except in the instance of corruption of inheritable blood, upon attainder of treason and felony. And though the monarch, in whose person the royal government was restored, deserves no commendation from posterity, yet in his reign, wicked, sanguinary, and turbulent as it was, the concurrence of happy circumstances was such, that from thence may be dated not only the re-establishment of the church and monarchy, but also the complete restitution of English liberty, for the first time since its total abolition at the Conquest. For under Charles II. not only these slavish tenures, the badge of foreign dominion, with all their oppressive appendages, were removed from incumbering the estates of the subject; but also an additional security of his person from imprisonment was obtained by that great bulwark of our constitution, the *Habeas Corpus* Act. These two statutes, with regard to our property and persons, form a second *Magna Charta*, as beneficial and effectual as that of Runing-Mead. That only pruned the luxuriances of the feudal system; but the statute of Charles II. extirpated all its slaveries, except perhaps in copyhold tenure; and there also they are now in great measure enervated by gradual custom, and the inter-

position of our courts of justice. *Magna Charta* only, in general terms, declared that no man shall be imprisoned contrary to law; the *Habeas Corpus* Act points him out effectual means, as well to release himself, as to punish all those who shall thus unconstitutionally misuse him.

To these may be added the abolition of the prerogatives of purveyance and pre-emption; the statute for holding triennial parliaments; the test and corporation acts, which were passed, and which may have helped to secure both our civil and religious liberties; the abolition of the writ *de hæretico comburendo;* the statute of frauds and perjuries, a great and necessary security to private property; the statute for distribution of intestates' estates, and that of amendments and *jeofails*, which cut off many of the superfluous niceties which had long disgraced our courts; together with many other wholesome acts that were passed in this reign, for the benefit of navigation and the improvement of foreign commerce.

It is not intended here to palliate or defend many iniquitous proceedings, *contrary to all law*, in that reign, through the artifice of wicked politicians, both in and out of employment. But what may be contended is this: that *by the law*, as it then stood, notwithstanding some invidious, nay dangerous, branches of the prerogative which have since been lopped off, and the rest more clearly defined, the people had a large portion of real liberty; and sufficient power residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative. For proof of which it is only necessary to appeal to the memorable catastrophe of the next reign. For when Charles's deluded brother attempted to enslave the nation, he found it was beyond his power; the people both could and did resist him; and in consequence of such resistance obliged him to quit his enterprise and his throne together.. Which introduces us to the next period of our legal history; viz.

VI. From the Revolution in 1688 to the time of Sir William Blackstone. In this period many laws were passed; as the Bill of Rights, the Toleration Act, the Act of Settlement with its conditions, the Act for uniting England with Scotland, and some others: which asserted our liberties in more clear and emphatic terms; regulated the succession of the crown by

parliament, as the exigencies of religous and civil freedom required; confirmed, and exemplified, the doctrine of resistance when the executive magistrate endeavours to subvert the constitution; maintained the superiority of the laws above the crown, by pronouncing the dispensing power to be illegal; indulged tender consciences with every religious liberty, which was then deemed to be consistent with the safety of the state; established triennial, since turned into septennial, elections of members to serve in parliament; excluded certain officers from the House of Commons; restrained the royal pardon from obstructing parliamentary impeachments; imparted to all the lords an equal right of trying their fellow-peers; regulated trials for high treason; set bounds to the Civil List, and placed the administration of that revenue in hands that are accountable to parliament; and made the judges completely independent of the sovereign, his ministers, and his successors. Yet, though these provisions have, in appearance and nominally, reduced the strength of the executive power to a much lower ebb than the preceding period; if, on the other hand, we throw into the opposite scale the vast acquisition of force, arising from the Riot Act, and the annual expedient of a standing army; and the vast acquisition of personal attachment, arising from the magnitude of the National Debt, and the manner of levying those yearly millions that are appropriated to pay the interest; we shall find that the crown during this period gradually and imperceptibly gained almost as much in influence as it apparently lost in prerogative.

The chief alterations of moment in the administration of private justice during the same period, were the solemn recognition of the law of nations with respect to the rights of ambassadors: the cutting off, by the statute for the amendment of the law, a vast number of excrescences that in process of time had sprung out of the practical part of it: the protection of corporate rights by the improvements in writs of *mandamus*, and informations in nature of *quo warranto:* the regulation of trials by jury, and the admitting witnesses for prisoners upon oath: the farther restraints upon alienation of lands in mortmain: the annihilation of the terrible judgment of *peine forte et dure*— the extension of the benefit of clergy, by abolishing the pedantic criterion of reading: the counterbalance to this mercy, by the vast

increase of capital punishment: the improvements which were made in ejectments for the trying of titles: the introduction and establishment of paper credit, by indorsements upon bills and notes, which showed the legal possibility and convenience of assigning a *chose in action*: the translation of all legal proceedings into the English language: the erection of courts of conscience for recovering small debts, since superseded by the county courts: the great system of marine jurisprudence, of which the foundations were laid, by clearly developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases: and lastly, the liberality of sentiment which took possession of our courts of common law, and induced them to adopt, where facts could be clearly ascertained, the same principles of redress as had prevailed in our courts of equity, from the time that Lord Nottingham presided there; and this, not only where specially empowered by particular statutes, as in the case of bonds, mortgages, and set-offs, but by extending the remedial influence of the equitable writ of trespass on the case according to its primitive institution by Edward I., to almost every instance of injustice not remedied by any other process.

VII. Upwards of a century has elapsed since the commentaries of Sir William Blackstone were first published. Much as the learned and enthusiastic commentator had cause for exultation in the improvements which had been introduced in his own times and those immediately preceding, he would have found matter for still warmer penegyric had he lived in our days. The events of the last hundred years have changed the face of Europe; and although our own country has not sustained those disastrous shocks which have been felt from time to time by most of the continental nations, it has not remained a stranger to the general progressive tendency which has been discernible, more or less, over the whole civilized world. On the contrary, the state of continuous healthy progress, which seems to be almost peculiar to our own institutions, has, perhaps, carried us farther in the direction of political and social freedom than any other nation in the world.

Among the first and most important constitutional changes

to be mentioned is the union of the British and Irish legislatures —an event which may be regarded as the foundation of that genuine union of interest and feeling between two nations intimately allied by geographical position, common language, and similar institutions, which, if not yet completely attained, seems now at least in a fair way of becoming permanently established. The statute of 1832, amending the representation of the people in the Commons' House of Parliament, popularly known as the Reform Act and The Representation of the People Act, 1867, introduced no new principle into the constitution; but simply restored to the great body of the people that ancient right of self-government, which they had derived from their Saxon ancestors. Several attempts have since been made to prevent corrupt practices in the election of members, with more or less sincerity; the most prominent of which are the statutes establishing voting by ballot; restoring the trial of contested elections to the judges; and imposing penalties and disqualification on all persons concerned in bribery, treating, or the use of undue influence. Though little appears to have been actually effected beyond the disfranchisement of the boroughs where such practices were found to prevail, the attention of the public is now aroused to the magnitude of the evil, and it may not unreasonably be hoped that an offence, which strikes at the very root of our representative system, will sooner or later be extirpated. A measure of almost equal importance, of which the professed object was the restoration of an ancient institution, was that which remodelled our municipal corporations, and removed many abuses which had crept into these bodies.

Our civil liberties have been further secured by that amendment of the law of libel, which has vested in the jury the right in such cases of deciding as well upon the law as upon the fact; and by the statutory recognition of the privilege of parliament to publish whatever it pleases. The boundaries of religious liberty have been extended by the repeal of the Test and Corporation Acts; a measure which has enabled that numerous and influential portion of our fellow-citizens who object to the discipline or dissent from the doctrines of the Church to participate in those political rights from which they had been before excluded; whilst the statute popularly termed the Catholic Emancipation Act has relieved those who still

render obedience to the See of Rome from the civil disabilities and penalties to which they were previously subject. The Church has probably gained strength from the commutation of tithes and the abolition of church-rates, and still more from those statutes which have been passed for the abolition of pluralities, and for compelling the residence of the beneficed clergy. Large and comprehensive measures have also been adopted for the better management and application of the cathedral revenues, and for the subdivision of large and populous parishes, the formation of new parochial districts, and the extension of the Church and its institutions. A committee of the Privy Council has been specially constituted for the distribution of the large sums of money which have for many years been annually voted by parliament for promoting education among the poorer classes of the people; and school boards have been established wherever the means of obtaining elementary education have been, or may yet be, found to be deficient.

The statutes amending the law relating to the celebration of marriage, while requiring that important ceremony to be accompanied in all cases by certain circumstances of publicity and notoriety, have at the same time, enabled every individual to enter into this solemn contract in the mode which he considers necessary or proper; and have thus removed an unreasonable restriction under which a large portion of the community previously laboured.

The abolition of colonial slavery, accomplished at a very great pecuniary sacrifice, is an event in our history never to be forgotten. The spirit of philanthropy which dictated that measure is a very prominent feature of our age, and has displayed itself in a variety of other enactments, particularly those modifying the severity of the laws relating to unfortunate traders and debtors, securing the proper care and treatment of lunatics, amending the discipline of prisons, and providing reformatory institutions not only for criminals who seek an opportunity of regaining their lost position, but for those unfortunate children, who are born as it were into crime, and have rarely if ever been taught to distinguish between good and evil. The laws for the relief of the poor have been remodelled, and some steps taken, falteringly, it is true, but in the right direction, towards a more equitable adjustment of the heavy taxation which is imposed for

their support; the numerous charities which are to be found in every part of the kingdom have been placed under the regulation and control of a body of commissioners, whose sole duty it is to see that the funds of these institutions are properly applied; the laws relating to *game*, always a fertile source of crime, have been so far modified, that we may anticipate an early repeal of all penal enactments on the subject; and several statutes have been passed, having for their object the improvement of the sanitary condition of populous places, and the preservation of the public health.

The interests of trade, commerce, and manufactures have been unceasingly studied and promoted since the restoration of peace in 1815. This is not the place, however, in which to attempt any enumeration of the various statutes, which have been from time to time passed for regulating these matters, the legislation relating to which has been often affected and controlled by financial necessities, or by the conflicting views of political economists. It may be enough to allude to the various statutes throwing open the trade to the East Indies, and removing many of the duties previously levied under the unpopular names of customs and excise, to the consolidation of the laws relating to the mercantile marine, and to the repeal of the Navigation Acts; all tending towards establishing a system of commerce free from all restraints, other than those which the collection of the public revenue and the machinery required for that purpose render indispensable. The law with regard to bankruptcy has been further consolidated—it can scarcely with truth be said, amended; real property has been subjected to the payment of debts; the rights of authors and inventors have been extended and secured; and the formation of joint-stock companies has been simplified and cheapened, the most ample regulations being made, at the same time, for the guidance of these bodies. The operations of the mercantile classes have been facilitated by several statutes having reference exclusively to commercial affairs; and protected to some extent by other enactments which have made breaches of trust, committed by bankers, factors, trustees, agents, and servants generally, severely punishable. Fraudulent debtors have been brought within the reach of the criminal law.

In regard to landed property and its transmission the most

important improvements have taken place. The alteration of the law of descent, the limitation of the time within which actions for the recovery of real estate may be brought, the shortening of the time of prescription or legal memory, the abolition of those complex modes of assurance, fines and recoveries, the modification of the wife's claim of dower, the annihilation of satisfied terms, — these, among other things, have tended greatly to facilitate the transfer of property, have got rid of endless doubts and difficulties which perpetually arose upon titles, and have materially shortened conveyances. A great improvement has also been introduced into the law of wills, and there is less danger now than formerly of the wishes of a testator being frustrated. A serious, and it is to be hoped successful, attempt has been made to get rid of copyhold tenures, and repeated efforts, hitherto without effect however, to introduce a system of registration of the titles to real estates.

The administration of private justice has been greatly simplified by the numerous alterations which have been made in the course of the last fifty years in the procedure of our courts. The abolition of real actions, and of the many fictions which formerly encumbered legal proceedings, was an important and beneficial change. The alteration of the old rules of law which formerly excluded the evidence of the parties to the suit, and prohibited persons who were considered disqualified, either by reason of interest or by crime, from being witnesses, have been attended with great advantage; all practical difficulties in eliciting the truth being now removed.

It would be premature to express any opinion on the recent consolidation of the Superior Courts of Law and Equity into one High Court of Justice. The abolition of the remaining Palatine Courts is an unquestionable advantage, and further changes are not improbably imminent. Each judge of the High Court has now all the powers of the tribunals which have been merged in it; the great increase in the number of these judges ought to prevent the possibility of delay in the hearing of causes; and there seems now to be no reason why the obtaining of justice in every branch of this court should not be a speedy and not ruinously expensive process.

But these changes have been much less beneficial to the great mass of the community, than the establishment of the county

courts, a measure warmly recommended by Sir William Blackstone; and to some extent a return to the ancient Saxon system, restored if not established by Alfred, for securing the administration of justice at every man's door.

The cognizance of matrimonial and testamentary causes has been taken from the ecclesiastical, and restored to the civil, courts; the law at the same time recognizing the right of divorce for adultery; and putting that remedy, which was previously only attainable by a private act of parliament, within the reach of all who are likely to demand it.

The criminal law has been, as to many of its branches, amended and consolidated; and the severity of punishments at the same time much softened, and adapted more carefully than formerly to the nature and magnitude of the offence. The barbarous sufferings prescribed for those attainted of treason no longer stain the statute-book; and the punishment of innocent parties for ancestral guilt, which often resulted from the doctrine of corruption of blood, can no longer happen; while the offences involving capital punishment, which the convict only escaped by claiming the benefit of clergy, have been gradually reduced in number, until the extreme penalty of the law has become in practice confined to the frightful crime of murder. The trial by battel, and the mode of proceeding by appeal, have been formally abolished; the law relating to principal and accessory has been divested of its niceties; and the forms of the proceedings in the criminal courts so far simplified and improved, that offenders, who have now the advantage of being defended by counsel, rarely escape punishment on purely technical objections.

Thus, therefore says the learned commentator at the conclusion of his great work, for the amusement and instruction of the student, I have endeavoured to delineate some rude outlines of a plan for the history of our laws and liberties: from their first rise and gradual progress, among our British and Saxon ancestors, till their total eclipse at the Norman Conquest; from which they have gradually emerged, and risen to the perfection they now enjoy, at different periods of time.

We have seen in the course of our inquiries, 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 now fraught with the accumulated wisdom of ages; that the forms of administering justice came to perfection under Edward I., and have not been much varied, nor always for the better, since; that our 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 Charles II., nor fully and explicitly acknowledged and defined, till the era of the happy revolution. Of a constitution, so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise which is justly and severely its due:—the thorough and attentive contemplation of it will furnish its best panegyric. It has been the endeavour of these commentaries, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and from the harmonious concurrence of those several parts, to demonstrate the elegant proportion of the whole. We have taken occasion to admire at every turn the noble monuments of ancient simplicity, and the more curious refinements of modern art. Nor have its faults been concealed from view; for faults it has, lest we should be tempted to think it of more than human structure; defects chiefly arising from the decays of time, or the rage of unskilful improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom as are delegated by their country to Parliament. The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind.

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