15
June 28

COMMENTARIES

ON THE

LAWS OF ENGLAND

BY

SIR WILLIAM BLACKSTONE, KT.,

EDITED BY

WILLIAM CAREY JONES

DIRECTOR OF THE SCHOOL OF JURISPRUDENCE,
UNIVERSITY OF CALIFORNIA

VOLUME II

CONTAINING BOOKS III AND IV

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1916

KF
103
BLA

TK
B631c
AMED

Copyright, 1916
BY
BANCROFT-WHITNEY COMPANY

FEB 3 1916

SAN FRANCISCO
THE FILMER BROTHERS ELECTROTYPE COMPANY
TYPOGRAPHERS AND STEREOTYPERS

CONTENTS OF THIS VOLUME.

Page

Outline of Book III v
Outline of Book IV xxvi
Tabular View of Book III xlv
Blackstone's Analysis of Book III xlvii
Tabular View of Book IV lxiii
Blackstone's Analysis of Book IV lxv

BOOK III. OF PRIVATE WRONGS.

[References are to star paging.]

CHAPTER I. Of the Redress of Private Wrongs by the Mere Act of the Parties 1
II. Of Redress by the Mere Operation of Law 18
III. Of Courts in General 22
IV. Of the Public Courts of Common Law and Equity 30
V. Of Courts Ecclesiastical, Military and Maritime 61
VI. Of Courts of a Special Jurisdiction 71
VII. Of the Cognizance of Private Wrongs 86
VIII. Of Wrongs and Their Remedies, Respecting the Rights of Persons 115
IX. Of Injuries to Personal Property 144
X. Of Injuries to Real Property, and First of Dispossession, or Ouster, of the Freehold 167
XI. Of Dispossession or Ouster of Chattels Real 198
XII. Of Trespass 208
XIII. Of Nuisance 216
XIV. Of Waste 223
XV. Of Subtraction 230
XVI. Of Disturbance 236
XVII. Of Injuries Proceeding from or Affecting the Crown 254
XVIII. Of the Pursuit of Remedies by Action; and, First, of the Original Writ 270
XIX. Of Process 279
XX. Of Pleading 293
XXI. Of Issue and Demurrer 314
XXII. Of the Several Species of Trial 325
XXIII. Of the Trial by Jury 349
XXIV. Of Judgment, and Its Incidents 386
XXV. Of Proceedings in the Nature of Appeals 402
XXVI. Of Execution 412
XXVII. Of Proceedings in the Courts of Equity 426
SUPPLEMENTARY CHAPTER. Conflict of Laws 2081*

*This reference is to the page of this Edition.

BOOK IV. OF PUBLIC WRONGS.

[References are to star paging.]

CHAPTER I. Of the Nature of Crimes; and their Punishment..... 1
II. Of the Persons Capable of Committing Crimes..... 20
III. Of Principals and Accessories..... 34
IV. Of Offenses Against God and Religion..... 41
V. Of Offenses Against the Law of Nations..... 66
VI. Of High Treason..... 74
VII. Of Felonies, Injurious to the King's Prerogative..... 94
VIII. Of *Præmunire* 103
IX. Of Misprisions and Contempts Affecting the King and Government 119
X. Of Offenses Against Public Justice..... 127
XI. Of Offenses Against the Public Peace..... 142
XII. Of Offenses Against Public Trade..... 154
XIII. Of Offenses Against the Public Health, and the Public Police or Economy..... 161
XIV. Of Homicide 176
XV. Of Offenses Against the Persons of Individuals..... 205
XVI. Of Offenses Against the Habitations of Individuals..... 220
XVII. Of Offenses Against Private Property..... 229
XVIII. Of the Means of Preventing Offenses..... 251
XIX. Of Courts of a Criminal Jurisdiction..... 258
XX. Of Summary Convictions 280
XXI. Of Arrests 289
XXII. Of Commitment and Bail..... 296
XXIII. Of the Several Modes of Prosecution..... 301
XXIV. Of Process upon an Indictment..... 318
XXV. Of Arraignment, and Its Incidents..... 322
XXVI. Of Plea and Issue..... 332
XXVII. Of Trial and Conviction..... 342
XXVIII. Of the Benefit of Clergy..... 365
XXIX. Of Judgment, and Its Consequences..... 375
XXX. Of Reversal of Judgment..... 390
XXXI. Of Reprieve, and Pardon..... 394
XXXII. Of Execution 403
XXXIII. Of the Rise, Progress and Gradual Improvements of the Laws of England..... 407

OUTLINE.

BOOK III.

OF PRIVATE WRONGS.

CHAPTER I.

OF THE REDRESS OF PRIVATE WRONGS BY THE MERE ACT OF THE PARTIES.

[References are to star paging.]

§ 1. General plan of the Commentaries restated..... 1
§ 2. Book I: Rights of Persons; Book II: Rights of Things; Books III and IV: Wrongs..... 2
Note: Bentham's doctrine that law is based on wrongs..... 2n
§ 3. Division of wrongs: private (Book III); public (Book IV).... 2
§ 4. Redress of private wrongs: extrajudicial remedies..... 2
§ 5. 1. Redress by act of the parties..... 3
Note: Theory and history of self-help..... 3n
§ 6. a. By the sole act of the injured party..... 3
§ 7. (1) Self-defense..... 3
§ 8. (2) Recaption..... 4
Note: Limits of self-defense..... 4n
Defense of third persons..... 4n
Note: Recaption of personal property..... 5n
§ 9. (3) Re-entry on land..... 5
Note: Entry upon lands to repossess them..... 5n
§ 10. (4) Abatement of nuisances..... 5
Note: Abatement of nuisances..... 5n
§ 11. (5) Distress..... 6
Note: Distress for rent in the United States..... 6n
§ 12. (a) Injuries for which distress allowed..... 6
Note: Nature of remedy by distraint..... 6n
§ 13. (b) Things exempt from distress..... 7
§ 14. (c) Procedure in distress..... 10
§ 15. (i) Time and place of making a distress..... 11
§ 16. (ii) Amount to be distrained..... 11
§ 17. (iii) Disposal of property distrained..... 12
Note: Development of the law of distress 12n
§ 18. (aa) Pounds..... 12
§ 19. (bb) Care of animals impounded..... 13
§ 20. (cc) Replevin of goods distrained..... 13
§ 21. (dd) Sale of goods distrained..... 14
§ 22. (d) Effect of irregularity in making a distress.... 14
Note: Hazardous character of remedy by distress..... 15n

[References are to star paging.]

§ 23. (6) Seizing of heriots 15
§ 24. b. Redress by joint act of parties concerned..... 15
§ 25. (1) Accord and satisfaction..... 16
Note: Accord and satisfaction..... 16n
§ 26. (2) Arbitration and award..... 16
Note: Effect of submission to arbitration..... 16n
Note: Change of property by award..... 17n

CHAPTER II.

OF REDRESS BY MERE OPERATION OF LAW.

§ 27. 2. Redress by mere operation of law: extrajudicial remedies..... 18
§ 28. a. Retainer 18
Note: Retainer 18n
§ 29. b. Remitter 19
Note: Remitter obsolete..... 20n

CHAPTER III.

OF COURTS IN GENERAL.

§ 30. 3. Redress by suit in court: judicial remedies..... 22
§ 31. (How far judicial and extrajudicial remedies concurrent)..... 22
Note: Ubi jus ibi remedium..... 23n
§ 32. a. Courts of justice..... 23
§ 33. (1) Definition of a court..... 23
Note: Meaning of courts..... 23n
§ 34. (2) Source of authority of courts..... 24
§ 35. (3) Classes of courts..... 24
Note: Distinction between courts of record and courts not of record..... 24n
§ 36. (a) Courts of record..... 24
§ 37. (b) Courts not of record..... 25
§ 38. (4) Constituent parts of a court: (a) actor; (b) *reus;* (c) judex 25
Note: Ex parte proceedings..... 25n
§ 39. (d) Attorneys 25
Note: Origin of attorneys..... 26n
§ 40. (e) Advocate or counsel: (i) barristers; (ii) serjeants 26
Note: Serjeants at law no longer created.. 27n
Note: Patents of precedence..... 28n
Note: Compensation of counsel..... 29n

[References are to star paging.]

CHAPTER IV.

OF THE PUBLIC COURTS OF COMMON LAW AND EQUITY.

§ 41. Species of courts..... 30
§ 42. Courts of common law and equity..... 30
Note: The Judicature Acts of 1873 and 1875..... 30n
Supreme court of judicature..... 30n
Divisions of the high court..... 30n
Judges of the high court..... 30n
Proceedings before the high court..... 30n
Divisional courts..... 30n
Court of appeal..... 30n
Principles of procedure in the high court..... 30n
§ 43. Early judicial systems..... 30
§ 44. English system of civil courts..... 32
§ 45. 1: Court of *piepoudre*..... 32
Note: Piepoudre courts..... 33n
§ 46. 2. Court-baron..... 33
§ 47. 3. Hundred court..... 34
§ 48. 4. County court..... 35
Note: Modern county courts in England..... 35n
§ 49. 5. Court of common pleas..... 37
§ 50. a. *Aula regis*..... 37
Note: Role of the king's courts in the development of the common law..... 37n
§ 51. b. Common pleas established..... 38
§ 52. c. Separation of jurisdiction..... 39
Note: Junior or inferior in rank: *puisne* judges..... 39n
§ 53. 6. Court of king's bench..... 41
§ 54. a. Jurisdiction of the king's bench..... 42
Note: Legal fictions..... 43n
§ 55. b. Appellate jurisdiction of the king's bench..... 44
§ 56. 7. Court of exchequer..... 44
§ 57. a. The equity court of the exchequer..... 44
§ 58. b. The common-law court of the exchequer..... 45
§ 59. c. Appeals from the court of exchequer..... 46
§ 60. 8. Court of chancery..... 47
§ 61. a. The ordinary legal court of chancery..... 48
§ 62. (1) Original writs..... 49
§ 63. b. The extraordinary, or equity, court of chancery..... 49
§ 64. (1) Origin of English equity..... 50
§ 65. (2) Cases arising *in consimili casu*..... 50
Note: Fundamental difference between law and equity..... 51n

[References are to star paging.]

§ 66. (3) The writ of subpœna..... 51
Note: Suits *pro læsione fidei*—Statute *Circumspecte Agatis* 52n
§ 67. (4) Character of the early chancellors..... 53
§ 68. (5) Dispute between the courts of law and equity..... 53
§ 69. (6) Establishment of an orderly system in the court of equity 54
§ 70. (7) Appeals from the court of equity..... 55
§ 71. 9. Court of exchequer chamber..... 55
§ 72. 10. House of peers..... 56
Note: Ultimate courts of appeal in England..... 56n
The house of lords..... 56n
The judicial committee of the privy council..... 57n
§ 73. 11. Courts of assize and *nisi prius*..... 57
§ 74. Review of the English judiciary system..... 59

CHAPTER V.

OF COURTS ECCLESIASTICAL, MILITARY AND MARITIME.

§ 75. Ecclesiastical, military and maritime courts..... 61
§ 76. 1. Ecclesiastical courts..... 61
a. Historical sketch of ecclesiastical jurisdiction..... 61
Note: Ecclesiastical courts 63n
§ 77. b. Classes of ecclesiastical courts..... 64
Note: Modern jurisdiction in ecclesiastical matters..... 64n
§ 78. (1) The archdeacon's court 64
§ 79. (2) The consistory court..... 64
§ 80. (3) The court of arches..... 64
§ 81. (4) The court of peculiars..... 65
§ 82. (5) The prerogative court..... 65
§ 83. (6) The court of delegates..... 66
§ 84. (7) Commission of review..... 67
§ 85. (8) Court of high commission..... 68
§ 86. 2. Military courts..... 68
Note: Court of chivalry obsolete..... 68n
§ 87. 3. Martime courts..... 69
Note: Court of admiralty..... 69n
Vice-admiralty courts in America..... 69n

CHAPTER VI.

OF COURTS OF A SPECIAL JURISDICTION.

§ 88. Courts of special jurisdiction..... 71
§ 89. 1. The forest courts..... 71

[References are to star paging.]

§ 90. 2. The commissioners of sewers..... 74
§ 91. 3. The court of policies of assurance..... 75
§ 92. 4. The court of marshalsea, and the palace court..... 76
§ 93. 5. Courts of the principality of Wales..... 77
§ 94. 6. The court of the duchy chamber of Lancaster..... 78
§ 95. 7. Courts of counties palatine..... 79
§ 96. 8. The stannary courts..... 80
§ 97. 9. Courts of London and other cities..... 81
§ 98. a. Courts of requests..... 82
§ 99. (1) Court of county of Middlesex..... 83
§ 100. 10. Courts of the universities..... 84

CHAPTER VII.

OF THE COGNIZANCE OF PRIVATE WRONGS.

§ 101. Civil jurisdiction of the several courts..... 86
§ 102. Common-law rule of jurisdiction of all courts..... 86
§ 103. 1. Jurisdiction of ecclesiastical courts..... 87
Note: Restrictions on the jurisdiction of ecclesiastical courts 87n
§ 104. a. Pecuniary causes cognizable in ecclesiastical courts..... 88
§ 105. (1) Tithes 88
§ 106. (2) Ecclesiastical dues..... 90
§ 107. (3) Fees of officers of ecclesiastical courts..... 90
§ 108. (4) Spoliation 91
§ 109. (5) Dilapidations 92
§ 110. (6) Church repairs..... 92
§ 111. b. Matrimonial causes..... 92
§ 112. (1) Jactitation of marriage..... 93
§ 113. (2) Specific performance of marriage..... 94
§ 114. (3) Restoration of conjugal rights..... 94
§ 115. (4) Divorce 94
§ 116. c. Testamentary causes..... 95
§ 117. (1) History of jurisdiction in testamentary causes.. .. 95
Note: Testamentary jurisdiction..... 95n
§ 118. (2) Tribunals having jurisdiction in testamentary causes 98
§ 119. (3) Classes of testamentary casuses..... 99
§ 120. d. Procedure in ecclesiastical courts..... 99
§ 121. (1) Ecclesiastical procedure regulated by the civil and canon law..... 99
Note: Authority of the canon law in ecclesiastical courts 99n
Note: Source of the English law on matrimonial causes 100n
§ 122. (2) Pleadings in ecclesiastical courts..... 100

[References are to star paging.]

§ 123. (3) Ecclesiastical penalties: excommunication..... 101
Note: Existing ecclesiastical punishments..... 101n
§ 124. 2. Jurisdiction of the military courts..... 103
§ 125. a. Procedure in the military courts..... 105
§ 126. 3. Jurisdiction of the maritime courts..... 106.
§ 127. a. Nature of admiralty courts..... 106
Note: Admiralty jurisdiction on inland waters..... 106n
§ 128. b. Conflict of jurisdiction..... 108
§ 129. c. Procedure in admiralty..... 109
§ 130. 4. Jurisdiction of the common-law courts..... 109
§ 131. a. Writ of *procedendo* 109
§ 132. b. Writ of *mandamus*..... 110
Note: Mandamus 110n
§ 133. c. Writ of prohibition 111
Note: Writ of prohibition..... 111n
Historical uses of the writ of prohibition..... 113n
§ 134. (1) Procedure in prohibition..... 114

CHAPTER VIII.

OF WRONGS AND THEIR REMEDIES RESPECTING THE RIGHTS OF PERSONS.

§ 135. Private wrongs, or civil injuries, and their remedies..... 115
Note: Scheme of the common-law actions..... 115n
Effect of Judicature Act of 1873 on forms of action.... 116n
Abolition of distinction between forms of action in United States 116n
§ 136. Forms of action under Roman law..... 116
§ 137. Classes of action in English law..... 117
§ 138. 1. Personal actions 117
§ 139. 2. Real actions 118
§ 140. 3. Mixed actions 118
§ 141. Kinds of civil injuries..... 119
Note: Difference between violent and nonviolent injuries..... 119n
§ 142. 1. Injuries to absolute rights of individuals..... 119
§ 143. a. Injuries affecting personal security..... 119
§ 144. (1) Injuries affecting life..... 119
Note: Lord Campbell's Act, 1846..... 119n
§ 145. (2,3) Injuries affecting limb or body: trespass..... 120
§ 146. (a) By threats 120
Note: Action for threats..... 120n
§ 147. (b) By assault 120
Note: Physical injury resulting from fright 120n
§ 148. (c) By battery 120
Note: Actions for battery..... 120n

[References are to star paging.]

§ 149. (d) By wounding 121
§ 150. (e) By mayhem 121
§ 151. (i) Civil and criminal liability..... 122
§ 152. (4) Injuries affecting health..... 122
Note: Degree of skill required of physician or surgeon 122n
§ 153. (a) Trespass on the case..... 122
Note: Negligence 122n
Note: Trespass on the case in *assumpsit*.. 123n
§ 154. (5) Injuries affecting reputation..... 123
Note: Defamation 123n
Truth as justification 123n
Fair comment and criticism..... 123n
Privilege 123n
§ 155. (a) Slander 123
(i) Words actionable *per se*..... 123
§ 156. (ii) Words actionable if causing damage.. 124
§ 157. (iii) Slander of title 124
§ 158. (iv) Words not actionable..... 125
§ 159. (v) Privileged occasions 125
§ 160. (vi) Truth of words as justification..... 125
§ 161. (b) Libel 125
Note: Right of privacy..... 126n
§ 162. (c) Malicious prosecution 126
Note: Malicious prosecution 127n
§ 163. b. Injuries affecting personal liberty: false imprisonment.. 127
§ 164. (1) Requisites of false imprisonment..... 127
§ 165. (2) Remedies for false imprisonment..... 128
§ 166. (a) Writ of mainprize 128
§ 167. (b) Writ *de odio et atia*..... 128
§ 168. (c) Writ *de homine replegiando*..... 129
§ 169. (d) Writ of *habeas corpus*..... 130
§ 170. (i) Lesser forms of writ of *habeas corpus*. 130
§ 171. (ii) The great writ: *habeas corpus ad subjiciendum* 131
§ 172. (iii) From what courts *habeas corpus* issues 131
§ 173. (iv) *Habeas corpus*, how procured..... 132
§ 174. (v) Cause of imprisonment..... 133
§ 175. (vi) Steps leading to the Habeas Corpus Act, 1679 134
§ 176. (vii) The Habeas Corpus Act, 1679..... 136
Note: Penal damages..... 138
§ 177. (e) Action of false imprisonment..... 138
§ 178. c. Injuries affecting property rights..... 138

[References are to star paging.]

§ 179. 2. Injuries affecting relative rights of persons: domestic relations 138
§ 180. a. Injuries affecting a husband..... 139
Note: Interference with domestic relations..... 139n
§ 181. (1) Abduction of wife..... 139
§ 182. (2) Adultery, or criminal conversation..... 140
§ 183. (3) Battery of a wife..... 140
§ 184. b. Injuries affecting a parent 140
§ 185. c. Injuries affecting a guardian 141
§ 186. d. Injuries affecting a master 141
Note: Interference with contractual relations..... 141n
Interference with business or employment..... 141n
Strikes, boycotts and pickets..... 142n
§ 187. (1) Enticing a servant..... 142
§ 188. (2) Battery of a servant..... 142
§ 189. e. Basis of actions for injuries to domestic relations..... 142

CHAPTER IX.

OF INJURIES TO PERSONAL PROPERTY.

§ 190. Injuries to personal property..... 144
§ 191. 1. Injuries to personal property in possession..... 144
§ 192. a. Unlawful taking of personal property..... 145
§ 193. (1) Replevin 145
Note: Present scope of replevin..... 145n
§ 194. (a) Ancient procedure in replevin..... 146
§ 195. (b) Later practice in replevin..... 149
§ 196. (2) Other remedies 150
§ 197. b. Unlawful detainer of personal property..... 151
Note: Replevin for detention of a distress..... 151n
Note: Summary of steps in development of detinue..... 151n
§ 198. (1) Action of detinue 151
§ 199. (2) Action of trover 152
§ 200. c. Actions of trespass and case for damage to personal property 153
Note: Action on the case..... 153n
§ 201. 2. Injuries to things in action..... 153
§ 202. a. Express contracts 153
§ 203. (1) Action of debt..... 154
Note: Action of debt and wager of law..... 154n
Note: Indebitatus assumpsit 155n
§ 204. (a) Writ in the *debet* and in the *detinet*..... 155
§ 205. (2) Action of covenant..... 156
§ 206. (a) Covenant real 156

[References are to star paging.]

§ 207. (3) Action of *assumpsit* 157
§ 208. (a) Statute of frauds 158
§ 209. b. Implied contracts 158
§ 210. (1) Actions of debt on judgments..... 159
Note: Nature of the obligation arising from a judgment 159n
§ 211. (2) Action of debt on a by-law or amercement..... 159
§ 212. (3) Action of debt for penalties..... 160
Note: Debt for penalties 160n
§ 213. (4) Implied *assumpsit* 161
§ 214. (a) *Quantum meruit* 161
§ 215. (b) *Quantum valebat* 161
§ 216. (c) Money had and received..... 162
§ 217. (d) Money paid at request..... 162
§ 218. (e) Account stated 162
§ 219. (i) Action of account..... 163
Note: Modern action of account..... 163n
Liability of custodian of public funds 163n
§ 220. (f) Case for negligent performance or willful breach 163
§ 221. (i) Case for fraud..... 164
§ 222. (ii) Case for breach of warranty..... 165
Note: Implied warranty of title..... 165n
Implied warranty of wholesomeness 165n
§ 223. (iii) Action of deceit..... 166
Note: Modern law of deceit..... 166n

CHAPTER X.

OF INJURIES TO REAL PROPERTY, AND FIRST OF DISPOSSESSION, OR OUSTER, OF THE FREEHOLD.

§ 224. Injuries to real property..... 167
Note: Importance of real property law..... 167n
§ 225. I. Ouster, or dispossession..... 167
§ 226. 1. Abatement 168
§ 227. 2. Intrusion 169
§ 228. 3. Disseisin 169
Note: Nature of disseisin 169n
§ 229. 4. Discontinuance 172
§ 230. 5. Deforcement 173
§ 231. 6. Remedies for ouster..... 174
§ 232. a. Entry by legal owner..... 175
§ 233. (1) When entry available..... 175

[References are to star paging.]

§ 234. (2) Right of entry tolled..... 176
§ 235. (a) When right of entry not barred by descent 177
§ 236. (3) Entry not available in a discontinuance..... 178
§ 237. (4) Entry not available on a deforcement..... 179
§ 238. (5) Statutes against forcible entry..... 179
§ 239. b. Possessory actions 180
§ 240. (1) Writ of entry 181
§ 241. (a) When writ of entry not available..... 183
§ 242. (b) Forms of writ of entry..... 184
Note: The most usual writs of entry.. 184n
§ 243. (2) Writ of assize 184
Note: Meaning of assize 185n
§ 244. (a) Assize of *mort d'ancestor*..... 185
§ 245. (b) Assize of novel disseisin..... 187
Note: Statute of Marlberge..... 188n
Note: Mort d'ancestor 188n
§ 246. (3) Statutes of limitation..... 188
§ 247. (4) Doctrine of remitter..... 190
§ 248. c. Writ of right..... 191
§ 249. (1) When writ of right available..... 191
§ 250. (a) Alienation by tenant in tail—Writ of formedon 192
§ 251. (b) Judgment by default—Writ *quod ei deforceat* 193
§ 252. (c) (d) Mere writ of right..... 194
§ 253. (2) Variations on the writ of right..... 194
§ 254. (3) Proceedings on writ of right..... 195
§ 255. (4) Requisites for a writ of right..... 196
Note: Sixty-year period of prescription..... 196n
§ 256. Modern remedies for ouster—Ejectment and trespass..... 196

CHAPTER XI.

OF DISPOSSESSION, OR OUSTER, OF CHATTELS REAL.

§ 257. Ouster of chattels real..... 198
§ 258. 1. Ouster from estates held by statute or *elegit*..... 198
§ 259. 2. Ouster from an estate for years..... 199
§ 260 a. Writ of *ejectione firmæ: ejectment*..... 200
§ 261. (1) History of writ of *ejectione firmæ*..... 200
Note: Termor's remedy for disseisin..... 200n
§ 262. (2) Requisites of action of ejectment..... 201
§ 263. (3) Use of fictions in ejectment..... 202
§ 264. (4) The real issue 204
§ 265. (5) Protection of real parties..... 204

[References are to star paging.]

§ 266. (6) Damages 205
§ 267. (7) Utility of ejectment..... 205
§ 268. (8) Where ejectment not available..... 206
§ 269. (9) Ejectment against tenants in arrears..... 206
§ 270. b. Writ of *quare ejecit infra terminum*..... 207

CHAPTER XII.

OF TRESPASS.

§ 271. Injuries to real property continued..... 208
§ 272. II. Trespass 208
§ 273. 1. Trespass, in general..... 208
§ 274. 2. Trespass *quare clausum fregit*..... 209
§ 275. a. What constitutes "breaking the close"..... 210
§ 276. b. Who may maintain trespass..... 210
§ 277. c. Liability for trespass..... 211
Note: Responsibility for negligence..... 211n
§ 278. d. Justifiable trespass 212
Note: Gleaning and hunting..... 213n
§ 279. (1) Trespass *ab initio*..... 213
Note: Trespass *ab initio*..... 213n
§ 280. (2) Defense of freehold..... 214
§ 281. e. Damages 215

CHAPTER XIII.

OF NUISANCE.

§ 282. Injuries to real property continued..... 216
§ 283. III. Nuisance 216
Note: Nature of nuisance 216n
§ 284. 1. Kinds of nuisance 216
§ 285. a. Nuisances to corporeal hereditaments..... 217
(1) Affecting dwellings 217
Note: Ancient lights in America 217n
§ 286. (2) Nuisances to land 217
§ 287. (3) Nuisances to other corporeal hereditaments.. 218
§ 288. b. Nuisances to incorporeal hereditaments 219
Note: Nuisances and their remedies 219n
§ 289. 2. Remedies for nuisance 219
§ 290. a. Remedy for public nuisances 220
§ 291. b. Redress by private persons for public nuisances... 220
§ 292. c. Remedy by self-help 220
§ 293. d. Remedies by suits 220
(1) Action on the case 220
§ 294. (2) Assize of nuisance 221
§ 295. (3) *Quod permittat prosternere* 222

[References are to star paging.]

CHAPTER XIV.

OF WASTE.

§ 296. Injuries to real property continued 223
§ 297. IV. Waste 223
Note: Waste and trespass 223n
§ 298. 1. Persons injured by waste 224
§ 299. 2. Remedies for waste 225
§ 300. a. Estrepement 225
§ 301. b. Injunction at equity 227
* § 302. c. Writ of waste 227
Note: Action on the case in the nature of waste. 227n

CHAPTER XV.

OF SUBTRACTION.

§ 303. Injuries to real property continued 230
V. Subtraction 230
Note: Subtraction 230n
§ 304. 1. Subtraction of services due by tenure 230
§ 305. a. Remedy by distress 231
§ 306. b. Other remedies 231
Note: Real and personal remedies distinguished. 232n
§ 307. c. Remedies to protect tenant 234
§ 308. 2. Subtraction of services due by custom and prescription. 235
§ 309. a. Remedies 235

CHAPTER XVI.

OF DISTURBANCE.

§ 310. Injuries to real property continued 236
VI. Disturbance 236
§ 311. 1. Disturbance of franchises 236
§ 312. 2. Disturbance of common 237
§ 313. a. Wrongful use of the common 237
§ 314. b. Surcharging the common 238
§ 315. c. Disseisin of the common 240
§ 316. d. Right of approvement of common 241
§ 317. 3. Disturbance of ways 242
§ 318. 4. Disturbance of tenure 242
§ 319. 5. Disturbance of patronage and usurpation of advowson. 243
§ 320. a. Remedies 244
(1) Writ of right of advowson 244
§ 321. (2) Assize of darrein presentment 245

[References are to star paging.]

§ 322. (3) Writ of *quare impedit* 246
§ 323. (a) Procedure on *quare impedit* 248
§ 324. (b) The real party in interest in *quare impedit* 252

CHAPTER XVII.

OF INJURIES PROCEEDING FROM OR AFFECTING THE CROWN.

§ 325. Injuries from and to the king 254
§ 326. 1. Injuries caused by the king 254
a. Personal immunity of the king 254
§ 327. b. Redress from the crown 256
§ 328. (1) Petition of right 256
§ 329. (2) *Monstrans de droit* 256
§ 330. 2. Suits by the crown 257
§ 331. a. Common-law actions 257
§ 332. b. Inquest of office, etc. 258
Note: Number of the jury 258n
§ 333. (1) Protection of the subject 260
§ 334. c. *Scire facias* 261
§ 335. d. Information 261
§ 336. e. *Quo warranto* 263
§ 337. (1) Information in the nature of *quo warranto* 263
§ 338. f. *Mandamus* 265
§ 339. Review of civil injuries and their remedies 265
Note: Classification of actions in the common-law system 265n
Note: Views of Blackstone and Bentham on the English law .. 268n

CHAPTER XVIII.

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

§ 340. Proceedings in an action at common law 270
§ 341. I. The original writ 273
Note: Office of the original writ 273n
§ 342. 1. Two kinds of original writ 274
§ 343. a. *Præcipe* 274
§ 344. b. *Si te fecerit securum* 274
§ 345. 2. The matter of security 275
§ 346. 3. Return of the writ 275
§ 347. a. Terms of court 275
Note: Modern terms, or sittings, of court 277n
§ 348. (1) Days in bank 277
§ 349. (2) The first return—Essoign day 278
§ 350. (3) Days of grace 278

[References are to star paging.]

CHAPTER XIX.

OF PROCESS.

§ 351. Proceedings in an action continued 279
II. Process 279
1. In common pleas 279
§ 352. a. Summons 279
§ 353. b. Attachment or *pone* 280
§ 354. c. Distress 280
§ 355. d. *Capias ad respondendum* 281
§ 356. (1) *Capias* used in first instance 282
§ 357. (2) Proceedings in outlawry 283
§ 358. 2. Ordinary process in king's bench 284
§ 359. a. Bill of Middlesex 285
§ 360. b. Writ of *latitat* 286
§ 361. 3. Process in the exchequer—Writ of *quo minus* 286
§ 362. 4. Subsequent proceedings in all courts 286
§ 363. a. Arrest of defendant—*Ac etiam* clause 287
§ 364. (1) What constitutes an arrest 288
Note: What constitutes arrest 288n
Note: Service on a person in l own dwelling 289n
§ 365. (2) Privileges from arrest 289
Note: What constitutes arrest 289
§ 366. (3) Bail 290
§ 367. (a) Appearance, and bail to the action ... 291
§ 368. (b) Special bail 292

CHAPTER XX.

OF PLEADINGS.

§ 369. Proceedings in an action continued 293
§ 370. III. Pleadings 293
Note: Pleadings under the codes 293n
§ 370. 1. The declaration 293
§ 371. a. Venue 294
§ 372. b. Counts 295
Note: Inconsistent counts in code pleading 295n
§ 373. c. Nonsuit 295
§ 374. d. *Retraxit* 296
§ 375. e. Discontinuance 296
§ 376. 2. Defense 297
§ 377. a. Defense and denial distinguished 298
§ 378. b. Claim of cognizance 299
§ 379. c. Imparlance 299

[References are to star paging.]

§ 380. d. Demand of view 299
§ 381. e. *Oyer* 300
§ 382. f. Prayer in aid 300
§ 383. g. Voucher 300
§ 384. h. Parol demurrer 300
§ 385. 3. Defendant's pleas 301
§ 386. a. Dilatory pleas 301
§ 387. (1) Plea to the jurisdiction 301
Note: Demurrer for lack of jurisdiction—Abatement 301n
§ 388. (2) Plea in abatement 302
§ 389. (3) Abatement 302
Note: Actio personalis moritur cum persona 302n
§ 390. b. Pleas to the action 303
§ 391. (1) Plea in confession 303
§ 392. (a) Tender 303
§ 393. (b) Payment into court 304
§ 394. (c) Setoff 305
Note: Application of setoff 305n
§ 395. (2) Pleas in denial, or bar 305
Note: Denials and new matter in code pleading 305n
§ 396. (a) The general issue 305
§ 397. (b) Special pleas in bar 306
§ 398. (i) Justification 306
§ 399. (ii) Statutes of limitation 306
§ 400. (aa) In real actions 307
§ 401. (bb) In personal actions 307
§ 402. (cc) In penal and criminal actions 307
§ 403. (dd) Policy of statutes of limitation 308
Note: Effect of statute of limitations ... 308n
§ 404. (iii) Estoppel 308
§ 405. (iv) Conditions and qualities of a plea 308
Note: Inconsistent defenses in code pleading 308n
§ 406. (v) General rules as to special pleas 309
§ 407. 4. Pleading: replication; rejoinder; surrejoinder; rebutter; surrebutter 309
Note: Pleading under the Judicature Act of 1873 .. 310n
§ 408. a. Departure in pleading 310

[References are to star paging.]

§ 409. b. New assignment 311
§ 410. c. Duplicity 311
§ 411. d. Protestation 311
§ 412. e. Conclusion of pleading 313
(1) Verification 313
§ 413. (2) Tender of issue 313

CHAPTER XXI.

OF ISSUE AND DEMURRER.

§ 414. Proceedings in an action continued 314
IV. Issue 314
§ 415. 1. Issue as to law: demurrer 314
Note: Issues of law 314n
§ 416. 2. Issue of fact 315
§ 417. Considerations generally applicable to pleading 316
1. Continuance 316
§ 418. 2. Plea of *puis darrein continuance* 316
§ 419. 3. The record 317
§ 420. 4. Law French 318
§ 421. 5. Law Latin 319
§ 422. 6. Utility of a technical language 320
§ 423. 7. Introduction of English 322
§ 424. 8. Court hand—Abbreviations 323
§ 425. 9. Demurrers decided by the court 324
§ 426. 10. Issues of fact decided by trial 324

CHAPTER XXII.

OF THE SEVERAL SPECIES OF TRIAL.

§ 427. Alleged uncertainty of legal proceedings 325
§ 428. 1. Multitude of laws and judicial decisions 325
§ 429. a. Multiplicity of rules due to liberty and property of subject 326
§ 430. b. Multiplicity of rules due to commerce and civilization ... 326
§ 431. c. Multiplicity of rules due to extent of territory 327
§ 432. d. Summary of causes of multiplicity of legal rules 328
§ 433. 2. English system of law vindicated 328
§ 434. 3. Cause and effect of lawsuits 329
§ 435. Trial—The several species 330
Note: Meaning and kinds of trial 331n
§ 436. 1. Trial by record 331
§ 437. 2. Trial by inspection 331
§ 438. a. In case of infancy of cognizor 332

[References are to star paging.]

§ 439. b. On plea that plaintiff is dead; idiocy..... 332
§ 440. c. Where issue is mayhem or no mayhem..... 333
§ 441. d. To determine a day past..... 333
§ 442. 3. Trial by certificate..... 333
§ 443. 4. Trial by witnesses..... 336
§ 444. 5. Wager of battle..... 337
Note: Abolition of trial by battle..... 337n
§ 445. a. History of wager of battle..... 338
§ 446. b. The champions..... 339
§ 447. c. The lists..... 339
§ 448. d. The oath..... 340
§ 449. e. The combat..... 340
§ 450. 6. Wager of law..... 341
Note: Extinction of wager of law in England..... 341n
Wager of law in America..... 341n
§ 451. a. Antiquity of wager of law..... 342
§ 452. b. Procedure in wager of law..... 343
§ 453. c. Wager of law optional in England..... 345
§ 454. d. Persons disqualified to wage their law..... 345
§ 455. e. When wager of law allowed..... 346
§ 456. f. When wager of law not allowed..... 347
§ 457. g. New remedies supplant wager of law..... 348

CHAPTER XXIII.

OF THE TRIAL BY JURY.

§ 458. 7. Trial by jury..... 349
§ 459. a. History of trial by jury..... 349
§ 460. b. Extraordinary trial by jury..... 351
§ 461. (1) Grand assize..... 351
§ 462. (2) Grand jury in an attaint..... 351
§ 463. c. Ordinary trial by jury..... 351
§ 464. (1) *Venire facias*..... 352
§ 465. (a) The clause of *nisi prius*..... 352
§ 466. (i) *Nisi prius* clause now omitted..... 353
§ 467. (2) Return of the panel..... 353
§ 468. (a) Compulsory attendance of jurors..... 354
Note: Jury process..... 354n
§ 469. (b) Disqualification of sheriff..... 354
§ 470. (c) Disqualification of coroner—Elisors..... 355
§ 471. (Practical excellence of trial by jury)..... 355
§ 472. (3) Producing the record..... 357
§ 473. (4) The trial..... 357
§ 474. (a) Common jury..... 358

[References are to star paging.]

§ 475. (i) Challenging the jury..... 359
§ 476. (aa) Challenges to the array..... 359
§ 477. (bb) Challenges to the polls..... 361
Note: Challenge to the polls.. 361n
Note: Bias or favor in the judge 361n
§ 478. (ii) Exemptions from jury service..... 364
§ 479. (iii) Summoning talesmen 365
§ 480. (iv) Jury sworn 365
§ 481. (Impartiality of the English jury system)..... 365
§ 482. (v) Hearing the case..... 366
§ 483. (vi) The evidence 367
Note: General survey of the historical development of the rules of evidence 367n
§ 484. (aa) Relevancy of evidence..... 367
§ 485. (bb) Written and parol evidence..... 367
§ 486. (cc) Rule as to "best evidence"..... 368
Note: The best evidence..... 368
§ 487. (dd) Hearsay evidence 368
§ 488. (ee) Books of account..... 368
§ 489. (ff) Parol evidence—Witnesses 369
§ 490. 1. Qualifications of witnesses... 370
§ 491. 2. *Quantum* of proof..... 371
§ 492. 3. Nature of evidence required. 371
§ 493. 4. Oath of witnesses..... 372
§ 494. 5. Bill of exceptions..... 372
§ 495. 6. Demurrer to evidence..... 372
§ 496. 7. Open examination of witnesses 373
§ 497. 8. Juror's own knowledge..... 374
§ 498. (vii) Charging the jury..... 375
§ 499. (viii) Deliberation of jury..... 375
Note: Carting the jury..... 376n
§ 500. (ix) Unanimity of jury..... 376
§ 501. (x) The verdict 377
§ 502. (aa) Special verdict..... 377
§ 503. (bb) General verdict in special case... 378
§ 504. (xi) Discharge of jury..... 378
§ 505. Encomium on the English jury system..... 379
Note: Merits and defects of the jury system..... 379n
§ 506. Defects of the jury system..... 382

[References are to star paging.]

CHAPTER XXIV.

OF JUDGMENT, AND ITS INCIDENTS.

§ 507. Matters subsequent to the trial..... 386
§ 508. 1. The *postea* 386
§ 509. 2. The judgment 386
§ 510. a. Suspending judgment; new trial..... 387
Note: Grounds of new trial..... 387n
Setting aside the verdict..... 387n
§ 511. (1) Misconduct of jury..... 387
§ 512. (2) Remedy for false verdict..... 389
§ 513. (3) Occasion for new trial..... 390
§ 514. b. Arrest of judgment..... 393
§ 515. (1) For variance 393
§ 516. (2) Where verdict is without issue..... 393
§ 517. (3) For insufficient pleading..... 394
§ 518. (a) Immaterial issues 395
§ 519. c. Kinds of judgment..... 396
§ 520. d. Nature of the judgment..... 396
Note: Judgments formed by act of the law, not of the judge 396n
§ 521. e. Interlocutory judgments 397
§ 522. f. Final judgments 398
§ 523. 3. Costs 399
§ 524. a. Exemption from costs..... 400

CHAPTER XXV.

OF PROCEEDINGS IN THE NATURE OF APPEALS.

§ 525. Species of appeal proceedings..... 402
§ 526. 1. Writ of attaint..... 402
§ 527. a. Trial and punishment in attaint..... 403
§ 528. 2. Writ of deceit..... 405
§ 529. 3. *Audita querela*..... 405
§ 530. 4. Writ of error 406
Note: Writ of error..... 406n
Note: Writs *coram nobis* and *coram vobis*..... 406n
§ 531. a. Amendment of judgments..... 406
§ 532. (1) Statutes of amendment and jeofails..... 407
§ 533. (2) History of amendment..... 407
§ 534. b. Bail on writ of error..... 411
§ 535. c. Courts from which error lies..... 411

[References are to star paging.]

CHAPTER XXVI.

OF EXECUTION.

§ 536. Execution of judgment..... 412
§ 537. 1. Forms of execution..... 412
a. In real and mixed actions..... 412
§ 538. b. In other actions 413
§ 539. c. In money actions..... 414
§ 540. (1) Writ of *capias*..... 414
§ 541. (a) Escape of prisoner in execution..... 415
§ 542. (b) Execution against bail..... 416
§ 543. (2) Writ of *fieri facias*..... 417
§ 544. (3) Writ of *levari facias*..... 418
§ 545. (4) Writ of *elegit*..... 418
§ 546. (5) Writ of extent..... 420
§ 547. 2. Time limitation on issuing execution..... 421
§ 548. Summary of Book III..... 422
§ 549. Spirit of English remedial law..... 423

CHAPTER XXVII.

OF PROCEEDINGS IN THE COURTS OF EQUITY.

§ 550. Causes cognizable in chancery..... 426
Note: Note on equity jurisdiction..... 426n
§ 551. 1. Guardianship of infants..... 427
§ 552. 2. Custody of idiots and lunatics..... 427
§ 553. 3. Charities 427
§ 554. 4. Bankrupts 428
§ 555. 5. Causes in different courts of equity..... 429
§ 556. Nature of equity..... 429
§ 557. 1. Equity follows the law..... 430
§ 558. 2. Equitable interpretation 431
§ 559. 3. Special jurisdiction 431
§ 560. 4. Equity a settled system..... 432
Note: The chancellor's foot..... 432n
§ 561. Similarity of courts of law and of equity..... 434
§ 562. 1. Rules of property, evidence and interpretation..... 434
§ 563. 2. Legal instruments and contracts..... 435
§ 564. 3. Rules of decision..... 436
§ 565. Difference between courts of law and of equity..... 437
§ 566. 1. Mode of proof..... 437
§ 567. 2. Mode of trial..... 438
§ 568. 3. Mode of relief..... 438
§ 569. 4. Construction of securities..... 439
§ 570. 5. Trusts 440

[References are to star paging.]

§ 571. Progressive improvement in equitable jurisprudence..... 440
§ 572. Procedure in courts of equity..... 442
§ 573. 1. Bill in chancery..... 442
§ 574. 2. Proceedings to compel answer of defendant..... 444
§ 575. 3. Process against corporations; peers; members of parliament. 445
§ 576. 4. Process where subpœna not served..... 446
§ 577. 5. Modes of defense in equity..... 446
§ 578. a. Demurrer 446
§ 579. b. Plea 446
§ 580. c. Answer 447
§ 581. (1) Answer how sworn..... 448
§ 582. 6. Amendment of the bill..... 448
§ 583. 7. Hearing on bill and answer..... 449
§ 584. a. Taking testimony..... 449
§ 585. (1) Commission to take testimony..... 449
§ 586. (2) Bill to perpetuate testimony..... 450
§ 587. b. Hearing the cause 450
§ 588. (1) Cross-causes 451
§ 589. (2) Method of hearing causes..... 451
§ 590. (3) Decrees 451
§ 591. (a) Decrees, interlocutory and final..... 452
§ 592. (b) Feigned issue 452
§ 593. (c) Taking opinion on questions of law..... 453
§ 594. (d) Accounting before master 453
§ 595. (e) Final decree 453
§ 596. (i) Petition for rehearing..... 453
§ 597. (ii) Bill of review..... 454
§ 598. (iii) Appeal to house of lords..... 454

SUPPLEMENTARY CHAPTER.

CONFLICT OF LAWS.

[References in this chapter are to pages of this Edition.]

§ 599. Conflict of laws..... 2081
1. Introduction 2081
§ 600. 2. Proper designation of subject..... 2081
§ 601. 3. Definition 2082
§ 602. 4. Recognition of rights acquired under foreign law..... 2083
§ 603. 5. Enforcement of rights..... 2083
§ 604. 6. Elements considered in determining what law should apply.. 2084
§ 605. 7. *Lex loci*..... 2084
§ 606. 8. Domicile and nationality..... 2085
§ 607. a. The doctrine of *renvoi*..... 2086
§ 608. b. Domicile 2087
§ 609. c. Personal status 2088
(1) In general 2088

[References are to pages of this Edition.]

§ 610. (2) Status: Marriage 2089
§ 611. (3) Status: Legitimacy and Adoption..... 2089
§ 612. 9. Property 2090
§ 613. 10. Succession 2091
§ 614. 11. Estates: Administration 2093
§ 615. 12. Obligations 2095
a. Torts 2095
§ 616. b. *Quasi* contract 2096
§ 617. c. Contracts 2098
(1) Validity 2098
§ 618. (2) Interpretation, obligation, performance and discharge 2100
§ 619. 13. Jurisdiction 2101
a. In general 2101
§ 620. b. Jurisdiction of courts..... 2103
(1) Actions *in rem* and *in personam*..... 2103
§ 621. (2) Divorce 2104

BOOK IV.

OF PUBLIC WRONGS.

CHAPTER I.

OF THE NATURE OF CRIMES, AND THEIR PUNISHMENT.

[References are to star paging.]

§ 1. Public wrongs: division of the subject..... 1
Note: Character of Blackstone's account of the criminal law.... 1n
§ 2. General nature of crimes and punishment 2
§ 3. 1. Importance of knowledge of criminal law..... 2
§ 4. 2. Definition of crime and misdemeanor..... 5
Note: Treason, felony and misdemeanor..... 5n
§ 5. a. Distinction between public and private wrongs..... 5
Note: Difference between torts and crimes..... 5n
Note: Reduction of the criminal law to statutory form.. 7n
§ 6. 3. Punishment of crimes..... 7
Note: Modern conception of the philosophy and science of crime 7n
§ 7. a. The right to punish..... 7
§ 8. (1) Capital punishment 9
§ 9. b. The object of punishment 11
§ 10. c. Degree of punishment 12
§ 11. (1) Retaliation 13
§ 12. (2) Principles determining degree of punishment..... 14
§ 13. (a) Object of the crime..... 15

[References are to star paging.]

§ 14. (b) Mitigating circumstances 15
§ 15. (c) Aggravating circumstances 16
§ 16. (d) Certainty rather than severity of punishment 17
§ 17. (e) Graduation of punishment to offense..... 18
§ 18. (i) Excessive number of capital offenses in English law 18
Note: Amelioration of English criminal law 18n

CHAPTER II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

§ 19. Persons capable of committing crimes..... 20
§ 20. 1. Essentials of crime: will and act..... 20
§ 21. a. Conditions exempting from responsibility for crime..... 21
§ 22. (1) Infancy 22
Note: Age of criminal responsibility..... 22n
§ 23. (a) Age of capacity..... 23n
§ 24. (2) Insanity and idiocy..... 24
Note: Relation of madness to criminal responsibility 24n
§ 25. (3) Drunkenness 26
Note: Intoxication as an excuse..... 26n
§ 26. (4) Misfortune or chance..... 26
Note: Accidental bodily harm..... 26n
§ 27. (5) Ignorance or mistake..... 27
Note: "Ignorance of the law excuses no one"..... 27n
Mistake 27n
Note: Killing by mistake..... 27n
§ 28. (6) Compulsion and necessity..... 28
§ 29. (a) Civil subjection 28
§ 30. (i) Case of wife coerced by husband..... 28
§ 31. (b) Duress 30
§ 32. (c) Choice of evils..... 31
§ 33. (d) Extreme want no justification..... 31
§ 34. (7) The king incapable of crime..... 33

CHAPTER III.

OF PRINCIPALS AND ACCESSORIES.

§ 35. Principals and accessories 34
§ 36. 1. Principals 34
§ 37. 2. Accessories 36
§ 38. a. Offenses admitting and not admitting accessories..... 36
§ 39. b. Accessories before the fact..... 37

[References are to star paging.]

§ 40. c. Accessories after the fact..... 38
§ 41. d. Reasons for the distinction of principal and accessory... 39
Note: Distinction of principal and accessory considered. 39n

CHAPTER IV.

OF OFFENSES AGAINST GOD AND RELIGION.

§ 42. Limits of the criminal law..... 41
§ 43. Offenses against religion..... 43
Note: Offenses against religion..... 43n
§ 44. 1. Apostasy..... 43
§ 45. 2. Heresy..... 45
§ 46. 3. Offenses against the established church..... 50
Note: Controversy over Blackstone's treatment of nonconformists..... 50n
§ 47. a. Reviling the ordinances..... 51
§ 48. b. Nonconformity..... 52
§ 49. (1) Absence from divine worship..... 52
§ 50. (2) Dissenters..... 52
§ 51. (a) Protestant dissenters..... 53
§ 52. (b) Papists..... 55
§ 53. (i) Persons professing the popish religion... 55
§ 54. (ii) Popish recusants..... 56
§ 55. (iii) Popish priests..... 57
§ 56. (iv) Observations on the laws against papists 57
Note: Removal of disabilities of Catholics 58n
§ 57. c. The corporation and tests acts..... 58
§ 58. 4. Blasphemy..... 59
§ 59. 5. Swearing and cursing..... 60
§ 60. 6. Witchcraft..... 61
§ 61. 7. Religious imposters..... 62
§ 62. 8. Simony..... 62
§ 63. 9. Sabbath-breaking..... 63
Note: Sunday laws in the United States..... 63n
§ 64. 10. Drunkenness..... 64
§ 65. 11. Lewdness..... 64
§ 66. Temporal punishment for having bastard children..... 65

CHAPTER V.

OF OFFENSES AGAINST THE LAW OF NATIONS.

§ 67. The law of nations..... 66
§ 68. Offenses against the law of nations..... 68
§ 69. 1. Violation of safe-conducts..... 68
§ 70. 2. Offenses against ambassadors..... 70
§ 71. 3. Piracy..... 71

[References are to star paging.]

CHAPTER VI.

OF HIGH TREASON.

§ 72. Offenses against the supreme executive power..... 74
Note: Change in the conception of treason..... 74n
§ 73. 1. Treason 75
§ 74. a. Treason under the older common law..... 76
§ 75. b. Statute of Treason, 25 Edward III (1351)..... 76
§ 76. (1) Compassing the death of the king..... 76
Note: Present law of treason in England..... 76n
Law of treason in the United States.... 77n
§ 77. (a) Meaning of compassing..... 79
§ 78. (b) Treasonable words 80
§ 79. (2) Violation of the king's companion, etc..... 81
§ 80. (3) Levying war against the king..... 82
§ 81. (4) Adhering to the king's enemies..... 83
§ 82. (5) Counterfeiting the king's seal..... 84
§ 83. (6) Counterfeiting the king's money..... 84
§ 84. (7) Slaying the chancellor, treasurer, or king's justices. 84
§ 85. (8) Merits of the Statute of Treason..... 85
§ 86. c. Statutes of treason under Richard II, Henry IV, Henry VIII and Mary..... 86
§ 87. d. New treasons by later statutes..... 87
§ 88. (1) Relating to papists 88
§ 89. (2) Relating to the coin and royal signature..... 88
§ 90. (3) For securing the Protestant succession..... 91
§ 91. e. Punishment of high treason..... 93

CHAPTER VII.

OF FELONIES INJURIOUS TO THE KING'S PREROGATIVE.

§ 92. II. Felonies injurious to the king's prerogative..... 94
§ 93. 1. Nature and meaning of felony..... 94
§ 94. 2. Feudal origin of the word "felony"..... 95
§ 95. 3. Forfeiture a consequence of all felonies..... 97
§ 96. 4. Capital punishment not a necessary element of felony... 97
Note: Felony as distinguished from minor crimes..... 98n
§ 97. 5. Classes of felonies injurious to the king's prerogative... 98
§ 98. a. Felonies relating to the coin..... 99
§ 99. b. Felonies against the king's council..... 100
§ 100. c. Felonies in serving foreign states..... 101
§ 101. d. Felonies by embezzling or destroying the king's war-like stores 102
§ 102. e. Felonies for desertion 102

[References are to star paging.]

CHAPTER VIII.

PRÆMUNIRE.

§ 103. III. Præmunire 103
§ 104. 1. Origin of præmunire 103
§ 105. 2. Relation of religion and civil government..... 103
§ 106. 3. History of papal encroachments in England..... 105
§ 107. 4. Statutes of præmunire..... 110
a. Edward I to Richard II..... 110
§ 108. b. The Statute of Præmunire: 16 Richard II (1392). 112
§ 109. c. Præmunire under Henry IV, Henry V, and Henry VI 113
§ 110. d. Statutes of præmunire under Henry VIII, Elizabeth, and James I..... 115
§ 111. e. Other statutes imposing the penalties of præmunire. 116
§ 112. 5. Penalties of præmunire..... 118

CHAPTER IX.

OF MISPRISIONS AND CONTEMPTS AFFECTING THE KING AND GOVERNMENT.

§ 113. IV. Misprisions and contempts..... 119
§ 114. 1. Definition of misprision..... 119
§ 115. 2. Kinds of misprision..... 119
§ 116. a. Negative misprisions 120
(1) Misprision of treason 120
§ 117. (2) Misprision of felony 121
§ 118. (3) Concealing treasure-trove 121
§ 119. b. Positive misprisions—High misdemeanors..... 122
§ 120. (1) Maladministration of public officers..... 122
§ 121. (2) Contempts against the king's prerogative..... 122
§ 122. (3) Contempts against the king's person and government 123
§ 123. (4) Contempts against the king's title..... 123
§ 124. (5) Contempts against the king's palaces and courts of justice..... 124
§ 125. (a) Striking in the superior courts..... 125
§ 126. (b) Rescue of prisoner..... 125
§ 127. (c) Threatening a judge..... 126
§ 128. (d) Threatening or assaulting a party..... 126
§ 129. (e) Dissuading witnesses, etc..... 126

[References are to star paging.]

CHAPTER X.

OF OFFENSES AGAINST PUBLIC JUSTICE.

§ 130. Offenses against the commonwealth: five species..... 127
§ 131. I. Offenses against public justice..... 128
§ 132. 1. Embezzling or falsifying judicial records..... 128
§ 133. 2. Duress of prisoner..... 129
§ 134. 3. Obstructing execution of process..... 129
§ 135. 4. Escapes 130
§ 136. 5. Breach of prison..... 130
§ 137. 6. Rescues 131
§ 138. 7. Returning from transportation..... 132
§ 139. 8. Accepting reward for return of stolen goods..... 132
§ 140. 9. Receiving stolen goods..... 132
§ 141. 10. Compounding a felony..... 133
§ 142. 11. Common barratry 134
§ 143. 12. Maintenance 134
§ 144. 13. Champerty 135
Note: Champerty and maintenance in United States... 135n
Champertous contract between attorney and client 135n
§ 145. 14. Compounding informations 136
§ 146. 15. Conspiracy to indict..... 136
Note: Crime of conspiracy..... 136n
§ 147. 16. Perjury 137
Note: Elements of the crime of perjury..... 137n
§ 148. 17. Bribery 139
§ 149. 18. Embracery 140
§ 150. 19. False verdicts 140
§ 151. 20. Negligence of public officers..... 141
§ 152. 21. Oppression by judges..... 141
§ 153. 22. Extortion 141

CHAPTER XI.

OF OFFENSES AGAINST THE PUBLIC PEACE.

§ 154. II. Offenses against the public peace 142
§ 155. 1. Riotous assembling of twelve persons 142
§ 156. 2. Unlawful hunting 144
§ 157. 3. Threatening letters 144
§ 158. 4. Destroying public works on navigable streams or highways 145
§ 159. 5. Affrays 145
§ 160. 6. Riots and unlawful assemblies 146

[References are to star paging.]

§ 161. 7. Tumultuous petitioning 147
§ 162. 8. Forcible entry and detainer 148
Note: Forcible entry and detainer 149n
§ 163. 9. Carrying arms 149
§ 164. 10. Spreading false news 149
§ 165. 11. False prophecies 149
§ 166. 12. Challenges to fight 150
§ 167. 13. Libel 150
Note: Criminal libel 150n
§ 168. a. Liberty of the press 152

CHAPTER XII.

OF OFFENSES AGAINST PUBLIC TRADE.

§ 169. III. Offenses against public trade 154
§ 170. 1. Owling 154
§ 171. 2. Smuggling 155
§ 172. 3. Fraudulent bankruptcy 156
§ 173. 4. Usury 156
§ 174. 5. Cheating 157
Note: Cheating 157n
§ 175. 6. Forestalling 158
§ 176. 7. Regrating 158
§ 177. 8. Engrossing 159
§ 178. 9. Monopolies 159
Note: Mr. Justice Field on Monopolies 159n
§ 179. 10. Exercising a trade without apprenticeship 160
§ 180. 11. Transporting artists abroad 160

CHAPTER XIII.

OF OFFENSES AGAINST THE PUBLIC HEALTH AND THE PUBLIC POLICE OR ECONOMY.

§ 181. IV. Offenses against the public health 161
§ 182. 1. Violating quarantine 161
§ 183. 2. Selling unwholesome provisions 162
§ 184. V. Offenses against the public police 162
§ 185. 1. Clandestine marriages 163
§ 186. 2. Bigamy 163
§ 187. 3. Wandering soldiers and sailors 165
§ 188. 4. Gipsies 165
§ 189. 5. Common nuisances 167
§ 190. a. Annoyances in highways and rivers 167
§ 191. (1) Purprestures 168
§ 192. b. Offensive trades 168
§ 193. c. Disorderly houses 168

[References are to star paging.]

§ 194. d. Lotteries 168
§ 195. e. Fireworks 168
§ 196. f. Eavesdroppers 168
§ 197. g. Common scolds 169
§ 198. 6. Vagrants, rogues and vagabonds 170
§ 199. 7. Sumptuary laws 170
§ 200. 8. Gaming 171
§ 201. a. Statutes against gaming 172
§ 202. 9. Killing game 173
§ 203. a. Game laws 174

CHAPTER XIV.

OF HOMICIDE.

§ 204. Summary of preceding chapters 176
§ 205. Offenses against individuals 176
Grounds for regarding them as public wrongs 176
§ 206. Of three kinds: I. Against the person; II. Against habitations; III. Against property 177
§ 207. I. Offenses against the person 177
1. Homicide 177
§ 208. a. Three kinds of homicide 178
§ 209. (1) Justifiable homicide 178
Note: Justifiable and excusable homicide considered 178n
§ 210. (a) Homicide owing to inevitable necessity .. 178
§ 211. (i) Homicide by command of the law .. 178
§ 212. (ii) Homicide by permission of the law .. 179
§ 213. (aa) Homicide to advance public justice 179
§ 214. (bb) Homicide to prevent crime 180
Homicide in defense of chastity 181
§ 215. (2) Excusable homicide 182
§ 216. (a) Homicide by misadventure 183
§ 217. (b) Homicide in self-defense 184
Chance-medley 184
Distinction between chance-medley and manslaughter 184
Time of self-defense 185
Saving one's own life at the expense of another's 186
§ 218. (i) Comparison of homicide in self-defense and by misadventure 186
§ 219. (ii) All homicides culpable 187
§ 220. (iii) Penalty of excusable homicide 188

[References are to star paging.]

§ 221. (3) Felonious homicide 189
§ 222. (a) Suicide 189
Note: Suicide as a crime..... 190n
Punishment of suicide 190
§ 223. (b) Killing another person 191
§ 224. (i) Manslaughter 191
§ 225. (aa) Voluntary manslaughter..... 191
§ 226. (bb) Involuntary manslaughter 192
Note: Death from negligence 192n
§ 227. (cc) Punishment of manslaughter.. 193
Note: Modern punishment of manslaughter in England.. 193n
Statutory punishment for mortally stabbing 193n
§ 228. (ii) Murder 194
Note: The name of murder.. 194n
§ 229. (aa) Definition of murder 195
Note: Premeditated and unpremeditated killing 195n
Degrees of murder.... 195n
§ 230. (aaa) Capacity of person killing 195
§ 231 (bbb) Unlawfulness of killing. 196
§ 232. (ccc) The person killed..... 198
Note: Criminal liability of the physician and surgeon..... 198n
§ 233. (ddd) Malice aforethought.. 198
Express malice 199
Implied malice 200
General rule as to malice 201
§ 234. (bb) Punishment of murder 202
Note: Modern practice of execution 202n
Parricide 202
§ 235. (cc) Petit treason 203
Note: Petit treason 203n
Kinds of petit treason..... 203
Punishment of petit treason.. 204

[References are to star paging.]

CHAPTER XV.

OF OFFENSES AGAINST THE PERSONS OF INDIVIDUALS.

§ 236. I. Continued. Offenses against the person, other than homicide. 205
§ 237. 1. Mayhem 205
§ 238. a. Earlier punishment of mayhem 206
§ 239. b. Later punishment of mayhem 206
§ 240. 2. Abduction and marriage of an heiress 208
§ 241. a. Construction of statutes against abducting an heiress. 208
§ 242. b. Abducting girls under sixteen 209
§ 243. 3. Rape 210
§ 244. a. Punishment of rape under the civil law 210
§ 245. b. Earlier common-law punishment of rape 211
§ 246. c. Later statutes against rape 212
§ 247. d. Capacity to commit rape 212
§ 248. e. Against whom rape may be committed 213
§ 249. f. Proof of crime of rape 213
§ 250. 4. Crime against nature 215
§ 251. 5, 6, 7. Assaults, batteries and woundings 217
Beating a clergyman 217
§ 252. 8. False imprisonment 218
§ 252a. 9. Kidnapping 219

CHAPTER XVI.

OF OFFENSES AGAINST THE HABITATIONS OF INDIVIDUALS.

§ 253. II. Offenses against the habitation of individuals 220
§ 254. 1. Arson 220
Note: Burning one's own house 220n
§ 255. a. The subject of arson 221
§ 256. b. The requisite of arson 222
§ 257. c. Punishment of arson 222
§ 258. 2. Burglary 223
§ 259. a. Definition of burglary 224
§ 260. (1) Time of committing burglary 224
§ 261. (2) Place of committing burglary 224
§ 262. (3) Manner of committing burglary 226
§ 263. (4) Intent in burglary 227
§ 264. b. Punishment of burglary 228

CHAPTER XVII.

OF OFFENSES AGAINST PRIVATE PROPERTY.

§ 265. III. Offenses against private property 229
§ 266. 1. Larceny 229
§ 267. a. Simple larceny: grand and petit 229

[References are to star paging.]

§ 268. (1) Definition of larceny 229
§ 269. (a) The "taking" in larceny 230
Note: Larceny by means of fraud or mistake 230n
§ 270. (b) The "carrying away" in larceny..... 231
§ 271. (c) The felonious intent in larceny..... 232
Note: Proof of the felonious intent..... 232n
§ 272. (d) Subjects of larceny 232
§ 273. (2) Punishment of larceny..... 235
§ 274. b. Compound larceny 239
§ 275. (1) Larceny from the house 239
§ 276. (2) Larceny from the person 241
§ 277. (a) Privately stealing from the person 241
§ 278. (b) Robbery 242
Note: Robbery 242n
§ 279. (i) Punishment of robbery 243
§ 280. 2. Malicious mischief 244
§ 281. a. Statutes against malicious mischief; Henry VIII to George III 244
§ 282. 3. Forgery 247
Note: Forgery 247n
§ 283. a. Statutes against forgery; Elizabeth to George III. 247

CHAPTER XVIII.

OF THE MEANS OF PREVENTING OFFENSES.

§ 284. Prevention of crime..... 251
§ 285. 1. Giving securities or recognizances 251
Note: Frank-pledge and gesammtburgschaft 251n
§ 286. a. What are recognizances 252
§ 287. b. Who may require recognizances 253
§ 288. c. Discharge of recognizances 254
§ 289. 2. Distinction between recognizances for the peace and for good behavior 254
§ 290. a. Who may be bound over to keep the peace..... 255
§ 291. (1) Forfeiture of recognizance to keep the peace..... 255
§ 292. b. Who may be bound over for good behavior..... 256
§ 293. (1) Forfeiture of recognizance for good behavior.... 257

CHAPTER XIX.

OF COURTS OF A CRIMINAL JURISDICTION.

§ 294. Courts of criminal jurisdiction..... 258
§ 295. I. Courts of public and general criminal jurisdiction 258
§ 296. 1. High court of parliament 259

[References are to star paging.]

§ 297. 2. Court of the lord high steward 261
§ 298. a. Trial of peers by parliament 263
§ 299. b. Right of bishops to sit in court of lord high steward 264
§ 300. 3. Court of king's bench on the crown side 265
§ 301. a. Former court of star-chamber 266
§ 302. 4. The court of chivalry 267
§ 303. 5. The high court of admiralty 268
§ 304. 6, 7. Court of oyer and terminer and gaol delivery 269
§ 305. 8. Courts of general quarter sessions 271
§ 306. a. Quarter sessions in towns; petty sessions 272
§ 307. 9. The sheriff's tourn 273
§ 308. 10. Court-leet 273
§ 309. 11. Court of the coroner 274
§ 310. 12. Court of the clerk of the market 275
§ 311. II. Criminal courts of limited jurisdiction 275
§ 312. 1, 2. Courts of the king's household 276
§ 313. 3. Courts of the universities 277

CHAPTER XX.

OF SUMMARY CONVICTIONS.

§ 314. Summary proceedings 279
§ 315. 1. For violating excise laws 281
§ 316. 2. Proceedings before justices of the peace 281
§ 317. a. Process in summary convictions 282
§ 318. 3. Contempt proceedings 283
§ 319. a. Kinds of contempt 283
§ 320. b. Attachment in contempt cases 286
§ 321. 4. Reflections on proceedings by summary conviction 287

CHAPTER XXI.

OF ARRESTS.

§ 322. Ordinary proceedings in courts of criminal jurisdiction..... 289
§ 323. I. Arrest 289
§ 324. 1. Arrest under warrants..... 290
§ 325. a. Warrants issued by justices of the peace 290
§ 326. b. General warrants illegal 291
§ 327. c. Execution of warrants 291
§ 328. 2. Arrest by officers without warrants..... 292
§ 329. 3. Arrest by private persons..... 293
Note: Arrest by private persons without warrant 293n
§ 330. 4. Arrest by hue and cry 293
§ 331. 5. Rewards for apprehending felons 294

[References are to star paging.]

CHAPTER XXII.

OF COMMITMENT AND BAIL.

§ 332. II. Commitment and bail 296
§ 333. 1. Examination of accused 296
§ 334. 2. Rules as to taking bail 297
§ 335. 3. Offenses not bailable 298
§ 336. a. Power of king's bench to bail 299
§ 337. b. Commitment for offenses not bailable 300

CHAPTER XXIII.

OF THE SEVERAL MODES OF PROSECUTION.

§ 338. III. Prosecution 300
§ 339. 1. Presentment 300
§ 340. 2. Indictment 302
Note: Functions of the grand jury 302n
§ 341. a. Grand jury 302
§ 342. (1) Offenses cognizable by the grand jury 302
§ 343. (2) Proceedings of the grand jury 305
§ 344. b. Requisites of an indictment 306
§ 345. 3. Information 308
§ 346. a. *Qui tam* prosecutions 308
§ 347. b. Informations in the name of the king 308
§ 348. (1) *Ex officio* 309
§ 349. (2) *Ex relatione* 309
§ 350. c. History of prosecutions by information 309
§ 351. d. Informations in the nature of *quo warranto* 312
§ 352. 4. Appeals 312
§ 353. a. Trial on appeal constituted jeopardy 315
§ 354. b. Punishment for conviction in appeals 316

CHAPTER XXIV.

OF PROCESS UPON AN INDICTMENT.

§ 355. IV. Process after indictment found 318
§ 356. 1. *Venire facias* 318
§ 357. 2. *Capias* 319
§ 358. 3. Process in outlawry 319
§ 359. a. Punishment for outlawries 319
§ 360. 4. *Certiorari* 320
Note: Certiorari in England 321n
Certiorari in the United States 321n

[References are to star paging.]

CHAPTER XXV.

OF ARRAIGNMENT, AND ITS INCIDENTS.

§ 361. V. Arraignment 322
§ 362. 1. Identifying the prisoner 323
Note: 1. The chaining of prisoners 323n
§ 363. 2. Reading the indictment 323
§ 364. a. Trial of accessories 323
§ 365. 3. Incidents of the arraignment 324
§ 366. a. Standing mute 324
§ 367. (1) Consequences of standing mute 325
Note: Standing mute in modern law 325n
§ 368. (a) *Trina admonitio* 325
§ 369. (b) Former use of torture 326
§ 370. (c) Penance for standing mute 327
§ 371. b. Confession of the prisoner 329
§ 372. (1) "Approvement" 329
Note: King's or state's evidence 330

CHAPTER XXVI.

OF PLEA, AND ISSUE.

§ 373. VI. Pleas of the prisoner 332
Note: Pleading in criminal cases 332n
§ 374. 1. Plea to the jurisdiction 333
§ 375. 2. Demurrer to the indictment 333
Note: Motion to quash 334n
§ 376. 3. Plea in abatement 334
§ 377. 4. Special pleas in bar 335
§ 378. a. Plea of former acquittal 335
Note: Twice in jeopardy 335n
§ 379. b. Plea of former conviction 336
§ 380. c. Plea of former attainder 336
§ 381. d. Plea of pardon 337
§ 382. 5. Plea of not guilty; the general issue 338
§ 383. a. Replication of "cul. prit." 339
Note: The word "culprit" 339n
§ 384. b. Issue joined 340

CHAPTER XXVII.

OF TRIAL AND CONVICTION.

§ 385. VII. The several methods of trial 342
§ 386. 1. Trial by ordeal 342
§ 387. a. Fire ordeal 343

[References are to star paging.]

§ 388. b. Water ordeal 343
§ 389. c. History of trial by ordeal 343
§ 390. 2. Trial by the corsned 345
§ 391. 3. Trial by battle 346
§ 392. Procedure in trial by battle 347
§ 393. 4. Trial of an indicted peer 348
§ 394. 5. Trial by jury 349
§ 395. a. Value of jury trial in criminal cases 349
§ 396. b. Impaneling the jury 350
§ 397. c. Challenges to the jury 352
§ 398. (1) Challenges for cause 352
§ 399. (2) Peremptory challenges 353
§ 400. d. Swearing the jury 355
§ 401. e. Proceedings after the jury is sworn 355
Note: Calling for the accused 356n
§ 402. f. Evidence in criminal cases 356
§ 403. (1) Evidence in cases of treason 356
§ 404. (2) Evidence of handwriting 358
§ 405. (3) Evidence in concealment of bastard child... 358
§ 406. (4) Presumptive evidence of felony 358
Note: Presumption of innocence 359n
§ 407. (5) Witnesses for the accused 359
Note: Swearing the witnesses for the prisoner 360n
§ 408. g. The verdict 360
§ 409. h. Effect of acquittal 361
§ 410. i. Effect of conviction 362
§ 411. (1) Costs 362
§ 412. (2) Restitution of stolen goods 362
Note: Public prosecution and civil remedy for same injury 363n

CHAPTER XXVIII.

OF THE BENEFIT OF CLERGY.

§ 413. VIII. Benefit of clergy 365
Note: Benefit of clergy in America 366n
§ 414. 1. Origin and history of benefit of clergy 365
§ 415. a. To whom benefit of clergy allowed 366
§ 416. b. Effect of allowing benefit of clergy 368
§ 417. c. Statutes regulating benefit of clergy 369
§ 418. d. Reflections on benefit of clergy 371
§ 419. 2. Persons entitled to benefit of clergy 371
§ 420. 3. Crimes for which benefit of clergy allowed 372
§ 421. 4. Consequences of benefit of clergy 374

[References are to star paging.]

CHAPTER XXIX.

OF JUDGMENT AND ITS CONSEQUENCES.

§ 422. IX. Judgment 375
§ 423. 1. Moving in arrest of judgment..... 375
Note: Arrest of judgment 375n
§ 424. a. Pardon 376
§ 425. b. Benefit of clergy..... 376
§ 426. 2. Punishment pronounced 376
Note: Modern punishments in England..... 376n
§ 427. a. Reflections on the punishments of English law..... 377
§ 428. b. Reasonableness of fines..... 379
§ 429. c. Attainder 380
Note: Forfeiture and corruption of blood abolished 381n
§ 430. (1) Forfeiture of property..... 381
§ 431. (a) Reasons for forfeiture 382
§ 432. (b) Origin of forfeiture of lands in England 383
§ 433. d. Forfeiture in felony..... 385
§ 434. (2) Corruption of blood..... 388

CHAPTER XXX.

OF REVERSAL OF JUDGMENT.

§ 435. X. Reversal of judgment 390
§ 436. 1. Reversal without writ of error..... 390
§ 437. 2. Reversal by writ of error..... 391
§ 438. 3. Reversal of attainder 392
§ 439. 4. Effect of reversal of judgment..... 392

CHAPTER XXXI.

OF REPRIEVE AND PARDON.

§ 440. XI. Reprieve and pardon 394
§ 441. 1. Reprieves 394
§ 442. a. Reprieves *ex arbitrio judicis*..... 394
§ 443. b. Reprieves *ex necessitate legis*..... 394
§ 444. 2. Pardon 396
Note: Effect of pardon in the United States..... 397n
§ 445. a. Object of pardon..... 398
§ 446. (1) Pardon not pleadable in impeachments..... 399
§ 447. (2) Manner of pardoning..... 400
§ 448. (a) Conditional pardons 401

[References are to star paging.]

§ 449. (3) Allowance of pardons..... 401
Note: Exile by conditional pardon..... 401n
§ 450. (4) Effect of pardon 402

CHAPTER XXXII.

OF EXECUTION.

§ 451. XII. Execution 403
§ 452. 1. How the warrant is executed..... 404
§ 453. 2. Change in mode of execution..... 404
§ 454. Conclusion of the Commentaries..... 406
Note: Fairness of English criminal justice..... 406n

CHAPTER XXXIII.

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

§ 455. Historical review of the more remarkable changes in the laws of England 407
§ 456. The several periods of English legal history..... 407
§ 457. First period: From the earliest times to the Norman Conquest.... 408
§ 458. 1. Alfred's legal measures..... 410
§ 459. 2. Dane-Lage, West-Saxon-Lage, and Mercen-Lage..... 411
§ 460. 3. Laws of Edgar and of Edward the Confessor..... 412
§ 461. 4. The more remarkable of the Saxon laws..... 412
§ 462. Second period: From the Norman Conquest to Edward I..... 414
§ 463. 1. Separation of the ecclesiastical and civil courts..... 415
§ 464. 2. The forest laws 415
§ 465. 3. Restriction of the influence of the county courts..... 416
§ 466. 4. Introduction of trial by combat..... 418
§ 467. 5. System of feudal tenure..... 418
§ 468. 6. Resulting debasement of society..... 418
§ 469. 7. Gradual restoration of society..... 420
§ 470. a. William Rufus and Henry I..... 420
§ 471. b. Stephen 421
§ 472. c. Henry II 421
§ 473. d. Richard I 423
§ 474. e. John and Henry III..... 423
§ 475. Third period: From Edward I to the Reformation..... 425
§ 476. 1. Legal reforms of Edward I..... 425
§ 477. a. Character of Edward I's reforms..... 427
§ 478. 2. During the civil wars..... 428
§ 479. 3. Henry VII 429
§ 480. Fourth period: From the Reformation to the Restoration of Charles II 430

[References are to star paging.]

§ 481. 1. Progress of the law under Henry VIII..... 430
§ 482. 2. Edward VI and Mary..... 431
§ 483. 3. Elizabeth 432
§ 484. 4. General condition of society and influence of the Renaissance 433
§ 485. 5. Use of the prerogative by Queen Elizabeth..... 435
§ 486. 6. Pretensions of James I..... 436
§ 487. 7. Pretensions of Charles I..... 436
§ 488. Fifth period: From the Restoration to the Revolution of 1688... 438
§ 489. Sixth period: From the Revolution of 1688 to the reign of George III 440
§ 490. 1. Chief alterations in the law during the sixth period..... 441
Note: General view of the progress of English law in the nineteenth century 442n
§ 491. The author's concluding reflections..... 442

TABULAR VIEW OF BOOK III.

PRIVATE WRONGS.

For which the laws of England have provided redress, — Chapter

- 1. By the mere act of the parties 1
- 2. By the mere operation of law 2
- 3. By both together, or suit in courts, wherein,
  - 1. Of courts, and therein of,
    - 1. Their nature and incidents 3
    - 2. Their several distinctions, viz.,
      - 1. Of public or general jurisdictions, as,
        - 1. The courts of common law and equity 4
        - 2. Ecclesiastical courts
        - 3. Courts military
        - 4. Courts maritime 5
      - 2. Of private or special jurisdiction 6
  - 2. Of the cognizance of wrongs, in the courts
    - 1. Ecclesiastical
    - 2. Military
    - 3. Maritime 7
    - 4. Of common law, wherein,
      - 1. Of the respective remedies, for injuries affecting,
        - 1. The rights of private persons:
          - 1. Absolute
          - 2. Relative 8
        - 2. The rights of property:
          - 1. Personal:
            - 1. In possession, by
              - 1. Dispossession
              - 2. Damage
            - 2. In action, by breach of contracts .. 9
          - 2. Real, by
            - 1. Ouster, or dispossession of,
              - 1. Freeholds 10
              - 2. Chattels real 11
            - 2. Trespass 12
            - 3. Nuisance 13
            - 4. Waste 14
            - 5. Subtraction 15
            - 6. Disturbance 16
        - 3. The rights of the crown 17
      - 2. Of the pursuit of remedies
        - 1. By action at common law, wherein of,
          - 1. Original writ 18
          - 2. Process 19
          - 3. Pleading 20
          - 4. Demurrer and issue 21
          - 5. Trial, by
            - 1. Record
            - 2. Inspection
            - 3. Witnesses
            - 4. Certificate
            - 5. Wager of battle
            - 6. Wager of law 22
            - 7. Jury 23
          - 6. Judgment 24
          - 7. Appeal 25
          - 8. Execution 26
        - 2. By proceedings in the courts of equity 27

BLACKSTONE'S ANALYSIS OF THE COMMENTARIES.*

BOOK III.

OF PRIVATE WRONGS.

[References are to star paging.]

CHAPTER I.

OF THE REDRESS OF PRIVATE WRONGS BY THE MERE ACT OF THE PARTIES.

1. Wrongs are the privation of right; and are, 1. Private. 2. Public 2
2. Private wrongs, or civil injuries, are an infringement, or privation, of the civil rights of individuals, considered as individuals..... 2
3. The redress of civil injuries is one principal object of the laws of England 3
4. This redress is effected, 1. By the mere act of the parties. 2. By the mere operation of law. 3. By both together, or suit in courts..... 3
5. Redress by the mere act of the parties is that which arises, 1. From the sole act of the party injured. 2. From the joint act of all the parties. 3
6. Of the first sort are, 1. Defense of one's self or relations. 2. Recaption of goods. 3. Entry on lands and tenements. 4. Abatement of nuisances. 5. Distress—for rent, for suit or service, for amercements, for damage, or for divers statutable penalties—made of such things only as are legally distrainable; and taken and disposed of according to the due course of law. 6. Seizing of heriots, etc. 3–15
7. Of the second sort are, 1. Accord. 2. Arbitration. 15, 16

CHAPTER II.

OF REDRESS BY THE MERE OPERATION OF LAW

1. Redress effected by the mere operation of law is, 1. In case of retainer; where a creditor is executor or administrator, and is thereupon allowed to retain his own debt. 2. In the case of remitter; where one, who has a good title to lands, etc., comes into possession by a bad one, and is thereupon remitted to his ancient good title, which protects his ill-acquired possession 18–21

*This Analysis was printed by Blackstone for the use of his students as a syllabus of his lectures.

[References are to star paging.]

CHAPTER III.

OF COURTS IN GENERAL.

1. Redress that is effected by the act both of law and of the parties, is by suit or action in the courts of justice. 22
2. Herein may be considered, 1. The courts themselves. 2. The cognizance of wrongs or injuries therein. And of courts, 1. Their nature and incidents. 2. Their several species..... 23
3. A court is a place wherein justice is judicially administered by officers delegated by the crown; being a court either of record or not of record. 23, 24
4. Incident to all courts are, a plaintiff, defendant, and judge; and with us there are also usually attorneys, and advocates or counsel, viz., either barristers, or serjeants at law..... 25

CHAPTER IV.

OF THE PUBLIC COURTS OF COMMON LAW AND EQUITY.

1. Courts of justice, with regard to their several species, are, 1. of a public or general jurisdiction throughout the realm. 2. Of a private or special jurisdiction 30
2. Public courts of justice are, 1. The courts of common law and equity. 2. The ecclesiastical courts. 3. The military courts. 4. The maritime courts. 30
3. The general and public courts of common law and equity are, 1. The Court of *Piepoudre*. 2. The court-baron. 3. The hundred court. 4. The county court. 5. The Court of Common Pleas. 6. The Court of King's Bench. 7. The Court of Exchequer. 8. The Court of Chancery. (Which last two are courts of equity as well as law.) 9. The courts of Exchequer Chamber. 10. The House of Peers. To which may be added, as auxiliaries, 11. The courts of Assize and *Nisi Prius* 32–60

CHAPTER V.

OF COURTS ECCLESIASTICAL, MILITARY, AND MARITIME.

1. Ecclesiastical courts (which were separated from the temporal by William the Conqueror), or courts Christian, are, 1. The Court of the Archdeacon. 2. The Court of the Bishop's Consistory. 3. The Court of Arches. 4. The Court of Peculiars. 5. The Prerogative Court. 6. The Court of Delegates. 7. The Court of Review.....62–68
2. The only permanent military court is that of chivalry; the courts martial, annually established by act of Parliament, being only temporary 67
3. Maritime courts are, 1. The Court of Admiralty and Vice-Admiralty. 2. The Court of Delegates. 3. The lords of the Privy Council, and others authorized by the king's commission, for appeals in prize causes 68

[References are to star paging.]

CHAPTER VI.

OF COURTS OF A SPECIAL JURISDICTION.

Courts of a special or private jurisdiction are, 1. The forest courts; including the courts of attachment, regard, sweinmote, and justice-seat. 2. The Court of Commissioners of Sewers. 3. The court of policies of assurance. 4. The Court of the Marshalsea and the Palace Court. 5. The courts of the principality of Wales. 6. The court of the duchy-chamber of Lancaster. 7. The courts of the counties palatine, and other royal franchises. 8. The stannary courts. 9. The Courts of London, and other corporations: to which may be referred the courts of request, or courts of conscience, and the modern regulations of certain courts-baron and county courts. 10. The courts of the two Universities. 71–85

CHAPTER VII.

OF THE COGNIZANCE OF PRIVATE WRONGS.

1. All private wrongs or civil injuries are cognizable either in the courts ecclesiastical, military, maritime, or those of common law..... 86
2. Injuries cognizable in the ecclesiastical courts are, 1. Pecuniary. 2. Matrimonial. 3. Testamentary. 87–98
3. Pecuniary injuries here cognizable are, 1. Subtraction of tithes. For which the remedy is by suit to compel their payment, or an equivalent; and also their double value. 2. Nonpayment of ecclesiastical dues. Remedy: by suit for payment. 3. Spoliation. Remedy: by suit for restitution. 4. Dilapidations. Remedy: by suit for damages. 5. Nonrepair of the church, etc.; and nonpayment of church-rates. Remedy: by suit to compel them.....82–92
4. Matrimonial injuries are, 1. Jactitation of marriage. Remedy: by suit for perpetual silence. 2. Subtraction of conjugal rights. Remedy: by suit for restitution. 3. Inability for the marriage state. Remedy: by suit for divorce. 4. Refusal of decent maintenance to the wife. Remedy: for suit for alimony.....92–95
5. Testamentary injuries are, 1. Disputing the validity of wills. Remedy: by suit to establish them. 2. Obstruction of administrations. Remedy: by suit for the granting them. 3. Subtraction of legacies. Remedy: by suit for the payment 95–98
6. The course of proceedings herein is much conformed to the civil and canon law; but their only compulsive process is that of excommunication, which is enforced by the temporal writ of *significavit*, or *de excommunicato capiendo* 98–103
7. Civil injuries cognizable in the court military, or court of chivalry, are, 1. Injuries in point of honor. Remedy: by suit for honorable amends. 2. Encroachments in coat-armor, etc. Remedy: by suit to remove them. The proceedings are in a summary method.....103–106

[References are to star paging.]

8. Civil injuries cognizable in the courts maritime are injuries in their nature of common-law cognizance, but arising wholly upon the sea, and not within the precincts of any county. The proceedings are herein also much conformed to the civil law.....106–109
9. All other injuries are cognizable only in the courts of common law; of which in the remainder of this book.....109–114
10. Two of them are, 1. Refusal or neglect of justice. Remedies: by writ of *procedendo*, or *mandamus*. 2. Encroachment of jurisdiction. Remedy: by writ of prohibition 109–114

CHAPTER VIII.

OF WRONGS, AND THEIR REMEDIES, RESPECTING THE RIGHTS OF PERSONS.

1. In treating of the cognizance of injuries by the courts of common law may be considered, 1. The injuries themselves, and their respective remedies. 2. The pursuit of those remedies in the several courts.. 115
2. Injuries between subject and subject cognizable by the courts of common law are in general remedied by putting the party injured into possession of that right whereof he is unjustly deprived..... 115
3. This is effected, 1. By delivery of the thing detained to the rightful owner. 2. Where that remedy is either impossible or inadequate, by giving the party injured a satisfaction in damages..... 116
4. The instruments by which these remedies may be obtained are suits or actions; which are defined to be the legal demand of one's right; and these are, 1. Personal. 2. Real. 3. Mixed 116–118
5. Injuries (whereof some are with, others without, force) are, 1. Injuries to the rights of persons. 2. Injuries to the rights of property. And the former are, 1. Injuries to the absolute; 2. Injuries to the relative, rights of persons 118–119
6. The absolute rights of individuals are, 1. Personal security. 2. Personal liberty. 3. Private property. (See Book I, c. 1.) To which the injuries must be correspondent..... 119
7. Injuries to personal security are, 1. Against a man's life. 2. Against his limbs. 3. Against his body. 4. Against his health. 5. Against his reputation. The first must be referred to the next book..... 119
8. Injuries to the limbs and body are, 1. Threats. 2. Assault. 3. Battery. 4. Wounding. 5. Mayhem. Remedy: by action of trespass *vi et armis*, for damages..... 120
9. Injuries to health, by any unwholesome practices, are remedied by a special action of trespass on the case, for damages..... 121
10. Injuries to reputation are, 1. Slanderous and malicious words. Remedy: by action on the case, for damages. 2. Libels. Remedy: the same. 3. Malicious prosecutions. Remedy: by action of conspiracy, or on the case, for damages. 123

[References are to star paging.]

11. The sole injury to personal liberty is false imprisonment. Remedies: 1. By writ of, 1st, mainprize; 2d, *odio et atia;* 3d. *Homine replegiando;* 4th, *habeas corpus;* to remove the wroug. 2. By action of trespass; to recover damages 127–138

12. For injuries to private property, see the next chapter.

13. Injuries to relative rights affect, 1. Husbands. 2. Parents. 3. Guardians. 4. Masters 138

14. Injuries to a husband are, 1. Abduction, or taking away his wife. Remedy: by action of trespass, *de uxore rapta et abducta,* to recover possession of his wife, and damages. 2. Criminal conversation with her. Remedy: by action on the case, for damages. 3. Beating her. Remedy: by action on the case, *per quod consortium amisit,* for damages 139

15. The only injury to a parent or guardian is the abduction of their children, or wards. Remedy: by action of trespass, *de filiis, vel custodiis, raptis vel abductis;* to recover possession of them, and damages. 140, 141

16. Injuries to a master are, 1. Retaining his servants. Remedy: by action on the case, for damages. 2. Beating them. Remedy: by action on the case, *per quod servitium amisit,* for damages.....141–143

CHAPTER IX.

OF INJURIES TO PERSONAL PROPERTY.

1. Injuries to the rights of property are either to those of personal or real property 144

2. Personal property is either in possession or in action..... 144

3. Injuries to personal property in possession are, 1. By dispossession, 2. By damage, while the owner remains in possession..... 144

4. Dispossession may be effected, 1. By an unlawful taking. 2. By an unlawful detaining 144

5. For the unlawful taking of goods and chattels personal, the remedy is, 1. Actual restitution; which (in case of a wrongful distress) is obtained by action of replevin. 2. Satisfaction in damages: 1st, in case of *rescous,* by action of *rescous,* pound-breach, or on the case; 2d, in case of other unlawful takings, by action of trespass or trover 145–151

6. For the unlawful detaining of goods lawfully taken, the remedy is also, 1. Actual restitution; by action of replevin, or detinue. 2. Satisfaction in damages; by action on the case, for trover and conversion 151

7. For damage to personal property, while in the owner's possession, the remedy is in damages, by action of trespass *vi et armis,* in case the act be immediately injurious, or by action of trespass on the case, to redress consequential damage..... 153

[References are to star paging.]

8. Injuries to personal property, in action, arise by breach of contracts, 1. Express. 2. Implied 153
9. Breaches of express contracts are, 1. By nonpayment of debts. Remedy, 1st, Specific payment; recoverable by action of debt. 2d, Damages for nonpayment; recoverable by action on the case. 2. By nonperformance of covenants. Remedy: by action of covenant, 1st, to recover damages in covenants personal; 2d, to compel performance in covenants real. 3. By nonperformance of promises, or *assumpsits*. Remedy: by action on the case for damages.....154–158
10. Implied contracts are such as arise, 1. From the nature and constitution of government. 2. From reason and the construction of law.. 158
11. Breaches of contracts implied in the nature of government are by the nonpayment of money which the laws have directed to be paid. Remedy: by action of debt (which, in such cases, is frequently a popular, frequently a *qui tam* action), to compel the specific payment; or sometimes by action on the case, for damages.....158–161
12. Breaches of contracts implied in reason and construction of law are by the nonperformance of legal presumptive *assumpsits;* for which the remedy is in damages; by an action on the case, on the implied *assumpsits,* 1. Of a *quantum meruit.* 2. Of a *quantum valebat.* 3. Of money expended for another. 4. Of receiving money to another's use. 5. Of an *insimul computassent,* on an account stated (the remedy on an account unstated being by action of account). 6. Of performing one's duty, in any employment, with integrity, diligence, and skill. In some of which cases an action of deceit (or on the case, in nature of deceit) will lie. 161–166

CHAPTER X.

OF INJURIES TO REAL PROPERTY; AND, FIRST, OF DISPOSSESSION, OR OUSTER, OF THE FREEHOLD.

1. Injuries affecting real property are, 1. Ouster. 2. Trespass. 3. Nuisance. 4. Waste. 5. Subtraction. 6. Disturbance..... 167
2. Ouster is the amotion of possession; and is, 1. From freeholds. 2. From chattels real 167
3. Ouster from freeholds is effected by, 1. Abatement. 2. Intrusion. 3. Disseisin. 4. Discontinuance. 5. Deforcement 167
4. Abatement is the entry of a stranger, after the death of the ancestor, before the heir. 167
5. Intrusion is the entry of a stranger, after a particular estate of freehold is determined, before him, in remainder or reversion..... 169
6. Disseisin is a wrongful putting out of him that is seised of the freehold 169
7. Discontinuance is where tenant in tail, or the husband of tenant in fee, makes a larger estate of the land than the law alloweth..... 171

[References are to star paging.]

8. Deforcement is any other detainer of the freehold from him who hath the property, but who never had the possession..... 172
9. The universal remedy for all these is restitution or delivery of possession, and, sometimes, damages for the detention. This is effected, 1. By mere entry. 2. By action possessory. 3. By writ of right.. 174
10. Mere entry on lands, by him who hath the apparent right of possession, will (if peaceable) divest the mere possession of a wrongdoer. But forcible entries are remedied by immediate restitution, to be given by a justice of the peace.....175–179
11. Where the wrongdoer hath not only mere possession, but also an apparent right of possession; this may be divested by him who hath the actual right of possession, by means of the possessory actions of writ of entry, or assize..... 179
12. A writ of entry is a real action, which disproves the title of the tenant, by showing the unlawful means under which he gained or continues possession. And it may be brought either against the wrongdoer himself, or in the degrees called the *per*, the *per* and *cui*, and the *post* 180
13. An assize is a real action, which proves the title of the demandant, by showing his own or his ancestor's possession. And it may be brought either to remedy abatements; viz., the assize of *mort d'ancestor*, etc.: or to remedy recent disseisins; viz., the assize of *novel disseisin*..... 184–190
14. Where the wrongdoer hath gained the actual right of possession, he who hath the right of property can only be remedied by a writ of right, or some writ of a similar nature. As, 1. Where such right of possession is gained by the discontinuance of tenant in tail. Remedy, for the right of property, by writ of *formedon*. 2. Where gained by recovery in a possessory action had against tenants of particular estates by their own default. Remedy: by writ of *quod ei deforceat*. 3. Where gained by recovery in a possessory action had upon the merits. 4. Where gained by the statute of limitations. Remedy, in both cases, by a mere writ of right, the highest writ in the law..190–197

CHAPTER XI.

OF DISPOSSESSION, OR OUSTER, OR CHATTELS REAL.

1. Ouster from chattels real is, 1. From estates by statute and *elegit*. 2. From an estate for years..... 198
2. Ouster from estates by statute or *elegit* is effected by a kind of disseisin. Remedy: restitution and damages; by assize of *novel disseisin* 198
3. Ouster from an estate for years is effected like a disseisin or ejectment. Remedy: restitution and damages; 1. By writ of *ejectione firmae*. 2. By writ of *quare ejecit infra terminum*..... 199

[References are to star paging.]

4. A writ of *ejectione firmae*, or action of trespass in ejectment, lieth where lands, etc., are let for a term of years, and the lessee is ousted or ejected from his term; in which case he shall recover possession of his term, and damages..... 199

5. This is now the usual method or trying titles to land, instead of an action real: viz., by, 1. The claimant's making an actual (or supposed) lease upon the land to the plaintiff. 2. The plaintiff's actual (or supposed) entry thereupon. 3. His actual (or supposed) ouster and ejectment by the defendant. For which injury this action is brought, either against the tenant, or (more usually) against some casual or fictitious ejector; in whose stead the tenant may be admitted defendant, on condition that the lease, entry, and ouster be confessed, and that nothing else be disputed but the merits of the title claimed by the lessor of the plaintiff.....200–206

6. A writ of *quare ejecit infra terminum* is an action of a similar nature; only not brought against the wrongdoer or ejector himself, but such as are in possession under his title. 207

CHAPTER XII.

OF TRESPASS.

Trespass is an entry upon, and damage done to, another's lands, by one's self or one's cattle, without any lawful authority or cause of justification; which is called a breach of his close. Remedy: damages; by action of trespass *quare clausum fregit;* besides that of distress damage feasant. But, unless the title to the land came chiefly in question, or the trespass was willful or malicious, the plaintiff (if the damages be under forty shillings) shall recover no more costs than damages.....208–215

CHAPTER XIII.

OF NUISANCE.

1. Nuisance, or annoyance, is a thing that worketh damage or inconvenience; and it is either a public and common nuisance, of which in the next book; or a private nuisance, which is anything done to the hurt or annoyance of, 1. The corporeal, 2. The incorporeal, hereditaments of another..... 216

2. The remedies for a private nuisance (besides that of abatement) are, 1. Damages; by action on the case (which also lies for special prejudice by a public nuisance). 2. Removal thereof, and damages; by assize of nuisance. 3. Like removal, and damages; by writ of *quod permittat prosternere*..... 219

[References are to star paging.]

CHAPTER XIV.

OF WASTE.

1. Waste is a spoil and destruction in lands and tenements, to the injury of him who hath, 1. An immediate interest (as by right of common) in the lands. 2. The remainder or reversion of the inheritance.... 233
2. The remedies for a commoner are, restitution, and damages; by assize of common; or damages only; by action on the case..... 224
3. The remedy for him in remainder, or reversion, is, 1. Preventive: by writ of *estrepement* at law, or injunction out of chancery; to stay waste. 2. Corrective: by action of waste; to recover the place wasted, and damages 225–229

CHAPTER XV.

OF SUBTRACTION.

1. Subtraction is when one who owes services to another withdraws or neglects to perform them. This may be, 1. Of rents, and other services, due by tenure. 2. Of those due by custom..... 230
2. For subtraction of rents and services due by tenure, the remedy is, 1. By distress; to compel the payment or performance. 2. By action of debt. 3. By assize. 4. By writ *de consuetudinibus et servitiis*—to compel the payment. 5. By writ of *cessavit;* and, 6. By writ of right *sur disclaimer*—to recover the land itself.....231–234
3. To remedy the oppression of the lord, the law has also given, 1. The writ of *ne injuste vexes.* 2. The writ of *mesne*..... 234
4. For subtraction of services due by custom the remedy is, 1. By writ of *secta ad molendinum, furnum, torrale,* etc., to compel the performance, and recover damages. 2. By action on the case; for damages only 235

CHAPTER XVI.

OF DISTURBANCE.

1. Disturbance is the hindering or disquieting the owners of an incorporeal hereditament in their regular and lawful enjoyment of it.... 236
2. Disturbances are, 1. Of franchises. 2. Of commons. 3. Of ways. 4. Of tenure. 5. Of patronage 236
3. Disturbance of franchises is remedied by a special action on the case; for damages..... 236
4. Disturbance of common is, 1. Intercommoning without right. Remedy: damages; by an action on the case, or of trespass: besides distress damage feasant; to compel satisfaction. 2. Surcharging the common. Remedies: distress damage feasant; to compel satisfaction; action on the case; for damages: or writ of admeasurement of pas-

[References are to star paging.]

ture; to apportion the common: and writ *de secunda superoneratione;* for the supernumerary cattle, and damages. 3. Inclosure, or obstruction. Remedies: restitution of the common, and damages; by assize of novel disseisin, and by writ of *quod permittat:* or damages only; by action on the case.....237–240

5. Disturbance of ways is the obstruction, 1. Of a way in gross, by the owner of the land. 2. Of a way appendant, by a stranger. Remedy, for both: damages; by action on the case..... 241

6. Disturbance of tenure, by driving away tenants, is remedied by a special action on the case; for damages..... 242

7. Disturbance of patronage is the hindrance of a patron to present his clerk to a benefice; whereof usurpation within six months is now become a species 242

8. Disturbers may be, 1. The pseudo-patron, by his wrongful presentation. 2. His clerk, by demanding institution. 3. The ordinary, by refusing the clerk of the true patron..... 244

9. The remedies are, 1. By assize of *darrein presentment.* 2. By writ of *quare impedit,* to compel institution and recover damages; consequent to which are the writs of *quare incumbravit* and *quare non admisit;* for subsequent damages. 3. By writ of right of advowson; to compel institution, or establish the permanent right.....245–252

CHAPTER XVII.

OF INJURIES PROCEEDING FROM, OR AFFECTING, THE CROWN.

1. Injuries to which the crown is a party are, 1. Where the crown is the aggressor. 2. Where the crown is the sufferer..... 254

2. The crown is the aggressor whenever it is in possession of any property to which the subject hath a right.....254, 255

3. This is remedied, 1. By petition of right; where the right is grounded on facts disclosed in the petition itself. 2. By *monstrans de droit;* where the claim is grounded on facts already appearing on record. The effect of both which is to remove the hands (or possession) of the king 255–257

4. Where the crown is the sufferer, the king's remedies are, 1. By such common-law actions as are consistent with the royal dignity. 2. By inquest of office, to recover possession; which, when found, gives the king his right by solemn matter of record, but may afterward be traversed by the subject. 3. By writ of *scire facias,* to repeal the king's patent or grant. 4. By information of intrusion, to give damages for any trespass on the lands of the crown; or of debt, to recover moneys due upon contract, or forfeited by the breach of any penal statute; or sometimes (in the latter case) by information *in rem:* all filed in the exchequer *ex officio* by the king's attorney general. 5. By writ of *quo warranto,* or information in the nature

[References are to star paging.]

of such writ; to seize into the king's hands any franchise usurped by the subject, or to oust a usurper from any public office. 6. By writ of *mandamus*, unless cause; to admit or restore any person entitled to a franchise or office: to which, if a false cause be returned, the remedy is by traverse, or by action on the case for damages; and, in consequence, a peremptory *mandamus*, or writ of restitution..257–265

CHAPTER XVIII.

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

1. The pursuit of the several remedies furnished by the laws of England is, 1. By action in the courts of common law. 2. By proceedings in the courts of equity..... 270
2. Of an action in the Court of Common Pleas (originally the proper court for prosecuting civil suits) the orderly parts are, 1. The original writ. 2. The process. 3. The pleadings. 4. The issue, or demurrer. 5. The trial. 6. The judgment. 7. The proceedings in nature of appeal. 8. The execution 272
3. The original writ is the beginning or foundation of a suit, and is either optional (called a *praecipe*), commanding the defendant to do something in certain, or otherwise show cause to the contrary; or peremptory (called a *si fecerit te securum*), commanding, upon security given by the plaintiff, the defendant to appear in court, to show wherefore he hath injured the plaintiff: both issuing out of chancery under the king's great seal, and returnable in bank during term time 272

CHAPTER XIX.

OF PROCESS.

1. Process is the means of compelling the defendant to appear in court.. 279
2. This includes, 1. Summons. 2. The writ of attachment, or *pone:* which is sometimes the first or original process. 3. The writ of *distringas*, or distress infinite. 4. The writs of *capias ad respondendum* and *testatum capias;* or, instead of these, in the king's bench, the bill of Middlesex, and writ of *latitat; and in the exchequer*, the writ of *quo minus*. 5. The *alias* and *pluries* writs. 6. The exigent, or writ of *exigi facias*, proclamations, and outlawry. 7. Appearance, and common bail. 8. The arrest. 9. Special bail, first, to the sheriff, and then to the action.....279–292

CHAPTER XX.

OF PLEADINGS.

Pleadings are the mutual altercations of the plaintiff and defendant, in writing; under which are comprised, 1. The declaration or count (wherein, incidentally, of the visne, nonsuit, *retraxit*, and discontinu-

[References are to star paging.]

ance). 2. The defense, claim of cognizance, imparlance, view, oyer, aid-prayer, voucher, or age. 3. The plea; which is either a dilatory plea (1st, to the jurisdiction; 2d. in disability of the plaintiff; 3d, in abatement); or it is a plea to the action; sometimes confessing the action, either in whole or in part (wherein of a tender, paying money into court, and setoff); but usually denying the complaint, by pleading either, 1st, the general issue; or, secondly, a special bar (wherein of justifications, the Statutes of Limitation, etc.). 4. Replication, rejoinder, surrejoinder, rebutter, surrebutter, etc. Therein of estoppels, color, duplicity, departure, new assignment, protestation, averment, and other incidents of pleading.....293–313

CHAPTER XXI.

OF ISSUE AND DEMURRER.

1. Issue is where the parties, in a course of pleading, come to a point affirmed on one side and denied on the other; which, if it be a matter of law, is called a demurrer; if it be a matter of fact, still retains the name of an issue of fact..... 314
2. Continuance is the detaining of the parties in court from time to time, by giving them a day certain to appear upon. And if any new matter arises since the last continuance or adjournment, the defendant may take advantage of it, even after demurrer or issue, by alleging it in a plea of *puis darrein continuance*..... 315
3. The determination of an issue in law, or demurrer, is by the opinion of the judges of the court; which is afterward entered on record.... 317

CHAPTER XXII.

OF THE SEVERAL SPECIES OF TRIAL.

1. Trial is the examination of the matter of fact put in issue..... 330
2. The species of trial are, 1. By the record. 2. By inspection. 3. By certificate. 4. By witnesses. 5. By wager of battle. 6. By wager of law. 7. By jury. 330
3. Trial by the record is had when the existence of such record is the point in issue 330
4. Trial by inspection or examination is had by the court, principally when the matter in issue is the evident object of the senses..... 331
5. Trial by certificate is had in those cases where such certificate must have been conclusive to a jury..... 333
6. Trial by witnesses (the regular method in the civil law) is only used on a writ of dower, when the death of the husband is in issue..... 336
7. Trial by wager of battle, in civil cases, is only had on a writ of right; but in lieu thereof the tenant may have, at his option, the trial by the grand assize..... 336

[References are to star paging.]

8. Trial by wager of law is only had where the matter in issue may be supposed to have been privily transacted between the parties themselves, without the intervention of other witnesses..... 341

CHAPTER XXIII.

OF THE TRIAL BY JURY.

1. Trial by jury is, 1. Extraordinary: as by the grand assize, in writs of right and by the grand jury, in writs of attaint. 2. Ordinary... 351

2. The method and process of the ordinary trial by jury is, 1. The writ of *venire facias* to the sheriff, coroners, or elisors; with the subsequent compulsive process of *habeas corpora*, or *distringas*. 2. The carrying down of the record to the court of *nisi prius*. 3. The sheriff's return; or panel of, 1st, special; 2d, common jurors. 4. The challenges; 1st, to the array; 2d, to the polls of the jurors, either *propter honoris respectum, propter defectum, propter affectum* (which is sometimes a principal challenge, sometimes to the favor), or, *propter delictum*. 5. The *tales de circumstantibus*. 6. The oath of the jury. 7. The evidence; which is either by proofs, 1st, written; 2d, parol;—or, by the private knowledge of the jurors. 8. The verdict: which may be, 1st, privy; 2d, public; 3d, special.....351–385

CHAPTER XXIV.

OF JUDGMENT, AND ITS INCIDENTS.

1. Whatever is transacted at the trial, in the court of *nisi prius*, is added to the record under the name of a *postea:* consequent upon which is the judgment 386

2. Judgment may be arrested or stayed for causes, 1. Extrinsic, or *dehors* the record: as in the case of new trials. 2. Intrinsic, or within it: as where the declaration varies from the writ, or the verdict from the pleadings and issue; or where the case laid in the declaration is not sufficient to support the action in point of law.....386–394

3. Where the issue is immaterial or insufficient, the court may award a repleader 395

4. Judgment is the sentence of the law, pronounced by the court, upon the matter contained in the record 395

5. Judgments are, 1. Interlocutory; which are incomplete till perfected by a writ of inquiry. 2. Final 396

6. Costs, or expenses of suit, are now the necessary consequence of obtaining judgment 399

CHAPTER XXV.

OF PROCEEDINGS IN THE NATURE OF APPEALS.

1. Proceedings in the nature of appeals from judgment are, 1. A writ of attaint; to impeach the verdict of a jury: which of late has been

[References are to star paging.]

superseded by new trials. 2. A writ of *audita querela;* to discharge a judgment by matter that has since happened. 3. A writ of error, from one court of record to another; to correct judgments, erroneous in point of law, and not helped by the statutes of amendments and jeofails 402–406

2. Writs of error lie, 1. To the Court of King's Bench, from all inferior courts of record; from the Court of Common Pleas at Westminster; and from the Court of King's Bench in Ireland. 2. To the Courts of Exchequer Chamber, from the law side of the Court of Exchequer; and from proceedings in the Court of King's Bench by bill. 3. To the house of peers, from proceedings in the Court of King's Bench by original, and on writs of error; and from the several Courts of Exchequer Chamber 406–411

CHAPTER XXVI.

OF EXECUTION.

Execution is the putting in force of the sentence or judgment of the law: which is effected, 1. Where possession of any hereditament is recovered; by writ of *habere facias seisinam, possessionem,* etc. 2. Where anything is awarded to be done or rendered, by a special writ for that purpose: as, by writ of abatement in case of nuisance; *retorno habendo,* and *capias in withernam* in replevin; *distringas* and *scire facias* in detinue. 3. Where money only is recovered; by writ of, 1st, *capias ad satisfaciendum,* against the body of the defendant; or, in default thereof, *scire facias* against his bail. 2d, *fieri facias,* against his goods and chattels. 3d, *levari facias,* against his goods, and the profits of his lands. 4th, *elegit,* against his goods, and the possession of his lands. 5th, *extendi facias,* and other process, on statutes, recognizance, etc., against his body, lands, and goods....412–425

CHAPTER XXVII.

OF PROCEEDINGS IN THE COURTS OF EQUITY.

1. Matters of equity which belong to the peculiar jurisdiction of the Court of Chancery, are, 1. The guardianship of infants. 2. The custody of idiots and lunatics. 3. The superintendence of charities. 4. Commissions of bankrupt 426–428

2. The Court of Exchequer and the Duchy Court of Lancaster have also some peculiar causes, in which the interest of the king is more immediately concerned 428–429

3. Equity is the true sense and sound interpretation of the rules of law; and, as such, is equally attended to by the judges of the courts both of common law and equity 430–436

[References are to star paging.]

4. The essential differences, whereby the English courts of equity are distinguished from the courts of law, are, 1. The mode of proof, by a discovery on the oath of the party; which gives a jurisdiction in matters of account and fraud. 2. The mode of trial; by depositions taken in any part of the world. 3. The mode of relief; by giving a more specific and extensive remedy than can be had in the courts of law: as, by carrying agreements into execution, staying waste or other injuries by injunction, directing the sale of encumbered lands, etc. 4. The true construction of securities for money, by considering them merely as a pledge. 5. The execution of trusts, or second uses, in a manner analogous to the law of legal estates 436–440

5. The proceedings in the Court of Chancery (to which those in the Exchequer, etc., very nearly conform) are, 1. Bill. 2. Writ of *subpœna;* and perhaps, injunction. 3. Process of contempt; viz. (ordinarily), attachment, attachment with proclamations, commission of rebellion, serjeant at arms, and sequestration. 4. Appearance. 5. Demurrer. 6. Plea. 7. Answer. 8. Exceptions; amendments, cross, or supplemental, bills; bills of revivor, interpleader, etc. 9. Replication. 10. Issue. 11. Depositions, taken upon interrogatories; and subsequent publication thereof. 12. Hearing. 13. Interlocutory decree; feigned issue and trial; reference to the master, and report, etc. 14. Final decree. 15. Rehearing, or bill of review. 16. Appeal to parliament 442–455

TABULAR VIEW OF BOOK IV.

PUBLIC WRONGS.

In which are considered, Chapter

- 1. The general nature of crimes, and punishment 1
- 2. The persons capable of committing crimes 2
- 3. Their several degrees of guilt, as
  - 1. Principals
  - 2. Accessories 3
- 4. The several crimes (with their punishments) more peculiarly offending,
  - 1. God and religion 4
  - 2. The law of nations 5
  - 3. The king and government, viz.,
    - 1. High treason 6
    - 2. Felonies injurious to the prerogative 7
    - 3. *Præmunire* 8
    - 4. Misprisons and contempts 9
  - 4. The commonwealth, viz., offenses against,
    - 1. The public justice 10
    - 2. Public peace 11
    - 3. Public trade 12
    - 4. Public health
    - 5. Public economy 13
  - 5. Individuals, being crimes against,
    - 1. Their persons, by
      - 1. Homicide 14
      - 2. Other corporeal injuries 15
    - 2. Their habitations 16
    - 3. Their property 17
- 5. The means of prevention, by security for
  - 1. The peace
  - 2. The good behavior 18
- 6. The method of punishment, wherein of,
  - 1. The several courts of criminal jurisdiction 19
  - 2. The proceedings there,
    - 1. Summary 20
    - 2. Regular, by
      - 1. Arrest 21
      - 2. Commitment and bail 22
      - 3. Prosecution, by
        - 1. Presentment
        - 2. Indictment
        - 3. Information
        - 4. Appeal 23
      - 4. Process 24
      - 5. Arraignment and its incidents 25
      - 6. Plea and issue 26
      - 7. Trial and conviction 27
      - 8. Clergy 28
      - 9. Judgment and attainder, which induce
        - 1. Forfeiture
        - 2. Corruption of blood 29
      - 10. Avoider of judgment, by
        - 1. Falsifying, or reversing, the attainder 30
        - 2. Reprieve or pardon 31
      - 11. Execution 32

BOOK IV.

OF PUBLIC WRONGS.

CHAPTER I.

OF THE NATURE OF CRIMES, AND THEIR PUNISHMENT.

[References are to star paging.]

1. In treating of public wrongs may be considered, 1. The general nature of crimes and punishments. 2. The persons capable of committing crimes. 3. Their several degrees of guilt. 4. The several species of crimes, and their respective punishments. 5. The means of prevention. 6. The method of punishment..... 1
2. A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, ither forbidding or commanding it..... 4
3. Crimes are distinguished from civil injuries, in that they are a breach and violation of the public rights, due to the whole community, considered as a community..... 5
4. Punishments may be considered with regard to, 1. The power, 2. The end, 3. The measure, of their infliction..... 7
5. The power or right, of inflicting human punishments, for natural crimes, or such as are *mala in se*, was by the law of nature vested in every individual; but, by the fundamental contract of society, is now transferred to the sovereign power, in which also is vested, by the same contract, the right of punishing positive offenses, or such as are *mala prohibita*..... 7
6. The end of human punishments is to prevent future offenses, 1. By amending the offender himself. 2. By deterring others through his example. 3. By depriving him of the power to do future mischief.. 11
7. The measure of human punishments must be determined by the wisdom of the sovereign power, and not by any uniform universal rule, though that wisdom may be regulated and assisted by certain general, equitable principles 12

CHAPTER II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

1. All persons are capable of committing crimes, unless there be in them a defect of will; for, to constitute a legal crime, there must be both a vicious will and a vicious act..... 20
2. The will does not concur with the act, 1. Where there is a defect of understanding. 2. Where no will is exerted. 3. Where the act is constrained by force and violence..... 21
3. A vicious will may therefore be wanting, in the cases of, 1. Infancy. 2. Idiocy or lunacy. 3. Drunkenness, which doth not, however, excuse.

[References are to star paging.]

4. Misfortune. 5. Ignorance, or mistake of fact. 6. Compulsion, or necessity, which is, 1st, that of civil subjection; 2d, that of duress *per minas;* 3d, that of choosing the least pernicious of two evils, where one is unavoidable; 4th, that of want, or hunger, which is no legitimate excuse 22–32

4. The king, from his excellence and dignity, is also incapable of doing wrong 33

CHAPTER III.

OF PRINCIPALS AND ACCESSORIES.

1. The different degrees of guilt in criminals are, 1. As principals. 2. As accessories 34

2. A principal in a crime is, 1. He who commits the fact. 2. He who is present at, aiding, and abetting, the commission..... 34

3. An accessory is he who doth not commit the fact, nor is present at the commission, but is in some sort concerned therein, either before or after 35

4. Accessories can only be in petit treason, and felony; in high treason and misdemeanors, all are principals..... 35

5. An accessory before the fact is one who, being absent when the crime is committed, hath procured, counseled, or commanded another to commit it 36

6. An accessory after the fact is where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. Such accessory is usually entitled to the benefit of clergy, where the principal and accessory before the fact are excluded from it..... 37

CHAPTER IV.

OF OFFENSES AGAINST GOD AND RELIGION.

1. Crimes and misdemeanors, cognizable by the laws of England, are such as more immediately offend, 1. God, and His holy religion. 2. The law of nations. 3. The king, and his government. 4. The public, or commonwealth. 5. Individuals 42

2. Crimes more immediately offending God and religion are, 1. Apostasy. For which the penalty is incapacity, and imprisonment. 2. Heresy. Penalty, for one species thereof: the same. 3. Offenses against the established church, either by reviling its ordinances. Penalties, fine, deprivation, imprisonment, forfeiture; or, by nonconformity to its worship, 1st, through total irreligion. Penalty, fine. 2d, through Protestant dissenting. Penalty, suspended (conditionally) by the toleration act. 3d, through popery, either in professors of the popish religion, popish recusants convict, or popish priests. Penalties, incapacity, double taxes, imprisonment, fines, forfeitures, abjuration

[References are to star paging.]

of the realm, judgment of felony, without clergy and judgment of high treason. 4. Blasphemy. Penalty, fine, imprisonment and corporal punishment. 5. Profane swearing and cursing. Penalty, fine or house of correction. 6. Witchcraft; or, at least the pretense thereto. Penalty, imprisonment and pillory. 7. Religious impostures. Penalty, fine, imprisonment and corporal punishment. 8. Simony. Penalties, forfeiture of double value, incapacity. 9. Sabbath-breaking. Penalty, fine. 10. Drunkenness. Penalty, fine or stocks. 11. Lewdness. Penalties, fine, imprisonment, house of correction 43–65

CHAPTER V.

OF OFFENSES AGAINST THE LAW OF NATIONS.

1. The law of nations is a system of rules, deducible by natural reason, and established by universal consent, to regulate the intercourse between independent states 66
2. In England, the law of nations is adopted in its full extent, as part of the law of the land..... 67
3. Offenses against this law are principally incident to whole states or nations; but, when committed by private subjects, are then the objects of the municipal law..... 67
4. Crimes against the law of nations, animadverted on by the laws of England, are, 1. Violation of safe-conducts. 2. Infringement of the rights of ambassadors. Penalty, in both: arbitrary. 3. Piracy. Penalty: judgment of felony, without clergy.....68–73

CHAPTER VI.

OF HIGH TREASON.

1. Crimes, and misdemeanors, more peculiarly offending the king and his government, are, 1. High treason. 2. Felonies injurious to the prerogative. 3. *Præmunire*. 4. Other misprisions and contempts..... 74
2. High treason may, according to the statute of Edward III, be committed, 1. By compassing or imagining the death of the king, or queen-consort, or their eldest son and heir; demonstrated by some overt act. 2. By violating the king's companion, his eldest daughter, or the wife of his eldest son. 3. By some overt act of levying war against the king in his realm. 4. By adherence to the king's enemies. 5. By counterfeiting the king's great or privy seal. 6. By counterfeiting the king's money, or importing counterfeit money. 7. By killing the chancellor, treasurer, or king's justices, in the execution of their offices.....76–87

[References are to star paging.]

3. High treasons, created by subsequent statutes, are such as relate, 1. To papists, as the repeated defense of the pope's jurisdiction; the coming from beyond sea of a natural-born popish priest; the renouncing of allegiance, and reconciliation to the pope, or other foreign power. 2. To the coinage, or other signatures of the king, as counterfeiting (or importing and uttering counterfeit) foreign coin, here current; forging the sign manual, privy signet, or privy seal; falsifying, etc., the current coin. 3. To the Protestant succession, as corresponding with, or remitting money to, the late pretender's sons; endeavoring to impede the succession; writing or printing, in defense of any pretender's title, or in derogation of the act of settlement, or of the power of parliament to limit the descent of the crown.....87–92

4. The punishment of high treason, in males, is (generally) to be, 1. Drawn. 2. Hanged. 2. Emboweled alive. 4. Beheaded. 5. Quartered. 6. The head and quarters to be at the king's disposal. But, in treasons relating to the coin, only to be drawn, and hanged till dead. Females, in both cases, are to be drawn and burned alive.... 92

CHAPTER VII.

OF FELONIES, INJURIOUS TO THE KING'S PREROGATIVE.

1. Felony is that offense which occasions the total forfeiture of lands or goods at common law, now usually also punishable with death, by hanging, unless through the benefit of clergy..... 94

2. Felonies, injurious to the king's prerogative (of which some are within, others without, clergy), are, 1. Such as relate to the coin, as the willful uttering of counterfeit money, etc. (to which head some inferior misdemeanors affecting the coinage may be also referred). 2. Conspiring or attempting to kill a privy counselor. 3. Serving foreign states, or enlisting soldiers for foreign service. 4. Embezzling the king's armor or stores. 5. Desertion from the king's armies, by land or sea.....98–102

CHAPTER VIII.

OF PRÆMUNIRE.

1. *Præmunire*, in its original sense, is the offense of adhering to the temporal power of the pope, in derogation of the regal authority. Penalty: outlawry, forfeiture, and imprisonment: which hath since been extended to some offenses of a different nature..... 104

2. Among these are, 1. Importing popish trinkets. 2. Contributing to the maintenance of popish seminaries abroad, or popish priests in England. 3. Molesting the possessors of abbey lands. 4. Acting as broker in an usurious contract, for more than ten per cent. 5. Obtaining any stay of proceedings in suits for monopolies. 6. Ob-

[References are to star paging.]

taining an exclusive patent for gunpowder or arms. 7. Exertion of purveyance or pre-emption. 8. Asserting a legislative authority in both or either house of parliament. 9. Sending any subject a prisoner beyond sea. 10. Refusing the oaths of allegiance and supremacy. 11. Preaching, teaching or advised speaking, in defense of the right of any pretender to the crown, or in derogation of the power of parliament to limit the succession. 12. Treating of other matters, by the assembly of peers of Scotland, convened for electing their representatives in parliament. 13. Unwarrantable undertakings by unlawful subscriptions to public funds.....115–117

CHAPTER IX.

OF MISPRISIONS AND CONTEMPTS, AFFECTING THE KING AND GOVERNMENT.

1. Misprisions and contempts are all such high offenses as are under the degree of capital..... 119

2. These are, 1. Negative, in concealing what ought to be revealed. 2. Positive, in committing what ought not to be done..... 119

3. Negative misprisions are, 1. Misprision of treason. Penalty: forfeiture and imprisonment. 2. Misprision of felony. Penalty: fine and imprisonment. 3. Concealment of treasure-trove. Penalty: fine and imprisonment 120–121

4. Positive misprisions, or high misdemeanors and contempts, are, 1. Maladministration of public trusts, which includes the crime of peculation. Usual penalties: banishment; fines; imprisonment; disability. 2. Contempts against the king's prerogative. Penalty: fine and imprisonment. 3. Contempts against his person, and government. Penalty: fine, imprisonment and infamous corporal punishment. 4. Contempts against his title. Penalties: fine, and imprisonment; or, fine, and disability. 5. Contempts against his palaces, or courts of justice. Penalties: fine; imprisonment; corporal punishment; loss of right hand; forfeiture.....121–126

CHAPTER X.

OF OFFENSES AGAINST PUBLIC JUSTICE.

1. Crimes, especially affecting the commonwealth, are offenses, 1. Against the public justice. 2. Against the public peace. 3. Against the public trade. 4. Against the public health. 5. Against the public police, or economy..... 127

2. Offenses against the public justice, are, 1. Embezzling or vacating records, and personating others in courts of justice. Penalty: judgment of felony, usually without clergy. 2. Compelling prisoners to become approvers. Penalty: judgment of felony. 3. Obstructing the execution of process. 4. Escapes. 5. Breach of prison. 6. Rescue.

[References are to star paging.]

Which four may (according to the circumstances) be either felonies, or misdemeanors punishable by fine and imprisonment. 7. Returning from transportation. This is felony, without clergy. 8. Taking rewards, to help one to his stolen goods. Penalty: the same as for the theft. 9. Receiving stolen goods. Penalties: transportation; fine; and imprisonment. 10. Theftbote. 11. Common barretry, and suing in a feigned name. 12. Maintenance. 13. Champerty. Penalty, in these four: fine, and imprisonment. 14. Compounding prosecutions on penal statutes. Penalty: fine, pillory, and disability. 15. Conspiracy; and threats of accusation in order to extort money, etc. Penalties: the villeinous judgment; fine, imprisonment, pillory, whipping; transportation. 16. Perjury, and subornation thereof. Penalties: infamy; imprisonment, fine, or pillory; and, sometimes, transportation or house of correction. 17. Bribery. Penalty: fine, and imprisonment. 18. Embracery. Penalty: infamy, fine, and imprisonment. 19. False verdict. Penalty: the judgment in attaint. 20. Negligence of public officers, etc. Penalty: fine and forfeiture of the office. 21. Oppression by magistrates. 22. Extortion of officers. Penalty, in both: imprisonment, fine, and sometimes forfeiture of the office 128–141

CHAPTER XI.

OF OFFENSES AGAINST THE PUBLIC PEACE.

1. Offenses, against the public peace, are, 1. Riotous assemblies to the number of twelve. 2. Appearing armed, or hunting, in disguise. 3. Threatening, or demanding any valuable thing, by letter. All these are felonies, without clergy. 4. Destroying of turnpikes, etc. Penalties: whipping; imprisonment; judgment of felony, with and without clergy. 5. Affrays. 6. Riots, routs, and unlawful assemblies. 7. Tumultuous petitioning. 8. Forcible entry and detainer. Penalty, in all four: fine, and imprisonment. 9. Going unusually armed. Penalty: forfeiture of arms, and imprisonment. 10. Spreading false news. Penalty: fine, and imprisonment; and forfeiture. 12. Challenge to fight. Penalty: fine, imprisonment, and sometimes forfeiture. 13. Libels. Penalty: fine, imprisonment, and corporal punishment 142–153

CHAPTER XII.

OF OFFENSES AGAINST PUBLIC TRADE.

1. Offenses, against the public trade, are, 1. Owling. Penalties: fines, forfeitures; imprisonment; loss of left hand; transportation; judgment of felony. 2. Smuggling. Penalties: fines, loss of goods; judgment of felony, without clergy. 3. Fraudulent bankruptcy.

[References are to star paging.]

Penalty: judgment of felony, without clergy. 4. Usury. Penalty: fine, and imprisonment. 5. Cheating. Penalties: fine, imprisonment; pillory; tumbrel; whipping, or other corporal punishment; transportation. 6. Forestalling. 7. Regrating. 8. Engrossing. Penalties, for all three: loss of goods; fine; imprisonment; pillory. 9. Monopolies, and combinations to raise the price of commodities. Penalties: fines; imprisonment; pillory; loss of ear; infamy; and, sometimes, the pains of *præmunire*. 10. Exercising a trade, not having served as apprentice. Penalty: fine. 11. Transporting, or residing abroad, of artificers. Penalties: fine, imprisonment; forfeiture; incapacity; becoming aliens.....154–160

CHAPTER XIII.

OF OFFENSES AGAINST THE PUBLIC HEALTH, AND THE PUBLIC POLICE OR ECONOMY.

1. Offenses, against the public health, are, 1. Irregularity, in time of the plague, or of quarantine. Penalties: whipping; judgment of felony, with and without clergy. 2. Selling unwholesome provisions. Penalties: amercement; pillory; fines; imprisonment; abjuration of the town 161–162

2. Offenses against the public police and economy, or domestic order of the kingdom, are, 1. Those relating to clandestine and irregular marriages. Penalties: judgment of felony. 3. Wandering, by soldiers or mariners. 4. Remaining in England, by Egyptians; or being in their fellowship one month. Both these are felonies, without clergy. 5. Common nuisances: 1st, by annoyances or purprestures in highways, bridges, and rivers; 2dly, by offensive trades and manufactures; 3dly, by disorderly houses; 4thly, by lotteries; 5thly, by cottages; 6thly, by fireworks; 7thly, by eavesdropping. Penalty, in all: fine. 8thly, by common scolding. Penalty: the cucking-stool. 6. Idleness, disorder, vagrancy and incorrigible roguery. Penalties: imprisonment; whipping; judgment of felony. 7. Luxury, in diet. Penalty: discretionary. 8. Gaming. Penalties: to gentlemen, fines; to others, fine and imprisonment; to cheating gamesters, fine, infamy, and the corporal pains of perjury. 9. Destroying the game. Penalties: fines; and corporal punishment.....162–175

CHAPTER XIV.

OF HOMICIDE.

1. Crimes, especially affecting individuals, are, 1. Against their persons. 2. Against their habitations. 3. Against their property..... 176

2. Crimes against the persons of individuals, are, 1. By homicide, or destroying life. 2. By other corporal injuries..... 177

3. Homicide is, 1. Justifiable. 2. Excusable. 3. Felonious..... 178

[References are to star paging.]

4. Homicide is justifiable, 1. By necessity, and command of law. 2. By permission of law: 1st, for the furtherance of public justice; 2dly, for prevention of some forcible felony..... 178
5. Homicide is excusable, 1. *Per infortunium*, or by misadventure. 2. *Se defendendo*, or in self-defense, by chance-medley. Penalty, in both: forfeiture of goods; which however, is pardoned of course.... 182
6. Felonious homicide is the killing of a human creature without justification or excuse. This is, 1. Killing one's self. 2. Killing another.. 188
7. Killing one's self, or self-murder, is where one deliberately, or by any unlawful malicious act, puts an end to his own life. This is felony; punished by ignominious burial, and forfeiture of goods and chattels 189
8. Killing another, is, 1. Manslaughter. 2. Murder..... 190
9. Manslaughter is the unlawful killing of another; without malice, express or implied. This is either, 1. Voluntary, upon a sudden heat. 2. Involuntary, in the commission of some unlawful act. Both are felony, but within clergy; except in the case of stabbing..... 191
10. 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 express or implied. This is felony, without clergy; punished with speedy death, and hanging in chains, or dissection 194
11. Petit treason (being an aggravated degree of murder) is where the servant kills his master, the wife her husband, or the ecclesiastics his superior. Penalty: in men, to be drawn, and hanged; in women, to be drawn, and burned..... 203

CHAPTER XV.

OF OFFENSES AGAINST THE PERSONS OF INDIVIDUALS.

1. Crimes affecting the persons of individuals, by other corporal injuries not amounting to homicide, are, 1. Mayhem; and also shooting at another. Penalties: fine; imprisonment; judgment of felony, without clergy. 2. Forcible abduction, and marriage or defilement, of an heiress; which is felony: also, stealing, and deflowering or marrying, any woman-child under the age of sixteen years; for which the penalty is imprisonment, fine, and temporary forfeiture of her lands. 3. Rape; and also carnal knowledge of a woman-child under the age of ten years. 4. Buggery, with man or beast. Both these are felonies, without clergy. 5. Assault. 6. Battery; especially of clergymen. 7. Wounding. Penalties, in all three: fine; imprisonment; and other corporal punishment. 8. False imprisonment. Penalties: fine; imprisonment; and (in some atrocious cases) the pains of *præmunire*, and incapacity of office or pardon. 9. Kidnapping, or, forcibly stealing away the king's subjects. Penalty: fine; imprisonment; and pillory.....205–219

[References are to star paging.]

CHAPTER XVI.

OF OFFENSES AGAINST THE HABITATIONS OF INDIVIDUALS.

1. Crimes, affecting the habitations of individuals, are, 1. Arson. 2. Burglary 220
2. Arson is the malicious and willful burning of the house, or outhouse, of another man. This is felony; in some cases within, in others without, clergy..... 220
3. Burglary is the breaking and entering, by night, into a mansion-house; with intent to commit a felony. This is felony, without clergy..... 222

CHAPTER XVII.

OF OFFENSES AGAINST PRIVATE PROPERTY.

1. Crimes, affecting the private property of individuals, are, 1. Larceny. 2. Malicious mischief. 3. Forgery 229
2. Larceny is, 1. Simple. 2. Mixed, or compound..... 229
3. Simple larceny is the felonious taking, and carrying away, of the personal goods of another. And it is, 1. Grand larceny; being above the value of twelvepence. Which is felony; in some cases within, in others without clergy. 2. Petit larceny; to the value of twelvepence or under. Which is also felony, but not capital; being punished with whipping, or transportation..... 229
4. Mixed, or compound, larceny is that wherein the taking is accompanied with the aggravation of being, 1. From the house. 2. From the person 239
5. Larcenies from the house, by day or night, are felonies without clergy, when they are, 1. Larcenies, above twelvepence, from a church;—or by breaking a tent or booth in a market or fair, by day or night, the owner or his family being therein;—or by breaking a dwelling-house by day, any person being therein;—or from a dwelling-house by day, without breaking, any person therein being put in fear;—or from a dwelling-house by night, without breaking, the owner or his family being therein and put in fear. 2. Larcenies, of five shillings, by breaking the dwelling-house, shop, or warehouse, by day, though no person be therein;—or, by privately stealing in any shop, warehouse, coach-house, or stable, by day or night, without breaking, and though no person be therein. 3. Larcenies, of forty shillings, from a dwelling-house or its outhouses, without breaking, and though no person be therein..... 239
6. Larceny from the person is, 1. By privately stealing, from the person of another, above the value of twelvepence. 2. By robbery; or the felonious and forcible taking, from the person of another, goods or money of any value, by putting him in fear. These are, both, felonies without clergy. An attempt to rob is also felony..... 241

[References are to star paging.]

7. Malicious mischief, by destroying dikes, goods, cattle, ships, garments, fish-ponds, trees, woods, churches, chapels, meeting-houses, houses, outhouses, corn, hay, straw, sea or river banks, hop-binds, coal mines (or engines thereunto belonging), or any fences for inclosures by act of parliament, is felony; and in most cases, without benefit of clergy 243
8. Forgery is the fraudulent making or alteration of a writing, in prejudice of another's right. Penalties: fine; imprisonment; pillory; loss of nose and ears; forfeiture; judgment of felony, without clergy.... 247

CHAPTER XVIII.

OF THE MEANS OF PREVENTING OFFENSES.

1. Crimes and misdemeanors may be prevented, by compelling suspected persons to give security: which is effected by binding them in a conditional recognizance to the king, taken in court, or by a magistrate out of court..... 251
2. These recognizances may be conditioned, 1. To keep the peace. 2. To be of the good behavior..... 252
3. They may be taken by any justice or conservator of the peace, at his own discretion; or, at the request of such as are entitled to demand the same 253
4. All persons, who have given sufficient cause to apprehend an intended breach of the peace, may be bound over to keep the peace; and all those that be not of good fame, may be bound to the good behavior; and may, upon refusal in either case, be committed to gaol..... 256

CHAPTER XIX.

OF COURTS OF A CRIMINAL JURISDICTION.

1. In the method of punishment may be considered, 1. The several courts of criminal jurisdiction. 2. The several proceedings therein..... 258
2. The criminal courts, are, 1. Those of a public and general jurisdiction throughout the realm. 2. Those of a private and special jurisdiction 258
3. Public criminal courts are, 1. The high court of parliament; which proceeds by impeachment. 2. The court of the lord high steward; and the court of the king in full parliament: for the trial of capitally indicted peers. 3. The court of king's bench. 4. The court of chivalry. 5. The court of admiralty, under the king's commission. 6. The courts of oyer and terminer, and general gaol delivery. 7. The court of quarter sessions of the peace. 8. The sheriff's tourn. 9. The court-leet. 10. The court of the coroner. 11. The court of the clerk of the market.....258–275
4. Private criminal courts, are, 1. The court of the lord steward, etc., by statute of Henry VII. 2. The court of the lord steward, etc., by statute of Henry VIII. 3. The university courts.....275–278

[References are to star paging.]

CHAPTER XX.

OF SUMMARY CONVICTIONS.

1. Proceedings in criminal courts are, 1. Summary. 2. Regular..... 280
2. Summary proceedings are such, whereby a man may be convicted of divers offenses, without any formal process or jury, at the discretion of the judge or judges appointed by act of parliament, or common law 280
3. Such are, 1. Trials of offenses and frauds against the laws of excise and other branches of the king's revenue. 2. Convictions before justices of the peace upon a variety of minute offenses, chiefly against the public police. 3. Attachments for contempts to the superior courts of justice 281–288

CHAPTER XXI.

OF ARRESTS.

1. Regular proceedings, in the courts of common law, are, 1. Arrest. 2. Commitment and bail. 3. Prosecution. 4. Process. 5. Arraignment, and its incidents. 6. Plea and issue. 7. Trial and conviction. 8. Clergy. 9. Judgment, and its consequences. 10. Reversal of judgment. 11. Reprieve of pardon. 12. Execution..... 289
2. An arrest is the apprehending or restraining, of one's person; in order to be forthcoming to answer a crime, whereof one is accused or suspected 289
3. This may be done, 1. By warrant. 2. By an officer, without warrant. 3. By a private person, without warrant. 4. By hue and cry....289–295

CHAPTER XXII.

OF COMMITMENT AND BAIL.

1. Commitment is the confinement of one's person in prison, for safe custody, by warrant from proper authority; unless, in bailable offense, he puts in sufficient bail, or security for his future appearance 295
2. The magistrate is bound to take reasonable bail, if offered, unless the offender be not bailable..... 296
3. Such are, 1. Persons accused of treason; or, 2. Of murder; or, 3. Of manslaughter, by indictment; or if the prisoner was clearly the slayer. 4. Prison-breakers, when committed for felony. 5. Outlaws. 6. Those who have abjured the realm. 7. Approvers, and appellees. 8. Persons taken with the mainour. 9. Persons accused of arson. 10. Excommunicated persons 298
4. The magistrate may, at his discretion, admit or not admit to bail, persons not of good fame, charged with other felonies, whether as principals or as accessories..... 299

[References are to star paging.]

5. If they be of good fame, he is bound to admit them to bail..... 299
6. The court of king's bench, or its judges in time of vacation, may bail in any case whatsoever..... 299

CHAPTER XXIII.

OF THE SEVERAL MODES OF PROSECUTION.

1. Prosecution, or the manner of accusing offenders, is either by a previous finding of a grand jury, as, 1. By presentment. 2. By indictment. Or, without such fining. 3. By information. 4. By appeal 301
2. A presentment is the notice taken by a grand jury of any offense, from their own knowledge or observation..... 301
3. An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented on oath by, a grand jury; expressing with sufficient certainty, the person, time, place, and offense 302
4. An information, is, 1. At the suit of the king and a subject, upon penal statutes. 2. At the suit of the king only. Either, 1. Filed by the attorney general *ex officio*, for such misdemeanor as affect the king's person or government: or, 2. Filed by the master of the crown office (with leave of the court of king's bench) at the relation of some private subject, for other gross and notorious misdemeanors. All differing from indictments in this: that they are exhibited by the informer, or the king's officer, and not on the oath of a grand jury 307–312
5. An appeal is an accusation or suit, brought by one private subject against another, for larceny, rape, mayhem, arson, or homicide; which the king cannot discharge or pardon, but the party alone can release 312

CHAPTER XXIV.

OF PROCESS UPON AN INDICTMENT.

1. Process to bring in an offender, when indicted in his absence, is, in misdemeanors, by *venire facias*, distress infinite, and *capias;* in capital crimes, by *capias* only: and, in both, by outlawry.....318–320
2. During this stage of proceedings, the indictment may be removed into the court of king's bench from any inferior jurisdiction, by writ of *certiorari facias:* and cognizance must be claimed in places of exclusive jurisdiction 320

CHAPTER XXV.

OF ARRAIGNMENT, AND ITS INCIDENTS.

1. Arraignment is the calling of the prisoner to the bar of the court, to answer the matter of the indictment..... 321

[References are to star paging.]

2. Incident hereunto are, 1. The standing mute of the prisoner; for which, in petit treason, and felonies of death, he shall undergo the *peine fort et dure*. 2. His confession: which is either simple; or by way of approvement 324–331

CHAPTER XXVI.

OF PLEA AND ISSUE.

1. The plea, or defensive matter alleged by the prisoner, may be, 1. A plea to the jurisdiction. 2. A demurrer in point of law. 3. A plea in abatement. 4. A special plea in bar; which is, 1st, *autrefois acquit;* 2dly, *autrefois convict;* 3dly, *autrefois attaint;* 4thly, a pardon. 5. The general issue, not guilty.....332–341
2. Hereupon issue is joined by the clerk of the arraigns, on behalf of the king 341

CHAPTER XXVII.

OF TRIAL, AND CONVICTION.

1. Trials of offenses, by the laws of England, were and are, 1. By ordeal, of either fire or water. 2. By the corsned. Both these have been long abolished. 3. By battle, in appeals and approvements. 4. By the peers of Great Britain. 5. By jury.....342–349
2. The method and process of trial by jury is, 1. The impaneling of the jury. 2. Challenges; 1st, for cause; 2dly, peremptory. 3. *Tales de circumstantibus.* 4. The oath of the jury. 5. The evidence. 6. The verdict, either general or special.....350–361
3. Conviction is when the prisoner pleads, or is found, guilty: whereupon, in felonies, the prosecutor is entitled to, 1. His expenses. 2. Restitution of his goods.....361–363

CHAPTER XXVIII.

OF THE BENEFIT OF CLERGY.

1. Clergy, or the benefit thereof, was originally derived from the usurped jurisdiction of the popish ecclesiastics; but hath since been new-modeled by several statutes..... 365
2. It is an exemption of the clergy from any other secular punishment for felony, than imprisonment for a year, at the court's discretion: and it is extended likewise, absolutely, to lay peers, for the first offense; and to all law commoners, for the first offense also, upon condition of branding, imprisonment, or transportation..... 371
3. All felonies are entitled to the benefit of clergy, except such as are now ousted by particular statutes..... 372

[References are to star paging.]

4. Felons, on receiving the benefit of clergy (though they forfeit their goods to the crown), are discharged of all clergyable felonies before committed, and restored in all capacities and credits..... 374

CHAPTER XXIX.

OF JUDGMENT AND ITS CONSEQUENCES.

1. Judgment (unless any matter be offered in arrest thereof) follows upon conviction; being the pronouncing of that punishment which is expressly ordained by law..... 375
2. Attainder of a criminal is the immediate consequence, 1. Of having judgment of death pronounced upon him. 2. Of outlawry for a capital offense 380
3. The consequences of attainder are, 1. Forfeiture to the king. 2. Corruption of blood..... 381
4. Forfeiture to the king is, 1. Of real estates, upon attainder:—in high treason, absolutely, till the death of the late pretender's sons;—in felonies, for the king's year, day, and waste;—in misprision of treason, assaults on a judge, or battery sitting the courts; during the life of the offender. 2. Of personal estates, upon conviction; in all treason, misprision of treason, felony, excusable homicide, petit larceny, standing mute upon arraignment, the above-named contempts of the king's courts, and flight.....381–388
5. Corruption of blood is an utter extinction of all inheritable quality therein: so that, after the king's forfeiture is first satisfied, the criminal's lands escheat to the lord of the fee; and he can never afterwards inherit, be inherited, or have any inheritance derived through him 388, 389

CHAPTER XXX.

OF REVERSAL OF JUDGMENT.

1. Judgments, and their consequences, may be avoided, 1. By falsifying, or reversing, the attainder. 2. By reprieve, or pardon..... 390
2. Attainders may be fasified, or reversed, 1. Without a writ of error; for matter *dehors* the record. 2. By writ of error; for mistakes in the judgment, or record. 3. By act of parliament; for favor..390–392
3. When an outlawry is reversed, the party is restored to the same plight, as if he had appeared upon the *capias*. When a judgment, on conviction, reversed, the party stands as if never accused..... 392

CHAPTER XXXI.

OF REPRIEVE AND PARDON.

1. A reprieve is a temporary suspension of the judgment, 1. *Ex arbitrio judicis*. 2. *Ex necessitate legis;* for pregnancy, insanity, or the trial of person, which must always be tried *instanter*.....394–396

[References are to star paging.]

2. A pardon is a permanent avoider of the judgment by the king's majesty, in offenses against his crown and dignity; drawn in due form of law, allowed in open court, and thereby making the offender a new man 396

3. The king cannot pardon, 1. Imprisonment of the subject beyond seas. 2. Offenses prosecuted by appeal. 3. Common nuisances. 4. Offenses against popular or penal statutes, after information brought by a subject. Nor is his pardon pleadable to an impeachment by the commons in parliament 398

CHAPTER XXXII.

OF EXECUTION.

1. Execution is the completion of human punishment, and must be strictly performed in the manner which the law directs..... 403

2. The warrant for execution is sometimes under the hand and seal of the judge; sometimes by writ from the king; sometimes by rule of court; but commonly by the judge's signing the calendar of prisoners, with their separate judgments in the margin..... 403

BOOK III.

OF PRIVATE WRONGS.

(lxxxi)

COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE THIRD.

OF PRIVATE WRONGS.

CHAPTER THE FIRST.

OF THE REDRESS OF PRIVATE WRONGS BY THE MERE ACT OF THE PARTIES.

§ 1. General plan of the Commentaries restated.—At the opening of these Commentaries[a] municipal law was in general defined to be, "a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong."[b] From hence, therefore, it followed that the primary objects of the law are the establishment of rights, and the prohibition of wrongs. And this occasioned[c] the distribution of these collections into two general heads; under the former of which we have already considered the *rights* that were defined and established, and under the latter are now to consider the *wrongs* that are forbidden and redressed, by the laws of England.

§ 2. Book I: Rights of Persons; Book II: Rights of Things; Books III and IV: Wrongs.—[2] In the prosecution of the first of these inquiries, we distinguished rights into two sorts; first, such as concern or are annexed to the persons of men, and are then called *jura personarum,* or *the rights of persons;* which, together with the means of acquiring and losing them, composed the first book of these Commentaries; and, secondly, such as a man may

[a] Introd., § 2.

[b] *Sanctio justa, jubens honesta, et probibens contraria.* Cic. 11 Philipp. 12. Bract., l. 1. c. 3.

[c] Book I, c. 1.

acquire over external objects, or things unconnected with his person, which are called *jura rerum*, or *the rights of things;* and these, with the means of transferring them from man to man, were the subject of the second book. I am now, therefore, to proceed to the consideration of *wrongs;* which for the most part convey to us an idea merely negative, as being nothing else but a privation of right. For which reason it was necessary that, before we entered at all into the discussion of wrongs, we should entertain a clear and distinct notion of rights: the contemplation of what is *jus* (right) being necessarily prior to what may be termed *injuria* (violation of right), and the definition of *fas* (lawful) precedent to that of *nefas* (unlawful).[1]

1 **Bentham's doctrine that law is based on wrongs.**—It has frequently been said by Bentham and his followers that the classification of law should be based on wrongs, not on rights, as it usually has been. "The fundamental idea, the idea which serves to explain all the others, is that of an offense. It is only by creating offenses, that is to say, by erecting certain actions into offenses, that the law confers rights. If it confer a right, it is by giving the quality of offenses to the different actions by which the enjoyment of this right might be interrupted or opposed. The division of rights ought therefore to correspond with the division of offenses." (Bentham, View of a Complete Code of Laws, c. 2; Works, vol. 3, p. 159.)

This implies the view of laws common to Bentham and Blackstone composed entirely of restraints on natural liberty. Freedom consists in the powers of doing anything at random without the slightest check or determination to one course rather than another, and law only takes away a certain number of the possible acts that are comprehended in this natural liberty, or, as Bentham says, "erects them into offenses." Rights are the residuum of unforbidden acts, with perhaps a connotation of some benefit resulting or expected to result to the action. "To assure to individuals the possession of a certain good is to confer a right upon them." But "the distinction between rights and offenses is therefore strictly verbal; there is no difference in the ideas. It is not possible to form the idea of a right without forming the idea of an offense."

Now, it is questionable whether the idea of a right is so completely dependent on that of an offense. I am willing to admit that such has been the origin of many of our rights, e. g., such as have grown up in equity from the use of certain remedies for wrongs. But a right is not necessarily a negative idea. Such rights as property, the right of a husband or father, have their basis in certain acts which would take place and be the subject of regulation even though never infringed. This is shown by the fact that the offenses corresponding to them have never been exhaustively defined or imagined. New offenses against property and other rights make their appearance even now,

§ 3. **Division of wrongs: private (Book III); public (Book IV).**—Wrongs are divisible into two sorts of species; *private wrongs* and *public wrongs.* The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries:* the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of *crimes* and *misdemeanors.* To investigate the first of these species of wrongs, with their legal remedies, will be our employment in the present book, and the other species will be reserved till the next or concluding volume.

and are instantly recognized as offenses, which they could not be if they had no idea of the right except one formed from the offenses against it. The idea of government is at least as positive and definite as that of rebellion or treason; so of property and larceny, embezzlement, etc. And it may be questioned whether Blackstone has not mistaken the chronological for the logical sequence. Wrongs no doubt first attracted attention; but the very idea of a wrong or offense presupposed that of a right, while the converse can hardly be said. Therefore, it seems to me that right should still be the basis of classification even on Blackstone's own theory. But the argument is much stronger if we form a just conception of law (*jus*) as a science of right or direction, positive not negative in its precepts, guiding the will, not merely thwarting and repressing it.

The first suggestion of Bentham's notion may be fairly attributed to Horace, who said that laws (or rights) must be confessed to have been invented from the fear of wrong. *Jura inventa metu injusti, fatere necesse est.* (I. Serm. 3.)

This was strictly in keeping with the doctrine of the Epicureans (at least as represented by their opponents), and of Carneades, who denied the natural character of the distinction between right and wrong, and reduced law to a mere fortification against injury.

But it is surprising to find how weakly it was opposed by the natural lawyers of the eighteenth century, who could only get rid of it by taking refuge in pure ethics, e. g., by showing that if there were nobody to injure, man would be bound by the law of nature to worship God to attend to self-preservation. (Heinecii Prælect in Grotium, Procem. § 19, op. omnia [*Id.* Gen. 1748], tem. ix. pp. 16, 17.)

Professor Amos, in his English Code, pages 39, 40, gives Mr. J. S. Mill credit for the first suggestion of "making rights take the lead in certain portions, and duties take the lead in other portions," as if that were an invention of the nineteenth century!—HAMMOND.

§ 4. Redress of private wrongs: extrajudicial remedies.— The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined and wrongs prohibited. This remedy is therefore principally to be sought by application to these [3] courts of justice; that is, by civil suit or action. For which reason our chief employment in this volume will be to consider the redress of private wrongs, by *suit* or *action* in courts. But as there are certain injuries of such a nature, that some of them 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 or eccentrical kind of remedy; of which I shall first of all treat, before I consider the several remedies by suit: and, to that end, shall distribute the redress of private wrongs into three several species; first, that which is obtained by the *mere act* of the *parties* themselves; secondly, that which is effected by the *mere act* and operation of *law;* and, thirdly, that which arises from *suit* or *action* in courts; which consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

§ 5. 1. Redress by act of the parties.—And, first, of that redress of private injuries, which is obtained by the mere act of the parties. This is of two sorts; first, that which arises from the act of the injured party only;[2] and, secondly, that which arises from the joint act of all the parties together; both which I shall consider in their order.

2 **Theory and history of self-help.**—A right which could be violated with impunity, without giving rise to any new legal relation between the person of inherence and the person of incidence, would not be a legal right at all. In an anarchical state of society an injured person takes such compensation as he can obtain from a wrongdoer, or, if strong enough, gets such satisfaction as may be derived from an act of revenge. A political society, in the first place, puts this rude self-help under stringent regulation, and secondly, provides a substitute for it in the shape of judicial process. Self-help is indeed but an unsatisfactory means of redress. Its possibility depends upon the injured party being stronger than the wrongdoer, a state of things which is by no means a matter of course; and the injured party is made judge in his own cause, often at a time when he is least likely to form an impartial opinion

§ 6. a. **By the sole act of the injured party.**—Of the first sort, or that which arises from the sole act of the injured party, is,

§ 7. **(1) Self-defense.**—The *defense* of one's self, or the mutual and reciprocal defense of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray.[d] For the law, in this

d 2 Roll. Abr. 546. 1 Hawk. P. C. 131.

---

upon its merits. To suppress private revenge, to erect courts of justice, and to compel everyone who is wronged to look to them for compensation, is, however, a task far beyond the strength of a state which is still in process of formation. So the heroic age of Greece was characterized, according to Grote, by "the omnipotence of private force, tempered and guided by family sympathies, and the practical nullity of that collective sovereign afterwards called the City, who in historical Greece becomes the central and paramount source of obligation, but who appears yet only in the background."

It is, therefore, not surprising that, as Sir Henry Maine has put it, "the commonwealth at first interfered through its various organs rather to keep order and see fair play in quarrels, than took them, as it now does always and everywhere, into its own hands." The stages of social improvement seem to be the following: First, the unmeasured, hot-blooded and violent retaliation of the injured party is superseded by a mode of taking compensation, the nature and formalities of which are to some extent prescribed by custom. "The primitive proceeding," says the author last quoted, "was undoubtedly the unceremonious, unannounced, attack of the tribe or the man stung by injury on the tribe or the man who had inflicted it. Any expedient by which sudden plunder or slaughter was adjourned or prevented was an advantage even to barbarous society. Thus it was a gain to mankind as a whole when its priests and leaders began to encourage the seizure of property or family, not for the purpose of permanent appropriation, but with a view to what we should now not hesitate to call extortion." This is the stage at which the seizure of pledges is so prominent, and to it belongs also the singular custom of "sitting *dharna*," according to which an Indian creditor fasts at the door of his debtor till his debt is paid. Next comes the stage when self-help, although permitted, is supervised and restrained by the political authority. Distress may still be resorted to, but only for certain purposes, and with many safeguards against abuse. Life and property may be protected by force, but the force used must not be in excess of the need. Nuisances may be "abated," but so as to interfere with no man's rights. Last of all comes the reign of the law courts.

case, respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice, to which he is [4] prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English

Legally regulated self-help is not wholly superseded, but, as a rule, redress of wrongs must be sought only from the tribunals of the sovereign.—HOLLAND, Jurisprudence (11th ed.), 318.

Had we to write legal history out of our own heads, we might plausibly suppose that in the beginning law expects men to help themselves when they have been wronged, and that by slow degrees it substitutes a litigatory procedure for the rude justice of revenge. There would be substantial truth in this theory. For a long time law was very weak, and as a matter of fact it could not prevent self-help of the most violent kind. Nevertheless, at a fairly early stage in its history, it begins to prohibit in uncompromising terms any and every attempt to substitute force for judgment. Perhaps we may say that in its strife against violence it keeps up its courage by bold words. It will prohibit utterly what it cannot regulate.

This at all events was true of our English law in the thirteenth century. So fierce is it against self-help that it can hardly be induced to find a place even for self-defense. The man who has slain another in self-defense deserves, it is true, but he also needs a royal pardon. This thought, that self-help is an enemy of law, a contempt of the king and his court, is one of those thoughts which lie at the root of that stringent protection of seisin on which we have often commented. The man who is not enjoying what he ought to enjoy should bring an action; he must not disturb an existing seisin, be it of land, of chattels, or of incorporeal things, be it of liberty, of serfage, or of the marital relationship. It would be a great mistake were we to suppose that during the later middle ages the law became stricter about this matter; it became laxer, it became prematurely lax. Some of the "fist-right," as the Germans call it, that was flagrant in the fifteenth century would have been impossible if the possessory assizes of Henry II's day had retained their pristine vigor. In our own day our law allows an amount of quiet self-help that would have shocked Bracton. It can safely allow this, for it has mastered the sort of self-help that is lawless.—POLLOCK & MAITLAND, 2 Hist. Eng. Law (2d ed.), 574. See, also, 3 Holdsworth, Hist. Eng. Law, 243 ff.

law particularly it is held an excuse for breaches of the peace, nay even for homicide itself: but care must be taken that the resistance does not exceed the bounds of mere defense and prevention, for then the defender would himself become an aggressor.[3]

§ 8. **(2) Recaption.**—Recaption or *reprisal* is another species of remedy by the mere act of the party injured. This happens when anyone hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent or master may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace.[e] The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children or servants

[e] 3 Inst. 134. Hal. Anal. § 46.

---

3 **Limits of self-defense.**—The force used in self-defense must not exceed what would seem to the average reasonable person necessary to meet the situation. Rowe v. Hawkins, 1 F. & F. 91; Morris v. Platt, 32 Conn. 75; Courvoisier v. Raymond, 23 Colo. 113, 47 Pac. 284. Where the defendant uses more force than is reasonably necessary, or, after the assault has ended, he strikes the plaintiff, he becomes the aggressor and cannot use the justification of self-defense. Ogden v. Claycomb, 52 Ill. 365. Where this happens, both parties are in the wrong. The first assailant may be sued by the person he assaulted; and the latter may be sued by the former, on the ground that he is a trespasser as to the excess of force used. Dole v. Erskine, 35 N. H. 503; McNatt v. McRae, 117 Ga. 898, 45 S. E. 248.

Defense of third persons.—"His whole defense was based on whether or not he in good faith believed that one of his sons was then and there in danger of bodily harm about to be inflicted upon him by the plaintiff, and that he used no more force than was necessary, or appeared to him in the exercise of a reasonable judgment to be necessary, to protect his son from injury at the hands of the plaintiff." Downs v. Jackson (Ky.), 128 S. W. 339. The principle set forth in this quotation extends to all family relations. Leward v. Basely, 1 Ld. Raym. 62, 91 Eng. Reprint, 937. A child may interfere in behalf of a parent. Drinkhorn v. Bubel, 85 Mich. 532, 48 N. W. 710. A brother in behalf of a brother. McIlen v. Thompson, 32 Vt. 407. A servant may also interfere to protect his master (Seaman v. Cuppledick, 1 Owen, 150, 74 Eng. Reprint, 966); and, it would seem, a master to protect his servant. Fortune v. Jones, 30 Ill. App. 116.

concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If, therefore, he can so contrive it as to gain possession of his property again, without force or terror, the law favors and will justify his proceeding. But, as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption [5] shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society.[4] If, for instance, my

[4] **Recaption of personal property.**—"If the chattel of one man be put upon the land of another by the fault of the owner of the chattel, and not by the fault or connivance of the owner of the land, the owner of the chattel cannot enter to retake it; but if it be put there without the fault or consent of either party, the owner of the chattel may enter and take it peaceably, after demand and refusal of permission, repairing, however, any damage which may be occasioned by his entry. . . . He may lawfully enter and retake his property where it has been wrongfully taken or received by the owner of the land." Chambers v. Bedell, 2 Watts & S. (Pa.) 225, 37 Am. Dec. 508. The question always is whether the act done, on the plea of recovering a chattel, is legitimately so done on the ground of recaption, or is a battery or a trespass to the realty, as the case may be. In a leading case the plaintiff was unlawfully hunting on the defendant's lands, and was carrying away some rabbits he had killed. The defendant's servants having demanded the rabbits and been refused, took them away from the plaintiff, using no more than necessary force. It was held that the defendant's servants had not committed an assault and battery. Blades v. Higgs, 10 Com. B., N. S., 713, 142 Eng. Reprint, 634. In another case, the plaintiff was a bookkeeper in the defendants' employ. Fifty dollars of the employers' money had been lost, and this amount had been deducted from the plaintiff's salary. Subsequently, a sum of money was placed in his hands with which to pay the help. Instead of paying the help, he took from this money what was then owing him, including the fifty dollars which had been withheld from his pay, put this amount in his pocket and returned the balance to one of his employers, saying that he had now received his pay and was going to leave. He was then seized by his employers, who attempted to take the money from him. He brought suit for assault and battery, and recovered judgment. In affirming the judgment, the upper court said: "Unquestionably, if one takes another's property from his possession, without right and against his will, the owner or person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny when he can stop

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;[t] but must have recourse to an action at law.

§ 9. **(3) Re-entry on land.**—As reception is a remedy given to the party himself, for an injury to his *ersonal* property, so, thirdly, a remedy of the same kind for injuries to *real* property is by *entry* on lands and tenements, when another person without any right has taken possession thereof.[5] This depends in some measure

t 2 Roll. Rep. 55, 56. 208. 2 Roll. Abr. 565, 566.

---

it, and he is not guilty of assault, in thus defending his right, by using force to prevent his property from being carried away. But this right of defense and recapture involves two things: *First*, possession by the owner; and, *second*, a purely wrongful taking or conversion, without a claim of right. If one has entrusted his property to another, who afterwards, honestly, though erroneously, claims it as his own, the owner has no right to retake it by personal force. If he has, the actions of replevin and trover in many cases are of little use. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defense, but not of redress." Kirby v. Foster, 17 R. I. 437, 14 L. R. A. 317, 22 Atl. 1111, 1112. See Bowler v. Eldredge, 18 Conn. 1; Spencer v. McGowen & Shepard, 13 Wend. (N. Y.) 256; Moore v. Shenk, 3 Pa. St. 13, 45 Am. Dec. 618. See, also, article on Forcible Reception of Chattels, by C. A. Branston, 28 Law Quart. Rev. 262.

5 **Entry upon lands to repossess them.**—At common law, where possession of land had been taken from the owner, he was entitled to retake it even by force. This indulgence, however, tended to lead to breaches of the peace, and it was declared by statute, 5 Richard II, c. 7 (Forcible Entry, 1381), "That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner." The provisions of this statute have been enacted in some of the states of the American Union, while in others it is recognized as part of the American common law. Two different views are taken of the effect of the statute. On the one hand, it is held that a landlord is not justified in using force to expel a tenant who is holding over. Newton v. Harland (1840), 1 Man. & G. 644. On the other hand it is held that the landlord, when sued for battery in a civil action, is not prevented from justifying the use of force. The grounds for this view are thus stated: "This statute [5 Richard II] creates one of the great differences which exist in our law between the being in possession and the being out of possession of land, and which gave rise to the old saying that posses-

on like reasons with the former; and, like that too, must be peaceable and without force. There is some nicety required to define and distinguish the cases, in which such entry is lawful or otherwise: it will therefore be more fully considered in a subsequent chapter; being only mentioned in this place for the sake of regularity and order.

§ 10. **(4) Abatement of nuisances.**—A fourth species of remedy by the mere act of the p. rty injured is the *abatement*, or removal of *nuisances*.[c] What nuisances are, an. their several species, we shall

sion is nine points of the law. The effect of the statute is this, that when a man is in possession he may use force to keep out a trespasser; but, if a trespasser has gained possession, the rightful owner cannot use force to put him out, but must appeal to the law for assistance. And the result of the cases appears to me to be this, that inasmuch as the possession of the defendant was unlawful, he can recover no damages for the forcible entry of the plaintiff. He can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute of Richard II creates a crime, it gives no civil remedy. But, in respect of independent wrongful acts which are done in the course of or after the forcible entry, a right of action does arise, because the person doing them cannot allege that the acts were lawful, unless justified by a lawful entry; and he cannot plead that he has a lawful possession. This, as it appears to me, is the result of the cases." Beddall v. Maitland (1881), 17 Ch. D. 174, 188. See, also, Sterling v. Warden, 51 N. H. 217, 12 Am. Rep. 80; Low v. Elwell, 121 Mass. 309, 23 Am. Rep. 272; Jackson ex dem. Stansbury v. Farmer, 9 Wend. (N. Y.) 201.

[6] **Abatement of nuisances.**—The true theory of the abatement of nuisance, it is said, is that an individual citizen may abate a private nuisance injurious to himself, when he could also bring an action; that is to say, the abatement may only be effected by the person to whom it is in fact injurious. Brown v. Perkins, 12 Gray (Mass.), 89. Entry on the land of another even to abate a nuisance is in general a trespass. It is justifiable only in case of immediate danger, or in case the entry is on the land of the person committing the nuisance. And in the latter case notice must first be given requesting the removal of the nuisance, unless, it is said, the nuisance is caused by a positive act. And in any event there must be no unnecessary damage and no breach of the peace. If a house, which is a nuisance, is inhabited, notice must first be given before it can be pulled down. Davies v. Williams (1851), 16 Q. B. 546; Lane v. Capsey, [1891] 3 Ch. 411. Where the nuisance can be abated without entering on another's land, there is no need of giving notice of intention to abate a nuisance. Thus, where the branches of a tree overhang one's land, or the roots run into one's soil, the person whose land is thereby affected may cut

find a more proper place to inquire under some of the subsequent divisions. At present I shall only observe, that whatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it.[g] If a house or wall is erected so near to mine that it stops my ancient lights, which is a *private* nuisance, I may enter my neighbor's land and peaceably pull it down.[h] Or if a new gate be erected across the public highway, which is a *common* nuisance, any of the king's subjects passing that way may cut it down and destroy it.[i] [6] And the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.

§ 11. **(5) Distress.**—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 other duties;[7] or, distraining another's cattle *damage feasant*, that is,

g 5 Rep. 101. 9 Rep. 55.
h Salk. 459.
i Cro. Car. 184.

---

the branches or roots so far as they encroach on his premises. Hickey v. Michigan Cent. R. Co., 96 Mich. 498, 35 Am. St. Rep. 621, 21 L. R. A. 729, 55 N. W. 950; Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623, 78 Cal. 611, 12 Am. St. Rep. 121, 21 Pac. 366; Lemmon v. Webb, [1895] App. Cas. 1.

7 **Distress for rent in the United States.**—In several of the states distress for rent has been expressly abolished, as inconsistent with the spirit of their laws or as making an invidious distinction in favor of a particular class of creditors: New York, Wisconsin, Minnesota, Utah, and District of Columbia. In some it has practically fallen into disuse. It has been judicially held in North Carolina and Missouri not to exist in those states. Howland v. Forlaw, 108 N. C. 567, 13 S. E. 173; Crocker v. Mann, 3 Mo. 472, 26 Am. Dec. 684. But in the latter state, by Revised Statutes of 1899, a substitute remedy is established, whereby the landlord in order to recover must make demand and also state in his affidavit for his landlord's warrant the exact amount of rent so as to give the tenant the opportunity to avoid the suit by payment of the rent demanded. Welch v. Ashby, 88 Mo. App. 400. In the New England states, the law of attachment on mesne process has superseded distress for rent; but under the attachment laws, the principles of the common-law doc-

doing damage, or trespassing, upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to ascertain, whose cattle they were that committed the trespass or damage.[8]

As the law of distresses is a point of great use and consequence, I shall consider it with some minuteness: by inquiring, first, for what injuries a distress may be taken; secondly, what things may be distrained; and, thirdly, the manner of taking, disposing of, and avoiding distresses.

§ 12. **(a) Injuries for which distress allowed.**—And first, it is necessary to premise that a distress,[1] *districtio*, is the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed.[9] 1. The most usual injury for which a distress

1 The thing itself taken by this process, as well as the process itself, is in our law books very frequently called a distress.

---

trine of distress have been essentially assumed, subject to the checks and limitations which, under the English statute law and modern decisions, have modified it. 2 Taylor, Landlord and Tenant (9th ed.), 187. Mississippi, which formerly abolished distress, has now restored it. Hawkins v. James, 69 Miss. 361, 11 South. 654. In most states, the procedure has practically fallen into disuse. 1 Stimson, Am. Stat. Law, § 2031. 2 Tiffany, Landlord and Tenant, 1983.

The securities known as "tacit hypothecs" were first known in Roman law in connection with the right of the landlord over the goods of his tenant, which is still well known on the Continent and in Scotland under its old name, and in England took the form of a right of distress. Holland, Jurisprudence (11th ed.), 231. The modern English law of distress for rent and of distress *damage feasant* may be found in 3 Stephen's Comm. (16th ed.), 447 ff.

8 The student may consult, besides Sir H. Maine's chapter on the Primitive Forms of Legal Remedies, the chapter on Distraint, in Mr. Bigelow's History of Procedure in England. For the common law in its settled form, see Blackstone, Book III, chapter 1. I cannot agree with Mr. Bigelow's argument that extrajudicial distraint was an innovation. Prohibitions in early laws, such as Cnut II, 19, even if of general application (which I doubt), really go to show that the practice was always common.—POLLOCK, Land Laws, 142 n.

9 **Nature of remedy by distraint.**—"The oldest form of self-help is the process of distraint. The essence of distraint is, as Blackstone puts it, 'the

may be taken is that of nonpayment of rent. It was observed in a former volume,[k] that distresses were incident by the common law to every *rent service*, and by particular reservation to *rent charges* also; but not to *rent-seck*, till the statute 4 George II, c. 28 (Landlord and Tenant, 1730), extended the same remedy to all rents alike, and thereby in effect abolished all material distinction between them. So that now we may lay it down as an universal principle, [7] that a distress may be taken for any kind of rent in arrear; the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it. 2. For neglecting to do suit to the lord's court,[l] or other certain personal service,[m] the lord may distrain, of common right. 3. For amercements in a court-leet a distress may be had of common right; but not for amercements in a court-baron, without a special prescription to warrant it.[n] 4. Another injury, for which distresses may be taken, is where a man finds beasts of a stranger wandering in his grounds, *damage feasant;* that is, doing him hurt or damage, by treading down his grass, or the like; in which case the owner of the soil may

k Book II, c. 3.
l Bro. Abr. tit. Distress. 15.
m Co. Litt. 46.
n Brownl. 36.

---

taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed.' This expedient is at once ancient, common, and, in early law, used for a variety of different purposes. It is so useful that it has maintained its place even in mature legal systems; but it has only maintained its place because it has been minutely regulated. In consequence of this regulation it has almost ceased to be a form of self-help, and has risen, even as in Roman law the Legis Actiones *per manus injectionem* and *per pignoris capionem* rose, to the dignity of a regular legal process. It is from this point of view that it differs from the forms of self-help which we have just been discussing. They are forms of self-help pure and simple, deliberately allowed by a settled system of law as just and reasonable: distraint is a particular form of self-help which has survived from the time when the coercive force of law was weak, because it has been broken in to the service of the law and become a useful part of legal process. But though the law made use of distraint as part of its process to enforce appearance, and sometimes as a mode of enforcing obedience to the orders of its courts, there are still surviving so forms of it which recall the days when it was the remedy of the priv person—when it was a form of self-help pure and simple," namely, distraint damage feasant, and the landlord's right to distrain for rent or other services in arrear.—HOLDSWORTH, 3 Hist. Eng. Law, 245.

distrain them, till satisfaction be made him for the injury he has thereby sustained. 5. Lastly, for several duties and penalties inflicted by special acts of parliament (as for assessments made by commissioners of sewers,[o] or for the relief of the poor[p]), remedy by distress and sale is given; for the particulars of which we must have recourse to the statutes themselves: remarking only that such distresses[q] are partly analogous to the ancient distress at common law, as being repleviable and the like; but more resembling the common-law process of execution, by seizing and selling the goods of the debtor under a writ of *fieri facias* (that you cause to be made), of which hereafter.[10]

§ 13. **(b) Things exempt from distress.**—Secondly; as to the things which may be distrained, or taken in distress, we may lay it down as a general rule that all chattels personal are liable to be distrained, unless particularly protected or exempted. Instead, therefore, of mentioning what things are distrainable, it will be easier to recount those which are not so, with the reason of their particular exemptions.[r] And, 1. As everything which is distrained is presumed to be the property of the wrongdoer, it will follow that such things, wherein no man can have an absolute and valuable property (as dogs, cats, rabbits, and [s] all animals *feræ naturæ*—of a wild nature) cannot be distrained. Yet if deer (which are *feræ naturæ*) are kept in a private inclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they may be distrained for rent.[s] 2. Whatever is in the personal use or occupation of any man is for the time privileged and protected from any distress; as an ax with which a man is cutting wood, or a horse while a man is riding him. But horses, drawing a cart, may

o Stat. 7 Ann. c. 10 (1708).

p Stat. 43 Eliz. c. 2 (Poor Relief, 1601).

q 4 Burr. 589.

r Co. Litt. 47.

s Davis v. Powel. C. B. Hil. 11 Geo. II.

---

10 Of the five cases enumerated, distress *damage feasant* alone remains in common use in the United States. Distress for rent has been abolished in most of them: but a *landlord's lien* on the tenant's goods is frequently substituted for it by statute.—HAMMOND.

(cart and all) be distrained for rent-arrear; and also if a horse, though a man be riding him, be taken *damage feasant*, or trespassing in another's grounds, the horse (notwithstanding his rider) may be distrained and led away to the pound.[t] 3. Valuable things in the way of trade shall not be liable to distress. As a horse standing in a smith's shop to be shoed, or in a common inn; or cloth at a tailor's house; or corn sent to a mill, or a market. For all these are protected and privileged for the benefit of trade; and are supposed in common presumption not to belong to the owner of the house, but to his customers. But, generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distrainable by him for rent: for otherwise a door would be open to infinite frauds upon the landlord; and the stranger has *his* remedy over by action on the case against the tenant, if by the tenant's default the chattels are distrained, so that he cannot render them when called upon. With regard to a stranger's beasts which are found on the tenant's land, the following distinctions are, however, taken. If they are put in by consent of the owner of the beasts, they are distrainable immediately afterwards for rent-arrear by the landlord.[u] So, also, if the stranger's cattle break the fences, and commit a trespass by coming on the land, they are distrainable immediately by the lessor for his tenant's rent, as a punishment to the owner of the beasts for the wrong committed through his negligence.[v] But if the lands were not [9] sufficiently fenced so as to keep out cattle, the landlord cannot distrain them, till they have been *levant* and *couchant* (*levantes et cubantes*) on the land; that is, have been long enough there to have lain down and rose up to feed; which in general is held to be one night at least: and then the law presumes that the owner may have notice whither his cattle have strayed, and it is his own negligence not to have taken them away. Yet, if the lessor or his tenant were bound to repair the fences and did not, and thereby the cattle escaped into their grounds without the negligence or default of the owner; in this case, though the cattle may have been *levant* and *couchant*, yet they are not distrainable for rent till actual notice is given to the owner that they are there, and he neglects to remove them:[w] for the law will not suffer the land-

[t] 1 Sid. 440.
[u] Cro. Eliz. 549.
[v] Co. Litt. 47.
[w] Lutw. 1580.

lord to take advantage of his own or his tenant's wrong. 4. There are also other things privileged by the ancient common law; as a man's tools and utensils of his trade, the ax of a carpenter, the books of a scholar, and the like: which are said to be privileged for the sake of the public, because the taking them away would disable the owner from serving the commonwealth in his station. So, beasts of the plow, *averia carucæ*, and sheep, are privileged from distresses at common law;[x] while dead goods, or other sort of beasts, which Bracton calls *catalla otiosa* (chattels not privileged from distraint), may be distrained. But, as beasts of the plow may be taken in execution for debt, so they may be for distresses by statute, which partake of the nature of executions.[y] And perhaps the true reason why these and the tools of a man's trade were privileged at the common law, was because the distress was then merely intended to compel the payment of the rent, and not as a satisfaction for its nonpayment: and therefore, to deprive the party of the instruments and means of paying it, would counteract the very end of the distress.[z] 5. Nothing shall be distrained for rent which may not be rendered again in as good plight as when it was distrained: for which reason milk, fruit and the like, cannot be distrained; a distress at [10] common law being only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. So, anciently, sheaves or shocks of corn could not be distrained, because some damage must needs accrue in their removal: but a cart loaded with corn might; as that could be safely restored. But now by statute 2 W. & M., c. 5 (Distress, 1690), corn in sheaves or cocks, or loose in the straw, or hay in barns or ricks, or otherwise, may be distrained as well as other chattels. 6. Lastly, things fixed to the freehold may not be distrained; as caldrons, windows, doors and chimneypieces: for they savor of the realty. For this reason, also, corn growing could not be distrained; till the statute 11 George II, c. 19 (Distress for Rent, 1737), empowered landlords to distrain corn, grass, or other products of the earth, and to cut and gather them when ripe.

x Stat. 51 Hen. III. st. 4. de Districtione Scaccarii (1266, of Exchequer Distraint).

y 4 Burr. 589.

z *Ibid.* 588.

§ 14. (c) Procedure in distress.—Let us next consider, thirdly, how distresses may be taken, disposed of, or avoided. And, first, I must premise, that the law of distresses is greatly altered within a few years last past. Formerly, they were looked upon in no other light than as a mere pledge or security, for payment of rent or other duties, or satisfaction for damage done. And so the law still continues with regard to distresses of beasts taken *damage feasant*, and for other causes, not altered by act of parliament; over which the distrainor has no other power than to retain them till satisfaction is made. But distresses for rent-arrear being found by the legislature to be the shortest and most effectual method of compelling the payment of such rent, many beneficial laws for this purpose have been made in the present century; which have much altered the common law, as laid down in our ancient writers.

In pointing out, therefore, the methods of distraining, I shall in general suppose the distress to be made for rent; and remark, where necessary, the differences between such distress and one taken for other causes.

§ 15. (i) Time and place of making a distress.—[11] In the first place, then, all distresses must be made *by day*, unless in the case of *damage feasant*; an exception being there allowed, lest the beasts should escape before they are taken.[a] And, when a person intends to make a distress, he must, by himself or his bailiff, enter on the demised premises; formerly during the continuance of the lease, but now,[b] if the tenant holds over, the landlord may distrain within six months after the determination of the lease; provided his own title or interest, as well as the tenant's possession, continue at the time of the distress. If the lessor does not find sufficient distress on the premises, formerly he could resort nowhere else; and therefore tenants, who were knavish, made a practice to convey away their goods and stock fraudulently from the house or lands demised, in order to cheat their landlords. But now[c] the landlord may distrain any goods of his tenant, carried off the premises clandestinely, wherever he find them within thirty days after,

a Co. Litt. 142.
b Stat. 8 Ann. c. 14 (Landlord and Tenant, 1709).
c Stat. 8 Ann. c. 14. 11 Geo. II. c. 19 (Distress for Rent, 1737).

unless they have been *bonâ fide* sold for a valuable consideration: and all persons privy to, or assisting in, such fraudulent conveyance, forfeit double the value to the landlord. The landlord may also distrain the beasts of his tenant, feeding upon any commons or wastes, appendant or appurtenant to the demised premises. The landlord might not formerly break open a house, to make a distress, for that is a breach of the peace. But when he was in the house, it was held that he might break open an inner door:[d] and now[e] he may, by the assistance of the peace officer of the parish, break open in the daytime any place, whither the goods have been fraudulently removed and locked up to prevent a distress; oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein.

§ 16. (ii) Amount to be distrained.—Where a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once; and not for part at one time, and part at another.[f] But if he distrains for the whole, and there is not sufficient on the premises, or he happens [12] to mistake in the value of the thing distrained, and so takes an insufficient distress, he may take a second distress to complete his remedy.[g]

Distresses must be proportioned to the thing distrained for. By the statute of Marlbridge, 52 Henry III, c. 4 (Distress, 1267), if any man takes a great or unreasonable distress, for rent-arrear, he shall be heavily amerced for the same. As if[h] the landlord distrains two oxen for twelvepence rent; the taking of *both* is an unreasonable distress; but, if there were no other distress nearer the value to be found, he might reasonably have distrained *one* of them; but for homage, fealty or suit, as also for parliamentary wages, it is said that no distress can be excessive.[i] For as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again. The remedy for excessive distresses is by a special action on the statute of Marlbridge; for an action of tres-

[d] Co. Litt. 161. Comberb. 17.
[e] Stat. 11 Geo. II. c. 19.
[f] 2 Lutw. 1532.
[g] Cro. Eliz. 13. Stat. 17 Car. II. c. 7 (1665). 4 Burr. 590.
[h] 2 Inst. 107
[i] Bro. Abr. t. Assise. 291. Prerogative. 98.

pass is not maintainable upon this account, it being no injury at the common law.[j]

§ 17. **(iii) Disposal of property distrained.**—Where the distress is thus taken, the next consideration is the disposal of it. For which purpose the things distrained must, in the first place, be carried to some pound, and there impounded by the taker. But, in their way thither, they may be *rescued* by the owner, in case the distress was taken without cause, or contrary to law: as if no rent be due; if they were taken upon the highway, or the like; in these cases the tenant may lawfully make rescue.[k] But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law.[l 11]

§ 18. **(aa) Pounds.**—A pound (*parcus*, which signifies any inclosure) is either pound-*overt*, that is, open overhead; or pound-

j 1 Ventr. 104. Fitzgibb. 85. 4 Burr. 590.
k Co. Litt. 160, 161.
l *Ibid.* 47.

11 **Development of the law of distress.**—By the common law things taken in distress were a mere pledge for payment of the rent. Therefore nothing might be distrained which could not be restored in the same condition, such as corn in sheaves; nor anything which grew out of or was fixed to the soil, such as standing corn; and the landlord had no power to sell distrained beasts or goods, nor to deal with them in any way as owner, even for the owner's benefit, except perhaps, in case of evident necessity. And, moreover, as Blackstone tells us, "the many particulars which attend the taking of a distress used formerly to make it a hazardous kind of proceeding; for, if any one irregularity was committed, it vitiated the whole," and the person distraining became a mere trespasser. This has already been noticed by Sir Henry Maine as evidence of the archaic nature of the institution. "The excessive technicality of ancient law" clings to all ancient customary remedies unless and until, as in this case, modern legislators remove it for the benefit of the parties, or one of them. In 1689 the power of selling things taken by distress, after notice to the tenant, was first given to the landlord by act of parliament; it was further secured and defined by subsequent statutes of the eighteenth century, and the old restrictions on the kinds of things liable to distress were greatly relaxed. "The summary power of sale now exercised has been created by the recent statute law with more attention to the profit of the rich man than to the rights which were secured to the poor by our ancient jurisprudence."—POLLOCK, Land Laws, 143.

covert, that is, close. By the statute 1 & 2 P. & M., c. 12 (Pound, 1554), no distress of cattle can be driven out of the hundred where it is taken, [13] 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 find and replevy the distress. And by statute 11 George II, c. 19 (Distress for Rent, 1737), which was made for the benefit of landlords, any person distraining for rent may turn any part of the premises, upon which a distress is taken, into a pound, *pro hac vice* (for this occasion), for securing of such distress. If a live distress, of animals, be impounded in a *common* pound-overt, the owner must take notice of it at his peril; but if in any *special* pound-overt; so constituted for this particular purpose, the distrainor must give notice to the owner: and, in both these cases, the owner, and not the distrainor, is bound to provide the beasts with food and necessaries. But if they are put in a pound-covert, as in a stable or the like, the landlord or distrainor must feed and sustain them.[m] A distress of household goods, or other dead chattels, 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.

§ 19. **(bb) Care of animals impounded.**—When impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it hath been held,[n] that the distrainor is not at liberty to work or use a distrained beast. And thus the law still 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.

§ 20. **(cc) Replevin of goods distrained.**—To *replevy* (*replegiare*, that is to take back the pledge), is, when a person distrained upon applies to the sheriff or his officers, and has the distress returned into his own possession; upon giving good security to try the right of taking it in a suit at law, and, if that

m Co. Litt. 47.
n Cro. Jac. 148.

be determined against him, to return the cattle or goods once more into the hands of the distrainor. This is called a replevin, of which more will be said hereafter. At present I shall only observe that, as a distress is at common [14] law only in nature of a security for the rent or damages done, a replevin 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.

§ 21. (dd) Sale of goods distrained.—This kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to *him*, yet, if he continues obstinate and will make no satisfaction or payment, it is no remedy at all to the distrainor. But for a debt due to the crown, unless paid within forty days, the distress was always salable at the common law.[o] And for an amercement imposed at a court-leet, the lord may also sell the distress:[p] partly because, being the king's court of record, its process partakes of the royal prerogative;[q] but principally because it is in the nature of an execution to levy a legal debt. And, so in the several statute distresses before mentioned, which are also in the nature of executions, the power of sale is likewise usually given, to effectuate and complete the remedy. And, in like manner, by several acts of parliament,[r] in all cases of distress for rent, if the tenant or owner do not, within five days after the distress is taken, and notice of the cause thereof given him, replevy the same with sufficient security; the distrainor, with the sheriff or constable, shall cause the same to be appraised by two sworn appraisers, 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 and entire satisfaction may now be 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 act of parliament.

o Bro. Abr. t. Distress. 71.

p 8 Rep. 41.

q Bro. *Ibid.* 12 Mod. 330.

r 2 W. & M. c. 5 (1690). 8 Ann. c. 14 (1709). 4 Geo. II. c. 28 (1730). 11 Geo. II. c. 19 (1737).

§ 22. **(d) Effect of irregularity in making a distress.**—Before I quit this article, I must observe that the many particulars which attend the taking of a distress, used formerly to make it a hazardous kind of proceeding; for, if any [15] one irregularity was committed, it vitiated the whole, and made the distrainors trespassers *ab initio* (from the beginning).[s] [12] But now by the statute 11 George II, c. 19 (1737), it is provided, that, for any unlawful act done, the whole shall not be unlawful, or the parties trespassers *ab initio:* but that the party grieved shall only have an action for the real damage sustained; and not even that, if tender of amends is made before any action is brought.

[s] 1 Ventr. 37.

---

12 **Hazardous character of remedy by distress.**—During the same period [from the thirteenth to the seventeenth century] the remedy gradually grew more and more technical in response to judicial prejudice against it as an essentially *ex parte* remedy. Professor Maine has called attention to the fact that the analogous formal remedy in Roman law went through exactly the same process. Gaius, speaking generally of the *legis actiones,* says, "they fell into discredit because through the excessive subtlety of the ancient lawyers, things came to such a pass that he who committed the smallest error failed altogether." Gaius, Inst., Lib. IV, § 30. With this language compare the entirely similar but wholly independent statement of Blackstone: "The many particulars which attend the taking of a distress used formerly to make it a hazardous kind of proceeding; for if any one irregularity was committed, it vitiated the whole."

There is an abundance of matter in the old books which proves the correctness of Blackstone's statement. Truly the remedy is, as has been said, a two-edged sword by which one may bring down his antagonist, but not without danger to himself. In a case of trespass tried before Rolle, C. J., it appeared that the defendant had distrained a trunk for rent. Being informed that there were things of value in the trunk, he caused it to be corded as a precaution against loss or damage. It was adjudged that this interference with the chattels was unwarranted, and made the distress void.

It is to be noted that the peculiar and exceptional doctrine of trespass *ab initio* no doubt had its origin largely in this prejudice against distraint. An irregularity in the distress made the distrainor a wrongdoer from the beginning and made him subject to the action of trespass. "If the lord who distrains for rent, or the owner for damage feasant, works or kills the distress . . . the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio.*" (Six Carpenters' Case, 8 Coke, 146b.) This principle was modified in 1738 by a statute which provided that distresses should not thereafter be treated as being

§ 23. **(6) Seizing of heriots.**—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 cattle or goods in distress. As for that division of heriots, which is called heriot-service, and is only a species of rent, the lord may distrain for this, as well as seize: but for heriot-custom (which, Sir Edward Coke says,[t] lies only in *prender*, and not in *render*) the lord may seize the identical thing itself, but cannot distrain any other chattel for it.[u] The like speedy and effectual remedy of seizing is given with regard to many things that are said to lie in franchise; as waifs, wrecks, estrays, deodands, and the like; all which the person entitled thereto may seize without the formal process of a suit or action. Not that they are debarred of this remedy by action; but have also the other, and more speedy one, for the better asserting their property; the thing to be claimed being frequently of such a nature, as might be out of the reach of the law before any action could be brought.

§ 24. **b. Redress by joint act of parties concerned.**—These are the several species of remedies, which may be had by the mere act of the party injured. I shall, next, briefly mention such as arise from the joint act of all the parties together. And these are only two, *accord* and *arbitration*.

§ 25. **(1) Accord and satisfaction.**—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.[13] As if a man contract [16] to build a house or deliver a horse,

t Cop. § 25.

u Cro. Eliz. 590. Cro. Car. 260.

---

made altogether unlawful and void merely because of some irregularity incident to the proceedings, but the party aggrieved was by the same statute permitted to maintain his action for such damage as actually resulted from the irregularity. But when this act was passed feudalism was a thing of the past, distress had been restricted almost wholly to the recovery of rent, and an entirely different character had been given to the remedy by the statute of William and Mary.—STREET, 3 Foundations of Legal Liability, 294.

13 **Accord and satisfaction.**—In recent books a distinction is commonly made between the two words: *accord* meaning the agreement between the parties as to the terms of compromise or settlement, and *satisfaction* the perform-

and fail in it; this is an injury, for which the sufferer may have his remedy by action; but if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action.[w] By several late statutes, particularly 11 George II, c. 19 (1737), in case of irregularity in the method of distraining; and 24 George II, c. 24 (1750), in case of mistakes committed by justices of the peace; even *tender* of sufficient amends to the party injured is a bar of all actions, whether he thinks proper to accept such amends or no.

§ 26. (2) Arbitration and award.—Arbitration is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more *arbitrators;* who are to decide the controversy:

[w] 9 Rep. 79.

---

ance thereof by payment or other act. Thus when it is said that accord without satisfaction is not binding, it means only what Blackstone expresses by saying that the accord "*when performed* is a bar of all actions upon this account." But a satisfaction actually given and accepted will be such a bar without a previous accord (United States v. Adams, 7 Wall. (U. S.) 463, 19 L. Ed. 249; United States v. Child, 12 Wall. (U. S.) 232, 20 L. Ed. 360); and is not set aside by a subsequent unavailing attempt at arbitration. Hemingway v. Stansell, 106 U. S. 399, 27 L. Ed. 245, 1 Sup. Ct. Rep. 473.—HAMMOND.

The kind of agreement known as an accord, i. e., an agreement for the compromise or settlement of a debt or other cause of action, is bilateral. Of course a unilateral promise may be made by the debtor in consideration of the actual extinguishment of the debt (which can only be by release), or by the creditor to extinguish the debt in consideration of something actually given or done by the debtor; but neither of these is what is meant by an accord, which is executory on both sides. It was formerly held that an accord could not be enforced by action, either because mutual promises were not binding, or because the law would not enforce an agreement which merely substituted one cause of action for another, or for both of these reasons. The first reason, of course, has long ceased to exist, and the second would now, it seems, be disregarded. A cause of action may indeed be settled and extinguished without any previous binding agreement; and if with that view the parties merely agree upon terms of settlement without intending to make a contract, of course they will not be bound.—LANGDELL, Summary of Contr., § 87.

For a thorough discussion of the subject, see Professor Williston's article on "Accord and Satisfaction," in 17 Harv. Law Rev., 459 ff.

and if they do not agree, it is usual to add that another person be called in as *umpire* (*imperator* or *impar* [x]), to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed.[14] This decision, in any of these cases, is called an *award*. And thereby the question is as fully determined, and

x Whart. Angl. Sacr. I. 772. Nicols. Scot. Hist. Libr. c. 1. Prope Finem.

---

14 **Effect of submission to arbitration.**—Submission to arbitration, when made in writing, is now governed in England by the Arbitration Act, 1889. See 1 Halsbury, Laws of Eng., 437 ff; 3 Stephen's Comm. (16th ed.), 465 ff.

In the United States arbitration is likewise, in many instances, now governed by statute. On the nature of a clause in a contract providing for submission to arbitration, Professor Langdell has said: "A contract in writing sometimes contains a clause providing that any dispute arising under the contract shall be referred to arbitrators; and a question has been made whether in such a case the obligation of each party to perform the principal contract will be dependent by implication upon the other's performing the agreement to refer. (Roper v. Lendon, 1 El. & El. 825, 120 Eng. Reprint, 1120.) But it seems that an agreement to refer to arbitrators, and the agreement which is to furnish the subject of the reference, are necessarily separate contracts, the former not coming into operation until the latter is broken. If the agreement to refer were contained in a separate instrument, or if it were not made until after the dispute arose, the effect of it would be the same. Besides, it is impossible that a thing to be done by A in the event of B's *not* performing his promise should be a part of B's compensation for performing his promise. When two parties enter into two contracts at the same time, and by the same instrument, it may be justly inferred that neither contract would have been made unless both had been made, but that does not make them one contract. It merely amounts to saying that the *making* of each contract was conditional upon the making of the other; and it does not at all follow from that, that the *performance* of either is conditional upon the performance of the other." LANGDELL, Summary of Contracts, § 115.

"The facts connected with the arbitration, and the conduct of the parties in procuring the decree, if true, as they must, on demurrer, be assumed to be, make a case of fraud, imposition and circumvention which courts of equity cannot, without renouncing their functions, allow to stand, if the results are, or would be, injurious to the complainant. They speak for themselves, standing confessed.

"The arbitration, although made *pendente lite*, has upon its face no reference to the suit. It does not seem to have been made under any order of the court, or with any view of being made the order of the court in the case. One of the three parties to it was not a party to the suit. It was an arbitration at common law. It appears regular, and, until impeached by facts or denials, is of the very highest authority. 'Thereby,' says Mr. Justice Blackstone, 'the

the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice.[y] But the right of real property cannot thus pass by a mere award:[z] which subtilty in point of form (for it is now reduced to nothing else) had its rise from feudal principles; for, if this had been permitted, the land might have been aliened conclusively without the consent of the superior.[15] Yet doubtless an arbitrator may now award a conveyance or a release of land; and it will be a breach of the arbitration bond to refuse compliance. For, though originally the submission to arbitration used to be by word, or by deed, yet both of these being revocable in their nature, it is now become the practice to enter into mutual bonds, with condition to stand to the award or arbitration of the arbitrators [17] or umpire therein named.[a] And experience having shown the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are

[y] Brownl. 55. 1 Freem. 410.
[z] 1 Roll. Abr. 242. 1 Lord Raym. 115.
[a] Append. No. III. § 6.

---

question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties, or the judgment of a court.' Book III, p. 16. This is strong language. But it impresses the policy of the courts to discourage litigation, and support the Christian injunction upon all men, to agree with their adversaries quickly, while they are in the way with them.

"By that arbitration, complainant obtained the first and *only* lien which appears in the whole history of the transactions, and, while it lasted, it became, between the parties, as effectual as if retained in the original deed to Estes. Any step taken after that, by the parties in the suit, to press it to a termination inconsistent with the arbitration, was a fraud."—EAKIN, J., in Harris v. Hanie, 37 Ark. 348, 354.

15 **Change of property by award.**—For the reason why an arbitrator's award could not transfer the title to land, it is hardly necessary to invoke feudal principles, or a nonexistent dependence on the consent of the superior. The reason was the same that prevented land passing, as chattels might, in consequence of a judgment for the value in money, or by any mere contract, or grant, or by a decree in equity. None of these could take the place of an actual transfer of possession or livery of seisin; without which a change of possession was a mere fiction. When land could pass by a deed, under the statute of uses, there was no reason left why it should not also pass by a deed of submission to an award: but the habit of requiring an express transfer was too strong to be overthrown.—HAMMOND.

difficult and almost impossible to be adjusted on a trial at law; the legislature has now established the use of them, as well in controversies where causes are depending, as in those where no action is brought, and which still depend upon the rules of the common law: enacting, by statute 9 & 10 W. III, c. 15 (Arbitration, 1697), that all merchants and others, who desire to end any controversy (for which there is no other remedy but by personal action or suit in equity), may agree that their submission of the suit to arbitration or umpirage shall be made a rule of any of the king's courts of record: and, after such rule made, the parties disobeying the award shall be liable to be punished, as for a contempt of the court; unless such award shall be set aside, for corruption or other misbehavior in the arbitrators or umpire, proved on oath to the court, within one term after the award is made. And, in consequence of this statute it is now become a considerable part of the business of the superior courts to set aside such awards when partially or illegally made; or to enforce their execution, when legal, by the same process of contempt, as is awarded for disobedience to those rules and orders which are issued by the courts themselves.

[18]

CHAPTER THE SECOND.

OF REDRESS BY THE MERE OPERATION OF LAW.

§ 27. 2. Redress by mere operation of law: extrajudicial remedies.—The remedies for private wrongs, which are effected by the mere operation of the law, will fall within a very narrow compass: there being only two instances of this sort that at present occur to my recollection; the one that of *retainer*, where a creditor is made executor or administrator to his debtor; the other, in the case of what the law calls a *remitter*.

§ 28. a. Retainer.—If a person indebted to another makes his creditor or debtee his executor, or if such creditor obtains letters of administration to his debtor; in these cases the law gives him a remedy for his debt, by allowing him to retain so much as will pay himself, before any other creditors whose debts are of equal degree.[a] [1] This is a remedy by the mere act of law, and grounded

[a] 1 Roll. Abr. 922. Plowd. 54.

---

1 **Retainer.**—Mr. Justice Holmes, in his essay on "Early English Executors" (9 Harv. Law Rev. 42, 3 Select Essays in Anglo-Am. Leg. Hist. 737), in describing peculiarities of the legal position of the executor, says: "Another singular thing is the form of an executor's right of retainer. 'If an executor has as much goods in his hands as his own debt amounts to, the property of those goods is altered and rests in himself; that is, he has them as his own proper goods in satisfaction of his debt, and not as executor.' (Woodward v. Lord Darcy, Plowd. 184, 185.) This proposition is qualified by Wentworth, so far as to require an election where the goods are more than the debt. (Executors (14th ed.), 77, 198, 199.) But the right is clear, and if not exercised by the executor in his lifetime passes to his executor. (Hopton v. Dryden, Prec. Ch. 179; Wentw. Exrs. (14th ed.) 77, note, citing 11 Vin. Abr. 261, 263; Croft v. Pyke, 3 P. Wms. 179, 183; Burdet v. Pix, 2 Brownl. 50.) So when an executor or administrator pays a debt of the deceased with his own money, he may appropriate chattels to the value of the debt. (Dyer, 2a; Elliott v. Kemp, 7 M. & W. 306, 313.) A right to take money would not have seemed strange, but this right to take chattels at a valuation *in pais* without judgment is singular. It may be a survival of archaic modes of satisfaction when money was scarce and valuations in the country common. (See, e. g., the application of the trusteed wool to the judgment in 1 Rot. Parl. 108. Assignment of dower *de la pluis beale*, Litt. § 49. Delivery of debtor's chattels by sheriff, St. Westm. II, c. 18;

upon this reason; that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the decease., 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. Else, by being made executor, [19] he would be put in a worse condition than all the rest of the world besides. For, though a ratable payment of all the debts of the deceased, in equal degree, is clearly the most equitable method, yet as every scheme for a proportionable distribution of the assets among all the creditors hath been hitherto found to be impracticable, and productive of more mischiefs than it would remedy; so that the creditor who first commences his suit is entitled to a preference in payment; it follows, that as the

Kearns v. Cunniff, 138 Mass. 434, 436.) But it may be a relic of a more extensive title."

The doctrine of retainer as known to the common law is said to be still recognized to some extent in some of the American states, although of little significance in most of them, because of changed conditions. "Retainer is the legitimate result of the doctrine of priority to the creditor who first brings action, together with the right of preference in the administrator, before action brought. An action by an administrator, in his capacity as creditor of the intestate, against himself, in his capacity as representative of the deceased, would be absurd (Perkins v. Se Ipsam, 11 R. I. 270; Thomas v. Thomas, 3 Litt. 8; 3 Bl. Comm. 18; Woodward v. Darcy, 1 Plowd. 184; Phillips v. Phillips, 18 Mont. 305, *per* Field, J., concurring in Bryan v. Kales, 134 U. S. 126, 136. See, also, Norton v. Walsh, 94 Cal. 564; Byrne v. Byrne, 94 Cal. 576. So the allowance of a claim owned beneficially by an administrator, though in the name of another person, is void. Smith v. Downey, 3 Ired. Eq. 268, 278); the right to prefer, then, necessarily takes the shape of retainer, otherwise he would lose the amount of his own debt, if other creditors brought suit and the estate turned out insolvent. (The doctrine of retainer is also deduced from the maxim, *In æquale jure potior est conditio possidentis:* Fonbl. Eq., bk. 4, pt. 2, c. 2, § 2.) But where the right to prefer creditors does not exist in the administrator, and creditors gain no preference according to the time of bringing their actions, the doctrine of retainer means nothing more than the satisfaction of the claims of executors and administrators under the same conditions which determine the rights of other creditors. (Nelson v. Russell, 15 Mo. 356, 359; Williamson v. Anthony, 47 Mo. 299; Taylor's Estate, 10 Cal. 482; Shortridge v. Easley, 10 Ala. 450; Hubbard v. Hubbard, 16 Ind. 25; Henderson v. Ayers, 23 Tex. 96, 102; Lenoir v. Winn, 4 Desaus. 65; Berry v. Graddy, I Met. (Ky.) 553, 557; Smith v. Bryant, 60 Ala. 235, 238.)"—WOERNER, 2 Am. Law of Admin. (2d ed.), 786.

executor can commence no suit, he must be paid the last of any, and of course must lose his debt, in case the estate of his testator should prove insolvent, unless he be allowed to retain it. The doctrine of *retainer* is therefore the necessary consequence of that other doctrine of the law, the priority of such creditor who first commences his action. 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; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt, in prejudice to that of his coexecutor in equal degree; but both shall be discharged in proportion.[b] Nor shall an executor of his own wrong be in any case permitted to retain.[c]

§ 29. **b. Remitter.**—Remitter is where he, who hath the true property or *jus proprietatis* in lands, but is out of possession thereof and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and of course defective, title: in this case he is remitted, or sent back, by operation of law, to his ancient and more certain title.[d 2] The right of entry, which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good one; and his defeasible estate shall be utterly defeated and annulled, by the instantaneous act of law, without his participation or consent.[e] As if A disseises B, that [20] is, turns him out of possession, and dies leaving a son C; hereby the estate descends to C the son of A, and B is barred from entering thereon till he proves his right in an action: now, if afterwards C, the heir of the disseisor, makes a lease for life to D, with remainder to B, the

b Viner Abr. t. Executors. D. 2.
c 5 Rep. 30.
d Litt. § 659.
e Co. Litt. 358. Cro. Jac. 489.

2 **Remitter obsolete.**—The doctrine of remitter is of little or no practical importance since the abolition of real actions and the introduction of the present procedure for the recovery of land. On this subject and that of retainer, see Broom's Leg. Maxims, 8th ed., 175, under the maxim, *quod remedio destituitur ipsa re valet si culpa absit.*

disseisee for life, and D dies; hereby the remainder accrues to B, the disseisee: who thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of law *remitted*, or in of his former and surer estate.[f] For he hath hereby gained a new right of possession, to which the law immediately annexes his ancient right of property.

If the subsequent estate, or right of possession, be gained by a man's own act or consent, as by immediate purchase being of full age, he shall not be remitted. For the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right.[g] Therefore, it is to be observed that to every remitter there are regularly these incidents; an ancient right, and a new defeasible estate of freehold, uniting in one and the same person; which defeasible estate must be *cast upon* the tenant, not gained by his own act or folly. The reason given by Littleton[h] why this remedy, which operates silently and by the mere act of law, was allowed, is somewhat similar to that given in the preceding article; because otherwise he who hath right would be deprived of all remedy. For as he himself is the person in possession of the freehold, there is no other person against whom he can bring an action to establish his prior right. And for this cause the law doth adjudge him in by remitter; that is, in such plight as if he had lawfully recovered the same land by suit. For, as Lord Bacon observes,[i] the benignity of the law is such, as when, to preserve the principles and grounds of law, it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse. *Nam quod remedio destituitur, ipsa re valet, si culpa absit* (what is without a remedy is by that very fact valid if there be no fault). But there shall be no [21] remitter to a right, for which the party has no remedy by action:[k] as if the issue in tail be barred by the fine or warranty of his ancestor, and the freehold is afterwards cast upon him; he shall not be remitted to his estate-tail:[l] for the operation of the remitter is exactly the same, after the union of the two rights, as that of a real action would have been before it. As, therefore, the issue

f Finch. L. 194. Litt. § 683.
g Co. Litt. 348, 350.
h § 661.
i Elem. c. 3.
k Co. Litt. 349.
l Moor. 115. 1 And. 286.

in tail could not by any action have recovered his ancient estate, he shall not recover it by remitter.

And thus much for these extrajudicial remedies, as well for real as personal injuries, which are furnished by the law, where the parties are so peculiarly circumstanced, as not to be able to apply for redress in the usual and ordinary methods to the courts of public justice.

1518

CHAPTER THE THIRD. [22]

OF COURTS IN GENERAL.

§ 30. 3. Redress by suit in court: judicial remedies.—The next, and principal, object of our inquiries is the redress of injuries by *suit in courts:* wherein the act of the parties and the act of law co-operate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument by which the parties are enabled to procure a certain and adequate redress.

§ 31. How far judicial and extrajudicial remedies concurrent.—And here it will not be improper to observe that although, in the several cases of redress by the act of the parties mentioned in a former chapter,[a] the law allows an extrajudicial remedy, yet that does not exclude the ordinary course of justice: but it is only an additional weapon put into the hands of certain persons in particular instances, where natural equity or the peculiar circumstances of their situation required a more expeditious remedy than the formal process of any court of judicature can furnish. Therefore, though I may defend myself, or relations, from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods, if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action of trover or detinue: I may either enter on the lands, on which I have a right of entry, or may demand possession by a real action: I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may distrain for rent, or have an action of debt, at my own [23] option. If I do not distrain my neighbor's cattle *damage feasant,* I may compel him by action of trespass to make me a fair satisfaction; if a heriot, or a deodand, be withheld from me by fraud or force, I may recover it though I never seized it. And with regard to accords and arbitrations, these, in their nature being merely an agreement or compromise, must indisputably suppose a previous right of obtaining redress some other way, which is given up by such agreement.

[a] Ch. 1.

But as to remedies by the mere operation of law, those are indeed given, because no remedy *can* be ministered by suit or action, without running into the palpable absurdity of a man's bringing an action against himself: the two cases wherein they happen being such, wherein the only possible legal remedy would be directed against the very person himself who seeks relief.

In all other cases it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever the right is invaded.[1] And, in treating of these remedies by suit in courts, I shall pursue the following method: first, I shall consider the nature and several species of

[1] **Ubi jus, ibi remedium.**—*Ubi jus, ibi remedium* has long been one of the best accepted maxims of the law. (See Broom's Legal Maxims, 192.) But if it were true, as Mr. Austin and his followers claim, that there are no natural rights, and that the unwritten law is created by the judges in their decisions, the logical result would be that no legal right could exist in any case but those in which a legal remedy had already been given: or, in other words, that the absence of a precedent giving the exact remedy desired would be conclusive against the existence of a right to it.

But it is equally a maxim that it is the office of a just judge to give new remedies for new forms of wrong as they appear (En novel cas, novel remedy, Bereford, C. J., 18 Ed. II, fol. 570; Ashhurst, J., in Pasley v. Freeman, 3 Term Rep. 51, 63; 1 Am. Lead. Cas. 442; and see page *123 of Blackstone's text following); and courts have often declared that the forms of wrong are infinitely various. (2 Wils. 145, 205.) The moment the law closed its list of remediable wrongs human ingenuity would be prompted to devise new ones thus made irremediable. In truth, the labor which fills a hundred volumes of reports every year is chiefly spent, so far as it is not wasted in mistakes and needless controversies, in adapting new remedies to such new wrongs, each of which supposes a pre-existing right, differing in some point from any previously formulated. A system of law that recognized no legal rights except such as the courts had already defined and passed upon would never satisfy the needs of a living people. It may be doubted whether it would satisfy even a closet student because of the necessary incompleteness visible on its very face. A true system of law must always find a place for rights not yet formulated or even perceived, but which are yet imminent in it and capable of being developed when occasion requires.

The true meaning of *ubi jus, ibi remedium* is that the two things are the necessary complements of each other. As every remedy implies a right, so every right requires a remedy, and is not fully and practically a right until the remedy for its breaches is given.—HAMMOND.

"This case, no doubt, involves first principles. On the one hand, the law is strongly against the invention or creation of any rights of action, but, on the

courts of justice: and, secondly, I shall point out in which of these courts, and in what manner, the proper remedy may be had for any private injury; or, in other words, what injuries are cognizable, and how redressed, in each respective species of courts.

§ 32. a. Courts of justice.—First, then, of courts of justice. And herein we will consider, first, their nature and incidents in general; and, then, the several species of them, erected and acknowledged by the laws of England.

§ 33. (1) Definition of a court.—A court is defined to be a place wherein justice is judicially administered.[b 2]

[b] Co. Litt. 58.

---

other hand, where a wrong has actually been suffered by one person in consequence of the conduct of another, one is anxious to uphold as far as possible the maxim *'ubi jus, ibi remedium.'* "—POLLOCK, B., in Western Counties Manure Co. v. Lawes Chem. Manure Co., L. R. 9 Ex. 218, 222.

2 **Meaning of courts.**—A court is a tribunal presided over by one or more judges, for the exercise of such judicial power as has been conferred upon it by law. Blackstone, following Coke, defines it as "a place where justice is judicially administered" (3 Bl. Comm. 23); but it is also essential that this place be designated by law, and that the person or persons authorized to administer justice be at that place for the purpose of administering justice at such times as may be also designated by law. The times fixed by law for the transaction of judicial business are called "terms," and the periods between the end of one term and beginning of the next are called "vacations." These "terms" vary in different jurisdictions according to the statutes by which they are fixed, in some states ending at fixed dates and in others continuing until the commencement of a succeeding term. Formerly in England there were four terms of court in each year, and their duration was so fixed that there were only ninety-one days in each year during which the courts could be in session. As the judicial business increased it became impossible to transact it all within these periods of time, and there grew up the practice of hearing many matters "out of court" with the same effect as if heard while the court was in session; but the matters which were thus heard were only such as pertained to causes pending in court, and which were of a nature to expedite or facilitate the judicial disposition of the pending cause to which they were merely subsidiary or collateral. At a later day the practice arose of hearing and disposing of such matters at certain hours during "term time" while the court was not in formal session, and subsequently, certain hours of each day were fixed at which one of the judges would hear these matters while the court was actually in session. The motions and orders thus made were said

§ 34. **(2) Source of authority of courts.**—And, as by our excellent constitution the sole executive power of the laws is vested in the person of the king, it will follow that all courts of justice, which are [24] the medium by which he administers the laws, are derived from the power of the crown.[c] For whether created by act of parliament, or letters patent, or subsisting by prescription (the only methods by which any court of judicature[d] can exist), the king's consent in the two former is expressly, and in the latter impliedly, given. In all these courts the king is supposed in contemplation of law to be always present; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.[3]

[c] See Book I. c. 7.

[d] Co. Litt. 260.

---

to be heard and disposed of "at chambers" for the reason that they were heard by the judge at his chambers, rather than in the courtroom, but the term "chambers" finally became extended so as to include any place, either in or out of the courtroom at which a judge may hear applications or make orders while the court is not in session, in matters pending in that court. The distinction between those matters which could be heard in court and those which could be heard at chambers arose from convenience, rather than from any other cause, but they were limited to the subsidiary and incidental steps in practice and procedure, leaving to the court the judicial determination of the issues presented by the pleadings, and which formed a part of the record.

The term "court," as used in the Code of Civil Procedure, means sometimes the place where the court is held, sometimes the tribunal itself, and sometimes the individual presiding over the tribunal, and in many cases is used synonymously, as well as interchangeably, with "judge"; and, whether the act is to be performed by the one or the other, is generally to be determined by the character of the act, rather than by such designation.—HARRISON, J., in Von Schmidt v. Widber, 99 Cal. 511, 512, 34 Pac. 109. See State v. Woodson, 161 Mo. 444, 61 S. W. 252, 255.

On courts, both federal and state, see Baldwin, The American Judiciary. On the jurisdiction of the federal courts, see Curtis, Jurisdiction of the Courts of the United States, 2d ed. Valuable extracts illustrating the nature and functions of courts and their jurisdiction may be found in Pound, Readings in the Common Law (2d ed.), 318 ff.

3 "These words might give a false impression of the historical and legal relations of the courts and the crown, if it is not remembered that they are nothing more than the expression of a venerable fiction. The administration of justice was, indeed, one of the functions of the king in early times; the king himself sat on circuit so late as the reign of Edward IV; and even after

§ 35. (3) Classes of courts.—For the more speedy, universal and impartial administration of justice between subject and subject, the law hath appointed a prodigious variety of courts, some with a more limited, others with a more extensive jurisdiction; some constituted to inquire only, others to hear and determine: some to determine in the first instance, others upon appeal and by way of review. All these in their turns will be taken notice of in their respective place: and I shall therefore here only mention one distinction that runs throughout them all; *viz.*, that some of them are courts *of record*, others *not of record*.[4]

regular tribunals were established, a reserve of judicial power still remained in the king and his council, in the exercise of which it was possible for the king to participate personally. The last judicial act of an English king, if such it can be called, was that by which James I settled the dispute between the court of chancery and courts of common law. Since the establishment of parliamentary government the courts take their law directly from the legislature, and the king is only connected with them indirectly as a member of the legislative body. The king's name, however, is still used in this as in other departments of state action." 7 Ency. Britan. (11th ed.), 322.

4 **Distinction between courts of record and courts not of record.**—A settled axiom of the law furnishes the governing principles by which these proceedings are to be tested. If the court had jurisdiction of the subject matter and the parties, it is altogether immaterial how grossly irregular, or manifestly erroneous its proceedings may have been; its final order cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached. On the other hand, if it proceeded without jurisdiction, it is equally unimportant how technically correct, and precisely certain, in point of form, its record may appear; its judgment is void to every intent, and for every purpose, and must be so declared by every court in which it is presented. In the one case, the court is invested with the power to determine the rights of the parties, and no irregularity or error in the execution of the power can prevent its judgment, while it stands unreversed, from disposing of such rights as fall within the legitimate scope of its adjudication; while in the other, its authority is wholly usurped, and its judgments and orders the exercise of arbitrary power under the forms, but without the sanction, of law. The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented which brings this power into action. But before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal, to answer the charge therein contained. When these appear, the jurisdiction has attached; the right to hear and determine is perfect; and

§ 36. **(a) Courts of record.**—A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and supereminent authority, that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary.[e] And if the existence of a record 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 would be no end of disputes. But, if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are the king's courts, in right of his crown and royal dignity,[f] and therefore no other court hath authority to fine or imprison; so that the very erection [25] of a new jurisdiction with

[e] *Ibid.* [f] Finch. L. 231.

---

the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred; and whether determined rightfully or wrongfully, correctly or erroneously, is alike immaterial to the validity, force and effect of the final judgment, when brought collaterally in question. United States v. Arredondo, 6 Pet. (U. S.) 709, 8 L. Ed. 554; Rhode Island v. Massachusetts, 12 Pet. (U. S.) 718, 9 L. Ed. 1258.

We wholly dissent from the position taken in argument, that the jurisdiction of the court, or the effect of its final order, can be made to depend upon the records disclosing such a state of facts to have been shown in evidence, as to warrant the exercise of its authority. To adopt the language of the court, in answer to the same position, in Voorhees v. Jackson, 10 Pet. (U. S.) 473, 9 L. Ed. 500: "We cannot hesitate on giving a distinct and unqualified negative to this proposition, both on principle and authority too well and long settled to be questioned." It was distinctly repudiated in the early case of Ludlow's Heirs v. Johnston, 3 Ohio St. 553, 560, 17 Am. Dec. 609; and has been no less positively denied in every subsequent case, including Adams v. Jeffries, 12 Ohio St. 253, 40 Am. Dec. 477. The tribunal in which these proceedings were had was a court of record, of general common-law and chancery jurisdiction; and while it is true that in the exercise of this particular authority it may be regarded as a tribunal of special and limited powers prescribed by statute, it is still to be remembered that it was the tribunal created by the constitution, with exclusive jurisdiction over probate and testamentary matters, and had no one single characteristic of those inferior courts and commissions, to which the rule insisted upon has been applied by the English and American courts. All its proceedings are recorded, and constitute records, in

power of fine or imprisonment makes it instantly a court of record.[s 5]

§ 37. **(b) Courts not of record.**—A court not of record is the court of a private man; whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow-subjects. Such are the courts-baron incident to every manor, and other inferior jurisdictions: where the proceedings are not enrolled or recorded; but as well their existence as the truth of the matters therein contained shall, if disputed, be tried and determined by a jury. These courts can hold no plea of matters cognizable by the common law, unless under the value of 40s., nor of any

s Salk. 200. 12 Mod. 388.

---

the highest sense of the term, importing absolute verity, not to be impugned by averment or proof to the contrary, and conclusively binding the parties, and all who stand in privity with them. The distinction is not between courts of general and those of limited jurisdiction, but between courts of record, that are so constituted as to be competent to decide on their own jurisdiction, and to exercise it to a final judgment without setting forth the facts and evidence on which it is rendered, and whose records, when made, import absolute verity; and those of an inferior grade, whose decisions are not of themselves evidence, and whose judgments can be looked through for the facts and evidence which are necessary to sustain them. McCormick v. Sullivant, 10 Wheat. 199, 6 L. Ed. 302; Griswold v. Sedgwick, 1 Wend. (N. Y.) 126, 131; Baldwin v. Hale, 17 Johns. (N. Y.) 272; Grignon's Lessee v. Astor, 2 How. 341, 11 L. Ed. 292; 2 Binn. 255; 4 Id. 187.—RANNEY, J., in Sheldon v. Newton, 3 Ohio St. 494, 499.

"I will mention here a little technical point for the sake of any student who may be puzzled by it, as I was for a time. Sir G. Jessel once committed himself to the statement that the court of chancery was not a court of record. (L. R. 20 Eq., at p. 347.) The only reason he gave was that the records were in the custody not of the chancellor but of the master of the rolls. The statement is directly contrary to Blackstone's (Comm. I, 68), and, with great respect, the reason is doubly wrong. First, according to general understanding and practice the master of the rolls was only the chancellor's deputy, though this was not free from controversy. Secondly, the decisive mark of a court of record, according to Coke's opinion given in two places, is not that the judges of the court keep the record, but that the record itself is the only authentic and conclusive proof of what the court has done."—Sir F. POLLOCK, 29 Law Quart. Rev., 210.

5 On the power to fine and imprison for contempts, see p. *285, *post*.

forcible injury whatsoever, not having any process to arrest the person of the defendant.[h]

§ 38. (4) Constituent parts of a court: (a) actor; (b) reus; (c) judex.—In every court there must be at least three constituent parts, the *actor*, *reus*, and *judex*:[6] 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 to apply the remedy. It is also usual in the superior courts to have attorneys, and advocates or counsel, as assistants.[7]

§ 39. (d) Attorneys.—An attorney at law answers to the *procurator*, or proctor, of the civilians and canonists.[i] And he is one who is put in the place, stead, or *turn* of another, to manage his matters of law. Formerly every suitor was obliged to appear in person, to prosecute or defend his suit (according to the old Gothic constitution[k]), unless by special license under the king's letters patent.[l] This is still the law in criminal cases. And an idiot cannot to this day appear by attorney, but in person;[m] for he hath not discretion to enable him to appoint [26] a proper substitute: and upon his being brought before the court in so defenseless a condition, the judges are bound to take care of his interests, and they shall admit the best plea in his behalf that anyone

[h] 2 Inst. 311.

[i] Pope Boniface VIII. in 6. Decretal. l. 3. t. 16. § 3. speaks of "*procuratoribus, qui in aliquibus partibus* attornati *nuncupantur* (proctors, who are in some places called attorneys)."

[k] Stiernhook de Jure Goth. l. 1. c. 6.

[l] F. N. B. 25.

[m] *Ibid.* 27.

---

[6] **Ex parte proceedings.**—In modern times many proceedings are *ex parte*, as in the case of guardianship and the custody of infants, and then there may often be no defendant or respondent.

[7] On the history of the legal profession in the United States, see Warren, History of the American Bar. And on the character of the American bar and its relations to the bench, see chapter XXIII of Baldwin's American Judiciary.

present can suggest.[n] But, as in the Roman law "*cum olim in usu fuisset, alterius nomine agi non posse, sed, quia hoc non minimam incommoditatem habebat, cœperunt homines per procuratores litigare* (although formerly it had been the custom for no one to act in the name of another, yet, as this was attended with great inconvenience, men began to carry on lawsuits by proctors),"[o] so with us, upon the same principle of convenience, it is now permitted in general, by divers ancient statutes, whereof the first is statute Westm. II, c. 10,[8] that attorneys may be made to prosecute or defend any action in the absence of the parties to the suit. These attorneys are now formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster Hall; and are in all points officers of the respective courts in which they are admitted: and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges. No man can practice as an attorney in any of those courts, but such as is admitted and sworn an attorney of that particular court: an attorney of the court of king's bench cannot practice in the court of common pleas; nor *vice versa.* To practice in the court of chancery it is also necessary to be admitted a solicitor therein: and by the statute 22 George II, c. 46 (1748), no person shall act as an attorney at the court of quarter sessions but such as has been regularly admitted in some superior court of record. So early as the statute of 4 Henry IV, c. 18 (Attorneys, 1402), it

n Bro. Abr. t. Idcot. 1.

o Inst. 4. tit. 10.

---

8 **Origin of attorneys.**—Attorneys in civil cases were allowed long before the statute. Westm. II, A. D. 1285. Numerous examples are found in Bracton's Note Book, edition Maitland, of parties appearing by them early in the reign of Henry III, either for special purposes, or generally *ad lucrandum vel perdendum.* But these were, like our attorneys in fact, appointed for each case to represent the party. In many cases the husband appears as such for the wife, the wife for the husband. There was as yet no class or profession of attorneys, learned in the law. There was a difference between the pleas allowed to a party in person and those which could be pleaded by an attorney or bailiff: the two terms meaning much the same. It was not until the fourteenth century that we find attorneys who make a business of appearing for all who employed them.—HAMMOND.

was enacted that attorneys should be examined by the judges, and none admitted but such as was virtuous, learned and sworn to do their duty. And many subsequent statutes[p] have laid them under further regulations.

§ 40. (e) Advocates or counsel: (i) barristers; (ii) serjeants. Of advocates, or (as we generally call them) counsel, there are two species or degrees; barristers and serjeants. The former are admitted after a considerable period of study, or at least standing, in the inns of court;[q] and are in our old [27] books styled apprentices, *apprenticii ad legem*, being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were sixteen years standing; at which time, according to Fortescue,[r] they might be called to the state and degree of serjeants or *servientes ad legem*. How ancient and honorable this state and degree is, with the form, splendor, and profits attending it, have been so fully displayed by many learned writers,[s] that they need not be here enlarged on. I shall only observe, that serjeants at law are bound by a solemn oath[t] to do their duty to their clients: and that by custom[u] the judges of the courts of Westminster are always admitted into this venerable order, before they are advanced to the bench; the original of which was probably to qualify the *puisné* barons of the exchequer to become justices of assize, according to the exigence of the statute of 14 Edward III. c. 16 (*Nisi Prius Procedure*, 1340).[9] From both these degrees some

p 3 Jac. I. c. 7 (1605). 12 Geo. I. c. 29 (1725). 2 Geo. II. c. 23 (1728). 22 Geo. II. c. 46 (1748). 23 Geo. II. c. 26 (1749).

q See Book I. Introd. § 1.

r De L.L. c. 50.

s Fortesc. *Ibid.* 10 Rep. pref. Dugdal. Orig. Jurid. To which may be added a tract by the late Serjeant Wynne, printed in 1765, entitled "observations touching the antiquity and dignity of the degree of serjeant at law."

t 2 Inst. 214.

u Fortesc. c. 50.

---

9 **Serjeants at law no longer created.**—It was enacted by the Judicature Act, 1873, that no person appointed a judge, either of the high court of justice or of the court of appeal should be required to hold the degree of serjeant at law. No serjeants have been created since 1875.—STEPHEN, 3 Comm. (16th ed.), 504.

are usually selected to be his majesty's counsel learned in the law; the two principal of whom are called his attorney and solicitor general. The first king's counsel, under the degree of serjeant, was Sir Francis Bacon, who was made so *honoris causa* (as a mark of honor), without either patent or fee;[w] so that the first of the modern order (who are now the sworn servants of the crown, with a standing salary) seems to have been Sir Francis North, afterwards lord keeper of the great seal to King Charles II.[x] These king's counsel answer in some measure to the advocates of the revenue, *advocati fisci,* among the Romans. For they must not be employed in any cause against the crown without special license;[10] in which restriction they agree with the advocates of the fisc:[y] but in the imperial law the prohibition was carried still further, and perhaps was more for the dignity of the sovereign; for, excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned [28] in private suits between subject and subject.[z] A custom has of late years prevailed of granting letters patent of precedence to such barristers as the crown thinks proper to honor with that mark of distinction: whereby they are entitled to such rank and pre-audience[a] as are assigned in their respective patents;[11] sometimes next after the king's

[w] See his letters. 256.

[x] See his life by Roger North. 37.

[y] Cod. 2. 9. 1.

[z] Cod. 2. 7. 13.

[a] Pre-audience in the courts is reckoned of so much consequence, that it may not be amiss to subjoin a short table of the precedence which usually obtains among the practicers.

1. The king's premier serjeant (so constituted by special patent).
2. The king's ancient serjeant, or the eldest among the king's serjeants.

---

10 Hence a king's counsel cannot plead in court for the accused in a criminal prosecution without permission from the crown. But this permission is never refused.—STEPHEN, 3 Comm. (16th ed.), 505 n.

11 **Patents of precedence.**—"The king's counsel, down to Lord Bacon's time, who had recognized precedence and pre-audience over all others, were the king's serjeants and the attorney and solicitor general. King's counsel extraordinary were afterwards somewhat rarely appointed until the reign of George III, when their creation became more common. This class of advocates, now known as king's or queen's counsel, were appointed by patent, and precedence was given them thereby over the serjeants at law. After the ser-

attorney general, but usually next after his majesty's counsel then being. These (as well as the queen's attorney and solicitor general [b]) rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts: but receive no salaries, and are not sworn; and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately (except in the court of common pleas, where only serjeants are admitted) may take upon them the protection and defense of any suitors, whether plaintiff or defendant;

3. The king's advocate general.
4. The king's attorney general.
5. The king's solicitor general.
6. The king's serjeants.
7. The king's counsel, with the queen's attorney and solicitor.
8. Serjeants at law.
9. The recorder of London.
10. Advocates of the civil law.
11. Barristers.

In the [former] court of exchequer two of the most experienced barristers, called the *post*-man and the *tub*-man (from the places in which they sit), have also a precedence in motions. [Reg. v. Bishop of Exeter, 7 M. & W. 188.]

[b] Seld. Tit. Hon. 1. 6, 7.

---

jeants lost their monopoly in the court of common pleas, it was customary to grant patents of precedence to those of them whose professional reputation warranted it; so that they obtained rank and precedence immediately after the counsel of the crown already created, and before those of subsequent creation. These patents were also granted to barristers upon whom it was desired to confer a mark of distinction, without subjecting them to the disabilities under which counsel to the crown were subject as holding office under the crown. Mostly they were conferred upon barristers who were members of the house of commons, whose seats would have been vacated if they had been appointed counsel to the crown. This was the motive in such distinguished cases as those of Mansfield, Erskine, Eldon, and Brougham.

"Serjeant Pulling in The Order of the Coif, page 200, thinks these patents of doubtful legality, as being against the established usage of the courts; but adds that they have never really been called in question.

"Holders of the patents sat within the bar with the counsel of the crown.

"It has now become very unusual to grant them. Mr. Justice Phillimore was the only holder of such a patent at the bar on his appointment to the bench in 1897, with the exception of Serjeant Simon, who died in that year, and was the last of the serjeants to hold a patent of precedence.

"[Authority.—PULLING, Order of the Coif.]" 11 Ency. Laws of Eng. 427.

who are therefore called their *clients*, like thedependents upon the ancient Roman orators. These indeed practiced *gratis*, for honor merely, or at most for the sake of gaining influence: and so likewise it is established with us,[c] that a counsel can maintain no action for his fees;[12] 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 counselor cannot demand without doing wrong to his reputation:[d] as is also laid down with regard to advocates in the civil law,[e] whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand [29] sesterces, or about 80*l.* of English money.[f] And, in order to encourage due freedom of speech in the lawful defense of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men (a few of whom may sometimes insinuate themselves even into the most honorable professions), it hath been holden that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his clients' instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions if it be impertinent to the cause in hand, he is then liable to an action from the party

c Davis Pref. 22. 1 Chan. Rep. 38.
d Davis. 23.
e Ff. 11. 6. 1.
f Tac. Ann. l. 11.

---

12 **Compensation of counsel.**—The rule that a counsel can maintain no action for his fees is now properly obsolete in this country, for it is not regarded as a point of honor not to ask a proper compensation for work done. (See Sharswood's Legal Ethics, p. 148.) The effect of the Roman rule, referred to above, is shown by Tacitus, Ann. xi. 5. as Professor Christian has pointed out.

On the other hand, it is a rule of the common law that if a serjeant or other do or counsel to do any manner of deceit in court, to deceive the court or the parties concerned, he shall be imprisoned for a year and a day, and not be heard again. (Stat. Westm. I, c. 29.) And willfully pleading a false plea to delay justice is said by Coke to be within this statute. (2 Inst. 215. See Bacon's Abt. Pleas, G. 4; Fortescue v. Hall, 1 Vent. 213.)—HAMMOND.

On the statement of the text, see Moor v. Row (1629), 1 Ch. Rep. 21; and, as regards the effect of a *special contract* to pay a fixed sum of money, instead of the usual fees, see Kennedy v. Broun (1863), 13 Com. B., N. S., 677; Mostyn v. Mostyn (1870), L. R. 5 Ch. App. 457; and The Queen v. Doutre (1884), L. R. 9 App. Cas. 745.—STEPHEN, 3 Comm. (16th ed.), 506 n.

injured.[g] And counsel guilty of deceit or collusion are punishable by the statute Westm. I, 3 Edward I, c. 28 (Criminal Procedure, 1275), with imprisonment for a year and a day, and perpetual silence in the courts: a punishment still sometimes inflicted for gross misdemeanors in practice.[h]

g Cro. Jac. 90.

h Raym. 376.

CHAPTER THE FOURTH. [30]

OF THE PUBLIC COURTS OF COMMON LAW AND EQUITY.

§ 41. Species of courts.—We are next to consider the several species and distinctions of courts of justice, which are acknowledged and used in this kingdom. And these are either such as are of public and general jurisdiction throughout the whole realm; or such as are only of a private and special jurisdiction in some particular parts of it. Of the former there are four sorts: the universally established courts of common law and equity; the ecclesiastical courts; the courts military; and courts maritime.

§ 42. Courts of common law and equity.—And, first, of such public courts as are courts of common law and equity.[1]

[1] **The Judicature Acts of 1873 and 1875.**—The existing superior courts of common law and equity in England, in theory, owe their existence and organization to the changes introduced by the Judicature Acts of 1873 and 1875, which went into operation on the 1st November, 1875, and to the various statutory amendments which have been adopted down to 1910. The Judicature Acts, it must be noted, in substance only arranged and incorporated the superior courts existing at the time when they took effect; and consequently it is of the highest importance to be familiar with the history and organization of these old courts as set forth by Blackstone. To the American student, especially, Blackstone's chapters are of the greatest value, for "they portray," as Professor Hammond says, "a system with which every American judge and lawyer of our first century was familiar, and which they regarded with a veneration hardly less than that paid the law itself. More remains of it may now be found in America than in the mother country: for no such sweeping change as that of the Judicature Acts is possible under our state and national organization. Moreover, the English reports from the Year-Books down are unintelligible, unless he understands the former organization of the courts." (3 Hammond's Black. 84.) The operation and effects of the Judicature Acts will now be given in the authoritative language of Stephen's Commentaries.

Supreme court of judicature.—In the first place, the Judicature Acts created and constituted a new court, called the supreme court of judicature, consisting of the high court of justice and the court of appeal. To the high court of justice was transferred all the jurisdiction which in 1875 was capable of being exercised by (1) the high court of chancery, (2) the court of king's bench, (3) the court of common pleas at Westminster, (4) the court of exchequer, (5) the high court of admiralty, (6) the court of probate, (7)

§ 43. **Early judicial systems.**—The policy of our ancient constitution, as regulated and established by the great Alfred, was to bring justice home to every man's door, by constituting as many courts of judicature as there are manors and townships in the kingdom; wherein injuries were redressed in an easy and expeditious manner, by the suffrage of neighbors and friends. These little courts, however, 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 respectively constituted to correct the errors of the inferior ones, and

the court for divorce and matrimonial causes, (8) the court of common pleas at Lancaster, (9) the court of pleas at Durham, and (10) the courts created by commissions of assize, of *oyer and terminer*, and of gaol delivery.

Divisions of the high court.—For the more convenient distribution of business, the high court was, however, divided into five divisions, namely, the chancery division, the queen's bench division, the common pleas division, the exchequer division, and the probate, divorce, and admiralty division; and to each division was assigned, speaking generally, the class of business which before 1875 was within the special or exclusive cognizance of the court or courts from which the particular division took its name. The business which was common to all the common-law courts was (by inference) left to be dealt with indifferently by the queen's bench, the common pleas, or the exchequer divisions. At the end of 1880, the queen's bench, common pleas, and exchequer divisions were united into one division then called the queen's bench division, and now the king's bench division; and in 1884 the bankruptcy business of the London court of bankruptcy was assigned to that division under the provisions of the Bankruptcy Act of the previous year.

Judges of the high court.—The judges of the high court consist of the lord chancellor, who is the president of the chancery division, the lord chief justice, who is the president of the king's bench division, the president of the probate, divorce and admiralty division, and twenty-three other judges, who are styled "justices of the high court"; of whom six sit in the chancery division, sixteen (Supreme Court of Judicature Act, 1910. Whenever, after the 1st August, 1911, the number of *puisné* judges attached to the king's bench division amounts to fifteen or upwards, any vacancy occurring cannot be filled unless and until an address is presented by both houses of parliament requesting that such vacancy shall be filled), in the king's bench division, and one in the probate, divorce, and admiralty division. Subject to a few exceptions, all the judges of the high court have equal power and jurisdiction, and may legally sit in any division.

Proceedings before the high court.—The high court has both original and appellate jurisdiction. Actions commenced in or transferred from a county court or other inferior court to the high court are tried before a judge alone,

to determine such causes as by reason of their weight and difficulty demanded a more solemn discussion. The [31] course of justice flowing in large streams from the king, as the fountain, to his superior courts of record, and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed. An institution that seems highly agreeable to the dictates of natural reason, as well as of more enlightened policy; being equally similar to that which prevailed in Mexico and Peru before they were discovered by the Spaniards; and that which was established in the Jewish republic by Moses.

if they are tried in the chancery division; or by a judge alone or with a jury, if tried in either of the other divisions, or by a judge assisted by nautical assessors, if tried in the admiralty division. But if any action requires any prolonged examination of documents, or any scientific or local investigation, which cannot be conveniently made before a jury or conducted by the court, or consists of matters of account, it may, without the consent of the parties, be ordered to be tried before a special referee or arbitrator. The plaintiff may, within certain limitations, bring his action in any division he chooses. If he brings in one division an action assignable under the Judicature Acts to another division, the judge has power either to retain it, or to transfer it to the division in which it ought to have been commenced and where it can be more conveniently dealt with. But it is one of the essential principles of the Judicature Acts that all divisions of the high court are competent to conduct all kinds of business; and, therefore, the judge ought not to dismiss any for want of jurisdiction. The interlocutory proceedings in an action, that is to say, the various proceedings on summonses which take place between the issue of the writ and the trial, are generally in chambers; usually before a master or registrar, but sometimes before a judge. In the king's bench division, a master, and in the probate, divorce, and admiralty division a registrar, may, subject to a few exceptions, transact all such business and exercise all such jurisdiction as may, under the Judicature Acts and the Rules, be transacted or exercised by a judge in chambers; but from his exercise of such jurisdiction an appeal lies to the judge in chambers. In the chancery division, the masters represent the judge; and most interlocutory applications are made to them in the first instance. But any party to such application is entitled to take the matter before the judge himself, by way of adjournment, not of appeal.

Divisional courts.—An important part of the jurisdiction of the high court is exercised by divisional courts, consisting of two or more judges sitting together. The divisional court of the king's bench division exercises both original and appellate jurisdiction. For example, it has jurisdiction on motion to order a solicitor to be struck off the rolls for misconduct, or to order a person to be attached or committed for contempt, or to order the issue of a

In Mexico each town and province had its proper judges, who heard and decided causes, except when the point in litigation was too intricate for their determination; and then it was remitted to the supreme court of the empire, established in the capital, and consisting of *twelve* judges.[a] Peru, according to Garcilasso de Vega (an historian descended from the ancient Incas of that country), was divided into small districts containing *ten* families each, all registered, and under one magistrate; who had authority to decide little differences and punish petty crimes. Five of these composed a higher class of *fifty* families; and two of these last

a Mod. Un. Hist. xxxviii. 469.

---

writ of mandamus. It hears appeals from and determines questions of law on cases stated by, quarter or petty sessions, appeals on questions of law from a county court or other inferior court, appeals from revising barristers, and in proceedings relating to election petitions, parliamentary or municipal, and appeals from a judge in chambers, where such appeals are permissible. The divisional court of the probate, divorce, and admiralty division hears appeals from separation or protection orders made by a court of summary jurisdiction under the Summary Jurisdiction (Married Women) Act, 1895, or under the Licensing Act, 1902, where the husband or wife is an habitual drunkard, and admiralty appeals from a county court exercising admiralty jurisdiction, or from a wreck commissioner's report to the board of trade canceling or suspending the certificate of the master, engineer, or mate of a ship for misconduct. The judgment of the divisional court of either division is final; unless leave to appeal to the court of appeal is given by the divisional court or by the court of appeal.

Court of appeal.—To the other branch of the supreme court of judicature, *viz.*, the court of appeal, was transferred, by the Judicature Act, 1873, all the appellate jurisdiction of (1) the lord chancellor and the court of appeal in chancery, (2) the court of exchequer chamber, (3) the judicial committee of the privy council in appeals from the high court of admiralty, and in lunacy appeals from the lord chancellor, (4) the court of appeal in chancery of the county palatine of Lancaster, and (5) the full court for divorce and matrimonial causes. The court of appeal consists of certain *ex-officio* judges, namely, the lord chancellor, the lord chief justice, the master of the rolls, and the president of the probate, divorce, and admiralty division, and every person who has held the office of lord high chancellor, and of five ordinary judges, who are styled "lords justices of appeal." But any judge of the high court may, if so required by the lord chancellor, also sit as judge of the court of appeal; and any lord of appeal in ordinary who, at the time of appointment as such, was either a member of the court of appeal or qualified to be a member, may, if he consents, upon the request of the lord chan-

composed another called a *hundred*. Ten hundred constituted the largest division, consisting of a thousand families; and each division had its separate judge or magistrate, with a proper degree of subordination.[b] In like manner we read of Moses, that, finding the sole administration of justice too heavy for him, he "chose able men out of all Israel, such as feared God, men of truth, hating covetousness; and made them heads over the people, rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens: and they judged the people at all seasons; the hard causes they brought unto Moses, but every small matter they judged themselves."[c] These inferior courts, at least the name and form of

[b] *Ibid.*. xxxix. 14. [c] Exod. c. 18.

---

cellor, to do so, sit and act as a judge of the court of appeal. The court of appeal has, in general, jurisdiction to hear and determine an appeal from (1) any judgment or order of a divisional court, provided, cases where the divisional court has itself acted as an appellate tribunal, that leave to appeal has been given by the divisional court or the court of appeal; (2) any final judgment or order of the high court; (3) any interlocutory order of a judge in chambers in matters of practice and procedure, subject, in most cases, to leave to appeal being given; (4) any decision or order of a county court judge on a question of law under the Workmen's Compensation Act, 1906; (5) a judgment of the Liverpool court of p: ge; (6) a judgment of the palatine court of Durham; and (7) a judgment of the Lancaster chancery court. Over any matter brought on appeal before the court of appeal, the court has all the power and jurisdiction of the high court, and may make any order which ought to have been made in the court below, or such further order as the justice of the case may require. As a rule, three judges are required to constitute the court of appeal; but appeals from interlocutory orders may be heard by two judges, as also appeals from final judgments where the parties consent. But, in the latter case, if the judges differ in opinion, the appeal must be argued before three judges before going to the house of lords. Generally speaking, the court of appeal sits in two divisions, to hear common law and equity cases respectively; but the only limit to the number of divisions in which it may sit is the number of judges available, and any division may, of course, deal with any appellate business which is within the jurisdiction of the court.

Principles of procedure in the high court.—Hardly less important than the organization and jurisdiction of the supreme court are the principles upon which its business is carried on. And of these it is important to remember that the Judicature Act, 1873, provided that the rules of common law and equity were to be concurrently administered, and that every judge of the high court, in whatever division he might sit, should give effect to every legal

them, still continue in our legal constitution: but as the superior courts of record have in practice obtained a concurrent original jurisdiction with these; and as there is besides a power of removing plaints or actions thither from all the inferior jurisdictions; upon these accounts (among others) it has happened that [32] these petty tribunals have fallen into decay, and almost into oblivion: whether for the better or the worse, may be matter of some speculation; when we consider, on the one hand, the increase of expense and delay, and on the other the more upright and impartial decision, that follow from this change of jurisdiction.

or equitable claim or defense or counterclaim, and should grant any legal or equitable remedy, such as damages, specific performance, injunction, or any other kind of relief, to which any of the parties to an action might be entitled in respect of any legal or equitable claim properly brought forward. As there were many matters in which the rules of equity conflicted with those of the common law (as, for example, the rules as to waste committed by a tenant for life, and as to assignment of debts and choses in action), the act declared the rules to be followed in certain enumerated cases, and also provided, generally, as we have seen, that where the rules of equity and common law conflicted in the same matter, the rules of equity were to prevail. The supreme court is, therefore, a court exercising in every branch of it a complete common law and equitable jurisdiction.

The Judicature Acts do not, however, abolish the distinction between law and equity; but merely prescribe which rule is to be followed in cases where the court of chancery would, before the acts, have applied a different rule from that which a court of common law would have applied in the same case. Consequently, where there was no conflict between law and equity before the acts, the rules of each will continue to be administered as before. The object of the acts was to enable either party to any action brought in the high court to obtain whatever legal or equitable remedy or relief is more appropriate to the circumstances of his claim or defense at one hearing, instead of having to apply for different remedies to different tribunals. The acts did not create new legal or equitable rights; they merely provided a more simple and effective remedy for enforcing those which existed before. They united the superior courts of law and equity with a view to the administration in one tribunal of one system of rules in place of the two systems known as law and equity; and the general aim of the acts was to enable a suitor to obtain, by one proceeding in one court, the same ultimate result as he would have obtained before 1875 by having selected the court which was able to give him the more effective remedy, or brought proceedings in the court of chancery and in a court of common law in succession. Thus, for example, whereas the assignee of a debt had formerly to obtain from the court of chancery a decree or order compelling the assignor to bring an action in a

§ 44. **English system of civil courts.**—The order I shall observe in discoursing on these several courts, constituted for the redress of *civil* injuries (for with those of a jurisdiction merely *criminal* I shall not at present concern myself), will be by beginning with the lowest, and those whose jurisdiction, though public and generally dispersed throughout the kingdom, is yet (with regard to each particular court) confined to very narrow limits; and so ascending gradually to those of the most extensive and transcendent power.

§ 45. **1. Court of piepoudre.**—The lowest, and at the same time the most expeditious, court of justice known to the law of England is the court of *piepoudre, curia pedis pulverizati* (the dusty foot court): so called from the dusty feet of the suitors; or according to Sir Edward Coke,[d] because justice is there done as speedily as dust can fall from the foot. Upon the same principle that justice among the Jews was administered in the gate of the city,[e] that the proceedings might be the more speedy, as well as public. But the etymology given us by a learned modern writer[f] is much more ingenious and satisfactory; it being derived, according to him, from *pied puldreaux*, a peddler, in old French, and therefore signifying the court of such petty chapmen as resort to fairs or markets. It is a court of record, incident to every fair and market; of which the steward of him who owns or has the toll of the market is the judge. It was instituted to administer jus-

[d] 4 Inst. 272.
[e] Ruth. c. 4.
[f] Barrington's Observat. on the Stat. 337.

---

court of common law to recover judgment against the debtor for the benefit of the assignee; the assignee will now simply sue in his own name, making, if necessary, the assignor a defendant. If a person commences in the king's bench division an action falling within the class of actions assigned by the acts to the chancery division, the judge may, as has been said, retain it or transfer it to the chancery division; but, if he retains it, he must determine it according to the rules which would have been applied if it had been tried in the chancery division. And a corresponding rule applies if a "common law" claim, e. g., of damages for fraud, arises in the course of proceedings in the chancery division. Again, a judgment of the high court given in an action in any division may be enforced by any legal or equitable mode of execution which is in the circumstances appropriate.—STEPHEN, 3 Comm. (16th ed.), 520–527.

tice for all commercial injuries done in that very fair or market, and not in any preceding one.[2] So that the injury must be done, complained of, heard and determined, within the compass of one and the same day, unless the fair continues longer. The court hath cognizance of [33] all matters of contract that can possibly arise within the precinct of that fair or market; and the plaintiff must make oath that the cause of an action arose there.[g] From this court a writ of error lies, in the nature of an appeal, to the courts at Westminster.[h] The reason of its institution seems to have been, to do justice expeditiously among the variety of persons, that resort from distant places to a fair or market: since it is probable that no other inferior court might be able to serve its process, or execute its judgments, on both or perhaps either of the parties; and therefore, unless this court had been erected, the complaint must necessarily have resorted even in the first instance to some superior judicature.

§ 46. **2. Court-baron.**—The *court-baron* is a court incident to every manor in the kingdom, to be holden by the steward within the said manor. This court-baron is of two natures:[1] the one is a customary court, of which we formerly spoke,[k] appertaining entirely to the copyholders, in which their estates are transferred by

g Stat. 17 Edw. IV. c. 2 (Court of Piepoudre, 1477).
h Cro. Eliz. 773.
i Co. Litt. 58.
k Book II. c. 4. c. 6. and c. 22.

---

2 **Piepoudre courts.**—This limitation of *piepoudre* jurisdiction to "*commercial* injuries," and "matters of contract" (p. *33) was first inserted, by the text in the fifth edition, and no doubt depends on the statute 17 Edward IV, c. 2, cited in a note. But authorities made accessible long after Blackstone wrote show that it was no part of the original constitution of these courts. From the proceedings of the Court of the Fair of St. Ives, printed in the second volume of the Selden Society, 1888, it is abundantly shown that other injuries and even misdemeanors were within their jurisdiction in the thirteenth century. The same may be inferred from the mention of them in the Ipswich Domesday printed in the Black Book of the Admiralty, volume 2. Indeed, we have no reason to think that actions of contract were then sufficiently discriminated from wrongs to form a peculiar jurisdiction.—HAMMOND.

On the Piepoudre Court, see Carter, Eng. Legal Institutions, 256.

surrender and admittance, and other matters transacted relative to their tenures only. The other, of which we now speak, is a court of common law, and it is the court of the barons, by which name the freeholders were sometimes anciently called: for that it is held before the freeholders who owe suit and service to the manor, the steward being rather the registrar than the judge. These courts, though in their nature distinct, are frequently confounded together. The court we are now considering, *viz.*, the freeholder's court, was composed of the lord's tenants, who were the *pares* (peers or equals) of each other, and were bound by their feudal tenure to assist their lord in the dispensation of domestic justice. This was formerly held every three weeks; and its most important business is to determine, by writ of right, all controversies relating to the right of lands within the manor. It may also hold plea of any personal actions, of debt, trespass on the case, or the like, where the debt or damages do not [34] amount to forty shillings.[l] Which is the same sum, or three marks, that bounded the jurisdiction of the ancient Gothic courts in their lowest instance, or *fierding-courts*, so called because four were instituted within every superior district or hundred.[m] But the proceedings on a writ of right may be removed into the county court by a precept from the sheriff called a *tolt*,[n] "*quia tollit atque eximit causam e curia baronum* (because it tolls, i. e., takes away and removes, the cause from the court baron)."[o] And the proceedings in all other actions may be removed into the superior courts by the king's writs of *pone*,[p] or *accedas ad curiam* (you may come to the court), according to the nature of the suit.[q] After judgment given, a writ also of *false judgment*[r] lies to the courts at Westminster to rehear and review the cause, and not a writ of *error*; for this is not a court of record: and therefore, in some of these writs of removal, the first direction given is to cause the plaint to be recorded, *recordari facias loquelam* (that you cause the plaint to be recorded).

l Finch. 248.
m Stiernhook de Jure Goth. l. 1. c. 2.
n F. N. B. 3, 4. See Append. No. I. § 2.
o 3 Rep. Pref.
p See Append. No. I. § 3.
q F. N. B. 4. 70. Finch. L. 444, 445.
r F. N. B. 18.

§ 47. 3. Hundred court.—A hundred court is only a larger court-baron, being held for all the inhabitants of a particular hundred instead of a manor. The free suitors are here also the judges and the steward the registrar, as in the case of a court-baron. It is likewise no court of record; resembling the former in all points, except that in point of territory it is of a greater jurisdiction.[s] This is said by Sir Edward Coke to have been derived out of the county court for the ease of the people, that they might have justice done to them at their own doors, without any charge or loss of time:[t] but its institution was probably coeval with that of hundreds themselves, which were formerly observed[u] to have been introduced though not invented by Alfred, being derived from the polity of the ancient Germans. The *centeni*, we may remember, were the principal inhabitants of a district composed of different villages, originally in number an *hundred*, but afterwards only [35] called by that name;[v] and who probably gave the same denomination to the district out of which they were chosen. Cæsar speaks positively of the judicial power exercised in *their* hundred courts and courts-baron. "*Principes regionum atque pagorum*" (which we may fairly construe, the lords of hundreds and manors), "*inter suos jus dicunt controversiasque minuunt* (declare the law among their dependents, and abate controversies)."[w] And Tacitus, who had examined their constitution still more attentively, informs us not only of the authority of the lords, but of that of the *centeni*, the hundredors, or jury; who were taken out of the common freeholders, and had themselves a share in the determination. "*Eliguntur in conciliis et principes, qui jura per pagos vicosque reddunt: centeni singulis, ex plebe comites, consilium simul et auctoritas, adsunt* (The lords are also chosen in their councils who administer justice through the towns

s Finch. L. 248. 4 Inst. 267.

t 2 Inst. 71.

u Book I. Introd. § 4.

v *Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur; et, quod primo numerus fuit, jam nomen et honor est* (Each village is divided into hundreds, and are so called by their inhabitants; and that which first was a mere number has now become both a name and an honor). Tac. de Mor. Germ. c. 6.

w De Bell. Gall. l. 6. c. 22.

and districts. The jury for each hundred are chosen from the people, and have both counsel and authority)."[x] This hundred court was denominated *hæreda* in the Gothic constitution.[y] But this court, as causes are equally liable to removal from hence, as from the common court-baron, and by the same writs, and may also be reviewed by writ of false judgment, is therefore fallen into equal disuse with regard to the trial of actions.

§ 48. 4. County court.—The county court is a court incident to the jurisdiction of the sheriff.[3] It is not a court of record, but may hold pleas of debt or damages under the value of forty shillings.[z] Over some of which causes these inferior courts have,

x De Morib. German. c. 13.

y Stiernhook. l. 1. c. 2.

z 4 Inst. 266.

3 **Modern county courts in England.**—Before the creation of the modern county courts in 1846, the principal inferior courts of civil jurisdiction were the court-baron, which was a court incident to every manor in the kingdom; the hundred court, which was a larger court-baron held for all the inhabitants of a particular hundred; and the sheriff's county court, which was the principal court of civil jurisdiction in the kingdom, until practically superseded by the assize courts. These inferior courts had jurisdiction to try actions relating to land before *real* actions were abolished; and to try personal actions for the recovery of debts or damages under forty shillings. Their procedure was, however, expensive and dilatory; and attempts were accordingly made, in a few of the chief centers of population, to supply the much-felt want of local courts for the speedy and cheap recovery of small claims, by the establishment of *courts of request*. The first was created in the city of London in the reign of James I; and by the year 1841 a little over a hundred of such local courts had been established in various parts of the kingdom, with jurisdiction in claims for debt or damages varying in amount from forty shillings to £15.

But these courts proved to be inadequate and unsatisfactory; chiefly because their jurisdiction was confined to sums of too trivial an amount, or restricted to particular places and to small districts. In 1846, after various unsuccessful attempts by successive parliaments to deal with the problem of local courts, the first County Courts Act was passed, establishing the modern county courts, which have superseded most, though not all, of the more ancient inferior courts of civil jurisdiction. After 1846, the jurisdiction of the county courts was extended by several statutes, which with the original act of 1846 were repealed, and their provisions consolidated, by the County Courts Act, 1888, the principal act now in force relating to county courts, though the jurisdiction con-

by the express words of the statute of Gloucester,[a] a jurisdiction totally exclusive of the king's superior courts. For in order to be entitled to sue an action of trespass for goods before the king's justiciars, the plaintiff is directed to make affidavit that the cause of action does really and *bona fide* amount to 40*s.*, which affidavit is now unaccountably disused,[b] except in the court of exchequer. The statute, also, 43 Elizabeth, c. 6 (Frivolous Suits, 1601), which gives the judges in many personal actions, where the jury assess less damages than 40*s.* a power to certify the same and [36] abridge the plaintiff of his full costs, was also meant to prevent vexation by litigious plaintiffs; who, for the purposes of mere oppression, might be inclinable to institute suits in the superior courts for injuries of a trifling value. The county court may also hold plea of many real actions, and of all personal actions to any amount, by virtue of a special writ called a *justicies;* which is a writ empowering the sheriff for the sake of dispatch to do the same justice in his county court, as might otherwise be had at Westminster.[c] The freeholders of the county are the real judges in this court, and the sheriff is the ministerial officer. The great conflux of freeholders, which are supposed always to attend at the county court (which Spelman calls *forum plebeiæ justitiæ et theatrum comitivæ potestatis*—the court of justice for the common people and the theater of the power of the country)[d] is the reason why all acts of parliament at the end of every session were wont to be there published by the sheriff; why all outlawries of absconding offenders are there proclaimed; and why all popular elections which the freeholders are to make, as formerly of sheriffs and conservators of the peace, and still of coroners, verderors, and knights of the shire, must ever be made *in pleno comitatu,* or, in

[a] 6 Edw. I. c. 8 (1278).
[b] 2 Inst. 391.
[c] Finch. 318. F. N. B. 152.
[d] *Gloss v. Comitatus.*

---

ferred by the act of 1888 has since been extended by the County Courts Act, 1903. In accordance with the provisions of the principal act, England and Wales are mapped out into more than fifty circuits, comprising an aggregate of nearly five hundred courts. For each circuit a judge is appointed by the lord chancellor; and for each court in the circuit a registrar is appointed by the judge, with clerks and subordinate officers and bailiffs to transact the business of the court. 3 Stephen's Comm. (16th ed.), 671. The jurisdiction of the county court is considered in the pages following the above citation.

full county court. By the statute 2 Edward VI, c. 25 (Sheriff's County Court, 1548), no county court shall be adjourned longer than for one month, consisting of twenty-eight days. And this was also the ancient usage, as appears from the laws of King Edward the elder:[e] "*præpositus* (that is, the sheriff) *ad quartam circiter septimanam frequentem populi concionem celebrato: cuique jus dicito; litesque singulas dirimito* (let the sheriff hold a full assembly of the people about once a month; declare the law to everyone; and severally determine suits)." In those times the county court was a court of great dignity and splendor, the bishop and the ealdorman (or earl) with the principal men of the shire sitting therein to administer justice both in lay and ecclesiastical causes.[f] But its dignity was much impaired, when the bishop was prohibited and the earl neglected to attend it. And, in modern times, as proceedings are removable from hence into the king's superior courts, by writ of *pone* or *recordare*,[g] in the same manner as from [37] hundred courts, and courts-baron; and as the same writ of false judgment may be had, in nature of a writ of error; this has occasioned the same disuse of bringing actions therein.

These are the several species of common-law courts, which though dispersed universally throughout the realm, are nevertheless of a partial jurisdiction, and confined to particular districts: yet communicating with, and as it were members of, the superior courts of a more extended and general nature; which are calculated for the administration of redress not in any one lordship, hundred, or county only, but throughout the whole kingdom at large. Of which sort is

§ 49. 5. Court of common pleas.—The court of *common pleas*, or, as it is frequently termed in law, the court of *common bench*.

By the ancient Saxon constitution there was only one superior court of justice in the kingdom: and that had cognizance both of civil and spiritual causes; *viz.*, the *wittenagemote*, or general council, which assembled annually or oftener, wherever the king kept his Easter, Christmas, or Whitsuntide, as well to do private justice

e C. 11.
f LL. Eadgari. c. 5.
g F. N. B. 70. Finch. 445.

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 counselors to the crown.

§ 50. a. **Aula regis.**—He therefore established a constant court in his own hall, thence called by Bracton [h] and other ancient authors *aula regia* or *aula regis* (the king's bench).[4] This court was composed of the king's great officers of state resident in his palace, and usually attendant on his person: such as the lord high constable and lord marshal, who chiefly presided in matters of

[h] L. 3. tr. 1. c. 7.

---

4 **Role of the king's courts in the development of the common law.**—The king's court was originally the tribunal held by authority of the king, as the source of all justice within the realm, before himself or his chief justiciar. In Henry II's reign the ordinary legal business of the king's court was delegated to judges sitting permanently at Westminster; the institution of itinerant judges, visiting every county, was firmly established; and a remedy in the king's court was given to all freeholders who had suffered unjust dispossession of their land; so that the justice of the king's court was brought home to the whole people. After Henry III's reign the original jurisdiction of the king's court of law was divided between its three branches, the courts of king's bench, common pleas, and exchequer; to be again united in the year 1875 in the high court of justice established by the Judicature Acts. The king's courts of law have been the chief agents in the development of the common law, which is derived from the ancient customs of the nation recognized and enforced therein as law, and the rules and principles of which have been evolved from the decisions of those courts upon cases submitted to their judgment from the time of their establishment to the present day. The legal reforms initiated by Henry II had the effect of increasing the importance of the jurisdiction of the king's court at the expense of that of the local tribunals, such as the county and hundred courts; and resulted in the establishment of a uniform body of judge-made law applicable throughout the land, which gradually superseded the old local customs. The enormous influence of Henry II's judicial institutions may be gauged by the fact that Bracton's treatise written in Henry III's reign is as much founded on English case law as any modern text-book. See Madox, Hist. Exch., c. I–III, XIX; Stubbs, Const. Hist., c. XI, §§ 118, 121, 125–127, c. XIII, § 163, c. XV, §§ 233, 235; Maitland, Bracton's Note Book, Introd. pp. 1–12, 18; Selden Society, Select Pleas of the Crown, Introd. xi, *sq.*; P. & M. Hist. Eng. Law, i, 85–87, 132–139, 167–185.—Williams, Real Prop. (21st ed.), 9 n.

honor and of arms; determining according to the law military and the law of nations. Besides these there were the lord high steward, and lord great chamberlain; the steward of the household; the lord chancellor, whose peculiar [38] business it was to keep the king's seal and examine all such writs, grants, and letters, as were to pass under that authority; and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices; and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments, transacted all secular business, both criminal and civil, and likewise the matters of the revenue: and over all presided one special magistrate, called the chief justiciar or *capitalis justiciarius totius Angliæ* (chief justiciar of all England); who was also the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. And this officer it was who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and from the plenitude of his power grew at length both obnoxious to the people and dangerous to the government which employed him.[1]

§ 51. b. Common pleas established.—This great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein was found very burdensome to the subject. Wherefore King John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of *magna carta*, and enacts, that "*communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo* (let not the common pleas follow the king's court, but be held in some fixed place)." This certain place was established in Westminster Hall, the place where the *aula regis* originally sat, when the king resided in that city; and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judges became so too, and a

[1] Spelm. Gl. 331, 2, 3. Gilb. Hist. C. P. Introd. 17.

chief with other justices of the common pleas was thereupon appointed; with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject. Which critical establishment of this principal court of [39] common law, at that particular juncture and that particular place, gave rise to the inns of court in its neighborhood; and, thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who labored to extirpate and destroy it.[j] This precedent was soon after copied by King Philip the Fair in France, who about the year 1302 fixed the parliament of Paris to abide constantly in that metropolis; which before used to follow the person of the king wherever he went, and in which he himself used frequently to decide the causes that were there depending: but all were then referred to the sole cognizance of the parliament and its learned judges.[k] And thus also in 1495 the Emperior Maximilian I fixed the imperial chamber (which before always traveled with the court and household) to be constantly held at Worms, from whence it was afterwards translated to Spire.[l]

§ 52. c. Separation of jurisdiction.—The *aula regia* being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of King Henry III. And, in further pursuance of this example, the other several offices of the chief justiciar were under Edward the First (who new-modeled the whole frame of our judicial polity) subdivided and broken into distinct courts of judicature. A court of chivalry was erected, over which the constable and marshal presided; as did the steward of the household over another, constituted to regulate the king's domestic servants. 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. The distribution of common justice be-

[j] See Book I. Introd. § 1.
[k] Mod. Un. Hist. xxiii. 396.
[l] *Ibid.* xxix. 467.

tween man and man was thrown into so provident an order, that the great judicial officers were [40] 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 particularly the superintendence of all the rest by way of appeal; 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 misdemeanors, wherein the king (on behalf of the public) is the plaintiff; and *common pleas,* which include all civil actions, depending between subject and subject. The former of these were the proper object of the jurisdiction of the court of king's bench; the latter of the court of common pleas: which is a court of record, and is styled by Sir Edward Coke[m] the lock and key of the common law; for herein only can real actions, that is, actions which concern the right of freehold or the realty, be originally brought: and all other, or personal, pleas between man and man are likewise here determined; though in some of *them* the king's bench has also a concurrent authority.

The judges of this court are at present[n] four in number, one chief and three *puisné*[5] justices, created by the king's letters patent, who sit every day in the four terms to hear and determine

m 4 Inst. 99.

n King James I, during the greater part of his reign, appointed five judges in the courts of king's bench and common pleas, for the benefit of a casting voice in case of a difference in opinion, and that the circuits might at all times be fully supplied with judges of the superior courts. And, in subsequent reigns, upon the permanent indisposition of a judge, a fifth hath been sometimes appointed. Raym. 475.

---

5 **Junior or inferior in rank.**—The several judges and barons of the former common-law courts at Westminster, other than the chiefs, were called *puisné.* By the 40 & 41 Vict., c. 9, § 5, a "*puisné* judge" is defined as a judge of the high court other than the lord chancellor, the lord chief justice of England, the master of the rolls, the lord chief justice of the common pleas, and the lord chief baron, and their successors respectively. 12 Ency. Laws of England, 139.

all matters of law arising in civil causes, whether real, personal, or mixed and compounded of both. These it takes cognizance of, as well originally, as upon removal from the inferior courts before mentioned. But a writ of error, in the nature of an appeal, lies from this court into the court of king's bench.

§ 53. 6. Court of king's bench.—[41] The court of king's bench (so called because the king used formerly to sit there in person,[o] the style of the court still being *coram ipso rege*—before the king himself) is the supreme court of common law in the kingdom; consisting of a chief justice and three *puisné* justices, who are by their office the sovereign conservators of the peace and supreme coroners of the land. Yet, though the king himself used to sit in this court, and still is supposed so to do; he did not, neither by law is he empowered[p] to, determine any cause or motion, but by the mouth of his judges, to whom he has committed his whole judicial authority.[q]

This court (which as we have said) is the remnant of the *aula regia*, is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the king's person wherever he goes; for which reason all process issuing out of this court in the king's name is returnable "*ubicunque fuerimus in Anglia* (in whatever part of England we shall be)." It hath indeed, for some centuries past, usually sat at Westminster, being an ancient palace of the crown; but might remove with the king to York or Exeter, if he thought proper to command it. And we find that, after Edward I had conquered Scotland, it actually sat at Roxburgh.[r] And this movable quality, as well as its dignity and power, are fully expressed by Bracton, when he says that the

o 4 Inst. 73.

p See Book I. c. 7. The king used to decide causes in person in the *aula regia*. "*In curia domini regis ipse in propria persona jura decernit* (the king in person judges in his own court)." (Dial. de Scacch. l. 1. § 4.) After its dissolution, King Edward I frequently sat in the court of king's bench. (See the records cited 4 Burr. 851.) And, in later time, James I is said to have sat there in person, but was informed by his judges that he could not deliver an opinion.

q 4 Inst. 71.

r M. 20, 21 Edw. I. Hale Hist. C. L. 200.

justices of this court are "*capitales, generales, perpetui, et majores; a latere regis residentes; qui omnium aliorum corrigere tenentur injurias et errores* (chief, general, perpetual, and elder; accompanying the king, who are appointed to redress the injuries and correct the errors of all others)."[s] And it is moreover especially provided in the *articuli super cartas*[t] that the king's chancellor, and the justices of his bench, shall follow him, so that he may have at all times near unto him some that be learned in the laws.

§ 54. a. Jurisdiction of the king's bench.—[42] The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of 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 ensuing volume. But on the plea side, or civil branch, it hath an original jurisdiction and cognizance of all actions of trespass, or other injury alleged to be committed *vi et armis* (with force and arms); of actions for forgery of deeds. maintenance, conspiracy, deceit, and actions on the case which allege any falsity or fraud: all of which favor of a criminal nature, although the action is brought for a civil remedy; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party.[u] The same doctrine is also now extended to all actions on the case whatsoever:[w] but no action of debt or detinue, or other mere civil action, can by the *common law* be prosecuted by any subject in this court, by *original* writ out of chancery;[x] though an action of debt, given by *statute*, may be

s L. 3. c. 10.
t 28 Edw. I. c. 5 (Articles on the Charters, 1300).
u Finch. L. 198. 2 Inst. 23. Dyversite de Courtes. c. Bank le Roy.
w F. N. B. 86. 92. 1 Lilly. Pract. Reg. 503.
x 4 Inst. 76. Tryc's Jus Filazar. 101.

brought in the king's bench as well as in the common pleas.[y] And yet this court might always have held 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, or prison-keeper, of this court, for a breach of the peace or any other offense.[z] And in process of time, it began by a fiction to hold plea of all personal actions whatsoever, and has continued to do so for ages:[a] it being surmised that the defendant is arrested for a [43] supposed trespass, which he never has in reality committed; and, being thus in the custody of the marshal of this court, the plaintiff is at liberty to proceed against him for any other personal injury: which surmise, of being in the marshal's custody, the defendant is not at liberty to dispute.[b] [6] And these fictions of law, though at first they may startle the student, he will find upon further consideration to be highly beneficial and useful: especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law.[c] So true it is, that *in fictione juris semper subsistit æquitas*

y Carth. 234.

z 4 Inst. 71.

a *Ibid.* 72.

b Thus too in the civil law: *contra fictionem non admittitur probatio: quid enim efficeret probatio veritatis, ubi fictio adversus veritatem fingit? Nam fictio nihil aliud est, quam legis adversus veritatem in re possibili ex justa causa dispositio* (proof is not admitted to contradict a fiction: for what would the proof of truth avail, where fiction counterfeits truth? For fiction is simply a supposition by the law, for a just cause, of something possible which is contrary to the truth). (Gothofred. in Ff. 1. 22. t. 3.)

c 3 Rep. 30. 2 Roll. Rep. 502.

---

6 It was surmised, as Blackstone says, that the defendant had committed a breach of the peace in Middlesex, for instance, and by the aid of this false suggestion, a writ, called a Bill of Middlesex, or a writ of *latitat* (he lies hidden), founded on a Bill of Middlesex, as the case might be, was issued against him. Thereby he was supposed to be committed to the custody of the marshal, and so brought within the jurisdiction of the court. To this was added, under the *ac etiam* (and also) clause, the ground of action which it was the real intention of the parties to try. Hereon see pp. *285 ff., *post.*

(a fiction of law is always founded in equity).[d 7] In the present case, it gives the suitor his choice of more than one tribunal, before which he may institute his action; and prevents the circuity and delay of justice, by allowing that suit to be originally, and in the first instance, commenced in this court, which after a determination in another, might ultimately be brought before it on a writ of error.

[d] 11 Rep. 51. Co. Litt. 150.

---

7 **Legal fictions.**—For a discussion of fictions in law, see chapter II of Maine's Ancient Law, and Pollock's note D in his edition of the Ancient Law. Blackstone gives illustrations of legal fictions on pages 43, 45, 153, 203 of this book. Mr. Justice Curtis (Jurisdiction of United States Courts, 2d ed., 148) gives the following instance of a fiction in our practice:

"'A suit by or against a corporation in its corporate name *may be presumed* to be a suit by or against citizens of the state which created the corporate body, and *no averment* or denial to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States.' There is the Roman 'fiction.' The court first decides the law, presumes all the members are citizens of the state which created the corporation, and then says, 'You shall not traverse that presumption'; and that is the law now. Under it, the courts of the United States constantly entertain suits by or against corporations. (Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207.) It has been so frequently settled, that there is not the slightest reason to suppose that it will ever be departed from by the court. It has been repeated over and over again in subsequent decisions; and the supreme court seem entirely satisfied that it is the right ground to stand upon; and, as I am now going to state to you, they have applied it in some cases which go beyond, much beyond, these decisions to which I have referred. So that when a suit is to be brought in a court of the United States by or against a corporation, by reason of the character of the parties, you have only to say that this corporation (after naming it correctly) was created by a law of the state of Massachusetts, and has its principal place of business in that state; and that is exactly the same in its consequences as if you could allege, and did allege, that the corporation was a citizen of that state. According to the present decisions, it is not necessary you should say that the members of that corporation are citizens of Massachusetts. They have passed beyond that. You have only to say that the corporation was created by a law of the state of Massachusetts, and has its principal place of business in that state; and that makes it, for the purposes of jurisdiction, the same as if it were a citizen of that state." See Pound, Readings in Roman Law, 95 n.

On the maxim, *In fictione juris semper subsistit æquitas*, see Broom, Legal Maxims (8th ed.), 105.

§ 55. **b. Appellate jurisdiction of the king's bench.**—For this court is likewise a court of appeal, into which may be removed by writ of error all determinations of the court of common pleas, and of all inferior courts of record in England; and to which a writ of error lies also from the court of king's bench in Ireland. Yet even this so high and honorable court is not the *dernier resort* (court of final appeal) of the subject: for, if he be not satisfied with any determination here, he may remove it by writ of error into the house of lords, or the court of exchequer chamber, as the case may happen, according to the nature of the suit, and the manner in which it has been prosecuted.

§ 56. **7. Court of exchequer.**—The court of exchequer is inferior in rank not only to the court of king's bench, but to the common pleas also: but I have chosen to consider it in this order, on account of its double capacity, as a court of law and a court of equity [44] also.[8] It is a very ancient court of record, set up by William the Conqueror,[e] as a part of the *aula regia*,[f] though regulated and reduced to its present order by King Edward I;[g] and intended principally to order the revenues of the crown, and to recover the king's debts and duties.[h] It is called the exchequer, *scaccharium*, from the chequed cloth, resembling a chess-board, which covers the table there; and on which, when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions: the receipt of the exchequer, which manages the royal revenue, and with which these Commentaries have no concern; and the court or judicial part of it, which is again subdivided into a court of equity, and a court of common law.

§ 57. **a. The equity court of the exchequer.**—The court of equity is held in the exchequer chamber before the lord treasurer, the chancellor of the exchequer, the chief baron, and three *puisné*

e Lamb. Archeion. 24.

f Madox. Hist. Exch. 109.

g Spelm. Guil. I. in cod. leg. vet. apud Wilkins.

h 4 Inst. 103.—116.

8 By the Court of Chancery Act, 1841, the general equitable jurisdiction of the court of exchequer was transferred to the court of chancery.

ones. These Mr. Selden conjectures[1] to have been anciently made out of such as were barons of the kingdom, or parliamentary barons; and thence to have derived their name:[9] which conjecture receives great strength from Bracton's explanation of *magna carta*, c. 14, which directs that the earls and barons be amerced by their peers; that is, says he, by the barons of the exchequer.[k] The primary and original business of this court is to call the king's debtors to account, by bill filed by the attorney general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown. So that by their original constitution the jurisdiction of the courts of common pleas, king's bench, and exchequer, was entirely separate and distinct; the common pleas being intended to decide all controversies between subject and subject; the king's bench to correct all crimes and misdemeanors that amount to a breach of the peace, the king being then plaintiff, as such offenses are in open derogation of the *jura regalia* (regal rights) of his crown: and the exchequer to adjust [45] and recover his revenue, wherein the king also is plaintiff, as the withholding and nonpayment thereof is an injury to his *jura fiscalia* (fiscal rights). But, as by a fiction almost all sorts of civil actions are now allowed to be brought in the king's bench, in like manner by another fiction all kinds of personal suits may be prosecuted in the court of exchequer. For as all the officers and ministers of this court have, 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 accountants of the exchequer, are privileged to sue and implead all manner of persons in the same court of equity that they themselves are called into. They have likewise privilege to sue and implead one another, or any stranger, in the same kind of common-law actions (where the personalty only is concerned) as are prosecuted in the court of common pleas.

§ 58. b. **The common-law court of the exchequer.**—This gives original to the common-law part of their jurisdiction, which was

[1] Tit. Hon. 2. 5. 16.

[k] L. 3. tr. 2. c. 1. § 3.

[9] That is to say, the judges of the court of exchequer were called *barones* (or "liege men"), simply; not *justiciarii* (or "judges").

established merely for the benefit of the king's accountants, and is exercised by the barons only of the exchequer, and not the treasurer or chancellor. The writ upon which all proceedings here are grounded is called a *quo minus:* in which the plaintiff suggests that he is the king's farmer or debtor, and that the defendant hath done him the injury or damage complained of; *quo minus sufficiens existit, by which* he is *the less* able, to pay the king his debt or rent. And these suits are expressly directed, by what is called the statute of Rutland,[1] to be confined to such matters only as specially concern the king or his ministers of the exchequer. And by the *articuli super cartas* [m] it is enacted that no common pleas be thenceforth holden in the exchequer, contrary to the form of the great charter. But now, by the suggestion of privilege, any person may be admitted to sue in the exchequer as well as the king's accountant. The surmise of being debtor to the king is therefore become matter of form and mere words of course, and the court is open to all the nation equally. The same holds with regard to the equity side of the court: for there any person may file [46] a bill against another upon a bare suggestion that he is the king's accountant; but whether he is so or not is never controverted.[10] In this court, on the equity side, the clergy have long used to exhibit their bills for the nonpayment of tithes; in which case the surmise of being the king's debtor is no fiction, they being bound to pay him their first-fruits, and annual tenths. But the chancery has of late years obtained a large share in this business.

§ 59. c. Appeals from the court of exchequer—An appeal from the equity side of this court lies immediately to the house of peers; but from the common-law side, in pursuance of the statute 31, Edward III, c. 12 (Exchequer Chamber, 1357), a writ of error must be first brought into the court or exchequer chamber. And from their determination there lies, in the *dernier resort,* a writ of error to the house of lords.

l 10 Edw. I. c. 11 (1282). m 28 Edw. I. c. 4 (1300).

10 When the writ of *quo minus* was abolished by the Uniformity of Process Act, 1832, the method then substituted gave a direct jurisdiction to the court of exchequer in matters of private debt generally.

§ 60. **8. Court of chancery.**—The high court of chancery is the only remaining, and in matters of civil property by much the most important of any, of the king's superior and original courts of justice. It has its name of chancery, *cancellaria*, from the judge who presides here, the lord chancellor or *cancellarius;* who, Sir Edward Coke tells us, is so termed *a cancellando*, from canceling the king's letters patent when granted contrary to law, which is the highest point of his jurisdiction.[n] But the office and name of chancellor (however derived) 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 several judicial powers, and a general superintendency over the rest of the officers of the prince. From the Roman empire it passed to the Roman church, ever emulous of imperial state; 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 [47] when seals came in use he had always the custody of the king's great seal. So that the office of chancellor, or lord keeper (whose authority by statute 5 Elizabeth, c. 18 (Lord Chancellor, 1563), is declared to be exactly the same), is with us at this day created by the mere delivery of the king's great seal into his custody:[o] 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.[p] He is a privy counselor by his office,[q] and, according to Lord Chancellor Ellesmere,[r] prolocutor of the house of lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic (for none else were then capable of an office

n 4 Inst. 88.
o Lamb. Archeion. 65. 1 Roll. Abr. 385.
p Stat. 31 Hen. VIII. c. 10 (Parliament Precedence, 1539).
q Selden. Office of Lord Chanc. § 3.
r Of the Office of Lord Chancellor. edit. 1651.

so conversant in writings) and presiding over the royal chapel,[s] he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of twenty marks[ss] *per annum* in the king's books. He is the general guardian of all infants, idiots and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the court of chancery: wherein, as in the exchequer, there are two distinct tribunals: the one ordinary, being a court of common law; the other extraordinary, being a court of equity.

§ 61. a. **The ordinary legal court of chancery.**—The ordinary legal court is much more ancient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias* (that you make known) to repeal and cancel the king's letters patent, when made against law, or upon untrue suggestions; and to hold plea of petitions, *monstrans de droit* (plea of right), traverses of offices, and the like; when the king hath been advised to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right.[t] On proof of which, as the king can never [48] be supposed intentionally 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.[11] It also appertains to this court to hold plea of all personal actions, where any officer or minister of the court is a party.[u] It might likewise hold plea (by *scire facias*) of partitions of lands in coparcenary,[w] and of dower,[x] where any ward of the crown was concerned in interest, so long as the military tenures subsisted: as it now may also do of the tithes of forest land, where granted by the king and

s Madox. Hist. of Exch. 42.

ss 38 Edw. III (1363). 3. F. N. B. 35. though Hobart (214.) extends this value to twenty *pounds*.

t 4 Rep. 54.

u 4 Inst. 80.

w Co. Litt. 171. F. N. B. 62.

x Bro. Abr. tit. Dower. 66. Moor. 565.

11 See 1 Poll. & Maitl., Hist. Eng. Law (2d ed.), 197.

claimed by a stranger against the grantee of the crown;[y] and of executions on statutes, or recognizances in nature thereof by the statute 23 Henry VIII, c. 6 (Recognizances for Debt, 1531).[z] But if any cause comes to issue in this court, that is, if any fact be disputed between the parties, the chancellor cannot try it, having no power to summon a jury; but must deliver the record *propria manu* (with his own hand) into the court of king's bench, where it shall be tried by the country, and judgment shall be there given thereon.[a] And, when judgment is given in chancery upon demurrer or the like, a writ of error, in nature of an appeal, lies out of this ordinary court into the court of king's bench:[b] though so little is usually done on the common-law side of the court, that I have met with no traces of any writ of error[c] being actually brought since the fourteenth year of Queen Elizabeth, A. D. 1572.

§ 62. (1) Original writs.—In this ordinary, or legal, court is also kept the *officina justitiæ* (the magazine of justice): out of which all original writs that pass under the great seal, all commissions of charitable uses, sewers, bankruptcy, idiocy, lunacy and the like, do issue; and for which it is always open to the subject, who may there at any time demand and have, *ex debitò justitiæ* (as due to justice), any writ that his occasions [49] may call for. These writs (relating to the business of the subject) and the returns to them were, according to the simplicity of ancient times, originally kept in a hamper *in hanaperio;* and the others (relating to such matters wherein the crown is immediately or mediately concerned) were preserved in a little sack or bag, *in parva baga;* and thence hath arisen the distinction of the *hanaper* office, and *petty bag* office, which both belong to the common-law court in chancery.

§ 63. b. The extraordinary, or equity, court of chancery.—But the extraordinary court, or court of equity, is now become the

y Bro. Abr. t. Dismes. 10.

z 2 Roll. Abr. 469.

a Cro. Jac. 12. Latch. 112.

b Year-Book, 18 Edw. III. 25 (1344). 17 Ass. 24. 29 Ass. 47. Dyer. 315. 1 Roll. Rep. 287. 4 Inst. 80.

c The opinion of Lord Keeper North in 1682 (1 Vern. 131. 1 Equ. Cas. Abr. 129.) that nó such writ of error lay, and that an injunction might be issued against it, seems not to have been well considered.

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:[d] and yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans;[e] the *jus prætorium*, or discretion of the prætor, being distinct from the *leges* or standing laws:[f] but the power of both centered in one and the same magistrate, who was equally entrusted to pronounce the rule of law, and to apply it to particular cases by the principles of equity. With us, too, the *aula regia*, which was the supreme court of judicature, undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require: and, when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition.

§ 64. (1) Origin of English equity.—For though equity is mentioned by Bracton[g] as a thing contrasted to strict law, yet neither in that writer, nor in Glanvill or Fleta, nor yet in Britton (composed under the auspices and in the name of Edward I, and [50] treating particularly of courts and their several jurisdictions), is there a syllable to be found relating to the equitable jurisdiction of the court of chancery. It seems, therefore, probable that when the courts of law, proceeding merely upon the ground of the king's original writs and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the applica-

d The *council of conscience*, instituted by John III., King of Portugal, to review the sentences of all inferior courts, and moderate them by equity (Mod. Un. Hist. xxii. 237.), seems rather to have been a court of appeal.

e Thus to the parliament of Paris, the court of session in Scotland, and every other jurisdiction in Europe of which we have any tolerable account, found all their decisions as well upon principles of equity as those of positive law. (Lord Kayms. Histor. Law Tracts, I. 325. 330. Princ. of Equit. 44.)

f Thus Cicero: "*jam illis promissis non esse standum, quis non videt, quæ coactus quis metu et deceptus dolo promiserit? quæ quidem plerumque jure prætorio liberantur, nonnulla legibus* (To whom is it not evident that promises made through fear or fraud are of no validity? Some of which are dissolved at the discretion of the judge, and some by the laws)." Offic. l. 1.

g L. 2. c. 7. fol. 23.

tion for redress used to be to the king in person assisted by his privy council (from whence also arose the jurisdiction of the court of requests,[h] which was virtually abolished by the statute 16 Car. I, c. 10—Star-chamber, 1640);[12] 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. This was the custom not only among our Saxon ancestors, before the institution of the *aula regia*,[i] but also after its dissolution, in the reign of King Edward I;[k] and perhaps during its continuance, in that of Henry II.[l]

§ 65. (2) Cases arising in consimili casu.—In these early times the chief juridical employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the chancery, who were too much attached to ancient precedents, it is provided by statute Westm. II, 13 Edward I, c. 24 (Real Actions, 1285), that "whenso-

h The matters cognizable in this court, immediately before its dissolution, were "almost all suits, that by color of equity, or supplication made to the prince, might be brought before him: but originally and properly all poor men's suits, which were made to his majesty by supplication; and upon which they were entitled to have right, without payment of any money for the same." (Smith's Commonwealth, b. 3. c. 7.)

i *Nemo ad regem appellet pro aliqua lite, nisi jus domi consequi non possit. Si jus nimis severum sit, alleviatio deinde quæratur apud regem* (No one may appeal to the king in any suit, unless he cannot obtain justice at home. If the decision be too severe, then a mitigation of it may be prayed from the

LL. Edg. c. 2.

bard. Archeion. 59.

l Johannes Sarisburiensis (who died A. D. 1182, 26 Hen. II.) speaking of the chancellor's office in the verses prefixed to his *polycraticon*, has these lines;

Hic est, qui leges regni cancellat iniquas,
Et mandata pii principis æqua facit.

(It is he who cancels the inequitable laws of the kingdom, and executes the just mandates of a righteous prince.)

12 On the history of the court of requests, see Carter, Hist. Eng. Leg. Institutions, 162–166.

ever from thenceforth in one case a writ shall be found in the chancery, and in a like case [13] falling under the same right and requiring like remedy [51] no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one: and, if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law,[m] lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors." And this accounts for the very great variety of writs of trespass on the case, to be met with in the register; whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty, reason and equity of his very case.[n] Which provision (with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ) might have effectually answered all the purposes of a court of equity;[o 14] except that of obtaining a discovery by the oath of the defendant.

[m] A great variety of new precedents of writs, in cases before unprovided for, are given by this very statute of Westm. II.

[n] Lamb. Archeion. 61.

[o] This was the opinion of Fairfax, a very learned judge in the time of Edward the Fourth. "*Le subpœna* (says he) *ne serroit my cy sovcntement use come il est ore, si nous attendomus tiels actions sur les cases, et mainteinomus le jurisdiction de ceo court, et d'auter courts* (The subpœna would not be so often used here as it now is if we were to pay attention to actions on the case, and maintain the jurisdiction of this and other courts)." Yearb. 21 Edw. IV. 23 (1481)).

---

13 The Latin in the original of this great statute of Westminster II for the words "in like case," *viz.*, *in consimili casu,* was taken, after the lapse of about a hundred years, to authorize the issuance of writs "in like case" with any of the established forms. This phrase thus became the parent of all the common-law actions which have marked the progressive evolution of the law. See note, p. *153, *post.*

14 **Fundamental difference between law and equity.**—Is this statute [statute of Westminster], now more than six hundred years old, still a living force for the betterment of the common law in England and the United States? There can be but one answer to that question. This statute is a perennial fountain of justice to be drawn upon so long as, in a given jurisdiction, instances may be pointed out in which the common-law courts have failed to give a remedy for damage inflicted upon one person by the reprehensible act

§ 66. **(3) The writ of subpœna.**—But when, about the end of the reign of King Edward III, uses of land were introduced,[p] and, though totally discountenanced by the courts of common law, were considered as fiduciary deposits and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established;[q] and John Waltham, who was bishop of Salisbury and chancellor to King Richard II, by a strained interpretation of the above-mentioned statute of Westm. II, devised the writ of *subpœna*, returnable in the court of chancery only, to make the feoffee to uses accountable to his *cestuy que use:* which process was afterwards extended to other matters wholly determinable at the common law, upon false and fictitious suggestions; for which,

p See Book II. c. 20.

q Spelm. Gloss. 106. 1 Lev. 242.

---

of another, and the continued absence of a remedy would shock the moral sense of the community.

But with everything done that could be done by this statute, our law as a whole would have been a very imperfect instrument of justice if the system of common-law remedies had not been supplemented by the system of equitable remedies. Blackstone has asserted that the common-law judges by a liberal interpretation of the statute of Westminster by means of the action on the case might have done the work of a court of equity. Such an opinion betrays a singular failure to appreciate the fundamental difference between law and equity, namely, that the law acts *in rem*, while equity acts *in personam*. The difference between the judgment at law and the decree in equity goes to the root of the whole matter. The law regards chiefly the right of the plaintiff, and gives judgment that he recover the land, debt or damages, because they are his. Equity lays the stress upon the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear. It is because of this emphasis upon the defendant's duty that equity is so much more ethical than law. The difference between the two in this respect appears even in cases of concurrent jurisdiction. The moral standard of the man who commits no breach of contract or tort, or, having committed the one or the other, does his best to restore the *status quo*, is obviously higher than that of the man who breaks his contract or commits a tort and then refuses to do more than make compensation for his wrong. It is this higher standard of morality that equity enforces wherever the legal remedy of pecuniary compensation would be inadequate, by commanding the defendant by injunction to refrain from the commission of a tort or breach of contract, or by compelling him, after the commission of the one or the other, by means of a mandatory injunction, or a decree for specific performance, so called, to make specific reparation for his wrong.—AMES, Lect. on Leg. Hist., 443.

therefore, the chancellor himself is by statute 17 Richard II, 6 (Untrue Suggestions in Chancery, 1393), directed to give damages to the party unjustly aggrieved. But as the [52] clergy, so early as the reign of King Stephen, had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro læsione fidei* (for a breach of faith), as a spiritual offense against conscience, in case of nonpayment of debts or any breach of civil contracts;[r] till checked by the constitutions of Clarendon,[s] which declared that, "*placita de debitis, quæ fide interposita debentur, vel absque interpositione fidei, sint in justicia regis* (let those pleas of debts, which are due with or without the interposition of a trust, be in the king's jurisdiction)": therefore probably the ecclesiastical chancellors, who then held the seal, were remiss in abridging their own new-acquired jurisdiction; especially as the spiritual courts continued[t] to grasp at the same authority as before, in suits *pro læsione fidei*, so late as the fifteenth century,[u] till finally prohibited by the unanimous concurrence of all the judges.[15] How-

r Lord Lyttelt. Hen. II. b. 3. p. 361. not.

s 10 Hen. II. c. 15 (1166). Speed. 458.

t In 4 Hen. III. (1219) suits in court Christian *pro læsione fidei* upon temporal contracts were adjudged to be contrary to law. (Fitzh. Abr. t. Prohibition. 15.) But in the statute or writ of *circumspecte agatis* (that you act cautiously) supposed by some to have issued 13 Edw. I. (1285), but more probably (3 Pryn. Rec. 336.) 9 Edw. II. (1315), suits *pro læsione fidei* were allowed to the ecclesiastical courts: according to some ancient copies (Berthelet Stat. Antiqu. Lond. 1531. 90. b. 3 Pryn. Rec. 336.), and the common English translation, of that statute: though in Lyndewode's copy (Prov. l. 2. t. 2.) and in the Cotton MS. (Claud. D. 2.) that clause is omitted.

u Yearb. 2 Hen. IV. 10 (1400). 11 Hen. IV. 88 (1409). 38 Hen. VI. 29 (1459). 20 Edw. IV. 10 (1480).

---

15 **Suits pro læsione fidei—Statute Circumspecte Agatis.**—"In England, with the single exception of the proceedings in the exchequer above referred to, it seems probable that no lay court took any cognizance of a *fidei læsio*, whilst the canon law seems to have claimed a general jurisdiction in all cases of the breach of an oath or of the plighted faith,—a jurisdiction probably enforceable by admonition and penance, and in default of obedience by excommunication. Accordingly we find the clergy of Normandy, in articles passed by them in 1190 and assented to by Richard, asserting a general jurisdiction in breaches of faith and violations of oaths; . . and in like manner in England we find that the courts Christian asserted a general jurisdiction in all such

ever, it appears from the parliament rolls,[w] that in the reigns of Henry IV and V the commons were repeatedly urgent to have the writ of *subpœna* entirely suppressed, as being a novelty devised by the subtlety of Chancellor Waltham, against the form of the common law; whereby no plea could be determined, unless by examination and oath of the parties, according to the form of the law civil, and the law of holy church, in subversion of the common law. 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 (Judgments, 1402), 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 *subpœna* was become the daily practice of the court.[x]

[53] But this did not extend very far, for in the ancient treatise, entitled *Diversité des Courtes* (Diversity of the Courts),[y] supposed to be written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable by *subpœna* in chancery, which fall within a very narrow compass.

w Rot. Parl. 4 Hen. IV. No. 78 & 110. 3 Hen. V. No. 46. cited in Prynne's Abr. of Cotton's records. 410. 422. 424. 548. 4 Inst. 83. 1 Roll. Abr. 370, 371, 372.

x Rot. Parl. 14 Edw. IV. No. 33. (not. 14 Edw. III. as cited 1 Roll. Abr. 370. etc.)

y Tit. Chancery. fol. 296. Rastell's edit. A. D. 1534.

---

cases. If it had been allowed, it is evident that they would have acquired a firm hold on almost all the ordinary affairs of life, whenever in fact there was a contract or dealing in which the faith could be pledged or an oath taken. . . . The struggle was long continued. 'The Spiritual Courts,' says Blackstone, 'continued to grasp at the same authority as before in suits *pro læsione fidei*, so late as the fifteenth century.' The two versions of the great statute *Circumspecte Agatis*, the one saving to the courts Christian jurisdiction in such actions, and the other denying it to them, are evidence of the zeal with which the contest was carried on: for the true text must almost certainly have been tampered with and falsified by the one party or the other, in order to support its contention." Fry, Specific Performance (3d ed.), 10. The authenticity of the writ or statute *Circumspecte Agatis* is doubtful; in Y. B. 19 Edw. III (R. S.), 292, Willoughby, J., said: "The prelates made it themselves." 2 Holdsworth, Hist. Eng. Law, 246.

§ 67. **(4) Character of the early chancellors.**—No regular judicial system at that time prevailed in the court; but the suitor, when he thought himself aggrieved, found a desultory and certain remedy, according to the private opinion of the chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman: no lawyer having sat in the court of chancery from the times of the Chief Justices Thorpe and Knyvet, successively chancellors to King Edward III, in 1372 and 1373,[z] to the promotion of Sir Thomas More by King Henry VIII, in 1530. After which the great seal was indiscriminately committed to the custody of lawyers, or courtiers,[a] or churchmen,[b] according as the convenience of the times and the disposition of the prince required, till Serjeant Puckering was made lord keeper in 1592: from which time to the present the court of chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the seal was entrusted to Dr. Williams, then Dean of Westminster, but afterwards Bishop of Lincoln; who had been chaplain to Lord Ellesmere when chancellor.[c]

§ 68. **(5) Dispute between the courts of law and equity.**—In the time of Lord Ellesmere (A. D. 1616) arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the court of king's bench; whether a court of equity could give relief after or against a judgment at the common law. This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a *præmunire*, by questioning in a court of equity a judgment in the court of king's bench, obtained by gross fraud and imposition.[d] This matter, being brought before the king, was by him referred [54] to his learned council for their advice and opinion; who reported so strongly in favor of the courts of equity,[e] that his majesty gave judgment on their behalf: but, not contented with the irre-

z Spelm. Gloss. 111. Dugd. Chron. Ser. 50.
a Wriothesly, St. John, and Hatton.
b Goodrick, Gardiner, and Heath.
c Biogr. Brit. 4278.
d Bacon's Works. IV. 611, 612. 632.
e Whitelocke of Parl. ii. 390; 1 Chan. Rep. Append. 11.

fragable reasons and precedents produced by his counsel (for the chief justice was clearly in the wrong) he chose rather to decide the question by referring it to the plenitude of his royal prerogative.[f] Sir Edward Coke submitted to the decision,[g] and thereby made atonement for his error: but this struggle, together with the business of *commendams* (in which he acted a very noble part[h]) and his controlling the commissioners of sewers,[i] were the open and avowed causes,[k] first of his suspension, and soon after of his removal, from his office.

§ 69. (6) Establishment of an orderly system in the court of equity.—Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court into a more regular system; but did not sit long enough to effect any considerable revolution in the science itself: and few of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of Charles I, did little to improve upon his plan: and even after the restoration the seal was committed to the Earl of Clarendon, who had withdrawn from practice as a lawyer near twenty years; and afterwards to the Earl of Shaftesbury, who (though a lawyer by education) had never practiced at all. Sir Heneage Finch,

[f] "For that it appertaineth to our princely office only to judge over all judges, and to discern and determine such differences, as at any time may and shall arise between our several courts touching their jurisdictions, and the same to settle and determine, as we in our princely wisdom shall find to stand most with our honor, etc." (1 Chan. Rep. Append. 26.)

[g] See the entry in the council book, 26 July, 1616. (Biogr. Brit. 1390.)

[h] In a cause of the Bishop of Winchester, touching a *commendam*, King James conceiving that the matter affected his prerogative, sent letters to the judges not to proceed in it, till himself had been first consulted. The twelve judges joined in a memorial to his majesty, declaring that their compliance would be contrary to their oaths and the law: but upon being brought before the king and council, they all retracted and promised obedience in every such case for the future; except Sir Edward Coke, who said, "that when the case happened, he would do his duty." (Biogr. Brit. 1388.)

[i] See that article in chap. 6.

[k] See Lord Ellesmere's speech to Sir Henry Montague, the new chief justice, 15 Nov. 1616. (Moor's reports. 828.) Though Sir Edward might probably have retained his seat, if during his suspension, he would have complimented Lord Villiers (the new favorite), with the disposal of the most lucrative office in his court. (Biogr. Brit. 1391.)

who succeeded in 1673, [65] and became afterwards Earl of Nottingham, was a person of the greatest abilities and most uncorrupted integrity; a thorough master and zealous defender of the laws and constitution of his country; and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence and jurisdiction upon wide and rational foundations; which have also been extended, and improved by many great men, who have since presided in chancery. And from that time to this, the power and business of the court have increased to an amazing degree.

§ 70. **(7) Appeals from the court of equity.**—From this court of equity in chancery, as from the other superior courts, an appeal lies to the house of peers. But there are these differences between appeals from a court of equity and writs of error from a court of law: 1. That the former may be brought upon any interlocutory matter, the latter upon nothing but only a definitive judgment: 2. That on writs of error the house of lords pronounces the judgment, on appeals it gives direction to the court below to rectify its own decree.

§ 71. **9. Court of exchequer chamber.**—The next court that I shall mention is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions.[16] This is the court of exchequer chamber; which was first erected by statute 31 Edward III, c. 12 (Exchequer Chamber, 1357), to determine causes upon writs of error from the common-law side of the

[16] By the Law Terms Act, 1830, the court of exchequer chamber was remodeled, and was constituted a court of error from the judgments of all the three superior courts of common law; the judges of the court being the judges of the three superior courts, other than the court whose judgments were to be revised.

court of exchequer. And to that end it consists of the lord treasurer and lord chancellor, with the justices of the king's bench and common pleas. In imitation of which, a second court of exchequer chamber was erected by statute 27 Elizabeth, c. 8 (Errors from Queen's Bench, 1584), consisting of the justices of the common pleas and the barons of the exchequer, before whom writs of error may be brought to reverse judgments [56] in certain suits[1] originally begun in the court of king's bench. Into the court, also, of exchequer chamber (which then consists of all the judges of the three superior courts, and now and then the lord chancellor also), are sometimes adjourned from the other courts such causes, as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court below.[m]

From all the branches of this court of exchequer chamber a writ of error lies to

§ 72. 10. House of peers.—The house of peers, which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error; to rectify any injustice or mistake of the law committed by the courts below.[17] To this authority they succeeded of course

[1] See c. 25, pag. 411.

[m] 4 Inst. 119. 2 Bulstr. 146.

---

[17] **Ultimate courts of appeal in England.**—It was one of the objects of the Judicature Act, 1873, to abolish the appellate jurisdiction which formerly resided in the house of lords and the judicial committee of the privy council. So far as the house of lords was concerned, the Act of 1873 professed actually to abolish the appellate jurisdiction; and it made provision for the taking of a similar step by order in council, in the case of the judicial committee. But, before the Act of 1873 came into operation, these provisions were suspended by the Judicature Act, 1875; and they were afterwards entirely repealed by the Appellate Jurisdiction Act, 1876. The jurisdictions of the house of lords and the judicial committee, as ultimate courts of appeal, accordingly remain.

The house of lords.—It is expressly provided by the Appellate Jurisdiction Act, 1876, that an appeal shall lie to the house of lords from any order or judgment, either of the court of appeal in England, or of any of the Scotch or Irish courts, from which error or an appeal lay thereto at or immediately before the commencement of the act; that is to say, the 1st November, 1876. Leave to appeal is unnecessary, whether the order appealed against is final or interlocutory (Ford's Hotel Co. v. Bartlett, [1896] App. Cas. 1); except in the case of certain matrimonial causes, and in bankruptcy appeals. In these

upon the dissolution of the *aula regia*. For, as the barons of parliament were constituent members of that court and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside; it followed that the right of receiving appeals, and superintending all other jurisdictions, still remained in that noble assembly, from which every other great court was derived. They are therefore in all causes the last resort, from whose judgment no further appeal is permitted; but every subordinate tribunal must conform to their determinations. The law reposing an entire confidence in the honor and conscience of the noble persons who compose this important assembly, that they will make themselves masters of those questions upon which they undertake to decide; since upon their decision all property must finally depend.

Hitherto may also be referred the tribunal established by statute 14 Edward III, c. 5 (Delays in Court, 1340), consisting (though

cases no appeal lies to the house of lords without the leave of the court of appeal (Lane v. Esdaile, [1891] App. Cas. 210; Re Lake, [1901] 1 K. B. 710; Re Beauchamp, [1904] 1 K. B. 572).

The practice in appeals to the house of lords is governed by the Appellate Jurisdiction Acts, 1876 and 1887, and by the standing orders and directions of the house. Every appeal is by way of *petition*, praying that the matter of the order or judgment appealed against may be reviewed before his majesty the king in his court of parliament, and that the order or judgment may be reversed or varied. In theory, every member of the house of lords has a right to be present and vote at the hearing of an appeal; but it is provided by the Act of 1876 that no appeal may be heard and determined, unless there be present not less than three specially qualified peers, known as lords of appeal. This class of peers comprises: the lord chancellor, the lords of appeal in ordinary, and such peers as have held "high judicial office" (that is to say, the lord chancellorship of Great Britain or of Ireland, a paid judgeship of the judicial committee, a judgeship of the high court of justice, or of the court of appeal, and the like).

With regard to the lords of appeal in ordinary, it is enacted, by the Appellate Jurisdiction Act, 1876, that, in order to aid the house of lords in the hearing and determination of appeals, his majesty may appoint by patent two (now six) qualified persons (the qualification consists in having held "high judicial office" for not less than two years, or having been for not less than fifteen years a practicing barrister in England or Ireland, or a practicing advocate in Scotland). Such lords of appeal shall hold office during good behavior and notwithstanding the demise of the crown, but who shall be removable on an address of both houses of parliament. Each of such lords of appeal is

now out of use) of one prelate, two earls, and two barons, who are to be chosen at every new parliament, to hear complaints of grievances and delays of justice in the king's courts, and (with the advice of the chancellor, treasurer and justices of both benches) to give directions for remedying these inconveniences [57] in the courts below. This committee seems to have been established, lest there should be a defect of justice for want of a supreme court of appeal, during any long intermission or recess of parliament; for the statute further directs that if the difficulty be so great that it may not well be determined without assent of parliament, it shall be brought by the said prelate, earls and barons unto the *next* parliament, who shall finally determine the same.

entitled during life to rank as a baron, and, even after his retirement or resignation, to a writ of summons to attend, and to sit and vote, in the house of lords; but his dignity is not hereditary, though his children are entitled to the courtesy prefix of "Honorable." The house of lords may sit as a court of appeal during the prorogation of parliament, and even during the dissolution of parliament; should his majesty think fit, by writing under his sign manual, to authorize the lords of appeal to hold sittings during such dissolution.

The judicial committee of the privy council.—The constitution and powers of this body have been described in detail in a former part of this work. Here it is sufficient to say that, by virtue of the Appellate Jurisdiction Act, 1876, the lords of appeal in ordinary now sit as members of the judicial committee; and that the two ultimate courts of appeal are therefore becoming largely, though not entirely, identical in composition. The Act of 1876 directs that, subject to the due performance of his duties with regard to appeals in the house of lords, it shall be the duty of a lord of appeal, if a privy councilor, to sit and act also as a member of the judicial committee. The same act also provides, that his majesty by order in council, with the advice of the judicial committee or any five of them (the lord chancellor being one), and of the archbishops and bishops who are members of the privy council (or any two of them), may make rules for the attendance, as *assessors* of the committee on the hearing of ecclesiastical cases, of such number of the archbishops and bishops of the Church of England as may, by such rules, be determined.

An appeal to the judicial committee is brought by way of petition; and printed cases are lodged. The procedure resembles that in the house of lords; but is regulated, not by orders of that house, but by orders in council. The committee, after hearing the parties, and taking time for deliberation, delivers a written judgment through the mouth of one of its members, in the form of reasons for humbly advising his majesty to allow, or (as the case may be) dismiss, the appeal. Differences of opinion between the members of the board are not officially recorded.—STEPHEN, 3 Comm. (16th ed.), 529–532.

§ 73. **11. Courts of assize and nisi prius.**—Before I conclude this chapter, I must also mention an eleventh species of courts, of general jurisdiction and use, which are derived out of, and act as collateral auxiliaries to, the foregoing; I mean the courts of assize and *nisi prius*.

T[illegible]are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom (except London and Middlesex, where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts; and except the four northern counties, where the assizes are holden only once a year) to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster Hall. These judges of assize came into use in the room of the ancient justices in eyre, *justiciarii in itinere:* who were regularly established, if not first appointed, by the parliament of Northampton, A. D. 1176, 22 Henry II,[n] with a delegated power from the king's great court or *aula regia*, being looked upon as members thereof: and they afterwards made their circuit round the kingdom once in seven years for the purpose of trying causes.[o] They were afterwards directed by *Magna Carta*, c. 12, to be sent into every county once a year, to take (or receive the verdict of the jurors or recognitors in certain actions, then called) recognitions or assizes; the most difficult of which they are directed to adjourn into the court of common pleas to be there determined. The itinerant justices were sometimes mere justices of assize, or of dower, or of gaol delivery, and the like; and [58] they had sometimes a more general commission, to determine all manner of causes, *justiciarii ad omnia placita* (justices for all pleas):[p] but the present justices of assize and *nisi prius* are more immediately derived from the statute Westm. II, 13 Edward I, c. 30 (Justices of *Nisi Prius*, 1285), which

[n] Seld. Jan. l. 2. § 5. Spelm. Cod. 329.

[o] Co. Litt. 293. *Anno* 1261 *justiciarii itinerantes venerunt apud Wigorniam in octavis S. Johannis Baptistæ;—et totus comitatus eos admittere recusavit, quod* septem *anni nondum erant elapsi, postquam justiciarii ibidem ultimo sederunt* (The itinerant justices, or justices in eyre, came to the city of Worcester on the octave of St. John the Baptist; but the whole county refused to admit them because seven years had not yet elapsed since the justices had last sat there). (Annal. Eccl. Wigorn. in Whart. Angl. sacr. I. 495.)

[p] Bract. l. 3. tr. 1. c. 11.

directs them to be assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county. By statute 27 Edward I, c. 4 (1299) (explained by 12 Edward II, c. 3—1318) assizes and inquests were allowed to be taken before any one justice of the court in which the plea was brought; associating to him one knight or other approved man of the county. And lastly, by statute 14 Edward III, c. 16 (*Nisi Prius* Procedure, 1340), inquests of *nisi prius* may be taken before any justice of either bench (though the plea be not depending in his own court) or before the chief baron of the exchequer, if he be a man of the law; or otherwise before the justices of assize, so that one of such justices be a judge of the king's bench or common pleas, or the king's serjeant sworn. They usually make their circuits in the respective vacations after Hilary and Trinity terms; assizes being allowed to be taken in the holy time of Lent by consent of the bishops at the king's request, as expressed in statute Westm. I, 3 Edward I, c. 51 (Times of Taking Certain Assizes, 1275). And it was also usual, during the times of popery, for the prelates to grant annual licenses to the justices of assize to administer oaths in holy times; for oaths being of a sacred nature, the logic of those deluded ages concluded that they must be of ecclesiastical cognizance.[q] The prudent jealousy of our ancestors ordained[r] that no man of law should be judge of assize in his own country: and a similar prohibition is found in the civil law,[s] which has carried this principle so far, that it is equivalent to the crime of sacrilege for a man to be governor of the province in which he was born, or has any civil connection.[t]

The judges upon their circuits now sit 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 [59] to the subsequent book of these Commentaries. But the fourth commission is, 4. A commission of *assize*, directed to the justices and serjeants

q Instances hereof may be met with in the appendix to Spelman's original of the terms, and in M. Parker's Antiquities. 209.

r Stat. 4 Edw. III. c. 2 (Justices of Assize, 1330). 8 Rich. II. c. 2 (1384). 33 Hen. VIII. c. 24 (1541).

s Ff. 1. 22. 3.

t C. 9. 29. 4.

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 and summoned for the trial of *landed* disputes, of which hereafter. The other authority is, 5. That of *nisi prius*, which is a consequence of the commission of *assize*[u] being annexed to the office of those justices by the statute of Westm. II, 13 Edward I, c. 30 (1285). And it empowers them to try all questions of fact issuing out of the courts at Westminster that are then ripe for trial by jury. These by the course of the courts[w] are usually appointed to be tried at Westminster in some Easter or Michaelmas term, by a jury returned from the county, wherein the cause of action arises; but with this proviso, *nisi prius, unless before* the day prefixed the judges of assize come into the county in question.[18] This they are sure to do in the vacations preceding each Easter and Michaelmas term, which saves much expense and trouble. These commissions are constantly accompanied by writs of *association*, in pursuance of the statutes of Edward I and II before mentioned; whereby certain persons (usually the clerk of assize and his subordinate officers) are directed to associate themselves with the justices and serjeants, and they are required to admit the said persons into their society, in order to take the assizes, etc.; that a sufficient supply of commissioners may never be wanting. But, to prevent the delay of justice by the absence of any of them, there is also issued of course a writ of *si non omnes* (if not all); directing, that if all cannot be present, any two of them (a justice or serjeant being one) may proceed to execute the commission.

§ 74. Review of the English judicial system.—These are the several courts of common law and equity, which are of public and general jurisdiction throughout the kingdom. And, upon the whole, we cannot but admire the wise economy and admirable provision of our ancestors in settling the distribution of justice in a method so well calculated for cheapness, expedition and ease. By

u Salk. 454.

w See c. 23. pag. 353.

18 The words "*nisi prius*" were not to be found in the original writ by which the action was commenced: but in the *venire facias*, or writ of the sheriff, which bade him summon a jury of the county and send it to Westminster, "unless," etc. 3 Stephen's Comm. (16th ed.), 519 n.

the constitution which they established, all trivial debts, and injuries of small consequence, were to be recovered or redressed in every [60] man's own county, hundred or perhaps parish. Pleas of freehold, and more important disputes of property, were adjourned to the king's court of common pleas, which was fixed in one place for the benefit of the whole kingdom. Crimes and misdemeanors were to be examined in a court by themselves; and matters of the revenue in another distinct jurisdiction. Now, indeed, for the ease of the subject and greater dispatch of causes, methods have been found to open all the three superior courts for the redress of private wrongs; which have remedied many inconveniences, and yet preserved the forms and boundaries handed down to us from high antiquity. If facts are disputed, they are sent down to be tried in the country by the neighbors; but the law, arising upon those facts, is determined by the judges above: and, if they are mistaken in point of law, there remain in both cases two successive courts of appeal, to rectify such their mistakes. If the rigor of general rules does in any case bear hard upon individuals, courts of equity are open to supply the defect, but not sap the fundamentals, of the law. Lastly, there presides over all one great court of appeal, which is the last resort in matters both of law and equity; and which will therefore take care to preserve an uniformity and *equilibrium* among all the inferior jurisdictions: a court composed of prelates selected for their piety, and of nobles advanced to that honor for their personal merit, or deriving both honor and merit from an illustrious train of ancestors; who are formed by their education, interested by their property, and bound upon their conscience and honor, to be skilled in the laws of their country. This is a faithful sketch of the English juridical constitution, as designed by the masterly hands of our forefathers. Of which the original lines are still strong and visible; and, if any of its minuter strokes are by the length of time at all obscured or decayed, they may still be with ease restored to their pristine vigor: and that not so much by fanciful alterations and wild experiments (so frequent in this fertile age) as by closely adhering to the wisdom of the ancient plan, concerted by Alfred and perfected by Edward I; and by attending to the spirit, without neglecting the forms, of their excellent and venerable institutions.

[61]

CHAPTER THE FIFTH.

OF COURTS ECCLESIASTICAL, MILITARY AND MARITIME.

§ 75. Ecclesiastical, military, and maritime courts.—Besides the several courts which were treated of in the preceding chapter, and in which all injuries are redressed, that fall under the cognizance of the common law of England, or that spirit of equity which ought to be its constant attendant, there still remain some other courts of a jurisdiction equally public and general: which take cognizance of other species of injuries, of an ecclesiastical, military, and maritime nature, and therefore are properly distinguished by the title of ecclesiastical courts, courts military, and courts maritime.

§ 76. 1. Ecclesiastical courts: a. Historical sketch of ecclesiastical jurisdiction.—Before I descend to consider particular ecclesiastical courts, I must first of all in general premise that in the time of our Saxon ancestors there was no sort of 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 ascertained and 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 alderman, or in his absence the sheriff of the county, used to sit 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 judges in temporal.[a] This union of power was very advantageous to them both: the presence of the [62] bishop added weight and reverence to the sheriff's proceedings; and the authority of the sheriff was equally useful to the bishop, by enforcing obedience to his decrees in such refractory offenders as would otherwise have despised the thunder of mere ecclesiastical censures.

[a] *Celeberrimo huic conventui episcopus et aldermannus intersunto; quorum alter jura divina, alter humana populum edoceto* (Let the bishop and alderman be present at this illustrious assembly; of whom let the one instruct the people in divine, the other in human laws). LL. Eadgar. c. 5.

But so moderate and rational a plan was wholly inconsistent with those views of ambition, that were then forming by the court of Rome. It soon became an established maxim in the papal system of policy that all ecclesiastical persons and all ecclesiastical causes should be solely and entirely subject to ecclesiastical jurisdiction only: which jurisdiction was supposed to be lodged in the first place and immediately in the pope, by divine indefeasible right and investiture from Christ Himself; and derived from the pope to all inferior tribunals. Hence the canon law lays it down as a rule, that "*sacerdotes a regibus honorandi sunt, non judicandi* (priests are to be honored, not judged by kings)";[b] and places an emphatical reliance on a fabulous tale which it tells of the Emperor Constantine: that when some petitions were brought to him, imploring the aid of his authority against certain of his bishops, accused of oppression and injustice, he caused (says the holy canon) the petitions to be burnt in their presence, dismissing them with this valediction; "*ite, et inter vos causas vestras discutite, quia dignum non est ut nos judicemus Deos* (go and discuss your causes among yourselves, for it is not fit that we should judge the Gods)."[c]

It was not, however, till after the Norman Conquest that this doctrine was received in England; when William I (whose title was warmly espoused by the monasteries which he liberally endowed, and by the foreign clergy, whom he brought over in shoals from France and Italy and planted in the best preferments of the English church), was at length prevailed upon to establish this fatal incroachment, and separate the ecclesiastical court from the civil: whether actuated by principles of bigotry or by those of a more refined policy, in order to discountenance the laws of King Edward abounding with the spirit of Saxon liberty, is not altogether [63] certain. But the latter, if not the cause, was undoubtedly the consequence, of this separation: for the Saxon laws were soon overborne by the Norman justiciaries, when the county court fell into disregard by the bishop's withdrawing his presence, in obedience to the charter of the Conqueror;[d] which prohibited any spiritual cause from being tried in the secular courts, and com-

[b] Decret. part. 2. caus. 11. qu. 1. c. 41..

[c] *Ibid.*

[d] Hale. Hist. C. L. 102. Selden. in Eadm. p. 6. l. 24. 4 Inst. 259. Wilk. LL. Angl. Sax. 292.

manded the suitors to appear before the bishop only, whose decisions were directed to conform to the canon law.[e]

King Henry the First, at his accession, among other restorations of the laws of King Edward the Confessor, revived this of the union of the civil and ecclesiastical courts.[f] [1] Which was, according to

[e] *Nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundret placita teneant, nec causam quæ ad regimen animarum pertinet ad judicium secularium hominum adducant: sed quicunque secundum episcopales leges, de quacunque causa vel culpa interpellatus fuerit, ad locum, quem ad hoc episcopus elegerit et nominaverit, veniat; ibique de causa sua respondeat; et non secundum hundret, sed secundum canones et episcopales leges, rectum Deo et episcopo suo faciat* (No bishop or archdeacon shall longer hold pleas in the hundred court that are to be decided by episcopal laws, nor bring any cause which relates to spiritual matters (the government of souls) for the judgment of secular persons; but whoever shall be sued according to the episcopal laws, for any cause or offense, shall come to the place chosen and appointed by the bishop for that purpose, and there make his own defense; to the end that right may be done to God and his bishops, according to the canon and episcopal laws, and not those of the hundred).

[f] *Volo et præcipio, ut omnes de comitatu eant ad comitatus et hundreda, sicut fecerint tempore regis Edwardi* (I will and command that all persons belonging to the county attend the county and hundred courts as they did in the time of King Edward). (Cart. Hen. I. in Spelm. cod. vet. legum. 305.) And what is here obscurely hinted at, is fully explained by his code of laws extant in the red book of the exchequer, though in general but of doubtful authority. Cap. 8. *Generalia comitatuum placita certis locis et vicibus teneantur. Intersint autem episcopi, comites, etc.; et agantur primo debita veræ christianitatis jura, secundo regis placita, postremo causæ singulorum dignis satisfactionibus expleantur* (Let the general pleas of the counties be held in certain places and districts; and the bishops and counts, etc., be present; and first, let all affairs concerning religion be transacted; next, the pleas of the crown; and lastly, let the causes of individuals be heard and justly determined).

---

[1] **Ecclesiastical courts.**—The great names of Coke and Blackstone have given general acceptance to this statement that Henry I tried to undo his father's work and closed the separate ecclesiastical courts. But the basis of it is a single phrase in the statute Henry I, c. 8 (quoted by Blackstone in note *f* to p. *63), which may be otherwise understood. Moreover, it is now generally agreed that that compilation is of later date, and at all events subsequent to the synod of Westminster, 3 Henry I, which as Blackstone himself says "soon dissolved this newly effected union." Hence it is safe to say that the phrase cannot mean what is inferred from it.

The jurisdiction of the courts Christian over the testamentary and matrimonial cases of laymen, although peculiar to England, lasted from the time

Sir Edward Coke,[g] after the great heat of the contest was past, only a restitution of the ancient law of England. This, however, was ill-relished by the popish clergy, who, under the guidance of that arrogant prelate, Archbishop Anselm, very early disapproved of a measure that put them on a level with the profane laity, and subjected spiritual men and causes to the inspection of the secular magistrates: and therefore in their synod at Westminster, 3 Henry I (1103), they ordained that no bishop should attend the discussion of temporal causes;[h] which soon dissolved this newly effected union. And when, upon the death of King Henry the First, [64] the usurper Stephen was brought in and supported by the clergy, we find 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.[i] And as it was about that time that the contest and emulation began between the laws of England and those of Rome,[k] the temporal courts adhering to the former, and the spiritual adopting the latter as their rule of proceeding, this widened the breach between them, and made a coalition afterwards impracticable; which probably would else have been effected at the general reformation of the church.

§ 77. b. Classes of ecclesiastical courts.—In briefly recounting the various species of ecclesiastical courts, or, as they are often styled, courts Christian (*curiæ christianitatis*), I shall begin with

g 2 Inst. 70.

h "*Ne episcopi sæcularium placitorum officium suscipiant* (Let no bishop take charge of secular pleas)." Spelm. Cod. 301.

i *Ibid.* 310.

k See Book I. Introd. § 1.

---

of the Conqueror to the present century, surviving the Reformation. Indeed, the return of these matters to the lay courts and common law is one of several reforms for which the mother country is indebted to her eldest daughter. The English colonies in America brought no ecclesiastical courts with them, and were obliged, therefore, to invent a new probate jurisdiction, usually exercised at first by town councils, afterwards by orphans' courts, surrogates, etc.—HAMMOND.

the lowest, and so ascend gradually to the supreme court of appeal.[1] [2]

§ 78. **(1) The archdeacon's court.**—The *archdeacon's* court is the most inferior court in the whole ecclesiastical polity. It is held in the archdeacon's absence before a judge appointed by himself, and called his official; and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the bishop's court of the diocese. From hence, however, by statute 24 Henry VIII, c. 12 (Appeals to Rome, 1532), an appeal lies to that of the bishop.

§ 79. **(2) The consistory court.**—The *consistory* court of every diocesan bishop is held in their several cathedrals, for the trial of all ecclesiastical causes arising within their respective dioceses. The bishop's chancellor, or his commissary, is the judge; and from his sentence an appeal lies, by virtue of the same statute, to the archbishop of each province respectively.[3]

§ 80. **(3) The court of arches.**—The court of *arches* is a court of appeal belonging to the Archbishop of Canterbury; whereof the judge is called [65] the *dean of the arches;* because he anciently held his court in the church of St. Mary *le bow* (*sancta Maria de arcubus*), though all the principal spiritual courts are now holden

1 For further particulars see Burn's Ecclesiastical Law. Wood's Institute of the Common Law, and Oughton's Ordo Judiciorum.

---

2 **Modern jurisdiction in ecclesiastical matters.**—The jurisdiction formerly enjoyed by the ecclesiastical courts in testamentary and matrimonial causes was transferred in 1857 to the court of probate and the court for matrimonial causes, two purely secular tribunals, which are now represented in the probate, divorce, and admiralty division of the high court. But in ecclesiastical matters the following ecclesiastical courts have retained their jurisdiction: (1) the court of the archdeacon; (2) the court of the bishop, otherwise called the consistory court; (3) the provincial court of the archbishop; (4) the judicial committee of the privy council, which took the place of the court of delegates. 3 Stephen's Comm. (16th ed.), 694.

3 Under the Clergy Discipline Act, 1892, all proceedings instituted against clerks, for immorality and the like, are assigned to the bishop's court, and appeals, as regards proceedings under this act, are either to the provincial court or to the judicial committee.

at doctors' commons.[4] His proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London; but the office of dean of the arches having been for a long time united with that of the archbishop's principal official, he now, in right of the last mentioned office, (as doth also the official principal of the Archbishop of York) receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. And from him an appeal lies to the king in chancery (that is, to a court of delegates appointed under the king's great seal) by statute 25 Henry VIII, c. 19 (Crown, 1533), as supreme head of the English church, in the place of the Bishop of Rome, who formerly exercised this jurisdiction; which circumstance alone will furnish the reason why the popish clergy were so anxious to separate the spiritual court from the temporal.

§ 81. (4) The court of peculiars.—The court of *peculiars* is a branch of and annexed to the court of arches. It has a jurisdiction over all those parishes dispersed through the province of Canterbury in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only. All ecclesiastical causes, arising within these peculiar or exempt jurisdictions are, originally, cognizable by this court; from which an appeal lay formerly to the pope, but now by the statute 25 Henry VIII, c. 19 (Crown, 1533), to the king in chancery.

§ 82. (5) The prerogative court.—The *prerogative* court is established for the trial of all testamentary causes, where the de-

4 The provincial court of the Archbishop of Canterbury, which used to be called the court of arches, and the provincial court of the Archbishop of York, which used to be called the chancery court of York, were united by the Public Worship Regulation Act, 1874, which provided, that, the two archbishops might (subject to the approval of the crown) appoint "a judge of the provincial courts of Canterbury and York," and that all proceedings taken before him should be deemed to be taken in the arches court of Canterbury or the chancery court of York, as the case might require. The proper jurisdiction of the court is to determine appeals from the sentence of all inferior ecclesiastical courts within either province; but original suits may also be brought therein, i. e., suits the cognizance of which belongs properly to the inferior jurisdictions within the province, in respect of which the inferior judge has waived his jurisdiction. 3 Stephen's Comm. (16th ed.), 695.

ceased hath left *bona notabilia*[5] within two different dioceses. In which case the probate of wills belongs as we have formerly seen,[m] to the archbishop of the province, by way of special prerogative. And all causes relating to the wills, administrations or legacies of such persons are, originally, cognizable herein, before a judge appointed by the archbishop, called the judge of the prerogative court; from whom an appeal lies by [66] statute 25 Henry VIII, c. 19 (1533) to the king in chancery, instead of the pope, as formerly.

I pass by such ecclesiastical courts as have only what is called a *voluntary* and not a *contentious* jurisdiction; which are merely concerned in doing or selling what no one opposes, and which keep an open office for that purpose (as granting dispensations, licenses, faculties, and other remnants of the papal extortions), but do not concern themselves with administering redress to any injury: and shall proceed to

§ 83. (6) The court of delegates.—The great court of appeal in all ecclesiastical causes, *viz.*, the court of *delegates, judices delegati* (delegated judges), appointed by the king's commission under his great seal, and issuing out of chancery, to represent his royal person, and hear all appeals to him made by virtue of the beforementioned statute of Henry VIII.[6] This commission is usually filled with lords spiritual and temporal, judges of the courts at Westminster, and doctors of the civil law. Appeals to Rome were always looked upon by the English nation, even in the times of popery, with an evil eye; as being contrary to the liberty of the subject, the honor of the crown, and the independence of the whole realm; and were first introduced in very turbulent times in the sixteenth year of King Stephen (A. D. 1151) at the same period (Sir Henry Spelman observes) that the civil and canon laws were first

m Book II. c. 32.

---

5 On *bona notabilia*, see note 13, p. 1402, vol. I.

6 Appeals from the archbishops' courts lay before 1832 to the court of delegates; but since that year all appeals from ecclesiastical courts are referred for decision to the judicial committee of the privy council, and provision is made for the appointment of certain of the archbishops and bishops to attend as assessors of the judicial committee on the hearing of such appeals. 3 Stephen's Comm. (16th ed.), 696.

imported into England.[n] But, in a few years after, to obviate this growing practice, the constitutions made at C' 'endon, 11 Henry II (1164), on account of the disturbances raised by Archbishop Becket and other zeal. s of the Holy See, expressly declare[o] that appeals in causes ecclesiastical ought to lie from the archdeacon to the diocesan; from the diocesan to the archbishop of the province; and from the archbishop to the king; and are not to proceed any further without special license from the crown. But the unhappy advantage that was given in the reigns of King John and his son, Henry the Third, to the encroaching [67] power of the pope, who was ever vigilant to improve all opportunities of extending his jurisdiction hither, at length 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 the Eighth; when all the jurisdiction usurped by the pope in matters ecclesiastical was restored to the crown, to which it originally belonged; so that the statute 25 Henry VIII was but declaratory of the ancient law of the realm.[p] But in case the king himself be party in any of these suits, the appeal does not then lie to him in chancery, which would be absurd; but, by the statute 24 Henry VIII, c. 12 (Appeals to Rome, 1532), to all the bishops of the realm, assembled in the upper house of convocation.

§ 84. **(7) Commission of review.**—A commission of *review* is a commission sometimes granted, in extraordinary cases, to revise the sentence of the court of delegates; when it is apprehended they have been led into a material error. This commission the king may grant, although the statutes 24 & 25 Henry VIII, before cited, declare the sentence of the delegates definitive: because the pope as supreme head by the canon law used to grant such commission of review; and such authority as the pope heretofore exerted is now annexed to the crown[q] by statutes 26 Henry VIII, c. 1 (Act of Supremacy, 1534), and 1 Elizabeth, c. 1 (Act of Supremacy, 1558). But it is not matter of right, which the subject may demand *ex debito justitiæ* (as due to justice); but merely a matter of favor, and which therefore is often denied.

n Cod. vet. leg. 315.
o Chap. 8.
p 4 Inst. 341.
q *Ibid.*

§ 85. **(8) Court of high commission.**—These are now the principal courts of ecclesiastical jurisdiction, none of which are allowed to be courts of record, no more than was another much more formidable jurisdiction, but now deservedly annihilated, *viz.*, the court of the king's *high commission* in causes ecclesiastical. This court was erected and united to the regal power[r] by virtue of the statute 1 Elizabeth, c. 1 (1558), instead of a larger jurisdiction which had before been exercised under the pope's authority. It was intended [88] to vindicate the dignity and peace of the church, by reforming, ordering, and correcting the ecclesiastical state and persons, and all manners of errors, heresies, schisms, abuses, offenses, contempts, and enormities. Under the shelter of which very general words means were found in that and the two succeeding reigns, to vest in the high commissioners extraordinary and almost despotic powers, of fining and imprisoning; which they exerted much beyond the degree of the offense itself, and frequently over offenses by no means of spiritual cognizance. For these reasons this court was justly abolished by statute 16 Car. I, c. 11 (Commission of Inquiry, 1640). And the weak and illegal attempt that was made to revive it, during the reign of King James the Second, served only to hasten that infatuated prince's ruin.

§ 86. **2. Military courts.**—Next, as to the courts military. The only court of this kind known to, and established by, the permanent laws of the land, is the court of *chivalry*, formerly held before the lord high constable and earl marshal of England jointly; but since the attainder of Stafford, Duke of Buckingham, under Henry VIII, and the consequent extinguishment of the office of lord high constable, it hath usually with respect to civil matters been held before the earl marshal only.[s 7] This court by statute 13 Richard II, c. 2 (Benefice, 1389), hath cognizance of contracts and other matters touching deeds of arms and war, as well out of

r 4 Inst. 324.

s 1 Lev. 230. Show. Parl. Cas. 60.

7 **Court of chivalry obsolete.**—The extinction of the hereditary office of constable in 1521 destroyed the continuity of the court of chivalry in its old form with respect to military law, administration of which then passed into the hands of persons specially nominated by the crown, or to commanders-in-chief empowered to delegate judicial authority, which now takes the form of

the realm as within it. And from its sentences an appeal lies immediately to the king in person.[t] This court was in great reputation in the times of pure chivalry, and afterwards during our connections with the Continent, by the territories which our princes held in France; but is now grown almost entirely out of use, on account of the feebleness of its jurisdiction and want of power to enforce its judgments; as it can neither fine nor imprison, not being a court of record.[u]

§ 87. 3. Maritime courts.—The maritime courts, or such as have power and jurisdiction to determine all maritime injuries arising upon the [69] seas, or in parts out of the reach of the common law, are only the court of admiralty, and its courts of appeal.[8] The court of admiralty is held before the lord high admiral of England, or his deputy, who is called the judge of the court.

t 4 Inst. 125.

u 7 Mod. 127.

---

courts-martial. The court has never been expressly abolished by act of parliament, but the supplanting of its criminal and martial jurisdiction, and the decay of interest in questions of heraldry have for all practical purposes put an end to it. 1 Stubbs, Const. Hist., 354; 4 Ency. Laws of Eng. 158.

8 **Court of admiralty.**—This tribunal was originally the court of the lord high admiral, who had jurisdiction, exercised by his deputy, in maritime causes arising on the high seas, and not within the jurisdiction of the courts of common law. The criminal jurisdiction of the admiral to punish piracy, or other crimes committed on the high seas, was taken away in 1536; and, after the restoration of Charles the Second, the maritime jurisdiction of the court in civil cases was considerably curtailed by writs of prohibition issued out of the court of king's bench. During the Napoleonic wars, the court exercised an important jurisdiction in prize cases; and the great reputation of Lord Stowell, who was appointed judge in 1798, attracted public attention to the court. As the result of the report of a commission appointed to inquire into the office and duties of the judge of the court, the Admiralty Court Act of 1840 was passed, which reconstituted the high court of admiralty, and defined and extended its jurisdiction. The jurisdiction of the court was afterwards still further extended by the Admiralty Court Act, 1861, and the Merchant Shipping Acts. The jurisdiction could be exercised by proceedings *in rem*, by warrant for the arrest of the ship to which the claim related; and this was the peculiar and distinctive feature of admiralty jurisdiction. An appeal lay to the judicial committee of the privy council. 3 Stephen's Comm. (16th ed.), 517. The high court of admiralty was abolished by the Judicature Act, 1873, and its jurisdiction was vested in the high court, being assigned to the probate, divorce, and

According to Sir Henry Spelman,[w] and Lambard,[x] it was first of all erected by King Edward the Third. Its proceedings are according to the method of the civil law, like those of the ecclesiastical courts; upon which account it is usually held at the same place with the superior ecclesiastical courts, at doctors' commons in London. It is no court of record, any more than the spiritual courts. From the sentences of the admiralty judge an appeal always lay, in ordinary course, to the king in chancery, as may be collected from statute 25 Henry VIII, c. 19 (Crown, 1533), which directs the appeal from the archbishops' courts to be determined by persons named in the king's commission, "like as in case of appeal from the admiral court." But this is also expressly declared by statute 8 Elizabeth, c. 5 (Judgment of Delegates, 1566), which enacts that upon appeal made to the chancery, the sentence definitive of the delegates appointed by commission shall be final.

Appeals from the vice-admiralty courts in America,[9] and our other plantations and settlements, may be brought before the courts of admiralty in England, as being a branch of the admiral's jurisdiction, though they may also be brought before the king in council. But in case of prize vessels, taken in time of war, in any part of the world, and condemned in any courts of admiralty or vice-

w Gloss. 13. x Archeion. 40.

---

admiralty division. For an account of proceedings in admiralty, see 3 Stephen's Comm. (16th ed.), 656 ff; 1 Halsbury, Laws of Eng., 57 ff. The history of admiralty jurisdiction is given in the last mentioned work, and more fully in Carter, Hist. Eng. Leg. Institutions, 167 ff.

9 **Vice-admiralty courts in America.**—This jurisdiction of course disappeared at the outbreak of the revolution, and one of the earliest acts of the colonies—especially of those interested in navigation and in the fitting out of privateers—was to establish such courts under their own authority. By the ninth of the articles of confederation, Congress was authorized to establish a court of appeal in admiralty from these colonial tribunals. A full and interesting account of that court and of its proceedings is given by the reporter of the United States supreme court in the centennial appendix to those reports. (131 U. S. xi–xlix.)

Much interesting matter relating to the courts and jurisdiction mentioned by Blackstone before the revolution will be found in Chalmers' Colonial Opinions (Am. ed. 1858), pages 499–533, and in Forsyth's Cases and Opinions in Constitutional Law (London, 1869), pages 90–118.—HAMMOND.

admiralty as lawful prize, the appeal lies to certain commissioners of appeals consisting chiefly of the privy council, and not to judges delegates. And this by virtue of divers treaties with foreign nations; by which particular courts are established in all the maritime countries of Europe for the decision of this 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 original court, to which this question is [70] permitted in England, is the court of admiralty; and the court of appeal is in effect the king's privy council, the members of which are, in consequence of treaties, commissioned under the great seal for this purpose. In 1748, for the more speedy determination of appeals, the judges of the courts of Westminster Hall, though not privy counselors, were added to the commission then in being. But doubts being conceived concerning the validity of that commission, on account of such addition, the same was confirmed by statute 22 George II, c. 3 (Prize Causes, 1748), with a proviso that no sentence given under it should be valid, unless a majority of the commissioners present were actually privy counselors. But this did not, I apprehend, extend to any future commissions: and such an addition became indeed wholly unnecessary in the course of the war which commenced in 1756; since, during the whole of that war, the commission of appeals was regularly attended and all its decisions conducted by a judge, whose masterly acquaintance with the law of nations was known and revered by every state in Europe.[y*]

* The reference is to Lord Mansfield, C. J. K. B., who was also a privy counselor and a member of the commission of appeals.—HAMMOND.

y See the sentiments of the President Montesquieu, and M. Vattel (a subject of the King of Prussia) on the answer transmitted by the English court to his Prussian Majesty's Exposition des Motifs, etc., A. D. 1753. (Montesquieu's Letters, 5 Mar. 1753. Vattel's Droit de Gens. l. 2. c. 7. § 84.)

[71]

CHAPTER THE SIXTH.

OF COURTS OF A SPECIAL JURISDICTION.

§ 88. Courts of special jurisdiction.—In the two preceding chapters we have considered the several courts whose jurisdiction is public and general, and which are so contrived that some or other of them may administer redress to every possible injury that can arise in the kingdom at large. There yet remain certain others, whose jurisdiction is private and special, confined to particular spots or instituted only to redress particular injuries. These are

§ 89. 1. The forest courts.—The forest courts, instituted for the government of the king's forests in different parts of the kingdom, and for the punishment of all injuries done to the king's 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 *sweinmote*, and of *justice seat*. 1. The court of *attachments*, *woodmote*, or forty days court, is to be held before the verderers of the forest once in every forty days;[a] and is instituted to inquire into all offenders against vert and venison:[b] who may be attached by their bodies, if taken with the mainor (or *mainœuvre, a manu*). that is, in the very act of killing venison or stealing wood, or preparing so to do, or by fresh and immediate pursuit after the act is done;[c] else, they must be attached by their goods. And in this forty days court the foresters or keepers are to bring in their attachments, [72] or presentments *de viridi et venatione* (of vert and venison); and the verderers are to receive the same, and to enroll them, and to certify them under their seals to the court of justice seat, or sweinmote:[d] for this court can only inquire of, but not convict offenders. 2. The court of *regard*, or survey of dogs, is to be holden every third year for the lawing or expeditation of mastiffs, which is done by cutting off the claws of the forefeet, to prevent them from running after deer.[e] No other dogs but mastiffs are to be thus lawed or expeditated, for none

[a] Cart. de Forest. 9 Hen. III. c. 8.
[b] 4 Inst. 289.
[c] Carth. 79.
[d] Cart. de Forest. c. 16.
[e] *Ibid.* c. 6.

other were permitted to be kept within the precincts of the forest; it being supposed that the keeping of these, and these only, was necessary for the defense of a man's house.[f] 3. The court of *sweinmote* is to be holden before the verderers, as judges, by the steward of the sweinmote thrice in every year,[g] the sweins or freeholders within the forest composing the jury. The principal jurisdiction of this court is, first, to inquire into the oppressions and grievances committed by the officers of the forest; "*de super-oneratione forestariorum, et aliorum ministrorum forestæ; et de eorum oppressionibus populo regis illatis* (concerning the impositions of the foresters, and other officers of the forest; and their oppression on the king's people)"; and, secondly, to receive and try presentments certified from the court of attachments against offenses in vert and venison.[h] And this court may not only inquire, but convict also, which conviction shall be certified to the court of justice seat under the seals of the jury; for this court cannot proceed to judgment.[i] But the principal court is, 4. The court of *justice seat*, which is held before the chief justice in eyre, or chief itinerant judge, *capitalis jusitiarius in itinere*, or his deputy; to hear and determine all trespasses within the forest, and all claims of franchises, liberties and privileges, and all pleas and causes whatsoever therein arising.[k] It may also proceed to try presentments in the inferior courts of the forests, and to give judgment upon conviction of the sweinmote. And the chief justice may therefore after presentment made or indictment found, but [73] not before,[l] issue his warrant to the officers of the forest to apprehend the offenders. It may be held every third year; and forty days' notice ought to be given of its sitting. This court may fine and imprison for offenses within the forest,[m] it being a court of record: and therefore a writ of error lies from hence to the court of king's bench, to rectify and redress any maladministrations of justice;[n]

f 4 Inst. 308.
g Cart. de Forest. c. 8.
h Stat. 34 Edw. I. c. 1 (Forest, 1306).
i 4 Inst. 289.
k 4 Inst. 291.
l Stat. 1 Edw. III. c. 8 (Beaupleader, 1326). 7 Rich. II. c. 4 (Forest, 1383).
m 4 Inst. 313.
n *Ibid.* 297.

or the chief justice in eyre may adjourn any matter of law into the court of king's bench.[o] These justices in eyre were instituted by King Henry II, A. D. 1184;[p] and their courts were formerly very regularly held; but the last court of justice seat of any note was that holden in the reign of Charles I, before the Earl of Holland; the rigorous proceedings at which are reported by Sir William Jones. After the restoration another was held, *pro forma* (as a matter of form) only, before the Earl of Oxford;[q] but since the era of the revolution in 1688, the forest laws have fallen into total disuse, to the great advantage of the subject.

§ 90. **2. The commissioners of sewers.**—A second species of restricted courts is that of commissioners of *sewers*. This is a temporary tribunal erected by virtue of a commission under the great seal; which formerly used to be granted *pro re nata* (for the occasion as it may arise) at the pleasure of the crown,[r] but now at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute 23 Henry VIII, c. 5 (Sewers, 1531). Their 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 shall expressly name. The commissioners are a court of record, and may fine and imprison for contempts;[s] and in the execution of their duty may proceed by jury, or upon their own view, and may take order for the removal of any annoyances, or the safeguard [74] and conservation of the sewers within their commission, either according to the laws and customs of Romney-marsh,[t] or otherwise at their own discretion. They may also assess such rates, or scots, upon the owners of lands within their district, as

o *Ibid.* 295.

p Hoveden.

q North's Life of Lord Guildford. 45.

r F. N. B. 113.

s 1 Sid. 145.

t Romney-marsh in the county of Kent, a tract containing 24,000 acres, is governed by certain ancient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of King Henry the Third; from which laws all commissioners of sewers in England may receive light and direction. (4 Inst. 276.)

they shall judge necessary; and, if any person refuses to pay them, the commissioners may levy the same by distress of his goods and chattels; or they may, by statute 23 Henry VIII, c. 5 (Sewers, 1531), sell his freehold lands (and by the 7 Ann., c. 10 (1708), his copyhold also) in order to pay such scots or assessments. But their conduct is under the control of the court of king's bench, which will prevent or punish any illegal or tyrannical proceedings.[u] And yet in the reign of King James I (8 Nov. 1616), the privy council took upon them to order, that no action or complaint should be prosecuted against the commissioners, unless before that board; and committed several to prison who had brought such action at common law, till they should release the same: and one of the reasons for discharging Sir Edward Coke from his office of lord chief justice was for countenancing those legal proceedings.[v] The pretense for which arbitrary measures was no other than the tyrant's plea,[w] of the *necessity* of unlimited powers in works of evident utility to the public, "the supreme reason above all reasons, which is the salvation of the king's lands and people." But now it is clearly held, that this (as well as all other inferior jurisdictions) is subject to the discretionary coercion of his majesty's court or king's bench.[x]

§ 91. 3. The court of policies of assurance.—The court of *policies of assurance*, when subsisting, is erected in pursuance of the statute 43 Elizabeth, c. 12 (Policies of Assurance, 1601), which recites the immemoral usage of policies of assurance, "by means whereof it cometh to pass, upon the loss or perishing [75] of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavy upon few, and rather upon them that adventure not, than upon those that do adventure: whereby all merchants, especially those of the younger sort, are allured to venture more willingly and more freely: and that heretofore such assurers had used to stand so justly and precisely upon their credits, as few or no controversies had arisen thereupon; and if any had grown, the same had from time to time been ended and ordered by certain grave and discreet merchants appointed by the

u Cro. Jac. 336.
v Moor. 825, 826. See pag. 54.
w Milt. Parad. Lost, iv. 393.
x 1 Ventr. 66. Salk. 146.

lord mayor of the city of London; as men by reason of their experience fittest to understand and speedily decide those causes"; but that of late years divers persons had withdrawn themselves from that course of arbitration, and had driven the assured to bring separate actions at law against each assurer: it therefore enables the lord chancellor yearly to grant a standing commission to the judge of the admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight merchants; any three of which, one being a civilian or a barrister, are thereby and by the statute 13 & 14 Car. II, c. 23 (Policies of Assurance, 1662), empowered to determine in a summary way all causes concerning policies of assurance in London, with an appeal (by way of bill) to the court of chancery. But the jurisdiction being somewhat defective, as extending only to London, and to no other assurances but those on merchandise,[y] and to suits brought by the assured only and not by the insurers,[z] no such commission has of late years issued; but insurance causes are now usually determined by the verdict of a jury of merchants, and the opinion of the judges in case of any legal doubts; whereby the decision is more speedy, satisfactory and final: though it is to be wished, that some of the parliamentary powers invested in these commissioners, especially for the examination of witnesses, either beyond the seas or speedily going out of the kingdom,[a] could at present be adopted by the courts of Westminster Hall, without requiring the consent of parties.

§ 92. 4. The court of marshalsea, and the palace court.—[76] The court of the *marshalsea*, and the *palace court* at Westminster, though two distinct courts, are frequently confounded together. The former was originally holden before the steward and marshal of the king's house, and was instituted to administer justice between the king's domestic servants, that they might not be drawn into other courts, and thereby the king lose their service.[b] It was formerly held in, though not a part of, the *aula regis*;[c] and, when

y Styl. 166.
z 1 Show. 396.
a Stat. 13 & 14 Car. II. c. 22. § 3 & 4 (Moss Troopers, 1662).
b 1 Bulstr. 211.
c Flet. l. 2. c. 2.

that was subdivided, remained a distinct jurisdiction: holding plea of all trespasses committed within the verge of the court, where only one of the parties is in the king's domestic service (in which case the inquest shall be taken by a jury of the country) and of all debts, contracts, and covenants, where both of the contracting parties belong to the royal household; and then the inquest shall be composed of men of the household only.[d] By the statute of 13 Richard II, st. 1, c. 3—1389 (in affirmance of the common law[e]), the verge of the court in this respect extends for twelve miles round the king's place of residence.[f] And, as this tribunal was never subject to the jurisdiction of the chief justiciary, no writ of error lay from it (though a court of record) to the king's bench, but only to parliament,[g] till the statutes of 5 Edward III, c. 2 (Marshalsea, 1331), and 10 Edward III, st. 2, c. 3 (Purveyance, 1336), which allowed such writ of error before the king in his place. But this court being ambulatory, and obliged to follow the king in all his progresses, so that by the removal of the household, actions were frequently discontinued,[h] and doubts having arisen as to the extent of its jurisdiction,[i] King Charles I, in the sixth year of his reign (1630), by his letters patent erected a new court of record, called the *curia palatii* or *palace court*, to be held before the steward of the household and knight marshal, and the steward of the court, [77] or his deputy; with jurisdiction to hold plea of all manner of personal actions whatsoever, which shall arise between any parties within twelve miles of his majesty's palace at Whitehall.[k] The court is now held once a week, together with the ancient court of marshalsea, in the borough of Southwark: and a writ of

[d] Artic. Sup. Cart. 28 Edw. I. c. 3 (Inquests Within Verge, 1300). Stat. 5 Edw. III. c. 2 (Marshalsea, 1331). 10 Edw. III. st. 2. c. 2 (1336).

[e] 2 Inst. 548.

[f] By the ancient Saxon constitution, the *pax regia*, or privilege of the king's palace, extended from his palace gate to the distance of three miles, three furlongs, three acres, nine feet, nine palms, and nine barley corns; as appears from a fragment of the *textus Roffensis* cited in Dr. Hickes's Dissertat. Epistol. 114.

[g] 1 Bulstr. 211. 10 Rep. 79.

[h] F. N. B. 241. 2 Inst. 548.

[i] 1 Bulstr. 208.

[k] 1 Sid. 180. Salk. 439.

error lies from thence to the court of king's bench.[1] But if the cause is of any considerable consequence, it is usually removed on its first commencement, together with the custody of the defendant, either into the king's bench or common pleas by a writ of *habeas corpus cum causa:* and the inferior business of the court hath of late years been much reduced, by the new courts of conscience erected in the environs of London; in consideration of which the four counsel belonging to these courts had salaries granted them for their lives by the statute 23 George II, c. 27 (1749).

§ 93. **5. Courts of the principality of Wales.**—A fifth species of private courts of a limited, though extensive, jurisdiction are those of the principality of Wales; which upon its thorough reduction, and the settling of its polity in the reign of Henry the Eighth,[l] were erected all over the country; principally by the statute 34 & 35 Henry VIII, c. 26 (Wales Government, 1543), though much had before been done, and the way prepared by the statute of Wales, 12 Edward I (1284), and other statutes.[2] By the statute of Henry the Eighth before mentioned, courts-baron, hundred and county courts are there established as in England. A session is also to be held twice in every year in each county, by judges[m] appointed by the king, to be called the great sessions of the several counties in Wales; in which all pleas of real and personal actions shall be held, with the same form of process and in as ample a

[l] See Book I. Introd. § 4.

[m] Stat. 18 Eliz. c. 8 (Welch Circuits, 1575).

---

1 The jurisdictions of both the court of marshalsea and the palace court were abolished in 1849, the previous work in smaller matters being assigned to the then newly established county courts, and the more important to the court of common pleas. The whole of the law relating to this court is comprehensively reviewed in the case of *The Marshalsea* (1613), 10 Co. Rep. 68 b, all the early authorities being cited and explained.

2 In 1830 the separate jurisdiction for the principality of Wales and the county palatine of Chester was abolished and it was provided that the assizes should be held in Chester and Wales as in other places. That was the position at the time of the passing of the Judicature Act of 1873, which enacted that the counties palatine of Lancaster and Durham should cease to be counties palatine as respects the issue of commissions of assize or other like commissions, but no further. The court of chancery of Lancashire is said to be still vigorous. Carter, Eng. Leg. Institutions, 286.

manner as in the court of common pleas at Westminster:[n] and writs of error shall lie from judgments therein (it being a court of record) to the court of king's bench at Westminster. But the ordinary original writs or process of the king's courts at Westminster do not run into the principality of Wales,[o] though [78] process of execution does,[p] as do also all prerogative writs, as writs of *certiorari*, *quo minus*, *mandamus*, and the like.[q] And even in causes between subject and subject, to prevent injustice through family factions or prejudices, it is held lawful (in causes of freehold at least, and it is usual in all others) to bring an action in the English courts, and try the same in the next English county adjoining to that part of Wales where the cause arises,[r] and wherein the venue is laid. But, on the other hand, to prevent trifling and frivolous suits, it is enacted by statute 13 George III, c. 51 (Frivolous Suits, 1772), that in *personal* actions, *tried* in any English county, where the cause of action arose, and the defendant resides in Wales, if the plaintiff shall not recover a verdict for ten pounds, he shall be nonsuited and pay the defendant's costs, unless it be certified by the judge that the freehold or title came principally in question, or that the cause was proper to be tried in such English county. And if any *transitory* action, the cause whereof arose and the defendant is resident in Wales, shall be *brought* in any English county, and the plaintiff shall not recover a verdict for ten pounds, the plaintiff shall be nonsuited, and shall pay the defendant's costs, deducting thereout the sum recovered by the verdict.

§ 94. 6. The court of the duchy chamber of Lancaster.—The court of the duchy chamber of Lancaster is another special jurisdiction, held before the chancellor of the duchy or his deputy, concerning all matter of equity relating to lands holden of the king

n See, for further regulation of the practice of these courts, stat. 5 Eliz. c. 25 (Juries, 1562). 8 Eliz. c. 20 (Criminal Law, 1566). 8 Geo. I. c. 25. § 6 (Judgments, 1721). 6 Geo. II. c. 14 (Courts in Wales and Chester, 1732). 13 Geo. III. c. 51 (Frivolous Suits, 1772).

o 2 Roll. Rep. 141.

p 2 Bulst. 156. 2 Saund. 193. Raym. 206.

q Cro. Jac. 484.

r Vaugh. 413. Hardr. 66.

in right of the duchy of Lancaster:[s] which is a thing very distinct from the county palatine (which hath also its separate chancery for sealing of writs, and the like[ss]), and comprises much territory which lies at a vast distance from it; as particularly a very large district surrounded by the city of Westminster. The proceedings in this court are the same as on the equity side in the courts of exchequer and chancery;[t] so that it seems not to be a court of record; and indeed it has been holden that those courts have a concurrent jurisdiction with the duchy court, and may take cognizance of the same causes.[u]

§ 95. **7. Courts of counties palatine.**—[79] Another species of private courts, which are of a limited local jurisdiction, and have at the same time an exclusive cognizance of pleas, in matters both of law and equity,[v] are those which appertain to the counties palatine of Chester, Lancaster and Durham, and the royal franchise of Ely.[w] In all these, as in the principality of Wales, the king's ordinary writs, issuing under the great seal out of chancery, do not run; that is, they are of no force. For, as originally all *jura regalia* (royal rights) were granted to the lords of these counties palatine, they had of course the sole administration of justice, by their own judges appointed by themselves and not by the crown. It would therefore be incongruous for the king to send his writ to direct the judge of another's court in what manner to administer justice between the suitors. But, when the privileges of these counties palatine and franchises were abridged by statute 27 Henry VIII, c. 24 (Franchises, 1535), it was also enacted that all writs and process should be made in the king's name, but should be *tested* or witnessed in the name of the owner of the franchise. Wherefore all writs, whereon actions are founded, and which have current authority here, must be under the seal of the respective franchises; the two former of which are now united to the crown, and the two latter under the government of their several bishops. And the judges of assize, who sit therein, sit by virtue of a special commission from the owners of the several franchises, and under

s Hob. 77. 2 Lev. 24.
ss 1 Ventr. 257.
t 4 Inst. 206.
u 1 Chan. Rep. 55. Toth. 145. Hard. 171.
v 4 Inst. 213. 218. Finch. R. 452.
w See Book I. Introd. § 4.

the seal thereof; and not by the usual commission under the great seal of England. Hither also may be referred the courts of the *cinque ports*,[3] or five most important havens, as they formerly were esteemed, in the kingdom; *viz.*, Dover, Sandwich, Romney, Hastings and Hythe; to which Winchelsey and Rye have been since added: which have also similar franchises in many respects[x] with the counties palatine, and particularly an exclusive jurisdiction (before the mayor and jurats of the ports) in which exclusive jurisdiction the king's ordinary writ does not run. A writ of error lies from the mayor and jurats of each port to the lord warden of the *cinque ports*, in his court of *Shepway;* and from the court of *Shepway* to the king's [80] bench.[y] So, likewise, a writ of error lies from all the other jurisdictions to the same supreme court of judicature,[z] as an ensign of superiority reserved to the crown at the original creation of the franchises. And all prerogative writs (as those of *habeas corpus*, prohibition, *certiorari*, and *mandamus*) may issue for the same reason to all these exempt jurisdictions;[a] because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king.[b]

§ 96. **8. The stannary courts.**—The stannary courts in Devonshire and Cornwall, for the administration of justice among the tinners therein, are also courts of record, but of the same private and exclusive nature. They are held before the lord warden and his substitutes, 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 lawsuits in other

x 1 Sid. 166.

y Jenk. 71. Dyversyte des Courts. t. Bank le Roy. 1 Sid. 356.

z Bro. Abr. t. Error. 74. 101. Davis. 62. 4 Inst. 38. 214. 218.

a 1 Sid. 92.

b Cro. Jac. 543.

---

3 Very little remains of the former jurisdiction of the Lord Warden of the *cinque ports*, whose civil jurisdiction was abolished, except as to salvage, in 1855. A commission for the punishment of offenses may be issued. The admiralty court of the *cinque ports* is still preserved. 9 Halsbury, Laws of Eng. 127.

courts.[c] The privileges of the tinners are confirmed by a charter, 33 Edward I (1305), and fully expounded by a private statute, 50 Edward III (1376), which[d] has since been explained by a public act, 16 Car. I, c. 15 (Stannaries Court, 1640). What relates to our present purpose is only this: that all tinners and laborers in and about the stannaries shall, during the time of their working therein *bona fide*, be privileged from suits of other courts, and be only impleaded in the stannary court in all matters, excepting pleas of land, life and member. No writ of error lies from hence to any court in Westminster Hall; as was agreed by all the judges[e] in 4 Jac. I (1606). But an appeal lies from the steward of the court to the under-warden; and from him to the lord warden; and thence to the privy council of the Prince of Wales, as Duke of Cornwall,[f] when he hath had livery or investiture of the same.[g] And from thence the appeal lies to the king himself, in the last resort.[h]

§ 97. 9. Courts of London and other cities.—[81] The several courts within the city of London,[i] and other cities, boroughs and corporations throughout the kingdom, held by prescription, charter or act of parliament, are also of the same private and limited species. It would exceed the design and compass of our present inquiries if I were to enter into a particular detail of these, and to examine the nature and extent of their several jurisdictions. It may in general be sufficient to say, that they arose originally from the favor of the crown to those particular districts, wherein we find them erected, upon the same principle that hundred courts, and the like, were established; for the conven-

c 4 Inst. 232.

d See this at length in 4 Inst. 232.

e 4 Inst. 231.

f *Ibid.* 230.

g 3 Bulst. 183.

h Doderidge Hist. of Cornw. 94.

i The chief of those in London are the *sheriff's courts*, holden before their steward or judge; from which a writ of error lies to the *court of hustings*, before the mayor, recorder, and sheriffs; and from thence to justices appointed by the king's commission, who used to sit in the church of St. Martin *le grand*. (F. N. B. 32.) And from the judgment of those justices a writ of error lies immediately to the house of lords.

ience of the inhabitants, that they may prosecute their suits, and receive justice at home: that, for the most part, the courts at Westminster Hall have a concurrent jurisdiction with these, or else a superintendency over them:[1] and that the proceedings in these special courts ought to be according to the course of the common law, unless otherwise ordered by parliament; for though the king may erect new courts, yet he cannot alter the established course of law.

§ 98. **a. Courts of requests.**—But there is one species of courts, constituted by act of parliament, in the city of London and other trading and populous districts, which in its proceedings so varies from the course of the common law, that it may deserve a more particular consideration. I mean the courts of requests, or courts of conscience, for the recovery of small debts.[4] The first of these was established in London, so early as the reign of Henry the Eighth, by an act of their common council; which, however, was certainly insufficient for that purpose and illegal, till confirmed by statute 3 Jac. I, c. 15 (1605), which has since been explained and amended by statute 14 George II, c. 10 (1740). The constitution is this: two aldermen, and four commoners, sit twice a week to hear all causes of debt not exceeding the [82] value of forty shillings; which they examine in a summary way, by the oath of the parties or other witnesses, and make such order therein as is consonant to equity and good conscience. The time and expense of obtaining this summary redress are very inconsiderable, which make it a great benefit to trade; and thereupon divers trading towns and other districts have obtained acts of parliament, for establishing in them courts of conscience upon nearly the same plan as that in the city of London.

The anxious desire that has been shown to obtain these several acts proves clearly that the nation in general is truly sensible of the great inconvenience arising from the disuse of the ancient county and hundred courts; wherein causes of this small value were always formerly decided, with very little trouble and expense to the parties. But it is to be feared that the general

[1] Salk. 144. 263.

[4] See note on county courts, p. 1543, *ante*.

remedy which of late hath been principally applied to this inconvenience (the erecting these new jurisdictions) may itself be attended in time with very ill consequences: as the method of proceeding therein is entirely in derogation of the common law; as their large discretionary powers create a petty tyranny in a set of standing commissioners, and as the disuse of the trial by jury may tend to estrange the minds of the people from that valuable prerogative of Englishmen, which has already been more than sufficiently excluded in many instances. How much rather is it to be wished, that the proceedings in the county and hundred courts could again be revived,* without burdening the freeholders with too frequent and tedious attendances; and at the same time removing the delays that have insensibly crept into their proceedings, and the power that either party have of transferring at pleasure their suits to the courts at Westminster!

§ 99. **(1) Court of county of Middlesex.**—And we may with satisfaction observe, that this experiment has been actually tried, and has succeeded in the populous county of Middlesex; which might serve as an example for others. For by statute 23 George II, c. 33 (1749), it is enacted, 1. That a special county court shall be held, at least once a month in every hundred of the county of Middlesex, [83] by the county clerk. 2. That twelve freeholders of that hundred, qualified to serve on juries, and struck by the sheriff, shall be summoned to appear at such court by rotation; so as none shall be summoned oftener than once a year. 3. That in all causes, not exceeding the value of forty shillings, the county clerk and twelve suitors shall proceed in a summary way, examining the parties and witnesses on oath, without the formal process anciently used; and shall make such order therein as they shall

* Blackstone's wish was fulfilled, long after his death, by the complete remodeling of the county courts and the establishment of the modern system by 9 & 10 Vict. c. 95 (1846—County Courts), with subsequent acts, especially in 1867 enlarging the jurisdiction. These are now held by judges appointed for that purpose in all the more important cities and towns of England. Their jurisdiction has several times been enlarged, and they now form a very important part of the administration of justice in England, superseding the great number of petty corporation and other courts of which Blackstone complains in this paragraph.—HAMMOND.

judge agreeable to conscience. 4. That no plaints shall be removed out of this court, by any process whatsoever; but the determination herein shall be final. 5. That if any action be brought in any of the superior courts against a person resident in Middlesex, for a debt or contract, upon the trial whereof the jury shall find less than 40*s*. damages, the plaintiff shall recover no costs, but shall pay the defendant double costs; unless upon some special circumstances, to be certified by the judge who tried it. 6. Lastly, a table of very moderate fees is prescribed and set down in the act; which are not to be exceeded upon any account whatsoever. This is a plan entirely agreeable to the constitution and genius of the nation: calculated to prevent a multitude of vexatious actions in the superior courts, and at the same time to give honest creditors an opportunity of recovering small sums; which now they are frequently deterred from by the expense of a suit at law: a plan which, in short, wants only to be generally known, in order to its universal reception.

§ 100. 10. Courts of the universities.—There is yet another species of private courts, which I must not pass over in silence: *viz.*, the chancellor's courts in the two universities of England. Which two learned bodies enjoy the sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits whatsoever, when a scholar or privileged person is one of the parties; excepting in such cases where the right of freehold is concerned. And these by the university charter 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; which has generally led them to carry on their process in a [84] course much conformed to the civil law, for reasons sufficiently explained in a former volume.[k]

These privileges were granted, that the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations. And privileges of this kind are of very high antiquity, being generally enjoyed by all foreign universities as well as our own, in consequence (I apprehend) of a constitution of the Emperior Frederick, A. D. 1158.[l] But as to

[k] Book I. Introd. § 1.

[l] Cod. 4. tit. 13.

England in particular, the oldest charter that I have seen, containing this grant to the University of Oxford was 28 Henry III, A. D. 1244. And the same privileges were confirmed and enlarged by almost every succeeding prince, down to King Henry the Eighth; in the fourteenth year of whose reign the largest and most extensive charter of all was granted. One similar to which was afterwards granted to Cambridge in the third year of Queen Elizabeth. But yet, notwithstanding these charters, the privileges granted therein, of proceeding in a course different from the law of the land, were of so high a nature, that they were held to be invalid; for though the king might erect new courts, yet he could not alter the course of law by his letters patent. Therefore, in the reign of Queen Elizabeth an act of parliament was obtained,[m] confirming *all* the charters of the two universities, and those of 14 Henry VIII (1523), and 3 Elizabeth (1560), by name. Which *blessed act*, as Sir Edward Coke entitles it,[n] established this high privilege without any doubt or opposition:[o] or, as Sir Matthew Hale[p] very fully expresses the sense of the common law and the operation of the act of parliament, "although King Henry the Eighth, 14 *A. R. sui*, granted to the university a liberal charter, to proceed according to the use of the university; *viz.*, by a course much conformed to the civil law; yet that charter had not been sufficient to have warranted such proceedings without the help of an act of parliament. And therefore in 13 Elizabeth (1571), [85] an act passed, whereby that charter was in effect enacted; and it is thereby that at this day they have a kind of civil law procedure, even in matters that are of themselves of common law cognizance, where either of the parties is privileged."[5]

This privilege, so far as it relates to civil causes, is exercised at Oxford in the chancellor's court; the judge of which is the vice-

m 13 Eliz. c. 29 (Oxford and Cambridge Universities, 1571).

n 4 Inst. 227.

o Jenk. Cent. 2. pl. 88. Cent. 3. pl. 33. Hardr. 504. Godbolt. 201.

p Hist. C. L. 33.

---

5 The statute of 13 Eliz. (1571), c. 29, which subsequently recognized and confirmed all the charters of these two universities, and those of the 14 Henry VIII (for Oxford) and 3 Elizabeth (for Cambridge) by name, fully established the civil privileges of these universities. It is to be observed, however,

chancellor, his deputy, or assessor. From his sentence an appeal lies to delegates appointed by the congregation; from thence to other delegates of the house of convocation; and if they all three concur in the same sentence it is final, at least by the statutes of the university,[q] according to the rule of the civil law.[r] But, if there be any discordance or variation in any of the three sentences, an appeal lies in the last resort to judges delegates appointed by the crown under the great seal in chancery.

I have now gone through the several species of private, or special, courts of the greatest note in the kingdom, instituted for the local redress of private wrongs; and must, in the close of all, make one general observation from Sir Edward Coke;[s] that these particular 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 will most explicitly warrant.

q Tit. 21. § 19.
r Cod. 7. 70. 1.
s 2 Inst. 548.

---

that the privilege can be claimed only on behalf of members who are defendants; and when an action in the high court is brought against such member, the university enters a *claim of conusance*, that is, claims the cognizance of the matter, whereupon the action is withdrawn from the high court and transferred to the university court. (Ginnett v. Whittingham (1885), 16 Q. B. D. 761). But as regards the University of Cambridge, the privilege is, *semble*, no longer exclusive. The procedure in the university courts is, for the most part, regulated according to the laws of the civilians; but is subject to any specific rules made by the vice-chancellor of the university with the approval of three of his majesty's judges. And, as regards appeals, the procedure thereon is like that on appeals from other inferior courts; the appeal being to a divisional court of the high court of justice.—STEPHEN, 3 Comm. (16th ed.), 693.

[86]

CHAPTER THE SEVENTH.

OF THE COGNIZANCE OF PRIVATE WRONGS.

§. 101. Civil jurisdiction of the several courts.—We are now to proceed to the cognizance of private wrongs; that is, to consider in which of the vast variety of courts, mentioned in the three preceding chapters, every possible injury that can be offered to a man's person or property is certain of meeting with redress.

The authority of the several courts of private and special jurisdiction, or of what wrongs such courts have cognizance, was necessarily remarked as those respective tribunals were enumerated; and therefore need not be here again repeated: which will confine our present inquiry to the cognizance of civil injuries in the several courts of public or general jurisdiction. 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 military. 3. What in the maritime. And 4. What in the courts of common law.

§ 102. Common-law rule of jurisdiction of all courts.—And, with regard to the three first of these particulars, I must beg not so much to consider what hath at any time been *claimed* or pretended to belong to their jurisdiction, by the officers and judges of those respective courts; but what the common law allows and permits to be so. For these eccentrical tribunals (which are principally guided by the rules of the imperial and canon laws) as they subsist and are admitted [87] in England, not by any right of their own,[a] but upon bare sufferance and toleration from the municipal laws, must have recourse to the laws of that country wherein they are thus adopted, to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden, to be discussed or drawn in question before them. It matters not, therefore, what the pandects of Justinian or the decretals of Gregory have ordained. They are here of no more intrinsic authority than the laws of Solon and Lycurgus: curious, perhaps, for their antiquity, respectable for their equity, and frequently

[a] See Book I, Introd. § 1.

of admirable use in illustrating a point of history. Nor is it at all material in what light other nations may consider this matter of jurisdiction. Every nation must and will abide by its own municipal laws; which various accidents conspire to render different in almost every country in Europe. We permit some kinds of suits to be of ecclesiastical cognizance, which other nations have referred entirely to the temporal courts; as concerning wills and successions to intestates' chattels: and perhaps we may, in our turn, prohibit them from interfering in some controversies, which on the Continent may be looked upon as merely spiritual. In short, the common law of England is the one uniform rule to determine the jurisdiction of courts; and, if any tribunals whatsoever attempt to exceed the limits so prescribed them, the king's courts of common law may and do prohibit them; and in some cases punish their judges.[b]

Having premised this general caution, I proceed now to consider

§ 103. 1. Jurisdiction of ecclesiastical courts.—The wrongs or injuries cognizable by the ecclesiastical courts.[1] I mean such as

[b] Hal. Hist. C. L. c. 2.

---

[1] **Restrictions on the jurisdiction of ecclesiastical courts.**—During the nineteenth century the jurisdiction of the ecclesiastical courts was considerably curtailed. Their cognizance of cases of defamation was taken away in 1855. Two years later their jurisdiction in testamentary matters and in cases of intestacy was transferred to the court of probate which was then created, and their jurisdiction in matrimonial causes was transferred to the newly established divorce court. In 1860 their power of trying and punishing lay persons for brawling in a church or churchyard was abolished, without prejudice to their jurisdiction over clergymen for a similar offense. And their power of correcting lay persons who are guilty of moral offenses has fallen into desuetude, and has been judicially declared to be inconsistent with modern custom and opinion. (Phillimore v. Machon (1876), 1 P. D. 481, per Lord Penzance, at p. 487).—HALSBURY, 11 Laws of Eng. 505.

The present jurisdiction of the ecclesiastical courts is limited to (1) enforcing the discipline of the clergy; (2) correcting certain ecclesiastical offenses or omissions on the part of lay persons holding some office or position in the church; (3) protecting buildings and ground consecrated to ecclesiastical purposes and everything placed in or upon such buildings and ground, and guarding the rights of the parishioners therein; and (4) adjudicating upon and enforcing some other civil rights in connection with ecclesiastical matters.—*Ibid.* 512.

are offered to private persons or individuals; which are cognizable by the ecclesiastical court, not for reformation of the offender himself or party *injuring* (*pro salute animæ*—for the safety of the soul), as is the case with immoralities in general, when unconnected with private injuries), but for the sake of the party *injured*, to make him a satisfaction and redress for [88] the damage which he has sustained. And these I shall reduce under three general heads; of causes *pecuniary*, causes *matrimonial*, and causes *testamentary*.

§ 104. a. Pecuniary causes cognizable in ecclesiastical courts. Pecuniary causes, cognizable in the ecclesiastical courts, are such as 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 is permitted to institute a suit in the spiritual court.

§ 105. (1) Tithes.—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.[c] [2] But herein a distinction must be taken: for the ecclesiastical courts have no jurisdiction to try the *right* of tithes unless between spiritual persons;[d] but in ordinary cases, between spiritual men and laymen, are only to compel the payment of them, when the right is not disputed.[e] By the statute or rather writ[f] of *circumspecte agatis*,[g] it is declared that the court Christian shall not be prohibited from

c Stat. 32 Hen. VIII. c. 7 (Ecclesiastical Court, 1540).
d 2 Roll. Abr. 309, 310. Bro. Abr. t. Jurisdiction. 85.
e 2 Inst. 364. 489. 490.
f See Barrington. 123. 3 Pryn Rec. 336.
g 13 Edw. I. st. 4 (1285) or rather, 9 Edw. II (1315).

---

2 Before the Tithe Commutation Acts, the ecclesiastical courts had a limited jurisdiction to enforce the payment of tithes or ecclesiastical dues; but in most parishes tithes have been commuted into a rent-charge recoverable by distress or by the appointment of a receiver under the Tithe Act, 1891. It would seem, however, that other ecclesiastical dues, where they are recoverable at all, are still recoverable in the ecclesiastical courts; unless the amount claimed is less than ten pounds, when they are recoverable before magistrates in a summary way.—STEPHEN, 3 Comm. (16th ed.), 696.

holding plea, "*si rector petat versus parochianos oblationes et decimas debitas et consuetas* (if the rector sue his parishioners for oblations and tithes due and accustomed)": so that if any dispute arises whether such tithes be *due* and *accustomed*, this cannot be determined in the ecclesiastical court, but before the king's courts of the common law; as such question affects the temporal inheritance, and the determination must bind the real property. But where the *right* does not come into question, but only the *fact*, whether or no the tithes allowed to be due are really subtracted or withdrawn, this is a transient personal injury, for which the remedy may properly be had in the spiritual court; *viz.*, the recovery of the tithes, or their equivalent. By statute 2 & 3 Edward VI, c. 13 (Easter Offerings and Tithes, 1548), it is enacted that if any person shall carry off his predial tithes (*viz.*, of corn, hay, or the like) before the tenth part [89] is duly set forth, or agreement is made with the proprietor, or shall willingly withdraw his tithes of the same, or shall stop or hinder the proprietor of the tithes or his deputy from viewing or carrying them away, such offender shall pay *double* the value of the tithes, with costs, to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws. By a former clause of the same statute, the *treble* value of the tithes, so subtracted or withheld, may be sued for in the temporal courts, which is equivalent to the *double* value to be sued for in the ecclesiastical. For one may sue for and recover in the ecclesiastical courts the tithes themselves, or a recompense for them, by the ancient law; to which the suit for the *double* value is superadded by the statute. But as no suit lay in the temporal courts for the subtraction of tithes themselves, therefore the statute gave a *treble* forfeiture, if sued for there; in order to make the course of justice uniform, by giving the same reparation in one court as in the other.[h] However, it now seldom happens that tithes are sued for at all in the spiritual court; for if the defendant pleads any custom, *modus*, composition, or other matter whereby the right of tithing is called in question, this takes it out of the jurisdiction of the ecclesiastical judges; for the law will not suffer the existence of such a right to be decided by the sentence of any single, much less an ecclesiastical.

[h] 2 Inst. 250.

judge; without the verdict of a jury. But a more summary method than either of recovering small tithes under the value of 40*s*. is given by statute 7 & 8 W. III, c. 6 (Tithes, 1695), by complaint to two justices of the peace: and, by another statute of the same year,[i] the same remedy is extended to all tithes withheld by Quakers under the value of ten pounds.

§ 106. (2) Ecclesiastical dues.—Another pecuniary injury, cognizable in the spiritual courts, is the *nonpayment* of other 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. [90] Besides which all offerings, oblations and obventions, not exceeding the value of 40*s*. may be recovered in a summary way, before two justices of the peace.[j] But care must be taken that these are real and not imaginary dues; for, if they be contrary to the common law, a prohibition will issue out of the temporal courts to stop all suits concerning them. As where a fee was demanded by the minister of the parish for the baptism of a child, which was administered in another place;[k] this, however authorized by the canon, is contrary to common right: for of common right no fee is due to the minister even for performing such branches of his duty, and it can only be supported by a special custom;[l] but no custom can support the demand of a fee without performing them at all.

§ 107. (3) Fees of officers of ecclesiastical courts.—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.[m] It is also said, that if a curate be licensed, and his salary appointed by the bishop, and he be not paid, the curate has a remedy in the ecclesiastical court;[n] but, if he be not

i C. 34.
j Stat. 7 & 8 W. III. c. 6 (Tithes, 1695).
k Salk. 332.
l *Ibid.* 334. Lord Raym. 450. 1558. Fitzg. 55.
m 1 Ventr. 165.
n 1 Burn. Eccl. Law. 438.

licensed, or hath no such salary appointed, or hath made a special agreement with the rector, he must sue for a satisfaction at common law;° either by proving such special agreement, or else by leaving it to a jury to give damages upon a *quantum meruit* (as much as he had earned), that is, in consideration of what he reasonably deserved in proportion to the service performed.

Under this head of pecuniary injuries may also be reduced the several matters of spoliation, dilapidations and neglect of repairing the church and things thereunto belonging; for which a satisfaction may be sued for in the ecclesiastical court.

§ 108. (4) Spoliation.—Spoliation is an injury done by one clerk or incumbent to another, in taking the fruits of his benefice without any [91] right thereunto, but under a pretended title. It is remedied by a decree to account for the profits so taken. This injury, when the *jus patronatus* or right of advowson doth not come in debate, is cognizable in the spiritual court; as if a patron first presents A to a benefice, who is instituted and inducted thereto; and then, upon pretense of a vacancy, *the same* patron presents B to the same living, and he also obtains institution and induction. Now, if the fact of the vacancy be disputed, then that clerk who is kept out of the profits of the living, whichever it be, may sue the other in the spiritual court for spoliation, or taking the profits of his benefice. And it shall there be tried, whether the living were or were not vacant; upon which the validity of the second clerk's pretensions must depend.°° But if the right of patronage comes at all into dispute, as if one patron presented A, and another patron presented B, there the ecclesiastical court hath no cognizance, provided the tithes sued for amount to a fourth part of the value of the living but may be prohibited at the instance of the patron by the king's writ of *indicavit* (he showed).ᵖ So, also, if a clerk, without any color of title, ejects another from his parsonage, this injury must be redressed in the temporal courts: for it depends upon no question determinable by the spiritual law (as plurality of benefices or no plurality, vacancy or no vacancy), but is merely a civil injury.

° 1 Freem. 70.

°° F. N. B. 36.

ᵖ *Circumspecte agatis;* 13 Edw. I. st. 4 (1285). Artic. Cleri. 9 Edw. II. c. 2 (1315). F. N. B. 45.

§ 109. **(5) Dilapidations.** — For *dilapidations*, which are a kind of ecclesiastical waste, either voluntary, by pulling down; or permissive, by suffering the chancel, personage house, and other buildings thereunto belonging to decay; an action also lies, either in the spiritual court by the canon law, or in the courts of common law,[q] and it may be brought by the successor against the predecessor, if living, or, if dead, then against his executors.[3] It is also said to be good cause of deprivation, if the bishop, parson, vicar or other ecclesiastical person, dilapidates the buildings or cuts down timber growing on the patrimony of [92] the church, unless for necessary repairs:[r] and that a writ of prohibition will also lie against him in the courts of common law.[s] By statute 13 Elizabeth, c. 10 (Dilapidations, 1571), if any spiritual person makes over or alienates his goods with intent to defeat his successors of their remedy for dilapidations, the successor shall have such remedy against the alienee, in the ecclesiastical court, as if he were the executor of his predecessor. And by statute 14 Elizabeth, c. 11 (Dilapidations, 1572), all money recovered for dilapidations shall within two years be employed upon the buildings, in respect whereof it was recovered, on penalty of forfeiting double the value to the crown.

§ 110. **(6) Church repairs.**—As to the neglect of reparations of the church, churchyard and the like, the spiritual court has undoubted cognizance thereof;[ss] and a suit may be brought therein for nonpayment of a rate made by the churchwardens for that purpose. And these are the principal pecuniary injuries, which are cognizable, or for which suits may be instituted, in ecclesiastical courts.

§ 111. **b. Matrimonial causes.**—Matrimonial causes, or injuries respecting the rights of marriage, are another, and a much

q Cart. 224. 3 Lev. 268.

r 1 Roll. Rep. 86. 11 Rep. 98. Godb. 259.

s 3 Bulstr. 158. 1 Roll. Rep. 335.

ss *Circumspecte agatis.* 5 Rep. 66.

---

3 The proceedings in respect of dilapidations are now taken, in general, under the Ecclesiastical Dilapidations Act, 1871 and 1872.

more undisturbed, branch of the ecclesiastical jurisdiction. Though, if we consider marriages in the right of mere civil contracts, they do not seem to be properly of spiritual cognizance.[t] But the Romanists having very early converted this contract into a holy sacramental ordinance, the church of course took it under her protection, upon the division of the two jurisdictions. And, in the hands of such able politicians, it soon became an engine of great importance, to the papal scheme of an universal monarchy over Christendom. The numberless canonical impediments that were invented, and occasionally dispensed with, by the holy see, not only enriched the coffers of the church, but gave it a vast ascendant over princes of all denominations; whose marriages were sanctified or reprobated, their issue legitimated or bastardized, and the succession to their thrones established or rendered precarious, according [93] to the humor or interest of the reigning pontiff; besides a thousand nice and difficult scruples, with which the clergy of those ages puzzled the understandings and loaded the consciences of the inferior orders of the laity; and which could only be unraveled and removed by these their spiritual guides. Yet, abstracted from this universal influence, which affords so good a reason for their conduct, one might otherwise be led to wonder, that the same authority, which enjoined the strictest celibacy to the priesthood, should think them the proper judges in causes between man and wife. These causes, indeed, partly from the nature of the injuries complained of and partly from the clerical method of treating them,[u] soon became too gross for the modesty of a lay tribunal. And causes matrimonial are now so peculiarly ecclesiastical, that the temporal courts will never interfere in controversies of this kind unless in some particular cases. As if the spiritual court do proceed to call a marriage in question after the death of either of the parties; this the court of common law will prohibit, because it tends to bastardize and disinherit the issue; who cannot so well defend the marriage as the parties themselves, when both of them living, might have done.[v]

t Warb. Alliance. 173.

u Some of the impurest books, that are extant in any language, are those written by the popish clergy on the subjects of matrimony and divorce.

v 2 Inst. 614.

§ 112. (1) Jactitation of marriage.—Of matrimonial causes, one of the first and principal is, 1. *Causa jactitationis matrimonii;* when one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue.[4] On this ground the party injured may libel the other in the spiritual court; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head, which is the only remedy the ecclesiastical courts can give for this injury.

§ 113. (2) Specific performance of marriage. — Another species of matrimonial causes was when a party contracted to another brought a suit in the ecclesiastical court to compel a celebration of the marriage in pursuance of such contract; but this branch of causes is now cut off entirely by the act for preventing clandestine marriages, 26 George II, [94] c. 33 (Clandestine Marriages, 1753), which enacts, that for the future no suit shall be had in any ecclesiastical court, to compel a celebration of marriage *in facie ecclesiæ* (in the face of the church), for or because of any *contract* of matrimony whatsoever.

§ 114. (3) Restoration of conjugal rights.—The suit for *restoration of conjugal rights* is also another species of matrimonial causes:[5] which 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 the ecclesiastical jurisdiction will compel them to come together again, if either party be weak enough to desire it, contrary to the inclination of the other.

§ 115. (4) Divorce.—*Divorces* also, of which and their several distinctions we treated at large in a former volume,[w] are

[w] Book I. c. 15.

---

4 The jurisdiction of suits for jactitation of marriage would now, of course, be in the probate, divorce and matrimonial division of the high court. The remedy is now rarely resorted to, as, in general, it is said, since Lord Hardwicke's Act, 1766, there is sufficient certainty in the forms of legal marriage in England to prevent anyone being in ignorance whether he or she is really married or not. 2 Bouvier's Law Dict. (Rawle's 3d Rev.), 1689.

5 Enforced restitution of conjugal relations is not known in the United States.

causes thoroughly matrimonial, and cognizable by their ecclesiastical judge.[6] If it becomes improper, through some supervenient cause arising *ex post facto*, that the parties should live together any longer, as through intolerable cruelty, adultery, a perpetual disease, and the like, this unfitness or inability for the marriage state may be looked upon as an injury to the suffering party; and for this the ecclesiastical law administers the remedy of separation, or a divorce *a mensa et thoro* (from bed and board). But if the cause existed previous to the marriage, and was such a one as rendered the marriage unlawful *ab initio* (from the beginning), as consanguinity, corporeal imbecility, or the like; in this case the law looks upon the marriage to have been always null and void, being contracted *in fraudem legis* (unlawfully), and decrees not only a separation from bed and board, but *a vinculo matrimonii* (from the bonds of matrimony) itself. 5. The last species of matrimonial causes is a consequence drawn from one of the species of divorce, that *a mensa et thoro;* which is the suit of *alimony*, a term which signifies maintenance: which suit the wife, in case of separation, may have against her husband, if he neglects or refuses to make her an allowance suitable to their station in life. This is an injury to the wife, and the court Christian will redress it by assigning her a competent maintenance, and compelling the husband by ecclesiastical censures to pay it. But no alimony will be assigned in case of a divorce for adultery on her part; for as that amounts to a forfeiture of her [95] dower after his death, it is also a sufficient reason why she should not be partaker of his estate when living.

§ 116. c. Testamentary causes.—Testamentary causes are the only remaining species belonging to the ecclesiastical jurisdiction; which, as they are certainly of a mere temporal nature,[x] may seem at first view a little oddly ranked among matters of a spiritual cognizance.[7] And indeed (as was in some degree ob-

x Warburt. Alliance. 173.

---

6 A summary account of the proceedings for the dissolution of marriage in England may be found in 3 Stephen's Comm. (16th ed.), 645 ff.

7 Probate proceedings since the passing of the Judicature Act of 1873 are described in 3 Stephen's Comm. (16th ed.), 635 ff.

served in a former volume[y]) they were originally cognizable in the king's courts of common law, *viz.*, the county courts;[z] and afterwards transferred to the jurisdiction of the church by the favor of the crown, as a natural consequence of granting to the bishops the administration of intestates' effects.

§ 117. (1) History of jurisdiction in testamentary causes.—This spiritual jurisdiction of testamentary causes is a peculiar constitution of this island;[8] for, in almost all other (even in popish)

[y] Book II. c. 32.

[z] Hickes Disser. Epistolar. pag. 8. 58.

---

[8] **Testamentary jurisdiction.**—Although the jurisdiction of the courts Christian over wills and the effects of intestates probably began with the institution of those courts, as Blackstone here argues, yet it certainly was not exclusive, as to all chattels of intestates till a later period. This is shown by the writs *de rationabili parte bonorum* found in the register, fol. 142b. (And see F. N. B. 122.) By these the widow could sue for a third part of the goods and chattels of the husband, if detained by the executors: and the children for another third. (See 2 Bl. Comm. *492, *493.) The writs indeed treat these as due by the local custom of single counties. The Year-Book cases, I think, show the reason for this. A group of them in the reign of Edward II sue on the common law, and the courts evidently discourage them and strive to remit the parties to the ecclesiastical courts. Another group, in the reign of Edward III, about fifty years later, sue on local customs, though otherwise alleging it in the same way: and it was about this period, as is commonly thought, that the register was compiled. The effort to revive the lay jurisdiction in the shape of a county custom, after it had been rejected as common law, seems evident; but it does not seem to have been successful.

The recently published Note-Book of cases temp. Henry III abundantly confirms the statement of Blackstone (p. *96), that matters testamentary then belonged to the spiritual courts, while it furnishes examples of the writ *de rationabili parte* applied to land. (F. N. B. 2.)

Only two writs *de rationabili parte bonorum* are given in the register, one for the wife, the other for the children (*pueri*), who are not heirs, and have not been advanced in the father's lifetime. Both are based on the custom of the county, and the following *regula* is annexed: "In some courts this writ is founded on magna charta, but is not valid because exception of statute is not statute," which repeats one of the *dicta* of the Year-Book on the subject (Reg. fol. 124b); but Brooke, *Rat. p. bon.* 6, shows the question was still an open one in the reign of Henry VIII. Both writs are against the executors, and in the nature of detinue. (See, also, Fitzh. *Dett.* 156; *Detinue*, 52, 56, 60; *Respond.* 6, 15, 76, 95.) Fitz. *Respond.* 76, M. 30 Edward III, 25, and 95, M. 30, Henry VI, holds it *debt*.—HAMMOND.

countries all matters testamentary are under the jurisdiction of the civil magistrate. And that this privilege is enjoyed by the clergy in England, not as a matter of ecclesiastical right, but by the special favor and indulgence of the municipal law, and as it should seem by some public act of the great council, is freely acknowledged by Lindewode, the ablest canonist of the fifteenth century. Testamentary causes, he observes, belong to the ecclesiastical courts. "*de consuetudine Angliæ, et super consensu regio et suorum procerum in talibus ab antiquo concesso* (by the custom of England, and the consent of the king and his nobles anciently granted in such cases)."[a] The same was, about a century before, very openly professed in a canon of Archbishop Stratford *viz.*, that the administration of intestates' goods was "*ab olim*" (formerly) granted to the ordinary, "*consensu regio et magnatum regni Angliæ* (by the command of the king and the peers of the kingdom of England)."[b] The constitutions of Cardinal Othobon also testify that this provision, "*olim a prælatis cum approbatione regis et baronum dicitur emanasse* (is said to have emanated formerly from the prelates with the approbation of the king and barons)."[c] And Archbishop Parker,[d] in Queen Elizabeth's time, affirms in express words that originally in matters testamentary "*non ullam* [96] *habebant episcopi auctoritatem, præter eam quam a rege acceptam referebant. Jus testamenta probandi non habebant: administrationis potestatem cuique delegare non poterant* (the bishops had no other authority than what they received from the king. They had not the right of proving wills; neither could they grant the power of administration)."

At what period of time the ecclesiastical jurisdiction of testaments and intestacies began in England is not ascertained by any ancient writer: and Lindewode[e] very fairly confesses, "*cujus regis temporibus hoc ordinatum sit, non reperio* (I do not find in what king's reign this was ordained)." We find it indeed frequently asserted in our common-law books that it is but of *late years* that

a Provincial. l. 3. t. 13. fol. 176.
b *Ibid.* l. 3. t. 38. fol. 263.
c Cap. 23.
d See 9 Rep. 38.
e Fol. 263.

the church hath had the probate of wills.[f] But this must only be understood to mean that it had not *always* had this prerogative: for certainly it is of very high antiquity. Lindewode, we have seen, declares that it was "*ab antiquo* (anciently)"; Stratford, in the reign of King Edward III, mentions it as "*ab olim ordinatum* (ordained formerly)"; and Cardinal Othobon, in the 52 Henry III (1267), speaks of it as an ancient tradition. Bracton holds it for clear law in the same reign of Henry III, that matters testamentary belonged to the spiritual court.[g] And, yet earlier, the disposition of intestates' goods "*per visum ecclesiæ* (under the direction of the church)" was one of the articles confirmed to the prelates by King John's *Magna Carta*.[h] Matthew Paris also informs us that King Richard I ordained in Normandy, "*quod distributio rerum quæ in testamento relinquuntur auctoriate ecclesiæ fiet* (that a distribution of the things which are left by will be made by the authority of the church)." And even this ordinance, of King Richard, was only an introduction of the same law into his ducal dominions, which before prevailed in this kingdom: for in the reign of his father, Henry II, Glanvill is express that "*si quis aliquid dixerit contra testamentum, placitum illud in curia christianitatis audiri debet et terminari* (if anything be averred against a will, that plea should be heard and determined in the spiritual court)."[i] And the Scots book called *Regiam Majestatem* agrees *verbatim* with Glanvill in this point.[k]

It appears that the foreign clergy were pretty early ambitious of this branch of power; but their attempts to assume [97] it on the Continent were effectually curbed by the edict of the Emperor Justin,[l] which restrained the insinuation or probate of testaments (as formerly) to the office of the *magister census* (an officer for taking the value of estates): for which the emperor subjoins this reason; "*absurdum etenim clericis est, immo etiam opprobriosum, si peritos se velint ostendere disceptationum esse forensium* (for

[f] Fitz. Abr. tit. Testament. pl. 4. 2 Roll. Abr. 217. 9 Rep. 37. Vaugh. 207.

[g] l. 5. de Exceptionibus. c. 10.

[h] Cap. 27. edit. Oxon.

[i] l. 7. c. 8.

[k] l. 2. c. 38.

[l] Cod. 1. 3. 41.

it is absurd, nay more, it is disgraceful for clergymen to wish to display their skill in forensic disputes)." But afterwards by the canon law [m] it was allowed that the bishop might compel by ecclesiastical censures the performance of a bequest to *pious uses*. And therefore, as that was considered as a cause *quæ secundum canones et episcopales leges ad regimen animarum pertinuit* (which belonged, according to the canon and episcopal laws, to spiritual matters), it fell within the jurisdiction of the spiritual courts by the express words of the charter of King William I, which separated those courts from the temporal. And afterwards, when King Henry I by his coronation charter directed that the goods of an intestate should be divided for the good of his soul,[n] this made all intestacies immediately spiritual causes, as much as a legacy to pious uses had been before. This, therefore, we may probably conjecture, was the era referred to by Stratford and Othobon, when the king by the advice of the prelates, and with the consent of his barons, invested the church with this privilege. And accordingly in King Stephen's charter it is provided that the goods of an intestate ecclesiastic shall be distributed *pro salute animæ ejus, ecclesiæ consilio* (for the good of his soul, by the advice and direction of the church);[o] which latter words are equivalent to *per visum ecclesiæ* in the great charter of King John before mentioned. And the Danes and Swedes (who received the rudiments of Christianity and ecclesiastical discipline from England about the beginning of the twelfth century) have thence also adopted the spiritual cognizance of intestacies, testaments and legacies.[p]

§ 118. (2) Tribunals having jurisdiction in testamentary causes.—This jurisdiction, we have seen, is principally exercised with us in the consistory courts of every diocesan bishop, and [98]

m Decretal. 3. 26. 17. Gilb. Rep. 204, 205.

n *Si quis baronum seu hominum meorum—pecuniam suam non dederit vel dare disposuerit, uxor sua, sive liberi, aut parentes et legitimi homines ejus eam* pro anima ejus *dividant, sicut eis melius visum fuerit* (If any one of my barons or vassals shall not have disposed of his wealth, or directed the disposal of it, let his wife, children, or parents and proper persons divide it, for the good of his soul, as shall seem best to them). (Text. Roffens. c. 34. p. 51.)

o Lord Lyttelt, Hen. II. vol. I. 536. Hearne ad Gul. Neubr. 711.

p Stiernhook de Jure Sueon. l. 3. c. 8.

in the prerogative court of the metropolitan, originally; and in the arches court and court of delegates by way of appeal.

§ 119. (3) Classes of testamentary causes.—It is divisible into three branches: the probate of wills, the granting of administrations, and the suing for legacies. The two former of which, when no opposition is made, are granted merely *ex officio et debito justitiæ* (officially and as in justice due), and are then the object of what is called the *voluntary*, and not the *contentious*, jurisdiction. But when a *cavcat* is entered against proving the will, or granting administration, and a suit thereupon follows to determine either the validity of the testament, or who hath a right to the administration, this claim and obstruction by the adverse party are an injury to the party entitled, and as such are remedied by the sentence of the spiritual court, either by establishing the will or granting the administration. Subtraction, the withholding or detaining, of legacies is also still more apparently injurious, by depriving the legatees of that right, with which the laws of the land, and the will of the deceased have invested them; and therefore, as a consequential part of testamentary jurisdiction, the spiritual court administers redress herein, by compelling the executor to pay them. But in this last case the courts of equity exercise a concurrent jurisdiction with the ecclesiastical courts, as incident to some other species of relief prayed by the complainant; as to compel the executor to account for the testator's effects, or assent to the legacy, or the like. For, as it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause, when once brought there, receives there also its full determination.

§ 120. d. Procedure in ecclesiastical courts.—These are the principal injuries, for which the party grieved either must, or may, seek his remedy in the spiritual courts. But before I entirely dismiss this head, it may not be improper to add a short word concerning the *method of proceeding* in these tribunals, with regard to the redress of injuries.

It must (in the first place) be acknowledged, to the honor of the spiritual courts, that though they continue to this [99] day to decide many questions which are properly of temporal cognizance,

yet justice is in general so ably and impartially administered in those tribunals (especially of the superior kind), and the boundaries of their power are now so well known and established, that no material inconvenience at present arises from this jurisdiction still continuing in the ancient channel. And, should an alteration be attempted, great confusion would probably arise, in overturning long-established forms, and new-modeling a course of proceedings that has now prevailed for seven centuries.[9]

§ 121. **(1) Ecclesiastical procedure regulated by the civil and canon law.**—The establishment of the civil law process in all the ecclesiastical courts was indeed a masterpiece of papal discernment, as it made a coalition impracticable between them and the national tribunals, without manifest inconvenience and hazard.[10] And this

[9] See note 2, p. 1580, *ante*.

[10] **Authority of the canon law in the ecclesiastical courts.**—There have been two views held as to the authority of the canon law of Rome in the ecclesiastical courts in this country. *The Report of the Ecclesiastical Courts Commission*, 1883, gave support to the view that though the canon law was of great authority and entitled to respectful consideration, yet it was not binding. On the other side Professor Maitland, in his *Canon Law in the Church of England*, firmly maintained that the canon law of Rome was in the courts Christian of this country regarded as absolutely binding.

But inasmuch as the late Bishop of Oxford, who drew the commissioners' report, intimated to me some time before his death that he was not prepared to dissent from Professor Maitland's view, that view may be considered for the present as authoritative. It is put briefly as follows.

The Decretum Gratiani was the text-book of the old church law, but in 1234 it was out of date. Three popes, Gregory IX, Boniface VIII, and John XXII, issued three collections of Decretals, each of which was a statute book for the whole Catholic church, and as such binding.

Professor Maitland calls as his chief witness William Lyndwood, the great English canon lawyer, and the principal official or judge of the Archbishop of Canterbury: he wrote a commentary for beginners on the archiepiscopal constitutions of Canterbury. In this he never suggests that the Decretals are other than law, and that though their meaning be doubtful, they are not binding, and he explicitly states that the pope is above both general council and the law, and that to dispute the authority of a Decretal is heresy. Obstinate heretics; he adds, are to be burnt.

In contrast with the pope, an archbishop can make statutes or constitutions for his province, either of a declaratory or supplementary nature, but such ordinances cannot derogate from the Decretals. If they are contrary to the

consideration had undoubtedly its weight in causing this measure to be adopted, though many other causes concurred. The time when the pandects of Justinian were discovered afresh and rescued from the dust of antiquity, the eagerness with which they were studied by the popish ecclesiastics, and the consequent dissensions between the clergy and the laity of England, have formerly [q] been spoken to at large. I shall only now remark upon those collections that their being written in the Latin tongue, and referring so much to the will of the prince and his delegated officers of justice, sufficiently recommended them to the court of Rome, exclusive of their intrinsic merit. To keep the laity in the darkest ignorance, and to monopolize the little science, which then existed, entirely among the monkish clergy, were deep-rooted principles of papal policy. And, as the bishops of Rome affected in all points to mimic the imperial grandeur, as the spiritual prerogatives were molded on the pattern of the temporal, so the canon law process was formed on the model of the civil law: the prelates embracing with the utmost ardor a method of judicial proceedings, which was carried on in a language unknown to the bulk of the people, which banished the intervention of a jury (that bulwark of [100] Gothic liberty), and which placed an arbitrary power of decision in the breast of a single man.

The proceedings in the ecclesiastical courts are therefore regulated according to the practice of the civil and canon laws; or

[q] Book I. Introd. § 1.

Decretals they are *ultra vires*, and at any rate they may be upset by a future Decretal. As might be expected, the archiepiscopal constitutions did not contain anything of great importance. Not only was the pope superior to the archbishop; but so was the legate *a latere;* hence Lyndwood makes the following list in order of authority: (i) Decretals, (ii) legatine constitutions, (iii) provincial constitutions, provided they do not contravene the other two.

Though the king and the king's courts could and did restrict the area of activity for the church courts as by writs of prohibition, yet within the permitted limits the church could cultivate its own garden in its own way, nor was there any claim to dictate to the church courts what judgments should be given. When the church took the position that subsequent marriage legitimated offspring born before marriage, the king's court declined to recognize the church view so far as it affected the law of inheritance, but for the purposes of ordination permitted an illegitimate person to take orders with a dispensation.—CARTER, Hist. Eng. Leg. Institutions, 233 n.

rather according to a mixture of both, corrected and new-modeled by their own particular usages, and the interposition of the courts of common law.[11] For, if the proceedings in the spiritual court be ever so regularly consonant to the rules of the Roman law, yet if they be manifestly repugnant to the fundamental maxims of the municipal laws, to which upon principles of sound policy the ecclesiastical process ought in every state to conform [r] (as if they require two witnesses to prove a fact, where one will suffice at common law); in such cases a prohibition will be awarded against them.[s]

§ 122. (2) Pleadings in ecclesiastical courts.—But, under these restrictions, their ordinary course of proceeding is, first, by *citation*, to call the party injuring before them. Then by *libel*, *libellus*, a little book, or by articles drawn out in a formal *allegation*, to set forth the complainant's ground of complaint. To this succeeds the *defendant's answer* upon oath, when, if he denies or extenuates the charge, they proceed to *proofs* by witnesses examined, and their depositions taken down in writing, by an officer of the court. If the defendant has any circumstances to offer in his defense, he must also propound them in what is called his *defensive allegation*, to which he is entitled in his turn to the *plaintiff's answer* upon oath, and may from thence proceed to *proofs* as well as his antagonist. The canonical doctrine of *purgation* whereby the parties were obliged to answer upon oath to any

r Warb. Alliance. 179.

s 2 Roll. Abr. 300, 302.

---

11 **Source of the English law on matrimonial causes.**—"This law of the ecclesiastical courts in the matter of marriage has been based on the canon law, though its authority was much restricted, and depended on its having been received and admitted by parliament, or upon immemorial usage and custom. This jurisdiction devolved upon the clerical courts from the conception of marriage as a religious sacrament and tie, the nature, validity and dissolution of which were matters of clerical cognizance. The procedure was 'regulated according to the practice of the civil and canon laws, or rather according to a mixture of both, corrected and new-modeled by their own particular usages, and the interposition of the courts of common law.' A well-known instance of this is the way in which the law of England dealt with the Roman doctrine of *legitimatio ante nuptias*. But generally the greater part of the English law on matrimonial causes is derived from the civil or canon law." Scrutton, Roman Law Influence, 1 Sel. Essays in Anglo-Am. Leg. Hist. 227.

matter, however criminal, that might be objected against them (though long ago overruled in the court of chancery, the genius of the English law having broken through the bondage imposed on it by its clerical chancellors, and asserted the doctrines of judicial as well as civil liberty), continued till the middle of the last century to be upheld by the spiritual courts; when the legislature was obliged to interpose, to teach them a lesson of similar moderation.[12] By the [101] statute of 13 Car. II, c. 12 (Ecclesiastical Courts, 1661), it is enacted that it shall not be lawful for any bishop, or ecclesiastical judge, to tender or administer to any person whatsoever, the oath usually called the oath *ex officio*, or any other oath whereby he may be compelled to confess, accuse or purge himself of any criminal matter or thing, whereby he may be liable to any censure or punishment. When all the pleadings and proofs are concluded, they are referred to the consideration, not of a jury, but of a single judge; who *takes information* by hearing advocates on both sides, and thereupon forms his *interlocutory decree* or *definitive sentence* at his own discretion; from which there generally lies an *appeal*, in the several stages mentioned in a former chapter;[t] though, if the same be not appealed from in fifteen days, it is final, by the statute 25 Henry VIII, c. 19 (Crown, 1533).

§ 123. (3) Ecclesiastical penalties: excommunication.—But the point in which these jurisdictions are the most defective is that of enforcing their sentences when pronounced; for which they have no other process, but that of *excommunication*, which is described[u] to be twofold: the less, and the greater excommunication.[13] The

[t] Chap. 5.

[u] Co. Litt. 133.

12 This reform was really due to the long parliament and not to that which now has the credit of it. Like the abolition of military tenures, and many other improvements in the law, it was the work of the Republicans during the interregnum; but the benefit was so manifest that even the restoration parliament dared do nothing but confirm it.—HAMMOND.

13 **Existing ecclesiastical punishments.**—"Ecclesiastical censures or punishments to which the clergy are liable consist of (1) monition; (2) inhibition under the Public Worship Regulation Act, 1874; (3) suspension; (4) sequestration; (5) deprivation and incapacity to hold preferment; (6) deposition from holy orders; (7) excommunication; and (8) penalties and forfeitures. They are inflicted as the result of proceedings duly taken for the purpose and

less is an ecclesiastical censure, excluding the party from the participation of the sacraments: the greater proceeds further, and excludes him not only from these but also from the company of all Christians. But, if the judge of any spiritual court excommunicates a man for a cause of which he hath not the legal cognizance, the party may have an action against him at common law, and he is also liable to be indicted at the suit of the king.[w]

Heavy as the penalty of excommunication is, considered in a serious light, there are, notwithstanding, many obstinate or profligate men, who would despise the *brutum fulmen* of mere ecclesiastical censures, especially when pronounced by a petty surrogate in the country, for railing or contumelious words, for nonpayment of fees, or costs, or for other trivial cause. The common law therefore compassionately steps in to [102] the aid of the ecclesiastical jurisdiction, and kindly lends a supporting hand to an otherwise tottering authority. Imitating herein the policy of our British ancestors, among whom, according to Cæsar,[x] whoever were interdicted by the Druids from their sacrifices, "*in numero impiorum ac sceleratorum habentur: ab iis omnes decedunt, aditum eorum sermonemque defugiunt, ne quid ex contagione incommodi accipiant: neque iis petertibus jus redditur, neque honos ullus communicatur* (are reckoned among the impious and wicked: all shun them, fly their approach, and avoid all communication with them, lest they receive some injury from the contagion; neither is justice rendered to them, when they seek it, nor is any honor conferred on them)." And so with us by the common law an excommunicated person is disabled to do any act that is required to be done by one that is *probus et legalis homo* (a true and lawful man). He cannot serve upon juries, cannot be a witness in any court, and, which is the worst of all, cannot bring an action, either real or personal, to recover lands or money due to him.[y] Nor is

w 2 Inst. 623.

x De Bello Gall. l. 6.

y Litt. § 201.

---

in consequence of the commission of some crime or ecclesiastical offense." As regards the sentence of excommunication, it was provided by the Ecclesiastical Courts Act, 1813, that no person should incur, by the sentence of excommunication, any penalty or incapacity whatever, except such imprisonment, not exceeding six months, as the ecclesiastical court may have power to direct. The punishment of excommunication has practically become obsolete.—HALSBURY, 11 Laws of Eng., 533, 539.

this the whole: for if, within forty days after the sentence has been published in the church, the offender does not submit and abide by the sentence of the spiritual court, the bishop may certify such contempt to the king in chancery. Upon which there issues out a writ to the sheriff of the county, called, from the bishop's certificate, a *significavit* (he signified); or from its effects a writ *de excommunicato capiendo* (for taking the excommunicated): and the sheriff shall thereupon take the offender, and imprison him in the county gaol, till he is reconciled to the church, and such reconciliation certified by the bishop; upon which another writ, *de excommunicato deliberando* (for liberating the excommunicated), issues out of chancery to deliver and release him.[s] This process seems founded on the charter of separation (so often referred to) of William the Conqueror. "*Si aliquis per superbiam elatus ad justitiam episcopalem venire noluerit, vocetur semel, secundo, et tertio: quod si nec sic ad emendationem venerit, excommunicetur; et, si opus fuerit, ad hoc vindicandum fortitudo et justitia regis sive vicecomitis adhibeatur* (if anyone, elate with pride, come not to the episcopal court, let him be summoned three times, and if he attend not then its due correction, let him be excommunicated; and, if necessary, let the power and justice of the king, or sheriff, be exerted to punish his contempt)." And in case of subtraction of tithes, a more summary and expeditious assistance is given by the statutes of 27 Henry VIII, c. 20 (Tithes, 1535), and 32 Henry VIII, c. 7 (Ecclesiastical Court, 1540), which enact that upon complaint of any contempt or misbehavior to the ecclesiastical judge by the defendant in any suit for tithes, any privy counselor, or any [103] two justices of the peace (or, in case of disobedience to a definitive sentence, any two justices of the peace) may commit the party to prison without bail or mainprize, till he enters into a recognizance with sufficient sureties to give due obedience to the process and sentence of the court. These timely aids, which the common and statute laws have lent to the ecclesiastical jurisdiction, may serve to refute that groundless notion which some are too apt to entertain, that the courts of Westminster Hall are at open variance with those at doctors' commons. It is true that they are

[s] F. N. B. 62.

sometimes obliged to use a parental authority, in correcting the excesses of these inferior courts, and keeping them within their legal bounds; but, on the other hand, they afford them a parental assistance in repressing the insolence of contumacious delinquents, and rescuing their jurisdiction from that contempt, which for want of sufficient compulsive powers would otherwise be sure to attend it.

§ 124. 2. Jurisdiction in the military courts.—I am next to consider the injuries cognizable in the *court military*, or court of *chivalry*.[14] The jurisdiction of which is declared by statute 13 Richard II, c. 2 (Benefice, 1389), to be this: "that it hath cognizance of contracts touching deeds of arms or of war, out of the realm, and also of things which touch war within the realm, which cannot be determined or discussed by the common law; together with other usages and customs to the same matters appertaining." So that wherever the common law can give redress, this court hath no jurisdiction: which has thrown it entirely out of use as to the matter of contracts, all such being usually cognizable in the courts of Westminster Hall, if not directly, at least by fiction of law: as if a contract be made at Gibraltar, the plaintiff may suppose it made at Northampton; for the locality, or place of making it, is of no consequence with regard to the validity of the contract.

The words, "other usages and customs," support the claim of this court, 1. To give relief to such of the nobility and gentry as think themselves aggrieved in matters of honor; and 2. To keep up the distinction of degrees and [104] quality. Whence it follows that the civil jurisdiction of this court of chivalry is principally in two points: the redressing injuries of honor, and correcting encroachments in matters of coat armor, precedency and other distinctions of families.

As a court of honor, it is to give satisfaction to all such as are aggrieved in that point; a point of a nature so nice and delicate, that its wrongs and injuries escape the notice of the common law, and yet are fit to be redressed somewhere. Such, for instance, as calling a man a coward, or giving him the lie; for which, as they are productive of no immediate damage to his person or property, no action will lie in the courts at Westminster: and yet they are such injuries as will prompt every man of spirit to demand some

14 See note 7, on court of chivalry, p. 1584, *ante*.

honorable amends, which by the ancient law of the land was appointed to be given in the court of chivalry.[a] But modern resolutions have determined that how much soever such a jurisdiction may be expedient, yet no action for words will at present lie therein.[b] And it hath always been most clearly holden[c] that as this court cannot meddle with anything determinable by the common law, it therefore can give no pecuniary satisfaction or damages; inasmuch as the quantity and determination thereof is ever of common-law cognizance. And therefore this court of chivalry can at most only order reparation in point of honor; as, to compel the defendant *mendacium sibi ipsi imponere,* or to take the lie that he has given upon himself, or to make such other submission as the laws of honor may require.[d] Neither can this court, as to the point of reparation in honor, hold plea of any such word, or thing, wherein the party is relievable by the courts of common law. As if a man gives another a blow, or calls him thief or murderer; for in both these cases the common law has pointed out his proper remedy by action.

[105] As to the other point of its civil jurisdiction, the redressing of encroachments and usurpations in matters of heraldry and coat armor: it is the business of this court, according to Sir Matthew Hale, to adjust the right and armorial ensigns, bearings, crests, supporters, pennons, etc.; and also rights of place or precedence, where the king's patent or act of parliament (which cannot be overruled by this court) have not already determined it.

§ 125. a. Procedure in the military courts.—The proceedings in this court are by petition, in a summary way; and the trial not by a jury of twelve men, but by witnesses, or by combat.[e] But as it cannot imprison, not being a court of record, and as by the resolutions of the superior courts it is now confined to so narrow and restrained a jurisdiction, it has fallen into contempt and disuse. The marshaling of coat armor, which was formerly the pride and

[a] Year-Book, 37 Hen. VI. 21 (1458). Selden of Duels, c. 10. Hal. Hist. C. L. 37.

[b] Salk. 533. 7 Mod. 125. 2 Hawk. P. C. 11.

[c] Hal. Hist. C. L. 37.

[d] 1 Roll. Abr. 128.

[e] Co. Litt. 261.

study of all the best families in the kingdom, is now greatly disregarded; and has fallen into the hands of certain officers and attendants upon this court, called heralds, who consider it only as a matter of lucre and not of justice: whereby such falsity and confusion have crept into their records (which ought to be the standing evidence of families, descents and coat armor), that, though formerly some credit has been paid to their testimony, now even their common seal will not be received as evidence in any court of justice in the kingdom.[f] But their original visitation books, compiled when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families and to register such marriages and descents as were verified to them upon oath, are allowed to be good evidence of pedigrees.[g] And it is much to be wished that this practice of visitation at certain periods were revived; for the failure of inquisitions *post mortem* (after death), by the abolition of military tenures, combined with the negligence of the heralds in omitting their usual progresses, has rendered the proof of a modern descent, [106] for the recovery of an estate or succession to a title of honor, more difficult than that of an ancient. This will be indeed remedied for the future, with respect to claims of peerage, by a late standing order[h] of the house of lords, directing the heralds to take exact accounts and preserve regular entries of all peers and peeresses of England, and their respective descendants; and that an exact pedigree of each peer and his family shall, on the day of his first admission, be delivered to the house by garter, the principal king-at-arms. But the general inconvenience, affecting more private successions, still continues without a remedy.

§ 126. 3. Jurisdiction of the maritime courts.—Injuries cognizable by the courts maritime, or admiralty courts, are the next object of our inquiries.[15] These courts have jurisdiction and

f 2 Roll. Abr. 686. 2 Jon. 224.
g Comb. 63.
h 11 May, 1767.

15 **Admiralty jurisdiction of the United States.**—Of the "eccentrical tribunals" (see p. *36) mentioned in this chapter, the admiralty courts alone are known in this country; and this entire jurisdiction is by the federal constitution (art. iii. § 2) vested in the Union, to the exclusion of the states, and by

power to try and determine all maritime causes; or such injuries which, though they are in their nature of common-law cognizance, yet being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own.[16]

§ 127. a. Nature of admiralty causes.—All admiralty causes must be therefore causes arising wholly upon the sea, and not within the precincts of any county.[1][17] For the statute 13 Richard

[1] Co. Litt. 260. Hob. 79.

---

act of Congress, that of the *instance* court is vested in the district courts, while that of the *prize* court is given to the circuit. (U. S. Rev. Stats., §§ 563, subd. 8, 629, subd. 6, 711.) The acts save to suitors in all cases the right of a common-law remedy, when the common law is competent to give it. The supreme court has, of course, appellate jurisdiction.—HAMMOND.

[16] On the modern court of admiralty in England, see note 8, p. 1585, *ante*.

[17] **Admiralty jurisdiction on inland waters.**—Until 1845 this rule was supposed to be as applicable in this country as in England, and the limit of admiralty jurisdiction was the ebb and flow of the tide. The commerce carried upon the inland waters before the rise of steam navigation was small, and cases rarely arose for these courts. Thus it was held that the Mississippi river above tide water, the Missouri and Ohio throughout their length, and the chain of the great lakes, were not "navigable waters" in the eye of the law. The first attempt to extend admiralty jurisdiction to the lakes was by act of Congress, February 26, 1845. (5 U. S. Stats. at Large, 726.) In the first case that reached the United States supreme court under this act the entire subject was discussed, and the English rule shown to be inapplicable here. The English streams were not navigable for ships above tide water, and as there could be no use for an admiralty jurisdiction where there could be no navigation, this *test* of navigability became substituted there for navigability itself. The true rule in both countries is the navigable capacity of the stream: and as this was ascertained in England by a test wholly inapplicable here, we could not be bound by it. The result was that the earlier cases were overruled and principles established, under which the United States district courts took admiralty jurisdiction of all matters arising upon the navigable rivers and lakes of the country, as well as upon the sea. (The Genesee Chief v. Fitzhugh, 12 How. 457, 13 L. Ed. 1065.) This jurisdiction at first was supposed to be *limited* by the act of 1845; but in Jackson v. The Magnolia, 20 How. 296, 15 L. Ed. 909, it was held that it did not depend on the act of 1845, but was a part of the original grant of the power in the Judiciary Act of 1879. In the long period before 1845 the states upon the lakes and rivers had passed statutes giving to their own courts

II, c. 5 (1389), directs that the admiral and his deputy shall not meddle with anything, but only things done upon the sea; and the statute 15 Richard II, c. 3 (Admiralty, 1391), declares that the court of the admiral hath no manner of cognizance of any contract, or of any other thing, done within the body of any county, either by land or by water; nor of any wreck of the sea: for that must be cast on land before it becomes a wreck.[j] But it is otherwise of things *flotsam*, *jetsam* and *ligan;* for over them the admiral hath jurisdiction, as they are in and upon the sea.[k] If part of any contract, or other cause of action, doth arise upon the sea, and part upon the land, the common law excludes the admiralty court from its jurisdiction; for, part belonging properly to one cognizance and part to another, the common or general law takes place of the particular.[l] Therefore, [107] though pure maritime acquisitions, which are earned and become due on the high seas, as seamen's wages, are one proper object of the admiralty jurisdiction, even though the contract for them be made upon land;[m] yet, in general, if there be a contract made in England and to be executed upon the seas, as a charter-party or covenant that a

j See Book I. c. 8.
k 5 Rep. 106.
l Co. Litt. 261.
m 1 Ventr. 146.

---

a kind of admiralty jurisdiction *in rem* over boats and vessels. This was needful while the federal courts supposed they had no such jurisdiction there; and it was twenty years after they assumed that jurisdiction before the question was raised and decided whether the state statutes and remedies were consistent with the *exclusive* admiralty jurisdiction of the United States. But in 1867, the case of The Ad. Hine v. Trevor, 4 Wall. 555, 18 L. Ed. 451, decided that all such state laws giving suits *in rem* against boats and vessels and other parts of admiralty jurisdiction to state courts were unconstitutional and void, as conflicting with that exclusive jurisdiction. The saving to suitors of a "common-law remedy where the common law is competent to give it" does not save any proceeding *in rem* as used in the admiralty. The common-law knows no such procedure. (The Moses Taylor v. Hammons, 4 Wall. 411, 18 L. Ed. 397, and The Belfast v. Boon, 7 Wall. 624, 19 L. Ed. 266.) The process *in rem* and the maritime lien are correlative. (Galena etc. Packet Co. v. Rock Island Bridge Co., 6 Wall. 213, 18 L. Ed. 753.)

For the earliest history of the American law on the subject the student may refer to a note of Judge Story's in 5 Wheat., pp. 103–162, and for the later changes to one by the late John N. Rogers of Iowa, in 1 West. Jur. 241–247.—HAMMOND.

ship shall sail to Jamaica, or shall be in such a latitude by such a day; or a contract made upon the sea tc be performed in England, as a bond made on shipboard to pay money in London or the like; these kinds of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law.[n] And indeed it hath been further holden that the admiralty court cannot hold plea of any contract under seal.[o]

And also, as the courts of common law have obtained a concurrent jurisdiction with the court of chivalry with regard to foreign contracts, by supposing them made in England; so it is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at the royal exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster Hall.[p] This the civilians exclaim against loudly, as inequitable and absurd; and Sir Thomas Ridley[q] hath very gravely proved it to be impossible for the ship in which such cause of action arises to be really at the royal exchange in Cornhill. But our lawyers justify this fiction, by alleging as before, that the locality of such contracts is not at all essential to the merits of them, and that learned civilian himself seems to have forgotten how much such fictions are adopted and encouraged in the Roman law: that a son killed in battle is supposed to live forever for the benefit of his parents;[r] and that, by the fiction of *postliminium* and the *lex Cornelia*, captives, when freed from bondage, were held to have never been prisoners,[s] and such as died in captivity were supposed to have died in their own country.[t]

§ 128. b. Conflict of jurisdiction.—[108] Where the admiral's court hath not original jurisdiction of the cause, though there should arise in it a question that is proper for the cognizance of that court, yet that doth not alter nor take away the exclusive jurisdiction of the common law.[u] And so, *vice versa*, if it hath jurisdiction of the original, it hath also jurisdiction of all conse-

n Hob. 12. Hal. Hist. C. L. 35.
o Hob. 212.
p 4 Inst. 134.
q View of the Civil Law, b. 3. p. 1. § 3.
r Inst. 1. tit. 25.
s Ff. 49. 15. 12, § 6.
t Ff. 49. 15. 18.
u Comb. 462.

quential questions, though properly determinable at common law.[v] Wherefore, among other reasons, a suit for beaconage of a beacon standing on a rock in the sea may be brought in the court of admiralty, the admiral having an original jurisdiction over beacons.[w] In case of prizes also 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, the courts of admiralty have an undisturbed and exclusive jurisdiction to determine the same according to the law of nations.[x]

§ 129. **c. Procedure in admiralty.**—The proceedings of the courts of admiralty bear much resemblance to those of the civil law, but are not entirely founded thereon: and they likewise adopt and make use of other laws, as occasion requires; such as the Rhodian laws and the laws of Oleron.[y] For the law of England, as has frequently been observed, doth not acknowledge or pay any deference to the civil law considered as such; but merely permits its use in such cases where it judged its determinations equitable, and therefore blends it, in the present instance, with other marine laws: the whole being corrected, altered and amended by acts of parliament and common usage; so that out of this composition a body of jurisprudence is extracted, which owes its authority only to its reception here by consent of the crown and people. The first process in these courts is frequently by arrest of the defendant's person;[z] and they also take recognizances or stipulation of certain fidejussors in the nature of bail,[a] and in case of default may [109] imprison both them and their principal.[b] They may also fine and imprison for a contempt in the face of the court.[c] And all this is supported by immemorial usage, grounded on the necessity of supporting a jurisdiction so extensive;[d] though opposite to the

v 13 Rep. 53. 2 Lev. 25. Hardr. 183.
w 1 Sid. 158.
x 2 Show. 232. Comb. 474.
y Hale, Hist. C. L. 36. Co. Litt. 11.
z Clerke Prax. Cur. Adm. § 13.
a *Ibid.* § 11. 1 Roll. Abr. 531. Raym. 78. Lord Raym. 1286.
b 1 Roll. Abr. 531. Gobd. 193. 260.
c 1 Ventr. 1.
d 1 Keb. 552.

usual doctrines of the common law: these being no courts of record, because in general their process is much conformed to that of the civil law.*

§ 130. 4. Jurisdiction of the common-law courts.—I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark that all possible injuries whatsoever that did not fall within the cognizance of either the ecclesiastical, military or maritime tribunals, are for that very reason within the cognizance of the common-law courts of justice. For it is a settled and invariable principle in the laws of England that every right when withheld must have a remedy, and every injury its proper redress. The definition and explication of these numerous injuries, and their respective legal remedies, will employ our attention for many subsequent chapters. But, before we conclude the present, I shall just mention two species of injuries, which will properly fall now within our immediate consideration: and which 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 and decide the merits without a legal authority.

§ 131. a. Writ of procedendo.—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* (proceeding to judgment), issues out of the court of chancery, where judges of any court do delay the parties; for that they will not give judgment, either on the one side or on the other, when they ought so to do. In this case a writ of *procedendo* shall be awarded, commanding them in the king's name to proceed to judgment; but without specifying any particular judgment, for that (if erroneous) may [110] be set aside in the course of appeal, or by writ of error or false judgment; and, upon further neglect or refusal, the judges of the inferior court may be punished for their contempt, by writ of attachment returnable in the king's bench or common pleas.[f]

* Bro. Abr. t. Error. 177.

[f] F. N. B. 153, 154. 240.

§ 132. b. Writ of mandamus.—A writ of *mandamus* is, in general, a command issuing in the king's name from the court of king's bench, and directed to any person, corporation or inferior court of judicature within the king's dominions, requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice.[18] It is a high prerogative writ, of a most extensively

[18] **Mandamus.**—Chief Justice Taney said: "It is well settled that a *mandamus* in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It was so held by this court in the cases of Kendall v. United States, 12 Pet. 615, 9 L. Ed. 1217; Kendall v. Stokes and Others, 3 How. 100, 11 L. Ed. 513." Commonwealth of Kentucky v. Dennison, 24 How. 66, 97, 16 L. Ed. 717. The writ is not available when there is other adequate remedy. County of San Joaquin v. Superior Court, 98 Cal. 602, 33 Pac. 482. Nor can it be demanded as a matter of right, but is awarded in the discretion of the court. People v. Croton Aqueduct Board, 49 Barb. (N. Y.) 259; Wiedwald v. Dodson, 95 Cal. 450, 30 Pac. 580. But it is held that where a clear legal right to a writ of *mandamus* is shown, the court has no discretion about granting it. Illinois Cent. R. Co. v. People, 143 Ill. 434, 19 L. R. A. 119, 33 N. E. 173. The general purpose of the writ is to enforce the performance of a duty. Roberts v. United States, 176 U. S. 221, 44 L. Ed. 443, 20 Sup. Ct. Rep. 376. It is more especially designed to compel the performance of public duties, and is applied in a wide variety of circumstances. Bayard v. United States, 127 U. S. 246, 32 L. Ed. 116, 8 Sup. Ct. Rep. 1223. It has been held that it may issue to compel the governor of a state to perform a ministerial duty, the court looking rather to the nature of the duty, whether ministerial or discretionary, than to the character of the officer. State v. Brooks, 14 Wyo. 393, 7 Ann. Cas. 1108, 6 L. R. A. (N. S.) 750, 84 Pac. 488; State v. Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557. But there are decisions on the other side, holding that a governor cannot be compelled by *mandamus* to the performance of any duty, even a ministerial one. People v. Morton, 156 N. Y. 136, 66 Am. St. Rep. 547, 41 L. R. A. 231, 50 N. E. 791; State v. Stone, 120 Mo. 428, 41 Am. St. Rep. 705, 23 L. R. A. 194, 25 S. W. 376.

Mandamus may be used to compel corporations to do a large variety of specific acts. Northern Pac. R. Co. v. Washington, 142 U. S. 492, 35 L. Ed. 1092, 12 Sup. Ct. Rep. 283. Especially is it applicable to compel public service companies to perform a duty to the public. Commercial Union Tel. Co. v. New

remedial nature; and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office; but it issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance. A *mandamus*, therefore, lies to compel the admission or restoration of the party applying to any office or franchise of a public nature, whether spiritual or temporal; to academical degrees; to the use of a meeting-house, etc.: it lies for the production, inspection or delivery of public books and papers; 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 recite minutely. But at present we are more particularly to remark that it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench, to superintend all other inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them: and this, not only by restraining their excesses, but also by quickening [111] their negligence, and obviating their denial of justice. A *mandamus* may therefore be had to the courts of the city of London, to enter up judgment;[s] to the spiritual courts to grant an administration, to swear a churchwarden, and the like. This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below: whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made (except in some general cases, where the prob-

s Raym. 214.

England Tel. & Tel. Co., 61 Vt. 241, 15 Am. St. Rep. 893, 5 L. R. A. 161, 17 Atl. 1071. It may be used, under certain circumstances, from a superior to an inferior court, as for a federal circuit court to remand a case to a state court when it has no jurisdiction (In re Winn, 213 U. S. 458, 53 L. Ed. 873, 29 Sup. Ct. Rep. 515); or to compel the inferior court to take jurisdiction when it should do so. In re Hohorst, 150 U. S. 653, 37 L. Ed. 1211, 14 Sup. Ct. Rep. 221. It may be used to restore a person to a corporate office, when his title thereto is otherwise established. Metsker v. Neally, 41 Kan. 122, 13 Am. St. Rep. 269, 21 Pac. 206.

able ground is manifest) 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 to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place a *peremptory mandamus*, to do the thing absolutely; to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other person makes no return, or fails in his respect and obedience, he is punishable for his contempt by attachment. But, if he, at the first, returns a sufficient cause, although it should be false in fact, the court of king's bench will not try the truth of the fact upon affidavits; but will for the present believe him, and proceed no further on the *mandamus*. But then the party injured may have an action against him for his false return, and (if found to be false by the jury) shall recover damages equivalent to the injury sustained; together with a *peremptory mandamus* to the defendant to do his duty. Thus much for the injury of neglect or refusal of justice.

§ 133. c. Writ of prohibition.—The other injury, which is that of encroachment of jurisdiction, or calling one *coram non judice* (before a judge unauthorized to take cognizance of the affair), to answer in a court that has no legal cognizance of the cause, is also a grievance, for which the common law has provided a remedy by the writ of *prohibition*.[19]

[19] **Writ of prohibition.**—Prohibition is the name of a writ issued by a superior court, directed to the judge and parties to a suit in an inferior court, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. Bouvier, Law Dict.; Camron v. Kenfield, 57 Cal. 550; Alexander v. Crollott, 199 U. S. 580, 50 L. Ed. 317, 26 Sup. Ct. Rep. 161. A history of the province of the writ at common law is given in the opinion of the court in Ex parte Williams, 4 Ark. 537, 38 Am. Dec. 46. "Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy

[112] A prohibition is a writ issuing properly only out of the court of king's bench, being the king's prerogative writ; but, for the furtherance of justice, it may now also be had in some cases out of the court of chancery,[h] common pleas,[i] or exchequer;[k] directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. This writ may issue either to inferior courts of common law; as, to the courts of the counties palatine or principality of Wales, if they hold plea of land or other matters not lying within their respective franchise;[l] to the county courts or courts-baron, where they attempt to hold plea of any matter of the value of forty shillings:[m] or it may be directed to the courts Christian, the university courts, the court of chivalry, or the court of admiralty, where they concern themselves with any matter not within their jurisdiction; as if the first should attempt to try the validity of a custom pleaded, or the latter a contract made or to be executed within this kingdom. Or, if in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England; as where they require two witnesses to prove the payment of a legacy, a release of tithes,[n] or the like; in such cases also a prohibition will be awarded. For, as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessory to some original question clearly within their jurisdiction; it ought therefore, where the two laws differ, to be decided not according to the spiritual, but the

h 1 P. Wms. 476.
i Hob. 15.
k Palmer. 523.
l Lord Raym. 1408.
m Finch. L. 451.
n Cro. Eliz. 666. Hob. 188.

---

is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings." In re Rice, 155 U. S. 396, 402, 39 L. Ed. 198, 15 Sup. Ct. Rep. 149.

temporal law; else the same question might be determined different ways, according to the court in which the suit is depending: an impropriety which no wise government can or ought to endure, [113] and which is therefore a ground of prohibition. 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 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;[20] even from the time of the constitutions of Clarendon made in opposition to the claims of Archbishop Becket in 10 Henry II (1163), to the exhibition of certain articles of complaint to the king by Archbishop Bancroft in 3 Jac. I (1605), on behalf of the ecclesiastical courts: from which, and from the answers to them signed by all the judges of Westminster Hall,[p] much may be collected con-

° F. N. B. 40.

p 2 Inst. 601–618.

---

20 **Historical uses of the writ of prohibition.**—"In the long struggle of the common-law courts with their rivals—in the middle ages, chiefly the ecclesiastical tribunals—the writ of prohibition proved itself a weapon of wonderful power. It was a writ which could be and was directed not only against parties, but also against tribunals. In cases involving subject matter claimed by the common-law courts as falling within their own exclusive jurisdiction, not only were parties restrained by prohibition from suing in ecclesiastical courts, but those courts were themselves restrained by prohibition from entertaining such proceedings. It was thus largely by this writ that the courts of common law preserved and extended their jurisdiction, keeping other tribunals to their own peculiar province, and that they protected parties in their common-law rights as opposed to rights good at ecclesiastical law. At a later day the chancery, in its struggle with common-law courts, employed the injunction to effect a similar purpose; but there was this important difference between the prohibition of common-law courts and the injunction of chancery, that the injunction restrained only parties; while the prohibition restrained both parties and courts. Only, therefore, in its effect in restraining parties can we say that the prohibition anticipated the injunction.

"Bracton is careful to explain why there should be two prohibitions—one to the ecclesiastical court and one to the party. At first sight, he says, it

cerning the reasons of granting and methods of proceeding upon prohibitions.

§ 134. (1) Procedure in prohibition.—A short summary of the latter is as follows: The party aggrieved in the court below applies to the superior court, setting forth in a suggestion upon record the nature and cause of his complaint, in being drawn *ad aliud examen* (to another examination or trial), by a jurisdiction or manner of process disallowed by the laws of the kingdom: upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues; commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion: and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare* in prohibition; that is, to prosecute an action, by filing a declaration, against the other, upon a supposition or fiction (which is not traversable[q]) that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if, upon demurrer and argument, the court shall finally be of opinion, that the matter suggested is a good and sufficient ground of [114] prohibition in point of law, then judgment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior court, shall be prohibited from proceeding any further. On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the prohibi-

[q] Barn. Not. 4to. 148.

---

might seem that a prohibition to the judge alone or to the party alone should suffice, for if the judge, in obedience to the prohibition, refused to hear the case, the party's attempt to sue would be of no avail, and if the party, in obedience to the prohibition, did not proceed with his suit, the judge could give no judgment for lack of a plaintiff. But two prohibitions are nevertheless better than one, maintains Bracton, lest either the judge or the party might proceed in the matter with impunity. Apparently he means that two prohibitions, rather than one, will make assurance doubly sure by giving no loop-hole for either judge or party to assert that he has not been prohibited. (Bracton, f. 405 b.)"—HAZELTINE, Essay on Early Equity, in Vinogradoff (editor), Essays in Legal Hist., 277.

tion in the court above, and a writ of *consultation* shall be awarded; so called, because upon deliberation and consultation had the judges find the prohibition to be ill-founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined, in the inferior court. And, even in ordinary cases, the writ of prohibition is not absolutely final and conclusive. For, though the ground be a proper one in point of *law*, for granting the prohibition, yet, if the *fact* that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction. If, for instance, a custom be pleaded in the spiritual court, a prohibition ought to go, because that court has no authority to try it: but if the fact of such a custom be brought to a competent trial, and be there found false, a writ of *consultation* will be granted. For this purpose the party prohibited may appear to the prohibition and take a declaration (which must always pursue the suggestion), and so plead to issue upon it; denying the contempt, and traversing the custom upon which the prohibition was grounded: and, if that issue be found for the defendant, he shall then have a writ of *consultation*. The writ of *consultation* may also be, and is frequently granted by the court without any action brought; when, after a prohibition issued, upon more mature consideration the court are of opinion that the matter suggested is not a good and sufficient ground to stop the proceedings below. 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, founded on the usage of the kingdom or act of parliament, do properly belong to their jurisdiction.

[115]

CHAPTER THE EIGHTH.

OF WRONGS, AND THEIR REMEDIES RESPECTING THE RIGHTS OF PERSONS.

§ 135. Private wrongs, or civil injuries, and their remedies.— The former chapters of this part of our Commentaries having been employed in describing the several methods of redressing private wrongs, either by the mere act of the parties, or the mere operation of law; and in treating of the nature and several species of courts, together with the cognizance of wrongs or injuries by private or special tribunals, and the public ecclesiastical, military and maritime jurisdictions of this kingdom, I come now to consider at large, and in a more particular manner, the respective remedies in the public and general courts of common law for injuries or private wrongs of any denomination whatsoever, not exclusively appropriated to any of the former tribunals. And herein I shall, first, define the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury;[1] and shall, secondly, describe the method of pursuing and obtaining these remedies in the several courts.

First, then, as to the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury. And, in treating of these, I shall at present confine myself to such wrongs as may be committed in the mutual intercourse between subject and subject; which the king, as the fountain of justice, is officially bound to redress in the ordinary forms of law: reserving such [116] injuries or incroachments as may occur between the crown and the subject, to be distinctly considered

1 **Scheme of the common-law actions.**—So much of substantive law is, for historical reasons, bound up in procedure that it is highly important for the student to become acquainted at once with the more important common-law actions. Although these actions are now superseded by more simple and flexible forms of procedure, they have given rise to, or correspond to, important distinctions in the substance of the law, which are still of daily application.

The principal common-law actions are ten: (1) Ejectment, (2) detinue, (3) replevin, (4) debt, (5) covenant, (6) special *assumpsit*, (7) general (*indebitatus*) *assumpsit*, (8) trespass, (9) trespass on the case (case), (10) trover. This is the final form of these actions, after they had developed into a logical system. Historically, ejectment, *assumpsit*, case, and trover were

hereafter, as the remedy in such cases is generally of a peculiar and eccentrical nature.

Now, as all wrong may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the

developments out of trespass, and *assumpsit* and trover were in form to the end actions of trespass on the case.

1. To recover property

To recover real property.....REAL ACTIONS

The real actions are obsolete, except that the writ of entry is in use in Massachusetts, New Hampshire, and Maine.

2. To recover possession

Of real property.....EJECTMENT

Of personal property

acquired lawfully by the defendant, but subject to a superior right of immediate possession in the plaintiff.....DETINUE

taken by the defendant from the plaintiff.....REPLEVIN

Replevin, in this country, has almost entirely superseded detinue, and generally lies in all cases to recover possession of personal property.

3. To recover damages

(1) *Ex contractu*

To recover a liquidated sum of money, due upon specialty, record, statute, or simple contract.....DEBT

To recover damages for breach of a covenant, or promise under seal .....COVENANT

To recover damages for breach of a simple contract.....

(SPECIAL) ASSUMPSIT

To recover damages upon *quasi* contract (no promise, but the case dealt with in law as if there had been one).....

(GENERAL) ASSUMPSIT

(2) *Ex delicto*

To recover damages for a direct physical interference with the person or property.....TRESPASS

Where the trespass consists in taking chattel property out of the plaintiff's possession, the action is called Trespass *de bonis asportatis*, or Trespass *de bonis*.

Where the trespass is committed upon real property, the action is called Trespass *quare clausum fregit*, or Trespass *quare clausum*.

To recover damages for wrongful acts not within the scope of other actions (and not breaches of contract) which cause injury, without direct physical interference with person or property (e. g., libel, slander, a nuisance, deceit).....CASE

To recover damages for the conversion of chattels.....TROVER

—POUND, Readings on the Common Law, 349.

being put in possession of that right whereof the party injured is deprived. This may either be effected by a specific delivery or

Effect of Judicature Act of 1873 on forms of action.—Before the Judicature Act, 1873, actions in the courts of common law were, as has been said, classified as actions on contract and actions of tort. These were all *personal actions*, i. e., actions based upon the defendant's personal liability to do some act or suffer some liability. The old *real actions*, which sought the recovery of some specific piece of land, having been almost entirely swept away by the Real Property Limitation Act, 1833, and completely by the Common Law Procedure Act, 1860. Since 1875, when the Judicature Act, 1873, took effect, an action to recover land, though still often called an "action of ejectment," has been commenced, like an ordinary action, by writ of summons.

Of personal actions there were eight forms, *viz.*, debt, covenant, assumpsit, trespass, trover, detinue, replevin, and trespass on the case. The first three were founded on contract, and the remaining five on tort.

(1) An action of *debt* lay to recover a certain sum of money alleged to be due from the defendant to the plaintiff; (2) of *covenant*, to recover damages for breach of a contract under seal; (3) of *assumpsit*, to recover damages for breach of a contract (or, as it was more technically called, a "special promise") not under seal. (4) An action of *trespass* lay to recover damages for any disturbance or violation of the plaintiff's possession of land or goods, or for any direct and forcible injury to his person; (5) of *detinue*, to recover possession of any chattel wrongfully detained, or its value, if the defendant could or would not restore it to the plaintiff; (6) of *trover* or *conversion*, to recover the value of goods as damages from any other person who had got possession of them and converted them to his own use; (7) of *replevin*, to recover damages for unlawful distress levied on the plaintiff's goods or cattle; and (8) of *trespass on the case*, which was the general remedy, in cases not falling within any of the other forms, for personal wrongs and injuries without force. The plaintiff had to be careful to select the proper form of action; because if he chose the wrong one, he would be nonsuited and have to pay the defendant's costs, even though he had on the facts a good cause of action. The Common Law Procedure Act, 1852, however, introduced, in place of these forms of action, simple statements of the cause of action relied on; and, since the Judicature Act, 1873, all of the above-mentioned kinds of action are commenced in the same way, by a writ of summons indorsed with a statement of the nature of the claim made or the relief or remedy sought. And it is no longer necessary to state in what form the plaintiff is suing. The material facts relied on are stated in the pleadings delivered after the issue of the writ; and, on the facts as alleged and proved, the court will, as a rule, give the plaintiff whatever relief or remedy he is entitled to, irrespective of the form in which he may have brought his action.

Thus it will be seen that, so far as the form of proceedings is concerned, a knowledge of the old varieties of action is not now material. With regard,

restoration of the subject matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded,

however, to the substance of the rights of the parties, the old pleadings are of importance; for it is by a careful study of them that an exact knowledge of the nature and extent of the wrong complained of, and the remedies therefor, is often best obtained. For, as has been said before, the Judicature Acts, though they have profoundly changed legal procedure, were not intended to change (except in certain specified instances), and have not changed, the substantial rights of the parties. Thus, for example, if we wish to know exactly what constitutes the tort of trespass, and who may bring an action of trespass, and against whom such an action can be brought, we can hardly do better than look up the old precedents of pleading in such cases. There the law of the subject will be found expressed with accuracy and precision.—STEPHEN, 3 Comm. (16th ed.), 473.

The reader is advised that he may find on a later page an important note on the Classification of Actions at Common Law, extracted from Street's Foundations of Legal Liability. See note 5, p. 1843, *post*.

Abolition of distinction between forms of actions in the United States.—The classification of actions, which is described by Blackstone and which was such a marked characteristic of the English common law, has now been superseded in most American jurisdictions by the adoption of the so-called "code system." This system originated in statutory form in the Code of Procedure adopted by the state of New York in 1848. During the following years, codes were adopted in many of the states along the same general lines, and at the present time the majority of the states, including practically all of the western states, may be described as code states. Where the common-law system of procedure still prevails, changes have been made so as to incorporate some of the more important provisions of the codes. In England itself, the common-law system of distinct forms of actions, with particularized forms of pleading, was abolished in 1873, by the passage of the Judicature Acts (Stats. 36 & 37 Vict., c. 66; 38 & 39 Vict., c. 77), which, with the rules adopted under their provisions, effected an even more radical change than do the American Codes of Procedure.

The fundamental provision of these codes is the abolition of distinctions between forms of actions. Under their provisions, there is but one form of civil action, and the distinction in form between various actions, and between actions at law and suits in equity, is expressly or impliedly abolished.

It is important to note the scope of this change. One of the purposes of the framers of the codes was to avoid the injustice of turning a suitor out of court because he had not sought his relief in the appropriate form of action. A person may therefore maintain an action in the code states if the facts are such as to entitle him to relief, either at law or in equity, for tort or breach of contract, even though he mistakenly asks for the wrong remedy. To defeat the action, the defendant must not only show that plaintiff has no right to

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, etc.: to which damages the party injured has acquired an incomplete or inchoate right the instant he receives the injury;[a] though such right be not fully ascertained till they are assessed by the intervention of the law. The instruments whereby this remedy is obtained (which are sometimes considered in the light of the remedy itself) are a diversity of suits and actions, which are defined by the Mirror[b] to be "the

[a] See Book II. c. 29.

[b] C. 2. § 1.

---

recover in ejectment, or in trespass, or in equity; he must go further, and show that plaintiff is not entitled to any relief whatever. Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423. Sometimes, however, courts lose sight of this principle and deny a party relief to which he is entitled upon the facts, if such relief is inconsistent with his "theory of the case" as disclosed by his pleading. Oolitic Stone Co. v. Ridge, 169 Ind. 639, 83 N. E. 246. For the contrary and more liberal view, see Conaughty v. Nichols, 42 N. Y. 83.

Furthermore, the codes extend the scope of the relief which may be awarded in a single action. A cause of action under the codes exists where "there is a primary legal right in the plaintiff, a primary legal duty connected with such right in the defendant, and a breach of such duty." Soule v. Weatherby, 39 Utah, 580, Ann. Cas. 1913E, 75, 118 Pac. 833; Pomeroy on Code Remedies, sec. 347. If such a cause of action exists, plaintiff may obtain in a single proceeding all the relief to which he is entitled by reason of its existence, no matter how varied that relief may be, nor how many actions would have been necessary to obtain it before the adoption of the codes. Thus, legal and equitable relief may be sought in a single action. Hahl v. Sugo, 169 N. Y. 109, 88 Am. St. Rep. 539, 61 L. R. A. 226, 62 N. E. 135.

Moreover, equitable defenses may be asserted in actions formerly legal. At common law, if A brought ejectment against B, and B had an equitable title which would defeat his right, B's only remedy was by a separate suit in equity, in which the ejectment suit could be enjoined until the equitable rights were determined. Under the code system, the equitable defense may be presented and determined in the original action brought to recover possession.

However, the adoption of the code system was not designed to, and did not, effect any change in the substantive law. It neither enlarged nor diminished the relief to which a party is entitled on a given state of facts. But previous to its adoption, courts and lawyers had for generations expressed much of the substantive law in procedural terms. A particular state of facts was said to be necessary, not to the granting of particular relief, but to the maintenance of trover, or trespass, or ejectment. This habit of expression, which had

lawful demand of one's right";[2] or, as Bracton and Fleta express it, in the words of Justinian,[c] *jus prosequendi in judicio quod alicui debetur* (the right of prosecuting to judgment which is due to everyone).

§ 136. Forms of action under Roman law.—The Romans introduced, pretty early, set forms for actions and suits in their law, after the example of the Greeks; and made it a rule that each injury should be redressed by its proper remedy only: "*Actiones*, say the pandects, *compositæ sunt quibus inter se homines disceptarent, quas actiones ne populus prout vellet instituerent, certas solennesque esse voluerunt* (Forms of action were devised, by which men might argue their differences, which forms were established and made certain, that the people might not at pleasure institute their own modes of proceeding)."[d] The forms of these actions were originally preserved in the books of the pontifical college, as choice and inestimable secrets, till one Cneius Flavius, the secretary of Appius Claudius, stole a copy and published them to the

[c] Inst. 4. 6. pr.

[d] Ff. 1. 2. 2. § 6.

---

become firmly embedded in legal literature, has naturally survived to a greater or less extent. Occasionally it has betrayed the courts into a disregard of the purposes of the code system, and a reversion to the formalism of common-law procedure.

And although forms of actions are abolished by the codes, the distinction between the nature of various actions inheres in their substance, and is still recognized. Courts are frequently called upon to decide to what class a particular action belongs,—as, for instance, whether the action is for injury to person or to property, or whether it is *ex contractu* or *ex delicto*,—when they apply the provisions of the codes themselves relating to joinder of causes of action, limitation of actions, and many incidental matters of practice. Moreover, the question whether a particular cause is legal or equitable in its nature must often be passed upon in determining the right to a trial by jury.—M. E. HARRISON.

2 "The term [suit] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit."—MARSHALL, C. J., in Weston v. Charleston, 2 Pet. 449, 464, 7 L. Ed. 481, 487.

people.[e] The [117] concealment was ridiculous: but the establishment of some standard was undoubtedly necessary to fix the true state of a question of right; lest in a long and arbitrary process it might be shifted continually, and be at length no longer discernible. Or, as Cicero expresses it,[f] "*sunt jura, sunt formulæ de omnibus rebus constitutæ, ne quis aut in genere injuriæ, aut in ratione actionis, errare possit. Expressæ enim sunt ex uniuscujusque damno, dolore, incommodo, calamitate, injuria, publicæ a prætore formulæ, ad quas privata lis accommodatur* (there are rights, there are forms appointed for all things, lest anyone should mistake either the kind of injury or the mode of redress. For public forms are composed by the prætor from every species of loss, trouble, inconvenience, calamity and injury, for the accommodation of private suits)." And in the same manner our Bracton, speaking of the original writs upon which all our actions are founded, declares them to be fixed and immutable, unless by authority of parliament.[g] And all the modern legislators of Europe have found it expedient, from the same reasons, to fall into the same or a similar method.

§ 137. Classes of actions in English law.—With us in England the several suits, or remedial instruments of justice, are from the subject of them distinguished into three kinds; actions *personal*, *real* and *mixed*.

§ 138. 1. Personal actions. — Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof: and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon *torts* or wrongs, and they are the same which the civil law calls "*actiones in personam, quæ adversus eum intenduntur, qui ex con-*

[e] Cic. pro Muræna. § 11. de Orat. l. 1. c. 41.

[f] Pro. Qu. Roscio. § 8.

[g] *Sunt quædam brevia formata super certis casibus de cursu, et de communi consilio totius regni approbata et concessa, quæ quidem nullatenus mutari poterint absque consensu et voluntate eorum* (There are some writs formed on certain cases, granted and approved by the common council of the kingdom, which can in no wise be changed without its will and consent). (L. 5. de Exceptionibus. c. 17. § 2.)

tractu vel delicto obligatus est aliquid dare vel concedere (personal actions which are commenced against him who by contract, or through the commission of some offense, is bound to give or surrender something)."[h] Of the former nature are all actions upon debt or promises; of the latter all actions for trespasses, nuisances, assaults, defamatory words and the like.

§ 139. 2. Real actions.—Real actions (or, as they are called in the Mirror,[1] *feudal actions*), which concern real property only,[3] are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons or other hereditaments, [118] in fee simple, fee-tail, or for term of life. By these actions formerly all disputes concerning real estates were decided; but they are now pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process: a much more expeditious method of trying titles being since introduced, by other actions personal and mixed.

§ 140. 3. Mixed actions.—Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained. As for instance, an action of waste: which is brought by him who hath the inheritance, in remainder or reversion, against the tenant for life, who hath committed waste therein, to recover not only the land wasted, which would make it merely a *real* action; but also treble damages, in pursuance of the statute of Gloucester,[k] which is

h Inst. 4. 6. 15.

1 C. 2. § 6.

k 6 Edw. I. c. 5.

---

3 "In real actions the demandant claims title to lands, tenements, or hereditaments, in fee simple, fee-tail, or for a term of life (3 Bl. Comm. 117), by writ of right, entry, etc., hence they are said by Blackstone to 'concern real property only.' Chief Justice Shaw considered that the terms real and personal actions were not used in the statute of Massachusetts regulating costs in the sense contemplated by the common law, and as defined by Blackstone. He said: 'The broad distinction which runs throughout the statute is that between actions in which rights to real estate may be brought in question and tried, and those which affect personal rights' (Plympton v. Baker, 10 Pick. (Mass.) 474. See §§ 1, 64)."—SEDGWICK & WAIT, Ejectment, 3 Sel. Essays in Anglo-Am. Leg. Hist., 637.

a *personal* recompense; and so both, being joined together, denominate it a *mixed* action.

§ 141. Kinds of civil injuries.—Under these three heads may every species of remedy by suit or action in the courts of common law be comprised. But in order effectually to apply the remedy, it is first necessary to ascertain the complaint. I proceed, therefore, now to enumerate the several kinds, and to inquire into the respective natures, of all private wrongs, or civil injuries, which may be offered to the rights of either a man's person or his property; recounting at the same time the respective remedies which are furnished by the law for every infraction of right. But I must first beg leave to premise that all civil injuries are of two kinds, the one *without force* or violence, as slander or breach of contract, the other coupled *with force* and violence, as batteries, or false imprisonment.[1] Which latter species savor something of the criminal kind, being always attended with some violation of the peace; for which in strictness of law a fine ought to be paid to the king, as [119] well as private satisfaction to the party injured.[m] And this distinction of private wrongs, into injuries *with* and *without* force, we shall find to run through all the variety of which we are now to treat.[4] In considering of which I shall follow the same

[1] Finch. L. 184.

[m] Finch. L. 198. Jenk. Cent. 185.

---

[4] **Difference between violent and nonviolent injuries.**—Such a primary division as this [as stated by Blackstone above] is not to be thought of at the present day. But the distinction to which Blackstone's classification points is too important to be hastily put aside. Consideration of the difference between violent and nonviolent injuries will in fact give a clearer perception of certain fundamental notions underlying the evolution of civil liability than can be gotten from any other point of view. The difference can perhaps be truly indicated as follows:

In the field of trespass liability is based solely upon the fact that damage is directly done by force. No consideration is here taken of the moral qualities of the act which results in damage. The actor may or may not be culpable or morally blameworthy. He may or may not have intended to do the harm complained of. All discussion on this point is, as a matter of primary principle, entirely irrelevant. In the field of wrongs not characterized by a display of force, it is different. Here the law does not impose liability unless the injurious act or omission complained of exhibits in some form the element of blameworthiness. Fraud, malice, negligence, will occur to the reader as

method that was pursued with regard to the distribution of rights: for as these are nothing else but an infringement or breach of those rights, which we have before laid down and explained, it will follow that this negative system, of *wrongs*, must correspond and tally with the former positive system, of *rights*. As, therefore, we divided[n] all rights into those of *persons*, and those of *things*, so we must make the same general distribution of injuries into such

[n] See Book I. c. 1.

---

forms of blame which, in one connection or another, are accepted as a basis of liability.

The moral ingredient thus appears to be negligible in wrongs of direct violence, while in other torts it is of prime importance. The internal development of the law of tort is largely a result of the interplay of these two ideas of absolute liability and of liability conditioned upon some form of fault or actual moral delinquency. The first idea is harsh. Hence as the law becomes humanized and as the legal mind becomes educated to realize the truth that the fault of the actor is a factor which has a rightful place in determining liability, the theory of trespass is ameliorated.

The idea of absolute liability is as characteristic of the primary strata of legal thought as the idea of liability conditioned upon the fault is characteristic of later development. The early law considers plight of the injured party, but pays little or no attention to the motive or intention of the actor.

It may be observed that liability for nonviolent injuries has commonly been enforced by the action on the case. Consequently the amelioration of the law of trespass just indicated may be looked upon as a victory of the principle of case over that of trespass.

The proposition that the moral ingredient is, as a matter of primary principle, negligible in wrongs of direct violence, must be taken as meaning not that this factor is necessarily absent in such wrongs, but merely that law takes no account of it. In truth, all law starts more or less from moral roots. If no morally blameworthy act had ever been done, we may be sure there would never have been any law of torts. If there had been no culpable acts of deliberate violence the law would never have concerned itself to make one man pay for damage befalling another as a result of blameless injury. But however important the moral ingredient may have been in causing the courts to take the trespass in hand, when they had once done so, a hard-and-fast rule was laid down that left no room for consideration of the moral character of the act as reflected in the motive or intention of the actor. In trespass "the intent cannot be construed," said Rede, J., at the beginning of the sixteenth century. But this harsh doctrine is merely a principle of first impression and by no means represents the final judgment of the common law.—STREET, 1 Foundations of Legal Liability, 2.

as affect the *rights of persons*, and such as affect the *rights of property*.

§ 142. 1. Injuries to absolute rights of persons.—The rights of persons, we may remember, were distributed into *absolute* and *relative*: *absolute*, which were such as appertained and belonged to private men, considered merely as individuals, or single persons; and *relative*, which were incident to them as members of society, and connected to each other by various ties and relations. And the absolute rights of each individual were defined to be the right of personal security, the right of personal liberty, and the right of private property, so that the wrongs or injuries affecting them must consequently be of a correspondent nature.

§ 143. a. Injuries affecting personal security.—As to injuries which affect the personal security of individuals, they are either injuries against their lives, their limbs, their bodies, their health, or their reputations.

§ 144. (1) Injuries affecting life.—With regard to the first subdivision, or injuries affecting the life of man, they do not fall under our present contemplation; being one of the most atrocious species of crimes, the subject of the next book of our Commentaries.[5]

[5] **Lord Campbell's Act, 1846.**—Before 1846, if a man was killed in an accident due to the negligence of another, no right of action for damages survived to his family. Railway accidents that had then begun to occur with increasing frequency made the hardship of the common-law rule no longer tolerable. Accordingly in that year, the Fatal Accidents Act (9 & 10 Vict., c. 93), commonly called Lord Campbell's Act, was passed. The text of this act is as follows:

"Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Injury so caused by him: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who-

§ 145. (2, 3) Injuries affecting limb or body: trespass.—[120] The two next species of injuries, affecting the limbs or bodies of individuals, I shall consider in one and the same view. And these may be committed,

§ 146. (a) By threats.—By *threats* and menaces of bodily hurt, through fear of which a man's business is interrupted. A menace alone, without a consequent inconvenience, makes not the injury;[6] but, to complete the wrong, there must be both of them together.[o] The remedy for this is in pecuniary damages, to be re-

[o] Finch. L. 202.

---

would have been liable if Death hath not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.

"II. And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit such Action shall be brought; and the Amount so recovered, after deducting the Costs not recovered from the Defendant, shall be divided amongst the before-mentioned Parties in such Shares as the Jury by their Verdict shall find and direct.

"III. Provided always, and be it enacted, That not more than One Action shall lie for and in respect of the same Subject Matter of Complaint, and that every such Action shall be commenced within Twelve Calendar Months after the Death of such deceased Person."

Statutes fashioned after this act have been passed in most of the states of the American Union.

6 **Action for threats.**—Blackstone does not say, as he has sometimes been understood, that substantial damages must be shown to make threats or menace actionable: that damage cannot be implied. This would be inconsistent with the nature of an action of trespass *vi et armis*, which lies here, as he shows. His meaning is that the threats or menace must produce some effect on the party threatened; must inconvenience him, put him out of his way, or the like, even if no more. Otherwise they are mere words, idle wind, and not actionable when addressed to a man who simply disregards them. But the effect once produced "completes the injury," and constitutes a trespass as much as if it had been done by a blow.—HAMMOND.

covered by action of *trespass vi et armis* (trespass with force and arms),[p] this being an inchoate, though not an absolute, violence.

§ 147. **(b) By assault.**—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; this is an assault, *insultus*, which Finch[q] describes to be "an unlawful setting upon one's person." This also is an inchoate violence, amounting considerably higher than bare threats; and therefore, though no actual suffering is proved, yet the party injured may have redress by action of *trespass vi et armis;* wherein he shall recover damages as a compensation for the injury.[7]

p Registr. 104. 27 Ass. 11. 7 Edw. IV. 24 (1467).

q Finch. L. 202.

---

7 **Physical injury resulting from fright.**—Within recent years there has been occasion for adjudication on the question whether a person subjected by the conduct of another to fright or nervous shock may recover for the injury caused to him. It is well settled that damages for an admitted tort to a person may be enhanced by proof of mental anguish and nervous shock caused by fright induced by the defendant's misconduct. Melone v. Sierra Ry. Co., 151 Cal. 113, 91 Pac. 522. But the situation is not so clear when the primary injury is fright, with resulting illness or impaired health and usefulness. Where the defendant has been guilty of a wanton tort, it is usually conceded that the plaintiff may recover for the consequences of fright, although there has been no battery on his body. Thus a person was held liable who entered as a trespasser a woman's house in the absence of her husband, and flourished a whip at her and addressed her with threats and abusive language, causing fright which brought on illness and miscarriage. Brownback v. Frailey, 78 Ill. App. 262; Watson v. Dilts, 116 Iowa, 249, 93 Am. St. Rep. 239, 57 L. R. A. 559, 89 N. W. 1068; Williams v. Underhill, 63 App. Div. 223, 71 N. Y. Supp. 291. And this principle is applied in the case where the defendant was indulging only in a practical joke. The defendant, as a practical joke, represented to a woman that her husband had lost both legs in a railway accident. She suffered a violent shock to her nervous system, entailing weeks of illness and suffering. She was held entitled to damages. Wilkinson v. Downton, L. R. [1897] 2 Q. B. 57. See, also, Green v. T. A. Shoemaker & Co., 111 Md. 69, 23 L. R. A. (N. S.) 667, 73 Atl. 688.

In most of the cases that have arisen the fright was caused by the negligent conduct of the defendant, and not by his wanton tort or reckless disregard of consequences. Here the courts draw a distinction between the cases where

§ 148. (c) By battery.—By *battery;* which is the unlawful beating of another. The least touching of another's person willfully, 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

there has been any impact on the body of the plaintiff and the cases where there has been no impact. Where there has been impact, no matter how slight, the courts have had no difficulty in holding the defendant liable for the injury resulting from the fright. Thus, a passenger in a railway collision is thrown against a seat, and although not physically hurt by the impact, is allowed to recover for nervous shock ending in paralysis. Homans v. Boston El. R. Co., 180 Mass. 456, 91 Am. St. Rep. 324, 57 L. R. A. 291, 62 N. E. 737. A woman is struck on the temple by an incandescent lamp globe, causing only a slight bruise. She is allowed to recover for a miscarriage resulting from the fright received at the time of the blow. Jones v. Brooklyn Heights R. Co., 23 App. Div. 141, 48 N. Y. Supp. 914. And so in similar instances, Warren v. Boston & M. R. Co., 163 Mass. 484, 40 N. E. 895; Armour & Co. v. Kollmeyer, 161 Fed. 78; Porter v. Delaware L. & W. R. Co., 73 N. J. L. 405, 63 Atl. 860.

On the other hand, where there has been no wanton tort, reckless disregard of consequences, nor bodily impact, the courts are divided on the question of the defendant's liability. Those that deny recovery rest their decision on one or more of three grounds: (1) Because fright alone is not an independent basis of action; (2) Because the damage is too remote; (3) For reasons of expediency and policy. Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 56 Am. St. Rep. 604, 34 L. R. A. 781, 45 N. E. 354; Victorian Ry. Commrs. v. Coultas, 13 App. Cas. 222; Ward v. West Jersey & S. R. Co., 65 N. J. L. 383, 47 Atl. 561; Spade v. Lynn & B. R. Co., 168 Mass. 285, 60 Am. St. Rep. 393, 38 L. R. A. 512, 47 N. E. 88. The courts that stand for the liability of the defendant deny the force of these reasons. In refutation of the first ground for refusing liability it is, for instance, said: "First of all, it is argued, fright caused by negligence is not in itself a cause of action,—ergo, none of its consequences can give a cause of action. . . . With all respect to the learned judges who have so held, I feel a difficulty in following this reasoning. No doubt damage is an essential element in a right of action for negligence. . . . It may, I conceive, be truly said that, viewed in relation to an action for negligence, direct bodily impact is, without resulting damage, as insufficient a ground of legal claim as the infliction of fright. That fright—where physical injury is directly produced by it—cannot be a ground of action merely because of the absence of any accompanying impact appears to me to be a contention both unreasonable and contrary to the weight of authority."—KENNEDY, J., in Dulieu v. White & Sons, [1901] 2 K. B. 669.

The answer to the second ground for denying recovery, that the damage is too remote, is thus stated: "Recalling that proximate cause is probable cause,

sacred, and no other having a right to meddle with it, in any the slightest manner. And therefore upon a similar principle the Cornelian law *de injuriis* (of personal injuries) prohibited *pulsation* as well as *verberation;* distinguishing verberation, which was accompanied with pain, from pulsation which was attended with none.[r] But battery is, in some cases, justifiable or lawful;[8] as where one

r Ff. 47. 10. 5.

---

and that the proximate consequence of a given act or omission, as distinguished from a remote consequence, is one which succeeds naturally in the ordinary course of things, and which therefore ought to have been anticipated by the wrongdoer, we must be prepared to conclude in favor of these courts which hold that injuries of this kind [miscarriages resulting from fright] are actionable. Not only will every competent physician or surgeon that can be summoned testify that a severe fright or nervous shock has a tendency to produce a miscarriage in a pregnant woman, but it is a matter so well known that it may be rested upon common observation; and every court ought to take judicial notice of such a fact." Thompson on Negligence (2d ed.), § 156.

The refutation of the argument based on expediency or policy for refusing relief is stated in one case as follows: "The argument from mere expediency cannot commend itself to a court of justice resulting in the denial of a logical legal right and remedy in all cases because in some a fictitious injury may be urged as a real one. The apparent strength of the theory of expediency lies in the fact that nervous disturbances and injuries are sometimes more imaginary than real, and are sometimes feigned; but this reasoning loses sight of the equally obvious fact that a nervous injury arising from actual impact is as likely to be imagined as one resulting from fright without physical impact, and that the former is as capable of simulation as the latter." Green v. T. A. Shoemaker & Co., 111 Md. 69, 23 L. R. A. (N. S.) 667, 73 Atl. 688.

The whole argument against allowing recovery may be found in the cited New York case of Mitchell v. Rochester R. Co.; and the whole argument in favor of granting recovery in the cited English case of Dulieu v. White, or the Maryland case of Green v. Shoemaker & Co. For further reference on the subject, see 2 Mod. Am. Law, 23–33; Burdick, Tort Liability for Mental Disturbance and Nervous Shock, 5 Columbia Law Rev. 179; monographic notes, 3 L. R. A. (N. S.) 49 and 22 L. R. A. (N. S.) 1073.

8 **Actions for battery.**—"Battery is the unlawful beating of another." "But battery is in some cases justifiable or lawful."

This is an example of a fault very uncommon in Blackstone, *viz.*, carelessness in the use of words and inconsistency with his own definitions. It is desirable to settle on one or the other form of expression. In the one sense a man might properly swear that he had not committed a battery: in the other, such swearing would be clear perjury, if in fact he had struck a man, though

who hath authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice. So, also, on the principle of self-defense; for if one strikes me first, or even only assaults me, I may strike in my own defense; and, if sued for it, may plead *son assault demesne,* or that it was the plaintiff's [121] own original assault that occasioned it. So likewise in defense of my goods or possession, if a man endeavors 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.[s] 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.[ss] 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, as for assault, by action of *trespass vi et armis,* wherein the jury will give adequate damages.

§ 149. (d) By wounding.—By *wounding;* which consists in giving another some dangerous hurt, and is only an aggravated species of battery.

§ 150. (e) By mayhem.—By *mayhem;* which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defense in fight. This is a battery, attended with this aggravating circumstance, that thereby the party injured is forever disabled from making so good a defense against future external injuries, as he otherwise might have done. Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a foretooth,[t] and also some others.[u] But the loss of one of the jaw-teeth, the ear, or the nose,

[s] 1 Finch. L. 203.
[ss] 1 Sid. 301.
[t] Finch. L. 204.
[u] 1 Hawk. P. C. 111.

---

ly. But a more natural and frequent inconvenience is the uncertainty introduced into the rules of pleading. If battery necessarily imported the unlawfulness of the act, justification as a defense would be provable under a general denial: whereas by the common usage, as well as by the better opinion, it must be specially pleaded.—HAMMOND.

is no mayhem at common law; as they can be of no use in fighting. The same remedial action of *trespass vi et armis* lies also to recover damages for this injury, an injury, which (when willful) no motive can justify, but necessary self-preservation. If the ear be cut off, treble damages are given by statute 37 Henry VIII, c. 6 (Criminal Law, 1545), though this is not mayhem at common law.

§ 151. (i) Civil and criminal liability.—And here I must observe that for these four last injuries, assault, battery, wounding and mayhem, an indictment may be brought as well as an action; and frequently both are accordingly prosecuted; the one at the suit of the crown for the crime against the public, the [122] other at the suit of the party injured, to make him a reparation in damages.

§ 152. (4) Injuries affecting health.—Injuries affecting a man's *health* are where by any unwholesome practices of another a man sustains any apparent damage in his vigor or constitution. As by selling him bad provisions or wine;[w] by the exercise of a noisome trade, which infects the air in his neighborhood;[x] or by the neglect or unskillful management of his physician, surgeon or apothecary.[9] For it hath been solemnly resolved[y] that *mala praxis* (bad practice) is a great misdemeanor and offense at common law,

w 1 Roll. Abr. 90.

x 9 Rep. 52. Hutt. 135.

y Lord Raym. 214.

---

9 **Degree of skill required of physician or surgeon.**—The complaint of the plaintiff is, that, in the treatment of the wound under which he was suffering, the defendant did not furnish that degree of skill, learning and experience which was required of him, and which, in undertaking the case, he impliedly bound himself to furnish. It is not contended that he engaged to furnish extraordinary skill, or that he warranted a cure, but that in undertaking the case he held himself out as being a man of reasonable and ordinary skill and experience in his profession as a surgeon. His contract, as implied by law, is, so far as this point is concerned, that he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession. Leighton v. Sargent, 27 N. H. 460, 59 Am. Dec. 388. It must be the ordinary skill, learning and experience of the profession generally. Wilmot v. Howard, 39 Vt. 447, 94 Am. Dec. 338. And, in judging of this degree of skill in any given case, regard is to be had to the advanced state of the profession at the time. McCandless v. McWha, 22 Pa. St. 261.—AMES, J., in Small v. Howard, 128 Mass. 131, 135, 35 Am. Rep. 363.

whether it be for curiosity and experiment, or by neglect; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction. Thus also, in the civil law,[x] neglect or want of skill in physicians or surgeons "*culpæ adnumerantur; veluti si medicus curationem dercliquerit, male quempium secuerit, aut perperam ei medicamentum dederit* (they are reckoned faults, as if a medical man neglect his patient, perform an amputation unskillfully, or administer medicine unadvisedly)."

§ 153. (a) Trespass on the case.—These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages by a special action of *trespass, upon the case.*[10] This ac-

x Inst. 4, 3. 6. & 7.

---

10 **Negligence.**—Negligence is defined to be the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Blyth v. Birmingham Waterworks Co., [1856] 11 Ex. 781.

We may say as a general proposition that whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger; and a negligent failure to perform the duty renders him liable for the consequences of his neglect. Depue v. Flatau, 100 Minn. 299, 111 N. W. 1. Thus, a person using a highway is under a duty to take reasonable care to avoid doing injury to other persons lawfully on the highway. Bailees or other persons having the possession or custody of the goods of another, are under a duty, independently of contract, to take reasonable care of them. Meux v. Great Eastern Ry. Co., [1895] 2 Q. B. 387. Public carriers of passengers and of goods are under a like duty. An occupier of premises owes to persons who come to them on lawful business a duty to use reasonable care to see that the premises are in a safe condition, or to give reasonable warning of danger of which he knows, or ought with reasonable care to have known. Indermaur v. Dames, L. R. 1 C. P. 274; Sweeny v. Old Colony etc. R. Co., 10 Allen (Mass.), 368, 87 Am. Dec. 644. A licensee, as a general rule, goes upon land at his own risk, and must take the premises as he finds them (Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369); but circumstances may cast a duty upon the owner of the premises. Carskaddon v. Mills, 5 Ind. App. 22, 31 N. E. 559. Even trespassers may, under exceptional conditions, recover for injury caused by negligence. Herrick v. Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333. Especially is this so, in the case of young children, who have been tempted, by

tion, of *trespass*, or transgression, *on the case*, is an universal remedy, given for all personal wrongs and injuries without force; so called because the plaintiff's whole case or cause of complaint is

such things alluring to them as turntables, and other machinery, to trespass upon the defendant's property. Sioux City & Pac. R. Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745; Keffe v. Milwaukee & St. P. Ry. Co., 21 Minn. 207, 18 Am. Rep. 393; Cahill v. E. B. & A. L. Stone & Co., 153 Cal. 571, 19 L. R. A. (N. S.) 1094, 96 Pac. 84. Of cases holding to the contrary, the leading one is Frost v. Eastern R. Co., 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; a later case is Daniels v. New York & N. E. R. Co., 154 Mass. 349, 26 Am. St. Rep. 253, 13 L. R. A. 248, 28 N. E. 283. The owner of property abutting on a highway may not make an excavation, for instance, so near the highway that a prudent passer-by is likely to fall into the excavation. Barnes v. Ward, 9 Com. B. 392, 137 Eng. Reprint, 945.

Where there is a duty to use care, the standard of care which the law requires is the care ordinarily exercised by the great mass of mankind, or its type, the ordinarily prudent person, under the same or similar circumstances. Yerkes v. Northern Pac. R. Co., 112 Wis. 184, 88 Am. St. Rep. 961, 88 N. W. 33. Thus a blind person in walking along a public street is required to use the ordinary care that persons of ordinary prudence under such circumstances would exercise. Hill v. Glenwood, 124 Iowa, 479, 100 N. W. 522.

The damages recoverable in an action of negligence are such as will fairly compensate the plaintiff for the actual injury or loss he has sustained. In order, however, that damages may be recovered, the resulting injury must be the natural and proximate consequence of the negligence complained of. The rule as commonly stated is that the proximate, and not the remote, cause is regarded—*causa proxima, sed non remota, spectatur.* Two ways of interpreting this rule have been used and have caused much conflict in the decisions. According to one interpretation it is said that in order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances. Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256. The other form of statement is that the defendant is liable for all the natural consequences flowing in an unbroken chain of causation, whether he could have foreseen or anticipated them or not. Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co., 130 Iowa, 123, 8 Ann. Cas. 45, 5 L. R. A. (N. S.) 882, 106 N. W. 498. The former of these rules is sometimes called the foresight rule and the latter the hindsight rule. Rodgers v. Missouri Pac. Ry. Co., 75 Kan. 222, 121 Am. St. Rep. 416, 12 Ann. Cas. 441, 10 L. R. A. (N. S.) 658, 88 Pac. 885. The correct application of these two rules was given in 1870 by Baron Channel, who advised us that the question whether there had been negligence was to be determined by what a reasonable man might foresee as a consequence of his act; but that once it has been decided that there was negligence, the person

set forth at length in the original writ.[a] For though in general there are methods prescribed and forms of actions previously settled for redressing those wrongs which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, nonpayment of debts, detaining one's goods, or the like; yet where [123] any

[a] **Trespass on the case in assumpsit.**—For example: "*Rex vicecomiti salutem. Si A fecerit te securum de clamore suo prosequendo, tunc pone per vadium et salvos plegios B quod sit coram justitiariis nostris apud Westmonasterium in octabis sancti Michaelis, ostensurus quare cum idem B ad dextrum oculum ipsius A casualiter læsum bene et competenter curandum apud S. pro quadam pecuniæ summa præ manibus soluta assumpsisset, idem B curam suam circa oculum prædictum tam negligenter et improvide apposuit, quod idem A defectu ipsius B visum oculi prædicti totaliter amisit, ad damnum ipsius A viginti librarum, ut dicit. Et habeas ibi nomina plegiorum et hoc breve. Teste meipso apud Westmonasterium, etc.*" (The king to the sheriff greeting. If A shall make you secure that he will prosecute his claim, then put by gages and safe pledges B that he be before our justices at Westminster on the octave of St. Michael, to show wherefore whereas he, the said B, undertook well and competently to cure the right eye of the said A, which was accidentally injured, for a certain sum of money beforehand received, he, the same B, so negligently and carelessly applied his cure to the said eye that the said A, by the default of him, the said B, totally lost the sight of the said eye, to the damage of him, the said A, of twenty pounds, as he saith. And have there the names of the pledges and this writ. Witness myself at Westminster, etc.—Maitland, Equity, 383, 384. (Registr. Brev. 105.)

---

guilty of it is equally liable for its consequences, whether he could have foreseen them or not. Smith v. London & S. W. Ry. Co., L. R. 6 C. P. 14.

The plaintiff is not entitled to recover damages if he was himself guilty of contributory negligence; that is to say, where, notwithstanding the defendant's negligence, he could, by reasonable care on his part, have avoided the accident. As Lord Ellenborough put it: "One person being in fault will not dispense with another's using ordinary care for himself." Butterfield v. Forrester, 11 East, 60, 103 Eng. Reprint. 926. The doctrine of contributory negligence is subject to many refinements and difficulties of application. A leading variation of this doctrine is known as the rule of the "last clear chance," in the leading case of which the facts were that the defendant was driving carelessly along the highway and ran into and injured the plaintiff's donkey, which was straying on the highway with his feet fettered. It was held that the plaintiff's negligence was not the proximate cause and accordingly he was not barred from recovery. Davies v. Mann (1842), 10 M. & W. 546. The rule is that, where both parties are negligent, the one who has the last clear

special consequential damage arises which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and the statute of Westm. II, c. 24 (13 Edward I, 1285, Real Actions), to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance.[b] For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action;[c 11] and therefore, wherever a new injury is done, a new method of remedy must be pursued.[d] And it is a settled distinction[e] that where an act is done which is in itself an *immediate* injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis;* but where there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by *consequence* and collaterally, there no action of trespass *vi et armis* will lie, but an action on the special case, for the damages consequent on such omission or act.

§ 154. (5) Injuries affecting reputation.—Lastly; injuries affecting a man's *reputation* or good name are, first, by malicious, scandalous and slanderous *words*, tending to his damage and derogation.[12]

[b] See pag. 51.
[c] 1 Salk. 20. 6 Mod. 54.
[d] Cro. Jac. 478.
[e] 11 Mod. 180. Lord Raym. 1402. Stra. 635.

---

opportunity of avoiding an accident is considered responsible therefor. Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. Ed. 485, 12 Sup. Ct. Rep. 679; Dyerson v. Union Pac. R. Co., 74 Kan. 528, 11 Ann. Cas. 207, 7 L. R. A. (N. S.) 132, 87 Pac. 680; Indianapolis, T. & T. Co. v. Kidd, 167 Ind. 402, 10 Ann. Cas. 942, 7 L. R. A. (N. S.) 143, 79 N. E. 347. In order to make the last clear chance applicable, the acts of negligence must be successive and not concurrent. The Steam Dredge No. 1, 134 Fed. 161, 69 L. R. A. 293, 67 C. C. A. 67.

11 See Broom, Legal Maxims (8th ed.), 153.

12 **Defamation.**—The English law of defamation is full of anomalies; its provisions can only be thoroughly understood by knowledge of its development "The crooked and wrenched form of the law of slander and libel can be accounted for, but it must be accounted for in the way we account for the distorted shape of a tree—by looking for the special circumstances under which it has grown and the forces to which it has been exposed." 6 Am. Law Rev. 597. This history may be read in articles by Frank Carr, English Law of

§ 155. (a) Slander: (i) Words actionable per se.—As if a man, maliciously and falsely, utter any slander or false tale of another, which may either endanger him in law, by impeaching him of some heinous crime, as to say that a man hath poisoned another,

Defamation, 18 Law Quar. Rev. 255, 388, and by Van Vechten Veeder, 3 Col. Law Rev. 546, and 4 Col. Law Rev. 33.

The common-law doctrine of actionable defamation may be very clearly and succinctly stated, by saying that matter which tends to hurt one's reputation is actionable in any one of the following situations:

I. If the words impute the commission of a crime. This rule is variously interpreted. Sometimes, it is a crime which must be punished corporally (Birch v. Benton, 26 Mo. 153; Waganan v. Byers, 17 Md. 183; Billings v. Wing, 7 Vt. 439); or sometimes, a crime involving moral turpitude (Frisbie v. Fowler, 2 Conn. 707; Hoag v. Hatch, 23 Conn. 585; Reitan v. Goebel, 33 Minn. 151, 22 N. W. 291); or again, a crime involving moral turpitude and punishable corporally (Redway v. Gray, 31 Vt. 292, qualifying Billings v. Wing, 7 Vt. 439; Murray v. McAllister, 38 Vt. 167); or, a crime involving disgrace (Miller v. Parish, 8 Pick. (Mass.) 384; Brown v. Nickerson, 5 Gray (Mass.), 1; Ranger v. Goodrich, 17 Wis. 78); or, a crime subjecting the offender to infamous punishment (Shipp v. McCraw, 7 N. C. 463, 9 Am. Dec. 611; Harris v. Terry, 98 N. C. 131, 3 S. E. 745); or, an offense which is indictable and involves moral turpitude, or subjects the offender to corporal punishment, or to infamous punishment (Griffin v. Moore, 43 Md. 246; Brooker v. Coffin, 5 Johns. (N. Y.) 188, 4 Am. Dec. 337; Curry v. Collins, 37 Mo. 324); or, generally, any criminal offense whatever (Webb v. Beavan, 11 Q. B. D. 609). See 1 Ames & Smith, Cases on Torts (3d ed.), 408 n.

II. If the words impute to the person slandered a loathsome disease; loathsome disease being, however, construed to mean only plague, leprosy or venereal disease. Taylor v. Perkins, Cro. Jac. 144, 79 Eng. Reprint, 126; Taylor v. Hall, 2 Strange, 1189, 93 Eng. Reprint, 1118; George, the Count Joannes, v. Burt, 6 Allen (Mass.), 236, 83 Am. Dec. 625.

III. If the words cast an injurious imputation upon one in respect to his office, profession or business. Lumby v. Allday, 1 Cromp. & J. 301, 148 Eng. Reprint, 1434; Foulger v. Newcomb, L. R. 2 Ex. 327; Ayre v. Craven, 2 Ad. & E. 2, 111 Eng. Reprint, 1; Jones v. Littler, 7 M. & W. 423; Secor v. Harris, 18 Barb. (N. Y.) 425; Sumner v. Utley, 7 Conn. 257; Lovejoy v. Whitcomb, 174 Mass. 586, 55 N. E. 322; Freisinger v. Moore, 65 N. J. L. 286, 47 Atl. 432; Mattice v. Wilcox, 147 N. Y. 624, 42 N. E. 270; McIntyre v. Weinert, 195 Pa. St. 52, 45 Atl. 666; Gauvreau v. Superior Pub. Co., 62 Wis. 403, 22 N. W. 726.

IV. If no one of the above several conditions exist, the words will still be actionable if the plaintiff can show that they were followed by actual pecuniary damage such as might have been expected naturally to follow therefrom. Davies v. Gardiner, Popham, 36, 79 Eng. Reprint, 1155; Allsop v. Allsop, 5

or is perjured;[f] 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.[g] Words spoken in dero-

[f] Finch. L. 185.

[g] *Ibid.* 186.

H. & N. 534; Adams v. Smith, 58 Ill. 417; Woodbury v. Thompson, 3 N. H. 194.

V. If the publication of the defamatory matter take the form of writing, printing, pictures, or effigy; that is to say, if it constitutes what is known as libel.

The generalized statement of the law of libel is that the doing of appreciable harm to his reputation by the publication of defamatory matter is a source of legal liability. The law of slander, spoken defamation, has never reached this generalization owing to the accidents of its history. Words spoken by word of mouth are actionable only if they come under one of the first four heads given above.

Truth as justification.—The very conception of defamation is falsity in the accusations. Hence, the truth of the statements, if complete and going to every part of the accusation, is a complete defense in a civil action. Foss v. Hildreth, 10 Allen (Mass.), 76; Thompson v. Pioneer Press Co., 37 Minn. 285, 33 N. W. 856. This general rule has, however, been modified in some states, and the truth is not a defense, unless published with a proper motive. Delaware etc. Ins. Co. v. Croosdale, 6 Houst. (Del.) 181; Jones, Varnum & Co. v. Townsend's Admx., 21 Fla. 431, 58 Am. Rep. 676; Palmer v. Adams, 137 Ind. 72, 36 N. E. 695; Perry v. Porter, 124 Mass. 338; Fordyce v. Richmond, 78 Neb. 752, 111 N. W. 850; McClaughry v. Cooper, 39 W. Va. 313, 19 S. W. 415. In New Hampshire and Pennsylvania, although there is no statute on the subject, the mere truth of the libel is not always a defense. Hutchins v. Page, 75 N. H. 215, 31 L. R. A. (N. S.) 132, 72 Atl. 689; Burkhart v. North American Co., 214 Pa. 39, 63 Atl. 410. See 18 Harv. Law Rev. 414 n; and 1 Ames & Smith, Cases on Torts (3d ed.), 438 n.

In criminal prosecutions the common-law rule was that the defendant in a prosecution for libel was never allowed to allege the truth by way of justification. But the Libel Act, 1843, known as Lord Campbell's Act, now allows the defendant in criminal proceedings to plead that the libel complained of is true, provided that he further pleads that the publication was for the public benefit. In the United States it has been held that on an indictment for libel the truth is a justification and may be given in evidence. King . Root, 4 Wend. (N. Y.) 114, 21 Am. Dec. 102.

Fair comment and criticism.—Closely akin to justification by truth is the defense of fair comment or fair criticism. This question arises in libel cases where the alleged defamation consists in strictures upon enterprises and works

gation of a peer, a judge or other great officer of the realm, which are called *scandalum magnatum* (slander of great men), are held to be still more heinous;[h] and, though they be such as would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury, [124] which is redressed by an action on the case founded on many ancient statutes;[i] as well on behalf of the

[h] 1 Ventr. 60.

[i] Westm. I. 3 Edw. I. c. 34 (Slanderous Reports, 1275). 2 Rich II. c. 5 (Penalty for Slandering Great Men, 1378). 12 Rich. II. c. 11 (Penalty for Slandering Great Men, 1388).

---

which appeal to the public and about which individuals have a right to express an opinion. "I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable." Campbell v. Spottiswood, 3 Best & S. 769, 122 Eng. Reprint, 288; Crane v. Waters, 10 Fed. 619; Kinyon v. Palmer, 18 Iowa, 377; Bradford v. Clark, 90 Me. 298, 38 Atl. 229; People v. Glassman, 12 Utah, 238, 42 Pac. 956.

It is with respect to alleged libels on works of literature and art that the principle of fair criticism usually arises. The rule is that when an author places a book before the public, he invites criticism, and the critic is not liable for libel if he does not materially misrepresent the contents of the book and does not assail the character of the author. Carr v. Hood, 1 Camp. 355 n; Whistler v. Ruskin, The Times, Nov. 26, 27, 1878; 2 Wigmore, Cases on Torts, 510; Crane v. Waters, 10 Fed. 619; Snyder v. Fulton, 34 Md. 128 6 Am. Rep. 314; Gott v. Pulsifer, 122 Mass. 235, 23 Am. Rep. 322; Dowling v. Livingstone, 108 Mich. 321, 62 Am. St. Rep. 702, 32 L. R. A. 104, 66 N. W. 225; Press Co. v. Stewart, 119 Pa. 584, 14 Atl. 51.

Privilege.—What is called privilege in the law of libel and slander means that there are exceptional circumstances which make the publication of matter not actionable which otherwise would be actionable. There are two kinds of privilege,—absolute and conditional. Absolute privilege attaches to the utterances made in the course of judicial proceedings by judges (Scott v. Stansfield, L. R. 3 Ex. 220; Yates v. Lansing, 5 Johns. (N. Y.) 282, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290); by counsel (Munster v. Lamb, 11 Q. B. D. 588; Gilbert v. People, 1 Denio (N. Y.), 41, 43 Am. Dec. 646; Union Mut. Life Ins. Co. v. Thomas, 83 Fed. 803, 28 C. C. A. 96; Myers v. Hodges, 53 Fla. 197, 44 South. 357; Gaines v. Ætna Ins. Co., 104 Ky. 695, 47 S. W. 884; Jones v. Brownlee, 161 Mo. 258, 53 L. R. A. 445, 61 S. W. 795), by witnesses (Seaman

crown, to inflict the punishment of imprisonment on the slanderer, as on behalf of the party, to recover damages for the injury sustained. Words also tending to scandalize a magistrate or person in a public trust are reputed more highly injurious than when spoken of a private man.[k] It is said that formerly no actions were brought for words, unless the slander was such as (if true) would endanger the life of the object of it.[l] But, too great encouragement being given by this lenity to false and malicious slanderers, it is now held that for scandalous words of the several species before mentioned (that may endanger a man by subjecting him to the penalties of the law, may exclude him from society,

[k] Lord Raym. 1369. [l] 2 Vent. 28.

---

v. Netherclift, 2 C. P. D. 53; Terry v. Fellows, 21 La. Ann. 375; Hunckel v. Voneiff, 69 Md. 179, 9 Am. St. Rep. 413, 14 Atl. 500, 17 Atl. 1056; Runge v. Franklin, 72 Tex. 585, 13 Am. St. Rep. 833, 3 L. R. A. 417, 10 S. W. 721; Cooley v. Galyon, 109 Tenn. 1, 97 Am. St. Rep. 823, 60 L. R. A. 139, 70 S. W. 607); by jurors (Dunham v. Powers, 42 Vt. 1; Fisk v. Soniat, 33 La. Ann. 1400; Rector v. Smith, 11 Iowa, 302), and by parties litigant (Doyle v. O'Doherty, Car. & M. 418; Bartlett v. Christhilf, 69 Md. 219, 14 Atl. 518; Crockett v. McLanahan, 109 Tenn. 517, 61 L. R. A. 914, 72 S. W. 950).

In the United States the rule of absolute privilege in the case of attorneys, witnesses and parties is usually said to be restricted to utterances on their part which are pertinent to the question in hand and which are material. Gilbert v. People, 1 Denio (N. Y.), 41, 43 Am. Dec. 646; McLaughlin v. Cowley, 127 Mass. 316; King v. McKissick, 126 Fed. 215; Lawson v. Hicks, 38 Ala. 279, 81 Am. Dec. 49; Hollis v. Meux, 69 Cal. 625, 58 Am. Rep. 574, 11 Pac. 248; People v. Green, 9 Colo. 506, 13 Pac. 514; Lester v. Thurmond, 51 Ga. 118; Spaids v. Barrett, 57 Ill. 289, 290, 11 Am. Rep. 10; Hawk v. Evans, 76 Iowa, 593, 14 Am. St. Rep. 247, 41 N. W. 368; Sebree v. Thompson, 126 Ky. 223, 15 Ann. Cas. 770, 11 L. R. A. (N. S.) 723, 103 S. W. 374; Gardemal v. McWilliams, 43 La. Ann. 454, 26 Am. St. Rep. 195, 9 South. 106; Barnes v. McCrate, 32 Me. 442; Acre v. Starkweather, 118 Mich. 214, 76 N. W. 379; Cooper v. Phipps, 24 Or. 357, 22 L. R. A. 836, 33 Pac. 985; Larkin v. Noonan, 19 Wis. 82.

In the cases of conditional, or qualified, privilege, it is the occasion rather than the person who is protected. Where one speaks in the exercise of a common and recognized right, or in obedience to a legal or moral duty, his utterances are privileged. The following are illustrations: The publication of reports of legislative bodies, or other bodies in whose proceedings the public has a clear interest (Wason v. Walter, L. R. 4 Q. B. 73; Blodgett v. Des Moines Daily News Co. (Iowa), 113 N. W. 821; Nixon v. Dispatch Printing Co., 101 Minn. 309, 11 Ann. Cas. 161, 12 L. R. A. (N. S.) 188, 112 N. W. 258); of

may impair his trade, or may affect a peer of the realm, a magistrate, or one in public trust), an action on the case may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen.

§ 156. (ii) Words actionable if causing damage.—But with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened; which is called laying his action with a *per quod*. As if I say that such a clergyman is a bastard, he cannot for this bring any action against me, unless he can show some special loss by it; in which case he may bring his action against me, for saying he was a bastard, *per quod* he lost the presentation to such a living.[m]

§ 157. (iii) Slander of title.—In like manner to slander another man's title, by spreading such injurious reports, as, if true, would deprive him of his estate (as to call the issue in tail, or one who hath land by descent, a bastard) is actionable, provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land.[n]

§ 158. (iv) Words not actionable.—But 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 [125] man heretic or adulterer, are cognizable only in the ecclesiastical court;[o] unless any temporal damage ensues, which may be

[m] 4 Rep. 17. 1 Lev. 248.
[n] Cro. Jac. 213. Cro. Eliz. 197.
[o] Noy. 64. 1 Freem. 277.

---

judicial proceedings (Bathrick v. Detroit Post etc. Co., 50 Mich. 629, 45 Am. Rep. 63, 16 N. W. 172; Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921); of communications between persons occupying confidential relations (Atwill v. Mackintosh, 120 Mass. 177, 181; Levy v. McCan, 44 La. Ann. 528, 10 South. 794; Shurtleff v. Stevens, 51 Vt. 501, 31 Am. Rep. 698; Harriott v. Plimpton, 166 Mass. 585, 44 N. E. 992); of statements made with respect to the character of a servant to a prospective employer (Child v. Affleck, 9 B. & C. 403, 109 Eng. Reprint, 150).

On the subject of this note, see Odgers, Libel and Slander, 5th ed.; 1 Street, Foundations of Legal Liability, 273–321.

a foundation for a *per quod*. Words of heat and passion, as to call a man rogue and 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.[p]

§ 159. (v) Privileged occasions.—Neither (as was formerly hinted[q]) are any reflecting words made use of in legal proceedings, and p ent to the cause in hand, a sufficient cause of action for slande .

§ 160. (vi) Truth of words as justification.—Also if the defendant be able to justify, and prove the words to be true, no action will lie,[s] even though special damage hath 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, and the divine a heretic, 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 injuria* (damage without injury); and where there is no injury, the law gives no remedy. And this is agreeable to the reasoning of the civil law:[t] "*eum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit* (it is not just and right that he who exposes the faults of a guilty person should be condemned on that account; for it is proper and expedient that the offenses of the guilty should be known)."

§ 161. (b) Libel.—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[u] light, and thereby diminish his reputation. With regard to libels in general, there are,

p Finch. L. 186. 1 Lev. 82. Cro. Jac. 91.
q Pag. 29.
r Dyer. 285. Cro. Jac. 90.
s 4 Rep. 13.
t Ff. 47. 10. 18.
u 2 Show. 314. 11 Mod. 99.

as in many other cases, two remedies: one by indictment and another by action. The former for the *public* offense; for every libel has a tendency to the breach of the peace, by provoking the person libeled to break it: which offense is the same (in point of law) whether the matter contained [126] be true or false; and therefore the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification.[w] But in the remedy by action on the case, which is to repair the *party* in damages for the injury done him, the defendant may, as for words *spoken*, justify the truth of the facts, and show that the plaintiff has received no injury at all.[x] What was said with regard to words spoken will also hold in every particular with regard to libels by writing or printing, and the civil actions consequent thereupon; but as to signs or pictures, it seems necessary always to show, by proper *innuendoes* and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed; otherwise it cannot appear that such libel by picture was understood to be leveled at the plaintiff, or that it was attended with any actionable consequences.[13]

[w] 5 Rep. 125. [x] Hob. 253. 11 Mod. 99.

---

[13] **Right of privacy.**—In an English case in 1849, it was said: "In the present case, where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether." Prince Albert v. Strange, 1 Macn. & G. 25, 41 Eng. Reprint, 1171. But there was no clear suggestion that such a legal right existed until the doctrine of a right of privacy was formulated in a magazine article published in 1890. S. D. Warren and L. D. Brandeis, The Right to Privacy, 4 Harvard Law Rev. 193. The conception of the right has been judicially stated as follows: "The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone. Cooley, Torts, p. 29. The principle is fundamental and essential in organized society that everyone, in exercising a personal right and in the use of his property, shall respect the rights and properties of others. He must so conduct himself, in the enjoyment of the rights and privileges which belong to him as a member of society, as that he shall prejudice no one in the possession and enjoyment of those which are exclusively his." Gray, J., in Roberson

§ 162. (c) Malicious prosecution.—A third way of destroying or injuring a man's reputation is, by preferring malicious indictments or prosecutions against him; which, under the mask of

v. Rochester Folding-box Co., 171 N. Y. 538, 89 Am. St. Rep. 828, 59 L. R. A. 478, 64 N. E. 442.

In the relatively few cases in which the question of the right has been presented for judicial decision, certain courts have strongly denied the existence of the right, while others have as warmly maintained it. There are two general classes of cases, one in which a person's likeness has been published for purposes of commercial gain, the other in which the publisher of the likeness has had no such ulterior object. In several cases the person, the publication of whose likeness was objected to, was dead. In the larger number of cases the commercial element has been present, the plaintiff's picture being published for the exploitation of the publisher's business without the consent of the plaintiff. Thus, there was an action on account of the widespread publication of a young woman's face for advertising a brand of flour, in which the plaintiff finally lost her suit (Roberson v. Rochester Folding-box Co., 171 N. Y. 538, 89 Am. St. Rep. 828, 59 L. R. A. 478, 64 N. E. 442); an action on account of the publication, in connection with an advertisement of a life insurance company, of an unauthorized indorsement of the company by the plaintiff, together with his picture, in which case the plaintiff was granted relief (Pavesich v. New England Life Ins. Co., 122 Ga. 190, 106 Am. St. Rep. 104, 2 Ann. Cas. 561, 69 L. R. A. 101, 50 S. E. 68); an action on account of the publication of the plaintiff's name and picture on the labels of bottles of a patent medicine, wherein the plaintiff's right was upheld (Edison v. Edison Polyform & Manufacturing Co., 73 N. J. Eq. 136, 67 Atl. 392); an action on account of the publication of the name and picture of the plaintiff an infant, in a newspaper advertisement of jewelry, wherein the plaintiff's right was upheld (Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076); an action for the publication of the plaintiff's likeness in a newspaper advertisement of coats for autoists, wherein the right was denied (Henry v. Cherry, 30 R. I. 13, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006, 24 L. R. A. (N. S.) 991, 73 Atl. 97); and an action for the publication of a deceased person's likeness as a label to a brand of cigars, wherein it was held that the deceased's family had no cause of action (Atkinson v. Doherty & Co., 121 Mich. 372, 80 Am. St. Rep. 507, 46 L. R. A. 219, 80 N. W. 285).

On the other hand, only a few cases have arisen in which the plaintiff has complained of the unauthorized use of his picture, when the publisher was not seeking to exploit his business or goods thereby. In one of these cases, there was the project to erect the statue of a deceased woman as an ideal of human philanthropy; the objections of her relatives were overruled in the court of last resort (Schuyler v. Curtis, 147 N. Y. 434, 49 Am. St. Rep. 671, 31 L. R. A. 286, 42 N. E. 22). In a second case relatives of a deceased man objected to the publication of his likeness in an unauthorized biography, but

justice and public spirit, are sometimes made the engines of private spite and enmity. For this, however, the law has given a very adequate remedy in damages, either by an action of *conspiracy*,[y]

[y] Finch. L. 305.

---

relief was denied on the ground that the deceased had been a public man and had waived his right of privacy (Corliss v. E. W. Walker Co., 57 Fed. 434, 64 Fed. 280, 31 L. R. A. 283). In a third case the likeness of a young woman was published in connection with a newspaper article dealing with the alleged criminal misconduct of her father; the existence of a common-law right of privacy was denied (Hillman v. Star Publishing Co., 64 Wash. 691, 35 L. R. A. (N. S.) 595, 117 Pac. 594).

The two leading representative cases on either side are, (1) against the existence of the right (Roberson v. Rochester Folding-box Co., 171 N. Y. 538, 89 Am. St. Rep. 828, 59 L. R. A. 478, 64 N. E. 442); and (2) in favor of the existence of the right (Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68). In the Roberson case it appeared that lithographic likenesses of a young woman, accompanied by the legend, "Flour of the Family," were printed and extensively used by a flour milling company to advertise their goods. The declaration alleged that in consequence of the circulation of these lithographs the plaintiff's good name had been attacked, and that she had been greatly humiliated and made ill and obliged to employ a physician. In two trials before the supreme court and before the appellate divis thereof, it was held that the plaintiff's right of privacy had been invade nd that she might recover. But in the court of appeals the judgment was reversed, and by a divided court it was held that there was no cause of action existing either at law or in equity. Parker, C. J., said: "An examination of the authorities leads us to the conclusion that the so-called right of privacy has not yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided." It is to be noted that in 1903, the year after the rendering of this decision, the New York legislature passed an act "to prevent the unauthorized use of the name or picture of any person for the purposes of trade."

In the Pavesich case, the court held, on the other hand, that the publication of the picture of a person without his consent, as a part of an advertisement for the purpose of exploiting the publisher's business, was a violation of a right of privacy, and entitled the person whose picture was so used to recover, even without proof of special damage. "The novelty of the complaint," the court argued, speaking through Cobb, J., "is no objection, when an injury cognizable by law is shown to have been inflicted on the plaintiff. Where the case is new in principle, the courts have no authority to give a remedy, no matter how great the grievance; but where the case is only new in instance, and the sole question is upon the application of a recognized principle to a

which cannot be brought but against two at the least, or, which is the more usual way, by a special action on the case for a false and malicious prosecution.[s] In order to carry on the former (which gives a recompense for the danger to which the party has been exposed) it is necessary that the plaintiff should obtain a copy of the record of his indictment and acquittal; but, in prosecutions for felony, it is usual to deny a copy of the indictment, where there is any, the least, probable cause to found such prosecution upon.[a] [14] For it would be a very great discouragement to the public justice

[s] F. N. B. 116.

[a] Carth. 421. Lord Raym. 253.

---

new case, 'it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago' (Broom, Legal Maxims (8th ed.), 193)." The court took the view that the right of privacy has its foundation in the instincts of nature. It was recognized in the Roman law. It is among the absolute rights of individuals proclaimed by Blackstone (I, 129, 134), whose illustrations of what would be a violation of such absolute rights are not to be taken as exhaustive. It is to be included under the head of liberty, which embraces the right to live as one will, so long as one's will does not interfere with the rights of another or of the public. One person may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters and of publicity as to others. The right of privacy, like every other right that rests in the individual, may be waived by him or by one duly authorized. The existence of the waiver, whether express or implied, carries with it the right to an invasion of privacy only to such an extent as may be equitably necessary and proper in dealing with the matter which has brought about the waiver. See further, Foster-Milburn Co. v. Chinn, 134 Ky. 424, 135 Am. St. Rep. 417, 34 L. R. A. (N. S.) 1137, 120 S. W. 364; Douglas v. Stokes, 149 Ky. 506, Ann. Cas. 1914B, 374, 42 L. R. A. (N. S.) 386, 149 S. W. 849; Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 927, 14 L. R. A. (N. S.) 304, 67 Atl. 97, 103; 2 Mod. Am. Law, 361-392; 4 Harv. Law Rev. 193; 36 Am. Law Reg. 745; 2 Col. Law Rev. 437; 12 Col. Law Rev. 693; 1 Street, Foundations of Legal Liability.

14 The reasons which have availed to keep this particular question of fact, in actions for malicious prosecution and false imprisonment, in the hands of the court, are easily to be seen, and have already been suggested. It is the danger so often recognized by the courts, e. g., by Lord Colonsay, lest those who would come forward in aid of public justice should be intimidated or discouraged. For this reason the judge used to refuse to give out copies of indictments for felony unless on a special order, "for the late frequency of actions against prosecutors (which cannot be without copies of the indictments) deterreth people from prosecuting for the King upon just occasions."

of the kingdom if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried. [127] But an action on the case for a malicious prosecution may be founded upon an indictment, whereon no acquittal can be had; as if it be rejected by the grand jury, or be *coram non judice* (before a judge who has not jurisdiction of the affair), or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation and expense, upon which this action is founded.[b] However, any probable cause for preferring it is sufficient to justify the defendant.[15]

[b] 10 Mod. 219, 220. Stra. 691.

Such orders were refused where there appeared to the court to have been probable cause for the prosecution. In 1697, "per Holt, Chief Justice, if A be indicted of felony and acquitted, and he has a mind to bring an action, the judge will not permit him to have a copy of the record, if there was probable cause of the indictment, and he cannot have a copy without leave." And, in the last half of the next century, Blackstone tells us that, "in prosecutions for felony it is usual to deny a copy of the indictment, where there is any, the least, probable cause to found such prosecution upon."—THAYER, Prelim. Treatise on Evidence, 230.

15 **Malicious prosecution.**—The action for conspiracy mentioned by Blackstone gradually fell into disuse, the action for malicious prosecution superseding it. The principles on which an action for malicious prosecution is based are: (1) It must appear that the proceedings against the accused are at an end and that they terminated in his favor. Castrique v. Behrens, 3 El. & El. 709, 121 Eng. Reprint, 608; Whitworth v. Hall, 2 Barn. & Ad. 695, 109 Eng. Reprint, 1302; Halberstadt v. New York Life Ins. Co., 194 N. Y. 1, 16 Ann. Cas. 1102, 21 L. R. A. (N. S.) 293, 86 N. E. 801; (2) There must have been an absence of probable cause for bringing the prosecution in the first instance. Probable cause has been defined as "the existence of such facts and circumstances as would excite the belief in a reasonable mind acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." Wheeler v. Nesbitt, 24 How. 544, 16 L. Ed. 765; Ravenga v. Mackintosh, 2 Barn. & C. 693, 107 Eng. Reprint, 541; Cloon v. Gerry, 13 Gray (Mass.), 201; Stubbs v. Mulholland, 168 Mo. 47, 67 S. W. 650; Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; (3) It is generally stated that there must be malice on the part of the prosecutor as well as want of probable cause. Jordan v. Alabama G. S. R. Co., 81 Ala. 220, 8 South. 191. But malice may be inferred from lack of probable cause. Lunsford v. Dietrich, 93 Ala. 565, 30 Am. St. Rep. 79, 9 South. 308. The burden of proving both malice and want of probable cause is on the plaintiff. Ravenga v. Mackintosh, 2 Barn. & C. 693, 107 Eng. Re-

§ 163. b. Injuries affecting personal liberty: false imprisonment.—We are next to consider the violation of the right of personal liberty. This is effected by the injury of false imprisonment, for which the law has not only decreed a punishment, as a heinous public crime, but has also given 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 a civil action, on account of the damage sustained by the loss of time and liberty.

§ 164. (1) Requisites of false imprisonment.—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 in the stocks, or even by forcibly detaining one in the public streets.[c] Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority: which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment;[d] or from some other special cause warranted, for the necessity of the thing, either by common law, or act of parliament; such as the arresting of a felon by a private person without warrant, the impressing of mariners for the public service, or the apprehending of

[c] 2 Inst. 589. [d] *Ibid.* 46.

---

print, 541; Legallee v. Blaisdell, 134 Mass. 473; Le Clear v. Perkins, 103 Mich. 131, 26 L. R. A. 627, 61 N. W. 357.

Liability for malicious prosecution is not limited to strictly criminal offenses. An action will lie for the malicious institution of proceedings in bankruptcy or to wind up a corporation. Chapman v. Pickersgill, 2 Wils. C. Pl. 145, 95 Eng. Reprint, 734; Stewart v. Sonneborn, 98 U. S. 187, 25 L. Ed. 116. And malicious proceedings to have a person declared insane may be actionable. Lockenour v. Sides, 57 Ind. 360. And in a number of the American states it is held that an action will lie for the malicious institution of any ungrounded civil suit. Eastin v. Stockton Bank, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. 1106; Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558; Pope v. Pollock, 46 Ohio St. 367, 15 Am. St. Rep. 608, 4 L. R. A. 255, 21 N. E. 356; Lipscomb v. Shofner, 96 Tenn. 112, 33 S. W. 818; Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316.

wagoners for misbehavior in the public highways.[e] False imprisonment also may arise by executing a lawful warrant or process at an unlawful [128] time, as on a Sunday;[f] or in a place privileged from arrests, as in the verge of the king's court. This is the injury. Let us next see the remedy, which is of two sorts: the one *removing* the injury, the other *making satisfaction* for it.

§ 165. (2) Remedies for false imprisonment.—The means of *removing* the actual injury of false imprisonment are fourfold: 1. By writ of *mainprize*. 2. By writ *de odio et atia* (of hatred and ill will). 3. By writ *de homine replegiando* (of replevying a man). 4. By writ of *habeas corpus*.

§ 166. (a) Writ of mainprize.—The writ of *mainprize, manucaptio*, is a writ directed to the sheriff (either generally, when any man is imprisoned for a bailable offense, and bail hath been refused; or specially, when the offense or cause of commitment is not properly bailable below), commanding him to take sureties for the prisoner's appearance, usually called *mainpernors*, and to set him at large.[g] Mainpernors differ from bail, in that a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither, but are barely sureties for his appearance at the day: bail are only sureties, that the party be answerable for the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever.[h]

§ 167. (b) Writ de odio et atia.—The writ *de odio et atia* was anciently used to be directed to the sheriff, commanding him to inquire whether a prisoner charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam*, for hatred and ill will; and if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail. This writ, according to Bracton,[i] ought

[e] Stat. 7 Geo. III. c. 42 (Highways, 1766).
[f] Stat. 29 Car. II. c. 7 (Sunday Observance, 1677).
[g] F. N. B. 250. 1 Hal. P. C. 141. Coke on Bail and Mainpr. c. 10.
[h] Co. *Ibid.* c. 3. 4 Inst. 179.
[i] L. 3. tr. 2. c. 8.

not to be denied to any man; it being expressly ordered to be made out *gratis*, without any denial, by *Magna Carta*, c. 29, and statute Westm. II, 13 Edward I, c. 29 (Writs of Trespass, 1285). But the statute [129] of Gloucester, 6 Edward I, c. 9 (Homicide, 1278), restrained it in the case of killing by misadventure or self-defense, and the statute 28 Edward III, c. 9 (Sheriffs, 1354), abolished it in all cases whatsoever; but as the statute 42 Edward III, c. 1 (Confirmation of Charters, 1368), repealed all statutes then in being, contrary to the great charter, Sir Edward Coke is of opinion [k] that the writ *de odio et atia* was thereby revived.

§ 168. (c) Writ de homine replegiando.—The writ *de homine replegiando* [l] lies to replevy a man out of prison, or out of the custody of any private person (in the same manner that chattels taken in distress may be replevied, of which in the next chapter), upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. And, if the person be conveyed out of the sheriff's jurisdiction, the sheriff may return that he is eloigned, *elongatus;* upon which a process issues (called a *capias in withernam*—that you take in withernam) to imprison the defendant himself, without bail or mainprize,[m] till he produces the party. But this writ is guarded with so many exceptions,[n] that it is not an effectual remedy in numerous instances, especially where the crown is concerned. The incapacity, therefore, of these three remedies to give complete relief in every case hath almost entirely antiquated them, and hath caused a general recourse to be had, in behalf of persons aggrieved by illegal imprisonment, to

§ 169. (d) Writ of habeas corpus.—The writ of *habeas corpus*, the most celebrated writ in the English law.

[k] 2 Inst. 43. 55. 315.

[l] F. N. B. 66.

[m] Rayn. 474.

[n] *Nisi captus est per speciale præceptum nostrum, vel capitalis justitiarii nostri, vel pro morte hominis, vel pro foresta nostra, vel pro aliquo alio retto, quare secundum consuetudinem Angliæ non sit replegiabilis* (Unless he be taken by our special command, or by that of our chief justice, for the death of a man, for a breach of the forest laws, or any other offense for which, according to the custom of England, he may not be repleviable). (Registr. 77.)

§ 170. (i) Lesser forms of writ of habeas corpus.—Of this there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice.

Such is the *habeas corpus ad respondendum* (that you have the body to answer), when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the court above.[o]

Such is that *ad satisfaciendum* (to satisfy), when a prisoner hath [130] had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution.[p]

Such, also, are those *ad prosequendum, testificandum, deliberandum, etc.* (to prosecute, testify, deliberate, etc.); 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.

Such is, lastly, the common writ *ad faciendum et recipiendum* (to do and receive), which issues out of any of the courts of Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated an *habeas corpus cum causa*—that you have the body with the cause of detention) to *do and receive* whatsoever the king's court shall consider in that behalf. This is a writ grantable of common right, without any motion in court;[q] and it instantly supersedes all proceedings in the court below. But, in order to prevent the surreptitious discharge of prisoners, it is ordered by statute 1 & 2 P. & M., c. 13 (Criminal Law, 1554), that no *habeas corpus* shall issue to remove any prisoner out of any gaol, unless signed by some judge of the court out of which it is awarded. And, to avoid vexatious delays by removal of frivolous causes, it is enacted by statute 21 Jac. I, c. 23 (Civil Procedure, 1623), that, where the judge of an inferior court

o 2 Mod. 198.

p 2 Lilly Prac. Reg. 4.

q 2 Mod. 306.

of record is a barrister of three years' standing, no cause shall be removed from thence by *habeas corpus* or other writ, after issue or demurrer deliberately joined; that no cause, if once remanded to the inferior court by writ of *procedendo* or otherwise, shall ever afterwards be again removed, and that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount to the sum of five pounds. But an *expedient*[r] having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for five pounds or upwards (and then by the course of the court the *habeas corpus* removed both actions together), it is therefore enacted by statute 12 George I, c. 29 (Frivolous Arrests, 1725), that the inferior [131] court may proceed in such actions as are under the value of five pounds. notwithstanding other actions may be brought against the same defendant to a greater amount.

§ 171. (ii) The great writ: habeas corpus ad subjiciendum.—But the great and efficacious writ, in all manner of illegal confinement, is that of *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.[s]

§ 172. (iii) From what courts habeas corpus issues.—This is a high prerogative writ, and therefore by the common law issuing out of the court of king's bench not only in term time, but also during the vacation,[t] by a *fiat* from the chief justice or any other of the judges, and running into all parts of the king's dominions; for the king is at all times entitled to have an account, why the liberty

r Bohun Instit. Legal. 85. edit. 1708.

s St. Trials. viii. 142.

t The *pluries habeas corpus* directed to Berwick in 43 Eliz. (1601) (cited 4 Burr. 856) was *teste'd die Jovis prox' post quinden' sancti Martini* (the Thursday next after the *quindena* [Nov. 25] of St. Martin). It appears, by referring to the dominical letter of that year, that this *quindena* (Nov. 25.) happened that year on a Saturday. The Thursday after was therefore the 30th of November, two days after the expiration of the term.

of any of his subjects is restrained,[u] wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon;[v] unless the term should intervene, and then it may be returned in court.[w] Indeed, if the party were privileged in the courts of common pleas and exchequer, as being (or supposed to be) an officer or suitor of the court, an *habeas corpus ad subjiciendum* might also have been awarded from thence;[x] and, if the cause of imprisonment were palpably illegal, they might have discharged him:[y] but, if he were committed for any criminal matter, they could only have remanded him, or taken bail for his appearance in the court of king's bench;[z] which occasioned the common pleas for some time to discountenance such applications. But since the [133] mention of the king's bench and common pleas, as co-ordinate in this jurisdiction, by statute 16 Car. I, c. 10 (Star-chamber, 1640), it hath been holden that every subject of the kingdom is equally entitled to the benefit of the common-law writ, in either of those courts at his option.[a] It hath also been said, and by very respectable authorities,[b] that the like *habeas corpus* may issue out of the court of chancery in vacation; but, upon the famous application to Lord Nottingham by Jenks, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation,[c] and therefore his lordship refused it.

§ 173. (iv) Habeas corpus, how procured.—In the king's bench and common pleas it is necessary to apply for it by motion to the court,[d] as in the case of all other prerogative writs (*certiorari*, prohibition, *mandamus*, etc.) which do not issue as of mere course, without showing some probable cause why the extraordi-

u Cro. Jac. 543.
v 4 Burr. 856.
w *Ibid.* 460. 542. 606.
x 2 Inst. 55. 4 Inst. 290. 2 Hal. P. C. 144. 2 Ventr. 24.
y Vaugh. 155.
z Carter. 221. 2 Jon. 13.
a 2 Mod. 198. Wood's Case. C. B. Hil. 11 Geo. III. (1770).
b 4 Inst. 182. 2 Hal. P. C. 147.
c Lord Nott. MSS. Rep. July, 1676.
d 2 Mod. 306. 1 Lev. 1.

nary power of the crown is called in to the party's assistance. For, as was argued by Lord Chief Justice Vaughan,[e] "it is granted on motion, because it cannot be had of course; and there is therefore no *necessity* to grant it; for the court ought to be satisfied that the party hath a probable cause to be delivered." And this seems the more reasonable, because (when once granted) the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner.[f] So that, 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 king'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 an *habeas corpus*, though sure to be remanded as soon as brought up to the court. And therefore Sir Edward Coke, when chief justice, did not scruple in 13 Jac. I (1615), to deny a *habeas corpus* to one confined by the court of admiralty for piracy; there appearing, upon his own showing, sufficient grounds to confine [133] him.[g] On the other hand, if a probable ground be shown that the party is imprisoned without just cause,[h] and therefore hath 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."[i]

§ 174. (v) Cause of imprisonment.—In a former part of these Commentaries[k] we expatiated at large on the personal liberty of the subject. This was shown to be a natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case without the special permission of law. A doctrine coeval with the first rudiments of the English constitution; and

e Bushell's Case. 2 Jon. 13.
f Cro. Jac. 543.
g 3 Bulstr. 27. See also 2 Roll. Rep. 138.
h 2 Inst. 615.
i Com. Journ. 1 Apr. 1728.
k Book I. c. 1.

handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman Conquest: asserted afterwards and confirmed by the Conqueror himself and his descendants: and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of *Magna Carta*, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty, by rendering its protection impossible; but the glory of the English law consists in clearly defining the times, the causes and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an *habeas corpus* may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

§ 175. (vi) Steps leading to the Habeas Corpus Act, 1679.—[134] And yet, early in the reign of Charles I, the court of king's bench, relying on some arbitrary precedents (and those perhaps misunderstood) determined[1] that they could not upon an *habeas corpus* either bail or deliver a prisoner, though committed 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 drew on a parliamentary inquiry, and produced the *petition of right*, 3 Car. I (1627), which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And, when at length they agreed that it was, they, however, annexed a condition of finding sureties for the good behavior, which

[1] State Tr. vii. 136.

still protracted their imprisonment, the Chief Justice Sir Nicholas Hyde at the same time declaring,[m] 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 Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four and twenty years.[n]

These pitiful evasions gave rise to the statute 16 Car. I, c. 10, § 8 (Star-chamber, 1640), whereby it was enacted that if any person be committed by the king himself in person, or by his privy [135] council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretense whatsoever, a writ of *habeas corpus*, upon demand or motion made to the court of 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, before alluded to,[o] who in 1676 was committed by the king in council for a turbulent speech at Guildhall,[p] new shifts and devices were made use of to prevent his enlargement by law; the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum, etc.*, whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this

m *Ibid.* 240.

n "*Etiam judicum tunc primarius nisi illud faceremus, rescripti illius forensis, qui libertatis personalis omnimodæ vindex legitimus est fere solus, usum omnimodum pclam pronuntiavit (sui semper similis) nobis perpetuo in posterum denegandum. Quod, ut odiosissimum juris prodigium, scientioribus hic universis censitum* (Then also the chief justice (always the same) openly declared that unless we could do it [find sureties for good behavior] the use of this forensic rescript, which is almost the only lawful protection of every kind of personal liberty, would ever after be denied us. Which was considered by all the lawyers present as a most odious and monstrous declaration)." (Vindic. Mar. Claus. edit. A. D. 1653.)

o Pag. 132.

p State Trials, vii. 471.

great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party: and many other vexatious shifts were practiced to detain state prisoners in custody. But whoever will attentively consider the English history may observe that the flagrant abuse of any power, by the crown or its ministers, 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 famous *habeas corpus* act, 31 Car. II, c. 2 (1679), which is frequently considered as another *Magna Carta*[q] of the kingdom; and by consequence has also in subsequent times reduced the method of proceeding on these writs (though not within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty.

§ 176. (vii) The Habeas Corpus Act, 1679.—[136] The statute itself enacts, 1. That the writ shall be returned and the prisoner brought up within a limited time according to the distance, not exceeding in any case twenty days. 2. That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them.[r] 3. That on complaint and request in writing by or on behalf of any person committed and charged with any crime (unless committed for treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any petit treason or felony; or upon suspicion of such petit treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process), the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the

q See Book I. c. 1.

r These two clauses seem to be transposed, and should properly be placed after the following provisions.

judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority (specified in the act) shall for the first offense forfeit 100*l.* and for the second offense 200*l.* to the party grieved, and be disabled to hold his office. 5. That no person, once delivered by *habeas corpus*, shall be recommitted for the same offense, on penalty of 500*l.* 6. That every person committed for treason or felony shall, if he requires it the first week of the next term or the first day of the next session of *oyer* and *terminer*,[s] be 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, he shall be discharged from his imprisonment for such imputed offense: but that no person, after the assizes shall be [137] opened for the county in which he is detained, shall be removed by *habeas corpus* till after the assizes are ended; but shall be left to the justice of the judges of assize. 7. That any such prisoner may move for and obtain his *habeas corpus*, as well out of the chancery or exchequer, as out of the king's bench or common pleas; and the lord chancellor or judges denying the same, on sight of the warrant or oath that the same is refused, forfeit severally to the party grieved the sum of 500*l.* 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported; or having committed some capital offense in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey or any places beyond the seas, within or without the king's dominions: on pain that the party committing, his advisers, aiders and assistants, shall forfeit to the party grieved a sum not less than 500*l.* to be

[s] See Book IV, 269.

recovered with treble costs;[16] shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire;* and shall be incapable of the king's pardon.

This is the substance of that great and important statute, which extends (we may observe) 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 now expected by the court, agreeable to ancient precedents[ss] and the spirit of the act of parliament, that the writ should be immediately obeyed, without waiting for any *alias* or *pluries;* otherwise an attachment will issue. By which admirable regulations, judicial as well as parliamentary, the remedy is now complete for *removing* the injury of unjust and 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. [138] For it frequently happens in foreign countries (and has happened in England during temporary suspensions[t] of the statute), that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.

§ 177. (e) Action of false imprisonment.—The *satisfactory* remedy for this injury of false imprisonment is by an action of trespass, *vi et armis,* usually called an action of false imprisonment; which is generally, and almost unavoidably, accompanied with a charge of assault and battery also: and therein the party

[ss] 4 Burr. 856.

[t] See Book I. pag. 136.

---

16 **Penal damages.**—In the many recent discussions of the principle of punitive damages, it has not been noticed, I think, that it not only rests on the same basis with all legal penalties going to the informer, but is expressly recognized in the form of damages by a statute of no less importance than the English Habeas Corpus Act (31 Car. II, c. 2), which provides that any inhabitant sent prisoner out of England shall recover damages against the person so committing him, which no jury shall assess at less than 500*l.*, *without reference to the amount of damage actually shown.* Upon the connection between penal and exemplary damages, see Yundt v. Hartrunft, 41 Ill. 9; Peters v. Lake, 66 Ill. 206, 16 Am. Rep. 593.

shall recover damages for the injury he has received; and also the defendant is, as for all other injuries committed with force, or *vi et armis*, liable to pay a fine to the king for the violation of the public peace.

§ 178. **c. Injuries affecting property rights.**—With regard to the third absolute right of individuals, or that of private property, though the enjoyment of it, when acquired, is strictly a personal right; yet as its nature and original, and the means of its acquisition or loss, fell more directly under our second general division, of the *rights of things;* and as, of course, the wrongs that affect these rights must be referred to the corresponding division in the present book of our Commentaries, I conceive it will be more commodious and easy to consider together, rather than in a separate view, the injuries that may be offered to the *enjoyment,* as well as to the *rights,* of property. And therefore I shall here conclude the head of injuries affecting the *absolute* rights of individuals.

§ 179. **2. Injuries affecting relative rights of persons: domestic relations.**—We are next to contemplate those which affect their *relative* rights, or such as are incident to persons considered as members of society, and connected to each other by various ties and relations; and, in particular, such injuries as may be done to persons under the four following relations: husband and wife, parent and child, guardian and ward, master and servant.

§ 180. **a. Injuries affecting a husband.**—[139] Injuries that may be offered to a person, considered as a *husband,*[17] are princi-

[17] **Interference with domestic relations.**—The gist of the action which a husband may maintain against one who infringes his marital rights is said to lie in his loss of consortium. The nature of consortium is thus explained: "The foundation of the husband's right of action is the wrong done him by the defendant in violating his personal rights. The husband has the right to the conjugal fellowship of his wife, to her society, her aid, and her fidelity in every conjugal relation. Any act of another by which the husband is deprived of this right constitutes a personal wrong for which the law gives him redress in damages." Bedan v. Turney, 99 Cal. 649, 34 Pac. 442.

Formerly the right of the husband had to be vindicated within the narrow limits of an action of trespass; but in 1745 a new departure was taken broadening the scope of the remedy by allowing an action on the case. Wins-

pally three: *abduction*, or taking away a man's wife; *adultery*, or criminal conversation with her; and *beating* or otherwise abusing her.

§ 181. (1) Abduction of wife.—As to the first sort, *abduction* or taking her away, this may either be by fraud and persuasion,

more v. Greenbank, Willes, 577 (where the husband recovered for alienation of his wife's affections). Modern cases in which the husband recovered are: Yundt v. Hartrunft, 41 Ill. 9 (criminal conversation); Smith v. City of St. Joseph, 55 Mo. 456, 17 Am. Rep. 660 (negligence causing personal injuries); Mowry v. Chaney, 43 Iowa, 609 (malpractice by a physician); Rogers v. Smith, 17 Ind. 323, 79 Am. Dec. 483 (malicious prosecution and imprisonment of wife); Hoard v. Peck, 56 Barb. (N. Y.) 202 (sale of injurious drug to wife); Garrison v. Sun Printing etc. Assn., 150 App. Div. 689, 135 N. Y. Supp. 721 (libel). See for an able discussion of the subject, Marri v. Stamford St. R. Co., 84 Conn. 9, Ann. Cas. 1912B, 20, 33 L. R. A. (N. S.) 1042, 78 Atl. 582.

The right of a wife to maintain an action for deprivation of her husband's society is said, in England, to be an open question. Clerk & Lindsell, Torts (6th ed.), 245. In a case decided in 1861, a majority of the law lords expressed an opinion in favor of such a right of action, but the decision was against the plaintiff on the ground that the injury complained of in the particular case was too remote. Lynch v. Knight, 9 H. L. Cas. 577, 11 Eng. Reprint, 854. In the United States the prevailing view is that a wife may recover for loss of the consortium of her husband when caused by alienation of affections or criminal conversation. Foot v. Card, 58 Conn. 1, 18 Am. St. Rep. 258, 6 L. R. A. 829, 18 Atl. 1027; Wolf v. Frank, 92 Md. 138, 52 L. R. A. 102, 48 Atl. 132. It has also been held that a wife may recover for loss of consortium against a druggist who had sold morphine to the husband from the use of which he became mentally unbalanced. Flandermeyer v. Cooper, 85 Ohio St. 327, Ann. Cas. 1913A, 983, 40 L. R. A. (N. S.) 360, 98 N. E. 102. The old rule of pleading that the wife could not sue without joining her husband was formerly an obstacle in recognizing the right on the part of the wife.

The right of the parent to recover for the loss of the consortium of a child was not so readily recognized. When the courts did so recognize the right, it happened that they based the remedy on loss of service. This idea became crystallized in the law, and it became necessary to allege as the gist of the action, the loss of service. Grinnell v. Wells, 7 Man. & G. 1033, 135 Eng. Reprint, 419. The courts never required proof of actual service, presuming service from the relation of parent and child, provided at least if the child was old enough to render service. Horgan v. Pacific Mills, 158 Mass. 402, 35 Am. St. Rep. 504, 33 N. E. 581. And where the wrongful act consists in the seduction of a daughter, or a girl owing the duty of a daughter, damages are freely allowed for consequential damages in the way of expenses, and for

or open violence: though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by writ of *ravishment*, or action of *trespass vi et armis, de uxore rapta et abducta* (for the ravishment and abduction of his wife).[u] This action lay at the common law, and thereby the husband shall recover, not the possession[w] of his wife, but damages for taking her away; and by statute Westm. I, 3 Edward I, c. 13 (Rape, 1275), the offender shall also be imprisoned two years, and be fined at the pleasure of the king. Both the king and the husband may therefore have this action;[x] and the husband is also entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause.[y] The old law was so strict in this point, that, if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned:[z] but a stranger

u F. N. B. 89.
w 2 Inst. 434.
x *Ibid.*
y Law of Nisi Prius, 74.
z Bro. Abr. t. Trespass, 213.

---

parental disgrace and injured feelings. And in the case of minor daughters living in the household, the law implies a relation of service. Dean v. Peel, 5 East, 45, 102 Eng. Reprint, 986.

Actions for enticing away a servant whereby the master lost the service arose in an age when the relation of master and servant was considered to fall within the domestic circle. The first Statute of Laborers (23 Edw. III, c. 2) of the year 1349, made it a criminal offense for a servant to leave his service before the end of his term, or for any person to receive or keep a servant who had so departed. The courts, after the passing of this act, took the statute as founding a right in the master and gave a civil action for knowingly enticing servants away from their employment. The older authorities are discussed by Coleridge, J., in Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Reprint, 749. This statute was repealed in 1563, but the class of civil actions which had arisen under it had become firmly established and was not disturbed by the repeal of the statute. It has, accordingly, been settled law for centuries that a third person who knowingly and willfully entices a servant from his employment is liable in damages to his master or employer. Hart v. Aldridge, Cowp. 54, 98 Eng. Reprint, 964; Gunter v. Astor, 4 J. B. Moore, 12; Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Reprint, 749; Jones v. Blocker, 43 Ga. 331; Walker v. Cronin, 107 Mass. 555; Drew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780.

might carry her behind him on horseback to market, to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce.[a]

§ 182. **(2) Adultery, or criminal conversation.**—*Adultery*, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased and diminished by circumstances;[b] as the rank and fortune of the plaintiff and defendant; the relation or connection [140] between them; the seduction or otherwise of the wife, founded on her previous behavior and character; and the husband's obligation by settlement or otherwise to provide for those children, which he cannot but suspect to be spurious.

§ 183. **(3) Battery of a wife.**—The third injury is that of *beating* a man's wife or otherwise ill-using her; for which, if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife *jointly;* but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a *separate* remedy by an action of trespass, in nature of an action upon the case, for this ill usage, *per quod consortium amisit* (by which means he lost the society of his wife); in which he shall recover a satisfaction in damages.[c]

§ 184. **b. Injuries affecting a parent.**—Injuries that may be offered to a person considered in the relation of a *parent* were likewise of two kinds: 1. *Abduction*, or taking his children away; and 2. *Marrying* his son and heir without the father's consent, whereby during the continuance of the military tenures he lost the value of his marriage. But this last injury is now ceased, together with the

[a] *Ibid.* 207. 440.
[b] Law of Nisi Prius. 26.
[c] Cro. Jac. 501. 538.

right upon which it was grounded; for, the father being no longer entitled to the value of the marriage, the marrying his heir does him no sort of injury, for which a civil action will lie. As to the other, of abduction or taking away the children from the father, that is also a matter of doubt whether it be a civil injury or no; for, before the abolition of the tenure in chivalry, it was equally a doubt whether an action would lie for taking and carrying away any other child besides the heir: some holding that it would not, upon the supposition that the only ground or cause of action was losing the value of the heir's marriage; and others holding that an action would lie for taking away *any* of the children, for that the parent hath an interest in them all, to provide for their education.[d] If, therefore, before the abolition of these tenures it was an injury to the father to take [141] away the rest of his children, as well as his heir (as I am inclined to think it was), it still remains an injury, and is remediable by a writ of *ravishment*, or, action of *trespass vi et armis, de filio, vel filia, rapto vel abducto* (for the ravishment or abduction of the son or daughter);[e] in the same manner as the husband may have it, on account of the abduction of his wife.

§ 185. c. Injuries affecting a guardian.—Of a similar nature to the last is the relation of *guardian* and *ward;* and the like actions *mutatis mutandis* (varying according to circumstances), as are given to fathers, the guardian also has for recovery of damages, when his ward is stolen or ravished away from him.[f] And though guardianship in chivalry is now totally abolished, which was the only beneficial kind of guardianship to the guardian, yet the guardian in socage was always,[g] and is still, entitled to an action of *ravishment,* if his ward or pupil be taken from him: but then he must account to his pupil for the damages which he so recovers.[h] And, as guardian in socage was also entitled at common law to a writ of *right of ward, de custodia terræ et hæredis* (for the custody of the land and heir), in order to recover the possession and custody of the infant,[i] so I apprehend that he is still entitled to sue out this antiquated writ. But a more speedy and summary method of re-

[d] Cro. Eliz. 770.
[e] F. N. B. 90.
[f] *Ibid.* 139.
[g] *Ibid.*
[h] Hale on F. N. B. 139.
[i] F. N. B. *Ibid.*

dressing all complaints relative to wards and guardians hath of late obtained by an application to the court of chancery; which is the supreme guardian, and has the superintendent jurisdiction, of all the infants in the kingdom. And it is expressly provided by statute 12 Car. II, c. 24 (Wards, 1660), that testamentary guardians may maintain an action of ravishment or trespass, for recovery of any of their wards, and also for damages to be applied to the use and benefit of the infants.[k]

§ 186. **d. Injuries affecting a master.**—To the relation between *master* and *servant*, and the rights accruing therefrom, there are two species of injuries incident.[18] The one is, retaining

k 2 P. Wms. 108.

---

18 **Interference with contractual relations.**—It is now the settled law in England and in most jurisdictions in the United States that the relation established between two persons by contract gives rise to a right *in rem*, or against all the world, and that a breach of that right by the unjustifiable act of a third person renders such person liable for the damage caused by his interference. The leading case clearly stating the doctrine is Lumley v. Gye (2 El. & Bl. 216, 118 Eng. Reprint, 749), decided in the court of queen's bench in 1853. The plaintiff, as manager of a theater, had contracted with an opera singer to sing during a certain period in the plaintiff's theater and nowhere else. The defendant, a rival theater manager, enticed and procured the opera singer to leave the plaintiff's employment. Here the majority of the court intimated, by way of dictum, that the principle of enticing away servants from their employment extended to all cases of interference with contractual relations. This doctrine was accepted by the court of appeal in 1881, in the case of Bowen v. Hall (6 Q. B. D. 333), and confirmed by the house of lords in 1901, in the case of Quinn v. Leathem ([1901], App. Cas. 495).

The doctrine of Lumley v. Gye has been generally followed in the United States. Thereunder an employer whose employees have been induced by a third person, knowingly and willfully, to break their contract of employment, may maintain an action against such third person. Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 106 Am. St. Rep. 137, 2 Ann. Cas. 694, 69 L. R. A. 90, 50 S. E. 353; Doremus v. Hennessy, 176 Ill. 608, 68 Am. St. Rep. 203, 43 L. R. A. 797, 52 N. E. 924, 54 N. E. 524; Walker v. Cronin, 107 Mass. 555; Johnston Harvester Co. v. Meinhardt, 9 Abb. N. C. (N. Y.) 393; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; McCutchin v. Taylor, 11 Lea (Tenn.), 259; J. S. Brown Hardware Co. v. Indiana Stove Works, 96 Tex. 453, 73 S. W. 800. An employee, likewise, has a right of action against a third person who knowingly and willfully procures his discharge while he is under contract of employment. London Guarantee & Accident Co. v. Horn,

a man's hired servant before his time is expired; the other is beating or confining him in such a manner that he is not able to perform his work.

206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526; Hollenbeck v. Ristine, 114 Iowa, 358, 86 N. W. 377; Chipley v. Atkinson, 23 Fla. 206, 11 Am. St. Rep. 367, 1 South. 934; Perkins v. Pendleton, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; Lucke v. Clothing Cutters & Trimmers' Assy., 77 Md. 396, 39 Am. St. Rep. 421, 19 L. R. A. 408, 26 Atl. 505; Moran v. Dunphy, 177 Mass. 485, 83 Am. St. Rep. 289, 52 L. R. A. 115, 59 N. E. 125; Berry v. Donovan, 188 Mass. 353, 108 Am. St. Rep. 499, 3 Ann. Cas. 738, 5 L. R. A. (N. S.) 899, 74 N. E. 603; Holder v. Cannon Mfg. Co., 135 N. C. 392, 47 S. E. 481.

A few jurisdictions in the United States qualify the general doctrine by allowing an action only when the breaking of the contract has been procured by some means unlawful in itself, such as fraud, deceit, slander, nuisance or violence. Boyson v. Thorn, 98 Cal. 578, 21 L. R. A. 233, 33 Pac. 492; Chambers v. Baldwin, 91 Ky. 121, 34 Am. St. Rep. 135, 11 L. R. A. 545, 15 S. W. 57; Perkins v. Pendleton, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; Raycroft v. Tayntor, 68 Vt. 219, 54 Am. St. Rep. 882, 33 L. R. A. 225, 35 Atl. 53.

Interference with business or employment.—"It has been considered that, *prima facie*, the intentional infliction of temporal harm is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape." Holmes, J., in Aikens v. Wisconsin, 195 U. S. 194, 49 L. Ed. 154, 25 Sup. Ct. Rep. 3. Applying this principle to the modern business world we have the newly recognized doctrine that intentional interference with rights of business or employment is *prima facie* a tort, and that, unless justification be shown, an action will lie. "Every person has a right under the law, as between him and his fellow-subjects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others." Erle, Law Relating to Trade Unions [1869], p. 12. "I think the right to employ their labor as they will is a right both recognized by the law and sufficiently guarded by its provisions to make any undue interference with that right an actionable wrong." Halsbury, L. C., in Allen v. Flood [1898], App. Cas. 1. It had been said even so long ago as 1706: "He that hinders another in his trade or livelihood is liable to an action for so hindering him." Holt. C. J., in Keeble v. Hickeringill, 11 East, 575, 103 Eng. Reprint, 1127. For further statements of the problem, see Doremus v. Hennessy, 176 Ill. 608, 68 Am. St. Rep. 203, 43 L. R. A. 797, 52 N. E. 924, 54 N. E. 524; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230.

There seem to be two questions which have to be answered at the outset in every case arising under an alleged interference with business or employ-

§ 187. (1) Enticing a servant.—As [142] to the first: the retaining another person's servant during the time he has agreed to serve his present master; this, as it is an ungentlemanlike, so it

ment. The first is whether the interference was legally a wrong, that is to say, whether, among several competing rights, there was such undue interference with the plaintiff's rights as to give him a *prima facie* ground of action. If this question be decided in the affirmative, the second question is whether there was legal justification for the act. Mr. Justice Holmes states the doctrine of justification as follows: "In numberless instances the law warrants the intentional infliction of temporal damage because it regards it as justified. On the question as to what shall amount to a justification . . . the true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law, which nobody disputes. . . . It has been the law for centuries that as a man may set up a business in a country town too small to support more than one, although he expects and intends thereby to ruin someone already there, and succeeds in his intent. In such a case he is not held to act unlawfully and without justifiable cause. . . . The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of damage is privileged. . . . Yet even this proposition nowadays is disputed by a considerable body of persons, including many whose intelligence is not to be denied, little as we may agree with them. I have chosen this illustration partly with reference to what I have to say next. It shows without the need of further authority that the policy of allowing free competition justifies the intentional infliction of temporal damage, including the damage of interference with a man's business, by some means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade." Vegelahn v. Guntner, 167 Mass. 92, 57 Am. St. Rep. 443, 35 L. R. A. 722, 44 N. E. 1077.

Competition has been accepted as a justification for centuries. In 1410 we have the Gloucester Schoolmasters' Case, where the plaintiff claimed damages on account of the loss of revenue caused by the establishment of a rival school. The court held that the competition was in the interest of the public, and that there was consequently no ground for the action. In 1889 we have a case where it was held that a shipping company might, in the course of competition, go so far as to ruin or drive its competitors out of the field. Mogul Steamship Co. v. McGregor, L. R. 23 Q. B. D. 598. The courts both in the United States and in England have had numerous cases in which they have had to decide whether the competition alleged was fair or unfair, and was accordingly a justification or not. See Passaic Print Works v. Ely & Walker Dry Goods Co., 105 Fed. 163, 62 L. R. A. 673, 44 C. C. A. 426; Tuttle v. Buck, 107 Minn. 145, 131 Am. St. Rep. 446, 16 Ann. Cas. 807, 22 L. R. A. (N. S.) 599, 119 N. W. 946; Lewis v. Huie-Dodge Lumber Co., 121 La. 658, 46 South.

is also an illegal act. For every master has by his contract purchased for a valuable consideration the service of his domestics for a limited time: the inveigling or hiring his servant, which induces

685; Graham v. St. Charles St. Ry. Co., 47 La. Ann. 214, 49 Am. St. Rep. 366, 27 L. R. A. 416, 16 South. 806.

The pleadings in this class of cases aver that the act was done "maliciously." By this is not meant a bad motive, spite or ill will, but only that the act was unjustifiable. Bromage v. Prosser, 4 Barn. & C. 247, 107 Eng. Reprint, 1051; Allen v. Flood [1898], App. Cas. 1. The interference of the relations between employer and employees is usually brought about by the act, not of a single individual, but of a large number of persons. Hence has arisen the question, over which the courts are divided, whether an act, innocent when done by one person, can become actionable when done by a combination. The negative view is thus expressed: "What one man may lawfully do singly, two or more may lawfully do jointly. The number who unite to do the act cannot change its character from lawful to unlawful." Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 40 Am. St. Rep. 319, 21 L. R. A. 337, 55 N. W. 1119. The affirmative view is thus stated: "The individual right is radically different from the combined action. The combination has hurtful powers not possessed by the individual." Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 90 Am. St. Rep. 126, 57 L. R. A. 547, 41 S. E. 553. See, further, Doremus v. Hennessy, 176 Ill. 608, 68 Am. St. Rep. 203, 43 L. R. A. 797, 52 N. E. 924, 54 N. E. 524; Delz v. Winfree, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S W. 111; Bailey v. Master Plumbers' Assn., 103 Tenn. 99, 46 L. R. A. 561, 52 S. W. 853; Martell v. White, 185 Mass. 255, 102 Am. St. Rep. 341, 64 L. R. A. 260, 69 N. E. 1085.

Strikes, boycotts and pickets.—Hereunder, we have to deal with the subjects of strikes, boycotts and picketing, as these are ordinary means adopted to bring about a discharge or retention of employees, and the breaking up of a business. There is more or less diversity in the definitions of a strike, according as stress is laid upon one or the other of the two elements that go to make up the definition. These elements are, first, a ceasing from work, but not from employment; and, secondly, compulsion to extort from the employers the concession desired. Laborers have a conceded right to organize as labor unions in order to promote their common welfare. And it is conceded as a general proposition that they have, as a union, the right to strike. "Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor, or improving their relations with their employers. They have the right to strike (that is, to cease working in a body by prearrangement until a grievance is redressed), provided the object is not to gratify malice, or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others, but to improve their own condition, is not a violation of law." Vann, J., in National Protective Assn. v. Cumming, 170 N. Y. 315, 88 Am. St. Rep. 648, 58 L. R. A. 135, 63 N. E. 369; Minasian v. Osborne, 210 Mass. 250, Ann. Cas. 1912C, 1299,

a breach of this contract, is therefore an injury to the master, and for that injury the law has given him a remedy by a special action on the case; and he may also have an action against the servant for

37 L. R. A. (N. S.) 179, 96 N. E. 1036. "To make a strike a legal strike it is necessary that the strikers should have acted in good faith in striking for a purpose which the court holds to have been a legal purpose for a strike." De Minico v. Craig, 207 Mass. 593, 42 L. R. A. (N. S.) 1048, 94 N. E. 317. Sometimes we have the so-called sympathetic strike, which has been described as "a strike not to forward the common interests of the strikers, but to forward the interests of an individual employee in respect to a grievance between him and his employer where no contract of employment exists." Reynolds v. Davis, 198 Mass. 294, 17 L. R. A. (N. S.) 162, 84 N. E. 457. In that case the strike was against the open shop, and it was construed by a majority of the court to be in the nature of a sympathetic strike, and unjustifiable, and relief was given to the employers against the strikers. For a case involving both the direct strike and the sympathetic strike, the former held legal and the latter illegal, see Pickett v. Walsh, 192 Mass. 572, 116 Am. St. Rep. 272, 7 Ann. Cas. 638, 6 L. R. A. (N. S.) 1067, 78 N. E. 753. But the simple legal strike is of rare occurrence. In order to accomplish its purpose it is usually accompanied by such factors as boycotting, picketing, disorder or intimidation.

The term "boycott" is of recent origin, dating back only to about 1880. The history of the term may be found in State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890, and in Crump's Case, 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620. Two or three definitions of boycott will be given. "A combination to injure or destroy the trade, business or occupation of another, by threatening injury to the trade, business or occupation of those who have business relations with him." Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 128 Am. St. Rep. 492, 22 L. R. A. (N. S.) 607, 114 S. W. 997. "The exclusion of the employer from all communication with former customers and materialmen by threats of similar exclusion of the latter if dealings are continued." Moores v. Bricklayers' Union, 10 Ohio Dec. (Reprint) 665, 23 Ohio W. L. B. 48. What is defined above is the boycott proper, sometimes called the "secondary boycott." Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324. On the other hand, there is what is called the "primary boycott," namely, when the members of a union, acting by agreement among themselves and for their common interest, cease to patronize a person against whom the concert of action is directed. Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324. Such boycotts are entirely lawful, labor organizations having a right to withhold patronage from one who does not give fair compensation for labor. Gray v. Building Trades Council, 91 Minn. 171, 103 Am. St. Rep. 477, 1 Ann. Cas. 172, 63 L. R. A. 753, 97 N. W. 663.

In the primary boycott the dispute is confined to two parties,—the combination and the person against whom the boycott is directed. In the secondary boycott, the object of the combination is to coerce a third party, who

the nonperformance of his agreement.[l] But, if the new master was not apprised of the former contract, no action lies against *him*,[m] unless he refuses to restore the servant upon demand.

[l] F. N. B. 167.

[m] *Ibid.* Winch. 51.

---

has no interest in the dispute, by threats of injury to him, in order to compel the party against whom the grievance exists to accede to the combination's demands. There are three methods usually pursued in using such a boycott. (1) A combination is directed against a person to injure his business by preventing workmen from continuing to work for him, or by preventing workmen not in his service but willing to go into his employment from doing so, by the use of force, violence or intimidation. Such conduct is actionable. Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324; My Maryland Lodge v. Adt, 100 Md. 238, 68 L. R. A. 752, 59 Atl. 721; Beck v. Railway Teamsters' Prot. Union, 118 Mich. 497, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13; Reinecke Coal Min. Co. v. Wood, 112 Fed. 477. (2) A combination of workmen formed for the purpose of coercing the customers, actual or prospective, of a person against whom the combination is directed, to withhold their patronage from him. This is generally held to be unlawful. The principle upon which the decisions are based is that organized labor's right of coercion by strikes and boycotts is limited to strikes against those with whom the combination has a trade dispute. Wilson v. Hey, 232 Ill. 389, 122 Am. St. Rep. 119, 13 Ann. Cas. 82, 16 L. R. A. (N. S.) 85, 83 N. E. 928; Gray v. Building Trades Council, 91 Minn. 171, 103 Am. St. Rep. 477, 1 Ann. Cas. 172, 63 L. R. A. 753, 97 N. W. 663; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Rocky Mt. Bell Tel. Co. v. Montana Fed. of Labor, 156 Fed. 809. A few decisions hold that such secondary boycotts may be legal. Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324. (3) A third form is where a combination, having declared a boycott against a certain person, threatens to cause strikes against other persons dealing in materials, or to boycott them if they sell their material to the boycotted person. Such conduct is held actionable. Temperton v. Russell, 1 Q. B. 715; Moores v. Bricklayers' Union, 10 Ohio Dec. (Reprint) 665, 23 Ohio W. B. 48.

Picketing is held by some courts to be of itself not unlawful; by other courts all picketing is held unlawful. The difference is apparently in what the courts conceive picketing to be. As a general rule, the determination of whether the picketing is lawful or unlawful depends upon the circumstances of each case. If the picketing is accompanied by acts unlawful in themselves such as force, coercion, intimidation, the picketing is actionable. Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219, 8 L. R. A. (N. S.) 460, 86 Pac. 806; Jones v. Van Winkle Gin & Machine Works, 131 Ga. 336, 127 Am. St. Rep. 235, 17 L. R. A. (N. S.) 848, 62 S. E. 236; Goldfield Consol. Mines Co. v. Goldfield Miner's Union, 159 Fed. 500. But in some jurisdictions all picketing is held unlawful. One

§ 188. (2) Battery of a servant.—The other point of injury is that of beating, confining or disabling a man's servant, which depends upon the same principle as the last, *viz.*, the property which the master has by his contract acquired in the labor of the servant. In this case, besides the remedy of an action of battery or imprisonment, which the servant himself as an individual may have against the aggressor, the master also, as a recompense for *his* immediate loss, may maintain an action of trespass, *vi et armis*, in which he must allege and prove the special damage he has sustained by the beating of his servant *per quod servitium amisit* (by which means he lost his service) :[n] and then the jury will make him a proportionable pecuniary satisfaction. A similar practice to which we find also to have obtained among the Athenians, where masters were entitled to an action against such as beat or ill-treated their servants.[o]

§ 189. e. Basis of actions for injuries to domestic relations.—We may observe that in these relative injuries notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself or at least the advantages accruing therefrom; while the loss of the inferior by

[n] 9 Rep. 113. 10 Rep. 130.

[o] Pott. Antiqu. b. 1. c. 26.

---

court says: "There can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching." Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324. In this view, it is held that picketing is in itself an act of intimidation, an unwarrantable interference with freedom of trade, and that it makes no difference in effect whether the pickets are stationed a few feet or a thousand feet away from the premises picketed. Beck v. Railway Teamsters' Union, 118 Mich. 497, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13; A. R. Barnes & Co. v. Chicago Typ. Union, 232 Ill. 424, 13 Ann. Cas. 54, 14 L. R. A. (N. S.) 1018, 83 N. E. 940; George Jonas Glass Co. v. Glass Bottle Blowers' Assn., 72 N. J. Eq. 653, 66 Atl. 953.

See on the subjects of this note, Martin, The Modern Law of Labor Unions; Wyman, Control of the Market; 2 Modern Am. Law, 313, 359; 1 Street, Foundations of Legal Liability, 263–272, 342–373; Ames, How Far an Act may be a Tort Because of the Wrongful Motive of the Actor, 18 Harv. Law Rev. 411; Sarat Chandra Basak, Principles of Liability for Interference With Trade, Calling or Profession, 27 Law Quar. Rev. 290, 399, 28 Law Quar. Rev. 52; Stimson, The Law of Combined Action or Possession, 45 Am. Law Rev. 1; Wigmore, Interference With Social Relations, 21 Am. Law Rev. 766.

such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care or assistance of the superior, as the superior [143] is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury.[19] The wife cannot recover damages for beating her husband, for she hath no separate interest in anything during her coverture. The child hath no property in his father or guardian, as they have in him, for the sake of giving him education and nurture. Yet the wife or the child if the husband or parent be slain, have a peculiar species of criminal prosecution allowed them, in the nature of a civil satisfaction; which is called an *appeal*, and which will be considered in the next book. 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, for any battery or imprisonment which such master may happen to endure.

19 In its widest sense, property includes all a person's legal rights, of whatever description. A man's property is all that is *his in law*. This usage, however, is obsolete at the present day, though it is common enough in the older books. Thus Blackstone speaks of the property (i. e., right) which a master has in the person of his servant, and a father in the person of his child. "The inferior," he says, "hath 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." So Hobbes says: "Of things held in propriety, those that are dearest to a man are his own life and limbs; and in the next degree, in most men, those that concern conjugal affection; and after them riches and means of living." In like manner Locke tells us that "every man has a property in his own person," and he speaks elsewhere of a man's right to preserve "his property, that is, his life, liberty and estate."—SALMOND, Jurisprudence, 493.

CHAPTER THE NINTH. [144]

OF INJURIES TO PERSONAL PROPERTY.

§ 190. Injuries to personal property.—In the preceding chapter we considered the wrongs or injuries that affected the rights of persons, either considered as individuals or as related to each other; and are at present to enter upon the discussion of such injuries as affect the rights of property, together with the remedies which the law has given to repair or redress them.

And here again we must follow our former division [a] of property into personal and real: *personal*, which consists in goods, money and all other movable chattels, and things thereunto incident; a property, which may attend a man's person wherever he goes, and from thence receives its denomination, and *real* property, which consists of such things as are permanent, fixed and immovable; as lands, tenements and hereditaments of all kinds, which are not annexed to the person, nor can be moved from the place in which they subsist.

First, then, we are to consider the injuries that may be offered to the rights of personal property; and, of these, first the rights of personal property in *possession*, and then those that are in *action* only.[b]

§ 191. 1. Injuries to personal property in possession.—The rights of personal property in *possession* are liable to two species of injuries: the amotion or deprivation of that possession; and the abuse or damage of the chattels, while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches; the unjust and unlawful *taking* them away; and the unjust *detaining* them, though the original taking might be lawful.

§ 192. a. Unlawful taking of personal property.—[145] 1. And first of an unlawful *taking*. The right of property in all external things being solely acquired by occupancy, as has been formerly stated, and preserved and transferred by grants, deeds

[a] See Book II. c. 2.

[b] *Ibid.* c. 25.

and wills, which are a continuation of that occupancy; it follows as a necessary consequence, that when I once have gained a rightful possession of any goods or chattels, either by a just occupancy or by a legal transfer, 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 between man and man, 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.

§ 193. (1) **Replevin.**—The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the law of England has given for it.[1] And this is, in the first place, the restitution of the goods themselves so wrongfully taken, with damages for the loss sustained by such unjust invasion; which is effected by action of *replevin:* an institution, which the Mirror[o] ascribes to Glanvill, chief justice to King Henry the Second. This obtains only in one instance of an unlawful taking, that of a

[o] C. 2. § 6.

---

[1] **Present scope of replevin.**—"The action of replevin lies, in England and most of the states, wherever there has been an illegal taking (18 E. L. & E. 230; Pangburn v. Partridge, 7 Johns. (N. Y.) 140, 5 Am. Dec. 250; Ilsley v. Stubbs, 5 Mass. 280, 283; Stoughton v. Rappalo, 3 Serg. & R. (Pa.) 559, 562; Daggett v. Robins, 2 Blackf. (Ind.) 415, 21 Am. Dec. 752; Bruen v. Ogden, 11 N. J. L. 370, 20 Am. Dec. 593; Drummond v. Hopper, 4 Harr. (Del.) 327); and in some states wherever a person claims title to specific chattels in another's possessions (Ward v. Taylor, 1 Pa. 238; Skinner v. Stouse, 4 Mo. 93; Waterman v. Matteson, 4 R. I. 539; Lathrop v. Bowen, 121 Mass. 107; Eveleth v. Blossom, 54 Me. 447, 92 Am. Dec. 555); while in others it is restricted to a few cases of illegal seizure (Watson v. Watson, 9 Conn. 140, 23 Am. Dec. 324; Eggleston v. Mundy, 4 Mich. 295). The object of the action is to recover possession; and it will not lie where the property has been restored. And when brought in the *detinet*, the destruction of the articles by the defendant is no answer to the action." 3 Bouvier, Law Dict. (Rawle's 3d Rev.), 2891.

wrongful distress;[2] and this and the action of *detinue* (of which I shall presently say more) are almost the only actions in which the actual specific possession of the identical personal chattel is restored to the proper owner. For things personal are looked upon by the law as of a nature so transitory and perishable, that it is for the most part impossible either to ascertain their identity, or to restore them in the same condition as when they came to the hands of the wrongful possessor. And, since it is a maxim that "*lex neminem cogit ad vana seu impossibilia* (the law compels no one to do things which are either useless or impossible)," it therefore [146] contents itself in general with restoring, not the thing itself, but a pecuniary equivalent to the party injured; by giving him a satisfaction in damages. But in the case of a *distress*, the goods are from the first taking in the custody of the law, and not merely in that of the distrainor; and therefore they may not only be identified, but also restored to their first possessor, without any material change in their condition. And, being thus in the custody of the law, the taking them back by force is looked upon as an atrocious injury, and denominated a *rescous*, for which the distrainor has a remedy in damages, either by writ of *rescous*,[d] in case they were going to the pound, or by writ *de parco fracto*, or *pound-breach*,[e] in case they were actually impounded. He may also at his option bring an action on the case for this injury; and shall therein, if the distress were taken for rent, recover treble damages.[f] The term, *rescous*, is likewise applied to the forcible delivery

[d] F. N. B. 101.
[e] *Ibid.* 100.
[f] Stat. 2. W. & M. Sess. 1. c. 5 (Distress, 1690).

---

[2] In the four hundred years preceding this century there are stray *dicta*, but, it is believed, no reported decision that replevin would lie against any adverse taker but a distrainor. We need not be surprised, therefore, at Blackstone's statement that replevin "obtains only in one instance of an unlawful taking, that of a wrongful distress." Lord Redesdale, in Shannon v. Shannon, 1 Sch. & Lef. 327, dissented from this statement, saying that replevin would lie for any wrongful taking, and his opinion has been generally regarded as law. But the attempt to extend the scope of the action so as to cover a wrongful detention without any previous taking was unsuccessful. From what has been said, it is obvious that replevin has played a very small part in the history of trover.—AMES, Hist. of Trover, 3 Sel. Essays in Anglo-Am. Leg. Hist., 432.

of a defendant, when arrested from the officer who is carrying him to prison. In which circumstances the plaintiff has a similar remedy by action on the case, or of *rescous*:[g] or, if the sheriff make a return of such *rescous* to the court out of which the process issued, the rescuer will be punished by attachment.[h]

§ 194. **(a) Ancient procedure in replevin.**—An action of replevin, the regular way of contesting the validity of the transaction, is founded, I said, upon a distress taken wrongfully and without sufficient cause: being a redelivery of the pledge,[i] 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:[j] after which the distrainor may keep it, till tender made of sufficient amends, but must then redeliver it to the owner.[k] And formerly, when the party distrained upon intended to dispute the right of the distress, he had no other process by the old common law than by a writ of replevin, *replegiari facias* (that you cause to be replevied);[l] which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards [147] to do justice in respect of the matter in dispute in his own county court. But this being a tedious method of proceeding, the beasts or other goods were long detained from the owner to his great loss and damage.[m] For which reason the statute of Marlbridge[n] directs, that, without suing a writ out of the chancery) the sheriff immediately upon plaint to him made, shall proceed to replevy the goods. And, for the greater ease of the parties, it is further provided by statute 1 P. & M., c. 12 (Pound, 1554), that the sheriff shall make at least four deputies in each county, for the sole purpose of making replevins. Upon application, therefore, either to the sheriff or one of his said deputies, security is to be given, in pursuance of the statute of Westm. II, 13 Edward I, c. 2 (Replevin, 1285). 1. That the party replevying will pursue his action against the distrainor, for which purpose he puts in *plegios de prosequendo*, or pledges to prosecute; and,

g 6 Mod. 211.
h Cro. Jac. 419. Salk. 586.
i See pag. 13.
j Co. Litt. 145.
k 8 Rep. 147.
l F. N. B. 68.
m 2 Inst. 139.
n 52 Hen. III. c. 21 (1267).

2. That if the right be determined against him, he will return the distress again; for which purpose he is also bound to find *plegios de retorno habendo* (pledges to have the return). Besides these pledges, the sufficiency of which is discretionary and at the peril of the sheriff, the statute 11 George II, c. 19 (Distress for Rent, 1737), requires that the officer granting a replevin on a distress for rent, shall take a bond with two sureties in a sum of double the value of the goods distrained, conditioned to prosecute the suit with effect and without delay; which bond shall be assigned to the avowant or person making cognizance, on request made to the sheriff; and, if forfeited, may be sued in the name of the assignee. And certainly, 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 sufficient sureties as by retaining the very distress, which might frequently occasion great inconvenience to the owner; and that the law never wantonly inflicts. The sheriff, on receiving such security, is immediately, by his officers, to cause the chattels taken in distress to be restored into the possession of the party distrained upon; unless the distrainor claims a property in the goods so taken. For if, by this method of distress, the distrainor happens [148] to come again into possession of his own property in goods which before he had lost, the law allows him to keep them, without any reference to the manner by which he thus has regained possession; being a kind of personal *remitter*.[o] If, therefore, the distrainor claims any such property, the party replevying must sue out a writ *de proprietate probanda* (for proving the ownership), in which the sheriff is to try, by an inquest, in whom the property previous to the distress subsisted.[p] And if it be found to be in the distrainor, the sheriff can proceed no further, but must return the claim of property to the court of king's bench or common pleas, to be there further prosecuted, if thought advisable, and there finally determined.[q]

But if no claim of property be put in, or if (upon trial) the sheriff's inquest determines it against the distrainor, then the sheriff is to replevy the goods (making use of even force, if the

o See pag. 19.

p Finch. L. 316.

q Co. Litt. 145. Finch. L. 450.

distrainor makes resistance[r]) in case the goods be found within his county. But if the distress be carried out of the county, or concealed, then the sheriff may return that the goods, or beasts, are *eloigned, elongata,* carried to a distance, to places to him unknown: and thereupon the party replevying shall have a writ of *capias in withernam, in vetito* (or, more properly, *repetito*) *namio;*[3] a term which signifies a second or reciprocal distress,[s] in lieu of the first which was eloigned. It is therefore a command to the sheriff to take other goods of the distrainor, in lieu of the distress formerly taken, and eloigned, or withheld from the owner.[t] So that here is now distress against distress; one being taken to answer the other, by way of reprisal,[u] and as a punishment for the illegal behavior of the original distrainor. For which reason goods taken in *withernam* cannot be replevied till the original distress is forthcoming.[v]

§ 195. (b) Later practice in replevin.—[149] But, in common cases, the goods are delivered back to the party replevying, who is then bound to bring his action of replevin; which may be prosecuted in the county court, be the distress of what value it may.[w] But either party may remove it to the superior courts of king's bench or common pleas, by writ of *recordari* or *pone;*[x] the plain-

r 2 Inst. 193.

s Smith's Commonw. b. 3. c. 10. 2 Inst. 141. Hickes's Thesaur. 164.

t F. N. B. 69. 73.

u In the old northern languages the word *withernam* is used as equivalent to *reprisals.* (Stiernhook, de Jure Sueon. l. 1. c. 10.)

v Raym. 475. The substance of this rule composed the terms of that famous question, with which Sir Thomas More (when a student on his travels) is said to have puzzled a pragmatical professor in the university of Bruges in Flanders; who gave a universal challenge to dispute with any person in any science: *in omni scibili, et de quolibet ente.* Upon which Mr. More sent him this question, "*utrum averia carucæ, capta in vetito namio, sint irreplegibilia*"; whether beasts of the plough, taken in *withernam,* are incapable of being replevied. (Hoddesd. c. 5.)

w 2 Inst. 139.

x 2 Inst. 23.

3 "Blackstone, Comm. III. 49 [148], suggests that *de vetito namii* is a corrupt reading of *de repetito namii.* This is a needless emendation. If you refuse to give up a thing, you are said *vetare* that thing." 2 Poll. & Maitl., Hist. Eng. Law (2d ed.), 577 n.

tiff at pleasure, the defendant upon reasonable cause:[y] and also, if in the course of proceeding any right of freehold comes in question, the sheriff can proceed no further;[z 4] so that it is usual to carry it up in the first instance to the courts of Westminster Hall. Upon this action brought, and declaration delivered, the distrainor, who is now the defendant, makes *avowry;* that is, he *avows* taking the distress in his own right, or the right of his wife;[a] 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; and on the truth and legal merits of this avowry or cognizance the cause 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.[b] But if the defendant prevails, by the default or nonsuit of the plaintiff, 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. And at the common law the plaintiff might have brought another replevin, and so *in infinitum* to the intolerable vexation of the defendant. Wherefore the statute [150] of Westm. II, c. 2 (1285), restrains the plaintiff, when nonsuited, from suing out any fresh replevin; but allows him a *judicial* writ, issuing out of the original record, and called a writ of *second deliverance,* in order to have the same distress again delivered to him, on giving the like security as before. And, if the plaintiff be a second time nonsuit, or if the defendant has judgment upon verdict or demurrer in the first replevin, he shall have a writ of *return irreplevisable;* after which no writ of second deliverance shall be allowed.[c] But in case of a distress for rent arrear, the writ of second deliverance is in

[y] F. N. B. 69, 70.
[z] Finch. L. 317.
[a] 2 Saund. 195.
[b] F. N. B. 69.
[c] 2 Inst. 340.

4 Because the right of freehold could not be tried without the king's writ.—HAMMOND.

effect[d] taken away by statute 17 Car. II, c. 7 (Distresses and Avowries for Rent, 1665), which directs that, if the plaintiff be nonsuit before issue joined, then upon suggestion made on the record in nature of an avowry of cognizance, or if judgment be given against him on demurrer, then, without any such suggestion, the defendant may have a writ to inquire into the value of the distress by a jury, and shall recover the amount of it in damages, if less than the arrear of rent; or, if more, then so much as shall be equal to such arrear, with costs; or, if the nonsuit be after issue joined, or if a verdict be against the plaintiff, then the jury impaneled to try the cause shall assess such arrears for the defendant: and if (in any of these cases) the distress be insufficient to answer the arrears distrained for, the defendant may take a further distress or distresses.[e] But otherwise, if, pending a replevin for a former distress, a man distrains again for the same rent or service, then the party is not driven to his action of replevin, but shall have a writ of *recaption*,[f], and recover damages for the defendant the redistrainor's contempt of the process of the law.

§ 196. (2) Other remedies.—In like manner, other remedies for other unlawful takings of a man's goods consist only in recovering a satisfaction in damages. As if a man takes the goods of another out of his actual or virtual possession, without having a lawful title so to do, it is an injury; which, though it doth not amount to felony unless it be done *animo furandi* (with a design of stealing them), is nevertheless a transgression, for which an action of *trespass vi et armis* will [151] lie; wherein the plaintiff shall not recover the thing itself, but only damages for the loss of it. Or, if committed without force, the party may, at his choice, have another remedy in damages by action of *trover* and *conversion*, of which I shall presently say more.

§ 197. b. Unlawful detainer of personal property.—Deprivation of possession may also be by an unjust *detainer* of another's goods, though the original *taking* was lawful. As if I distrain another's cattle damage feasant, and before they are impounded he

[d] 1 Vent. 64.
[e] Stat. 17 Car. II. c. 7 (1665).
[f] F. N. B. 71.

tenders me sufficient amends; now, though the original taking was lawful, my subsequent detainment of them after tender of amends is wrongful, and he shall have an action of *replevin* [5] against me to recover them:[g] in which he shall recover damages only for the *detention* and not for the *caption*, because the original taking was lawful. Or, 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*.[h] [6]

[g] F. N. B. 69. [h] *Ibid.* 138.

---

5 **Replevin for detention of a distress.**—This may seem inconsistent with the rule of the common law, that replevin lies only on a wrongful taking, and has been quoted sometimes to sustain the American rule allowing it to be brought for detention. But it appears to rest on the ancient doctrine that any misconduct in regard to a distress, not warranted by the purpose for which it was taken, was itself a trespass; thus killing the distress, after it was in the possession of the distrainor. (Text, p. *152, *post.*) And we are told in Britton that the *vee*, or refusal to give up the pledge upon tender, was in itself a breach of the king's peace (Book I, c. 28, § 2, Nichol's ed. i, p. 136); but detinue would also lie after a tender. (Hale's notes to F. N. B. 69; Y. B. P., 4th ed., iii. pl. 13, fol. 9.)—HAMMOND.

6 **Summary of steps in development of detinue.**—To sum up in a few words the various stages through which detinue has passed, we may say that the action first appeared as a form of debt, and before the reign of Edward I was not distinguishable from the mother action. It was the remedy by which the bailor enforced his rights against the bailee (detinue *sur bailment*); and though theoretically broad enough to be used in all cases where there was a contractual duty (debt) to surrender a specific chattel, it was in practice limited strictly to the field of bailment and was used only against the bailee. By degrees the action was permitted to be used against the heirs, representatives and finally against sub-bailees.

Later, upon alleging a bailment and generally that the goods had thereafter come to the hands of the defendant (*devenerunt ad manus*), the bailor was permitted in this action to recover from anyone who obtained the chattels unlawfully from the bailee, as by theft or trespass. By this means the remedy could be used by the bailor to recover his chattels wherever they might be found.

The next step in the development of the action was that by which the owner of goods (and not merely the bailor) was permitted to maintain detinue against one who came into possession by finding (*per inventionem*), the finder being treated as a sort of *quasi*-bailee. This was detinue *sur trover*. This form of the remedy was, by its nature, readily adapted to extension into

§ 198. (1) 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 a sack, for then it may be distinguishably marked. In order, therefore, to ground an action of detinue, which is only for the detaining, these points are necessary:[1] 1. That the defendant came lawfully into possession of the goods, as either by delivery to him, or finding them; 2. That the plaintiff have a property; 3. That the goods themselves be of some value; and 4. That they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. And the judgment is conditional; that the plaintiff recover the said goods, or (if they cannot be had) their respective values, and also the damages for detaining them.[2] But there is one disadvantage which attends this action; *viz.*, that the defendant is herein permitted to wage

[1] Co. Litt. 286. [2] Co. Entr. 170. Cro. Jac. 681.

---

the field of trespass; for it is easily seen that one who takes by trespass or theft can be held at least to the civil liability of a finder, such person not being permitted to take advantage of his own wrong and to show that the taking was unlawful. Detinue *sur trover* was thus in theory available against trespassers at large, but in practice it was not so used until quite modern times, detinue having been largely superseded by the action on the case. When in the nineteenth century detinue emerged from its long eclipse, the old limitations on the action were forgotten, and it was properly used concurrently with replevin, trover and trespass *de bonis asportatis*, in all cases of the wrongful detention of chattels, and regardless of whether the defendant originally acquired possession lawfully or otherwise.—STREET, 3 Foundations of Legal Liability, 152.

Besides the chapter on "Action of Detinue," just quoted from, see Ames, Lect. on Legal Hist., 71ff.

"In order to ground the action of detinue, these points are necessary: (1) The plaintiff must have property in the thing sought to be recovered; (2) he must have the right to its immediate possession; (3) it must be capable of identification; (4) it is essential that the property be of some value; and (5) the defendant must have had possession at some time before the institution of the action." Hefner v. Fidler, 58 W. Va. 159, 112 Am. St. Rep. 961, 3 L. R. A. (N. S.) 138, 52 S. E. 513.

his law, that is, to exculpate [152] himself by oath,[k] and thereby defeat the plaintiff of his remedy: which privilege is grounded on the confidence originally reposed in the bailee by the bailor,[7] in the borrower by the lender, and the like; from whence arose a strong presumptive evidence, that in the plaintiff's own opinion the defendant was worthy of credit. But for this reason the action itself is of late much disused, and has given place to the action of *trover*.

§ 199. **(2) Action of trover.**—This action of *trover* and *conversion* was in its original an action of trespass upon the case, for recovery of damages against such person as had found *another's* goods, and refused to deliver them on demand, but *converted* them to his own use; from which finding and converting it is called an action of *trover* and *conversion*.[8] The freedom of this action from wager of law, and the less degree of certainty requisite in describing the goods,[1] gave it so considerable an advantage over the action of *detinue*, that by a fiction of law actions of *trover* were at length permitted to be brought against any man who had in his possession by any means whatsoever the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the

[k] Co. Litt. 295.

[1] Salk. 654.

---

[7] **Wager of law.**—This explanation of *wager of law* is quite in the fashion of the eighteenth century, but would have been unintelligible to the time when the rule originated. That rule was a survival from the primitive right of every unblemished freeman in a Germanic community to exonerate himself from charges, civil or criminal, made against him on the mere word of others, by his own denial under oath, with a sufficient number of compurgators. Its applicability to debt and detinue is perhaps the strongest proof of their great antiquity, in substance if not in that exact form.

A few cases of wager of law may be found in early American reports, but it was practically never in use here.—HAMMOND.

[8] On the history of the action of trover, see Ames, Lect. on Legal Hist., 80, 3 Street, Foundations of Legal Liability, 159, and Salmond, Trover and Conversion, 21 Law Quart. Rev., 43.

The action of trover lies wherever the defendant has done an act which constitutes a conversion. And a conversion is any unauthorized act which deprives another of the dominion of his personal property permanently or for an indefinite time. Bramwell, B., in Hiort v. Bott, L. R. 9 Ex. 86.

conversion: for any man may take the goods of another into possession, if he finds them; but no finder is allowed to acquire a property therein, unless the owner be forever[o] unknown:[m] 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, *prima facie*, sufficient evidence of a conversion.[n] The fact of the finding, or *trover*, is therefore now totally immaterial: for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them: and, if he proves that the goods are *his* property, and that the defendant had them in his possession, it is sufficient. But a conversion must be fully proved: and then in this action the plaintiff shall recover damages, equal to the value of the thing converted, but not the thing itself; which nothing will recover but an action of *detinue* or *replevin*.

§ 200. c. Actions of trespass and case for damage to personal property.—[153] 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 explication. I have only, therefore, to mention the remedies given by the law to redress them, which are in two shapes:[10] by action

m See Book I. c. 8. Book II. c. 1. and 26.

n 10 Rep. 56.

---

9 *Forever* is a strong expression: would no prescriptive title ever accrue to the finder, after the true owner's remedy was barred by statute?—HAMMOND.

10 **Action on the case.**—We now come to consider the great residuary remedy of trespass on the case or the action on the case. To be entirely accurate and precise, we must distinguish between trespass on the case and the general action on the case. Trespass on the case, we should say, is that form of the action on the case which is strictly *in consimili casu* with the action of trespass. It is used to redress wrongs which are analogous to the wrong of trespass, but which yet are not identical with the trespass. The general action on the case, on the other hand, is used to redress wrongs in general which have no resemblance to the trespass whatever. . . .

We are bound to add that the authorities do not make the explicit distinction which is here drawn between trespass on the case and the general action

of *trespass vi et armis*, where the act is in itself *immediately* injurious to another's property, and therefore necessarily accompanied with some degree of force; and by special action *on the case*, where the act is in itself indifferent, and the injury only *conse-*

on the case, and in the books the expressions "trespass on the case" and "action on the case," or simply "case," are used interchangeably. The propriety of the distinction cannot, however, be doubted; neither can there be any doubt that the authorities themselves point to the distinction in that vague and obscure way which is indicative of inadequate analysis. In truth, if we push analysis far enough we shall perceive that under this head of trespass on the case, or action on the case, have been grouped together a number of really different remedies which have only the feature in common that they are all derived by an identical process of extension from the several distinct common-law remedies. Just as there is a specific action on the case in the nature of trespass (trespass on the case), so there are such specific actions as the action on the case in the nature of deceit, the action on the case in the nature of waste, the action on the case in the nature of nuisance, the action on the case in the nature of detinue (trover). And in addition to these specific forms of case there is, as was indicated above, the general residuary action which lies to recover redress for wrongs for which no specific remedy existed. . . .

The various actions on the case are formless actions based directly on legal duty. In conformity with common modes of speech we should speak in the singular, and say that the action on the case is a formless action based directly on legal duty. As indicated above, it is the great residuary remedy in the field of tort, just as *indebitatus assumpsit* is the residuary remedy in the field of contract. Wherever the law upon a particular state of facts imposes a pure legal duty, as distinguished from a contractual duty, the action on the case lies to enforce that duty or to recover damages for its breach provided no other form of action is available. Accordingly, we may say that case lies to recover damage incurred by reason of any act done, or permitted, or omitted to be done, contrary to the obligation of the law. "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages."

In the evolution of the common-law remedies the action on the case has served to keep remedy measurably abreast with the expanding conception of right, and to the existence of this remedy is largely to be attributed whatever truth is to be found in the ancient legal maxim *ubi jus ibi remedium*. Inasmuch as the action on the case is a formless action and is founded directly on legal duty, an attempt to assign limits to its scope would be as vain as an attempt to define the limits of legal liability. The limits of legal liability are being constantly extended with the growth of society, and as long as there exists any sort of equilibrium between substantive and remedial law the scope of the action on the case must be likewise extended. From a prac-

quential, and therefore arising without any breach of the peace. In both of which suits the plaintiff shall recover damages, in 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.[o] 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.[p]

§ 201. 2. Injuries to things in action.—Hitherto of injuries affecting the right of things personal, in *possession.* We are next to consider those which regard things in *action* only; or such rights as are founded on, and arise from *contracts;* the nature and several divisions of which were explained in the preceding volume.[q] The violation, nonperformance, of these contracts might be extended into as great a variety of wrongs, as the rights which we then considered: but I shall now endeavor to reduce them into a narrow compass, by here making only a twofold division of contracts, *viz.,* contracts *express* and contracts *implied,* and considering the injuries that arise from the violation of each, and their respective remedies.

§ 202. a. Express contracts.—Express contracts include three distinct species: debts, covenants and promises.

[o] Noy's Max. c. 44.

[p] Cro. Car. 254. 487.

[q] See Book II. c. 30.

---

tical standpoint the importance of the remedy may be appreciated when we observe that it is the action by which the greater number of legal rights in the field of tort have been vindicated. A glance at the most prominent heads in this branch of the law will show the truth of this statement. Thus the wrongs which are grouped under such titles as Negligence, Fraud, Malice, Slander and Libel, Slander of Title, Waste, Conversion, Conspiracy, Nuisance, Escape of Dangerous Things, are all redressed by the action on the case in some form or other."—STREET, 3 Foundations of Legal Liability, 245.

The writer proceeds in the pages following these passages to portray the process by which the principle of growth embodied in the action on the case has manifested itself in the development of legal principle.

§ 203. **(1) Action of debt.**—[154] 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; a special bargain; or a rent reserved on a lease; where the quantity is fixed and unalterable, and does not depend upon any after-calculation to settle it.[11] The nonpayment of these is an injury, for which the proper remedy is by action of *debt*,[r] to compel the perform-

r F. N. B. 119.

---

11 **Action of debt and wager of law.**—A feature of debt which doomed the action to obsolescence so soon as *assumpsit* could be used in its stead, was found in the fact that the defendant could wage his law. All simple debts were subject to this mode of defense (this rule, however, did not apply in the exchequer. 1 Chitty Pl. 127), but the specialty and debts of record were not. When the right of the defendant to wage his law was indirectly taken away by the decision in Slade's Case (1602), 4 Coke, 92, 76 Eng. Reprint, 1074, which permitted *assumpsit* to be used in suing upon simple debts, the old practitioners looked upon the innovation as a great hardship. The venerable Jenkins, in the time of the commonwealth, enumerated this among the abuses which had crept into the common law in his day (Jenkins Centuries, ed. 1777, xxi). A little later Vaughan, C. J., inveighed with considerable show of feeling against what seemed to him to be an "illegal resolution." (Edgcomb v. Dee, Vaugh. 101, 124 Eng. Reprint, 990.) Such protests as these were of no avail. The circumstance that the action of debt could not be used against the representatives of a deceased person also contributed to the popularity of *assumpsit* as a remedy upon debts.

When the wager of law became obsolete in the eighteenth century, debt gave some indications of a power to recover some of its lost ground (King v. Williams, 4 D. & R. 206), for debt was more expeditious than *assumpsit*, judgment being final in the first instance, if the defendant did not appear. By statute in 1833 the wager of law was totally abolished (3 & 4 Will. IV, c. 42, § 13), and at the same time the action of debt was permitted to be brought against the representatives of deceased persons. But it was too late to bring the action back into frequent use, for a few years later all forms of action shared a common fate upon the passage of the Procedure Acts.

In America, it should be observed, the wager of law never gained recognition as a legal mode of defense (see Childress v. Emory, 8 Wheat. (U. S.) 642, 675, 5 L. Ed. 705, 713), and modern constitutional provisions guaranteeing the right of trial by jury are of course inconsistent with the existence of such right. The action of debt, in this country, has not therefore been hampered by the limitations imposed upon the action by the wager of law.—STREET, 3 Foundations of Legal Liability, 138. See, also, on the history of the action of debt, Ames, Lect. on Legal Hist., 88.

ance of the contract and recover the specifical sum due.[s] This is the shortest and surest remedy; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal. 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 not liable to an action of debt, but a special action on the case, according to the nature of my contract. And indeed actions of debt are now seldom brought but upon special contracts under seal; wherein the sum due is clearly and precisely expressed; for in case of such an action upon a simple contract, the plaintiff labors under two difficulties. First, the defendant has here the same advantage as in an action of *detinue*, that of waging his law, or purging himself of the debt by oath, if he thinks proper.[ss] Secondly, in an action of debt the plaintiff must recover the whole debt he claims, or nothing at all.[12] For the debt is one single cause of action, fixed and determined; and which, therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof the performance is sued for. If, therefore, I bring an action of debt for 30*l.*, I am not at liberty to prove a debt of 20*l.*, and recover a verdict thereon;[t] any more than if I bring an action of *detinue* for a horse, I can thereby recover an ox.[13] For I fail in the proof of that contract,

[s] See Appendix, No. III. § 1.

[ss] 4 Rep. 94.

[t] Dyer, 219.

---

12 Professor Pound suggests a comparison of this last statement with the following passage from Aristotle's Politics (II, 8, Welldon's transl.): "And further no one compels a juror to perjure himself if he returns a verdict of simple acquittal or condemnation where the charge is duly preferred in simple terms. For a juror who votes acquittal, decides not that the defendant owes nothing but that he does not owe the twenty *minae* claimed, and the only person guilty of perjury is a juror who returns a verdict for the plaintiff when he does not believe that the defendant owes the twenty *minae*." Pound, Readings in Roman Law, 149 n.

13 Formerly the rule of strict conformity between the allegation and proof as to the amount of the debt was also applied when *assumpsit* was used. In 1715, however, in Vaux v. Mainwaring, Fortescue, 197, 92 Eng. Reprint, 816, Willet v. Tidey, 1 Show. 215, 89 Eng. Reprint, 544, it was held that while in debt a variance in the proof from the amount stated in the declaration, in *indebitatus assumpsit* the plaintiff could recover as much as he proved.

which my action or complaint has alleged to be specific, express and determinate. But in an action on the case, on what is called an *indebitatus assumpsit* (being indebted he undertook), which is not brought to compel a specific performance of the contract, but to recover damages for its nonperformance, [155] the implied *assumpsit*, and consequently the damages for the breach of it, are in their nature indeterminate; and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration. For if *any* debt be proved, however less than the sum demanded, the law will raise a promise *pro tanto* (for so much), and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant, *being indebted* to me in 30*l.*, *undertook* or promised to pay it, but failed;[14] and lay my damages arising from such failure at what sum I please: and the jury will, according to the nature of my proof, allow me either the whole in damages, or any inferior sum.

§ 204. (a) Writ in the debet and in the detinet.—The form of the writ of *debt* is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only; that is, the writ states, either that the defendant *owes* and unjustly *detains* the debt or thing in question, or only that he unjustly *detains* it. It is brought in the *debet* as well as *detinet*, when sued by one of the original contracting parties who personally gave the credit, against the other who personally incurred the debt or against his heirs, if they are bound

But in 1789, in M'Quillin v. Cox, 1 H. Black. 249, 126 Eng. Reprint, 144, it was held that in simple debt the plaintiff can recover though he proves less than he has demanded in his declaration. Debt will now lie at common law for the recovery of any pecuniary demand which can be reduced to a certainty. United States v. Lyman, 26 Fed. Cas. 1024 (No. 15,647), 1 Mason, 482.

14 **Indebitatus assumpsit.**—The student should read Slades' Case, 4 Coke, 92, 76 Eng. Reprint, 1074 [note 11, p. 1711, *ante*], by which the propriety of so laying an action was adjudged on great consideration. It marks an epoch in the English law of contracts, and in fact introduced that conception of simple contract as essentially a promise upon consideration which is now considered the only truly "scientific" one, but was utterly unknown to the primitive law in which breach of promise was regarded as essentially a fraud. HAMMOND.

to the payment;[15] as by the obligee against the obligor, the landlord against the tenant, etc. But, if it be brought by or against an executor for a debt due to or from the testator, this, not being his own debt, shall be sued for in the *detinet* only.[u] So, also, if the action be for goods, for corn, or an horse, the writ shall be in the *detinet* only; for nothing but a sum of money, for which I (or my ancestors in my name) have personally contracted, is properly considered as my *debt*. And indeed a writ of *debt* in the *detinet* only, for goods and chattels, is neither more nor less than a mere writ of *detinue;* and is followed by the very same judgment.[v]

§ 205. **(2) Action of covenant.**—A covenant also, contained in a deed, to do a direct act or to omit one, is another species of express contracts, the violation or breach of which is a civil injury.[16] As if a man covenants to be at York by such a day, or not to exercise a [156] 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 perhaps greatly to the disadvantage and loss of the covenantee. The remedy for this is by a writ of *covenant:*[w] which directs the sheriff to command the defendant generally to keep his covenant with the plaintiff (without specifying the nature of the covenant) or show good cause to the contrary; and if he continues refractory, or the covenant is already so broken that it cannot now be specifically performed, then the subsequent proceedings set forth with precision the covenant, the breach, and the loss which has happened thereby; whereupon the jury will give damages, in proportion to the injury sustained by the plaintiff, and occasioned by such breach of the defendant's contract.

u F. N. B. 119.
v Rast. Entr. 174.
w F. N. B. 145.

---

15 That is to say, where the obligation which created the debt contained the word "heirs," the writ could be in both *debet et detinet;* but otherwise only in the *detinet*, for the simple duty to pay a debt was regarded as so purely personal as to perish with the person of the debtor.

16 On the history of the action of covenant, see Ames, Lect. on Legal Hist., 97, 3 Street, Foundations of Legal Liability, 114, and Salmond, in 3 Select Essays in Anglo-Am. Legal Hist., 324.

§ 206. (a) **Covenant real.**—There is one species of covenant, of a different nature from the rest, and that is a covenant *real*, to convey or dispose of lands, which seems to be partly of a personal and partly of a real nature.[x] For this the remedy is by a special writ of covenant, for a specific performance of the contract, concerning certain lands particularly described in the writ. It therefore directs the sheriff to command the defendant, here called the deforciant, to keep the covenant made between the plaintiff and him concerning the identical lands in question; and upon this process it is that fines of land are usually levied at common law;[y] the plaintiff, or person to whom the fine is levied, bringing a writ of covenant, in which he suggests some agreement to have been made between him and the deforciant, touching those particular lands, for the completion of which he brings this action. And, for the end of this supposed difference, the fine or *finalis concordia* (final agreement) is made, whereby the deforciant (now called the cognizor) acknowledges the tenements to be the right of the plaintiff, now called the cognizee. And moreover, as leases for years were formerly considered only as contracts[z] or covenants for the enjoyment of the rents and profits, and not as the conveyance [157] of any real interest in the land, the ancient remedy for the lessee, if ejected, was by writ of covenant against the lessor, to recover the term (if in being) and damages, in case the ouster was committed by the lessor himself; or, if the term was expired, or the ouster was committed by a stranger, claiming by an elder title, then to recover damages only.[a]

[No person could at common law take advantage of any covenant or condition, except such as were parties or privies thereto;[17]

x Hal. on F. N. B. 146.
y See Book II. c. 21.
z *Ibid.* c. 9.
a Bro. Abr. t. Covenant. 33. F. N. B. 145.

---

17 It became a well-established rule that covenant would lie only at the instance of one who was a party to the covenant. The same rule controls in debt and *assumpsit*. A good illustration of the doctrine, under conditions of hardship is furnished by the case of Colyear v. Countess of Mulgrave (1836), 2 Keen, 81, 48 Eng. Reprint, 559. "A father who had four natural daughters and a legitimate son, entered into an agreement with his son, evi-

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 then newly dissolved, the statute 32 Henry VIII, c. 34, gives the assignee of a reversion (after notice of such assignment[aa]) the same remedies against the particular tenant, by entry or action, for waste or other forfeitures, nonpayment of rent, and nonperformance of conditions, covenants and agreements, as the assignor himself might have had; and makes him equally liable, on the other hand, for acts agreed to be performed by the assignor, except in the case of warranty.] [18]

§ 207. (3) Action of assumpsit.—A promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. 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.[19] The remedy indeed is not exactly the same: since, instead of an action of covenant, there only lies an action upon the case, for what is called the *assumpsit* or undertaking of the defendant; the failure of per-

[aa] Co. Litt. 215. Moor. 876. Cro. Jac. 145.

---

denced by certain deeds, whereby the father covenanted to transfer the sum of £20,000 to a trustee, for the benefit of his four natural daughters, and the son covenanted to pay the debts of the father. The son paid some of the father's debts, and died before the covenant on the part of the father was performed, having by his will given the whole of his property to his father who became the son's personal representative." One of the daughters filed a bill to have the covenant performed against the estate of the deceased son, but a demurrer thereto was sustained. The ground of the decision was stated to be where two persons for a valuable consideration as between themselves covenant to do some act for the benefit of one who is a stranger to the covenant, that stranger cannot enforce the covenant, although either of the two parties to the covenant might do so against the other.

The same rule prevails in the United States. Lyon v. Parker, 45 Me. 474; Hurd v. Curtis, 19 Pick. (Mass.) 459; Harms v. McCormick, 132 Ill. 104, 22 N. E. 511; Henricus v. Englert, 137 N. Y. 488, 33 N. E. 550.

[18] The paragraph in brackets appears for the first time in the ninth edition of the Commentaries, and is not printed in Hammond's edition.

[19] It is remarkable that Blackstone has omitted here all mention of *consideration* as an essential element of the actionable promise. See Book II, p. *445, which must be read in connection with this.—HAMMOND.

forming which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. 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 on the case 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 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 case, instead of being driven to an action of debt.[b] 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,[c] may recover the value of the note in damages, if it remains unpaid. Some agreements indeed, though never so expressly made, are deemed of so important a nature that they ought not to rest in verbal promise only, which cannot be proved but by the memory (which sometimes will induce the perjury) of witnesses.

§ 208. **(a) Statute of frauds.**—To prevent which, the statute of frauds, and perjuries, 29 Car. II, c. 3 (1677), enacts, that in the five following [158] cases no verbal promise shall be sufficient to ground an action upon, but at the 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. In all these cases a mere verbal *assumpsit* is void.[20]

b 4 Rep. 92. c See Book II. c. 30.

20 The student will find this statute re-enacted in substance, with more or less changes of detail, in every American state, and should refer to the statute book for it.—HAMMOND.

§ 209. b. Implied contracts.—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 nonperformance.

§ 210. (1) Actions of debt on judgments.—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 hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation, of the law. For it is a part of the original contract, entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state, of which each individual is a member. Whatever, therefore, the laws order anyone to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge. And this implied agreement it is, that gives the plaintiff a right to institute a second action, founded merely on the general contract, in order to recover such damages, or sum of money, as are assessed by the jury and adjudged by the court to be due from the defendant to the plaintiff in any former action. So that if he hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, [159] he may afterwards bring an action of debt upon this judgment,[d] and shall not be put upon the proof of the original cause of action; but upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies that by the original contract of society the defendant hath contracted a debt, and is bound to pay it.*[21] This

* Cited and followed, 18 Ala. 519, 52 Am. Dec. 232; 7 Ga. 395; 23 Iowa, 83, 92 Am. Dec. 412; 32 Kan. 441, 49 Am. Rep. 491; 12 Me. 98; 73 Me. 331; but in 5 Or. 500, it was held that under the code domestic judgment cannot be thus enforced, because it would be inconsistent with the theory of the statute; the only remedy is to obtain leave to issue execution as provided for by statute; preceding part of paragraph quoted in 4 Conn. 403; 19 Ohio St. 37. Cited, 3 Bland, 327, 22 Am. Dec. 274; 15 Me. 168.—HAMMOND.

[d] 1 Roll. Abr. 600, 601.

---

[21] **Nature of the obligation arising from a judgment.**—The question whether a judgment is a contract is an old one very much discussed, and in

method seems to have been invented, when *real* actions were more in use than at present, and damages were permitted to be recovered thereon; in order to have the benefit of a writ of *capias* to take the defendant's body in execution for those damages, which process was allowable in an action of debt (in consequence of the some cases it was held to be such, chiefly upon the authority of Blackstone, who rested his opinion as to the propriety of this classification upon the doctrine of the social compact. The relations of a judgment to the idea of a contract or a *quasi* contract have received much attention, in connection with the more careful investigation and accurate understanding of that class of obligations known as *quasi* contracts. Blackstone said, "Upon showing the judgment, once obtained, still in full force and yet unsatisfied, the law immediately implies that, by the original contract of society, the defendant hath contracted a debt, and is bound to pay it." 3 Bl. Comm. 159. Of this expression it has been said, "This is certainly a very remarkable statement, and involves large assumptions in regard to 'an original contract of society' and its supposed binding force upon a judgment debtor of the nineteenth century." Howe, Stud. Civ. L. 188. This early theory of an "original contract of society" has been long since abandoned, and after the time of Blackstone's Commentaries, Lord Mansfield, in a carefully considered case, said: "A judgment is no contract, nor can it be considered in the light of a contract as *judicium redditur in invitum.*" 3 Burr. 1545. The same view of the question was taken by the United States supreme court, which held that a judgment was not a "contract within the meaning of the constitutional prohibition against impairing the obligation of a contract." Chase v. Curtis, 113 U. S. 452, 28 L. Ed. 1038, 5 Sup. Ct. Rep. 554. That court has, in two other important cases, discussed the question of the nature of a judgment and the obligation which is created by it, and in both cases it strongly dissents from the view of Blackstone and the earlier text-writers. In Lewis v. City of Shreveport, 108 U. S. 282, 285, 27 L. Ed. 728, 2 Sup. Ct. Rep. 634, the court said: "A judgment for damages, estimated in money, is sometimes called, by text-writers, a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered, and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment. But this fiction cannot convert a transaction, wanting the assent of the parties, into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed on the losing party, by a higher authority, against his will and protest. The prohibition of the federal constitution was intended to secure the observance of good faith, in the stipulation of parties, against state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition." In this case it was held that the conversion of a statutory right to demand

statute 25 Edward III, c. 17—Process of Exigent, 1351), but not in an action real. Wherefore, since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the courts, as being generally vexatious and oppressive, by harassing the defendant with the costs of two actions instead of one.

compensation for damages caused by a mob into a judgment does not make it a contract within the constitutional prohibition against impairing the obligation of a contract. In the more recent case of Hilton v. Guyot, 159 U. S. 113, 40 L. Ed. 95, 16 Sup. Ct. Rep. 139, in referring to the doctrine of Blackstone, with reference to a foreign judgment, the court held that the idea that such judgment imposed or created an obligation or duty was a remnant of an ancient fiction, and "while the theory in question would serve to explain rules of pleading which originated while the fiction was believed in, it is hardly a sufficient guide at the present day in dealing with questions of international law; and it might be safer to adopt the maxim applied to foreign judgments by Chief Justice Weston, speaking for the supreme judicial court of Maine, *judicium redditur in invitum,* or as given by Lord Coke, *in præsumptione legis judicium redditur in invitum.* Jordan v. Robinson, 15 Me. 167; Co. Litt. 248 b." In New York it is held that a judgment is in no sense a contract or agreement (Wyman v. Mitchell, 1 Cow. (N. Y.) 316); even a judgment founded upon a contract (McCoun v. New York etc. R. R. Co., 50 N. Y. 176); and the same doctrine is asserted with great vigor in a later case (O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64). This is also the prevailing doctrine in other states (Larrabee v. Baldwin, 35 Cal. 155; Masterson v. Gibson, 53 Ala. 56; McDonald v. Dickson, 87 N. C. 404; Tyler's Exrs. v. Winslow, 15 Ohio St. 364; Sprott v. Reid, 3 G. Greene (Ia.), 489, 56 Am. Dec. 549; Rae v. Hulbert, 17 Ill. 572); some cases are *contra:* Morse v. Toppan, 3 Gray (Mass.), 411; Sawyer v. Vilas, 19 Vt. 43; Taylor v. Root, 43 N. Y. (4 Keyes) 335, 4 Abb. Dec. 382. The last case alone was relied on as the authority for the proposition that a judgment is a contract by Harlan, J., dissenting, in Louisiana v. Mayor, 109 U. S. 285, 27 L. Ed. 936, 3 Sup. Ct. Rep. 211, but the case so relied upon is in a collection omitted from the regular reports and is in direct contradiction to cases cited *supra,* in which the opposing doctrine is emphatically stated by the same court, one decided four and the other sixteen years later. See, also, Burnes v. Simpson, 9 Kan. 658. The later text-books concur in supporting the statement already made as to the weight of authority. In one a judgment is said to be not under any circumstances a contract (1 Black, Judgt., § 10), and in another it is said that though a judgment is not a contract, it may be treated in some cases as a contract or as included in that term in certain statutes. 1 Freem. Judgt., § 4. Cases in which the contrary has been held will usually be found within this classification. Leake (Contracts, 1911 ed., 105) classifies a judgment as a contract of record.—Bouvier, 2 Law Dict. (Rawle's 3d Rev.), 1722.

§ 211. (2) Action of debt on a by-law or amercement.—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 by-laws and private ordinances of a corporation upon any that belong to the body, or an amercement set in a court-leet or court-baron upon any of the suitors to the court (for otherwise it will not be binding[e]) immediately create a debt in the eye of the law: and such forfeiture or amercement, if unpaid, work an injury to the party or parties entitled to receive it; for which the remedy is by action of debt.[f]

§ 212. (3) Action of debt for penalties.—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 transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires.[22] The usual application of this forfeiture is [160] either to the party grieved, or else to any of the king's subjects in general. Of the former sort is the forfeiture inflicted by the statute of Winchester[g] (explained and enforced by several subsequent statutes[h]) upon the hundred wherein a man

[e] Law of Nisi Prius. 155.

[f] 5 Rep. 64. Hob. 279.

[g] 13 Edw. I. c. 1 (Fines and Recoveries, 1285).

[h] 27 Eliz. c. 13 (Hue and Cry, 1584). 29 Car. II. c. 7 (Sunday Observance, 1677). 8 Geo. II. c. 16 (Hue and Cry, 1734). 22 Geo. II. c. 24 (Hue and Cry, 1748).

---

22 **Debt for penalties.**—The extension of actions of contract to legal penalties is clearly derived from the later Roman law. An example will be found in C. J. C. Nov. vii, c. 5, where it is enacted that the buyer of church property, illegally sold, shall lose his purchase money, and have no action against the church for it, but may have an action *ex contractu* against the individual bishop or other who presumed to sell, to be satisfied out of their own property. Here, as in the case of church leases, we find illustrations of a general rule: that wherever we find the common law borrowing from the Roman, we can trace it through the influence of the church. Of course this is true only of the period before the Reformation, or perhaps ending still earlier. In more recent times the direct study of Roman law has given us not a few useful terms and conceptions, especially in equity.—HAMMOND.

is robbed, which is meant to oblige the hundredors to make hue and cry after the felon; for, if they take him, they stand excused. But otherwise the party robbed is entitled to prosecute them, by a special action on the case, for damages equivalent to his loss. And of the same nature is the action given by statute 9 George I, c. 22 (Criminal Law, 1722), commonly called the black act, against the inhabitants of any hundred, in order to make satisfaction in damages to all persons who have suffered by the offenses enumerated and made felony by that act. But, more usually, these 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.[1] Sometimes one part is given to the king, 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, etc., quam pro se ipso in hac parte sequitur* (who prosecutes this suit as well for the king, etc., as for himself)." If the king, therefore, himself commences this suit, he shall have the whole forfeiture.[k] But if anyone hath begun a *qui tam,* or *popular,* action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself. This has frequently occasioned offenders to procure their own friends to begin a suit, in order to forestall and prevent other actions: which practice is in some measure prevented by a statute made in the reign of a very sharp-sighted prince in penal laws; 4 Henry VII, c. 20 (Penal Statute, 1488), which enacts that no recovery, otherwise than by verdict, obtained by collusion in an action popular, shall be a bar to any other action prosecuted *bona fide.* A provision, that seems borrowed from [161] the rule of the Roman law, that if the person was acquitted of any accusation, merely by the prevarication of the accuser, a new prosecution might be commenced against him.[l]

§ 213. (4) Implied assumpsits.—A second class, of implied contracts, are such as do not arise from the express determination

[1] See Book II. c. 29.
[k] 2 Hawk. P. C. 268.
[l] Ff. 47. 15. 3.

of any court, or the positive direction of any statute; but from natural reason, and the just construction of law. Which class extends to all presumptive undertakings or *assumpsits;* which, though never perhaps actually made, yet constantly arise from this general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires. Thus,

§ 214. (a) Quantum meruit.—If I employ a person to transact any business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labor deserved. And if I neglect to make him amends, he has a remedy for his injury by bringing his action on the case upon this implied *assumpsit;* wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is called an *assumpsit* on a *quantum meruit* (as much as he is entitled to.)[23]

§ 215. (b) Quantum valebat.—There is also an implied *assumpsit* on a *quantum valebat* (as much as it was worth), 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 on the case may be brought accordingly, if the vendee refuses to pay that value.

§ 216. (c) Money had and received.—[162] A third species of implied *assumpsits* is when one has had and received money belonging to another, without any valuable consideration given on

23 Upon this and the four following paragraphs arise the causes of action usually known as the "common counts" in a declaration in *assumpsit*, and added to a *special assumpsit* or statement of the promise actually made, in order to cover every possible variance between the pleading and the evidence. Although as common counts these are fobidden in the new system of pleading, each one where appropriate is a legitimate cause of action by itself.—HAMMOND.

the receiver's part: for the law construes this to be money had and received for the use of the owner only; and implies that the person so receiving promised and undertook to account for it to the true proprietor. And, if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repair the owner in damages, equivalent to what he has detained in such violation of his promise. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex æquo et bono* (by equity and right) he ought to refund. It lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion or oppression, or where undue advantage is taken of the plaintiff's situation.[m]

§ 217. (d) Money paid at request.—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*.[n]

§ 218. (e) Account stated.—Likewise, fifthly, 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 it is frequent for actions on the case to be brought, declaring that the plaintiff and defendant had settled their accounts together, *insimul computassent* (which gives name to this species of *assumpsit*), and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it.

§ 219. (i) Action of account.—But if no account has been made up, then the legal remedy is by bringing a writ of *account, de computo;*[o] commanding the defendant to render a just account to the plaintiff, [163] or show the court good cause to the contrary.[24] In this action, if the plaintiff succeeds, there are two

m 4 Burr. 1012.

n Carth. 446. 2 Keb. 99.

o F. N. B. 116.

24 **Modern action of account.**—"Concerning the action of account in modern times but little need be said. As *indebitatus assumpsit* has inherited the

judgments: the first is, that the defendant do account (*quod computet*) before auditors appointed by the court; and, when such account is finished, then the second judgment is, that he do pay the plaintiff so much as he is found in arrear. This action, by the old common law,[p] lay only against the parties themselves, and

[p] Co. Litt. 90.

---

jurisdiction formerly possessed by account in all cases where the amount due can be determined by means of legal machinery, so the chancery court has fallen heir to its jurisdiction in all cases where the accounts are complicated or parties numerous. The power to compel discovery by means of an answer under oath was doubtless the chief consideration which made it desirable for parties to proceed in the chancery court in these cases. At any rate, parties were inclined to resort thither, and the court of equity from an early time assumed jurisdiction to compel an accounting, going on the theory that the action of account at law was not an adequate remedy. For this reason account fell into disuse and in the eighteenth century became practically obsolete."—STREET, 3 Foundations of Legal Liability, 109.

The action of account has in several of the American states received a liberal extension. Curtis v. Curtis, 13 Vt. 517; Dennison v. Goehring, 7 Pa. 175, 47 Am. Dec. 505; Barnum v. Landon, 25 Conn. 137; Knowles v. Harris, 5 R. I. 402, 73 Am. Dec. 77; 1 Bouvier's Law Dict. (Rawles' 3d Rev.), 108.

For the history of the action of account, see Ames, Lect. on Legal Hist. 116; Langdell, Brief Survey of Equity Jurisdiction, 73; and 3 Street, Foundations of Legal Liability, 99.

Liability of custodian of public funds.—Owing, it is said, to a forgetfulness, in the obsolescence of the common-law action of account, of important principles connected with the remedy, an unduly stringent rule has grown up in the United States concerning the liability of custodians of public funds. The first case establishing the American rule was United States v. Prescott (1845), 3 How. 578, 11 L. Ed. 734. The defendant was receiver of public moneys at Chicago. Certain moneys were stolen without negligence on the part of the defendant, and he urged this as a defense to the action of the government for the deficiency. Mr. Justice McLean argued that since it was not a case of bailment, the law of bailment could not apply, and that the defendant was absolutely liable. The mistake which was made was in not recognizing that the officer in his capacity of receiver was under practically the same liability as a bailee. Smythe v. United States, 188 U. S. 156, 47 L. Ed. 425, 23 Sup. Ct. Rep. 279, reviews the cases and abides by the rule of United States v. Prescott. A majority of the states accept this doctrine. There is, however, a minority which holds that the officer is a bailee, bound to a high degree of care, but, in the absence of statutes imposing additional liability, not liable where money has been lost without the default, misconduct

not their executors; because matters of account rested solely in their own knowledge. But this defect, after many fruitless attempts in parliament, was at last remedied by statute 4 Ann., c. 16 (Account, 1705), which gives an action of account against the executors and administrators. But however it is found by experience, that the most ready and effectual way to settle these matters of account is by bill in a court of equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce. Wherefore actions of account, to compel a man to bring in and settle his accounts, are now very seldom used; though, when an account is once stated, nothing is more common than an action upon the implied *assumpsit* to pay the balance.[25]

§ 220. (f) Case for negligent performance or willful breach. The last classes of contracts, implied by reason and construction of law, arises upon this supposition that everyone who undertakes any office, employment, trust or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence and skill.[26] And, if by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case. A few instances will fully illustrate this matter. If an officer of the public is guilty of

or negligence of the custodian. State v. Houston, 78 Ala. 576; City of Healdsburg v. Mulligan, 113 Cal. 205, 33 L. R. A. 461, 45 Pac. 337; Wilson v. People, 19 Colo. 199, 41 Am. St. Rep. 243, 22 L. R. A. 449, 34 Pac. 944 (see, also, Gartley v. People, 24 Colo. 155, 49 Pac. 272); Cumberland County v. Pennell, 69 Me. 357, 31 Am. Rep. 284; City of Livingston v. Woods, 20 Mont. 91, 49 Pac. 437; York County v. Watson, 15 S. C. 1, 40 Am. Rep. 675; State v. Copeland, 96 Tenn. 296, 54 Am. St. Rep. 840, 31 L. R. A. 844, 34 S. W. 427; State v. Gramm, 7 Wyo. 329, 40 L. R. A. 690, 52 Pac. 533; Roberts v. Board of Commrs., 8 Wyo. 177, 56 Pac. 915. For a review of the subject, see article entitled "Liability for Loss of Public Funds," by Gustav Stein, in 1 Michigan Law Rev. 557.

25 Notice the distinction here made between an action of *account* (a distinct common-law form) and an action *upon* an account, or *case sur assumpsit:* a distinction often ignored, to the great confusion of the entire subject.—HAMMOND.

26 The immense variety of cases included under this sixth head are now for the most part treated as actions of tort or negligence.—HAMMOND.

neglect of duty, or a palpable breach of it, of nonfeasance or of misfeasance; as, if the sheriff does not execute a writ sent to him, or if he willfully makes a false return thereof; in both these cases the party aggrieved shall have an action *on the case*, for damages to be assessed by a jury.[q] If a sheriff or gaoler suffers a prisoner, who is taken upon mesne process (that [164] is, during the pendency of a suit) to escape, he is liable to an action *on the case*.[r] But if, after judgment, a gaoler or a sheriff permits a debtor to escape, who is charged in execution for a certain sum; the debt immediately becomes his own, and he is compellable by action of *debt*, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand: which doctrine is grounded[s] on the equity of the statutes of Westm. II, 13 Edward I, c. 11 (Accounts, 1285), and 1 Richard II, c. 12 (Prisoners for Debt, 1377). An advocate or attorney that betray the cause of their client, or, being retained, neglect to appear at the trial, by which the cause miscarries, are liable to an action on the case, for a reparation to their injured client.[ss] There is also in law always an implied contract with a common innkeeper, to secure his guest's goods in his inn; with a common carrier or bargemaster, to be answerable for the goods he carries; 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 on the case lies to recover damages for such breach of their general undertaking.[t] 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 victualer, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him

q Moor. 431. 11 Rep. 99.

r Cro. Eliz. 625. Comb. 69.

s Bro. Abr. t. Parliament. 19. 2 Inst. 382.

ss Finch. L. 188.

t 11 Rep. 54. 1 Saund. 324.

for damages, if he without good reason refuses to admit a traveler.[u 27]

§ 221. **(i) Case for fraud.**—If anyone cheats me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action on the case also lies against him for damages, upon the contract which the law always implies, that every transaction is fair and honest.[v]

§ 222. **(ii) Case for breach of warranty.**—In contracts, likewise, for sales, it is constantly understood that the seller undertakes that the [165] commodity he sells is his own; and if it proves otherwise, an action on the case lies against him, to exact damages for this deceit.[28] In contracts for provisions it is always

[u] 1 Ventr. 333.

[v] 10 Rep. 56.

---

27 "If we look at those early examples of writs or declarations in case which contain allegations of negligence, we shall find that, with scarcely an exception, they are confined to cases in which the ground to the action was an undertaking by the defendant and a failure to perform that undertaking. It is familiar knowledge, to all who have studied the history of contract in English law, that the grafting of the doctrine of consideration on to this form of action gave us our law of simple contract. In other words, as the late Professor Ames has so brilliantly demonstrated, the institution of the simple contract grew out of the action of *assumpsit*, which alleged negligence on the part of the defendant. But what is this but to say that, so far as we can see, the common law refused to recognize negligence, i. e., omission of a positive duty, as a ground of legal liability; except where the defendant had expressly taken upon himself such duty, or where (as in the case of surgeons, common carriers, innkeepers, etc.) his profession or calling was deemed to be a 'holding out' to that effect? That this is no fanciful theory is proved by the remarkable passage in Blackstone, which treats actionable negligence as arising, in effect, always from contract, express or implied. This treatment is the more noteworthy for the fact that Blackstone's handling of the subject of contract is, to a modern reader, surprisingly sketchy; while his doctrine of tort is much firmer and more complete."—EDWARD JENKS, article entitled "On Negligence and Deceit in the Law of Torts," 26 Law Quar. Rev. 162.

28 **Implied warranty of title.**—From what has been said it is apparent that the law of deceit as applied to the sale of chattels during the time of James I was not a very creditable body of legal doctrine; yet modern law has been built upon the foundation thus laid. That the product should lack harmony and consistency is no more than might have been expected. Legal de-

implied that they are wholesome; and if they be not, the same remedy may be had. Also if he, that selleth anything, doth 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

velopment in this field has of course constantly been towards a broader conception of liability. Some of the manifestations of this tendency will be noted.

On the question of warranty the greatest need for modification of doctrine was felt in connection with title, for in common transactions of bargain and sale the purchaser is seldom so cautious as to require an express agreement to warrant the title, and it is a great hardship that he should have no redress against a seller when it turns out that the thing belongs to another. In Medina v. Stoughton (1700), 1 Salk. 210, 1 Ld. Raym. 593, 91 Eng. Reprint, 188, Lord Holt held that where the seller has actual possession of the goods at the time of the sale, an affirmation of ownership amounts to a warranty; "for his having possession is a color of title and perhaps no other title can be made out." This was a distinct advance, for it tended to break down the rule that express words of warranty are necessary, and was the beginning of the modern doctrine that every affirmation is a warranty where it appears to have been so intended and understood. (Power v. Barham, 4 Ad. & E. 473, 31 E. C. L. 115, 111 Eng. Reprint, 865; Shepherd v. Kain, 5 Barn. & Ald. 240, 7 E. C. L. 82, 106 Eng. Reprint, 1180; Carter v. Crick, 4 H. & N. 412.)

Even with this concession the trouble was not wholly cured, for in many sales there is no express affirmation of ownership, any more than there is an express warranty. Clearly the next step was to determine that every sale of itself implies an affirmation of ownership which is equivalent to a warranty. As Popham, C. J., had observed a hundred years before, an affirmation that the goods are the proper goods of the vendor is implied in the very fact of sale. (Chandelor v. Lopus (1605), 8 Harv. L. Rev. 284.) Thus would an implied warranty of title gain recognition. A consciousness of the propriety and justice of the step caused Blackstone to strain previous authority somewhat by saying that a purchaser of chattels may have satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose. (2 Bl. Comm. 451; 3 Bl. Comm. 165.) But the doctrine of implied warranty of title did not actually obtain full recognition in the English courts until about a hundred years later. As late as 1849, in Morley v. Attenborough (1849), 3 Exch. 500, upon a full review of authorities it was considered that the sale of a chattel does not imply a warranty of title.

A few years later, however, in Eichholz v. Bannister (1864), 17 Com. B., N. S., 708, 112 E. C. L. 708, 144 Eng. Reprint, 284, it was held that in the case of goods sold in open shop or warehouse, there is an implied warranty on the part of the seller that he is owner of the goods. Erle, C. J., said: "If the vendor of a chattel by word or conduct gives the purchaser to understand

on the case will lie to recover damages.[w] 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:[x] for it is then made without any consideration; neither does the buyer then take the goods upon the

[w] F. N. B. 94.

[x] Finch. L. 189.

---

that he is the owner, that tacit representation forms part of the contract." (17 Com. B., N. S., 721, 112 E. C. L. 721, 144 Eng. Reprint, 289.) As a result of this and similar decisions, what were formerly exceptions have now come to stand for a general principle, and on this point of the question of title the rule of *caveat emptor* has dwindled into an exception. Mr. Benjamin formulates the modern English doctrine as follows: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." (Benj. on Sales, 6th Am. ed., § 639.)

In America the courts, generally speaking, were quicker to adopt the idea of an implied warranty of title in the sale of chattels than were the English courts; Blackstone's statement being here accepted as a correct exposition of law. (Boyd v. Bopst (1785), 2 Dall. (Pa.) 91, 1 L. Ed. 302; Defreeze v. Trumper (1806), 1 Johns. (N. Y.) 274, 3 Am. Dec. 329; 2 Kent Com. 478.) But the principle has generally been restricted in America to sales of personalty in the possession of the seller. (Huntingdon v. Hall, 36 Me. 501, 58 Am. Dec. 765; Scranton v. Clark, 39 N. Y. 220, 100 Am. Dec. 430; Scott v. Hix, 2 Sneed (Tenn.), 192, 62 Am. Dec. 458.) This was due to the unguarded acceptance of Lord Holt's language in Medina v. Stoughton (1689), 1 Salk. 210, 91 Eng. Reprint, 188, as embodying the true reason for the rule. In England no such limitation is recognized in the modern cases. (See Pasley v. Freeman, 3 Term Rep. 58, 100 Eng. Reprint, 450, where Buller, J., repudiates the idea that there is a distinction as to the implied warranty of title between sales where the vendor has, and sales where he has not, the possession. In New Hampshire, as in England, there is no distinction as to warranty of title between goods in the vendor's possession and goods out of his possession. Smith v. Fairbanks, 27 N. H. 521.)

The reason for raising the implied warranty is that one who sells of necessity thereby affirms title to be in himself, and if the representation be false, he is liable for it, the other having acted upon it to his damage. This reasoning applies where the goods are out of the vendor's hands as well as where he has possession. Possession by no means furnishes a proper criterion for raising an implied warranty. The idea of scienter or knowledge, on the part of the seller, of his want of title, on which the judges used to lay stress (Dale's Case, Cro. Eliz. 44, 78 Eng. Reprint, 308; Kenrick v. Burges, Moo. K. B. 126, pl. 273, 72 Eng. Reprint, 483), was fully as sound. Yet that idea has long

credit of the vendor. Also the warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro:* as, that a horse *is* sound at the buying of him; not that he *will be* sound two years hence.[29] But, if the vendor knew the goods to be unsound, and hath used any art to disguise them,[y] or if

[y] 2 Roll. Rep. 5.

---

since been exploded as a criterion of liability in case of a failure of title.—STREET, 1 Foundations of Legal Liability, 382.

Implied warranty of wholesomeness.—Blackstone's statement that in the sale of provisions there is always an implied warranty of wholesomeness has been accepted as regards sales of food and drink for immediate consumption, provided the seller is a common taverner, victualer, vintner, brewer, butcher, or other person whose common calling is to supply food and drink. Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210; Craft v. Parker etc. Co., 96 Mich. 245, 21 L. R. A. 139, 55 N. W. 812; Van Bracklin v. Fonda, 12 Johns. (N. Y.) 468, 7 Am. Dec. 339. There is authority to the effect that it is not necessary that the seller should be a regular dealer. Hoover v. Peters, 18 Mich. 51. The other view, however, is generally accepted. Giroux v. Stedman, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. 538.

[29] It is said by Blackstone: "The warranty can only reach the things in being at the time of the warranty made, and not the things *in futuro;* as, that a horse is sound at the buying of him, not that he will be sound two years hence." An understanding of Blackstone's meaning requires reflection upon the origin of law of warranty, in an action in the nature of deceit. It is of course law to-day that one may bind himself by contract for the happening of any future event, and a warranty of a piano for a year, for instance, is a contract to be answerable for any defect that may occur during that time. (See Scott v. Keeth, 152 Mich. 547, 116 N. W. 183.) When warranty is based not on an actual contract, however, but on an obligation imposed by law on the seller because of a misrepresentation he has made, the situation is not so plain. It is commonly laid down in the law of deceit that a misrepresentation upon which an action may be founded must be in regard to an existing fact. (Cooley, Torts (3d ed.), 929.) This, however, has been qualified, especially in recent times, by recognition that a promise is itself a representation of an existing intention. (Edgington v. Fitzmaurice, 29 Ch. D. 459; Swift v. Rounds, 19 R. I. 527, 61 Am. St. Rep. 791, 33 L. R. A. 561, 35 Atl. 45.) But this qualification is rather apparent than real, since the deception consists not in the future event to which the promise relates, but in the existing fact of the promisor's intention to keep it. It seems upon principle, therefore, that unless an actual contract can be made out, or unless representations as to future events carry with them necessarily a representation as to a present condition, as may often be the case, the statement of Blackstone is sound.—WILLISTON, Sales, § 212.

they are in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness. A general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses, as if a horse be warranted perfect, and wants either a tail or an ear, unless the buyer in this case be blind. But if cloth is warranted to be of such a length, when it is not, there an action on the case lies for damages; for that cannot be discerned by sight, but only by a collateral proof, the measuring it.[z] Also if a horse is 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 is frequently matter of skill, it hath been held that an action on the case lieth to recover damages for this imposition.[a]

§ 223. (iii) Action of deceit.—Besides the special action on the case, there is also a peculiar remedy, entitled an action of deceit,[b] to give damages [166] in some particular cases of fraud; and principally where one man does anything in the name of another, by which he is deceived or injured;[c] as if one brings an action in another's name, and then suffers a nonsuit, whereby the plaintiff becomes liable to costs: or where one obtains or suffers a fraudulent recovery of lands, tenements or chattels, to the prejudice of him that hath right.[30] As when by collusion the

z Finch. L. 189.
a Salk. 611.
b F. N. B. 95.
c Law of Nisi Prius. 30.

30 **Modern law of deceit.**—"One of the very oldest of common-law writs is the writ of deceit (*breve de deceptione*). (The writ of deceit was already known in the time of John. 2 Poll. & Mait. Hist. Eng. Law, 2d ed., 535, citing Select Civil Pleas, pl. III [A. D. 1201].) Consideration of the scope of this early writ shows where legal evolution in the field of fraud began. The first form of deceit which was recognized by the common law as a ground of legal liability was that which embodied a deception of the court and a consequent perversion of the ordinary course of legal proceeding. (See F. N. B. 95 E. et seq.; Reg. Brev. Orig. 112 et seq.) Of such a wrong the common law could take notice because it was an interference with the administration of royal justice. The wrong was viewed as an offense against the king as well as a wrong against the individual who happened to be damaged. Hence the wrongdoer had to pay a fine to the king as well as damages to the indi-

attorney of the tenant makes default in a real action, or where the sheriff returns the tenant summoned when he was not so, and in either case he loses the land, the writ of *deceit* lies against the demandant, and also the attorney or the sheriff and his officers, to annul the former proceedings and recover back the land.[d] It also lies in the cases of warranty before mentioned, and other personal injuries committed contrary to good faith and honesty.[e] But an action *on the case*, for damages, in nature of a writ of *deceit*, is more usually brought upon these occasions.[f] And, in-

[d] Booth. Real Actions. 251. Rast. Entr. 221, 222. See pag. 405.

[e] F. N. B. 98.

[f] Booth. 253. Co. Entr. 8.

---

vidual. False personation in court proceedings, whereby actions were brought without authority or judgments recovered against persons ignorant of the pendency of a suit, was the most common grievance for which the writ of deceit was used. (2 Poll. & Mait. Hist. Eng. Law, 2d ed., 534, 535. These writers cite an interesting case from 9 & 10 Edw. I [unprinted], where one Adam was attached to answer for defrauding his wife by producing a female who personated her in the levying of a fine.)

"Deceit was one of the first of common-law actions to feel the stimulus of the statute specially authorizing the issuance of writs *in consimili casu* with writs already formed (Stat. West. II, c. 24); and under the influence of that statute, the action of deceit or case in the nature of deceit began to be used for many other purposes than that of recovering damages for deceitful practices in court proceedings. . . . Reference to the authorities (Fitz. Abr., Disceit; Brooke Abr., Disceit; 1 Rolle Abr., Action sur le Case (P); Com. Dig., Action upon Case for Deceipt) will show that the old writ of deceit was entirely merged in or superseded by the action on the case in the nature of deceit and that in the latter form it became the general common-law remedy for fraudulent acts of any kind which result in actual damage. The remedy was broad enough to cover such wrongs as malicious prosecution and abuse of legal process, and, indeed, much of the old law on these topics is tucked away under the heading 'Deceit' in the old books."—STREET, 1 Foundations of Legal Liability, 375, 376.

Deceit or fraud, considered as a tort, is most commonly based on a fraudulent misrepresentation, which consists in knowingly making a false representation of a material fact with the intention that it shall be acted upon by the person to whom it is made. The person to whom the representation was made must have been deceived and have acted upon the deception to his own damage. The first case in which a court of common law ever held that an action might be maintained upon a false affirmation or false representation, independent of a relation of contract, is found in Pasley v. Freeman (1789), 3 Term Rep. 51, 100 Eng. Reprint, 450. The elements of actionable misrepresentation are (1) repre-

deed, this is the only [s] remedy for a lord of a manor, in or out of ancient demesne, to reverse a fine or recovery had in the king's courts of lands lying within his jurisdiction; which would otherwise be thereby turned into frank fee. And this may be brought by the lord against the parties and *cestuy que use* of such fine or recovery; and thereby he shall obtain judgment not only for damages (which are usually remitted) but also to recover his court

[s] 3 Lev. 419.

---

sentation, (2) falsity thereof, (3) knowledge (*scienter*) of the falsity, (4) deception of the plaintiff, and (5) resulting damage to the plaintiff.

(1) "The gist of the action [of deceit] is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff." Stewart v. Wyoming Cattle Ranche Co., 128 U. S. 383, 388, 32 L. Ed. 439, 9 Sup. Ct. Rep. 101. The representation must concern a past or existing fact. Long v. Woodman, 58 Me. 49; State v. Gordon, 56 Kan. 64, 42 Pac. 346; Holton v. State, 109 Ga. 127, 34 S. E. 358. A prediction of future events (Murray v. Tolman, 162 Ill. 417, 44 N. E. 748; French v. Ryan, 104 Mich. 625, 62 N. W. 1016; Holton v. Noble, 83 Cal. 7, 23 Pac. 58); or a mere expression of opinion, though untrue and made in most positive language (Credle v. Swindell, 63 N. C. 305; Hazard v. Irwin, 18 Pick. (Mass.) 95), are not sufficient to give rise to an action for deceit. But if the expression of opinion is made as of positive knowledge, it will be sufficient. Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313. A representation of rules of law is not sufficient, unless the party making the misrepresentation did it with knowledge both of the law and of the other party's ignorance. Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203.

(2) The representation complained of must be false in point of fact. Stevens v. Rainwater, 4 Mo. App. 292. But a statement partly true and partly false, if the false part is material, is just as fraudulent as though it were wholly false. Rose v. Hurley, 39 Ind. 77. Ambiguous language and suppression of the truth may be sufficient to make statements fraudulent. Smith v. Chadwick, 9 App. Cas. 187.

(3) Under this head, it has been laid down that fraud is proved when it is shown that a false representation has been made (a) knowingly, or (b) without belief in its truth, or (c) recklessly careless whether it be true or false. Lord Herschell, in Derry v. Peek, 14 App. Cas. 337. In this famous case, however, it was decided by the house of lords that an action for *deceit* cannot be sustained by proving a merely negligent misrepresentation. Hereon, see Sir Frederick Pollock in 5 Law Quar. Rev. 410; 9 Harv. Law Rev. 214; and dissenting opinions of Field, C. J., and Holmes, J., in Nash v. Minnesota

and jurisdiction over the lands, and to annul the former proceedings.[h]

Thus much for the nonperformance of contracts, express or implied; which includes every possible injury to what is by far the most considerable species of personal property; *viz.*, that which consists in action merely, and not in possession. Which finishes our inquiries into such wrongs as may be offered to *personal* property, with their several remedies by suit or action.

h Rast. Entr. 100 b. 3 Lev. 415. Lutw. 711. 749.

---

etc. Trust Co., 163 Mass. 574, 47 Am. St. Rep. 489, 28 L. R. A. 753, 40 N. E. 1039. And in England, by the Companies (Consolidation) Act, 1908, superseding the Directors' Liability Act, 1890, to the same effect and covering the facts presented in Derry v. Peek, every promoter or director of a company who issues a prospectus inviting persons to subscribe for shares or debentures, is liable to pay compensation to any person who subscribes for them on the faith of the prospectus, for loss sustained by any untrue statement therein; unless it is proved that such promoter or director had reasonable ground for believing, and did in fact believe, that the statement was true.

Derry v. Peek was followed in Kountze v. Kennedy, 147 N. Y. 124, 49 Am. St. Rep. 651, 29 L. R. A. 360, 41 N. E. 414, it being held that where an act is attributable to an honest belief, a fraudulent intent is lacking and a charge of deceit fails. In Watson v. Jones, 41 Fla. 241, 25 South. 678, however, it was held that the defendants' situation or means of knowledge made it his duty to know. And the following are to the same effect: Seale v. Baker, 70 Tex. 283, 8 Am. St. Rep. 592, 7 S. W. 742; Munroe v. Pritchett, 16 Ala. 785, 50 Am. Dec. 203; Jordan v. Pickett, 78 Ala. 331; Johnson v. Gulick, 46 Neb. 817, 50 Am. St. Rep. 629, 65 N. W. 883.

(4) In order that the plaintiff establish his case, he must show that he was in fact misled by the false representation. Smith v. Chadwick, 9 App. Cas. 187; Moses v. Katzenberger, 84 Ala. 95, 4 South. 237; Fottler v. Moseley, 179 Mass. 295, 60 N. E. 788. The representation need not have been the sole inducement; it is sufficient if it was a material factor in misleading the plaintiff. Edgington v. Fitzmaurice, L. R. 29 Ch. D. 459; Holton v. State, 109 Ga. 127, 34 S. E. 358; Matthews v. Bliss, 22 Pick. (Mass.) 48.

(5) The last prerequisite for sustaining an action for deceit is that the plaintiff has suffered damage as a consequence of the deception played upon him. Alden v. Wright, 47 Minn. 225, 49 N. W. 767; Roome v. Jennings, 2 Misc. Rep. 257, 21 N. Y. Supp. 938; Bunn v. Ahl, 29 Pa. St. 387, 72 Am. Dec. 639.

[167]

CHAPTER THE TENTH.

OF INJURIES TO REAL PROPERTY, AND FIRST OF DISPOSSESSION, OR OUSTER OF THE FREEHOLD.

§ 224. Injuries to real property.—I come now to consider such injuries as affect that species of property which the laws of England have denominated *real;* as being of a more substantial and permanent nature than those transitory rights of which personal chattels are the object.[1]

Real injuries, then, or injuries affecting real rights, are principally six: 1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; 6. Disturbance.

1 **Importance of real property law.**—Students are too apt to pass over these chapters (10–15) hastily and with slight attention, thinking that they relate only to land law, and are mostly obsolete even in that regard. But there is no part of the Commentaries that will better repay careful study, if one wishes to understand the common law in its original form thoroughly. The law of real property received more attention than any other subject, except, perhaps, pleading, while the common law was forming—and it was in this that were formed the principles and fundamental conceptions that were applied to all the rest.

For example, the student will see that the divisions of injury here given are typical of all forms now recognized by the law in respect to chattels, and even to incorporeal rights.

Every right may be conceived, as it often has been by philosophical writers, as a closed field surrounding the person to whom it belongs, and of which his personality forms the center, while the legal definition marks the boundary between that and the similar rights of others. All forms of injury, therefore, may be reduced to these:

1. Entire deprivation of the right or its object, typified by the ouster of the freehold; the deprivation or asportation of his chattels; the destruction or refusal of his civil rights; the forcible or fraudulent abstraction of money, etc.

2. Forcible intrusion upon his rights and injury not amounting to entire deprivation, typified by *trespass* in all its forms to property or person; the distinctive feature of all such injuries, being the intrusion of the wrongdoer upon the field of right belonging to another, and in his actual possession and enjoyment.

3. Damage wrought upon that field of right by the act of one who abstains from intruding upon it, but does on his own land or that of others injurious acts typified by *nuisance.* Most actions on the case are of this character, as

§ 225. **I. Ouster, or dispossession.**—Ouster, or dispossession, is a wrong or injury that carries with it the amotion of possession: for thereby the wrongdoer gets into the actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy, in order to gain possession, and damages for the injury sustained. And such ouster, or dispossession, may either be of the *freehold*, or of *chattels real*. Ouster of the *freehold* is effected by one of the following methods: 1. Abatement; 2. Intrusion; 3. Disseisin; 4. Discontinuance; 5. Deforcement. All of which in their order, and afterwards their respective remedies, will be considered in the present chapter.

§ 226. **1. Abatement.** And, first, an *abatement* is where a person dies seised of an inheritance, and before the heir or devisee enters, a stranger [168] who has no rights makes entry, and gets possession of the freehold: this entry of him is called an abatement, and he himself is denominated an abator.[a] It is to be observed that this expression, of *abating*, which is derived from the French and signifies to quash, beat down or destroy, is used by our law in three senses. The first, which seems to be the primitive sense, is that of abating or beating down a nuisance, of which we spoke in the beginning of this book:[b] and in a like sense it is used in statute Westm. I, 3 Edward I, c. 17 (Distress, 1275), where mention is made of abating a castle or fortress; in which case it clearly signifies to pull it down, and level it with the ground. The second signification of abatement is that of abating a writ or notice, of which we shall say more hereafter: here it is taken

[a] Finch. L. 195. [b] Page 5.

---

indirect wrongs, interfering with another's enjoyment of his own rights, though not directly crossing the boundary between them.

4. Waste typifies the numerous cases in which one's rights are injured by another to whom the owner has intrusted the possession of their objects. The wrongdoer here has been admitted within the field of another's right and has taken advantage of his position to do the harm; as in actions against a negligent bailee, breaches of trust, etc.

5. *Subtraction*, though a more technical and narrower class than the four preceding, may stand for the vast class of cases of nonfeasance and breach of wrong; harm done by the nonfulfillment of positive duty owed by one man to another.—HAMMOND.

figuratively, and signifies the overthrow or defeating of such writ, by some fatal exception to it. The last species of abatement is that we have now before us; which is also a figurative expression to denote that the rightful possession or freehold of the heir or devisee is overthrown by the rude intervention of a stranger.

This abatement of a freehold is somewhat similar to an immediate occupancy in a state of nature, which is effected by taking possession of the land the same instant that the prior occupant by his death relinquishes it. But this, however agreeable to natural justice, considering man merely as an individual, is diametrically opposite to the law of society, and particularly the law of England: which, for the preservation of public peace, hath prohibited as far as possible all acquisitions by mere occupancy: and hath directed that lands, on the death of the present possessor, should immediately vest either in some person, expressly named and appointed by the deceased, as his devisee; or, on default of such appointment, in such of his next relations as the law hath selected and pointed out as his natural representative or heir. Every entry, therefore, of a mere stranger by way of intervention between the ancestor and heir or person next entitled, which [169] keeps the heir or devisee out of possession, is one of the highest injuries to the rights of real property.

§ 227. **2. Intrusion.**—The second species of injury by ouster, or amotion of possession from the frechold, is by *intrusion:* which is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. And it happens where a tenant for term of life dieth seised of certain lands and tenements, and a stranger entereth thereon, after such death of the tenant, and before any entry of him in remainder or reversion.[c] This entry and interposition of the stranger differ from an abatement in this: that an abatement is always to the prejudice of the heir, or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion. For example: if A dies seised of lands in fee simple, and, before the entry of B his heir, C, enters thereon, this is an abatement; but if A be tenant for life, with remainder to B in fee simple, and, after the death of

[c] Co. Litt. 277. F. N. B. 203, 204.

A, C enters, this is an intrusion. Also if A be tenant for life on lease from B, or his ancestors, or be tenant by the curtesy, or in dower, the reversion being vested in B; and after the death of A, C enters and keeps B out of possession, this is likewise an intrusion. So that an intrusion is always immediately consequent upon the determination of a particular estate; an abatement is always consequent upon the descent or devise of an estate in fee simple. And in either case the injury is equally great to him whose possession is defeated by this unlawful occupancy.

§ 228. **3. Disseisin.**—The third species of injury by ouster, or privation of the freehold, is by *disseisin*.[2] Disseisin is a wrongful putting out of him that is seised of the freehold.[d] The two former species of injury were by a wrongful entry where the possession was vacant; but this is an attack upon him who is in actual possession, and turning him out of it. Those were an ouster from a freehold in law; this is an ouster from a freehold in deed. Dis-

[d] Co. Litt. 277.

---

2 **Nature of disseisin.**—Disseisin was the wrongful taking away from the real owner of his actual seisin. "Disseisin was formerly a notorious act, when the disseisor put himself in the place of the disseisee as tenant of the freehold and performed the acts of the freeholder and appeared in that character in the lords' court" (Lord Ellenborough in William v. Thomas, 12 East, 141, 155, 104 Eng. Reprint, 56. See 4 Kent. Com. 482), or, as Lord Mansfield put it: "Disseisin, therefore, must mean some way or other of turning the tenant out of his tenure and usurping his place and feudal relation." (Taylor v. Horde, 1 Burr. 60, at p. 107, 97 Eng. Reprint, 190, 216.) How this was accomplished originally, unless the lord conspired with the disseisor, we do not know. It is sufficient for our purpose that disseisin was early possible, and that every wrongful taking of seisin from the real owner was not necessarily a disseisin. That only was disseisin, where someone entered upon and ousted one who had taken actual possession under claim of freehold. Certainly this was true of actual disseisin, though there was a disseisin by election, where persons, to avail themselves of the remedy by assize, frequently were allowed to suppose or admit themselves to be disseised when they were not. Whatever may be true of the law of to-day, there was in the early common law a clear distinction between disseisin and other forms of adverse possession; for unless actual seisin was interfered with, or could be regarded as interfered with for the purposes of the action, there was no disseisin, though there might perhaps be an abatement or some other form of adverse possession.—GEORGE P. COSTIGAN, Jr., "Conveyance of Lands by Disseisee," 19 Harv. Law Rev. 268.

seisin may be effected either in corporeal inheritances [170] or incorporeal. Disseisin, of things corporeal, as of houses, lands, etc., must be by entry and actual dispossession of the freehold;[e] as if a man enters either by force or fraud into the house of another, and turns, or at least keeps, him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession; for the subject itself is neither capable of actual bodily possession, or dispossession: but it depends on their respective natures and various kinds; being in general nothing more than a disturbance of the owner in the means of coming at, or enjoying them. With regard to freehold rent in particular, our ancient law books[f] mention five methods of working a disseisin thereof: 1. By *inclosure;* where the tenant so incloseth the house or land that the lord cannot come to distrain thereon, or demand it. 2. By *forestaller,* or lying in wait; when the tenant besetteth the way with force and arms, or by menaces of bodily hurt affrights the lessor from coming: 3. By *rescous;* that is, either by violently retaking a distress taken, or by preventing the lord with force and arms from taking any at all: 4. By *replevin;* when the tenant replevies the distress at such time when his rent is really due: 5. By *denial;* which is when the rent being lawfully demanded is not paid. All, or any of these circumstances amount to a disseisin of rent, that is, they wrongfully put the owner out of the only possession, of which the subject matter is capable, namely, the receipt of it. But all these disseisins, of hereditaments incorporeal, are only so at the election and choice of the party injured: if, for the sake of more easily trying the right, he is pleased to suppose himself disseised.[g] Otherwise, as there can be no actual dispossession, he cannot be compulsively disseised of any incorporeal hereditament.

And so, too, even in corporeal hereditaments a man may frequently suppose himself to be disseised, when he is not so in fact, for the sake of entitling himself to the more easy and commodious remedy of an assize of *novel disseisin* (which will be explained in the sequel of this chapter), instead of being [171] driven to the more tedious process of a writ of entry.[h] The true injury of com-

[e] Co. Litt. 181.
[f] Finch. L. 165, 166. Litt. § 237, etc.
[g] Litt. §§ 588, 589.
[h] Hengh. Parv. c. 7. 4 Burr. 110.

pulsive disseisin seems to be that of dispossessing the tenant, and substituting oneself to be the tenant of the lord in his stead; in order to which in the times of pure feudal tenure the consent or connivance of the lord, who upon every descent or alienation personally gave, and who therefore alone could change, the seisin or investiture, seems to have been considered as necessary. But when in process of time the feudal form of alienations wore off, and the lord was no longer the instrument of giving actual seisin, it is probable that the lord's acceptance of rent or service, from him who had dispossessed another, might constitute a complete disseisin. Afterwards, no regard was had to the lord's concurrence, but the dispossessor himself was considered as the sole disseisor: and this wrong was then allowed to be remedied by entry only, without any form of law, as against the disseisor himself; but required a legal process against his heir or alienee. And when the remedy by assize was introduced under Henry II to redress such disseisins as had been committed within a few years next preceding, the facility of that remedy induced others, who were wrongfully kept out of the freehold, to feign or allow themselves to be disseised, merely for the sake of the remedy.

These three species of injury, *abatement*, *intrusion*, and *disseisin*, are such wherein the entry of the tenant *ab initio*, as well as the continuance of his possession afterwards, is unlawful. But the two remaining species are where the entry of the tenant was at first lawful, but the wrong consists in the detaining of possession afterwards.

§ 229. 4. Discontinuance.—Such is, fourthly, the injury of *discontinuance;* which happens when he who hath an estate-tail, maketh a larger estate of the land then by law he is entitled to do:[1] in which case the estate is good, so far as his power extends who made it, but no further. As if tenant in tail makes a feoffment in fee simple, or for the life of the feoffee, or in tail; all [172] which are beyond his power to make, for that by the common law extends no further than to make a lease for his own life: in such case the entry of the feoffee is lawful during the life of the feoffor; but if he retains the possession after the death of the feoffor, it

[1] Finch. L. 190.

is an injury, which is termed a discontinuance; the ancient legal estate, which ought to have survived to the heir in tail, being gone, or at least suspended, and for awhile discontinued. For, in this case, on the death of the alienors, neither the heir in tail nor they in remainder or reversion expectant on the determination of the estate-tail, can enter on and possess the lands so alienated. Also, by the common law, the alienation of an husband who was seised in the right of his wife, worked a discontinuance of the wife's estate: till the statute 32 Henry VIII, c. 28 (Leaseholds, 1540), provided that no act by the husband alone should work a discontinuance of, or prejudice, the inheritance or freehold of the wife; but that, after his death, she or her heirs may enter on the lands in question. Formerly, also, if an alienation was made by a sole corporation, as a bishop or dean, without consent of the chapter, this was a discontinuance.[j] But this is now quite antiquated by the disabling statutes of 1 Elizabeth, c. 19 (Bishoprics, 1559), and 13 Elizabeth, c. 10 (Dilapidations, 1571), which declare all such alienations absolutely void *ab initio*, and therefore at present no discontinuance can be thereby occasioned.

§ 230. 5. Deforcement.—The fifth and last species of injuries by ouster or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer is now become unlawful, is that by *deforcement*. This, in its most extensive sense, is *nomen generalissimum* (a most general name); a much larger and more comprehensive expression than any of the former: it then signifying the holding of any lands or tenements to which another person hath a right.[k] So that this includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the [173] freehold, from him that hath the right of property, but never had any possession under that right, as falls within none of the injuries which we have before explained. As in case where a lord has a seigniory, and lands escheat to him *propter defectum sanguinis* (through failure of issue), but the seisin of the lands

j F. N. B. 194.

k Co. Litt. 277.

is withheld from him: here the injury is not *abatement*, for the right vests not in the lord as heir or devisee; nor is it *intrusion*, for it vests not in him in remainder or reversion; nor is it *disseisin*, for the lord was never seised; nor does it at all bear the nature of any species of *discontinuance;* but, being neither of these four, it is therefore a *deforcement*.[1] If a man marries a woman, and during the coverture is seised of lands, and aliens, and dies; is disseised, and dies; or dies in possession; and the alienee, disseisor or heir enters on the tenements and doth not assign the widow her dower; this is also a deforcement to the widow, by withholding lands to which she hath a right.[m] In like manner, if a man lease lands to another for term of years, or for the life of a third person, and the term expires by surrender, efflux of time or death of the *cestuy que vie;* and the lessee or any stranger, who was at the expiration of the term in possession, holds over, and refuses to deliver the possession to him in remainder or reversion, this is likewise a deforcement.[n] Deforcements may also arise upon the breach of a condition in law: as if a woman gives lands to a man by deed, to the intent that he marry her, and he will not when thereunto required, but continues to hold the lands: this is such a fraud on the man's part that the law will not allow it to devest the woman's right of possession; though, this entry being lawful, it does devest the actual possession, and thereby becomes a deforcement.[o] Deforcements may also be grounded on the disability of the party deforced: as if an infant do make an alienation of his lands, and the alience enters and keeps possession; now, as the alienation is voidable, this possessi as against the infant (or, in case of his decease, as against his heir) is after avoidance wrongful, and therefore a deforcement.[p] The same happens [174] when one of nonsane memory aliens his lands or tenements, and the alienee enters and holds possession, this may also be a deforcement.[q] Another species of deforcement is, where two persons have the same title to land, and one of them enters and keeps posses-

[1] F. N. B. 143.

[m] *Ibid.* 8. 147.

[n] Finch. L. 263. F. N. B. 201. 205, 6, 7. See Book II. c. 9. pag. 151.

[o] F. N. B. 205.

[p] Finch. L. 264. F. N. B. 192.

[q] Finch. *Ibid.* F. N. B. 202.

sion against the other: as where the ancestor dies seised of an estate in fee simple, which descends to two sisters as coparceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety; this is also a deforcement.[r] Deforcement may also be grounded on the nonperformance of a covenant real: as if a man, seised of lands, covenants to convey them to another, and neglects or refuses so to do, but continues possession against him; this possession, being wrongful, is a deforcement.[s] And hence, in levying a fine of lands, the person, against whom the fictitious action is brought upon a supposed breach of covenant, is called the *deforciant*. Thus, lastly, keeping a man by any means out of a freehold office is a deforcement: and, indeed, from all these instances, it fully appears that whatever injury (withholding the possession of a freehold), is not included under one of the four former heads, is comprised under this of deforcement.

§ 231. 6. Remedies for ouster.—The several species and degrees of injury by *ouster* being thus ascertained and defined, the next consideration is the remedy: which is, universally, the *restitution* or *delivery of possession* to the right owner; and, in some cases, *damages*, also, for the unjust amotion. The methods, whereby these remedies, or either of them, may be obtained, are various.

§ 232. a. Entry by legal owner.—The first is that extrajudicial and summary one, which we slightly touched in the first chapter of the present book,[t] of *entry* by the legal owner, when another person, who hath no right, hath previously taken possession of lands or tenements. In this case the party entitled may make a formal, but peaceable, entry thereon, declaring that thereby he takes possession; which notorious act of ownership is equivalent to a feudal investiture by the lord:[u] or he may enter on any [175] part of it in the same county, declaring it to be in the name of the whole:[v] but if it lies in different counties he must make different entries; for the notoriety of such entry or claim to the *pares* or freeholders of Westmoreland, is not any notoriety to the *pares* or

r Finch. L. 293, 294. F. N. B. 197.
s F. N. B. 146.
t See page 5.
u See Book II. c. 14. pag. 209.
v Litt. § 417.

freeholders of Sussex. Also if there be *two* disseisors, the party disseised must make his entry on *both;* or if *one* disseisor has conveyed the lands with livery to *two* distinct feoffees, entry must be made on *both:*[w] for as their seisin is distinct, so also must be the act which devests that seisin. If the claimant be deterred from entering by menaces or bodily fear, he may make *claim*, as near to the estate as he can, with the like forms and solemnities: which claim is in force for a year and a day only.[x] And therefore this claim, if it be repeated once in the space of every year and day (which is called *continual claim*), has the same effect with, and in all respects amounts to, a legal entry.[y] Such an entry gives a man seisin,[z] or puts him into immediate possession that hath right of entry on the estate, and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase.

§ 233. (1) When entry available.—This remedy by entry takes place in three only of the five species of ouster, *viz.*, abatement, intrusion, and disseisin:[a] for, as in these the original entry of the wrongdoer was unlawful, they may therefore be remedied by the mere entry of him who hath right. But, upon a discontinuance or deforcement, the owner of the estate cannot enter, but is driven to his action: for herein the original entry being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant. Yet a man may enter[b] on his tenant by sufferance: for such tenant hath no freehold, but only a bare possession; which may be defeated, like a tenancy at will, by the mere entry of the owner. But if the owner thinks it more expedient to suppose or admit[c] such tenant to [176] have gained a tortious freehold, he is then remediable by writ of entry, *ad terminum qui præteriit* (for the term which has passed).

§ 234. (2) Right of entry tolled.—On the other hand, in case of abatement, intrusion, or disseisin, where entries are generally lawful, this right of entry may be *tolled*, that is, taken away, by

w Co. Litt. 252.
x Litt. § 422.
y *Ibid.* § 419. 423.
z Co. Litt. 15.
a *Ibid.* 237.
b See Book IV pag. 150.
c Co. Litt. 57.

descent. Descents, which take away entries,[d] are when anyone, seised by any means whatsoever of the inheritance of a corporeal hereditament, dies, whereby the same descends to his heir: in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken away; and he cannot recover possession against the heir by this summary method, but is driven to his action to gain a legal seisin of the estate. And this, first, because the heir comes to the estate by act of law, and not by his own act; the law therefore protects his title, and will not suffer his possession to be devested, till the claimant hath proved a better right. Secondly, because the heir may not suddenly know the true state of his title: and therefore the law, which is ever indulgent to heirs, takes away the entry of such claimant as neglected to enter on the ancestor, who was well able to defend his title; and leaves the claimant only the remedy of a formal action against the heir.[e] Thirdly, this was admirably adapted to the military spirit of the feudal tenures, and tended to make the feudatory bold in war; since his children could not, by any mere entry of another, be dispossessed of the lands whereof he died seised. And, lastly, it is agreeable to the dictates of reason and the general principles of law.

For, in every complete title[f] to lands, there are two things necessary; the possession or seisin, and the right or property therein:[g] or, as it is expressed in Fleta, *juris et seisinæ conjunctio*.[h] Now, if the possession be severed from the property, if A has the *jus proprietatis* (right of property), 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 [177] him in possession, but does it by different means according to the circumstances of the case. Thus, as B, who was himself the wrongdoer, and hath obtained the possession by either fraud or force, hath only a *bare* or *naked possession*, without any shadow of right; A therefore, who hath both the *right* of property and the *right* of possession, may put an end to his title at once, by the summary method of *entry*. But if B, the wrongdoer, dies seised of the lands, then B's heir

d Litt. § 385–413.
e Co. Litt. 237.
f See Book II. c. 13.
g Mirror. c. 2. § 27.
h L. 3. c. 15, § 5.

advances one step further towards a good title: he hath not only a *bare* possession, but also an apparent *jus possessionis*, or *right* of possession. For the law presumes that the possession, which is transmitted from the ancestor to the heir, is a rightful possession, until the contrary be shown: and therefore the mere entry of A is not allowed to evict the heir of B; but A is driven to his action at law to remove the possession of the heir, though his entry alone would have dispossessed the ancestor.

§ 235. **(a) When right of entry not barred by descent.**—So that in general it appears that no man can recover possession by mere entry on lands, which another hath by descent. Yet this rule hath some exceptions,[1] wherein those reasons cease, upon which the general doctrine is grounded; especially if the claimant were under any legal disabilities, during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm: in all which cases there is no neglect or *laches* in the claimant, and therefore no descent shall bar or take away his entry.[k] And this title of taking away entries by descent is still further narrowed by the statute 32 Henry VIII, c. 33 (Disseisin, 1540), which enacts, that if any person disseises or turns another out of possession, no descent to the heir of the disseisor shall take away the entry of him that has right to the land, unless the disseisor had peaceable possession five years next after the disseisin. But the statute extendeth not to any feoffee or donee of the disseisor, mediate or immediate:[l] because such a one by the genuine feudal constitutions always came into the tenures solemnly [178] and with the lord's concurrence, by actual delivery of seisin or open and public investiture. On the other hand, it is enacted by the statute of limitations, 21 Jac. I, c. 16 (1623), that no entry shall be made by any man upon lands, unless within twenty years after his right shall accrue. And by statute 4 & 5 Ann., c. 16 (Limitation of Time, 1705), no entry shall be of force to satisfy the said statute of limitations, or to avoid a fine levied of lands, unless an

[1] See the particular cases mentioned by Littleton, b. 3. c. 6. the principles of which are well explained in Gilbert's Law of Tenures.

[k] Co. Litt. 246.

[l] *Ibid.* 256.

action be thereupon commenced within one year after, and prosecuted with effect.

§ 236. (3) Entry not available in a discontinuance.—Upon an ouster, by the discontinuance of tenant in tail, we have said that no remedy by mere entry is allowed; but that, when tenant in tail aliens the lands entailed, this takes away the entry of the issue in tail, and drives him to his action at law to recover the possession.[m] For, as in the former cases the law will not suppose, without proof, that the ancestor of him in possession acquired the estate by wrong; and therefore, after five years' peaceable possession, and a descent cast, will not suffer the possession of the heir to be disturbed by mere entry without action; so here, the law will not suppose the discontinuor to have aliened the estate without power so to do, and therefore leaves the heir in tail to his action at law, and permits not his entry to be lawful. Besides, the alienee, who came into possession by a lawful conveyance, which was at least good for the life of the alienor, hath not only a *bare* possession, but also an *apparent right* of possession; which is not allowed to be devested by the mere entry of the claimant, but continues in force till a better right be shown, and recognized by a legal determination. And something also, perhaps, in framing this rule of law, may be allowed to the inclination of the courts of justice, to go as far as they could in making estates-tail alienable, by declaring such alienations to be voidable only and not absolutely void.

§ 237. (4) Entry not available on a deforcement.—In case of deforcements also, where the deforciant had originally a lawful possession of the land, but ne[illegible] it wrongfully, he still continues to have the presumptive *jus* [179] *facie* evidence of right; that is, possession lawfully gained. Which possession shall not be overturned by the mere entry of another; but only by the demandant's showing a better right in a course of law.

§ 238. (5) Statutes against forcible entry.—This remedy by entry must be pursued, according to statute 5 Richard II, st. 1, c. 8-(Forcible Entry, 1381), in a peaceable and easy manner; and

m Co. Litt. 325.

not with force or strong hand. For, if one turns or keeps another out of possession forcibly, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate restitution; which puts the ancient possessor *in statu quo* (in the former condition): the criminal injury, or public wrong, by breach of the king's peace, is punished by fine to the king. For by the statute 8 Henry VI, c. 9 (Forcible Entry, 1429), upon complaint made to any justice of the peace, of a forcible entry, with strong hand, on lands or tenements; or a forcible detainer after a peaceable entry; he shall try the truth of the complaint by jury, and, upon force found, shall restore the possession to the party so put out: and in such case, or if any alienation be made to defraud the possessor of his right (which is declared to be absolutely void), the offender shall forfeit, for the force found, treble damages to the party grieved, and make fine and ransom to the king. But this does not extend to such as endeavor to keep possession *manu forti* (with a strong hand), after three years' peaceable enjoyment of either themselves, their ancestors, or those under whom they claim; by a subsequent clause of the same statute, enforced by statute 31 Elizabeth, c. 11.

§ 239. **b. Possessory actions.**—Thus far of remedies, where the tenant or occupier of the land hath gained only a *mere possession*, and no apparent shadow of right. Next follow another class, which are in use where the title of the tenant or occupier is advanced one step nearer to perfection; so that he hath in him not only a bare possession, which may be destroyed by entry, but also an *apparent right of possession*, which cannot be removed but by course of law: in the process of which it must be shown that though he hath at present possession and therefore hath [180] the presumptive right, yet there is a right of possession, superior to his residing in him who brings the action.

These remedies are either by a *writ of entry* or an *assize:* which are actions merely *possessory;* serving only to regain that possession, whereof the demandant (that is, he who sues for the land) or his ancestors have been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claims. They meddle not with the *right of property:* only restoring the demandant to that state or situation, in which he was (or by law ought to have been) before the dispossession committed. But this without

any prejudice to the right of ownership: for, if the dispossessor has any legal claim, he may afterwards exert it, notwithstanding a recovery against him in these possessory actions. Only the law will not suffer him to be his own judge, and either take or maintain possession of the lands, until he hath recovered them by legal means:[n] rather presuming the right to have accompanied the ancient seisin than to reside in one who had no such evidence in his favor.

§ 240. (1) Writ of entry.—The first of these possessory remedies is by *writ of entry;* which is that which disproves the title of the tenant or possessor, by showing the unlawful means by which he entered or continues possession.[o] The writ is directed to the sheriff, requiring him to "command the tenant of the land that he render (in Latin, *præcipe quod reddat*), to the demandant the premises in question, which he claims to be his right and inheritance; and into which, as he saith, the said tenant hath not entry but by a disseisin, intrusion or the like, made to the said demandant, within the time limited by law: or that upon refusal he do appear in court on such a day, to show wherefore he hath not done it."[p] This is the original process, the *præcipe,* upon which all the rest of the suit is grounded; and from hence it appears, that what is required of the tenant is in the alternative, either to deliver [181] seisin of the lands or to show cause why he will not. Which cause may be either a denial of the fact, of having entered by such means as are suggested, or a justification of his entry by reason of title in himself, or in those under whom he makes claim: and hereupon the possession of the land is awarded to him who produces the clearest right to possess it.

In our ancient books we find frequent mention of the *degrees* within which writs of entry are brought. If they be brought against the party himself that did the wrong, then they only charge the tenant himself with the injury; "*non habuit ingressum nisi per intrusionem quam ipse fecit* (he had no entry but by the intrusion which he himself made)." But if the intruder, disseisor, or the like, has made any alienation of the land to a third person, or it

n Mirr. c. 4. § 24.
o Finch. L. 261.
p See Book II. Append. No. V. § 1.

has descended to his heir, that circumstance must be alleged in the writ, for the action must always be brought against the tenant of the land; and the defect of his possessory title, whether arising from his own wrong or that of those under whom he claims, must be set forth. One such alienation or descent makes the first [q] degree, which is called the *per*, because then the form of a writ of entry is this: that the tenant had no right of entry, but *by* the original wrongdoer, who alienated the land, or from whom it descended, to him: "*non habuit ingressum, nisi* per *Gulielmum, qui se in illud intrusit, et illud tenenti dimisit* (he had no entry but *by* William who intruded himself on it, and demised it to the tenant)."[r] A second alienation or descent makes another degree, called the *per* and *cui;* because the form of a writ of entry, in that case, is, that the tenant had no title to enter, but *by* or *under* a prior alienee, *to* whom the intruder demised it; "*non habuit ingressum, nisi* per *Ricardum*, cui *Gulielmus illud dimisit, qui se in illud intrusit* (he had no entry but *by* Richard, *to whom* William, who had intruded on the land, demised it)."[s] These degrees thus state the original wrong, and the title of the tenant who claims under such wrong. If more than two degrees, that is. two alienations or descents were past, there lay no writ of entry at the common law. For, as it was provided, for the [182] quietness of men's inheritances, that no one, even though he had the true right of possession, should enter upon him who had the apparent right by descent or otherwise, but he was driven to his *writ of entry* to gain possession; so, after more than two descents or two conveyances were passed, the demandant, even though he had the right both of possession and property, was not allowed this *possessory* action; but was driven to his *writ of right,* a long and final remedy, to punish his neglect in not sooner putting in his claim, while the degrees subsisted, and for the ending of suits, and quieting of all controversies.[t] But by the statute of Marlbridge, 52 Henry III, c. 30 (1267), it was provided that when the number of alienations

[q] Finch. L. 262. Booth indeed (of Real Actions. 172.) makes the first degree to consist in the original wrong done, the second in the *per,* and the third in the *per* and *cui.* But the difference is immaterial.

[r] Booth. 181.

[s] Finch. L. 263. F. N. B. 203. 204.

[t] 2 Inst. 153.

or descents exceeded the usual degrees, a new writ should be allowed without any mention of degrees at all. And accordingly a new writ has been framed, called a writ of entry in the *post*, which only alleges the injury of the wrongdoer, without deducing all the intermediate title from him to the tenant: stating it in this manner: that the tenant had no legal entry unless *after*, or subsequent to, the ouster or injury done by the original dispossessor; "*non habuit ingressum nisi* post *intrusionem quam Gulielmus in illud fecit* (he had no entry except *after* the intrusion which William made on it)"; and rightly concluding, that if the original title was wrongful, all claims derived from thence must participate of the same wrong. Upon the latter of these writs it is (the writ of entry *sur disseisin* (on disseisin) in the *post*) that the form of our common recoveries of landed estates is usually grounded; which, we may remember, were observed in the preceding volume[u] to be 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 recovers the land.

§ 241. (a) When writ of entry not available.—This remedial instrument, of writ of entry, is applicable to all the cases of ouster before mentioned, except that of discontinuance by tenant in tail and some peculiar species of deforcements. Such is that of deforcement of dower, by not assigning *any* dower to the widow within the time limited by [183] law; for which she has her remedy by writ of *dower, unde nihil habet* (whereby she has nothing).[w] But if she be deforced of part only of her dower, she cannot then say that *nihil habet;* and therefore she may have recourse to another action, by writ of *right of dower:* which is a more general remedy, extending either to part or the whole; and is (with regard to her claim) of the same nature as the grand writ of right, whereof we shall presently speak, is with regard to claims in fee simple.[x] On the other hand, if the heir (being within age) or his guardian, assign her more than she ought to have, they may be remedied by a writ of *admeasurement of dower.*[y] But, in general, the writ of

u Book II. c. 21.

w F. N. B. 147.

x *Ibid.* 16.

y F. N. B. 148. Finch. L. 314. Stat. Westm. II. 13 Edw. I. c. 7 (Dower, 1285).

entry is the universal remedy to recover possession, when wrongfully withheld from the owner.

§ 242. (b) Forms of writ of entry.—It were therefore endless to recount all the several divisions of writs of entry, which the different circumstances of the respective demandants may require, and which are furnished by the laws of England:[s] being plainly and clearly chalked out in that most ancient and highly venerable collection of legal forms, the *registrum omnium brevium* (register of all writs), or register of such writs as are suable out of the king's courts, upon which Fitzherbert's *natura brevium* (natural writs) is a comment; and in which every man who [184] is injured will be sure to find a method of relief, exactly adapted to his own case, described in the compass of a few lines, and yet without the omission of any material circumstance. So that the wise and equitable provision of the statute Westm. II, 13 Edward I,

[s] **The most usual writs of entry.**—See Bracton. l. 4. tr. 7. c. 6. § 4. Britton. c. 114. fol. 264. The most usual were, 1. The writs of entry *sur disseisin* and of *intrusion* (F. N. B. 191, 203.) which are brought to remedy either of those species of ouster. 2. The writs of *dum fuit infra ætatem* (while he was under age), and *dum fuit non compos mentis* (while he was of unsound mind): (*Ibid.* 192. 202.) which lie for a person of full age, or one who hath recovered his understanding, after having (when under age or insane) aliened his lands; or for the heirs of such alienor. 3. The writs of *cui in vita* (whom in his lifetime) and *cui ante divortium* (whom before divorce): (*Ibid.* 193. 204.) for a woman, when a widow or divorced, whose husband during the coverture (*cui in vita sua, vel cui ante divortium, ipsa contradicere non potuit*—whom in his lifetime, or whom before divorce she could not contradict) hath aliened her estate. 4. The writ *ad communem legem* (at common law): (*Ibid.* 207.) for the reversioner, after the alienation and death of the particular tenant for life. 5. The writs *in casu proviso* (in the case provided) and *in consimili casu* (in the like case): (*Ibid.* 205. 206.) which lay not *ad communem legem*, but are given by Stat. Gloc. 7 Edw. I. c. 7 (1279), and Westm. II. 13 Edw. I. c. 24 (Chancery Practice, 1285), for the reversioner after the alienation, but during the life, of the tenant in dower or other tenant for life. 6. The writ *ad terminum qui præteriit* (for an expired term): (*Ibid.* 201.) for the reversioner, when the possession is withheld by the lessee or a stranger, after the determination of a lease for years. 7. The writ *causa matrimonii præ-locuti* (in consideration of a marriage before agreed upon): (*Ibid.* 205.) for a woman who giveth land to a man in fee or for life, to the intent that he may marry her, and he doth not. And the like in case of other deforcements.

c. 34 (Abduction, 1285), for framing new writs when wanted,[a] is almost rendered useless by the very great perfection of the ancient forms. And indeed I know not whether it is a greater credit to our laws to have such a provision contained in them, or not to have occasion, or at least very rarely, to use it.[3]

In the times of our Saxon ancestors, the right of possession seems only to have been recoverable by writ of entry;[b] which was then usually brought in the county court. And it is to be observed that the proceedings in these actions were not then so tedious, when the courts were held and process issued every three weeks, as after the Conquest, when all causes were drawn into the king's courts, and process issued from term to term; which was found exceeding dilatory, being at least four times as slow as the other. And hence a new remedy was invented in many cases, to do justice to the people and to determine the possession, in the proper counties, and yet by the king's judges. This was the remedy by *assize*, of which we are next to speak.

§ 243. (2) Writ of assize.—The writ of *assize* is said to have been invented by Glanvill, chief justice to Henry the Second;[c]

[a] See pag. 51.
[b] Gilb. Ten. 42.
[c] Mirror. c. 2. § 25.

---

3 "In closing this section we have to say that the account here given of the relation of the writs of entry to the possessory assizes is utterly at variance with the traditional doctrine sanctioned by Blackstone (Comm. III. 184), which makes 'our Saxon ancestors' acquainted with writs of entry. Now, however, that large selections from the early plea rolls have been printed, there can be no doubt at all that the assizes are older than the writs of entry, though even a comparison of Bracton with Glanvill should have made this clear. To this must be added that throughout the thirteenth century there is no writ of entry for the disseisee against the disseisor. No one would think of using such a writ, because the assize of novel disseisin is far more summary. At a much later period when the assize procedure was becoming obsolete—obsolete because too rude—such a writ of entry, 'the writ in the nature of an assize,' or 'writ in the *quibus*' was invented. But in Bracton's time the writs of entry presuppose the assizes. The credit of having been the first to explain the relation between the assizes and the writs of entry is due to Dr. Brunner's Entstehung der Schwurgerichte." 2 Poll. & Maitl., Hist. Eng. Law (2d ed.), 80 n. See Sedgwick & Wait, Ejectment, 3 Select Essays in Anglo-Am. Legal Hist., 616.

and, if so, it seems to owe its introduction to the parliament held at Northampton, in the twenty-second year of that prince's reign, when justices in eyre were appointed to go round the kingdom in order to take these assizes, and the assizes themselves (particularly those of *mort d'ancestor*—death of the ancestor—and *novel disseisin*—new disseisin) were clearly pointed out and described.[d] As a writ of entry [185] is a real action, which *disproves* the title of the tenant by showing the unlawful commencement of his possession, so an assize is a real action, which proves the title of the demandant merely by showing his, or his ancestor's possession:[e] and these two remedies are in all other respects so totally alike, that a judgment or recovery in one is a bar against the other: so that when a man's possession is once established by either of these possessory actions, it can never be disturbed by the same antagonist in any other of them. The word, *assize*, is derived by Sir Edward Coke[f] from the Latin *assideo*, to sit together; and it signifies, originally, the jury who try the cause, and sit together for that purpose.[4] By a figure it is now made to signify the court or

[d] § 9. *Si dominus feodi negat hæredibus defuncti saisinam ejusdem feodi, justitiarii domini regis faciant inde fieri recognitionem per xii legales homines, qualem saisinam defunctus inde habuit, die qua fuit vivus et mortuus; et, sicut recognitum fuerit, ita hæredibus ejus restituant.* § 10. *Justitiarii domini regis faciant fieri recognitionem de dissaisinis factis super assisam, a tempore quo dominus rex venit in Angliam proxime post pacem factam inter ipsum et regem filium suum* (§ 9. If the lord of the fee refuse to the heirs of the deceased seisin of the same fee, the king's justices may cause an inquiry to be made by twelve lawful men, of what seisin the deceased had on the day of his death, and according to the result of such inquiry it shall be restored to his heirs. § 10. The king's justices shall cause an inquiry to be made of the disseisins made upon assize, from the time at which the king came into England, next after the peace made between him and his son). (Spelm. Cod. 330.)

[e] Finch. L. 284.

[f] 1 Inst. 153.

---

[4] **Meaning of assize.**—It is singular that Blackstone does not mention among the meanings of assize that of ordinance or statute, so well known in the assizes of Northampton of Clarendon; which must have been so familiar to the people in the assizes of arms, of the forest, of bread, of beer, etc. (Stubbs, S. C., p. 193, etc.)

The question which was the original signification has more than a merely etymologic interest. If, as seems probable, assize meaning the jury is derived

jurisdiction, which summons this jury together by a commission of assize, or *ad assisas capiendas;* and hence the judicial assemblies held by the king's commission in every county, as well to take these writs of assize as to try causes at *nisi prius*, are termed in common speech the *assizes*. By another somewhat similar figure, the name of assize is also applied to this action for recovering possession of lands: for the reason, saith Littleton,[g] why such writs at the beginning were called assizes, was, for that in these writs the sheriff is ordered to summon a jury, or assize; which is not expressed in any other original writ.[h]

§ 244. (a) Assize of mort d'ancestor.—This remedy, by writ of assize, is only applicable to two species of inquiry by ouster, *viz., abatement,* and a recent or *novel disseisin.* If the abatement happened upon the death of the demandant's father or mother, brother or sister, uncle or aunt, nephew or niece, the remedy is by an assize of *mort d'ancestor*, or the death of one's ancestor: and the general purport of this writ is to direct the sheriff to summon a jury or assize, to view the land in question, and to recognize

g § 234. h Co. Litt. 159.

---

from assize meaning the law, much light is thrown on other meanings, and especially on the assizes discussed here of *mort d'ancestor*, etc., with the procedure in them, and especially their form of jury also called the *assisa*, in its distinction from the *jurata*.

The various meanings are closely connected, and it is not easy to say certainly which of them may represent the earliest usage. But that it was the jury "who sat together," as Coke and Blackstone think, is improbable. The earliest examples of its usage are in the sense of law or ordinances—the later statute—as in the cases above and in several passages of Glanvill, e. g., *nulli licet per assisam regni,* viii, 8, 5. The forms of jury known as assizes were certainly those established by positive law, whether that be the origin of the name or not: the great assize by that mentioned in Glanvill, ii, 7, and the possessory assizes by the constitutions or assizes mentioned above. It is therefore much more probable that they were so called from the laws by which they were established, rather than from the sitting together of the jurors, which was common to them with the *juratæ,* from which they were so constantly distinguished. The phrase occurring so often in Glanvill's writs, *posuit se in assisam meam, et petit recognitionem fieri,* points to the same origin.

That from the assizes as modes of trial the assizes in each county took their name is unquestionable.—HAMMOND.

whether such ancestor were seised thereof on the day of his death, and whether the demandant be the next heir.[1] And, in a short time after, the judges usually come down by the king's commission to take the recognition of assize: when, if [186] those points are found in the affirmative, the law immediately transfers the possession from the tenant to the demandant. If the abatement happened on the death of one's grandfather or grandmother, then an assize of *mort d'ancestor* no longer lies, but a writ of *ayle*, or *de avo* (from the grandfather): if on the death of the great grandfather or great grandmother, then a writ of *besayle*, or *de proavo* (from the great grandfather): but if it mounts one degree higher, to the *tresayle* or grandfather's grandfather, or if the abatement happened upon the death of any collateral relation, other than those before mentioned, the writ is called a writ of *cosinage*, or *de consanguineo*.[k] And the same points shall be inquired of in all these actions *ancestral*, as in an assize of *mort d'ancestor*, they being of the same nature:[l] though they differ in this point of form, that these *ancestral* writs (like all other writs of *præcipe*) expressly assert the demandant's title (*viz.*, the seisin of the ancestor at his death, and his own right of inheritance); the assize asserts nothing directly, but only prays an inquiry whether those points be so.[m] There is also another ancestral writ, denominated a *nuper obiit* (he lately died), to establish an equal division of the land in question, where on the death of an ancestor, who has several heirs, one enters and holds the others out of possession.[n] But a man is not allowed to have any of these possessory actions for an abatement consequent on the death of any collateral relation, beyond the fourth degree;[o] though in the lineal ascent he may proceed *ad infinitum*.[p] For the law will not pay any regard to the possession of a collateral relation, so very distant as hardly to be any at all.

It was always held to be law[q] that where lands were devisable in a man's last will by the custom of the place, there an assize of *mort*

[1] F. N. B. 195. Finch. L. 290.
[k] Finch. L. 266, 267.
[l] Stat. Westm. II. 13 Edw. I. c. 20 (Real Actions, 1285).
[m] 2 Inst. 399.
[n] F. N. B. 197. Finch. L. 293.
[o] Hale on F. N. B. 221.
[p] Fitzh. Abr. tit. Cosinage. 15.
[q] Bracton, l. 4. de Assis. Mortis, Antecessoris. c. 13. § 3. F. N. B. 196.

d'ancestor did not lie. For, where lands were so devisable,* the right of possession could never be determined by a process, which inquired only of these two points, the seisin of the ancestor and the heirship of the demandant. And hence it might be reasonable to conclude, that when the [187] statute of wills, 32 Henry VIII, c. 1 (1540), made all socage lands devisable, an assize of *mort d'ancestor* no longer could be brought of lands held in socage;[r] and that now, since the statute 12 Car. II, c. 24 (Military Tenures, 1660), which converts all tenures, a few only excepted, into free and common socage, it should follow that no assize of *mort d'ancestor* can be brought of any lands in the kingdom; but, in case of abatements, recourse must be properly had to the more ancient writs of entry.

§ 245. (b) Assize of novel disseisin.—An assize of *novel* (or recent) *disseisin* is an action of the same nature with the assize of *mort d'ancestor* before mentioned, in that herein the demandant's possession must be shown. But it differs considerably in other points: particularly in that it recites a complaint by the demandant of the disseisin committed, in terms of direct averment; whereupon the sheriff is commanded to reseize the land and all the chattels thereon, and keep the same in his custody till the arrival of the justices of assize (which in fact is now omitted);[s] and in the meantime to summon a jury to view the premises, and make recognition of the assize before the justices.[t] At which time the tenant may plead either the general issues *nul tort, nul disseisin* (no wrong, no disseisin), or any special plea. And if, upon the general issue, the recognitors find an actual seisin in the demandant, and his subsequent disseisin by the present tenant, he shall have judgment to recover his seisin, and damages for the injury sustained: being the only case in which damages were recoverable in any possessory action at the common law;[u] the tenant being usu-

* In some recent editions this word is printed *divisible* in both places where it occurs in this paragraph; quite changing the sense.—HAMMOND.

r See 1 Leon. 267.

s Booth. 211. Bract. l. 4. tr. 1. c. 19. § 7.

t F. N. B. 177.

u Bracton. 187. Stat. Marlbridg. c. 16.

ally allowed to retain the intermediate profits of the land, to enable him to perform the feudal services.

The process of assizes in general is called, by statute Westm. II, 13 Edward I, c. 24 (Chancery Practice, 1285), *festinum remedium* (the speedy remedy), in comparison with that by a writ of entry; it not admitting of many dilatory pleas and proceedings, to which other real actions are subject.[v] Costs and damages were annexed to many other of these possessory actions by the statutes of Marlberge,[5] 52 Henry III, c. 16 (Wardship, 1267), and of Gloucester, 6 Edward I, c. 1 (Recovery of Damages and Costs, 1278). And [188] to prevent frequent and vexatious disseisins, it is enacted by the statute of Merton, 20 Henry III, c. 3 (Redisseisin, 1235), that if a person disseised recover seisin of the land again by assize of *novel disseisin*, and be again disseised of the same tenements by the same disseisor, he shall have a writ of *redisseisin;* and, if he recover therein, the redisseisor shall be imprisoned; and, by the statute of Marlbridge, 52 Henry III, c. 8 (Redisseisin, 1267), shall also pay a fine to the king: to which the statute Westm. II, 13 Edward I, c. 26 (Real Actions, 1285), hath superadded double damages to the party aggrieved. In like manner, by the same statute of Merton, when any lands or tenements are recovered by assize of *mort d'ancestor*, or other jury,[6] or any judgment of the court, if the party be afterwards disseised by the same person against whom judgment was obtained, he shall have a writ of *post-disseisin*

[v] Booth. 262.

---

5 **Statute of Marlberge.**—The curious discrepancy between this name and that given the same statute a few lines below, where it is called the statute of Marlbridge, is probably explained by the fact (shown by the marginal references), that the latter was a part of Blackstone's original text, published in 1768, while the former was intercalated in the seventh edition seven years later. This is also the form adopted in the Statutes Revised, A. D. 1870, and of Pickering's edition, while Coke used the other.—HAMMOND.

6 **Mort d'ancestor.**—This is a singular variance from the letter of the statute quoted, which reads, "*per assisam mortis antecessoris et . . . per juratas in curia domini R.*" The passage is of interest as a clear recognition of the distinction between the *assisa* and the *jurata* in 1235, and a refutation of the recent hypothesis that the terms were interchangeable (L. O. Pike, Introd. to Y. B. 12 & 13 Edw. III, pp. xlv, lxv), although there seems to be no authority for Blackstone's use of the word "other" jury.—HAMMOND.

against him; which subjects the post-disseisor to the same penalties as a redisseisor. The reason of all which, as given by Sir Edward Coke,[w] is because such proceeding is a contempt of the king's courts, and in despite of the law; or, as Bracton more fully expresses it,[x] "*talis qui ita convictus fuerit, dupliciter delinquit contra regem: quia facit disseisinam et roberiam contra pacem suam; et etiam ausu temerario irrita facit ea, quæ in curia domini regis rite acta sunt: et propter duplex delictum merito sustinere; debet pœnam duplicatam* (he who is so convicted offends doubly against the king; first, because he makes a disseisin and robbery against his peace; and secondly, by a rash undertaking sets at defiance the just decisions of the king's court: and for this double offense he deserves a double punishment)."

§ 246. (3) Statutes of limitation.—In all these possessory actions there is a time of limitation settled, beyond which no man shall avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary. For, if he be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance, to recover the possession merely; both to punish his neglect (*nam leges vigilantibus, non dormientibus, subveniunt*—for the laws aid the vigilant, not the careless),[7] and also because it is presumed that the supposed wrongdoer has in such a length of time procured a legal title, otherwise he would sooner have been sued. This time of limitation by the statute of Merton, 20 Henry III, c. 8 (Limitation of Writs, 1235), and Westm. I, 3 Edward I, c. 39 (Limitation of Prescription, 1275), was successively dated from particular eras, *viz.*, from the return of King John from Ireland, and from the coronation, etc., of King Henry [189] the Third. But this date of limitation continued so long unaltered, that it became indeed no limitation at all: it being above three hundred years from Henry the Third's coronation to the year 1540, when the present statute of limitations[y]

w 2 Inst. 83, 84.

x l. 4. c. 49.

y 32 Hen. VIII. c. 2 (Limitation of Prescription, 1540).

7 See Broom, Legal Maxims (8th ed.), 688.

was made. This instead of limiting actions from the date of a particular event, as before, which in process of years grew absurd, took another and more direct course, which might endure forever; by limiting a certain period, as fifty years for lands, and the like period[z] for customary and prescriptive rents, suits and services (for there is no time of limitation upon rents created by deed, or reserved on a particular estate[a]) and enacting that no person should bring any possessory action, to recover possession thereof merely upon the seisin, or dispossession, of his ancestors, beyond such certain period. But this does not extend to services, which by common possibility may not happen to become due more than once in the lord's or tenant's life; as fealty, and the like.[b] And all writs, grounded upon the possession of the demandant himself, are directed to be sued out within thirty years after the disseisin complained of; for if it be an older date, it can with no propriety be called a fresh, recent or *novel disseisin*, which name Sir Edward Coke informs us was originally given to this proceeding, because the disseisin must have been since the last *eyre* or circuit of the justices, which happened once in seven years, otherwise the action was gone.[c] And we may observe[d] that the limitation, prescribed by Henry the Second at the first institution of the assize of *novel disseisin*, was from his own return into England after the peace made between him and the young king, his son; which was but the year before.

§ 247. (4) Doctrine of remitter.—What has been here observed may throw some light on the doctrine of *remitter*, which we spoke of in the second [190] chapter of this book,[e] and which, we may remember, was, where one who hath right to lands, but is out of possession, hath afterwards the freehold cast upon him by some

[z] So Berthelet's original edition of the statute, A. D. 1540: and Cay's, Pickering's and Ruffhead's editions, examined with the record. Rastell's and other intermediate editions, which Sir Edward Coke (2 Inst. 95.) and other subsequent writers have followed, make it only *forty* years for rents, etc.

[a] 8 Rep. 65.

[b] Co. Litt. 115.

[c] 1 Inst. 153. Booth. 210.

[d] See pag. 184.

[e] See pag. 19.

subsequent defective title, and enters by virtue of that title. In this case the law remits him to his ancient and more certain right, and by an equitable fiction supposes him to have gained possession in consequence, and by virtue, thereof: and this, because he cannot possibly obtain judgment at law to be restored to his prior right, since he is himself the tenant of the land, and therefore hath nobody against whom to bring his action. This determination of the law might seem superfluous to an hasty observer; who perhaps would imagine, that since the tenant hath now both the right and also the possession, it little signifies by what means such possession shall be said to be gained. But the wisdom of our ancient law determined nothing in vain. As the tenant's possession was gained by a defective title, it was liable to be overturned by showing that defect in a writ of entry; and then he must have been driven to his writ of right to recover his just inheritance: which would have been doubly hard, because, during the time he was himself tenant, he could not establish his prior title by any possessory action. The law therefore remits him to his prior title, or puts him in the same condition as if he had recovered the land by writ of entry. Without the remitter, he would have had *jus, et seisinam* (a right and seisin), separate; a good right, but a bad possession: now, by the remitter, he hath the most perfect of all titles, *juris et seisinæ conjunctionem* (the conjunction of right and seisin).

§ 248. c. Writ of right.—By these several possessory remedies the right of possession may be restored to him, that is unjustly deprived thereof. But the right of *possession* (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*, which is recovered by these possessory actions; so [191] one man may have the *right of possession*, and cannot therefore be evicted by any possessory action, and another may have the *right of property*, which cannot be otherwise asserted than by the great and final remedy of a writ of right, or such correspondent writs as are in the nature of a writ of right.

§ 249. (1) When writ of right available.—This happens principally in four cases: 1. Upon discontinuance by the alienation of

tenant in tail: whereby he, who had the right of possession, hath transferred it to the alienee; and therefore his issue, or those in remainder or reversion, shall not be allowed to recover by virtue of that possession, which the tenant hath so voluntarily transferred. 2. In case of judgment given against either party by his own default; or, 3. Upon trial of the merits, in any possessory action: for such judgment, if obtained by him who hath not the true ownership, is held to be a species of deforcement; which, however, binds the right of possession, and suffers it not to be ever again disputed, unless the right of property be also proved. 4. In case the demandant, who claims the right, is barred from these possessory actions by length of time and the statute of limitations before mentioned: for an undisturbed possession for fifty years ought not to be devested by anything, but a very clear proof of the absolute right of propriety. In these four cases the law applies the remedial instrument of either the writ of right itself, or such other writs, as are said to be of the same nature.

§ 250. (a) Alienation by tenant in tail—Writ of formedon.—And first, upon an alienation by tenant in tail, whereby the estate-tail is discontinued, and the remainder or reversion is by failure of the particular estate displaced, and turned into a mere right, the remedy is by action of *formedon* (*secundum formam doni*—according to the form of the gift), which is in the nature of a writ of right,[f] and is the highest action that tenant in tail can have.[g] For he cannot have an absolute writ of right, which is confined only to such as claim in fee simple: and for that reason this writ of *formedon* was granted him by the statute *de donis* or [192] Westm. II, 13 Edward I, c. 1 (1285), which is therefore emphatically called *his* writ of right.[h] This writ is distinguished into three species: a *formedon* in the *descender*, in the *remainder*, and in the *reverter*. A writ of *formedon* in the *descender* lieth where a gift in tail is made, and the tenant in tail aliens the lands entailed, or is disseised of them, and dies; in this case the heir in tail shall have this writ of *formedon* in the *descender*, to recover these lands so given in tail, against him who is then the actual tenant of the freehold.[i] In which action the demandant is bound

[f] Finch. L. 267.
[g] Co. Litt. 316.
[h] F. N. B. 255.
[i] [illegible], 212.

to state the manner and form of the gift in tail, and to prove himself heir *secundum formam doni.* A *formedon* in the *remainder* lieth where a man giveth lands to another for life or in tail, with remainder to a third person in tail or in fee; and he who hath the particular estate dieth, without issue inheritable, and a stranger intrudes upon him in remainder, and keeps him out of possession.[k] In this case the remainderman shall have his writ of *formedon* in the *remainder*, wherein the whole form of the gift is stated, and the happening of the event upon which the remainder depended. This writ is not given in express words by the statute *de donis;* but is founded upon the equity of the statute, and upon this maxim in law, that if any one hath a right to the land, he ought also to have an action to recover it. A *formedon* in the *reverter* lieth where there is a gift in tail, and afterwards by the death of the donee or his heirs without issue of his body the reversion falls in upon the donor, his heirs, or assigns: in such case the reversioner shall have this writ to recover the lands, wherein he shall suggest the gift, his own title to the reversion minutely derived from the donor, and the failure of issue upon which his reversion takes place.[l] This lay at common law, before the statute *de donis*, if the donee aliened before he had performed the condition of the gift, by having issue, and afterwards died without any.[m] The time of limitation in a *formedon* by statute 21 Jac. I, c. 16 (Limitation, 1623), is twenty years; within [193] which space of time, after his title accrues, the demandant must bring his action, or else is forever barred.

§ 251. (b) Judgment by default—Writ quod ei deforceat.— In the second case: if the owners of a particular estate, as for life, in dower, by the curtesy, or in fee-tail, are barred of the right of possession by a recovery had against them, through their default or nonappearance in a possessory action, they were absolutely without any remedy at the common law: as a writ of right does not lie for any but such as claim to be tenants of the fee simple. Therefore the statute Westm. II, 13 Edward I, c. 4 (Real Actions, 1285), gives a new writ for such persons, after their lands have been so

k *Ibid.* 217.

l *Ibid.* 219. 8 Rep. 88.

m Finch. L. 268.

recovered against them by default, called a *quod ei deforceat* (that he deforced him); which, though not strictly a writ of right, so far partakes of the nature of one, as that it will restore the right to him, who has been thus unwarily deforced by his own default.[h] But in case the recovery were not had by his own default, but upon defense in the inferior possessory action, this still remains final with regard to these particular estates, as at the common law: and hence it is that a common recovery (on a writ of entry in the *post*) had, not by default of the tenant himself, but (after his defense made and voucher of a third person to warranty) by default of such vouchee, is now the usual bar to cut off an estate-tail.[i]

§ 252. (c) (d) Mere writ of right.—Thirdly, in case the right of possession be barred by a recovery upon the merits in a possessory action, or, lastly, by the statute of limitations, a claimant in fee simple may have a *mere writ of right;* which is in its nature the highest writ in the law,[k] and lieth only of an estate in fee simple, and not for him who hath a less estate. This writ lies *concurrently* with all other real actions, in which an estate of fee simple may be recovered; and it also lies *after* them, being, as it were, an appeal to the mere right, when judgment hath been had as to the possession in an inferior possessory action.[l] [194] But though a writ of right may be brought, where the demandant is entitled to the possession, yet it rarely is advisable to be brought in such cases; as a more expeditious and easy remedy is had, without meddling with the property, by proving the demandant's own, or his ancestor's, possession, and their illegal ouster, in one of the possessory actions. But, in case the right of possession be lost by length of time, or by judgment against the true owner in one of these inferior suits, there is no other choice: this is then the only remedy that can be had; and it is of so forcible a nature, that it overcomes all obstacles, and clears all objections that may have arisen to cloud and obscure the title. And, after issue once joined in a writ of right, the judgment is absolutely final; so that a recovery had in this action may be pleaded in bar of any other claim or demand.[m]

h F. N. B. 155.
i See Book II. c. 21.
k F. N. B. 1.
l F. N. B. 1. 5.
m *Ibid.* 6. Co. Litt. 158.

§ 253. (2) Variations on the writ of right. — The pure, proper or mere writ of right lies only, we have said, to recover lands in fee simple, unjustly withheld from the true proprietor. But there are also some other writs which are said to be *in the nature of* a writ of right, because their process and proceedings do mostly (though not entirely) agree with the writ of right: but in some of them the fee simple is not demanded; and in others not land, but some incorporeal hereditament. Some of these have been already mentioned, as the writ of *right of dower*, of *formedon*, etc.: and the others will hereafter be taken notice of, under their proper divisions. Nor is the mere writ of right alone, or always, applicable to every case of a claim of lands in fee simple: for if the lord's tenant in fee simple dies without heir, whereby an escheat accrues, the lord shall have a writ of *escheat*,[n] which is in the nature of a writ of right.[o] And if one of two or more co-parceners deforces the other, by usurping the sole possession, the party aggrieved shall have a writ of right, *de rationabili parte* (for the reasonable part):[p] which may be grounded on the [195] seisin of the ancestor at any time during his life; whereas in a *nuper obiit* (which is a possessory remedy[q]) he must be seised at the time of his death. But, waiving these and other minute distinctions, let us now return to the general writ of right.

§ 254. (3) Proceedings on writ of right.—This writ ought to be first brought in the court-baron of the lord,[r] of whom the lands are holden; and then it is open or *patent:* but if he holds no court, or hath waived his right, *remisit curiam suam*, it may be brought in the king's courts by writ of *præcipe* originally;[s] and then it is a writ of right *close*,[t] being directed to the sheriff and not the lord.[u] [8] Also, when one of the king's immediate tenants *in capite* is deforced, his writ of right is called a writ of *præcipe in capite* (command for the tenant in capite) (the improper use of

n F. N. B. 143.
o Booth. 135.
p F. N. B. 9.
q See pag. 186.
r Appendix, No. I, § 1, *post.*
s F. N. B. 2. Finch. L. 313.
t Booth. 91.
u Appendix, No. I, § 4, *post.*

8 For distinction between a writ of right *patent* and a writ of right *close*, see Liter v. Green, 2 Wheat. (U. S.) 306, 4 L. Ed. 246.

which, as well as of the former *præcipe quia dominus remisit curiam* (because the lord has waived his court), so as to oust the lord of his jurisdiction, is restrained by *Magna Carta* [w]), and, being directed to the sheriff and originally returnable in the king's court, is also a writ of right *close*.[x] There is likewise a little writ of *right close, secundum consuetudinem manerii* (according to the custom of the manor), which lies for the king's tenants in ancient demesne,[y] and others of a similar nature,[z] to try the right of their lands and tenements in the court of the lord exclusively.[a] But the writ of *right patent* itself may also at any time be removed into the county court, by writ of *tolt*, and from thence into the king's courts by writ of *pone* or *recordari facias* (that you cause to be recorded), at the suggestion of either party that there is a delay or defect of justice.[b]

§ 255. **(4) Requisites for a writ of right.**—In the progress of this action, the demandant must allege some seisin of the lands and tenements in himself, or else in some person under whom he claims, and then derive the right [196] from the person so seised to himself; to which the tenant may answer by denying the demandant's right, and averring that he has more right to hold the lands than the demandant has to demand them: and, this right of the tenant being shown, it then puts the demandant upon the proof of his title: in which, if he fails, or if the tenant hath shown a better, the demandant and his heirs are perpetually barred of their claim; but if he can make it appear that his right is superior to the tenant's, he shall recover the land against the tenant and his heirs forever. But even this writ of right, however superior to any other, cannot be sued out at any distance of time. For by the ancient law no seisin could be alleged by the demandant, but from the time of Henry the First;[c] by the statute of Merton, 20

w C. 24.

x F. N. B. 5.

y See Book II. c. 6.

z Kitchen. tit. Copyhold.

a Bracton. l. 1. c. 11. l. 4. tr. 1. c. 9. & tr. 3. c. 13. § 9. Old Tenur. t. Tenir, en Socage. Old N. B. t. Garde. & t. Briefe de Recto Claus. F. N. B. 11.

b F. N. B. 3, 4.

c Co. Litt. 114.

Henry III, c. 8 (Limitation of Writs, 1235); from the time of Henry the Second; by the statute of Westm. I, 3 Edward I, c. 39 (Limitation of Prescription, 1275); from the time of Richard the First; and now, by statute 32 Henry VIII, c. 2 (Limitation of Prescription, 1540),—seisin in a writ of right shall be within sixty years. So that the possession of lands in fee simple uninterruptedly, for three score years, is at present a sufficient title against all the world, and cannot be impeached by any dormant claim whatsoever.[9]

§ 256. Modern remedies for ouster—Ejectment and trespass. I have now gone through the several species of injury by ouster and dispossession of the freehold, with the remedies applicable to each. In considering which I have been unavoidably led to touch upon much obsolete and abstruse learning, as it lies intermixed with, and alone can explain the reason of, those parts of the law which are now more generally in use. For, without contemplating the

[9] **Sixty-year period of prescription.**—Before the year 1875, the rule was that title might be required to be shown for sixty years, in all cases where forty years' title can now be called for. (Sug. V. & P. 365 sq., 407; Cooper v. Emery, 1 Ph. 388, 41 Eng. Reprint, 679.) The origin of this rule is sometimes attributed to the fact that under the statutes of limitation applicable to the old real and mixed actions nothing less than sixty years' possession would bar adverse claims to the land. (See Stat. 32 Hen. VIII, c. 2; 3 Bl. Comm. 193-196; Sug. V. & P. 365.) But even sixty years' possession will not necessarily give a sure title to land, as against all the world; for if the land had been limited for an estate-tail or for life, the right of the reversioner or remainderman to enter into possession would not accrue till after the determination of the particular estate; and under the present as well as the old statutes of limitation, circumstances might occur to render possible the recovery of land by a reversioner or remainderman more than sixty years after the dispossession of the tenant in tail or for life. (See Sug. V. & P., 11th ed. 609, 14th ed. 366; 1 Prest. Abst. 2d ed. 20–22.) Another reason is accordingly given for the rule; namely, that the term of sixty years corresponds with the ordinary duration of human life, and inquiry into the title for the duration of an ordinary lifetime affords some safeguard against the existence of the adverse claims, which might not have accrued until the death of a particular tenant. (See Mr. Brodie's opinion, 1 Hayes' Conveyancing, 564; 1 Ph. 389, 41 Eng. Reprint, 679.) The period of sixty years was reduced to forty by the Vendor and Purchaser Act, 1874, on no other ground, apparently, than that in practice purchasers were generally found willing to accept a forty years' title.—WILLIAMS, Real Prop. (21st ed.), 593.

whole fabric together, it is impossible to form any clear idea of the meaning and connection of those disjointed parts, which still form a considerable branch of the modern law; such as the doctrine of entries and remitter, the levying of fines, and the suffering of common recoveries. Neither, indeed, is any considerable part of that, which I have selected in this chapter from among the venerable monuments of our ancestors, so absolutely [197] antiquated as to be out of *force*, though they are certainly out of *use*: there being, it must be owned, but a very few instances for more than a century past of prosecuting any real action for land by writ of *entry*, *assize*, *formedon*, writ of *right*, or otherwise. The forms are indeed preserved in the practice of common recoveries; but they are forms and nothing else; for which the very clerks that pass them are seldom capable to assign the reason. But the title of lands is now usually tried upon actions of *ejectment* or *trespass*.

1769

CHAPTER THE ELEVENTH.

OF DISPOSSESSION, OR OUSTER, OF CHATTELS REAL.

§ 257. Ouster of chattels real.—Having in the preceding chapter considered with some attention the several species of injury by dispossession or ouster of the *freehold*, together with the regular and well-connected scheme of remedies by actions real, which are given to the subject by the common law, either to recover the possession only, or else to recover at once the possession, and also to establish the right of property; the method which I there marked out leads me next to consider injuries by ouster, or dispossession, of *chattels real;* that is to say, by amoving the possession of the tenant either from an estate by statute merchant, statute staple, or *elegit* (he has chosen): or from an estate for years.

§ 258. 1. Ouster from estates held by statute or elegit.—Ouster, or amotion of possession, from estates held by either statute or *elegit*, is only liable to happen by a species of disseisin, or turning out of the legal proprietor, before his estate is determined by raising the sum for which it is given him in pledge. And for such ouster, though the estate be merely a chattel interest, the owner shall have the same remedy as for an injury to a freehold; *viz.*, by assize of *novel disseisin.*[a] But this depends upon the several statutes, which [199] create these respective interests,[b] and which expressly provide and allow this remedy in case of dispossession. Upon which account it is that Sir Edward Coke observes,[c] that these tenants are said to hold their estates *ut liberum tenementum* (as a freehold), until their debts be paid: because by the statutes they shall have an assize, as tenants of the freehold shall have; and in that respect they have the similitude of a freehold.[d]

a F. N. B. 178.

b Stat. Westm. 2. 13 Edw. I. c. 18 (Damages, 1285). Stat. de Mercatoribus, 27 Edw. III. c. 19 (1353).

c 1 Inst. 43.

d See Book II. c. 10.

§ 259. 2. Ouster from an estate for years.—As for ouster, or emotion of possession, from an estate for years; this happens only by a like kind of disseisin, ejection or turning out, of the tenant from the occupation of the land during the continuance of his term. For this injury the law has provided him with two remedies, according to the circumstances and situation of the wrongdoer: the writ of *ejectione firmæ;* which lies against anyone, the lessor, reversioner, remainderman or any stranger, who is himself the wrongdoer and has committed the injury complained of, and the writ of *quare ejecit infra terminum* (why he hath ejected within the term); which lies not against the wrongdoer or ejector himself, but his feoffee or other person claiming under him.[1] These are mixed actions, somewhat between real and personal; for therein are two things recovered, as well restitution of the term of years, as damages for the ouster or wrong.

§ 260. a. Writ of ejectione firmæ: ejectment.—A writ, then, of *ejectione firmæ,* or action of trespass in *ejectment,* lieth where lands or tenements are let for a term of years; and afterwards the lessor, reversioner, remainderman or any stranger, doth eject or oust the lessee of his term.[e] In this case he shall have his writ of *ejection* to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired and ejecting him.[f] And by this writ the plaintiff shall recover back his term, or the remainder of it, with damages.

[200] Since the disuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements. It may not, therefore, be improper to delineate, with some

[e] F. N. B. 220.

[f] Appendix, No. II, § 1, *post.*

---

1 "This distinction is not warranted by the authorities, and the commentator's position is not sustained by the form of the writ *quare ejecit infra terminum,* which alleges an ejectment *by the defendant.* The entry and wrongful act of the defendant created the cause of action against him, not any act of his lessor. It would be extraordinary if an alienee of a wrongdoer was liable in damages for the torts committed by his alienor. Damages always constituted a part of the recovery, and when the term had expired, the only recovery is *quare ejecit.*" Sedgwick & Wait, Ejectment, 3 Sel. Essays, in Anglo-Am. Leg. Hist., 621.

degree of minuteness, its history, the manner of its process, and the principles whereon it is grounded.

§ 261. (1) History of writ of ejectione firmæ.—We have before seen[g] that the writ of covenant, for breach of the contract contained in the lease for years, was anciently the only specific remedy 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[h] to that of the lessor, or by a grantee of the reversion (who might at any time by a common recovery have destroyed the term[1]), though the lessee might still maintain an action of covenant against the lessor, for nonperformance of his contract or lease, yet he could not by any means recover the term itself. If the ouster was committed by a mere stranger, without any title to the land, the lessor might indeed by a real action recover possession of the freehold, but the lessee had no other remedy against the ejector but in damages,[2] by a writ of *ejectione firmæ*, for the

g See pag. 156.
h F. N. B. 145.
1 See Book II. c. 9.

---

2 **Termor's remedy for disseisin.**—I have quoted in note 3 to Book II, chapter 9, Bracton's explicit statement to the contrary, and his account of the writ *de termino qui nondum præteriit* as introduced in his own time for the very purpose of sustaining the lessee's term against purchasers as well as the original lessor. Blackstone himself added a reference to this passage in his seventh edition (see note *k*, page *200); although he left the text unaltered, with the statement that such a remedy dates only from the reign of Edward IV. The same statement is made by Fitzherbert, and has been followed by other writers ever since his time.

How are the two facts to be reconciled? I see no way of doing this but to suppose that after Bracton's time this remedy, which put the termor almost on the same footing with the freeholder (as he himself says), in some way disappeared from use, and a long interval followed in which the termor's estate was really as weak and defenseless as the modern writers assert it to have been, until the revival of the remedy for recovery of the term itself, as stated in the text; and that after this had occurred, the original existence of such a remedy in Bracton's time was forgotten altogether.

This disappearance of the termor's remedy must have taken place (if at all), about the time when the doctrine of *seisin* was taking the form in which Littleton, Coke, and subsequent writers have made it familiar to us; i. e., when

trespass committed in ejecting him from his farm.[k] But afterwards, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately 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 species of remedy not warranted by the original writ nor prayed by the declaration (which are [201] calculated for damages merely, and are silent as to any restitution), *viz.*, a judgment to recover the term, and a writ of possession thereupon. This method seems to have been settled as early as the reign of Edward IV;[m] though it hath been said[n] to have first begun under

k P. 6 Rich. II. *Ejectione firmæ n'est que un action de trespass en son nature, et le plaintiff ne recovera son terme que est a venir, nient plus que en trespass home recovera damages pur trespass nient fait, mes a feser; mes il convient a suer par action de covenant al comen law a recoverer son terme: quod tota curia concessit. Et per* Belknap, *la comen ley est, lou home est ouste de son terme par estranger, il avera ejectione firmæ versus cesty que luy ouste; et sil soit ouste par son lessor, briefe de covenant; et si par lessee ou grantee de reversion briefe de covenant versus son lessor, et countera especial count, etc.* (A writ of *ejectione firmæ* is in its nature merely an action of trespass, and the plaintiff shall only recover that part of the term which is unexpired, the same as in trespass, a man shall recover no damages for a trespass not committed but to be committed. But to recover his term he must sue by an action of covenant at common law; to which the whole court assented. And per Belknap, where a man is ousted from his term by a stranger, the common law is, that he shall have a writ of *ejectione firmæ* against him who ousted him; and if he be ousted by his lessor, a writ of covenant; and if by the lessee, or grantee of the reversion, a writ of covenant against his lessor, and he shall count a special count, etc.) (Fitz. Abr. t. Eject. Firm. 2.) See Bract. l. 4. tr. 1. c. 36.

m 7 Edw. IV. 6 (1467). Per Fairfax; *si home port ejectione firmæ le plaintiff recovera son terme qui est arere, sibien come in quare ejecit infra terminum; et, si nul soit arrere, donques tout in damages* (if a plaintiff bring a writ of *ejectione firmæ* he shall recover the remainder of his term as well as in a *quare ejecit infra terminum*, and, if it be all run out, he shall recover the whole in damages). (Bro. Abr. t. Quare Ejecit Infra Terminum. 6.)

n F. N. B. 220.

---

seisin had become a strictly technical term, confined to the possession of the freeholder, instead of being loosely used for possession generally, as it certainly was down to Bracton's time. (See note 3 to Book II, c. 9, at page *142.) This would of course lead to a stricter line of division between the freehold and the term, and have an unfavorable influence on the use of writs for the term which seemed appropriate to freehold.—HAMMOND.

Henry VII, because it probably was then first applied to its present principal use, that of trying the title to the land.[3]

§ 262. (2) Requisites of action of ejectment.—The better to apprehend the contrivance, whereby this end is effected, we must recollect that the remedy by ejectment is in its original an action brought by one who hath 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 is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. For it would be an offense, called in our law *maintenance* (of which in the next book), to convey a title to another, when the grantor is not in possession of the land: and indeed it was doubted at first whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance.[o] When, therefore, a person, who hath right of entry into lands, determines to acquire that possession, which is wrongfully withheld by the present tenant, he makes (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, seals and delivers a lease for years to some third person or lessee: and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land till the prior tenant, or he who had the previous possession, enters thereon afresh and

o 1 Ch. Rep. Append. 39.

---

3 The real and mixed actions given by the common law to freeholders were abolished in 1833. But for more than two centuries previously it had been usual to try the title to freehold land in the action of ejectment. This was properly the leaseholder's remedy for dispossession: but it was extended to freeholds by means of the fiction of a lease, which the defendant was by rule of court prevented from disputing. In 1852 the old proceedings in ejectment, including the fiction of a lease, were abolished, and a simpler form of action was substituted, enabling any person, whether freeholder, copyholder, or leaseholder, to recover directly the possession of land, if entitled thereto. Since the Judicature Acts began in 1875, this action has been termed an action for the recovery of land. 3 Bl. Comm. 200–206, Stats. 3 & 4 Will. IV, c. 27, sec. 36; 15 & 16 Vict., c. 76, secs. 168–221.—WILLIAMS, Real Prop. (21st ed.), 65 n.

custs him; or till some other person (either by accident or by agreement beforehand) comes upon the land, and turns him [202] out or ejects him. For this injury the lessee is 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 is brought against such a casual ejector as is before mentioned, and not against the very tenant in possession, the court will not suffer the tenant to lose his possession without any opportunity to defend it. Wherefore it is a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession (if any there be) and making him a defendant if he pleases. And, in order to maintain the action, the plaintiff must, in case of any defense, make out four points before the court; *viz.*, *title, lease, entry,* and *ouster*. First, he must show a good *title* in his lessor, which brings the matter of right entirely before the court; then, that the lessor, being seised or possessed by virtue of such title, did make him the *lease* for the present term; thirdly, that he, the lessee, or plaintiff, did *enter* or take possession in consequence of such lease; and then, lastly, that the defendant *ousted* or ejected him. Whereupon he shall have judgment to recover his term and damages; and shall, in consequence, have a *writ of possession,* which the sheriff is to execute by delivering him the undisturbed and peaceable possession of his term.

§ 263. (3) Use of fictions in ejectment.—This is the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and incidentally before the court, in order to show the injury done to the lessee by this ouster. This method must be still continued in due form and strictness, save only as to the notice of the tenant, whenever the possession is vacant, or there is no actual occupant of the premises; and also in some other cases. 'But, as much trouble and formality were found to attend to the actual making of the *lease, entry* and *ouster*, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented somewhat more than a century ago, by the Lord Chief Justice Rolle,[p] who then sat in the court of *upper* bench, so called dur-

[p] Styl. Pract. Reg. 108. (edit. 1657.)

ing the exile of King Charles the [203] Second. This new method entirely depends upon a string of legal fictions: no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title.[4] To this end, in the proceedings[q] a lease for a term of years is stated to have been made, by him who claims title, to the plaintiff who brings the action; as by John Rogers to Richard Smith, which plaintiff ought to be some real person, and not merely an ideal fictitious one who hath no existence as is frequently though unwarrantably practiced:[r] it is also stated that Smith, the lessee, entered; and that the defendant William Stiles, who is called the *casual ejector*, ousted him; for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration,[s] Stiles, the casual ejector, or defendant, sends a written notice to the tenant in possession of the lands, as George Saunders, informing him of the action brought by Richard Smith, and transmitting him a copy of the declaration; withal assuring him, that he, Stiles, the defendant, has no title at all to the premises, and shall make no defense, and therefore advising the tenant to appear in court and defend his own title; otherwise he, the casual ejector, will suffer judgment to be had against him, and thereby the actual tenant, Saunders, will inevitably be turned out of possession.[ss] On receipt of this friendly caution, if the tenant in possession does not within a limited time apply to the court to be admitted a defendant in the stead of Stiles, he is supposed to have no right at all; and, upon judgment being had against Stiles, the casual ejector, Saunders, the real tenant, will be turned out of possession by the sheriff.

But, if the tenant in possession applies to be made a defendant, it is allowed him upon this condition: that he enter into a rule

q Appendix, No. II, §§ 1, 2, *post.*
r 6 Mod. 309.
s Appendix, No. II, § 2, *post.*
ss *Ibid.*

4 "The introduction of imaginary or fictitious persons as parties followed, and was finally adopted as the universal practice, though reprobated by Blackstone, chiefly on the trivial ground that the defendant could not collect his costs from an imaginary person. This objection was overcome by framing the consent rule so that in the event of judgment for defendant the plaintiff's lessor should pay the costs." Sedgwick & Wait, Ejectment, 3 Sel. Essays in Anglo-Am. Leg. Hist., 627.

of court to confess,[t] at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action; *viz.*, the *lease* of Rogers the lessor, the *entry* of Smith, [204] the plaintiff, and his *ouster* by Saunders himself, now made the defendant instead of Stiles: which requisites, as they are wholly fictitious, should the defendant put the plaintiff to prove, he must of course be nonsuited for want of evidence; but by such stipulated confession of *lease, entry* and *ouster*, the trial will now stand upon the merits of the *title* only.

§ 264. (4) The real issue.—This done, the declaration is altered by inserting the name of George Saunders instead of William Stiles, and the cause goes down to trial under the name of Smith (the plaintiff), on the demise of Rogers (the lessor), against Saunders, the new defendant. And therein the lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for Richard Smith, the nominal plaintiff, who by this trial has proved the right of John Rogers, his supposed lessor.

§ 265. (5) Protection of real parties.—Yet, to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by statute 11 George II, c. 19 (Distress for Rent, 1737), on pain of forfeiting three years' rent, to give notice to their landlords, when served with any declaration in ejectment: and any landlord may by leave of the court be made a codefendant to the action; which indeed he had a right to demand, long before the provision of this statute:[u] in like manner as (previous to the statute of Westm. II, c. 3) if in a real action the tenant of the freehold made default, the remainderman or reversioner had a right to come in and defend the possession; lest, if judgment were had against the tenant; the estate of those behind should be turned to a naked right.[w] But if the new defendant fails to appear at the trial, and to confess lease, entry and ouster,

[t] Appendix, No. II, § 3, *post*.
[u] Styl. Pract. Reg. 108. III. 265. 7 Mod. 70. Salk. 257. Burr. 1301.
[w] Bracton. l. 5. c. 10. § 14.

the plaintiff Smith must indeed be there nonsuited, for want of proving those requisites; but judgment will in the end be entered against the casual ejector Stiles; for the condition on which Saunders was admitted a defendant is broken, and therefore the plaintiff is put again in the [205] same situation as if he never had appeared at all; the consequence of which (we have seen) would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out Saunders and delivered possession to Smith. The same process, therefore, as would have been had provided no conditional rule had been ever made. must now be pursued as soon as the condition is broken. But execution shall be stayed, if any landlord after the default of his tenant applies to be made a defendant, and enters into the usual rule to confess lease, entry and ouster.[x]

§ 266. (6) Damages.—The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) very small and inadequate; amounting commonly to one shilling or some other trivial sum. In order, therefore, to complete the remedy, when the possession has been long detained from him that has right, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession has wrongfully received. Which action may be brought in the name of either the nominal plaintiff in the ejectment or his lessor, against the tenant in possession: whether he be made party to the ejectment or suffers judgment to go by default.[y]

§ 267. (7) Utility of ejectment.—Such is the modern way of obliquely bringing in question the title to lands and tenements, in order to try it in this collateral manner; a method which is now universally adopted in almost every case. It is founded on the same principle as the ancient writs of assize, being calculated to try the mere *possessory* title to an estate; and hath succeeded to those real actions, as being infinitely more convenient for attaining

x Stat. 11 Geo. II. c. 19 (Distress for Rent, 1737).

y 4 Burr. 668.

the end of justice: because the form of the proceeding being entirely fictitious, it is wholly in the power of the court to direct the application of that fiction, so as to prevent fraud and chicane, and eviscerate the very truth of the title. The writ of ejectment and its nominal parties (as was resolved by all the [206] judges[z]) are "judicially to be considered as the fictitious form of an action, really brought by the lessor of the plaintiff against the tenant in possession: invented, under the control and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either side."

§ 268. (8) Where ejectment not available.—But a writ of ejectment is not an adequate means to try the title of all estates; for on those things, whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Therefore, an ejectment will not lie of an advowson, a rent, a common or other incorporeal hereditament;[a] except for tithes in the hands of lay appropriators, by the express purview of statute 32 Henry VIII, c. 7 (Ecclesiastical Court, 1540), which doctrine hath since been extended by analogy to tithes in the hands of the clergy;[b] nor will it lie in such cases where the entry of him that hath right is taken away by descent, discontinuance, twenty years' dispossession or otherwise.

§ 269. (9) Ejectment against tenants in arrears.—This action of ejectment is, however, rendered a very easy and expeditious remedy to landlords whose tenants are in arrear, by statute 4 George II, c. 28 (Landlord and Tenant, 1730), which enacts, that every landlord who hath by his lease a right of re-entry in case of nonpayment of rent, when half a year's rent is due, and no sufficient distress is to be had, may serve a declaration in ejectment on his tenant, or fix the same upon some notorious part of the premises, which shall be valid, without any formal re-entry or previous demand of rent. And a recovery in such ejectment shall

z Mich. 32 Geo. II (1758). 4 Burr. 668.
a Brownl. 129. Cro. Car. 492. Stra. 54.
b Cro. Car. 301. 2 Lord Raym. 789.

be final and conclusive, both in law and equity, unless the rent and all costs be paid or tendered within six calendar months afterwards.

§ 270. **b. Writ of quare ejecit infra terminum.**—The writ of *quare ejecit infra terminum* (why did he eject within the term) lieth, by the ancient law, where the wrongdoer or ejector is not himself in [207] possession of the lands, but another who claims under him. As where a man leaseth lands to another for years, and, after, the lessor or reversioner entereth, and maketh a feoffment in fee, or for life, of the same lands to a stranger: now the lessee cannot bring a writ of *ejectione firmæ* or ejectment against the feoffee; because he did not eject him, but the reversioner: neither can he have any such action to recover his term against the reversioner, who did oust him; because he is not now in possession. And upon that account this writ was devised, upon the equity of the statute Westm. II, c. 24, as in a case where no adequate remedy was already provided.[o] And the action is brought against the feoffee for deforcing or keeping out, the original lessee during the continuance of his term: and herein, as in the ejectment, the plaintiff shall recover so much of the term as remains, and also damages for that portion of it whereof he has been unjustly deprived. But since the introduction of fictitious ousters, whereby the title may be tried against any tenant in possession (by what means soever he acquired it), this action is fallen into disuse.

[o] F. N. B. 198.

CHAPTER THE TWELFTH. [208]

OF TRESPASS.

§ 271. Injuries to real property continued.—In the two preceding chapters we have considered such injuries to real property as consisted in an ouster, or amotion of the possession. Those which remain to be discussed are such as may be offered to a man's real property without any amotion from it.

§ 272. II. Trespass.—The second species, therefore, of real injuries, or wrongs that affect a man's lands, tenements or hereditaments, is that of *trespass.*

§ 273. 1. Trespass, in general.—Trespass, in its largest and most extensive sense, signifies any transgression or offense against the law of nature, of society, or of the country in which we live; whether it relates to a man's person or his property. Therefore, beating another is a trespass; for which (as we have formerly seen) an action of trespass *vi et armis* in assault and battery will lie; taking or detaining a man's goods are respectively trespasses; for which an action of trespass *vi et armis,* or on the case in trover and conversion, is given by the law; so, also, nonperformance of promises or undertakings is a trespass, upon which an action of trespass on the case in *assumpsit* is grounded: and, in general, any misfeasance, or act of one man whereby another is injuriously treated or damnified, is a transgression, or trespass in its largest sense;* for which, we have already seen,[a] that, whenever the act itself is directly and immediately injurious to the person or property of another, [209] and therefore necessarily accompanied with some force, an action of trespass *vi et armis* will lie; but, if the injury is only consequential, a special action of trespass *on the case* may be brought.

* In this sense as equivalent to "private wrong," or at least to "tort," the term "trespass" is now seldom, if ever, used except in the Lord's Prayer; but only in that of "wrong with force."—HAMMOND.

[a] See pag. 123.

§ 274. **2. Trespass quare clausum fregit.**—But in the limited and confined sense, in which we are at present to consider it, it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of *meum* and *tuum* (mine and thine) or property, in lands being once established, it follows, as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry, therefore, thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression. The Roman laws seem to have made a direct prohibition necessary, in order to constitute this injury: "*qui alienum fundum ingreditur, potest a domino, si is prævideriit, prohiberi ne ingrediatur* (he who enters on another's land may be resisted by the owner if he shall have previously forbidden it)."[b] But the law of England, justly considering that much inconvenience may happen to the owner before he has an opportunity to forbid the entry, has carried the point much farther, and has treated every entry upon another's lands (unless by the owner's lease, or in some very particular cases), as an injury or wrong, for satisfaction of which an action of trespass will lie; but determines the *quantum* of that satisfaction, by considering how far the offense was willful or inadvertent, and by estimating the value of the actual damages sustained.

§ 275. **a. What constitutes "breaking the close."**—Every unwarrantable entry on another's soil the law entitles a trespass by *breaking his close;* the words of the writ of trespass commanding the defendant to show cause, *quare clausum querentis fregit* (wherefore he broke the plaintiff's close). For every man's land is, in the eye of the law, inclosed and set apart from his neighbors: 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, [210] existing only in the 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

[b] Inst. 2. 1. 12.

still the words of the writ itself specify one general damage, *viz.*, the treading down and bruising his herbage.[c]

§ 276. **b. Who may maintain trespass.**—One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass; or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land.[d 1] Thus, if a meadow be divided annually among the 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:[e] for they have an exclusive interest and freehold therein for the time. But before entry and actual possession, one cannot maintain an action of trespass, though he hath the freehold in law.[f] And therefore an heir before entry cannot have this action against an abator; though a disseisee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seised of the land: but he cannot have it for any act done after the disseisin, until he hath gained possession by re-entry, and then he may well maintain it for the intermediate damage done; for after his re-entry the law, by a kind of *jus postliminii* (right of restoration to former condition) supposes the freehold to have all along continued in him.[g] Neither, by the common law, in case of an intrusion or deforcement, could the party kept out of possession sue the wrongdoer by a mode of redress, which was calculated merely for injuries committed against the land while *in the possession* of the owner. But by the statute 6 Ann., c. 18 (1706), if a guardian or trustee for any infant, a husband seised *jure uxoris* (in the right of his wife), or a person having any estate or interest determinable upon a life or lives, shall, after the determination [211] of their

c F. N. B. 87, 88.
d Dyer. 285. 2 Roll. Abr. 549.
e Cro. Eliz. 421.
f 2 Roll. Abr. 553.
g 11 Rep. 5.

1 Mere possession is sufficient against a wrongdoer (State v. Blackwell, 9 Ala. 79, 82); or a stranger (Witt v. St. Paul & N. P. Ry. Co., 38 Minn. 122, 35 N. W. 862; Boyington v. Squires, 71 Wis. 276, 37 N. W. 227). The plaintiff must have possession (Kempton v. Cook, 4 Pick. (Mass.) 305); though it may be by an agent (Davis v. Clancy, 3 McCord (S. C.), 422).

respective interests, hold over and continue in possession of the lands or tenements, they are now adjudged to be trespassers; and the reversioner or remainderman may once in every year, by motion to the court of chancery, procure the *cestuy que vie* to be produced by the tenant of the land, or may enter thereon in case of his refusal or willful neglect. And, by the statutes of 4 George II, c. 28 (Landlord and Tenant, 1730), and 11 George II, c. 19 (Distress for Rent, 1737), in case after the determination of any term of life, lives or years, any person shall willfully hold over the same, the lessor is entitled to recover by action of debt, either at the rate of double the annual value of the premises, in case he himself hath demanded and given notice in writing, to deliver the possession; or else double the usual rent, in case the notice of quitting proceeds from any tenant having power to determine his lease, and he afterwards neglects to carry it into due execution.

§ 277. **c. Liability for trespass.**—A man is answerable for not only his own trespass, but 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 neighbor's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages.[2] And the

[2] **Responsibility for negligence.**—We have now traced down to modern times the doctrines of responsibility in the typical classes of acts found expressly regulated in the primitive law; and everywhere there has been more or less rationalization of the rules. In some classes (e. g., keeping cattle) the duty is made an absolute one for all in similar situations; in others the question of culpability is reopened as to due care in each case on its circumstances; but in all there has come to be assumed some degree of fault sufficient to amount to culpability. There are, however, numbers of acts not falling under the classes above traced; and the question arises, What has been, historically, the canon of responsibility with reference to these? When did the courts in these cases begin to base an action upon negligence alone, or upon some other test? We are here brought to the subject of the history of the action on the case for negligence, so called. But this is an inquiry too complex to be here taken up; a summary reference to its probable history must here suffice. Looking, then, at these sundry injuries (other than the above classes) as the courts of several centuries ago must be imagined to have approached them, we find that they would probably have presented themselves in one of three aspects: (1) There was as early as the 1600's, and probably earlier, a principle that one who did an unlawful act (or one who committed a trespass) was liable for

law gives the party injured a double remedy in this case; by permitting him to distrain the cattle thus *damage feasant*, or doing damage, till the owner shall make him satisfaction; or else by leaving him to the common remedy *in foro contentioso* (in a court of litigation), by action. And the action that lies in either of these cases, of trespass committed upon another's land either by a man himself or his cattle, is the action of trespass *vi et armis;* whereby a man is called upon to answer, *quare vi et armis clausum ipsius A apud B fregit, et blada ipsius A ad valentiam centum solidorum ibidem nuper crescentia cum quibusdam averiis depastus fuit, conculcavit, et consumpsit*, etc. (wherefore he broke the close of the said A at B by force and arms, razed, trampled on, and consumed the grass of the said A lately growing thereon, with certain beasts to the value of twenty shillings, etc.);[h] for the law always couples the idea of force with that of intrusion upon the property of another. And herein, if any unwarrantable act of the [212] defendant or his beasts in coming upon the land be proved, it is an

[h] Registr. 94.

---

all the consequential damage, when properly alleged as special damage. (2) The principle *sic utere tuo ut alienum non lædas* was early familiar to the judges, and can clearly be traced even where it is given an English garb. This was generally employed to cover the case of an injury caused by acts done on one's own land, but it was sometimes extended to cover the case of injuries by cattle. (3) For harm caused by a mere nonfeasance, including many cases which we now subsume under negligence, probably no action would lie. The word *negligentia*, as used in earlier times, meant apparently (as has been seen in the action for fire) merely "failure to do" a duty already determined to exist; thus, though the courts constantly said that "a man is bound to keep his cattle in at his peril," he is sometimes said to be held for "*defaut de bon garde*,"—meaning, not negligent keeping, but merely failure to keep as bound; and the misapprehension of this was probably the source of Blackstone's well-known misstatement that the action was for "negligently keeping" his cattle. It seems, then, that the action on the case based on a mere negligent doing was of little or no consequence until the present century, and that it then came about partly through the principle of consequential damage noted above, and partly through the growing application of the test of negligence in trespass, as already indicated. But this suggestion is merely one made in passing; the essential point to note is that certain of the cases we have studied historically had become, in the present century, amenable to a generic test of negligence, or due care under the circumstances, which had somehow come to be applied to other cases also.—WIGMORE, Responsibility for Tortious Acts, 7 Harv. Law Rev. 452; 3 Select Essays in Anglo-Am. Legal Hist. 517.

act of trespass for which the plaintiff must recover some damages; such, however, as the jury shall think proper to assess.

In trespasses of a permanent nature, where the injury is continually renewed (as by spoiling or consuming the herbage with the defendant's cattle), the declaration may allege the injury to have been committed by *continuation* from one given day to another (which is called laying the action with a *continuando*—by continuation), and the plaintiff shall not be compelled to bring separate actions for every day's separate offense.[i] But where the trespass is by one or several acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a *continuando;* yet if there be repeated acts of trespass committed (as cutting down a certain number of trees), they may be laid to be done, not continually, but at divers days and times within a given period.[k]

§ 278. d. Justifiable trespass.—In some cases trespass is justifiable; or, rather, entry, on another's land or house shall not in those cases be accounted trespass: as if a man comes there to demand or to 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 possesses the keeping of such inn or public house, he thereby gives a general license to any person to enter his doors. So a landlord may justify entering to distrain for rent; a commoner to attend his cattle, commoning on another's land; and a reversioner, to see if any waste be committed on the estate; for the apparent necessity of the thing.[l] Also it hath been said that by the common law and custom of England the poor are allowed to enter and glean upon another's ground after the harvest, without [213] being guilty of trespass:[m 3] which

[i] 2 Roll. Abr. 545. Lord Raym. 240.

[k] Salk. 638, 639. Lord Raym. 823. 7 Mod. 152.

[l] 8 Rep. 146.

[m] Gilb. Ev. 253. Trials per Pais. c. 15. pag. 438.

---

3 **Gleaning and hunting.**—"The poor are allowed to enter and glean after harvest." "In like manner the common law warrants the hunting of ravenous beasts."

Both these common-law rights have disappeared entirely from American law; not by legislation, or even by a change of decisions, but by that entire

humane provision seems borrowed from the mosaical law.[n] In like manner the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land; because the destroying such creatures is said to be profitable to the public.[o]

§ 279. (1) Trespass ab initio.—But in cases where a man misdemeans himself, or makes an ill use of the authority with which the law entrusts him, he shall be accounted a trespasser *ab initio:*[p] as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary to inclinations of the owner; this wrongful act shall affect and have relation back even to his first entry, and makes the whole a trespass.[q 4] But a bare

n Levit. c. 19. v. 9. & c. 23. v. 22. Deut. c. 24. v. 19, etc.

o Cro. Jac. 321.

p Finch. L. 47. Cro. Jac. 148.

q 2 Roll. Abr. 561.

---

change in the convictions and circumstances of the people out of which all rules of the common law grow. I suppose that no right to glean as a legal right has ever been claimed in this country, and that no effort to hunt such beasts has ever been withstood: yet the *right* in both cases has equally disappeared.—HAMMOND.

4 **Trespass ab initio.**—"The elements that must in fact concur to make one liable as a trespasser *ab initio* are these: (1) there must be an act which upon general principle is a trespass; (2) the act must be privileged in law; and (3) there must be an abuse of that privilege such that the law will withdraw its protection." 1 Street, Foundations of Legal Liability, 48.

Mr. Justice Holmes has expressed his disapproval of the survival of what he regards as an antiquated doctrine: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. I am thinking of the technical rule as to trespass *ab initio*, as it is called, which I attempted to explain in a recent Massachusetts case (Commonwealth v. Rubin, 165 Mass. 453, 43 N. E. 200)." The Path of the Law, 10 Harv. Law Rev. 457, at 469.

The classical case on the rule of trespass *ab initio* is the Six Carpenters' Case, 8 Coke, 146, cited by Blackstone. Some modern instances where one has been held liable as a trespasser *ab initio* are the following: An officer who, after lawful attachment, puts an intoxicated man in as keeper of the attached property (Malcolm v. Spoor, 12 Met. (Mass.) 279, 46 Am. Dec. 675); one who, after lawfully cutting grass in a highway, unlawfully feeds it to his

nonfeasance, as not paying for the wine he calls for, will not make him a trespasser; for this is only a breach of contract, for which the taverner shall have an action of debt or *assumpsit* against him.[r] So if a landlord distrained for rent, and willfully killed the distress, this by the common law made him a trespasser *ab initio;*[s] and so, indeed, would any other irregularity have done, till the statute 11 George II, c. 19 (Distress for Rent, 1737), which enacts, that no subsequent irregularity of the landlord shall make his first entry a trespass; but the party injured shall have a special action of trespass or on the case for the real specific injury sustained, unless tender of amends hath been made. But still, if a reversioner, who enters on pretense of seeing waste, breaks the house, or stays there all night, or if the commoner who comes to tend his cattle, cuts down a tree, in these and similar cases the law judges that he entered for this unlawful purpose, and therefore, as the act which demonstrates such his purpose, is a trespass, he shall be esteemed a trespasser *ab initio.*[t] So, also, in the case of hunting the fox or the badger, a man cannot justify breaking the soil, and digging him out of his earth: for though [214] the law warrants the hunting of such noxious animals for the public good, yet it is held[u] that such things must be done in an ordinary and usual manner; therefore, as there is an ordinary course to kill them, *viz.*, by hunting, the court held that the digging for them was unlawful.

§ 280. (2) Defense of freehold.—A man may also justify in an action of trespass, on account of the freehold and right of entry

r 8 Rep. 147.
s Finch. L. 47.
t 8 Rep. 146.
u Cro. Jac. 321.

---

horse (Cole v. Drew, 44 Vt. 49, 8 Am. Rep. 363); an officer, and also a creditor, who works a horse seized under an attachment (Lamb v. Day, 8 Vt. 407, 30 Am. Dec. 479); one failing to feed and water cattle after lawfully impounding them (Adams v. Adams, 13 Pick. (Mass.) 384); one selling the whole of a chattel under a process which was against one only of several co-owners of the chattel (Smyth v. Tankersley, 20 Ala. 212, 56 Am. Dec. 193). Where the authority is from the plaintiff, as a license to enter a house, and not under an authority conferred by law, the abuse of the authority or license does not make one a trespasser *ab initio* (Allen v. Crofoot, 5 Wend. (N. Y.) 506. See 2 Mod. Am. Law, 70).

being in himself; and this defense brings the title of the estate in question. This is therefore one of the ways devised, since the disuse of real actions, to try the property of estates; though it is not so usual as that by ejectment, because that, being now a mixed action, not only gives damages for the ejection, but also possession of the land: whereas in trespass, which is merely a personal suit, the right can only be ascertained, but no possession delivered; nothing being recovered but damages for the wrong committed.

§ 281. e. Damages.—In order to prevent trifling and vexatious actions of trespass, as well as other personal actions, it is (*inter alia*—among other things) enacted by statute 43 Elizabeth, c. 6 (Frivolous Suits, 1601), and 22 & 23 Car. II, c. 9, § 136 (Duties on Law Proceedings, 1670), that where the jury, who try an action of trespass, give less damages than forty shillings,* the plaintiff shall be allowed no more costs than damages; unless the judge shall certify under his hand that the freehold or title of the land came chiefly in question. But this rule now admits of two exceptions more, which have been made by subsequent statutes. One is by statute 8 & 9 W. III, c. 11 (Vexatious Actions, 1696), which enacts that in all actions of trespass, wherein it shall appear that the trespass was willful and malicious, and it be so certified by the judge, the plaintiff shall recover full costs. Every trespass is *willful,* where the defendant has notice, and is especially forewarned not to come on the land; as every trespass is *malicious,* though the damage may not amount to forty shillings, where the intent of the defendant plainly appears to [215] be to harass and distress the plaintiff. The other exception is by statute 4 & 5 W. & M., c. 23 (Game, 1692), which gives full costs against any inferior tradesman, apprentice or other dissolute person, who is convicted of a trespass in hawking, hunting, fishing or fowling upon another's land. Upon this statute it has been adjudged that if a person be an inferior tradesman, as a clothier, for instance, it matters not what qualification he may have in point of estate; but, if he be guilty of such trespass, he shall be liable to pay full costs.[w]

[w] Lord Raym. 149.

[216] # CHAPTER THE THIRTEENTH.

OF NUISANCE.

§ 282. Injuries to real property continued.—A third species of real injuries to a man's lands and tenements is by *nuisance.*

§ 283. III. Nuisance.—Nuisance, *nocumentum*, or annoyance, signifies anything that worketh hurt, inconvenience or damage. And nuisances are of two kinds; *public* or *common* nuisances, which affect the public, and are an annoyance to *all* the king's subjects; for which reason we must refer them to the class of public wrongs, or crimes and misdemeanors: 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.[a] [1] We will therefore, first, mark out the several kinds of nuisances, and then their respective remedies.

[a] Finch. L. 188.

---

[1] **Nature of nuisance.**—At the start it is well to emphasize the fact that the element common to all civil nuisances is found in the circumstance that the wrong is done in respect of some right incident to realty. Blackstone says that the nuisance is a species of real injury to a man's lands and tenements. The private nuisance he defines as "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." But taken literally this is not accurate. Nuisance does not convey the idea of injury to the realty itself. It means rather an interference with some right incident to the ownership or possession of realty. The law of nuisance is an extension of the idea of trespass into the field that fringes property. It is associated with those rights of enjoyment which are, or may become, attached to realty. Ownership or rightful possession necessarily involves the right to the full and free enjoyment of the property occupied. It may be observed that the law of nuisance proceeds on a principle which is indicated, but not defined, in the maxim *sic utere tuo ut alienum non lædas.*

It sometimes appears that the nuisance is an injury of a merely personal nature and that it does not involve an interference with any real right whatever. Thus, in Brill v. Flagler (1840), 23 Wend. (N. Y.) 354, it was held that if a neighbor's dog constantly comes upon one's premises, making night hideous with his howls, the nuisance may be abated with a gun. Undoubtedly even a legal mind will ordinarily conceive this situation as furnishing an instance of a wrong purely personal to the householder and his family. But

§ 284. 1. Kinds of nuisances.—In discussing the several kinds of nuisances, we will consider, first, such nuisances as may affect a man's corporeal hereditaments, and then those that may damage such as are incorporeal.

§ 285. a. Nuisances to corporeal hereditaments: (1) Affecting dwellings.—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.[b] Likewise to erect a house or other building so near to mine that it obstructs my ancient [217] lights and windows is a nuisance of a similar nature.[c 2] But in this latter case it is necessary that the windows be *ancient*, that is, have subsisted there time out of mind; otherwise there is no injury done. For he hath as much right to build a new edifice upon his ground as I have upon mine: since every man may do what he pleases upon the upright or perpendicular of his own soil; and it was my folly to build so near another's ground.[d] Also, if a person keeps his hogs, or other noisome animals, so near the house of another, that the stench of them 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.[e] A like injury is, if one's neighbor sets

[b] F. N. B. 184.
[c] 9 Rep. 58.
[d] Cro. Eliz. 118. Salk. 459.
[e] 9 Rep. 58.

---

in such a case as this the wrong is ultimately resolvable into an interference with that right to the undisturbed enjoyment of one's premises which is inseparable from the ownership or possession of realty. And such beyond all question is the diagnosis of every true nuisance.—STREET, 1 Foundations of Legal Liability, 211.

[2] **Ancient lights in America.**—The American decisions on this subject are conflicting, excepting cases where a grant or covenant or an estoppel is relied on. The tendency of the later cases, in most states, is against the doctrine of the text: holding that an easement in light and air cannot be obtained by mere prescription. Keats v. Hugo, 115 Mass. 204, 216, 15 Am. Rep. 80; Randall v. Sanderson, 111 Mass. 114; Morrison v. Marquardt, 24 Iowa, 35, 92 Am. Dec. 444; Mullen v. Stricker, 19 Ohio St. 135, 2 Am. Rep. 379; Stein v. Hauck, 56 Ind. 65, 26 Am. Rep. 10; Parker v. Foote, 19 Wend. (N. Y.) 309; Doyle v. Lord, 64 N. Y. 432, 21 Am. Rep. 629; Johnson v. Oppenheim, 55 N. Y. 280.

up and exercise 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* (so use your property that you do not injure that of another)": this, therefore, is an actionable nuisance.[f] So that the nuisances which affect a man's *dwelling* may be reduced to these three: 1. Overhanging it: which is also a species of trespass, for *cujus est solum ejus est usque ad cœlum* (he who owns the soil has it even to the sky): 2. Stopping ancient lights: and, 3. Corrupting the air with noisome smells: for light and air are two indispensable requisites to every dwelling. 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 an actionable nuisance.[g]

§ 286. **(2) Nuisances to land.**—As to nuisances to one's *lands:* if one erects a smelting-house for lead so near the land of another that the vapor and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance.[h] 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 [218] him to find some other place to do that act where it will be less offensive. So, also, if my neighbor ought to scour a ditch, and does not, whereby my land is overflowed, this is an actionable nuisance.[i]

§ 287. **(3) Nuisances to other corporeal hereditaments.**—With regard to *other* corporeal hereditaments: it is a nuisance to stop or divert water that used to run to another's meadow or mill;[k] to corrupt or poison a watercourse, by erecting a dye-house or a lime-pit for the use of trade, in the upper part of the stream;[l] or, in short, to do any act therein, that in its consequences must necessarily tend to the prejudice of one's neighbor. So closely does the

[f] Cro. Car. 510.
[g] 9 Rep. 58.
[h] 1 Roll. Abr. 89.
[i] Hale on F. N. B. 427.
[k] F. N. B. 184.
[l] 9 Rep. 59. 2 Roll. Abr. 141.

law of England enforce that excellent rule of gospel morality, of "doing to others, as we would they should do unto ourselves."

§ 288. **b. Nuisances to incorporeal hereditaments.**—As to *incorporeal* hereditaments, the law carries itself with the same equity. 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 plowing 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.[m] 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.[n] But in order to make this out to be a nuisance, it is necessary, 1. That my market or fair be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine. For Sir Matthew Hale[o] construes the *dieta*, or reasonable day's journey, mentioned by Bracton,[p] to be twenty miles; as, indeed, it is usually understood not only in our own law,[q] but also in the civil,[r] from which we probably borrowed it. So that if the new market be not within seven miles of the old one, it is no [219] nuisance: for it is held reasonable that every man should have a market within one-third of a day's journey from his own home; that, the day being divided into three parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there. If such market or fair be on the same day with mine, it is *prima facie* a nuisance to mine, and there needs no proof of it, but the law will intend it to be so: but if it be on any other day, it *may* be a nuisance; though whether it *is* so or not, cannot be intended or presumed, but I must make proof of it to the jury. 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 king's subjects; otherwise he may

m F. N. B. 183. 2 Roll. Abr. 140.
n F. N. B. 148. 2 Roll. Abr. 140.
o On F. N. B. 184.
p l. 3. c. 16.
q 2 Inst. 567.
r Ff. 2. 11. 1.

be grievously amerced:[s] it would be therefore extremely hard, if a new ferry were suffered to share his profits, which does not also share his burden. 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 neighborhood or rivalship with another: for by such emulation the public are like to be gainers; and, if the new mill or school occasion a damage to the old one, it is *damnum absque injuria* (damage without legal injury).[t][8]

§ 289. 2. Remedies for nuisance.—Let us next attend to the remedies which the law has given for this injury of nuisance.

[s] 2 Roll. Abr. 140.

[t] Hale on F. N. B. 184.

---

[8] **Nuisances and their remedies.**—"Under this state of facts [namely, proceedings by municipal officers to abate a nuisance], which are admitted on the record by the demurrer to the plea, it may not be unprofitable, by way of illustrating our views, to announce a few principles of law, which we regard as involved in this cause.

"A *nuisance*, in its common acceptation, means, literally, annoyance. In law, its signification is more restricted. According to Blackstone, it means or signifies 'anything that worketh hurt, inconvenience or damage.' See 3 Bl. Comm. 216.

"*Nuisances* are of two kinds: *common* or *public*, and *private*. See Bac. Abr. 146.

"The first class is defined to be such an inconvenience or troublesome offense as annoys the whole community, in general, and not merely some particular person. See 1 Hawk. P. C. 197; 4 Bl. Comm. 166, 167. It is said to be difficult to define what degree of annoyance is necessary to constitute a nuisance. In relation to trades, it seems that when a trade renders the enjoyment of life or property uncomfortable, it becomes a nuisance, for the reason, that the neighborhood have a right to have pure and fresh air. See 1 Burr. 333; 2 Car. & P. 485; 2 Lord Raym. 1163; 1 Str. 686.

"The second class, or private nuisances, is anything done to the hurt or annoyance of the lands, tenements or hereditaments of another. See 3 Bl. Comm. 215; 5 Bac. Abr. 146.

"For a common or public nuisance, the usual remedy at law is by indictment. For a private nuisance, the ordinary remedy at law is case. See 3 Bl. Comm. 13; Staple v. Spring, 10 Mass. 72; Shaw v. Cummiskey, 7 Pick. (Mass.) 76; Hughes v. Mung, 3 Har. & McH. 441.

"Courts of chancery exercise jurisdiction both as to common or public and private nuisances, by restraining persons from setting them up, by inhibiting

§ 290. a. Remedy for public nuisance.—And here 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* the king's subjects, 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 separate actions. For this reason, no person, natural or corporate, can have an action for a public nuisance, or punish it; but only the king in his public capacity [220] of supreme governor, and *paterfamilias* of the kingdom.[u]

§ 291. b. Redress by private persons for public nuisance.—Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance; in which case he shall have a private satisfaction by action. As if, by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer

[u] Vaugh. 341, 342.

---

their continuance, or compelling their abatement. See 2 Story's Eq. sec. 924, p. 260.

"As we have said, both courts of law and courts of equity afford ample redress, and sufficiently prompt remedies in case of nuisances. But it seems the law is not satisfied with these, as affording full protection to the public or citizen, in many cases, for it is generally conceded that any person may abate a public nuisance. See 2 Salk. 458; 5 Bac. Abr. 152; 3 Ib. 498. And it seems that this right extends as well to private as to common or public nuisances. See 5 Bac. Abr., *ubi sup.;* 2 Bouv. Law Dic., §§ 3–2, p. 18; 2 Barn. & C. 311; 3 Dowl. & R. 556.

"A public nuisance may be abated without notice (2 Salk. 458), and so may a private nuisance, which arises by an act of commission. And where the security of lives or property may require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it, an individual would be justified in abating a nuisance from omission without notice. 2 Barn. & C. 311; 3 Dowl. & R. 556, as above.

"As to private nuisances, it has been held that if a man in his own soil erect a thing which is a nuisance to another, the party injured may enter the soil of the other and abate the nuisance, and justify the trespass. See Hodges v. Raymond, 9 Mass. 316; Gleason v. Gary, 4 Conn. 418; Strong v. Benedict, 5 Conn. 210; Woods v. Nashua Mfg. Co., 4 N. H. 527."—HANLY, J., in Harvey v. De Woody, 18 Ark. 252, 258.

any injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action.[w]

§ 292. **c. Remedy by self-help.**—Also, if a man hath abated, or removed, a nuisance which offended him (as we may remember it was stated in the first chapter of this book, that the party injured hath a right to do) in this case he is entitled to no action.[x] For he had choice of two remedies: either without suit, by abating it himself, by his own mere act and authority; or by suit, in which he may both recover damages, and remove it by the aid of the law: but having made his election of one remedy, he is totally precluded from the other.

§ 293. **d. Remedies by suit: (1) Action on the case.**—The remedies by suit are, 1. By action *on the case* for damages; in which the party injured shall only recover a satisfaction for the injury sustained; but cannot thereby remove the nuisance. Indeed, every continuance of a nuisance is held to be a fresh one;[y] and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it. Yet the founders of the law of England did not rely upon probabilities merely, in order to give relief to the injured. They have therefore provided two other actions: the *assize of nuisance* and the writ of *quod permittat prosternere* (that he permit to abate or put down): which not only give the plaintiff satisfaction for his injury past, but also strike at the root and remove the cause itself, the nuisance that occasioned the injury. These two actions, however, can only be brought by the tenant of the freehold; so that a lessee for years is confined to his action upon the case.[z]

§ 294. **(2) Assize of nuisance.**—[221] An *assize of nuisance* is a writ; wherein it is stated that the party injured complains of some particular fact done, *ad nocumentum liberi tenementi sui* (to the damage of his freehold), and therefore commanding the sheriff to summon an assize, that is, a jury, and view the premises, and have them at the next commission of assizes, that justice may

w Co. Litt. 56. 5 Rep. 73.
x 9 Rep. 55.
y 2 Leon. pl. 129. Cro. Eliz. 402.
z Finch. L. 289.

be done therein:[a] and, if the assize is found for the plaintiff, he shall have judgment of two things: 1. To have the nuisance abated; and 2. To recover damages.[b] Formerly, an assize of nuisance only lay against the very wrongdoer himself who levied, or did, the nuisance; and did not lie against any person to whom he had aliened the tenements, whereon the nuisance was situated. This was the immediate reason for making that equitable provision in statute Westm. II, 13 Edward I, c. 24 (1285), for granting a similar writ, *in casu consimili* (in a similar case), where no former precedent was to be found. The statute enacts, that "*de cætero non recedant querentes a curia domini regis, pro eo quod tenementum transfertur de uno in alium* (moreover the complainants shall not be obliged to abandon their action because the tenement is transferred to another)"; and then gives the form of a new writ in this case: which only differs from the old one in this, that, where the assize is brought against the very person only who levied the nuisance, it is said "*quod A* (the wrongdoer) *injuste levavit tale nocumentum* (that A unjustly levied such a nuisance)"; but, where the lands are aliened to another person, the complaint is against both; "*quod A* (the wrongdoer) *et B* (the alienee) *levavcrunt* (that A and B levied)."[c] For every continuation, as was before said, is a fresh nuisance; and therefore the complaint is as well grounded against the alienee, who continues it, as against the alienor, who first levied it.

§ 295. (3) Quod permittat prosternere.—Before this statute, the party injured, upon any alienation of the land wherein the nuisance was set up, was driven to his *quod permittat prosternere;* which is in the nature of a writ of right, and therefore subject to greater delays.[d] This is a writ commanding the defendant to permit the plaintiff to abate, *quod permittat prosternere*, the nuisance complained of; [222] and, unless he so permits, to summon him to appear in court and show cause why he will not.[e] And this writ lies as well *for* the alienee of the party first injured as *against* the alienee of the party first injuring; as hath been determined by all

a F. N. B. 183.
b 9 Rep. 55.
c *Ibid.*
d 2 Inst. 405.
e F. N. B. 124.

the judges.[f] And the plaintiff shall have judgment herein to abate the nuisance, and to recover damages against the defendant.[4]

Both these actions, of *assize of nuisance* and of *quod permittat prosternere*, are now out of use, and have given way to the action on the case; in which, as was before observed, no judgment can be had to abate the nuisance, but only to recover damages. Yet, as therein it is not necessary that the freehold should be in the plaintiff and defendant respectively, as it must be in these real actions, but it is maintainable by one that hath possession only, against another that hath like possession, the process is therefore easier; and the effect will be much the same, unless a man has a very obstinate as well as an ill-natured neighbor, who had rather continue to pay damages than remove his nuisance. For in such a case, recourse must at last be had to the old and sure remedies, which will effectually conquer the defendant's perverseness, by sending the sheriff with his *posse comitatus*, or power of the county, to level it.

[f] 5 Rep. 100, 101.

---

4 Blackstone does not mention the remedy in equity, by an injunction, which is now more usual and effective than any other; especially under the new practice which permits it to be united with a recovery of damages for the wrong already suffered.—HAMMOND.

1798

CHAPTER THE FOURTEENTH. [223]

OF WASTE.

§ 296. Injuries to real property.—The fourth species of injury that may be offered to one's real property is by *waste*, or destruction in lands and tenements.

§ 297. IV. Waste.—What shall be called waste was considered at large in a former volume,[a] as it was a means of forfeiture, and thereby of transferring the property of real estates. I shall therefore here only beg leave to remind the student that waste is a spoil and destruction of the estate, either in houses, woods or lands; by demolishing not the temporary profits only, but the very substance of the thing; thereby rendering it wild and desolate; which the common law expresses very significantly by the word *vastum:*[1] and that this *vastum*, or waste, is either voluntary or permissive; the one by an actual and designed demolition of the lands, woods and houses; the other arising from mere negligence, and want of sufficient care in reparations, fences and the like.* So

* "It may be committed by alteration as well as destruction of any part of a tenement." 53 Wis. 60; 15 Or. 6; 57 Am. Rep. 3.—HAMMOND.

a See Book II, c. 18.

---

1 **Waste and trespass.**—A word may be added concerning the relation between waste and the ordinary trespass upon realty. In point of substance they are very similar torts, for in both damage is done to real property by the direct application of force. The sole difference is that in waste the damage is done by one who has a temporary legal estate, or by one for whose act such person is answerable; while in trespass the damage is done by a stranger. The trespass violates possession. Waste violates property and is committed by one having legal possession. Inasmuch as waste is a wrong of direct violence it would seem not unreasonable to have held in the beginning that the action of trespass could be maintained for waste. But this was never done, trespass being consistently restricted to cases where there is a violation of possession. As a consequence, waste and the trespass upon realty, though they have much in common, have never been associated together, a circumstance which is due solely to one of those caprices in our legal history which give to the common law its wonderful complexity and variety.—STREET, 1 Foundations of Legal Liability, 33.

that my only business is at present to show to whom this waste is an injury; and of course who is entitled to any, and what, remedy by action.

§ 298. 1. Persons injured by waste.—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, without any encumbrance or charge on the premises, he may commit whatever waste his [224] own indiscretion may prompt him to, without being impeachable or accountable for it to anyone. And, though his heir is sure to be the sufferer, yet *nemo est hæres viventis* (no one is heir to the living): no man is certain of succeeding him, as well on account of the uncertainty which shall die first, as also because he has it in his own power to constitute what heir he pleases, according to the civil law notion of an *hæres natus* (heir born, or natural heir) and an *hæres factus* (heir made or appointed); or, in the more accurate phraseology of our English law, he may alien or devise his estate to whomever he thinks proper, and by such alienation or devise may disinherit his heir at law. Into whose hands soever, therefore, the estate wasted comes, after a tenant in fee simple, though the waste is undoubtedly *damnum* (loss), it is *damnum absque injuria* (damage without legal injury).

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

But the most usual and important interest that is hurt by this commission of waste is that of him who hath the remainder or reversion of the inheritance, after a particular estate for life or years

[b] F. N. B. 59. 9 Rep. 112.

in being. Here, if the particular tenant (be it the tenant in dower or by curtesy, who was answerable for waste at the common law,[c] or the lessee for life or years, [225] who was first made liable by the statutes of Marlbridge[d] and of Gloucester[e]), if the particular tenant, I say, commits or suffers any waste, it is a manifest injury to him that has the inheritance, as it tends to mangle and dismember it of its most desirable incidents and ornaments, among which timber and houses may justly be reckoned the principal. To him, therefore, in remainder or reversion the law hath given a remedy; that is, to him to whom the *inheritance* appertains in expectancy.[f] For he who hath the remainder *for life* only is not entitled to sue for waste; since his interest may never, perhaps, come into possession, and then he hath suffered no injury. Yet a parson, vicar, archdeacon, prebendary and the like, who are seised in right of their churches of any remainder or reversion, may have an action of waste; for they, in many cases, have for the benefit of the church and of the successor a fee-simple qualified: and yet, as they are not seised in their own right, the writ of waste shall not say, *ad exhæredationem ipsius* (to his disherison), as for other tenants in fee simple; but *ad exhæredationem ecclesiæ* (to the dishersion of the church), in whose right the fee simple is holden.[g]

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

§ 300. **a. Estrepement.**—Estrepement is an old French word, signifying the same as waste or extirpation; and the writ of *estrepement* lay at the common law, *after* judgment obtained in any action real,[h] and before possession was delivered by the sheriff; to stop any waste which the vanquished party might be tempted to commit in lands, which were determined to be no longer his.[2] But

c 2 Inst. 299.
d 52 Hen. III. c. 23 (Landlord and Tenant, 1267).
e 6 Edw. I. c. 5 (Actions of Waste, 1278).
f Co. Litt. 53.
g *Ibid.* 341.
h 2 Inst. 328.

2 An account of the writs of *estrepement* may be found in Hazeltine's essay on Early Equity, in Vinogradoff (editor), Essays in Legal Hist., 275.

as in some cases the demandant may be justly apprehensive, that the tenant may make waste or *estrepement* pending the suit, well knowing the weakness of his title, therefore the statute of Gloucester[1] gave another writ of *estrepement, pendente placitio* (waste pending the suit), commanding the sheriff firmly [226] to inhibit the tenant "*ne faciat vastum vel estrepamentum pendente placito dicto indiscusso* (that he do not commit waste or devastation during the continuance of the suit)."[k] And, by virtue of either of these writs the sheriff may resist them that do, or offer to do waste; and, if otherwise he cannot prevent them, he may lawfully imprison the wasters, or make a warrant to others to imprison them: or, if necessity require, he may take the *posse comitatus* (power of the county) to his assistance. So odious in the sight of the law is waste and destruction.[l] In suing out these two writs this difference was formerly observed: that in actions merely possessory, where no damages are recovered, a writ of *estrepement* might be had at any time *pendente lite* (pending suit), nay, even at the time of suing out the original writ, or first process: but, in an action where damages were recovered, the demandant could only have a writ of *estrepement,* if he was apprehensive of waste after verdict had;[m] for, with regard to waste done before the verdict was given, it was presumed the jury would consider that in assessing the *quantum* of damages. But now it seems to be held, by an equitable construction of the statute of Gloucester, and in advancement of the remedy, that a writ of *estrepement,* to prevent waste, may be had in every stage, as well of such actions wherein damages are recovered, as of those wherein only possession is had of the lands; for peradventure, saith the law, the tenant may not be of ability to satisfy the demandant his full damages.[n] And therefore now, in an action of waste itself, to recover the place wasted and also damages, a writ of *estrepement* will lie, as well before as after judgment. For the plaintiff cannot recover damages for more waste than is contained in his original complaint; neither is he at liberty to assign or give in evidence any waste made after the suing out of the writ: it is therefore reasonable that he should have this writ of *preventive* justice, since he is in his present suit

[1] 6 Edw. I. c. 13 (1278).
[k] Regist. 77.
[l] 2 Inst. 329.
[m] F. N. B. 60, 61.
[n] *Ibid.* 61.

debarred of any further *remedial*.[o] If a writ of *estrepement*, forbidding waste, be directed and delivered to the tenant himself, as it may be, and he afterwards proceeds to commit waste, an action may be carried on upon the [227] foundation of this writ; wherein the only plea of the tenant can be, *non fecit vastum contra prohibitionem* (that he did not commit waste against prohibition); and, if upon verdict it be found that he did, the plaintiff may recover costs and damages,[p] or the party may proceed to punish the defendant for the contempt: for if, after the writ directed and delivered to the tenant or his servants, they proceed to commit waste, the court will imprison them for this contempt of the writ.[q] But not so if it be directed to the sheriff, for then it is incumbent upon him to prevent the *estrepement* absolutely, even by raising the *posse comitatus*, if it can be done no other way.

§ 301. b. Injunction at equity.—Besides this preventive redress at common law, the courts of equity, upon bill exhibited therein, complaining of waste and destruction, will grant an injunction or order to stay waste, until the defendant shall have put in his answer, and the court shall thereupon make further order. Which is now become the most usual way of preventing waste.[3]

§ 302. c. Writ of waste.—A writ of *waste* is also an action, partly founded upon the common law and partly upon the statute of Gloucester;[r 4] and may be brought by him who hath the immedi-

[o] 5 Rep. 115.
[p] Moor. 100.
[q] Hob. 85.
[r] 6 Edw. I. c. 5 (Actions of Waste, 1278).

---

[3] And the injunction being now made permanent instead of temporary, has in this country entirely superseded the writ of estrepement.—HAMMOND.

[4] **Action on the case in the nature of waste.**—The statutory action of waste thus obtained a secure footing among common-law remedies. Its chief advantage lay in the fact that in this action the premises wasted could be recovered as well as the statutory penalty; for by the statutes the doing of waste operated as a forfeiture of the tenements. As a means of recovering tenements the statutory action of waste was, however, found to be cumbersome and ineffectual, and for recovering damages the action on the case furnished a more satisfactory remedy, since the plaintiff got his costs. Besides, case would lie in some instances where waste would not. Consequently an action on the case in the nature of waste gradually supplanted the action of waste. After

ate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by the curtesy, or tenant for years. This action is also maintainable, in pursuance of statute[s] Westm. II, by one tenant in common of the inheritance against another, who makes waste in the estate holden in common. The equity of which statute extends to joint tenants, but not to coparceners: because by the old law coparceners might make partition, whenever either of them thought proper, and thereby prevent future waste, but tenants in common and joint tenants could not; and therefore the statute gave them this remedy, compelling the defendant either to make partition, and take the place wasted to his own share, or to give security not to commit any further waste.[t] But these tenants in common and joint tenants are [228] not liable to the penalties of the statute of Gloucester, which extends only to such as have life estates, and do waste to the prejudice of the inheritance. The waste, however, must be something considerable; for if it amount only to twelve pence, or some such petty sum, the plaintiff shall not recover in an action of waste: *nam de minimis non curat lex* (for the law does not recognize trifles).[u]

This action of waste is a mixed action; partly real, so far as it recovers land, and partly personal, so far as it recovers damages. For it is brought for both those purposes; and if the waste be proved, the plaintiff shall recover the thing or place wasted, and also treble damages by the statute of Gloucester. The writ of waste calls upon the tenant to appear and show cause why he hath committed waste and destruction in the place named, *ad exhæredationem*, to the disinherison, of the plaintiff.[w] And if the defendant makes default, or does not appear at the day assigned him, then the sheriff is to take with him a jury of twelve men, and go in person to the place alleged to be wasted, and there inquire of

[s] 13 Edw. I. c. 22 (Actions of Waste, 1285).
[t] 2 Inst. 403, 404.
[u] Finch. L. 29.
[w] F. N. B. 55.

---

having been long obsolete in practice, the remedy by writ of waste was expressly abolished in England by statute, the law on the subject of waste remaining otherwise unchanged. The result was that the action on the case in the nature of waste was thereby left in almost exclusive possession of the field covered by waste, and this supremacy it maintained until the final abolition of all forms of action.—STREET, 3 Foundations of Legal Liability, 270.

the waste done, and the damages; and make a return or report of the same to the court, upon which report the judgment is founded.[x] For the law will not suffer so heavy a judgment, as the forfeiture and treble damages, to be passed upon a mere default, without full assurance that the fact is according as it is stated in the writ. But if the defendant appears to the writ, and *afterwards* suffers judgment to go against him by default, or upon a *nihil dicit* (when he makes no answer, puts in no plea, in defense), this amounts to a confession of the waste; since, having once appeared, he cannot now pretend ignorance of the charge. Now, therefore, the sheriff shall not go to the place to inquire of the fact, whether any waste has, or has not, been committed; for this is already ascertained by the silent confession of the defendant: but he shall only, as in defaults upon other actions, make inquiry of the *quantum* of damages.[y] The defendant, on [229] the trial, may give in evidence anything that proves there was no waste committed, as that the destruction happened by lightning, tempest, the king's enemies, or other inevitable accident.[z] But it is no defense to say that a stranger did the waste, for against him the plaintiff hath no remedy; though the defendant is entitled to sue such stranger in an action of trespass *vi et armis*, and shall recover the damages he has suffered in consequence of such unlawful act.[a]

When the waste and damages are thus ascertained, either by confession, verdict or inquiry of the sheriff, judgment is given, in pursuance of the statute of Gloucester, c. 5, that the plaintiff shall recover the place wasted; for which he has immediately a writ of *seisin*, provided the particular estate be still subsisting (for, if it be expired, there can be no forfeiture of the land), and also that the plaintiff shall recover treble the damages assessed by the jury; which he must obtain in the same manner as all other damages, in actions personal and mixed, are obtained, whether the particular estate be expired or still in being.

x Poph. 24.
y Cro. Eliz. 18. 290.
z Co. Litt. 53.
a Law of Nisi Prius. 112.

[230]

CHAPTER THE FIFTEENTH.

OF SUBTRACTION.

§ 303. Injuries to real property: V. Subtraction.—Subtraction, which is the fifth species of injuries affecting a man's real property, happens when any person who owes any suit, duty, custom or service to another, withdraws or neglects to perform it.[1] It differs from a disseisin, in that *this* is committed without any denial of the right, consisting merely in nonperformance; *that* strikes at the very title of the party injured, and amounts to an ouster or actual dispossession. Subtraction however, being clearly an injury, is remediable by due course of law: but the remedy differs according to the nature of the services; whether they be due by virtue of any tenure, or by custom only.

§ 304. 1. Subtraction of services due by tenure.—Fealty, suit of court, and rent, are duties and services usually issuing and arising *ratione tenuræ* (by reason of the tenure), 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* (common bond) between lord and tenant; that they should do suit, or duly attend and follow the lord's courts, and there from time to time give their

[1] **Subtraction.**—Subtraction, as a wrong, has disappeared from modern law, partly by the obsoleteness of the remedies appropriate to it; still more by the gradual conversion of all services due on tenure and customs into money rents; but most of all by the change in the conception of such rents by which they have become debts due from the tenant to the lord at fixed terms, and recoverable by the same personal actions with other debts, instead of incorporeal hereditaments, giving to the owner a right of the nature of property in the land itself, out of which they issue, and a remedy directly against it. (See note 23 to Book II, c. 3, p. *42.)

It may not be easy for a modern student to seize this conception, and see how different it was from our present notions; although it is only since the reign of Anne that the principal change was made, and an action of debt given for freehold rents. (Text, p. *232.) But much of the ancient law, not only of land, but also of contracts, etc., will be incomprehensible without it.—HAMMOND.

assistance, by serving on juries, either to decide the property of their neighbors in the court-baron or correct their misdemeanors in the court-leet, and, lastly, that they should yield to the lord certain annual stated returns, in military attendance, in provisions, in arms, in matters of ornament or pleasure, in rustic employments or [231] prædial labors, or (which is *instar omnium*—equal to all) 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 nonobservance of any of these conditions, by neglecting to swear fealty, to do suit of court, or to render the rent or service reserved, is an injury to the freehold of the lord, by diminishing and depreciating the value of his seigniory.

§ 305. a. **Remedy by distress.**—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. The nature of distresses, their incidents and consequences, we have before more than once explained:[a] it may here suffice to remember that they are a taking of beasts, or other personal property, by way of pledge to enforce the performance of something due from the party distrained upon. And for the most part it is provided that distresses be reasonable and moderate; but, in the case of distress for fealty or suit of court, no distress can be unreasonable, immoderate or too large:[b] 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, that has no bounds with regard to its quantity, and may be repeated from to time until the stubbornness of the party is conquered, is called a *distress infinite;* which is also used for some other purposes, as in summoning jurors, and the like.

§ 306. b. **Other remedies.**—Other remedies for subtraction of rents or services are, 1. By action of *debt,* for the breach of this express contract, of which enough has been formerly said.[2] This

a See pages, 6, 147. b Finch. L. 285.

2 Very grudgingly our law in later days allowed an action of debt for rent due from a freeholder in some cases in which there was no other remedy. See

is the most 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, since the abolition of the military tenures. But for a freehold rent reserved on [232] a lease for life, etc., no action of *debt* lay by the common law during the continuance of the freehold out of which it issued;[c] for the law would not suffer a *real* injury to be remedied by an action that was merely *personal*.[3] However, by the statutes 8 Ann., c. 14 (Land-

[c] 1 Roll. Abr. 595.

Ognel's Case, 4 Coke's Reports, 48 b; Co. Litt. 47 a; Bl. Comm. III. 231, and (for the doctrine has been important even in recent years) Thomas v. Sylvester, L. R. 8 Q. B. 368; In re Blackburn etc. Society, 42 Ch. Div. 343. See, also, Cyprian Williams, Incidence of Rent, Harv. L. R. xi. 1, and L. Q. R. xiii. 288. Even the action of debt against the termor, which became common, seems rare in Bracton's day. As early as 1225, Note-Book, pl. 946, it is brought after the term has expired.—POLL. & MAITL., 2 Hist. Eng. Law (2d ed.), 127 n.

[3] **Real and personal remedies distinguished.**—The rule that denied an action of debt to recover freehold rents is probably of older date than the distinction of *real* and *personal* things or remedies. The true reason was that such a rent was not a *chose in action*, or based on a contract. The rent itself was a freehold, and recoverable by the same remedies with other freeholds; and this equally in the case of rent-service and rent-charge. This is shown by the fact mentioned by Blackstone that an assize could be brought for it. Of the same nature was the writ *de consuetudinibus et servitiis*, which was the specific remedy for such rents until it became obsolete. Yet Blackstone's distinction of *real* and *personal* no doubt represents a later view of the same distinction.

The whole of this chapter and the next will be more easily understood if the student seizes clearly this conception of rents, services and other incorporeal hereditaments as things, the objects of property and possession, and quite distinct from debts or any kind of contractual obligations. The common law was strictly consistent in all its parts; therefore all the remedies for *subtraction* of such rights were of the nature of those for wrongs to land, and had no analogy with remedies for breach of contract and other rights *in personam*. So, too, a third party would be held liable for *disturbing* such rights, or rather their object; a notion that would have been regarded as absurd or impossible in regard to rights *in personam*.

Even the modern substitute for these common-law remedies, the action on the case, is founded on the same conception of wrong to a definite object or thing, trespass. It is to this conception of wrongs to such incorporeal things as of the same nature with trespass that we owe the modern decisions, by which the mere infringement of a right is actionable without showing damage.

lord and Tenant, 1709), and 5 George III, c. 17 (Lease, 1765), actions of debt may now be brought at any time to recover such freehold rents. 2. An assize of *mort d'ancestor* or *novel disseisin* will lie of rents as well as of lands;[d] if the lord, for the sake of trying the possessory right, will elect to suppose himself ousted or disseised thereof. This is now seldom heard of; and all other real actions, being in the nature of writs of right, and therefore more dilatory in their progress, are entirely diffused, though not formally abolished by law. Of this species, however, is, 3. The writ *de consuetudinibus et servitiis* (of customs and services), which lies for the lord against his tenant, who withholds from him the rents and services due by custom, or tenure, for his land.[e] This compels a specific payment or performance of the rent or service; but there are also others, whereby the lord shall recover the land itself in lieu of the duty withheld. As, 4. The writ of *cessavit* (he hath ceased), which lies by the statutes of Gloucester, 6 Edward I, c. 4 (1278), and of Westm. II, 13 Edward I, c. 21 & 41 (Alienation by Religious Houses, 1285), when a man who holds lands of a lord by rent or other services neglects or *ceases* to perform his services for two years together; or where a religious house hath lands given it, on condition of performing some certain spiritual service, as reading prayers or giving alms, and neglects it; in either of which cases, if the *cesser* or neglect have continued for two years, the lord or donor and his heirs shall have a writ of *cessavit* to recover the land itself, *eo quod tenens in faciendis servitiis per biennium jam cessavit* (because the tenant has already ceased to do service

[d] F. N. B. 195. [e] *Ibid.* 151.

(Ashby v. White, 2 Ld. Raym. 938, 92 Eng. Reprint, 126; 1 Smith's Lead. Cas. 472; Harrop v. Hirst, L. R. 4 Ex. 43.)

The incorporeal thing is regarded as subject to a trespass—a notion that probably antedated the statute Westm. II, and the formal distinction of trespass and case, direct and indirect actions—and thus *injuria*, whether *damnum* is shown or not. This began with actions for disturbance of common and the like. (1 Saund. 346 *b*, 85 Eng. Reprint, 503; 2 W. Black. 1233, 96 Eng. Reprint, 726; 4 Term Rep. 71, 100 Eng. Reprint, 900; 2 East, 154, 102 Eng. Reprint, 328.) And the notion that the wrongdoer might by repetition gain a right, i. e., destroy the plaintiff's right, is a modern version of the same notion.—HAMMOND.

for two years).[f] And in like manner, by the civil law, if a tenant (who held lands upon payment of rent or services, or, as they call it, "*jure emphyteutico*"), neglected to pay or perform them *per totum triennium* (for three whole years), he might be ejected from such emphyteutic lands.[g 4] But by the statute of Gloucester, the *cessavit* does not lie for lands let upon fee-farm rents, unless they have lain fresh and uncultivated for two years, and there be [233] not sufficient distress upon the premises; or unless the tenant hath so inclosed the land that the lord cannot come upon it to distrain.[h] For the law prefers the simple and ordinary remedies, by distress or by the actions just now mentioned, to this extraordinary one of forfeiture for a *cessavit;* and therefore the same statute of Gloucester has provided, further, that upon tender of arrears and damages before judgment, and giving security for the future performance of the services, the process shall be at an end, and the tenant shall retain his land. And to this the statute of Westm. II conforms, so far as may stand with convenience and reason of law.[i] It is easy to observe that the statute[k] 4 George II, c. 28—Landlord and Tenant, 1730 (which permits landlords who have a right of re-entry for nonpayment of rent to serve an ejectment on their tenants, when half a year's rent is due, and there is no distress on the premises), is in some measure copied from the ancient writ of *cessavit:* especially as it may be satisfied and put an end to in a similar manner, by tender of the rent and costs within six months after. And the same remedy is, in substance, adopted by statute

f *Ibid.* 208.
g Cod. 4. 66. 2.
h F. N. B. 209. 2 Inst. 298.
i 2 Inst. 401. 460.
k See pag. 206.

---

4 Two statutes of Edward I were required to give the lord an ampler remedy: the action called *cessavit per biennium* was invented; if the tenant allowed his services to fall into arrear for two years, the lord might claim the land in demesne. There can, we think, be little doubt that this new action was borrowed immediately from the canon law and mediately from the legislation of Justinian. It is one of the very few English actions that we can trace directly to a foreign model. (Bl. Comm. III. 232. In Cod. 4. 66. 2, Justinian lays down the rule that the *emphyteuta* whose rent is in arrear for three years may be ejected. In Nov. 7. 3. 2, the period of three years is cut down to two years where the landlord is a church. In this form the rule passes into the canon law; c. 4, X. 3. 18.) 1 Poll. & Maitl., Hist. Eng. Law (2d ed.), 353.

11 George II, c. 19, § 16 (Distress for Rent, 1737), which enacts that where any tenant at rack-rent shall be one year's rent in arrear, and shall desert the demised premises, leaving the same uncultivated or unoccupied, so that no sufficient distress can be had, two justices of the peace (after notice affixed on the premises for fourteen days without effect) may give the landlord possession thereof, and thenceforth the lease shall be void. 5. There is also another very effectual remedy, which takes place when the tenant upon a writ of assize for rent, or on a replevin, disowns or disclaims his tenure, whereby the lord loses his verdict, in which case the lord may have a writ of right, *sur disclaimer* (on disclaimer), grounded on this denial of tenure; and shall, upon proof of the tenure, recover back the land itself so holden, as a punishment to the tenant for such his false disclaimer.[1] This piece of retaliating justice, whereby the tenant who endeavors to defraud his lord is himself deprived of the estate, as it evidently proceeds upon feudal principles, [234] so it is expressly to be met with in the feudal constitutions:[m] "*vasallus, qui abnegavit feudum ejusve conditionem exspoliabitur* (the vassal who has denied either his fee, or the condition by which he held it, shall be deprived of it)."

§ 307. **c. Remedies to protect tenant.**—And, as on the one hand the ancient law provided these several remedies to obviate the knavery and punish the ingratitude of the tenant, so on the other hand it was equally careful to redress the oppression of the lord, by furnishing, 1. The writ of *ne injuste vexes* (do not unjustly oppress);[n] which is an ancient writ founded on that chapter[o] of *Magna Carta*, which prohibits distresses for greater services than are really due to the lord; being itself of the prohibitory kind, and yet in the nature of a writ of right.[p] It lies where the tenant in fee simple and his ancestors have held of the lord by certain services; and the lord hath obtained seisin of more or greater services, by the inadvertent payment or performance of them by the tenant himself. Here the tenant cannot in an avowry avoid the lord's possessory right, because of the seisin given by his own hands; but is driven to this writ, to devest the

[1] Finch. L. 270, 271.
[m] Feud. l. 2. t. 26.
[n] F. N. B. 10.
[o] C. 10.
[p] Booth. 26.

lord's possession, and establish the mere right of property, by ascertaining the services, and reducing them to their proper standard. But this writ does not lie for tenant in tail; for he may avoid such seisin of the lord, obtained from the payment of his ancestors, by plea to an avowry in replevin.[q] 2. The writ of *mesne, de medio*, which is also in the nature of a writ of right,[r] and lies, when upon a subinfeudation the *mesne* or middle lord[s] suffers his under-tenant or tenant *paravail* to be distrained upon by the lord *paramount*, for the rent due to him from the mesne lord.[t] And in such case the tenant shall have judgment to be acquitted (or indemnified) by the mesne lord; and if he makes default therein, or does not appear originally to the tenant's writ, he shall be forejudged of his mesnalty, and the tenant shall hold immediately of the lord paramount himself.[u]

§ 308. 2. Subtraction of services due by custom and prescription.—[235] 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.

§ 309. a. Remedies.—And for this injury the owner shall have a writ *de secta ad molendinum* (for suit at his mill),[w] commanding the defendant to do his suit at that mill, *quam ad illud facere debet, et solet* (which he ought, and was used to do at it), or show good cause to the contrary: in which action the validity of the prescription may be tried, and if it be found for the owner,

q F. N. B. 11. 2 Inst. 21.
r Booth. 136.
s See Book II. c. 5. pag. 59, 60.
t F. N. B. 135.
u 2 Inst. 374.
w F. N. B. 123.

he shall recover damages against the defendant.[x] In like manner, and for like reasons, the register[y] will inform us, that a man may have a writ of *secta ad furnum, secta ad torrale, et ad omnia alia hujusmodi* (his suit at the oven, his suit at the kiln, and all others of the same kind); for suit due to his *furnum*, his public oven or bake-house; or to his *torrale*, his kiln, or malt-house; when a person's ancestors have erected a convenience of that sort for the benefit of the neighborhood, upon an agreement (proved by immemorial custom) that all the inhabitants should use and resort to it when erected. But besides these special remedies for subtractions, to compel the specific performance of the service due by custom, an action *on the case* will also lie for all of them, to repair the party injured in damages. And thus much for the injury of subtraction.

x Co. Entr. 461.

y Fol. 153.

1813

[236]

CHAPTER THE SIXTEENTH.

OF DISTURBANCE.

§ 310. Injuries to real property: VI. Disturbance. — The sixth and last species of real injuries is that of *disturbance;* which is usually a wrong done to some incorporeal hereditament, by hindering or disquieting the owners in their regular and lawful enjoyment of it.[a] I shall consider five sorts of this injury; *viz.*, 1. Disturbance of *franchises.* 2. Disturbance of *common.* 3. Disturbance of *ways.* 4. Disturbance of *tenure.* 5. Disturbance of *patronage.*

§ 311. 1. Disturbance of franchises.—Disturbance of *franchises* happens when a man has the franchise of holding a court-leet, of keeping a fair or market, of freewarren, of taking toll, of seizing waifs or estrays, or, in short, any other species of franchise whatsoever; and he is disturbed or incommoded in the lawful exercise thereof. As if another by distress, menaces or persuasions prevails upon the suitors not to appear at my court; or obstructs the passage to my fair or market; or hunts in my freewarren; or refuses to pay me the accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes or is carried out of my liberty: in every case of this kind, which it is impossible here to recite or suggest, there is an injury done to the legal owner; his property is damnified, and the profits arising from such his franchise are diminished. To remedy which, as the law has given no other writ, he is [237] therefore entitled to sue for damages by a special action *on the case:* or, in case of toll, may take a distress if he pleases.[b]

§ 312. 2. Disturbance of common.—The disturbance of *common* comes next to be considered; where any act is done, by which the right of another to his common is incommoded or diminished.

§ 313. a. Wrongful use of the common.—This may happen, in the first place, where one who hath no right of common puts

[a] Finch. L. 187.

[b] Cro. Eliz. 558.

his cattle into the land, and thereby robs the cattle of the commoners of their respective shares of the pasture. Or if one, who hath a right of common, puts in cattle which are not commonable, as hogs and goats; which amounts to the same inconvenience. But the lord of the soil may (by custom or prescription, but not without) put a stranger's cattle into the common;[c] and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common.[d] The lord, also, of the soil may justify making burrows therein, and putting in rabbits, so as they do not increase to so large a number as totally to destroy the common.[e] But in general, in case the beasts of a stranger, or the uncommonable cattle of a commoner, be found upon the land, the lord or any of the commoners may distrain them damage feasant;[f] or the commoner may bring an action on the case to recover damages, provided the injury done be anything considerable: so that he may lay his action with a *per quod*, or allege that *thereby* he was deprived of his common. But for a trivial trespass* the commoner has no action, but the lord of the soil only, for the entry and trespass committed.[g]

§ 314. b. Surcharging the common.—Another disturbance of common is by *surcharging* it, or putting more cattle therein than the pasture and herbage will sustain, or the party hath 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 [238] them into a smaller compass. This injury by surcharging can, properly speaking, only happen where the common is *appendant* or *appurtenant*,[h] and of course limited by law; or where, when *in gross*, it is expressly limited and certain:

* Trespass here is used in the broad sense of any wrong, as defined on page *208, as is shown by the rule there given. In trespass *vi et armis* the action lies, however trivial the damage.—HAMMOND.

c 1 Roll. Abr. 396.

d Co. Litt. 122.

e Cro. Eliz. 876. Cro. Jac. 195. Lutw. 108.

f 9 Rep. 112.

g *Ibid.*

h See Book II. c. 3.

for where a man hath common *in gross, sans nombre* or *without stint,* he cannot be a surcharger. However, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts:[1] for the law will not suppose that, at the original grant of the common, the lord meant to exclude himself.

The usual remedies for surcharging the common are either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass; both which may be had by the lord, or, lastly, by a special action on the case for damages; in which any commoner may be plaintiff.[j] But the ancient and most effectual method of proceeding is by writ of *admeasurement* of *pasture.* This lies, either where a common appurtenant or in gross is certain as to number, or where a man has common appendant or appurtenant to his land, the quantity of which common has never yet been ascertained. In either of these cases, as well the lord as any of the commoners is entitled to this writ of admeasurement; which is one of those writs that are called *vicontiel,*[k] being directed to the sheriff (*vice-comiti*), and not to be returned to any superior court till finally executed by him. It recites a complaint that the defendant hath surcharged, *superoneravit,* the common: and therefore commands the sheriff to admeasure and apportion it; that the defendant may not have more than belongs to him, and that the plaintiff may have his rightful share. And upon this suit all the commoners shall be admeasured, as well those who have not as those who have surcharged the common; as well the plaintiff as the defendant.[l] The execution of this writ must be by a jury of twelve men, who are upon their [239] oaths to ascertain, under the superintendence of the sheriff, what and how many cattle each commoner is entitled to feed. And the rule for this admeasurement is generally understood to be, that the commoner shall not turn more cattle upon the common than are sufficient to manure and stock the land to which his right of common is annexed; or, as our ancient law expressed it, such cattle only as are *levant* and *couchant* upon his tenement;[m] which being a thing uncertain

[1] Roll. Abr. 399.
[j] Freem. 273.
[k] 2 Inst. 369. Finch. L. 314.
[l] F. N. B. 125.
[m] Bro. Abr. t. Prescription. 28.

before admeasurement, has frequently, though erroneously, occasioned this unmeasured right of common to be called a common *without stint* or *sans nombre;*[n] a thing which, though possible in law,[o] does in fact very rarely exist.

If, after the admeasurement has thus ascertained the right, the same defendant surcharges the common again, the plaintiff may have a writ of *second surcharge, de secunda superoneratione,* which is given by the statute Westm. II, 13 Edward I, c. 8 (1285), and thereby the sheriff is directed to inquire by a jury whether the defendant has in fact again surcharged the common contrary to the tenor of the last admeasurement; and if he has, he shall then forfeit to the king the supernumerary cattle put in, and also shall pay damages to the plaintiff.[p] This process seems highly equitable: for the first offense is held to be committed through mere inadvertence, and therefore there are no damages or forfeiture on the first writ, which was only to ascertain the right which was disputed; but the second offense is a willful contempt and injustice, and therefore punished very properly with not only damages, but also forfeiture. And herein the right, being once settled, is never again disputed; but only the fact is tried, whether there be any second surcharge or no, which gives this neglected proceeding a great advantage over the modern method, by action on the case, wherein the *quantum* of common belonging to the defendant must be proved upon every fresh trial, for every repeated offense.

§ 315. c. Disseisin of the common.—[240] There is yet another disturbance of common, when the owner of the land, or other person, so incloses or otherwise obstructs it, that the commoner is precluded from enjoying the benefit to which he is by law entitled. This may be done either by erecting fences, or by driving the cattle off the land, or by plowing up the soil of the common.[q] 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

[n] Hardr. 117.
[o] Lord Raym. 407.
[p] F. N. B. 126. 2 Inst. 370.
[q] Cro. Eliz. 198.

by action against the owner.[r] This kind of disturbance does indeed amount to a disseisin, and if the commoner chooses to consider it in that light, the law has given him an assize of *novel disseisin*, against the lord, to recover the possession of his common.[s] Or it has given a writ of *quod permittat* (that he permit), against any stranger, as well as the owner of the land, in case of such a disturbance to the plaintiff as amounts to a total deprivation of his common; whereby the defendant shall be compelled to permit the plaintiff to enjoy his common as he ought.[t] But if the commoner does not choose to bring a *real* action to recover seisin, or to try the right, he may (which is the easier and more usual way) bring an action on the case for his damages, instead of an assize or a *quod permittat*.[u]

§ 316. d. Right of approvement of common.—There are cases, indeed, in which the lord may inclose and abridge the common; for which, as they are no injury to anyone, so no one is entitled to any remedy. For it is provided by the statute of Merton, 20 Henry III, c. 4 (Common, 1235), that the lord may *approve*, that is, inclose and convert to the uses of husbandry (which is a melioration or approvement), any waste grounds, woods or pastures in which his tenants have common *appendant* to their estates; provided he leaves [241] sufficient common to his tenants, according to the proportion of their land. And this is extremely reasonable: for it would be very hard if the lord, whose ancestors granted out these estates to which the commons are appendant, should be precluded from making what advantage he can of the rest of his manor; provided such advantage and improvement be no way derogatory from the former grants. The statute Westm. II, 13 Edward I, c. 46 (Common, 1285), extends this liberty of approving, in like manner, against *all others* that have common *appurtenant*, or *in gross*, as well as against the tenants of the lord, who have their common *appendant;* and further enacts that no assize of *novel disseisin*, for common, shall lie against a lord for erecting on the common any windmill, sheep-house or other necessary buildings therein specified, which, Sir Edward Coke says,[w] are only

r Cro. Jac. 195.
s F. N. B. 179.
t Finch. L. 275. F. N. B. 123.
u Cro. Jac. 195.
w 2 Inst. 476.

put as examples; and that any other necessary improvements may be made by the lord, though in reality they abridge the common, and make it less sufficient for the commoners. And lastly, by statute 29 George II, c. 36 (Inclosure, 1755), and 31 George II, c. 41 (Inclosure, 1757), it is particularly enacted that any lords of wastes and commons, with the consent of the major part, in number and value, of the commoners, may inclose any part thereof, for the growth of timber and underwood.

§ 317. **3. Disturbance of ways.**—The third species of disturbance, that of *ways*, is very similar in its nature to the last: it principally happening when a person, who hath a right to a way over another's grounds, by grant or prescription, is obstructed by inclosures, or other obstacles, or by plowing across it; by which means he cannot enjoy his right of way, or at least not 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 assize will lie, as mentioned in a former chapter.[x] 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), [242] or if the obstruction of a way belonging to an house or land is made by a stranger, it is then in either case merely a disturbance: for the obstruction of a way in gross is no detriment to any lands or tenements, and therefore does not fall under the legal notion of a nuisance, which must be laid, *ad nocumentum liberi tenementi* (to the detriment of his free tenement);[y] and the obstruction of it by a stranger can never tend to put the *right* of way in dispute: the remedy, therefore, for these disturbances is not by assize or any real action, but by the universal remedy of action on the case to recover damages.[z]

§ 318. **4. Disturbance of tenure.**—The fourth species of disturbance is that of disturbance of *tenure* or breaking that connection which subsists between the lord and his tenant, and to which the law pays so high a regard that it will not suffer it to be wantonly dissolved by the act of a third person. The having of an

x C. 13. p. 218.
y F. N. B. 183.
z Hale on F. N. B. 183. Lutw. 111. 119.

estate well tenanted is an advantage that every landlord must be very sensible of; and therefore the driving away a tenant from off his estate is an injury of no small consequence. If, therefore, there be a tenant at will of any lands or tenements, and a stranger either by menaces and threats, or by unlawful distresses, or by fraud and circumvention, or other means, 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,[a] and gives him a reparation in damages against the offender by a special action on the case.[1]

§ 319. 5. Disturbance of patronage and usurpation of advowson.—The fifth and last species of disturbance, but by far the most considerable, is that of disturbance of *patronage;* which is an hindrance or obstruction of a patron to present his clerk to a benefice.

This injury was distinguished at common law from another species of injury, called *usurpation;* which is an absolute ouster or dispossession of the patron, and happens when a stranger, that hath no right, presenteth a clerk, and he is thereupon [243] admitted and instituted.[b] In which case, of usurpation, the patron lost by the common law not only his turn of presenting *pro hac vice* (for this turn), but also the absolute and perpetual inheritance of the advowson, so that he could not present again upon the next avoidance, unless in the meantime he recovered his right by a real action, *viz.*, a writ of *right of advowson.*[c] The reason given for his losing the present turn, and not ejecting the usurper's clerk, was, that the final intent of the law in creating this species of property being to have a fit person to celebrate divine service, it preferred the peace of the church (provided a clerk were once admitted and instituted) to the right of any patron whatever.

a Hal. Annal. c. 40. 1 Roll. Abr. 108. c 6 Rep. 49.
b Co. Litt. 227.

---

1 The remainder of this chapter, treating of a wrong unknown to American law (except in a very few of the colonies in their early years) has no interest except a historical, and but little of that. The law of advowsons, though a part of the common law, was so mingled with and affected by the legislation of the church, that it can scarcely be used with profit even to illustrate the rest.—HAMMOND.

And the patron also lost the inheritance of his advowson, unless he recovered it in a writ of right, because by such usurpation he was put out of possession of his advowson as much as when by actual entry and ouster he is disseised of lands or houses; since the only possession of which an advowson is capable is by actual presentation and admission of one's clerk. And therefore, when the clerk was once instituted (except in the case of the king, where he must also be inducted [d]) the church was absolutely *full*, and the usurper became *seised* of the advowson. Which seisin or possession it was impossible for the true patron to remove by any possessory action, or other means, during the plenarty or fullness of the church; and when it became void afresh, he could not present, since another had the right of possession.

§ 320. a. **Remedies: (1) Writ of right of advowson.**—The only remedy, therefore, which the patron had left was to try the mere right in a writ of *right of advowson;* which is a peculiar writ of right, framed for this special purpose, but in every other respect corresponding with other writs of right: [e] and, if a man recovered therein, he regained his advowson and was entitled to present at the next avoidance.[f] But in order to such recovery he must allege a presentation in himself or some of his ancestors, which proves him or them to have been once in possession: for, as a grant of the advowson, during the fullness of the church, conveys [244] no manner of possession for the present, therefore a purchaser, until he hath presented, hath no actual seisin whereon to ground a writ of right.[g] Thus stood the common law.

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 possession, it was in substance enacted by statute Westm. II, 13 Edward I, c. 5, § 2 (Benefice, 1285), that if a possessory action be brought within six months after the avoidance, the patron shall (notwithstanding such usurpation and institution) recover that very presentation; which gives back to him the seisin of the advowson. Yet still, if the true patron omitted to bring his action within six

[d] *Ibid.*
[e] F. N. B. 30.
[f] *Ibid.* 36.
[g] 2 Inst. 357.

months, the seisin was gained by the usurper, and the patron to recover it was driven to the long and hazardous process of a writ of right. To remedy which it was further enacted by statute 7 Ann., c. 18 (Benefice, 1708), that no usurpation shall displace the estate or interest 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 the title of usurpation is now much narrowed, and the law stands upon this reasonable 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. Usurpation now gains no right to the usurper, with regard to any future avoidance, but only to the present vacancy: it cannot, indeed, be remedied after six months are past; but, during those six months, it is only a species of disturbance.

Disturbers of a right of advowson may therefore be these three persons: 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, [245] 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. These disturbances are vexatious and injurious to him who hath the right; and therefore, if he be not wanting to himself, the law (besides the writ of *right of advowson*, which is a final and conclusive remedy) hath given him two inferior possessory actions for his relief: an assize of *darrein presentment* (last presentment), and a writ of *quare impedit* (wherefore he has hindered), 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 to the clerk, who hath no right in him till institution, and of course can suffer no injury.

§ 321. (2) Assize of darrein presentment.—1. An assize of *darrein presentment*, or last presentation, lies when a man, or his ancestors, under whom he claims, have presented a clerk to a benefice, who is instituted; and afterwards upon the next avoidance a stranger presents a clerk, and thereby disturbs him that is the real

patron. In which case the patron shall have this writ[h] directed to the sheriff to summon an assize or jury, to inquire who was the last patron that presented to the church now vacant, of which the plaintiff complains that he is deforced by the defendant: and, according as the assize determines that question, a writ shall issue to the bishop; to institute the clerk of that patron, in whose favor the determination is made, and also to give damages, in pursuance of statute Westm. II, 13 Edward I, c. 5 (Benefice, 1285). This question, it is to be observed, was, before the statute 7 Ann. (7 Ann., c. 18, Benefice, 1708) before mentioned, entirely conclusive, as between the patron or his heirs and a stranger: for, till then, the full possession of the advowson was in him who presented last and his heirs; unless, since that presentation, the clerk had been evicted within six months, or the rightful patron had recovered the advowson in a writ of right; which is a title superior to all others. But that statute having given a right to any person to bring a *quare impedit*, and to recover (if his title be good) notwithstanding the last presentation, by whomsoever [246] made; assizes of *darrein presentment*, now not being in anywise conclusive, have been totally disused, as indeed they began to be before; a *quare impedit* being a more general, and therefore a more usual, action. For the assize of *darrein presentment* lies only where a man has an advowson by descent from his ancestors; but the writ of *quare impedit* is equally remedial whether a man claims title by descent or by purchase.[i]

§ 322. **(3) Writ of quare impedit.**—2. I proceed, therefore, secondly, to inquire into the nature[k] of a writ of *quare impedit*, now the only action used in case of the disturbance of patronage; and shall first premise the usual proceedings previous to the bringing of the writ.

Upon the vacancy of a living the patron, we know, is bound to present within six calendar months,[l] 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;[m] unless the church be full, or there be notice of any litigu-

h F. N. B. 31.
i 2 Inst. 355.
k See Boswell's Case. 6 Rep. 48.
l See Book II. c. 18.
m See Book I. c. 11.

tion. For if any opposition be intended, it is usual for each party to enter a *caveat* (that he take care) with the bishop, to prevent his institution of his antagonist's clerk. An institution after a *caveat* entered is void by the ecclesiastical law;[n] but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity.[o] But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become *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 patronatus* (right of advowson), he is bound to do it. A *jus patronatus* 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 [247] rightful patron;[p] and if, upon such inquiry made and certificate thereof returned by 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, whatever proceedings may be had afterwards in the temporal courts.

The clerk refused by the bishop may also have a remedy against him in the spiritual court, denominated a *duplex querela* (double complaint):[q] 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 delegates: 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 in contested presentations they seldom go so far: for, upon the first delay or refusal of the bishop to admit his clerk, the patron usually brings his writ 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 pretense 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

n 1 Burn. 207.
o 1 Roll. Rep. 191.
p 1 Burn. 16, 17.
q *Ibid.* 113.

bishop; or against the patron only. But it is most advisable to bring it against all three: for if the bishop be left out, and the suit be not determined till the six months are past, the bishop is entitled to present by lapse; for he is not party to the suit:[r] but, if he be named, no lapse can possibly accrue till the right is determined. If the patron be left out, and the writ be brought only against the bishop and the clerk, the suit is of no effect, and the writ shall abate;[s] for the right of the patron is the principal question in the cause.[t] If the [248] clerk be left out, and has received institution before the action brought (as is sometimes the case), the patron by this suit may recover his right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant and party to the suit, to hear what he can allege against it. For which reason it is the safer way always to insert them, all three in the writ.

§ 323. (a) Procedure on quare impedit.—The writ of *quare impedit*[u] commands the disturbers, the bishop, the pseudo-patron and his clerk, to permit the plaintiff to present a proper person (without specifying the particular clerk) to such a vacant church, which pertains to his patronage, and which the defendants, as he alleges, do obstruct; and unless they so do, then that they appear in court to show the reason why they hinder him.

Immediately on the suing out of the *quare impedit*, if the plaintiff 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* (do not admit);[w] which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever till such contention be determined. And if the bishop doth, after the receipt of this writ, admit any person, even though the patron's right may have been found in a *jure patronatus*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by writ of *scire facias:*[x] and shall have a special action against the bishop, called a *quare incumbravit* (wherefore he has encumbered); to recover the presentation, and also satisfaction in damages for the

r Cro. Jac. 93.
s Hob. 316.
t 7 Rep. 25.
u F. N. B. 32.
w *Ibid.* 37.
x 2 Sid. 94.

injury done him by encumbering the church with a clerk, pending the suit, and after the *ne admittas* received.[y] But if the bishop has encumbered the church by instituting the clerk before the *ne admittas* issued, no *quare incumbravit* lies; for the bishop hath no legal notice till the writ of *ne admittas* is served upon [249] him. The patron is therefore left to his *quare impedit* merely; which, as was before observed, now lies (since the statute of Westm. II) as well upon a recent usurpation within six months past as upon a disturbance without any usurpation had.

In the proceedings upon a *quare impedit*, the plaintiff must set out his title at length, and prove at least one presentation in himself, his ancestors, or those under whom he claims; for he must recover by the strength of his own right, and not by the weakness of the defendant's;[z] and he must also show a disturbance before the action brought.[a] Upon this the bishop and the clerk usually 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 the right be found for the plaintiff, on the trial, three further points are also to be inquired: 1. If the church be full; and, if full, then of whose presentation: for if it be of the defendant's presentation, then the clerk is removable by writ brought in due time. 2. Of what value the living is; and this in order to assess the damages which are directed to be given by the statute of Westm. II. 3. In case of plenarty upon an usurpation, whether six calendar[b] months have passed between the avoidance and the time of bringing the action: for then it would not be within the statute, which permits an usurpation to be devested by a *quare impedit*, brought *infra tempus semestre* (within half a year). So that plenarty is still a sufficient bar in an action of *quare impedit*, brought above six months after the vacancy happens; as it was universally by the common law, however early the action was commenced.

If it be found that the plaintiff hath the right and hath commenced his action in due time, then he shall have judgment [250]

[y] F. N. B. 48.
[z] Vaugh. 7, 8.
[a] Hob. 199.
[b] 2 Inst. 361.

to recover the presentation; and, if the church be full by institution of any clerk, to remove him; unless it were filled *pendente lite* (pending the suit) by lapse to the ordinary, he not being party to the suit, in which case the plaintiff loses his presentation *pro hac vice* (for this turn), but shall recover two years' full value of the church from the defendant the pretended patron, as a satisfaction for the turn lost by his disturbance; or, in case of his insolvency, he shall be imprisoned for two years.[c] 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* (for admitting the clerk),[d] reciting the judgment of the court, and ordering him to admit and institute the clerk of the prevailing party; and, if upon this order he does not admit him, the patron may sue the bishop in a writ of *quare non admisit* (why he has not admitted),[e] and recover ample satisfaction in damages.

Besides these possessory actions, there may be also had (as hath before been incidentally mentioned) a writ of *right of advowson*, which resembles other writs of right: the only distinguishing advantage now attending it being, that it is more conclusive than a *quare impedit;* since to an action of *quare impedit* a recovery had in a writ of right may be pleaded in bar.

There is no limitation with regard to the time within which any actions touching advowsons are to be brought; at least none later than the times of Richard I and Henry III; for by statute 1 Mar., st. 2, c. 5 (Limitation of Actions, 1554), the statute of limitations, 32 Henry VIII, c. 2 (1540), is declared not to extend to any writ of right of advowson, *quare impedit*, or assize of *darrein presentment*, or *jus patronatus*. And this upon very good reason: because it may very easily happen that the title to an advowson may not come in question, nor the right have opportunity to be tried, within sixty years; which is the longest period of limitation assigned by the statute of Henry VIII. For Sir Edward Coke[f] tells us that there was a parson of one of his [251] churches that had been incumbent there above fifty years; nor are instances wanting

[c] Stat. West. 2. 13 Edw. I. c. 5. § 3 (1285).
[d] F. N. B. 38.
[e] *Ibid.* 47.
[f] 1 Inst. 115.

wherein two successive incumbents have continued for upwards of a hundred years.[g] Had, therefore, the last of these incumbents been the clerk of a usurper, or had been presented by lapse, it would have been necessary and unavoidable for the patron, in case of a dispute, to have recurred back above a century; in order to have shown a clear title and seisin by presentation and admission of the prior incumbent. But though, for these reasons, a limitation is highly improper with respect only to the length of time; yet, as the title of advowsons is, for want of some limitation, rendered more precarious than that of any other hereditament, it might not perhaps be amiss if a limitation were established with respect to the number of avoidances; or, rather, if a limitation were compounded of the length of time and the number of avoidances together: for instance, if no seisin were admitted to be alleged in any of these writs of patronage, after sixty years and three avoidances were past.

§ 324. (b) The real party in interest in quare impedit.—In a writ of *quare impedit*, which is almost the only real action that remains in common use, and also in the assize of *darrein presentment*, and writ of right, the patron only, and not the clerk, is allowed to sue the disturber. But, by virtue of several acts of parliament,[h] there is one species of presentations, 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. I mean the presentation to such benefices as belong to Roman Catholic patrons; which, according to their several counties, are vested in and secured to the two universities of this kingdom. And particularly by the statute of 12 Ann., st. 2, c. 14, § 4 (Benefices, 1713), a new method of proceeding is provided; *viz.*, that, besides the writs of *quare impedit*, which the universities as patrons are entitled to bring, they, or their clerks, may be at liberty to file a bill [252] in equity against any person presenting to such livings, and

[g] The two last incumbents of the rectory of Chelsfield *cum* Farnborough in Kent, continued 101 years; of whom the former was admitted in 1650, the latter in 1700, and died in 1751.

[h] Stat. 3. Jac. I. c. 5 (Benefices or Popish Recusant, 1605). 1 W. & M. c. 26 (Benefices, 1688). 12 Ann. st. 2. c. 14 (Benefices, 1713). 11 Geo. II. c. 17 (Church Patronage, 1737).

disturbing their right of patronage, or his *cestuy 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: and also (by the statute 11 George II—1737) to compel a discovery whether any grant or conveyance, said to be made of such advowson, were made *bona fide* to a Protestant purchaser, for the benefit of Protestants and for a full consideration; without which requisites every such grant and conveyance of any advowson or avoidance is absolutely null and void. This is a particular law and calculated for a particular purpose; but in no instance but this does the common law permit the clerk himself to interfere in recovering a presentation, of which he is afterwards to have the advantage. For besides that he has (as was before observed) no temporal right in him till after institution and induction, and as he therefore can suffer no wrong, is consequently entitled to no remedy, this exclusion of the clerk from being plaintiff seems also to arise from the very great honor and regard which the law pays to his sacred function. For it looks upon the cure of souls as too arduous and important a task to be eagerly sought for by any serious clergyman; and therefore will not permit him to contend openly at law for a charge and trust, which it presumes he undertakes with diffidence.

But when the clerk 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, by writ of entry, assize, ejectment, debt or trespass (as the case may happen), which it furnishes to the owners of lay property. Yet he shall not have a writ of right, nor such other similar writs as are grounded upon the mere right; because he hath not in him the entire fee and right:[1] but he is entitled to a special remedy called a writ of *juris utrum*, which is sometimes styled the parson's writ of right,[k] [253] being the highest writ which he can have.[1] This lies for a parson or a prebendary at common law, and for a vicar by statute 14 Edward III, c. 17 (Real Actions, 1340), and is in the nature of an assize, to inquire whether the tenements in question are frankal-

[1] F. N. B. 49.
[k] Booth. 221.
[1] F. N. B. 48.

moigne belonging to the church of the demandant or else the lay fee of the tenant.[m] And thereby the demandant may recover lands and tenements, belonging to the church, which were aliened by the predecessor; or of which he was disseised; or which were recovered against him by verdict, confession or default, without praying in aid of the patron and ordinary; or on which any person has intruded since the predecessor's death.[n] But since the restraining statute of 13 Elizabeth, c. 10 (Fraudulent Conveyance, 1571), whereby the alienation of the predecessors, or a recovery suffered by him of the lands of the church, is declared to be absolutely void, this remedy is of very little use, unless where the parson himself has been deforced for more than twenty years;[o] for the successor, at any competent time after his accession to the benefice, may enter, or bring an ejectment.

m Registr. 32.

n F. N. B. 48, 49.

o Booth. 221.

CHAPTER THE SEVENTEENTH. [254]

OF INJURIES PROCEEDING FROM OR AFFECTING THE CROWN.

§ 325. Injuries from and to the king.—Having in the nine preceding chapters considered the injuries, or private wrongs, that may be offered by one subject to another, all of which are redressed by the command and authority of the king, signified by his original writs returnable in his several courts of justice, which thence derive a jurisdiction of examining and determining the complaint, I proceed now to inquire of 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,[a] or else is the sufferer, and which then are usually remedied by peculiar forms of process, appropriated to the royal prerogative. In treating, therefore, of these, we will consider, first, the manner of redressing those wrongs or injuries which a subject may suffer from the crown, and then of redressing those which the crown may receive from a subject.

§ 326. 1. Injuries caused by the king: a. Personal immunity of the king.—That the king can do no wrong is a necessary and fundamental principle of the English constitution: meaning only, as has formerly been observed,[b] that, in the first place, whatever may be amiss in the conduct of public affairs is not [255] chargeable personally on the king, nor is he, but his ministers, accountable for it to the people: and, secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice.[c] Whenever, therefore, it happens that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign[d] (for who shall command the king?[e]), yet the law hath furnished the subject with a decent and respectful mode of removing

[a] Bro. Abr. t. Petition. 12. t. Prerogative. 2.
[b] Book I. c. 7. pag. 243–246.
[c] Plowd. 487.
[d] Jenkins. 78.
[e] Finch. L. 83.

that invasion, by informing the king 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, it then issues as of course, in the king's 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, because it feels itself incapable of furnishing any adequate remedy, without infringing the dignity and destroying the sovereignty of the royal person, by setting up some superior power with authority to call him to account. The inconveniency, therefore, of a mischief that is barely possible, is (as Mr. Locke has observed [f]) well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being set out of the reach of coercion. 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 king has been deceived and induced to do a temporary injustice.

§ 327. b. Redress from the crown.—[256] The common-law methods of obtaining possession or restitution from the crown, of either real or personal property, are,

§ 328. (1) Petition of right.—By *petition de droit*, or petition of right, which is said to owe its original to King Edward the First.[g 1] 2. By *monstrans de droit*, manifestation or plea of right:

f On Gov. p. 2. § 205.

g Bro. Abr. t. Prerog. 2. Fitzh. Abr. t. Error. 8.

1 The proceedings upon a petition of right are now in practice regulated by the Petition of Right Act, 1860. The suppliant (for the claimant in such proceedings is thus designated) is required to leave at the home office a petition for the *fiat* of the crown that right be done. When this *fiat* has been granted,

both of which may be preferred or prosecuted either in the chancery or exchequer.[h] The former is of use where the king is in full possession of the hereditaments or chattels, and the party suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself; in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate:[i] and then, upon this answer being indorsed or underwritten by the king, *soit droit fait al partie* (let right be done to the party[j]), a commission shall issue to inquire of the truth of this suggestion:[k] after the return of which, the king's attorney is at liberty to plead in bar; and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. Thus, if a disseisor of lands, which are holden of the crown, dies seised without any heir, whereby the king is *prima facie* entitled to the lands, and the possession is cast on him either by inquest of office or by act of law without any office found; now, the disseisee shall have remedy by petition of right, suggesting the title of the crown and his own superior right before the disseisin made.[l]

§ 329. (2) Monstrans de droit.—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 king or the subject hath the right.[2] As if, in the case before supposed, the whole special matter is found by an inquest of office

h Skin. 609.
i Finch. L. 256.
j Stat. Tr. vii. 134.
k Skin. 608. Rast. Entr. 461.
l Bro. Abr. t. Petition. 20. 4 Rep. 58.

---

the petition is returned to the suppliant, who will file it at the central office, and serve a copy on the solicitor to the treasury; and, if the claim is not admitted, a defense is delivered on behalf of the crown. The subsequent proceedings are very similar to the course of an ordinary action. Judgment, however, cannot be enforced against the crown by any mode of execution. Costs are payable both to and by the crown, subject to the same rules, so far as practicable, as obtain in proceedings between subject and subject.—STEPHEN, 3 Comm, (16th ed.), 666.

2 Although now obsolete, the procedure of *monstrans de droit* was once of great importance, and almost superseded that by petition.

(as well the disseisin, as the dying without any heir), the party grieved shall have *monstrans de droit* at the common law.[m] But as this seldom happens, and [257] the remedy by *petition* was extremely tedious and expensive, that by *monstrans* was much enlarged and rendered almost universal by several statutes, particularly 36 Edward III, c. 13 (Escheators, 1362), and 2 & 3 Edward VI, c. 8 (Inquisitions of Escheator, 1548), which also allow inquisitions of office to be traversed or denied, wherever the right of a subject is concerned, except in a very few cases.[n] These proceedings are had in the petty bag office in the court of chancery: 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* (that the hand of the king be removed, and possession restored to the petitioner, saving the right of the king);[o] which last clause is always added to judgments against the king,[p] to whom no *laches* is ever imputed, and whose right (till some late statutes[q]) was never defeated by any limitation or length of time. And by such judgment the crown is instantly out of possession;[r] so that there needs not the indecent interposition of his own officers to transfer the seisin from the king to the party aggrieved.

§ 330. 2. Suits by the crown.—The methods of redressing such injuries as the crown may receive from a subject, are,

§ 331. a. Common-law actions.—By such usual common-law actions as are consistent with the royal prerogative and dignity. As, therefore, the king, by reason of his legal ubiquity, cannot be disseised or dispossessed of any real property which is once vested in him, he can maintain no action which supposes a dispossession of the plaintiff, such as an assize or an ejectment;[s] but he may bring a *quare impedit*,[t] which always supposes the complainant to

m 4 Rep. 55.
n Skin. 608.
o 2 Inst. 695. Rast. Entr. 463.
p Finch. L. 460.
q 21 Jac. I. c. 2 (Crown Suits, 1623). 9 Geo. III. c. 16 (Crown Suits, 1768).
r *Ibid.* 459.
s Bro. Abr. t. Prerogative. 89.
t F. N. B. 32.

be seised or possessed of the advowson: and he may prosecute this writ, like every other by him brought, as well in the king's bench [u] as the common pleas, or in whatever court he pleases. So, too, he may bring an action of trespass for taking away his goods; but such actions are not usual (though in strictness maintainable) for breaking his close, or other injury done upon his soil or possession.[w] It would be equally tedious [258] and difficult to run through every minute distinction that might be gleaned from our ancient books with regard to this matter; nor is it in any degree necessary, as much easier and more effectual remedies are usually obtained by such prerogative modes of process as are peculiarly confined to the crown.

§ 332. **b. Inquest of office, etc.**—Such is that of *inquisition* or *inquest of office:* which is an inquiry made by the king's officer, his sheriff, coroner or escheator, *virtute officii* (by virtue of their office), or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels.[x] This is done by a jury of no determinate number; being either twelve, or less, or more.[3] As, to inquire, whether the king's tenant

u Dyversite de Courtes. c. Bank le Roy.

w Bro. Abr. t. Prerog. 130. F. N. B. 90. Year-Book. 4 Hen. IV. 4 (Crown Grants, 1402).

x Finch. L. 323, 4, 5.

---

3 **Number of the jury.**—As to the number of the jury: In early times the inquisition had no fixed number. In the Frankish empire we are told of a great variety of numbers. Among the Normans, also, it varied much, and "twelve has not even the place of the prevailing *grundzahl.*" It may have been the recognitions under Henry II that established twelve as the usual number; and even there the number was not uniform. In the technical "inquest of office," it always continued to be uncertain: "This is done," says Blackstone, "by a jury of no determinate number; being either twelve, or less or more." In 1199 there is a jury of nine. In Bracton's Note-Book, at dates between 1217 and 1219, we see juries of nine, thirty-six, and forty—partly owing, indeed, to the consent of litigants. We have already noticed that the grand assize was sixteen, made by adding the four electors to the elected twelve, and that recognitions as to whether one be of age were by eight. The attaint jury was usuall twenty-four; but in the reign of Henry VI a judge remarked that the number was discretionary with the court.—THAYER, Prelim. Treatise on Evidence, 85.

for life died seised, whereby the reversion accrues to the king: whether A, who held immediately of the crown, died without heirs; in which case the lands belong to the king by escheat: whether B be attainted of treason, whereby his estate is forfeited to the crown: whether C, who has purchased lands, be an alien; which is another cause of forfeiture: whether D be an idiot *a nativitate* (from his birth); and therefore, together with his lands, appertains to the custody of the king: and other questions of like import, concerning both the circumstances of the tenant and the value or identity of the lands. These inquests of office were more frequently in practice than at present, during the continuance of the military tenures amongst us: when, upon the death of every one of the king's tenants' an inquest of office was held, called an *inquisitio post mortem* (an inquest after death), to inquire of what lands he died seised, who was his heir, and of what age, in order to entitle the king to his marriage, wardship, relief, *primer-seisin*, or other advantages, as the circumstances of the case might turn out. To superintend and regulate these inquiries the court of wards and liveries was instituted by statute 32 Henry VIII, c. 46 (Court of Wards, 1540), which was abolished at the restoration of King Charles the Second, together with the oppressive tenures upon which it was founded.

[259] With regard to other matters, the inquests of office still remain in force, and are taken upon proper occasions; being extended not only to lands, but also to goods and chattels personal, as in the case of wreck, treasure-trove and the like; and especially as to forfeitures for offenses. For every jury which tries a man for treason or felony, every coroner's inquest that sits upon a *felo de se*, or one killed by chance-medley, is, not only with regard to chattels, but also as to real interests, in all respects an inquest of office; and if they find the treason or felony, or even the flight of the party accused (though innocent) the king is thereupon, by virtue of this *office found*, entitled to have his forfeitures; and also, in the case of chance-medley, he or his grantees are entitled to such things by way of deodand as have moved to the death of the party.

These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; with-

out which he in general can neither take nor part from anything.[y] For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury.[z] It is, however, particularly enacted by the statute 33 Henry VIII, c. 20 (Treason, 1541), that, in case of attainder for high treason, the king shall have the forfeiture instantly, without any inquisition of office. And, as the king hath no title at all to any property of this sort before office found, therefore by the statute 18 Henry VI, c. 6 (Crown Grants, 1439), it was enacted that all letters patent or grants of lands and tenements before office found, or returned into the exchequer, shall be void. And, by the bill of rights at the revolution, 1 W. & M., st. 2, c. 2 (1688), it is declared that all grants and promises of fines and forfeitures of particular persons before conviction (which is here the inquest of office) are illegal and void; which indeed was the law of the land in the reign of Edward the Third.[a]

[260] With regard to real property, if an office be found for the king, it puts him in immediate possession, without the trouble of a formal entry, provided a subject in the like case would have had a right to enter; and the king shall receive all the mesne or intermediate profits from the time that his title accrued.[b] As, on the other hand, by the *articuli super cartas*,[c] if the king's escheator or sheriff seize lands into the king's hand without cause, upon taking them out of the king's hand again, the party shall have the mesne profits restored to him.

§ 333. (1) Protection of the subject.—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 (for the most part) *traverse* or deny the matter of fact itself, and put it in a course of trial by the common-law process of the court of chancery; yet

[y] Finch. L. 82.
[z] Gilb. Hist. Exch. 132. Hob. 347.
[a] 2 Inst. 48.
[b] Finch. L. 325, 326.
[c] 28 Edw. I. st. 3. c. 19 (Escheat, 1300).

still, in some special cases, he hath no remedy left but a mere petition of right.[d] These *traverses*, as well as the *monstrans de droit*, were greatly enlarged and regulated for the benefit of the subject, by the statutes before mentioned, and others.[e] And in the traverses thus given by statute, which came in the place of the old petition of right, the party traversing is considered as the plaintiff;[f] and must therefore make out his own title, as well as impeach that of the crown, and then shall have judgment *quod manus domini regis amoveantur*, etc.*

§ 334. c. Scire facias.—Where the crown hath unadvisedly granted anything by letters patent, which ought not to be granted,[g] or where the patentee hath done an act that amounts to a forfeiture of [261] the grant,[h] the remedy to repeal the patent is by writ of *scire facias* in chancery.[14] This may be brought either on the part of the king, in order to resume the thing granted; or, if the grant be injurious to a subject, the king is bound of right to permit him (upon his petition) to use his royal name for repealing the patent in a *scire facias*.[k] And so, also, if, upon office untruly found for the king, he grants the land over to another, he who is grieved thereby, and traverses the office itself, is entitled before issue joined to a *scire facias* against the patentee, in order to avoid the grant.[l]

§ 335. d. Information.—An *information* on behalf of the crown, filed in the exchequer by the king's attorney-general, is a

* See p. *257.

d Finch. L. 324.

e Stat. 34 Edw. III. c. 13 (Escheators, 1360). 36 Edw. III. c. 13 (Escheators, 1362). 2 & 3 Edw. VI. c. 8 (Inquisitions of Escheator, 1548).

f Law of Nisi Prius. 201, 202.

g See Book II. c. 21.

h Dyer. 198.

i 3 Lev. 220. 4 Inst. 88.

k 2 Ventr. 344.

l Bro. Abr. t. Scire Facias. 69. 185.

---

14 The proceeding by *scire facias* to repeal a patent is now abolished. The revocation of a patent is now obtainable in England on petition to the court, the petition being presented either by the attorney general, or by anyone authorized by him, or by any aggrieved person.

method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong[m] committed in the lands or other possessions of the crown. It differs from an information filed in the court of king's bench, of which we shall treat in the next book; in that *this* is instituted to redress a private wrong, by which the property of the crown is affected, *that* is calculated to punish some public wrong, or heinous misdemeanor in the defendant. It is grounded on no writ under seal, but merely on the intimation of the king's officer the attorney-general, who "gives the court to understand and be informed of" the matter in question; upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual informations are those of *intrusion* and *debt: intrusion*, for any trespass committed on the lands of the crown,[n] as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, or the like; and *debt*, upon any contract for moneys due to the king, or for any forfeiture due to the crown upon the breach of a penal statute. This is most commonly used to recover forfeitures occasioned by transgressing those laws, which are enacted for the establishment [262] and support of the revenue; others, which regard mere matters of police and public convenience, being usually left to be inforced by common informers, in the *qui tam* informations or actions, of which we have formerly spoken.[o] But after the attorney-general has informed upon the breach of a penal law, no other information can be received.[p] There is also an information *in rem*, when any goods are supposed to become the property of the crown, and no man appears to claim them, or to dispute the title of the king. As anciently in the case of treasure-trove, wrecks, waifs and estrays, seised by the king's officer for his use. Upon such seizure an information was usually filed in the king's exchequer, and thereupon a proclamation was made for the owner (if any) to come in and claim the effects; and at the same time there issued a commission of *appraisement* to value the goods in the officer's hands: after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the

m Moor. 375.
n Cro. Jac. 212. 1 Leon. 48. Savil. 49.
o See pag. 160.
p Hard. 201.

use of the crown.[q] And when, in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs and excise, the same process was adopted in order to secure such forfeited goods for the public use, though the offender himself had escaped the reach of justice.

§ 336. **e. Quo warranto.**—A writ of *quo warranto* (by what warrant) is in the nature of a writ of right for the king, 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.[r] It lies also in case of nonuser or long neglect of a franchise, or misuser or abuse of it; being a writ commanding 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. This was originally returnable before the king's justices at Westminster;[s] but afterwards only [263] before the justices in eyre, by virtue of the statutes of *quo warranto*, 6 Edward I, c. 1 (1278), and 18 Edward I, st. 2 (1290),[t] but since those justices have given place to the king's temporary commissioners of assize, the judges on the several circuits, this branch of the statutes hath lost its effect;[u] and writs of *quo warranto* (if brought at all) must now be prosecuted and determined before the king's justices at Westminster. And in case of judgment for the defendant, he shall have an allowance of his franchise; but in case of judgment for the king, for that the party is entitled to no such franchise, or hath disused or abused it, the franchise is either seized into the king'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.[w]

§ 337. **(1) Information in the nature of quo warranto.**—The judgment on a writ of *quo warranto* (being in the nature of a writ

q Gilb. Hist. of Exch. c. 13.
r Finch. L. 322. 2 Inst. 282.
s Old Nat. Brev. fol. 107. edit. 1534.
t 2 Inst. 498. Rast. Entr. 540.
u 2 Inst. 498.
w Cro. Jac. 259. 1 Show. 280.

of right) is final and conclusive even against the crown.[x] Which, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by *information* filed in the court of king's bench by the attorney-general, in the nature of a writ of *quo warranto;* wherein the process is speedier and the judgment not quite so decisive. 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 hath 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.

During the violent proceedings that took place in the latter end of the reign of King Charles the Second, it was, among other things, thought expedient to new-model most of the corporation towns in the kingdom; for which purpose many of [264] those bodies were persuaded to surrender their charters, and informations in the nature of *quo warranto* were brought against others, upon a supposed, or frequently a real, forfeiture of their franchises by neglect or abuse of them. And the consequence was, that the liberties of most of them were seized into the hands of the king, who granted them fresh charters with such alterations as were thought expedient; and, during their state of anarchy, the crown named all their magistrates. This exertion of power, though perhaps in *summo jure* (in strict right) it was for the most part strictly legal, gave a great and just alarm; the new-modeling of all corporations being a very large stride towards establishing arbitrary power; and therefore it was thought necessary at the revolution to bridle this branch of the prerogative, at least so far as regarded the metropolis, by statute 2 W. & M., c. 8 (City of London, 1690), which enacts that the franchises of the city of London shall never be forfeited again for any cause whatsoever.

This proceeding is, however, 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 (Municipal Offices, 1710), which permits an information in nature of *quo warranto* to be brought with leave of the court, at the rela-

[x] 1 Sid. 86. 2 Show. 47. 12 Mod. 225.

tion 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.

§ 338. f. Mandamus.—The writ of *mandamus*[y] (we command) is also made by the same statute 9 Ann., c. 20, a most full and 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. [265] These are injuries for which, though redress for the party interested may be had by assize, or other means, yet as the franchises concern the public, and may affect the administration of justice, this prerogative writ also issues from the court of king's bench; commanding, upon good cause shown to the court, the party complaining to be admitted or restored to his office. And the statute requires that a return be immediately made to the first writ of *mandamus;* which return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue or demur, and the same proceedings may be had as if an action on the case had been brought for making a false return: and, after judgment obtained for the prosecutor, he shall have a peremptory writ of *mandamus* to compel his admission or restitution; which latter (in case of an action) is effected by a writ of restitution.[z] So that now the writ of *mandamus*, in cases within this statute, is in the nature of an action: whereupon the party applying and succeeding may be entitled to costs, in case it be the franchise of a citizen, burgess or freeman,[a] and also, in general, a writ of error may be had thereupon.[b]

This writ of *mandamus* may also be issued, in pursuance of the statute 11 George I, c. 4 (Municipal Elections, 1724), in case within the regular time no election shall be made of the mayor or

y See pag. 110.
z 11 Rep. 79.
a Stat. 12 Geo. III. c. 21 (Municipal Corporation, 1772).
b 1 P. Wms. 351.

other chief officer of any city, borough or town corporate, or (being made) it shall afterwards become void; to require the electors to proceed to election, and proper courts to be held for admitting and swearing in the magistrates so respectively chosen.

§ 339. Review of civil injuries and their remedies.—We have now gone through the whole circle of civil injuries, and the redress which the laws of England have anxiously provided for each.[5] In

5 **Classification of actions in the common-law system.**—The manner in which the actions originated shows that practical convenience and not theory determined their birth, their growth, and in many cases their death. It is, however, true that any system of remedial law, in what manner soever produced, may be profitably viewed from the standpoint of abstract jurisprudence, and this is especially necessary when we come to study it with the purpose of finding out the degree of maturity reached at a particular epoch. If we are to learn much about the actions they must be classified.

The simplest and most formal way of doing this, the way in which the older masters of the common law like Fitzherbert and Coke would have gone about it, would be to make an exhaustive analysis of the writs found on the Register, and distribute the actions according to the verbal resemblances found in them.

There were two types of writs containing well-marked differences. One was the *præcipe;* the other, the *si te fecerit securum.* Of the *præcipe* there were three forms: *præcipe quod reddat, præcipe quod permittat,* and *præcipe quod faciat.* The sheriff was ordered by these words of the writ to bid the defendant to render, permit or do something. The return of the sheriff showed whether the defendant complied; if he did not, the action proceeded in the king's court. The oldest of the writs belong to this class. The writ of right and other proprietary real actions, as well as debt, detinue, account and covenant, were *præcipes.*

The writs beginning *si te fecerit securum* presupposed the existence of a complete cause of action and ordered the sheriff to command the defendant to appear and answer in the king's court, if proper security should be given by the prosecution. The four petty assizes, *novel disseisin, morte d'ancestor, assize utrum,* and *darrein presentment,* as well as the writ of trespass and the different forms of case, were of this type. The *si te fecerit securum* involved a more immediate and direct application of the royal power, and evidently belonged to a maturer stage than the *præcipe.* Nothing that is helpful can now be made out of this formal difference in the writs, but when English law was merely a commentary on writs, the distinction was not without importance.

After canvassing the field of remedial law in Edward I's day, Professor Maitland has put together a string of questions which would be helpful in determining the genera and species of the many actions. The results would

which the student cannot but observe that the main difficulty which attends their discussion arises from their great variety, which is apt at our first acquaintance to breed a confusion of ideas and a kind of distraction in the memory: a difficulty not a little increased [268] by the very immethodical arrangement, too justly complained of in our ancient writers, but which will insensibly wear away when they come to be reconsidered, and we are a little familiarized to those terms of art in which the language of

hardly compensate at this late day for the labor expended in putting each particular action through such an examination. The common-law scheme of actions was not framed; it grew. The secret of all its defects, its irregularities, its incompleteness is found in this. Yet in time even the slow and unaided process of natural growth fills in nearly all the interstices and gives us a rounded whole such as no legislator or theorist with all imaginable human wisdom and foresight could possibly have supplied beforehand.

Let us now turn to the other scheme of classification which has commended itself to English lawyers from the time of Bracton. All actions, says he, are either *in rem, in personam,* or mixed. Fleta and subsequent writers converted the phrases *in rem* and *in personam* into the terms *real* and *personal.*

For the genesis of this classification of actions we must go back much farther than to the time of Bracton. As has already been indicated, the Roman classification of actions turned upon the conception of legal obligation or duty. The action *in personam* lay against a particular person to enforce a personal obligation arising out of contract or tort; or, as it may be otherwise expressed, to enforce the plaintiff's right to some specific act or forbearance on the part of the defendant.

The expression *in personam* is said to be abridged from *in personam certam sive determinatam.* At any rate the obligation in cases of actions *in personam* exists against a definite person, a person ascertained either by the fact that he has made a contract or has done an act which constitutes a delict or tort. The expression *in rem,* which is used in connection with the other grand division of Roman actions, is overlaid with perplexities. Primarily, the action *in rem* lies to enforce such rights as are available not against a particular individual, but against the whole world. But it has another meaning—that of an action directed against the thing itself. The action *in rem* is therefore either an impersonal action or an action against a thing. This latter sense is, however, a derived one, and may be included under the other. In the action *in rem* the plaintiff claimed that, as against all the world, a *res,* corporeal or incorporeal, was his. This action was used to vindicate a *jus in rem.* The personal action, on the other hand, asserted a *jus in personam.* Status, property or ownership, and servitudes are illustrations of *jura in rem.* It will be seen that the notion lying at the basis of the Roman action *in rem* was an abstract one and not very clearly defined. The most conspicuous element in

our ancestors has obscured them. Terms of art there will unavoidably be in all sciences, the easy conception and thorough comprehension of which must depend upon frequent use: and the more subdivided any branch of science is, the more terms must be used to express the nature of these several subdivisions, and mark out with sufficient precision the ideas they are meant to convey. This difficulty, therefore, however great it may appear at first view, will shrink to nothing upon a nearer approach, and be rather advan-

it is the conception of the *res*, corporeal or incorporeal, which was the subject matter of the right to be vindicated.

Now, Bracton's chapter on actions, as Professor Maitland fully shows, is largely based on the Roman Institutes, as the learning of that book filters through the mind of the mediæval commentator Azo. Bracton seems to have made but poor use of his material and was unable to make the English actions fit into the Roman classification. Azo gives a number of divisions. Of these apparently the most important—that which divides all actions into actions *in rem*, actions *in personam*, and mixed actions—Bracton adopts. The actions *in personam* do not give him a great deal of trouble, though even here the English writer does not fail to fall into some errors. No one could fail to grasp the conspicuous truth that the personal actions lie to enforce obligations arising against a definite person out of a contract or tort. This feature Bracton perceives, and he accordingly brings the idea out clearly.

Turning to the actions *in rem*, Bracton brings with him from his excursion into Roman law only the expression itself, *actio in rem*, and one or two ideas which lie plainly on the surface. Thus he perceives that the action is not based upon obligation in the Roman sense, and that the plaintiff demands a certain thing, not the value or equivalent of it. But Bracton goes further than this, and in a bold, though apparently casual utterance, restricts the action *in rem* in English law to the recovery of immovables (real property) and interests incident thereto, such as the right of advowson and right of common.

This departure of Bracton from Roman ideas was perhaps due to a mere caprice of independence rather than to any necessary distinction between the Roman and English law of actions. This whim of Bracton, if it be a mere whim, has had far-reaching effects, and the marks of it are found to-day in that distinction between real and personal property which is peculiar to English law. What reason does he give for the proposition that, in English law, an action for the recovery of a specific chattel cannot be an action *in rem?*

"If," says he, "the thing sought to be recovered is a movable, such as a lion, ox, ass, garment, or other thing determinable by weight or measure, it would seem at first sight that the action would be *in rem* rather than *in personam*, because a specific thing is sought and because the possessor is in duty bound to restore the thing sued for. But, on the contrary, the action will be *in personam* only because he from whom the recovery is sought is not held

tageous than of any disservice, by imprinting a clear and distinct notion of the nature of these several remedies. And, such as it is, it arises principally from the excellence of our English laws, which adapt their redress exactly to the circumstances of the injury, and do not furnish one and the same action for different wrongs, which are impossible to be brought within one and the same description: whereby every man knows what satisfaction he is entitled to expect from the courts of justice, and as little as possible is left in the

exactly to the restoration of the thing, but, in the alternative, either to the return of the thing or its value; and by paying the value only, he will be discharged whether the thing is produced or not."

Bracton here clearly missed the true principle of classification, for instead of determining the nature of the action by the duty which it is brought to enforce, he finds the criterion in the nature of the redress which was to be or might be obtained. It would seem that the proposition to which he was here committing English law was a principle erroneously deduced from the fact that in writs of debt in the *detinet*, the plaintiff was required to state the value of the chattel sued for. To state the value was certainly highly proper, and indeed necessary; for it might transpire that the chattel was lost or destroyed, or animal dead, in which case it could not be restored. Movables are necessarily destructible, but this furnishes no reason why the action for their recovery should not be classed as an action *in rem*. In Roman law the circumstance that the plaintiff might be compelled, as a last resort, to accept a money compensation instead of the chattel sued for did not result in changing the action from one category to another. It still remained an action *in rem* because of the nature of the fundamental duty. If the defendant failed to restore the thing, he was condemned to pay its value as damages. If Bracton had been content faithfully to copy from the Roman sources, he could have said with perfect consistency that detinue is an action *in rem* and that it is based directly on ownership. Instead of this, our law of ownership in chattels, blunders around for two or three centuries, and the right clue to the subject has hardly yet been discovered.

From the viewpoint which classifies according to the nature of the duties to be enforced, a triple division of civil actions is the only proper one—actions based on ownership, actions *ex contractu*, and actions *ex delicto*. The actions based on ownership might well be called proprietary actions, or, to use a Roman term, recuperatory actions. There is no reason in nature or law why the proprietary actions should be restricted to actions for the recovery of immovable property, but such was the result of Bracton's theory. The English law consequently acknowledged no purely proprietary writ for chattels; and detinue, which ought by all means to have been placed in this lost category, has since wandered around among the common-law actions, unable to find its proper place in the procedural system. Bracton and those who came after him

breast of the judges, whom the law appoints to administer, and not to prescribe the remedy. And I may venture to affirm that there is hardly a possible injury that can be offered either to the person or property of another, for which the party injured may not find a remedial writ, conceived in such terms as are properly adapted to his own particular grievance.

In the several personal actions which we have cursorily explained, as debt, trespass, detinue, action on the case, and the like, it is easy to observe how plain, perspicuous and simple the remedy

would have it that the only actions *in rem* were those brought to vindicate a right to immovables. The action *in rem*, being thus permanently associated with real property, came to be spoken of as a real action.

The term "personal" was of course likewise substituted, for *in personam*, and as detinue had been improperly forced into the category of personal actions, the meaning of the term personal as applied to actions has been much confused. It has, in fact, included three distinct sorts of actions, i. e., actions *ex contractu*, actions *ex delicto*, and the proprietary action for the recovery of chattels. The original meaning of personal action, as the equivalent of *actio in personam*, was thus obscured, and by a curious perversion the action was finally supposed to be called personal because of the fact that chattels might be recovered by the use of such remedy. Now, just as the term "realty" had come to be used for the immovable property recovered in real actions, so "personalty" came to be used for the chattels or damages recovered in the personal action. The distinction between real and personal property which runs all through our law is thus in a measure an accidental development in the evolution of the common-law actions.

The differences of the most practical importance between the real and personal actions are found in the process incident to the prosecution of them. In the real actions the process was direct, and the tenements could, under varying conditions, be seized by the sheriff into the king's hand and turned over to the demandant. In personal actions the mesne, as distinguished from the final, process was directed against the defendant personally in order to compel him to put in an appearance. His goods could be distrained or he could be taken on a *capias*. In trespass *vi et armis* this right of arrest existed by common law; in debt, detinue, account, and trespass on the case it had been given by statute. It was well into the nineteenth century before a plaintiff in a personal action could obtain a final judgment against a defendant who failed to appear.

As the Roman law had its mixed actions, so the English lawyers were compelled to classify as mixed certain actions which partook of the nature of both. The necessity for recognizing such a class shows that the original classification was not satisfactory. "'Mixed' is a blessed word," say the historians of our early law. "The impatient student who looks down upon mediæval

is, as chalked out by the ancient common law. In the methods prescribed for the recovery of landed and other permanent property, as the right is more intricate, the feudal or rather Norman remedy by real actions is somewhat more complex and difficult, and attended with some delays. And since, in order to obviate those difficulties and retrench those [267] delays, we have permitted the rights of real property to be drawn into question in mixed or personal suits, we are (it must be owned) obliged to have recourse to such arbitrary fictions and expedients that unless we had developed

law from the sublime heights of general jurisprudence will say that most of our English actions are mixed, and many of them very mixed."

Perhaps it will lead to a better understanding of the classification approved by Bracton to quote from the familiar pages of his modern successor. "With us in England," says Blackstone, "the several suits, or remedial instruments of justice, are from the subject of them distinguished into three kinds: actions personal, real and mixed. Personal actions are such whereby a man claims a debt or personal duty, or damages in lieu thereof; and likewise whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs. . . . Of the former nature are all actions upon debt or promises; of the latter, all actions for trespasses, nuisances, assaults, defamatory words, and the like.

"Real actions, . . . which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons or other hereditaments, in fee simple, fee-tail, or for term of life. By these actions formerly all disputes concerning real estates were decided; but they are now pretty generally laid aside in practice, upon account of the great nicety required in their management and the inconvenient length of their process; a much more expeditious method of trying titles being since introduced by other actions, personal and mixed.

"Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded and also personal damages for a wrong sustained. As, for instance, an action of waste, which is brought by him who hath the inheritance, in remainder or reversion, against the tenant for life, who hath committed waste therein, to recover not only the land wasted, which would make it merely a real action, but also treble damages in pursuance of the statute of Gloucester, which is a personal recompense; and so both being joined together, denominate it a mixed action."

To go through the catalogue of actions in order to place them properly in this classification would be unprofitable and the result unsatisfactory. We have a hint of the difficulties that would be encountered in such an undertaking when we learn that Bracton could hardly determine in his own mind whether the assizes of *novel disseisin* and *morte d'ancestor* were actions *in rem* or *in*

their principles, and traced out their progress and history, our present system of remedial jurisprudence (in respect of landed property) would appear the most intricate and unnatural that ever was adopted by a free and enlightened people.

But this intricacy of our legal process will be found, when attentively considered, to be one of those troublesome, but not dangerous, evils which have their root in the frame of our constitution, and which therefore can never be cured, without hazarding every-

personam. We must, however, notice a few of the most important of the actions and observe where they belong.

At the top of the scale of actions available for the recovery of lands and interests therein was the writ of right, the most real of the real actions, the great and final remedy for the recovery of proprietary interests in land. Closely associated with this remedy in procedure were certain other writs said to be in the nature of the writ of right. Such were the writ of right of dower, the formedon in descender and reverter, and the writ of right *de rationabili parte.*

Below the writ of right were the possessory real actions known as the assizes and the writ of entry. In the assize of *novel disseisin* the plaintiff recovered both seisin and damages, this being, says Blackstone, the only instance where damages were recoverable in a possessory action at common law.

The assizes were in the nature of statutory remedies, and available only under circumstances defined for each. The writ of entry, on the other hand, was the universal remedy for the recovery of possession wrongfully withheld from the owner. Its forms were many, "being plainly and clearly chalked out in that most ancient and highly venerable collection of legal forms, the *Registrum Brevium.*" Some form of this writ was available by a party ousted of his tenements by abatement, intrusion or disseisin, and, in general, for deforcements. But the widow's writs for obtaining her dower had special names: writ of dower and writ of dower *unde nihil habet.* If too much were assigned for dower, her holdings could be cut down by means of a writ for the admeasurement of dower, sued out at the instance of the heir or his guardian. The writs of dower were analogous to the writ of right.

For disturbance or usurpation of the right of presentation to a benefice there was a scheme of real actions beginning with the writ of right of advowson and ending in the *quare impedit,* which latter remedy, in Blackstone's day, had supplanted the others and then remained almost the sole real action in common use. For disturbance in franchises, commons, ways and tenures, the usual remedy was by an action on the case; but a real action for the admeasurement of common and an action upon a writ *quod permittat* were respectively available for surcharging and disturbing the common.

The writs *de ejectione firmæ* and *quare ejecit infra terminum* were maintainable at the suit of a tenant for years who was dispossessed of his interest

thing that is dear to us. In absolute governments, when new arrangements of property and a gradual change of manners have destroyed the original ideas, on which the laws were devised and established, the prince by his edict may promulge a new code, more suited to the present emergencies. But when laws are to be framed by popular assemblies, even of the representative kind, it is too

in the term. The former lay against the lessor, reversioner, remainderman, or any stranger who was himself the wrongdoer; the other against a person claiming under a wrongdoer. From the *quare ejecit* came the modern action of ejectment. These actions are, like waste, mixed, inasmuch as the plaintiff recovers the unexpired term and damages for the injury. Originally the recovery of damages was the chief object in ejectment, but as the remedy came to be more and more real and was principally used to try questions of title, this object was lost sight of. The damages recoverable in the action of ejectment thus became nominal, and the plaintiff was allowed to sue for his actual damages in an independent action for mesne profits.

Of personal common-law actions the most important are account, covenant, debt, detinue, *assumpsit*, trespass, case, trover and replevin. These, as we have seen, are divided into two classes—actions *ex contractu* and actions *ex delicto;* a classification logical enough in itself, but made somewhat unsatisfactory by the supposed necessity of forcing the action of detinue into one or the other division.

One who compares the treatise of Bracton with such a modern work as Chitty on Pleading will be struck with the fact that the comparative importance of the real and personal actions has been reversed in the period spanning the six intervening centuries. Bracton wrote a big book, and a large part of the really English law which he undertook to expound is found in connection with the subject of real actions. Of the personal actions he has little or nothing to say. In Blackstone's treatise only the personal actions are thought deserving of attention. The old real actions were practically obsolete when Chitty wrote (1808), and within the succeeding generation legislation abolished nearly every remaining vestige of them. The procedure incident to their prosecution was too cumbersome.

It was a toilsome and tedious process, that by which English remedial law was wrought out. Remedies conceived and partially developed in one field had to be warped and bent to strange uses. Ejectment, *assumpsit*, trover, all illustrate this. Wondrous are the mazes encountered even in a casual glance at the history of the various actions. That there has never been a logical classification in this field is not surprising. Before the time of Blackstone no man could have been in a position to see the subject in its entirety. Even when Coke wrote, many new things were yet to be done with such actions as *assumpsit*, detinue, trover, and replevin, and in Blackstone's day some parts of the long cavalcade of actions had already passed or were receding from view.—STREET, 3 Foundations of Legal Liability, 36.

Herculean a task to begin the work of legislation afresh, and extract a new system from the discordant opinions of more than five hundred counselors. A single legislator or an enterprising sovereign, a Solon or Lycurgus, a Justinian or a Frederick, may at any time form a concise, and perhaps an uniform, plan of justice; and evil betide that presumptuous subject who questions its wisdom or utility. But who that is acquainted with the difficulty of new-modeling any branch of our statute laws (though relating but to roads or to parish settlements) will conceive it ever feasible to alter any fundamental point of the common law, with all its appendages and consequents, and set up another rule in its stead? When, therefore, by the gradual influence of foreign trade and domestic tranquillity, the spirit of our military tenures began to decay, and at length the whole structure was removed, the judges quickly perceived that the forms and delays of the old feudal actions (guarded with their several outworks of essoins, vouchers, aid-prayers and a hundred other formidable intrenchments) were ill-suited to that [268] more simple and commercial mode of property which succeeded the former, and required a more speedy decision of right, to facilitate exchange and alienation. Yet they wisely avoided soliciting any great legislative revolution in the old-established forms, which might have been productive of consequences more numerous and extensive than the most penetrating genius could foresee; but left them as they were, to languish in obscurity and oblivion, and endeavored by a series of minute contrivances to accommodate such personal actions as were then in use, to all the most useful purposes of remedial justice: and where, through the dread of innovation, they hesitated at going so far as perhaps their good sense would have prompted them, they left an opening for the more liberal and enterprising judges who have sat in our courts of equity to show them their error by supplying the omissions of the courts of law. And, since the new expedients have been refined by the practice of more than a century, and are sufficiently known and understood, they in general answer the purpose of doing speedy and substantial justice, much better than could now be effected by any great fundamental alterations. The only difficulty that attends them arises from their fictions and circuities; but when once we have discovered the proper clew, that labyrinth is easily pervaded. We inherit an old Gothic castle, erected in the

days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls are magnificent and venerable, but useless. The inferior apartments, now converted into rooms of convenience are cheerful and commodious, though their approaches are winding and difficult.[6]

In this part of our disquisitions I, however, thought it my duty to unfold, as far as intelligibly I could, the nature of these real actions, as well as of personal remedies. And this not only because they are still in force, still the law of the land, though obsolete and disused, and may perhaps, in their turn, be hereafter with some necessary corrections called out again into common use, but also

[6] **Views of Blackstone and Bentham on the English Law.**—In forming a judgment of Bentham's work and of the way he did it and of the efficiency of that way, it is almost as essential to see how he regarded the English law as it is to inquire precisely how far his opinions were correct. Bentham's voluminous writings leave no doubt as to his views concerning the English law. There was no health in it. Admitting, as he did, that the legislative enactments and the reports of adjudged cases contained more valuable materials for the construction of a system of laws than any other nation in the world possessed, he yet maintained that the existing law, so far from being the perfection of human reason or the product of matured experience, was (to use his own language) but "a fathomless and boundless chaos, made up of fiction, tautology, technicality and inconsistency, and the administrative part of it a system of exquisitely contrived chicanery, which maximizes delay and denial of justice." Thus viewing it, he saw no remedy but its overthrow and destruction as a system, and rebuilding it anew, using old materials as far as they were useful and no further. He regarded the whole system, as I have often thought, with much the same feeling that the French people contemporaneously looked upon the Bastile, as a monument of feudalism, oppression and injustice, fit only to be destroyed. Blackstone, on the other hand, viewing the system with the optimistic eyes of the age in which he wrote, compared it, in his inimitable style, to "an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls are magnificent and venerable, but useless, and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult." What could be more charming, what more desirable! All the interest and grandeur that attach to a structure at once imposing, venerable, and historic, combined with the convenience that results from its being already fitted to the amplest modern uses,—the only defect being, if indeed, it is such, that the approaches *may* be [he does not feel quite sure that they are] somewhat winding and difficult.—DILLON, Laws and Jurisprudence, Lect. XII, "Blackstone and Bentham," 321.

because, as a sensible [269] writer has well observed,[x] "whoever considers how great a coherence there is between the several parts of the law, and how much the reason of one case opens and depends upon that of another, will, I presume, be far from thinking any of the old learning useless, which will so much conduce to the perfect understanding of the modern." And besides I should have done great injustice to the founders of our legal constitution had I led the student to imagine that the remedial instruments of our law were originally contrived in so complicated a form as we now present them to his view: had I, for instance, entirely passed over the direct and obvious remedies by assizes and writs of entry, and only laid before him the modern method of prosecuting a writ of ejectment.

[x] Hawk. Abr. Co. Litt. Pref.

1853

[270]

CHAPTER THE EIGHTEENTH.

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

§ 340. Proceedings in an action at common law.—Having, under the head of *redress by suit in courts*, pointed out in the preceding pages, in the first place, the *nature* and several *species* of courts of justice, wherein remedies are administered for all sorts of private wrongs, and, in the second place, shown to which of these courts in particular application must be made for redress, according to the distinction of injuries, or, in other words, what wrongs are *cognizable* by one court and what by another, I proceeded, under the title of *injuries cognizable by the courts of common law*, to define and explain the specifical remedies by action, provided for every possible degree of wrong or injury; as well such remedies as are dormant and out of use as those which are in every day's practice, apprehending that the reason of the one could never be clearly comprehended, without some acquaintance with the other: and I am now, in the last place, to examine the *manner* in which these several remedies are *pursued* and applied, by action in the courts of common law; to which I shall afterwards subjoin a brief account of the proceedings in courts of equity.

[271] In treating of remedies by action at common law, I shall confine myself to the *modern* method of practice in our courts of judicature. For, though I thought it necessary to throw out a few observations on the nature of real actions, however at present disused, in order to demonstrate the coherence and uniformity of our legal constitution, and that there was no injury so obstinate and inveterate but which might in the end be eradicated by some or other of those remedial writs, yet it would be too irksome a task to perplex both my readers and myself with explaining all the rules of proceeding in these obsolete actions; which are frequently mere positive establishments, the *forma et figura judicii* (the form and appearance of judgment), and conduce very little to illustrate the reason and fundamental grounds of the law. Wherever I apprehend they may at all conduce to this end, I shall endeavor to hint at them incidentally.

What, therefore, the student may expect in this and the succeeding chapters is an account of the method of proceeding in and prosecuting a suit upon any of the personal writs we have before spoken of, in the court of *common pleas* at Westminster; that being the court originally constituted for the prosecution of all civil actions. It is true that the courts of king's bench and exchequer, in order, without intrenching upon ancient forms, to extend their remedial influence to the necessities of modern times, have now obtained a concurrent jurisdiction and cognizance of civil suits, but, as causes are therein conducted by much the same advocates and attorneys, and the several courts and their judges have an entire communication with each other, the methods and forms of proceeding are in all material respects the same in all of them. So that, in giving an abstract or history[a] of the progress of a suit through the court of common pleas, we [272] shall at the same time give a general account of the proceedings of the other two courts; taking notice, however, of any considerable difference in the local practice of each. And the same abstract will moreover afford us some general idea of the conduct of a cause in the inferior courts of common law, those in cities and boroughs, or in the court-baron, or hundred, or county court: all which conform (as near

[a] In deducing this history the student must not expect authorities to be constantly cited; as practical knowledge is not so much to be learned from any books of law, as from experience and attendance on the courts. The compiler must therefore be frequently obliged to rely upon his own observations; which in general he hath been studious to avoid where those of any other might be had. To accompany and illustrate these remarks, such gentlemen as are designed for the profession will find it necessary to peruse the books of *entries*, ancient and modern; which are transcripts of proceedings that have been had in some particular actions. A book or two of technical learning will also be found very convenient; from which a man of a liberal education and tolerable understanding may glean *pro re nata* (for the occasion as it may arise) as much as is sufficient for his purpose. These *books of practice* as they are called, are all pretty much on a level, in point of composition and solid instruction; so that that which bears the latest edition is usually the best. But *Gilbert's history and practice of the court of common pleas* is a book of a very different stamp; and though (like the rest of his posthumous works) it has suffered most grossly by ignorant or careless transcribers, yet it has traced out the reason of many parts of our modern practice, from the feudal institutions and the primitive construction of our courts, in a most clear and ingenious manner.

as may be) to the example of the superior tribunals, to which their causes may probably be, in some stage or other, removed.

The most natural and perspicuous way of considering the subject before us will be, I apprehend, to pursue it in the order and method wherein the proceedings themselves follow each other, rather than to distract and subdivide it by any more logical analysis. The general, therefore, and orderly parts of a suit are these: 1. The original writ: 2. The process: 3. The pleadings: 4. The issue or demurrer: 5. The trial: 6. The judgment, and its incidents: 7. The proceedings in nature of appeals: 8. The execution.

§ 341. I. The original writ.—First, then, of the *original*, or original writ, which is the beginning or foundation of the suit.[1] When a person hath received an injury, and think it worth his while to demand a satisfaction for it, he is to consider with himself, or take advice, what redress the law has given for that injury, [273] and thereupon is to make application or suit to the crown, the fountain of all justice, for that particular specific remedy which he is determined or advised to pursue. As, for money due on bond, an action of *debt;* for goods detained without force, an action of *detinue* or *trover;* or, if taken with force, an action of *trespass vi et armis;* or, to try the title of lands, a *writ of entry* or action of trespass in *ejectment;* or, for any consequential injury received, a special action *on the case.* To this end he is to sue out, or purchase by paying the stated fees, an *original* or original writ, from the court of chancery, which is the *officina justitiæ,* the shop or mint of justice, wherein all the king's writs are framed.[2] It is a mandatory letter from the king in parchment,

1 In the United States original writs, properly so called, never existed. The constitutions and the laws of the United States, and of the several states, confer and fix jurisdiction upon the courts. While these writs have been abolished in England, their original functions and their history are yet vital and instructive. For this reason they have been considered more in detail than their practical importance demands. In theory, some conduit-pipe is still requisite to transfer jurisdiction from the sovereign, whether monarch or people, to the delegated tribunal. Such conduit was the original writ.—PERRY, Common-law Pleading, 146.

2 The student must not be misled by this sentence; original writs were sued out centuries before the equitable jurisdiction of the court of chancery was established. (The court of chancery was regularly established towards the

sealed with his great seal,[b] and directed to the sheriff of the county wherein the injury is committed or supposed so to be, requiring him to command the wrongdoer or party accused, either to do justice to the complainant or else to appear in court and answer the accusation against him. Whatever the sheriff does in pursuance of this writ, *he* must *return* or certify to the court of common pleas, together with the writ itself: which is the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause. For it was a maxim introduced by the Normans that there should be no proceedings in common pleas before the king's justices without his original writ;[3] because they held it unfit that those justices, being only the substitutes of the crown, should take cognizance of anything but what was thus expressly referred to their judgment.[c] However, in small actions, below the value of forty shillings, which are brought in the court-baron or county court, no royal writ is necessary; but

[b] Finch. L. 237.

[c] Flet. l. 2. c. 34.

---

end of the reign of Edward III. Ker. Eq. Ju. 4, . The office of chancellor had existed, according to Lord Coke, from extreme antiquity (4 Inst. 78), and a charter of Edward the Confessor is sealed by "Rembald, the King's Chancellor" (The King's Peace, 31).—PERRY, Common-law Pleading, 140.

3 **Office of the original writ.**—The original writ is shown here to be peculiar to the common pleas, though no account is given of its introduction to the practice of the other courts. In recent books this distinction is not made, but it is spoken of as if common to all the courts. (See Stephen on Pleading, App. No. 2.)

It may be inferred that the original writ gave to the common bench jurisdiction of each case separately, but was not needed in the king's bench when the king sat in person—at first actually and always on theory. Another clear trace of such a distinction between the two courts may be found in the diversity of courts (p. 292 of the edition annexed to the Mirror), where it is said that if the king's bench award process in a formedon, writ of right, etc. (i. e., if they encroach on the jurisdiction of the common bench), still the sheriff ought to execute the writs. But if the common bench grant process of treason, etc. (encroaching on the criminal jurisdiction of the king's bench), the sheriff ought not to execute the process. In other words, there is a presumption in favor of any jurisdiction assumed by the king's bench, but any such assumption by the common bench outside of their peculiar province is merely void. Or as Blackstone says (*supra*): "They held it unfit that those justices, being only the substitutes of the crown, should take cognizance of anything but what was thus expressly referred to their judgment." In the king's bench,

the foundation of such suits continues to be (as in the times of the Saxons) not by original *writ*, but by *plaint*;[d] that is, by a private memorial tendered in open court to the judge, wherein the party injured sets forth his cause of action; and the judge is bound of common right to administer justice therein, without any special mandate [274] from the king. Now, indeed, even the royal writs are held to be demandable of common right, on paying the usual fees: for any delay in the granting them, or setting an unusual or exorbitant price upon them, would be a breach of *Magna Carta*, c. 29, "*nulli vendemus, nulli negabimus, aut differemus justitiam vel rectum* (to no one will we sell, to none deny, to none delay either right or justice)."

§ 342. 1. Two kinds of original writ.—Original writs are either *optional* or *peremptory;* or, in the language of our law, they are either a *præcipe*, or a *si te fecerit securum* (if he make you secure).[e]

[d] Mirr. c. 2. § 3. [e] Finch. L. 257.

---

where he was supposed to sit in person, no such authority to the court was requisite.

This view of the writ as an express authority to the judges of the common pleas to hear and determine the cases before them, brings out in a clear light the reasons why it exercised so great influence on the action in all its stages. The judges could not allow of amendments, or pardon mistakes; they could not permit a party to change his cause of action, or to recover more than his writ called for; because any such departure from the original would have been a transgression of their own instructions. (See 3 Comm. 393.) The judges were not commissioned simply to judge between the parties on such evidence as might be produced, and render an equitable decision thereon; they were authorized only to render a certain judgment if they found the party entitled to it. Perhaps the nearest survival of their position in this respect may be found in a modern case of *mandamus* with its strict conformity between the alternative and the peremptory writ, though the limit is here self-imposed. In the early procedure the original was the exact analogue of the former, while the judgment or writ of execution may be likened to the latter. Viewed in this light, the technical strictness of the early common-law judges is reasonable, and not the motiveless quibbling about trifles that it is often represented to be. It may even be doubted whether this rigid adherence to form and literal interpretation was not altogether in the interests of justice to the suitors, rather than the blind sacrifice of equity to precedent that it so often is represented. It was the indispensable condition of rigid

§ 343. a. Praecipe.—The *præcipe* is in the alternative, commanding the defendant to do the thing required, or show the reason wherefore he hath not done it.[f] The use of this writ is where something certain is demanded by the plaintiff, which is in the power of the defendant himself to perform; as, to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, to render an account, and the like: in all which cases the writ is drawn up in the form of a *præcipe* or command to do thus or show cause to the contrary; giving the defendant his choice to redress the injury or stand the suit.

§ 344. b. Si te fecerit securum.—The other species of original writs is called a *si fecerit te securum,* from the words of the writ, which directs the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gives the sheriff security effectually to prosecute his claim.[g] This writ is in use where nothing is specifically demanded but only a satisfaction in general; to obtain which and minister complete redress, the intervention of some judicature is necessary. Such are writs of trespass, or on the case, wherein no debt or other specific thing is sued for in certain, but only damages to be assessed by a jury. For this end the defendant is immediately called upon to appear in

[f] Appendix, No. III, § 1.

[g] Appendix, No. II, § 1.

---

responsibility of judges; not by any means a superfluous restraint, judging from much we read of the men who sat on the bench in that day.

It is to be regretted that this has been concealed from modern students by the mistaken identification of the original writ with our modern summons or other original process to bring the defendant in. These correspond to the judicial writs or summons. The difference between the original writ and the later process by which the defendant is served as the first step of an action is seen in Year-Book, Henry VI, 43, quoted F. N. B., 95, note *a*. A brought *disceit* against B for suing him in C's name without C's assent, whereby he was vexed. The vexatious suit was in debt by original and three *capias's*. Defendant pleaded separately to the original and the *capias's*. Moved that the last plea go to the whole, for A was *not damaged by suing of the original, so no action lies for that.* Yet by the better opinion, seeing that was the beginning of the wrong, he shall answer it.

Or briefly: the original writ is a part of the wrongful action, and may be alleged and pleaded to; but it does not of itself work any damage to the defendant, as the *capias* does.—HAMMOND.

court, provided the plaintiff gives good security of prosecuting his claim. Both species of writs are *tested*, or witnessed, in the king's own name; "witness ourself at Westminster," or wherever the chancery may be held.

§ 345. 2. The matter of security.—[275] The security here spoken of, to be given by the plaintiff for prosecuting his claim, is common to both writs, though it gives denomination only to the latter. The whole of it is at present become a mere matter of form, and John Doe and Richard Roe are always returned as the standing pledges for this purpose. The ancient use of them was to answer for the plaintiff, who in case he brought an action without cause, or failed in the prosecution of it when brought, was liable to an amercement from the crown for raising a false accusation; and so the form of the judgment still is.[h] In like manner, as by the Gothic constitution no person was permitted to lay a complaint against another, "*nisi sub scriptura aut specificatione trium testium, quod actionem vellet persequi* (unless under writing, or the specification of three witnesses, that he will prosecute the action)":[i] and, as by the laws of Sancho I, King of Portugal, damages were given against a plaintiff who prosecuted a groundless action.[k]

§ 346. 3. Return of the writ.—The day on which the defendant is ordered to appear in court, and on which the sheriff is to bring in the writ and report how far he has obeyed it, is called the *return* of the writ; it being then returned by him to the king's justices at Westminster. And it is always made returnable at the distance of at least fifteen days from the date or *teste*, that the defendant may have time to come up to Westminster, even from the most remote parts of the kingdom; and upon some day in one of the four *terms*, in which the court sits for the dispatch of business.

§ 347. a. Terms of court.—These terms are supposed by Mr. Selden[l] to have been instituted by William the Conqueror; but Sir Henry Spelman hath clearly and learnedly shown that they were gradually formed from the canonical constitutions of the church; being indeed no other than those leisure seasons of the

h Finch. L. 189. 252.
i Stiern. de Jure Gothor. l. 3. c. 7.
k Mod. Un. Hist. xxii. 45.
l Jan. Ang. l. 2. § 9.

year which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. [276] Throughout all Christendom, in very early times, the whole year was one continual term for hearing and deciding causes. For the Christian magistrates, to distinguish themselves from the heathens, who were extremely superstitious in the observation of their *dies fasti et nefasti* (legal and nonlegal days), went into a contrary extreme, and administered justice upon all days alike. Till at length the church interposed and exempted certain holy seasons from being profaned by the tumult of forensic litigations. 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 hay time and harvest. All Sundays also, and some particular festivals, as the days of the Purification, Ascension, and some others, were included in the same prohibition, which was established by a canon of the church, A. D. 517, and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian code.[m]

Afterwards, when our own legal constitution came to be settled, the commencement and duration of our law terms were appointed with an eye to those canonical prohibitions, and it was ordered by the laws of King Edward the Confessor,[n] that from Advent to the octave of the Epiphany, from Septuagesima to the octave of Easter, from the Ascension to the octave of Pentecost, and from 3 in the afternoon of all Saturdays till Monday morning, the peace of God and of holy church shall be kept throughout all the kingdom. And so extravagant was afterwards the regard that was paid to these holy times, that though the author of the Mirror[o] mentions only one vacation of any considerable length, containing the months of August and September, yet Britton is express[p] that in the reign of King Edward the First no secular plea could be held, nor any man sworn on the [277] evangelists,[q] in the times of Advent, Lent, Pentecost, harvest and vintage, the days of the great litanies, and all solemn festivals. But he adds that the bishops did neverthe-

m Spelman of the Terms.
n C. 3. de Temporibus et Diebus Pacis.
o C. 3. § 8.
p C. 53.
q See pag. 58.

less grant dispensations (of which many are preserved in Rymer's *fœdera*[r]), that assizes and juries might be taken in some of these holy seasons. And soon afterwards a general dispensation was established by statute Westm. I, 3 Edward I, c. 51 (Times of Taking Certain Assizes, 1275), which declares that, "by the assent of all the prelates, assizes of *novel disseisin*, *mort d'ancestor*, and *darrein presentment* shall be taken in Advent, Septuagesima, and Lent; and that at the special request of the king to the bishops." The portions of time that were not included within these prohibited seasons fell naturally into a fourfold division, and, from some festival day that immediately preceded their commencement, were denominated the terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael: which terms have been since regulated and abbreviated by several acts of parliament; particularly Trinity term by statute 32 Henry VIII, c. 2 (Limitation of Prescription, 1540), and Michaelmas term by statute 16 Car. I, c. 6 (Michaelmas Term, 1640), and again by statute 24 George II, c. 48 (Michaelmas Term, 1750).[4]

§ 348. (1) Days in bank.—There are in each of these terms stated days called *days in bank, dies in banco;* that is, days of ap-

r. Temp. Hen. III. Passim.

---

4 **Modern terms, or sittings, of court.**—The terms of court were regulated by acts passed in 1829 and 1831 and ceased to exist for purposes of court work by operation of the Judicature Act of 1873 and sittings substituted. ("There are still a few dates regulated by the old terms; and they are enshrined in the prandial arrangements of the Inns of Court." Jenks, Short Hist. of Eng. Law, 379 n.) Formerly Michaelmas term, which was the beginning of the judicial year, began October 9th and ended November 28th; Hilary term began January 3d and ended February 12th; Easter term began the second Wednesday after Easter Sunday and ended the Monday after Ascension Day; Trinity term began the Friday after Trinity Sunday, and ended the second Wednesday thereafter.

By the Judicature Act of 1873 the year is divided into sittings and vacations. Continuous sittings in London and Middlesex are provided for. These sittings follow the names of the old terms. Michaelmas sittings from October 12th to December 21st; Hilary sittings from January 11th to the Wednesday before Easter; Easter sittings from the Tuesday after Easter week to the Friday before Whitsunday; and Trinity sittings from the Tuesday after Whitsun week to July 31st.

pearance in the court of common *bench.** They are generally at the distance of about a week from each other, and have reference to some festival of the church. On some one of these days in bank all original writs must be made returnable; and therefore they are generally called the *returns* of that term, whereof every term has more or less, said by the Mirror[s] to have been originally fixed by King Alfred, but certainly settled as early as the statute of 51 Henry III, st. 2 (1266). But though many of the return days are fixed upon Sundays, yet the court never sits to receive these returns till the Monday after:[t] and therefore no proceedings can be held, or judgment can be given, or supposed to be given, on the Sunday.[u]

§ 349. (2) The first return—Essoign day.—[278] The first return in every term is, properly speaking, the first day in that term; as, for instance, the octave of St. Hilary, or the eighth day inclusive after the feast of that saint: which falling on the thirteenth of January, the octave, therefore, or first day of Hilary term is the twentieth of January. And thereon the court sits to take *essoigns*, or excuses, for such as do not appear according to the summons of the writ: wherefore this is usually called the *essoign day* of the term.

§ 350. (3) Days of grace.—But the person summoned has three days of grace, beyond the return of the writ, in which to make his appearance; and if he appears on the fourth day inclusive, *quarto die post*, it is sufficient. For our sturdy ancestors held it beneath the condition of a freeman to appear, or to do any other act, at the precise time appointed. The feudal law, therefore, always allowed three distinct days of citation before the defendant was adjudged contumacious for not appearing:[v] preserving in this respect the German custom, of which Tacitus thus speaks,[w]

* Editions prior to the eighth read, "pleas, called usually *bancum*, or *commune bancum*, distinguished from *bancum regis* or the court of king's bench."

[s] C. 5. § 108.

[t] Registr. 19. Salk. 627. 6 Mod. 250.

[u] 1 Jon. 156. Swann & Broome. B. R. Mich. 5 Geo. III. et in Dom, Proc. 1766.

[v] Feud. l. 2. t. 22.

[w] De Mor. Ger. c. 11.

"*illud ex libertate vitium, quod non simul nec jussi conveniunt; sed et alter et* tertius *dies cunctatione coëuntium absumitur*. (there is this fault resulting from their liberty, that they come not together at the time appointed, but a second and a third day are lost by the delay of those who are to assemble)." And a similar indulgence prevailed in the Gothic constitution: "*illud enim nimiæ libertatis indicium, concessa toties impunitas non parendi; nec enim* trinis *judicii consessibus pœnam perditæ causæ contumax meruit* (for the impunity with which they so often neglected to appear was a sign of their excessive liberty; nor were the contumacious punished by losing their cause, as three days' grace was allowed)."[x] Therefore, at the beginning of each term, the court does not usually[y] sit for dispatch of business till the *fourth* day, as in Hilary term on the twenty-third of January; and in Trinity term, by statute 32 Henry VIII, c. 21 (Trinity Term, 1540), not till the *fifth* day, the *fourth* happening on the great popish festival of *Corpus Christi;*[z] which days are therefore called and set down in the almanacs as the first days of the term.

x Stiernh. de Jure Goth. l. 1. c. 6.

y See 1 Bulstr. 35.

z See Spelman on the Terms. c. 17. Note, that if the feast of Saint John the Baptist, or midsummer day, falls on the morrow of *Corpus Christi* day (as it did A. D. 1614, 1698, and 1709, and will again A. D. 1791), Trinity full term then *commences* and the courts sit on that day; though in other years it is no juridical day. Yet in 1702, 1713, and 1724, when midsummer day fell upon what was regularly the *last* day of the term, the courts did not then sit, but the term was prolonged to the twenty-fifth of June. (Rot. C. B. Bunb. 176.)

CHAPTER THE NINETEENTH. [279]

OF PROCESS.

§ 351. Proceedings in an action—II. Process: 1. In common pleas.—The next step for carrying on the suit, after suing out the original, is called the *process;* being the means of compelling the defendant to appear in court. This is sometimes called *original* process, being founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues, pending the suit, upon some collateral interlocutory matter; as to summon juries, witnesses and the like.* *Mesne* process is also sometimes put in contradistinction to *final* process, or process of *execution;* and then it signifies all such process as intervenes between the beginning and end of a suit.*

§ 352. a. Summons.—But process, as we are now to consider it, is the method taken by the law to compel a compliance with the original writ, of which the primary step is by giving the party notice to obey it.[1] This notice is given upon all real *præcipes*, and also upon all personal writs for injuries not against the peace, by *summons;* which is a warning to appear in court at the return of the original writ, given to the defendant by two of the sheriff's messengers called *summoners*, either in person or left at his house or land,[b] in like manner as in the civil law the first process is by personal citation, *in jus vocando* (by citing to justice).[c] This warning on the land is given, in real actions, by erecting a white stick or wand on the defendant's ground[d] (which stick or wand among the northern nations is called the *baculus* [280] *nunciatorius*—nuntiatory staff[e]); and by statute 31 Elizabeth, c. 3 (Avoid-

* Quoted and held that in Rhode Island any process except final process is "mesne process," 13 R. I. 547.—Hammond.

a Finch. L. 436.
b *Ibid.* 344. 352.
c Ff. 2. 4. 1.
d Dalt. of Sher. c. 31.
e Stiernh. de Jure Sueon. l. 1. c. 6.

1 Process at common law varied "in stringency from the polite summons to the decree of outlawry." 2 Poll. & Maitl., Hist. Eng. Law (2d ed.), 578.

ance of Secret Outlawries, 1588), the notice must also be proclaimed on some Sunday before the door of the parish church.

§ 353. **b. Attachment or pone.**—If the defendant disobeys this verbal monition, the next process is by writ of *attachment* or *pone*, so called from the words of the writ,[f] "*pone per vadium et salvos plegios*, put by gage and safe pledges A B, the defendant, etc." This is a writ, not issuing out of chancery, but out of the court of common pleas, being grounded on the nonappearance of the defendant at the return of the original writ; and thereby the sheriff is commanded to attach him, by taking *gage*, that is, certain of his goods, which he shall forfeit if he doth not appear;[g] or by making him find *safe pledges* or sureties, who shall be amerced in case of his nonappearance.[h] This is also the first and immediate process, without any previous summons, upon actions of trespass *vi et armis*, or for other injuries, which, though not forcible, are yet trespasses against the peace, as *deceit* and *conspiracy;*[i] where the violence of the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attached, without any precedent warning.[j]

§ 354. **c. Distress.**—If, after *attachment*, the defendant neglects to appear, he not only forfeits this security, but is moreover to be further compelled by writ of *distringas*,[k] or *distress, infinite;* which is a subsequent process issuing from the court of common pleas, commanding the sheriff to distrain the defendant from time to time, and continually afterwards, by taking his goods and the profits of his lands, which are called *issues*, and which he forfeits to the king if he doth not appear.[l] But the issues may be sold, if the court shall so direct, in order to defray the reasonable costs of the plaintiff.[m] In like [281] manner by the civil law, if the

[f] Appendix, No. III, § 2.
[g] Finch. L. 345. Lord Raym. 278.
[h] Dalt. Sher. c. 32.
[i] Finch. L. 305. 352.
[j] Appendix, No. II, § 1.
[k] Appendix, No. III, § 2.
[l] Finch. L. 352.
[m] Stat. 10 Geo. III. c. 50 (Parliamentary Privilege, 1770).

defendant absconds, so that the citation is of no effect, "*mittitur adversarius in possessionem bonorum ejus* (his adversary is put into possession of his goods)."[n]

§ 355. **d. Capias ad respondendum.**—And here by the common, as well as the civil, law the process ended in case of injuries without force: the defendant, if he had any substance, being gradually stripped of it all by repeated distresses, till he rendered obedience to the king's writ; and, if he had no substance, the law held him incapable of making satisfaction, and therefore looked upon all further process as nugatory. And besides, upon feudal principles, the person of a feudatory was not liable to be attached for injuries merely civil, lest thereby his lord should be deprived of his personal services. But, in cases of injury accompanied with force, the law, to punish the breach of the peace and prevent its disturbance for the future, provided also a process against the defendant's *person* in case he neglected to appear upon the former process of attachment, or had no substance whereby to be attached; subjecting his body to imprisonment by the writ of *capias ad respondendum* (that you take him to answer).[o 2] But this immunity of the defendant's person, in case of peaceable though fraudulent injuries, producing great contempt of the law in indigent wrongdoers, a *capias* was also allowed, to arrest the person, in actions of *account*, though no breach of the peace be suggested, by the statutes of Marlbridge, 52 Henry III, c. 23 (Landlord and Tenant, 1267), and Westm. II, 13 Edward I, c. 11 (Accountants, 1285), in actions of *debt* and *detinue*, by statute 25 Edward III, c. 17 (Process of Exigent, 1351), and in all actions *on the case*, by stat-

[n] Ff. 2. 4. 19.

[o] 3 Rep. 12.

---

2 In some of the forms of action, for example, trespass *vi et armis*, there can be arrest (*Capias ad respondendum*), and, failing this, there may be outlawry; in other forms "distress infinite" is the last process. At a yet later stage, partly by statute, partly under the cover of fictions, *capias* and outlawry became common to many forms, and "imprisonment upon mesne process" was the weapon on which our law chiefly relied in its struggle with the contumacious. (The extension of the *capias* is best studied in Hale's tract Concerning the Courts of King's Bench and Common Pleas, printed in Hargrave's Law Tracts, p. 359. See, also, Bl. Comm. III. 279 ff.) 2 Poll. & Maitl., Hist. Eng. Law (2d ed.), 594.

ute 19 Henry VII, c. 9 (Process, 1503). Before which last statute a practice had been introduced of commencing the suit by bringing an original writ of trespass *quare clausum fregit* (why he hath broken his close), for breaking the plaintiff's close, *vi et armis*, which by the old common law subjected the defendant's person to be arrested by writ of *capias*, and then afterwards, by connivance of the court, the plaintiff might proceed to prosecute for any other less forcible injury. This practice (through custom rather than necessity, and for saving some trouble and expense, in suing out a special original [282] adapted to the particular injury) still continues in almost all cases, except in actions of debt; though now, by virtue of the statutes above cited and others, a *capias* might be had upon almost every species of complaint.

If, therefore, the defendant being summoned or attached makes default and neglects to appear, or if the sheriff return a *nihil*, or that the defendant hath nothing whereby he may be summoned, attached or distrained, the *capias* now usually issues,[p] being a writ commanding the sheriff to *take* the body of the defendant if he may be found in his bailiwick or county, and him safely to keep, so that he may have him in court on the day of the return, to answer to the plaintiff of a plea of debt, or trespass, etc., as the case may be.[3] This writ, and all others subsequent to the original writ, not issuing out of chancery but from the court into which the original was returnable, and being grounded on what has passed in that court in consequence of the sheriff's return, are called *judicial*, not *original*, writs; they issue under the private seal of that court, and not under the great seal of England, and are *tested*, not in the king's name, but in that of the chief justice only. And these several writs being grounded on the sheriff's return, must respectively bear date the same day on which the writ immediately preceding was returnable.

[p] Appendix, No. III, § 2.

---

[3] A *capias ad respondendum*, authorizing the arrest of the defendant's person is of limited use in the United States as original process. It is allowed in some jurisdictions by statutory provision in cases of fraud, breach of trust or other gross wrongdoing.

An attachment is similarly authorized against the property of absconding debtors, nonresidents, and other classes of persons specifically designated in the statutes.

§ 356. (1) Capias used in first instance.—This is the regular and orderly method of process. But it is now usual in practice to sue out the *capias* in the first instance, upon the supposed return of the sheriff; especially if it be suspected that the defendant, upon notice of the action, will abscond, and afterwards a fictitious original is drawn up, with a proper return thereupon, in order to give the proceedings a color of regularity. When this *capias* is delivered to the sheriff, he by his under-sheriff grants a warrant to his inferior officers, or bailiffs, to execute it on the defendant. And, if the sheriff of Oxfordshire (in which county the injury is supposed to be committed and the action is laid) cannot find the defendant in his jurisdiction, he [283] returns that he is not found, *non est inventus*, in his bailiwick; whereupon another writ issues, called a *testatum capias*,[q] directed to the sheriff of the county where the defendant is supposed to reside, as of Berkshire, reciting the former writ, and that it is *testified, testatum est*, that the defendant lurks or wanders in *his* bailiwick, wherefore he is commanded to take him, as in the former *capias*. But here also, when the action is brought in one county and the defendant lives in another, it is 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 was. And this fiction, being beneficial to all parties, is readily acquiesced in and is now become the settled practice; being one among many instances to illustrate that maxim of law, that *in fictione juris consistit æquitas* (all fiction of law is founded in equity).

§ 357. (2) Proceedings in outlawry.—But where a defendant absconds, and the plaintiff would proceed to an outlawry against him, an original writ must then be sued out regularly, and after that a capias. And if the sheriff cannot find the defendant upon the first writ of *capias*, and returns a *non est inventus*, there issues out an *alias* writ, and after that a *pluries*, to the same effect as the former:[r] only after these words "we command you," this clause is inserted, "as we have *formerly*," or, "as we have *often* commanded you"; *sicut* alias," or "*sicut* pluries, *præcipimus*."

[q] Appendix, No. III, § 2.

[r] Appendix, No. III, § 2.

And if a *non est inventus* is returned upon all of them, then a writ of *exigent* or *exigi facias* (that you cause to be required) may be sued out,[s] which requires the sheriff to cause the defendant to be proclaimed, required or exacted, in five county courts successively, to render himself; and, if he does, then to take him, as in a *capias:* but if he does not appear, and is returned *quinto exactus* (required for the fifth time), he shall then be outlawed by the coroners of the county. Also by statutes 6 Henry VIII, c. 4 (Outlawry, 1514), and 31 Elizabeth, c. 3 (Avoidance of Secret Outlawries, 1588), whether the defendant dwells within the same or another county than that wherein the *exigent* is sued out, [284] a *writ of proclamation*[ss] shall issue out at the same time with the *exigent,* commanding the sheriff of the county, wherein the defendant dwells, to make three proclamations thereof in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place. Such *outlawry* is putting a man out of the protection of the law, so that he is incapable to bring an action for redress of injuries; and it is also attended with a forfeiture of all one's goods and chattels to the king. And therefore, till some time after the Conquest, no man could be outlawed but for felony; but in Bracton's time, and somewhat earlier, process of outlawry was ordained to lie in all actions for trespasses *vi et armis.*[t] And since, by a variety of statutes (the same which allow the writ of *capias* before mentioned), process of outlawry doth lie in divers actions that are merely civil; provided they be commenced by original and not by bill.[u] If after outlawry the defendant appears publicly, he may be arrested by a writ of *capias utlagatum*[v] (that you make the outlaw), and committed till the outlawry be reversed. Which reversal may be had by the defendant's appearing personally in court or by attorney[w] (though in the king's bench he could not appear by attorney,[x] till permitted by statute 4 & 5 W. & M., c. 18—Criminal Procedure, 1692), and any plausi-

s Appendix, No. III, § 2.

ss Appendix, No. III, § 2.

t Co. Litt. 128.

u 1 Sid. 159.

v Appendix, No. III, § 2.

w 2 Roll. Rep. 490. Regul. C. B. A. D. 1654. c. 13.

x Cro. Jac. 616. Salk. 496.

ble cause, however slight, will in general be sufficient to reverse it, it being considered only as a process to compel an appearance. But then the defendant must pay full costs, and put the plaintiff in the same condition as if he had appeared before the writ of *exigi facias* was awarded.[4]

§ 358. 2. Ordinary process in king's bench.—Such is the first process in the court of *common pleas*. In the *king's bench* they *may* also (and frequently *do*) proceed in certain causes, particularly in actions of ejectment and trespass, by *original* writ, with *attachment* and *capias* thereon;[y] returnable, not at Westminster, where the common pleas are now fixed in consequence of *Magna Carta*, but "*ubicunque fuerimus in Anglia*," wheresoever the king shall then be in [285] England; the king's bench being removable into any part of England at the pleasure and discretion of the crown.

§ 359. a. Bill of Middlesex.—But the more usual method of proceeding therein is without any original, but by a peculiar

y Appendix, No. II, § 1.

---

4 Two things are especially to be noted by the student in connection with this procedure enforced through so many centuries. The first is the tedious forbearance of the law. "Very slowly it turns the screw which brings the pressure to bear upon the defendant. . . . If we would understand its patience, we must transport ourselves into an age when steam and electricity had not become ministers of the law, when roads were bad and when no litigant could appoint an attorney until he had appeared in court. Law must be slow in order that it may be fair." Secondly, we must especially observe that no judgment can be given against the absent in a personal action. There is no *judgment by default*. "One thing our law would not do, the obvious thing. It would exhaust its terrors in the endeavor to make the defendant appear, but it would not give judgment against him until he had appeared, and, if he was obstinate enough to endure imprisonment or outlawry, *he could deprive the plaintiff of his remedy*. . . . Instead of saying to the defaulter, 'I don't care whether you appear or no,' it sets its will against his will: 'But you shall appear.' To this we may add, that the emergence and dominance of the semi-criminal action of trespass prevents men from thinking of our personal actions as mere contests between two private persons. The contumacious defendant has broken the peace, is defying justice and must be crushed. *Whether the plaintiff's claim will be satisfied is a secondary question.*" It required nearly six centuries to correct this primitive misconception.—PERRY, Common-law Pleading, 151.

species of process entitled a *bill of Middlesex:* and therefore so entitled; because the court now sits in that county; for if it sat in *Kent,* it would then be a *bill of Kent.*[z] For though, as the justices of this court have, by its fundamental constitution, power to determine all offenses and trespasses, by the common law and custom of the realm,[a] it needed no original writ from the crown to give it cognizance of any misdemeanor in the county wherein it resides; yet, as by this court's coming into any county, it immediately superseded the ordinary administration of justice by the general commissions of *eyre* and of *oyer and terminer,*[b] a process of its own became necessary, within the county where it sat, to bring in such persons as were accused of committing any *forcible* injury. The bill of Middlesex[c] (which was formerly always founded on a *plaint* of trespass *quare clausum fregit,* entered on the records of the court[d]) is a kind of *capias,* directed to the sheriff of that county, and commanding him to take the defendant, and have him before our lord the king at Westminster on a day prefixed, to answer to the plaintiff of a plea of trespass. For this accusation of trespass it is that gives the court of king's bench jurisdiction in other civil causes, as was formerly observed; since, when once the defendant is taken into custody of the marshal, or prison-keeper of this court, for the supposed trespass, he, being then a prisoner of this court, may here be prosecuted for any other species of injury. Yet, in order to found this jurisdiction, it is not necessary that the defendant be actually the marshal's prisoner; for, as soon as he appears, or puts in bail, to the process, he is deemed by so doing to be in such custody of the marshal as will give the court a jurisdiction to proceed.[e] And, upon these accounts, in the bill of process [286] a complaint of trespass is always suggested, whatever else may be the real cause of action.

§ 360. b. Writ of latitat.—This bill of Middlesex must be served on the defendant by the sheriff, if he finds him in that

[z] Thus, when the court sat at Oxford, by reason of the plague, Mich. 1665, the process was by *bill of Oxfordshire.* Trye's Jus Filizar. 101.

[a] Bro. Abr. t. Oyer and Determiner. 8.

[b] Bro. Abr. t. Jurisdiction. 66. 3 Inst. 27.

[c] Appendix, No. III, § 3.

[d] Trye's Jus Filizar. 98.

[e] 4 Inst. 72.

county; but, if he return "*non est inventus*," then there issues out a writ of *latitat*,[t] to the sheriff of another county, as *Berks*, which is similar to the *testatum capias* in the common pleas, and recites the bill of Middlesex and the proceedings thereon, and that it is testified that the defendant "*latitat et discurrit*" lurks and wanders about in Berks; and therefore commands the sheriff to take him, and have his body in court on the day of the return. But, as in the common pleas the *testatum capias* may be sued out upon only a supposed, and not an actual, preceding *capias*, so in the king's bench a *latitat* is usually sued out upon only a supposed, and not an actual *bill of Middlesex*. So that, in fact, a *latitat* may be called the first process in the court of king's bench, as the *testatum capias* is in the common pleas. Yet, as in the common pleas, if the defendant lives in the county wherein the action is laid, a common *capias* suffices; so in the king's bench likewise, if he lives in Middlesex, the process must still be by *bill of Middlesex* only.

§ 361. 3. Process in the exchequer—Writ of quo minus.—In the exchequer the first process is by writ of *quo minus*, in order to give the court a jurisdiction over pleas between party and party.[5] In which writ [u] the plaintiff is alleged to be the king's farmer or debtor, and that the defendant hath done him the injury complained of, *quo minus sufficiens existit*, by which he is the less able, to pay the king his rent or debt. And upon this the defendant may be arrested as upon a *capias* from the common pleas.

§ 362. 4. Subsequent proceedings in all courts.—Thus differently do the three courts set out at first, in the commencement of a suit, in order to entitle the two courts of king's bench and exchequer to hold plea in subjects' causes, which by the original constitution of Westminster Hall they were not empowered to do.

[t] Appendix, No. III, § 3.

[u] Appendix, No. III, § 4.

---

5 It is said by Kerly (Eq. Ju. 12) that the fictitious use of the writ of *quo minus* by the exchequer antedated the similar use of the bill of Middlesex by the king's bench. But he cites no authority for his statement. Blackstone, Reeves and Stephen write as if the king's bench led the way in this assumption of jurisdiction. It is stated in Hargrave's Law Tracts (422), that the date of innovation in either court is not certainly known.—PERRY, Common-law Pleading, 154 n.

Afterwards, when the cause is once drawn into the respective courts, the method of pursuing it is pretty much the same in all of them.

[287] If the sheriff has found the defendant upon any of the former writs, the *capias, latitat,* etc., he was anciently obliged to take him into custody, in order to produce him in court upon the return, however small and minute the cause of action might be. For, not having obeyed the original summons, he had shown a contempt of the court, and was no longer to be trusted at large. But when the summons fell into disuse, and the *capias* became in fact the first process, it was thought hard to imprison a man for a contempt which was only supposed; and therefore in common cases by the gradual indulgence of the courts (at length authorized by statute 12 George I, c. 29 (Frivolous Arrests, 1725), which was amended by statute 5 George II, c. 27 (Frivolous Arrests, 1731), and made perpetual by statute 21 George II, c. 3—Vexatious Arrests, 1747), the sheriff or his officer can now only personally serve the defendant with the copy of the writ or process, and with notice in writing to appear by his attorney in court to defend this action; which in effect reduces it to a mere summons. And if the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance and obedience; which sureties are called *common bail,* being the same two imaginary persons that were pledges for the plaintiff's prosecution, John Doe and Richard Roe. Or, if the defendant does not appear upon the return of the writ, or within four (or in some cases, eight) days after, the plaintiff may enter an appearance for him, as if he had really appeared; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself.

§ 363. a. Arrest of defendant—Ac etiam clause.—But if the plaintiff will make *affidavit* or assert upon oath that the cause of action amounts to ten pounds or upwards, then in order to arrest the defendant, and make him put in substantial sureties for his appearance, called *special bail,* it is required by statute 13 Car. II, st. 2, c. 2 (Vexatious Arrests and Delays at Law, 1661), that the true cause of action should be expressed in the body of the writ or process; else no security can be taken in a greater sum than

40*l*. This statute (without any such intention in the makers) had like to have ousted the king's bench of [288] all its jurisdiction over civil injuries without force; for, as the bill of Middlesex was framed only for actions of trespass, a defendant could not be arrested and held to bail thereupon for breaches of civil contracts. But to remedy this inconvenience, the officers of the king's bench devised a method of adding what is called a clause of *ac etiam* (and also) to the usual complaint of trespass, the bill of Middlesex commanding the defendant to be brought in to answer the plaintiff of a plea to trespass, *and also* to a bill of debt;[g] the complaint of trespass giving cognizance to the court, and that of debt authorizing the arrest. In imitation of which, Lord Chief Justice North a few years afterwards, in order to save the suitors of his court the trouble and expense of suing out special originals, directed that in the common pleas, besides the usual complaint of breaking the plaintiff's close, a clause of *ac etiam* might be also added to the writ of *capias*, containing the true cause of action; as "that the said Charles the defendant may answer to the plaintiff of a plea of trespass in breaking his close; and also, *ac etiam*, may answer him, according to the custom of the court, in a certain plea of trespass upon the case, upon promises, to the value of twenty pounds, etc."[gg] The sum sworn to by the plaintiff is marked upon the back of the writ; and the sheriff, or his officer the bailiff, is then obliged actually to arrest or take into custody the body of the defendant, and, having so done, to return the writ with a *cepi corpus* (I have taken the body), indorsed thereon.

§ 364. (1) What constitutes an arrest.—An *arrest* 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.[6] For every man's house is looked upon by

g Trye's Jus Filizar. 102. Appendix, No. III, § 3.

gg Lilly Pract. Reg. t. Ac Etiam. North's Life of Lord Guilford. 99.

---

6 **What constitutes arrest.**—In order to arrest a person one "must make him his prisoner in an unequivocal form." Harrington, J., in Lawson v. Buzines, 3 Harr. (Del.) 416, 418. The term "arrest" implies restraint of liberty by an officer of the law, and touching the person is not necessary unless re-

the law to be his castle of defense 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.[h]

§ 365. **(2) Privileges from arrest.**—Peers of the realm, members [289] of parliament, and corporations are privileged from arrests, and of course from outlawries.[i] And against them the process to enforce an appearance must be by summons and distress infinite,[k] instead of a *capias*. Also clerks, attorneys and all other persons attending the courts of justice (for attorneys, being officers of the court, are always supposed to be there attending) are not liable to be arrested by the ordinary process of the court, but

h Ff. 2. 4. 18–21.

k See page 280.

i Whitelock of Parl. 206, 207.

---

quired to acquire control of him. In Warner v. Riddiford, 4 Com. B., N. S., 180, 205, 140 Eng. Reprint, 1052, 1062, the subject is examined by Willes, J., holding that actual contact is not necessary, and dissenting from Sir James Mansfield, in Arrowsmith v. Le Mesurier, 2 N. R. 211, an authority relied on for the contrary view. See, also, State v. Buxton, 102 N. C. 129, 8 S. E. 774; McAleer v. Good, 216 Pa. 473, 116 Am. St. Rep. 782, 10 L. R. A. (N. S.) 303, 65 Atl. 934; Butler v. Washburn, 25 N. H. 251; 1 Bouvier, Law Dict. (Rawle's 3d Rev.), 240.

Service on a person in his dwelling.—Generally speaking, an officer may go wherever the person wanted is in order to arrest him or make service on him. This is limited, however, by the application of the maxim, that every man's house is his castle, meaning thereby that a man's dwelling may not be invaded by or at the instance of a private person, or even by an officer of the law, in the service of civil process. Kelley v. Schuyler, 20 R. I. 432, 78 Am. St. Rep. 887, 44 L. R. A. 435, 39 Atl. 893. The immunity of castle in a dwelling-house is confined to its outer doors (Swain v. Mizner, 8 Gray (Mass.), 182, 69 Am. Dec. 244), and if an officer has lawfully entered the house, as through an open door, he may, if need be, break open inner doors in order to make service of process. State v. Beckner, 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950. It may be only a part of a larger building which will be regarded as a particular individual's castle. A building may be occupied by many persons, having their separate apartments opening into a common hall, so that the rooms of the person complaining of an unlawful intrusion communicate with the hall by several doors. Swain v. Mizner, 8 Gray (Mass.), 182, 69 Am. Dec. 244; 2 Mod. Am. Law, 68.

must be sued by *bill* (called usually a *bill of privilege*) as being personally present in court.[1] Clergymen performing divine service, and not merely staying in the church with a fraudulent design, are for the time privileged from arrests, by statute 50 Edward III, c. 5 (1376), and 1 Richard II, c. 16 (1377), as likewise members of convocation actually attending thereon, by statute 8 Henry VI, c. 1 (Clergy, 1429). 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 king's presence, nor within the verge of his royal palace, nor in any place where the king's justices are actually sitting. The king hath, moreover, a special prerogative (which indeed is very seldom exerted [m]), that he may by his *writ of protection* privilege a defendant from all personal, and many real, suits for one year at a time, and no longer; in respect of his being engaged in his service out of the realm.[n] And the king also by the common law might take his creditor into his protection so that no one might sue or arrest him till the king's debt were paid;[o] but by the statute 25 Edward III, st. 5, c. 19 (Crown Debtors, 1351), notwithstanding such protection, another creditor may proceed to judgment against [290] him, with a stay of execution, till the king's debt be paid, unless such creditor will undertake for the king's debt, and then he shall have execution for both. And, lastly, by statute 29 Car. II, c. 7 (Sunday Observance, 1677), no arrest can be made nor process served upon a Sunday, except for treason, felony or breach of the peace.

§ 366. (3) Bail.—When the defendant is regularly arrested, he must either go to prison, for safe custody, or put in *special bail*

[1] Bro. Abr. t. Bille. 29. 12 Mod. 163.

[m] Sir Edward Coke informs us (1 Inst. 131.), that herein "he could say nothing of his own experience; for albeit Queen Elizabeth maintained many wars, yet she granted few or no protections: and her reason was, that he was no fit subject to be employed in her service, that was subject to other men's actions; lest she might be thought to delay justice." But King William, in 1692, granted one to Lord Cutts, to protect him from being outlawed by his tailor (3 Lev. 332.): which is the last that appears upon our books.

[n] Finch. L. 454. 3 Lev. 332.

[o] F. N. B. 28. Co. Litt. 131.

to the sheriff.[7] For, the intent of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered, whether the sheriff detains his person or takes sufficient security for his appearance, called *bail* (from the French word, *bailler*, to deliver), because the defendant is bailed, or delivered, to his sureties, upon their giving security for his appearance, and is supposed to continue in their friendly custody instead of going to gaol. The method of putting in bail to the sheriff is by entering into a bond or obligation, with one or more sureties (not fictitious persons, as in the former case of common bail, but real, substantial, responsible bondsmen) to insure the defendant's appearance at the return of the writ; which obligation is called the *bail bond*.[p] The sheriff, if he pleases, *may* let the defendant go without any sureties; but that is at his own peril: for, after once taking him, the sheriff is bound to keep him safely, so as to be forthcoming in court; otherwise an action lies against him for an escape. But, on the other hand, he is obliged, by statute 23 Henry VI, c. 10 (1444), to take (if it be tendered) a sufficient bail bond, and, by statute 12 George I, c. 29 (Frivolous Arrests, 1725), the sheriff shall take bail for no other sum than such as is sworn to by the plaintiff and indorsed on the back of the writ.

§ 367. (a) Appearance, and bail to the action.—Upon the return of the writ, or within four days after, the defendant must *appear* according to the exigency of the writ. This *appearance* is effected by putting in and justifying bail *to the action;* which is commonly called putting in bail *above.* If this be not done, and the bail that were taken by [291] the sheriff *below* are responsible persons, the plaintiff may take an assignment from the sheriff of

[p] Appendix, No. III, § 5.

---

[7] In some of the states of the Union the defendant when arrested gives bail by bond to the sheriff, conditioned to appear and answer to the plaintiff and abide the judgment and not to avoid, which thus answers the purpose of bail above and below. Hale v. Russ, 1 Greenl. (Me.) 334, 336; Hamilton v. Dunklee, 1 N. H. 172; Pierce v. Read, 2 N. H. 360; Champion v. Noyes, 2 Mass. 481, 484; Broaders v. Welsh, 2 Nott. & McC. (S. C.) 569; Harwood v. Robertson, 2 Hill (S. C.), 336; West v. Ratledge, 15 N. C. 31, 40; Liceth v. Cobb, 18 Ga. 314; 1 Bouvier, Law Dict. (Rawle's 3d Rev.), 308.

the bail bond (under the statute 4 & 5 Ann., c. 16—Bail, 1705), and bring an action thereupon against the sheriff's bail. But if the bail so accepted by the sheriff be insolvent persons, the plaintiff may proceed against the sheriff himself, by calling upon him, first, to return the writ (if not already done) and afterwards to bring in the body of the defendant. And, if the sheriff does not then cause sufficient bail to be put in *above*, he will himself be responsible to the plaintiff.

The bail *above*, or bail *to the action*, must be put in either in open court, or before one of the judges thereof; or else, in the country, before a commissioner appointed for that purpose by virtue of the statute 4 W. & M., c. 4 (Bail, 1692), which must be transmitted to the court. These bail, who must at least be two in number, must enter into a recognizance [q] in court or before the judge or commissioner, whereby they do jointly and severally undertake that if the defendant be condemned in the action he shall pay the costs and condemnation, or render himself a prisoner, or that they will pay it for him: which recognizance is transmitted to the court in a slip of parchment entitled a *bail piece*.[r] And, if required, the bail must *justify* themselves in court, or before the commissioner in the country, by swearing themselves housekeepers, and each of them to be worth double the sum for which they are bail, after payment of all their debts. This answers in some measure to the *stipulatio* or *satisdatio* (a stipulation and putting in sufficient security) of the Roman laws,[s] which is mutually given by each litigant party to the other: by the plaintiff, that he will prosecute his suit, and pay the costs if he loses his cause, in like manner as our law still requires nominal pledges of prosecution from the plaintiff: by the defendant, that he shall continue in court, and abide the sentence of the judge, much like our special bail; but with this difference, that the *fidejussores* were there absolutely bound *judicatum solvere*, to see the costs and condemnation [292] paid at all events; whereas our special bail may be discharged, by surrendering the defendant into custody, within the time allowed by law, for which purpose they are at all times entitled to a warrant to apprehend him.[t]

q Appendix, No. III, § 5.
r Appendix, No. III, § 5.
s Inst. l. 4. t. 11. Ff. l. 2. t. 8.
t 2 Show. 202. 6 Mod. 231.

§ 368. (b) **Special bail.**—Special bail is required (as of course) only upon actions of debt, or actions on the case in trover or for money due, where the plaintiff can swear that the cause of action amounts to ten pounds; but in actions where the damages are precarious, being to be assessed *ad libitum* by a jury, as in actions for words, ejectment or trespass, it is very seldom possible for a plaintiff to swear to the amount of his cause of action; and therefore no special bail is taken thereon, unless by a judge's order or the particular directions of the court, in some peculiar species of injuries, as in cases of mayhem or atrocious battery; or upon such special circumstances as make it absolutely necessary that the defendant should be kept within the reach of justice. Also in actions against heirs, executors and administrators, for debts of the deceased, special bail is not demandable; for the action is not so properly against them in person, as against the effects of the deceased in their possession. But special bail is required even of them, in actions for a *devastavit,* or wasting the goods of the deceased; that wrong being of their own committing.

Thus much for *process;* 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 appears either in person as a prisoner or out upon bail, then follow the *pleadings* between the parties, which we shall consider at large in the next chapter.

CHAPTER THE TWENTIETH. [293]

OF PLEADING.

§ 369. Proceedings in an action—III. Pleadings.—Pleadings are the mutual altercations between the plaintiff and defendant, which at present are set down and delivered into the proper office in writing, though formerly they were usually put in by their counsel *ore tenus*, or *viva voce* (by word of mouth), in court, and then minuted down by the chief clerks, or prothonotaries; whence in our old law-French the pleadings are frequently denominated the *parol*.[1]

§ 370. 1. The declaration.—The first of these is the *declaration*, *narratio* or *count*, anciently called the *tale;* in which the

1 **Pleadings under the codes.**—The adoption of the "code system," in whole or in part, in most American jurisdictions, has established a new system of pleading, to understand which, however, it is necessary to be familiar with the principles of common-law pleading. The authors of the code felt that common-law pleading consisted largely of allegations of conclusions of law, which did not warn the adverse party of the facts relied upon, and that its usefulness was impaired by the statement of legal fictions, such as that of the loss and finding in trover, and the lease in ejectment. On the other hand, equity pleading had become prolix and artificial, and was rendered cumbersome by the inclusion of details of evidentiary statement.

Accordingly, the codes provide for a complaint or petition, which is the plaintiff's first pleading, and which is required to state in ordinary and concise language the facts constituting his cause of action. The defendant meets this with his answer, which may deny any of the material allegations of the complaint, or allege any new matter constituting a defense. In addition, some of the states provide for a reply, whereby the plaintiff may controvert the affirmative allegations of the answer; but beyond this the pleadings do not extend, except that a demurrer may be interposed by the adverse party to test the legal sufficiency of a pleading. In most of the code states, a defect in the form of allegations cannot be reached by demurrer, but only by a motion to make more definite and certain. In England demurrers have been abolished.

Under the codes, the ultimate facts must be pleaded, as distinguished from conclusions of law, on the one hand, and evidentiary matter on the other. Green v. Palmer, 15 Cal. 411, 76 Am. Dec. 492. For instance, in actions involving the title to real property, the steps in the deraignment of the title are merely evidence by which the ultimate fact of ownership may be established, and should not ordinarily be set out in a pleading. Coryell v. Cain, 16 Cal.

plaintiff sets forth his cause of complaint at length,[a] being indeed only an amplification or exposition of the original writ upon which his action is founded, with the additional circumstances of time and place, when and where the injury was committed. But we may remember[b] that, in the king's bench, when the defendant is brought into court by bill of Middlesex, upon a supposed trespass, in order to give the court a jurisdiction, the plaintiff may declare in whatever action, or charge him with whatever injury he thinks proper, unless he has held him to bail by a special *ac etiam*, which the plaintiff is then bound to pursue. And so, also, in order to

[a] Appendix, No. II, § 2; No. III, § 6. [b] See pag. 285. 288.

---

567. An example of an allegation of a conclusion of law is the characterization of an act as being wrongful or unlawful; this is but the statement of an inference which the court may draw from the ultimate facts, and it does not add to the force of a pleading. Scofield v. Whitelegge, 49 N. Y. 259.

As at common law, it is neither necessary nor proper for the plaintiff to anticipate and negative a possible defense. Jones v. Ewing, 22 Minn. 157. If this be done, the defendant may treat the allegation as immaterial surplusage.

Fictions are sought to be done away with, and truth in pleading secured, not only by requiring that the facts be stated, but also by the additional requirement of the verification of pleadings.

The theory of the code provisions is sometimes prevented from being carried out in practice as it was intended that it should. The "ordinary, concise language" becomes a more or less stereotyped legal phraseology. And the method of pleading is influenced to a great extent by history and custom. *A priori*, there would seem to be as much reason for requiring particularity in stating the details of negligent as of fraudulent conduct. However, lawyers had been accustomed to plead negligence in actions at law only, whereas they had constantly been required to set out in a bill in equity the details and particulars of the fraud upon which they relied. As the result we have under the codes the rule that negligence may be averred generally, but that the facts constituting the fraud must be set out in detail.

Another respect in which the code theory has yielded to legal custom and conservatism is with regard to the use of the common counts. Because of their set form, often giving little indication of the facts of the case, and because they consist largely of conclusions of law, they would seem to be out of harmony with the principles of code pleading; and in a few states, the courts have discountenanced their use. In most code jurisdictions, however, this form of pleading is allowed.

The codes of procedure also provide, in somewhat varying terms, for a more liberal joinder of parties and of causes of action than was permitted at common law.—M. E. HARRISON.

have the benefit of a *capias* to secure the defendant's person, it was the ancient practice, and is therefore still warrantable in the common [294] pleas, to sue out a writ of trespass *quare clausum fregit* for breaking the plaintiff's close; and when the defendant is once brought in upon this writ, the plaintiff declares in whatever action the nature of his actual injury may require; as an action of covenant, or on the case for breach of contract, or other less forcible transgression:[c] unless, by holding the defendant to bail on a special *ac etiam,* he has bound himself to declare accordingly.

§ 371. **3. Venue.**—In *local* actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, etc., affecting land, the plaintiff must lay his declaration or declare his injury to have happened in the very county and place that it really did happen; but in *transitory* actions, for injuries that might have happened anywhere, as debt, detinue, slander and the like, the plaintiff may declare in what county he pleases, and then the trial must be in that county in which the declaration is laid. Though if the defendant will make affidavit that the cause of action, if any, arose not in that but in another county, the court will direct a change of *the venue* or *visne* (that is, the *vicinia* or neighborhood in which the injury is declared to be done), and will oblige the plaintiff to declare in the proper county. For the statutes 6 Richard II, c. 2 (Venue in Actions for Debt, 1382), and 4 Henry IV, c. 18 (Attorneys, 1402), having ordered *all* writs to be laid in their proper counties, this, as the judges conceived, empowered them to change the *venue,* if required, and not to insist rigidly on abating the writ; which practice began in the reign of James the First.[d] And this power is discretionally exercised, so as not to cause but prevent a defect of justice. Therefore the court will not change the *venue* of any of the four northern counties previous to the spring circuit; because there the assizes are holden only once a year, at the time of the summer circuit. And it will sometimes remove the *venue* from the proper jurisdiction (especially of the narrow and limited kind), upon a suggestion,

c 2 Ventr. 259.

d Rastell t. Dette. 184. b. Fitz. Abr. t. Briefe. 18. Salk. 670. Trye's Jus Filiz. 231. Styl. Pract. Reg. (edit. 1657) 331.

duly supported, that a fair and impartial trial cannot be had therein.*

§ 372. **b. Counts.**—[295] It is generally usual in actions upon the case to set forth several cases, by different *counts* in the same declaration, so that if the plaintiff fails in the proof of one he may succeed in another.[2] As, in an action on the case upon an *assumpsit* for goods sold and delivered, the plaintiff usually counts or declares, first, upon a settled and agreed price between him and the defendant; as that they bargained for twenty pounds: and lest he should fail in the proof of this, he counts likewise upon a *quantum valebant* (as much as they were worth); that the defendant bought other goods, and agreed to pay him so much as they were reasonably worth; and then avers that they were worth other twenty pounds: and so on in three or four different shapes; and at last concludes with declaring that the defendant had refused to fulfill any of these agreements, whereby he is endamaged to such a value. And if he proves the case laid in any one of his counts, though he fails in the rest, he shall recover proportionable damages. This declaration always concludes with these words. "and thereupon he brings *suit, etc., inde producit sectam, etc.*" By which words, *suit* or *secta* (*a sequendo*), were anciently understood the witnesses or followers of the plaintiff.[f] For in former times the law would not put the defendant to the trouble of answering the charge till the plaintiff had made out at least a probable case.[g] But the actual production of the *suit*, the *secta*, or *fol-*

e Stra. 874.—Mylock v. Saladine. Trin. 4 Geo. III. B. R.

f Seld. on Fortesc. c. 21.

g Bract. 400. Flet. l. 2. c. 6.

---

2 **Inconsistent counts in code pleading.**—The pleading of the same cause of action in inconsistent counts would seem to be ordinarily incompatible with the code system of pleading, which aims to secure a statement of the actual facts. Pomeroy on Code Remedies, sec. 467. However, where the facts are peculiarly within the knowledge of the adverse party, this method of pleading is allowable, even under the codes. Rucker v. Hall, 105 Cal. 425, 38 Pac. 962. Unless there is, because of some such circumstance, a reasonable doubt of plaintiff's ability to plead the facts safely in one mode only, he will be required to elect between inconsistent counts. Harvey v. Southern Pacific Co., 46 Or. 505, 80 Pac. 1061.—M. E. Harrison.

lowers, is now antiquated, and hath been totally disused, at least ever since the reign of Edward the Third, though the form of it still continues.

§ 373. **c. Nonsuit.**—At the end of the declaration are added also the plaintiff's common pledges of prosecution, John Doe and Richard Roe, which, as we before observed,[h] are now mere names of form, though formerly they were of use to answer to the king for the amercement of the plaintiff, in case he were nonsuited, barred of his action, or had a verdict and judgment against him,[i] For, if the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law in any subsequent [296] stage of the action, he is adjudged *not to follow* or pursue his remedy as he ought to do, and thereupon a *nonsuit*, or *non prosequitur*, is entered; and he said to be *nonpros'd*. And for thus deserting his complaint. after making a false claim or complaint (*pro falso clamore suo*), he shall not only pay costs to the defendant, but is liable to be amerced to the king.

§ 374. **d. Retraxit.**—A *retraxit* (he hath withdrawn) differs from a nonsuit, in that the one is negative and the other positive: the nonsuit is a default and neglect of the plaintiff, and therefore he is allowed to begin his suit again, upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit, in court, and by this he forever loses his action.

§ 375. **e. Discontinuance.**—A *discontinuance* is somewhat similar to a nonsuit, for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend; but the plaintiff must begin again, by suing out a new original, usually paying costs to his antagonist. Anciently, by the demise of the king, all suits depending in his courts were at once discontinued, and the plaintiff was obliged to renew the process, by suing out a fresh writ from the successor, the virtue of the former writ being totally gone, and the defendant no longer bound to attend in con-

[h] See pag. 275.

[i] 3 Bulstr. 275. 4 Inst. 189.

sequence thereof; but, to prevent the expense as well as delay attending this rule of law, the statute 1 Edward VI, c. 7 (Demise of the Crown, 1547), enacts that by the death of the king no action shall be discontinued, but all proceedings shall stand good as if the same king had been living.

§ 376. 2. **Defense.**—When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make his *defense* and to put in a *plea*, or else the plaintiff will at once recover judgment by *default*, or *nihil dicit* of the defendant.

Defense, in its true legal sense, signifies not a justification, protection or guard, which is now its popular signification, but merely an *opposing* or *denial* (from the French verb *defender*) of the truth or validity of the complaint. It is the *contestatio litis* (the opening of a case before witnesses) of the civilians: a general assertion that the plaintiff hath no ground of action, which assertion is afterwards extended [297] and maintained in his plea. For it would be ridiculous to suppose that the defendant comes and *defends* (or, in the vulgar acceptation, justifies) the force and injury, in one line, and pleads that he is *not guilty* of the trespass complained of in the next. And therefore, in actions of dower, where the demandant does not count of any injury done, but merely demands her endowment,[k] and in assizes of land, where also there is no injury alleged, but merely a question of right stated for the determination of the recognitors or jury, the tenant makes no such defense.[l] In writs of entry,[m] where no injury is stated in the count, but merely the right of the demandant and the defective title of the tenant, the tenant comes and defends or denies *his* rights, *jus suum*, that is (as I understand it, though with a small grammatical inaccuracy),[3] the right of the demandant, the only one expressly mentioned in the pleadings: or else denies his own right to be such as is suggested by the count of the demandant. And in writs of right[n] the tenant always comes and defends the right of the demand-

k Rastal. Entr. 234.
l Booth of Real Actions. 118.
m Book II. Appendix No. V, § 2.
n Appendix, No. I, § 5.

3 The grammatical inaccuracy noted by Blackstone is in using *suum* (his own) for *ejus* (his).

ant and his seisin, *jus prædicti S. et seisinam ipsius* (the right and seisin of the aforesaid S.)[o] (or else the seisin of his ancestor, upon which he counts, as the case may be), and the demandant may reply that the tenant unjustly defends his, the demandant's, right and the seisin on which he counts.[p 4] All which is extremely clear, if we understand by *defense* an *opposition* or *denial*, but is otherwise inexplicably difficult.[q]

§ 377. a. **Defense and denial distinguished.**—The courts were formerly very nice and curious with respect to the nature of the defense, so that if no defense was made, though a sufficient plea was pleaded, the plaintiff should recover judgment;[r] and therefore the book entitled *novæ narrationes* or *the new talys*,[s] at the end of almost every count, *narratio* or tale, subjoins such defense as is proper for the defendant to make. For a general defense or denial was not prudent in every situation, since thereby the propriety of the writ, the competency of the plaintiff, and the cognizance of the court were allowed. By defending the force and injury [298] the defendant waived all pleas of misnomer;[t] by defending the damages, all exceptions to the person of the plaintiff; and by defending either one or the other *when and where* it should behoove him, he acknowledged the jurisdiction of the court.[u] But of late

o Co. Entr. 182.

p Nov. Narr. 230. edit. 1534.

q The true reason of this, says Booth (on Real Actions, 94. 112), I could never yet find.

r Co. Litt. 127.

s Edit. 1534.

t Theloal. dig. l. 14. c. 1. pag. 357.

u *En la defence sont iij choses entendantz: per tant quil defende tort et force, home doyt extendre quil se excuse de tort a luy surmys per counte, et fait se partie al ple; et per tant quil defende les damages, il affirm le partie able destre respondu; et per tant quil defende ou et quant il devera, il accepte la poiar de court de conustre ou trier lour ple.* (Mod. Tenend Cur. 408 edit. 1534.) See, also, Co. Litt. 127.

---

4 The record will say that the tenant *venit et defendit ius suum*, but as Blackstone, Comm., III, 297, has rightly remarked, this means that he defends (-denies) the demandant's right. Note-Book, pl. 86; there are two demandants; the tenant "*venit et defendit ius eorum.*"—POLL. & MAITL., 2 Hist. Eng Law (2d ed.), 608 n.

years these niceties have been very deservedly discountenanced,* though they still seem to be law, if insisted on.[x]*

§ 378. **b. Claim of cognizance.**—Before defense made, if at all, *cognizance* of the suit must be *claimed* or demanded; when any person or body corporate hath the franchise, not only of *holding pleas* within a particular limited jurisdiction, but also of the *cognizance of pleas:* and that, either *without* any words exclusive of other courts, which entitles the lord of the franchise, whenever any suit that belongs to his jurisdiction is commenced in the courts at Westminster, to demand the cognizance thereof; or *with* such exclusive words which also entitle the defendant to plead to the jurisdiction of the court.[y] Upon this claim of cognizance, if allowed, all proceedings shall cease in the superior court, and the plaintiff is left at liberty to pursue his remedy in the special jurisdiction. As, when a scholar, or other privileged person of the universities of Oxford or Cambridge is impleaded in the courts at Westminster, for any cause of action whatsoever, unless upon a question of freehold.[z] In these cases, by the charter of those learned bodies, confirmed by act of parliament, the chancellor or vice-chancellor may put in a claim of cognizance, which, if made in due time and form, and with due proof of the facts alleged, is regularly allowed by the courts.[a] It must be demanded before full defense is made[b] or imparlance prayed; for these are a submission to the jurisdiction of the superior court, and the delay is a *laches* in the lord of the franchise: and it will not be allowed if it occasions a failure of justice,[c] or if an [299] action be brought against

* Formal "defense," either before or in an answer or plea, is now entirely obsolete both in England and this country.—HAMMOND.

w Salk. 217. Lord Raym. 282.
x Carth. 230. Lord Raym. 117.
y 2 Lord Raym. 836. 10 Mod. 126.
z See pag. 83.
a Hardr. 505.
b Rast. Entr. 128, etc.
c 2 Ventr. 363.

the person himself who claims the franchise, unless he hath also a power in such case of making another judge.[d] *

§ 379. **c. Imparlance.**—After defense made, the defendant must put in his *plea.* But, before he defends, if the suit is commenced by *capias* or *latitat,* without any special *original,* he is entitled to demand one *imparlance,** or *licentia loquendi* (liberty of speaking); and may, before he pleads, have more granted by consent of the court, to see if he can end the matter amicably without further suit, by talking with the plaintiff: a practice which is[e] supposed to have arisen from a principle of religion, in obedience to that precept of the gospel, "agree with thine adversary quickly, whilst thou art *in the way* with him."[g] And it may be observed that this gospel precept has a plain reference to the Roman law of the twelve tables, which expressly directed the plaintiff and defendant to make up the matter, while they were *in the way,* or going to the prætor;—*in via, rem ubi pacunt, orato* (where the parties come to terms, let the matter be settled).

§ 380. **d. Demand of view.**—There are also many other previous steps which may be taken by a defendant before he puts in

* This entire paragraph with the notes was in fifth edition transferred from the close of that succeeding. It is almost superfluous to say that the entire contents of it is obsolete now.—HAMMOND.

[d] Hob. 87. Year-Book, M. 8. Hen. VI. 20 (1429). In this latter case the Chancellor of Oxford claimed cognizance of an action of trespass brought against himself; which was disallowed, because he should not be judge in his own cause. The argument used by Serjeant Rolfe, on behalf of the cognizance, is curious and worth transcribing.—*Jeo vous dirai un fable. En ascun temps fuit un pape, et avoit fait un grand offence, et le cardinals vindrent a luy et disoyent a luy, "peccasti": et il dit, "judica me": et ils disoyent, "non possumus, quia caput es ecclesiæ; judica teipsum": et l'apostol' dit, "judico me cremari"; et fuit combustus; et apres fuit un sainct. Et in ceo cas il fuit son juge demene, et issint n'est pas inconvenient que un home soit juge demene.* (I will tell you a story. There was formerly a pope, and he committed a great crime, and the cardinals came to him, and said, "Thou hast sinned"; and he said, "Judge me"; and they answered, "We cannot, for thou art the head of the church; judge thyself"; and the apostle said, "I sentence myself to be burned"; and burned he was; and afterwards he was made a saint. And in that case he was his own judge, and therefore it is not improper that a man should judge himself.)

[e] Appendix, No. III, § 6.

[f] Gilb. Hist. Com. Pl. 35.

[g] Matth. v. 25.

his plea. He may, in real actions, demand a *view* of the thing in question, in order to ascertain its identity and other circumstances.

§ 381. **e. Oyer.**—He may crave *oyer*[h] of the writ, or of the bond, or other specialty upon which the action is brought; that is, to *hear* it read to him, the generality of defendants in the times of ancient simplicity being supposed incapable to read it themselves: whereupon the whole is entered *verbatim* upon the record, and the defendant may take advantage of any condition or other part of it not stated in the plaintiff's declaration.

§ 382. **f. Prayer in aid.**—[300] In real actions, also, the tenant may pray in aid, or call for assistance of another, to help him to plead because of the feebleness or imbecility of his own estate. Thus a tenant for life may pray in aid of him that hath the inheritance in remainder or reversion, and an incumbent may pray in aid of the patron and ordinary; that is, that they shall be joined in the action and help to defend the title.

§ 383. **g. Voucher.**—*Voucher*, also, is the calling in of some person to answer the action that hath warranted the title to the tenant or defendant. This we still make use of in the form of common recoveries,[i] which are grounded on a writ of entry; a species of action that we may remember relies chiefly on the weakness of the tenant's title, who therefore vouches another person to warrant it. If the vouchee appears, he is made defendant instead of the voucher, but, if he afterwards makes default, recovery shall be had against the original defendant, and he shall recover over an equivalent in value against the deficient vouchee. In assizes, indeed, when the principal question is whether the demandant or his ancestors were or were not in possession till the ouster happened, and the title of the tenant is little (if at all) discussed, there no voucher is allowed; but the tenant may bring a writ of *warrantia chartæ* against the warrantor, to compel him to assist him with a good plea or defense, or else to render damages and the value of the land, if recovered against the tenant.[k]

§ 384. **h. Parol demurrer.**—In many real actions also,[l] brought by or against an infant under the age of twenty-one years,

h Appendix, No. III, § 6.
i Book II. Append. No. V. § 2.
k F. N. B. 135.
l Dyer. 137.

and also in actions of debt brought against him, as heir to any deceased ancestor, either party may suggest the nonage of the infant, and pray that the proceedings may be deferred till his full age, or, in our legal phrase, that the infant may have his age, and that the *parol may demur*, that is, that the pleadings may be stayed; and then they shall not proceed till his full age, unless it be apparent that he cannot be prejudiced thereby.[m] But, by the statutes of Westm. I, 3 Edward I, c. 46 (Order of Hearing Pleas, 1275), and of Gloucester, 6 Edward I, c. 2 (Real Actions, 1278), in writs of entry *sur disseisin* in some particular cases, and in actions ancestral brought by [301] an infant, the parol shall not demur; otherwise he might be deforced of his whole property, and even want a maintenance, till he came of age. So, likewise, in a writ of dower the heir shall not have his age; for it is necessary that the widow's claim be immediately determined, else she may want a present subsistence.[n] Nor shall an infant patron have it in a *quare impedit*,[o] since the law holds it necessary and expedient that the church be immediately filled.

§ 385. **3. Defendant's plea.**—When these proceedings are over, the defendant must then put in his excuse or plea. Pleas are of two sorts; *dilatory* pleas, and pleas *to the action*.

§ 386. **a. Dilatory pleas.**—Dilatory pleas are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy rather than by denying the injury; pleas to the action are such as dispute the very cause of suit. The former cannot be pleaded after a general imparlance, which is an acknowledgment of the propriety of the action. For imparlances are either *general*, of which we have before spoken, and which are granted of course, or *special*, with a saving of all exceptions to the writ or count, which may be granted by the prothonotary; or they may be still *more special*, with a saving of all exceptions whatsoever, which are granted at the discretion of the court.[p]

§ 387. **(1) Plea to the jurisdiction.**—Dilatory pleas are, 1. To the *jurisdiction* of the court: alleging, that it ought not to hold plea

m Finch. L. 360.
n 1 Roll. Abr. 137.
o *Ibid.* 138.
p 12 Mod. 529.

of this injury, it arising in Wales or beyond sea;[5] or because the land in question is of ancient demesne, and ought only to be demanded in the lord's court, etc.

§ 388. **(2) Plea to the disability of plaintiff.**—To the *disability* of the plaintiff, by reason whereof he is incapable to commence or continue the suit, as that he is an alien enemy, outlawed, excommunicated, attainted of treason or felony, under a *præmunire*, not *in rerum natura*—in the nature of things (being only a fictitious person), an infant, a feme covert, or a monk professed.

§ 389. **(3) Plea in abatement.**—In *abatement:* which abatement is either of the [302] writ, or the count, for some defect in one of them, as by misnaming the defendant, which is called a *misnomer;* giving him a wrong addition, as *esquire* instead of *knight;* or other want of form in any material respect. Or, it may be, that the plaintiff is dead; for the death of either party is at once an abatement of the suit. And in actions merely personal, arising *ex delicto* (from wrong done), for wrongs actually done or

5 **Demurrer for lack of jurisdiction—Abatement.**—It has been held from a very early date in this country that where the jurisdiction fails entirely (as distinguished from cases of special jurisdiction like that of the lord's court, which cases are very rare here) no plea to the jurisdiction is necessary. The court may take notice of the defect in its jurisdiction without it. (Lawrence v. Smith, 5 Mass. 362; Bischoff v. Wethered, 9 Wall. 812, 19 L. Ed. 829; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 28 L. Ed. 76, 3 Sup. Ct. Rep. 507.) In such a case the plea cannot give jurisdiction to any other court of the same state, and is therefore bad. (Lawrence v. Smith, *supra.*) Nor can the parties by stipulation give jurisdiction and prevent the court from taking notice of the defect. (Webster v. Buffalo Ins. Co., 110 U. S. 386, 28 L. Ed. 172, 4 Sup. Ct. Rep. 79.)

Abatement of the action by death of a party is held to be no longer a mere matter of procedure, to be taken advantage of by a dilatory plea, but a part of the substance of the action. A cause of action which abates by common law cannot be revived in a court of the United States unless an act of Congress allows it to survive. Although these courts follow the procedure of the state courts, and the latter allows a revivor of the action, it cannot be revived in the federal courts. Whether an action survives depends on the substance of the cause of action, not on the forms of procedure to enforce it. (Ex parte Schreiber, 110 U. S. 76, 77, 28 L. Ed. 65, 3 Sup. Ct. Rep. 423. See, also, Baker v. Crandall, 78 Mo. 584, 47 Am. Rep. 126.—HAMMOND.

committed by the defendant, as trespass, battery and slander, the rule is that *actio personalis moritur cum persona* (a personal action dies with the person),[q] and it never shall be revived either by or against the executors or other representatives.[6] For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity any manner of wrong or injury. But in actions arising *ex contractu* (from contract), by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against or by the executors:[r] being, indeed, rather actions against the prop-

[q] 4 Inst. 315.

[r] Mar. 14.

[6] **Actio personalis moritur cum persona.**—This maxim may be translated, "a personal right of action comes to an end by the death of either of the parties." It is a rule that has met with the severest criticism, Sir Frederick Pollock, for instance, calling it barbarous (Torts, 9th ed., 64). Its application from the time of Bracton down has been gradually narrowed. Perhaps it never included all personal actions. "Personal actions in the English law are, in the words of Blackstone, 'such whereby a man claims a debt or personal duty or damages in lieu thereof; and likewise whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs.' (Bl. Comm., III, p. 117.) Now, it is in this wide sense that *actio personalis* in our brocard should be *prima facie* understood, but, as we shall see, it was never, from the time it was first formulated, extended so far in practice. Had the maxim been taken literally, the result would have been that every right of action, whether arising out of contract or of tort or other obligation, would have come to an end by the death of either party. A covenant, for instance, would have ceased to be actionable by the death of either covenantor or covenantee or a contract of bailment by the death of bailor or bailee. But an examination of the reports from early times shows that the common law never went so far. Apart from torts, the utmost that can be said is that the old English law, for a brief period, refused to recognize the transmission passively of actions on contract, and even this can only be admitted subject to exceptions, e. g., actions on covenant under seal. But it clearly ceased to be the rule once a definite theory of contract was developed and the action of *assumpsit* established. When this stage was reached we find that, apart from one or two special contractual claims such as the old actions of debt and account, and (later) the action of breach of promise of marriage, actions on contract survived *ab utraque parte*, and nontransmissibility on death became restricted in practice to actions based on tort or on facts analogous to tort. In other

erty than the person, in which the executors have now the same interest that their testator had before.

These pleas to the jurisdiction, to the disability, or in abatement were formerly very often used as mere dilatory pleas, without any foundation of truth, and calculated only for delay; but now by statute 4 & 5 Ann., c. 16 (1705), no dilatory plea is to be admitted without affidavit made of the truth thereof, or some probable matter shown to the court to induce them to believe it true. And with respect to the pleas themselves, it is a rule that no exception shall be admitted against a declaration or writ, unless the defendant will in the same plea give the plaintiff a better;[s] that is, show him how it might be amended, that there may not be two objections upon the same account. Neither, by statute 8 & 9 W. III, c. 31 (Parti-

[s] Brownl. 139.

---

words, nontransmissibility applied as a rule only to actions for reparation of damages for injuries and penalties for wrongful acts." (H. Goudy, in Essays in Legal History, Vinogradoff ed., 1913, 217.)

It was more particularly in the field of tort that the maxim applied. Statutes were passed by parliament which restricted the rule in the cases of injuries to property. The first remedial step was taken by 4 Edward, III, c. 7 (1330), which enacted that for trespass done to a man's goods and chattels during his lifetime his executors might sue. This statute, although liberally construed, was limited to active transmissibility and to personal property. This next step came only after the lapse of nearly five centuries. The act of 3 & 4 Wm. IV, c. 42, made actions for wrongful damage to real property to personal representatives of the injured party. It also sanctioned passive transmissibility by providing that the personal representatives of one who had caused wrongful damage to property, whether real or personal, of another should be liable by action of trespass or trespass on the case to the extent of his assets. The earlier English statutes have been recognized as part of the common law in the United States. Hegerich v. Keddie, 99 N. Y. 258, 260, 52 Am. Rep. 25, 1 N. E. 787. And there have been other ameliorating statutes in many of the states.

The general principle of the nonsurvival of personal actions still obtains in respect to personal torts, injuries to the person and character. Yet, even here the field has been narrowed by Lord Campbell's Act of 1846 (Fatal Accidents Act), and the many similar statutes in America, which authorize actions by personal representatives in case of death by wrongful act.

On the subject of this note, see Street, 3 Foundations of Legal Liability, c. VI; H. Goudy, "Two Ancient Brocards," in Essays in Legal History, Vinogradoff ed., 1913, 216; Bouvier, 1 Law Dict. (Rawle's 3d Rev.), 121; Broom, Legal Maxims (8th ed.), 697.

tion, 1696), shall any plea in abatement be admitted in any suit for partition of lands, nor shall the same be abated by reason of the death of any tenant.

[303] All pleas to the jurisdiction conclude to the cognizance of the court; praying "judgment, whether the court will have further cognizance of the suit": pleas to the disability conclude to the person; by praying "judgment, if the said A the plaintiff ought to be answered": and pleas in abatement (when the suit is by original) conclude to the writ or declaration; by praying "judgment of the writ, or declaration, and that the same may be quashed," *cassetur*, made void, or abated; but, if the action be by bill, the plea must pray "judgment of the bill," and not of the declaration, the bill being here the original and the declaration only a copy of the bill.[7]

When these dilatory pleas are allowed, the cause is either dismissed from that jurisdiction, or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ, by leave obtained from the court,[t] or to amend and new frame his declaration. But when, on the other hand, they are overruled as frivolous, the defendant has judgment of *respondeat ouster*, or to *answer over* in some better manner. It is then incumbent on him to plead.

§ 390. b. Pleas to the action.—A plea *to the action;* that is, to answer to the merits of the complaint. This is done by confessing or denying it.

§ 391. (1) Plea in confession.—A confession of the whole complaint is not very usual, for then the defendant would probably end the matter sooner, or not plead at all, but suffer judgment to go by default.

§ 392. (a) Tender.—Yet sometimes, after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then

[t] Co. Entr. 271.

---

[7] The defenses which at common law were raised by dilatory pleas may, under the express provision of the codes, be now taken advantage of by demurrer if the defect appears affirmatively upon the face of the complaint, and otherwise by answer. In the answer they may be united with defenses which go to the merits of the cause.—M. E. HARRISON.

becomes 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 all cases discharge the costs,[u] but not the debt itself, though in some particular cases the creditor will totally lose his money.[v] [304] But frequently the defendant confesses one *part* of the complaint (by a *cognovit actionem* (he hath acknowledged the action) in respect thereof) and traverses or denies the rest; in order to avoid the expense of carrying that part to a former trial, which he has no ground to litigate.

§ 393. (b) Payment into court.—A species of this sort of confession is the *payment of money into court*,[vv] which is for the most part 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, together with the costs hitherto incurred, in order to prevent the expense of any further proceedings. This may be done upon what is called a *motion;* which is an occasional application to the court by the parties or their counsel, in order to obtain some rule or order of the court, which becomes necessary in the progress of a cause; and it is usually grounded upon an *affidavit* (the perfect tense of the verb *affido*), being a voluntary oath before some judge or officer of the court, to evince the truth of certain facts, upon which the motion is grounded; though no such *affidavit* is necessary for payment of money into court. If, after the money paid in, the plaintiff proceeds in his suit, it is at his own peril; for, if he does not prove more due than is so paid into court, he shall be nonsuited 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. In the French law the rule of practice is grounded upon principles somewhat similar to this, for there, if a person be sued for more than he owes, yet he loses his cause if he doth not tender so much as he really does owe.[w]

[u] 1 Vent. 21.
[v] Litt. § 338. Co. Litt. 209.
[vv] Styl. Pract. Reg. (edit. 1657.) 201. 2 Keb. 555. Salk. 596.
[w] Sp. L. b. 6, c. 4.

§ 394. **(c) Setoff.**—To this head may also be referred the practice of what is called a *setoff*,[8] 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 setoff, must pay the remaining balance into court. This answers [305] very nearly to the *compensatio*, or *stoppage*, of the civil law,[x] and depends on the stat-

x Ff. 16. 2. 1.

---

8 **Application of setoff.**—A setoff was unknown to the common law, according to which mutual debts were distinct and inextinguishable except by actual payment or release. The statute of 2 George II, c. 22, mentioned by Blackstone, has been generally adopted, with modifications, in the United States. It is not a denial of the plaintiff's claim, and in order to be asserted it must be declared on with the same formality that any demand is declared on in the original writ, and the party against whom it is filed must answer in the same manner as the defendant in any cross-action. It is substantially a cross-action, and being but a creature of statute, it can be availed of only in the mode prescribed by statute. Barnstable Sav. Bank v. Snow, 128 Mass. 512; Harrisburg Trust Co. v. Shufeldt, 87 Fed. 669, 31 C. C. A. 190. Mutuality is essential to the validity of a setoff, and, in order that one demand may be set off against another, both must mutually exist between the same parties. O'Grady v. Stotts City Bank, 106 Mo. App. 366, 80 S. W. 696; La Foy v. La Foy, 43 N. J. Eq. 206, 3 Am. St. Rep. 302, 10 Atl. 266; Menaugh v. Chandler, 89 Ind. 94; Flynn v. Scale, 2 Cal. App. 665, 84 Pac. 263. Setoff takes place only in actions on contracts for the payment of money, as *assumpsit*, debt and covenant; and where the claim set off grows out of a transaction independent of the contract sued on. Avery v. Brown, 31 Conn. 398. Setoff may ~~arise~~ upon a judgment or award in favor of a defendant against a plaintiff, or against him and another; and cannot be pleaded except in an action on a contract, judgment or award. Clark v. Raison, 126 Ky. 486, 104 S. W. 342; Needham v. Pratt, 40 Ohio St. 186. Generally speaking, an unliquidated claim cannot be set off against one which is for a stipulated amount. Whether a claim, it has been said, is of a nature connoted by the term "setoff," and whether as to its liquidated or unliquidated character, capable of being the subject of setoff, is to be determined by applying the test, Will an action of *indebitatus assumpsit* lie thereon? If so, it is liquidated within the meaning of the word "setoff." Links v. Mariowe, 83 N. J. L. 389, 84 Atl. 1056. The right of setoff, except in equity, is a matter of local legislation, and the federal courts follow the rules established by the tribunals of the state in which they are sitting. Charnley v. Sibley, 73 Fed. 980, 20 C. C. A. 157.

utes 2 George II, c. 22 (Insolvent Debtor's Relief, 1728), and 8 George II, c. 24 (Setoff, 1734), which enact that, where there are mutual debts between the plaintiff and defendant, one debt may be set against the other, and either pleaded in bar or given in evidence upon the general issue at the trial; which shall operate as payment, and extinguish so much of the plaintiff's demand.

§ 395. (2) Pleas in denial, or bar.—Pleas that totally deny the cause of complaint are either the *general* issue, or a *special* plea, in bar.[9]

§ 396. (a) The general issue.—The *general* issue, or general plea, is what traverses, thwarts and denies at once the whole declaration, without offering any special matter whereby to evade it. As in trespass either *vi et armis,* or on the case, *non culpabilis,* not guilty;[y] in debt upon contract, *nihil debet,* he owes nothing; in debt on bond, *non est factum,* it is not his deed; on an *assumpsit, non assumpsit,* he made no such promise. Or in real actions, *nul tort,* no wrong done; *nul disseisin,* no disseisin; and in a writ of right, the mise or issue is, that the tenant has more right to hold than the demandant has to demand. These pleas are called the general issue, because, by importing an absolute and general denial of what is alleged in the declaration, they amount at once to an

y Appendix, No. II, § 4.

---

9 **Denials and new matter in code pleading.**—Under the codes, the answer of the defendant may contain: (1) a denial of the material allegations of the complaint controverted by the defendant; and (2) a statement of any new matter constituting a defense or counterclaim.

The distinction between denials and new matter under the code is not the same as that between the general issue, and pleas in confession and avoidance, at common law. McKyring v. Bull, 16 N. Y. 297, 299, 69 Am. Dec. 696. Thus, prior to the adoption of the Hilary Rules in 1834, the defendant, was allowed to prove many affirmative defenses, including a release, under the general issue in *assumpsit,* on the ground that such defenses negatived the legal conclusion of the indebtedness. It was intended by the framers of the codes to obviate such situations, where the pleadings failed of their purpose to apprise the adverse party of the defenses relied upon. Every defense, therefore, which does not consist of a contradiction of some of the facts which go to make up the plaintiff's cause of action, must be pleaded as new matter.—M. E. HARRISON.

issue; by which we mean a fact affirmed on one side and denied on the other.

Formerly, the general issue was seldom pleaded, except 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 is called a *special* plea; which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defense, and to keep the law and the fact distinct. And it is an invariable rule that every defense which cannot be thus specially pleaded may be given in evidence, upon the general issue at the trial. But, the science [306] of special pleading having been frequently perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves everything open, the fact, the law and the equity of the case, and have allowed special matter to be given in evidence at the trial. And, though it should seem as if much confusion and uncertainty would follow from so great a relaxation of the strictness anciently observed, yet experience has shown it to be otherwise; especially with the aid of a new trial, in case either party be unfairly surprised by the other.

§ 397. (b) Special pleas in bar.—Special pleas, *in bar* of the plaintiff's demand, are very various, according to the circumstances of the defendant's case. As, in real actions a general release or a fine, both of which may destroy and bar the plaintiff's title. Or, in personal actions, an accord, arbitration, conditions performed, nonage of the defendant, or some other fact which precludes the plaintiff from his action.*

§ 398. (i) Justification.—A *justification* is likewise a special plea in bar; as in actions of assault and battery, *son assault demesne* (his own assault), that it was the plaintiff's own original assault; in trespass, that the defendant did the thing complained of in right of some office which warranted him so to do; or, in an action of slander, that the plaintiff is really as bad a man as the defendant said he was.

* Appendix, No. III, § 6.

§ 399. **(ii) Statutes of limitation.**—Also a man may plead the statutes of limitation[a] in bar, or the time limited by certain acts of parliament beyond which no plaintiff can lay his cause of action.

§ 400. **(aa) In real actions.**—This, by the statute of 32 Henry VIII, c. 2 (Prescription, 1540), in a writ of right is *sixty* years; in assizes, writs of entry or other possessory actions real, of the seisin of one's ancestors, in lands, and either of their seisin, or one's own, in rents, suits and services, *fifty* years; and in actions real for lands grounded upon one's own seisin or possession, such possession must have been within *thirty* years. By statute 1 Mar., st. 2, c. 5 (Limitation of Actions, 1554), this limitation does not extend to any suit for advowsons, upon reasons given in a [307] former chapter.[b] But by the statute 21 Jac. I, c. 2 (Crown Suits, 1623), a time of limitation was extended to the case of the king: *viz.*, *sixty* years precedent to 19 February, 1623;[c] but, this becoming ineffectual by efflux of time, the same date of limitation was fixed by statute 9 George III, c. 16 (Crown Suits, 1768), to commence and be reckoned backwards, from the time of bringing any suit or other process, to recover the thing in question; so that a possession for *sixty* years is now a bar even against the prerogative, in derogation of the ancient maxim, "*nullum tempus occurrit regi* (no time runs against the king)." By another statute, 21 Jac. I, c. 16 (Limitation, 1623), *twenty* years is the time of limitation in any writ of formedon, and, by a consequence, *twenty* years is also the limitation in every action of ejectment; for no ejectment can be brought, unless where the lessor of the plaintiff is entitled to enter on the lands,[d] and by the statute 21 Jac. I, c. 16, no entry can be made by any man, unless within twenty years after his right shall accrue.

§ 401. **(bb) In personal actions.**—Also all actions of trespass (*quare clausum fregit*, or otherwise), detinue, trover, replevin, account and case (except upon accounts between merchants), debt on simple contract, or for arrears of rent, are limited by the statute last mentioned to *six* years after the cause of action commenced; and actions of assault, menace, battery, mayhem and im-

[a] See pag. 188.
[b] See pag. 250.
[c] 3 Inst. 189.
[d] See pag. 206.

prisonment must be brought within *four* years, and actions for words within *two* years, after the injury committed.

§ 402. **(cc) In penal and criminal actions.**—And by the statute 31 Elizabeth, c. 5 (Criminal Procedure, 1588), all suits, indictments and informations, upon any penal statutes, where any forfeiture is to the crown, shall be sued within *two* years, and where the forfeiture is to a subject, within *one* year, after the offense committed; unless where any other time is specially limited by the statute. Lastly, by statute 10 W. III, c. 14 (Reversal of Fines and Recoveries, 1698), no writ of error, *scire facias*, or other suit, shall be brought to reverse any judgment, fine or recovery, for error, unless it be prosecuted within *twenty* years.

§ 403. **(dd) Policy of statutes of limitation.**—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 [308] therefore holds, that "*interest reipublicæ ut sit finis litium* (it is for the public good that there be an end to litigation):" and upon the same principle the Athenian laws in general prohibited all actions, where the injury was committed *five* years before the complaint was made.[9] If, therefore, in any suit, the injury, or cause of action, happened earlier than the period expressly limited by law, the defendant may plead the statutes of limitations in bar: as upon an *assumpsit*, or promise to pay money to the plaintiff, the defendant may plead *non assumpsit infra sex annos;* he made no such promise within six years, which is an effectual bar to the complaint.[10]

§ 404. **(iii) Estoppel.**—An *estoppel* is likewise a special plea in bar: which happens where a man hath done some act, or exe-

[9] Pott. Ant. b. 1. c. 21.

[10] **Effect of statute of limitations.**—As statutory limitations must be specially pleaded, the necessary inference was that if not so pleaded the court would take no notice of them, even if the demand was evidently barred by lapse of time on the face of the declaration. Hence it was logically held

cuted some deed, which estops or precludes him from averring anything to the contrary. As if tenant for years (who hath no freehold), levies a fine to another person. Though this is void as to strangers, yet it shall work as an estoppel to the cognizor; for, if he afterwards brings an action to recover these lands, and his fine is pleaded against him, he shall thereby be estopped from saying that he had no freehold at the time, and therefore was incapable of levying it.

that it was a part of the remedy, and governed by the *jus fori;* that the statute of the *lex loci contractus,* if differing, had no effect; and, generally, that the cause of action was not destroyed by the running of the statute, nor any affirmative right or title created by it. (See on the latter point note 1 to c. 17, Book II, p. *263.)

Some states have expressly made the statute of limitations a ground of demurrer, and others have held that where the plaintiff's petition shows it to have run the defense may be made by demurrer, e. g., Boyce v. Christy, 47 Mo. 70. This, of course, implies that the cause of action no longer exists; that the limitation is a part of the contract itself and not of the remedy, and in general the converse of all the positions mentioned above. But in many cases the connection between the different rules has been overlooked, and much confusion caused by inconsistent decisions. The distinction between the two theories of the effect of a limitation as merely discharging the defendant from the remedy when properly pleaded, or as destroying the cause of action, was pointed out in 2 Wms. S., p. 62, note 6, to Hodsden v. Harridge.

Upon its application to criminal cases, see United States v. Cook, 17 Wall. 168, 21 L. Ed. 538; 2 Green's Criminal Law Reports, 88, with note, 96–102; 12 Am. Law Reg. 692, with note, 691–698, with cases cited, showing that defendant may avail himself of it under general issue in criminal cases.

The rule that the limitation must be specially pleaded and cannot be proved under the general issue, or taken advantage of by demurrer, even if appearing in the face of the declaration, is peculiar to the statutes 21 Jac., c. 16, and 32 Henry, VIII, c. 2.

"In all other cases where an action is required by statute to be commenced within a limited time, it is the duty of the plaintiff to prove that he has complied with the terms of it, and if he does not, he will fail in his suit." (Blanchard on Limitations, p. 191; Petrie v. White, 3 Term Rep. 11, 100 Eng. Reprint, 425, 428.) And this was formerly held even as to the statute of 21 Jac. (Brown v. Hancock, Cro. Car. 115, 79 Eng. Reprint, 701. And see Blanchard on Limitations, p. 191, and 2 Wms. S. 63a.)

"The necessity to plead a statute of limitations applies to cases where the remedy only is taken away, and in which the defense is by way of confession and avoidance; not where the right and title to the thing is extinguished and gone, and the defense is by denial of that right. . . . The true reason for requiring the statute to be pleaded is that it confesses and avoids the declara-

§ 405. **(iv) Conditions and qualities of a plea.**—The conditions and qualities of a plea (which, as well as the doctrine of estoppels, will also hold equally, *mutatis mutandis* (making the necessary changes), with regard to other parts of pleading) are, 1. That it be single and containing only one matter; for duplicity begets confusion. But by statute 4 & 5 Ann., c. 16 (1705), a man with leave of the court may plead two or more distinct matters or single pleas; as in an action of assault and battery, these three, not guilty, *son assault demesne* and the statute of limitations.[11] 2. That it be direct and positive, and not argumentative. 3. That it have convenient certainty of time, place and persons. 4. That it answer the plaintiff's allegations in every material point. 5. That it be so pleaded as to be capable of trial.*

* But *quære* whether under the new procedure it is necessary to plead an estoppel by record or deed any more than an estoppel *in pais* by such a special plea, where the effect of the estoppel is admissible in proof under a denial.—HAMMOND.

---

tion, and therefore is not comprehended within any plea which merely denies the whole or part of the declaration." (Gale v. Capern, 1 Ad. & E. 102 [110 Eng. Reprint, 1146]; Margetts v. Bays, 4 Ad. & E. 489 [111 Eng. Reprint, 871].)" Patterson, J., in De Beauvoir v. Owen, 5 Ex. 167, 1850, affirming Owen v. De Beauvoir, 16 Mees. & W. 547.

That whatever forms part of the contract is governed by the *lex loci contractus*, no matter where it may operate or be enforced, is clear enough. As Hemphill, C. J., says in De Cordova v. City of Galveston, 4 Tex. 470, 480 (1849): "If a remedy formed a part of the contract, it should follow it into a foreign country and be prosecuted in the form of action presented by the *lex loci contractus* at its date; and this, although a different form may be allowed where the suit is instituted and there be no forms of action recognized or permitted by law."

This was a case where the statute of limitations was held to belong to the remedy only, and not to be a part of the contract; yet what the necessary and logical result would be if it were, is here clearly set out. See precisely to the same effect the reasoning of McLean, J., dissenting, in Bronson v. Kinzie, 1 How. 311, 329, 11 L. Ed. 143.—HAMMOND.

11 **Inconsistent defenses in code pleading.**—The codes have dispensed with the requirement of "singleness of issue," and generally provide that a defendant may set up in his answer as many defenses and counterclaims as he may have.

There is a marked difference of opinion as to whether under the codes inconsistent defenses may be pleaded and relied on. Where the inconsistency is merely a logical one, as, for instance, between a denial of the execution

§ 406. (v) General rules as to special pleas.—[309] Special pleas are usually in the affirmative, sometimes in the negative, but they always advance some new fact not mentioned in the declaration; and then they must be averred to be true in the common form: "and this he is ready to verify." This is not necessary in pleas of the general issue, those always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.

It is a rule in pleading that no man be allowed to plead specially such a plea as amounts only to the general issue, or a total denial of the charge; but in such case he shall be driven to plead the general issue in terms, whereby the whole question is referred to a jury. But if the defendant in an assize or action of trespass be desirous to refer the validity of his title to the court rather than the jury, he may state his title specially, and at the same time *give color* to the plaintiff, or suppose him to have an appearance or color of title, bad, indeed, in point of law, but of which the jury are not competent judges. As if his own true title be that he claims by feoffment with livery from A, by force of which he entered on the lands in question, he cannot plead this by itself, as it amounts to no more than the general issue, *nul tort, nul disseisin,* in assize, or *not guilty,* in an action of trespass. But he may allege this specially, provided he goes further and says that the plaintiff claiming by *color* of a prior deed of feoffment, without livery, entered, upon whom he entered, and may then refer himself to the judgment of the court which of these two titles is the best in point of law.[f]

§ 407. 4. Pleading: replication; rejoinder; surrejoinder; rebutter; surrebutter.—When the plea of the defendant is thus put

[f] Dr. & Stud. 2. c. 53.

---

of a contract and a plea of the statute of limitations, it is agreed that both may be relied on. Lawrence v. Peck, 3 S. D. 645, 54 N. W. 808; May v. Burk, 80 Mo. 675. Where, however, the defenses are contradictory in point of fact, so that proof of one would disprove the other, there is good ground for the position taken by some courts that the maintenance of both of such defenses is not consonant with the spirit of the code system. Derby v. Gallup, 5 Minn. 119. But in many jurisdictions there is apparently no limitation upon the right of the defendant to plead inconsistent defenses. Banta v. Siller, 121 Cal. 414, 53 Pac. 935.—M. E. HARRISON.

in, if it does not amount to an issue or total contradiction of the declaration but only evades it, the plaintiff may plead again, and *reply* to the defendant's plea;* either traversing it, that is, totally denying it, as if on an action of debt upon bond the defendant pleads *solvit ad diem*, that he paid the money when [310] due, here the plaintiff in his *replication* may totally traverse this plea, by denying that the defendant paid it, or he may allege new matter in contradiction to the defendant's plea; as when the defendant pleads *no award made*, the plaintiff may reply, and set forth an actual award, and assign a breach: or the replication may *confess and avoid* the plea, by some new matter or distinction, consistent with the plaintiff's former declaration; as, in an action for trespassing upon land whereof the plaintiff is seised, if the defendant shows a title to the land by descent, and that therefore he had a right to enter, and gives color to the plaintiff, the plaintiff may either traverse and totally 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 term of life. To the replication the defendant may *rejoin*, or put in an answer called a *rejoinder*. The plaintiff may answer the rejoinder by a *surrejoinder*, upon which the defendant may *rebut*, and the plaintiff answer him by a *surrebutter*. Which pleas, replications, rejoinders, surrejoinders, rebutters and surrebutters answer to the *exceptio, replicatio, duplicatio, triplicatio* and *quadruplicatio* of the Roman laws.[h] [12]

* Upon the *special traverse*, as the mode of pleading described in the preceding paragraph is called, later writers differ from Blackstone, holding that the plaintiff's proper course is to reaffirm his previous pleading. (See Stephen on Pleading, pp. 186–189.) But the entire method is obsolete even in common-law pleading, and unknown to the new system.—HAMMOND.

[h] Inst. 4. 14. Bract. l. 5. tr. 5. c. 1.

---

[12] **Pleading under the Judicature Act of 1873.**—The principles and rules of pleading under the common law continued practically unchanged to the middle of the nineteenth century. The excessive subtlety developed by the pleaders and the rigor with which the rules were applied led to the subordination of the merits of the case to the technical questions of form. This caused a reaction, and attempts were made to correct the defects in the administration of the law by the Common Law Procedure Acts, 1852–60. A more thorough reform was carried through by the Judicature Act of 1873. The more

§ 408. a. **Departure in pleading.**—The whole of this process is denominated the *pleading;* in the several stages of which it must be carefully observed, not to depart or vary from the title or defense, which the party has once insisted on. For this (which is called a *departure* in pleading) might occasion endless altercation. Therefore, the replication must support the declaration, and the

material changes made by this act in the rules relating to pleading were the following:

(i) Forms of action were abolished. A plaintiff need no longer specify the particular form of action in which he seeks to recover judgment. He is now allowed to state the facts on which he relies, and the court will grant him the remedy to which on those facts he is entitled.

(ii) Each party must now state facts and not conclusions of law. He was bound, before 1875, to set out with reasonable precision the points which he intended to raise; but this he generally did by stating, not the facts which he meant to prove, but the conclusion of law which he sought to draw from them. His opponent thus learned that he desired to prove some set of facts which would sustain a given legal conclusion; but how he proposed to sustain that legal conclusion was not disclosed. For instance, there was a very common form of declaration: "For money received by the defendant to the use of the plaintiff." A claim in that form might be established by some six or seven entirely different sets of facts, and it could not be ascertained from the plaintiff's pleading which set of facts would be set up a. he trial, to show that the particular money claimed was received to the use of the plaintiff. Now the plaintiff must plead the facts on which he proposes to rely as showing that the sum of money which he claims was received by the defendant to his use.

(iii) So, too, with the defense. "The general issue" is abolished. In an action for goods sold and delivered, the defendant was formerly allowed to plead that he "never was indebted as alleged." This is a conclusion of law, and at the trial it was open to him to give in evidence under this plea any one or more of several totally different defenses, e. g., that he never ordered the goods; that they never were delivered to him; that they were not of the quality ordered; that they were sold on a credit which had not expired at the time that the action was commenced; or that the statute of frauds had not been complied with. Now a mere denial of the debt is inadmissible. So in an action for money received to the use of the plaintiff, the defendant must either deny the receipt of the money, or the existence of those facts which are alleged to make such receipt a receipt to the use of the plaintiff.

So in actions of tort, the defendant was formerly allowed to plead "the general issue," Not Guilty. Under that plea it was open to him at the trial to raise several distinct defenses. Thus the defendant in an action of libel or slander by one short and convenient plea of "Not Guilty," simultaneously denied the publication of the words complained of, denied that he published

rejoinder must support the plea, without departing out of it. As in the case of pleading no award made, in consequence of a bond of arbitration, to which the plaintiff replies, setting forth an actual award, now the defendant cannot rejoin that he hath performed this award, for such rejoinder would be an entire departure from his original plea, which alleged that no such award was made: therefore he has now no other [311] choice but to traverse the fact of the replication, or else to demur upon the law of it.

§ 409. **b. New assignment.**—Yet in many actions the plaintiff, who has alleged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that

them in the defamatory sense imputed by the innuendo, or in any defamatory or actionable sense which the words themselves imported, asserted that the occasion was privileged, and also denied that the words were spoken of the plaintiff in the way of his profession or trade, whenever they were alleged to have been so spoken. But now this compendious mode of pleading is abolished. "Not Guilty" can no longer be pleaded in a civil action. The defendant must deal specifically with every allegation of which he does not admit the truth.

(iv) Demurrers were abolished. It is true that either party is still allowed to place on the record an *objection in point of law*, which is very similar to the former demurrer. But there is this important difference. The party demurring could formerly insist on having his demurrer separately argued, which caused delay. But now such points of law are argued at the trial of the action; it is only by consent of the parties, or by order of the court or a judge, that the party objecting can have the point set down for argument and disposed of before the trial. And, as a rule, such an order will only be made where the decision of the point of law will practically render any trial of the action unnecessary.

(v) Pleas in abatement were abolished. If either party desires to add or strike out a party, he must apply by summons (see Kendall v. Hamilton, [1879] 4 App. Cas. 504; Pilley v. Robinson, [1887] 20 Q. B. D. 155; Wilson v. Balcarres Brook Steamship Co., [1893] 1 Q. B. 422). No cause or matter now "shall be defeated by reason of the misjoinder or nonjoinder of parties."

(vi) Equitable relief is now granted, and equitable claims and defenses are now recognized, in all actions in the high court of justice.

(vii) Payment into court was for the first time allowed generally in all actions.

(viii) The right of setoff was preserved unchanged; but a very large power was given to a defendant to counterclaim. He can raise any kind of cross-claim against the plaintiff, and in some cases even against the plaintiff with others, subject only to the power of a master or judge to order the claim

general wrong to a more particular certainty, by assigning the injury afresh with all its specific circumstances in such manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a *new* or *novel assignment*. As, if the plaintiff in trespass declares on a breach of his close in D, and the defendant pleads that the place where the injury is said to have happened is a certain close of pasture in D, which descended to him from B, his father, and so is his own freehold; the plaintiff may reply and assign another close in D, specifying the abuttals and boundaries as the real place of the injury.[1]

§ 410. **c. Duplicity.**—It hath previously been observed[k] that *duplicity* in pleading must be avoided. Every plea must be simple, entire, connected and confined to one single point: it must never be entangled with a variety of distinct independent answers to the same matter; which must require as many different replies, and introduce a multitude of issues upon one and the same dispute. For this would often embarrass the jury, and sometimes the court itself, and at all events would greatly enhance the expense of the parties. Yet it frequently is expedient to plead in such a manner, as to avoid any implied admission of a fact, which cannot with propriety or safety be positively affirmed or denied.

§ 411. **d. Protestation.**—And this may be done by what is called a *protestation*, whereby the party interposes an oblique allegation or denial of some fact, protesting (by the gerund, *protes-*

[1] Bro. Abr. t. Trespass. 205. 284. [k] Pag. 308.

---

and cross-claim to be tried separately, if they cannot conveniently be tried together.

(ix) The defendant is also allowed in certain cases to bring in third parties and claim contribution or indemnity against them in the original action in which he himself is sought to be made liable.

(x) The names of the principal pleadings were changed. A statement of claim takes the place of the former *declaration*. Instead of *pleas*, the defendant now delivers a defense, or, it may be, a defense and counterclaim. The *replication* is now called a reply. The further pleadings, which now are rarely seen, retain their ancient names: *rejoinder, surrejoinder, rebutter*, and *surrebutter*. See 11 Ency. Laws of Eng. 162.

For the principles and rules of the old common-law system of pleading, see Stephen, Pleading, or Perry, Common-Law Pleading.

tando) that such a matter does or does not exist, and at the same time avoiding a direct affirmation or denial. Sir Edward Coke hath defined[1] a protestation (in the pithy dialect of that age) to be "an exclusion of a conclusion." [312] For the use of it is to save the party from being concluded with respect to some fact or circumstance, which cannot be directly affirmed or denied without falling into duplicity of pleading; and which yet, if he did not thus enter his protest, he might be deemed to have tacitly waived or admitted. Thus, while tenure in villeinage subsisted, if a villein had brought an action against his lord, and the lord was inclined to try the merits of the demand, and at the same time to prevent any conclusion against himself that he had waived his seigniory, he could not in this case both plead affirmatively that the plaintiff was his villein and also take issue upon the demand, for then his plea would have been *double*, as the former alone would have been a good bar to the action, but he might have alleged the villeinage of the plaintiff, by way of protestation, and then have denied the demand. By this means the future vassalage of the plaintiff was saved to the defendant, in case the issue was found in his (the defendant's) favor,[m] for the protestation prevented that conclusion, which would otherwise have resulted from the rest of his defense, that he had enfranchised the plaintiff;[n] since no villein could maintain a civil action against his lord. So, also, if a defendant, by way of inducement to the point of his defense, alleges (among other matters) a particular mode of seisin or tenure, which the plaintiff is unwilling to admit, and yet desires to take issue on the principal point of the defense, he must deny the seisin or tenure by way of protestation, and then traverse the defensive matter. So, lastly, if an award be set forth by the plaintiff, and he can assign a breach in one part of it (*viz.*, the nonpayment of a sum of money), and yet is afraid to admit the performance of the rest of the award, or to aver in general a nonperformance of any part of it, lest something should appear to have been performed; he may save to himself any advantage he might hereafter make of the general nonperformance, by alleging *that* by protestation, and plead only the nonpayment of the money.

[1] 1 Inst. 124.

[m] Co. Litt. 126.

[n] See Book II. c. 6. pag. 94.

§ 412. e. Conclusion of pleading. (1) Verification. — [313] In any stage of the pleadings, when either side advances or affirms any new matter, he usually (as was said) avers* it to be true; "and this he is ready to verify."

§ 413. (2) Tender of issue.—On the other hand, when either side traverses or denies the facts pleaded by his antagonist, he usually tenders an issue, as it is called; the language of which is different according to the party by whom the issue is tendered; for if the traverse or denial comes from the defendant, the issue is tendered in this manner, "and of this he puts himself upon the country," thereby submitting himself to the judgment of his peers; but if the traverse lies upon the plaintiff, he tenders the issue or prays the judgment of the peers against the defendant in another form; thus, "and this he prays may be inquired of by the country."

But if either side (as, for instance, the defendant) pleads a special negative plea, not traversing or denying anything that was before alleged, but disclosing some new negative matter, as where the suit is on a bond, conditioned to perform an award, and the defendant pleads, negatively, that no award was made, he tenders no issue upon this plea; because it does not yet appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award; but when the plaintiff replies, and sets forth an actual specific award, if then the defendant traverses the replication, and denies the making of any such award, he then and not before tenders an issue to the plaintiff. For when in the course of pleading they 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 favor of the plaintiff or of the defendant.

* Notice here the correct use of the term "aver" or "averment," which should never be used for an allegation of law, as it sometimes is.—HAMMOND.

CHAPTER THE TWENTY-FIRST. [314]

OF ISSUE AND DEMURRER.

§ 414. Proceedings in an action: IV. Issue.—Issue, *exitus*, being the end of all the pleadings, is the fourth part or stage of an action, and is either upon matter of *law* or matter of *fact*.[1]

§ 415. 1. Issue as to law: demurrer.—An issue upon matter of law is called a *demurrer*, and it confesses the facts to be true, as stated by the opposite party; but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party which first demurs, *demoratur*, rests or abides upon the point in question. As, if the matter of the plaintiff's complaint or declaration be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration; if, on the other hand, the defendant's excuse or plea be invalid, as if he pleads that he committed the trespass by authority from a stranger, without setting out the stranger's right, here the plaintiff may demur in law to the plea: and so on in every other part of the proceedings, where either side perceives any material objection in point of law, upon which he may rest his case.[2]

1 On the subject of this chapter, see Perry, Common-Law Pleading.

2 **Issues of law.**—Strictly speaking, there is no issue of law, in the sense in which the term is used for an issue of fact (see p. *313 of the text), for a specific point affirmed on one side and denied on the other. The use of the word in this connection is of recent date compared with the other. It is not in the nature of law to be reduced to a single definite issue, binding on the courts as well as the parties. The court determines for itself what is the question of law involved in the facts, and is not confined to that which counsel have presented and argued on one side or on the other, as it is to the *allegata* and *probata* of fact. It may and should consider all the law bearing on the case, whether stated by counsel (or parties) or not.

The new procedure has indeed made all demurrers "special" in kind, by requiring the grounds of demurrer to be stated, and by implication, excluding decision on any other ground. But the judge is none the less bound by his duty to notice the most important defects apparent in the pleadings, such as failure of jurisdiction, or lack of cause of action, or of defense: as well as to know all the authorities for either side.—HAMMOND.

The form of such demurrer is by averring the declaration or plea, the replication or rejoinder, to be insufficient in [315] law to maintain the action or the defense, and therefore praying judgment for want of sufficient matter alleged. Sometimes demurrers are merely for want of sufficient *form* in the writ or declaration. But in case of exceptions to the form, or manner of pleading, the party demurring must by statute 27 Elizabeth, c. 5 (Demurrers and Pleadings, 1584), and 4 & 5 Ann., c. 16 (1705), set forth the causes of his demurrer, or wherein he apprehends the deficiency to consist. And upon either a *general* or such a *special* demurrer, the opposite party avers it to be sufficient, which is called a joinder in demurrer, and then the parties are at issue in point of law. Which issue in law, or demurrer, the judges of the court before which the action is brought must determine.

§ 416. 2. Issue of fact.—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, thus, "and this he prays may be inquired of by the country," or, "and of this he puts himself upon the country," it may immediately be subjoined by the other party, "and the said A B doth the like." Which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause upon the truth of the fact in question. And this issue of fact must, generally speaking, be determined, not by the judges of the court, but by some other method; the principal of which methods is that by the country, *per pais* (in Latin, *per patriam*), that is, by jury. Which establishment, of different tribunals for determining these different issues, is in some measure agreeable to the course of justice in the Roman republic, where the *judices ordinarii* (ordinary judges) determined only questions of fact, but questions of law were referred to the decisions of the *centumviri*.[a]

§ 417. Considerations generally applicable to pleading—1. Continuance.—But here it will be proper to observe that during the whole of these proceedings, from the time of the defendant's appearance in obedience to the king's writ, it is necessary [316] that both the parties be kept or *continued* in court from day

[a] Cic. de Orator. l. 1. c. 38.

to day, till the final determination of the suit. For the court can determine nothing, unless in the presence of both the parties, in person or by their attorneys, or upon default of one of them, after his original appearance and a time prefixed for his appearance in court again. Therefore, in the course of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder and the like, within the times allotted by the standing rules of the court, the plaintiff, if the omission be his, is said to be *nonsuit*, or not to follow and pursue his complaint, and shall lose the benefit of his writ; or, if the negligence be on the side of the defendant, judgment may be had against him for such his default. And, after issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually given and entered upon the record for the parties to appear on from time to time, as the exigence of the case may require. The giving of this day is called the *continuance*, because thereby the proceedings are continued without interruption from one adjournment to another. If these continuances are omitted, the cause is thereby discontinued, and the defendant is discharged *sine die*, without a day, for this turn: for by his appearance in court he has obeyed the command of the king's writ; and, unless he be adjourned over to a day certain, he is no longer bound to attend upon that summons, but he must be warned afresh, and the whole must begin *de novo*.

§ 418. 2. Plea of puis darrein continuance.—Now, it may sometimes happen that after the defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some new matter, which it is pr r for the defendant to plead; as, that the plaintiff, being a *feme sole*, is since married, or that she has given the defendant a release, and the like: here, if the defendant takes advantage of this new matter, as early as he possibly can, *viz.*, at the day given for his next appearance, he is permitted to plead it in what is called a plea *puis darrein continuance*, or since the last adjournment. For it would be unjust to exclude him [317] from the benefit of this new defense, which it was not in his power to make when he pleaded the former. But it is dangerous to rely on such a plea, without due consideration; for it confesses the matter which was before in dispute between the parties.[e] And it

[e] Cro. Eliz. 49.

is not allowed to be put in, if any continuance has intervened between the rising of this fresh matter and the pleading of it, for then the defendant is guilty of neglect, or *laches*, and is supposed to rely on the merits of his former plea. Also it is not allowed after a demurrer is determined, or verdict given, because then relief may be had in another way, namely, by writ of *audita querela* (the complaint has been heard), of which hereafter. And these pleas *puis darrein continuance;* when brought to a demurrer in law or issue of fact, shall be determined in like manner as other pleas.*

§ 419. 3. The record.—We have said that demurrers, or questions concerning the *sufficiency* of the matters alleged in the pleadings, are to be determined by the judges of the court, upon solemn 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 most material proceedings in the cause, entered on a parchment roll, and continued down to the present time; in which must be stated the original writ and summons, all the pleadings, the declaration, view or *oyer* prayed, the imparlances, plea, replication, rejoinder, continuances and whatever further proceedings have been had; all entered *verbatim* on the roll, and also the issue or demurrer, and joinder therein.

§ 420. 4. Law French.—These were formerly all written, as indeed all public proceedings were, in Norman or law French, and even the arguments of the counsel and decisions of the court were in the same barbarous dialect.[3] An evident and shameful badge, it must be owned, of tyranny and foreign servitude, being [318] introduced under the auspices of William the Norman and his sons, whereby the ironical observation of the Roman satirist came

* The purpose of such a plea is now usually served by a supplementary pleading or amendment; the former, where a distinction is made between the two. These, however, do not now "confess the matter which was before in dispute between the parties," as the plea p. d. c. did.—HAMMOND.

---

3 For the character of the French used in legal proceedings, see Pollock, First Book of Jurisprudence, 279.

to be literally verified, that "*Gallia causidicos docuit facundu Britannos* (eloquent Gaul hath instructed British lawyers)."[g] This continued till the reign of Edward III, who, having employed his arms successfully in subduing the *crown* of France, thought it unbeseeming the dignity of the victors to use any longer the *language* of a vanquished country. By a statute, therefore, passed in the thirty-sixth year of his reign,[h] it was enacted, that for the future all pleas should be pleaded, shown, defended, answered, debated and judged in the English tongue, but be entered and enrolled in Latin. In like matter as Don Alonso X, King of Castile (the great-grandfather of our Edward III), obliged his subjects to use the Castilian tongue in all legal proceedings,[i] and as, in 1286, the German language was established in the courts of the empire.[k] And perhaps if our legislature had then directed that the writs themselves, which are mandates from the king to his subjects to perform certain acts or to appear at certain places, should have been framed in the English language, according to the rule of our ancient law,[l] it had not been very improper. But the record or enrollment of those writs and the proceedings thereon, which was calculated for the benefit of posterity, was more serviceable (because more durable) in a dead and immutable language than in any flux or living one. The practicers, however, being used to the Norman language, and therefore imagining they could express their thoughts more aptly and more concisely in that than in any other, still continued to take their notes in law French, and, of course, when those notes came to be published, under the denomination of reports, they were printed in that barbarous dialect; which, joined to the additional terrors of a Gothic black letter, has occasioned many a student to throw away his Plowden and Littleton, without venturing to attack a page of them. And yet in reality upon a nearer acquaintance, they would have found nothing very formidable in the language, which differs in its grammar [319] and orthography as much from the modern French as the diction of Chaucer and Gower does from that of Addison and Pope. Besides, as the English and Norman languages were currently used by our ancestors for several centuries together, the two idioms

g Juv. xv. 111.
h C. 15.
i Mod. Un. Hist. xx. 211.
k *Ibid.* xxix. 235.
l Mirr. c. 4. § 3.

have naturally assimilated, and mutually borrowed from each other: for which reason the grammatical construction of each is so very much the same, that I apprehend an Englishman (with a week's preparation) would understand the laws of Normandy, collected in their *grand coustumier*, as well if not better than a Frenchman bred within the walls of Paris.

§ 421. **5. Law Latin.**—The Latin, which succeeded the French for the entry and enrollment of pleas, and 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. Whereas in reality it is a very universal dialect, spread throughout all Europe at the irruption of the northern nations, and particularly accommodated and molded to answer all the purposes of the lawyers with a peculiar exactness and precision. This is principally owing to the simplicity, or (if the reader pleases) the poverty and baldness of its texture, calculated to express the ideas of mankind just as they arise in the human mind, without any rhetorical flourishes, or perplexed ornaments of style: for it may be observed that those laws and ordinances, of public as well as private communities, are generally the most easily understood, where strength and perspicuity, not harmony or elegance of expression, have been principally consulted in compiling them. These northern nations, or rather their legislators, though they resolved to make use of the Latin tongue in promulgating their laws, as being more durable and more generally known to their conquered subjects than their own Teutonic dialects, yet (either through choice or necessity) have frequently intermixed therein some words of a Gothic original; which is, more or less, the case in every country [320] of Europe, and therefore not to be imputed as any peculiar blemish in our English legal latinity.[m] The truth is, what is generally denominated law Latin is in reality a

[m] The following sentence, "*si quis ad battalia curte sua exicrit*, if anyone goes out of his own court to fight," etc., may raise a smile in the student as a flaming modern anglicism: but he may meet with it, among others of the same stamp, in the laws of the Burgundians on the Continent, before the end of the fifth century. (Add. 1. c. 5. § 2.)

mere technical language, calculated for eternal duration, and easy to be apprehended both in present and future times; and on those accounts best suited to preserve those memorials which are intended for perpetual rules of action. The rude pyramids of Egypt have endured from the earliest ages, while the more modern and more elegant structures of Attica, Rome and Palmyra have sunk beneath the stroke of time.

§ 422. **6. Utility of a technical language.**—As to the objection of locking up the law in a strange and unknown tongue, this is of little weight with regard to records, which few have occasion to read but such as do, or ought to, understand the rudiments of Latin. And besides, it may be observed of the law Latin, as the very ingenious Sir John Davis[n] observes of the law French, "that it is 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 is true, indeed, that the many terms of art with which the law abounds are sufficiently harsh when latinized (yet not more so than those of other sciences), and may, as Mr. Selden observes,[o] give offense "to some grammarians of squeamish stomachs, who would rather choose to live in ignorance of things the most useful and important, then to have their delicate ears wounded by the use of a word, unknown to Cicero, Sallust or the other writers of the Augustan age." Yet this is no more than must unavoidably happen when things of modern use, of which the Romans had no idea, and consequently no phrases to express [321] them come to be delivered in the Latin tongue. It would puzzle the most classical scholar to find an appellation, in his pure latinity, for a constable, a record, or a deed of feoffment; it is therefore to be imputed as much to necessity, as ignorance, that they were styled in our forensic dialect, *constabularius, recordum* and *feoffamentum*. Thus again, another uncouth word of our *ancient* laws (for I defend not the ridiculous barbarisms sometimes introduced by the ignorance of *modern* practicers), the substantive *murdrum*, or the verb *murdrare*, however harsh and unclassical it may seem, was necessarily framed to express a particular offense; since no other

n Pref. Rep.

o Pref. ad Eadmer.

word in being, *occidere, interficere, necare* (to kill, to put to death, to slay), or the like, was sufficient to express the *intention* of the criminal, or *quo animo* (with what intention) the act was perpetrated, and therefore by no means came up to the notion of murder at present entertained by our law, *viz.*, a killing *with malice aforethought.*

A similar necessity to this produced a similar effect at Byzantium, when the Roman laws were turned into Greek for the use of the oriental empire: for, without any regard to Attic elegance, the lawyers of the imperial courts made no scruple to translate *fidei commissarios*, φιδεϊκομμισζαριους;[p] *cubiculum*, κουβουκλειον;[q] *filium-familias*, παιδα-φαμιλιας;[r] *repudium*, ρεπουδιον;[s] *compromissum*, κομπρομισσον;[t] *reverentia et obsequium*, ρευερεντια και οβσεκονιον (trustees, a bed-chamber, the son of a family, a divorce, a bond or engagement wherein two parties oblige themselves to stand to the arbitration or award of the umpire, reverence and compliance);[u] and the like. They studied more the exact and precise import of the words than the neatness and delicacy of their cadence. And my academical readers will excuse me for suggesting that the terms of the law are not more numerous, more uncouth, or more difficult to be explained by a teacher than those of logic, physics and the whole circle of Aristotle's philosophy; nay, even of the politer arts of architecture and its kindred studies, or the science of rhetoric itself. Sir Thomas More's famous legal question[w] contains in it nothing more difficult than the [322] definition which in his time the philosophers currently gave of their *materia prima* (the primary matter), the groundwork of all natural knowledge: that it is "*neque quid, neque quantum, neque quale, neque aliquid eorum quibus ens determinatur* (neither that, nor as much as, nor such as, nor any part of those things by which being is determined); or its subsequent explanation by Adrian Heereboord, who assures us[x] that "*materia prima non est corpus, neque per formam corporeitatis, neque per simplicem essentiam: est tamem ens, et quidem substantia, licet incompleta; habetque actum ex se entitativum, et simul est potentia sub-*

p Nov. 1. c. 1.
q Nov. 8 edict. Constantinop.
r Nov. 117. c. 1.
s *Ibid.* c. 8.
t Nov. 82. c. 11.
u Nov. 78, c. 2.
w See pag. 149.
x Philosoph. Natural. c. 1. § 28, etc.

jectiva (primary matter is not body, neither by form of corporeity nor by simple essence; nevertheless it is a being, and certain substance although incomplete; and has an entitative action from itself, and is at the same time a subjective power)." The law, therefore, with regard to its technical phrases, stands upon the same footing with other studies, and requests only the same indulgence.

§ 423. 7. Introduction of English.—This technical Latin continued in use from the time of its first introduction till the subversion of our ancient constitution under Cromwell, when, among many other innovations in the law, some for the better and some for the worse, the language of our records was altered and turned into English. But, at the restoration of King Charles, this novelty was no longer countenanced, the practicers finding it very difficult to express themselves so concisely or significantly in any other language but the Latin. And thus it continued without any sensible inconvenience till about the year 1730, when it was again thought proper that the proceedings at law should be done into English, and it was accordingly so ordered by statute 4 George II, c. 26 (Procedure, 1730). This was done, in order 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 I know not how well it has answered, but am apt to suspect that the people are now, after many years' experience, altogether as ignorant in matters of law as before. On the other hand, these inconveniences have already arisen from the alteration; that now many clerks and attorneys are hardly able to read, much less to understand, a record even of so modern a date as the reign of George the First. And it has much enhanced the expense of [323] all legal proceedings: for since the practicers are confined (for the sake of the stamp duties, which are thereby considerably increased) to write only a stated number of words in a sheet, and as the English language, through the multitude of its particles, is much more verbose than the Latin, it follows that the number of sheets must be very much augmented by the change.[y] The translation also of technical

[y] For instance, these three words, "*secundum formam statuti,*" are now converted into seven, "according to the form of the statute."

phrases, and the names of writs and other process, were found to be so very ridiculous (a writ of *nisi prius*, *quare impedit*, *fieri facias*, *habeas corpus*, and the rest, not being capable of an English dress with any degree of seriousness), that in two years' time a new act was obliged to be made, 6 George II, c. 14 (Courts in Wales and Chester, 1732), which allows all technical words to continue in the usual language, and has thereby almost defeated every beneficial purpose of the former statute.

§ 424. 8. Court hand—Abbreviations.—What is said of the alteration of language by the statute 4 George II, c. 26 (Procedure, 1730), will hold equally strong with respect to the prohibition of using the ancient immutable *court hand* in writing the records or other legal proceedings; whereby the reading of any record that is forty years old is now become the object of science, and calls for the help of an antiquarian. But that branch of it which forbids the use of abbreviations seems to be of more solid advantage, in delivering such proceedings from obscurity, according to the precept of Justinian;[a] "*ne per scripturam aliqua fiat in posterum dubitatio, jubemus non per siglorum captiones et compendiosa enigmata ejusdem codicis textum conscribi, sed per literarum consequentiam explanari concedimus* (lest, through the method of writing, the meaning of this code be rendered doubtful to posterity, we command that it be not written in abbreviations or ciphers; but that it be rendered plain by the regular succession of letters)." But, to return to our demurrer.

§ 425. 9. Demurrers decided by the court.—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 upon solemn argument determined by the court, and not by any trial by jury; and judgment [324] is thereupon accordingly given. As, in an action of trespass, if the defendant in his plea confesses the fact, but justifies it *causa venationis*, for that he was hunting; and to this the plaintiff demurs, that is, he admits of 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 jus-

[a] De Concept. Digest. § 13.

tify 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.

§ 426. **10. Issues of fact decided by trial.**—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 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 two succeeding chapters.

[325] # CHAPTER THE TWENTY-SECOND.

OF THE SEVERAL SPECIES OF TRIAL.

§ 427. Alleged uncertainty of legal proceedings.—The uncertainty of legal proceedings is a notion so generally adopted, and has so long been the standing theme of wit and good humor, that he who should attempt to refute it would be looked upon as a man who was either incapable of discernment himself or else meant to impose upon others. Yet it may not be amiss, before we enter upon the several modes whereby certainty is meant to be obtained in our courts of justice, to inquire a little wherein this uncertainty, so frequently complained of, consists, and to what causes it owes its original.

§ 428. 1. Multitude of laws and judicial decisions.—It hath sometimes been said to owe its original to the number of our municipal constitutions and the multitude of our judicial decisions,[a] which occasion, it is alleged, abundance of rules that militate and thwart with each other, as the sentiments or caprice of successive legislatures and judges have happened to vary. The fact, of multiplicity, is allowed, and that thereby the researches of the student are rendered more difficult and laborious: but that, with proper industry, the result of those inquiries will be doubt and indecision, is a consequence that cannot be admitted. People are apt to be angry at the want of simplicity in our laws: they mistake variety for confusion, and complicated cases for contradictory. [326] They bring us the examples of arbitrary governments of Denmark, Muscovy and Prussia; of wild and uncultivated nations, the savages of Africa and America; or of narrow domestic republics in ancient Greece and modern Switzerland; and unreasonably require the same paucity of laws, the same conciseness of practice, in a nation of freemen, a polite and commercial people, and a populous extent of territory.

§ 429. a. Multiplicity of rules due to liberty and property of subject.—In an arbitrary, despotic government, where the lands

[a] See the preface to Sir John Davies' reports: wherein many of the following topics are discussed more at large.

are at the disposal of the prince, the rules of succession, or the mode of enjoyment, must depend upon his will and pleasure. Hence there can be but few legal determinations relating to the property, the descent, or the conveyance of real estates; and the same holds in a stronger degree with regard to goods and chattels, and the contracts relating thereto. Under a tyrannical sway trade must be continually in jeopardy, and of consequence can never be extensive: this, therefore, puts an end to the necessity of an infinite number of rules, which the English merchant daily recurs to for adjusting commercial differences. Marriages are there usually contracted with slaves, or at least women are treated as such: no laws can be therefore expected to regulate the rights of dower, jointures and marriage settlements. Few, also, are the persons who can claim the privileges of any laws; the bulk of those nations, *viz.*, the commonalty, boors, or peasants, being merely villeins and bondmen. Those are therefore left to the private coercion of their lords, are esteemed (in the contemplation of these boasted legislators) incapable of either right or injury, and of consequence are entitled to no redress. We may see, in these arbitrary states, how large a field of legal contests is already rooted up and destroyed.

§ 430. b. Multiplicity of rules due to commerce and civilization.—Again; were we a poor and naked people, as the savages of America are, strangers to science, to commerce, and the arts as well of convenience as of luxury, we might perhaps be content, as some of them are said to be, to refer all disputes to the next man we meet upon the road, and so put a short end [327] to every controversy. For in a state of nature there is no room for municipal laws; and the nearer any nation approaches to that state, the fewer they will have occasion for. When the people of Rome were little better than sturdy shepherds or herdsmen, all their laws were contained in ten or twelve tables; but as luxury, politeness and dominion increased, the civil law increased in the same proportion, and swelled to that amazing bulk which it now occupies, though successively pruned and retrenched by the Emperors Theodosius and Justinian.

§. 431. c. Multiplicity of rules due to extent of territory.—In like manner we may lastly observe that in petty states and nar-

row territories much fewer laws will suffice than in large ones, because there are fewer objects upon which the laws can operate. The regulations of a private family are short and well known; those of a prince's household are necessarily more various and diffuse.

§ 432. d. Summary of causes of multiplicity of legal rules.—The causes, therefore, of the multiplicity of the English laws are, the extent of the country which they govern; the commerce and refinement of its inhabitants; but, above all, the liberty and property of the subject. These will naturally produce an infinite fund of disputes, which must be terminated in a judicial way, and it is essential to a free people that these determinations be published and adhered to; that their property may be as certain and fixed as the very constitution of their state. For though in many other countries everything is left in the breast of the judge to determine, yet with us he is only to *declare* and *pronounce*, not to *make* or *new-model*, the law. Hence a multitude of decisions, or cases adjudged, will arise; for seldom will it happen that any one rule will exactly suit with many cases. And in proportion as the decisions of courts of judicature are multiplied, the law will be loaded with decrees, that may sometimes (though rarely) interfere with each other: either because succeeding judges may not be apprised of the prior adjudication; or because they may think differently from their predecessors; or because the same arguments did not occur formerly as at [328] present; or, in fine, because of the natural imbecility and imperfection that attends all human proceedings. But wherever this happens to be the case in any material point, the legislature is ready, and from time to time both may, and frequently does, intervene to remove the doubt; and, upon due deliberation had, determines by a declaratory statute how the law shall be held for the future.

§ 433. 2. English system of law vindicated.—Whatever instances, therefore, of contradiction or uncertainty may have been gleaned from our records, or reports, must be imputed to the defects of human laws in general, and are not owing to any particular ill construction of the English system. Indeed, the reverse is most strictly true. The English law is less embarrassed with

inconsistent resolutions and doubtful questions than any other known system of the same extent and the same duration. I may instance in the civil law, the text whereof, as collected by Justinian and his agents, is extremely voluminous and diffuse; but the idle comments, obscure glosses, and jarring interpretations grafted thereupon by the learned jurists are literally without number. And these glosses, which are mere private opinions of scholastic doctors (and not like our books of reports, judicial determinations of the court), are all of authority sufficient to be vouched and relied on: which must needs breed great distraction and confusion in their tribunals. The same may be said of the canon law, though the text thereof is not of half the antiquity with the common law of England; and though the more ancient any system of laws is the more it is liable to be perplexed with the multitude of judicial decrees. When, therefore, a body of laws, of so high antiquity as the English, is in general so clear and perspicuous, it argues deep wisdom and foresight in such as laid the foundations, and great care and circumspection, in such as have built the superstructure.

§ 434. 3. Cause and effect of lawsuits.—But is not (it will be asked) the multitude of lawsuits, which we daily see and experience, an argument against the clearness and certainty of the law itself? By no means: for [329] among the various disputes and controversies which are daily to be met with in the course of legal proceedings, it is obvious to observe how very few arise from obscurity in the rules or maxims of law. An action shall seldom be heard of, to determine a question of inheritance, unless the fact of the descent be controverted. But the dubious points which are usually agitated in our courts arise chiefly from the difficulty there is of ascertaining the intentions of individuals, in their solemn dispositions of property; in their contracts, conveyances and testaments. It is an object, indeed, of the utmost importance in this free and commercial country, to lay as few restraints as possible upon the transfer of possession from hand to hand, or their various designations marked out by the prudence, convenience or necessities, or even by the caprice, of their owners; yet to investigate the *intention* of the owner is frequently matter of difficulty, among heaps of entangled conveyances or wills of a various obscurity. The law rarely hesitates in declaring its own meaning;

but the judges are frequently puzzled to find out the meaning of others. Thus the powers, the interest, the privileges, and properties of a tenant for life, and a tenant in tail, are clearly distinguished and precisely settled by law; but what words in a will shall constitute this or that estate has occasionally been disputed for more than two centuries past, and will continue to be disputed as long as the carelessness, the ignorance, or singularity of testators shall continue to clothe their intentions in dark or new-fangled expressions.

But, notwithstanding so vast an accession of legal controversies, arising from so fertile a fund as the ignorance and willfulness of individuals, these will bear no comparison in point of number to those which are founded upon the dishonesty, and disingenuity of the parties: by either their suggesting complaints that are false in fact, and thereupon bringing groundless actions, or by their denying such facts as are true, in setting up unwarrantable defenses. *Ex facto oritur jus* (Law arises from fact): if, therefore, the fact be perverted or misrepresented, the law which arises from thence will unavoidably be unjust or partial. [330] And, in order to prevent this, it is necessary to set right the fact, and establish the truth contended for, by appealing to some mode of *probation* or *trial*, which the law of the country has ordained for a criterion of truth and falsehood.

These modes of probation or trial form in every civilized country the great object of judicial decisions. And experience will abundantly show that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of. About twenty days in the year are sufficient, in Westminster Hall, to settle (upon solemn argument) every demurrer or other special point of law that arises throughout the nation; but two months are annually spent in deciding the truth of facts, before six distinct tribunals, in the several circuits of England; exclusive of Middlesex and London, which afford a supply of causes much more than equivalent to any two of the largest circuits.

§ 435. **Trial—The several species.**—Trial, then, 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, of all which we will take a cursory view in this and the

subsequent chapter. For the law of England so industriously endeavors 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 in the English courts of justice.

The species of trials in civil cases are seven: By *record;* by *inspection,* or *examination;* by *certificate;* by *witnesses;* by *wager of battle;* by *wager of law;* and by *jury.*[1]

§ 436. 1. Trial by record.—First, then, of the trial by *record.* This is only used in one particular instance, and that is where a matter of record [331] is pleaded in any action, as a fine, a judgment, or the like, and the opposite party pleads, "*nul tiel record,*" that there is no such matter of record existing: upon this, issue is tendered and joined in the following form, "and this he

1 **Meaning and kinds of trial.**—Of these the only method recognized at this day, for issues of fact, is trial by jury: with trial by the court when a jury is waived, or trial by a referee, in certain cases involving the examination of a long account or the like. In most states, indeed, the jury is declared by statute, if not by the constitution, to be the right of every citizen upon an issue of fact.

Yet the others are not all so obsolete as they may seem. Wager of battle and wager of law, indeed, are so. Trial by witnesses remains much as it did in Blackstone's day, reserved for collateral issues, such as may arise upon motions and the like. (See text, p. *336.) Trial by inspection or examination is not unknown in the like cases, though never employed, as it was in Blackstone's time (text, p. *333), in the principal question. In one case, however, where a party seeks damages for bodily injuries, it is now held by some courts that he may be required to submit to personal examination, the result of which goes to the jury with other evidence in the case.

Trial by record and by certificate are less changed in substance than the rest. Many facts besides those mentioned by the commentator are conclusively proved by records, or by the certificate of the proper officer. True, this proof now goes to the jury with other evidence, instead of being addressed to and passed upon by the court; but with the instruction of the court as to the effect to be given such proof, the result is the same.

Indeed, the change since Blackstone's time is more in the use of the word "trial" than in any matter of substance. Blackstone speaks of the trial of

prays may be inquired of by *the record*, and the other doth the like"; and hereupon the party pleading the record has a day given him to bring it in, and proclamation is made in court for him to "bring forth the record by him in pleading alleged, or else he shall be condemned"; and, on his failure, his antagonist shall have judgment to recover. The trial, therefore, of this issue is merely by the record; for, as Sir Edward Coke,[b] observes, a record or enrollment is a monument of so high a nature, and 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, jury 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 king's writ or patent only, which is matter of record.[c] Also in case of an alien, whether alien friend or enemy, shall be tried by the league or treaty between his sovereign and ours, for every league or treaty is of record.[d] And also, whether a manor be held in ancient demesne or not, shall be tried by the record of *domesday* in the king's exchequer.

§ 437. 2. Trial by inspection.—Trial by *inspection*, or *examination*, is when for the greater expedition of a cause, in some point or issue being either the principal question, or arising collaterally out of it, but being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. For, where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it; who are properly called

[b] 1 Inst. 117. 260.
[c] 6 Rep. 53.
[d] 9 Rep. 31.

---

the matter of fact in the issue, and never of the trial of the case as a whole, as we now commonly do. This fact being always single by the rules of pleading of his time, its "trial" was in the original sense of the word its *testing*, or the means by which it was proved or conclusively established; while we commonly think of the trial of a case as involving the entire evidence in the case, *pro* and *con*, with the result drawn from all the facts proved in the course of it. And this change is the result of that which has come over jury trial from the time when the jurors had merely to verify the truth or falsity of a single averment as witnesses, to our own, when they are formally recognized as sitting in judgment on all the facts of the case and deciding between conflicting parties.—HAMMOND.

in to inform the conscience of the court in respect of *dubious* facts, and therefore, when the fact, from its nature, must be evident to the court either from ocular demonstration or other irrefragable proof, there the law departs [332] from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone.

§ 438. a. In case of infancy of cognizor.—As in case of a suit to reverse a fine for nonage of the cognizor, or to set aside a statute or recognizance entered into by an infant, here, and in other cases of the like sort, a writ shall issue to the sheriff,[e] commanding him that he constrain the said party to appear, that it may be ascertained by the view of his body by the king's justices, whether he be of full age or not; "*ut per aspectum corporis sui constare poterit justiciariis nostris, si prædictus A sit plenæ ætatis necne.*"[f] 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 proofs of the fact, and, particularly, may examine the infant himself upon an oath of *voir 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.[g]

§ 439. b. On plea that plaintiff is dead; idiocy.—In like manner if a defendant pleads in abatement of the suit that the plaintiff is *dead*, and one appears and calls himself the plaintiff, which the defendant denies, in this case the judges shall determine by inspection and examination, whether he be the plaintiff or not.[h] Also, if a man be found by a jury an idiot *a nativitate* (from birth), he may come in person into the chancery before the chancellor, or be brought there by his friends, to be inspected and examined, whether idiot or not; and if, upon such view and inquiry, it appears he is not so, the verdict of the jury, and all the proceedings thereon, are utterly void and instantly of no effect.[i]

e 9 Rep. 31.

f This question of nonage was formerly, according to Glanvill (l. 13. c. 15.), tried by a jury of eight men; though now it is tried by inspection.

g 2 Roll. Abr. 573.

h 9 Rep. 30.

i *Ibid.* 31.

§ 440. c. Where issue is mayhem or no mayhem.—Another instance in which the trial by inspection may be used, is when, upon an appeal of mayhem, the issue joined is whether it be mayhem or no mayhem, this shall be decided by the court upon inspection, for which purpose they may [333] call in the assistance of surgeons.[j] And, by analogy to this, in an action of trespass for mayhem, the court (upon view of such mayhem as the plaintiff has laid in his declaration, or which is certified by the judges who tried the cause to be the same as was given in evidence to the jury), may increase the damages at their own discretion;[k] as may also be the case upon view of an atrocious battery.[l] But then the battery must likewise be alleged so certainly in the declaration that it may appear to be the same with the battery inspected.

§ 441. d. To determine a day past.—Also, to ascertain any circumstances relative to a particular day past, it hath been tried by an inspection of the almanac by the court. Thus, upon a writ of error from an inferior court, that of Lynn, the error assigned was that the judgment was given on a Sunday, it appearing to be on 26 February, 26 Elizabeth (1583), and upon inspection of the almanacs of that year it was found that the 26th of February in that year actually fell upon a Sunday: this was held to be a sufficient trial, and that a trial by a jury was not necessary, although it was an error in fact; and so the judgment was reversed.[m] But, in all these cases, the judges, if they conceive a doubt, may order it to be tried by jury.

§ 442. 3. Trial by certificate.—The trial by *certificate* is allowed in such 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 (if given to a jury), must have been conclusive, the law, to save trouble and circuity, permits the fact to be determined upon such certifi-

j 2 Roll. Abr. 578.
k 1 Sid. 108.
l Hardr. 408.
m Cro. Eliz. 227.

cate merely. Thus, 1. If the issue be whether A was absent with the king in his army out of the realm in time of war, this shall be tried [n] by the certificate of the marshal of [334] the king's host in writing under his seal, which shall be sent to the justices. 2. If, in order to avoid an outlawry, or the like, it was alleged that the defendant was in prison, *ultra mare* (beyond the sea), at Bordeaux, or in the service of the mayor of Bordeaux, this should have been tried by the certificate of the mayor; and the like of the captain of Calais.[o] But, when this was law,[p] those towns were under the dominion of the crown of England. And therefore, by a parity of reason, it should now hold that in similar cases arising at Jamaica or Minorca, the trial should be by certificate from the governor of those islands. We also find [q] that the certificate of the queen's messenger, sent to summon home a peeress of the realm, was formerly held a sufficient trial of the contempt in refusing to obey such summons. 3. For matters within the realm; the customs of the city of London shall be tried by the certificate of the mayor or aldermen, certified by the mouth of their recorder,[r] upon a surmise from the party alleging it that the custom ought to be thus tried, else it must be tried by the country.[s] As, the custom of distributing the effects of freemen deceased; of enrolling apprentices; or that he who is free of one trade may use another; if any of these, or other similar points come in issue. But this rule admits of an exception, where the corporation of London is party, or interested, in the suit, as in an action brought for a penalty inflicted by the custom, for there the reason of the law will not endure so partial a trial; but this custom shall be determined by a jury, and not by the mayor and aldermen, certifying by the mouth of their recorder.[t] 4. In some cases the sheriff of London's certificate shall be the final trial: as if the issue be whether the defendant be a citizen of London or a foreigner,[u] in case of privilege pleaded to be sued only in the city courts. Of a nature somewhat similar to which is the trial of the privilege of the university, when the chancellor claims cognizance of the cause, because one of the parties is a [335] privileged person. In this case, the ch ers,

n Litt. § 102.
o 9 Rep. 31.
p 2 Roll. Abr. 583.
q Dyer. 176, 177.
r Co. Litt. 74. 4 Burr. 248.
s Bro. Abr. t. Trial. pl. 96.
t Hob. 85.
u Co. Litt. 74.

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 hath also been usual to add an *affidavit* of the fact; but if the parties be at issue between themselves, whether A is a member of the university or no, on a plea of privilege, the trial shall be then by jury and not by the chancellor's certificate;[v] because the charters direct only that the privilege be allowed on the chancellor's certificate, when the claim of cognizance is made by him, and not where the defendant himself pleads his privilege; so that this must be left to the ordinary course of determination. 5. In matters of ecclesiastical jurisdiction, as *marriage*, and of course *general bastardy*, and also *excommunication*, and *orders*, these, and other like matters, shall be tried by the bishop's certificate.[w] As if it be pleaded in abatement, that the plaintiff is excommunicated, and issue is joined thereon; or if a man claims an estate by descent, and the tenant alleges the demandant to be a bastard; or if on a writ of dower the heir pleads no marriage; or if the issue in a *quare impedit* be whether or no the church be full by institution; all these being matters of mere ecclesiastical cognizance shall be tried by certificate from the ordinary. But in an action on the case for calling a man bastard, the defendant having pleaded in justification that the plaintiff was really so, this was directed to be tried by a jury;[x] because, whether the plaintiff be found either a general or special bastard, the justification will be good, and no question of special bastardy shall be tried by the bishop's certificate, but by a jury.[y 2] For a special bastard is one born before marriage, of parents who afterwards intermarry, which is bastardy by our law, though not by the ecclesiastical. It would therefore be improper to refer the trial of that question to the bishop, who, whether the child be born before or after marriage, will be [336] sure to return or certify him legitimate.[z] *Ability* of a clerk pre-

v 2 Roll. Abr. 583.

w Co. Litt. 74. 2 Lev. 250.

x Hob. 179.

y Dyer. 79.

z See introd. to the great charter. edit Oxon. sub anno 1233.

---

2 See 1 Poll. & Maitl., Hist. Eng. Law (2d ed,), 127.

sented,[a] *admission, institution* and *deprivation* of a clerk, shall also be tried by certificate from the ordinary or metropolitan, because of these he is the most competent judge;[b] but *induction* shall be tried by a jury, because it is a matter of public notoriety,[c] and is likewise the corporal investiture of the temporal profits. *Resignation* of a benefice may be tried in either way;[d] but it seems most properly to fall within the bishop's cognizance. 6. The trial of all customs and practice of the courts shall be by certificate from the proper officers of those courts respectively; and, what return was made on a writ by the sheriff or under-sheriff, shall be only tried by his own certificate.[e] And thus much for those several issues, or matters of fact, which are proper to be tried by certificate.

§ 443. **4. Trial by witnesses.**—A fourth species of trial is that by *witnesses, per testes,* without the intervention of a jury.[3] This is the only method of trial known to the civil law, in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined; but it is very rarely used in our law, which prefers the trial by jury before it in almost every instance. Save, only, that when a widow brings a writ of dower, and the tenant pleads that the husband is not dead, this, being looked upon as a dilatory plea, is in favor of the widow and for greater expedition, allowed to be tried by witnesses examined before the judges: and so, saith Finch,[f] shall no other case in *our* law. But

[a] See Book I. c. 11.
[b] 2 Inst. 632. Show. Parl. C. 88. 2 Roll. Abr. 583, etc.
[c] Dyer. 229.
[d] 2 Roll. Abr. 583.
[e] 9 Rep. 31.
[f] L. 423.

---

3 Trial by witnesses is said by Thayer to have been one of the oldest kinds of "one-sided" proof. Pollock and Maitland say that for a moment it threatened to be a serious rival of trial by jury. They say that the common law of a later day admits in a few cases what it calls a trial by witnesses; but we should nowadays call it a trial by judge without jury. "This venerable and transformed relic of the middle ages was abolished in England, when real actions came to an end by the statute of 1833." See Thayer, Preliminary Treatise on Evidence, 17; Poll. & Maitl., 2 Hist. Eng. Law (2d ed.), 637.

Sir Edward Coke[s] mentions some others: as to try whether the tenant in a real action was duly summoned, or the validity of a challenge to a juror; so that Finch's observation must be confined to the 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.

§ 444. 5. Wager of battle.—[337] The next species of trial is of great antiquity, but much disused, though still in force if the parties choose to abide by it; I mean the trial by *wager of battle*.[4] This seems to have owed its original to the military spirit of our ancestors, joined to a superstitious frame of mind, it being in the nature of an appeal to Providence, under an apprehension and hope (however presumptuous and unwarrantable) that Heaven would give the victory to him who had the right. The decision of suits, by this appeal to the God of battles, is by some said to have been invented by the Burgundi, one of the northern or German clans that planted themselves in Gaul. And it is true that the

[s] 1 Inst. 6.

---

[4] **Abolition of trial by battle.**—For further account of trial by battle, see Lea, Superstition and Force, 93; Thayer, Prelim. Treatise on Evidence, 39; Poll. & Maitl., 2 Hist. Eng. Law (2d ed.), 632; White, Legal Antiquities, c. 5. "Efforts to abolish the judicial battle were made through that century [the seventeenth] and the next, but without result. At last came the famous appeal of murder in 1819 (Ashford v. Thornton, 1 Barn. & Ald. 405, 106 Eng. Reprint, 149), in which the learning of the subject was fully discussed by the king's bench, and battle was adjudged to be still 'the constitutional mode of trial' in this sort of case. As in an Irish case in 1815 (Neilson, Trial by Combat, 330), so here, to the amazement of mankind, the defendant escaped by means of this rusty weapon. And now, at last, in June, 1819, came the abolition of a long-lived relic of barbarism, which had survived in England when all the rest of Christendom had abandoned it." Thayer, Prelim. Tr. on Ev. 44. The statute 59 George III, c. 46 (1819), recites that "appeals of murder, treason, felony, and other offenses, and the manner of proceeding therein, have been found to be oppressive; and the trial by battle in any suit is a mode of trial unfit to be used; and it is expedient that the same should be wholly abolished." The statute went on to enact that all such appeals "shall cease, determine, and become void and . . . utterly abolished, [and that] in any writ of right now depending or hereafter to be brought, the tenant shall not be received to wage battle, nor shall issue be joined or trial be had by battle in any writ of right."

first written injunction of judiciary combats that we meet with is in the laws of Gundebald, A. D. 501, which are preserved in the Burgundian code. Yet it does not seem to have been merely a local custom of this or that particular tribe, but to have been the common usage of all those warlike people from the earliest times.[h] And it may also seem from a passage in Velleius Paterculus,[i] that the Germans, when first they became known to the Romans, were wont to decide all contests of right by the sword; for when Quintilius Varus endeavored to introduce among them the Roman laws and method of trial, it was looked upon (says the historian) as a "*novitas incognitæ disciplinæ, ut solita armis decerni jure terminarentur* (an introduction of a custom never before heard of, that matters which had always been decided by arms should be determined by law)." And among the ancient Goths in Sweden we find the practice of judiciary duels established upon much the same footing as they formerly were in our own country.[j]

§ 445. a. History of wager of battle.—This trial was introduced in England among other Norman customs by William the Conqueror, but was only used in three cases; one military, one criminal, and the third civil. The first in the court-martial, or court of chivalry and honor;[k] the second in appeals of felony,[l] of which we shall speak in the next book; and the third upon issue joined in a [338] writ of right, the last and most solemn decision of real property. For in writs of right the *jus proprietatis* (right of property), which is frequently a matter of difficulty, is a question; but other real actions being merely questions of the *jus possessionis* (right of possession), which are usually more plain and obvious, our ancestors did not in them appeal to the decision of Providence. Another pretext for allowing it, upon these final writs of right, was also for the sake of such claimants as might have the true right, but yet by the death of witnesses or other defect of evidence be unable to prove it to a jury. But the most curious reason of all is given in the Mirror,[m] that it is allowable upon warrant of the combat between David for the people of Israel of the one party, and Goliah for the Philistines of the other

h Seld. of Duels. c. 5.
i l. 2. c. 118.
j Stiernh. de Jure Sueon. l. 1. c. 7.
k Co. Litt. 261.
l 2 Hawk. P. C. 45.
m Ch. 3. § 23.

party: a reason which Pope Nicholas I very seriously decides to be inconclusive.[n] Of battle, therefore, on a writ of right we are now to speak, and although the writ of right itself, and of course this trial thereof, be at present disused, yet, as it is law at this day, it may be matter of curiosity, at least, to inquire into the forms of this proceeding, as we may gather them from ancient authors.[p]

The last trial by battle that was waged in the court of common pleas at Westminster (though there was afterwards[q] one in the court of chivalry in 1631, and another in the county palatine of *Durham*[r] in 1638) was in the thirteenth year of Queen Elizabeth, A. D. 1571, as reported by Sir James Dyer,[s] and was held in Tothill-fields, Westminster, "*non sine magna jurisconsultorum perturbatione* (not without great disturbance of the lawyers)," saith Sir Henry Spelman,[ss] who was himself a witness of the ceremony. The form, as appears from the authors before cited, is as follows:

§ 446. b. The champions.—When the tenant in a writ of right pleads the general issue, *viz.*, that he hath more right to hold than the demandant [339] hath to recover, and offers to prove it by the body of his champion, which tender is accepted by the demandant, the tenant in the first place must produce his champion, who, by throwing down his glove as a gage or pledge, thus *wages* or stipulates battle, with the champion of the demandant; who, by taking up the gage or glove, stipulates on his part to accept the challenge. The reason why it is waged by champions, and not by the parties themselves, in civil actions, is because, if any party to the suit dies, the suit must abate and be at an end for the present; and therefore no judgment could be given for the lands in question if either of the parties were slain in battle:[t] and also that no person might

n Decret. part. 2. caus. 2. qu. 5. c. 22.

p Glanvill. l. 2. c. 3. Vet. nat. brev. fol. 2. Nov. Nar. tit. Droit Patent. fol. 221 (edit. 1534). Year-Book. 29 Edw. III. 12. Finch. L. 421. Dyer. 301. 2 Inst. 247.

q Rushw. Coll. vol. 2. part. 2. fol. 112. 19 Rym. 322.

r Cro. Car. 512.

s Dyer. 301.

ss Gloss. 103.

t Co. Litt. 294. Dyversite des Courts. 304.

claim an exemption from this trial, as was allowed in criminal cases, where the battle was waged in person.

§ 447. c. **The lists.**—A piece of ground is then in due time set out, of sixty feet square, inclosed with lists, and on one side a court erected for the judges of the court of common pleas, who attend there in their scarlet robes, and also a bar is prepared for the learned serjeants at law. When the court sits, which ought to be by sunrising, proclamation is made for the parties and their champions, who are introduced by two knights, and are dressed in a coat of armor, with red sandals, barelegged from the knee downwards, bareheaded, and with bare arms to the elbows. The weapons allowed them are only batons, or staves, of an ell long, and a four-cornered leather target; so that death very seldom ensued this civil combat. In the court military, indeed, they fought with sword and lance, according to Spelman and Rushworth, as likewise in France only villeins fought with the buckler and baton, gentlemen armed at all points. And upon this and other circumstances, the President Montesquieu [u] hath with great ingenuity not only deduced the impious custom of private duels upon imaginary points of honor, but hath also traced the heroic madness of knight errantry, from the same original of judicial combats. But to proceed.

§ 448. d. **The oath.**—[340] When the champions, thus armed with batons, arrive within the lists or place of combat, the champion of the tenant then takes his adversary by the hand, and makes oath that the tenements in dispute are not the right of the demandant, and the champion of the demandant, then taking the other by the hand, swears in the same manner that they are; so that each champion is, or ought to be, thoroughly persuaded of the truth of the cause he fights for. Next an oath against sorcery and enchantment is to be taken by both the champions, in this or a similar form: "hear this, ye justices, that I have this day neither eat, drank, nor have upon me, neither bone, stone, ne grass; nor any inchantment, sorcery, or witchcraft, whereby the law of God may be abased, or the law of the devil exalted. So help me God and his saints."

[u] Sp. L. b. 28. c. 20. 22.

§ 449. e. The combat.—The battle is thus begun, and the combatants are bound to fight till the stars appear in the evening, and, if the champion of the tenant can defend himself till the stars appear, the tenant shall prevail in his cause; for it is sufficient for him to maintain his ground, and make it a drawn battle, he being already in possession; but, if victory declares itself for either party, for him is judgment finally given. This victory may arise from the death of either of the champions, which indeed hath rarely happened; the whole ceremony, to say the truth, bearing a near resemblance to certain rural athletic diversions, which are probably derived from this original. Or victory is obtained if either champion proves *recreant*, that is, yields, and pronounces the horrible word of *craven;* a word of disgrace and obloquy, rather than of any determinate meaning. But a horrible word it indeed is to the vanquished champion, since as a punishment to him for forfeiting the land of his principal by pronouncing that shameful word, he is condemned, as a recreant, *amittere liberam legem* (to lose his free law), that is, to become infamous, and not be accounted *liber et legalis homo* (a free and lawful man); being supposed by the event to be proved foresworn, and therefore never to be put upon a jury or admitted as a witness in any cause.

[341] This is the form of a trial by battle; a trial which the tenant, or defendant in a writ of right, has it in his election at this day to demand, and which was the only decision of such writ of right after the Conquest, till Henry the Second, by consent of parliament, introduced the *grand assize,*[w] a peculiar species of trial by jury, in concurrence therewith, giving the tenant his choice of either the one or the other. Which example, of discountenancing these judicial combats, was imitated about a century afterwards in France, by an edict of Louis the Pious, A. D. 1260, and soon after by the rest of Europe. The establishment of this alternative, Glanvill, chief justice to Henry the Second, and probably his adviser herein, considers as a most noble improvement, as in fact it was, of the law.[x]

[w] Appendix, No. I, § 6.

[x] *Est autem magna assisa regale quoddam beneficium, clementia principis, de consilio procerum, populis indultum; quo vitæ hominum, et status integritati tam salubriter consulitur, ut, retinendo quod quis possidet in libero tenemento soli, duelli casum declinare possint homines ambiguum. Ac per hoc contingit, insperatæ et prematuræ mortis ultimum evadere supplicium, vel saltem perennis*

§ 450. **6. Wager of law.**—A sixth species of trial is by *wager of law, vadiatio legis*, as the foregoing is called *wager of battle, vadiatio duelli;* because, as in the former case the defendant gave a pledge, gage, or *vadium*, to try the cause by battle, so here he was to put in sureties or *vadios*, that at such a day he will make his law, that is, take the benefit which the law has allowed him.[y 5] For our ancestors considered that there were many cases

infamiæ opprobrium illius infesti et inverecundi verbi, quod in ore victi turpiter sonat, consecutivum. Ex æquitate item maxima prodita est legalis ista institutio. Jus enim, quod post multas et longas dilationes vix evincitur per duellum, per beneficium istius constitutionis commodius et acceleratius expeditur. (The Grand Assize is a certain royal benefit bestowed upon the people, and emanating from the clemency of the prince, with the advice of his nobles. So effectually does this proceeding preserve the lives and civil condition of Men, that everyone may now possess his right in safety, at the same time that he avoids the doubtful event of the duel. Nor is this all: the severe punishment of an unexpected and premature death is evaded, or, at least the opprobrium of a lasting infamy, of that dreadful and ignominious word that so disgracefully resounds from the mouth of the conquered champion. Beames' Trans. of Glanvill, 44.) (l. 2. c. 7.)

y Co. Litt. 295.

---

5 **Extinction of wager of law in England.**—The validity of this ancient trial was, indeed, recognized by the court of common pleas in 1805, but in 1824, when for the last time it makes its appearance in our reports, it is a discredited stranger, ill understood: "Debt on simple contract. Defendant pleaded *nil debet per legem*. . . . Langslow applied to the court to assign the number of compurgators. . . . The books [he says] leave it doubtful. . . . This species of defense is not often heard of now. . . . Abbot, C. J. The court will not give the defendant any assistance in this matter. He must bring such number of compurgators as he shall be advised are sufficient. . . . Rule refused. The defendant [say the reporters] prepared to bring eleven compurgators, but the plaintiff abandoned the action." It had turned out, then, to be not yet quite a ghost; and so in 1833 it was at last enacted by parliament "that no wager of law shall be hereafter allowed."—THAYER, Prelim. Treatise on Evidence, 33.

Wager of law in America.—Blackstone says: "In the room of actions of account a bill in equity is usually filed. . . . So that wager of law is quite out of use; . . . but still it is not out of force. And therefore when a new statute inflicts a penalty and gives . . . debt for recovering it, it is usual to add 'in which no wager of law shall be allowed'; otherwise an hardy delinquent might escape any penalty of the law by swearing that he had never incurred or else had discharged it." (III, 347–8.) "This clause had already been found in English statutes for three centuries and more; it appeared, also, on this side

where an innocent man, of good credit, might be overborne by a multitude of false witnesses; and therefore established this species of trial, by the oath of the defendant himself, for if he will absolutely swear himself not chargeable, and appears to be a person of reputation, he shall go free and forever acquitted of the debt or other cause of action.

§ 451. a. Antiquity of wager of law.—[342] This method of trial is not only to be found in the codes of almost all the northern nations that broke in upon the Roman empire and established petty kingdoms upon its ruins,[z] but its original may also be traced as far back as the Mosaical law. "If a man deliver unto his neighbor an ass, or an ox, or a sheep, or any beast, to keep; and it die, or be hurt, or driven away, no man seeing it; then shall an oath of the Lord be between them both, that he hath not put his hand unto his neighbor's goods; and the owner of it shall accept thereof, and he shall not make it good."[a] We shall likewise be able to dis-

[z] Sp. L. b. 28. c. 13. Stiernhook de Jure Sueonum. l. 1. c. 9. Feud. l. 1. t. 4. 10. 28.

[a] Exod. xxii. 10.

---

of the water, in our colonial acts, even in regions like Massachusetts, where it is said that wager of law was not practiced. Dane's Ab. i, c. 29, art. 8. In Childress v. Emory, 8 Wheat. 642, 675, 5 L. Ed. 705, 713 (1823), Story, J., is of opinion that 'the wager of law if it ever had a legal existence in the United States, is now completely abolished.'" "Trial by oath," however, was not unknown here. Se also, the effect of the defendant's oath as neutralizing the plaintiff's shop-books in Plym. Col. Laws, 196 (1682). By a statute of Massachusetts (Stats. 1783, c. 55) on a charge of usury a like purgation was given, at a time when a party to the suit could not be a witness. When, later, he was admitted, in such cases, to testify, we find Shaw, C. J., in Little v. Rogers, 1 Met. (Mass.) 108, 110 (1840), describing the situation as one where "the trial by jury has been substituted for the old trial by oath." Compare Frye v. Barker, 2 Pick. (Mass.) 65. Lea, Sup. and Force, 4th ed., 87–88, quotes cases from the English colony of Bermuda in 1638 and 1639, where, at the assizes, persons "presented upon suspicion of incontinency," are sentenced to punishment unless they purge themselves by oath.—THAYER, Prelim. Treatise on Evidence, 33 n.

For further account of wager of law, see Lea, Superstition and Force, 13; Thayer, Prelim. Treatise on Evidence, 24; White, Legal Antiquities, c. 7; Poll. & Maitl., 2 Hist. Eng. Law (2d ed.), 634.

cern a manifest resemblance between this species of trial and the canonical purgation of the popish clergy, when accused of any capital crime. The defendant or person accused was in both cases to make oath of his own innocence, and to produce a certain number of compurgators, who swore they believed his oath. Somewhat similar also to this is the *sacramentum decisionis*, or the voluntary and decisive oath of the civil law;[b] where one of the parties to the suit, not being able to prove his charge, offers to refer the decision of the cause to the oath of his adversary, which the adversary was bound to accept, or tender the same proposal back again, otherwise the whole was taken as confessed by him. But, though a custom somewhat similar to this prevailed formerly in the city of London,[c] yet in general the English law does not thus, like the civil, reduce the defendant, in case he is in the wrong, to the dilemma of either confession or perjury, but is indeed so tender of permitting the oath to be taken, even upon the defendant's own request, that it allows it only in a very few cases; and in those it has also devised other collateral remedies for the party injured, in which the defendant is excluded from his wager of law.

§ 452. b. Procedure in wager of law.—[343] The manner of waging and making law is this: He that has waged, or given security, to make his law, brings with him into court eleven of his neighbors, a custom which we find particularly described so early as in the league between Alfred and Guthrun the Dane;[d] for by the old Saxon constitution every man's credit in courts of law depended upon the opinion which his neighbors had of his veracity. The defendant then, standing at the end of the bar, is admonished by the judges of the nature and danger of a false oath.[e] And if he still persists, he is to repeat this or the like oath: "hear this, ye justices, that I do not owe unto Richard Jones the sum of ten pounds, nor any penny thereof, in manner and form as the said Richard hath declared against me. So help me God." And thereupon his eleven neighbors or compurgators shall avow upon their oaths that they believe in their consciences that he saith the

b Cod. 4. 1. 12.
c Bro. Abr. t. Ley Gager. 77.
d Cap. 3. Wilk. LL. Angl. Sax.
e Salk. 682.

truth; so that himself must be sworn *de fidelitate* (on his fidelity), and the eleven *de credulitate* (on their belief).[f] It is held, indeed, by later authorities[g] that fewer than eleven compurgators will do; but Sir Edward Coke is positive that there must be this number, and his opinion not only seems founded upon better authority, but also upon better reason: for, as wager of law is equivalent to a verdict in the defendant's favor, it ought to be established by the same or equal testimony, namely, by the oath of *twelve* men. And so, indeed, Glanvill expresses it,[h] "*jurabit duodecima manu* (he shall swear by twelve men)": and in 9 Henry III (1225),[i] when a defendant in an action of debt waged his law, it was adjudged by the court "*quod defendat se duodecima manu* (that he defend himself by twelve men)." Thus, too, in an author of the age of Edward the First,[k] we read, "*adjudicabitur reus ad legem suam duodecima manu* (the defendant shall be adjudged to make his law by twelve men)." And the ancient treatise, entitled, *dyversite des courts*, expressly confirms Sir Edward Coke's opinion.[l]

[344] It must be, however, observed that so long as the custom continued of producing the *secta*, the *suit*, or witnesses to give probability to the plaintiff's demand (of which we spoke in a former chapter), the defendant was not put to wage his law, unless the *secta* was first produced, and their testimony was found consistent. To this purpose speaks *Magna Carta*, c. 28. "*Nullus ballivus de cætero ponat aliquem ad legem manifestam*" (that is, wager of battle), "*nec ad juramentum*" (that is, wager of law), "*simplici loquela sua*" (that is, merely by his count or declaration), "*sine testibus fidelibus ad hoc inductis* (no bailiff shall put anyone to his wager of battle, or to his wager of law, on his simple declaration, without faithful witnesses brought for that purpose)." Which Fleta thus explains:[m] "*si petens sectam produxerit, et con-*

[f] Co. Litt. 295.

[g] 2 Ventr. 171.

[h] l. 1. c. 9.

[i] Fitzh. Abr. t. Ley. 78.

[k] Hengham Magna. c. 5.

[l] *Il covient aver' oue luy xi maynz de jurer oue luy, sc. que ilz entendre en lour consciens que il disoyt voier* (He shall have eleven men to swear for him—that is, that they believe in their conscience that he has spoken the truth). (fol. 306. edit. 1534.)

[m] l. 2. c. 63.

cordes inveniantur, tunc reus poterit vadiare legem suam contra petentem et contra sectam suam prolatam; sed si secta variabilis inveniatur, extunc non tenebitur legem vadiare contra sectam illam (if the plaintiff bring his witnesses, and they agree in their testimony, then the defendant may wage his law against him, and against his suit; but if the suit vary in their testimony, he will thenceforward not be bound to wage his law against that suit)." It is true, indeed, that Fleta expressly limits the number of compurgators to be only double to that of the *secta* produced; "*ut si* duos *vel* tres *testes produxerit ad probandum, oportet quod defensio fiat per* quatuor *vel per* sex; *ita quod pro quolibet teste duos producat juratores, usque ad* duodecim (that if he bring two or three witnesses to prove the fact, the defense must be made by four or six; so that for every witness he must bring two jurors up to twelve)"; so that according to this doctrine the eleven compurgators were only to be *produced*, but not all of them *sworn*, unless the *secta* consisted of six. But, though this might possibly be the rule till the production of the secta was generally disused, since that time the *duodecima manus* seems to have been generally required.[n]

In the old Swedish or Gothic constitution, wager of law was not only permitted, as it still is in *criminal* cases, unless the fact be extremely clear against the prisoner;[o] but was also absolutely required, in many *civil* cases: which an author of their own[p] very justly charges as being the source of frequent perjury. This, he tells us, was owing to the popish ecclesiastics, who introduced this method of purgation from their canon law; and, having sown a plentiful crop of oaths [345] in all judicial proceedings, reaped afterwards an ample harvest of perjuries, for perjuries were punished in part by pecuniary fines, payable to the coffers of the church.

§ 453. c. Wager of law optional in England.—But with us in England wager of law is never *required;* and is then only *admitted,* where an action is brought upon such matters as may be supposed to be privately transacted between the parties, and wherein the

[n] Bro. Abr. t. Ley Gager. 9.
[o] Mod. Un. Hist. xxxiii. 22.
[p] Stiernhook de Jure Sueonum. l. 1. c. 9.

defendant may be presumed to have made satisfaction without being able to prove it. Therefore, it is only in actions of debt upon simple contract, or for amercement, in actions of detinue, and of account, where the debt may have been paid, the goods restored, or the account balanced, without any evidence of either; it is only in these actions, I say, that the defendant is admitted to wage his law;[q] so that wager of law lieth not when there is any specialty, as a bond or deed, to charge the defendant, for that would be canceled if satisfied; but when the debt groweth by word only. Nor doth it lie in an action of debt, for arrears of an account, settled by auditors in a former action.[r] And by such wager of law (when admitted) the plaintiff is perpetually barred; for the law, in the simplicity of the ancient times, presumed that no one would forswear himself for any worldly thing.[s] Wager of law, however, lieth in a real action, where the tenant alleges he was not legally summoned to appear, as well as in mere personal contracts.[t]

§ 454. d. Persons disqualified to wage their law.—A man outlawed, attainted for false verdict, or for conspiracy or perjury, or otherwise become infamous, as by pronouncing the horrible word in a trial of battle, shall not be permitted to wage his law. Neither shall an infant under the age of twenty-one, for he cannot be admitted to his oath; and therefore, on the other hand, the course of justice shall flow equally, and the defendant, where an infant is plaintiff, shall not wage his law. But a *feme covert*, when joined with her husband, may be admitted to wage her law; and an alien shall do it in his own language.[u]

§ 455. e. When wager of law allowed.—[346] It is moreover a rule that where a man is compellable by law to do anything, whereby he becomes creditor to another, the defendant in that case shall not be admitted to wage his law; for then it would be in the power of any bad man to run in debt first, against the inclinations of his creditors, and afterwards to swear it away. But where the plaintiff hath given voluntary credit to the defendant,

q Co. Litt. 295.
r 10 Rep. 103.
s Co. Litt. 295.
t Finch. L. 423.
u Co. Litt. 295.

there he may wage his law; for, by giving him such credit, the plaintiff has himself borne testimony that he is one whose character may be trusted. Upon this principle it is that in an action of debt against a prisoner by a gaoler for his victuals, the defendant shall not wage his law, for the gaoler cannot refuse the prisoner, and ought not to suffer him to perish for want of sustenance. But otherwise it is for the board or diet of a man at liberty. In an action of debt brought by an attorney for his fees the defendant cannot wage his law, because the plaintiff is compellable to be his attorney. And so, if a servant he retained according to the statute of laborers, 5 Elizabeth, c. 4 (Artificers and Apprentices, 1562), which obliges all single persons of a certain age, and not having other visible means of livelihood, to go out to service, in an action of debt for the wages of such a servant, the master shall not wage his law, because the plaintiff was compellable to serve. But it had been otherwise, had the hiring been by special contract and not according to the statute.[w]

§ 456. f. When wager of law not allowed.—In no case where a contempt, trespass, deceit or any injury *with force* is alleged against the defendant is he permitted to wage his law;[x] for it is impossible to presume he has satisfied the plaintiff his demand in such cases, where damages are uncertain and left to be assessed by a jury. Nor will the law trust the defendant with an oath to discharge himself, where the private injury is coupled, as it were, with a public crime, that of force and violence; which would be equivalent to the purgation oath of the civil law, which ours has so justly rejected.

[347] Executors and administrators, when charged for the debt of the deceased, shall not be admitted to wage their law;[y] for no man can with a safe conscience wage law of another man's contract—that is, swear that he never entered into it, or at least that he privately discharged it. The king also has his prerogative; for, as all wager of law imports a reflection on the plaintiff for dishonesty, therefore there shall be no such wager on actions brought by him.[z] And this prerogative extends and is communicated to his

[w] Co. Litt. 295.
[x] *Ibid.* Raym. 286.
[y] Finch. L. 424.
[z] *Ibid.* 425.

debtor and accountant; for, on a writ of *quo minus* in the exchequer for a debt on simple contract, the defendant is not allowed to wage his law.[a]

§ 457. g. New remedies supplant wager of law.—Thus the wager of law was never permitted, but where the defendant bore a fair and unreproachable character, and it also was confined to such cases where a debt might be supposed to be discharged, or satisfaction made in private, without any witnesses to attest it; and many other prudential restrictions accompanied this indulgence. But at length it was considered that (even under all its restrictions) it threw too great a temptation in the way of indigent or profligate men, and therefore by degrees new remedies were devised, and new forms of actions were introduced, wherein no defendant is at liberty to wage his law. So that now no plaintiff need at all apprehend any danger from the hardiness of his debtor's conscience, unless he voluntarily chooses to rely on his adversary's veracity, by bringing an obsolete, instead of a modern, action. Therefore, one shall hardly hear at present of an action of *debt* brought upon a simple contract: that being supplied by an action of *trespass on the case* for the breach of a promise or *assumpsit;* wherein, though the specific debt cannot be recovered, yet damages may, equivalent to the specific debt. And, this being an action of trespass, no law can be waged therein. So, instead of an action of *detinue* to recover the very thing detained, an action of trespass on the case in *trover* [348] *and conversion* is usually brought; wherein, though the horse or other specific chattel cannot be had, yet the defendant shall pay damages for the conversion, equal to the value of the chattel; and for this trespass also no wager of law is allowed. In the room of actions of *account* a bill in equity is usually filed; wherein, though the defendant answers upon his oath, yet such oath is not conclusive to the plaintiff; but he may prove every article by other evidence, in contradiction to what the defendant has sworn. So that wager of law is quite out of use, being avoided by the mode of bringing the action; but still it is not out of force. And therefore, when a new statute inflicts a penalty, and gives an action of debt for recover-

[a] Co. Litt. 295.

ing it, it is usual to add, in which no wager of law shall be allowed; otherwise an hardy delinquent might escape any penalty of the law, by swearing he had never incurred, or else had discharged it.

These six species of trials that we have considered in the present chapter are only had in certain special and eccentrical cases; where the trial by the country, *per pais*, or by jury, would not be so proper or effectual. In the next chapter we shall consider at large the nature of that principal criterion of truth in the law of England.

[349] # CHAPTER THE TWENTY-THIRD.

OF THE TRIAL BY JURY.

§ 458. 7. Trial by jury.—The subject of our next inquiries will be the nature and method of the trial *by jury;* called also the trial *per pais,* or *by the country.*

§ 459. a. History of trial by jury.—A trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof.[1] Some authors have endeavored to trace the original of juries up as high as 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 by Bishop Nicholson [a] to Woden himself, their great legislator and captain. Hence it is that we may find traces of juries in the laws of all 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 and true, "*boni homines,*" usually the vassals or tenants of the lord, being the equals or peers of the parties litigant, and, as the lord's vassals judged each other in the lord's courts, so the king's vassals, or the lords themselves, judged each other in the king's court.[b] In England we find actual mention of them so early as the laws of King Ethelred, and that not as a new invention.[c] Stiernhook [d] ascribes the invention of the jury, which in the Teutonic language is denominated *nembda,* to Regner, King of Sweden and Denmark, who was cotemporary with our King Egbert. Just as we are apt to impute the invention of this, and some [350] other pieces of jurid-

a De Jure Saxonum, p. 12.
b Sp. L. b. 30. c. 18. Capitul. Lud. pii. A. D. 819. c. 2.
c Wilk. LL. Angl. Sax. 117.
d De Jure Sueonum. l. 1. c. 4.

---

1 The reader is referred to the three scholarly chapters on "Trial by Jury and Its Development," in Thayer, Preliminary Treatise on Evidence, 47–182. See, also, Bigelow, Hist. of Procedure in England, Poll. & Maitl., Hist. of Eng. Law, Holdsworth, Hist. of Eng. Law, and Jenks, Short Hist. of Eng. Law, under the title "Jury."

ical polity, to the superior genius of Alfred the Great; to whom, on account of his having done much, it is usual to attribute everything, and as the tradition of ancient Greece placed to the account of their one Hercules whatever achievement was performed, superior to the ordinary prowess of mankind. Whereas, 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 establishment, however, and use, in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battle, was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In *Magna Carta* it is more than once insisted on as the principal bulwark of our liberties; but especially by chapter 29, that no freeman shall be hurt in either his person or property; "*nisi per legale judicium parium suorum vel per legem terræ* (unless by the lawful judgment of his peers, or by the law of the land)." A privilege which is couched in almost the same words with that of the Emperor Conrad, two hundred years before:[e] "*nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per judicium parium suorum* (no one shall be deprived of his property but according to the custom of our predecessors, and by the judgment of his peers)." And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature.

But I will not misspend the reader's time in fruitless encomiums on this method of trial: but shall proceed to the dissection and examination of it in all its parts, from whence, indeed, its highest encomium will arise; since the more it is searched into and understood the more it is sure to be valued. And this is a species of knowledge most absolutely necessary for every gentleman in the kingdom, as well because he may be frequently called upon to determine in this capacity the rights of others, his fellow-subjects, as because his own property, his liberty and his life depend upon maintaining, in its legal force, the constitutional trial by jury.

§ 460. b. Extraordinary trial by jury.—[351] Trials by jury in civil causes are of two kinds: *extraordinary* and *ordinary*. The

[e] LL. Longob. l. 3. t. 8. l. 4.

extraordinary I shall only briefly hint at, and confine the main of my observations to that which is more usual and ordinary.

§ 461. (1) Grand assize.—The first species of extraordinary trial by jury is that of the *grand assize,* which was instituted by King Henry the Second in parliament, as was mentioned in the preceding chapter, by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the barbarous and unchristian custom of dueling. For this purpose a writ *de magna assisa eligenda* (of choosing the grand assize) is directed to the sheriff,[f] to return four knights, who are to elect and choose twelve others to be joined with them, in the manner mentioned by Glanvill,[g] who, having probably advised the measure itself, is more than usually copious in describing it: and these, all together, form the grand assize, or great jury, which is to try the matter of right, and must now consist of sixteen jurors.[h]

§ 462. (2) Grand jury in an attaint.—Another species of extraordinary juries is the jury to try an *attaint,* which is a process commenced against a former jury for bringing in a false verdict; of which we shall speak more largely in a subsequent chapter. At present I shall only observe that this jury is to consist of twenty-four of the best men in the country, who are called the *grand* jury in the attaint, to distinguish them from the first or *petit* jury; and these are to hear and try the goodness of the former verdict.

§ 463. c. Ordinary trial by jury.—With regard to the *ordinary* trial by jury in civil cases, I shall pursue the same method in considering it that I set out with in explaining the nature of prosecuting actions in general, *viz.*, by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

§ 464. (1) Venire facias.—[352] When, therefore, an issue is joined by these words, "and this the said A prays may be inquired of by the country," or, "and of this he puts himself upon the

f F. N. B. 4.
g 1. 2. c. 11-21.
h Finch. L. 412. 1 Leon. 303.

country, and the said B does the like," the court awards a writ of *venire facias* upon the roll or record, commanding the sheriff "that he cause to come *here* on such a day, twelve free and lawful men, *liberos et legales homines*, of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A, nor the aforesaid B, to recognize the truth of the issue between the said parties."[1] And such writ is accordingly issued to the sheriff.

§ 465. (a) The clause of nisi prius.—Thus the cause stands ready for a trial *at the bar* of the court itself; for all trials were there anciently had, in actions which were there first commenced, which never happened but in matters of weight and consequence, all trifling suits being ended in the court-baron, hundred or county courts, and all causes of great importance or difficulty are still usually retained upon motion, to be tried at the bar in the superior courts. But when the usage began to bring actions of any trifling value in the courts of Westminster Hall, it was found to be an intolerable burden to compel the parties, witnesses and jurors to come from Westmoreland, perhaps, or Cornwall to try an action of assault at Westminster. A practice, therefore, very early obtained of *continuing* the cause from term to term in the court above, provided the justices in eyre [illegible] not previously come into the county where the cause of action arose;[k] and if it happened that they arrived there within that interval, then the cause was removed from the jurisdiction of the justices at Westminster to that of the justices in eyre. Afterwards, when the justices in eyre were superseded by the modern justices of assize (who came twice or thrice in the year into the several counties, *ad capiendas assisas*, to take or try writs of assize, of *mort d'ancestor*, *novel disseisin*, *nuisance*, [353] and the like), a power was superadded by statute Westm. II, 13 Edward I, c. 30 (Justices of *Nisi Prius*, 1285), to these justices of assize to try common issues in trespass, and other less important suits, with directions to return them (when tried) into the court above; where alone the judgment should be given. And as only the trial, and not the determination of the cause, was now

[1] Appendix, No. II, § 4.

[k] *Semper dabitur dies partibus a justiciariis de banco, sub tali conditione, "nisi justiciarii itinerantes prius venerint ad partes illas."* (Bract. l. 3. tr. 1. c. 11. § 8.)

intended to be had in the court below, therefore the clause of *nisi prius* was left out of the conditional *continuances* before mentioned, and was directed by the statute to be inserted in the writs of *venire facias;* that is, "that the sheriff should cause the jurors to come to Westminster (or wherever the king's courts should be held) on such a day in Easter and Michaelmas terms; *nisi prius*, unless before that day, the justices assigned to take assizes shall come into his said county." By virtue of which the sheriff returned his jurors to the court of the justices of assize, which was sure to be held in the vacation before Easter and Michaelmas terms, and there the trial was had.

§ 466. (i) Nisi prius clause now omitted.—An inconvenience attended this provision, principally because, as the sheriff made no return of the jury to the court at Westminster, the parties were ignorant who they were till they came upon the trial, and therefore were not ready with their challenges or exceptions. For this reason by the statute 42 Edward III, c. 11 (Jury, 1368), the method of trials by *nisi prius* was altered,[2] and it was enacted that no inquests (except of assize and gaol delivery) should be taken by writ of *nisi prius* till after the sheriff had returned the names of the jurors to the court above. So that now in almost every civil cause the clause of *nisi prius* is left out of the writ of *venire facias*, which is the sheriff's warrant to warn the jury, and is inserted in another part o the proceedings, as we shall see presently.

§ 467. (2) Return of the panel.—For now the course is to make the sheriff's *venire* returnable on the last return of the same term wherein issue is joined, *viz.*, Hilary or Trinity terms; which,

2 In 1427, we read in the Stats. 6 H. VI, c. 2, that in certain cases the sheriffs must furnish the parties with the jury's names six days before the session, if they ask for it, since (it is recited as a grievance) defendants heretofore could not know who the jury were, "so as to inform them of their right and title before the day of the session" (*pur eux enformer de lour droit et titles devaunt*, etc.). This statute supplements an earlier general statute of 42 Edward III, c. 11 (1368), mentioned in 3 Bl. Comm. 353, which deals with the mischief that parties cannot be ready with their challenges. Probably Coke's remark about the St. H. VI, in 3 Inst. 175, that both parties must have been meant to be present when this information was given, was a misapprehension; but, of course, a party had to keep outside the line of embracery.—THAYER, Prelim. Treatise on Evidence, 92.

from the making up of the issues therein, are usually called *issuable* terms. And he returns the names of the jurors in a *panel* (a little pane, or oblong piece of parchment) annexed to the writ.

§ 468. **(a) Compulsory attendance of jurors.**—This jury [354] is not summoned, and therefore, not appearing at the day, must unavoidably make default. For which reason a compulsive process is now awarded against the jurors, called in the common pleas a writ of *habeas corpora juratorum* (that you have the bodies of the jurors), and in the king's bench a *distringas* (that you distrain),[3] commanding the sheriff to have their bodies, or to distrain them by their lands and goods, that they may appear upon the day appointed. The entry, therefore, on the roll or record is,[1] "that the jury is respited, through defect of the jurors, till the first day of the next term, then to appear at Westminster, unless before that time, *viz.*, on Wednesday the fourth of March, the justices of our lord the king, appointed to take assizes in that county, shall have come to Oxford, that is, to the place assigned for holding the assizes. Therefore, the sheriff is commanded to have their bodies at Westminster on the said first day of next term, or before the said justices of assize, if before that time they come to Oxford; *viz.*, on the fourth of March aforesaid." And, as the judges are sure to come and open the circuit commissions on the day mentioned in the writ, the sheriff returns and summons this jury to appear at the assizes, and there the trial is had before the justices of *assize* and *nisi prius:* among whom (as hath been said [m]) are usually two of the judges of the courts at Westminster, the whole

[1] Appendix, No. II, § 4.
[m] See pag. 58.

---

3 **Jury process.**—These writs answer respectively to the attachment and distress of the process by which parties are brought in. (As to which see page *280 of the text.) Evidently the same process was used in all cases until experience showed that a single writ was all that was needed to bring in the jurors.

How it happened that one writ was selected for that purpose in the one court, another of the same series in the other, would hardly repay investigation. Yet the fact is interesting because it illustrates the true origin of that vast number of technicalities that gathered about the common law, and have often been attributed to the selfish greed of lawyers and court officers, when they may all be traced to historical causes.—HAMMOND.

kingdom being divided into six circuits for this purpose. And thus we may observe that the trial of common issues, at *nisi prius*, was in its original only a collateral incident to the original business of the justices of assize; though now, by the various revolutions of practice, it is become their principal civil employment, hardly anything remaining in use of the real *assizes* but the name.

§ 469. (b) Disqualification of sheriff.—If the sheriff be not an indifferent person, as if he be a party in the suit, or be related by either blood or affinity to either of the parties, he is not then trusted to return the jury; but the *venire* shall be directed to the coroners, who in this, as in many other instances, are the substitutes of the sheriff, to execute process when he is deemed an improper person.

§ 470. (c) Disqualification of coroner—Elisors.—If any exception lies to the coroners, the *venire* shall be directed to two clerks of the court, or two persons of the county [355] named by the court, and sworn.[n] And these two, who are called *elisors*, or electors, shall indifferently name the jury, and their return is final, no challenge being allowed to their array.

§ 471. Practical excellence of trial by jury.—Let us now pause awhile and observe (with Sir Matthew Hale[o]), in these first preparatory stages of the trial, how admirably this constitution is adapted and framed for the investigation of truth, beyond any other method of trial in the world. For, first the *person returning* the jurors is a man of some fortune and consequence; that so he may be not only the less tempted to commit willful errors, but likewise be responsible for the faults of either himself or his officers; and he is also bound by the obligation of an oath faithfully to execute his duty. Next, as to the *time of their return:* the panel is returned to the court upon the original *venire,* and the jurors are to be summoned and brought in many weeks afterwards to the trial, whereby the parties may have notice of the jurors, and of their sufficiency or insufficiency, characters, connections and relations, that so they may be challenged upon just cause; while at the

[n] Fortesc. de Laud. LL. c. 25. Co. Litt. 158.

[o] Hist. C. L. c. 12.

same time, by means of the compulsory process (of *distringas* or *habeas corpora*), the cause is not like to be retarded through defect of jurors. Thirdly, as to the *place* of their appearance: which in causes of weight and consequence is at the bar of the court, but in ordinary cases at the assizes, held in the county where the cause of action arises and the witnesses and jurors live: a provision most excellently calculated for the saving of expense to the parties. For though the preparation of the causes in point of pleading is transacted at Westminster, whereby the order and uniformity of proceeding is preserved throughout the kingdom, and multiplicity of forms is prevented, yet this is no great charge or trouble, one attorney being able to transact the business of forty clients. But the troublesome and most expensive attendance is that of jurors and witnesses at the trial, which, therefore, is brought home to them in the country where most of them inhabit. Fourthly, the *persons before* [356] *whom* they are to appear, and before whom the trial is to be held, are the judges of the superior court, if it be a trial at bar, or the judges of assize delegated from the courts at Westminster by the king, if the trial be held in the country: persons, whose learning and dignity secure their jurisdiction from contempt, and the novelty and very parade of whose appearance have no small influence upon the multitude. The very point of their being strangers in the county is of infinite service in preventing those factions and parties which would intrude in every cause of moment were it tried only before persons resident on the spot, as justices of the peace and the like. And, the better to remove all suspicion of partiality, it was wisely provided by the statutes 4 Edward III, c. 2 (Justices of Assize, 1330), 8 Richard II, c. 2 (1384), and 33 Henry VIII, c. 24 (1541), that no judge of assize should hold pleas in any county wherein he was born or inhabits. And, as this constitution prevents party and faction from intermingling in the trial of right, so it keeps both the rule and the administration of the laws uniform. These justices, though thus varied and shifted at every assizes, are all sworn to the same laws, have had the same education, have pursued the same studies, converse and consult together, communicate their decisions and resolutions, and preside in those courts which are mutually connected and their judgments blended together, as they

are interchangeably courts of appeal or advice to each other. And hence their administration of justice and conduct of trials are consonant and uniform; whereby that confusion and contrariety are avoided which would naturally arise from a variety of uncommunicating judges, or from any provincial establishment. But let us now return to the assizes.

§ 472. (3) Producing the record.—When the general day of trials is fixed, the plaintiff or his attorney must bring down the record to the assizes, and enter 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, will himself undertake to bring on [357] the trial, giving proper notice to the plaintiff. Which proceeding is called the trial by *proviso;* by reason of the clause then inserted in the sheriff's *venire, viz.*, "*proviso,* provided that if two writs come to your hands (that is one from the plaintiff and another from the defendant) you shall execute only one of them." But this practice begins to be disused since the statute 14 George II, c. 17 (Delay of Cause After Issue Joined, 1740), which enacts that if, after issue joined, the cause is not carried down to be tried according to the course of the court, the plaintiff shall be esteemed to be nonsuited, and judgment shall be given for the defendant as in case of a nonsuit. In case the plaintiff intends to try the cause, he is bound to give the defendant (if he lives within forty miles of London) eight days' notice of trial, and, if he lives at a greater distance, then fourteen days' notice, in order to prevent surprise; and if the plaintiff then changes his mind, and does not countermand the notice six days before the trial, he shall be liable to pay costs to the defendant for not proceeding to trial, by the same last mentioned statute. The defendant, however, or plaintiff, may, upon good cause shown to the court above, as upon absence or sickness of a material witness, obtain leave upon motion to defer the trial of the cause till the next assizes.

§ 473. (4) The trial.—But we will now suppose all previous steps to be regularly settled, and the cause to be called on in court.

The record is then handed to the judge, to peruse and observe the pleadings, and what issues the parties are to maintain and prove, while the jury is called and sworn. To this end the sheriff returns his compulsive process, the writ of *habeas corpora*, or *distringas*, 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 bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause, as to warrant an exception to him. He is in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book, and the officer is to take indifferently [358] forty-eight of the principal freeholders in the presence of the attorneys on both sides, who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel. By the statute 3 George II, c. 25 (Juries, 1729), either party is entitled upon motion to have a special jury struck upon the trial of any issue, as well at the assizes as at bar, he paying the extraordinary expense, unless the judge will certify (in pursuance of the statute 24 George II, c. 18—Juries, 1750), that the cause required such special jury.

§ 474. (a) Common jury.—A common jury is one returned by the sheriff according to the directions of the statute 3 George II, c. 25 (Juries, 1729), which appoints that the sheriff or officer shall not return a separate panel for every separate cause, as formerly; but one and the same panel for every cause to be tried at the same assizes, containing not less than forty-eight nor more than seventy-two jurors, and that their names being written on tickets, shall be 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, shall be sworn upon the jury, unless absent, challenged or excused, or unless a previous view of the messuages, lands or place in question shall have been thought necessary by the court:[p] 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, shall be

[p] Stat. 4 Ann. c. 16 (1705).

appointed by special writ of *habeas corpora* or *distringas*, to have the matters in question shown to them by two persons named in the writ, and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest previous to any other jurors. These acts are well calculated to restrain any suspicion of partiality in the sheriff, or any tampering with the jurors when returned.

§ 475. (i) Challenging the jury.—As the jurors appear, when called, they shall be sworn, unless *challenged* by either party. Challenges are of two sorts: challenges to the *array* and challenges to the *polls*.

§ 476. (aa) Challenges to the array.—[359] 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 before the awarding the *venire* were sufficient to have directed it to the coroners 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. Formerly, if a lord of parliament had a cause to be tried, and no knight was returned upon the jury, it was a cause of challenge to the array;[q] but an unexpected use having been made of this dormant privilege by a spiritual lord,[r] it was abolished by statute 24 George II, c. 18 (Juries, 1750). But still, in an attaint, a knight must be returned on the jury.[s] Also, by the policy of the ancient law, the jury was to come *de vicineto*, from the neighborhood of the vill or place where the cause of action was laid in the declaration, and therefore some of the jury were obliged to be returned from the hundred in which such vill lay, and, if none were returned, the array might be challenged for defect of hundredors.

q Co. Litt. 156. Seldon Baronage. II. 11.
r K. v. Bishop of Worcester, M. 23 Geo. II. B. R. (1749).
s Co. Litt. 156.

Thus the Gothic jury, or *nembda*, was also collected out of every quarter of the county: "*binos, trinos, vel etiam senos, ex singulis territorii quadrantibus* (two, three, or even six, from every quarter of the country)."[ss] For, living in the neighborhood, they were properly the very country, or *pais*, to which both parties had appealed, and were supposed to know beforehand the characters of the parties and witnesses, and therefore the better knew what credit to give to the facts alleged in evidence. But this convenience was overbalanced by another very natural and almost unavoidable inconvenience, that jurors, coming out of the immediate neighborhood, would be apt [360] to intermix their prejudices and partialities in the trial of right. And this our law was so sensible of, that it for a long time has been gradually relinquishing this practice; the number of necessary hundredors in the whole panel, which in the reign of Edward III were constantly *six*,[t] being in the time of Fortescue[u] reduced to *four*. Afterwards, indeed, the statute 35 Henry VIII, c. 6 (Jurors, 1543), restored the ancient number of *six*, but that clause was soon virtually repealed by statute 27 Elizabeth, c. 6 (Juries, 1584), which required only *two*. And Sir Edward Coke also[v] gives us such a variety of circumstances, whereby the courts permitted this necessary number to be evaded, that it appears they were heartily tired of it. At length by statute 4 & 5 Ann., c. 16 (1705), it was entirely abolished upon all civil actions, except upon penal statutes; and upon those also by the 24 George II, c. 18 (Juries, 1750), the jury being now only to come *de corpore comitatus*, from the body of the county at large, and not *de vicineto*, or from the particular neighborhood. The array by the ancient law may also be challenged if an alien be party to the suit, and upon a rule obtained by his motion to the court for a jury *de medietate linguæ* (consisting half of foreigners and half of natives), such a one be not returned by the sheriff, pursuant to the statute 28 Edward III, c. 13 (1354), enforced by 8 Henry VI, c. 29 (Inquest, 1429), which enacts, that where either party is an alien born, the jury shall be one-half denizens and the other aliens (if so many be forthcoming in the place) for the more impartial trial. A privilege indulged to strangers in no other

[ss] Stiernhook de Jure Goth. l. 1. c. 4.
[t] Gilb. Hist. C. P. c. 8.
[u] De Laud. LL. c. 25.
[v] 1 Inst. 157.

country in the world, but which is as ancient with us as the time of King Ethelred, in whose statute (*e monticolis Walliæ* (of the mountaineers of Wales) (then aliens to the crown of England), *cap.* 3, it is ordained that "*duodeni legales homines, quorum sex Walli et sex Angli erunt, Anglis et Wallis jus dicunto* (let twelve lawful men, of whom six shall be Welsh and six English, give their verdict for English and Welsh)." But where both parties are aliens, no partiality is to be presumed to one more than another; and therefore it was resolved soon after the statute 8 Henry VI[w] that where the issue is joined between two aliens (unless the plea be had before the mayor of the staple, and thereby subject to the restrictions of statute 27 Edward III, st. 2, c. 8—Law Merchant, 1353), the jury shall all be denizens. And it now might be a question how far the [361] statute 3 George II, c. 25 (Juries, 1729), (before referred to) hath in civil causes undesignedly abridged this privilege of foreigners, by the positive directions therein given concerning the manner of impaneling jurors, and the persons to be returned in such panel. So that (unless this statute is to be construed by the same equity which the statute 8 Henry VI, c. 29 (Inquests, 1429), declared to be the rule of interpreting the statute 2 Henry V, st. 2, c. 3 (1414), concerning the landed qualification of jurors in suits to which aliens were parties), a court might perhaps hesitate whether it has now a power to direct a panel to be returned *de medietate linguæ*, and thereby alter the method prescribed for striking a special jury, or balloting for common jurors.

§ 477. (bb) Challenges to the polls.—Challenges to the polls, *in capita*, are exceptions to particular jurors,[4] and seem to answer the *recusatio judicis* (objection to the judge) in the civil and canon laws, by the constitutions of which a judge might be refused upon

w Yearb. 21 Hen. VI. 4 (1442).

---

4 **Challenge to the polls.**—Those are now usually divided into *peremptory* and for cause. The number of the former is strictly limited to a small number in minor cases, to a larger in more important ones: largest of all in capital cases.

Those for cause are unlimited in number because each challenge is to be tried and allowed only if good cause is shown. For the common-law method of trial see page *363 of text.—HAMMOND.

any suspicion of partiality.[x] By the laws of England, also, in the times of Bracton[y] and Fleta,[z] a judge might be refused for good cause, but now the law is otherwise, and it is held that judges or justices cannot be challenged.[a] For the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.[5] And should the fact at any time prove flagrantly such as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehavior would draw down a heavy censure from those to whom the judge is accountable for his conduct.

But challenges to the polls of the jury[6] (who are judges of fact) are reduced to four heads by Sir Edward Coke:[b] *propter honoris*

x Cod. 3. 1. 16. Decretal. l. 2. t. 28. c. 36.
y l. 5. c. 15.
z l. 6. c. 37.
a Co. Litt. 294.
b 1 Inst. 156.

---

5 **Bias or favor in the judge.**—In many states a party may now by statute obtain a change of venue on the ground of partiality or prejudice in a judge, and in some the judge is compelled to grant it when the charge is sustained by a certain number of affidavits, however free from suspicion he may know himself to be, or whatever the real motive of the application. The only apology for such a statute must be that in the few cases where a judge could so far forget his duty, it would be unsafe to trust him with any discretion in the matter.

But it may also be added that under our usual arrangements of circuits, the judge is in closer daily contact with most of the suitors than in England; and at the same time there is not the opportunity of securing a different judge by waiting for another circuit.

We have not, indeed, in this country the shield against judicial misbehavior on which Blackstone relies, in "a heavy censure from those to whom the judge is accountable for his conduct." (Text, *ubi supra.*) It must be gross misbehavior indeed that will draw down any notice of bias or favor in private matters from the great mass of voters to whom most judges in the United States owe their places, and to whom alone they are accountable. Yet before we condemn the elective judiciary on this account we should reflect that so long as the appointing officer himself is elective, we are rather hiding the difficulty than curing it by giving the appointment to a governor or president. Even our highest courts owe their purity to other causes than those that influence most of the appointments made to fill vacancies.—HAMMOND.

6 Challenges to the poll or individual juror in almost every state are the subject of statutory regulations which must be consulted. Those of the first head, *propter honoris respectum* will usually be found in the guise of exemptions from jury service. (See, also, note 4, *ante.*)—HAMMOND.

respectum; propter defectum; propter affectum; and *propter delictum* (on account of dignity, on account of incompetency, on account of partiality, on account of the commission of some offense).

1. *Propter honoris respectum;* as if a lord of parliament be impaneled on a jury, he may be challenged by either party, or he may challenge himself.

[362] 2. *Propter defectum;* as if a juryman be an alien born, this is defect of birth; if he be a slave or bondman, this is defect of liberty, and he cannot be *liber et legalis homo* (a free and lawful man). Under the word *homo* also, though a name common to both sexes, the female is, however, excluded, *propter defectum sexus* (because not of the male sex), except when a widow feigns herself with child, in order to exclude the next heir, and a supposititious birth is suspected to be intended; then upon the writ *de ventre inspiciendo* (of inspecting pregnancy), a jury of women is to be impaneled to try the question, whether with child or not.[c] But the principal deficiency is defect of estate, sufficient to qualify him to be a juror: This depends upon a variety of statutes.[7] And, first, by the statute of Westm. II, 13 Edward I, c. 38 (Juries, 1285), none shall pass on juries in assizes within the county but such as may dispend 20*s.* by the year at the least; which is increased to 40*s.* by the statute 21 Edward I, st. 1 (1292), and 2 Henry V, st. 2, c. 3 (1414). This was doubled by the statute 27 Elizabeth, c. 6 (Juries, 1584), which requires in every such case the jurors to have estate of freehold to the yearly value of 4*l.* at the least. But, the value of money at that time decreasing very considerably, this qualification was raised by the statute 16 & 17 Car. II, c. 3 (Juries, 1664), to 20*l. per annum,* which being only a temporary act, for three years, was suffered to expire without renewal, to the great debasement of juries. However, by the statute 4 & 5 W. & M., c. 24 (Continuation of Statutes, 1692), it was again raised to 10*l. per annum* in England and 6*l.* in Wales, of freehold lands *or copyhold;* which is the first time that copyholders (as such) were admitted to serve upon juries in any of the

c Cro. Eliz. 566.

---

7 Property qualifications for jurors are now done away with in most of the American states.—HAMMOND.

king's courts, though they had before been admitted to serve in some of the sheriff's courts, by statutes 1 Richard III, c. 4 (Sheriffs' Tourns, 1483), and 9 Henry VII, c. 13 (1493). And, lastly, by statute 3 George II, c. 25 (Juries, 1729), any leaseholder for the term of five hundred years absolute, or for any term determinable upon life or lives, of the clear yearly value of 20*l. per annum* over and above the rent reserved, is qualified to serve upon juries. When the jury is *de medietate linguæ*, that is, one moiety of the English tongue or nation, and the other of any foreign one, no want of lands shall be [363] cause of challenge to the alien; for, as he is incapable to hold any, this would totally defeat the privilege.[d]

3. Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. This may be either a *principal* challenge or *to the favor*. A *principal* challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favor: as, that a juror is of kin to either party within the ninth degree;[e] 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,[8] servant, counselor, steward or attorney,

d See Stat. 2 Hen. V. st. 2. c. 3 (1414). 8 Hen. VI. c. 29 (Inquests, 1429).

e Finch. L. 401.

8 "In practice, there was little occasion for invoking the strict law relating to the qualification of jurors. It fell into disuse, and a critical examination of it became unnecessary. Text-writers stated merely the general doctrine, without going into particular distinctions, or attempting to draw the line accurately between challenges for principal cause and to the favor. Thus, Buller, writing in 1767, says: 'If a juryman be related to either party, or interested in the cause, or have declared his opinion, or have been arbitrator in the cause, it is a good cause of challenge; but I do not enter at large into these matters, because, since the 3 George II, by which one panel is returned for the whole county, and not less than forty-eight in such panel, causes of challenge are not so minutely entered into as formerly.' Bull. N. P. 307. 'Many of those text-writers,' says Parke, B., speaking upon the law of challenge, 'the more modern particularly, only repeat those who preceded them, and the more correct notion of the common law will be obtained from the older.' Gray v. Reg., 11 Clark & F. 427, 471, 8 Eng. Peprint, 1164, 1180. Upon this subject, implicit reliance can be put upon none later than the middle of the eighteenth century.

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* (above all exception). Challenges *to the favor* are where the party hath no principal challenge, but objects only some probable circumstances of suspicion, as acquaintance and the like;[f] the validity of which must be left to the determination of *triers*, whose office it is to decide whether the juror be favorable or unfavorable. The triers, 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 triers shall try the next, and, when another is found indifferent and sworn, the two triers shall be superseded, and the two first sworn on the jury shall try the rest.[g]

4. Challenges *propter delictum* are for some crime or misdemeanor that affects the juror's credit and renders him infamous. As for a conviction of treason, felony, perjury or conspiracy; or if for some infamous offense he hath received judgment of the pillory, tumbrel or the like; or to be branded, [364] whipped or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, *præmunire*, or forgery; or, lastly, if he hath proved recreant when champion in the trial by battle, and thereby hath lost his *liberam legem* (free law). A juror may him-

[f] In the *nembda*, or jury, of the ancient Goths, three challenges only were allowed to the favor, but the principal challenges were indefinite, "*Licebat palam excipere, et semper ex probabili causa tres repudiari; etiam plures ex causa prægnanti et manifesta* (They might openly object to, and always refuse three for a probable cause; and even more for a prægnant and manifest cause)." (Stiernhook. l. 1. c. 4.)

[g] Co. Litt. 158.

Blackstone, for example, says it is a principal cause of challenge that the juror is the 'party's master,' 3 Bl. Comm. 363. That in this he is mistaken, the authorities are decisive. 21 Edward IV, p. 67, pl. 52; 22 Edward IV, p. 1, pl. 4; 14 Henry VII, p. 2, pl. 6; Brooke, Abr. 'Challenge,' 71, 183; Fitzh. Abr. 'Challenge,' 64; Moore, 470; Cham v. Matthew, Cro. Eliz. 581, 78 Eng. Reprint, 824; Cro. Jac. 21, 79 Eng. Reprint, 17. It is probable that this and other errors on the subject found in the text-books were due to the liberality of modern practice—to mistaking the practice for the law."—CARPENTER, J., in State v. Sawtelle, 66 N. H. 488, 32 Atl. 831, 848.

self be examined on oath of *voir dire, veritatem dicere* (to speak the truth), with regard to such causes of challenge as are not to his dishonor or discredit; but not with regard to any crime or anything which tends to his disgrace or disadvantage.[h]

§ 478. (ii) Exemptions from jury service.—Besides these challenges, which are exceptions against the fitness of jurors, and whereby they may be *excluded* from serving, there are also other causes to be made use of by the jurors themselves, which are matter of exemption; whereby their service is *excused* and not *excluded*. As by statute West. II, 13 Edward I, c. 38 (Juries, 1285), sick and decrepit persons, persons not commorant in the county, and men above seventy years old; and by the statute of 7 & 8 W. III, c. 32 (Juries, 1695), infants under twenty-one. This exemption is also extended by divers statutes, customs and charters to physicians and other medical persons, counsel, attorneys, officers of the courts and the like; all of whom, if impaneled, must show their special exemption. Clergymen are also usually excused, out of favor and respect to their function, but, if they are seised of lands and tenements, they are in strictness liable to be impaneled in respect of their lay fees, unless they be in the service of the king or of some bishop: "*in obsequio domini regis, vel alicujus episcopi.*"[i]

§ 479. (iii) Summoning talesmen.—If by means of challenges or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a *tales*. A *tales* is a supply of *such* men as are summoned upon the first panel, in order to make up the deficiency. For this purpose a writ of *decem tales, octo tales* (a tales of ten, a tales of eight), and the like, was used to be issued to the sheriff at common law, and must be still so done at a trial at bar, if the jurors make default. But at the assizes or *nisi prius*, by virtue of the statute 35 Henry VIII, c. 6 (Jurors, 1543), and other subsequent [365] statutes, the judge is empowered at the prayer of either party to award a *tales de circumstantibus* (a tales from the bystanders), 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.

[h] Co. Litt. 158. b.

[i] F. N. B. 166. Reg. Brev. 179.

This is usually done till the legal number of twelve be completed, in which patriarchal and apostolical number Sir Edward Coke[k] hath discovered abundance of mystery.[1]

§ 480. (iv) Jury sworn.—When a sufficient number of persons impaneled, or *talesmen*, 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.*[9]

§ 481. Impartiality of the English jury system.—We may here again observe, and observing we cannot but admire, how scrupulously delicate and how impartially just the law of England approves itself, in the constitution and frame of a tribunal, thus excellently contrived for the test and investigation of truth; which appears most remarkably, 1. In the avoiding of frauds and secret management, by electing the twelve jurors out of the whole panel by lot. 2. In its caution against all partiality and bias, by quashing the whole panel or array, if the officer returning is suspected to be other than indifferent; and repelling particular jurors, if probable cause be shown of malice or favor to either party. The prodigious multitude of exceptions or challenges allowed to jurors, who are the judges of fact, amounts nearly to the same thing as was

[k] 1 Inst. 155.

[1] Pausanias relates, that at the trial of Mars, for murder, in the court denominated *areopagus* from that incident, he was acquitted by a jury composed of *twelve* pagan deities. And Dr. Hickes, who attributes the introduction of this *number* to the Normans tells us that among the inhabitants of Norway, from whom the Normans as well as the Danes were descended, a great veneration was paid to the number *twelve: "nihil sanctius, nihil antiquius fuit; perinde ac si in ipso hoc numero secreta quædam esset religio* (nothing was more sacred, nothing more venerable than this number, as though it contained within itself a something holy)." (Dissert. epistolar. 9.)

---

[9] **Jurors and jurata.**—It is observable that although the body is called *jurata* as acting under oath, the members are never called *jurati*. That term was used for certain local or municipal officers, still called jurats, but I do not recall a single case of its use for jurors. This shows how clearly it was perceived that the office of jurors was to swear to facts, to give testimony (*veredicta*, true utterances), not to be judges of fact or to decide between contrary averments.—HAMMOND.

practiced in the Roman republic before she lost her liberty: that the select judges should be appointed by the prætor with the mutual consent of the parties. [366] Or, as Tully [m] expresses it: "*neminem voluerunt majores nostri, non modo de existimatione cujusquam, sed ne pecuniaria quidem de re minima, esse judicem; nisi qui inter adversarios convenisset* (our ancestors would have no judge concerning the reputation of a man, or even of the least pecuniary matter, but him who had been agreed upon by the contending parties)."

Indeed, these *selecti judices* (chosen judges) bore in many respects a remarkable resemblance to our juries, for they were first returned by the prætor; *de decuria senatoria conscribuntur;* then their names were drawn by lot, till a certain number was completed: *in urnam sortito mittuntur, ut de pluribus necessarius numerus confici posset:* then the parties were allowed their challenges; *post urnam permittitur accusatori, ac reo, ut ex illo numero rejiciant quos putaverint sibi aut inimicos aut ex aliqua re incommodos fore* (after the names were drawn, both the prosecutor and defendant were allowed to reject all those from the number whom they thought might from any cause be unfriendly or ill-disposed towards them): next day they struck what we call a *tales; rejectione celebrata, in eorum locum qui rejecti fuerunt subsortiebatur prætor alios, quibus ille judicum legitimus numerus compleretur* (these being rejected, the prætor drew others to supply their place, by whom the lawful number of judges was completed); lastly, the judges, like our jury, were sworn; *his perfectis, jurabant in leges judices, ut obstricti religione judicarent.*[n 10]

[m] Pro. Cluentio. 43.

[n] Ascon. in Cic. Verr. 1. 6. A learned writer of our own, Dr. Pettingal, hath shown in an elaborate work (published A. D. 1769.) so many resemblances, between the δικασται (judges) of the Greeks, the *judices selecti* of the Romans, and the juries of the English, that he is tempted to conclude that the latter are derived from the former.

---

10 All of which resemblances sink into mere coincidences when we remember that the *judices* were from the first judges of fact, delegated to hear witnesses and decide on their testimony the question referred to them by the prætor's *formula:* while the jurors were originally witnesses whose office was completed with their verdict or evidence of a specific fact. It was not until the jurors had lost this original character that the true resemblance of both offices as judges of fact is discernible.—HAMMOND.

§ 482. (v) **Hearing the case.**—The jury are now ready to hear the merits, and, to fix their attention the closer to the facts which they are impaneled 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, in which our law agrees with the civil,[o] "*ei incumbit probatio, qui dicit, non qui negat: cum per rerum naturam factum-negantis probatio nulla sit* (the proof lies on him who asserts the fact, not on him who denies it, as from the nature of things a negative is no proof)." The opening counsel briefly informs them what has been transacted in the court above; the parties, the nature of the action, the declaration, the plea, replication, and other proceedings, and lastly, upon what point the issue is joined, which is there sent down to be determined. Instead of which formerly[p] the whole record and process of the pleadings was read to [367] them in English by the court, and the matter in issue clearly explained to their capacities. The nature of the case and the evidence intended to be produced are next laid before them by counsel also on the same side, and, when their evidence is gone through, the advocate on the other side opens the adverse case and supports it by evidence; and then the party which began is heard by way of reply.

§ 483. (vi) **The evidence.**—The nature of my present design will not permit me to enter into the numberless niceties and distinctions of what is, or is not, legal *evidence* to a jury.[q 11] I shall only therefore select a few of the general heads and leading

[o] Ff. 22. 3. 2. Cod. 4. 29. 23.

[p] Fortesc. c. 26.

[q] This is admirably well performed in Lord Chief Baron Gilbert's excellent treatise of evidence: a work, which it is impossible to abstract or abridge, without losing some beauty and destroying the chain of the whole; and which hath lately been engrafted into a very useful work, the Introduction to the Law of Nisi Prius. 4to. 1767.

11 On the law of evidence the reader is referred to the masterly little volume of Thayer, Preliminary Treatise on Evidence, and to the two extensive works, Wigmore, Treatise on Evidence, and Jones, Commentaries on Evidence, ed. by Horwitz, and also to the smaller one volume work of Jones on Evidence.

maxims relative to this point, together with some observations on the manner of giving evidence.[12]

12 **General survey of the historical development of the rules of evidence.**—The details of the history of the rules of evidence can best be examined while considering the particular rules each in its place. But it is worth while to notice here summarily the historical development of the general system in its main features, and the relative chronology of the different rules. Some notion can thus be obtained of the influence of certain external circumstances on the rules at large and of some of the individual principles upon the others.

The marked divisions of chronology, for our law of evidence, may be said to be seven—from primitive times to 1200 A. D., thence to 1500, thence to 1700, to 1790, to 1830, to 1860, and to the present time:

(1) A. D. 700–1200. Up to the period of the 1200's, the history of the rules of evidence, in the modern sense, is like the chapter upon ophidians in Erin; for there were none. Under the primitive practices of trial by ordeal, by battle, and by compurgation, the proof is accomplished by a *judicium Dei*, and there is no room for our modern notion of persuasion of the tribunal by the credibility of the witnesses; for the tribunal merely verified the observance of the due formalities, and did not conceive of these as directly addressed to their own reasoning powers. Nevertheless, a few marks, indelibly made by these earlier usages, were left for a long time afterwards in our law. The summoning of attesting witnesses to prove a document, the quantitative effect of an oath, the conclusiveness of a seal in fixing the terms of a documentary transaction, the necessary production of the original of a document—these rules all trace a continuous existence back to this earliest time, although they later took on different forms and survived for reasons not at all connected with their primitive theories.

(2) A. D. 1200–1500. With the full advent of the jury, in the 1200's, the general surroundings of the modern system are prepared; for now the tribunal is to determine out of its own conscious persuasion of the facts, and not merely by supervising external tests. The change is of course gradual; and trial by jury is as yet only one of several competing methods; but at least a system for the process of persuasion becomes possible. In this period, no new specific rules seem to have sprung up. The practice for attesting witnesses, oaths and documentary originals is developed. The rule for the conclusiveness of a sealed writing is definitely established. But during these three centuries the general process of pleading and procedure is only gradually differentiated from that of proof—chiefly because the jurors are as yet relied upon to furnish in themselves both knowledge and decision; for they are not commonly caused to be informed by witnesses, in the modern sense.

(3) A. D. 1500–1700. By the 1500's, the constant employment of witnesses, as the jury's chief source of information, brings about a radical change. Here enter, very directly, the possibilities of our modern system. With all the emphasis gradually cast upon the witnesses, their words and their documents,

§ 484. **(aa) Relevancy of evidence.** — 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 the whole question of admissibility arises. One first great consequence is the struggle between the numerical or quantitative system, which characterized the canon law and still dominated all other methods of proof, and the unfettered systemless jury trial; and it was not for two centuries that the numerical system was finally repulsed. Another cardinal question now necessarily faced was that of the competency of witnesses; and by the end of the 1500's the foundations were laid for all the rules of disqualification which prevailed thenceforward for more than two centuries, and in part still remain. At the same time, and chiefly from a simple failure to differentiate, most of the rules of privilege and privileged communication were thereby brought into existence, at least in embryo. The rule for attorneys, which alone stood upon its own ground, also belongs here, though its reasons were newly conceived after the lapse of a century. A third great principle, the right to have compulsory attendance of witnesses, marks the very beginning of this period. Under the primitive notions, this all rested upon the voluntary action of one's partisans; the calling of compurgators and documentary attestors, under the older methods of trial, was in effect a matter of contract. But as soon as the chief reliance came to be the witnesses to the jurors, and the latter ceased to act on their own knowledge, the necessity for the provision of such information, compulsorily if not otherwise, became immediately obvious. The idea progressed slowly; it was enforced first for the crown, next for civil parties; and not until the next period was it conceded to accused persons. Thus was laid down indirectly the general principle that there is no privilege to refuse to be a witness; to which the other rules, above mentioned, subsequently became contrasted as exceptions. A fourth important principle, wholly independent in origin, here also arose and became fixed by the end of this period—the privilege against self-crimination. The creature, under another form, of the canon law, in which it had a long history of its own, it was transferred, under stress of political turmoil, into the common law, and thus, by a singular contrast, came to be a most distinctive feature of our trial system. About the same period—the end of the 1600's—an equally distinctive feature, the rule against using an accused's character, became settled. Finally, the "parol evidence" rule enlarged its scope, and came to include all writings and not merely sealed documents; this development, and the enactment of the statute of frauds and perjuries, represent a special phase of thought in the end of this period. It ends, however, rather with the restoration of 1660 than with the revolution of 1688, or the last years of the century; for the notable feature of it is that the regenerating results of the struggle against the arbitrary methods of James I and Charles I began to be felt as early as the return of Charles II. The mark of the new period is seen at the restoration. Justice, on all hands,

other point. Therefore, upon an action of debt, when the defendant denies his bond by the plea of *non est factum* (it is not his deed), 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

then begins to mend. Crudities which Matthew Hale permitted, under the commonwealth, Scroggs refused, under James II. The privilege against self-crimination, the rule for two witnesses in treason, and the character rule—three landmarks of our law of evidence—find their first full recognition in the last days of the Stuarts.

(4) A. D. 1700–1790. Two circumstances now contributed independently to a further development of the law on two opposite sides, its philosophy and its practical efficiency. On the one hand, the final establishment of the right of cross-examination by counsel, at the beginning of the 1700's, gave to our law of evidence the distinction of possessing the most efficacious expedient ever invented for the extraction of truth (although, to be sure, like torture—that great instrument of the continental system—it is almost equally powerful for the creation of false impressions). A notable consequence was that by the multiplication of oral interrogation at trials the rules of evidence were now developed in detail upon such topics as naturally came into new prominence. All through the 1700's this expansion proceeded, though slowly. On the other hand, the already existing material began now to be treated in doctrinal form. The first treatise on the law of evidence was that of Chief Baron Gilbert, not published till after his death in 1726. About the same time the abridgments of Bacon and of Comyns gave many pages to the title of Evidence; but no other treatise appeared for a quarter of a century, when the notes of Mr. J. Bathurst (later Lord Chancellor) were printed, under the significant title of the "Theory of Evidence." But this propounding of a system was as yet chiefly the natural culmination of the prior century's work, and was independent of the expansion of practice now going on. In Gilbert's book, for example, even in the fifth edition of 1788, there are in all, out of the three hundred pages, less than five concerned with the new topics brought up by the practice of cross-examination; in Bathurst's treatise (by this time embodied in his nephew Buller's "Trials at Nisi Prius") the number is hardly more; Blackstone's Commentaries, in 1768, otherwise so full, are here equally barren. The most notable result of these disquisitions, on the theoretical side, was the establishment of the "best evidence" doctrine, which dominated the law for nearly a century later. But this very doctrine tended to preserve a general consciousness of the supposed simplicity and narrowness of compass of the law of evidence. As late as the very end of the century Mr. Burke could argue down the rules of evidence, when attempted to be enforced upon the house of lords at Warren Hastings' trial, and ridicule them as petty and inconsiderable. But, none the less, the practice had materially expanded during his lifetime. In this period, besides the rules for impeachment and corroboration of witnesses (which were due chiefly to the development of cross-examination), are

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.

§ 485. (bb) Written and parol evidence.—Again; evidence in the trial by jury is of two kinds: either that which is given in

to be reckoned also the origins of the rules for confessions, for leading questions, and for the order of testimony. The various principles affecting documents—such as the authorization of certified (or office) copies and the conditions dispensing from the production of originals—now also received their general and final shape.

(5) A. D. 1790–1830. The full spring-tide of the system had now arrived. In the ensuing generation the established principles began to be developed into rules and precedents of minutiæ relatively innumerable to what had gone before. In the Nisi Prius reports of Peake, Espinasse, and Campbell, centering around the quarter-century from 1790 to 1815, there are probably more rulings upon evidence than in all the prior reports of two centuries. In this development the dominant influence is plain; it was the increase of printed reports of Nisi Prius rulings. This was at first the cause, and afterwards the self-multiplying effect, of the detailed development of the rules. Hitherto, upon countless details, the practice had varied greatly on the different circuits; moreover, it had rested largely in the memory of the experienced leaders of the trial bar and in the momentary discretion of the judges. In both respects it therefore lacked fixity, and was not amenable to tangible authority. These qualities it now rapidly gained. As soon as Nisi Prius reports multiplied and became available to all, the circuits must be reconciled, the rulings once made and recorded must be followed, and these precedents must be open to the entire profession to be invoked. There was, so to speak, a sudden precipitation of all that had hitherto been suspended in solution. This effect began immediately to be assisted and emphasized by the appearance of new treatises, summing up the recent acquisitions of precedent and practice. In nearly the same year, Peake, for England (1801), and MacNally, for Ireland (1802), printed small volumes whose contents, as compared with those of Gilbert and Buller, seem to represent almost a different system, so novel were their topics. In 1806 Evans' Notes to Pothier on Obligations was made the vehicle of the first reasoned analysis of the rules. In this respect it was epoch-making; and its author in a later time once quietly complained that its pages were "more often quoted than acknowledged." The room for new treatises was rapidly enlarging. Peake and MacNally, as handbooks of practice, were out of date within a few years, and no new editions could cure them. In 1814, and then in 1824, came Phillipps and Starkie—in method combining Evans' philosophy with Peake's strict reflection of the details of practice. There was now indeed a system of evidence, consciously and fully realized. Across the water a similar stage had been reached. By a natural interval Peake's treatise was balanced, in 1810, by Swift's Connecticut book, while

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,

Phillipps and Starkie (after a period of sufficiency under American annotations) were replaced by Greenleaf's treatise of 1842.

(6) A. D. 1830–1860. Meantime, the advance of consequences was proceeding, by action and reaction. The treatises of Peake and Phillipps, by embodying in print the system as it existed, at the same time exposed it to the light of criticism. It contained, naturally enough, much that was merely inherited and traditional, much that was outgrown and outworn. The very efforts to supply explicit reasons for all this made it the easier to puncture the insufficient reasons and to impale the inconsistent ones. This became the office of Bentham. Beginning with the first publication, in French, of his Theory of Judicial Evidence, in 1818, the influence of his thought upon the law of evidence gradually became supreme. While time has only ultimately vindicated and accepted most of his ideas (then but chimeras) for other practical reforms, and though some still remain untried, the results of his proposals in this department began almost immediately to be achieved. Mature experience constantly inclines us to believe that the best results on human action are seldom accomplished by sarcasm and invective; for the old fable of the genial sun and the raging wind repeats itself. But Bentham's case must always stand out as a proof that sometimes the contrary is true—if conditions are meet. No one can say how long our law might have waited for regeneration if Bentham's diatribes had not lashed the community into a sense of its shortcomings. It is true that he was particularly favored by circumstances in two material respects—the one personal, the other broadly social. He gained, among others, two incomparable disciples, who served as a fulcrum from which his lever could operate directly upon legislation. Henry Brougham and Thomas Denman combined with singular felicity the qualities of leadership in the technical arts of their profession and of energy for the abstract principles of progress. Holding the highest offices of justice, and working through a succession of decades, they were enabled, within a generation, to bring Bentham's ideas directly into influence upon the law. One who reads the great speech of Brougham, on February 7, 1828, on the state of the common law courts, and the reports of Denman and his colleagues, in 1852 and 1853, on the common law procedure, is perusing epoch-making deliverances of the century. The other circumstance that favored Bentham's causes was the radical readiness of the times. The French revolution had acted in England; and as soon as the Napoleonic wars were over, the influence began to be felt. One part of public opinion was convinced that there must be a radical change; the other and dominant part felt assured that if the change did not come as reform, it would come as revolution; and so the reform was given, to prevent the revolution. In a sense, it did not much matter to them where the reform came

1. Records, and 2. Ancient deeds of thirty years' standing, which prove themselves; but 3. Modern deeds, and 4. Other writings, [368] must be attested and verified by *parol* evidence of witnesses.

about—in the economic, or the political, or the juridical field—if only there was reform. At this stage, Bentham's denouncing voice concentrated attention on the subject of public justice—criminal law and civil procedure; and so it was here that the movement was felt among the first. As a matter of chronological order, the first considerable achievements were in the field of criminal law, beginning in 1820, under Romilly and Mackintosh; then came the political upheaval of the Reform Bill, in 1832, under Russell and Grey; next the economic regeneration, beginning with Huskisson and culminating with Peel in the Corn Law Repeal of 1846. Not until the Common Law Procedure Acts of 1852 and 1854 were large and final results achieved for the Benthamic ideas in procedure and evidence. But over the whole preceding twenty years had been spread initial and instructive reforms. Brougham's speech of February 7, 1828, was the real signal for the beginning of this epoch—a beginning which would doubtless have culminated more rapidly if urgent economic and political crises had not intervened to absorb the legislative energy.

In the United States, the counterpart of this period came only a little later. It seems to have begun all along the line, and was doubtless inspired by the accounts of progress made and making in England, as well as by the writings of Edward Livingston, the American Bentham, and by the legislative efforts of David Dudley Field, in the realm of civil procedure. The period from 1840 to 1870 saw the enactment, in the various jurisdictions in this country, of most of the reformatory legislation which had been carried or proposed in England.

(7) A. D. 1860. After the Judicature Act of 1875, and the Rules of Court (of 1883) which under its authority were formulated, the law of evidence in England attained rest. It is still overpatched and disfigured with multiplicitous fragmentary statutes, especially for documentary evidence. But it seems to be harmonious with the present demands of justice, and above all to be so certain and settled in its acceptance that no further detailed development is called for. It is a substratum of the law which comes to light only rarely in the judicial rulings upon practice.

Far otherwise in this country. The latest period in the development of the law of evidence is marked by a temporary degeneracy. Down to about 1870, the established principles, both of common-law rules and of statutory reforms, were restated by our judiciary in a long series of opinions which, for careful and copious reasoning, and for the common sense of experience, were superior (on the whole) to the judgments uttered in the native home of our law. Partly because of the lack of treatises and even of reports—partly because of the tendency to question imported rules and therefore to defend on grounds of principle and policy whatever could be defended—partly because of the moral obligation of the judiciary, in new communities, to vindicate by intellectual effort its right to supremacy over the bar—and partly, also, because

§ 486. (cc) **Rule as to "best evidence."**—And the one general rule that runs through all the doctrine of trials 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

of the advent, coincidently, of the same rationalizing spirit which led to the reformatory legislation—this very necessity of restatement led to the elaboration of a finely reasoned system. The "mint, anise, and cummin" of mere precedent were not unduly revered. There was always a reason given—even though it might not always be a worthy reason. The pronouncement of Bentham came near to be exemplified, that "so far as evidence is concerned, the English practice needs no improvement but from its own stores. Consistency, consistency, is the one thing needful. Preserve consistency, and perfection is accomplished."

But the newest states in time came to be added. New reports spawned a multifarious mass of new rulings in fifty jurisdictions—each having theoretically an equal claim to consideration. The liberal spirit of choosing and testing the better rule degenerated into a spirit of empiric eclecticism in which all things could be questioned and requestioned *ad infinitum*. The partisan spirit of the bar, contesting desperately on each trifle, and the unjust doctrine of new trials, tempting counsel to push up to the appellate courts upon every ruling of evidence, increased this tendency. Added to this was the supposed necessity in the newer jurisdictions of deciding over again all the details that had been long settled in the older ones. Here the lack of local traditions at the bar and of self-confidence on the bench led to the tedious re-exposition of countless elementary rules. This lack of peremptoriness on the supreme bench, and (no less important) the marked separation of personality between courts of trial and courts of final decision, led also to the multifarious heaping up, within each jurisdiction, of rulings upon rulings involving identical points of decision. This last phenomenon may be due to many subtly conspiring causes. But at any rate the fact is that in numerous instances, and in almost every jurisdiction, recorded decisions of supreme courts upon precisely the same rule and the same application of it can be reckoned by the dozens and scores. This wholly abnormal state of things—in clear contrast to that of the modern English epoch—is the marked feature of the present period of development in our own country.

Of the change that is next to come, and of the period of its arrival, there seem as yet to be no certain signs. Probably it will come either in the direction of the present English practice—by slow formation of professional habits—or in the direction of attempted legislative relief from the mass of bewildering judicial rulings—by a concise code. The former alone might suffice. But the latter will be a false and futile step, unless it is founded upon the former; and in any event the danger is that it will be premature. A code fixes error as well as truth. No code can be worth casting until there has been more explicit discussion of the reasons for the rules and more study of

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.

§ 487. (dd) Hearsay evidence.—So, no evidence of a discourse with another will be admitted, but the man himself must

them from the point of view of synthesis and classification. The time must first come when, in the common understanding and acceptance of the profession, "every rule is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."—WIGMORE, 1 Evidence, § 8.

The best evidence.—No rule of law is more frequently cited, and more generally misconceived, than this. It is certainly true when rightly understood; but it is very limited in its extent and application. It signifies nothing more than that, if the best legal evidence cannot possibly be produced, the next best legal evidence shall be admitted. Evidence may be divided into primary and secondary; and the secondary evidence is as accurately defined by the law as the primary. But, in general, the want of better evidence can never justify the admission of hearsay, interested witnesses, the copies of copies, etc. Where there are exceptions to general rules, these exceptions are as much recognized by the law as the general rule; and where boundaries and limits are established by the law for every case that can possibly occur, it is immaterial what we call the rule, and what the exception.—CHRISTIAN.

Professor Thayer (Prelim. Treatise on Evidence, 494), in discussing the Best Evidence rule, says of Christian's note: "These keen observations, although attributing to the rules of evidence, rightly so called, much too great an elaboration and completeness, nevertheless went to the root of this matter. . . . But the sagacious observations of Christian were little heeded; they were probably little known." He later continues (p. 497): "But as regards the main rule of the Best Evidence, in its general application, the text-books which followed Gilbert, beginning with Peake in 1801, and continuing with the leading treatises of Phillipps in 1814, Starkie in 1824, Greenleaf in 1842, Taylor in 1848, and Best in 1849, all repeat it. But it is accompanied now with so many explanations and qualifications as to indicate the need of some simpler and truer statement, which should exclude any mention of this as a working rule of our system. Indeed, it would probably have dropped naturally out of use long ago, if it had not come to be a convenient, short description of the

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 will not be received of any particular facts.

§ 488. **(ee) Books of account.**—So, too, books of account, or shop-books, are not allowed of themselves to be given in evidence for the owner; but the servant who made the entry may have recourse to them to refresh his memory, and, if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence:[r] for as tradesmen are often under a necessity of giving credit without any note or writing, this is therefore, when accompanied with such other collateral proofs of fairness and regularity,[s] the best evidence that can then be produced. However, this dangerous species of evidence is not carried so far in England as abroad,[ss] where a man's own books of accounts, by a distortion of the civil law (which

r Law of Nisi Prius. 266.

s Salk. 285.

ss Gail. Observat. 2. 20. 23.

---

rule as to proving the contents of a writing. Regarded as a general rule, the trouble with it is that it is not true to the facts, and does not hold out in its application; and in so far as it does apply, it is unnecessary and uninstructive. It is roughly descriptive of two or three rules which have their own reasons and their own name and place, and are well enough known without it. When explained theoretically, and treated as a working rule, it is restricted to the situation where the evidence which is offered discloses, on its face, that there is something behind it for which it is a substitute.

"Let us therefore look at the Best Evidence rule, in its character as a specific rule forbidding substitutionary evidence, i. e., such as shows on its face that there is something directer and better behind it. In this sense it is a phrase which has been thought to group under one name at least three other specific rules, namely: (1) If you would introduce before a jury the statements of a witness, you must produce the witness in person; (2) If you would introduce to a jury the contents of a writing, you must produce the writing itself; (3) If you would prove to a jury the execution of an attested document, you must produce the attesting witnesses. In each case secondary modes of proof are allowed under more or less definite circumstances. In each we have the general notion of primary and secondary evidence."

seems to have meant the same thing as is practiced with us [t]), with the suppletory oath of [369] the merchant, amount at all times to full proof. But as this kind of evidence, even thus regulated, would be much too hard upon the buyer at any long distance of time, the statute 7 Jac. I, c. 12 (Evidence, 1609), (the penners of which seem to have imagined that the books of themselves were evidence at common law), confines this species of proof to such transactions as have happened within one year before the action brought, unless between merchant and merchant in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be unraveled and adjusted.

§ 489. (ff) Parol evidence—Witnesses. — With regard to *parol* evidence, or *witnesses:* it must first be remembered that there is a process to bring them in by writ of *subpœna ad testificandum* (a subpœna to give evidence), which commands them, laying aside all pretenses and excuses, to appear at the trial on pain of 100*l.* to be forfeited to the king; to which the statute 5 Elizabeth, c. 9 (Perjury, 1562), has added a penalty of 10*l.* to the party aggrieved, and damages equivalent to the loss sustained by want of his 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, except he resides within the bills of mortality, and is summoned to give evidence within the same. This compulsory process, to bring in unwilling witnesses, and the additional terrors of an attachment in case of disobedience, are of excellent use in the thorough investigation of truth; and, upon the same principle, in the Athenian courts, the witnesses who were summoned to attend the trial had their choice of three things; either to swear to the truth of the fact in question, to deny or abjure it, or else to pay a fine of a thousand drachmas.[u]

[t] *Instrumenta domestica, seu adnotatio, si non aliis quoque adminiculis adjuventur, ad probationem sola non sufficiunt.* (Cod. 4. 19. 5.) *Nam exemplo perniciosum est, ut ei scripturæ credatur, qua unusquisque sibi adnotatione propria debitorem constituit* (Private instruments, or memoranda, unless supported by other evidence, are not alone sufficient proof. For it is a dangerous precedent to give credit to any memorandum by which the writer makes another man his debtor). (*Ibid.* l. 7.)

[u] Pott. Antiq. b. 1. c. 21.

§ 490. 1. Qualification of witnesses.—All witnesses, of whatever religion or country that have the use of their reason,[13] are to be received and examined, except such as are *infamous*, or such as are interested in the event of the cause. All others are *competent* witnesses; though the jury from other circumstances will judge of their *credibility*.[14] [370] Infamous persons are such as may be challenged as jurors, *propter delictum* (on account of incompetency) and therefore never shall be admitted to give evidence to inform that jury, with whom they were too scandalous to associate. Interested witnesses may be examined upon a *voir dire* (to speak the truth), if suspected to be secretly concerned in the event; or their interest may be proved in court. Which last is the only method of supporting an objection to the former class; for no man is to be examined to prove his own infamy. And no counsel, attorney or other person entrusted with the secrets of the cause by the party himself shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of privacy as came to his knowledge by virtue of such trust and confidence:[v] but 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 entrusted in the cause.

[v] Law of Nisi Prius. 267.

---

13 I have known a witness rejected, and hissed out of court, who declared that he doubted of the existence of a God and a future state. But I have since heard a learned judge declare at Nisi Prius, that the judges had resolved not to permit adult witnesses to be interrogated respecting their belief of the Deity and a future state. It is probably more conducive to the course of justice that this should be presumed till the contrary is proved. And the most religious witness may be scandalized by the imputation, which the very question conveys.—CHRISTIAN.

Upon this note of Christian's, Professor Thayer (Prelim. Treatise on Evidence, 541 n.) remarks: "The establishment of this conclusive presumption would be nearly equivalent to admitting the evidence of Atheists, which is now excluded; as it would be almost impossible to prove the exact state of a man's belief. This change, therefore, as indeed of all the rules of exclusion of evidence, is very desirable, but has not yet been effected."

14 Interested witnesses and even parties to the record are now usually competent, though the facts that at common law excluded them go to their credibility, according to the rule here given for others.—HAMMOND.

§ 491. 2. Quantum of proof.—One witness (if credible) is *sufficient* evidence to a jury 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. "*Unius responsio testis, omnino non audiatur* (the evidence of one witness may never be admitted)."[w] To extricate itself out of which absurdity, the modern practice of the civil law courts has plunged itself into another. For, as they do not allow a less number than two witnesses to be *plena probatio* (full proof), they call the testimony of one, though never so clear and positive, *semiplena probatio* (half proof) only, on whom no sentence can be founded. To make up, therefore, the necessary complement of witnesses, when they have one only to a single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf, and administer to him what is called the *suppletory* oath, and, if his evidence happens to be in his own favor, this immediately converts the half proof into a whole one. By this ingenious device satisfying at once the forms of the Roman law and acknowledging the superior reasonableness [371] of the law of England, which permits one witness to be sufficient where no more are to be had, and, to avoid all temptations of perjury, lays it down as an invariable rule, that *nemo testis esse debet in propria causa* (no one should be a witness in his own cause).

§ 492. 3. Nature of evidence required.—Positive 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.[15] *Stabitur præ-*

[w] Cod. 4. 20. 9.

---

[15] **Presumptions.**—Blackstone here anticipates the conclusion of Mr. Justice Stephen, who, in his excellent Digest of Evidence, article 1, "Definition of Terms," has limited the extension of the term in the same way.

sumptioni donec probetur in contrarium.[x] *Violent* presumption is many times equal to full proof;[y] for there those circumstances appear which *necessarily* attend the fact. As if a landlord sues for rent due at Michaelmas, 1754, 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 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 therefore induces so forcible a presumption, that no proof shall be admitted to the contrary.[z] *Probable* presumption arising from such circumstances as *usually* attend the fact, hath also its due weight: as if, in a suit for rent due in 1754, the tenant proves the payment of the rent due in 1755; this will prevail to exonerate the tenant,[a] unless it be clearly shown that the rent of 1754 was retained for some special reason, or that there was some fraud or mistake: or otherwise it will be presumed to have been paid before that in 1755, as it is most usual to receive first the rents

x Co. Litt. 373.
y *Ibid.* 6.
z Gilb. Evid. 161.
a Co. Litt. 373.

"A presumption means a rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, *unless and until the truth of such inference is disproved.*" And in note 1 he adds: "I use the word 'presumption' in the sense of a presumption of law, capable of being rebutted. A presumption of fact is simply an argument. A conclusive presumption I describe as conclusive proof." (And see Best on Evidence, sec. 299.)

Blackstone has indeed described these "conclusive proofs" under the name of *violent* presumptions which as he says are "equivalent to full proof"; and he has neglected to distinguish *probable* and light presumptions, by the essential mark of difference between them, as presumptions *juris et facti.* This seems to be due to his identification of the doctrine of presumptions with circumstantial evidence throughout. But his definition, above quoted, points out the exact limit within which the term may be exactly and usefully employed.

This is the *præsumptio juris* of the civilians and the only one in which the term "presumption" has any real significance in our law. The civilians and canonists, who knew no separate triers of fact and therefore treated all questions of proof as matter of law for the court, might properly use the word otherwise, in a sense that answers generally to the topic of circumstantial evidence in our law.—HAMMOND.

of longest standing. *Light*, or rash, presumptions have no weight or validity at all.

§ 493. **4. Oath of witnesses.**—[372] 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; so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not.

§ 494. **5. Bill of exceptions.**—And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel and all bystanders, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country: which must curb any secret bias or partiality that might arise in his own breast. And if, either in his directions or decisions, he misstates the law by ignorance, inadvertence or design, the counsel on either side may require him publicly to seal a *bill of exceptions*, stating the point wherein he is supposed to err; and this he is obliged to seal by statute Westm. II, 13 Edward I, c. 31 (Bills of Exceptions, 1285), or, if he refuses so to do, the party may have a compulsory writ against him,[b] commanding him to seal it, if the fact alleged be truly stated: and if he returns that the fact is untruly stated when the case is otherwise, an action will lie against him for making a false return. This bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below.

§ 495. **6. Demurrer to evidence.**—But a *demurrer* to evidence shall be determined by the court out of which the record is sent. This happens where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law; in which case the adverse party may, if he pleases, demur to the whole evidence, which admits the truth of every fact that has been alleged, but denies the sufficiency of them all in point

[b] Reg. Br. 182. 2 Inst. 487.

of law to maintain or overthrow the issue:[c] which draws the question of law from the cognizance of the jury, to be decided (as it ought) by the court. But neither these demurrers to evidence nor the bills of exceptions are at present so much [373] in use as formerly; since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of the judge at *nisi prius*.

§ 496. **7. Open examination of witnesses.**—This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth[d] than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides, the occasional questions of the judge, the jury and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge, during the examination, a matter of small importance; for besides the respect and awe with which his presence will naturally inspire 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, behavior 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: and yet as much may be frequently collected from the manner in which the evidence is delivered, as from

[c] Co. Litt. 72. 5 Rep. 104.

[d] Hale's Hist. C. L. 254, 5, 6.

the matter of [374] it. These are a few of the advantages attending this, the English, way of giving testimony, *ore tenus* (by word of mouth). Which was also indeed familiar among the *ancient* Romans, as may be collected from Quintilian,[e] who lays down very good instructions for examining and cross-examining witnesses *viva voce*. And this, or somewhat like it, was continued as low as the time of Hadrian;[f] but the civil law, as it is now modeled, rejects all public examination of witnesses.

§ 497. **8. Juror's own knowledge.**—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 hath been often held[g] that though no proofs be produced on either side, yet the jury might bring in a verdict. For the oath of the jurors to find according to their evidence was construed[h] to be, to do it according to the best of their own knowledge. This seems to have arisen from the ancient practice in taking recognitions of assize at the first introduction of that remedy; the recognitors, when sworn, being to retire immediately from the bar, and bring in their verdict according to their own personal knowledge, without hearing extrinsic evidence or receiving any direction from the judge.[i] And the same doctrine (when attaints came to be extended to trials by jury, as well [as] to recognitions of assize) was also applied to the case of common jurors; that they might escape the heavy penalties of the *attaint*, in case they could show by any additional proof that their verdict was agreeable to the truth, though not according to the evi-

[e] Instit. Orat. l. 5. c. 7.

[f] See his epistle to Varus, the legate or judge of Cilicia: "*tu magis scire potes, quanta fides sit habenda testibus; qui, et cujus dignitatis, et cujus æstimationis sint; et, qui simpliciter visi sint dicere; utrum unum eundemque meditatum sermonem attulerint, an ad ea quæ interrogaveras extempore verisimilia responderint* (You are better able to judge what faith is to be placed in witnesses; why they are, and in what credit and estimation they are held; whether they seem to speak ingenuously, and whether their answers to your questions be preconcerted, or the expressions of the moment)." (Ff. 22. 5. 3.)

[g] Yearbook, 14 Hen. VII (1498). 29 Plowd. 12. Hob. 227. 1 Lev. 87.

[h] Vaugh. 148, 149.

[i] Bract. l. 4. tr. 1. c. 19. § 3. Flet. l. 4. c. 9. § 3.

dence produced: with which additional proof the law presumed they were privately acquainted though it did not appear in [375] court. But this doctrine was again gradually exploded, when *attaints* began to be disused and *new trials* introduced in their stead. For it is quite incompatible with the grounds upon which such 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 first introduced,[k] 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.

§ 498. **(vii) Charging the jury.**—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.[16]

§ 499. **(viii) Deliberation of jury.**—The jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of 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 greater concern. For by the golden bull of the empire,[l] if, after the congress is opened, the electors delay the election of a king of the Romans for thirty days, they shall be fed only with bread and water, till the same is 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 finable; and if they do so at his

k Styl. 233. 1 Sid. 133.

l Ch. 2.

16 In some states the instructions of the judge are now limited to "his opinion in matters of law," and his remarks on the evidence, or on questions of fact, are forbidden.—HAMMOND.

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 are gone [376] 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. And it has been held that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned,[m] the judges are not bound to wait for them, but may carry them around the circuit from town to town in a cart.[n 17]

This necessity of a total unanimity seems to be peculiar to our own constitution,[o] or, at least, in the *nembda* or jury of the ancient Goths there was required (even in criminal cases) only the consent of the major part; and in case of an equality, the defendant was held to be acquitted.[p]

§ 500. **(ix) Unanimity of jury.**—When they are all unanimously agreed, the jury return back to the bar, and, before they deliver their verdict, the plaintiff is bound to appear in court, by himself, attorney or counsel, in order to answer the amercement to which by the old law he is liable, as has been formerly mentioned,[q] in case he fails in his suit, as a punishment for his false claim. To be *amerced,* or *a mercie,* is to be at the king's mercy with regard to the fine to be imposed; *in misericordia domini regis pro falso clamore suo* (at the king's mercy for his false claim). The amercement is disused, but the form still continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be *nonsuit, non sequitur clamorem suum* (he does not pursue

m Mirr. c. 4. § 24.

n Lib. Ass. fol. 40. pl. 11.

o See Barrington on the Statutes. 19, 20, 21.

p Stiernh. l. 1. c. 4.

q Pag. 275.

---

17 **Carting the jury.**—This holding, though it has been quoted many times by judges before as well as since Blackstone, resolves itself on examination into the dictum of a judge, that rather than take the verdict of eleven jurors the justices *should* have carried them on the circuit in a cart till they agreed. The case is 41 Ass. 11 (not 40 Ass. as all the editions of Blackstone have in note) and a similar dictum is found in 19 Ass. 6.—HAMMOND.

his claim). Therefore, it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself; 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 shall recover his costs. The reason of this practice is, that a nonsuit is more eligible for the plaintiff than a verdict against him: for after a nonsuit, which is only a default, he may commence the same suit [377] again for the same cause of action; but after a verdict had, and judgment consequent thereupon, he is forever barred from attacking the defendant upon the same ground of complaint. But, in case the plaintiff appears, the jury by their foreman deliver in their verdict.

§ 501. (x) The verdict.—A verdict, *vere dictum,* is either *privy* or *public.* A *privy* verdict is when the judge hath left or adjourned the court, and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court,[r] which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in court, wherein the jury may, if they please, vary from their privy verdict. So that the privy verdict is indeed a mere nullity, and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged. But the only effectual and legal verdict 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 also sustained by the plaintiff, in consequence of the injury upon which the action is brought.

§ 502. (aa) Special verdict.—Sometimes, if there arises in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attainted, will find a *special* verdict; which is grounded on the statute Westm. II, 13 Edward I, c. 30, § 2 (Justices of *Nisi Prius,*

r If the judge hath adjourned the court to his own lodgings, and there receives the verdict, it is a *public* and not a *privy* verdict.

1285). And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon, concluding conditionally that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried.

§ 503. (bb) General verdict in special case.—[378] Another method of finding a species of special verdict is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge or the court above, on a *special case* stated by the counsel on both sides with regard to a matter of law: which has this advantage over a special verdict, that it is attended with much less expense and obtains a much speedier decision; the *postea* (of which in the next chapter) being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant as the case may happen. But, as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge upon the point of law. Which makes it a thing to be wished that a method could be devised of either lessening the expense of special verdicts, or else of entering the case at length upon the *postea*. But in both these instances the jury may, if they think proper, take upon themselves 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.[s] [18]

§ 504. (xi) Discharge of jury.—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: a trial, which besides the other vast advantages which we have occasionally observed in

[s] Litt. § 386.

18 By statute in many states the judge may now require the jury to render a special verdict, or what is in substance the same, to answer specific questions of fact underlying their verdict.—HAMMOND.

its progress, is also as expeditious and cheap as it is convenient, equitable and certain; for a commission out of chancery, or the civil law courts, for examining witnesses in one cause will frequently last as long, and of course be full as expensive, as the trial of a hundred issues at *nisi prius:* and yet the fact cannot be determined by such commissioners at all; no, not till the depositions are published and read at the hearing of the cause in court.

§ 505. Encomium on the English jury system.—[379] Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law.[19] And, if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to

[19] **Merits and defects of the jury system.**—The late Judge John F. Dillon, in his Laws and Jurisprudence of England and America (p. 121), says: "I consider the trial by jury an essential part of our judicial system. It is a cherished tradition. It is more. Its roots strike down deep into the experience, the life, and the nature of the people who have developed and perfected it. It gives an individuality to our legal system. It is a vital part of it. Its shortcomings are not inherent. If judges will do their full duty, jurors will do theirs. I have tried literally thousands of cases with juries, and the instances are few where I had reason to be dissatisfied with their verdicts. . . .

"In criminal cases there is no substitute for the jury that would be acceptable to the profession or endured by the people. In the solemn act of passing upon the guilt of those charged with offenses against the public, the jury represent the majesty of the people as a whole; and when acting under the guidance of a capable judge, their verdicts are almost always right. . . .

"But civil controversies, especially in modern times, are much more complicated than criminal trials, and the verdicts of juries are much less satisfactory. This is largely owing to obvious causes:

"Juries ought always to be, but too frequently are not, composed of the better class of citizens in respect to intelligence, moral character, and business experience.

"Judges have been deprived in many of the states of some of the powers necessary to secure a true verdict, and they fail to exercise there and elsewhere the power to correct the mistakes of juries by an adequate exercise of the right to grant new trials. In some of the states, moreover, statutes have been passed which degrade the judge as the presiding and guiding intelligence at the trial, into an officer whose functions rather resemble those of a mere moderator. He is forbidden to charge upon the facts, forbidden to sum up the case upon the evidence, forbidden to express any opinion upon the value of the testimony, and is expressly required to confine his charge or instructions to a barren, and to the jury often unintelligible, statement of the law

criminal cases. But this we must refer to the ensuing book of these Commentaries, only observing for the present that it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals. A constitution, that I may venture to affirm has, under Providence, secured the just liberties of this nation for a long succession of ages. And therefore a celebrated French writer,[t] who concludes, that because Rome, Sparta and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta and Carthage, at the

[t] Montesq. Sp. L. xi. 6.

---

of the case; and is sometimes required to give or refuse instructions in the precise form in which they are adroitly framed by counsel. . . .

"The remedy is not in the line of these statutes which are based upon the assumed continued existence of the cause of such statutes, but the true remedy is to remove the cause by securing judges who are competent to the full discharge of the high and delicate duties of the judicial office. Taking the judges as they run, I very much doubt whether such legislation has the approval of the body of the bar of the states which have adopted it. It has, doubtless, often originated, not in a public demand, or in any demand on the part of the bar at large, but with some lawyer in the legislature who likes to control juries by declamatory rhetoric, and who has been disappointed by the conscientious discharge on the part of some independent judge of his whole duty. Under the practice required by these statutes, mistaken verdicts are greatly multiplied. At the same time, as an indirect although unintended consequence of other legislation, judges have been led to pay too much respect to erroneous and eccentric verdicts. I have known judges who boasted that they had never exercised their power to set aside verdicts. This is a useful power in the court, and one which it is sometimes necessary to use to prevent a miscarriage of justice, and when thus necessary should be unhesitatingly exercised. . . . If the courts will clearly instruct juries, and will exercise when they ought to do so the power to set aside verdicts and grant new trials, there will be less complaints about trial by jury, and less agitation for a change in the law whereby verdicts may be rendered by a less number than the whole of the jury—a change which I believe to be based upon no necessity and in the highest degree unwise.

"It is mainly to the causes above mentioned, some of which are produced by unwise legislation, but all of which, happily, are remediable, that the trial by jury has declined to such an extent that it has come in many cases to be an avowed maxim of professional action—a good case is for the court; a bad or doubtful case is for the jury."

time when their liberties were lost, were strangers to the trial by jury.

Great as this eulogium may seem, it is no more than this admirable constitution, when traced to its principles, will be found in sober reason to deserve. The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias toward those of their own rank and dignity; it is not to be expected from human nature that *the few* should be always attentive to the interests and good of *the many*. On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts. It is wisely, therefore, ordered, that the principles and axioms of law, which are general propositions, flowing from abstracted reason, and not [380] accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of fact pre-established. But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or more artfully by suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This, therefore, preserves in the hands of the

people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decision of facts, without the intervention of a jury (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates), is a step towards establishing aristocracy, the most oppressive of absolute governments. The feudal system, which for the sake of military subordination pursued an aristocratical plan in all its arrangements of property, had been intolerable in times of peace had it not been wisely counterpoised by that privilege so universally diffused through every part of it, the trial by the feudal peers. And in every country on the Continent, as the trial by the peers has been gradually disused, so the nobles have increased in power, till the state has been torn to pieces by rival factions, and oligarchy in effect has been established, though under the shadow of regal government; [381] unless where the miserable commons have taken shelter under absolute monarchy, as the lighter evil of the two. And, particularly, it is a circumstance well worthy an Englishman's observation, that in Sweden the trial by jury, that bulwark of northern liberty, which continued in its full vigor so lately as the middle of the last century,[u] is now fallen into disuse:[w] and that there, though the regal power is in no country so closely limited, yet the liberties of the commons are extinguished, and the government is degenerated into a mere aristocracy.[x] It is therefore upon the whole a duty which every man owes to his country, his friends, his posterity, and himself, to maintain to the utmost of his power this valuable constitution in all its rights; to restore it to its ancient dignity, if at all impaired by the different value of property or otherwise deviated from its first institution; to amend it, wherever it is defective; and, above all, to guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time imperceptibly undermine this best preservative of English liberty.

u 2 Whitelocke of Parl. 427.
w Mod. Un. Hist. xxxiii. 22.
x *Ibid.* 17.

§ 506. Defects of the jury system.—Yet, after all, it must be owned, that the best and most effectual method to preserve and extend the trial by jury in practice would be by endeavoring to remove all the defects, as well as to improve the advantages incident to this mode of inquiry. If justice is not done to the entire satisfaction of the people in this method of deciding facts, in spite of all encomiums and panegyrics on trials at the common law, they will resort in search of that justice to another tribunal; though more dilatory, though more expensive, though more arbitrary in its frame and constitution. If justice is not done to the crown by the verdict of a jury, the necessities of the public revenue will call for the erection of summary tribunals. The principal defects seem to be.[20]

1. The want of a complete discovery by the oath of the parties. This each of them is now entitled to have, by [382] going through the expense and circuity of a court of equity, and therefore it is sometimes had by consent, even in the courts of law. How far such a mode of compulsive examination is agreeable to the rights of mankind, and ought to be introduced in any country, may be matter of curious discussion, but is foreign to our present inquiries. It has long been introduced and established in our courts of equity, not to mention the civil-law courts; and it seems the height of judicial absurdity that in the same cause between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster Hall and denied on the other; or that the judges of one and the same court should be bound by law to reject such a species of evidence, if attempted on a trial at bar; but, when sitting the next day as a court of equity, should be obliged to hear such examination read, and to found their decrees upon it. In short, common reason will tell us that in the same country, governed by the same laws, such a mode of inquiry should be universally admitted, or else universally rejected.

2. A second defect is of a nature somewhat similar to the first: the want of a compulsive power for the production of books and papers belonging to the parties. In the hands of third persons

20 All the four defects here pointed out by Blackstone have been supplied by statute or usage in the American states almost without exception.—HAMMOND.

they can generally be obtained by rule of court, or 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; such, for instance, as the day-book of a trader, where the transaction must be recently entered, as really understood at the time; though subsequent events may tempt him to give it a different color. And, as this evidence may be finally obtained, and produced on a trial at law, by the circuitous course of filing a bill in equity, the want of an original power for the same purposes in the courts of law is liable to the same observations as were made on the preceding article.

[383] 3. Another want is that of powers to examine witnesses abroad, and to receive their depositions in writing, where the witnesses reside, and especially when the cause of action arises in a foreign country. To which may be added the power of examining witnesses that are aged, or going abroad, upon interrogatories *de bene esse* (to be accepted for the present subject to future circumstances); to be read in evidence if the trial should be deferred till after their death or departure, but otherwise to be totally suppressed. Both these are now very frequently effected by mutual consent, if the parties are open and candid; and they may also be done indirectly at any time, through the channel of a court of equity, but such a practice has never yet been directly adopted[y] as the rule of a court of law. Yet by statute 13 George III, c. 63 (East India Co., 1772), where the cause of action arises in India, and a suit is brought thereupon in any of the king's courts at Westminster, the court is empowered to issue a commission to examine witnesses upon the spot, and a mode is marked out for transmitting the depositions to England.

4. The administration of justice should not only be chaste, but (like Cæsar's wife) should not even be suspected. A jury coming from the neighborhood is in some respects a great advantage; but is often liable to strong objections, especially in small jurisdictions, as in cities which are counties of themselves, and such where assizes are but seldom holden; or where the question in dispute has an extensive local tendency; where a cry has been raised and the

y See Pag. 75.

passions of the multitude been inflamed; or where one of the parties is popular, and the other a stranger or obnoxious. It is true that if a whole county is interested in the question to be tried, the trial by the rule of law[x] must be in some adjoining county; but, as there may be a strict interest so minute as not to occasion any bias, so there may be the strongest bias, where the whole county cannot be said to have any pecuniary interest. In all these cases, to summon a jury, laboring under local prejudices, is laying a snare for their consciences, and, though [384] they should have virtue and vigor of mind sufficient to keep them upright, the parties will grow suspicious, and resort under various pretenses to another mode of trial. The courts of law will therefore in *transitory* actions very often change the *venue* or county wherein the cause is to be tried,[a] but in *local* actions, though they sometimes do it indirectly and by mutual consent, yet to effect it directly and absolutely, the parties are driven to the delay and expense of a court of equity; where, upon making out a proper case, it is done upon the ground of being necessary to a fair, impartial and satisfactory trial.[b]

The locality of trial required by the common law seems a consequence of the ancient locality of jurisdiction. All over the world actions transitory follow the person of the defendant; territorial suits must be discussed in the territorial tribunal. I may sue a Frenchman here for a debt contracted abroad; but lands lying in France must be sued for there, and English lands must be sued for in the kingdom of England. Formerly, they were usually demanded only in the court-baron of the manor, where the steward could summon no jurors but such as were the tenants of the lord. When the cause was removed to the hundred court (as seems to have been the course in the Saxon times[c]) the lord of the hundred had a further power, to convoke the inhabitants of different vills to form a jury; observing, probably, always to intermix among

x Stra. 177.

a See pag. 294.

b This, among a number of other instances, was the case of the issues directed by the house of lords in the cause between the Duke of Devonshire and the miners of the county of Derby, A. D. 1762.

c LL. Edw. Conf. v. 32. Wilk. 203.

them a stated number of tenants of that manor wherein the dispute arose. When afterwards it came to the county court, the great tribunal of Saxon justice, the sheriff had wider authority, and could impanel a jury from the men of his county at large, but was obliged (as a mark of the original locality of the cause) to return a competent number of hundredors; omitting the inferior distinction, if indeed it ever existed. And when at length, after the Conquest, the king's justiciars drew the cognizance of the cause from the [385] county court, though they could have summoned a jury from any part of the kingdom, yet they chose to take the cause as they found it, with all its local appendages; triable by a stated number of hundredors, mixed with other freeholders of the county. The restriction as to hundredors hath gradually worn away, and at length entirely vanished;[d] that of counties still remains, for many beneficial purposes: but, as the king's courts have a jurisdiction coextensive with the kingdom, there surely can be no impropriety in sometimes departing from the general rule, when the great ends of justice warrant and require an exception.

I have ventured to mark these defects, that the just panegyric, which I have given on the trial by jury, might appear to be the result of sober reflection, and not of enthusiasm or prejudice. But should they, after all, continue unremedied and unsupplied, still (with all its imperfections) I trust that this mode of decision will be found the best criterion for investigating the truth of facts that was ever established in any country.

[d] See pag. 360.

§ 394. (c) Setoff.—To this head may also be referred the practice of what is called a *setoff*,[8] 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 setoff, must pay the remaining balance into court. This answers [305] very nearly to the *compensatio*, or *stoppage*, of the civil law,[x] and depends on the stat-

x Ff. 16. 2. 1.

---

8 **Application of setoff.**—A setoff was unknown to the common law, according to which mutual debts were distinct and inextinguishable except by actual payment or release. The statute of 2 George II, c. 22, mentioned by Blackstone, has been generally adopted, with modifications, in the United States. It is not a denial of the plaintiff's claim, and in order to be asserted it must be declared on with the same formality that any demand is declared on in the original writ, and the party against whom it is filed must answer in the same manner as the defendant in any cross-action. It is substantially a cross-action, and being but a creature of statute, it can be availed of only in the mode prescribed by statute. Barnstable Sav. Bank v. Snow, 128 Mass. 512; Harrisburg Trust Co. v. Shufeldt, 87 Fed. 669, 31 C. C. A. 190. Mutuality is essential to the validity of a setoff, and, in order that one demand may be set off against another, both must mutually exist between the same parties. O'Grady v. Stotts City Bank, 106 Mo. App. 366, 80 S. W. 696; La Foy v. La Foy, 43 N. J. Eq. 206, 3 Am. St. Rep. 302, 10 Atl. 266; Menaugh v. Chandler, 89 Ind. 94; Flynn v. Seale, 2 Cal. App. 665, 84 Pac. 263. Setoff takes place only in actions on contracts for the payment of money, as *assumpsit*, debt and covenant; and where the claim set off grows out of a transaction independent of the contract sued on. Avery v. Brown, 31 Conn. 398. Setoff may arise upon a judgment or award in favor of a defendant against a plaintiff, or against him and another; and cannot be pleaded except in an action on a contract, judgment or award. Clark v. Raison, 126 Ky. 486, 104 S. W. 342; Needham v. Pratt, 40 Ohio St. 186. Generally speaking, an unliquidated claim cannot be set off against one which is for a stipulated amount. Whether a claim, it has been said, is of a nature connoted by the term "setoff," and whether as to its liquidated or unliquidated character, capable of being the subject of setoff, is to be determined by applying the test, Will an action of *indebitatus assumpsit* lie thereon? If so, it is liquidated within the meaning of the word "setoff." Links v. Mariowe, 83 N. J. L. 389, 84 Atl. 1056. The right of setoff, except in equity, is a matter of local legislation, and the federal courts follow the rules established by the tribunals of the state in which they are sitting. Charnley v. Sibley, 73 Fed. 980, 20 C. C. A. 157.

§ 510. a. Suspending judgment; new trial.—Causes of *suspending* the judgment by granting a *new trial* are at present wholly *extrinsic*, arising from matter foreign to or *dehors* the record.[1] Of this sort are want of notice of trial; or any flagrant misbehavior of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehavior of the jury among themselves: also if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith;[b] or if they have given exorbitant damages;[c] or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict: for these, and other reasons of the like kind, it is the practice of the court to award a *new*, or second, *trial*. But if two juries agree in the same or a similar verdict, a third trial is seldom awarded:[d] for the law will not readily suppose that the verdict of any one subsequent jury can countervail the oaths of the two preceding ones.[2]

[b] Law of Nisi Prius. 303, 4.
[c] Comb. 357.
[d] 6 Mod. 22. Salk. 649.

---

1 "The origin of the practice of granting new trials is of extremely ancient date, and, consequently, involved in some obscurity. Blackstone gives the most connected and satisfactory account of it of any writer."—BOUVIER, 3 Law Dict. (Rawle's 3d Rev.), 2339.

Further account of the history of new trial is given by the late Professor Thayer, Prelim. Treatise on Evidence, who remarks that the common-law courts were probably stirred up to granting new trials not only by the obsolescence of attaints and the need of controlling juries which resulted from that, but by the abolition of the star-chamber, and the interference of courts of equity. The star-chamber was abolished in 1640.

For the older law of attaints, reviews and new trials in the American colonies, especially in Massachusetts, see a learned note by Mr. Justice Gray, in Quincy's Rep. 558–560, 565, 567; 6 Dane's Abr., c. 189; Angier v. Jackson (1763), Quincy (Mass.), 84; 9 Pick. (Mass.) 569–571; Miller v. Baker, 20 Pick. (Mass.) 285, 288–290; Thayer, Prelim. Treatise on Ev., 172 n.

2 **Grounds of new trial.**—A new trial is a trial anew, with as little prejudice to either party as if the cause had never been heard before. Star Bottling Co. v. Louisiana Purchase Exposition Co., 240 Mo. 634, 144 S. W. 776. The granting of a new trial is entirely within the discretion of the trial court. A new trial may be granted after judgment so long as the case is still under the control of the trial court, and if the motion was made reasonably within the

§ 511. **(1) Misconduct of jury.**—The exertion of these superintendent powers of the king's courts, in setting aside the verdict of a jury and granting a new trial on account of misbehavior in the jurors, is of a date extremely ancient. There are instances in

rule of the statute controlling or of the common law. Kingman & Co. v. Western Mfg. Co., 170 U. S. 675, 42 L. Ed. 1192, 18 Sup. Ct. Rep. 786. There are other grounds for new trial than those stated by Blackstone. An irregularity in summoning and drawing a jury which deprives the complaining party of a substantial right is ground for granting a new trial. Commonwealth v. Roby, 12 Pick. (Mass.) 496; State v. Breen, 59 Mo. 413, 417. Likewise, the disqualification of jurors, not waived, will warrant an order for a new trial. State v. Harrison, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982; Jewell v. Jewell, 84 Me. 304, 18 L. R. A. 473, 24 Atl. 858. Where there has been perjury of witnesses, conviction of such perjury is necessary before there is ground for new trial. Great Falls Mfg. Co. v. Mathes, 5 N. H. 574; Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159, 13 L. R. A. 336, 25 Pac. 970, 27 Pac. 537. A new trial is granted on account of newly discovered evidence only when the court is satisfied that the evidence has come to the applicant's knowledge after the trial, and that it is so material that it is likely to produce a different result. Wiggin v. Coffin, 3 Story, 1, Fed. Cas. No. 17,624; Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342; Chicago v. Edson, 43 Ill. App. 417. Erroneous rulings by the judge are admitted grounds for new trial. Thompson v. Thompson, 77 Ga. 692, 3 S. E. 261.

Setting aside the verdict.—"The cases cited for the plaintiff show that it is sometimes said to be the duty of the court to direct the jury to return a verdict for the defendant in cases where the whole evidence is insufficient to support a verdict for the plaintiff. The rule as declared by the supreme court of the United States is that in such a case 'the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.' Randall v. Baltimore & O. R. Co., 109 U. S. 478, 27 L. Ed. 1003, 3 Sup. Ct. Rep. 322; Schofield v. Chicago etc. Ry. Co., 114 U. S. 615, 29 L. Ed. 224, 5 Sup. Ct. Rep. 1125. In the present case the court may have thought it expedient to leave the case to the jury without such direction, in the expectation that they would find for the defendants, and thus save any further question; or for the moment it may have seemed doubtful whether there was not some slight evidence entitling the plaintiff to go to the jury. However this may have been, the plaintiff has not referred us to any case where it has been held that the omission to give such direction on motion of the defendants will debar the court from afterwards setting aside a verdict for the plaintiff, as against the evidence. No such limitation of authority is found in Pub. Stats., c. 153, § 6, providing that 'the courts may at any time before judgment in a civil action set aside the verdict, and order a new trial for any cause, for which a new trial may by law be granted.' We have no doubt of the legal authority of the court to set aside the verdict, although the defendants' motion to direct

the Year-Books of the reigns of Edward III,[e] Henry IV,[f] and Henry VII[g] of judgments being stayed (even after a trial at bar) and [388] new *venires* awarded, because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a juryman before he was sworn.[3] And upon these the chief justice, Glynn, in 1655, grounded the first precedent that is reported in our books[h] for granting a new trial upon account of *excessive damages* given by the jury; apprehending with reason that notorious partiality in the jurors was a principal species of misbehavior. A few years before a practice took rise in the common pleas[i] of granting new trials upon the mere certificate of the judge (unfortified by any report of the evidence), that the verdict had passed against his opinion; though Chief Justice Rolle

[e] 24 Edw. III. 24 (1350). Bro. Abr. t. Verdite. 17.
[f] 11 Hen. IV. 18 (1409). Bro. Abr. t. Enquest. 75.
[g] 14 Hen. VII. 1 (1498). Bro. Abr. t. Verdite. 18.
[h] Styl. 466.
[i] *Ibid.* 138.

---

the jury to find a verdict for the defendants has been denied. In this commonwealth there is no rule of law limiting the number of times that a judge may set aside a verdict as against the evidence. On the other hand, it has been recognized that in an extraordinary case the court might set aside any number of verdicts that might be returned. Coffin v. Phenix Ins. Co., 15 Pick. (Mass.) 291, 295; Denny v. Williams, 5 Allen (Mass.), 1, 5; Brooks v. Somerville, 106 Mass. 271, 275. See, also, Davies v. Hoper, 2 Jur. (N. S.) 167; State v. Horner, 86 Mo. 71; Wolbrecht v. Baumgarten, 26 Ill. 291. The fact that three successive verdicts for the plaintiff have been returned does not of itself make it the legal duty of the court to allow the last verdict to stand, if unsupported by sufficient evidence. No other reasons except those above referred to have been assigned for questioning the action of the court in setting aside the verdict for the plaintiff, and neither of these shows that the court exceeded its legal authority."—ALLEN, J., in Clark v. Jenkins, 162 Mass. 397, 38 N. E. 974.

3 In 1577–78, in Welcden v. Elkington, 2 Plowd. 516, 518, 75 Eng. Reprint, 763, we read, "And for that a certain box of preserved barberries, and sugar, called sugar-candy, and sweet roots, called liquorish, were found with the aforesaid John Mucklow, one of the jurors aforesaid, after he had departed from the bar here to advise together with the other jurors aforesaid . . . therefore the same John Mucklow is committed to the prison . . . of the Fleet, until he shall have made a fine with the lady the Queen, etc." He was fined twenty shillings.—THAYER, Prelim. Treatise on Evidence, 155 n.

(who allowed of new trials in case of misbehavior, surprise or fraud, or if the verdict was notoriously contrary to evidence[k]) refused to adopt that practice in the court of king's bench. And at that time it was clearly held for law[l] that whatever matter was of force to avoid a verdict, ought to be returned upon the *postea*, and not merely surmised to the court; lest posterity should wonder why a new *venire* was awarded, without any sufficient reason appearing upon the record. But very early in the reign of Charles the Second new trials were granted upon *affidavits;*[m] and the former strictness of the courts of law, in respect of new trials, having driven many parties into courts of equity to be relieved from oppressive verdicts, they are now more liberal in granting them; the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another.[n]

§ 512. **(2) Remedy for false verdict.**—Formerly, the principal remedy for reversal of a verdict unduly given was by writ of *attaint;* of which we shall speak in the next chapter, and which is at least as old as the institution of the grand assize by Henry II,[o] in lieu of the Norman trial by battle. Such a sanction was probably thought [389] necessary, when, instead of appealing to Providence for the decision of a dubious right, it was referred to the oath of fallible or perhaps corrupted men. Our ancestors saw that a jury might give an erroneous verdict, and, if they did, that it ought not finally to conclude the question in the first instance; but the remedy, which they provided, shows the ignorance and ferocity of the times, and the simplicity of the points then usually litigated in the courts of justice. They supposed that, the law being told to the jury by the judge, the proof of fact must be always so clear that, if they found a wrong verdict, they must be willfully and corruptly perjured. Whereas a juror may find a just verdict from unrighteous motives, which can only be known to the

k 1 Sid. 235. Styl. Pract. Reg. 310, 311. edit. 1657.

l Cro. Eliz. 616. Palm. 325. 1 Brownl. 207.

m 1 Sid. 235. 2 Lev. 140.

n 4 Burr. 395.

o *Ipsi regali institutioni eleganter inserta* (Dexterously inserted in that royal institution). (Glanv. l. 2. c. 19.)

great searcher of hearts; and he may, on the contrary, find a verdict very manifestly wrong, without any bad motive at all; from inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes. But such a remedy as this laid the injured party under an insuperable hardship, by making a conviction of the jurors for perjury the condition of his redress.

The judges saw this, and therefore very early, even upon writs of assize, they devised a great variety of distinctions, by which an attaint might be avoided, and the verdict set to rights in a more temperate and dispassionate method.[p] Thus, if excessive damages were given, they were moderated by the discretion of the justices.[q] And, if either in that or in any other instance, justice was not completely done, through the error of either the judge or the recognitors, it was remedied by *certificate of assize*, which was neither more nor less than a second trial of the same cause by the same jury.[r] And, in mixed or personal actions, as trespass and the like (wherein no attaint originally lay), if the jury gave a wrong verdict, the judges did not think themselves warranted thereby to pronounce an iniquitous judgment; but amended it, if possible, by subsequent inquiries of their own, and, if that [390] could not be, they referred it to another examination.[s] When afterwards attaints, by several statutes, were more universally extended, the judges frequently, even for the misbehavior of jurymen, instead of prosecuting the writ of attaint, awarded a second trial, and subsequent resolutions, for more than a century past, have so amplified the benefit of this remedy, that the attaint is now as obsolete as the trial by battle which it succeeded: and we shall probably see

p Bracton. l. 4. tr. 5. c. 4.

q *Ibid.* tr. 1. c. 19. § 8.

r *Ibid.* tr. 5. c. 6. § 2. F. N. B. 181. 2 Inst. 415.

s *Si juratores erraverint, et justiciarii secundum eorum dictum judicium pronuntiaverint, falsam faciunt pronuntiationem; et ideo sequi non debent eorum dictum, sed illud emendare tenentur per diligentem examinationem. Si autem dijudicare nesciant recurrendum erit ad majus judicium* (If the jury shall have erred, and the justices have pronounced judgment according to their verdict, they pronounce a false judgment; and therefore ought not to follow up their verdict, but are bound to amend it by a diligent examination—but if they cannot decide it, it shall be referred to a higher tribunal). Bract. l. 4. tr. 5. c. 4. § 2.

the revival of the one as soon as the revival of the other. And here I cannot but admire [t] the wisdom of suffering time to bring to perfection new remedies, more easy and beneficial to the subject, which, by degrees, from the experience and approbation of the people, supersede the necessity or desire of using or continuing the old.

§ 513. **(3) Occasion for new trial.**—If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of the imperial law, upon depositions in writing, which might be reviewed in a course of appeal. Causes of great importance, titles to land, and large questions of commercial property come often to be tried by a jury, merely upon the general issue: where the facts are complicated and intricate, the evidence of great length and variety, and sometimes contradicting each other; and where the nature of the dispute very frequently introduces nice questions and subtilties of law. Either party may be surprised by a piece of evidence, which (had he known of its production) he could have explained or answered; or may be puzzled by a legal doubt, which a little recollection would have solved. In the hurry of a trial the ablest judge may mistake the law, and misdirect the jury: he may not be able so to state and range the evidence as to lay it clearly before them, nor to take off the artful impressions which have been made on their minds by learned and experienced advocates. The jury are to give their [391] opinion *instanter;* that is, before they separate, eat or drink. And under these circumstances the most intelligent and best intentioned men may bring in a verdict which they themselves upon cool deliberation would wish to reverse.

Next to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive: he would arraign the determination as manifestly unjust, and abhor a tribunal which he imagined had done him an injury without a possibility of redress.

[t] See pag. 268.

Granting a new trial, under proper regulations, cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision which is the glory of the English law. A new trial is a rehearing 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 rule of court for awarding such second trial on the other: and the subsequent verdict, though contrary to the first, imports no title of 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 laid before the court, to satisfy them 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 *nisi prius*, it is disclosed to the court by *affidavit:* if it arises from what passed at the trial, it is taken from the judge's information, who usually makes a special and minute report of the evidence.[4] Counsel are heard on both sides to impeach [392] or establish the verdict, and the court give their reasons at large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colors 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 and truth of the case. A new trial is not granted where the value is too inconsiderable to merit a second examination. It 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

4 In this country the place of such a report is usually taken by a bill of exceptions, embodying all the evidence and rulings thereon, or so much as is necessary to show the grounds of exception to an appellate court.—HAMMOND.

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 very strongly to preponderate.

In granting such further trial (which is matter of sound discretion) the court has also an opportunity, which it seldom fails to improve, of supplying those defects in this mode of trial which were stated in the preceding chapter; by laying the party applying under all such equitable terms, as his antagonist shall desire and mutually offer to comply with: such as the discovery of some facts upon oath; the admission of others, not intended to be litigated; the production of deeds, books and papers; the examination of witnesses, infirm or going beyond sea; and the like. And the delay and expense of this proceeding are so small and trifling, that it seldom can be moved for to gain time or to gratify humor. The motion must be made within the first four days of the next succeeding term, within which term it is usually heard and decided. And it is worthy observation how infinitely superior to all others the trial by jury approves itself, even in the very mode of its revision. In every other country of Europe, and in those of our own tribunals which conform themselves to the [393] process of the civil law, the parties are at liberty, whenever they please, to appeal from day to day and from court to court upon questions merely of fact; which is a perpetual source of obstinate chicane, delay and expensive litigation.[u] With us no new trial is allowed, unless there be a manifest mistake, and the subject matter be worthy of interposition. The party who thinks himself aggrieved may still, if he pleases, have recourse to his writ of attaint after judgment; in the course of the trial he may demur to the evidence, or tender a bill of exceptions. And, if the first is totally laid aside, and the other two very seldom put in practice, it is because long

[u] Not many years ago an appeal was brought to the house of lords from the court of session in Scotland, in a cause between Napier and Macfarlane. It was instituted in March, 1745; and (after many interlocutory orders and sentences below, appealed from and reheard as far as the course of proceedings would admit) was finally determined in April, 1749; the question being only on the property in an ox, adjudged to be of the value of three guineas. No pique or spirit could have made such a cause, in the court of king's bench or common pleas, have lasted a tenth of the time, or have cost a twentieth part of the expense.

experience has shown that a motion for a second trial is the shortest, cheapest and most effectual cure for all imperfections in the verdict, whether they arise from the mistakes of the parties themselves, or their counsel or attorneys, or even of the judge or jury.

§ 514. b. Arrest of judgment.—Arrests of judgment arise from *intrinsic* causes, appearing upon the face of the record.[5]

§ 515. (1) For variance.—Of this kind are, first, where the declaration varies totally from the original writ; as where the writ is in debt or detinue, and the plaintiff declares in an action on the case for an *assumpsit:* for, the original writ out of chancery being the foundation and warrant of the whole proceedings in the common pleas, if the declaration does not pursue the nature of the writ, the court's authority totally fails.

§ 516. (2) Where verdict is without issue.—Also, secondly, where the verdict materially differs from the pleadings and issue thereon; as if, in an action for words, it is laid in the declaration that the defendant said, "the plaintiff *is* a bankrupt," and the verdict finds specially that he said, "the plaintiff *will* be a bankrupt."

§ 517. (3) For insufficient pleading.—Or, thirdly, if the case laid in the declaration is not sufficient in point of law to found an action upon. And this is an invariable [394] rule with regard to arrests of judgment upon matter of law, "that whatever is alleged in arrest of judgment must be such matter, as would upon demurrer have been sufficient to overturn the action or plea." As if, on an action for slander in calling the plaintiff a Jew, the

5 "'Arrest of judgment' is defined to be 'the act of staying a judgment, or refusing to render judgment, in actions at law and in criminal cases, after verdict, for some matter intrinsic, appearing on the face of the record, which would render the judgment, if given, erroneous or reversible.' 2 Ency. Pl. & Pr. 794, and authorities cited in note. 'The question raised by a motion in arrest of judgment is a question of law, arising from the face of the record; judgments being arrested only for intrinsic causes, i. e., such only as are apparent on the record.' Gould, Pl. 460; Stephen, Pl. 185. These principles are elementary. Gilstrap v. Felts, 50 Mo. 428; Cox v. Moss, 53 Mo. 432; State v. Bonner, 5 Mo. App. 13; White v. Caldwell, 17 Mo. App. 691." Browning v. Powers, 142 Mo. 322, 44 S. W. 224.

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, still the defendant may move in arrest of judgment that to call a man a Jew is not actionable, and, if the court be of that opinion, the judgment shall be arrested and never entered for the plaintiff. But the rule will not hold *e converso* "that everything that may be alleged as cause of demurrer will be good in arrest of judgment": for if a declaration or plea omits to state some particular circumstance, without proving of which, at the trial, it is impossible to support the action or defense, this omission shall be aided by a verdict. As if, in an action of trespass, the declaration doth not allege that the trespass was committed on any certain day;[w] or if the defendant justifies, by prescribing for a right of common for his cattle, and does not plead that his cattle were *levant* and *couchant* on the land;[x] though either of these defects might be good cause to demur to the declaration or plea, yet if the adverse party omits to take advantage of such omission in due time, but takes issue, and has a verdict against him, these exceptions cannot after verdict be moved in arrest of judgment. For the verdict ascertains those facts, which before from the inaccuracy of the pleadings might be dubious; since the law will not suppose that a jury under the inspection of a judge would find a verdict for the plaintiff or defendant, unless he had proved those circumstances, without which his general allegation is defective.[y] Exceptions, therefore, that are moved in arrest of judgment, must be much more material and glaring than such as will maintain a demurrer; or, in other words, many inaccuracies and omissions which would be fatal if early observed, are cured by a subsequent verdict, and not suffered, in the last stage of a cause, to unravel the whole proceedings. [395] But if the thing omitted be essential to the action or defense, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself,[z] or if to an action of debt the defendant pleads *not guilty* instead of *nil debet* (he owes nothing),[a] these cannot be cured by a verdict for the plaintiff in the first case, or for the defendant in the second.

[w] Carth. 389.
[x] Cro. Jac. 44.
[y] 1 Mod. 292.
[z] Salk. 365.
[a] Cro. Eliz. 778.

§ 518. (a) Immaterial issue.—If, by the misconduct or inadvertence of the pleaders, the issue be joined on a fact totally immaterial, or insufficient to determine the right, so that the court upon the finding cannot know for whom judgment ought to be given; as if, [on] an action on the case in *assumpsit* against an executor, he pleads that he himself (instead of the testator) made no such promise,[b] or if, in an action of debt on bond conditioned to pay money *on* or *before* a certain day, the defendant pleads payment *on* the day[c] (which issue, if found for the plaintiff, would be inconclusive, as the money might have been paid *before*), in these cases the court will, after verdict, award a *repleader, quod partes replacitent* (that the parties may replead), unless it appears from the whole record that nothing material can possibly be pleaded in any shape whatsoever, and then a repleader would be fruitless.[d] And, whenever a repleader is granted, the pleadings must begin *de novo* at that stage of them, whether it be the plea, replication or rejoinder, *etc.*, wherein there appears to have been the first defect, or deviation from the regular course.[e]

§ 519. c. Kinds of judgments.—If judgment is not by some of these means arrested within the first four days of the next term after the trial, it is then to be entered on the roll or record. Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record, and are of four sorts: First, 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 a *verdict;* thirdly, where [396] 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 abandons or withdraws his prosecution; which is the case in judgments upon a *nonsuit* or *retraxit.*

§ 520. d. Nature of the judgment.—The judgment, though pronounced or awarded by the judges, is not their determination

[b] 2 Ventr. 196.
[c] Stra. 994.
[d] 4 Burr. 301, 302.
[e] Raym. 458. Salk. 579.

or sentence, 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 stand thus: Against him, who hath rode over my corn, I may recover damages by law, but A hath 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 suit or action is the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study to point out, and therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but, "it is considered," *consideratum est per curiam* (it is considered by the court), that the plaintiff do recover his damages, his debt, his possession, and the like, which implies that the judgment is none of their own; but the act of law, pronounced and declared by the court, after due deliberation and inquiry.[6]

6 **Judgments formed by the act of the law, not of the judge.**—How are we to reconcile this doctrine with the obvious truth that the law is of historical growth, and is even now constantly undergoing changes, partly, indeed, by legislation, but chiefly through the judgments so pronounced?

Because the law as a whole, never having been reduced to an authoritative text, exists only in the popular consciousness, that is, in the knowledge of those who have made a study of it, and especially "in the breasts of the judges" (text, page *380), who are empowered by the constitution to speak with authority upon it. This is not peculiar to the law, but common to it with all sciences; with chemistry, with astronomy, with mathematics even. To deny the binding force of the law in the decisions of an honest judge, because he can state it only as he knows it, is as absurd as to assert that the author of an arithmetic constructs a new rule when he states the old-fashioned "rule of three" in a modern form; or that the chemist creates the effects that he produces by a new combination. So, too, of the effect of an error in all cases: the decision of a judge who mistakes the law is no more law than the misstatement of the chemist or mathematician. (See Book I, Introd., p. *69.) That the changes of the law are so much more rapid and noticeable than those of the other sciences mentioned is chiefly due to two causes: first, to the vast

§ 521. e. Interlocutory judgments.—All these species of judgments are either *interlocutory* or *final. Interlocutory* judgments are such as are given in the middle of a cause, upon some plea, proceeding or default, which is only intermediate, and does not finally determine or complete the suit. Of this nature are all judgments for the plaintiff upon pleas in abatement of the suit or action, in [397] which it is considered by the court that the defendant do answer over, *respondeat ouster;* that is, put in a more substantial plea.[f] It is easy to observe that the judgment here given is not final, but merely interlocutory; for there are afterwards further proceedings to be had, when the defendant hath put in a better answer.

But the interlocutory judgments, most usually spoken of, are those incomplete judgments, whereby the *right* of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained, which is a matter that cannot be done without the intervention of a jury. As by the old Gothic constitution the cause was not completely finished till the *nembda* or jurors were called in "*ad executionem decretorum judicii, ad æstimationem pretii, damni, lucri, etc.* (to execute the decrees of court, to estimate the price, damage, gain, etc.)."[g] This can only happen where the plaintiff recovers; for when judgment is given for the defendant, it is always complete as well as final. And this happens, in the first place, where the defendant suffers judgment to go against him by default, or *nihil dicit;* as if he puts in no plea at all to the

[f] 2 Saund. 30.

[g] Stiernhook, de Jure Goth. l. 1. c. 4.

---

number and complexity of the facts with which it deals, and their dependence on the constantly changing circumstances of social life; and then to the manifold changes constantly going on as the effect, direct or indirect, of legislation.

It must be remembered that Blackstone is speaking here of the judgments pronounced by the courts, not of the opinions, oral or written, in which such judgments are usually announced. Except so far as these set forth and explain the judgment actually rendered, they are mere *dicta,* private opinions of no binding force. Their object usually is to show the litigants the conformity of the judgment with previous decisions, or to show why their arguments have been rejected. They may thus serve a useful purpose in condensing the result of earlier judgments. But many causes have been at work to increase their number and bulk, and to diminish their value.—HAMMOND.

plaintiff's declaration, by confession or *cognovit actionem*, where he acknowledges the plaintiff's demand to be just, or by *non sum informatus* (I am not instructed), when the defendant's attorney declares he has no instructions to say anything in answer to the plaintiff, or in defense of his client, which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete. And therefore it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit*, *cognovit actionem*, or *non sum informatus*) in an action of debt to be brought by the creditor against the debtor for the specific sum due, which judgment, when confessed, is absolutely complete and binding; provided the same (as is also required in all other judgments) be regularly *docquetted*, that is, abstracted and entered in a book, according [398] to the directions of statute 4 & 5 W. & M., c. 20 (Judgments, 1692). But, where damages are to be recovered, a jury must be called in to assess them, unless the defendant, to save charges, will confess the whole damages laid in the declaration, otherwise the entry of the judgment is, "that the plaintiff ought to recover his damages (indefinitely), but because the court know not what damages the said plaintiff hath 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, subject to nearly the same law and conditions as the trial by jury at *nisi prius*, what damages the plaintiff hath really sustained; and when their verdict is given, which must assess *some* damages, the sheriff returns the inquisition, which is entered upon the roll in manner of a *postea;* and thereupon it is considered that the plaintiff do recover the exact sum of the damages so assessed. In like manner, when a demurrer is determined for the plaintiff upon an action wherein damages are recovered, the judgment is also incomplete, without the aid of a writ of inquiry.

§ 522. f. Final judgments.—Final judgments are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. In which case if the judgment be for the plaintiff, it is also considered that the defendant be either amerced, for his willful delay of justice in not immediately obeying the king's writ by rendering the plaintiff his due,[h] or to be taken up, *capiatur*, to pay a fine to the king, in case of any forcible injury.[i] Though now by statute 5 & 6 W. & M., c. 12 (Capiatur Fine, 1694), no writ of *capias* shall issue for this fine, but the plaintiff shall pay 6*s.* 8*d.*, and be allowed it against the defendant among his other costs. And therefore in judgments in the court of common pleas they enter that the fine is remitted, and in the court of king's bench they now take no notice of any fine or *capias* at all.[k] [399] But if judgment be for the defendant, then it is considered that the plaintiff and his pledges of prosecuting be (nominally) amerced for his false suit, and that the defendant may go without a day, *eat inde sine die*, that is, without any further continuance or adjournment; the king's writ, commanding his attendance, being now fully satisfied and his innocence publicly cleared.[l]

§ 523. 3. Costs.—Thus much for judgments, to which 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* (he who loses the suit pays the costs thereof to the successful party)."[m] Though the common law did not professedly allow any, the amercement of the vanquished party being his only punishment. The first statute which gave costs, *eo nomine* (by that name), to the demandant in a real action was the statute of Gloucester, 6 Edward I, c. 1 (Recovery of Damages and Costs, 1278), as did the statute of Marlbridge, 52 Henry III, c. 6 (Wardship, 1267), to the defendant in one particular case, relative to wardship in chivalry, though in reality costs were always considered and included in the *quantum* of damages, in such actions where damages are given, and, even now, costs for the plaintiff are always entered on the roll as increase of damages by the court.[n] But, be-

h 5 Rep. 40.
i Appendix, No. II, § 4.
k Salk. 54. Carth. 390.
l Appendix, No. III, § 6.
m Cod. 3, 1, 13.
n Appendix, No. II, § 4.

cause those damages were frequently inadequate to the plaintiff's expenses, the statute of Gloucester orders costs to be also added, and further directs that the same rule shall hold place in all cases where the party is to recover damages. And therefore in such actions where no damages were then recoverable (as in *quare impedit*, in which damages were not given till the statute of Westm. II, 13 Edward I—1285) no costs are now allowed,[o] unless they have been expressly given by some subsequent statute. The statute 3 Henry VII, c. 10 (Costs in Error, 1487), was the first which allowed any costs on a writ of error. But no costs were allowed the *defendant* in any shape till the statutes 23 Henry VIII, c. 15 (Costs, 1531), 4 Jac. I, c. 3 (Costs, 1606), 8 & 9 W. III, c. 11 (Vexatious Actions, 1696), and 4 & 5 Ann., c. 16 (1705), which very equitably gave the defendant, if he prevailed, the same costs as the plaintiff would have had in case he had recovered. These costs on both sides are taxed and moderated by the prothonotary, or other proper officer of the court.

§ 524. a. Exemption from costs.—[400] The king (and any person suing to his use[p]) shall neither pay nor receive costs; for, besides that he is not included under the general words of these statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them.[7] And it seems reasonable to suppose that the queen-consort participates of the same privilege; for, in actions brought by her, she was not at the common law obliged to find pledges of prosecution, nor could be amerced in case there was judgment against her.[q] In two other cases an exemption also lies from paying costs. Executors and administrators, when suing in the right of the deceased, shall pay none,[r] for the statute 23 Henry VIII, c. 15 (1531), doth not give costs to defendants, unless where the action supposeth the contract to be made with, or the wrong to be done to, the plaintiff himself. And paupers, that is, such as will swear themselves not worth five

o 10 Rep. 116.
p Stat. 24 Hen. VIII. c. 8 (1532).
q F. N. B. 101. Co. Litt. 133.
r Cro. Jac. 229. 1 Vent. 92.

7 "So far as the dignity of the state is concerned, that is its own affair. The United States has not been above taking costs."—HOLMES, J., in Missouri v. Illinois, 202 U. S. 598, 599, 50 L. Ed. 1160, 26 Sup. Ct. Rep. 713.

pounds, are, by statute 11 Henry VII, c. 12 (Suing in *Forma Pauperis*, 1495), to have original writs and *subpœnas gratis* (free subpœnas), and counsel and attorney assigned them without fee; and are excused from paying costs, when plaintiffs, by the statute 23 Henry VIII, c. 15, but shall suffer other punishment at the discretion of the judges. And it was formerly usual to give such paupers, if nonsuited, their election either to be whipped or pay the costs;[s] though that practice is now disused.[t] It seems, however, agreed that a pauper may recover costs, though he pays none; for the counsel and clerks are bound to give their labor to *him*, but not to his antagonists.[u] To prevent, also, trifling and malicious actions, for words, for assault and battery, and for trespass, it is enacted by statutes 43 Eliz., c. 6 (Frivolous Suits, 1601), 21 Jac. I, c. 16 (Limitation, 1623), and 22 & 23 Car. II, c. 9, § 136 (Duties on Law Proceedings, 1670), that, where the jury who try any of these actions shall give less damages than 40*s*., the plaintiff shall be allowed no more costs than damages, unless the judge before whom the cause is tried shall certify under his hand on the back of the record that an actual battery (and not an assault only) was proved, or that in trespass the freehold or title of the land came chiefly in question. Also by statute 4 & 5 W. & M., [401] c. 23 (Game, 1692), and 8 & 9 W. III, c. 11 (Vexatious Actions, 1696), if the trespass were committed in hunting or sporting by an inferior tradesman, or if it appear to be willfully and maliciously committed, the plaintiff shall have full costs,[w] though his damages as assessed by the jury amount to less than 40*s*.

After *judgment* is entered, *execution* will immediately follow, unless the party condemned thinks himself unjustly aggrieved by any of these proceedings; and then he has his remedy to reverse them by several writs in the nature of appeals, which we shall consider in the succeeding chapter.

[s] 1 Sid. 261. 7 Mod. 114.
[t] Salk. 506.
[u] 1 Equ. Cas. Abr. 125.
[w] See pag. 214, 215.

CHAPTER THE TWENTY-FIFTH. [402]

OF PROCEEDINGS IN THE NATURE OF APPEALS.

§ 525. Species of appeal proceedings.—Proceedings, in the nature of *appeals* from the proceedings of the king's courts of law, are of various kinds, according to the subject matter in which they are concerned. They are principally four.

§ 526. 1. Writ of attaint.—A writ of *attaint:* which lieth to inquire whether a jury of *twelve* men gave a false verdict,[a] that so the judgment following thereupon may be reversed; and this must be brought in the lifetime of him for whom the verdict was given, and of two at least of the jurors who gave it.[1] This lay, at the common law, only upon writs of *assize,* and seems to have been coeval with that institution by King Henry II, at the instance of his Chief Justice, Glanvill, being probably meant as a check upon the vast power then reposed in the recognitors of assize, of finding a verdict according to their own personal knowledge, without the examination of witnesses. And even here it extended no further than to such instances where the issue was joined upon the very point of assize (the heirship, disseisin, etc.), and not on any collateral matter; as villeinage, bastardy, or any other disputed fact. In these cases the *assize* was said to be turned into an *inquest* or *jury* (*assisa vertitur in juratam*), or that the assize should be taken in *modum juratæ et non in modum assisæ;* that is, that the issue should be tried by a common jury or inquest, and not by recognitors of assize;[b] and then I apprehend that no attaint lay against the inquest or jury that determined such collateral issue.[c]

[a] Finch. L. 484.

[b] Bract. l. 4. tr. 1. c. 34. § 2, 3, 4. tr. 3. c. 17. tr. 5. c. 4. § 1, 2. Flet. l. 5. c. 22. § 8. Co. Entr. 61. b. Booth. 213.

[c] Bract. 4. l. 34. 2. Flet. *Ibid.*

---

[1] For the history of the writ of attaint, see Thayer, Prelim. Treatise on Evidence, and Holdsworth, 1 Hist. Eng. Law. Originally, it was limited to the possessory assizes; in 1360 it was allowed in all classes of cases; in 1565 it was said to be seldom in use; in 1665, Hyde, C. J., declared it to be fruitless; in 1757, Lord Mansfield said that it was "a mere sound"; in 1825 it was abolished.

Neither do I find any mention made by our ancient writers of such a process obtaining after the trial by inquest or jury, in the old Norman or feudal actions [403] prosecuted by writ of *entry*. Nor, indeed, did any attaint lie in *trespass, debt* or other action personal by the old common law, because those were always determined by common inquests or juries.[d] At length the statute of Westm. I, 3 Edward I, c. 38 (Attaints in Real Actions, 1275), allowed an attaint to be sued upon *inquests* as well as *assizes*, which were taken upon any plea of *land* or of *freehold*. But this was at the king's discretion, and is so understood by the author of Flcta,[e] a writer contemporary with the statute; though Sir Edward Coke[f] seems to hold a different opinion. Other subsequent statutes[g] introduced the same remedy in all pleas of *trespass*, and the statute 34 Edward III, c. 7 (Attaint, 1360), extended it to *all* pleas whatsoever, personal as well as real, except only the writ of *right*, in such cases where the mise or issue is joined on the *mere right*, and not on any *collateral* question. For, though the attaint seems to have been generally allowed in the reign of Henry the Second,[h] at the first introduction of the grand assize (which at that time might consist of only *twelve* recognitors), yet subsequent authorities have holden that no attaint lies on a false verdict given upon the mere right, either at common law or by statute; because that is determined by the grand assize, appealed to by the party himself, and now consisting of *sixteen* jurors.[i]

§ 527. a. Trial and punishment in attaint.—The jury who are to try this false verdict must be twenty-four, and are called the grand jury; for the law wills not that the oath of one jury of twelve men should be attainted or set aside by an equal number, nor by less, indeed, than double the former.[k] And he that brings

[d] Yearb. 28 Edw. III. 15 (The Staple, 1354). 17 Ass. pl. 15. Flet. 5. 22. 16.

[e] L. 5. c. 22. § 8 & 16.

[f] 2 Inst. 130. 237.

[g] Stat. 1 Edw. III. st. 1. c. 6 (1326). 5 Edw. III. c. 7 (Attaints, 1331). 28 Edw. III. c. 8 (Attaint, 1354).

[h] See pag. 389.

[i] Bract. 290. Flet. 5. 22. 7. Britt. 243. b. 12 Hen. VI. 6. Bro. Abr. t. Atteint. 42. 1 Roll. Abr. 280.

[k] Bracton. l. 4. tr. 5. c. 4. § 1. Flet. l. 5. c. 22, § 7.

the attaint can give no other evidence to the grand jury than what was originally given to the petit. For as their verdict is now trying, and the question is whether or no they did right upon the evidence that appeared to them, the law adjudged it the highest absurdity to produce any subsequent proof upon such trial, and to [404] condemn the prior jurisdiction for not believing evidence which they never knew. But those against whom it is brought are allowed, in affirmance of the first verdict, to produce new matter;[1] because the petit jury may have formed their verdict upon evidence of their own knowledge, which never appeared in court. If the grand jury found the verdict a false one, the judgment by the common law was, that the jurors should lose their *liberam legem* (free law) and become forever infamous; should forfeit their goods and the profits of their lands; should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their meadows plowed; and that the plaintiff should be restored to all that he lost by reason of the unjust verdict. But as the severity of this punishment had its usual effect in preventing the law from being executed, therefore by the statute 11 Henry VII, c. 24 (Attaints, 1495), revived by 23 Henry VIII, c. 3 (Attaints, 1531), and made perpetual by 13 Elizabeth, c. 25 (Continuation of Acts, 1571), an attaint is allowed to be brought after the death of the party, and a more moderate punishment was inflicted upon attainted jurors; *viz.*, perpetual infamy, and, if the cause of action were above 40*l.* value, a forfeiture of 20*l.* apiece by the jurors; or, if under 40*l.*, then 5*l.* apiece; to be divided between the king and the party injured. So that a man may now bring an attaint either upon the statute or at common law, at his election,[m] and in both of them may reverse the former judgment. But the practice of setting aside verdicts upon motion and granting *new trials* has so superseded the use of both sorts of attaints, that I have not observed any instance of an attaint in our books much later than the sixteenth century.[n 2] By the old Gothic constitution, indeed, no cer-

[1] Finch. L. 486.

[m] 3 Inst. 164.

[n] Cro. Eliz. 309. Cro. Jac. 90.

2 "The writ of attaint," said Lord Mansfield in 1757 (Bright v. Eynon, 1 Burr. 393, 97 Eng. Reprint, 366), "is now a mere sound in every case." In

tificate of a judge was allowed, in matters of evidence, to countervail the oath of the jury; but their verdict, however erroneous, was absolutely final and conclusive. Yet there was a proceeding from whence our attaint may be derived. If, upon a lawful trial before a superior tribunal [405] they were found to have given a false verdict, they were fined, and rendered infamous for the future.[o]

§ 528. **2. Writ of deceit.**—The writ of *deceit*, or action on the case in nature of it, may be brought in the court of common pleas, to reverse a judgment there had by fraud or collusion in a real action, whereby lands and tenements have been recovered to the prejudice of him that hath right. But of this enough hath been observed in a former chapter.[p]

§ 529. **3. Audita querela.**—An *audita querela* is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment; as if the plaintiff hath given him a general release, or if the defendant hath paid the debt to the plaintiff, without entering satisfaction on the record.[3] In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it (either at the beginning of the suit or *puis darrein continuance* (since the last continuance), which, as was shown in a former chapter,[q] must always be before judg-

o "*Si tamen evidenti argumento falsum jurasse convincantur (id quod superius judicium cognoscere debet) mulctantur in bonis, de cætero perjuri et intestabiles.*" Stiernhook de Jure Goth. l. 1. c. 4.

p See pag. 166.

q See pag. 310.

1825 it was at last enacted that in all cases attaints should "henceforth cease, become void and be utterly abolished."

3 In some of the American states *audita querela* is of frequent use as a remedy recognized by statute. Hopkins v. Hayward, 34 Vt. 474; McLean v. Bindley, 114 Pa. 559, 8 Atl. 1; Fischer v. Johnson, 74 Mo. App. 64; Radclyffe v. Barton, 161 Mass. 327, 37 N. E. 373. In other states, the modern practice is to grant the same relief which might be obtained by *audita querela*. Baker v. Judges, 4 Johns. (N. Y.) 191; Witherow v. Keller, 11 Serg. & R. (Pa.) 271, 274; Longworth v. Screven, 2 Hill (S. C.), 298, 27 Am. Dec. 381; Dunlap v. Clements, 18 Ala. 778.

ment), an *audita querela* lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the court, stating that the complaint of the defendant hath been heard, *audita querela defendentis*, and then setting out the matter of the complaint, it at length enjoins the court to call the parties before them, and, having heard their allegations and proofs, to cause justice to be done between them.[r] It also lies for bail, when judgment is obtained against them by *scire facias* to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed; for here the bail, after judgment had against them, have no opportunity to *plead* this special matter, and therefore they shall have redress by *audita querela;*[s] which is a writ of a most remedial nature, and seems to have been invented, lest in any case there should [406] be an oppressive defect of justice, where a party has a good defense, but by the ordinary forms of law had no opportunity to make it. But the indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression,[ss] has almost rendered useless the writ of *audita querela*, and driven it quite out of practice.

§ 530. **4. Writ of error.**—But, fourthly, the principal method of redress for erroneous judgments in the king's courts of record is by *writ of error* to some superior court of appeal.[4]

A writ of error lies for some supposed mistake in the proceedings of a court of record; for, to amend errors in a base court, not of record, a writ of *false judgment* lies.[u] The writ of error only

r Finch. L. 488. F. N. B. 102.
s 1 Roll. Abr. 308.
ss Lord Raym. 439.
u Finch. L. 484.

4 **Writ of error.**—After final judgment is signed, the unsuccessful party may bring a writ of error; and this, if obtained and allowed, and if notice of the allowance be served before execution, suspends (generally speaking) the latter proceeding, till the former is determined. A writ of error is sued out of chancery, directed to the judges of the court in which judgment was given, and commanding them, in some cases, themselves to examine the record; in others, to send it to another court of appellate jurisdiction, to be examined, in order that some alleged error in the proceedings may be corrected. The first form of writ—called a writ of error *coram nobis* [or *vobis*]—is, where

lies upon matter of *law* arising upon the face of the proceedings; so that no evidence is required to substantiate or support it; and there is no method of reversing an error in the determination of

the alleged error consists of matter of fact; the second—called a writ of error generally—where it consists of law.

When a writ of error is obtained, the whole proceedings to final judgment inclusive are then always actually entered (if this has not before been done) on record; and the object of the writ of error is to reverse the judgment, for some error of fact or law that is supposed to exist in the proceedings as so recorded. It will be proper here to explain in what such error may consist.

Where an issue in fact has been decided, there is (as formerly observed) no appeal in the English law from its decision except in the way of motion for new trial; and its being wrongly decided is not error, in that technical sense to which a writ of error refers. So, if a matter of fact should exist, which was not brought into issue, but which, if brought into issue, would have led to a different judgment, the existence of such fact does not after judgment amount to error in the proceedings. For example, if the defendant has a release, but does not plead it in bar, its existence cannot, after judgment, on the ground of error or otherwise, in any manner be brought forward. But there are certain facts which affect the validity and regularity of the legal proceeding itself; such as the defendant having, while under age, appeared in the suit by attorney, and not by guardian; or, the plaintiff or defendant having been a married woman when the suit was commenced. Such facts as these, however late discovered and alleged, are errors in fact, and sufficient to reverse the judgment upon writ of error. To such cases, the writ of error *coram nobis* applies; "because the error in fact is not the error of the judges, and reversing it is not reversing their own judgment." [Hadley v. Bernero, 103 Mo. App. 549, 78 S. W. 64; Fregate v. State, 85 Miss. 94, 107 Am. St. Rep. 268, 3 Ann. Cas. 326, 37 South. 554; United States v. One Trunk Containing Fourteen Pieces of Embroidery, 155 Fed. 651.]

But the most frequent case of error, is when, upon the face of the record, the judges appear to have committed a mistake in the law. This may be, by having wrongly decided an issue in law brought before them by demurrer; but it may also happen in other ways. As formerly stated, the judgment will, in general, follow success in the issue. It is, however, a principle necessary to be understood, in order to have a right apprehension of the nature of writs of error, that the judges are, in contemplation of law, bound, before in any case they give judgment, to examine the whole record; and then to adjudge either for the plaintiff or defendant, according to the legal right, as it may on the whole appear—notwithstanding, or without regard to, the issue in law, or fact, that may have been raised and decided between the parties; and this, because the pleader may from misapprehension have passed by a material question of law, without taking issue upon it. Therefore, whenever, upon examination of the whole record, right appears on the whole, not to have been done, and judgment appears to have been given, for one of the parties, when it

facts, but by an attaint, or a new trial, to correct the mistakes of the former verdict.[5]

§ 531. a. Amendment of judgments.—Formerly, the suitors were much perplexed by writs of error brought upon very slight and trivial grounds, as misspellings and other mistakes of the clerks, all which might be amended at the common law, while all the proceedings were in *paper;*[w] for they were then considered as

[w] 4 Burr. 1099.

---

should have been given for the other, this will be error in law. And it will be equally error, whether the question was raised on demurrer—or the issue was an issue in fact—or there was no issue; judgment having been taken by default, confession, etc. In all these cases, indeed, except the first, the judges have really committed no error; for it may be collected, from preceding explanations, that no record, or even a copy of the proceedings, is actually brought before them, except on demurrer; but, with respect to a writ of error, the effect is the same as if the proceedings had all actually taken place and been recorded in open court, according to the practice of ancient times. So, on the same principle, there will be error in law, if judgment has been entered in a wrong form inappropriate to the case; although, as we have seen, the judges have in practice nothing to do with the entry on the roll. But, on the other hand, nothing will be error in law that does not appear on the face of the record; for matters not so appearing are not supposed to have entered into the consideration of the judges. Upon error in law, the remedy is not by writ of error *coram nobis* (for that would be merely to make the same judges reconsider their own judgment), but by a writ of error, requiring the record to be sent into the other court of appellate jurisdiction, that the error may be there corrected—and called a writ of error generally.—STEPHEN, Pleading, 117.

A writ of error is the general method of bringing cases to a higher court; an appeal is the exception. Cariño v. Insular Government, 212 U. S. 449, 456, 53 L. Ed. 594, 29 Sup. Ct. Rep. 334.

[5] **Writs coram nobis and coram vobis.**—Besides the writ of error for mistakes in law, there was the writ of error *coram nobis* or *coram vobis* to correct errors in fact. If the judgment erroneous in matter of fact was in the king's bench, it might be reversed by writ of error *coram nobis* (before us); if the cause was in the common pleas, the writ was called a writ of error *coram vobis* (before you). This remedy was very common in civil actions, and while rarely used in criminal cases, was regarded as entirely appropriate there. In the notes to Jaques v. Cesar, 2 Saund. 100, the early English cases are cited, showing the scope, character and effect of the writ. It is recognized in many of the American states as part of their law. See the thorough discussions in Saunders v. State, 85 Ind. 318, 44 Am. Rep. 29, and Ex parte Martinez (Tex. Cr.), 145 S. W. 959, 1002 ff.

only in *fieri*, and therefore subject to the control of the courts. But, when once the record was made up, it was formerly held that by the common law no amendment could be permitted, unless within the very term in which the judicial act so recorded was done: for during the term the record is in the breast of the court, but afterwards it admitted of no alteration.[x] But now the courts are become more liberal, and, where justice requires it, will allow of amendments at any time while the suit is pending, notwithstanding the record be made up and the term be past. For they at present consider the proceedings as in *fieri*, till judgment is given; and therefore that, till then, they have power to permit amendments by the common [407] law; but when the judgment is once given and enrolled, no amendment is permitted in any subsequent term.[y]

§ 532. **(1) Statutes of amendment and jeofails.**—Mistakes are also effectually helped by the statutes of amendment and *jeofails:* so called, because when a pleader perceives any slip in the form of his proceedings, and acknowledges such error (*jeo faile*), he is at liberty by those statutes to amend it; which amendment is seldom actually made, but the benefit of the acts is attained by the court's overlooking the exception.[z] These statutes are many in number, and the provisions in them too minute to be here taken notice of, otherwise than by referring to the statutes themselves;[a] by which all trifling exceptions are so thoroughly guarded against, that writs of error cannot now be maintained, but for some material mistake assigned.

§ 533. **(2) History of amendment.**—This is at present the general doctrine of amendments, and its rise and history are somewhat curious. In the early ages of our jurisprudence, when all pleadings were *ore tenus* (by word of mouth), if a slip was perceived

x Co. Litt. 260.

y Stat. 11 Hen. IV. c. 3 (1409).

z Stra. 1011.

a Stat. 14 Edw. III. c. 6 (1340). 9 Hen. V. c. 4 (1421). 4 Hen. VI. c. 3 (1425). 8 Hen. VI. c. 12 & 15 (1429). 32 Hen. VIII. c. 30 (1540). 18 Eliz. c. 14 (1575). 21 Jac. I. c. 13 (1623). 16 & 17 Car. II. c. 8 (1664) (styled in 1 Ventr. 100. an omnipotent act). 4 & 5 Ann. c. 16 (1705). 9 Ann. c. 20 (1710). 5 Geo. I. c. 13 (1718).

and objected to by the opposite party or the court, the pleader instantly acknowledged his error and rectified his plea, which gave occasion to that length of dialogue reported in the ancient Year-Books. So liberal were, then, the sentiments of the crown as well as the judges, that in the statute of Wales, made at Rothelan, 12 Edward I, the pleadings are directed to be carried on in that principality, "*sine calumpnia verborum, non observata illa dura consuetudine, qui cadit a syllaba cadit a tota causa* (without that strictness to the letter; that rigid custom not being observed, that he who fails in one syllable loses the whole cause)." The judgments were entered up immediately by the clerks and officers of the court; and, if any misentry was made, it was rectified by the minutes, or by the remembrance of the court itself.

When the treatise by Britton was published, in the name and by authority of the king (probably about the 13 Edward I (1285), because the last statutes therein referred to are those of Winchester and Westminster the Second), a check seems intended [408] to be given to the unwarrantable practices of some judges, who had made false entries on the rolls to cover their own misbehavior, and had taken upon them by amendments and rasures to falsify their own records. The king therefore declares[b] that "although we have granted to our justices to make record of pleas pleaded before them, yet we will not that their own record shall be a warranty for their own wrong, nor that they may rase their rolls, nor amend them, nor record them, contrary to their original enrollment." The whole of which, taken together, amounts to this, that a record surreptitiously or erroneously made up, to stifle or pervert the truth, should not be a sanction for error; and that a record, originally made up according to the truth of the case, should not afterwards by any private rasure or amendment be altered to any sinister purpose.

But when afterwards King Edward, on his return from his French dominions in the seventeenth year of his reign, after upwards of three years' absence, found it necessary (or convenient) to prosecute his judges for their corruption and other malpractices, the perversion of judgments[c] by erasing and altering records was

[b] Brit. præm. 2, 3.

[c] *Judĭcia perverterunt, et in aliis erraverunt.* (Matth. West. A. D. 1289.)

one of the causes assigned for the heavy punishments inflicted upon almost all the king's justices, even the most able and upright.[d] The severity of which [409] proceedings seems so to have alarmed the succeeding judges that, through a fear of being said to do wrong, they hesitated at doing that which was right. As it was so hazardous to alter a record, even from compassionate motives (as happened in Hengham's case, which in strictness was certainly indefensible), they resolved not to touch a record any more, but held that even palpable errors, when enrolled and the term at an end, were too sacred to be rectified or called in question, and, because Britton had forbidden all criminal and clandestine altera-

[d] Among the other judges, Sir Ralph Hengham, chief justice of the king's bench, is said to have been fined 7,000 marks, Sir Adam Stratton, chief baron of the exchequer, 34,000 marks, and Thomas Weyland, chief justice of the common pleas, to have been attainted of felony, and to have abjured the realm, with a forfeiture of all his estates; the whole amount of the forfeitures being upwards of 100,000 marks, or 70,000 pounds. (3 Pryn. Rec. 401, 402.) An incredible sum in those days, before paper credit was in use, and when the annual salary of a chief justice was only sixty marks. (Claus. 6 Edw. I. m. 6. Dugd. Chron. Ser. 26.) The charge against Sir Ralph Hengham (a very learned judge, to whom we are obliged for two excellent treatises of practice), was only, according to a tradition that was current in Richard the Third's time (Year-Book, M. 2 Rich. III. 10—1484), his altering out of mere compassion a fine, which was set upon a very poor man, from 13*s.* 4*d.* to 6*s.* 8*d.* for which he was fined 800 marks; a more probable sum than 7,000. It is true, the book calls the judge so punished *Ingham* and not *Hengham:* but I find no judge of the name of Ingham in Dugdale's Series; and Sir Edward Coke (4 Inst. 255.) and Sir Matthew Hale (1 P. C. 646.) understand it to have been the chief justice. And certainly his offense (whatever it was) was nothing very atrocious or disgraceful: for though removed from the king's bench at this time (together with the rest of the judges) we find him about eleven years afterwards one of the justices in eyre for the general perambulation of the forests (Rot. Perambul. Forest. in Turri Lond. 29 Edw. I. m. 8—1301); and the next year made chief justice of the common pleas (Pat. 29 Edw. I. m. 7. Dugd. Chron. Ser. 32.), in which office he continued till his death in 2 Edw. II. (1308). (Claus. 1 Edw. II. m. 19. Pat. 2. Edw. II. p. 1. m. 9. Dugd. 34. Selden Pref. to Hengham.) There is an appendix to this tradition, remembered by Justice Southcote in the reign of Queen Elizabeth (3 Inst. 72. 4 Inst. 255.); that with this fine of Chief Justice Hengham a clock house was built at Westminster, and furnished with a clock, to be heard into Westminster Hall. Upon which story I shall only remark, that the first introduction of clocks was not till an hundred years afterwards, about the end of the fourteenth century. (Encyclopedie. tit. Horloge. 6 Rym. Foed. 590.)

tions, to make a record speak a falsity, they conceived that they might not judicially and publicly amend it, to make it agreeable to truth. In Edward the Third's time, indeed, they once ventured (upon the certificate of the justice in eyre) to estreat a larger fine than had been recorded by the clerk of the court below;[e] but, instead of amending the clerk's erroneous record, they made a second enrollment of what the justice had declared *ore tenus*, and left it to be settled by posterity in which of the two rolls that absolute verity resides, which every record is said to import in itself.[f] And, in the reign of Richard the Second, there are instances[g] of their refusing to amend the most palpable errors and misentries, unless by the authority of parliament.

To this real sullenness, but affected timidity, of the judges such a narrowness of thinking was added, that every slip (even of a syllable or a letter[h]) was now held to be fatal to the pleader, and overturned his client's cause.[i] If they durst [410] not, or would not, set right mere formal mistakes at any time upon equitable terms and conditions, they at least should have held that trifling objections were at all times inadmissible; and that more solid exceptions in point of form came too late when the merits had been tried. They might, through a decent degree of tenderness, have excused themselves from amending in criminal, and especially in capital, cases. They needed not have granted an amendment where it would work an injustice to either party, or where he could not be put in as good a condition, as if his adversary had made no mistake. And, if it was feared that an amendment after trial might subject the jury to an attaint, how easy was it to make waiving the attaint the condition of allowing the amendment! And yet these were among the absurd reasons alleged for never suffering amendments at all.[k]

The precedents then set were afterwards most religiously followed,[l] to the great obstruction of justice and ruin of the suitors,

[e] 1 Hal. P. C. 647.

[f] 1 Leon. 183. Co. Litt. 117. See pag. 3.

[g] 1 Hal. P. C. 648.

[h] Stat. 14 Edw. III. c. 6 (Amendment of Records, 1340).

[i] In those days it was strictly true, what Ruggle (in his Ignoramus) has humorously applied to more modern pleadings; "*in nostra lege unum comma evertit totum placitum* (in our law one comma overturns the whole plea).

[k] Styl. 207.

[l] 8 Rep. 156. etc.

who have formerly suffered as much by these obstinate scruples and literal strictness of the courts as they could have done even by their iniquity. After verdicts and judgments upon the merits, they were frequently reversed for slips of the pen or misspellings, and justice was perpetually entangled in a net of mere technical jargon. The legislature hath therefore been forced to interpose, by no less than twelve statutes, to remedy these opprobrious niceties, and its endeavors have been of late so well seconded by judges of a more liberal cast, that this unseemly degree of strictness is almost entirely eradicated, and will probably in a few years be no more remembered than the learning of essoins and defaults, or the counterpleas of voucher are at present. But, to return to our writs of error.

§.534. **b. Bail on writ of error.**—If a writ of error be brought after verdict, he that brings the writ, or that is plaintiff in error, must in most cases find substantial pledges of prosecution or bail,[m] to prevent delays [411] by frivolous pretenses to appeal, and for securing payment of costs and damages, which are now payable by the vanquished party in all, except a few particular, instances, by virtue of the several statutes recited in the margin.[n]

§ 535. **c. Courts from which error lies.**—A writ of error lies from the inferior courts of record in England into the king's bench,[o] and not into the common pleas.[p 6] Also from the king's bench in Ireland to the king's bench in England. It likewise may be brought from the common pleas at Westminster to the king's bench, and then from the king's bench the cause is removable to the house of lords. From proceedings on the law side of the exchequer a writ of error lies into the court of exchequer chamber before the

[m] Stat. 3 Jac. I. c. 8 (Execution, 1605). 13 Car. II. c. 2 (1661). 16 & 17 Car. II. c. 8 (Arrest of Judgment, 1664).

[n] 3 Hen. VII. c. 10 (Costs in Error, 1487). 13 Car. II. c. 2 (1661). 8 & 9 W. III. c. 11 (Vexatious Actions, 1696). 4 & 5 Ann., c. 16 (1705).

[o] See chap. 4.

[p] Finch. L. 480. Dyer. 250.

---

6 The regulation of appeals, under modern acts of parliament, is explained in notes to pages *30 and *56, *ante*.

lord chancellor, lord treasurer and the judges of the court of king's bench and common pleas, and from thence it lies to the house of peers. From proceedings in the king's bench, in debt, detinue, covenant, account, case, ejectment, or trespass, originally begun therein by bill (except where the king is party), it lies to the exchequer chamber, before the justices of the common pleas, and barons of the exchequer, and from thence also to the house of lords;[q] but where the proceedings in the king's bench do not first commence therein by bill, but by original writ sued out of chancery,[r] this takes the case out of the general rule laid down by the statute;[s] so that the writ of error then lies, without any intermediate stage of appeal, directly to the house of lords, the dernier resort for the ultimate decision of every civil action. Each court of appeal, in their respective stages, may, upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment of the inferior courts; but none of them are final, save only the house of peers, to whose judicial decisions all other tribunals must therefore submit and conform their own. And thus much for reversal or affirmance of judgments, by writs in the nature of appeals.

q Stat. 27 Eliz. c. 8.

r See pag. 42.

s 1 Roll. Rep. 264. 1 Sid. 424. 1 Saund. 346. Carth. 180. Comb. 295.

[412] # CHAPTER THE TWENTY-SIXTH.

OF EXECUTION.

§ 536. Execution of judgment.—If the regular judgment of the court, after the decision of the suit, be not suspended, superseded or reversed, by one or other of the methods mentioned in the two preceding chapters, the next and last step is the *execution* of that 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 had or recovered.

§ 537. 1. Forms of execution—a. In real and mixed actions.—If the plaintiff recovers in an action real or mixed, wherein the seisin or possession of land is awarded to him, the writ of execution shall be an *habere facias seisinam* (that you give him seisin), or writ of seisin, of a freehold; or an *habere facias possessionem*[a] (that you give him possession), or writ of possession, of a chattel interest.[b] These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so 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, in the name of seisin, is sufficient execution of the writ. Upon a presentation to a benefice recovered in a *quare impedit*, or assize of *darrein presentment*, [413] the execution is by a writ *de clerico admittendo* (on admitting the clerk); directed, not to the sheriff, but to the bishop or archbishop, and requiring him to admit and institute the clerk of the plaintiff.

§ 538. b. In other actions.—In other actions, where the judgment is that something in special be done or rendered by the defendant, then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff according to the nature of the case. As, upon an assize of nuisance,

[a] Appendix, No. II, § 4.

[b] Finch. L.

or *quod permittat prosternere,* where one part of the judgment is *quod amoveatur* (that he abate the nuisance), a writ goes to the sheriff to abate it at the charge of the party, which likewise issues even in case of an indictment.[c] Upon a replevin, the writ of execution is the writ *de retorno habendo* (to have returned);[d] and, if the distress be eloigned, the defendant shall have a *capias in withernam,*[e] but, on the plaintiff's tendering the damages and submitting to a fine, the process in *withernam* shall be stayed.[f] In detinue, after judgment, the plaintiff shall have a *distringas,* to compel the defendant to deliver the goods, by repeated distresses of his chattels;[g] or else a *scire facias* against any third person in whose hands they may happen to be, to show cause why they should not be delivered; and if the defendant still continues obstinate, then (if the judgment hath been by default or on demurrer) the sheriff shall summon an inquest to ascertain the value of the goods, and the plaintiff's damages (which being either so assessed, or by the verdict in case of an issue[h]), shall be levied on the person or goods of the defendant. So that, after all, in replevin and detinue (the only actions for recovering the specific possession of personal chattels), if the wrongdoer be very perverse, he cannot be compelled to a restitution of the identical thing taken or detained; but he still has his election to deliver the goods or their value:[i] an imperfection in the law that results from the nature of personal property, which is easily concealed or conveyed out of the reach of justice, and not always amenable to the magistrate.

§ 539. c. In money actions. — [414] Executions in actions where money only is recovered, as a debt or damages (and not any specific chattel), are of five sorts: either against the body of the defendant; or against his goods and chattels; or against his goods and the *profits* of his lands; or against his goods and the *possession* of his lands; or against all three—his body, lands, and goods.

§ 540. (1) Writ of capias.—The first of these species of execution is by writ of *capias ad satisfaciendum* (that you take to sat-

c Comb. 10.
d See pag. 150.
e See pag. 148.
f 2 Leon. 174.
g 1 Roll. Abr. 737. Rast. Entr. 215.
h Bro. Abr. t. Damages. 29.
i Keilw. 64.

isfy), which distinguishes it from the former *capias, ad respondendum* (that you take to answer), which lies to compel an appearance at the beginning of a suit.[1] And, properly speaking, this cannot be sued out against any but such as were liable to be taken upon the former *capias*.[k] The intent of it is, to imprison the body of the debtor till satisfaction be made for the debt, costs and damages: it therefore doth not lie against any privileged persons, peers or members of parliament, nor against executors or administrators, nor against such other persons as could not be originally held to bail. And Sir Edward Coke also gives us a singular instance,[l] where a defendant in 14 Edward III (1340) was discharged from a *capias* because he was of so advanced an age, *quod pœnam imprisonamenti subire non potest* (that he is not able to undergo the punishment of imprisonment). If an action be brought against an husband and wife for the debt of the wife, when sole, and the plaintiff recovers judgment, the *capias* shall issue to take both the husband and wife in execution:[m] but, if the action was originally brought against herself, when sole, and pending the suit she marries, the *capias* shall be awarded against her only, and not against her husband.[n] Yet, if judgment be recovered against an husband and wife for the contract, nay, even for the personal misbehavior,[o] of the wife during her coverture, the *capias* shall issue against the husband only: which is one of the many great privileges of English wives.

[415] The writ of *capias ad satisfaciendum* is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded; and therefore, when a man is

k 3 Rep. 12.
l 1 Inst. 289.
m Moor. 704.
n Cro. Jac. 323.
o Cro. Car. 513.

---

1 While it is stated (Chitty's Archbold's Practice, 891) that the writ of *capias ad satisfaciendum* may still be issued in certain cases for practical purposes the writ has been obsolete in England since the abolition of imprisonment for debt. In the United States, it was formerly a very common form of execution, in many of the states, until within a few years; but its efficiency has been destroyed by statutes facilitating the discharge of the debtor, in some states, and by statutes prohibiting its issue, in others, except in specified cases. 1 Bouvier, Law Dict. (Rawle's 3d Rev.), 419.

once taken in execution upon this writ, no other process can be sued out against his lands or goods. Only by statute 21 Jac. I, c. 24 (Execution, 1623), if the defendant dies, while charged in execution upon this writ, the plaintiff may, after his death, sue out a new execution against his land, goods or chattels. The writ is directed to the sheriff, commanding him to take the body of the defendant and have him at Westminster on a day therein named, to make the plaintiff satisfaction for his demand. And, if he does not then make satisfaction, he must remain in custody till he does. This writ may be sued out, as may all other executory process, for costs, against a plaintiff as well as a defendant, when judgment is had against him.

§ 541. (a) Escape of prisoner in execution.—When a defendant is once in custody upon this process he is to be kept in *arcta et salva custodia* (in close and safe custody), and, if he be afterwards seen at large, it is an *escape*, and the plaintiff may have an action thereupon against the sheriff for his whole debt. For though, upon arrests and what is called *mesne* process, being such as intervenes between the commencement and end of a suit,[p] the sheriff, till the statute 8 & 9 W. III, c. 27 (Imprisonment, 1696), might have indulged the defendant as he pleased, so as he produced him in court to answer the plaintiff at the return of the writ; yet, upon a taking in execution, he could never give any indulgence, for, in that case, confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor. Escapes are either voluntary or negligent. Voluntary are such as are by the express consent of the keeper, after which he never can retake his prisoner again[q] (though the plaintiff may retake him at any time[r]), but the sheriff must answer for the debt. Negligent escapes are where the prisoner escapes without his keeper's knowledge or consent, and then upon fresh pursuit the defendant may [416] be retaken, and the sheriff shall be excused, if he has him again before any action brought against himself for the escape.[s] A rescue of a prisoner *in execution*, either going to gaol or in gaol, or a breach

p See pag. 279.
q 3 Rep. 52. 1 Sid. 330.
r Stat. 8 & 9 W. III. c. 27 (Imprisonment, 1696).
s F. N. B. 130.

of prison, will not excuse the sheriff from being guilty of and answering for the escape; for he ought to have sufficient force to keep him, since he may command the power of the county.[t] But by statute 32 George II, c. 28 (Debtor's Imprisonment, 1758), if a defendant charged in execution for any debt less than 100*l*. will surrender all his effects to his creditors (except his apparel, bedding, and tools of his trade, not amounting in the whole to the value of 10*l*.), and will make oath of his punctual compliance with the statute, the prisoner may be discharged, unless the creditor insists on detaining him; in which case he shall allow him 2*s*. 4*d*. *per* week, to be paid on the first day of every week, and on failure of regular payment the prisoner shall be discharged. Yet the creditor may at any future time have execution against the lands and goods of the defendant, though never more against his person. And, on the other hand, the creditors may, as in case of bankruptcy, compel (under pain of transportation for seven years), such debtor charged in execution for any debt under 100*l*. to make a discovery and surrender of all his effects for their benefit; whereupon he is also entitled to the like discharge of his person.

§ 542. (b) Execution against bail.—If a *capias ad satisfaciendum* is sued out, and a *non est inventus* (he is not forthcoming) is returned thereon, the plaintiff may sue out a process against the bail, if any were given: who, we may remember, stipulated in this triple alternative, that the defendant should, if condemned in the suit, satisfy the plaintiff his debt and costs; or, that he should surrender himself a prisoner; or, that they would pay it for him; as therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place.[u] In order to which a writ of *scire facias* may be sued out against the bail, commanding them to show cause why the plaintiff should not have execution against them for his [417] debt and damages; and on such writ, if they show no sufficient cause, or the defendant does not surrender himself on the day of the return, or of showing cause (for afterwards is not sufficient) the plaintiff may have judgment against the bail, and take out a writ of *capias ad satisfaciendum*, or other process of execution against them.

t Cro. Jac. 419.

u Lutw. 1269–1273.

§ 543. (2) Writ of fieri facias.—The next species of execution is against the goods and chattels of the defendant, and is called a writ of *fieri facias*[w] (that you cause to be made), from the words in it where the sheriff is commanded, *quod, fieri faciat de bonis,* that he cause to be made of the goods and chattels of the defendant the sum or debt recovered.[2] This lies as well against privileged persons, peers, etc., as other common persons; and against executors or administrators with regard to the goods of the deceased. The sheriff may not break open any outer doors[x] to execute either this o the former writ, but must enter peaceably, and may then break open any inner door, belonging to the defendant, in order to take the goods.[y 3] And he may sell the goods and chattels (even

w Appendix, No. III, § 7.
x 5 Rep. 92.
y Palm. 54.

---

2 The writ of *fieri facias* is of great antiquity. It has still under the present practice the same force and effect as before the Judicature Acts. It is the writ most commonly resorted to, as evidenced by the fact that in 1904 there were 14,384 writs of *fieri facias* issued in the high court, as against 392 other writs of execution of all kinds. Under the Judgments Act of 1838, bank notes and money seized under a *fieri facias* were placed upon the same footing as goods. The common-law principles of the writ prevail generally, with modifications, in the United States.

3 "We think the second ruling also was correct; for, while there seems to be some slight conflict in the authorities as to whether an officer who has broken into a dwelling-house, and made an attachment or taken property found therein, in pursuance of his precept, may not lawfully hold the same, although the decided weight of authority is to the contrary (see the leading cases of Ilsley v. Nichols, 12 Pick. (Mass.) 270, 22 Am. Dec. 425; People v. Hubbard, 24 Wend. (N. Y.) 369, 35 Am. Dec. 628; State v. Hooker, 17 Vt. 658, 670–673; 2 Freem. Exns. [2d ed.], § 255, and cases cited), yet it is almost universally conceded that the officer who breaks and enters a dwelling-house for the purpose of serving any civil process therein, except perhaps as hereinafter mentioned, is a trespasser; this position being based on the ground that the law will not permit the sanctity of one's dwelling-house, which from very ancient times has been regarded as his castle, to be violated in this way. In short, the law provides, and wisely, too, we think, that the means of obtaining possession of personal property in civil process must be in subordination to the common-law rights of the defendant. 'Public policy,' says Campbell, J., in Bailey v. Wright, 39 Mich. 96, 'requires, above all things, that courts and officers executing their process shall respect the lawful rights of all persons. The practical permission which overzealous officers would receive to commit wrongs with substantial impunity, if their levies should be held good without

an estate for years, which is a chattel real[z]) of the defendant 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.[a] If part only of the debt be levied on a *fieri facias*, the plaintiff may have a *capias ad satisfaciendum* for the residue.[b]

§ 544. (3) Writ of levari facias.—A third species of execution is by writ of *levari facias* (that you cause to be levied); which affects a man's goods and the *profits* of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant, whereby the sheriff may seize all his goods, and receive the rents and profits of his lands till satisfaction be made to the plaintiff.[c 4] Little use [418] is now made of this writ; the remedy by *elegit*, which takes possession of the lands themselves, being much more effectual. But of this species is a writ of execution proper only to ecclesiastics, which is given when the sheriff, upon a common writ of execution sued, returns that the defendant is a beneficed clerk, not having any lay fee. In this case a writ goes

z 8 Rep. 171.

a Stat. 8 Ann. c. 14 (Landlord and Tenant, 1709).

b 1 Roll. Abr. 904. Cro. Eliz. 344.

c Finch. L. 471.

---

regard to the manner of their enforcement, would remove every check on lawlessness. To hold that an act is lawful which may be lawfully resisted is absurd. Such misconduct should neither be justified nor winked at.' Blackstone says a sheriff may not break open any outer doors to execute either a *fieri facias* or a *capias ad satisfaciendum;* but he must enter peaceably, and may then, after a request and refusal, break open any inner doors belonging to the defendant, in order to take the goods. 3 Bl. Comm. 417. And in Snydacker v. Brosse, 51 Ill. 357, 99 Am. Dec. 551, the court say: 'It is believed that what is said by Blackstone regarding said writs is true of all civil process.' Cases to the same general effect are numerous; but in view of the fact that in Clark v. Wilson, 14 R. I. 11, this court held the same doctrine, it is unnecessary to cite them. In that case, Durfee, C. J., said: 'It is perfectly well settled that an officer ordinarily has no authority to break an outer door or window of a dwelling-house in order to enter it for the purpose of executing a civil writ or process.'"—TILLINGHAST, J., in Kelley v. Schuyler, 20 R. I. 432, 78 Am. St. Rep. 887, 44 L. R. A. 435, 39 Atl. 893, 894.

4 The writ of *levari facias* was abolished, so far as civil proceedings are concerned, by the English Bankruptcy Act, 1883.

to the bishop of the diocese, in the nature of a *levari* or *fieri facias*,[d] to levy the debt and damage *de bonis ecclesiasticis* (of ecclesiastical goods), 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 church wardens, to collect the same and pay them to the plaintiff till the full sum be raised.*

§ 545. **(4) Writ of elegit.**—The fourth species of execution is by the writ of *elegit* (he hath chosen), which is a judicial writ given by the statute Westm. II, 13 Edward I, c. 18 (Damages, 1285), either upon a judgment for a debt or damages, or upon the forfeiture of a recognizance taken in the king's court.[5] By the common law a man could only have satisfaction of goods, chattels and the present profits of lands, by the two last-mentioned writs of *fieri facias*, or *levari facias*, but not the possession of the lands themselves, which was a natural consequence of the feudal principles, which prohibited the alienation, and of course the encumbering, of the fief with the debts of the owner. And, when the

[d] Registr. Orig. 300. Judic. 22. 2 Inst. 4.

* 2 Burn. Eccl. Law. 329.

---

[5] It has been only by slow and tedious stages, under operation of the writ of *fieri facias*, that the judgment creditor and the purchaser for value without notice, with regard to the goods of the judgment debtor, has reached a fair position of strength and security. The progress of legislation affecting the right of the creditor to take in execution the lands of his debtor has been no less slow and gradual. From the Statute of Westminster II (1285) to the Statute of Frauds (1677), a period of about four hundred years, the law on the subject was governed by the provisions of the earlier of these two enactments, under which the writ was available against the goods and chattels and a moiety of the lands and tenements of the defendant. Under the statute legal interests in land only were extendible. By the Statute of Frauds, the sheriff was empowered to deliver execution of lands, tenements, rectories, tithes, rents, and hereditaments held in trust for the execution debtor. After the further lapse of nearly two hundred years, the rights of the *elegit* creditor have been settled in their present shape, which is not yet esteemed to be one suited to modern requirements. The Judgments Act of 1838 extended the remedy by *elegit* to all the lands of the debtor, instead of limiting it to one-half only, and made it available against copyholds, and against all lands over which the debtor has a disposing power. See 5 Ency. Laws of Eng. 490.

The writ is still in use, to some extent, in the United States, with varying modifications in the states that have adopted it. See 4 Kent, Comm., 431 ff.

restriction of alienation began to wear away, the consequence still continued, and no creditor could take the possession of lands, but only levy the growing profits: so that, if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute therefore granted this writ (called an *elegit*, because it is in the choice or election of the plaintiff whether he will sue out this writ or one of the former), by which the defendant's goods and chattels are not sold, but only appraised, and all of them (except oxen and beasts of the plow) are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety or [419] one-half of his freehold lands, which he had at the time of the judgment given,[f] whether held in his own name, or by any other in trust for him,[g] 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*, of whom we spoke in a former part of these Commentaries.[h] We there observed that till this statute, by the ancient common law, lands were not liable to be charged with, or seized for, debts, because by these means the connection between lord and tenant might be destroyed, fraudulent alienations might be made, and these services be transferred to be performed by a stranger; provided the tenant incurred a large debt sufficient to cover the land. And therefore, even by this statute, only one-half was, and now is, subject to execution, that out of the remainder sufficient might be left for the lord to distrain upon for his services. And, upon the same feudal principle, copyhold lands are at this day not liable to be taken in execution upon a judgment.[i] But, in case of a debt to the king, it appears by *Magna Carta*, c. 8, that it was allowed by the common law for him to take possession of the lands till the debt was paid. For he, being the grand superior and ultimate proprietor of all landed estates, might seize the lands into his own hands, if anything was owing from the vassal, and could not be said to be defrauded of his services when

[f] 2 Inst. 395.
[g] Stat. 29 Car. II. c. 3 (Statute of Frauds, 1677).
[h] Book II. c. 10.
[i] 1 Roll. Abr. 888.

the ouster of the vassal proceeded from his own command. This execution, or seizing of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken; but if execution can only be had of the goods, because there are no lands, and such goods are not sufficient to pay the debt, a *capias ad satisfaciendum* may then be had after the *elegit*, for such *elegit* is in this case no more in effect than a *fieri facias*.[j] So that body and goods may be taken in execution, or land and goods; but not body [420] and land too, upon any judgment between subject and subject in the course of the common law. But

§ 546. **(5) Writ of extent.**—Upon some prosecutions given by statute, as in the case of recognizances or debts acknowledged on statutes merchant, or statutes staple (pursuant to the statutes 13 Edward I, *de mercatoribus* (1285), and 27 Edward III, c. 9—1353), upon forfeiture of these, the body, lands and goods, may all be taken at once in execution to compel the payment of the debt. The process hereon is usually called an *extent* or *extendi facias*, because the sheriff is to cause the lands, etc., 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.[k 6]

[j] Hob. 58.

[k] F. N. B. 131.

[6] The writ of extent has been variously modified by statute 57 George III, c. 117 (1817), and several subsequent acts of parliament. "In England, an extent, or *extendi facias*, is the peculiar remedy to recover debts of record due to the crown. It differs from an ordinary execution at the suit of a subject, in that under it, the body, lands and goods of the debtor may all be taken at once, to compel payment of the debt. There are two kinds of extents there, in chief and in aid. An extent in chief issues from the court of exchequer, and directs the sheriff to take an inquisition or inquest of office on the oath of lawful men, to ascertain the lands, etc., of the debtor, and seize them into the queen's hands. . . . An extent in aid issues, not at the suit of the crown, like an extent in chief, but at the suit or instance of a crown-debtor against a person indebted to himself; and it is grounded on the Statute of Extent, 33 Henry IV, c. 39, and on the principle that the crown is entitled to the debts due to the debtor. But when a crown-debtor ceases to be liable to the crown, he ceases to be entitled to crown process. Extents in chief have priority over extents in aid, and both have priority over subject creditors. . . .

"Under our statute an extent may be likened to an extent in chief in England. It is, so to speak, *prerogative process*, affording a summary remedy for

And by statute 33 Henry VIII, c. 39 (Exchequer, 1542), all obligations made to the king shall have the same force, and of consequence the same remedy to recover them, as a statute staple; though, indeed, before this statute, the king was entitled to sue out execution against the body, lands and goods of his accountant or debtor.[l] And his debt shall, in suing out execution, be preferred to that of every other creditor, who hath not obtained judgment before the king commenced his suit.[m] The king's judgment also affects all lands, which the king's debtor hath at or after the time of contracting his debt, or which any of his officers mentioned in the statute 13 Elizabeth, c. 4 (Crown Debt, 1571), hath at or after the time of his entering on the office; so that, if such officer of the crown aliens for a valuable consideration, the land shall be liable to the king's debt, even in the hands of a *bona fide* purchaser, though the debt due to the king was contracted by the vendor many years after the alienation.[n] Whereas, judgments between subject and subject related, even at common law, no further back than the first day of the term in which they were recovered, in respect of the lands of the debtor, and did not bind his goods and chattels, but from the date of the writ of execution. And now, by the statute of frauds, 29 Car. II, c. 3, 1677), the judgment shall not bind the land in the hands of a *bona* [421] *fide* purchaser, but only from the time of actually signing the same; nor the goods in the hands of a stranger, or a purchaser,[o] but only from the actual delivery of the writ to the sheriff.

[l] 3 Rep. 12.
[m] Stat. 33 Hen. VIII. c. 29 (1542).
[n] 10 Rep. 55, 56.
[o] Skin. 257.

---

recovering public revenue from public officers who have committed a breach of public duty, and in case of state taxes for recovery from the inhabitants of the town as well. No notice is given to show cause against the state treasurer's extent. In the words of Parker, C. J., in Waldron v. Lee, 5 Pick. (Mass.) 323, 328, 'the wheels of government cannot be stopped to hear complaint.'

"While this process is in the nature of an execution, as is also a warrant for the collection of taxes, it is very unlike the process commonly called an execution, which is issued on judgments recovered in suits *inter partes*. Extent proceedings are not *inter partes*, but rather in the nature of criminal proceedings."—ROWELL, J., in Hackett v. Amsden, 56 Vt. 201, 206.

The term "extent" is also used in some of the states to denote writs which give the creditor possession of the debtor's lands for a limited period till the debt is paid. Roberts v. Whiting, 16 Mass. 186.

§ 547. 2. Time limitation on issuing execution.—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 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. But all these writs of execution must be sued out within a year and a day after the judgment is entered, otherwise the court concludes *prima facie* that the judgment is satisfied and extinct; yet, however, it will grant a writ of *scire facias* in pursuance of statute Westm. II, 13 Edward I, c. 45 (Execution, 1285), for the defendant to show cause why the judgment should not be revived and execution had against him; to which the defendant may plead such matter as he has to allege, in order to show why process of execution should not be issued, or the plaintiff may still bring an action of debt, founded on this dormant judgment, which was the only method of revival allowed by the common law.[p]

§ 548. Summary of Book III.—In this manner are the several remedies given by the English law for all sorts of injuries, either real or personal, administered by the several courts of justice and their respective officers. In the course, therefore, of the present volume we have, first, seen and considered the nature of remedies, by the mere act of the parties, or mere operation of law, without any suit in courts. We have next taken a view of remedies by suit or action in courts: and therein have contemplated, first, the nature and species of courts, instituted for the redress of injuries in general; and then have shown in what particular courts application must be made for the redress of particular injuries, or the doctrine of jurisdictions and [422] cognizance. We afterwards proceeded to consider the nature and distribution of wrongs and injuries affecting every species of personal and real rights, with the respective remedies by suit which the law of the land has afforded for every possible injury. And, lastly, we have deduced and pointed out the method and progress of obtaining such remedies in the courts of justice, proceeding from the first general

[p] Co. Litt. 290.

complaint or *original* writ, through all the stages of *process*, to compel the defendant's appearance; and of *pleading*, or formal allegation on the one side, and excuse or denial on the other; with the examination of the validity of such complaint or excuse, upon *demurrer;* or the truth of the facts alleged and denied, upon *issue* joined, and its several *trials;* to the *judgment* or sentence of the law, with respect to the nature and amount of the redress to be specially given: till, after considering the suspension of that judgment by writs in the nature of *appeals*, we arrive at its final *execution;* which puts the party in specific possession of his right by the intervention of ministerial officers, or else gives him an ample satisfaction, either by equivalent damages, or by the confinement of his body who is guilty of the injury complained of.

§ 549. Spirit of English remedial law.—This care and circumspection in the law—in providing that no man's right shall be affected by any legal proceeding without giving him previous notice, and yet that the debtor shall not by receiving such notice take occasion to escape from justice; in requiring that every complaint be accurately and precisely ascertained in writing, and be as pointedly and exactly answered; in clearly stating the question either of law or of fact; in deliberately resolving the former after full argumentative discussion, and indisputably fixing the latter by a diligent and impartial trial; in correcting such errors as may have arisen in either of those modes of decision, from accident, mistake or surprise; and in finally enforcing the judgment, when nothing can be alleged to impeach it;—this anxiety to maintain and restore to every individual the enjoyment of his civil rights, without intrenching upon those of any other individual in the nation, this parental solicitude [423] which pervades our whole legal constitution, is the genuine offspring of that spirit of equal liberty which is the singular felicity of Englishmen. At the same time it must be owned to have given an handle, in some degree, to those complaints of delay in the practice of the law which are not wholly without foundation, but are greatly exaggerated beyond the truth. There may be, it is true, in this, as in all other departments of knowledge, a few unworthy professors, who study the science of chicane and sophistry rather than of truth and justice, and who, to gratify the spleen, the dishonesty, and willfulness of their clients, may endeavor to screen the guilty, by an unwarrantable

use of those means which were intended to protect the innocent. But the frequent disappointments and the constant discountenance that they meet with in the courts of justice have confined these men (to the honor of this age be it spoken) both in number and reputation to indeed a very despicable compass.

Yet some delays there certainly are, and must unavoidably be, in the conduct of a suit, however desirous the parties and their agents may be to come to a speedy determination. These arise from the same original causes as were mentioned in examining a former complaint,[q] from liberty, property, civility, commerce and an extent of populous territory, which whenever we are willing to exchange for tyranny, poverty, barbarism, idleness and a barren desert, we may then enjoy the same dispatch of causes that is so highly extolled in some foreign countries. But common sense and a little experience will convince us that more time and circumspection are requisite in causes where the suitors have valuable and permanent rights to lose than where their property is trivial and precarious, and what the law gives them to-day may be seized by their prince to-morrow. In Turkey, says Montesquieu,[r] where little regard is shown to the lives or fortunes of the subject, all causes are quickly decided: the basha, on a summary hearing, orders which party he pleases to be bastinadoed, and then sends them about their business. But in [424] free states the trouble, expense and delays of judicial proceedings are the price that every subject pays for his liberty, and in all governments, he adds, the formalities of law increase, in proportion to the value which is set on the honor, the fortune, the liberty and life of the subject.

From these principles it might reasonably follow that the English courts should be more subject to delays than those of other nations, as they set a greater value on life, on liberty and on property. But it is our peculiar felicity to enjoy the advantage, and yet to be exempted from a proportionable share of the burden. For the course of the civil law, to which most other nations conform their practice, is much more tedious than ours; for proof of which I need only appeal to the suitors of those courts in England, where the practice of the Roman law is allowed in its full extent. And particularly in France, not only our Fortescue[s]

q See pag. 327.

r Sp. L. b. 6. c. 2.

s De Laud. LL. c. 53.

accuses (on his own knowledge) their courts of most unexampled delays in administering justice, but even a writer of their own[t] has not scrupled to testify that there were in his time more causes there depending than in all Europe besides, and some of them an hundred years old. But (not to enlarge upon the prodigious improvements which have been made in the celerity of justice by the disuse of real actions, by the statutes of amendment and jeofails,[u] and by other more modern regulations, which it now might be indelicate to remember, but which posterity will never forget) the time and attendance afforded by the judges in our English courts are also greater than those of many other countries. In the Roman calendar there were in the whole year but twenty-eight judicial or triverbial[v] days allowed to the prætor for deciding causes,[w] whereas, with us one-fourth of the year is term time, in which three courts constantly sit for the dispatch of matters of law, besides the very close attendance of the court of chancery for determining [425] suits in equity, and the numerous courts of assize and *nisi prius* that sit in vacation for the trial of matters of fact. Indeed, there is no other country in the known world that hath an institution so commodious and so adapted to the dispatch of causes as our trials by jury in those courts for the decision of facts: in no other nation under Heaven does justice make her progress twice in each year into almost every part of the kingdom, to decide upon the spot by the voice of the people themselves the disputes of the remotest provinces.

And here this part of our Commentaries, which regularly treats only of redress at the common law, would naturally draw to a conclusion. But, as the proceedings in the courts of equity are very different from those at common law, and as those courts are of a very general and extensive jurisdiction, it is in some measure a branch of the task I have undertaken to give the student some general idea of the forms of practice adopted by those courts. These will therefore be the subject of the ensuing chapter.

t Bodin. de Republ. l. 6. c. 6.

u See pag. 406.

v Otherwise called *dies fasti, in quibus licebat prætori fari tria verba, do, dico, addico* (Legal days, in which the prætor was permitted the use of three words, *do, dico, addico,* I give judgment, I expound the law, I execute the law). (Calv. Lex. 285.)

w Spelman of the Terms. § 4. c. 2.

CHAPTER THE TWENTY-SEVENTH. [426]

OF PROCEEDINGS IN THE COURTS OF EQUITY.

§ 550. Causes cognizable in chancery.—Before we enter on the proposed subject of the ensuing chapter, *viz.*, the nature and method of proceedings in the courts of equity, it will be proper to recollect the observations which were made in the beginning of this book[a] on the principal tribunals of that kind, acknowledged by the constitution of England, and to premise a few remarks upon those particular causes, wherein any of them claims and exercises a sole jurisdiction, distinct from and exclusive of the other.[1]

I have already[b] attempted to trace (though very concisely) the history, rise and progress of the extraordinary court, or court of

[a] Ch. 4, and 6.

[b] Pag. 49, etc.

NOTE ON EQUITY JURISDICTION.

1 **Blackstone's treatment of the subject.**—The account given by Blackstone of the nature of equity and of the procedure in courts administering that branch of jurisprudence must be understood by the student as intended only as a general sketch. Had Blackstone attempted the undertaking of expounding the equity system with the same degree of care and accuracy in detail as he devotes to the common law, his book would have been of much greater volume and his original plan would have been modified. He set himself the task of writing "Commentaries on the Laws of England" and this colossal labor he achieved with signal success. But it was no part of his scheme to discuss with the same thoroughness the equitable system, which he conceived of not merely as a code of natural law, but as an artificial system of positive law supplementing the common law. To his mind there were not two conflicting systems—such a thing, he says, would be a monstrous "solecism." The laws of England are a self-sufficient system, though "equity is frequently called in to assist, to moderate and to explain them." (I, 91–92.) In other words, like Professor Maitland in our own day, he conceives of equity as "supplementary law, a sort of appendix added on to our code, or a sort of gloss written round our code." (Maitland, Equity, p. 18.) And regarding equity in this way, he deems his duty as a commentator upon the laws of England discharged when he gives a brief account in the most general way of the main heads of equity jurisdiction and of the principal peculiarities in the method of procedure in the courts of equity.

It is to be remembered, also, that Blackstone was a common-law judge and lawyer, and that the practice in equity courts and the study of the system was

equity, in chancery. The same jurisdiction is exercised, and the same system of redress pursued, in the equity court of the exchequer, with a distinction however, as to some few matters, peculiar to each tribunal, and in which the other cannot interfere. And, first, of those peculiar to the chancery.

in his time, and even now is carried on in England by lawyers who have devoted themselves exclusively to this branch of jurisprudence. (Leaming, A Philadelphia Lawyer in the London Courts, p. 39.) He doubtless did not consider himself properly equipped by his studies or previous experience to write a pioneer treatise upon the system of equity—a branch of jurisprudence upon which there was in his time no systematic work in existence. He says (III. 429): "As nothing is hitherto extant that can give a stranger a tolerable idea of the courts of equity subsisting in England, as distinguished from the courts of law, the compiler of these observations cannot but attempt it with diffidence: those who know them best are too much employed to find time to write: and those who have attended but little in those courts must often be at a loss for materials."

Modern treatment of the subject.—The student of the present day can easily fill in from later books the sketch that Blackstone offers. There is no subsequent treatise on the whole field of the common law that can compare with the Commentaries as a complete statement of that system, but the equitable jurisdiction has been completely and ably treated in several books, notably in the treatises by our great American jurists, Story and Pomeroy. The latter, in particular, treats the subject in the light of the modern cases, both English and American, and is recommended to the student desiring a good knowledge of the subject. (Equity Jurisprudence, by John Norton Pomeroy, 3d edition, 4 vols., by John Norton Pomeroy, Jr., Supplemented by a Treatise on Equitable Remedies, 2 vols., by John Norton Pomeroy, Jr., 1905, S. F., Bancroft-Whitney Company.) Other books which throw much light upon the fundamental principles of equity are: Equity, by F. W. Maitland, 1913, Cambridge, Eng., Cambridge University Press, and A Summary of Equity Pleading by C. C. Langdell, 1883, Cambridge, U. S. A., Charles W. Sever & Co.

Professor Pomeroy's criticism of Blackstone.—Recognizing that Blackstone intended only to present the most general outline of the subject, how has he succeeded in his task? Professor Pomeroy (Equity Jurisprudence, I, § 54), quoting a passage in this chapter, says: "Sir William Blackstone . . . goes to the extent of denying that equity has or ever had any power to correct the common law or to abate its rigor. This is one example, among many, of Blackstone's utter inability to comprehend the real spirit and workings of the English law." On the other hand, Professor Maitland, quoting the identical passage referred to by Professor Pomeroy, in which Blackstone points out that equity does not abate the rigor of the law in the harshest rules of descent—for example, the refusal to permit the father to succeed to the son—adopts Blackstone's ideas as expressive of his own. He agrees that "Every definition or

§ 551. 1. Guardianship of infants.—Upon the abolition of the court of wards, the care, which the crown was bound to take as guardian of its infant tenants, was totally extinguished in every feudal view, but [427] resulted to the king in his court of chancery, together with the general protection[c] of all other *infants* in the

[c] F. N. B. 27.

---

illustration which draws a 'ine between the two jurisdictions, by setting law and equity in opposition to each other, will be found totally erroneous, or erroneous to a certain degree." He quotes with approval Blackstone's summing up (III, 434): "The systems of jurisprudence in our courts both of law and equity are now equally artificial systems, founded in the same principles of justice and positive law; but varied by different usages in the forms and mode of their proceedings; the one being originally derived (though much reformed and improved) from the feudal customs, as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies introduced by their clerical chancellors." Maitland continues: "You will see what this comes to. Equity is now, whatever it may have been in past times, a part of the law of our land. What part? That part which is administered by certain courts known as courts of equity. We can give no other general answer. We can give a historical explanation. We can say, for example, that the common law is derived from feudal customs, while equity is derived from Roman and canon law (Blackstone, I think, greatly overrates the influence of Roman and canon law in the history of equity), but in no general terms can we describe either the field of equity or the distinctive character of equitable rules. Of course we can make a catalogue of equitable rules, and we can sometimes point to an institution such as the trust strictly so called, which is purely equitable, but we can make no generalization." It is believed that Maitland's views are more just to Blackstone than are Pomeroy's, that the learned commentator was right in calling attention to the fact that it is not the business of a court of equity to abate the rigor of the common law upon any general principles, however much those principles may have contributed to the historical evolution of the modern system. It is very certain that equity never attempted to "abate the rigor" of the harshest rules in regard to the descent of property, in regard to the inability of simple contract creditors to reach the land of a deceased debtor. That equity did force the mortgagee to permit a redemption after the failure of the mortgagor to pay the mortgage debt cannot justify us in drawing a generalization that "it is the business of a court of equity to abate the rigor of the law." Professor Pomeroy is also unjust to Blackstone in his interpretation of the passage quoted, in imputing to him the proposition that equity never had any power to correct the common law or to abate its rigor. Blackstone's proposition is that in his day it had no such general power. He shows very clearly in other parts of the Commentaries that historically the courts of equity

kingdom. When, therefore, a fatherless child has no other guardian, the court of chancery hath a right to appoint one, and, from all proceedings relative thereto, an appeal lies to the house of lords. The court of exchequer can only appoint a guardian *ad litem* to manage the defense of the infant if a suit be commenced against

had exercised this general power (III. 53), but in Blackstone's time they had ceased to claim any such general and extensive authority.

Equity a supplemental system.—Blackstone's idea that we should not think of law and of equity as two rival systems, "as if the one judged without equity, and the other was not bound by any law," is quite in accord with modern views. Equity, as Maitland points out, presupposes the existence of the common law. It is not, like the common law, a self-sufficient system. We could get along without courts of equity though much injustice would be done, but we would have absolute anarchy without the fundamental principles of the common law. Equity, in other words, is an appendix to the law; it supplements rather than sets it aside. (Maitland, Equity, 19.)

To illustrate what is meant by this view, let us look at a familiar case of equity cognizance, the specific performance of contracts. The enforcement of contracts was one of the most fundamental purposes of the law, but how did the law enforce them? By giving damages for the breach. But often this was very inadequate. One, for example, agreed to sell a particular estate to another and willfully refused to carry out his bargain. The damages which a court of law would award against him would be slight compared with the injustice which the purchaser suffered. Equity, if the contract was fair, supplemented this deficiency of the law by granting its remedy of specific performance. In other words, it would command the defendant to convey the property to the plaintiff upon the payment of the price. The inadequacy of the remedy at law was the basis of the jurisdiction of the court of equity in all such cases. (Pomeroy, Equity Jurisprudence, I, § 217.)

Equity proceeds in personam.—The instance cited of the specific performance of contracts is as good an illustration as can be had of the most fundamental characteristic of equity—that is, that it acts *in personam*. (Langdell, Summary of Equity Pleading, § 43.) While the common-law courts by their judgments never commanded the defendant to do anything, but left it to the sheriff to execute the judgment under a writ of execution, the orders and decrees of a court of equity, on the other hand, always commanded the defendant to do or not to do something. If the defendant refused obedience, the only remedy that a court of equity had originally was to punish him by imprisonment until he complied with its order. In the case cited of the specific performance of a contract, if the defendant remained obdurate, or if he left the country before the decree was executed, a court of equity was powerless to carry it into execution. This defect, however, has been changed by statutes in England and in many of the states of our Union, by authorizing a court of equity to direct an officer to execute the conveyance if the defendant refuses

him, a power which is incident to the jurisdiction of every court of justice;[d] but when the interest of a minor comes before the court judicially, in the progress of a cause, or upon a bill for that purpose filed, either tribunal indiscriminately will take care of the property of the infant.

[d] Cro. Jac. 641. 2 Lev. 1. T. Jones. 90.

---

obedience, or if he departs from the jurisdiction, or if for any other reason the defendant will not or cannot do the act ordered to be done. (Huston, The Enforcement of Decrees in Equity, Harvard Studies in Jurisprudence, Cambridge, Harvard University Press, 1915, pp. 13–28.) Professor Langdell points out that the fundamental principle that equity acts *in personam* owed its origin to the fact that the chancellor, who exercised the prerogative jurisdiction of the king, was, in the early days when the foundations of the system were being laid, usually an ecclesiastic and accustomed to the procedure of the ecclesiastical courts, which had no jurisdiction over the bodies of litigants, but only over their consciences. (Langdell, Summary of Equity Pleading, p. 43.) Notwithstanding the modern legislation referred to, which gives an *in rem* effect to the decrees of courts of equity in certain cases, and notwithstanding the amalgamation of courts of law and of equity, of which it remains to say something, this original peculiarity still is the chief characteristic of so-called equitable remedies, and they operate primarily as commands addressed to the defendant. (Hart v. Sansom, 110 U. S. 151, 28 L. Ed. 101, 3 Sup. Ct. Rep. 586.) Thus, though in most states by virtue of statutes the court will order a commissioner or other officer to make a conveyance if defendant contumaciously refuses, this is done only as an alternative; the decree, in the first place, orders that the defendant himself execute the instrument.

The fact that in its essence a court of equity acts *in personam* gives rise to the flexibility of its decrees. As a judgment at law must be framed so as to authorize a writ of execution to be framed upon it, as it must be for the recovery of so much money, such and such chattels or such and such a piece of land, it is manifest that it must be unconditional and either for plaintiff or for defendant absolutely. A court of equity, however, can, since its commands are personal, attach conditions to its orders. It may command the defendant, for example, to convey land if the plaintiff pays the purchase price. It may order an injunction to issue unless defendant does something before a certain time. It matters not how numerous the parties, how complicated the interests, the decree of a court of equity can adjust all of them. It is this flexibility in the character of its decrees and orders that enables a court of equity to render more exact justice than a court of law could give.

A court of equity as a court of conscience.—To its origin as a part of the king's prerogative justice administered by the chancellor, "the keeper of the king's conscience," we owe another broad principle characterizing equitable rights and remedies. It is that "equity acts upon the conscience." It is char-

§ 502. **2. Custody of idiots and lunatics.**—As to *idiots* and *lunatics:* the king himself used formerly to commit the custody of them to proper committees, in every particular case, but now, to avoid solicitations and the very shadow of undue partiality, a warrant is issued by the king * under his royal sign manual to the chan-

* See Book I. c. 8.

---

acteristic of legal rights and legal duties that they are enforced against persons whether they know of their existence or not. For example, a covenant respecting the use of land which runs at law binds subsequent purchasers, whether they know of it or not. In equity, however, the court will not charge a subsequent purchaser with the burden of a covenant which runs only in equity, unless the subsequent purchaser acquired the land with notice of the existence of the covenant. (Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Reprint, 1143.) The court does not, it should be observed, attempt to qualify the legal doctrine of covenants running with the land. It recognizes that doctrine as in existence. In other words, "it follows the law." But it supplements the existing legal doctrine by the recognition of equitable rights and obligations. And with reference to equitable rights and obligations, it applies its doctrine of *bona fide* purchase. The latter is a favorite of courts of equity; he takes freed from outstanding equities and equitable interests. This very characteristic doctrine of courts of equity has not been applied in courts of law, save in the one case of negotiable instruments. The courts of law have in that matter borrowed the principles of the law merchant,—itself a system permeated with equitable principles. (Maitland, Equity, pp. 165–170.)

Equitable rights regarded as in rem.—Historically, it was through the peculiarity of its remedies that equity developed, but in the course of this development it illustrated Sir Henry Maine's dictum to the effect that the substantive law appears in its early stages to be a product of the law of procedure. The chancellor's power of directing personal commands addressed to the conscience of the defendant gave rise to one of the most distinct and unique creations of English jurisprudence—the trust. The conveyance of property to be held by the transferee for the benefit of a third person might look at first sight like a mere contractual right. But through the enforcement of this personal obligation against subsequent purchasers with notice, a right analogous to a right *in rem* developed. The interest of the beneficiary under a trust, or of the *cestui que trust,* was unrecognized by the courts of common law. Unlike the contract or the mortgage which was recognized and enforced, though in different ways, both by courts of law and of equity, the *cestui que trust* could not secure the enforcement of his rights except through a court of equity—his rights were exclusively cognizable in the latter courts.

Though the *cestui's* rights owed their origin to the theory that a court of equity is a court of conscience issuing commands to the person, and were originally treated entirely as rights *in personam* (Holmes, Common Law, p. 407),

cellor or keeper of his seal, to perform this office for him, and, if he acts improperly in granting such custodies, the complaint must be made to the king himself in council.[f] But the previous proceedings on the commission, to inquire whether or no the party be an idiot or a lunatic, are on the law side of the court of chan-

[f] 3 P. Wms. 108. See Reg. Br. 267.

---

they later came to be regarded in many respects, for example, for the purposes of descent, as if they were interests in property. The treatment of the *cestui's* interest is an excellent illustration of the maxim that equity follows the law. Courts of equity might have set up a system of their own in respect to this creation of equity, the trust, but in all matters relating to descent and succession they followed the common law. In the modern development of the doctrine of trusts, the right of the *cestui* has come more and more to be treated as a right of property. (Brown v. Fletcher, 235 U. S. 589, 598, 35 Sup. Ct. Rep. 154, 59 L. Ed. —.) Maitland says of the *cestui's* interest, "In history and probably in ultimate analysis it is *jus in personam;* but it is so treated (and this for many important purposes) that it is very like *jus in rem.*" (Maitland, Equity, 23. See, also, In re Nisbet & Potts' Contract (1906), L. R. 1 Ch. Div. 386 (C. A.).)

Enumeration of equitable proceedings.—The sketch given by Blackstone of the equity system, while in essential particulars correct, does not profess to enumerate all of the heads of equity jurisdiction in his day. It is not proposed to supplement that omission here, but it may not be amiss to name some of the more important matters embraced under the term equity. The entire subject of trusts and their administration is no doubt the most important and largest branch of that jurisdiction, embracing as it does not only express private and charitable trusts, but also the so-called constructive and resulting trusts implied by the court to prevent injustice and fraud, as in cases of fraudulent purchases by agents or others occupying fiduciary relations with the money of their principals. The foreclosure and redemption of mortgages and other liens, the specific performance of contracts, injunctions against waste, nuisance, and trespass and other illegal acts, bills by creditors or stockholders of corporations for accounting, or to remedy corporate abuses, bills by creditors to reach assets not subject to legal execution, bills for dissolution of partnerships, for the cancellation or reformation of instruments upon the ground of fraud or mistake, bills of interpleader, bills for accounting, bills to quiet title or to restrain the unjust enforcement of judgments procured by fraud, are other instances of the sort of proceedings with which courts of equity are busied. (Bispham, Principles of Equity, 8th ed., c. II.)

Some branches of equity which in Blackstone's time were frequently invoked are no longer in frequent use, because statutes have made such use unnecessary. The most important of this class of bills is the bill for discovery. This was de-

cery, and can only be redressed (if erroneous) by writ of error in the regular course of law.

§ 553. 3. **Charities.**—The king, as *parens patriæ* (parent of his country), 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*),

manded by reason of the fact that a party could not be compelled to testify in an action at common law. The necessity for this so-called auxiliary jurisdiction has been largely obviated by the statutes which destroy this disability of the party. (1 Wigmore, Evidence, 577.) Bills for discovery have, therefore, fallen into disuse. Another class of bills very frequent in Blackstone's time by reason of the defective character of legal remedies was the bill for administration of the estates of decedents. These matters, too, are now generally fully provided for by the statutes in the various states creating probate courts, and giving them very full powers. Statutes, too, have covered the entire subject of the guardianship of infants and incompetent persons. So with the very important class of bills for the protection of married women's separate property, the need of this branch of equity has been superseded by statutes giving married women the same right to deal with their property as single women have always had. (Pomeroy, Equity Jurisprudence, I, §§ 68–88.)

Tendency toward adoption of equitable principles in law.—The instances just cited illustrate a very marked tendency in the development of our legal system since Blackstone's day. That tendency has been toward the unification of procedure in the two systems and the embodiment in the ordinary law of the extraordinary doctrines of the equity courts. The principles of equity have been increasingly carried into the law, either through interpretation or through the usual modern method of improvement, legislation. Though the system was well developed in Blackstone's day, some of the greatest chancellors were those of the nineteenth century. Under Lord Eldon, one of the greatest, the principles of equity were refined and systematized to the highest degree. But at the very time when the doctrines of the court of chancery were being elaborated by Lord Eldon, a strong movement for reform in the law had begun which resulted in the great changes of the nineteenth century. Blackstone, who speaks usually with such unqualified eulogy of English legal institutions, found the distinction between law and equity not wholly admirable (III. 429). The division was due entirely to historical accident. If the development of English law had not been arrested in the fourteenth and fifteenth centuries, there is little reason to believe but that courts of law might have developed their doctrines sufficiently to have avoided the need of the subsequent development of the supplemental jurisdiction later known as equity. (See an interesting account of the administration of what were later called equitable principles in

files *ex officio* an information in the court of chancery to have the charity properly established. By statute, also, 43 Elizabeth, c. 4 (Charitable Gifts, 1601), authority is given to the lord chancellor or lord keeper, and to the chancellor of the duchy of Lancaster, respectively, to grant commissions [428] under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree, which may be viewed in the r spective courts of the several chancellors, upon exceptions taken thereto. But, though this is done in the petty bag office in the court of chancery, because

the mediæval common-law courts by Hazeltine, The Early History of English Equity, Oxford Essays in Legal History, 261–285.)

Amalgamation of law and equity in England.—It is not surprising that the assaults of legal reformers in the nineteenth century should have been directed toward the abolition of the distinction between courts of law and courts of equity. It was not, however, until 1873, that these assaults were successful in England. In that year the Judicature Act was passed, largely through the efforts of Lord Selborne and of Lord Cairns, both very eminent Lord Chancellors, abolishing all the existing courts of general jurisdiction, and substituting in their place a supreme court of judicature, consisting of a high court of justice with a court of appeal. This high court is divided into three branches or divisions, the king's bench, the chancery, and the probate division. These divisions, however, are simply for purposes of convenience and do not affect jurisdiction. The king's bench, for example, might determine a matter of trust, the chancery division an action for personal injuries. It can no longer result that a suitor may be sent out of chancery because his right or remedy was legal, and out of the king's bench, because his right or remedy was equitable. (Bowen, Progress in the Administration of Justice during the Victorian Period, Select Essays in Anglo-American Legal History, I. 516–542).

History of equity in the United States.—The history of equity in the United States remains to be spoken of. The quarrel between Coke and Lord Ellesmere, which Blackstone elsewhere describes (III. 53–54), marked a division of opinion in English political theory that had practical influence upon the development of American jurisprudence in certain of the colonies. The parliamentary and Puritan theory which Coke represented was, in general, hostile to the rather vague claims of jurisdiction which the courts of equity then asserted. (Holdsworth, Coke, in Oxford Legal Essays, 297–311.) The New England colonists carried this hostility with them to their new home. The result was that in some of these colonies, notably in Massachusetts, there was no complete equity system. It was not until 1877 that the commonwealth conferred full equity powers upon its supreme court. In Maine, it was not until 1874 that the courts were vested with a complete equitable jurisdiction, while the same result took place in New Hampshire in 1867. Pennsylvania

the commission is there returned, it is not a proceeding at common law, but treated as an original cause in the court of equity. The evidence below is not taken down in writing, and the respondent in his answer to the exceptions may allege what new matter he pleases, upon which they go to proof, and examine witnesses in writing upon all the matters in issue: and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. And, as it is thus considered as an original cause throughout, an appeal lies of course from the chancellor's decree to the house of peers,[g] notwithstanding any loose opinions to the contrary.[h]

§ 554. 4. Bankrupts.—By the several statutes relating to *bankrupts*, a summary jurisdiction is given to the chancellor, in many matters consequential or previous to the commissions thereby directed to be issued, from which the statutes give no appeal.

g Duke's Char. Uses. 62. 128. Corporation of Burford v. Lenthall. Canc. 9 May, 1743.

h 2 Vern. 118.

---

has not even to the present day conferred a general equity jurisdiction upon her courts. (Two Centuries of American Law, pp. 136–138.)

In the great majority of the states, however, the equity jurisdiction was adopted in some form before the revolution. (For an account of the early history, see Wilson, Courts of Chancery in America, Select Essays in Anglo-American Legal History, II, 779.) The prevailing practice formerly was to vest the equity powers in a separate tribunal and this practice still obtains in New Jersey, Alabama, Mississippi, Delaware and Tennessee. In other states, of which Illinois may be taken as a type, the systems of law and equity are administered as separate systems, but by the same judges. The United States federal courts also conform to this model. (Pomeroy, Equity Jurisprudence, I, §§ 40, 41.)

The reformed procedure in the United States.—In most of the states, however, the example of the reform instituted through the efforts of David Dudley Field in New York, in 1848, has been followed, and the two systems are fused to the same extent as they are at the present day in England. In other words, the proper principles will be applied to the facts of a case whether the principles are what were formerly called legal or equitable. To the complete amalgamation of the two systems, however, there is one obstacle, that is, the existence of the right of trial by jury in common-law actions. (Donahue v. Meister, 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096.) Quite recently a very important step was taken by Congress in the direction of harmonizing the two sys-

§ 555. **5. Causes in different courts of equity.**—On the other hand, the jurisdiction of the court of chancery doth not extend to some causes wherein relief may be had in the exchequer. No information can be brought, in chancery, for such mistaken charities as are given to the king by the statutes for suppressing superstitious uses. Nor can chancery give any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property; not even in cases where he is a royal trustee.[1] Such causes must be determined in the court of exchequer, as a court of revenue, which alone has power [429] over the king's treasure, and the officers employed in its management: unless where it properly belongs to the duchy court of Lancaster, which hath also a similar jurisdiction as a court of revenue, and, like the other, consists of both a court of law and a court of equity.

In all other matters, what is said of the court of equity in chancery will be equally applicable to the other courts of equity. Whatever differences there may be in the forms of practice, it arises from the different constitution of their officers, or, if they differ in anything more essential, one of them must certainly be wrong; for truth and justice are always uniform, and ought equally to be adopted by them all.

§ 556. **Nature of equity.**—Let us next take a brief, but comprehensive, view of the general nature of *equity*, as now understood and practiced in our several courts of judicature. I have formerly touched upon it,[k] but imperfectly: it deserves a more complete explication. Yet as nothing is hitherto extant that can

[1] Huggins v. Yorkbuildings Company. Canc. 24 Oct. 1740. Reeve v. Attorney-general. Canc. 27 Nov. 1741. Lightboun v. Attorney-general. Canc. 2 May, 1743.

[k] Book I, Introd. § 2 & 3 ad calc.

---

tems by the act of March 3, 1915, permitting amendments to be made so as to change an action at law into a suit in equity, or *vice versa*, and also permitting equitable defenses to be pleaded in actions at law. Taken in connection with the new Equity Rules promulgated by the supreme court of the United States, November 4, 1912 (198 Fed., pp. v–xiii), the result may be predicted that the historical accident of the existence of a dual system in the Anglo-American law will, in the future, cease to offer any objection to the complete adjustment of rights in one proceeding and in one tribunal.—O. K. McMurray.

give a stranger a tolerable idea of the courts of equity subsisting in England, as distinguished from the courts of law, the compiler of these observations cannot but attempt it with diffidence: those who knew them best are too much employed to find time to write, and those who have attended but little in those courts must be often at a loss for materials.

Equity, then, 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 now draws a line between the two jurisdictions, by setting law and equity in [*430] opposition to each other, will be found either totally erroneous or erroneous to a certain degree.

§ 557. **1. Equity follows the law.**—Thus, in the first place, it is said[l] that it is the business of a court of equity in England to abate the rigor of the common law. But no such power is 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:[m] yet a court of equity had no power to interpose. Hard is the common law still subsisting, that land devised, or descending to the heir, shall not be liable to simple contract debts of the ancestor or devisor,[n] although the money was laid out in purchasing the very land, and that the father shall never immediately succeed as heir to the real estate of the son,[o] but a court of equity can give no relief; though in both these instances the artificial reason of the law, arising from feudal principles, has long ago entirely ceased. The like may be observed of the descent of lands to a remote relation of the whole blood, or even their escheat to the lord, in preference to the owner's

[l] Lord Kayms. Princ. of Equit. 44.
[m] See Book II. c. 23. pag. 378.
[n] *Ibid.* c. 15. pag. 243, 244, c. 23. pag. 377.
[o] *Ibid.* c. 14. pag. 208.

half-brother;[p] and of the total stop to all justice, by causing the *parol* to *demur*,[q] whenever an infant is sued as heir or is party to a real action. In all such cases of positive law, the courts of equity, as well as the courts of law, must say with Ulpian,[r] "*Hoc quidem perquam durum est, sed ita lex scripta est* (this indeed is very hard, but such is the written law)."

§ 558. 2. Equitable interpretation.—It is said[s] that a court of equity determines 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, and equally profess, to interpret statutes according to the true 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 [431] 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 often said to be within the equity, of an act of parliament, and so cases within the letter are frequently out of the equity. Here by *equity* we mean nothing but the sound interpretation of the law, though the words of the law itself may be too general, too special or otherwise inaccurate or defective. These, then, are the cases which, as Grotius[t] says, "*lex non exacte definit, sed arbitrio boni viri permittit* (the law does not define with exactness, but leaves something to the discretion of a man of sound judgment)," in order to find out the true sense and meaning of the lawgiver, from every other topic of construction.* But there is not a single rule of interpreting laws, whether equitably or strictly,

* For some cases the law does not prescribe an exact rule, but leaves them to the judgment of sound men; or, in the language of Grotius, *lex non exacte definit, sed arbitrio boni viri permittit.* 1 Bl. Comm. 61. The decision of an arbiter is *arbitrium*, as the etymology indicates; and the word denotes, in the passage cited, the decision of a man of good judgment who is not controlled by technical rules of law, but is at liberty to adapt the general principles of justice to the peculiar circumstances of the case. 1 Bouvier's Law Dict. (Rawle's 3d Rev.), 236.

p *Ibid.* pag. 227.
q See pag. 300.
r Ff. 40. 9. 12.
s Lord Kayms. Princ. of Equ. 177.
t De Aequitate. § 3.

that is not equally used by the judges in the courts both of law and equity: the construction must in both be the same, or, if they differ, it is only as one court of law may also happen to differ from another. Each endeavors to fix and adopt the true sense of the law in question; neither can enlarge, diminish or alter that sense in a single title.

§ 559. **3. Special jurisdiction.**—Again, it hath been said [u] that *fraud, accident* and *trust* are the proper and peculiar objects of a court of equity. But every kind of *fraud* is equally cognizable, and equally adverted to, in a court of law, and some frauds are only cognizable there; as fraud in obtaining a devise of lands, which is always sent out of the equity courts to be there determined. Many *accidents* are also supplied in a court of law; as, loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies, and many cannot be relieved even in a court of equity; as, if by accident a recovery is ill-suffered, a devise ill-executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement. A technical *trust*, indeed, created by the limitation of a second use was forced into [432] the courts of equity in the manner formerly mentioned,[w] and this species of trusts, extended by inference and construction, have ever since remained as a kind of *peculium* in those courts. But there are other trusts which are cognizable in a court of law: as deposits, and all manner of bailments, and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use,[x] which is the ground of an action on the case almost as universally remedial as a bill in equity.

§ 560. **4. Equity a settled system.**—Once more: it has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge,[y] founded on the circumstances

[u] 1 Roll. Abr. 374. 4 Inst. 84. 10 Mod. 1.

[w] Book II. c. 20.

[x] See pag. 162.

[y] This is stated by Mr. Selden (Tabletalk tit. Equity.) with more pleasantry than truth. "For *law*, we have a measure, and know what to trust to: *equity*

of every particular case. Whereas the system of our courts of equity is a labored connected system governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus the refusing a wife her dower in a trust estate,[z] yet allowing the husband his curtesy; the holding the penalty of a bond to be merely a security for the debt and interest, yet considering it sometimes as a debt itself, so that the interest shall not exceed that penalty;[a] the distinguishing between a mortgage at

is according to the conscience of him that is chancellor; and, as that is larger or narrower, so is equity. 'Tis all one, as if they should make the standard for the measure a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience."

[**The chancellor's foot.**—This famous comparison, repeated so frequently in the last hundred years, loses much of its force and propriety when it is quoted without the passage of West's Symboleography, which first suggested it and gave it point:

"Since law and equitie differ herein that strict law doth set downe in a general sort what it enacteth, and is severe and not to be moved one way or other: it taketh order for things once for all; the grounds and principles which it bringeth forth are universall and full of severitie and sharpenesse, from which rules it will not starte aside, no not the breadth of an haire.

"But equitie is fitly compared to a Shoemaker's shop, that is well furnished with all sorts and maner of lastes for men's feete, where each man may be sure to finde one last or other that shall fit him, be he great or smal. It is not also unfitly compared to an Apothecaries shop, stored with all kind of drugs, fit for all the maladies and diseases of men." The second part of the Symboleography, fol. 175, § 11 (ed. 1618).

Notice, also, that Selden ingeniously wrests the meaning of the figure to make equity depend on the chancellor's conscience, and the length of the chancellor's foot. The original figure measures men's cases by their own feet, not by the chancellor's; each suitor requiring a different judgment adapted to his case, as well as a shoe fitted to his individual foot. The court of conscience was so called, not because it decided cases by the chancellor's conscience (which would be a sorry compliment to the courts of common law), but because it measured the conscience of each party, and decided by that.

That such a jurisdiction must always depend in its exercise upon the judge's conscience also, is no doubt true: that has been a reproach against all kinds of equity always. But for that reason there would have been neither wit nor a slur upon this court in particular, in saying that.—HAMMOND.]

z 2 P. Wms. 640. See Book II. pag. 337.

a Salk. 154.

five per cent, with a clause of reduction to *four*, if the interest be regularly paid, and a mortgage at *four per cent*, with a clause of enlargement to *five* if the payment of the interest be deferred, so that the former shall be deemed a conscientious, the latter an unrighteous bargain:[b] all these, and other cases that might be instanced, are plainly rules of positive law, supported only by [433] the reverence that is shown, and generally very properly shown, to a series of former determinations, that the rule of property may be uniform and steady. Nay, sometimes a precedent is so strictly followed, that a particular judgment, founded upon special circumstances,[c] gives rise to a general rule.

In short, if a court of equity in England did really act, as many ingenious writers have supposed it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case. No wonder they are so often mistaken. Grotius, or Puffendorf, or any other of the great masters of jurisprudence, would have been as little able to discover, by their own light, the system of a court of equity in England, as the system of a court of law. Especially, as the notions before mentioned, of the character, power and practice of a court of equity, were formerly adopted and propagated (though not with approbation of the thing) by our principal antiquarians and lawyers,—Spelman,[d] Coke,[e] Lambard,[f] and Selden,[g] and even the great Bacon[h] himself. But this was in the infancy of our courts of

[b] 2 Vern. 289. 316. 3 Atk. 520.

[c] See the case of Foster and Munt, 1 Vern. 473. with regard to the undisposed *residuum* of personal estates.

[d] *Quæ in summis tribunalibus multi e legum canone decernunt judices, solus (si res exegerit) cohibet cancellarius ex arbitrio; nec aliter decretis tenetur suæ curiæ vel sui ipsius, quin, elucente nova ratione, recognoscat quæ voluerit, mutet et deleat prout suæ videbitur prudentiæ* (These decisions which many judges in the highest tribunals make according to the rules of law, the chancellor alone (if the case require it) can restrain according to his pleasure; nor is he so bound by the decrees of his court, or those of himself, but, a new reason appearing, he may revise whatever he pleases, may alter and reverse as he shall think fit). (Gloss. 108.)

[e] See pag. 53, 54.

[f] Archeion, 71, 72, 73.

[g] *Ubi supra.*

[h] De Augm. Scient. l. 8. c. 3.

equity, before their jurisdiction was settled, and when the chancellors themselves, partly from their ignorance of law (being frequently bishops or statesmen), partly from ambition and lust of power (encouraged by the arbitrary principles of the age they lived in), but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves such unlimited authority as hath totally been disclaimed by their successors for now above a century past. The decrees of a court of equity were then rather in the nature of awards, formed on the sudden *pro re nata* (from the circumstances of the case), with more probity of intention than knowledge of the subject, [434] founded on no settled principles, as being never designed, and therefore never used, for precedents. But the systems of jurisprudence in our courts, both of law and equity, are now equally artificial systems, founded in the same principles of justice and positive law, but varied by different usages in the forms and mode of their proceedings: the one being originally derived (though much reformed and improved) from the feudal customs, as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies, introduced by their clerical chancellors.

§ 561. Similarity of courts of law and of equity.—The suggestion, indeed, of every bill, to give jurisdiction to the courts of equity (copied from those early times), is that the complainant hath no remedy at the common law. But he who should from thence conclude that no case is judged of in equity where there might have been relief at law, and at the same time casts his eye on the extent and variety of the cases in our equity reports, must think the law a dead letter indeed.

§ 562. 1. Rules of property, evidence and interpretation.—The rules of property, rules of evidence and rules of interpretation in both courts are, or should be, exactly the same: both ought to adopt the best, or must cease to be courts of justice. Formerly, some causes, which now no longer exist, might occasion a different rule to be followed in one court from what was afterwards adopted in the other, as founded in the nature and reason of the thing;

but the instant those causes ceased, the measure of substantial justice ought to have been the same in both. Thus the penalty of a bond, originally contrived to evade the absurdity of those monkish constitutions which prohibited taking interest for money, was therefore very pardonably considered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest, for the judges could not, as the law then stood, give judgment that the interest should be specifically paid. But when afterwards the taking of interest became legal, as the necessary companion of commerce,[1] nay, after the statute of 37 Henry VIII, c. 9 (Usury, 1545), had declared the [435] debt or loan itself to be "the just and true intent" for which the obligation was given, their narrow-minded successors still adhered willfully and technically to the letter of the ancient precedents, and refused to consider the payment of principal, interest and costs, as a full satisfaction of the bond. At the same time more liberal men, who sat in the courts of equity, construed the instrument, according to its "just and true intent," as merely a security for the loan; in which light it was certainly understood by the parties, at least after these determinations, and therefore this construction should have been universally received. So in mortgages, being only a landed as the other is a personal security for the money lent, the payment of principal, interest and costs ought at any time, before judgment executed, to have saved the forfeiture in a court of law as well as in a court of equity. And the inconvenience as well as injustice of putting different constructions in different courts upon one and the same transaction obliged the parliament at length to interfere, and to direct by the statutes 4 & 5 Ann., c. 16 (1705), and 7 George II, c. 20 (Mortgage, 1733), that, in the cases of bonds and mortgages, what had long been the practice of the courts of equity should also for the future be universally followed in the courts of law, wherein it had before these statutes in some degree obtained a footing.[2]

§ 563. 2. Legal instruments and contracts.—Again; neither a court of equity nor of law can vary men's wills or agreements,

[1] See Book II. pag. 456.

[2] 2 Keb. 553. 555. Salk. 597. 6 Mod. 11. 60. 101.

or (in ot[illegible]r words) make wills or agreements for them. Both are to understand them truly, and therefore both of them uniformly. One court ought not to extend, nor the other abridge, a lawful provision deliberately settled by the parties, contrary to its just intent. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages, as a rent of 5*l.* an acre for plowing up ancient meadow,[k] nor against a lapse of time, where the time is material to the contract, as in covenants for renewal of leases. Both courts will equitably construe, but neither pretends to control or change, a lawful stipulation or engagement.

§ 564. 3. Rules of decision.—[436] The rules of decision are in both courts equally apposite to the subjects of which they take cognizance. Where the subject matter is such as requires to be determined *secundum æquum et bonum* (according to right and justice), as generally upon actions on the case, the judgments of the courts of law are guided by the most liberal equity. In matters of positive right, both courts must submit to and follow those ancient and invariable maxims, "*quæ relicta sunt et tradita* (which are left and handed down to us)."[1] Both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question is the object of that law; as in case of the privileges of ambassadors,[m] hostages or ransom bills.[n] In mercantile transactions they follow the *marine law,[o] and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper *forum*:[p] in matters origi-

* Notice here and in Book IV, page *441, the peculiar identification of the "marine" law with the "law-merchant" or mercantile law, and its use for matters that we now regard as belonging to the common law.—HAMMOND.

k 2 Atk. 239.

1 *De jure naturæ cogitare per nos atque dicere debemus; de jure populi Romani, quæ relicta sunt et tradita* (We ought to think and decide for ourselves concerning our natural rights; but the rights of the Roman people should be determined by the laws which are left and handed down to us). (Cic. de Leg. l. 3. ad calc.)

m See Book I. pag. 253.

n Ricord v. Bettenham. Tr. 5 Geo. III. B. R.

o See Book I. pag. 75. Book II. pag. 459. 461. 467.

p See Book II. pag. 513.

nally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject,[q] and, if a question came before either, which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country,[r] and would both decide accordingly.

§ 565. Difference between courts of law and of equity.—Such, then, being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law, *viz.*, the true construction of securities for money lent, and the form and effect [437] of a trust or second use, upon these main pillars hath been gradually erected that structure of jurisprudence which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the legal system which hath hitherto been delineated in these Commentaries, however different they may appear in their outward form, from the different taste of their architects.

§ 566. 1. Mode of proof.—And, first, as to the mode of *proof*. When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction; and, that being once discovered, the judgment is the same in equity as it would have been at law. But, for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account.[s] As incident to accounts, they take a concurrent cognizance of the administration of personal assets,[t] consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators.[u] As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto;[w]

q *Ibid.* 504.
r *Ibid.* 463.
s 1 Chan. Cas. 57.
t 2 P. Wms. 145.
u 2 Chan. Cas. 152.
w 1 Equ. Cas. Abr. 367.

of all dealings in partnership,[x] and many other mercantile transactions; and so of bailiffs, receivers, factors and agents.[y] It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts.

From the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud;[z] all matters in the private knowledge of the party, which, though concealed, are binding in conscience; and all judgments at law, obtained through such fraud or concealment. And this, not by [438] impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment, obtained by suppressing the truth,[a] and which, had the same facts appeared on the trial, as now are discovered, he would never have obtained at all.

§ 567. **2. Mode of trial.**—As to the mode of *trial*. This is by interrogatories administered to the witnesses, upon which their depositions are taken in writing wherever they happen to reside. If, therefore, the cause arises in a foreign country, and the witnesses reside upon the spot; if, in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if witnesses residing at home are aged or infirm,—any of these cases lay a ground for a court of equity to grant a commission to examine them, and (in consequence) to exercise the same jurisdiction which might have been exercised at law if the witnesses could probably attend.

§ 568. **3. Mode of relief.**—With respect to the mode of *relief*. The want of a more specific remedy than can be obtained in the courts of law gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory agreements. A court of equity will compel them to be carried into strict execution,[b] unless where it is improper or impossible, instead of giving damages for their nonperformance. And hence a fiction is estab-

x 2 Vern. 277.
y *Ibid.* 638.
z 2 Chan. Cas. 46.
a 3 P. Wms. 148. Year-Book, 22 Edw. IV. 37. pl. 21.
b Equ. Cas. Abr. 16.

lished that what ought to be done shall be considered as being actually done,[c] and shall relate back to the time when it ought to have been done originally: and 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. So, of waste, and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction.[d] Over questions that may be tried at law, in a great multiplicity of actions, a court of equity assumes a jurisdiction, [439] to prevent the expense and vexation of endless litigations and suits.[e] In various kinds of frauds it assumes a concurrent[f] jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief: as by setting aside fraudulent deeds,[g] decreeing reconveyances,[h] or directing an absolute conveyance merely to stand as a security.[i] And thus, lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands,[k] a court of equity holds plea of all debts, encumbrances and charges that may affect it or issue thereout.

§ 569. **4. Construction of securities.**—The true construction of *securities* for money lent is another fountain of jurisdiction in courts of equity. When they held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum *bona fide* advanced, with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and 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

c P. Wms. 215.
d 1 Ch. Rep. 14. 2 Chan. Cas. 32.
e 1 Vern. 308. Prec. Chan. 261. 1 P. Wms. 672. Stra. 404.
f 2 P. Wms. 156.
g 1 Vern. 32. 1 P. Wms. 239.
h 1 Vern. 237.
i 2 Vern. 84.
k 1 Equ. Cas. Abr. 337.

limited by the court; or he may, when out of possession, be barred by length of time, by analogy to the statute of limitations.*

§ 570. **5. Trusts.**—The form of a *trust*, or second use, gives the courts of equity an exclusive jurisdiction as to the subject matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction, but the trust is governed by very nearly the same rules as would govern the estate in a court of law,[1] if no trustee was interposed, and, [440] by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of the common law.

§ 571. **Progressive improvement in equitable jurisprudence.**—These are the principal (for I omit the minuter) grounds of the jurisdiction at present exercised in our courts of equity, which differ, we see, very considerably from the notions entertained by strangers, and even by those courts themselves before they arrived to maturity, as appears from the principles laid down, and the jealousies entertained of their abuse, by our early judicial writers cited in a former[m] page, and which have been implicitly received and handed down by subsequent compilers, without attending to those gradual accessions and derelictions, by which in the course of a century this mighty river hath imperceptibly shifted its channel. Lambard, in particular, in the reign of Queen Elizabeth, lays it down[n] that "equity should not be appealed unto, but only in rare and extraordinary matters, and that a good chancellor will

* The change noticed by Blackstone has gone much further since his time. The mortgagee has now no estate in the land or right of possession, even after the condition broken, and his only remedy is by bill of foreclosure and sale, except where for lack of sufficient security, the court will grant a receiver of rents, etc. The mortgagor otherwise continues in possession as well as "owner of the land" until ousted by purchaser under foreclosure. Hence bills of redemption are rarely used except in cases where the mortgagee or purchaser is in possession by an irregular sale, and brings one to cut off a party not regularly foreclosed.—HAMMOND.

1 2 P. Wms. 645. 668, 669.

m See pag. 433.

n Archeion. 71. 73.

not arrogate authority in every complaint that shall be brought before him, upon whatsoever suggestion; and thereby both overthrow the authority of the courts of common law, and bring upon men such a confusion and uncertainty, as hardly any man should know how or how long to hold his own assured to him." And, certainly, if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty would be a worse evil than any hardship that could follow from rules too strict and inflexible. Its powers would have become too arbitrary to have been endured in a country like this,[o] which boasts of being governed in all respects by law and not by will. But since the time when Lambard wrote, a set of great and eminent lawyers,[p] who have successively held the great seal, have by degrees erected the system of relief administered by a court of equity into a regular [441] science, which cannot be attained without study and experience any more than the science of law, but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what mode of suit, as readily and with as much precision, in a court of equity as in a court of law.

It were much to be wished, for the sake of certainty, peace and justice, that each court would as far as possible follow the other, in the best and most effectual rules for attaining those desirable ends. It is a maxim that equity follows the law, and in former days the law has not scrupled to follow even that equity, which was laid down by the clerical chancellors. Everyone who is conversant in our ancient books knows that many valuable improvements in the state of our tenures (especially in leaseholds[q] and copyholds[r]) and the forms of administering justice[s] have arisen from this single reason, that the same thing was constantly effected by means of a *subpœna* in the chancery. And sure there cannot be a greater solecism than that in two sovereign independent courts established in the same country, exercising concurrent jurisdiction,

o 2 P. Wms. 685, 686.
p See pag. 53, 54, 55.
q Gilbert of Ejectm. 2. 2 Bac. Abr. 160.
r Bro. Abr. t. Tenant per Copie, 10. Litt. § 77.
s See pag. 200.

and over the same subject matter, there should exist in a single instance two different rules of property, clashing with or contradicting each other.*

It would carry me beyond the bounds of my present purpose to go further into this matter. I have been tempted to go so far, because strangers are apt to be confounded by nominal distinctions, and the loose,† unguarded expressions to be met with in the best of our writers, and thence to form erroneous ideas of the separate jurisdiction now existing in England, but which never were separated in any other country in the universe. It hath also afforded me an opportunity to vindicate, on the one hand, the justice of our [442] courts of law from being that harsh and illiberal rule, which many are too ready to suppose it, and, on the other, the justice of our courts of equity from being the result of mere arbitrary opinion, or an exercise of dictatorial power, which rides over the law of the land, and corrects, amends and controls it by the loose and fluctuating dictates of the conscience of a single judge.

§ 572. Procedure in courts of equity.—It is now high time to proceed to the practice of our courts of equity, thus explained and thus understood.

§ 573. 1. Bill in chancery.—The first commencement of a suit in chancery is by preferring a bill to the lord chancellor in the style of a petition, "humbly complaining showeth to your lordship your orator A B that, *etc.*" This in the nature of a declaration at common law, or a libel and allegation in the spiritual courts,

* Blackstone refers here to the courts of chancery and exchequer.—HAMMOND.

† Prior to the eighth edition the words preceding were, "the very learned author to whom I have alluded, and whose works have given exquisite pleasure to every contemplative lawyer, is (among many others), a strong proof how easily names, and loose or."

The very learned author alluded to here (and also on page 433, as it stood before this eighth edition), is no doubt Henry Home, Lord Kames, author of Principles of Equity, published not long before the first edition of this volume. (See the references to it remaining on page 430.) It was dedicated to Lord Mansfield, August, 1766. Why Blackstone should have struck out at the end of ten years, this flattering reference to him personally, and substituted the general language in the text, we can only guess.—HAMMOND.

setting forth the circumstances of the case at length, as, some fraud, trust or hardship; "in tender consideration whereof" (which is the usual language of the bill), "and for that your orator is wholly without remedy at the common law," relief is therefore prayed at the chancellor's hands, and also process of *subpœna* against the defendant, to compel him to answer upon oath to all the matter charged in the bill. And, if it be to quiet the possession of lands, to stay waste, or to stop proceedings at law, an injunction is also prayed in the nature of the *interdictum* of the civil law, commanding the defendant to cease.

This bill must call all necessary parties, however remotely concerned in interest, before the court, otherwise no decree can be made to bind them, and must be signed by counsel, as a certificate of its decency and propriety. For it must not contain matter either scandalous or impertinent: if it does, the defendant may refuse to answer it till such scandal or impertinence is expunged, which is done upon an order to refer it to one of the officers of the court, called a master in chancery, of whom there are in number twelve, including the master of the rolls, all of whom, so late as the reign of Queen Elizabeth, were commonly doctors of the civil [443] laws.[ss] The master is to examine the propriety of the bill, and, if he reports it scandalous or impertinent, such matter must be struck out, and the defendant shall have his costs, which ought of right to be paid by the counsel who signed the bill.

When the bill is filed in the office of the six clerks (who originally were all in orders, and therefore, when the constitution of the court began to alter, a law[t] was made to permit them to marry), when, I say, the bill is thus filed, if an injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case. If the bill be to stay execution upon an oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an injunction will issue of course, and, when the answer comes in, the injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an injunction be wanted to stay waste, or other injuries of an equally urgent nature, then

[ss] Smith's Commonw. b. 2. c. 12.

[t] Stat. 14 & 15 Hen. VIII. c. 8 (Six Clerks in Chancery, 1523).

upon the filing of the bill, and a proper case supported by *affidavits*, the court will grant an injunction immediately, to continue till the defendant has put in his answer, and till the court shall make some further order concerning it; and, when the answer comes in, whether it shall then be dissolved or continued till the hearing of the cause, is determined by the court upon argument, drawn from considering the answer and affidavit together.

§ 574. **2. Proceedings to compel answer of defendant.**—But, upon common bills, as soon as they are filed, process of *subpœna* is taken out, which is a writ commanding the defendant to appear and answer to the bill, on pain of 100*l.* But this is not all: for, if the defendant, on service of the *subpœna*, does not appear within the time limited by the rules of the court, and plead, demur or answer to the bill, he is then said to be in *contempt;* and the respective processes of contempt are in successive order awarded against him.* The first of which is an *attachment*, which is a writ [444] in the nature of a *capias*, directed to the sheriff, and commanding him to attach, or take up, the defendant, and bring him into court. If the sheriff returns that the defendant *non est inventus* (he is not forthcoming), then an *attachment with proclamations* issues; which, besides the ordinary form of attachment, directs the sheriff that he cause public proclamations to be made, throughout the county, to summon the defendant, upon his allegiance, personally to appear and answer. If this be also returned with a *non est inventus*, and he still stands out in contempt, a *commission of rebellion* is awarded against him for not obeying the proclamations according to his allegiance, and four commissioners therein named, or any of them, are ordered to attach him wheresoever he may be found in Great Britain, as a rebel and contemner of the king's laws and government, by refusing to attend his

* Notice that all this process, down to sequestration (a late introduction), is against the person of defendant, without the distraints of common-law process. This is a relic of the doctrine that the chancellor's power was only over the conscience or will of the defendant, not over his property. The later doctrine by which this limitation led to an extension of his jurisdiction, and even to a jurisdiction *in rem*, is one of the most remarkable changes in legal history, but too extensive to be traced in a note.—HAMMOND.

sovereign when thereunto required: since, as was before observed,[u] matters of equity were originally determined by the king in person, assisted by his council; though that business is now devolved upon his chancellor. If upon this commission of rebellion a *non est inventus* is returned, the court then sends a *sergeant-at-arms* in quest of him, and if he eludes the search of the sergeant also, then a *sequestration* issues to seize all his personal estate, and the profits of his real, and to detain them, subject to the order of the court. Sequestrations were first introduced by Sir Nicholas Bacon, lord keeper in the reign of Queen Elizabeth, before which the court found some difficulty in enforcing its process and decrees.[v] After an order for a sequestration issued, the plaintiff's bill is to be taken *pro confesso* (as acknowledged), and a decree to be made accordingly. So that the sequestration does not seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree. Thus much if the defendant absconds.

If the defendant is taken upon any of this process, he is to be committed to the Fleet, or other prison, till he puts in his appearance, or answer, or performs whatever else this [445] process is issued to enforce, and also clears his contempts by paying the costs which the plaintiff has incurred thereby. For the same kind of process (which was also the process of the court of star-chamber till its dissolution[w]) is issued out in all sorts of contempts during the process of the cause, if the parties in any point refuse or neglect to obey the order of the court.

§ 575. 3. Process against corporations; peers; members of parliament.—The process against a body corporate is by *distringas*, to distrain them by their goods and chattels, rents and profits till they shall obey the summons or directions of the court. And, if a peer is a defendant, the lord chancellor sends a *letter missive* to him to request his appearance, together with a copy of the bill, and, if he neglects to appear, then he may be served with a *subpœna*, and, if he continues still in contempt, a sequestration issues out immediately against his lands and goods, with-

[u] Pag. 50.
[v] 1 Vern. 421.
[w] 18 Rym. Feod. 195.

out any of the mesne process of attachments, etc., which are directed only against the person, and therefore cannot affect a lord of parliament. The same process issues against a member of the house of commons, except only that the lord chancellor sends him no letter missive.

§ 576. **4. Process where subpœna not served.**—The ordinary process before mentioned cannot be sued out till after service of the *subpœna*, for then the contempt begins, otherwise he is not presumed to have notice of the bill; and therefore, by absconding to avoid the *subpœna*, a defendant might have eluded justice, till the statute 5 George II, c. 25 (Equity Procedure, 1731), which enacts that, where the defendant cannot be found to be served with process of *subpœna*, and absconds (as is believed) to avoid being served therewith, a day shall be appointed him to appear to the bill of the plaintiff, which is to be inserted in the London gazette, read in the parish church where the defendant last lived, and fixed up at the royal exchange, and if the defendant doth not appear upon that day, the bill shall be taken *pro confesso*.

§ 577. **5. Modes of defense in equity.**—But if the defendant appears regularly, and takes a copy of the bill, he is next to *demur*, *plead* or *answer*.

§ 578. **a. Demurrer.**—[446] A demurrer in equity is nearly of the same nature as a demurrer in law, being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill; as, for want of sufficient matter of equity therein contained; or where the plaintiff, upon his own showing, appears to have no right; or where the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehavior. For any of these causes a defendant may demur to the bill. And if, on demurrer, the defendant prevails, the plaintiff's bill shall be dismissed: if the demurrer be overruled, the defendant is ordered to answer.

§ 579. **b. Plea.**—A plea may be either to the *jurisdiction*, showing that the court has no cognizance of the cause, or to the *person*, showing some disability in the plaintiff, as by outlawry,

excommunication and the like, or it is in *bar*, showing some matter wherefor the plaintiff can demand no relief, as an act of parliament, a fine, a release or a former decree. And the truth of this plea the defendant is bound to prove, if put upon it by the plaintiff. But as bills are often of a complicated nature, and contain various matter, a man may plead as to part, demur as to part, and answer to the residue. But no exceptions to formal *minutiæ* in the pleadings will be here allowed, for the parties are at liberty, on the discovery of any errors in form, to amend them.[x]

§ 580. c. **Answer.**—An *answer* is the most usual defense that is made to a plaintiff's bill. It is given in upon oath, or the honor of a peer or peeress, but, where there are amicable defendants, their answer is usually taken without oath by consent of the plaintiff. This method of proceeding is taken from the ecclesiastical courts, like the rest of the practice in chancery, for there, in almost every case, the plaintiff may demand the [447] oath of his adversary in supply of proof. Formerly, this was done in those courts with compurgators, in the manner of our waging of law, but this has been long disused, and instead of it the present kind of purgation, by the single oath of the party himself, was introduced. This oath was made use of by the spiritual court, as well in criminal cases of ecclesiastical cognizance as in matters of civil right, and it was then usually denominated the oath *ex officio* whereof the high commission court in particular made a most extravagant and illegal use; forming a court of inquisition, in which all persons were obliged to answer, in cases of bare suspicion, if the commissioners thought proper to proceed against them *ex officio* for any supposed ecclesiastical enormities. But when the high commission court was abolished by statute 16 Car. I, c. 11 (Commission of Inquiry, 1640), this oath *ex officio* was abolished with it; and it is also enacted by statute 13 Car. II, st. 1, c. 12 (Commission of

[x] *En cest court de chauncerie, home ne serra prejudice par son mispledying ou pur defaut de forme, mes solonque le veryte del matcr: car il doit agarder solonque consciens, et nemi ex rigore juris* (In this court of chancery a man shall not be prejudiced by his mispleading, or defect of form, but according to the truth of the matter; for the decision should be made according to conscience and not according to the rigor of law). Dyversite des Courts. edit. 1534. fol. 296, 297. Bro. Abr. t. Jurisdiction. 50.

Inquiry, 1661), "that it shall not be lawful for any bishop or ecclesiastical judge to tender to any person the oath *ex officio*, or any other oath whereby the party may be charged or compelled to confess, accuse or purge himself of any *criminal* matter." But this does not extend to oaths in a civil suit, and therefore it is still the practice both in the spiritual courts and in equity to demand the personal answer of the party himself upon oath. Yet, if in the bill any question be put that tends to the discovery of any crime, the defendant may thereupon demur, as was before observed, and may refuse to answer.

§ 581. (1) Answer, how sworn.—If the defendant lives within twenty miles of London, he must be sworn before one of the masters of the court; if farther off, there may be a *dedimus potestatem* (we have given the power) or commission to take his answer in the country, where the commissioners administer him the usual oath, and then, the answer being sealed up, either one of the commissioners carries it up to the court, or it is sent by a messenger, who swears he received it from one of the commissioners, and that the same has not been opened or altered since he received it. An answer must be signed by counsel, and must either deny or confess all the [448] material parts of the bill, or it may confess and avoid, that is, justify or palliate the facts. If one of these is not done, the answer may be excepted to for insufficiency, and the defendant be compelled to put in a more sufficient answer. A defendant cannot pray anything in this his answer but to be dismissed the court; if he has any relief to pray against the plaintiff, he must do it by an original bill of his own, which is called a *cross-bill.*

§ 582. 6. Amendment of the bill.—After answer put in, the plaintiff, upon payment of costs, may amend his bill, either by adding new parties or new matter, or both, upon the new lights given him by the defendant, and the defendant is obliged to answer afresh to such amended bill. But this must be before the plaintiff has replied to the defendant's answer, whereby the cause is at issue; for afterwards, if new matter arises, which did not exist before, he must set it forth by a *supplemental bill.* There may be also a bill of *revivor*, when the suit is abated by the death of any of the parties, in order to set the proceedings again in motion,

without which they remain at a stand. And there is likewise a bill of *interpleader*, where a person who owes a debt or rent to one of the parties in suit, but, till the determination of it, he knows not to which, desires that they may interplead, that he may be safe in the payment. In this last case it is usual to order the money to be paid into court, for the benefit of such of the parties to whom upon hearing the court shall decree it to be due. But this depends upon circumstances, and the plaintiff must also annex an *affidavit* to his bill, swearing that he does not collude with either of the parties.

§ 583. **7. Hearing on bill and answer.**—If the plaintiff finds sufficient matter confessed in the defendant's answer to ground a decree upon, he may proceed to the hearing of the cause upon bill and answer only. But in that case he must take the defendant's answer to be true in every point. Otherwise the course is for the plaintiff to reply generally to the answer, averring his bill to be true, certain and sufficient, and the defendant's answer to be [449] directly the reverse, which he is ready to prove as the court shall award, upon which the defendant rejoins, averring the like on his side, which is joining issue upon the facts in dispute. To prove which facts is the next concern.

§ 584. **a. Taking testimony.**—This is done by examination of witnesses, and taking their *depositions* in writing, according to the manner of the civil law.* And for that purpose *interrogatories* are framed, or questions in writing, which, and which only, are to be proposed to, and asked of, the witnesses in the cause. These interrogatories must be short and pertinent, not leading ones (as, "Did not you see this?" or, "Did not you hear that?"); for if they be such, the depositions taken thereon will be suppressed and not suffered to be read. For the purpose of examining witnesses in or near London, there is an examiner's office appointed; but, for such as live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them, to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to

* Since 1852 evidence in chancery may be taken *viva voce*.

examine them there upon their own oaths, and (if foreigners) upon the oaths of skillful interpreters. And it hath been held[y] that the deposition of an heathen who believes in the Supreme Being, taken by commission in the most solemn manner according to the custom of his own country, may be read in evidence.

§ 585. (1) Commission to take testimony.—The commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the court of chancery, and their clerks are also sworn to secrecy. The witnesses are compellable by process of *subpœna*, as in the courts of common law, to appear and submit to examination. And when their depositions are taken, they are transmitted to the court with the same care that the answer of a defendant is sent.

§ 586. (2) Bill to perpetuate testimony.—[450] If witnesses to a disputable fact are old and infirm, it is very usual to file a bill to perpetuate the testimony of those witnesses, although no suit is depending; for, it may be, a man's antagonist only waits for the death of some of them to begin his suit. This is most frequent when lands are devised by will away from the heir at law, and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will *verbatim* therein, suggesting 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 contests the will. This is what is usually meant by proving a will in chancery.

§ 587. b. Hearing the cause.—When all the witnesses are examined, then, and not before, the depositions may be published, by a rule to pass publication, after which they are open for the inspection of all the parties, and copies may be taken of them. The cause is then ripe to be set down for hearing, which may be done at the procurement of the plaintiff or defendant, before either the lord chancellor or the master of the rolls, according to the discre-

[y] Omichund. v. Barker. Atk. 21.

tion of the clerk in court, regulated by the nature and importance of the suit and the arrear of causes depending before each of them respectively. Concerning the authority of the master of the rolls to hear and determine causes, and his general power in the court of chancery, there were (not many years since) divers questions and disputes very warmly agitated, to quiet which it was declared by statute 3 George II, c. 30 (Court of Chancery, 1729), that all orders and decrees by him made, except such as by the course of the court were appropriated to the great seal alone, should be deemed to be valid; subject, nevertheless, to be discharged or altered by the lord chancellor, and so as they shall not be enrolled till the same are signed by his lordship. Either party may be *subpœnaed* to hear judgment [451] on the day so fixed for the hearing, and then, if the plaintiff does not attend, his bill is dismissed with costs; or, if the defendant makes default, a decree will be made against him, which will be final, unless he pays the plaintiff's costs of attendance and shows good cause to the contrary on a day appointed by the court. A plaintiff's bill may also at any time be dismissed for want of prosecution, which is in the nature of a nonsuit at law, if he suffers three terms to elapse without moving forward in the cause.

§ 588. **(1) Cross-causes.**—When there are cross-causes on a cross-bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of them.

§ 589. **(2) Method of hearing causes.**—The method of hearing causes in court is usually this: The parties on both sides appearing by their counsel, the plaintiff's bill is first opened, or briefly abridged, and the defendant's answer also, by the junior counsel on each side, after which the plaintiff's leading counsel states the case and the matters in issue, and the points of equity arising therefrom, and then such depositions, as are called for by the plaintiff are read by one of the six clerks, and the plaintiff may also read such part of the defendant's answer as he thinks material or convenient;[z] and after this the rest of the counsel for the plaintiff

[z] On a trial at law if the plaintiff reads any part of the defendant's answer, he must read the whole of it; for by reading any of it he shows a reliance

make their observations and arguments. Then the defendant's counsel go through the same process for him, except that they may not read any part of his answer, and the counsel for the plaintiff are heard in reply.

§ 590. **(3) Decrees.**—When all are heard, the court pronounces the *decrée*, adjusting every point in debate according to equity and good conscience, which decree being usually very long, the minutes of it are taken down and read openly in court by the registrar. The matter of costs to be given to either party is not here held to be a point of right, but merely discretionary (by the statute 17 Richard II, c. 6—Untrue Suggestions in Chancery, 1393) according to the circumstances of the case, as they [452] appear more or less favorable to the party vanquished. And yet the statute 15 Henry VI, c. 4 (1436), seems expressly to direct that as well damages as costs shall be given to the defendant, if wrongfully vexed in this court.

§ 591. **(a) Decrees, interlocutory and final.**—The chancellor's decree is either *interlocutory* or *final*. It very seldom happens that the first decree can be final, or conclude the cause; for, if any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial by written depositions, that it will not bind the parties thereby, but usually directs the matter to be tried by jury; especially such important facts as the validity of a will, or whether A is the heir at law to B, or the existence of a *modus decimandi* (custom of tithing) or real and immemorial composition for tithes.

§ 592. **(b) Feigned issue.**—But, as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of king's bench or at the assizes, upon a *feigned issue*.* For (in order to bring it there, and have the point in dis-

on the truth of the defendant's testimony, and makes the whole of his answer evidence.

* The form of feigned issue here described is obsolete. But by most of the new codes a judge may order any question of fact arising in an equitable case to be tried by a jury. The verdict, however, is not binding on him but only advisory.—HAMMOND.

pute, and that only, put in issue) an action is feigned to be brought, wherein the pretended plaintiff declares that he laid a wager of 5*l.* with the defendant that A was heir at law to B, and then avers that he is so, and brings his action for the 5*l.* The defendant allows the wager, but avers that A is not the heir to B, and thereupon that issue is joined, which is directed out of chancery to be tried: and thus the verdict of the jurors at law determines the fact in the court of equity. These feigned issues seem borrowed from the *sponsio judicialis* of the Romans,* and are also frequently used in the courts of law, by consent of the parties, to determine some disputed right without the formality of pleading, and thereby to save much time and expense in the decision of a cause.

§ 593. (c) Taking opinion on questions of law.—So, likewise, if a question of mere law arises in the course of a cause, as whether by the words of a will an estate for life or [453] in tail is created, or whether a future interest devised by a testator shall operate as a remainder or an executory devise, it is the practice of this court to refer it to the opinion of the judges of the court of king's bench or common pleas, upon a case stated for that purpose, wherein all the material facts are admitted, and the point of law is submitted to their decision, who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. And upon such certificate the decree is usually founded.

§ 594. (d) Accounting before master.—Another thing also retards the completion of decrees. Frequently long accounts are to be settled, encumbrances and debts to be inquired into, and a hundred little facts to be cleared up, before a decree can do full and sufficient justice. These matters are always by the decree on the first hearing referred to a master in chancery to examine, which examinations frequently last for years, and then he is to report the

* *Nota est sponsio judicialis: "spondesne quingentos, si meus sit? spondeo, si tuus sit. Et tu quoque spondesne quingentos, ni tuus sit? spondeo, ni meus sit* (The judicial wager is known: 'Do you engage to give me five hundred pounds, if it be mine? I promise it, if it be thine. And you also, Do you promise me five hundred pounds if it be not thine? I promise it, if it be not mine')." *Vide* Heinecc. Antiquitat, l. 3. t. 16. § 3 etc. Sigon. de Judiciis. l. 21. p. 466. citat. *Ibid.*

fact, as it appears to him, to the court. This report may be excepted to, disproved and overruled, or otherwise is confirmed, and made absolute, by order of the court.

§ 595. **(e) Final decree.**—When all issues are tried and settled, and all references to the master ended, the cause is again brought to hearing upon the matters of equity reserved, and a final decree is made, the performance of which is enforced (if necessary) by commitment of the person or sequestration of the party's estate.*

§ 596. **(i) Petition for rehearing.**—And if by this decree either party thinks himself aggrieved, he may petition the chancellor for a *rehearing*, whether it was heard before his lordship, or any of the judges, sitting for him, or before the master of the rolls. For whoever may have heard the cause, it is the chancellor's decree, and must be signed by him before it is enrolled;[b] which is done, of course, unless a rehearing be desired. Every petition for a rehearing must be signed by two counsel of character, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to be reheard. And upon the [454] rehearing all the evidence taken in the cause, whether read before or not, is now admitted to be read, because it is the decree of the chancellor himself, who only now sits to hear reasons why it should not be enrolled and perfected, at which time all omissions of either evidence or argument may be supplied.[c] But, after the decree is once signed and enrolled, it cannot be reheard or rectified, but by bill of review, or by appeal to the house of lords.

§ 597. **(ii) Bill of review.**—A bill of *review* may be had upon apparent error in judgment, appearing on the face of the decree, or, by special leave of the court, upon oath made of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or

* The enforcement of decrees by commitment of the person or sequestration of the party's estate is now substantially obsolete everywhere. They are enforced by execution, general or special, according to the nature of the case in the same manner with judgments at law.—HAMMOND.

b Stat. 3 Geo. II. c. 30. See pag. 450.

c Gilb. Rep. 151, 152.

matter then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review.

§ 598. **(iii) Appeal to house of lords.**—An *appeal* to parliament, that is, to the house of lords, is the *dernier resort* of the subject who thinks himself aggrieved by any interlocutory order or final determination in this court, and it is effected by *petition* to the house of peers, and not by *writ of error*, as upon judgments at common law. This jurisdiction is said [d] to have begun in 18 Jac. I (1620), and certainly the first petition, which appears in the records of parliament, was preferred in that year,[e] and the first that was heard and determined (though the name of appeal was then a novelty) was presented in a few months after,[f] both leveled against the Lord Chancellor Bacon for corruption and other misbehavior. It was afterwards warmly controverted by the house of commons in the reign of Charles the Second.[g] But this dispute is now at rest; [h] it being obvious to the reason of all mankind that, when the courts of equity became principal tribunals for deciding causes of property, a revision of their [455] decrees (by way of appeal) became equally necessary, as a writ of error from the judgment of a court of law. And, upon the same principle, from decrees of the chancellor relating to the commissioners for the dissolution of chauntries, etc., under the statute 37 Henry VIII, c. 4 (College, 1545), (as well as for charitable uses under the statute 43 Elizabeth, c. 4, Charitable Gifts, 1601), an appeal to the king in parliament was always unquestionably allowed.[i] But no new evidence is admitted in the house of lords upon any account, this being a distinct jurisdiction,[k] which differs it very considerably from those instances wherein the same jurisdiction revises and corrects its own acts, as in hearings and bills of review. For it is a practice unknown to our law (though constantly followed in the spiritual courts), when a superior court is reviewing the sentence of the inferior, to examine the justice of the former decree by evidence that was never produced below. And thus much for the general method of proceeding in the courts of equity.

d Com. Journ. 13 Mar. 1704.
e Lords' Journ. 23 Mar. 1620.
f *Ibid.* 3. 11, 12 Dec. 1621.
g Com. Journ. 19 Nov. 1675, etc.
h Show. Parl. C. 81.
i Duke's Charitable Uses. 62.
k Gilb. Rep. 155, 156.

SUPPLEMENTARY CHAPTER.*

CONFLICT OF LAWS.

§ 599. Conflict of laws: 1. Introduction.—The subject of Conflict of Laws has been developed as a branch of English law since the publication of Blackstone's Commentaries. Very few questions involving the application of foreign law had before that date come before the English courts, and, generally, no attempt had been made to apply such law even in cases where justice would seem to demand it. To some extent, in matters of status particularly, English courts were obliged to recognize the binding force of foreign law, as in the case of marriages contracted abroad or in Scotland. But in general, questions as to the applicability of foreign law or the validity of foreign judgments seem to have been disregarded both by bench and bar. It has been said that the first case distinctly dealing with the principles of Conflict of Laws was Scrimshire v. Scrimshire in 1752.[1] However this may be, it is certain that no adequate treatment of the subject was to be found in the English language until the publication of Story's great treatise in 1834. Since that time, with the increase of commerce and mutual intercourse among the people of the world, this department of law has undergone an extensive development and has become of much practical importance.[2]

§ 600. 2. Proper designation of subject.—Considerable discussion has taken place over the propriety of the designation which Story, following earlier Dutch and Italian jurists, gave to the subject. It must be admitted that the phrase "Conflict of Laws" is not an ideal one, for it calls to mind a strife or contention, whereas the prevention of conflicts is the very purpose of this branch of

* This chapter has been written by Professor Orrin Kip McMurray.

---

1 2 Hagg. Cons. 395.

2 Some conception of the growth of the topic may be had from comparing the ten-page table of cases cited in Story's Conflict of Laws, 1834, indexing all cases twice, once under the names of the plaintiff and once under that of the defendant, with the table of cases cited in Wharton's Conflict of Laws, 1905, containing 159 pages, indexed only under the name of the plaintiff.

law. The expression "Private International Law," which is nowadays often used, has one advantage in directing the mind to the fact that the subject involves foreign jurisdictions, and also that it is often dealt with in treaties. The expression is, however, open to many objections, the chief one being that the subject of international law deals with the rights of states or sovereigns with respect to each other, while this body of law is concerned with the rights of private persons. In the United States most of the problems arise in connection with transactions occurring in whole or in part in the states of the Union, and the reference to international law in such a connection is plainly inappropriate. In consequence all American writers use the phrase "Conflict of Laws" rather than "Private International Law" to describe the subject. Jurists have suggested other expressions, such as International Private Law, the Extraterritorial Recognition of Rights, and the Application of Foreign Law, while a recent writer entitles his book Polarized Law. But there is little likelihood that any of these titles will receive general recognition.[3]

§ 601. 3. Definition.—Conflict of Laws has been said to be "a body of rules for finding rules." It is the system of rules which prevails in a given state, (1) for the purpose of selecting the law to be applied to a case where it is doubtful whether the domestic or the foreign law should govern, (2) for the purpose of selecting a competent tribunal where it is doubtful whether a domestic or a foreign court has jurisdiction, and (3) for the purpose of determining the effect to be given to the judgment of a foreign tribunal.[4]

[3] Upon the matters in this section, see Holland, Jurisprudence, 11th ed., 415–418; Baty, Polarized Law, 1–30; Dicey, Conflict of Laws, 2d ed., pp. 12–16. The most frequently used works upon this subject are, for England, Dicey, Conflict of Laws, 2d ed., 1908; Westlake, Private International Law, 5th ed., 1912; for the United States, Beale's Cases on the Conflict of Laws, 3 vols., 1907, containing a valuable summary at the end of the third volume; Story, Conflict of Laws, 8th ed., 1883; Wharton, Conflict of Laws, 3d ed., 1905, 2 vols.; Minor, Conflict of Laws, 1901. A very interesting and brief discussion of the fundamental principles is to be had in Baty, Polarized Law, 1914.

[4] Holland, Jurisprudence, 11th ed., 417.

§ 602. 4. Recognition of rights acquired under foreign law.—The courts of England and of the United States will, as a general principle, recognize rights acquired and enforce duties imposed under the law of any civilized state. The exceptions to this fundamental proposition are not capable of precise statement. A state will certainly not recognize rights acquired in another state or country where to do so would violate its public policy or shock prevailing conceptions of morality. Admittedly this exception is vague and difficult of application.[5] Even in a southern state in which marriages of whites and negroes were strictly forbidden, it has been held that such a marriage where entered into in a state not forbidding such alliances, should be recognized everywhere.[6] In Massachusetts, a marriage, which would have been void under the statutes of that commonwealth, was held valid where the parties had entered into the marriage before coming there, in a country where there was no inhibition.[7]

§ 603. 5. Enforcement of rights.—Though the general principle is that a state will recognize rights acquired in another state, it does not follow that it will in all cases enforce such rights. Thus, when slavery existed, the fact that a master took his slave with him into a free state did not confer the status of freedom upon the slave. The free state recognized the status of the slave.[8] It did not follow from this, however, that the master might, for example, chastise the slave as he might have done in a slave state. The status subsisted but was not enforced. Another instance of nonenforcement of obligations imposed in a foreign jurisdiction is the rule which exists with regard to criminal or penal obligations. They are never enforced outside of the state imposing them. Thus, a fine imposed as punishment for a crime cannot be enforced by action in a foreign jurisdiction.[9] The supreme court of the United States has held that a liability imposed by statute upon corporation directors to pay the debts of the corporation, in the event of their failure to make proper returns, is not a penal

5 Minor, Conflict of Laws, c. II.
6 State v. Ross (1877), 76 N. C. 242, 22 Am. Rep. 678.
7 Sutton v. Warren (1845), 10 Met. (Mass.) 451.
8 Polydore v. Prince (1837), Ware, 402.
9 Minor, Conflict of Laws, § 203.

liability within this rule, but is a contractual obligation.[10] If, however, a penalty of $100 were imposed, to be collected by any creditor for the same default, it would doubtless be considered as penal. In the first case the director is a surety for the corporation; in the latter case the penalty is plainly intended as a punishment.[11]

§ 604. 6. Elements considered in determining what law should apply.—In determining whether a right is to be governed by foreign or domestic law, several elements are considered: (1) The law of the place of making a contract (*lex loci contractus*). (2) The law of the place of performance (*lex loci solutionis*). (3) The law of the place where a tort was committed (*lex loci delicti*). (4) The law of the domicile (*lex domicilii*). (5) The law of the *situs* of property. (6) The law of the place where an act or ceremony was performed (*lex loci actus*). (7) The law of the tribunal trying the case (*lex fori*). Each of these elements is of importance, and the problems to be solved in cases arising in this field are as to which of these elements ought to control in the particular case.[12]

§ 605. 7. Lex fori.—In the absence of any evidence that the law of the foreign state is different from that of the forum, the latter will be applied. Courts often say that the foreign law will be presumed to be the same as that of the state in which the court sits, but it would seem better to say that there is no presumption, and that the court will apply the rules of the ordinary municipal law, unless the party claiming a right under the foreign law establishes its existence by proper evidence.[13] It is always necessary to prove foreign law as a fact, and courts will not take judicial notice of it.[14] Even when the foreign substantive law is properly proved, the court will use the law of the *forum* with respect to all

10 Huntington v. Attrill (1892), 146 U. S. 657, 36 L. Ed. 1123, 13 Sup. Ct. Rep. 224.

11 3 Beale, Conflict of Laws, Summary, 519.

12 Dicey, Conflict of Laws, 2d ed., 67–78.

13 Kales, Presumption of Foreign Law, 19 Harvard Law Review, 401.

14 Lemieux v. Boston & Maine R. R. Co. (1914), 219 Mass. 399, 106 N. E. 992.

matters of procedure. The competency of witnesses, the form of action, the statute of limitations in personal actions, are all governed by the *lex fori*.[15]

§ 606. **8. Domicile and nationality.**—The principle of domicile is of great importance in the English and American system of Conflict of Laws. In many matters, the question of a person's domicile determines the law by which his status or by which the validity of an act is to be measured. Thus, for example, the succession to the personal property of a decedent, as well as the form of the execution of a will disposing of such property, is determined by the place of his domicile. Again, the power of a court to grant a divorce is limited to the court of that state or country in which one or both parties are domiciled. Most European countries, on the other hand, have either abandoned the test of domicile or have never recognized it, adopting instead the test of nationality.[16] It is manifest that irreconcilable conflicts upon such important questions as the validity of marriages contracted, or of divorces granted, in foreign countries will arise out of this opposition of views as to the fundamental basis of this branch of the law. A recent instance is afforded by a decision of the supreme court of Palermo, Italy, which held void a divorce granted to a spouse domiciled in New York because the parties were, in the eyes of the Italian law, citizens of Italy.[17] An American court would treat as equally null a divorce granted by Italy to one of her citizens where the parties were domiciled in New York. It is manifest that difficulties such as are here presented can be solved only by treaties or conventions, and the obstacles in the way of a satisfactory settlement of the questions upon such a basis are well-nigh insuperable. Hitherto the United States and England, because of their insistence upon the principle of domicile, have been unwilling to become a party to any of the Hague conventions upon this subject.[18]

15 Minor, Conflict of Laws, §§ 205–211.

16 Westlake, Private International Law, 5th ed., c. II, pp. 25–42; Baty, Polarized Law, pp. 21–23, 109–115.

17 American Bar Association Journal, I, 67, citing, Clunet, Journal du Droit International Privé, XLI, 1362.

18 Baty, Polarized Law, 124–148.

§ 607. a. The doctrine of renvoi.—When an English or American court refers to the law of a person's domicile for the determination of rights, does it refer to the entire body of law of the domicile, including the rules governing Conflict of Laws, or does it exclude this branch of law and refer to the law of the domicile, deducting the rules governing Conflict of Laws? If it adopts the entire body of law, it may happen that the rules of the domiciliary law refers the court back to the law of the person's nationality. Suppose, for example, a citizen of the United States domiciled in Florence, dying there, and leaving personal estate in California. The California court in administering the estate will apply the law of Italy to determine the persons who should succeed to this property. But when we examine the Italian law, we find that it refers us back to the law of the person's nationality. What should the California court do? Should it adhere to its principle of domicile as the determining test, or should it try to apply the principle of nationality? There should seem to be little doubt upon principle that it should disregard that part of the Italian law which deals with the principles of Conflict of Laws and should adhere to its principle of domicile. Indeed, it would seem impossible for the California court to apply the so-called doctrine of *renvoi*, for there is no national law of succession in the United States, and the principle is well established that a citizen of a particular state loses his state citizenship, though not his American citizenship, by acquiring a foreign domicile. In one much criticised English case the principle of *renvoi* was adopted. The case mentioned, In re Johnson,[19] was as follows: A British citizen, born in Malta, died domiciled in Baden, leaving personal property, stock which had to be transferred in England. The English court, applying the general rule that the succession to personalty is governed by the law of the decedent's domicile, referred itself to the law of Baden. It found that by that law the succession to the personalty was governed by the law of the nationality of the decedent. Strictly, there was no national law appertaining to the status of British citizens, but the court treated the law of Malta as the nearest approach to a law of nationality and decided the course of succession by that law. The case has no following in England or the United States, and

[19] (1903), 1 Ch. 821.

there is little danger of the doctrine of *renvoi* becoming established.[20]

§ 608. **b. Domicile.**—The word "domicile" means legal home. Not every person actually has a home, but the law insists that he must have a "domicile." Some people, on the other hand, have more than one home, but no man can have more than one domicile at a time. The law attaches to everyone a domicile at his birth, which in the case of legitimate children is that of the father, and in the case of illegitimate children, or where the father is dead, is that of the mother. This is called the domicile of origin and continues until a new domicile is obtained.

A new domicile in the case of persons *sui juris* can be acquired by removal to another state and actual residence, coupled with the intention to reside there permanently, or for an indefinite period. This is called the domicile of choice. Upon marriage a woman acquires the domicile of her husband, and her subsequent domicile during marriage follows that of her husband. This is called a constructive domicile. If the father of the family obtains a new domicile of choice, not only his wife, but also his minor children acquire a new constructive domicile. Domicile is to be distinguished from residence, though the word "residence" is sometimes used where domicile is intended. In the case of the domicile of origin or of a constructive domicile, one may never have been in the state in which he is legally domiciled. In a leading English case,[21] a man was held to have a Scotch domicile, at his death, though he was born in Leghorn and never lived in Scotland. This peculiar result followed from the fact that his father, a consul at Leghorn, Italy, had not established a domicile there, and the son, through a long life devoted in large part to travel, never acquired a permanent domicile of choice.

The English law upon this subject attributes greater importance to the domicile of origin than do the American courts. The English doctrine is that by mere abandonment of the domicile of choice the domicile of origin attaches. Thus, an Englishman who has

20 Baty, Polarized Law, 115–120; Westlake, Private International Law, 5th ed., 37–42; Dicey, Conflict of Laws, 2d ed., 715–723.

21 Udny v. Udny (1869), L. R. 1 Sc. Ap. 457.

been domiciled in New York loses his New York domicile and acquires his original English domicile as soon as he leaves New York with the intention of abandoning his residence there. An American domiciled in New York, however, does not lose his former domicile merely by leaving with the same intent. His last domicile continues, in the eyes of the law, until he acquires a new one.[22]

§ 609. c. **Personal status: (1) In general.**—The general rule is that the status of a person is determined by the law of his domicile. It is, however, important to notice that certain disabilities imposed upon one for his own good or for that of society do not alter his status. Thus, for instance, the declaration by a competent court that one is a spendthrift and the appointment of a guardian over him do not alter his status, and will be given no effect outside of the jurisdiction. The same is, of course, true with respect to an adjudication of incompetency by reason of insanity. There is no such status known to our system of law as that of an insane person or a spendthrift. In the case of insanity, of course, the fact that a person is insane will be recognized, but the decree establishing that fact pronounced by the state of his domicile will not affect his capacity in a foreign jurisdiction.

On the other hand, slavery or deprivation of civil rights as a punishment for crime does create a status. As before pointed out, however, the fact that a foreign state will recognize the status does not necessarily mean that it will enforce the incidents. Thus, in Somerset's Case,[23] Lord Mansfield, while conceding that a slave brought by his master to England did not become free, refused to grant the master any remedy for the recovery of the personal liberty of the slave. Infancy is a status, fixed by the law of the domicile of the infant. Where, therefore, a difference exists between the law of several jurisdictions with respect to the age of minority, the law of the infant's domicile should control the question of his capacity.[24]

22 3 Beale, Cases on Conflict of Laws, Summary, 508–511; Dicey, Conflict of Laws, 2d ed., 82–163; 1 Wharton, Conflict of Laws, 3d ed., §§ 20–82; Minor, Conflict of Laws, §§ 19–67.

23 (1772), Lofft, 1.

24 3 Beale, Conflict of Laws, Summary, 522–523.

§ 610. (2) Status: Marriage.—A marriage valid where made is recognized everywhere, subject to the general rules of public policy which forbid the recognition of a relation abhorrent to prevailing ideas of morality. Marriages contracted between Indians according to tribal customs have frequently been treated as valid by our courts, though the relationship would hardly be considered as marriage in civilized nations.[25]

In the United States, generally, the validity of a marriage is governed by the law of the place of celebration.[26] But in England, while with respect to the form of the ceremony the law of the place of celebration governs, the capacity of the parties to enter into the marriage relation depends upon their domicile.[27] A marriage, therefore, between cousins, Portuguese subjects not domiciled in England though temporarily living there, was held invalid, notwithstanding the fact that the parties would by English law have been competent to marry.[28] If either husband or wife be domiciled in England and by the law of that country the marriage would be valid, it is deemed a binding marriage.[29] The case of Ogden v. Ogden shows some tendency to approach the American theory that the law of the place of celebration should govern as to validity, irrespective of domicile.[30]

§ 611. (3) Status: Legitimacy and adoption.—The legitimacy of children depends upon the law of the father's domicile at the time of birth. The legitimation of a child after birth, as under the Scotch law by subsequent marriage of its parents, should depend upon the domicile of the father at the time the marriage takes place. Where a child, illegitimate at birth, may be made legitimate under a statute, the statute that controls in such a case is that at the father's domicile. Where an illegitimate child acquires

25 Chancey v. Whinnery (Okl. 1915), 147 Pac. 1036; Hills v. State (1901), 61 Neb. 589, 57 L. R. A. 155, 159, and note.

26 Commonwealth v. Lane (1873), 113 Mass. 458, 18 Am. Rep. 509; 11 Columbia Law Review, 767.

27 Dicey, Conflict of Laws, 2d ed., 613.

28 Sottomayor v. De Barros (1877), L. R. 3 Prob. Div. 1.

29 Id., (1879), L. R. 5 Prob. Div. 94.

30 Ogden v. Ogden (1908), L. R. Prob. Div. 46, and see note by Mr. Dicey, Conflict of Laws, 2d ed., pp. 838, 839.

the status of legitimacy, or where a child is adopted, the new status should be recognized everywhere.[31] The English courts, however, have refused to concede the legitimation of a child by the subsequent marriage of its parents in Scotland, with respect to the succession of lands in England.[32] This rule has been criticised in England itself, and is not the law in the majority of American jurisdictions.[33]

§ 612. 9. Property.—When we leave the law of persons or status, and consider the principles that should control in the recognition of rights of property, we find the law of the *situs* occupying the chief position as a test. All questions concerning the title and form of conveyances of land depend upon the law of its *situs*,[34] and all rights issuing out of or annexed to the ownership of land are governed by the same principle. The right of action, for example, on the covenants of title contained in a deed depends upon the law of the place where the land is situated, not upon that of the place of making the deed or the domicile of the grantor.[35] Tangible chattels, under the doctrine of the modern cases, have a *situs* just as well defined as that of immovables.[36] The validity of a gift or sale, therefore, if completely made in a given state, is to be governed exclusively by its law.[37] Taxation of property proceeds upon the same principle, for, notwithstanding the maxim *mobilia sequuntur personam*, it is held that a state has no more right to tax tangible personal property of its citizens situated in a foreign state than it has to tax lands situated there.[38]

A chose in action, by the better doctrine, has no *situs*. With respect to such rights the Latin maxim just quoted, if strictly followed, will cause confusion. The state taxes the creditor, to be

31 Minor, Conflict of Laws, § 99.

32 Birtwhistle v. Vardill (1840), 7 Cl. & F. 895, 7 Eng. Reprint, 1308.

33 Ross v. Ross (1880), 129 Mass. 243, 37 Am. Rep. 321.

34 Minor, Conflict of Laws, §§ 11, 12.

35 Ellis v. Abbott (1914), 69 Or. 234, 138 Pac. 488.

36 Delaware & Lackawanna R. R. Co. v. Pennsylvania (1905), 198 U. S. 341, 49 L. Ed. 1077, 25 Sup. Ct. Rep. 669.

37 Black v. Zacharie (1845), 3 How. 483, 11 L. Ed. 690.

38 Union Refrigerator Transit Co. v. Kentucky (1905), 199 U. S. 194, 4 Ann Cas. 493, 50 L. Ed. 150, 26 Sup. Ct. Rep. 36.

sure, at the place where he lives, but the tax is strictly a personal one, not a property tax, and can usually be enforced by personal action. Outside of the field of taxation, the attribution of a *situs* to ordinary things in action as distinguished from things in possession only causes confusion. The rights existing under a chose in action are enforceable wherever the debtor may be found, or, in fact, wherever the owner of the chose in action can secure an attachment on property belonging to the debtor. This shows that the right is purely personal and transitory. In determining the validity of the transfer of a chose in action, therefore, the controlling law should be that of the place where the assignment is made. It is universally held, with reference to voluntary transfers,[39] that their validity is to be tested by the law of the place where the transfer was made.

Negotiable instruments, such as corporation bonds, promissory notes, and bills of exchange, are for certain purposes treated in the same way as tangible property. Thus, in many jurisdictions, the title to a promissory note may be transferred by execution sale of the note. The precise limits of the doctrine which attributes a *situs* to such mercantile specialties are, however, not clearly defined. The common-law specialty has always been held to have a *situs*, for the reason that profert of the bond must be made in an action brought upon it. But the courts have not taken the same view in all respects as to the so-called mercantile specialties. Under the power of taxation, they are usually treated as ordinary debts and taxed at the domicile of their owner.[40] Yet it is conceded that they may acquire a *situs* independent of the residence of their owner by use in business, as, for example, in banking business, in another jurisdiction.[41]

§ 613. 10. Succession.—In respect to the succession to movables, the principle of domicile again comes forward as the most prominent factor in determining the rules which should control. Even though the movables are tangible and have a *situs*, the suc-

[39] 3 Beale, Conflict of Laws, Summary, 507.

[40] Buck v. Beach (1907), 206 U. S. 392, 11 Ann. Cas. 732, 51 L. Ed. 1106, 27 Sup. Ct. Rep. 712; Selliger v. Kentucky (1909), 213 U. S. 200, 53 L. Ed. 761, 29 Sup. Ct. Rep. 447.

[41] New Orleans v. Stempel (1899), 175 U. S. 309, 44 L. Ed. 174, 20 Sup. Ct. Rep. 110; Adams' Estate (Iowa, 1914), 149 N. W. 531.

cession in the case of intestacy is governed by the law of their owner's domicile at the time of his death.[42] It is here that the maxim that the movables follow the person has its application. If the decedent leaves a will, its validity, so far as it disposes of movables, is governed, in the absence of statute, by the domicile of the testator. This is the rule with respect both to the formal execution of the will and its substantial validity.[43] The controlling law in such cases is that of the testator's domicile at the time of his death, not merely at the time of the execution of the will. One, therefore, who makes a will disposing of movables, executed in accordance with the law of his domicile, in effect revokes or rather suspends the will by changing his domicile to a jurisdiction where the law respecting execution of the will is different. If he dies domiciled at the latter place, intestacy is the result. The hardship incident to the operation of this general principle has led to legislation upon the subject in many of our states and in foreign countries.[44]

So far as concerns interpretation of the provisions of the will, the court seeking for the meaning of the testator should put itself as far as possible in the position of the testator at the time he made the will. The true meaning of its language is most nearly reached by applying the rules in force at the testator's domicile at the time he made the will.[45] The general principle, therefore, in respect to the selection of the law for the interpretation of the will disposing of movables is different from that which governs the validity of the instrument. Domicile in both cases is the principle; but in the case last mentioned it is the domicile at the time

42 3 Beale, Conflict of Laws, Summary, 532; Dicey, Conflict of Laws, 2d ed., 664.

43 Dupuy v. Wurtz (1873), 53 N. Y. 556; Minor, Conflict of Laws, §§ 143, 144.

44 See Dicey, Conflict of Laws, 2d ed., 673–687, and 1 Underhill, Wills, § 23, note, for examples of such legislation.

45 Dicey, Conflict of Laws, 2d ed., 679; Minor, Conflict of Laws, § 145; 3 Beale, Cases on Conflict of Laws, Summary, 533. An absurd provision in the Civil Code of California, section 1376, as amended in 1873–74, requires the court to interpret a will disposing of personalty in all cases by the law of the state of California. This, of course, would in most cases defeat the intention of the testator. The original code of 1872 expressed the rule more justly in accord with the general doctrine.

of death, in the matter of interpretation, it is the domicile at the time of the execution of the instrument,[46] that is regarded.

In the case of the succession of immovables, the law of the *situs* is applied to determine the validity of the will with respect both to its execution and its dispositions of property.[47] In this connection it is important to observe that leasehold interests, although classified in the law of property as chattel interests, are treated as immovables in this branch of law.[48] A testator, therefore, in executing a will disposing of immovables as well as movables must observe both the law of the state of his domicile and that of the state where the immovables are situated, and must execute his will in accordance with both systems of law.

The rules as to the revocation of wills follow in the main those as to the execution. The revocation of a will of land therefore depends upon the law of the state where the land is situated, while the revocation of a will disposing of personal property depends upon the law of the domicile of the testator when the revoking act was performed. Thus, where subsequent marriage revokes a will in jurisdiction A, in which one who has made a will of personalty is domiciled at the time of his marriage, though it does not have that effect in jurisdiction B, where the testator dies, where the movables are situated, and where he is domiciled at his death, the law of jurisdiction A will govern and the result will be intestacy.[49]

§ 614. 11. Estates: Administration.—Though the succession to movables, whether by will or intestacy, is governed by the law of the domicile of their owner, administration of the estate of the decedent may be had in whatever state any portion of his property is situated, or in the case of debts owing to him, in whatever state his debtor may be found.[50] The principal administration, how-

46 See the argument on both sides presented in Minor, Conflict of Laws, § 148.

47 Dicey, Conflict of Laws, 2d ed., 544.

48 Wharton, Conflict of Laws, 3d ed., §§ 286, 287.

49 In re Martin (1900), L. R. Prob. Div. 211 (C. A.); Waterman v. Schwab (1906), 43 Sc. L. Rep. 161, with comment in 20 Harvard Law Review, 68.

50 Minor, Conflict of Laws, § 113.

ever, is had at the domicile of the decedent; the other administrations, if any, are ancillary. An ancillary administration is not in every case necessary. If there are no debts, for example, within the state where the property is situated, and if the assets can be collected there without suit, there is no need for an ancillary administration.[51]

An administrator or executor has no power to sue outside of the state of his appointment.[52] He may, however, sue a debtor of the decedent who comes temporarily into the state where he has received his letters of administration. He may also receive payment of a debt and give a valid discharge in the same state.[53] His discharge, however, given to a debtor in another jurisdiction would not protect the latter from the liability to make a second payment of the debt to the administrator appointed in the debtor's home state.[54] An exception to the power to sue outside of the jurisdiction of his appointment exists where the executor or administrator sues upon a right which has come to him during administration.[55] Often the inconvenience due to the fact of the inability of the domiciliary representative to sue is obviated by his making an assignment of the chose in action to a trustee for collection. Such trustee, being invested with the title, may sue the debtor wherever he may be found.[56] The disability of the administrator or executor to sue abroad is compensated by his immunity from suit save in the state where he was appointed. If he cannot sue on demands owing to his testate or intestate in another state, neither can he be sued there.[57] From the limitation of his capacity, it follows that judgment for or against an executor or administrator in his representative capacity will not be recognized in a suit brought by or against the ancillary administrator in an-

51 Washburn's Estate (Putnam v. Pitney), (1891), 45 Minn. 242, 11 L. R. A. 41, 47 N. W. 790.

52 Johnson v. Powers (1891), 139 U. S. 156, 35 L. Ed. 112, 11 Sup. Ct. Rep. 525; Lewis v. Adams (1886), 70 Cal. 403, 59 Am. Rep. 423, 11 Pac. 833.

53 Wilkins v. Ellett (1883), 108 U. S. 256, 27 L. Ed. 718, 2 Sup. Ct. Rep. 641; 1 Woerner, American Law of Administration, § 161.

54 Ferguson v. Morris (1880), 67 Ala. 389.

55 Lewis v. Adams (1886), 70 Cal. 403, 59 Am. Rep. 423, 11 Pac. 833.

56 1 Woerner, American Law of Administration, § 162.

57 Minor, Conflict of Laws, § 107.

other state.[58] If, however, the judgment was rendered upon a transaction had by the administrator or executor after the death of the decedent, the rule would be otherwise, for he would possess such right not in his representative capacity, but personally. Creditors of the estate may prove their claims in any state in which administration is pending. Accordingly, a nonresident creditor may present his claim to an ancillary administrator at the place of ancillary administration, and, in case of rejection, may sue such ancillary administrator in the latter's state.[59]

An adjudication of bankruptcy and an appointment of a trustee in involuntary proceedings, under the national bankruptcy act, passes all the property of the bankrupt in this country (including ships at sea). Title to real property in a foreign country, however, cannot be affected by our bankruptcy statutes. Title to personal property will be considered as passing by the law of the domicile of the bankrupt, subject, as in the case of the administration of decedent's estate, to the payment of debts owing to creditors in that country. The same principles govern foreign bankruptcies and also control state insolvency statutes when such exist.[60] The guiding principles in cases of voluntary assignments are those which apply in ordinary transfers of property.[61] The law of the domicile is not the controlling law in such cases, but the law of the place where the assignment was made or where the goods are situated.

§ 615. 12. Obligations: a. Torts.—The principles of domicile and of *situs* become less prominent in connection with the ascertainment of the proper law to apply in the case of personal obligations incurred in a foreign state, and the *lex loci* becomes increasingly important. In the law of torts or obligations *ex delicto*, the law that gives the right of action should be that of the place where the injury complained of occurred, and this is, in fact, the rule throughout the United States.[62] Although the English courts hold

58 First Nat. Bank v. Dowdy (1913), 175 Mo. App. 478, 161 S. W. 859.

59 3 Beale, Cases on Conflict of Laws, Summary, 535.

60 1 Loveland, Bankruptcy, § 373.

61 Minor, Conflict of Laws, § 130.

62 Minor, Conflict of Laws, § 196. The action may be begun wherever the defendant is found, in general. There is, however, an exception in the case

that an action can only be maintained in England where the act is a wrong there as well as in the jurisdiction where committed, the universal doctrine in this country recognizes no such limitation.[63] A tort-feasor cannot escape the consequences of his wrongdoing merely by leaving the state or country where he committed the wrong.

Interesting applications of this principle are found in connection with the statutory right of action given to survivors for death where the law of the place where the wrongful act occurred gives a remedy. Such remedy is enforced in all other states where the proper machinery for enforcement exists. If the court of the forum sees that the damages given for wrongful death under such a statute are given, not by way of compensation, but by way of penalty, it will, however, refuse to enforce a foreign right of action for death. This refusal rests upon the exception that penal obligations will not be enforced outside of the territory of the state of their creation.[64] It is sometimes difficult to determine whether a given liability is penal or not, but the chief test would seem to be whether the damages are given without reference to the extent of injury to the plaintiff.[65]

A crime committed in a foreign jurisdiction is only punished there. A state does not undertake to punish acts committed wholly without its territorial jurisdiction.[66] Extradition will be granted in proper cases, but the matter of extradition is no part of the subject of Conflict of Laws.

§ 616. b. Obligations: Quasi contract.—One of the most important *quasi*-contractual obligations, if we define that term as applicable to "all noncontractual obligations which are treated,

of trespass to land. An action for such wrong can only be brought in the state where the land is situated. Kroll v. Chicago, B. & Q. R. Co. (1915), 152 N. W. 549. Cf., however, Little v. Chicago, St. P. etc. R. Co. (1896), 65 Minn. 48, 60 Am. St. Rep. 421, 33 L. R. A. 423, 67 N. W. 846.

63 Dicey, Conflict of Laws, 2d ed., 645.

64 3 Beale, Cases on Conflict of Laws, Summary, 518, 539; Jesse W. Lilienthal, Is the Statutory Action for Injuries Causing Death Transitory? 3 Harvard Law Review, 116.

65 Johnson v. Chicago, M. & St. P. Ry. Co. (1913), 174 Mo. App. 16, 160 S. W. 5.

66 3 Beale, Cases on Conflict of Laws, Summary, 518.

for the purpose of affording a remedy, as if they were contracts," is the obligation created by a judgment.[67] A foreign judgment creates an obligation under the Anglo-American system of Conflict of Laws which may be sued upon in another jurisdiction.[68]

A judgment *in rem*, of which a decree of condemnation in a prize court of admiralty is the best example, is conclusive everywhere. Other examples are judgments obtained upon the seizure of property by attachment,[69] so far as they affect the title of the thing seized.

It was formerly the view that a foreign judgment *in personam* was only *prima facie* evidence of the correctness of the claim. But this view has been abandoned, and the present doctrine of the United States supreme court upon the binding effect of foreign judgments for the recovery of money is based upon the principle of reciprocity. In other words, a French judgment will be given the same effect in this country as an American judgment is given in France.[70] English courts, and some of the state courts, reject the idea of reciprocity as a test, and give recognition to foreign judgments, where the foreign court had jurisdiction of the defendant's person and of the subject matter, to the same extent as they do to domestic judgments. Such courts refuse to permit the merits to be re-examined, though they do permit an inquiry into the jurisdictional facts.[71]

With respect to domestic judgments, there is no opportunity for any state to adopt a view such as the United States supreme court has adopted with reference to the enforcement of foreign judgments. The constitution of the United States (article IV, section 1) provides that full faith and credit shall be given in each state to the records and judicial proceedings of every other state, and the provision is made more effective by the legislation of Congress. The only grounds, therefore, upon which a judgment of another state of the Union may be denied enforcement by means of an action brought upon it are grounds which go to the inherent

67 Woodward, Quasi Contracts, § 1.

68 Dicey, Conflict of Laws, 2d ed., 411.

69 Pennoyer v. Neff (1878), 95 U. S. 714, 24 L. Ed. 565.

70 Hilton v. Guyot (1895), 159 U. S. 113, 40 L. Ed. 95, 16 Sup. Ct. Rep. 139.

71 3 Beale, Cases on Conflict of Laws, Summary, 536.

power of the court pronouncing the judgment. Lack of jurisdiction over the person in a personal action by reason of his being a nonresident of the state which rendered the judgment, and hence not amenable to its jurisdiction if served with process outside of its territory, is of course a valid objection to giving the judgment effect.[72] Even though the court has jurisdiction over the person, there is a class of cases where its decrees cannot be given effect outside of its territorial jurisdiction. This is the class of equitable decrees, where the defendant is commanded to do something outside of the jurisdiction which made the decree, as, for example, to convey land situated in another state. The latter state will not enforce this decree.[73]

From what has been said it sufficiently appears that the only way of enforcing in another jurisdiction a judgment for the recovery of money is by beginning a suit upon the judgment. A broad distinction exists between the English and American theory on this subject, and the continental theory. In the European countries, other than England, no action can be brought upon a foreign judgment. Such judgment is submitted to the courts to examine its fairness, and if found to be fair, is given effect forthwith by process of execution.[74]

In cases of *quasi*-contractual obligations other than judgments, it may be asserted broadly that they are to be determined according to the law of the jurisdiction where they arose.[75]

§ 617. c. Obligations: Contracts—(1) Validity.—The formal validity of a contract must always arise from the law of the place of making, the *lex loci celebrationis.* If a contract is made void by a statute where certain formalities, such as the use of a stamp, are omitted, it will be refused enforcement everywhere. If, however, by the law of the place where made, an instrument is merely declared to be inadmissible in evidence for the omission of a stamp, the question of its validity is not involved, and its admissibility

72 Fauntleroy v. Lum (1908), 210 U. S. 230, 52 L. Ed. 1039, 28 Sup. Ct. Rep. 641.

73 Fall v. Eastin (1909), 215 U. S. 1, 17 Ann. Cas. 853, 23 L. R. A. (N. S.) 924, 54 L. Ed. 65, 30 Sup. Ct. Rep. 3.

74 3 Beale, Cases on the Conflict of Laws, Summary, 537.

75 Id., 545.

in evidence will be determined by the *lex fori*, the law of the place where the remedy is sought. Under the statute of frauds, generally, a contract is not void because not evidenced by a writing, but is merely incapable of proof. A contract made, therefore, in a jurisdiction where no statute of frauds exists, though valid where made, may be incapable of proof in a forum where the statute forbids proof of contracts not evidenced by writing. On the other hand, if made in a state where such a statute exists, the contract may be proved in another state, though it would be incapable of proof in the state where it was made.[76]

Though the formal validity of a contract is generally conceded to be governed by the law of the place of making, when we consider the question by what law its substantial validity is to be determined, we find ourselves in a maze of contradictory theories. Doubtless the most logical is that strongly urged by Professor Beale, to the effect that the substantial validity, like the formal validity, should be governed by the law of the place of making.[77] But so far as a general statement can be made upon the subject, in view of the conflicting decisions and theories, it would seem that the prevailing doctrine is that defended by Professor Dicey, namely, that the essential validity of a contract is determined by what he calls "the proper law of the contract," that is, by the intention of the parties.[78] This very often is the law of the place of performance (*lex loci solutionis*). If a contract would be valid by the law of the place of performance, but invalid by the law of the place of making, it is believed the tendency of the courts is to refer it to the former law. As Dicey points out, however, the courts of England will not enforce the general principle for which he contends, either where the contract is opposed to English ideas of morality or positive law, or where it involves the doing of an act forbidden by the law of the place where the contract was made. Illustrations of these principles may be found in cases arising under the Sunday laws. The validity of such contracts is determined by the law of the place where made, so that, for example,

[76] Minor, Conflict of Laws, §§ 172–174.

[77] Beale, What Law Governs the Validity of a Contract, 23 Harvard Law Review, 1, 79, 194, 260.

[78] Dicey, Conflict of Laws, 2d ed., 817–821.

a contract made in state A, where there is no Sunday law, will be enforced in state B, although the latter has such a law. The theory, of course, is that the Sunday law passed in state B was passed solely for the purpose of regulating the conduct of its own people. Again, where a contract is made on a secular day in state B, which has a Sunday law, to be performed in state A on Sunday, the courts of state B will sustain the contract, if it would be lawful in state A, which has no Sunday law. The law of the place of performance gives validity to the contract, because the parties must be supposed to have intended that such should be the fact, and because the performance in state A does no harm to the public policy of state B. The latter is not interested in the conduct of persons outside of its jurisdiction.[79] The usury laws and the liquor laws also furnish a vast number of illustrations of the application of the principles governing the substantial validity of a contract.[80]

With respect to the validity of a contract as affected by the capacity of parties, the American rule is that such validity is determined by the law of the place of making.[81]

§ 618. c. Obligations: Contracts—(2) Interpretation, obligation, performance and discharge.—The interpretation of a contract should manifestly be governed by the law which the parties intend to govern. The same logical difficulty does not arise here as in the case of the validity. There is no reason, for example, why citizens of California should not expressly agree, if they choose, that their rights are to be governed by the Code Napoleon, or by the rules of a particular labor union or benefit society. So, also, with respect to their obligations under the contract. Where the parties have not expressly provided by what law they desire their rights and obligations to be governed, the court will examine the surrounding circumstances, as well as the terms of the contract, to discover their intention. If the contract is to be performed wholly in another jurisdiction, it should be presumed that the law of the place of performance should govern. In the absence

79 Minor, Conflict of Laws, §§ 168, 175.
80 Id., §§ 161, 176, 178, 179.
81 3 Beale, Cases on Conflict of Laws, Summary. 540.

of evidence to the contrary, however, such as is afforded by the choice of a different place of performance, the court must ultimately fall back to the law of the place of making.[82] A note made in state A, to be paid in state B, is, under these principles, to be governed, so far as its construction and effect is concerned, by the law of state B. Thus, its negotiability is determined by the law of the place of payment.[83] The place of performance determines the law governing performance, as well as the rights and obligations of the parties, because it is the presumed intention of the parties to be bound by such law, or, as the late Professor Westlake says, because that place has the "most real connection" with the contract.[84]

It is inconsistent with principle that the discharge of a contract should be governed by a different law from that of its performance. But the cases nevertheless hold that the discharge of a surety by reason of a change in the principal obligation is governed by the law of the place of making of the obligation, and not by that of the place of performance.[85] And, again, a discharge in bankruptcy by a debtor at the place where the obligation was incurred has been held to extinguish the obligation as against creditors who were not citizens or domiciled in the country where the discharge was granted. On the other hand, a discharge in a foreign court of bankruptcy will not affect a contract made in this country. A discharge, however, in a bankruptcy court of the United States operates everywhere within this country to discharge the debt, irrespective of the question as to where it was contracted.[86]

§ 619. **13. Jurisdiction: a. In general.**—The question of jurisdiction has incidentally been adverted to in previous sections, particularly in the section dealing with the *quasi*-contractual obligation of a foreign judgment. But it is not only with reference to foreign judgments that the principles of conflict of laws with re-

82 Dicey, Conflict of Laws, 2d ed., 556–568.

83 Barry v. Stover (1906), 20 S. D. 459, 129 Am. St. Rep. 941, 107 N. W. 672.

84 Westlake, Private International Law, 5th ed., § 212.

85 3 Beale, Conflict of Laws, Summary, 544.

86 Loveland, Bankruptcy, 1338–1341.

spect to jurisdiction apply. They are of universal application, and render even a domestic judgment invalid where pronounced with respect to a person or a subject matter outside of the court's jurisdiction. Indeed, the matter of jurisdiction is the most fundamental matter in the whole subject.

Generally speaking, a state has jurisdiction over all persons and things actually within its territory.[87] A visiting foreign sovereign or an accredited ambassador or diplomatic representative of a foreign sovereign would not be amenable to state process, and the property of such persons is also exempt from the state's jurisdiction. But short of these exceptional cases, there is no limit to the jurisdiction of a state over persons and things within its territory (save such as arise from the Constitution of the United States). Some countries attempt to exercise a jurisdiction over its citizens or subjects even where they are domiciled in another state or nation. Such an attempt, however, cannot create or destroy rights in the jurisdiction where a subject of the state attempting to exercise the jurisdiction may be. While the rights or duties thus created may be enforced within the state creating them, they will be refused extraterritorial recognition.[88] Whether a state may bind persons who have not lost their domicile in it, though temporarily absent, is a question upon which the authorities in this country are in conflict.[89] In respect to the taxing power over choses in action, in respect to the succession of movables, and in respect to the validity of a will disposing of movables, the state of the domicile plainly may bind those who are domiciled within it, though they are temporarily absent. The power has been denied by some courts, however, in the case of judicial proceedings.[90] Why a distinction should be had between jurisdiction in general and jurisdiction in judicial proceedings is not entirely clear.

87 3 Beale, Cases on Conflict of Laws, Summary, 505.

88 Id., 506.

89 Henderson v. Staniford (1870), 105 Mass. 504, 7 Am. Rep. 551, sustains such jurisdiction.

90 Moss v. Fitch (1908), 212 Mo. 484, 126 Am. St. Rep. 568, 111 S. W. 475; De la Montanya v. De la Montanya (1896), 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; Raber v. Raber (1911), 150 Iowa, 511, Ann. Cas. 1912D, 680, 35 L. R. A. (N. S.) 292, 129 N. W. 494, deny the jurisdiction.

The cases seem agreed to the effect that a ship of war is always subject to the jurisdiction of the nation to which it belongs, even when it is within the territorial waters of another nation.[91] A merchant vessel, while on the high seas, is regarded as subject to the jurisdiction under whose flag it sails. A nonmaritime tort, therefore, committed on the high seas should be governed by the law of the country to which the ship belongs.[92]

§ 620. b. Jurisdiction of courts: (1) Actions in rem and in personam.—From the principle that a state has jurisdiction over persons within its territory, it follows that one may be served with process while only temporarily in the state, and a valid judgment based upon such service may be rendered against him.[93] Conversely, as the state has no jurisdiction over persons without its territory (unless in the case above mentioned of a domiciled subject who is temporarily absent), its process cannot run beyond its territory, and it cannot, therefore, pronounce a judgment against an absent nondomiciled defendant.[94] To this statement, however, an exception must be made if the defendant voluntarily appears or waives service of process or otherwise consents to the court's exercise of jurisdiction.[95] As a court of equity in the absence of statute renders decrees which are merely personal commands, it is helpless even to decree specific performance of a contract for the sale of land within the jurisdiction. This defect has generally been cured by statutes.[96] On the other hand, a court of equity may command a defendant who is within the jurisdiction to execute a conveyance of land without the territory of the state. If, however, the defendant leaves the state pronouncing the decree, without complying with its commands, he cannot be sued upon the judgment elsewhere. The inherently personal character of the court of equity's decrees renders its judgments enforce-

91 Forbes v. Cochrane (1824), 2 Barn. & C. 448, 107 Eng. Reprint, 450.

92 Oehler v. Hamburg-Amerikanische-Packetfahrt A. G. (1914), 145 N. Y. Supp. 1090.

93 Alley v. Caspari (1888), 80 Me. 234, 6 Am. St. Rep. 178, 14 Atl. 12. Cf. Egbert v. Short (1907), L. R. 2 Ch. Div. 205.

94 Pennoyer v. Neff (1878), 95 U. S. 714, 24 L. Ed. 565.

95 The Dupleix (1912), L. R. Prob. Div. 8, 14.

96 Huston, The Enforcement of Decrees in Equity, 13–28.

able only by proceedings in contempt against the defendant. The court of the state rendering an equitable decree, therefore, can alone carry it into effect,[97] and to do so must be able to reach the defendant within the jurisdiction.

A proceeding *in rem*, brought directly to determine the title to property within the state, or one *quasi in rem*, brought not indeed directly to try title, but in which property is sequestrated to await the determination of the action, may be maintained against nonresidents. The reason is that the judgment sought is not a personal judgment, but is one determining title. The power to pronounce such judgments rests upon the state's jurisdiction over things within its territory. By the doctrine of the supreme court of the United States, a judgment may be pronounced upon constructive service against a nonresident defendant where a debt owing to him has been garnished, and such judgment will be sufficient to bind the garnished debtor as well as the principal defendant. It is difficult to sustain this view on theoretical grounds, either by the adoption of the now generally abandoned theory of a *situs* for choses in action, or upon the theory that the court where the debtor is may control the payment of the debt. If the *situs* theory be adopted, we must locate the property with the creditor rather than with the debtor, and it would seem that the effective control over the debt is likewise in the creditor's state, by whose law the validity of transfers of the claim would have to be determined.[98]

§ 621. Jurisdiction of courts: (2) Divorce.—Jurisdiction in actions of divorce should be governed by the principles which control *in rem* proceedings. That is, the state, in order to pronounce a valid decree determining status, should have jurisdiction over the status. And as status depends upon the law of the domicile, the only court competent to decree a divorce should be that of the domicile of the parties. In fact, this is the established doctrine.[99]

97 Beale, Jurisdiction of Courts Over Foreign Persons, 26 Harvard Law Review, 283.

98 Beale, The Exercise of Jurisdiction In Rem to Compel Payment of a Debt, 27 Harvard Law Review, 107.

99 Winship v. Winship (1863), 16 N. J. Eq. 107.

The mere presence of the parties within the jurisdiction is insufficient to authorize a court to pronounce a decree changing the status of the parties. The only court that can do this is one exercising jurisdiction at the domicile of the partics. To pronounce a decree of judicial separation, inasmuch as the status of the parties is unaffected by that decree, mere presence of the parties in the jurisdiction is sufficient.[100]

If the wife during marriage be regarded as having the domicile of the husband by legal construction, there is no difficulty in applying the general theory to the case where the parties are living apart. The English courts consistently hold that the wife's domicile is necessarily that of the husband, though they allow an action to be brought by the wife at the last domicile where the parties lived together, in cases where the husband abandons the wife. The American courts, however, have recognized the privilege of the wife to secure a domicile independently of the husband for the purposes of divorce. The difficulty is thus presented that there may be two courts with equal power to pronounce a divorce and to determine the status of the parties. If the absent defendant, husband or wife, appears in the proceeding, there is no difficulty in applying this theory. But how if the nonresident defendant refuses to appear or to submit to the jurisdiction? Can the court where the proceeding is begun pronounce a valid decree against him?[101]

The question is answered by the majority of courts in this country in the affirmative. But the answer is not unanimous. In particular, New York refuses to recognize the validity of a divorce granted by another state against a nonresident defendant, though the plaintiff was domiciled in the state which pronounced the decree. In the celebrated case of Haddock v. Haddock,[102] the husband left his wife in New York, claiming that he was justified in leaving her, and acquired a domicile in Connecticut, where he afterwards secured a divorce upon the ground of his wife's mis-

100 Armytage v. Armytage (1898), L. R. Prob. Div. 178.

101 4 California Law Review, 59.

102 (1906), 201 U. S. 562, 5 Ann. Cas. 1, 50 L. Ed. 867, 26 Sup. Ct. Rep. 525. See, also, Howard v. Strode (1912), 242 Mo. 210, 225, Ann. Cas. 1913C, 1057, 1061, 146 S. W. 792; Parker v. Parker (Tex. 1915), 222 Fed. 186.

conduct. The New York court refused to accord any validity to this decree, and the United States supreme court held that it did not violate the full faith and credit clause in thus refusing recognition to the Connecticut decree. In a prior case, Atherton v. Atherton,[103] a decree of a Kentucky court obtained by a husband against his wife, who left her husband in Kentucky and went to New York, was denied force by the latter state. The supreme court of the United States, in Atherton v. Atherton, held that the New York court's denial of the validity of the Kentucky decree was a violation of the full faith and credit clause, for the reason that the Kentucky court had jurisdiction to pronounce the divorce. The distinction between the two cases is that in Atherton v. Atherton the state pronouncing the decree had been the "matrimonial domicile" of the parties; they had last lived together in Kentucky. On the other hand, in Haddock v. Haddock, the wife had never lived in Connecticut. In importing the doctrine of "matrimonial domicile," the court is evidently struggling to escape the consequences flowing from the doctrine which permits a domicile to either spouse for the purposes of divorce. In view of the vigorous dissent in Haddock v. Haddock, in which four judges participated, it can hardly be believed that the matter is finally determined. Meanwhile, the unfortunate result is presented that the parties to the divorce in Haddock v. Haddock were single persons in Connecticut, but married in New York.

A decree for the payment of alimony is plainly *in personam* and hence can only be enforced where there was personal service upon the defendant within the jurisdiction decreeing the payment of alimony.[104] With respect to the custody of the children, it would seem that their presence within the jurisdiction is essential to a valid exercise of power over their persons.[105]

103 (1901), 181 U. S. 155, 45 L. Ed. 794, 21 Sup. Ct. Rep. 544.

104 Minor, Conflict of Laws, § 95.

105 De la Montanya v. De la Montanya (1896), 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345.

APPENDIX.

(2107)

APPENDIX.

No. I.

PROCEEDINGS ON A WRIT OF RIGHT PATENT.

§ 1. *Writ of right patent in the court-baron.*

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to Willoughby, Earl of Abingdon, greeting. **We** command you that without delay you hold full right to William Kent, Esquire, of one messuage and twenty acres of land, with the appurtenances, in Dorchester, which he claims to hold of you by the free service of one penny yearly in lieu of all services, of which Richard Allen deforces him. And unless you so do, let the Sheriff of Oxfordshire do it, that we no longer hear complaint thereof for defect of right. **Witness** ourself at Westminster, the twentieth day of August, in the thirtieth year of our reign.

Pledges of prosecution, { JOHN DOE. / RICHARD ROE.

§ 2. *Writ of tolt, to remove it into the county court.*

Charles Morton, Esquire, sheriff of Oxfordshire, to John Long, bailiff errant of our lord the king and of myself, greeting. **Because** by the complaint of William Kent, Esquire, personally present at my County Court, to wit, on Monday, the sixth day of September, in the thirtieth year of the reign of our lord George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, at Oxford, in the shire-house there holden, I am informed, that although he himself the writ of our said lord the king of right patent directed to Willoughby, Earl of Abingdon, for this that *he should hold full right to the said William Kent, of one messuage and twenty acres of land, with the appur- [*ii]

No. I.

tenances, in Dorchester, within my said county, of which Richard Allen deforces him, hath brought to the said Willoughby, Earl of Abingdon; yet for that the said Willoughby, Earl of Abingdon, favoreth the said Richard Allen in this part, and hath hitherto delayed to do full right according to the exigence of the said writ, I command you on the part of our said lord the king, firmly enjoining, that in your proper person you go to the court-baron of the said Willoughby, Earl of Abingdon, at Dorchester aforesaid, and take away the plaint, which there is between the said William Kent and Richard Allen by the said writ, into my County Court to be next holden; and summon by good summoners the said Richard Allen, that he be at my County Court, on Monday, the fourth day of October next coming, at Oxford, in the shire-house there to be holden, to answer to the said William Kent thereof. And have you there then the said plaint, the summoners, and this precept. **Given** in my County Court, at Oxford, in the shire-house, the sixth day of September, in the year aforesaid.

§ 3. *Writ of pone, to remove it into the court of common pleas.*

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the Sheriff of Oxfordshire, greeting. **Put** at the request of William Kent, before our justices at Westminster, on the morrow of All Souls', the plaint which is in your County Court by our writ of right, between the said William Kent, demandant, and Richard Allen, tenant, of one messuage and twenty acres of land, with the appurtenances, in Dorchester; and summon by good summoners the said Richard Allen, that he be then there, to answer to the said William Kent thereof. And have you there the summoners and this writ. **Witness** ourself at Westminster, the tenth day of September, in the thirtieth year of our reign.

§ 4. *Writ of right, quia dominus remisit curiam.* No. I.

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the Sheriff of Oxfordshire, greeting. **Command** Richard Allen, that he justly and without delay render unto William Kent one messuage and twenty acres of land, with the appurtenances, in Dorchester, which he claims to be his right and inheritance, and whereupon he complains that the aforesaid Richard unjustly deforces him. And unless he shall so do, and *if the said [*iii] William shall give you security of prosecuting his claim, then summon by good summoners the said Richard, that he appear before our justices at Westminster, on the morrow of All Souls', to show wherefore he hath not done it. And have you there the summoners and this writ. **Witness** ourself at Westminster, the twentieth day of August, in the thirtieth year of our reign. Because Willoughby, Earl of Abingdon, the chief lord of that fee, hath thereupon remised unto us his court.

Pledges of prosecution: JOHN DOE. RICHARD ROE.

Summoners of the within-named Richard: JOHN DEN. RICHARD FEN. Sheriff's return.

§ 5. *The record, with the award of battel.*

Pleas at Westminster before Sir John Willes, Knight, and his brethren, justices of the bench of the lord the king at Westminster, of the term of Saint Michael, in the thirtieth year of the reign of the lord George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, etc.

Oxon, to wit. **William Kent**, Esquire, by James Parker, his attorney, demands against Richard Allen, gentleman, one messuage and twenty acres of land, with the appurtenances, in Dorchester, as his right and inheritance, by writ of the lord the king of right, **because** Willoughby, Writ. Dominus remisit curiam.

No. I.
Count.

Earl of Abingdon, the chief lord of that fee, hath now thereupon remised to the lord the king his court. **And whereupon** he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of the lord Geor[illegible]he First, late King of Great

Esplees. Defense.

Britain, by taking th[illegible]lees thereof to the value† [of ten shillings, and more, in rents, corn, and grass]. And that such is his right he offers [suit and good proof]. **And** the said Richard Allen, by Peter Jones, his attorney, comes and defends the right of the said William Kent, and his seisin, when [and where it shall behoove him], and all [that concerns it], and whatsoever [he ought to defend], and chiefly the tenements aforesaid, with the appurtenances, as of fee and right, [namely, one messuage and twenty acres of land, with appurtenances, in

Wager of battel.

Dorchester]. **And** this he is ready to defend by the body of his freeman, George Rumbold by name, who is present here in court, ready to defend the same by his body, or in what manner soever the court of the lord the king shall

[*iv]

consider that he ought to defend. *And if any mischance should befall the said George, (which God defend,) he is ready to defend the same by another man, who [is

Replication.

bounden and able to defend it]. **And** the said William Kent saith, that the said Richard Allen unjustly defends the right of him the said William, and his seisin, etc., and all, etc., and whatsoever, etc., and chiefly of the tenements aforesaid, with the appurtenances, as of fee and right, etc.; because he saith that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of the said lord George the First, late King of Great Britain, by taking the esplees thereof to the value, etc.

Joinder of battel.

And that such is his right, he is prepared to prove by the body of his freeman, Henry Broughton by name, who is present here in court ready to prove the same by his

† N. B. The clauses between hooks, in this and the subsequent numbers of the Appendix are usually not otherwise expressed in the records than by an etc.—CHRISTIAN.

No. I.

body, or in what manner soever the court of the lord the king shall consider that he ought to prove; and if any mischance should befall the said Henry, (which God defend,) he is ready to prove the same by another man, who, etc. **And** hereupon it is demanded of the said George and Henry, whether they are ready to make battel, as they before have waged it; who say that they are. **And** the same George Rumbold giveth gage of defending, and the said Henry Broughton giveth gage of proving; and such engagement being given as the manner is, it is demanded of the said William Kent and Richard Allen, if they can say anything wherefore battel ought not to be awarded in this case; who say that they cannot. **Therefore it is considered** that battel be made thereon, etc. **And** the said George Rumbold findeth pledges of battel, to wit, Paul Jenkins and Charles Carter; and the said Henry Broughton findeth also pledges of battel, to wit, Reginald Read and Simon Tayler. **And thereupon** day is here given as well to the said William Kent as to the said Richard Allen, to wit, on the morrow of Saint Martin next coming, by the assent as well of the said William Kent as of the said Richard Allen. And it is commanded that each of them then have here his champion, sufficiently furnished with competent armor as becomes him, and ready to make the battel aforesaid; and that the bodies of them in the mean time be safely kept, on peril that shall fall thereon. **At** which day here come as well the said William Kent as the said Richard Allen by their attorneys aforesaid, and the said George Rumbold and Henry Broughton in their proper persons likewise come, sufficiently furnished with competent armor as becomes them, ready to make the battel aforesaid, as they had before waged it. **And** hereupon day is further given by the court here, as well to the said William Kent as to the said Richard Allen, at Tothill, near the city of Westminster, in the county of Middlesex, to wit, on the morrow of the Purification of the blessed Virgin Mary next coming, by the assent as well of the said *William as of [*v]

Gages given.

Award of battel. Pledges.

Continuance.

Champions appear.

Adjournment to Tothill Fields.

No. I.

the aforesaid Richard. And it is commanded that each of them have then there his champion, armed in the form aforesaid, ready to make the battel aforesaid, and that their bodies in the mean time, etc. At which day here, to wit, at Tothill aforesaid, comes the said Richard Allen by his attorney aforesaid, and the said George Rumbold and Henry Broughton in their proper persons likewise come, sufficiently furnished with competent armor as becomes them, ready to make the battel aforesaid, as they before had waged it. And the said William Kent being solemnly called, doth not come, nor hath prosecuted his writ aforesaid. **Therefore it is considered** that the same William and his pledges of prosecuting, to wit, John Doe and Richard Roe, be in mercy for his false complaint, and that the same Richard go thereof without a day, etc., and also that the said Richard do hold the tenements aforesaid with the appurtenances, to him and his heirs, quit of the said William and his heirs, forever, etc.

Demandant nonsuit.

Final judgment for the tenant.

§ 6. *Trial by the grand assize.*

Defense.

—— And the said Richard Allen, by Peter Jones, his attorney, comes and defends the right of the said William Kent, and his seisin, when, etc., and all, etc., and whatsoever, etc., and chiefly of the tenements aforesaid, with the appurtenances, as of fee and right, etc., and puts himself upon the grand assize of the lord the king, and prays recognition to be made, whether he himself hath greater right to hold the tenements aforesaid, with the appurtenances, to him and his heirs as tenants thereof, as he now holdeth them, or the said William to have the said tenements, with the appurtenances, as he above demandeth them. **And** he tenders here in court six shillings and eight pence to the use of the lord the now king, etc., for that, to wit, it may be inquired of the time [of the seisin alleged by the said William]. And he therefore prays that it may be inquired by the assize, whether the said William Kent was seised of the tenements aforesaid with the appurtenances in his demesne as of fee in the time of the said lord the king George the First, as the said Will-

Mise.

Tender of the demimark.

No. I.

iam in his demand before hath alleged. **Therefore** it is commanded the sheriff that he summon by good summoners four lawful knights of his county, girt with swords, that they be here on the octave of Saint Hilary next coming, to make election of the assize aforesaid. The same day is given as well to the said William Kent as to the said Richard Allen here, etc. At which day here come as well the said William Kent as the said Richard Allen; and the sheriff, to wit, Sir Adam Alstone, Knight, now returns, that he had caused to be summoned Charles Stephens, Randal Wheler, Toby Cox, and Thomas Munday, four lawful knights of *his county, girt with swords, [*vi] by John Doe and Richard Roe, his bailiffs, to be here at the said octave of Saint Hilary, to do as the said writ thereof commands and requires; and that the said summoners, and each of them, are mainprized by John Day and James Fletcher. Whereupon the said Charles Stephens, Randal Wheler, Toby Cox, and Thomas Munday, four lawful knights of the county aforesaid, girt with swords, being called, in their proper persons come, and being sworn upon their oath in the presence of the parties aforesaid, choose of themselves and others twenty-four, to wit, Charles Stephens, Randal Wheler, Toby Cox, Thomas Munday, Oliver Greenway, John Boys, Charles Price, knights; Daniel Prince, William Day, Roger Lucas, Patrick Fleming, James Harris, John Richardson, Alexander Moore, Peter Payne, Robert Quin, Archibald Stuart, Bartholomew Norton, and Henry Davis, esquires; John Porter, Christopher Ball, Benjamin Robinson, Lewis Long, William Kirby, gentlemen, good and lawful men of the county aforesaid, who neither are of kin to the said William Kent nor to the said Richard Allen, to make recognition of the grand assize aforesaid. **Therefore** it is commanded the sheriff, that he cause them to come here from the day of Easter in fifteen days, to make the recognition aforesaid. The same day is there given to the parties aforesaid. At which day here come as well the said William Kent as the said Richard Allen, by their

Summons of the knights.

Return.

Election of the recognitors.

Venire facias.

Recognitors sworn.

No. I.

attorneys aforesaid, and the recognitors of the assize, whereof mention is above made, being called come, and certain of them, to wit, Charles Stephens, Randal Wheler, Toby Cox, Thomas Munday, Charles Price, knights; Daniel Prince, Roger Lucas, William Day, James Harris, Peter Payne, Robert Quin, Henry Davis, John Porter, Christopher Ball, Lewis Long, and William Kirby, being

Verdict for the demandant.

elected, tried, and sworn upon their oath, say, that the said William Kent hath more right to have the tenements aforesaid, with the appurtenances, to him and his heirs, as he demandeth the same, than the said Richard Allen to hold the same as he now holdeth them, according as the said William Kent by his writ aforesaid hath sup-

Judgment.

posed. **Therefore it is considered** that the said William Kent do recover his seisin against the said Richard Allen of the tenements aforesaid, with the appurtenances, to him and his heirs, quit of the said Richard Allen and his heirs forever: and the said Richard Allen in mercy, etc.

[*vii]

No. II.

*No. II.

PROCEEDINGS ON AN ACTION OF TRESPASS IN EJECTMENT, BY ORIGINAL, IN THE KING'S BENCH.

§ 1. *The original writ.*

Si fecerit te securum.

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the Sheriff of Berkshire, greeting. If Richard Smith shall give you security of prosecuting his claim, then put by gage and safe pledges William Stiles, late of Newbury, gentleman, so that he be before us on the morrow of All Souls', wheresoever we shall then be in England, to show wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton, which John Rogers, Esquire, hath demised to the aforesaid Richard, for a term which is not yet expired, and ejected him from his said farm, and other enormities to him did, to the great damage of the said Richard, and against our peace. And have you there the

names of the pledges and this writ. **Witness** ourself at Westminster, the twelfth day of October, in the twenty-ninth year of our reign. No. II.

Pledges of prosecution. JOHN DOE. RICHARD ROE.

The within-named William Stiles is attached by pledges, JOHN DEN. RICHARD FEN. Sheriff's return.

§ 2. *Copy of the declaration against the casual ejector, who gives notice thereupon to the tenant in possession.*

Michaelmas, the 29th of King George the Second.

Berks, to wit. **William Stiles**, late of Newbury, in the said county, gentleman, was attached to answer Richard Smith, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton, in the county aforesaid, which John Rogers, Esquire, demised to the said Richard Smith, for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the lord the king, etc. And whereupon the said Richard, by *Robert Martin, his attorney, complains, that whereas the said John Rogers, on the first day of October, in the twenty-ninth year of the reign of the lord the king that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said Richard and his assigns, from the Feast of Saint Michael the Archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended, by virtue of which demise the said Richard entered into the said tenement, with the appurtenances, and was thereof possessed: and the said Richard being so possessed thereof, the said William afterward, that is to say, on the said first day of October, in the said twenty-ninth year, with force and arms, that is to say, Declaration. [*viii]

No. II.

with swords, staves, and knives, entered into the said tenement, with the appurtenances, which the said John Rogers demised to the said Richard in form aforesaid, for the term aforesaid, which is not yet expired, and ejected the said Richard out of his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the said lord the king; whereby the said Richard saith that he is injured and damaged to the value of twenty pounds. And thereupon he brings suit, etc.

MARTIN, for the plaintiff.
PETERS, for the defendant.
} Pledges of prosecution. } JOHN DOE. RICHARD ROE.

MR. GEORGE SAUNDERS.

Notice.

I am informed that you are in possession of, or claim title to, the premises mentioned in this declaration of ejectment, or to some part hereof; and I, being sued in this action as a casual ejector, and having no claim or title to the same, do advise you to appear next Hilary Term in his Majesty's Court of King's Bench at Westminster, by some attorney of that court, and then and there, by a rule to be made of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

Your loving friend,

WILLIAM STILES.

5th January, 1756.

[*ix] *§ 3. *The rule of court.*

Hilary Term, in the twenty-ninth year of King George the Second.

Smith against Stiles. for one messuage, with the appurtenances, in Sutton, on the demise of John Rogers.

Berks, to wit. } **It is ordered** by the court, by the assent of both parties, and their attorneys, that George Saunders, gentleman, may be made defendant, in the place of the now defendant, William Stiles, and shall immediately appear to the plaintiff's action, and shall receive a declaration in a plea of trespass and ejectment of the tenements in question, and shall immediately plead

No. II.

Not Guilty; and upon the trial of the issue, shall confess lease, entry, and ouster, and insist upon his title only. And if upon the trial of the issue the said George do not confess lease, entry, and ouster, and by reason thereof the plaintiff cannot prosecute his writ, then the taxation of costs upon such *non pros.* shall cease, and the said George shall pay such costs to the plaintiff as by the court of our lord the king here shall be taxed and adjudged for such his default in nonperformance of this rule; and judgment shall be entered against the said William Stiles, now the casual ejector, by default. And it is further ordered that if, upon the trial of the said issue, a verdict shall be given for the defendant, or if the plaintiff shall not prosecute his writ upon any other cause than for the not confessing lease, entry, and ouster as aforesaid, then the lessor of the plaintiff shall pay costs, if the plaintiff himself doth not pay them.

By the Court.

MARTIN, for the plaintiff.
NEWMAN, for the defendant.

§ 4. *The record.*

Pleas before the lord the king at Westminster, of the Term of Saint Hilary, in the twenty-ninth year of the reign of the lord George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, etc.

Berks, to wit. **George Saunders**, late of Sutton, in the county aforesaid, gentleman, was attached to answer Richard Smith, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton, which John Rogers, Esquire, hath demised to the said Richard for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the lord the king that *now is. **And whereupon** the said Richard, by Robert Martin, his attorney, complains, that whereas the said John Rogers on the first day of October, in the twenty-ninth year of

[*x] Declaration, or count.

No. II.

the reign of the lord the king that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said Richard and his assigns, from the Feast of Saint Michael the Archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended; by virtue of which demise the said Richard entered into the said tenement, with the appurtenances, and was thereof possessed: and, the said Richard being so possessed thereof, the said George afterward, that is to say, on the first day of October, in the said twenty-ninth year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, which the said John Rogers demised to the said Richard in form aforesaid for the term aforesaid, which is not yet expired, and ejected the said Richard out of his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the said lord the king; whereby the said Richard saith that he is injured and endamaged to the value of twenty pounds: and thereupon he brings suit [and good proof].

Defense.

And the aforesaid George Saunders, by Charles Newman, his attorney, comes and defends the force and injury, when [and where it shall behoove him];

Plea, not guilty.

and saith that he is no wise guilty of the trespass and ejectment aforesaid, as the said Richard above complains against him; and thereof he puts himself upon the country, and the said Richard doth likewise the same:

Issue.

Venire awarded.

Therefore let a jury come thereupon before the lord the king, on the octave of the Purification of the blessed Virgin Mary, wheresoever he shall then be in England, who neither [are of kin to the said Richard, nor to the said George], to recognize [whether the said George be guilty of the trespass and ejectment aforesaid]: because as well [the said George as the said Richard, between whom the difference is, have put themselves

No. II.

on the said jury]. The same day is there given to the parties aforesaid. **Afterward** the process therein, being continued between the said parties of the plea aforesaid by the jury, is put between them in respite, before the lord the king, until the day of Easter in fifteen days, wheresoever the said lord the king shall then be in England; unless the justices of the lord the king assigned to take assizes in the county aforesaid shall have come before that time, to wit, on Monday the eighth day of March, at Reading, in the said county, by the form of the statute [in that case provided], by reason of the default of the jurors [summoned to appear as aforesaid], at which day before the lord the king, at Westminster, come the parties aforesaid by their attorneys aforesaid; and the aforesaid justices of *assize, before whom [the jury aforesaid came], sent here their record before them, had in these words, to wit: **Afterward**, at the day and place within contained, before Heneage Legge, Esquire, one of the barons of the exchequer of the lord the king, and Sir John Eardly Wilmot, Knight, one of the justices of the said lord the king assigned to hold pleas before the king himself, justices of the said lord the king, assigned to take assizes in the county of Berks by the form of the statute [in that case provided], come as well the within named Richard Smith, as the within written George Saunders, by their attorneys within contained; and the jurors of the jury whereof mention is within made being called, certain of them, to wit, Charles Holloway, John Hooke, Peter Graham, Henry Cox, William Brown, and Francis Oakley, come, and are sworn upon that jury; and because the rest of the jurors of the same jury did not appear, therefore others of the bystanders being chosen by the sheriff, at the request of the said Richard Smith, and by the command of the justices aforesaid, are appointed anew, whose names are affixed to the panel within written, according to the form of the statute in such case made and provided; which said jurors so appointed anew, to wit, Roger Bacon, Thomas Small,

Respite for default of jurors.

Nisi prius.

[*xi]

Postea.

Tales de circumstantibus.

No. II.

Charles Pye, Edward Hawkins, Samuel Roberts, and Daniel Parker, being likewise called, come; and together with the other jurors aforesaid before impaneled and sworn, being elected, tried, and sworn, to speak the truth of the matter within contained, upon their oath say, that

Verdict for the plaintiff.

the aforesaid George Saunders is guilty of the trespass and ejectment within written, in manner and form as the aforesaid Richard Smith within complains against him; and assess the damages of the said Richard Smith, on occasion of that trespass and ejectment, besides his costs and charges which he hath been put unto about his suit in that behalf, to twelve pence; and, for those costs and charges, to forty shillings. **Whereupon** the said Richard Smith, by his attorney aforesaid, prayeth judgment against the said George Saunders, in and upon the ver-

Motion in arrest of judgment.

dict aforesaid by the jurors aforesaid given in the form aforesaid; and the said George Saunders, by his attorney aforesaid, saith, that the court here ought not to proceed to give judgment upon the said verdict, and prayeth that judgment against him the said George Saunders, in and upon the verdict aforesaid by the jurors aforesaid given in the form aforesaid, may be stayed, by reason that the said verdict is insufficient and erroneous, and that the same verdict may be quashed, and that the issue afore-

Continuance.

said may be tried anew by other jurors to be afresh impaneled. And, because the court of the lord the king here is not yet advised of giving their judgment of and upon the premises, therefore day thereof is given as well to the said Richard Smith as the said George Saunders, before the lord the king, until the morrow of the Ascen-

[*xii]

sion of our Lord, wheresoever the said lord *the king shall then be in England, to hear their judgment of and upon the premises, for that the court of the lord the king is not yet advised thereof. At which day before the lord the king at Westminster, come the parties aforesaid by their attorneys aforesaid; upon which, the record and matters aforesaid having been seen, and by the court of the lord the king now here fully understood, and all and

No. II.

singular the premises having been examined, and mature deliberation being had thereupon, for that it seems to the court of the lord the king now here that the verdict aforesaid is in no wise insufficient or erroneous, and that the same ought not to be quashed, and that no new trial ought to be had of the issue aforesaid, **therefore it is considered** that the said Richard do recover against the said George his term yet to come, of and in the said tenements, with the appurtenances, and the said damages assessed by the said jury in form aforesaid, and also twenty-seven pounds six shillings and eight pence for his costs and charges aforesaid, by the court of the lord the king here awarded to the said Richard, with his assent, by way of increase which said damages in the whole amount to twenty-nine pounds seven shillings and eight pence. "And let the said **George** be taken [until he maketh fine to the lord the king]." **And hereupon** the said Richard, by his attorney aforesaid, prayeth a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his term aforesaid, yet to come, of and in the tenements aforesaid, with the appurtenances; and it is granted unto him, returnable before the lord the king on the morrow of the Holy Trinity, wheresoever he shall then be in England. At which day, before the lord the king, at Westminster, cometh the said Richard, by his attorney aforesaid; and the sheriff, that is to say, Sir Thomas Reeve, Knight, now sendeth, that he by virtue of the writ aforesaid to him directed, on the ninth day of June last past, did cause the said Richard to have his possession of his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances, as he was commanded.

Opinion of the court.

Judgment for the plaintiff.

Costs.

Capiatur pro fine.

Writ of possession,

and return.

[*xiii]

No. III.

*No. III.

PROCEEDINGS ON AN ACTION OF DEBT IN THE COURT OF COMMON PLEAS; REMOVED INTO THE KING'S BENCH BY WRIT OF ERROR.

§ 1. *Original.*

Præcipe.

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the Sheriff of Oxfordshire, greeting. **Command** Charles Long, late of Burford, gentleman, that justly and without delay he render to William Burton two hundred pounds, which he owes him, and unjustly detains, as he saith. And unless he shall so do, and if the said William shall make you secure of prosecuting his claim, then summon by good summoners the aforesaid Charles, that he be before our justices, at Westminster, on the octave of Saint Hilary, to show wherefore he hath not done it. And have you there then the summoners, and this writ. **Witness** ourself at Westminster, the twenty-fourth day of December, in the twenty-eighth year of our reign.

Sheriff's return.

Pledges of prosecution: JOHN DOE. RICHARD ROE.

Summoners of the within named Charles Long: ROGER MORRIS. HENRY JOHNSON.

§ 2. *Process.*

Attachment

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith,

Pone.

and so forth, to the Sheriff of Oxfordshire, greeting. **Put** by gage and safe pledges Charles Long, late of Burford, gentleman, that he be before our justices at Westminster on the octave of the Purification of the blessed Mary, to answer to William Burton of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, as he saith; and to show wherefore he was not before our justices at Westminster on the octave of Saint

No. III.

Hilary, as he was summoned. And have there then the names of the pledges and this writ. **Witness,** Sir John Willes, Knight, at Westminster, the twenty-third day of January, in the twenty-eighth year of our reign.

Sheriff's return.

The within named Charles Long is attached by pledges. } EDWARD LEIGH. } ROBERT TANNER.

[*xiv]

Distringas.

***George** the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the Sheriff of Oxfordshire, greeting. **We** command you, that you distrain Charles Long, late of Burford, gentleman, by all his lands and chattels within your bailiwick, so that neither he nor anyone through him may lay hands on the same until you shall receive from us another command thereupon; and that you answer to us of the issues of the same; and that you have his body before our justices at Westminster, from the day of Easter in fifteen days, to answer to William Burton of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, as he saith, and to hear his judgment of his many defaults. **Witness,** Sir John Willes, Knight, at Westminster, the twelfth day of February, in the twenty-eighth year of our reign.

Sheriff's return: Nihil.

The within named Charles Long hath nothing in my bailiwick whereby he may be distrained.

Capias ad respondendum.

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the Sheriff of Oxfordshire, greeting. **We** command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our [illegible]s at Westminster, from the day of Easter in five [illegible] answer to William Burton, gentleman, of a plea, [illegible]he render to him two hundred pounds, which he owes him and unjustly detains, as he saith; and whereupon you have returned to our justices at West-

No. III.

minster, that the said Charles hath nothing in your bailiwick whereby he may be distrained. And have you there then this writ. **Witness**, Sir John Willes, Knight, at Westminster, the sixteenth day of April, in the twenty-eighth year of our reign.

Sheriff's return: Non est inventus.

The within named Charles Long is not found in my bailiwick.

Testatum capias.

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the Sheriff of Berkshire, greeting. **We** command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, on the morrow of the Holy Trinity, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith; and whereupon our Sheriff of Oxfordshire hath made a return to our justices at Westminster, at a certain day now past,

[*xv] that the aforesaid *Charles is not found in his bailiwick; and thereupon it is testified in our said court, that the aforesaid Charles lurks, wanders, and runs about in your county. And have you there then this writ. **Witness**, Sir John Willes, Knight, at Westminster, the seventh day of May, in the twenty-eighth year of our reign.

Sheriff's return: Cepi corpus.

By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready at the day and place within contained, according as by this writ it is commanded me.

Or, upon the return of non est inventus *upon the first* capias, *the plaintiff may sue out an* alias *and a* pluries, *and thence proceed to outlawry; thus:*

Alias capias.

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the Sheriff of Oxfordshire, greeting. **We** command you, as formerly we commanded you, that you

No. III.

take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster on the morrow of the Holy Trinity, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith. And have you there then this writ. **Witness**, Sir John Willes, Knight, at Westminster, the seventh day of May, in the twenty-eighth year of our reign.

Sheriff's return: Non est inventus.

The within named Charles Long is not found in my bailiwick.

Pluries capias

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the Sheriff of Oxfordshire, greeting. **We** command you, as we have more than once commanded you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, from the day of the Holy Trinity in three weeks, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith. And have you there then this writ. **Witness**, Sir John Willes, Knight, at Westminster, the thirtieth day of May, in the twenty-eighth year of our reign.

Sheriff's return: Non est inventus.

The within named Charles Long is not found in my bailiwick.

[*xvi]

Exigi facias.

*__George__ the Second, by the grace of God, of Great Britin, France, and Ireland, king, defender of the faith, and so forth, to the Sheriff of Oxfordshire, greeting. **We** command you, that you cause Charles Long, late of Burford, gentleman, to be required from county court to county court, until, according to the law and custom of our realm of England, he be outlawed, if he doth not appear; and if he doth appear, then take him and cause him to be safely kept, so that you may have his body

No. III.

before our justices at Westminster, on the morrow of All Souls', to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, as he saith; and whereupon you have returned to our justices at Westminster, from the day of the Holy Trinity in three weeks, that he is not found in your bailiwick. And have you there then this writ. **Witness,** Sir John Willes, Knight, at Westminster, the eighteenth day of June, in the twenty-eighth year of our reign.

Sheriff's return: Primo exactus.

By virtue of this writ to me directed, at my county court held at Oxford, in the county of Oxford, on Thursday the twenty-first day of June, in the twenty-ninth year of the reign of the lord the king within written, the within named Charles Long was required the first time, and did not appear: and at my county court held at Oxford aforesaid, on Thursday the twenty-fourth day of July, in the year aforesaid, the said Charles Long was required the second time, and did not appear: and at my county court held at Oxford aforesaid, on Thursday the twenty-first day of August, in the year aforesaid, the said Charles Long was required the third time, and did not appear: and at my county court held at Oxford aforesaid, on Thursday the eighteenth day of September, in the year aforesaid, the said Charles Long was required the fourth time, and did not appear: and at my county court held at Oxford aforesaid, on Thursday the sixteenth day of October, in the year aforesaid, the said Charles Long was required the fifth time, and did not appear: therefore the said Charles Long, by the judgment of the coroners of the said lord the king, of the county aforesaid, according to the law and custom of the kingdom of England, is outlawed.

Secundo exactus.

Tertio exactus.

Quarto exactus.

Quinto exactus.

Ideo utlagatus.

George the Second, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, and so forth, to the Sheriff of Oxfordshire, greeting. **Whereas** by our writ we have lately commanded you that you should cause Charles Long, late of Burford, gentle-

Writ of proclamation.

man, to be required from county court to county court, until, according to *the law and custom of our realm of England, he should be outlawed, if he did not appear; and if he did appear, then that you should take him and cause him to be safely kept, so that you might have his body before our justices at Westminster on the morrow of All Souls', to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith: **Therefore** we command you, by virtue of the statute in the thirty-first year of the Lady Elizabeth, late Queen of England, made and provided, that you cause the said Charles Long to be proclaimed upon three several days according to the form of that statute (whereof one proclamation shall be made at or near the most usual door of the church of the parish wherein he inhabits), that he render himself unto you; so that you may have his body before our justices at Westminster at the day aforesaid to answer the said William Burton of the plea aforesaid. And have you there then this writ. **Witness,** Sir John Willes, Knight, at Westminster, the eighteenth day of June, in the twenty-eighth year of our reign.

No. III.

[*xvii]

By virtue of this writ to me directed, at my county court held at Oxford, in the county of Oxford, on Thursday the twenty-sixth day of June, in the twenty-ninth year of the reign of the lord the king within written, I caused to be proclaimed the first time: and at the general Quarter Sessions of the peace, held at Oxford aforesaid, on Tuesday the fifteenth day of July, in the year aforesaid, I caused to be proclaimed the second time; and at the most usual door of the church at Burford within written, on Sunday the third day of August, in the year aforesaid, immediately after divine service, one month at the least before the within named Charles Long was required the fifth time, I caused to be proclaimed the third time, that the said Charles Long should render himself unto me, as within it is commanded me.

Sheriff's return: Proclamari feci.

No. III. Capias utlagatum.

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the Sheriff of Berkshire, greeting. **We** command you, that you omit not by reason of any liberty of your county, but that you take Charles Long, late of Burford, in the county of Oxford, gentleman (being outlawed in the said county of Oxford, on Thursday the sixteenth day of October last past, at the suit of William Burton, gentleman, of a plea of debt, as the Sheriff of Oxfordshire aforesaid returned to our justices at Westminster on the morrow of All Souls' then next ensuing), if the said Charles Long may be found in your bailiwick; [*xviii] and him safely keep, that you may *have his body before our justices at Westminster from the day of St. Martin in fifteen days, to do and receive what our court shall consider concerning him in this behalf. **Witness**, Sir John Willes, Knight, at Westminster, in the sixth day of November, in the twenty-ninth year of our reign.

Sheriff's return: Cepi corpus.

By virtue of this writ to be directed, I have taken the body of the within named Charles Long; which I have ready at the day and place within contained, according as by this writ it is commanded me.

§ 3. †*Bill of Middlesex, and Latitat thereupon in the court of king's bench.*

Bill of Middlesex for trespass;

Middlesex, } **The Sheriff** is commanded that he take
to wit, } Charles Long, late of Burford, in the county of Oxford, if he may be found in his bailiwick, and him safely keep, so that he may have his body before the lord the king at Westminster, on Wednesday next after fifteen days of Easter, to answer William Burton, gentleman, of a plea of trespass; [**and also** to a bill of the said William against the aforesaid Charles, for two

† Note, that sect. 3 and 4 are the usual method of process to compel an appearance in the Courts of King's Bench and Exchequer, in which the practice of those courts does principally differ from that of the Court of Common Pleas, the subsequent stages of proceeding being nearly alike in them all.

hundred pounds of debt, according to the custom of the court of the said lord the king, before the king himself to be exhibited;] and that he have there then this precept. No. III. ac etiam in debt.

The within named Charles Long is not found in my bailiwick. Sheriff's return: Non est inventus.

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the Sheriff of Berkshire, greeting. **Whereas** we lately commanded our Sheriff of Middlesex that he should take Charles Long, late of Burford, in the county of Oxford, if he might be found in his bailiwick, and him safely keep, so that he might be before us at Westminster, at a certain day now past, to answer unto William Burton, gentleman, of a plea of trespass; [**and** also to a bill of the said William against the aforesaid Charles, for two hundred pounds of debt, according to the custom of our court before us to be exhibited;] and our said Sheriff of Middlesex at that day returned to us that the aforesaid Charles was not found in his bailiwick; whereupon, on the behalf of the aforesaid William in our court before us, it is sufficiently attested that the aforesaid Charles lurks and runs about in your county: **Therefore** we command you, that you take him, if he may be found in *your bailiwick, and him safely keep, so that you may have his body before us at Westminster, on Tuesday next after five weeks of Easter, to answer to the aforesaid William of the plea [and bill] aforesaid; and have you there then this writ. **Witness,** Sir Dudley Ryder, Knight, at Westminster, the eighteenth day of April, in the twenty-eighth year of our reign. Latitat. Ac etiam. [*xix]

By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready at the day and place within contained, according as by this writ it is commanded me. Sheriff's return: Cepi corpus.

No. III.

§ 4. *Writ of quo minus in the exchequer.*

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the Sheriff of Berkshire, greeting. **We** command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take Charles Long, late of Burford, in the county of Oxford, gentleman, wheresoever he shall be found in your bailiwick, and him safely keep, so that you may have his body before the barons of our Exchequer at Westminster, on the morrow of the Holy Trinity, to answer William Burton, our debtor, of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, whereby he is the less able to satisfy us the debts which he owes us at our said Exchequer, as he saith he can reasonably show that the same he ought to render; and have you there this writ. **Witness,** Sir Thomas Parker, Knight, at Westminster, the sixth day of May, in the twenty-eighth year of our reign.

Sheriff's return: Cepi corpus.

By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready before the barons within written, according as within it is commanded me.

§ 5. *Special bail, on the arrest of the defendant, pursuant to the testatum capias,* in page xiv.

Bail bond to the sheriff.

Know all men by these presents, that we Charles Long, of Burford, in the county of Oxford, gentleman, Peter Hamond, of Bix, in the said county, yeoman, and Edward Thomlinson, of Woodstock, in the said county, inn-holder, are held and firmly bound to Christopher Jones, Esquire, sheriff of the county of Berks, in four hundred pounds of lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, we bind ourselves and each of us by himself *for the whole and in gross, our and every of our heirs, executors,

No. III.

and administrators, firmly by these presents, sealed with our seals. Dated the fifteenth day of May, in the twenty-eighth year of the reign of our sovereign lord George the Second, by the grace of God, King of Great Britain, France and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and fifty-five.

The condition of this obligation is such, that if the above bounden Charles Long do appear before the justices of our sovereign lord the king, at Westminster, on the morrow of the Holy Trinity, to answer William Burton, gentleman, of a plea of debt of two hundred pounds, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Sealed and delivered being first duly stamped, in the presence of
HENRY SHAW.
TIMOTHY GRIFFITH.

CHARLES LONG. (L. S.)
PETER HAMOND. (L. S.)
EDWARD THOMLINSON. (L. S.)

Recognizance of bail before the commissioner.

You, Charles Long, do acknowledge to owe unto the plaintiff four hundred pounds, and you, John Rose and Peter Hamond, do severally acknowledge to owe unto the same person the sum of two hundred pounds a piece, to be levied upon your several goods and chattels, lands, and tenements, **upon condition** that, if the defendant be condemned in the action, he shall pay the condemnation, or render himself a prisoner in the Fleet for the same; and, if he fail so to do, you, John Rose and Peter Hamond, do undertake to do it for him.

Trinity Term, 28 Geo. II.

Bail piece.

Berks, to wit. } **On** a *Testatum Capias* from Oxfordshire against Charles Long, late of Burford, in the county of Oxford, gentleman, returnable on the morrow of the Holy Trinity, at the suit of William Burton, of a plea of debt of two hundred pounds:

No. III.

The bail are John Rose, of Witney, in the county of Oxford, Esquire, Peter Hamond, of Bix, in the said county, yeoman.

RICHARD PRICE, attorney for the defendant.

The party himself in £400.

Each of the bail in £200.

Taken and acknowledged the twenty-eighth day of May, in the year of our Lord one thousand seven hundred and fifty-five, *de bene esse*, before me,

ROBERT GROVE,
One of the Commissioners.

[*xxi] *§ 6. *The record, as removed by writ of error.*

Writ of error.

The lord the king hath given in charge to his trusty and beloved Sir John Willes, Knight, his writ close in these words: **George** the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to our trusty and beloved Sir John Willes, Knight, greeting. **Because** in the record and process, and also in the giving of judgment of the plaint, which was in our court before you and your fellows, our justices of the bench, by our writ, between William Burton, gentleman, and Charles Long, late of Burford, in the county of Oxford, gentleman, of a certain debt of two hundred pounds, which the said William demands of the said Charles, manifest error hath intervened, to the great damage of him the said William, as we from his complaint are informed; we being willing that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, do command you, that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process of the plaint aforesaid, with all things concerning them, and this writ; so that we may have them from the day of Easter

in fifteen days, wheresoever we shall then be in England; that the record and process aforesaid being inspected, we may cause to be done thereupon for correcting that error, what of right, and according to the law and custom of our realm of England, ought to be done. **Witness** ourself at Westminster, the twelfth day of February, in the twenty-ninth year of our reign.

The record and process whereof in the said writ mention above is made, follow in these words, to wit: Chief justice's return.

Pleas at Westminster before Sir John Willes, Knight, and his brethren, justices of the bench of the lord the king at Westminster, of the term of the Holy Trinity, in the twenty-eighth year of the reign of the lord George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, etc. The record.

Oxon, to wit. } **Charles Long**, late of Burford, in the county aforesaid, gentleman, was summoned to answer William Burton, of Yarnton, in the said county, gentleman, of a plea that he render unto him two hundred pounds, which he owes him and unjustly detains, [as he saith]. **And whereupon** the said William, by Thomas Gough, his attorney, complains, and whereas on the first day of December, in the year of our Lord *one thousand seven hundred and fifty-four, at Bunbury, in this county, the said Charles, by his writing obligatory, did acknowledge himself to be bound to the said William in the said sum of two hundred pounds of lawful money of Great Britain, to be paid to the said William whenever after the said Charles should be thereto required; nevertheless the said Charles (although often required) hath not paid to the said William the said sum of two hundred pounds, nor any part thereof, but hitherto altogether hath refused, and doth still refuse to render the same; wherefore he saith that he is injured, and hath damage to the value of ten pounds: and thereupon he brings suit, [and good proof]. **And** he brings into court the writing obligatory aforesaid; which testifies the debt

Writ.

Declaration or count, on a bond.

[*xxii]

Profert in curia.

No. III.

Defense.

aforesaid in form aforesaid; the date whereof is the day and year before mentioned. **And** the aforesaid Charles, by Richard Price, his attorney, comes and defends the force and injury when [and where it shall behoove him],

Oyer prayed of the bond and condition, viz., to perform an award.

and craves oyer of the said writing obligatory, and it is read unto him [in the form aforesaid]: he likewise craves oyer of the condition of the said writing, and it is read unto him in these words: "The condition of this obligation is such, that if the above bounden Charles Long, his heirs, executors, and administrators, and every of them, shall and do fr ime to time, and at all times hereafter, well and truly stand to, obey, observe, fulfill, and keep the award, arbitrament, order, rule, judgment, final end, and determination of David Stiles, of Woodstock, in the said county, clerk, and Henry Bacon, of Woodstock aforesaid, gentleman (arbitrators indifferently nominated and chosen by and between the said Charles Long and the above-named William Burton, to arbitrate, award, order, rule, judge, and determine, of all and all manner of actions, cause or causes of action, suits, plaints, debts, duties, reckonings, accounts, controversies, trespasses, and demands whatsoever had, moved, or depending, or which might have been had, moved, or depending, by and between the said parties, for any matter, cause, or thing, from the beginning of the world until the day of the date hereof), which the said arbitrators shall make and publish, of or in the premises, in writing, under their hands and seals, or otherwise by word of mouth, in the presence of two credible witnesses, on or before the first day of January next ensuing the date hereof; then this obligation to be void and of none effect, or else to be and remain in full force and virtue." **Which** being read and

Imparlance.

heard, the said Charles prays leave to imparl therein

Continuance.

here until the octave of the Holy Trinity; and it is granted unto him. The same day is given to the said William Burton here, etc. At which day, to wit, on the octave of the Holy Trinity, here come as well the said William

No. III.

Burton as the said Charles Long, by their attorneys aforesaid; and hereupon the said William *prays that the said Charles may answer to his writ and count aforesaid. [*xxiii]

Plea:

And the aforesaid Charles defends the force and injury, when, etc., and saith, that the said William ought not to have or maintain his said action against him; because he saith that the said David Stiles and Henry Bacon, the arbitrators before named in the said condition, did not make any such award, arbitrament, order, rule, judgment, final end, or determination, of or in the premises above specified in the said condition, on or before the first day of January, in the condition aforesaid above mentioned, according to the form and effect of the said condition; and this he is ready to verify. Wherefore he prays judgment, whether the said William ought to have or maintain his said action thereof against him, [and that he may go thereof without a day]. **And** the aforesaid William saith, that for any thing above alleged by the said Charles in pleadings, he ought not to be precluded from having his said action thereof against him; because he saith, that after the making of the said writing obligatory, and before the said first day of January, to wit, on the twenty-sixth day of December, in the year aforesaid, at Banbury aforesaid, in the presence of two credible witnesses, namely, John Dew, of Chalbury, in the county aforesaid, and Richard Morris, of Wytham, in the county of Berks, the said arbitrators undertook the charge of the award, arbitrament, order, rule, judgment, final end, and determination aforesaid, of and in the premises specified in the condition aforesaid; and then and there made and published their award by word of mouth in manner and form following, that is to say, the said arbitrators did award, order, and adjudge that he, the said Charles Long, should forthwith pay to the said William Burton the sum of seventy-five pounds, and that thereupon all differences between them at the time of the making the said writing obligatory should finally cease and determine. And the said William further saith, that although he

no such award.

Replication, setting forth an award.

No. III.

afterward, to wit, on the sixth day of January, in the year of our Lord one thousand seven hundred and fifty-five, at Banbury aforesaid, requested the said Charles to pay to him, the said William, the said seventy-five pounds,

Protestando.

yet (by protestation that the said Charles hath not stood to, obeyed, observed, fulfilled, or kept any part of the said award, which by him the said Charles ought to have been stood to, obeyed, observed, fulfilled, and kept), for further plea therein he saith, that the said Charles the said seventy-five pounds to the said William hath not hitherto paid; and this he is ready to verify. Wherefore he prays judgment, and his debt aforesaid, together with his damages occasioned by the detention of the said debt, to

Demurrer.

be adjudged unto him, etc. **And** the aforesaid Charles saith, that the plea aforesaid, by him the said William in manner and form aforesaid above in his replication pleaded, and the matter in the same contained, are in

[*xxiv]

no wise sufficient in *law for the said William to have or maintain his action aforesaid thereupon against him the said Charles; to which the said Charles hath no necessity; neither is he obliged, by the law of the land, in any manner to answer; and this he is ready to verify. Wherefore, for want of a sufficient replication in this behalf, the said Charles, as aforesaid, prays judgment, and that the aforesaid William may be precluded from having his action aforesaid thereupon against him, etc. And the said Charles, according to the form of the statute in that case made and provided, shows to the court here

Causes of demurrer.

the causes of demurrer following; to wit, that it doth not appear, by the replication aforesaid, that the said arbitrators made the same award in the presence of two credible witnesses on or before the said first day of January, as they ought to have done, according to the form and effect of the condition aforesaid; and that the replication aforesaid is uncertain, insufficient, and wants form.

Joinder in demurrer.

And the aforesaid William saith, that the plea aforesaid, by him the said William in manner and form aforesaid, above in his replication pleaded, and the matter in the same contained, are good and sufficient in law for the

No. III.

said William to have and maintain the said action of him, the said William, thereupon against the said Charles; which said plea, and the matter therein contained, the said William is ready to verify and prove as the court shall award; and because the aforesaid Charles hath not answered to that plea, nor hath he hitherto in any manner denied the same, the said William, as before, prays judgment, and his debt aforesaid, together with his damages occasioned by the detention of that debt, to be adjudged unto him, etc. **And because** the justices here will advise themselves of and upon the premises before they give judgment thereupon, a day is thereupon given to the parties aforesaid here, until the morrow of All Souls', to hear their judgment thereupon, for that the said justices here are not yet advised thereof. At which day here come as well the said Charles as the said William, by their said attorneys; and because the said justices here will further advise themselves of and upon the premises before they give judgment thereupon, a day is further given to the parties aforesaid here until the octave of Saint Hilary, to hear their judgment thereupon, for that the said justices here are not yet advised thereof. At which day here come as well the said William Burton as the said Charles Long, by their said attorneys. **Wherefore** the record and matters aforesaid having been seen, and by the justices here fully understood, and all and singular the premises being examined, and mature deliberation being had thereupon; for that it seems to the said justices here that the said plea of the said William Burton before in his replication pleaded, and the matter therein contained, are not sufficient in law to have and maintain the action of the aforesaid William against the aforesaid Charles; **Therefore it is considered** that the aforesaid William *take nothing by his writ aforesaid, but that he and his pledges of prosecuting, to wit, John Doe and Richard Roe, be in mercy for his false complaint; and that the aforesaid Charles go thereof without a day, etc. **And it is further considered** that the aforesaid Charles do recover against the aforesaid William

Continuances.

Opinion of the court.

Replication insufficient.

Judgment for the defendant.

[*xxv]

Querens nihil capiat per breve.

Amercement.

No. III. Costs.

eleven pounds and seven shillings, for his costs and charges by him about his defense in this behalf sustained, adjudged by the court here to the said Charles with his consent, according to the form of the statute in that case made and provided; and that the aforesaid Charles may have execution thereof, etc.

Execution.

General error assigned.

Afterward, to wit, on Wednesday next after fifteen days of Easter in this same term, before the lord the king, at Westminster, comes the aforesaid William Burton, by Peter Manwaring, his attorney, and saith, that in the record and process aforesaid, and also in the giving of the judgment in the plaint aforesaid, it is manifestly erred in this; to wit, that the judgment aforesaid was given in form aforesaid for the said Charles Long against the aforesaid William Burton, when by the law of the land judgment should have been given for the said William Burton against the said Charles Long; and this he is ready to verify. **And** the said William prays the writ of the said lord the king to warn the said Charles Long to be before the said lord the king, to hear the record and process aforesaid; and it is granted unto him; by which the sheriff aforesaid is commanded that by good [and lawful men of his bailiwick] he cause the aforesaid Charles Long to know, that he be before the lord the king from the day of Easter in five weeks, wheresoever [he shall then be in England], to hear the record and process aforesaid, if [it shall have happened that in the same any error shall have intervened]; and further [to do and receive what the court of the lord the king shall consider in this behalf]. The same day is given to the aforesaid William Burton. **At which day** before the lord the king, at Westminster, comes the aforesaid William Burton, by his attorney aforesaid; and the sheriff returns, that by virtue of the writ aforesaid to him directed he had caused the said Charles Long to know, that he be before the lord the king at the time aforesaid in the said writ contained, by John Den and Richard Fen, good, etc., as by the same writ was commanded him; which said Charles Long, ac-

Writ of scire facias, to hear errors.

Sheriff's return: Scire feci.

No. III.

cording to the warning given him in this behalf, here cometh by Thomas Webb, his attorney. **Whereupon** the said William saith, that in the record and process aforesaid, and also in the giving of the judgment aforesaid, it is manifestly erred, alleging the error aforesaid by him in the form aforesaid alleged and prays that the judgment aforesaid for the error aforesaid, and others in the record and process aforesaid being, may be reversed, annulled, and entirely for nothing esteemed, and that the said Charles *may rejoin to the errors aforesaid, and that the court of the said lord the king here may proceed to the examination as well of the record and process aforesaid as of the matter aforesaid above for error assigned. **And** the said Charles saith, that neither in the record and process aforesaid, nor in the giving of the judgment aforesaid, in any thing is there erred; and he prays in like manner that the court of the said lord the king here may proceed to the examination as well of the record and process aforesaid as of the matters aforesaid above for error assigned. **And because** the court of the lord the king here is not yet advised what judgment to give of and upon the premises, a day is thereof given to the parties aforesaid until the morrow of the Holy Trinity, before the lord the king wheresoever he shall then be in England, to hear their judgment of and upon the premises, for that the court of the lord the king here is not yet advised thereof. At which day before the lord the king, at Westminster, come the parties aforesaid by their attorneys aforesaid: **Whereupon** as well the record and process aforesaid, and the judgment thereupon given, as the matters aforesaid by the said William above for error assigned, being seen, and by the court of the lord the king here being fully understood, and mature deliberation being thereupon had, for that it appears to the court of the lord the king here, that in the record and process aforesaid, and also in the giving of the judgment aforesaid, it is manifestly erred, **Therefore it is considered** that the judgment aforesaid for the error aforesaid, and others, in the record and process aforesaid, be reversed,

Error assigned afresh.

[*xxvi]

Rejoinder: In nullo est erratum.

Continuance.

Opinion of the court.

Judgment of the Common Pleas reversed.

No. III.

Judgment for the plaintiff.

Costs.

Defendant amerced.

annulled, and entirely for nothing esteemed; and that the aforesaid William recover against the aforesaid Charles his debt aforesaid, and also fifty pounds for his damages which he hath sustained as well on occasion of the detention of the said debt as for his costs and charges unto which he hath been put about his suit in this behalf, to the said William, with his consent, by the court of the lord the king here adjudged. And the said Charles in mercy.

§ 7. *Process of execution.*

Writ of capias ad satisfaciendum.

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the Sheriff of Oxfordshire, greeting. **We** command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before us in three weeks from the day of the Holy Trinity, wheresoever we shall then be in England, to satisfy William Burton, for two hundred pounds debt, which the said William Burton hath lately recovered against him in our
[*xxvii] court before us, and also fifty pounds, which were *adjudged in our said court before us to the said William Burton, for his damages which he hath sustained, as well by occasion of the detention of the said debt, as for his costs and charges to which he hath been put about his suit in this behalf, whereof the said Charles Long is convicted, as it appears to us of record; and have you there then this writ. **Witness,** Sir Thomas Denison,† Knight, at Westminster, the nineteenth day of June, in the twenty-ninth year of our reign.

Sheriff's return: Cepi corpus.

By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready before the lord the king at Westminster at the day within written, as within it is commanded me.

Writ of fieri facias.

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and

† The senior puisné justice; there being no chief justice in that term.

No. III.

so forth, to the Sheriff of Oxfordshire, greeting. **We** command you that of the goods and chattels within your bailiwick of Charles Long, late of Burford, gentleman, you cause to be made two hundred pounds debt, which William Burton lately in our court before us at Westminster hath recovered against him, and also fifty pounds, which were adjudged in our court before us to the said William, for his damages which he hath sustained, as well by occasion of the detention of his said debt as for his costs and charges to which he hath been put about his suit in this behalf, whereof the said Charles Long is convicted, as it appears to us of record; and have that money before us in three weeks from the day of the Holy Trinity, wheresoever we shall then be in England, to render to the said William for his debt and damages aforesaid; and have there then this writ. **Witness,** Sir Thomas Denison, Knight, at Westminster, the nineteenth day of June, in the twenty-ninth year of our reign.

Sheriff's return: Fieri feci.

By virtue of this writ to me directed, I have caused to be made of the goods and chattels of the within-named Charles Long two hundred and fifty pounds; which I have ready before the lord the king at Westminster at the day within written, as it is within commanded me.

COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK IV.

OF PUBLIC WRONGS.

BOOK THE FOURTH.

OF PUBLIC WRONGS.

CHAPTER THE FIRST.

OF THE NATURE OF CRIMES, AND THEIR PUNISHMENT.

§ 1. Public wrongs: division of the subject.—We are now arrived at the fourth and last branch of these Commentaries, which treats of *public wrongs*, or *crimes* and *misdemeanors*. For we may remember that, in the beginning of the preceding volume,[a] wrongs were divided into two sorts or species; the one *private*, and the other *public*. Private wrongs, which are frequently termed civil injuries, were the subject of that entire book: we are now, therefore, lastly, to proceed to the consideration of public wrongs, or crimes and misdemeanors, with the means of their prevention and punishment.[1] In the pursuit of which subject I shall consider, in the first place, the general nature of crimes and punishments; secondly, the persons capable of committing crimes;[2] thirdly, their several degrees of guilt, as principals or accessories; fourthly, the several species of crimes, with the punishment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and, sixthly, the method of inflicting those punishments, which the law has annexed to each several crime and misdemeanor.

[a] Book III. c. 1.

---

1 **Character of Blackstone's account of the criminal law.**—As regards the criminal law in particular, Blackstone's exposition of it follows in the main the method of Hale, and whilst quite full enough for all the purposes for which that work was intended, it is singularly free from technical details which have no value or interest except in the actual administration of justice. One of its merits is, that it presents a distinct and trustworthy picture of the criminal law as it was before the notion of recasting it had made any progress worth mentioning, and whilst belief in the wisdom of its principles still remained unshaken. It differs from the law as known to Coke and Hale in the greater precision and completeness given to the various common-law principles and definitions, but still more in the great additions which had been made in the course of the eighteenth century to the substantive

§ 2. General nature of crimes and punishment.—First, as to the general nature of crimes and their punishment, the discussion and admeasurement of which forms in every country the code of criminal law, or, as it is more usually denominated with us in England, the doctrine of the *pleas of the crown:* so called, because the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offense.[b]

§ 3. 1. Importance of knowledge of criminal law.—The knowledge of this branch of jurisprudence, which teaches the nature, extent and degrees of every crime and adjusts to it its adequate and necessary penalty, is of the utmost importance to every individual in the state. For (as a very great master of the crown law[c] has observed upon a similar occasion) no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us upon a moment's re-

[b] See Book I. p. 268.

[c] Sir Michael Foster, Pref. to Rep.

---

criminal law by statutory enactments. I have already quoted the well-known passage in which Blackstone laments "that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty are declared by act of parliament to be felonies without benefit of clergy, or, in other words, to be worthy of instant death." For the wantonness with which the punishment of death was thus lavished in cases in which it was never intended to be inflicted no excuse can be made, but most of the offenses thus punished were deserving of severe secondary punishment, and the extreme crudity and imperfection of the common law is proved to demonstration by the necessity which experience showed to exist of making statutory provisions respecting them. The legislation of the eighteenth and the early part of the nineteenth century on crime was in fact the slow enactment of a penal code the articles of which consisted of short acts of parliament passed as particular offenses happened to attract attention.—STEPHEN, 2 Hist. Crim. Law, 214.

flection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a willful disobedience may expose us, is a matter of universal concern.

In proportion to the importance of the criminal law ought also to be the care and attention of the legislature in properly [2] forming and enforcing it. It should be founded upon principles that are permanent, uniform and universal, and always conformable to the dictates of truth and justice, the feelings of humanity and the indelible rights of mankind; though it sometimes (provided there be no transgression of these eternal boundaries) may be modified, narrowed or enlarged, according to the local or occasional necessities of the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition and revenge; from retaining the discordant political regulations, which successive conquerors or factions have established, in the various revolutions of government; from giving a lasting efficacy to sanctions that were intended to be temporary, and made (as Lord Bacon expresses it) merely upon the spur of the occasion; or from, lastly, too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offense,—from some, or from all, of these causes it hath happened that the criminal law is in every country of Europe more rude and imperfect than the civil. I shall not here enter into any minute inquiries concerning the local constitutions of other nations, the inhumanity and mistaken policy of which have been sufficiently pointed out by ingenious writers of their own.[d] But even with us in England, where our crown law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined and penalties less uncertain and arbitrary; where all our accusations are public and our trials in the face of the world; where torture is unknown, and every delinquent is judged by such of his equals, against whom he can form no exception nor even a personal dislike,—even here we shall occasionally find room to remark some particulars that seem to want revision and amendment. These have chiefly arisen from too scrupulous an

[d] Baron Montesquieu, Marquis Beccaria, etc.

adherence to some rules of the ancient common law, when the reasons have ceased upon which those rules were founded; from not [4] repealing such of the old penal laws as are either obsolete or absurd; and from too little care and attention in framing and passing new ones. The enacting of penalties, to which a whole nation shall be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill, but be calmly and maturely considered by persons who know what provisions the laws have already made to remedy the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil. It is never usual in the house of peers even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges, and hearing their report thereon.[e] And surely equal precaution is necessary when laws are to be established which may affect the property, the liberty, and perhaps even the lives, of thousands. Had such a reference taken place, it is impossible that in the eighteenth century it could ever have been made a capital crime to break down (however maliciously) the mound of a fish-pond, whereby any fish shall escape, or to cut down a cherry tree in an orchard.[f 2] Were even a committee appointed but once in an hundred years to revise the criminal law, it could not have continued to this hour a felony without benefit of clergy to be seen for one month in the company of persons who call themselves, or are called, Egyptians.[g 3]

[e] See Book II. p. 345.

[f] Stat. 9 Geo. I. c. 22 (Criminal Law, 1722). 31 Geo. II. c. 42 (Mosstroopers, 1757).

[g] Stat. 5 Eliz. c. 20 (Vagrancy, 1563).

---

[2] By 7 & 8 George IV, c. 30 (1826), the maximum punishment for these offenses, provided the injury to the tree exceeded one pound, was seven years' transportation: and by the Malicious Damage Act, 1861, and the Penal Servitude Act, the maximum penalty is seven and five years, penal servitude respectively.

[3] The act of 5 Elizabeth, c. 20 (1562), against "that false and subtile company of vagabonds calling themselves Egyptians," was repealed in 1783.

It is true that these outrageous penalties, being seldom or never inflicted, are hardly known to be law by the public, but that rather aggravates the mischief, by laying a snare for the unwary. Yet they cannot but occur to the observation of anyone who hath undertaken the task of examining the great outlines of the English law, and tracing them up to their principles; and it is the duty of such a one to hint them [5] with decency to those whose abilities and stations enable them to apply the remedy. Having, therefore, premised this apology for some of the ensuing remarks, which might otherwise seem to savor of arrogance, I proceed now to consider (in the first place) the general nature of *crimes*.

§ 4. **2. Definition of crime and misdemeanor.**—I. A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it.[4] This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms, though, in common usage, the word "crimes" is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and

4 Blackstone's definition of crime has been very widely adopted. United States v. Eaton, 144 U. S. 677, 688; 36 L. Ed. 591, 594, 12 Sup. Ct. Rep. 764; Ex parte Hollwedell, 74 Mo. 395, 401; State v. Bishop, 7 Conn. 181, 185; In re Bergin, 31 Wis. 383, 386. Sir James Stephen defines a crime "as an act or omission in respect of which legal punishment may be inflicted on the person who is in default either by acting or omitting to act." Stephen, 1 Hist. Crim. Law, 1. Judge McClain defines a crime as "as act or omission punishable as an offense against the state."

"Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the federal constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the constitution were familiar with it. In this treatise, vol. 4, p. 5, is given a definition of the word 'crimes' . . .

"In the light of this definition we can appreciate the action of the convention which framed the constitution. In the draft of that instrument, as reported by the committee of five, the language was 'the trial of all criminal offenses . . . shall be by jury,' but by unanimous vote it was amended so as to read 'the trial of all crimes.' The significance of this change cannot be misunderstood. If the language had remained 'criminal offenses,' it might have been contended that it meant all offenses of a criminal nature, petty

omissions of less consequence, are comprised under the gentler name of "misdemeanors" only.[5]

§ 5. a. **Distinction between public and private wrongs.**—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 or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity.[6] As if I detain a field from another man, to

as well as serious, but when the change was made from 'criminal offenses' to 'crimes,' and made in the light of the popular understanding of the meaning of the word 'crimes,' as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses." Brewer, J., construing the provision of § 2, art. III of the federal constitution that "the trial of all crimes, except in cases of impeachment, shall be by jury," in Schick v. United States, 195 U. S. 65, 69, 1 Ann. Cas. 585, 49 L. Ed. 99, 102, 24 Sup. Ct. Rep. 826.

[5] **Treason, felony, and misdemeanor.**—The common law classified offenses into treasons, felonies, and misdemeanors. But treason was said to be a felony (*94, *post*), and it is not probably regarded otherwise in the United States. In the acceptation of the common law felony comprised every species of crime, which occasioned the forfeiture of lands and goods, whether punished capitally or not; and by statute any offense may be declared a felony. Misdemeanors were all indictable offenses which were not treasons or felonies. In the United States, statutes generally provide a definition for felony, and make it mean any offense punishable with death or confinement in the penitentiary. Nichols v. State, 35 Wis. 308; People v. War, 20 Cal. 117; State v. Smith, 32 Me. 369, 54 Am. Dec. 578. All crimes less than a felony are misdemeanors.—RUSSELL, 1 Crimes (6th ed.), 193.

[6] **Difference between torts and crimes.**—Since conduct which is straightforward came to be spoken of eulogistically as being "rectum," "directum" (whence "droit"), "recht" and "right," conduct of the opposite character naturally came to be expressed by the terms "delictum," "delit," as deviating from the right path, and "wrong" or "tort," as twisted out of the straight line. Similar conduct is less descriptively called in German "Rechtsverletzung." These terms are alike employed in their respective languages to denote, in a very general sense, acts which are violations of rights. They are, however, usually applied only to "wrongs independent of contract"; i. e., the large class of wrongful acts which are breaches of contract are specifically so described.

which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land: but treason, murder and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society, which cannot possibly subsist where actions of this sort are suffered to escape with impunity.

In all cases the crime includes an injury: every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community [6] Thus, treason in imagining the king's death involves in it conspiracy against an individual, which is also a civil injury; but as this species of treason in its

Certain other classes of wrongful acts also have for historical reasons specific designations which take them out of the category of delicts, or torts. Thus Roman law treated acts of certain kinds as giving rise to obligations not "*ex delicto*," but "*quasi ex delicto*," nor are breaches of trust, or such acts as are charged against a corespondent in the divorce court, since they were alike unknown to the old common law, described as torts by the law of England.

The distinction between those wrongs which are generically called "torts" and those which are called crimes may at first sight appear to be a fine one. The same set of circumstances will, in fact, from one point of view constitute a tort, while from another point of view they amount to a crime. In the case, for instance, of an assault, the right violated is that which every man has that his bodily safety shall be respected, and for the wrong done to this right the sufferer is entitled to get damages. But this is not all. The act of violence is a menace to the safety of society generally, and will therefore be punished by the state. So a libel is said to violate not only the right of an individual not to be defamed, but also the right of the state that no incentive shall be given to a breach of the peace. It is sometimes alleged by books of authority that the difference between a tort and a crime is a matter of procedure, the former being redressed by the civil, while the latter is punished by the criminal courts. But the distinction lies deeper, and is well expressed by Blackstone, who says that torts are an "infrirgement or privation of the private, or civil, rights belonging to individuals, considered as individuals; crimes are a breach of public rights and duties which affect the whole community, considered as a community." The right which is violated by a tort is always a different right from that which is violated by a crime. The person of inherence in the former case is an individual, in the latter case is the state. In a French criminal trial there may accordingly appear not only the public prosecutor, representing the state and demanding the punishment of the offender, but also the injured individual, as "*partie civile*," asking for damages for the loss which he has personally sustained.—HOLLAND, Jurisprudence (11th ed.), 324.

consequences principally tends to the dissolution of government, and the destruction thereby of the order and peace of society, this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual; but the law of society considers principally 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 may be considered in the same view; it is an injury to *private* property; but, were that all, a civil satisfaction in damages might atone for it: the *public* mischief is the thing, for the prevention of which our laws have made it a capital offense. In these gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so very great.[7] And, indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong: which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature, in which the public punishment is not so severe, but it affords room for a private compensation also; and herein the distinction of crimes from civil injuries is very apparent. For instance; in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine and

[7] The rule has sometimes been laid down, that where an individual has been civilly injured by a felonious act, he may sue the felon after conviction; but that, until he has discharged his duty of bringing or endeavoring to bring the felon to justice, his right of redress by action is suspended. But it is doubtful whether there is now any practical method of enforcing such a rule (Wells v. Abrahams (1872), L. R. 7 Q. B. 554; Ex parte Ball (1879), 10 Ch. D. 667; Midland Ins. Co. v. Smith and Wife (1881), 6 Q. B. D. 561; Appleby v. Franklin (1886), 17 Q. B. D. 93; S. v. S. (1889), 16 Cox C. C. 566); which in any case, never applied to misdemeanors.—STEPHEN, 4 Comm. (16th ed.), 5.

In the United States the weight of authority is that the common-law rule requiring a postponement of the civil action until after conviction of felony is not in force here, and that a civil suit for damages may be maintained against the wrongdoer regardless of whether a criminal prosecution for the act has been commenced or brought to a conclusion. Boardman v. Gore, 15 Mass. 331; Quimby v. Blackey, 63 N. H. 77; Short v. Barker, 22 Ind. 148; McClain, 1 Crim. Law, § 11.

imprisonment; and the party beaten may also have his private remedy by action of trespass for the injury, which he in particular sustains, and recover a civil satisfaction in damages. So, also, in case of a public nuisance, as digging a ditch across a highway, this is punishable by indictment, as a common offense to the whole kingdom and all his majesty's subjects; but if any individual sustains any special damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make [7] ample satisfaction, as well for the private injury as for the public wrong.

Upon the whole, we may observe that in taking cognizance of all wrongs, or unlawful acts, the law has a double view, *viz.*, not only to redress the party injured, by either restoring to him his right, if possible, or by giving him an equivalent, the manner of doing which was the object of our inquiries in the preceding book of these Commentaries, but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws which the sovereign power has thought proper to establish, for the government and tranquillity of the whole. What those breaches are, and how prevented or punished, are to be considered in the present book.[8]

[8] **Reduction of the criminal law to statutory form.**—The question of the reduction of the criminal law to statutory form presents an interesting question. Mr. Edward Livingston eloquently advocated this principle, contending that unless the criminal law was written in plain language in books readily accessible and understandable, punishment was tyranny of the most arbitrary kind. Livingston, 1 Complete Works on Criminal Jurisprudence, 87 et seq. On the other hand, Chief Justice Hosmer stoutly maintained: "It is indispensably necessary that there should exist a common law, on the broad principles of public convenience and necessity, defining crimes and prescribing adequate punishments. To determine, by statute, every offense and direct the punishment which shall be inflicted, has not, so far as I know, ever been attempted, and would be nearly impracticable. The community must, at least, be left exposed to injuries the most atrocious; and the evils resulting would be much greater than any mind will anticipate, from the exercise of a sound discretion, in the application of principles and analogies which the common law supplies." State v. Danforth, 3 Conn. 112. In the light of actual results it is interesting to note that experience has disproved the contentions of both sides. The law as codified in Ohio, Indiana, California and other states does cover all the common-law offenses with scarcely an exception. (For an exception see Johnson v. State, 66 Ohio St. 59, 90 Am. St. Rep. 564,

§ 6. 3. **Punishment of crimes.**—II. The nature of *crimes* and *misdemeanors* in general being thus ascertained and distinguished, I proceed in the next place to consider the general nature of *punishments:* which are evils or inconveniences consequent upon crimes and misdemeanors; being devised, denounced and inflicted by human laws, in consequence of disobedience or misbehavior in those to regulate whose conduct such laws were respectively made. And herein we will briefly consider the *power*, the *end*, and the *measure* of human punishment.[9]

61 L. R. A. 277, 63 N. E. 607.) On the other hand, in common-law jurisdictions governed by the unwritten law a person is practically never punished for an intentional act which he does not realize is contrary to law when he does it. The statutory crimes on the contrary are so voluminous, being found not only in bulky codes but scattered through literally thousands of laws and municipal ordinances difficult to find, that reasonable vigilance and good motives can no longer insure one against the violation of the criminal law. Furthermore, the statutory definitions of crimes are for the most part unintelligible and misleading unless read in the light of the common-law decisions. Homicide and larceny furnish good examples of this.—A. M. KIDD.

9 **Modern conception of the philosophy and science of crime.**—The modern conception of the philosophy and science of crime had not arisen in the time of Blackstone. Beccaria (1735–94), it is true, had published his Essay on Crimes and Punishments (1764), in which on the basis of the eighteenth century theory of the social contract he formulated a number of propositions of more or less validity. This essay, permeated with the humanitarian spirit of the age, a humanitarianism which in this field, as in literature, art and music, was prone to degenerate into idle sentimentalism, aroused, nevertheless, the first popular interest in the subject, and far more than any other book, is responsible for the remarkable mitigation that has taken place in the severity of punishments. With the spirit of this change in general Blacktone is in accord. As Stephen has pointed out, however (History of the Criminal Law, vol. 1, p. 470), the one hundred sixty felonies punishable by death in Blackstone's time do not constitute as formidable a list as seems at first glance, one act making grand larceny capital, being more severe than fifty acts covering the larceny of fifty different kinds of objects. When all is said and done, however, few offenses are to-day capitally punished in England, and few criminals are hanged, while in the United States the death penalty is seldom inflicted and has been abolished in many jurisdictions. The attacks of Beccaria on torture, secret investigation, the examination of the accused under oath, and the other characteristics of the continental procedure, which has received the type name of inquisitorial, were not directed at England. The English procedure from the arrest to the execution as developed by Blackstone's time

§ 7. a. **The right to punish.**—As to the *power* of human punishment, or the right of the temporal legislator to inflict discretionary penalties for crimes and misdemeanors.[h] It is clear that the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual. For it must be vested in somebody, otherwise the laws of nature would be vain and fruitless if none were empowered to put them in execution, and if that power is vested in *anyone*, it

[h] See Grotius, de j. b. & p. l. 2. c. 20. Puffendorf, L. of Nat. & N. b. 8. c. 3.

---

and lucidly outlined by him is an example of the accusatory type, its leading features being public trial, examination of witnesses in open court subject to cross-examination, compulsory process for the witnesses of the defense as well as the prosecution, privilege of the defendant to remain silent, rules of evidence, such as exclusion of hearsay, no torture, and verdict by a jury. (Esmein, History of Continental Procedure, c. I.) These features of the English system on the whole merit the complacent eulogy of Blackstone that the English "crown law is with justice supposed to be more nearly advanced to perfection." The superiority of the English system has led to the adoption of many of its features on the Continent, and where the accusatory system has come into competition with the inquisitorial, the accusatory has triumphed, as in Canada, where in civil cases the provinces of English origin have retained the common law and those of French origin the French law, but all agreed on the English criminal law, so that there is one common criminal law throughout the entire Dominion of Canada.

To a certain extent there has been in the United States a borrowing from the inquisitorial type, notably in the institution of the prosecuting attorney, and in England the director of public prosecution, to supply the defect in the haphazard common-law method of private prosecution by anyone interested.

Owing to an overstrained and unhistorical interpretation of the constitutional rights of the defendant and an unfortunate and technical rigidity in the application of the common-law rules of procedure and evidence, the administration of the criminal law in the United States has occasioned considerable criticism, a criticism, however, which, in so far as it is constructive, is directed toward remedying the abuses of the system, but not the system itself, which is fundamentally sound. On the Continent, the English importations in criminal procedure have not given universal satisfaction. In particular, the institution of the jury has aroused heated controversy. The folly of leaving to twelve men without special training or qualifications the difficult questions of law and fact that may arise in a criminal trial is an objection that cannot be ignored; it is little improvement on the judgments by ordeal and wager of battle which it superseded. Logically and theoretically trained judges could do the work much better. But the enforcement of law in a

must also be vested in *all* mankind; since all are by nature equal. Whereof the first murderer, [8] Cain, was so sensible, that we find him [1] expressing his apprehensions, that *whoever* should find him would slay him. 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 was intended to remedy. Whatever power, therefore, individuals had of punishing offenses against the law of

[1] Gen. iv. 14.

---

country of popular government, and in fact the existence of the government itself, depends so much on public opinion that the judgments of a select body of experts on matters involving the life and liberty of citizens would precipitate a clash between the special standards of a class and those of the general public. Between the extremes of the popular judgments of many ancient assemblies and the imposition of the law by the sovereign authority through the medium of a select class of experts, trial by jury is the most effective compromise yet devised, at least for England and the United States, and in spite of its undoubted defects will probably continue for many generations.

To the philosophy of crime neither Beccaria nor Blackstone make any substantial contribution. For both crime is a mysterious manifestation of the divine will, the explanation of which, like all secret things, belongs to God alone. Beccaria, with the optimism of the eighteenth century philosophy, looked for substantial improvement by changing the law and by general education. But the main reliance was on the punishment of the criminal, a punishment which should be proportioned to the enormity of the crime. Beccaria's ideal, which he endeavors to approximate roughly, of a scale of punishments descending from the greatest to the lowest, the amount depending on a sort of hedonistic calculus of the quantity of pain in the punishment that would balance the pleasure of the crime, strikes Blackstone as too "romantic," yet practically Blackstone offers nothing more. The implied philosophy is that expressed in the opera of the Mikado,—

> "My aim it is divine,
> I shall achieve in time
> To make the punishment fit the crime."

The philosophic opposition to this position is based on a revolution in the point of view. There can be no crime without a criminal; guilt is personal; it is the criminal who must be punished. Instead, therefore, of making the punishment fit the crime the later formula is to make it fit the criminal, with, of course, a due regard to certainty, to the deterrence of others and to the avoidance of the danger of arbitrary punishments. But how fit the

nature, that is now vested in the magistrate alone, who bears the sword of justice by the consent of the whole community. And to this precedent natural power of individuals must be referred that right, which some have argued to belong to every state (though, in fact, never exercised by any), of punishing not only their own subjects, but also foreign ambassadors, even with death itself, in case they have offended, not indeed against the municipal laws of the country, but against the divine laws of nature, and become liable thereby to forfeit their lives for their guilt.[k]

As to offenses merely against the laws of society, which are only *mala prohibita* (crimes because forbidden), and not *mala in se*

[k] See Book I. pag. 254.

---

criminal? One school laid down the proposition that if the criminal could not help doing what he did punishment was as futile, as unnecessary, as unjust as the punishment of a lunatic. The inquiry was accordingly directed to the freedom of the will of the criminal. It was argued that without free will there could be no punishment, and seriously urged that in proportion as freedom of the will was lacking punishment should be mitigated. On this theory the hardened criminal who, as a result of a long and persevering course of wrongdoing, had become incapable of anything else, would be the least guilty. Such a theory naturally aroused the opposition of a school which denied that there was any free will at all; that geographic, anthropologic, sociologic and pathologic conditions inevitably made the criminal what he was and that he could not be anything else. The extremists of this school drew the corollary that the born criminal at any rate should be restrained before he had the opportunity of committing crime, a proceeding destructive of personal liberty even if it could be put into actual operation. Another result was that there could be no punishment at all, but that society simply protects itself from criminals just as it does from lunatics. These conclusions, so neglectful of human psychology and so contrary to the instincts of the race which feels that the criminal is responsible and that the lunatic is not, stimulated the philosophers to renewed efforts to find a theory that would reconcile all the facts of experience. It has been formulated that a certain identity between one's self and identity with one's ellowmen is a condition of responsibility. When the alienation reaches that degree that it can no longer be said to be the act of the man himself, then there can be no responsibility. Short of a marked deviation from the normal there is responsibility no matter how weak the will of the particular individual may become. What the punishment should be is a matter to be determined by the needs of the particular criminal. It is because the criminal is what he is and is acting in accordance with what his whole evolution and environment have made him that there is a right to

(crimes in themselves),* the temporal magistrate is also empowered to inflict coercive penalties for such transgressions: and this by the consent of individuals, who, in forming societies, did either tacitly or expressly invest the sovereign power with a right of making laws, and of enforcing obedience to them when made, by exercising, upon their nonobservance, severities adequate to the evil. The lawfulness, therefore, of punishing such criminals is founded upon this principle, that the law by which they suffer was made by their own consent; it is a part of the original contract into

*On the distinction between *mala in se* and *mala prohibita,* see note 19, p. 94, Book I.

---

punish at all. An undetermined, erratic free will would be an arbitrary thing, not the product of the man himself, and therefore should not subject him to punishment. Whether the philosophers have succeeded in reconciling free will, determinism and punishment is perhaps not of such transcendent importance. Practical questions, such as probation, parole, the indeterminate sentence, juvenile courts, segregation of offenders in prisons and institutions best adapted to individual treatment, and in fact most practical results are in general but little affected by these philosophic disagreements. The philosophers have, in short, fulfilled their function by arousing interest in the subject, by defining the terms and by analyzing the problems, for the solution of which we must look elsewhere. In fact, one school has frankly proposed that we adopt Blackstone's definition of crimes and procedure for the arrest and conviction of the criminal without radical change; that the entire modern development since the time of Beccaria and Blackstone lies in the treatment of the offender after his conviction; in other words, the nature of the criminal and the causes leading to his crime.

These questions Beccaria solved by the easy, though futile, methods of closet speculation, much as his coworker, Bentham, formulated from his inner consciousness codes of law adapted to every time and place. It is to Lombroso (1836–1909) that credit must be given for taking criminology out of the realm of abstract speculation and establishing it on the foundation of scientific observation and experiment. We may doubt the importance attributed by Lombroso to anthropologic causes of crime; we may doubt the influence of atavism; we may doubt the evidence in support of the born criminal; we may doubt, in fact, the existence of that class at all, but that the causes of crime can be observed and studied, and valid conclusions can be drawn as to the treatment of criminals and the prevention of crime, is beyond question, difficult as the task undoubtedly is. Lombroso emphasizes the anthropologic side, Ferri, the sociological, enumerating factors as individual or anthropologic, physical or natural, and sociologic. Under individual or anthropologic, he enumerates age, sex, civil status, profession, domicile, social rank, instruc-

which they entered, when first engaged in society; it was calculated for, and has long contributed to, their own security.

This right, therefore, being thus conferred by universal consent, gives to the state exactly the same power, and no more, over all its members as each individual member had [9] naturally over himself or others. Which has occasioned some to doubt how far a human legislature ought to inflict capital punishments for *positive* offenses—offenses against the municipal law only, and not against

tion, education and the organic and psychic constitution. Under physical or natural factors, he enumerates race, climate, fertility of the soil, relative length of day and night, seasons, meteoric conditions, temperature. Under sociological factors, he specifies density of population, emigration, public opinion, customs, religion, public order, economic and industrial conditions, agricultural and industrial production, public administration of public safety, public instruction, beneficence, civil and penal legislation. Many others could be added without exhausting the list, and any one, such as the organic and psychic constitution, opens up a vast unexplored region. (See De Quiros, Modern Theories of Criminality (1911), p. 20.)

Hundreds of workers in various fields are contributing to the sum of knowledge on the subject. No panacea is offered. In fact, as society advances and older crimes die out or are practically exterminated, new crimes, like new diseases which civilization brings in its train, spring up as an almost inevitable concomitant, examples of which are the embezzlements so prevalent in modern business. The struggle against crime is apparently never ending. The present attitude is to doubt the generalized causes of crime even as minutely subdivided by Ferri, to submit each cause to the test of observation and experiment. The science is too young as yet for much generalization. One hundred men may commit larceny. The classical treatment of Blackstone and Beccaria would be a certain fixed punishment for each, with possibly some variation due to extenuating circumstances. This treatment has undoubtedly a certain deterrent effect on others, and during the imprisonment society is protected from other depredations. But under the prison conditions generally prevailing, the prisoner is degraded, physically and morally, and comes out at the end of his term to prey on society, more of a criminal than when he entered. The folly of this procedure has led to the epigram that "half the inmates of prisons should never have been in, and the other half should never be let out." Most judges of to-day whenever possible are making liberal use of probation for first offenders at the risk of weakening the deterrent effect on others. More and more, however, the effort is to diagnose each case, to determine the cause of the crime. One defendant may be feeble-minded and requires segregation temporarily or permanently in an institution adapted to his needs. The cause of another defendant's crime may be alcohol, for which medical treatment and the substitution of other activities that will take the place of the

the law of nature; since no individual has, naturally, a power of inflicting death upon himself or others for actions in themselves indifferent. With regard to offenses *mala in se*, capital punishments are in some instances inflicted by the immediate *command* of God himself to all mankind; as, in the case of murder, by the precept delivered to Noah, their common ancestor and representative,[1] "whoso sheddeth man's blood, by man shall his blood be shed." In other instances they are inflicted after the *example* of

[1] Gen. ix. 6.

---

desire for drink may afford the cure. For the hundred crimes there may be a hundred different causes. Without a knowledge of the cause in each case no effective treatment is possible. Often a cause like alcohol may be merely superficial,—a secondary effect of disease, or evil social, economic and industrial conditions that only time and persistent effort can improve. Often the disentanglement of the causative factors is a problem of bewildering complexity.

The task of the physician of crime is thus twofold,—to protect society from the offender, if possible building him up as a self-supporting, law-abiding member of the community, and to remove as far as possible the causes that make criminals. The analogy with the progress of medical science is apparent, The problem thus becomes not so much a matter of law as one of administration. After the guilt has been determined then there arises the problem which the modern science of criminology is attempting to solve. Statistics are lacking on which to base conclusions, particularly in the United States. Specialized institutions, factories, farms and other employments adapted to the needs of different offenders have not as yet been adequately provided for. The procedure for remuneration by the offender of the victim of a crime, a useful provision in some cases, as suggested by Beccaria, has not been worked out. In other words, more varied methods of punishment or treatment are required than a term in the typical prison or a pecuniary fine. Anthropology, medicine, psychology, psychiatry, economics are not yet in a position to answer the questions propounded. Men trained for this kind of work are lacking. In short, from this point of view it is apparent that criminology which has to do with the prevention of crime, the detection of offenders and their punishment or treatment forms a necessary condition to the existence of society and the cultivation of the sciences, while reciprocally criminology is dependent upon them all for its progress. Sound economic policies, social justice, good laws, temperance, better organization of police and many other factors tend to prevent crime,—a branch of the science corresponding to that preventive medicine which has accomplished so much in recent years. Chemistry, photography, dactyloscopy, the telegraph and many other sciences and instrumentalities assist in the detection of crime and enable

the Creator, in his positive code of laws for the regulation of the Jewish republic; as in the case of the crime against nature. But they are sometimes inflicted without such express warrant or example, at the will and discretion of the human legislature· as for forgery, for theft, and sometimes for offenses of a lighter kind. Of these we are principally to speak: as these crimes are, none of them, offenses against natural, but only against social, rights; not even theft itself, unless it be accompanied with violence to one's house or person: all others being an infringement of that right of property which, as we have formerly seen,[m] owes its origin not to the law of nature, but merely to civil society.

§ 8. **(1) Capital punishment.**—The practice of inflicting capital punishments, for offenses of human institution, is thus justified by that great and good man, Sir Matthew Hale:[n] "When offenses grow enormous, frequent and dangerous to a kingdom or

[m] Book II. c. 1.

[n] 1 Hal. P. C. 13.

---

the police to keep ahead of the modern criminal. The anthropologist, the physician, the psychologist, the psychiatrist aid in the diagnosis of the offender and in the determination of his treatment. It is thus literally and scientifically true that society has just the criminals it deserves, and that crime is a symptom of the disease and ignorance of the social whole. The science of criminology is in its infancy, but the achievement of the last fifty years has been to substitute the observation, experiment, theory and verification of science for the guesses of the abstract philosopher. Criminology has at last started on the road side by side with the other sciences. The Modern Criminal Science Series, published under the auspices of the American Institute of Criminal Law and Criminology, has made available in English several of the leading continental treatises on the subject, and these contain numerous references to other sources. The Journal of the Institute of Criminal Law and Criminology records the progress of the science in the United States and abroad.

Criminals and Crime (1907), by Sir Robert Anderson, gives a brief but interesting account of defects in the old system and the possibilities of the new from the point of view of the experienced police administrator. The Individual Delinquent (1915), by William Healy, is a good example of the present day methods of the painstaking, patient examination of each offender. The avenues of research opened up by such a work are innumerable. It is not claimed that pure cold science can alone solve all these problems. The fervent expression of noble sentiments is required to arouse to action, and above all there is needed hard, practical labor in social service. At present, however, there is the cry for more light, which science can supply.—A. M. KIDD.

state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom or its inhabitants, severe punishment and even death itself is necessary to be annexed to laws in many cases by the prudence of lawgivers." It is therefore the enormity, or dangerous tendency, of the crime that alone can warrant any earthly legislature in putting him to death that commits it. [10] It is not its frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For, though the end of punishment is to deter men from offending, it never can follow from thence that it is lawful to deter them at any rate and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws. Every humane legislator will be therefore extremely cautious of establishing laws that inflict the penalty of death, especially for slight offenses, or such as are merely positive. He will expect a better reason for his so doing than that loose one which generally is given; that it is found by former experience that no lighter penalty will be effectual. For is it found upon further experience that capital punishments are more effectual? Was the vast territory of all the Russias worse regulated under the late Empress Elizabeth than under her more sanguinary predecessors? Is it now, under Catherine II, less civilized, less social, less secure? And yet we are assured that neither of these illustrious princesses have, throughout their whole administration, inflicted the penalty of death: and the latter has upon full persuasion of its being useless, nay even pernicious, given orders for abolishing it entirely throughout her extensive dominions.° But, indeed, were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity (upon which the justice and propriety depend) of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public roads by loaded wagons is universally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow that it would be just for the legislature to inflict

° Grand instructions for framing a new code of laws for the Russian empire, § 210.

death upon every obstinate carrier who defeats or eludes the provisions of former statutes. Where the evil to be prevented is not adequate to the violence of the preventive, a sovereign that thinks seriously can never [11] justify such a law to the dictates of conscience and humanity. To shed the blood of our fellow-creature is a matter that requires the greatest deliberation and the fullest conviction of our own authority: for life is the immediate gift of God to man, which neither he can resign nor can it be taken from him, unless by the command or permission of Him who gave it, either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.

I would not be understood to *deny* the right of the legislature in any country to enforce its own laws by the death of the transgressor, though persons of some abilities have *doubted* it; but only to suggest a few hints for the consideration of such as are, or may hereafter become, legislators. When a question arises whether death may be lawfully inflicted for this or that transgression, the wisdom of the laws must decide it: and to this public judgment or decision all private judgments must submit; else there is an end of the first principle of all society and government. The guilt of blood, if any, must lie at their doors who misinterpret the extent of their warrant, and not at the doors of the subject who is bound to receive the interpretations that are given by the sovereign power.

§ 9. **b. The object of punishment.**—As to the *end*, or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the Supreme Being: but as a precaution against future offenses of the same kind. This is effected three ways: either by the amendment of the offender himself, for which purpose all corporal punishments, fines and temporary exile or imprisonment are inflicted; or by deterring others by the dread of his example from offending in the like way, "*ut pœna* (as Tully [p] expressed it) *ad paucos, metus ad omnes perveniat* (that few may suffer, but all may dread punishment)," which gives rise to all ignominious punishments, and to such executions of justice as are open and [12] public; or, lastly, by depriving the party injuring

[p] Pro Cluentio. 46. Cf. Coke, 3 Inst. 46.

of the power to do future mischief, which is effected by either putting him to death, or condemning him to perpetual confinement, slavery or exile. The same one end, of preventing future crimes, is endeavored to be answered by each of these three species of punishment. The public gains equal security, whether the offender himself be amended by wholesome correction, or whether he be disabled from doing any further harm: and if the penalty fails of both these effects, as it may do, still the terror of his example remains as a warning to other citizens. The method, however, of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it; therefore the pains of death, and perpetual disability by exile, slavery or imprisonment, ought never to be inflicted, but when the offender appears *incorrigible*, which may be collected either from a repetition of minuter offenses, or from the perpetration of some one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment: and in such cases it would be cruelty to the public to defer the punishment of such a criminal till he had an opportunity of repeating, perhaps, the worst of villainies.

§ 10. c. Degree of punishment.—As to the *measure* of human punishments. From what has been observed in the former articles we may collect that the quantity of punishment can never be absolutely determined by any standing invariable rule; but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offenses.

§ 11. (1) Retaliation.—Hence it will be evident that what some have so highly extolled for its equity, the *lex talionis* or law of retaliation, can never be in all cases an adequate or permanent rule of punishment. In some cases, indeed, it seems to be dictated by natural reason; as in the case of conspiracies to do an injury, or false accusations of the innocent, to which we may add [13] that law of the Jews and Egyptians, mentioned by Josephus and Diodorus Siculus, that whoever without sufficient cause was found with any mortal poison in his custody, should himself be obliged

to take it. But, in general, the difference of persons, place, time, provocation or other circumstances may enhance or mitigate the offense, and in such cases retaliation can never be a proper measure of justice. If a nobleman strikes a peasant, all mankind will see that if a court of justice awards a return of the blow, it is more than a just compensation. On the other hand, retaliation may sometimes be too easy a sentence; as, if a man maliciously should put out the remaining eye of him who had lost one before, it is too slight a punishment for the maimer to lose only one of his: and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered, by decreeing, in imitation of Solon's laws,[q] that he who struck out the eye of a one-eyed man should lose both his own in return. Besides, there are very many crimes that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. And, we may add, that those instances wherein retaliation appears to be used, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the same hurt he has done to his neighbor and no more; but this correspondence between the crime and punishment is barely a consequence from some other principle. Death is ordered to be punished with death, not because one is equivalent to the other, for that would be expiation, and not punishment. Nor is death always an equivalent for death: the execution of a needy decrepit assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth and full enjoyment of his friends, his honors, and his fortune. But the reason upon which this sentence is grounded seems to be, that this is the highest penalty that man can inflict, [14] and tends most to the security of mankind, by removing one murderer from the earth, and setting a dreadful example to deter others: so that even this grand instance proceeds upon other principles than those of retaliation. And truly, if any measure of punishment is to be taken from the damage sustained by the sufferer, the punishment ought rather to exceed than equal the injury: since it seems contrary to reason and equity that the guilty (if convicted) should suffer no more than

q Pott. Ant. b. 1. c. 26.

the innocent has done before him; especially as the suffering of the innocent is past and irrevocable, that of the guilty is future, contingent and liable to be escaped or evaded. With regard, indeed, to crimes that are incomplete, which consist merely in the intention and are not yet carried into act, as conspiracies and the like, the innocent has a chance to frustrate or avoid the villainy, as the conspirator has also a chance to escape his punishment: and this may be one reason why the *lex talionis* is more proper to be inflicted, if at all, for crimes that consist in intention than for such as are carried into act. It seems indeed consonant to natural reason, and has therefore been adopted as a maxim by several theoretical writers,[r] that the punishment due to the crime of which one falsely accuses another should be inflicted on the perjured informer. Accordingly, when it was once attempted to introduce into England the law of retaliation, it was intended as a punishment for such only as preferred malicious accusations against others; it being enacted by statute 37 Edward III, c. 18 (1363), that such as preferred any suggestions to the king's great council should put in sureties of taliation; that is, to incur the same pain that the other should have had, in case the suggestion were found untrue. But, after one year's experience, this punishment of taliation was rejected, and imprisonment adopted in its stead.[s]

§ 12. (2) Principles determining degree of punishment.—But though from what has been said it appears that there cannot be any regular or determinate method of rating the [15] quantity of punishments for crimes, by any one uniform rule, but they must be referred to the will and discretion of the legislative power, yet there are some general principles, drawn from the nature and circumstances of the crime, that may be of some assistance in allotting it an adequate punishment.

§ 13. (a) Object of the crime.—As, first, with regard to the *object* of it: for the greater and more exalted the object of an injury is, the more care should be taken to prevent that injury, and of course under this aggravation the punishment should be more severe. Therefore, treason in conspiring the *king's* death is by the

r Beccar. c. 15.

s Stat. 38 Edw. III. c. 9 (1364).

English law punished with greater rigor than even actually killing any private subject. And yet, generally, a design to transgress is not so flagrant an enormity as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking; so that it requires more obstinacy in wickedness to perpetrate an unlawful action than barely to entertain the thought of it: and it is an encouragement to repentance and remorse, even till the last stage of any crime, that it never is too late to retract, and that if a man stops even here, it is better for him than if he proceeds; for which reason an attempt to rob, to ravish, or to kill, is far less penal than the actual robbery, rape or murder. But in the case of a treasonable conspiracy, the object whereof is the king's majesty, the bare intention will deserve the highest degree of severity: not because the intention is equivalent to the act itself; but because the greatest rigor is no more than adequate to a treasonable purpose of the heart, and there is no greater left to inflict upon the actual execution itself.

§ 14. (b) Mitigating circumstances.—Again: the violence of passion, or temptation, may sometimes alleviate a crime; as theft, in case of hunger, is far more worthy of compassion, than when committed through avarice, or to supply one in luxurious excesses. To kill a man upon sudden and violent resentment is less penal than upon cool, deliberate malice. The age, education and character of the offender; the repetition (or otherwise) [16] of the offense; the time, the place, the company wherein it was committed; all these, and a thousand other incidents, may aggravate or extenuate the crime.[t]

§ 15. (c) Aggravating circumstances.—Further: as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures those should be most severely punished which are the most destructive of

[t] Thus Demosthenes (in his oration against Midias) finely works up the aggravations of the insults he had received. "I was abused," says he, "by my enemy, in cold blood, out of malice, not by heat of wine, in the morning, publicly, before strangers as well as citizens; and that in the temple, whither the duty of my office called me."

the public safety and happiness;[u] and, among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit: according to what Cicero observes,[v] "*ea sunt animadvertenda peccata maxime, quæ difficillime præcaventur* (those offenses should be most severely punished which it is most difficult to guard against)." Hence it is that for a servant to rob his master is in more cases capital than for a stranger: if a servant kills his master, it is a species of treason;[10] in another it is only murder: to steal a handkerchief, or other trifle of above the value of twelve-pence, privately from one's person, is made capital; but to carry off a load of corn from an open field, though of fifty times greater value, is punished with transportation only. And, in the Island of Man, this rule was formerly carried so far that to take away an horse or an ox was there no felony, but a trespass, because of the difficulty in that little territory to conceal them or carry them off; but to steal a pig or a fowl, which is easily done, was a capital misdemeanor, and the offender was punished with death.[w]

§ 16. (d) Certainty rather than severity of punishment.— Lastly, as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, 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 [17] distinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action,[x] that crimes are more effectually prevented by the *certainty*, than by the *severity*, of punishment. For the excessive severity of laws (says Montesquieu[y]) hinders their execution: when the punishment surpasses all meas-

u Beccar. c. 6.
v Pro Sexto Roscio, 40.
w 4 Inst. 285.
x Beccar. c. 7.
y Sp. L. b. 6. c. 13.

---

10 Petit treasons are now abolished, it being provided by act of 1861 that any offense which was formerly petit treason shall be deemed to be murder only.

ure, the public will frequently out of humanity prefer impunity to it. Thus also the statute 1 Mar., st. 1, c. 1 (Treason, 1554), recites in its preamble, "that the state of every king consists more assuredly in the love of the subject towards their prince, than in the dread of laws made with rigorous pains; and that laws made for the preservation of the commonwealth without great penalties are more often obeyed and kept, than laws made with extreme punishments." Happy had it been for the nation if the subsequent practice of that deluded princess in matters of religion had been correspondent to these sentiments of herself and parliament, in matters of state and government! We may further observe that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel punishments: the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished: under the emperors severe punishments were revived; and then the empire fell.

§ 17. **(e) Graduation of punishment to offense.**—It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect either in the wisdom of the legislative or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium* (the severest or capital punishment), to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind; yet [18] that magistrate must be esteemed both a weak and a cruel surgeon who cuts off every limb, which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniously proposed [z] that in every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least: but, if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offenses of an inferior

[z] Beccar. c. 6.

rank. Where men see no distinction made in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt. Thus, in France the punishment of robbery, either with or without murder, is the same;[a] hence it is, that though perhaps they are therefore subject to fewer robberies, yet they never rob but they also murder. In China, murderers are cut to pieces, and robbers not; hence in that country they never murder on the highway, though they often rob. And in England, besides the additional terrors of a speedy execution, and a subsequent exposure or dissection, robbers have a hope of transportation, which seldom is extended to murderers. This has the same effect here as in China; in preventing frequent assassination and slaughter.

§ 18. (i) Excessive number of capital offenses in English law. Yet, though in this instance we may find glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein; inflicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures. It is a melancholy truth that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parliament[b] to be felonies without benefit of clergy; or, in other words, to be worthy of instant death.[11] So

[a] Sp. L. b. 6. c. 16.

[b] See Ruffhead's index to the statutes (tit. felony) and the acts which have since been made.

---

[11] **Amelioration of English criminal law.**—The severity of the criminal law was greatly increased all through the eighteenth century by the creation of new felonies without benefit of clergy. In the second edition of the Commentaries (4 Black. 18), published in 1769, Blackstone says that "among the variety of actions which men are daily liable to commit no less than 160 have been declared by act of parliament to be felonies without benefit of clergy." This passage has often been quoted, but it must be observed that the number of capital offenses on the statute-book is no test of its severity. A few general enactments would be much more severe than a great number of special ones. A general enactment that grand larceny should be excluded from benefit of clergy would have been infinitely more severe than fifty acts excluding the stealing of fifty different sorts of things from the benefit

dreadful a list, instead of diminishing, increases the number of offenders. [19] The injured, through compassion, will often forbear to prosecute: juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offense: and judges, through compassion, will respite one-half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy and hardened of clergy. By a great number of statutes the forgery of different specified documents was made felony without benefit of clergy. Different statutes provided, for instance, for the forgery of exchequer bills, South Sea bonds, certain powers of attorney, etc. The real severity of a single general act about forgeries would have been much greater than that of these numerous scattered provisions, each of which went to swell the number of capital offenses. Moreover, the 160 offenses mentioned by Blackstone might probably be reduced by careful classification to a comparatively small number. For instance, I know not how many offenses of the 160 are included in what was known as the Black Act (9 George I, c. 27, 1722). This act provided, amongst other things, that if any persons armed or having their faces blacked, or being otherwise disguised, should appear in any forest, etc., or in any warren or place where hares or rabbits were usually kept, or in any high road, open heath, common, or down, or should unlawfully and willfully hunt, wound, kill, destroy, or steal any red or fallow deer, etc., they should be guilty of felony, without benefit of clergy. The part of this provision which I have quoted creates fifty-four capital offenses, for it forbids three classes of persons to do any one of eighteen acts. However, after making all deductions on these grounds, there can be no doubt that the legislation of the eighteenth century in criminal matters was severe to the highest degree, and destitute of any sort of principle or system. In practice the punishment of death was inflicted in only a small proportion of the cases in which sentence was passed. The persons capitally convicted were usually pardoned conditionally on their being transported either to the American or afterwards to the Australian colonies for life or for a long term of years. These conditional pardons were recognized by the Habeas Corpus Act (31 Charles II, c. 2, §§ 13, 14), and used to be granted by the king through the Secretary of State upon the recommendation of the judges of assize. This being thought circuitous and dilatory, it was enacted in 1768 (8 George III, c. 15) in substance that judges of assize should have power to order persons convicted of crimes without the benefit of clergy to be transported for any term they thought proper, or for fourteen years if no term was specially mentioned.

The result of all this legislation as to the punishment of death was in the reign of George IV as follows: All felonies except petty larceny and mayhem were theoretically punishable with death, but clergyable felonies were never punished with death, nor were persons convicted of such felonies sentenced to

offender overlooks the multitude that suffer; he boldly engages in some desperate attempt to relieve his wants or supply his vices; and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate in falling at last a sacrifice to those laws which long impunity has taught him to contemn.

death. When asked what they had to say why sentence should not be passed upon them, they "fell upon their knees and prayed their clergy," upon which they were liable to imprisonment for not exceeding a year, or in some cases to whipping, or in the case of petty larceny, or grand larceny not excluded from clergy, and in some other cases, to seven years' transportation.

A great number of felonies had been excluded from benefit of clergy in the course of the eighteenth century, and when a person was convicted of such an offense he had to be sentenced to death, but the judge might order him to be transported instead, and such an order had all the effects of a conditional pardon.

It came to be considered that to pass sentence of death in cases in which it was not intended to be carried out was objectionable, and accordingly in 1823 an act (4 George IV, c. 48) was passed which authorized the court in cases of capital convictions for any felony except murder to abstain from actually passing sentence of death, and to order it to be recorded, which had the effect of a reprieve. The act is still in force, but as in cases of murder sentence of death must be passed, and practically no other felony is capital, it is hardly ever acted upon.—STEPHEN, 1 Hist. Crim. Law, 470.

"This state of the law," Sir James Stephen continues, "excited great philanthropic indignation, and was completely altered by the first set of acts passed for the reform of the criminal law. They were conceived in a spirit totally different from that of our earlier legislation."

In 1827 benefit of clergy was abolished, and it was provided that no one convicted of felony should suffer death unless for felonies excluded from benefit of clergy, or made punishable by some statute subsequently passed. There followed from that date to 1861 a series of acts reducing, though by slow degrees, the number of capital offenses. The only offenses now punishable with death are treason, murder, piracy with violence, and setting fire to dockyards and arsenals.

CHAPTER THE SECOND. [20]

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

§ 19. Persons capable of committing crimes.—Having, in the preceding chapter, considered in general the nature of crimes and punishments, we are next led, in the order of our distribution, to inquire what persons are or are not *capable* of committing crimes; or, which is all one, who are exempted from the censures of the law upon the commission of those acts which in other persons would be severely punished. In the process of which inquiry we must have recourse to particular and special exceptions: for the general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

§ 20. 1. Essentials of crime: will and act.—All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto 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 any guilt: the concurrence of the will, when it has its choice either to do or to avoid the act in question, being the only thing [21] that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act. For though, *in foro conscientiæ* (at the tribunal of conscience), a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart or 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, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will, and, secondly, an unlawful act consequent upon such vicious will.

§ 21. a. Conditions exempting from responsibility for crime. Now, there are three cases in which 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, which is nothing else but a determination of one's choice to do or to abstain from a particular action: he, therefore, that has no understanding, can have no will to guide his conduct. 2. Where there is understanding and will sufficient, residing in the party, but not called forth and exerted at the time of the action done; which is the case of all offenses committed by chance or ignorance. Here the will sits neuter, and neither concurs with the act nor disagrees to it. 3. Where the action is constrained by some outward force and violence. Here the will counteracts the deed, and is so far from concurring with, that it loaths and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider all the several species of defect in will, as they fall under some one or other of these general heads, as infancy, idiocy, lunacy and intoxication, which fall under the first class; misfortune and ignorance, which [22] may be referred to the second; and compulsion or necessity, which may properly rank in the third.

§ 22. (1) Infancy.—First, we will consider the case of *infancy*, or nonage; which is a defect of the understanding.[1] In-

[1] **Age of criminal responsibility.**—The common law remains as Blackstone has stated it. It is believed, however, that no children of tender years have been executed in modern times. The whole treatment of juvenile offenders has been greatly modified by juvenile court acts, the general effect of which is to substitute the jurisdiction of the court of chancery over minors for the ordinary process of the criminal courts, not only as to minors under fourteen, but in some states as to minors of a greater age.—A. M. Kidd.

The age at which a person becomes competent to commit a crime is necessarily fixed in an arbitrary manner. What constitutes maturity is a question of degree, and the age at which it is reached differs from person to person and from country to country. By English law children under seven are absolutely exempt from punishment, and from seven to fourteen there is a presumption that they are not possessed of the degree of knowledge essential to criminality, though the presumption may be rebutted by proof to the contrary. (Stephen, 2 Hist. Crim. Law, 97.) Sir James

fants, under the age of discretion, ought not to be punished by any criminal prosecution whatever.[a] What the age of discretion is in various nations is matter of some variety. The civil law distinguished the age of minors, or those under twenty-five years old, into three stages: *infantia* (infancy), from the birth till seven years of age; *pueritia* (childhood), from seven to fourteen; and *pubertas* (puberty), from fourteen upwards. The period of *pueritia,* or childhood, was again subdivided into two equal parts; from seven to ten and an half was *ætas infantiæ proxima* (the age nearest infancy); from ten and an half to fourteen was *ætas pubertati proxima* (the age nearest puberty). During the first stage of infancy, and the next half stage of childhood, *infantiæ proxima,* they were not punishable for any crime.[b] During the other half stage of childhood, approaching to puberty, from ten and an half to fourteen, they were indeed punishable, if found to be *doli capaces,* or capable of mischief; but with many mitigations,

[a] 1 Hawk. P. C. 2. [b] Inst. 3. 20. 10.

Stephen says that this rule, like most other presumptions of law, is practically inoperative, or at all events operates seldom and capriciously. It is his opinion that the age of complete irresponsibility should be raised, say to twelve, except in the case of a few specially atrocious crimes, and that it should be succeeded by complete responsibility. Under the Children Act of 1908 a person under sixteen cannot be sentenced to death or to penal servitude; a person under fourteen cannot be sentenced to imprisonment; and a person between the ages of fourteen and sixteen can only be sentenced to imprisonment in exceptional cases.

In the United States the age varies at which an infant is criminally irresponsible. The general rule is that under the age of seven an infant is not criminally punishable, and between the ages of seven and fourteen is presumed incapable of criminal intent. State v. Guild, 10 N. J. L. 163, 18 Am. Dec. 404; State v. Learnard, 41 Vt. 585; Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494; Commonwealth v. Smith, 119 Mass. 305. In Texas the infant must be over nine years; and between nine and thirteen there is a rebuttable presumption of innocence. Parker v. State, 20 Tex. App. 451. In Illinois the ages of irresponsibility and rebuttable innocence are respectively ten and fourteen. Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132. The question of the capacity of an infant between the ages seven and fourteen, or whatever the respective ages are, is for the jury. State v. Milholland, 89 Iowa, 5, 56 N. W. 403; Willis v. State, 89 Ga. 188, 15 S. E. 32; 1 Russell, Crimes (6th ed.), 114; McClain, 1 Crim. Law, § 150.

and not with the utmost rigor of the law. During the last stage (at the age of puberty, and afterwards) minors were liable to be punished, as well capitally as otherwise.

§ 23. **(a) Age of capacity.**—The law of England does in some cases privilege an infant, under the age of twenty-one, as to common misdemeanors, so as to escape fine, imprisonment and the like: and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offenses;[c] for, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery or the like (which infants, when full grown, are at least as liable as others to commit), for these an infant, above [23] the age of fourteen, is equally liable to suffer, as a person of the full age of twenty-one.

With regard to capital crimes, the law is still more minute and circumspect, distinguishing with greater nicety the several degrees of age and discretion. By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open;[d] and from thence till the offender was fourteen, it was *ætas pubertati proxima* (the age nearest puberty), in which he might, or might not, be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion: but, under twelve, it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he in fact committed. But by the law, as it now stands, and has stood at least ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that "*malitia supplet ætatem* (malice is held equivalent to age)." Under seven years of age, indeed, an infant cannot be guilty of felony,[e] for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony.[f] Also,

[c] 1 Hal. P. C. 20, 21, 22.
[d] LL. Athelstan. Wilk. 65.
[e] Mirr. c. 4. § 16. 1 Hal. P. C. 27.
[f] Dalt. Just. c. 147.

under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax* (incapable of distinguishing good from evil); yet if it appear to the court and jury that he was *doli capax* (capable of distinguishing good from evil), and could discern between good and evil, he may be convicted and suffer death. Thus a girl of thirteen has been burnt for killing her mistress; and one boy of ten and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged, because it appeared upon their trials that the one hid himself and the other hid the body he had killed: which hiding manifested a consciousness of guilt, and a discretion [24] to discern between good and evil.[g] And there was an instance in the last century where a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge and cunning, he was found guilty, condemned and hanged accordingly.[h] Thus, also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behavior plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment.[i] But, in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt and contradiction.

§ 24. (2) Insanity and idiocy.—The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, *viz.*, in an *idiot* or a *lunatic*.[2] For the rule of law as to the latter, which may

g 1 Hal. P. C. 26, 27.
h Emlyn on 1 Hal. P. C. 25.
i Foster. 72.

---

2 **Relation of madness to criminal responsibility.**—I have considered this subject in my History of the Criminal Law (vol. II, c. XIX, pp. 124–186), and I refer to that chapter for a full statement of all my views on the subject. I will content myself here with a very short statement of my under-

easily be adapted also to the former, is, that "*furiosus furore solum punitur* (a madman is punished by his madness alone)." In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself.[k] Also, if a man in his sound memory

[k] 3 Inst. 6.

---

standing of the law. It is, as I believe, correctly expressed in the 27th Article of my Digest, which is as follows:

No act is a crime if the person who does it is at the time when it is done prevented, either by defective mental power, or by any disease affecting his mind—

(a) From knowing the nature and quality of his act;

(b) From knowing that either the act is illegal or that it is morally wrong; or

(c) From controlling his own conduct, unless the absence of the power of control has been produced by his own default.

But an act may be a crime although the mind of the person who does it is affected by disease, if such disease does not in fact produce upon the mind one or other of the effects above mentioned, in reference to that act.

By "knowing either that an act is illegal or that it is morally wrong" I understand being able to judge calmly and reasonably of the moral or legal character of a proposed action; and "by controlling his own conduct" I mean ability to refer calmly and reasonably to those motives which would lead men in general to resist temptations to crime and to allow proper weight to them. A man may be aware as a general proposition that murder is a crime, but if his mind is haunted by delusions, which, even if they are not immediately connected with the killing of any particular person, vitiate the sufferer's mental operations, and are inconsistent with such an appreciation of the facts as a sane man has, this is strong evidence to show that he does not know the moral character of the act of killing any particular person. It is equally strong evidence to show that he has not the ordinary power of control over his actions; for how does anyone ever control his actions except by attending to the various considerations, moral, legal and religious, which make him resist temptation? There may be no definite connection between the delusion, say, that a man's finger is made of glass and the murder of his wife; but if it was shown of anyone that he was under the delusion that his finger was made of glass when he murdered his wife, a long step would be taken towards showing that he was not in a position to know that to murder his wife was wrong, or to appreciate correctly the moral nature of any action whatever, or to perform that process of deliberation or comparison of conflicting considerations which is necessary to the control of conduct in any circumstances of temptation.

The law thus stated and explained is not, I think, open to objection, nor is it difficult to understand or to administer; but the subject has been made the

commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defense? If, after he be

occasion of great controversy between the legal and medical professions. Of this I have in my *History* said all that I think it necessary to say. I will, however, indicate the principal points on which it has turned.

It has been thought that the law of England is that the fact that a man is disabled from controlling his conduct by madness is not, if proved, a good defense to a charge of crime in respect of an act so done.

This appears to me to be a mistake traceable in part to a misunderstanding of the meaning, and in part to an exaggeration of the authority, of the answers of the judges in MacNaghten's case. I have considered this matter at large in the chapter already referred to, and shall not return to it here. I think that the answers in question are unfortunately expressed, and imperfect. They do not explain that the knowledge that an act is wrong, which is the test not of insanity but of responsibility—that is, liability to punishment—means, not knowledge of the truth of the general proposition that a particular class of actions are wrong, but a power of appreciating the moral quality of a particular action. This power may be disturbed by delusions or impulses of various kinds not immediately connected with crime by any link apparent to a sane mind unacquainted with the way in which madness works, and in spite of the retention by the madman of a power of appreciating the difference between moral good and evil in cases with which he is not personally concerned.

I have tried many cases of murder in which the defense was insanity, and I do not think that I ever found the least difficulty in disposing of them in a way which was not complained of by medical men. I do not think I have ever had occasion to check a medical man in giving any evidence which he wished to give, nor have I found any difficulty in pointing out to the jury the way in which it bore on the issue to be tried by them according to my understanding of the law of England; and for these reasons I think that the controversy supposed to exist between the medical and legal professions on this subject is merely a misunderstanding arising partly from the circumstance that the two professions look at the matter from different points of view, and partly from the fact that the nature of the disease was till lately very imperfectly understood.

Practically, there is no doubt that, as a general rule, madness in any of its forms is inconsistent with liability to legal punishment or responsibility, but this is not strictly true. It is the usual but not the invariable or necessary result of madness to destroy responsibility; and it is important to bear this in mind, for cases might occur in which a man might be both mad and responsible. Suppose, for instance, a very wicked man were to be slightly affected with a curable form of madness, so much so that it was thought

tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something [25] in stay of

desirable not at once to restore him to complete liberty, and suppose that, presuming on his supposed irresponsibility, he were with every circumstance of premeditation and contrivance to poison some person on whose death he would inherit a fortune. Surely such a person ought, as by law he would be, to be guilty of murder, and responsible for his act.

In connection with the subject of madness, the effects of drunkenness and anger may be noticed, each of which has something in common with madness. Neither drunkenness nor anger can in any case be an excuse for crime, but each may have, under certain circumstances, the effect in certain cases of affecting the degree of a criminal's guilt. Certain forms of provocation have the effect of reducing murder to manslaughter, and when any particular intention is essential to the commission of a crime, the fact that a person charged with the crime was drunk when he committed it is to be taken into account in considering whether he had the intention or not.—STEPHEN, General View of the Criminal Law of England, 78.

Blackstone's treatment of the important subject of the relation of insanity to criminal responsibility is very brief. Unsatisfactory as this is, it is by no means so much so as the tests laid down by later courts and text-writers and applied in most jurisdictions. The chief criticism of Blackstone's exposition is that for a successful defense on this ground there is required "absolute insanity," as to which Erskine, counsel in Hadfield's Case (27 How. St. Tr. 1281) said, "No such madness ever existed in the world." Apart from this there is nothing in the law laid down by Blackstone to prevent the courts and juries following the advancement of knowledge on this subject. It was early laid down that if the defendant did not know the difference between right and wrong with relation to the act committed, that is, did not know that the act was contrary to the law of the land, he was not guilty. This everyone would concede, but there are many who do possess this knowledge who are unquestionably insane. In Hadfield's Case (27 How. St. Tr. 1281), a former soldier who had been severely wounded and had been confined in insane asylums, became possessed of the delusion that he must die in order that the world might be saved; that he must not kill himself because that would be a sin. He therefore shot at the king in order that the law might put him to death. Hadfield therefore knew that the act he was doing was contrary to the law of the land, but before the defense was completed Lord Kenyon stopped the case, advising the jury to bring in a verdict of not guilty, the act manifestly being the result of delusions. The test of a knowledge of right and wrong, supplemented by the rule that where the act is the result of delusion the defendant is not guilty, indicates a sound instinct of judges and jurors

judgment or execution.[1] Indeed, in the bloody reign of Henry the Eighth, a statute was made [m] which enacted, that if a person, being *compos mentis* (of sane mind), should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this

[1] 1 Hal. P. C. 34.

[m] 33 Hen. VIII. c. 20 (Treason, 1541).

---

in such matters where their discretion is left untrammeled. Unfortunately, in 1843 came M'Naghten's Case (10 Cl. & F. 200, 8 Eng. Reprint, 718). M'Naghten, on account of a fancied grievance against Sir Robert Peel, shot and killed one Drummond, mistaking him for Peel. He was acquitted on the ground of insanity. General dissatisfaction over this verdict resulted in the house of lords inquiring from the judges as to the proper tests that should be applied in such cases. In response the judges laid down the right and wrong test, and on the question of delusion as a defense stated that the defendant must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real, in regard to which latter rule it has been said: "No ingenuous student of the law ever read it for the first time without being shocked by its exquisite inhumanity." (State v. Jones, 50 N. H. 369, 9 Am. Rep. 242.) The unfortunate result of M'Naghten's case has been that judges have laid down the right and wrong test without qualification, the result being, as Mr. Bishop has stated, "The memorials of our jurisprudence are written all over with cases in which those who are now understood to have been insane have been executed as criminals." Under the right and wrong test without qualification Hadfield would have been guilty. Yet it is apparent that the judges in M'Naghten's case had no intention of overruling the precedents of half a century.

M'Naghten's case is an excellent example of what happens when judges lay down the law in answer to abstract questions without reference to a concrete case. The answer, correct as to the abstract question, is applied to concrete cases materially different. The judges were careful to state in answer to each question that it was understood the defendant was not in other respects insane, but this qualification is usually overlooked by the courts professing to follow that case. Now, it is perfectly possible for a person suffering from a delusion to commit a wrongful act of his own wickedness, entirely unaffected by his delusion. Nearly every inmate of an insane asylum governs his conduct to some extent under the influence of rewards and punishments, but, on the other hand, a delusion may be merely a superficial manifestation of a profound mental disturbance, so that the defendant cannot be said to be in other respects sane. The wrongful act may therefore be a product of the insanity and not of the normal man. How the matter should be left to the jury is an unsolved problem. The question as put by Chief Justice Shaw to the jury was whether the evidence indicated such a diseased state of the mind that the act of killing

savage and inhuman law was repealed by the statute 1 & 2 Ph. & M., c. 10 (Treason, 1554). For, as is observed by Sir Edward Coke,[n] "the execution of an offender is for example, *ut pœna ad paucos, metus ad omnes perveniat* (that few may suffer, but all may dread punishment): but so it is not when a madman is executed; but

[n] 3 Inst. 6.

---

the warden was to be considered as an outbreak or paroxysm of disease which for the time being overwhelmed and superseded reason and judgment so that the accused was not an accountable agent. (Commonwealth v. Rogers, 7 Met. (Mass.) 500, 41 Am. Dec. 458.) Stephen, in his History of the Criminal Law, volume II, page 163, considered that a man would not have the capacity to know the difference between right and wrong if by reason of disease his mind was filled with delusions which, if true, would not justify or excuse his proposed act, but which in themselves were so wild and astonishing as to make it impossible for him to reason about them calmly, or, owing to their rapid succession, to be equal to the effort of calmly sustained thought on any subject. Yet Stephen's conclusion was that juries were usually reluctant to convict if they looked upon the act itself as upon the whole a mad one, and equally reluctant to acquit if they thought it was an ordinary crime. The learned judge and author therefore believed that it was questionable whether a more elaborate inquiry would produce more substantial justice.

It is evident that any formula like the right and wrong test, or the much lauded "power to choose" test, abstracts a certain and rather exceptional state of mind, and then applies the rule in these unusual cases to every form of mental alienation presented. The desired formula should be based on the question whether the act is the act of the man himself or whether disease has so alienated him that he is no longer identical with himself. In this view the absence of delusion is of great importance. It is essentially a question for the scientific medical expert to solve, and the legal formula should be sufficiently elastic to expand with the growth of knowledge on this subject. The trouble hitherto has been that the physician and the lawyer have not been speaking the same language. The physician was interested in disease, and from one point of view all crime is abnormal and indicates a pathologic condition, but pathologic conditions as such are of no importance to the lawyer. He is not interested in the question whether the defendant is suffering from disease or not. The only question for the lawyer is whether the act of the defendant is the act of the man himself or whether his condition has become so diseased, his deviation from the normal so great, as to mark him out as a person not responsible. The fundamental question is therefore based in large part on the definition of responsibility in general, and on the language of the causes, *indicia* and effect of insanity.

The occasional successes of advocates and medical experts in freeing defendants generally believed to be responsible has resulted in legislation limiting

should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others." But if there be any doubt whether the party be *compos* or not, this shall be tried by a jury. And if he be so found, a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses; but, if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency.[o] Yet, in the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting unless under proper control; and, in particular, they ought not to be suffered to go loose, to the terror of the king's subjects. It was the doctrine of our ancient law that persons deprived of their reason might be confined till they recovered their senses,[p] without waiting for the forms of a com-

[o] 1 Hal. P. C. 31.

[p] Bro. Abr. tit. Corone. 101.

---

and restricting the defense. In England, when the defense of insanity is established to the satisfaction of the jury, a verdict is brought in that the defendant is guilty, but insane. The result of this verdict is that the court orders the accused to be kept in custody as a criminal lunatic until the king's pleasure is known. (Trial of Lunatics Act, 1883, 46 & 47 Vict., c. 38, sec. 2.) In practice in England a defendant so committed is seldom released, and the defense of insanity is therefore restricted almost entirely to capital cases. The English law is thoroughly illogical on this point, as the defendant may be perfectly sane at the time of his trial and during his entire confinement. The practical success, however, of this measure in eliminating the defense has caused a movement for its adoption in states in this country. without as yet much success. The Washington act preventing the defense of insanity in any criminal case was held to be unconstitutional. (State v. Strasburg, 60 Wash. 106, Ann. Cas. 1912B, 917, 32 L. R. A. (N. S.) 1216, 110 Pac. 1020.)—A. M. KIDD.

After quoting Blackstone's rule, that idiots and lunatics are not chargeable with their own acts, the California court says: "This short quotation shows what all the books and treatises and decisions on the subject show, that the true and only reason why an insane person should not be tried is 'that he is disabled by the act of God to make a just defense, if he have one.' When the rule became a part of the common law, modern views of insanity were unknown. No sort of insanity was recognized except that which manifested itself in mental deficiency or in mental derangement. A congenital idiot, or a raving lunatic, was understood to be insane, but in the absence of any

mission or other special authority from the crown: and now, by the vagrant acts,[q] a method is chalked out for imprisoning, chaining and sending them to their proper homes.

§ 25. **(3) Drunkenness.**—Thirdly; as to artificial, voluntarily contracted madness, by *drunkenness* or intoxication, which, depriving men of their reason, puts them in a temporary frenzy; our law looks upon this as an aggravation of the offense, rather [26] than as an excuse for any criminal misbehavior. A drunkard, says Sir Edward Coke,[r] who is *voluntarius dæmon* (a voluntary madman), hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it: *nam omne crimen ebrietas, et incendit, et detegit* (for drunkenness excites to and discloses every crime). It hath been observed that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence, which may be necessary to make the blood move in Norway, would make an Italian mad. A German,

q 17 Geo. II. c. 5 (Justices' Commitment, 1743).

r 1 Inst. 247.

---

sensible loss of memory or material impairment of the intellectual faculties, a man was counted sane. If he could remember events and could reason logically, he was not within the letter or the reason of the rule which suspended proceedings against a madman or a lunatic. And if he was not within the common-law rule, neither is he within the rule of the statute, which merely reenacts the common law and has no other purpose than to suspend proceedings against a defendant who is by reason of mental infirmity incapable of making his defense. A similar provision in the law of New York was very thoroughly considered in the case of Freeman v. People, 4 Denio (N. Y.), 9, 47 Am. Dec. 216, where the court, upon an elaborate review of the authorities, stated its conclusion as follows: 'The statute is in affirmance of the common-law principle, and the reason on which the rule rests furnishes a key to what must have been the intention of the legislature. If, therefore, a person arraigned for a crime is capable of understanding the nature and object of the proceedings against him; if he rightly comprehends his own condition in reference to such proceedings and can conduct his defense in a rational manner, he is, for the purpose of being tried, to be deemed sane, although on some other subjects his mind may be deranged or unsound."—BEATTY, C. J., in In re Buchanan, 129 Cal. 330, 333, 50 L. R. A. 378, 61 Pac. 1120.

therefore, says the President Montesquieu,[s] drinks through custom, founded upon constitutional necessity; a Spaniard drinks through choice, or out of the mere wantonness of luxury: and drunkenness, he adds, ought to be more severely punished, where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and more northern countries. And accordingly, in the warm climate of Greece, a law of Pittacus enacted, "that he who committed a crime, when drunk, should receive a double punishment"; one for the crime itself, and the other for the ebriety which prompted him to commit it.[t] The Roman law indeed made great allowances for this vice: "*per vinum delapsis capitalis pæna remittitur* (capital punishment is remitted where the crime has been occasioned by ebriety)."[u] But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another.[w 3]

s Sp. L. b. 14. c. 10.
t Puff. L. of N. b. 8. c. 3.
u Ff. 49. 16. 6.
w Plowd. 19.

---

3 **Intoxication as an excuse.**—Blackstone, following the earlier authorities, considers intoxication as an aggravation of crime. The modern law, however, holds it as neither an aggravation nor yet a mitigation. For the apparently crazy impulses and motives governing the conduct of a drunken man he is just as responsible as if he were sober and no more. (State v. Kidwell, 62 W. Va. 466, 13 L. R. A. (N. S.) 1024, 59 S. E. 494.) Within the limits of this rule intoxication is often relevant to the issues of a criminal case. (1) It may show that the defendant did not commit the act, the intoxication being to such a degree as physically to incapacitate him, and that the crime must therefore have been committed by someone else. This obvious point is occasionally overlooked by trial courts. (Ingalls v. State, 48 Wis. 647, 712, 4 N. W. 785.) (2) Where a specific state of mind is required, intoxication is relevant to show that as a matter of fact the defendant did not possess the particular state of mind required. As, for example, the drunken man who by reason of his intoxication mistakes the property of another for his own is not a thief and guilty of larceny. (Ryan v. United States, 26 App. D. C. 74, 6 Ann. Cas. 633.) Again, where for the crime of murder in the first degree, actual premeditation is required, the evidence may show that by reason of his intoxication defendant was incapable of premeditation, or at any rate did not premeditate (Wilson v. State, 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428), and the offense is murder in the second degree. (State v. Johnson, 40

§ 26. **(4) Misfortune or chance.**—A fourth deficiency of will is where a man commits an unlawful act by *misfortune* or *chance*, and not by design.[4] Here the will observes a total neutrality, and does not co-operate with the deed; which therefore wants

Conn. 136.) (3) It is often stated by way of *dictum* that for the purpose of determining whether the crime is murder or manslaughter, evidence of intoxication is irrelevant. (People v. Langton, 67 Cal. 427, 7 Pac. 843.) This, of course, is not entirely true. When a defendant by reason of his drunken condition accidentally kills another, he cannot be said to be a murderer. The only question is whether the intoxication will supply the *mens rea* necessary for manslaughter. It certainly will where the defendant was doing an inherently dangerous act, but there is doubt where the act is a usual one not ordinarily attended with danger. (Regina v. Bruce, 2 Cox C. C. 262; Reg. v. Doherty, 16 Cox C. C. 306; Regina v. Egan, 1 Cox C. C. 29, 23 Vict. L. R. 159.) (4) There is a conflict of authority on whether the right of self-defense is enlarged by intoxication, some cases holding that if by reason of intoxication the defendant apprehended an assault upon himself, then the killing is without malice aforethought, and is manslaughter; others taking the view that the right of self-defense cannot be so enlarged, and that the crime is murder. (United States v. King, 34 Fed. 302; Springfield v. State, 96 Ala. 81, 38 Am. St. Rep. 85, 11 South. 250.)—A. M. KIDD.

[4] **Accidental bodily harm.**—The history of the subject is exceedingly curious, and was much misunderstood even while the old law upon the subject was still in force. Upon this I must refer to my history of the law relating to murder and manslaughter (Vol. III, pp. 1–107), which contains a full account of a number of matters which it would be uninteresting and uninstructive to abridge. What is said of accident is as follows: The cases in which homicide is excusable may all be reduced under the head of accident—that is to say, killing without any intention to kill or hurt—and upon this the law of England recognizes two distinctions. Death may be caused accidentally or, which is the same thing, unintentionally, in the doing of an act in itself lawful or in itself unlawful. It may also occur by reason of the omission to perform a legal duty tending to the preservation of life. The following are typical instances of these four classes of accidental death:

1. A fires a gun at a mark. The gun bursts and kills B.

2. A fires a gun at a mark without giving proper warning or taking proper care in placing the mark, and kills B.

3. A fires a gun at C with intent to murder him. The gun bursts and kills B, A's accomplice.

4. A fires a gun at B, intending to murder him, and kills C, whom A did not warn to stand out of the way.

I may add that in the four cases referred to under the law as it stands, A would, in case 1, be guilty of no crime at all. In case 2 he would be

one main ingredient of a crime. Of this when it affects the life of another, we shall find more occasion to speak hereafter; at present only observing that if any accidental mischief happens [27] to follow from the performance of a *lawful* act, the party stands 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 shall be no excuse; for, being guilty of one offense, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehavior.[x]

§ 27. **(5) Ignorance or mistake.**—Fifthly, *ignorance* or *mistake* is another defect of will; when a man, intending to do a lawful act, does that which is unlawful.[5] For here the deed and

x 1 Hal. P. C. 39.

---

guilty of manslaughter; but if B had been dangerously wounded instead of dying, A would be liable only civilly. In cases 3 and 4, A would be guilty of murder at common law, and under 24 & 25 Vict., c. 100, § 18, would be guilty of felonious wounding, if B had been only wounded (slightly or dangerously) instead of being killed; or if A intended only to wound C slightly and wounded B, whether slightly or severely, A would have been guilty only of unlawful and malicious wounding. The act says (§ 18), "who with intent to do grievous bodily harm to *any person* wounds *any person*," and (§ 20) "unlawfully and maliciously wounds any person"; words which take in the wounding of one with intent to wound another, or by the wounding of one by an act which is malicious and unlawful as against another. This is a striking instance of the advantage of statute over common law, though I think the common law in this case is rational and well understood.—STEPHEN, Gen. View of the Crim. Law, 129.

5 **"Ignorance of the law excuses no one."**—A distinction is usually drawn between ignorance of the law and of fact. An act may be excusable or even rescissible when done in ignorance of a state of facts, while its consequences cannot be avoided by showing that it was done in ignorance of the law. "*Regula est, iuris ignorantiam cuique nocere*" (Dig. xxii. 6. 9); so, says Paulus, "If one knows that he is heir under a will, but does not know that the prætor will give '*bonorum possessio*' to an heir, time runs against him, because he is mistaken in his law." (Dig. xxii, 6. 1.) And so it was held by Lord Ellenborough, that a captain of a king's ship who had paid over to his admiral, according to a usage in the navy, one-third of the freight received by him for bringing home treasure upon the public service, could not recover the payment upon discovering that there was no law compelling him to make

the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be

it. (Brisbane v. Dacres, 5 Taunt. 143.) Persons have even been convicted of what became an offense only under an act of parliament passed subsequently to the fact; in accordance with the rule, since altered, that the operation of an act of parliament, in the absence of express provision, relates to the first day of the session in which it was passed. (Attorney-general v. Panter, 6 Bro. P. C. 489; Latless v. Holmes, 4 Term Rep. 660; R. v. Thurston, 1 Lev. 91.) The very artificial reason alleged in the Digest for the inexcusability of ignorance of law is that "law both can and should be limited in extent" (Dig. xxii. 6. 2); and so Blackstone says, that "every person of discretion, not only may, but is bound and presumed to know the law." The true reason is no doubt, as Austin points out, that "if ignorance of law were admitted as a ground of exemption, the courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable." It would be necessary for the court to ascertain, first, whether the party was ignorant of the law at the time of the alleged wrong, and if so, secondly, was his ignorance of the law inevitable, or had he been previously placed in such a position that he might have known the law, if he had duly tried. Both of these questions are next to insoluble. "Whether the party were really ignorant of the law, and was so ignorant of the law that he had no surmise of its provisions, could scarcely be determined by any evidence accessible to others, and for the purpose of discovering the cause of his ignorance (its reality being ascertained), it were incumbent upon the tribunal to unravel his previous history, and to search his whole life for the elements of a just solution." (Jurisprudence, ii, p. 171.) The stringency of the rule was in Roman law modified by exceptions in favor of certain classes of persons "*quibus permissum est ius ignorare.*" Such were women, soldiers, and persons under the age of twenty-five, unless they had good legal advice within reach. (Dig. xxii. 6. 9.)—HOLLAND, Jurisprudence (11th ed.), 107.

Ignorance of the law is no excuse for breaking it. This substantive principle is sometimes put in the form of a rule of evidence, that everyone is presumed to know the law. It has accordingly been defended by Austin and others, on the ground of difficulty of proof. If justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try. But everyone must feel that ignorance of the law could never be admitted as an excuse, even if the fact could be proved by sight and hearing in every case. Furthermore, now that parties can testify, it may be doubted whether a man's knowledge of the law is any harder to investigate than many questions which are gone into. The difficulty, such as it is, would be met by throwing the burden of proving ignorance on the lawbreaker.

The principle cannot be explained by saying that we are not only commanded to abstain from certain acts, but also to find out that we are commanded. For if there were such a second command, it is very clear that the

an ignorance or mistake of fact and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own

guilt of failing to obey it would bear no proportion to that of disobeying the principal command if known, yet the failure to know would receive the same punishment as the failure to obey the principal law.

The true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.—HOLMES, Common Law, 47.

Mistake.—The problems presented by mistake have not been thoroughly solved. It is commonly said that ignorance of law is no defense; that ignorance of fact is, but this is by no means universally true. Where by definition a high degree of specific intent is required, ignorance of law may be an excuse, as in the larceny cases where the taking was under a *bona fide* but mistaken claim of right. (People v. Devine, 95 Cal. 227, 30 Pac. 378; Commonwealth v. Stebbins, 8 Gray (Mass.), 492.) It is also perfectly competent for the legislature to make an act criminal only if done with the intent to violate the law, and certain acts have been so construed. (Regina v. Twose 14 Cox C. C. 327.)

As a general rule, however, a sound public policy will not permit the excuse that the defendant did not know that what he was doing was contrary to law. There is room, however, for a juster rule when the ignorance or mistake is of some rule of substantive law other than the criminal law. A defendant will not be allowed to plead, for example, that he did not know that bigamy was a crime, but he ought not to be required to solve at his peril problems in the civil law of marriage and divorce, property, etc., that are only settled after years of litigation by a divided supreme court. Certain rules of the civil law everyone ought to know, but an ignorance or mistake of many rules of substantive law ought to be treated like a mistake of fact and be excusable where there is no negligence or other evil state of mind in the doer.

Bona fide and reasonable mistake of fact is generally conceded to be a defense. The exceptions arise from statutory offenses, and as to these there is a hopeless conflict of authority. The problem is essentially one of statutory construction. The legislature, subject in the United States to constitutional limitations, can make the doing of an act criminal without any evil state of mind. On the other hand, the presumption should be that when the legislature creates an offense, the usual common-law defenses may be asserted. No one questions that it may be set up in defense to a statutory crime that the

house, by mistake kills one of his own family, this is no criminal action:[y6] but if a man thinks he has a right to kill a person ex-

y Cro. Car. 538.

---

defendant was insane, an infant, a married woman acting under the coercion of her husband, etc., but it is sometimes held that the common-law defense of *bona fide* and reasonable mistake of fact cannot be asserted. Where this view is taken it is usually in offenses where one or more of the following conditions are present: (1) The offense is of minor importance. (2) The penalty is light. (3) The defense is easy to set up and hard to disprove. (4) The effect of enforcement would be to make people careful. (5) The act is one that is not looked on with favor in the eye of the law, but is barely tolerated and regulated, so that the defendant is put on notice that he acts at his peril. Examples of such offenses are the acts against selling liquor to minors, permitting minors in billiard-halls, food adulteration acts, smoke ordinances, etc., but there are decisions both ways on most of these questions, and much depends on the wording of the particular statute and the history of the statutes, the evil to be avoided, etc.. (Welch v. State, 145 Wis. 86, 32 L. R. A. (N. S.) 746, 129 N. W. 656; Commonwealth v. Mixer, 207 Mass. 141, 20 Ann. Cas. 1152, 31 L. R. A. (N. S.) 467, 93 N. E. 249.)

It is seldom that the defense of reasonable and *bona fide* mistake of fact is not admitted where the penalty is severe, the bigamy statutes being exceptions. It is generally held in the United States that a married person who marries within seven years of the disappearance of the spouse does so at his peril. (State v. Zichfeld, 23 Nev. 304, 46 Pac. 802.) Bishop has severely criticised these decisions. The English law is the other way: also some American jurisdictions. (Regina v. Tolson, 23 Q. B. Div. 168; Baker v. State, 86 Neb. 775, 27 L. R. A. (N. S.) 1097, 126 N. W. 300.) The famous twenty-nine million dollar Standard Oil fine offers an illustration. In that case an act of Congress provided that railroad tariffs should be posted at each station and filed in Washington. A penalty was imposed on the shipper for receiving a rate not so posted and filed. In the particular case one rate was posted and another filed. The defendant shipped by the posted rate. It was held by the circuit court of appeals, reversing the district court, that ignorance of the rate filed in Washington should have been allowed as a defense, and evidence showing the good faith of the defendant in accepting the rate posted, that the rate was the same that all other shippers were paying, and the same was charged by competing railroads, should have been admitted. Perhaps the best solution of the case would be to hold that a violation of the law constitutes a *prima facie* case for the government, but that the defendant may rebut this case by showing a reasonable and *bona fide* mistake of fact. (Standard Oil Co. of Indiana v. United States, 164 Fed. 376, 90 C. C. A. 364, reversing 155 Fed. 305.)—A. M. KIDD.

6 **Killing by mistake.**—Blackstone says, if a man intending to kill a thief in his own house, by mistake kills one of his own family, this is no criminal

communicated or outlawed, wherever he meets him, and does so, this is willful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defense. *Ignorantia juris, quod quisque tenetur scire, neminem excusat* (ignorance of law, which everyone is presumed to know, excuses no one), is as well the maxim of our own law,[s] as it was of the Roman.[a]

[s] Plowd. 343. [a] Ff. 22. 6. 9.

---

action. But Blackstone's explanation of this is most extraordinary; and to me, indeed, altogether unintelligible. He says, "For here the will and the deed acting separately, there is not that conjunction between them which is necessary to form a criminal act." Nothing can show more strongly than this confusion in the mind of so eminent a writer the importance of the analysis undertaken by Austin, of the relation between the mental consciousness of the actor and the act done. It is not very safe to attempt to assign a meaning to such a phrase as "the will and the deed acting separately," but I suppose it is another form of the erroneous expression so often met with, "doing an act against your will." The true view of the case I take to be this—Acts are produced by the will, by means of motions of our bodily muscles. But this exertion of the will, or volition, is the result of an antecedent desire. Thus, I take up a pistol, aim it at you, and pull the trigger, because I desire to kill you. I desire to kill you, because I believe that you are breaking into my house, and I consider it necessary to kill you in order to protect myself and my family. After I have fired, I find that you are a friend, coming to pay me an unexpected visit. My mistake as to your person has caused me to desire your death, which desire has acted upon my will. The same mistake has also led me to suppose that I was justified in killing you in self-defense.

There is, I think, no doubt that the case here put is one of murder, that is, that all the elements of murder are present, and if the liability to capital punishment does not arise, it is because of the abnormal condition of the person who fires the shot.

Whether any other liability than that to capital punishment will arise depends upon the circumstances. If I were not justified in assuming you to be a thief—if I were rash in drawing that inference, I might be guilty, though of a different crime. For rashness may be a ground of criminal imputation, and then the ignorance which is the result of that rashness cannot absolve me.

So again, where my mistake is not either rash or heedless, I may yet be liable in some cases. Thus, suppose I see in my neighbor's garden something moving in the trees, which I believe to be a wild, but harmless, animal. I examine it very carefully, and satisfy myself that it is a wild animal. I fire at it, and it turns out to be my neighbor himself, who is dangerously wounded by the shot. Here I am clearly liable; and why? Because, though my mis-

§ 28. (6) Compulsion and necessity.—A sixth species of defect of will is that arising from *compulsion* and inevitable *necessity*. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves, and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will, which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

§ 29. (a) Civil subjection.—[28] Of this nature, in the first place, is the obligation of *civil subjection*, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientiæ* (at the tribunal of conscience), or whether the inferior in this case is not bound to obey the divine rather than the human law, it is not my business to decide; though the question, I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff who burned Latimer and Ridley, in the bigoted days of Queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy, which endeavored to restore superstition under the holy auspices of its merciless sister, persecution.

take may be a reasonable one, yet, if all that I believed to be true, were true, my act would still be a breach of a primary duty, and the facts which I supposed to exist would not justify it. But not so in the case put by Blackstone. In that case, if all I believed to be true, were true, there would be an excuse for what would otherwise be a breach of a primary duty. There is a primary duty to forbear from taking life, but there is an exception where life is taken in self-defense. There is a primary duty not to fire guns into my neighbor's garden, and no exception where the object fired at is a wild animal. I am therefore liable to such consequences as are laid down by the positive law.—MARKBY, Elements of Law (3d ed.), 353.

§ 30. (i) Case of wife coerced by husband.—As to persons in private relations, the principal case, where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband: for neither a son nor a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master;[b] though in some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment, even for capital offenses. And, therefore, if a woman commit theft, burglary or other civil offenses against the laws of society, by the coercion of her husband, or * even in his company, which the law construes a coercion,* she is not guilty of any crime, being considered as acting by compulsion and not of her own will.[c 7] Which doctrine is at least a thousand years

*Previous to fifth edition, "merely by his command which the law construes a coercion; or even in his company, his example being equivalent to a command."

[b] 1 Hawk. P. C. 3.

[c] 1 Hal. P. C. 45.

---

[7] It is interesting to observe that Blackstone attempts to support the rule which excuses a wife for offenses committed in the presence of her husband by a reference to the laws of Ina and the northern nations of Europe. It is believed that the doctrine in the English law is a fiction to enable judges to administer a harsh law with mercy. Where a man committed a crime he could for centuries in England, if able to read, plead benefit of clergy and escape substantial punishment. (Chap. 28, *post.*) As a woman could not be in holy orders, she could not claim this privilege. If, therefore, a husband and wife were jointly indicted for a crime, it would have been necessary to acquit the husband and hang the wife, unless this artificial doctrine of coercion had been created. With the abolition of benefit of clergy there is no excuse for the perpetuation of the doctrine of coercion as relating to husband and wife.—A. M. KIDD.

Nevertheless, the rule is recognized in states having codes which change entirely the common-law status of married women. People v. Miller, 82 Cal. 107, 22 Pac. 934; State v. Kelly, 74 Iowa, 589, 38 N. W. 503. In Kansas, however, the court has held that statutes giving women equal property and other rights exclude the operation of the common-law rule. State v. Hendricks, 32 Kan. 559, 4 Pac. 1050. The presumption of constraint by the husband arises only when the act is done in his presence. Commonwealth v. Butler, 1 Allen (Mass.), 4. If the act is not done in the presence of the husband, even though

old in this kingdom, being to be found among the laws of King [29] Ina, the West Saxon.[d] And it appears that, among the northern nations on the Continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offense with a freeman; the male or freeman only was punished, the female or slave dismissed; "*procul dubio quod alterum libertas, alterum necessitas impelleret* (because, doubtless, the one did it of his own free will, the other of necessity)."[e] But (besides that in our law, which is a stranger to slavery, no impunity is given to servants, who are as much free agents as their masters) even with regard to wives, this rule admits of an exception in crimes that are *mala in se* (crimes in themselves), and prohibited by the law of nature, as murder and the like, not only because these are of a deeper dye, but also, since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In treason, also (the highest crime which a member of society can, as such, be guilty of), no plea in coverture shall excuse the wife; no presumption of the husband's coercion shall extenuate her guilt:[f] as well because of the odiousness and dangerous consequence of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself as a subject has forgotten to pay. In inferior misdemeanors, also, we may remark another exception: that a wife may be indicted and set in the pillory *with* her husband, for keeping a brothel; for this is an offense touching the domestic economy or government of the house, in which the wife has a principal share, and is also such an offense as the law presumes to be generally conducted by the intrigues of the female sex.[g] And in all cases where the wife

d Cap. 57.

e Stiernhook de Jure Sueon. l. 2. c. 4.

f 1 Hal. P. C. 47.

g 1 Hawk. P. C. 2, 3.

---

under his command, she is responsible. Commonwealth v. Feeney, 13 Allen (Mass.), 560; State v. Haines, 35 N. H. 207. The presumed coercion has never been recognized as a defense to the wife in crimes of treason and murder. Bibb v. State, 94 Ala. 31, 33 Am. St. Rep. 88, 10 South. 506; McClain, 1 Crim. Law, §§ 145, 146.

offends alone, without the company or coercion of her husband, she is responsible for her offense as much as any *feme sole*.

§ 31. **(b) Duress.**—[30] Another species of compulsion or necessity is what our law calls duress *per minas* (by threats),[h] or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanors, at least before the human tribunal. But then that fear, which compels a man to do an unwarrantable action, ought to be just and well-grounded; such, "*qui cadere possit in virum constantem, non timidum et meticulosum* (as might seize a courageous man not timid or fearful)," as Bracton expresses it,[i] in the words of the civil law.[k] Therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace.[18] This, however, seems only, or at least principally, to hold as to positive crimes, so created by the laws of society, and which, therefore, society may excuse; but not as to natural offenses, so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And, therefore, though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent.[m] But in such a case he is permitted to kill the assailant; for there the law of nature and self-defense, its primary canon, have made him his own protector.

h See Book I. pag. 131.
i l. 2. f. 16.
k Ff. 4. 2. 5, & 6.
l 1 Hal. P. C. 50.
m *Ibid.* 51.

---

8 "The crime imputed to the defendant by the indictment is that of levying war, by joining the armies of the king of Great Britain. Enlisting, or procuring any person to be enlisted, in the service of the enemy is clearly an act of treason. By the defendant's own confession, it appears that he actually enlisted in a corps belonging to the enemy; but it also appears that he had previously been taken prisoner by them and confined at Wilmington. . . . It must be remembered that, in the eye of the law, nothing will excuse the act of joining the enemy, but the fear of immediate death."—McKEAN, C. J., in Respublica v. McCarty (1781), 2 Dall. (Pa.) 86, 87, 1 L. Ed. 300.

§ 32. **(c) Choice of evils.**—There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action which without such obligation would be criminal. And that is, when a man has his choice of two evils set before him, and being under a necessity of choosing one, he chooses the [31] least pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive, than active; or, if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity where a man by the commandment of the law is bound to arrest another for any capital offense, or to disperse a riot, and resistance is made to his authority: it is here justifiable and even necessary to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public, and therefore excuse the felony, which the killing would otherwise amount to.[n]

§ 33. **(d) Extreme want no justification.**—There is yet another case of necessity, which has occasioned great speculation among the writers upon general law; *viz.*, whether a man in extreme want of food or clothing may justify stealing either, to relieve his present necessities. And this both Grotius[o] and Puffendorf,[p] together with many other of the foreign jurists, hold in the affirmative, maintaining by many ingenious, humane and plausible reasons that in such cases the community of goods by a kind of tacit concession of society is revived. And some even of our own lawyers have held the same,[q] though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians: at least it is now antiquated, the law of England admitting no such excuse at present.[r] And this its doctrine is agreeable not only to the sentiments of many of the wisest ancients, particularly Cicero,[s] who holds that "*suum cuique incommodum ferendum est,*

n 1 Hal. P. C. 53.
o de Jure b. & p. l. 2. c. 2.
p L. of Nat. and N. l. 2. c. 6.
q Britton, c. 10. Mirr. c. 4. § 16.
r 1 Hal. P. C. 54.
s De Off. l. 3. c. 5.

potius quam de alterius commodis detrahendum (everyone must bear his own inconvenience, rather than detract from the convenience of another),'' but also to the Jewish law, as certified by King Solomon himself:[t] ''if a thief steal to satisfy his soul when he is hungry, he shall restore [32] sevenfold, and shall give all the substance of his house''; which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason: for men's properties would be under a strange insecurity if liable to be invaded according to the wants of others, of which wants no man can possibly be an adequate judge but the party himself who pleads them. In this country, especially, there would be a peculiar impropriety in admitting so dubious an excuse: for by our laws such sufficient provision is made for the poor by the power of the civil magistrate, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. This case of a stranger is, by the way, the strongest instance put by Baron Puffendorf, and whereon he builds his principal arguments; which, however, they may hold upon the Continent, where the parsimonious industry of the natives orders everyone to work or starve, yet must lose all their weight and efficacy in England, where charity is reduced to a system, and interwoven in our very constitution. Therefore, our laws ought by no means to be taxed with being unmerciful for denying this privilege to the necessitous; especially when we consider that the king, on the representation of his ministers of justice, hath a power to soften the law, and to extend mercy in cases of peculiar hardship. An advantage which is wanting in many states, particularly those which are democratical: and these have in its stead introduced and adopted, in the body of the law itself, a multitude of circumstances tending to alleviate its rigor. But the founders of our constitution thought it better to vest in the crown the power of pardoning particular objects of compassion, than to countenance and establish theft by one general undistinguishing law.

§ 34. (7) The king incapable of crime.—To these several cases, in which the incapacity of committing crimes arises from

[t] Prov. vi. 30.

a deficiency of the will, we may add one more, in which the law supposes an incapacity of doing wrong, from the excellence and perfection of the person; [33] which extend as well to the will as to the other qualities of his mind. I mean the case of the king, who, by virtue of his royal prerogative, is not under the coercive power of the law;[u] which will not suppose him capable of committing a folly, much less a crime. We are, therefore, out of reverence and decency, to forbear any idle inquiries of what would be the consequence if the king were to act thus and thus, since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do anything inconsistent with his station and dignity, and therefore has made no provision to remedy such a grievance. But of this sufficient was said in a former volume,[w] to which I must refer the reader.

[u] 1 Hal. P. C. 44.

[w] Book I. c. 7. pag. 244.

CHAPTER THE THIRD. [34]

OF PRINCIPALS AND ACCESSORIES.

§ 35. **Principals and accessories.**—It having been shown in the preceding chapter what persons are, or are not, upon account of their situation and circumstances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among persons that are capable of offending, *viz.*, as *principal* and as *accessory*.

§ 36. **1. Principals.**—A man may be *principal* in an offense in two degrees.* A principal, in the first degree, is he that is the actor, or absolute perpetrator of the crime; and, in the second degree, he is who is present, aiding and abetting the fact to be done.[a] Which *presence* need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance.[b] And this rule hath also other exceptions: for, in case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, or persuading another to drink it[c] who is ignorant of its poisonous quality,[d] or giving it to him for that purpose, and yet not administer it himself, nor be present when the very deed of poisoning is committed.[e] And the same reasoning will hold with regard to other murders committed in the absence [35] of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed; letting out a wild beast, with an intent to do mischief; or exciting a madman to commit murder, so that death

*This distinction must not be confounded with that made by some recent statutes in the degree of the offense itself, e. g., murder in the first and second degree.—HAMMOND.

a 1 Hal. P. C. 615.
b Foster. 350.
c Kel. 52.
d Foster. 349.
e 3 Inst. 138.

thereupon ensues: in every of these cases the party offending is guilty of murder as a principal, in the first degree. For he cannot be called an accessory, that necessarily presupposing a principal; and the poison, the pitfall, the beast, or the madman cannot be held principals, being only the instruments of death. As, therefore, he must be certainly guilty, either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal: and if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet or assist.[f]

§ 37. 2. Accessories.—An *accessory* is he who is not the chief actor in the offense, nor present at its performance, but is some way concerned therein, either *before* or *after* the fact committed. In considering the nature of which degree of guilt we will, first, examine, what offenses 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 merely as such, and distinct from principals, are to be treated.

§ 38. a. Offenses admitting and not admitting accessories.—And, first, as to what offenses admit of accessories and what not. In high treason there are no accessories but all are principals; the same acts that make a man accessory in felony, making him a principal in high treason, upon account of the heinousness of the crime.[g] Besides it is to be considered that the bare intent to commit treason is many times actual treason; as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without an intention to have it done, there can be no accessories before the fact, since the [36] very advice and abetment amount to principal treason. But this will not hold in the inferior species of high treason, which do not amount to the legal idea of compassing the death of the king, queen or prince. For in those no advice to commit them, unless the thing be actually performed, will make a man a principal

[f] 1 Hal. P. C. 617. 2 Hawk. P. C. 315.
[g] 3 Inst. 138. 1 Hal. P. C. 613.

traitor.[h] In petit treason, murder and felonies of all kinds, there may be accessories: except only in those offenses, which by judgment of law are sudden and unpremeditated, as manslaughter and the like, which, therefore, cannot have any accessories *before* the fact.[i] But in petit larceny, or minute thefts, and all other crimes under the degree of felony, there are no accessories, but all persons concerned therein, if guilty at all, are principals:[k] the same rule holding with regard to the highest and lowest offenses, though upon different reasons. In treason all are principals, *propter odium delicti* (on account of the heinousness of the offense); in trespass all are principals, because the law *quæ de minimis non curat* (does not take cognizance of slight matters), does not descend to distinguish the different shades of guilt in petit misdemeanors. It is a maxim that *accessorius sequitur naturam sui principalis* (the accessory follows the condition of his principal);[l] and therefore an accessory cannot be guilty of a higher crime than his principal, being only punished, as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though, had he been present and assisting, he would have been guilty as principal of petit treason, and the stranger of murder.[m]

§ 39. b. Accessories before the fact.—As to the second point, who may be an accessory *before* the fact: Sir Matthew Hale[n] defines him to be one who, being absent at the time of the crime committed, doth yet procure, counsel or command another to commit a crime. Herein absence is necessary to make him an accessory; for if such procurer, or the like, be present, he is guilty of the crime as principal. If A, then, advises B to kill another, and [37] B does it in the absence of A, now B is principal, and A is accessory in the murder. And this holds, even though the party killed be not *in rerum natura* at the time of the advice given. As if A, the reputed father, advises B, the mother of a bastard child, unborn, to strangle it when born, and she does so, A is accessory

h Foster. 342.
i 1 Hal. P. C. 615.
k *Ibid.* 613.
l 3 Inst. 139.
m 2 Hawk. P. C. 315.
n 1 Hal. P. C. 615, 616.

to this murder.[o] And it is also settled,[p] that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other. As if A commands B to beat C, and B beats him so that he dies; B is guilty of murder as principal, and A as accessory. But if A commands B to burn C's house, and he, in so doing, commits a robbery, now A, though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unconsequential nature.[q] But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titius, he is stabbed or shot, and dies, the commander is still accessory to the murder, for the substance of the thing commanded was the death of Titius, and the manner of its execution is a mere collateral circumstance.[r]

§ 40. c. Accessories after the fact.—An accessory *after* the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts or assists the felon.[s] Therefore, to make an accessory *ex post facto* (after the fact), it is, in the first place, requisite that he knows of the felony committed.[t] In the next place, he must receive, relieve, comfort or assist him. And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried or suffering punishment, makes the assister an accessory. As furnishing him with a horse to escape his [38] pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him.[u] So, likewise, to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. But to relieve a felon in gaol with clothes or other necessaries is no offense: for the crime imputable to this species of accessory is the hindrance of public

o Dyer. 186.
p Foster. 125.
q 1 Hal. P. C. 617.
r 2 Hawk. P. C. 316.
s 1 Hal. P. C. 618.
t 2 Hawk. P. C. 319.
u 2 Hawk. P. C. 317, 318.

justice, by assisting the felon to escape the vengeance of the law.[v] To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law a mere misdemeanor, and made not the receiver accessory to the theft, because he received the *goods* only, and not the *felon;*[w] but now by the statutes 5 Ann., c. 31 (1705), and 4 George I, c. 11 (Piracy, 1717), all such receivers are made accessories, and may be transported for fourteen years, and, in the case of receiving linen goods stolen from the bleaching-grounds, are by statute 18 George II, c. 27 (Stealing from Bleaching-grounds, 1744), declared felons without benefit of clergy. In France such receivers are punished with death: and the Gothic constitutions distinguished also three sorts of thieves, "*unum qui consilium daret, alterum qui contrectaret, tertium qui receptaret et occuleret; pari pœnæ singulos obnoxios* (he who should plan a robbery, he who should commit it, and thirdly, he who should receive and conceal the stolen goods; each liable to an equal degree of punishment)."[x]

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 after the wound given, but before death ensues, a person assists or receives the delinquent: this does not make him accessory to the homicide, for till death ensues there is no felony committed.[y] But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to 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 [39] felony, the receivers become accessories *ex post facto* (after the fact).[z] 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, and therefore she is not bound, neither ought she, to discover her lord.[a]

§ 41. d. Reasons for the distinction of principal and accessory.—The last point of inquiry is, how accessories are to be

v 1 Hal. P. C. 620, 621.
w 1 Hal. P. C. 620.
x Stiernhook de Jure Goth. l. 3. c. 5.
y 2 Hawk. P. C. 320.
z 3 Inst. 108. 2 Hawk. P. C. 320.
a 1 Hal. P. C. 621.

treated, considered distinct from principals. And the general rule of the ancient law (borrowed from the Gothic constitutions[b]) is this, that accessories shall suffer the same punishment as their principals: if one be liable to death, the other is also liable,[c] as, by the laws of Athens, delinquents and their abettors were to receive the same punishment.[d] Why, then, it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment? For these reasons:[1] 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted; the commission of an actual robbery being quite a different accusation from that of harboring the robber. 2. Because, though by the ancient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy a distinction is made between them, accessories *after* the fact being still allowed the benefit of clergy in all cases, except horse-

[b] See Stiernhook, *ibid.*

[c] 3 Inst. 188.

[d] Pott. Antiq. b. 1. c. 26.

---

[1] **Distinction of principal and accessory considered.**—It may be doubted whether anyone reading this chapter, so far as the distinction between principals and accessories before the fact is concerned, can agree with the author that the distinction "will appear to be highly necessary." No such doctrine existed in the law of treason or misdemeanor. In felonies the law made no distinction in punishment. Both principal and accessory were hanged. The only effect of the rule in felonies was to make it impossible to convict the instigator of a crime where the agent carrying it out died before conviction, or for some other reason could not be apprehended or punished. Commonwealth v. Knapp, 9 Pick. 496, presents the interesting case where the accessory and principal having been both indicted, and their guilt being manifest, the accessory persuaded the principal to commit suicide, hoping thus to escape a just punishment under the law as it then stood. Much of the conflict in the law over incitations to commit suicide, and acts in foreign jurisdictions committed by guilty agents, can be traced to this doctrine of principal and accessory. 3 Columbia L. Rev. 379. The explanation of this irrational doctrine may be that when guilt and innocence were determined by supernatural tests, it would have been an absurdity to have convicted the accessory and acquitted the principal. The mediæval fondness for formal logic preserved the distinction after the development of jury trial. The distinction has been generally abolished, the better way being to make the accessory a principal.—A. M. KIDD.

stealing[e] and stealing of linen from the bleaching-grounds,[f] which is denied to the principals, and accessories *before* the fact, in many cases; as, among others, in petit treason, murder, robbery and willful burning.[g] And perhaps if a distinction were constantly to be made between the punishment of principals and accessories, even *before* the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would [40] be greater than that of his accomplices, by reason of the difference of his punishment.[h] 3. Because formerly no man could be tried as accessory till after the principal was convicted, or at least he must have been tried at the same time with him; though that law is now much altered, as will be shown more fully in its proper place. 4. Because, though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal, for an acquittal of receiving or counseling a felon is no acquittal of the felony itself; but it is matter of some doubt whether, if a man be acquitted as principal, he can be afterwards indicted as accessory before the fact, since those offenses are frequently very near allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also.[i] But it is clearly held that one acquitted as principal may be indicted as an accessory *after* the fact; since that is always an offense of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons the distinction of principal and accessory will appear to be highly necessary, though the punishment is still much the same with regard to principals and such accessories as offend *before* the fact is committed.

[e] Stat. 31 Eliz. c. 12 (Horse-stealing, 1589).
[f] Stat. 18 Geo. II. c. 27 (Stealing from Bleaching-grounds, 1744).
[g] 1 Hal. P. C. 615.
[h] Beccar. c. 37.
[i] 1 Hal. P. C. 625, 626. 2 Hawk. P. C. 373. Foster, 361.

[41]

CHAPTER THE FOURTH.

OF OFFENSES AGAINST GOD AND RELIGION.

§ 42. Limits of the criminal law.—In the present chapter we are to enter upon the detail of the several species of crimes and misdemeanors, with the punishment annexed to each by the laws of England. It was observed, in the beginning of this book,[a] that crimes and misdemeanors are a breach and violation of the public rights and duties, owing to the whole community, considered as a community, in its social aggregate capacity. And in the very entrance of these Commentaries[b] it was shown, that human laws can have no concern with any but social and relative duties; being intended only to regulate the conduct of man, considered under various relations, as a member of civil society. All crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society:[c] and, of consequence, private vices, or the breach of mere absolute duties, which man is bound to perform considered only as an individual, are not, cannot be, the object of any municipal law, any further than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a species of public crimes. Thus, the vice of drunkenness, if committed privately and alone, is beyond the knowledge, and of course beyond the reach of human tribunals: but if committed publicly, in the face of the world, its evil example makes it liable to temporal censures. The vice of lying, which consists (abstractedly taken) in a criminal violation of truth, and therefore in any [42] shape is derogatory from sound morality, is not, however, taken notice of by our law, unless it carries with it some public inconvenience, as spreading false news, or some social injury, as slander and malicious prosecution, for which a private recompense is given. And yet drunkenness and malevolent lying are *in foro conscientiæ* (at the tribunal of conscience) as thoroughly criminal when they are not, as when they are, attended with public inconvenience. The only difference is, that both public and private vices are subject to the vengeance of eternal justice, and

[a] See pag. 5.
[b] See Book I. pag. 123, 124.
[c] Beccar. c. 8.

public vices are besides liable to the temporal punishments of human tribunals.

On the other hand, there are some misdemeanors, which are punished by the municipal law, that have in themselves nothing criminal, but are made unlawful by the positive constitutions of the state for public convenience; such as poaching, exportation of wool, and the like. These are naturally no offenses at all; but their whole criminality consists in their disobedience to the supreme power, which has an undoubted right for the well-being and peace of the community to make some things unlawful which were in themselves indifferent. Upon the whole, therefore, though part of the offenses to be enumerated in the following sheets are offenses against the revealed law of God, others against the law of nature, and some are offenses against neither; yet in a treatise of municipal law we must consider them all as deriving their particular guilt, here punishable, from the law of man.

Having premised this caution, I shall next proceed to distribute the several offenses which are either directly or by consequence injurious to civil society, and therefore punishable by the laws of England, under the following general heads: First, those which are more immediately injurious to God and His holy religion; secondly, such as violate and transgress the law of nations; thirdly, such as more especially affect the sovereign executive power of the state, or the king and his government; fourthly, such as more directly [43] infringe the rights of the public or commonwealth; and, lastly, such as derogate from those rights and duties which are owing to particular individuals, and in the preservation and vindication of which the community is deeply interested.

§ 43. Offenses against religion.—First, then, of such crimes and misdemeanors as more immediately offend Almighty God, by openly transgressing the precepts of religion, either natural or revealed, and mediately, by their bad example and consequence, the law of society also; which constitutes that guilt in the action which human tribunals are to censure.[1]

[1] **Offenses against religion.**—There is perhaps no subject which better illustrates the historical development of the common law and its alterations with changing conditions and beliefs than offenses against religion. Com-

§ 44. 1. Apostacy.—Of this species the first is that of *apostacy*, or a total renunciation of Christianity, by embracing either a false religion or no religion at all. This offense can only take place in such as have once professed the true religion. The perversion of a Christian to Judaism, paganism or other false religion was punished by the Emperors Constantius and Julian with confiscation of goods;[d] to which the Emperors Theodosius and Valentinian added capital punishment, in case the apostate endeavored to pervert others to the same iniquity.[e] A punishment too severe for any temporal laws to inflict upon any spiritual offense; and yet the zeal of our ancestors imported it into this country, for we find by Bracton,[f] that in his time apostates were to be burned to death. Doubtless the preservation of Christianity,

[d] Cod. 1. 7. 1.
[e] *Ibid.* 6.
[f] l. 3. c. 9.

---

mon-law crimes like heresy and simony have quietly disappeared. By the end of the eighteenth century one might advocate religious beliefs at variance with the established church on two conditions: (1) That the advocacy was in a reverent manner and without blasphemy. (2) That the attack was not on the foundations of the Christian religion. (Trial of Thomas Williams for publishing Paine's "Age of Reason," 26 How. St. Tr. 653.) The second condition came to an end in the latter part of the nineteenth century, when the test was laid down that even the foundations of Christianity might be attacked, provided this was done in a philosophic and proper style. In other words, the change was one from matter to manner. (Regina v. Bradlaugh, 15 Cox C. C. 217; Regina v. Ramsay, 15 Cox C. C. 231.) Modern codes, like that of California, have made no provision for offenses against religion, and it is at least arguable that no attack on religion is to-day a criminal offense in the United States, unless it is vulgar and indecent, without regard to its religious aspect, and would be such if leveled at any religion, unless the attack is calculated to provoke a breach of the peace in that particular community, both exceptions existing from nonreligious grounds. The disappearance of religion as an interest specially protected by the criminal law does not militate against the continuance of Christian observances, such as the motto on the coins, Thanksgiving Day, chaplains in the army and navy, etc. Sunday laws are usually now sustained as secular enactments. (Ex parte Jentzsch, 112 Cal. 468, 10 Mich. L. Rev. 161.) —A. M. KIDD.

The history of the subjects treated of in this chapter are discussed, from a legal point of view, by Sir James Stephen, in History of the Criminal Law, vol. II, c. 25.

as a national religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state: which a single instance will sufficiently demonstrate. The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the Supreme Being, and a firm persuasion that He superintends and will finally compensate every action in human life (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our Saviour Christ), these are the grand foundation of all judicial oaths, which call God to witness the truth of those facts, which perhaps may be only known to him and the party attesting; *all moral evidence, [44] therefore, all confidence in human veracity, must be weakened by apostacy, and overthrown by total infidelity.[g]* Wherefore, all affronts to Christianity, or endeavors to depreciate its efficacy, in those who have once professed it, are highly deserving of censure. But yet the loss of life is a heavier penalty than the offense, taken in a civil light, deserves; and, taken in a spiritual light, our laws have no jurisdiction over it. This punishment, therefore, has long ago become obsolete, and the offense of apostacy was for a long time the object only of the ecclesiastical courts, which corrected the offender *pro salute animæ* (for the health of the soul). But about the close of the last century, the civil liberties to which we were then restored being used as a cloak of maliciousness, and the most horrid doctrines subversive of all religion being publicly avowed both in discourse and writings, it was thought necessary again for the civil power to interpose, by not admitting those miscreants[h] to the privi-

*Quoted, see elaborate discussion of subject, and of legal status of religious societies, 53 N. H. 126.—HAMMOND.

g *Utiles esse opiniones has, quis negat, cum intelligat, quam multa firmentur jurejurando; quantæ salutis sint fœderum religiones: quam multos divini supplicii metus a scelere revocarit; quamque sancta sit societas civium inter ipsos, Diis immortalibus interpositis tum judicibus tum testibus?* (Who can deny that these opinions are useful when he sees how many things are confirmed by oath; what security religion gives to compacts; how many are reclaimed from wickedness by the fear of divine punishment; and how sacred and inviolate is the bond of society between citizens, the presence of the immortal gods being impressed on the minds, as well of the judges, as of the witnesses?) Cic. de LL. ii. 7.

h *Mescroyants* in our ancient law books is the name of unbelievers.

leges of society who maintained such principles as destroyed all moral obligation. To this end it was enacted by statute 9 & 10 W. III, c. 32 (Blasphemy, 1697), that if any person educated in, or having made profession of, the Christian religion, shall by writing, printing, teaching or advised speaking deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he shall upon the first offense be rendered incapable to hold any office or place of trust, and, for the second, be rendered incapable of bringing any action, being guardian, executor, legatee or purchaser of lands, and shall suffer three years' imprisonment without bail. To give room, however, for repentance, if, within four months after the first conviction the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.

§ 45. 2. Heresy.—A second offense is that of *heresy;* which consists not in a total denial of Christianity, but of some of its essential [45] doctrines, publicly and obstinately avowed; being defined by Sir Matthew Hale, "*sententia rerum divinarum humano sensu excogitata, palam docta et pertinaciter defensa* (doctrines in religion, of human invention, openly taught and pertinaciously defended)."[1] And here it must also be acknowledged that particular modes of belief or unbelief, not tending to overturn Christianity itself, or to sap the foundations of morality, are by no means the object of coercion by the civil magistrate. What doctrines shall therefore be adjudged heresy was left by our old constitution to the determination of the ecclesiastical judge, who had herein a most arbitrary latitude allowed him. For the general definition of an heretic given by Lyndewode[k] extends to the smallest deviations from the doctrines of holy church: "*hæreticus est qui dubitat de fide catholica, et qui negligit servare ea, quæ Romana ecclesia statuit, seu servare decreverat* (a heretic is one who doubts concerning the Catholic faith, and who neglects to observe those things which the Roman church has appointed or ordained)." Or, as the statute 2 Henry IV, c. 15 (Heresies, 1400), expresses it in English, "teachers of erroneous opinions, contrary to the faith and blessed determinations of the holy church." Very contrary

[1] 1 Hal. P. C. 384.

[k] Cap. de Hæreticis.

this to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness. And what ought to have alleviated the punishment, the uncertainty of the crime, seems to have enhanced it in those days of blind zeal and pious cruelty. It is true that the sanctimonious hypocrisy of the canonists went at first no further than enjoining penance, excommunication and ecclesiastical deprivation, for heresy, though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods *in pios usus* (to pious uses). But in the meantime they had prevailed upon the weakness of bigoted princes to make the civil power subservient to their purposes, by making heresy not only a temporal, but even a capital, offense: the Romish ecclesiastics determining, without appeal, whatever they pleased to be heresy, and shifting off to the secular arm the odium and drudgery of executions, with which they themselves were too tender and delicate to intermeddle. Nay, they pretended to intercede and pray, on behalf of the convicted heretic, *ut citra mortis periculum sententia circa eum moderetur* (that the sentence with respect to him might be mitigated so as not to involve him in the danger of losing his life),[l] well [46] knowing at the same time that they were delivering the unhappy victim to certain death. Hence the capital punishments inflicted on the ancient Donatists and Manichæans by the Emperors Theodosius and Justinian;[m] hence, also, the constitution of the Emperor Frederic mentioned by Lyndewode,[n] adjudging all persons without distinction to be burnt with fire who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution,[o] 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 for good Catholics 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 pope, of disposing even of the kingdoms of refractory princes to more dutiful sons of the church. The immediate event of this constitution was something singular, and may serve to illustrate at once the gratitude of the Holy See, and the just

l Decretal. l. 5. t. 40. c. 27.
m Cod. l. 1. tit. 5.
n c. de Hæreticis.
o Cod. 1. 5. 4.

punishment of the royal bigot: for upon the authority of this very constitution the pope afterwards expelled this very Emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou.[p]

Christianity being thus deformed by the demon of persecution upon the Continent, we cannot expect that our own island should be entirely free from the same scourge. And therefore we find among our ancient precedents[q] a writ *de hæretico comburendo* (for burning a heretic), which is thought by some to be as ancient as the common law itself. However, it appears from thence that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself in a provincial synod, and that the delinquent was delivered over to the king to do as he should please with him; so that the crown had a control over the spiritual power, and might pardon the convict by issuing no process against him; the writ *de hæretico comburendo* being not a writ [47] of course, but issuing only by the special direction of the king in council.[r]

But in the reign of Henry the Fourth, when the eyes of the Christian world began to open, and the seeds of the Protestant religion (though under the opprobrious name of Lollardy[s]) took root in this kingdom, the clergy, taking advantage from the king's dubious title to demand an increase of their own power, obtained an act of parliament,[t] which sharpened the edge of persecution to its utmost keenness. For, by that statute, the diocesan alone, without the intervention of a synod, might convict of heretical tenets, and unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound *ex officio*, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By the statute 2 Henry V, c. 7 (Heresy, 1414), Lollardy was also made a temporal offense, and indictable in the king's courts, which did not thereby gain an ex-

p Baldus in Cod. 1. 5. 4.

q F. N. B. 269.

r 1 Hal. P. C. 395.

s So called not from *lolium*, or tares (an etymology, which was afterwards devised, in order to justify the *burning* of them; Matt. xiii. 30.), but from one Walter Lolhard, a German reformer, A. D. 1315. Mod. Un. Hist. xxvi. 13. Spelm. Gloss. 371.

t 2 Hen. IV. c. 15 (Heresies, 1400).

clusive, but only a concurrent, jurisdiction with the bishop's consistory.

Afterwards, when the final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated; for though what heresy *is* was not then precisely defined, yet we are told in some points what it is *not:* the statute 25 Henry VIII, c. 14 (Heresy, 1533), declaring that offenses against the See of Rome are not heresy, and the ordinary being thereby restrained from proceeding in any case upon mere suspicion; that is, unless the party be accused by two credible witnesses, or an indictment of heresy be first previously found in the king's courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel. For in six years afterwards, by statute 31 Henry VIII, c. 14 (Religion, 1539), the bloody law of the six articles was made, which established the six most contested points of [48] popery: transubstantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession; which points were "determined and resolved by the most godly study, pain and travail of his majesty: for which his most humble and obedient subjects, the lords *spiritual* and temporal and the commons, in parliament assembled, did not only render and give unto his highness their most high and hearty thanks," but did also enact and declare all oppugners of the first to be heretics, and to be burned with fire, and of the five last to be felons, and to suffer death. The same statute established a new and mixed jurisdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the supremacy of the bishops of Rome, and establishing all other their corruptions of the Christian religion.

I shall not perplex this detail with the various repeals and revivals of these sanguinary laws in the two succeeding reigns, but shall proceed directly to the reign of Queen Elizabeth, when the Reformation was finally established with temper and decency, unsullied with party rancor, or personal caprice and resentment. By statute 1 Elizabeth, c. 1 (Act of Supremacy, 1558), all former statutes relating to heresy are repealed, which leaves the jurisdiction of heresy as it stood at common law, *viz.*, as to the infliction of common censures, in the ecclesiastical courts, and, in case of burn-

ing the heretic, in the provincial synod only.[u] Sir Matthew Hale is indeed of a different opinion, and holds that such power resided in the diocesan also, though he agrees that in either case the writ *de hæretico comburendo* was not demandable of common right, but grantable or otherwise merely at the king's discretion.[v] But the principal point now gained was, that by this statute a boundary is for the first time set to what shall be accounted heresy; nothing for the future being to be so determined, but only such tenets which have been heretofore so declared, 1. By the words of the canonical Scriptures; 2. By the first four general councils, or such [49] others as have only used the words of the Holy Scriptures; or, 3. Which shall hereafter be so declared by the parliament, with the assent of the clergy in convocation. Thus was heresy reduced to a greater certainty than before, though it might not have been the worse to have defined it in terms still more precise and particular; as a man continued still liable to be burned, for what perhaps he did not understand to be heresy, till the ecclesiastical judges so interpreted the words of the canonical Scriptures. For the writ *de hæretico comburendo* (for burning a heretic) remained still in force, and we have instances of its being put in execution upon two Anabaptists in the seventeenth of Elizabeth (1574), and two Arians in the ninth of James the First (1611). But it was totally abolished, and heresy again subjected only to ecclesiastical correction, *pro salute animæ* (for the health of the soul), by virtue of the statute 29 Car. II, c. 9 (Heresy, 1677). For, in one and the same reign, our lands were delivered from the slavery of military tenures, our bodies from arbitrary imprisonment by the *habeas corpus* act, and our minds from the tyranny of superstitious bigotry, by demolishing this last badge of persecution in the English law.

In what I have now said I would not be understood to derogate from the just rights of the national church, or to favor a loose latitude of propagating any crude undigested sentiments in religious matters. Of propagating, I say; for the bare entertaining them, without an endeavor to diffuse them, seems hardly cognizable by any human authority. I only mean to illustrate the excellence of our present establishment, by looking back to former times.

[u] 5 Rep. 23. 12 Rep. 56, 92. [v] 1 Hal. P. C. 405.

Everything is now as it should be, with respect to the spiritual cognizance, and spiritual punishment, of heresy: unless, perhaps, that the crime ought to be more strictly defined, and no prosecution permitted, even in the ecclesiastical courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions, it seems necessary for the support of the national religion that the officers of the church should have power to censure heretics; yet not to harass them with temporal penalties, much less to exterminate or [50] destroy them. The legislature hath indeed thought it proper that the civil magistrate should again interpose with regard to one species of heresy very prevalent in modern times; for by statute 9 & 10 W. III, c. 32 (Blasphemy, 1697), if any person educated in the Christian religion, or professing the same, shall by writing, printing, teaching or advised speaking deny any one of the persons in the Holy Trinity to be God,[2] or maintain that there are more gods than one, he shall undergo the same penalties and incapacities which were just now mentioned to be inflicted on apostacy by the same statute. And thus much for the crime of heresy.

§ 46. **3. Offenses against the established church.**—Another species of offenses against religion are those which affect the *established church*. And these are either positive or negative: positive, by reviling its ordinances; or negative, by nonconformity to its worship. Of both of these in their order.[3]

2 The words "Deny any one of the three Persons in the Holy Trinity to be God" were repealed by 53 George III, c. 160 (1813), but the remainder is still nominally in force, though Sir James Stephen says he never heard of any prosecution under it having taken place at any time. Sir James Stephen further tells us: "The bill for the repeal was brought in by the well-known Mr. W. Smith, of Norwich. Several bishops remarked in the house of lords that they wished to say that the bill had not been made necessary by any desire on the part of the clergy of the Church of England to interfere with the Unitarians." (Stephen, 2 Hist. Crim. Law, 269.)

3 **Controversy over Blackstone's treatment of nonconformists.**—In the four or five pages of the text (*50–*54), immediately following, are embraced the subject matter of the severest controversy which followed the publication of the Commentaries. Two leading English dissenters, Dr. Priestley and Dr. Furneaux, at once criticised Blackstone's statement of the law in the original edition of this book (1769, designated here as edition IV). The former pub-

§ 47. **a. Reviling the ordinances.**—And, first, of the offense of *reviling the ordinances* of the church. This is a crime of a much grosser nature than the other of mere nonconformity, since it carries with it the utmost indecency, arrogance and ingratitude: indecency, by setting up private judgment in virulent and factious opposition to public authority; arrogance, by treating with contempt and rudeness what has at least a better chance to be right than the singular notions of any particular man; and ingratitude, by denying that indulgence and undisturbed liberty of conscience to the members of the national church which the retainers to every petty conventicle enjoy. However, it is provided by statutes 1 Edward VI, c. 1 (Sacrament, 1547), and 1 Elizabeth, c. 1 (Act of Supremacy—Sacrament, 1558), that whoever reviles the sacrament of the Lord's Supper shall be punished by fine and imprisonment; and by the statute 1 Elizabeth, c. 2 (Act of Uniformity, 1558), if any minister shall speak anything in derogation of the book of common prayer, he shall, if not beneficed, be imprisoned one year for the first offense, and for life for the second: and, if he be beneficed, he shall for the first offense be imprisoned six months, and forfeit a year's value of his benefice; for the second offense he shall be deprived, and suffer one year's imprisonment; and, for the third, shall in like manner be deprived, and suffer imprisonment for life. [51] And if *any person* whatsoever shall in plays, songs or other open words speak anything in derogation, depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be used in its stead, he shall forfeit for the first offense an hundred marks; for the

lished, July, 1769, "Remarks on some passages in the fourth volume of Dr. Blackstone's Commentaries," etc., to which Blackstone made a "Reply," dated September 2, 1769, and this was followed by "An answer to Dr. Blackstone's Reply," etc., dated Leeds, October 2, 1769. Dr. Furneaux published about the same time "Letters to William Blackstone, Esq., concerning his exposition of the Act of Toleration, and some positions relative to Religious Liberty," based on the first edition of book IV of the Commentaries. A second edition of the letters followed the next of the Commentaries, in which Blackstone had made changes, and these changes are referred to in the notes [in Hammond's edition].

The remarkable interest felt in America upon these subjects is shown by the reprint of both at Philadelphia in the year 1773, as an appendix to Blackstone: as to which see Bibliography, volume I, page xxxi.—HAMMOND.

second four hundred; and for the third shall forfeit all his goods and chattels, and suffer imprisonment for life. These penalties were framed in the infancy of our present establishment, when the disciples of Rome and of Geneva united in inveighing with the utmost bitterness against the English liturgy, and the terror of these laws (for they seldom, if ever, were fully executed) proved a principal means, under Providence, of preserving the purity as well as decency of our national worship. Nor can their continuance to this time (of the milder penalties at least) be thought too severe and intolerant, so far as they are leveled at the offense, not of *thinking* differently from the national church, but of *railing* at that church and *obstructing* its ordinances, for not submitting its public judgment to the private opinion of others. For, though it is clear that no restraint should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship, yet contumely and contempt are what no establishment can tolerate.[vv] A rigid attachment to trifles, and an intemperate zeal for reforming them, are equally ridiculous and absurd; but the latter is at present the less excusable, because from political reasons, sufficiently hinted at in a former volume,[w] it would now be extremely unadvisable to make any alterations in the service of the church; unless by its own consent, or unless it can be shown that some manifest impiety or shocking absurdity will follow from continuing the present forms.

§ 48. **b. Noncomformity.**—Noncomformity to the worship of the church is the other, or negative, branch of this offense. And for this there is much more to be pleaded than for the former; being a matter [52] of private conscience, to the scruples of which our present laws have shown a very just and Christian indulgence. For undoubtedly all persecution and oppression of weak consciences, on the score of religious persuasions, are highly unjustifiable upon every principle of natural reason, civil liberty or sound religion. But care must be taken not to carry this indulgence into

[vv] By an ordinance 23 Aug. 1645, which continued till the restoration, to preach, write, or print, anything in derogation or depraving of the *directory*, for the then established Presbyterian worship, subjected the offender upon indictment to a discretionary fine, not exceeding fifty pounds. (Scobell, 98.)

[w] Book I. pag. 98.

such extremes as may endanger the national church: there is always a difference to be made between toleration and establishment.

§ 49. (1) Absence from divine worship.—Nonconformists are of two sorts: first, such as absent themselves from divine worship in the established church, through total irreligion, and attend the service of no other persuasion. These by the statutes of 1 Elizabeth, c. 2 (Act of Uniformity, 1558), 23 Elizabeth, c. 1 (Religion, 1580), and 3 Jac. I, c. 4 (Popish Recusants, 1605), forfeit one shilling to the poor every Lord's day they so absent themselves, and 20*l.* to the king if they continue such default for a month together. And if they keep any inmate, thus irreligiously disposed, in their houses, they forfeit 10*l.* *per* month.

§ 50. (2) Dissenters.—The second species of nonconformists are those who offend through a mistaken or perverse zeal. Such were esteemed by our laws, enacted since the time of the Reformation, to be papists and Protestant dissenters, both of which were supposed to be equally schismatics in not communicating with the national church; with this difference, that the papists divided from it upon material, though erroneous, reasons, but many of the dissenters, upon matters of indifference, or, in other words, upon no reason at all. Yet certainly 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 through weakness of intellect, through misdirected piety, through perverseness and acerbity of temper, or (which is often the case) through a prospect of secular advantage in herding with a party, men quarrel with the ecclesiastical establishment, the civil magistrate has nothing to do with it; unless their tenets and practice are such as threaten ruin or disturbance to the state. He is bound, indeed, to protect the established church, [53] and, if this can be better effected by admitting none but its genuine members to offices of trust and emolument, he is certainly at liberty so to do; the disposal of offices being matter of favor and discretion. But, this point being once secured, all persecution for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy and civil freedom. The names and subordination of the clergy, the posture of devotion, the materials and

color of the minister's garment, the joining in a known or an unknown form of prayer, and other matters of the same kind, must be left to the option of every man's private judgment.

§ 51. **(a) Protestant dissenters.**—With regard, therefore, to *Protestant dissenters*, although the experience of their turbulent disposition in former times occasioned several disabilities and restrictions (which I shall not undertake to justify) to be laid upon them by abundance of statutes,[x] yet at length the legislature, with a spirit of true magnanimity, extended that indulgence to these sectaries which they themselves when in power had held to be countenancing schism, and denied to the Church of England.[y] The penalties are conditionally suspended by the statute 1 W. & M., st. 1, c. 18 (Toleration, 1688), "for exempting their majesties' Protestant subjects, dissenting from the Church of England, from the penalties of certain laws," commonly called the toleration act; which declares that neither the laws above mentioned, nor the statutes 1 Elizabeth, c. 2, § 14 (Act of Uniformity, 1558), 3 Jac. I, c. 4 & 5 (Popish Recusants, 1605), nor any other penal laws made against popish recusants (except the test acts) shall extend to any dissenters other than papists and such as deny the Trinity: provided, 1. That they take the oath of allegiance and supremacy (or make a similar affirmation, being Quakers[z]) and subscribe the declaration against popery; 2. That they repair to some congregation certified to and registered in the court of the bishop or archdeacon, or at the county sessions; 3. That the doors of such meeting-house shall be unlocked, unbarred and unbolted; in default of which [54] the persons meeting there are still liable to all the penalties of the former acts. Dissenting teachers, in order to be exempted from the penalties of the statutes 13 & 14 Car. II, c. 4 (Act of Uniformity, 1662), 17 Car. II, c. 2 (Nonconformists, 1665), and 22 Car. II, c. 1 (Conventicles, 1670), are

[x] 23 Eliz. c. 1 (Religion, 1580). 29 Eliz. c. 6 (Religion, 1586). 35 Eliz. c. 1 (Religion, 1592). 22 Car. II. c. 1 (Conventicles, 1670).

[y] The ordinance of 1645 (before cited) inflicted imprisonment for a year on the third offense, and pecuniary penalties on the former two, in case of using the book of common-prayer, not only in a place of public worship, but also in any private family.

[z] See Stat. 8 Geo. I. c. 6 (Quakers, 1721).

also to subscribe the articles of religion mentioned in the statute 13 Elizabeth, c. 12 (Church Discipline, 1571) (which only concern the confession of the true Christian faith and the doctrine of the sacraments), with an express exception of those relating to the government and powers of the church, and to infant baptism. And by statute 10 Ann., c. 2 (Toleration, 1711), this toleration is ratified and confirmed, and it is declared that the said act shall at all times be inviolably observed for the exempting such Protestant dissenters as are thereby intended from the pains and penalties therein mentioned. Thus, though the crime of nonconformity is by no means universally abrogated, it is suspended and ceases to exist with regard to these Protestant dissenters, during their compliance with the conditions imposed by the act of toleration: and, under these conditions, all persons who will approve themselves no papists or oppugners of the Trinity are left at full liberty to act as their consciences shall direct them in the matter of religious worship. And, if any person shall willfully, maliciously or contemptuously disturb any congregation, assembled in any church or permitted meeting-house, or shall misuse any preacher or teacher there, he shall (by virtue of the same statute 1 W. & M.) be bound over to the sessions of the peace, and forfeit twenty pounds. But by statute 5 George I, c. 4 (Religious Worship, 1718), no mayor or principal magistrate must appear at any dissenting meeting with the ensigns of his office,[a] on pain of disability to hold that or any other office: the legislature judging it a matter of propriety that a mode of worship, set up in opposition to the national, when allowed † be exercised in peace, should be exercised also with decency, gratitude and humility. Neither doth the act of toleration extend to enervate those clauses of the statutes 13 & 14 Car. II, c. 4 (Act of Uniformity, 1662), and 17 Car. II, c. 2 (Nonconformists, 1665), which prohibit (upon pain of fine and imprisonment) all persons from teaching school unless they be licensed by the ordinary and [55] subscribe a declaration of conformity to the liturgy of the church, and rev-

[a] Sir Humphrey Edwin, a lord mayor of London, had the imprudence soon after the Toleration Act to go to a Presbyterian meeting-house in his formalities: which is alluded to by Dean Swift, in his *Tale of a Tub*, under the allegory of *Jack* getting on a great horse, and eating custard.

erently frequent divine service *established* by the laws of this kingdom.[4]

§ 52. **(b) Papists.**—As to *papists*, what has been said of the Protestant dissenters would hold equally strong for a general toleration of them; provided their separation was founded only upon difference of opinion in religion, and their principles did not also extend to a subversion of the civil government. If once they could be brought to renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their purgatory, and auricular confession; their worship of relics and images; nay, even their transubstantiation. But while they acknowledge a foreign power, superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects.

Let us, therefore, now take a view of the laws in force against the papists, who may be divided into three classes: persons professing popery, popish recusants convict, and popish priests.

§ 53. **(i) Persons professing the popish religion.**—Persons professing the popish religion, besides the former penalties for not

4 Practically the Toleration Act put an end to the attempt to treat Protestant dissent as a crime, though theoretically it interfered in no degree with the general principle that the state ought to regulate religion, and that it is a duty to obey the law upon that as upon other subjects. The old statutes became obsolete, but they continued to exist upon paper for a great length of time.

The Five-mile Act and the Conventicle Act were repealed by 52 George III, c. 155, A. D. 1812, which also contains a section (§ 4) the effect of which is to extend to Unitarians the advantages of the Toleration Act; for it applies to every person officiating in or resorting to any congregation of Protestants whose place of meeting is duly certified under the act, and it makes no condition as to belief in the Trinity.

Two of the acts of Elizabeth—namely, the acts of 1581 and 1593—continued to be nominally in force, subject to the provisions of the Toleration Act, till 1844, when they were repealed by 7 & 8 Vict., c. 102. The section of Elizabeth's Act of Uniformity (1 Elizabeth, c. 2, § 14) which made attendance at church obligatory under a penalty of a shilling, was repealed in 1846 by 9 & 10 Vict., c. 59. The result of the whole is that it may now be stated broadly that uniformity in public worship is no longer one of the objects sanctioned by the criminal law.—STEPHEN, 2 Hist. Crim. Law, 483.

frequenting their parish church, are disabled from taking any lands either by descent or purchase, after eighteen years of age, until they renounce their errors; they must at the age of twenty-one register their estates before acquired, and all future conveyances and wills relating to them; they are incapable of presenting to any advowson, or granting to any other person any avoidance of the same; they may not keep or teach any school under pain of perpetual imprisonment; and, if they willingly say or hear mass, they forfeit the one two hundred, the other one hundred marks, and each shall suffer a year's imprisonment. Thus much for persons who, from the misfortune of family prejudices or otherwise, have conceived an unhappy attachment to the Romish church from their infancy and publicly profess its errors. But if any evil industry is used to rivet these errors upon them, if any person sends another abroad to be educated in the popish religion, or to reside in any religious house abroad for that purpose, or contributes to their maintenance when there, [56] both the sender, the sent, and the contributor, are disabled to sue in law or equity, to be executor or administrator to any person, to take any legacy or deed of gift, and to bear any office in the realm, and shall forfeit all their goods and chattels, and likewise all their real estate for life. And where these errors are also aggravated by apostacy, or perversion, where a person is reconciled to the See of Rome or procures others to be reconciled, the offense amounts to high treason.

§ 54. (ii) Popish recusants.—Popish recusants, convicted in a court of law of not attending the service of the Church of England, are subject to the following disabilities, penalties and forfeitures, over and above those before mentioned: They are considered as persons excommunicated; they can hold no office or employment; they must not keep arms in their houses, but the same may be seized by the justices of the peace; they may not come within ten miles of London, on pain of 100*l.*; they can bring no action at law or suit in equity; they are not permitted to travel above five miles from home, unless by license, upon pain of forfeiting all their goods; and they may not come to court under pain of 100*l.* No marriage or burial of such recusant, or baptism of

his child, shall be had otherwise than by the ministers of the Church of England, under other severe penalties. A married woman, when recusant, shall forfeit two-thirds of her dower or jointure, may not be executrix or administratrix to her husband nor have any part of his goods; and during the coverture may be kept in prison, unless her husband redeems her at the rat of 10*l.* a month, or the third part of all his lands. And, lastly, as a feme covert recusant may be imprisoned, so all others must, within three months after conviction, either submit and renounce their errors, or, if required so to do by four justices, must abjure and renounce the realm: and if they do not depart, or if they return without the king's license, they shall be guilty of felony, and suffer death as felons without benefit of clergy. There is also an inferior species of recusancy (refusing to make the declaration against popery enjoined by statute 30 Car. II, st. 2 (Parliament, 1678), when tendered by the proper magistrate), which, if the party resides within ten miles of London, makes him an absolute recusant convict, or, if at a greater distance, suspends him from having any seat in [57] parliament, keeping arms in his house, or any horse above the value of five pounds. This is the state, by the laws now in being,[b] of a lay papist. But,

§ 55. **(iii) Popish priests.**—The remaining species or degree, *viz.*, popish priests, are in a still more dangerous condition. By statute 11 & 12 W. III, c. 4 (Popery, 1698), popish priests or bishops celebrating mass or exercising any part of their functions in England, except in the houses of ambassadors, are liable to perpetual imprisonment. And by the statute 27 Elizabeth, c. 2 (Jesuits, 1584), any popish priest, born in the dominions of the crown of England, who shall come over hither from beyond sea (unless driven by stress of weather and tarrying only a reasonable time[c]), or shall be in England three days without con-

[b] Stat. 23 Eliz., c. 1 (1580); 27 Eliz., c. 2 (1584); 29 Eliz., c. 6 (1586); 35 Eliz., c. 2 (1592); 1 Jac. I, c. 4 (1603); 3 Jac. I, c. 4 & 5 (1605); 7 Jac. I, c. 6 (1609); 3 Car. I, c. 3 (1627); 25 Car. II, c. 2 (1672); 30 Car. II, st. 2 (1678); 1 W. & M., c. 9, 15 & 26 (1688); 11 & 12 W. III, c. 4 (1698); 12 Ann., st. 2, c. 14 (1713); 1 Geo. I, st. 2, c. 55 (1714); 3 Geo. I, c. 18 (1716); 11 Geo. II, c. 17 (1737).

[c] Raym. 377. Latch. 1.

forming and taking the oaths, is guilty of high treason, and all persons harboring him are guilty of felony without the benefit of clergy.

§ 56. **(iv) Observations on the laws against papists.**—This is a short summary of the laws against the papists, under their three several classes, of persons professing the popish religion, popish recusants convict, and popish priests. Of which the President Montesquieu observes,[d] that they are so rigorous, though not professedly of the sanguinary kind, that they do all the hurt that can possibly be done in cold blood. But in answer to this it may be observed (what foreigners who only judge from our statute book are not fully apprised of) that these laws are seldom exerted to their utmost rigor: and indeed, if they were, it would be very difficult to excuse them. For they are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved (upon a cool review) as a standing system of law. The restless machinations of the jesuits during the reign of Elizabeth, the turbulence and uneasiness of the papists under the new religious establishment, and the boldness of their hopes and wishes for the succession of the Queen of Scots, obliged the parliament to counteract so dangerous a spirit by laws of a great, and then perhaps necessary, severity. The powder-treason, in the succeeding reign, struck a panic into [58] James I, which operated in different ways: it occasioned the enacting of new laws against the papists, but deterred him from putting them in execution. The intrigues of Queen Henrietta in the reign of Charles I, the prospect of a popish successor in that of Charles II, the assassination plot in the reign of King William, and the avowed claim of a popish pretender to the crown in subsequent reigns, will account for the extension of these penalties at those several periods of our history. But if a time should ever arrive, and perhaps it is not very distant, when all fears of a pretender shall have vanished, and the power and influence of the pope shall become feeble, ridiculous and despicable, not only in England but in every kingdom of Europe, it probably would not then be amiss to review and soften these rigorous edicts, at least

[d] Sp. L. b. 19. c. 27.

till the *civil* principles of the Roman Catholics called again upon the legislature to renew them: for it ought not to be left in the breast of every merciless bigot to drag down the vengeance of these occasional laws upon inoffensive, though mistaken, subjects, in opposition to the lenient inclinations of the civil magistrate, and to the destruction of every principle of toleration and religious liberty.[5]

§ 57. c. The corporation and test acts.—In order the better to secure the established church against perils from nonconformists of all denominations, infidels, Turks, Jews, heretics, papists and sectaries, there are, however, two bulwarks erected, called the *corporation* and *test* acts: by the former of which[•] no person can be legally elected to any office relating to the government of any city or corporation, unless, within a twelvemonth before, he has received the sacrament of the Lord's Supper according to the rites of the Church of England; and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath of office, or, in default of either of these requisites, such

• Stat. 13 Car. II. st. 2. c. 1 (Corporations, 1661).

---

5 **Removal of disabilities of Catholics.**—Even after the passage in 1778 of the act 18 George III, c. 60, known as Sir George Saville's Act, the bare presence of a Roman Catholic priest in England was still treason under the act of Elizabeth, and the saying of mass was still an offense which involved a fine of 200 marks and a year's imprisonment. Similar legislation was afterwards proposed for Scotland, but was opposed with violence and rioting, which led utimately to the Gordon riots of 1780. Soon after this a great change came over public sentiment. In 1791 an act was passed in line with the Toleration Act, which exempted from the penalties of the acts of Elizabeth and James I all Roman Catholics who were willing to make a declaration renouncing certain doctrines imputed to the Catholic Church, and promising fidelity to the Hanoverian family. Catholics were still left subject to many disabilities as to holding office, especially as to sitting in parliament. These disabilities were removed by the Catholic Emancipation Act of 1829. Severe restrictions still remained on the statute-books against the jesuits and against other religious orders, although they were not enforced. All these were erased by the act of 1844, entitled "An Act to repeal certain penal enactments made against Her Majesty's Roman Catholic subjects" and by the act of 1846, entitled "An Act to relieve Her Majesty's subjects from certain penalties and disabilities in regard to religious opinions."—STEPHEN, 2 Hist. Crim. Law, 492.

election shall be void. The other, called the test act,[f] directs all officers, civil and military, to take the oaths and make the declaration against transubstantiation in any of the king's courts at Westminster, or at the quarter sessions, within six calendar months after their admission, and also within the [59] same time to receive the sacrament of the Lord's Supper, according to the usage of the Church of England, in some public church immediately after divine service and sermon, and to deliver into court a certificate thereof signed by the minister and churchwarden, and also to prove the same by two credible witnesses, upon forfeiture of 500*l*., and disability to hold the said office. And of much the same nature with these is the statute 7 Jac. I, c. 2 (Naturalization and Restoration of Blood, 1609), which permits no persons to be naturalized or restored in blood but such as undergo a like test, which test having been removed in 1753, in favor of the Jews, was the next session of parliament restored again with some precipitation.

Thus much for offenses, which strike at our national religion, or the doctrine and discipline of the Church of England in particular. I proceed now to consider some gross impieties and general immoralities, which are taken notice of and punished by our municipal law; frequently in concurrence with the ecclesiastical, to which the censure of many of them does also of right appertain, though with a view somewhat different: the spiritual court punishing all sinful enormities for the sake of reforming the private sinner *pro salute animæ* (for the health of the soul); while the temporal courts resent the public affront to religion and morality on which all government must depend for support, and correct more for the sake of example than private amendment.

§ 58. **4. Blasphemy.**—The fourth species of offenses, therefore, more immediately against God and religion, is that of *blasphemy* against the Almighty, by denying His Being or Providence; or by contumelious reproaches of our Saviour Christ.[6]

[f] Stat. 25 Car. II. c. 2 (Popish Recusants, 1672), explained by 9 Geo. II. c. 26 (Indemnity, 1735).

---

[6] The more celebrated English cases of prosecution for blasphemy are given in Stephen, 2 Hist. Crim. Law, 469. Most of the American states have en-

Whither also may be referred all profane scoffing at the Holy Scripture, or exposing it to contempt and ridicule. These are offenses punishable at common law by fine and imprisonment, or other infamous corporal punishment:[g] for Christianity is part of the laws of England.[h]

§ 59. **5. Swearing and cursing.**—Somewhat allied to this, though in an inferior degree, is the offense of profane and common *swearing* and [60] *cursing*. By the last statute against which, 19 George II, c. 21 (Profane Oaths, 1745), which repeals all former ones, every laborer, sailor or soldier profanely cursing or swearing shall forfeit 1*s*., every other person under the degree of a gentleman 2*s*., and every gentleman or person of superior rank 5*s*. to the poor of the parish; and, on a second conviction, double; and, for every subsequent offense, treble the sum first forfeited; with all charges of conviction: and in default of payment shall be sent to the house of correction for ten days. Any justice of the peace may convict upon his own hearing, or the testimony of one witness: and any constable or peace officer, upon his own hearing, may secure any offender and carry him before a justice, and there convict him. If the justice omits his duty, he forfeits 5*l*., and the constable 40*s*. And the act is to be read in all parish churches and public chapels the Sunday after every quarter-day, on pain of 5*l*. to be levied by warrant from any justice. Besides this punishment for taking God's name in vain in common discourse, it is enacted by statute 3 Jac. I, c. 21 (Plays, 1605), that if in any stage play, interlude or show the name of the Holy Trinity, or any of the persons therein, be jestingly or profanely used, the offender shall forfeit 10*l*., one moiety to the king and the other to the informer.

g 1 Hawk. P. C. 7.

h 1 Vent. 293. 2 Strange, 834.

---

acted statutes against this offense; but it is held that the statute does not necessarily abrogate the common law. The principal American cases are Commonwealth v. Kneeland, 20 Pick. (Mass.) 206; Updegraph v. Commonwealth, 11 Serg. & R. (Pa.) 394; People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Andrew v. New York Bible etc. Society, 4 Sandf. (N. Y.) 156; State v. Chandler, 2 Harr. (Del.) 553; Vidal v. Philadelphia, 2 How. 127, 11 L. Ed. 205.

§ 60. **6. Witchcraft.**—A sixth species of offenses against God and religion, of which our ancient books are full, is a crime of which one knows not well what account to give. I mean the offense of *witchcraft, conjuration, enchantment* or *sorcery.* To deny the possibility, nay, actual existence of witchcraft and sorcery, is at once flatly to contradict the revealed word of God, in various passages both of the Old and New Testament: and the thing itself is a truth to which every nation in the world hath in its turn borne testimony, either by examples seemingly well attested or by prohibitory laws, which at least suppose the possibility of a commerce with evil spirits. The civil law punishes with death not only the sorcerers themselves, but also those who consult them;[1] imitating in the former the express law of God,[k] "thou shalt not suffer a witch to live." And our own laws, both before and since the Conquest, have been [61] equally penal, ranking this crime in the same class with heresy, and condemning both to the flames.[l] The President Montesquieu[m] ranks them also both together, but with a very different view: laying it down as an important maxim that we ought to be very circumspect in the prosecution of magic and heresy; because the most unexceptionable conduct, the purest morals, and the constant practice of every duty in life, are not a sufficient security against the suspicion of crimes like these. And, indeed, the ridiculous stories that are generally told, and the many impostures and delusions that have been discovered in all ages, are enough to demolish all faith in such a dubious crime; if the contrary evidence were not also extremely strong. Wherefore it seems to be the most eligible way to conclude, with an ingenious writer of our own,[n] that in general there has been such a thing as witchcraft; though one cannot give credit to any particular modern instance of it.

Our forefathers were stronger believers, when they enacted by statute 33 Henry VIII, c. 8 (Witchcraft, 1541), all witchcraft and sorcery to be felony without benefit of clergy; and again by statute 1 Jac. I, c. 12 (Witchcraft, 1603), that all persons invoking any evil spirit, or consulting, covenanting with, entertaining, employ-

[1] Cod. l. 9. t. 18.
[k] Exod. xxii. 18.
[l] 3 Inst. 44.
[m] Sp. L. b. 12. c. 5.
[n] Mr. Addison, Spect. No. 117.

ing, feeding or rewarding any evil spirit; or taking up dead bodies from their graves to be used in any witchcraft, sorcery, charm or enchantment; or killing or otherwise hurting any person by such infernal arts, should be guilty of felony without benefit of clergy, and suffer death. And, if any person should attempt by sorcery to discover hidden treasure, or to restore stolen goods, or to provoke unlawful love, or to hurt any man or beast, though the same were not effected, he or she should suffer imprisonment and pillory for the first offense, and death for the second. These acts continued in force till lately, to the terror of all ancient females in the kingdom, and many poor wretches were sacrificed thereby to the prejudice of their neighbors and their own illusions; not a few having, by some means or other, confessed the fact at the gallows. But all executions for this dubious crime are now at an end, our legislature having at length followed the wise example of [62] Louis XIV, in France, who thought proper by an edict to restrain the tribunals of justice from receiving informations of witchcraft.[o] And accordingly it is with us enacted by statute 9 George II, c. 5 (Witchcraft, 1735), that no prosecution shall for the future be carried on against any person for conjuration, witchcraft, sorcery or enchantment. But the misdemeanor of persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in the occult sciences, is still deservedly punished with a year's imprisonment and standing four times in the pillory.

§ 61. 7. Religious imposters.—A seventh species of offenders in this class are all *religious imposters:* such as falsely 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, imprisonment and infamous corporal punishment.[p]

§ 62. 8. Simony.—Simony, or the corrupt presentation of anyone to an ecclesiastical benefice for gift or reward, is also

o Voltaire *Siecl. Louis XIV.* c. 29. Mod. Un. Hist. xxv. 215. Yet Voughlans (*de droit criminel,* 353, 459.) still reckons up sorcery and witchcraft among the crimes punishable in France.

p 1 Hawk. P. C. 7.

to be considered as an offense against religion; as well by reason of the sacredness of the charge which is thus profanely bought and sold, as because it is always attended with perjury in the person presented.[q] The statute 31 Elizabeth, c. 6—Benefices, 1588—(which, so far as it relates to the forfeiture of the right of presentation, was considered in a former book[r]), enacts, that if any patron, for money or any other corrupt consideration or promise, directly or indirectly given, shall present, admit, institute, induct, install or collate any person to an ecclesiastical benefice or dignity, both the giver and taker shall forfeit two years' value of the benefice or dignity; one moiety to the king, and the other to anyone who will sue for the same. If persons also corruptly resign or exchange their benefices, both the giver and taker shall in like manner forfeit double the value of the money or other corrupt consideration. And persons who shall [63] corruptly ordain or license any minister, or procure him to be ordained or licensed (which is the true idea of simony), shall incur a like forfeiture of forty pounds; and the minister himself of ten pounds, besides an incapacity to hold any ecclesiastical preferment for seven years afterwards. Corrupt elections and resignations in colleges, hospitals and other eleemosynary corporations are also punished by the same statute with forfeiture of the double value, vacating the place or office, and a devolution of the right of election for that turn to the crown.

§ 63. 9. Sabbath-breaking.—Profanation of the Lord's day vulgarly (but improperly) called *sabbath-breaking*, is a ninth offense against God and religion, punished by the municipal law of England.[7] For, besides the notorious indecency and scandal of

q 3 Inst. 156.

r See Book II. pag. 279.

---

7 **Sunday laws in the United States.**—The principles of the Stat. 29 Car. II have been substantially followed in the United States. The extent of the restriction of the Sunday laws in the several states varies greatly. Cases of necessity are determined by the moral fitness of the work. Commonwealth v. Nesbit, 34 Pa. 398, 409. In some states where Sunday laws exist, Jews and Seventh Day Adventists are excepted from their operation, and in other states they are not. Neuendorff v. Duryea, 69 N. Y. 557, 25 Am. Rep. 235; Commonwealth v. Has, 122 Mass. 40; Society for Visitation of Sick v. Common-

permitting any secular business to be publicly transacted on that day, in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day day in seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes by the help of conversation and society the manners of the lower classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens, but which yet would be worn out and defaced by an unremitted continuance of labor, without any stated times of recalling them to the worship of their maker. And therefore the laws of King Athelstan[s] forbade all merchandising on the Lord's day, under very severe penalties. And by the statute 27 Henry VI, c. 5 (Market and Fair: Sunday, 1448), no fair or market shall be held on the principal festivals, Good Friday, or any Sunday (except the four Sundays in harvest), on pain of forfeiting the goods exposed to sale. And since, by the statute 1 Car. I, c. 1 (Sunday Observance, 1625), no person shall

[s] c. 24.

---

wealth, 52 Pa. 125, 91 Am. Dec. 139; Shreveport v. Levy, 26 La. Ann. 671, 21 Am. Rep. 553. When laws forbid traveling on Sunday, the New England states hold that a person may not recover for injuries received when so traveling occasioned by public negligence, as for defective streets. Connolly v. Boston, 117 Mass. 64, 19 Am. Rep. 396; Johnson v. Irasburgh, 47 Vt. 28, 32, 19 Am. Rep. 111. In some other states it is held otherwise. Sutton v. Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534.

Judicial acts were the only ones that were considered void at common law if done on Sunday. In the United States it is generally held that contracts made on Sunday are invalid. Hilton v. Houghton, 35 Me. 143; Adams v. Gay, 19 Vt. 358; Hill v. Sherwood, 3 Wis. 343. Executed contracts will not be disturbed. Horton v. Buffinton, 105 Mass. 399. A state statute forbidding the running of trains on Sunday is held not to interfere with federal regulation of interstate commerce. Hennington v. Georgia, 163 U. S. 299, 41 L. Ed. 166, 16 Sup. Ct. Rep. 1086. Sunday laws have been contested on the ground of interfering with religious liberty. They have, however, been upheld as within the police power of the state. (Cooley, Const. Lim. (7th ed.), 675.)

assemble, out of their own parishes, for any sport whatsoever upon this day, nor, in their parishes, shall use any bull or [64] bear-baiting, interludes, plays, or other *unlawful* exercises, or pastimes, on pain that every offender shall pay 3*s.* 4*d.* to the poor. This statute does not prohibit, but rather impliedly allows, any innocent recreation or amusement, within their respective parishes, even on the Lord's day, after divine service is over. But by statute 29 Car. II, c. 7 (Sunday Observance, 1677), no person is allowed o *work* on the Lord's day, or use any boat or barge, or expose any goods to sale, except meat in public houses, milk at certain hours, and works of necessity or charity, on forfeiture of 5*s.* Nor shall any drover, carrier or the like travel upon that day, under pain of twenty shillings.

§ 64. 10. Drunkenness.—Drunkenness is also punished by statute 4 Jac. I, c. 5 (Drunkenness, 1606), with the forfeiture of 5*s.*, or the sitting six hours in the stocks: by which time the statute assumes the offender will have regained his senses, and not be liable to do mischief to his neighbors. And there are many wholesome statutes, by way of prevention, chiefly passed in the same reign of King James I, which regulate the licensing of ale-houses, and punish persons found tippling therein, or the masters of such houses permitting them.

§ 65. 11. Lewdness.—The last offense which I shall mention, more immediateley against religion and morality, and cognizable by the temporal courts, is that of open and notorious *lewdness:* either by frequenting houses of ill fame, which is an indictable offense,[t] or by some grossly scandalous and public indecency, for which the punishment is by fine and imprisonment.[u] In the year 1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and willful adultery were made capital crimes, but also the repeated act of keeping a brothel, or committing fornication, were (upon a second conviction) made felony without benefit of clergy.[w] But at the restoration, when men from

t Poph. 208.
u 1 Siderf. 168.
w Scobell. 121.

an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of [65] such unfashionable rigor. And these offenses have been ever since left to the feeble coercion of the spiritual court, according to the rules of the canon law; a law which has treated the offense of incontinence, nay even adultery itself, with a great degree of tenderness and lenity, owing, perhaps, to the constrained celibacy of its first compilers. The temporal courts, therefore, take no cognizance of the crime of adultery otherwise than as a private injury.[x]

§ 66. Temporal punishment for having bastard children.— But, before we quit this subject, we must take notice of the temporal punishment for having *bastard children*, considered in a criminal light; for with regard to the maintenance of such illegitimate offspring, which is a civil concern, we have formerly spoken at large.[y] By the statute 18 Elizabeth, c. 3 (Poor, 1575), two justices may take order for the punishment of the mother and reputed father; but what that punishment shall be is not therein ascertained, though the contemporary exposition was, that a corporal punishment was intended.[z] By statute 7 Jac. I, c. 4 (Vagabonds, 1609), a specific punishment (*viz.*, commitment to the house of correction) is inflicted on the woman only. But in both cases it seems that the penalty can only be inflicted if the bastard becomes chargeable to the parish; for otherwise the very maintenance of the child is considered as a degree of punishment. By the last-mentioned statute the justices may commit the mother to the house of correction, there to be punished and set on work for one year; and, in case of a second offense, till she finds sureties never to offend again.

x See Book III. pag. 139.
y See Book I. pag. 458.
z Dalt. Just. c. 11.

[66]

CHAPTER THE FIFTH.

OF OFFENSES AGAINST THE LAW OF NATIONS.

§ 67. The law of nations.—According to the method marked out in the preceding chapter, we are next to consider the offenses more immediately repugnant to that universal law of society which regulates the mutual intercourse between one state and another; those, I mean, which are particularly animadverted on, as such, by the English law.

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world,[a] in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states and the individuals belonging to each.[b] This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can, and, in time of war, as little harm as possible, without prejudice to their own real interests.[c] And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those [67] principles of natural justice, in which all the learned of every nation agree: or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.[1]

a Ff. 1. 1. 9.

b See Book I. pag. 43.

c Sp. L. b. 1. c. 3.

---

1 There are common-law dicta that legislation cannot change a rule of international law. (In Heathfield v. Chilton, 4 Burr. 2015, 98 Eng. Reprint, 50, Lord Mansfield said that Parliament not only did not intend to alter but "could not alter" the law of nations by stat. 7 Anne, c. 12. In The Scotia, 14 Wall. (U. S.) 170, 20 L. Ed. 822, Strong, J., said: "Undoubtedly no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can change the law of the world.") These

In arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world. Thus, in mercantile questions, such as bills of exchange and the like, in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature, the law-merchant,[d] which is a branch of the law of nations,

[d] See Book I. pag. 273.

---

appear to proceed upon the theory that international law is the law of nature applied to international relations and hence is of superior authority to positive law (4 Bl. Comm. 66–67). To that extent, Lord Mansfield's dictum may be the last echo in England of Coke's doctrine in Bonham's Case. The view which has prevailed, however, is that the courts are to prevent interference of legislation with international law by interpretation; that to avoid a conflict between international law and a statute, the courts will resort, if need be, to strained and forced constructions. (Le Louis, 2 Dods. 210, 239; Murray v. The Charming Betsy, 2 Cranch (U. S.), 64, 118, 2 L. Ed. 208, 226. Hence if the statute leaves *no* room for interpretation, international law must give way. An interesting example may be seen in the Scotch case of Mortensen v. Peters, 14 Scots L. T. 227. See Gregory, The Recent Controversy as to the British Jurisdiction Over Foreign Fishermen More than Three Miles from Shore, 1 Am. Pol. Sci. Rev. 410). On the Continent, where different views of the relation of courts to legislation obtain, it is significant that instead of discussing the duty of interpreting statutes so as to accord with international law, as do English and American authors, text-writers consider the duty of states to *change* their laws so as to bring them into harmony with the just demands of other states (1 Fiore, Nouveau Droit Internat. Public, 351–354). In other words, conflict between municipal law and international law may be avoided in any of three ways: (1) by holding law and legislation of a state at variance with international law void; (2) by construing legislation in derogation of international law strictly and avoiding departure therefrom by interpretation; (3) by changing local laws whenever at variance with the received usages of nations.—POUND, "Common Law and Legislation," 21 Harv. Law Rev. 383, 394.

is regularly and constantly adhered to. So, too, in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.

But, though in civil transactions and questions of property between the subjects of different states the law of nations has much scope and extent, as adopted by the law of England, yet the present branch of our inquiries will fall [68] within a narrow compass, as offenses against the law of nations can rarely be the object of the criminal law of any particular state. For offenses against this law are principally incident to whole states or nations, in which case recourse can only be had to war, which is an appeal to the God of hosts to punish such infractions of public faith as are committed by one independent people against another; neither state having any superior jurisdiction to resort to upon earth for justice. But where the individuals of any state violate this general law, it is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion and involve the two states in a war. It is therefore incumbent upon the nation injured first to demand satisfaction and justice to be done to the offender by the state to which he belongs, and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.

§ 68. Offenses against the law of nations.—The principal offenses against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds: 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.

§ 69. 1. Violation of safe-conducts.—As to the first, *violation* of *safe-conducts* or *passports*, expressly granted by the king or his ambassadors • to the subjects of a foreign power in time of

• See Book I. pag. 260.

mutual war, or committing acts of hostility against such as are in amity, league or truce with us, who are here under a general implied safe-conduct: these are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another, and such offenses may, according to the writers upon the law of nations, be a just ground of a national war; since it is not in the power of [69] the f reign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community. And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law, and, more especially, as it is one of the articles of *Magna Carta*[f] that foreign merchants should be entitled to safe-conduct and security throughout the kingdom, there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honor is more particularly engaged in supporting his own safe-conduct. And, when this malicious rapacity was not confined to private individuals, but broke out into general hostilities, by the statute 2 Henry V, st. 1, c. 6 (Safe-conducts, 1414), breaking of truce and safe-conducts, or abetting and receiving the truce-breakers, was (in affirmance and support of the law of nations) declared to be high treason against the crown and dignity of the king; and conservators of truce and safe-conducts were appointed in every port, and empowered to hear and determine such treasons (when committed at sea) according to the ancient marine law then practiced in the admiral's court, and, together with two men learned in the law of the land, to hear and determine according to that law the same treasons when committed within the body of any county; which statute, so far as it made these offenses amount to treason, was suspended by 14 Henry VI, c. 8 (Breaches of Truces, 1435), and repealed by 20 Henry VI, c. 11 (Foreign Pleas, 1444), but revived by 29 Henry VI, c. 2 (Safe-conducts, 1450), which gave the same powers to the lord chancellor, associated with either of the chief justices, as belonged to the conservators of truce and their assessors, and enacted that, notwithstanding the party be

[f] 9 Hen. III. c. 30 (1225). See Book I. pag. 259, etc.

convicted of treason, the injured stranger should have restitution out of his effects prior to any claim of the crown. And it is further enacted by the statute 31 Henry VI, c. 4 (1452), 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 attaching [70] 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.

It is to be observed that the suspending and repealing acts of 14 & 20 Henry VI, and also the reviving act of 29 Henry VI, were only temporary; so that it should seem that, after the expiration of them all, the statute 2 Henry V (Safe-conducts, 1414), continued in full force: but yet it is considered as extinct by the statute 14 Edward IV, c. 4 (1474), which revives and confirms all statutes and ordinances made before the accession of the house of York against breakers of amities, truces, leagues and safe-conducts, with an express exception to the statute of 2 Henry V. But (however that may be) I apprehend it was finally repealed by the general statutes of Edward VI and Queen Mary, for abolishing new-created treasons; though Sir Matthew Hale seems to question it as to treasons committed on the sea.[g] But certainly the statute of 31 Henry VI (1452) remains in full force to this day.

§ 70. 2. Offenses against ambassadors.—As to the rights of *ambassadors*, which are also established by the law of nations, and are therefore matter of universal concern, they have formerly been treated of at large.[h] It may here be sufficient to remark that the common law of England recognizes them in their full extent, by immediately 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, the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, it is declared by the statute 7 Ann., c. 12 (Diplomatic Privileges, 1708), that all process whereby the person of any ambassador, or of his domestic or do-

[g] 1 Hal. P. C. 267.

[h] See Book I. pag. 253.

mestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void; and that all persons prosecuting, soliciting or executing such process, being convicted by confession or the oath of one witness, before the [71] lord chancellor and the chief justices, or any two of them, shall be deemed violators of the laws of nations, and disturbers of the public repose, and shall suffer such penalties and corporal punishment as the said judges, or any two of them, shall think fit.[j] Thus, in cases of extraordinary outrage, for which the law hath provided no special penalty, the legislature hath entrusted to the three principal judges of the kingdom an unlimited power of proportioning the punishment to the crime.

§ 71. 3. Piracy.—Lastly, the crime of *piracy*, or robbery and depredation upon the high seas, is an offense against the universal law of society; a pirate being, according to Sir Edward Coke,[k] *hostis humani generis* (an enemy to mankind). As, therefore, he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defense, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.

By the ancient common law, piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance, and by an alien to be felony only; but now, since the statute of treasons, 25 Edward III, c. 2 (1351), it is held to be only felony in a subject.[l] Formerly, it was only cognizable by the admiralty courts, which proceed by the rules of the civil law.[m] But, it being inconsistent with the liberties of the nation that any man's life should be taken away, unless by the judgment of his peers, or the common law of the land, the statute 28 Henry VIII, c. 15 (Offenses at Sea, 1536), established a new jurisdiction for this pur-

[j] See the occasion of making this statute; Book I. p. 255.
[k] 3 Inst. 113.
[l] *Ibid.*
[m] 1 Hawk. P. C. 98.

pose, which proceeds according to the course of the common law, and of which we shall say more hereafter.

[72] The offense of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there.[n] But, by statute, some other offenses are made piracy also: as, by statute 11 & 12 W. III, c. 7 (Piracy, 1698), if any natural-born subject commits any act of hostility upon the high seas against others of his majesty's subjects, under color of a commission from any foreign power, this, though it would only be an act of war in an alien, shall be construed piracy in a subject. And further, any commander, or other seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition or goods, or yielding them up voluntarily to a pirate, or conspiring to do these acts, or any person assaulting the commander of a vessel to hinder him from fighting in defense of his ship, or confining him, or making or endeavoring to make a revolt on board, shall, for each of these offenses, be adjudged a pirate, felon and robber, and shall suffer death, whether he be principal or merely accessory by setting forth such pirates, or abetting them before the fact, or receiving or concealing them or their goods after it. And the statute 4 George I, c. 11 (Piracy, 1717), expressly excludes the principals from the benefit of clergy. By the statute 8 George I, c. 24 (1721), the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating or corresponding with them, or the forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard, shall be deemed piracy: and such accessories to piracy as are described by the statute of King William are declared to be principal pirates, and all pirates convicted by virtue of this act are made felons without benefit of clergy. By the same statutes, also (to encourage the defense of merchant vessels against pirates), the commanders or seamen wounded, and the widows of such seamen as are slain, in any piratical engagement, shall be entitled to a bounty, to [73] be divided

[n] 1 Hawk. P. C. 100.

among them, not exceeding one-fiftieth part of the value of the cargo on board; and such wounded seamen shall be entitled to the pension of Greenwich hospital, which no other seamen are, except only such as have served in a ship of war. And if the commander shall behave cowardly, by not defending the ship, if she carries guns or arms, or shall discharge the mariners from fighting, so that the ship falls into the hands of pirates, such commander shall forfeit all his wages, and suffer six months' imprisonment. Lastly, by statute 18 George II, c. 30 (Piracy, 1744), any natural-born subject, or denizen, who in the time of war shall commit hostilities at sea against any of his fellow-subjects, or shall assist an enemy on that element, is liable to be tried and convicted as a pirate.

These are the principal cases in which the statute law of England interposes to aid and enforce the law of nations, as a part of the common law; by inflicting an adequate punishment upon offenses against that universal law committed by private persons. We shall proceed in the next chapter to consider offenses which more immediately affect the sovereign executive power of our own particular state, or the king and government; which species of crimes branches itself into a much larger extent than either of those of which we have already treated.

[74]

CHAPTER THE SIXTH.

OF HIGH TREASON.

§ 72. Offenses against the supreme executive power.—The third general division of crimes consists of such as more especially affect the supreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the least to a criminal neglect of that duty which is due from every subject to his sovereign. In a former part of these Commentaries[a] we had occasion to mention the nature of allegiance, as the tie or *ligamen* which binds every subject to be true and faithful to his sovereign *liege* lord the king, in return for that protection which is afforded him, and truth and faith to bear of life and limb, and earthly honor, and not to know or hear of any ill intended him, without defending him therefrom. And this allegiance, we may remember, was distinguished into two sorts or species: the one natural and perpetual, which is inherent only in natives of the king's dominions; the other local and temporary, which is incident to aliens also. Every offense, therefore, more immediately affecting the royal person, his crown or dignity, is in some degree a breach of this duty of allegiance, whether natural and innate, or local and acquired by residence; and these may be distinguished into four kinds: 1. Treason. 2. Felonies injurious to the king's prerogative. 3. *Praemunire*. 4. Other misprisions and contempts. Of which crimes the first and principal is that of treason.[1]

[a] Book I. c. 10.

---

[1] **Change in the conception of treason.**—In this country the conception of treason has become entirely divorced from that of an abuse of confidence between a superior and inferior, which was its original sense (see text, p. *75), and is confined to that of a violation of allegiance due to the state as an abstract incorporeal body.

This is shown not only by the language of all our constitutions, state and federal, but by the disappearance of petit treason from the criminal law, and even of those species of high treason which relate chiefly to the person or personal relations of a sovereign. If there ever was a case in which the murder of a chief magistrate could have been regarded as an act of treason to the state, it was that of the assassination of Abraham Lincoln, at the very period

§ 73. 1. Treason.—[75] Treason, *proditio*, in its very name (which is borrowed from the French) imports a betraying, treachery or breach of faith. It therefore happens only between allies, saith the Mirror;[b] for treason is indeed a general appellation, made use of by the law, to denote not only offenses against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation, and the inferior so abuses that confidence, so forgets the obligations of duty, subjection and allegiance, as to destroy the life of any such superior or lord.[c] This is looked upon as proceeding from the same principle of treachery in private life as would have urged him who harbors it to have conspired in public against his liege lord and sovereign: and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary, these, being breaches of the lower allegiance, of private and domestic faith, are

[b] c. 1. § 7.

[c] LL. Aelfredi. c. 4. Aethelst. c. 4. Cnuti. c. 54. 61.

---

in which he had become the President not only *de jure* but *de facto* of the entire country, and when at the same time his life was regarded as of the utmost importance to the restitution of the government in the seceding states, and to public order. Even the murder of President Garfield, in a time of profound peace, was not simply that of an eminent citizen: it was prompted by political motives, as the assassin himself persistently declared. Yet neither was treated as a treason against the state.

This remarkable change is not due only to our constitutional provisions, but in large measure to the alteration which has come over the fundamental conceptions of the nature of government and law. This is shown by the fact that even in England, where only historical causes have been at work, most of the common-law treasons are obsolete (even of those contained in the stat. 25 Edward III, which has always been regarded as expressing the pure common law on this subject), and that recent statutes have blended even those which survive and are of practical importance to-day, in the novel conception of treason-felony.

The importance of the change is not limited to treason, or to criminal law. It necessarily affects the entire conception of law, and must be taken into account in defining it. Treason as a violation of "the duty due from every subject to his sovereign" (text, p. *74) belongs to the same order of ideas with the "law prescribed by a superior."—HAMMOND.

denominated *petit* treasons.[2] But when disloyality so rears its crest as to attack even majesty itself, it is called by way of eminent distinction *high* treason, *alta proditio;* being equivalent to the *crimen læsæ majestatis* (the crime of lese-majesty—high treason) of the Romans, as Glanvill [d] denominates it also in our English law.

§ 74. a. Treason under the older common law.—As this is the highest civil crime which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone (says the President Montesquieu) is sufficient to make any government degenerate into arbitrary power.[e] And yet, by the ancient common law, there was a great latitude left in the breast of the judges, to determine 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 arbitrary constructions, offenses into [76] the crime and punishment of treason which never were suspected to be such. Thus the *accroaching*, or attempting to exercise, royal power (a very uncertain charge) was in the 21 Edward III (1347), held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he paid him 90*l.*:[f] a crime, it must be owned, well deserving of punishment, but which seems to be of a complexion very different from that of treason. Killing the king's father or brother, or even his messenger, has also fallen under the same denomination.[g] The latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius, which determines that any attempts or designs against the ministers of the p ince shall be treason.[h]

d 1. 1. c. 2.

e Sp. L. b. 12. c. 7.

f 1 Hal. P. C. 80.

g Britt. c. 22. 1 Hawk. P. C. 34.

h *Qui de nece virorum illustrium, qui consiliis et consistorio nostro intersunt, senatorum etiam (nam et ipsi pars corporis nostri sunt) vel cujuslibet postremo,*

---

2 There is now no such offense as petit treason, the offense which formerly amounted to petit treason having been by statute declared to be murder only and no greater offense. Offenses Against the Person Act, 1861.

§ 75. b. Statute of Treason, 25 Edward III (1351).—But, however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edward III, c. 2 (Treason, 1351), was made, which defines what offense only for the future should be held to be treason, in like manner as the *lex Julia majestatis* (the Julian law concerning treason) among the Romans, promulgated by Augustus Cæsar, comprehended all the ancient laws that had before been enacted to punish transgressors against the state.[1] This statute must therefore be our text and guide, in order to examine into the several species of high treason. And we shall find that it comprehends all kinds of high treason under seven distinct branches.

§ 76. (1) Compassing the death of the king.—"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 "[3] Under this description it is held that a queen regnant (such as Queen Elizabeth and Queen Anne) is within the words of the act, being in-

qui militat nobiscum, cogitaverit: (eadem enim severitate voluntatem sceleris, qua effectum, puniri jura voluerunt) ipse quidem, utpote majestatis reus, gladio feriatur, bonis ejus omnibus fisco nostro addictis. (He who shall meditate the death of any of those illustrious men who assist at our councils; likewise of the senators (for they are a part of ourself) or lastly of any of our companions in arms; shall, forasmuch as he is guilty of treason, perish by the sword, and all his goods be confiscated: for the law will punish the intention and the perpetration of the crime with equal severity.) (Cod. 9. 8. 5.)

[1] Gravin. Orig. 1. § 34.

---

[3] **Present law of treason in England.**—Sir James Stephen, in his General View of the Criminal Law, 87, gives the following summary of the history and present condition of the law of treason:

"At every important crisis in our history, at the Reformation, in the time of Elizabeth, in the time of James I, at the restoration, at the revolution of 1688, at all periods of political excitement—in 1780, in 1794, in 1848, for instance—in a word, whenever there was any cause to apprehend a revolution, the definition of treason given in the 25th Edward III has either been enlarged by construction or has been reinforced by statutes intended to meet temporary purposes. The enlarged constructions given to the statute must still be regarded as theoretically law, but they have been practically superseded by the statute 11 Vict., c. 12 (1848), which makes them statutory felonies punishable with penal servitude for life as a maximum punishment; and it

vested with royal power and entitled to the allegiance of her subjects:[j] but the husband of such a queen is not comprised within these words, [77] and therefore no treason can be committed against him.[k] The king here intended is the king in possession, without any respect to his title; for it is held that a king *de facto* (in fact) and not *de jure* (by right), or, in other words, an usurper that hath got possession of the throne, is a king within the meaning of the statute, as there is a temporary allegiance due to him, for his administration of the government, and temporary protection of the public: and therefore treasons committed against

[j] 1 Hal. P. C. 101. [k] 3 Inst. 7. 1 Hal. P. C. 106.

---

is by this statute that of late years such offenses have been usually punished. The result is that the law has fallen into this shape, speaking roughly: High treason is divided into three heads—

"First, compassing and imagining the queen's death, taking the words in a wide but not unnatural sense—that is, as including every conspiracy, the natural effect of which may probably be to cause personal danger to the queen.

"Second, actual levying of war against the queen for the attainment by open force of public objects.

"Third, political plots and conspiracies intended to bring about the deposition of the queen, or levying of war against her, or the invasion of her territories. These last offenses are usually punished not as treason but as felony under 11 Vict., c. 12.

"I pass over with a bare mention, such an unusual form of treason as adhering to the queen's enemies; I may observe, however, that its vagueness is a curious proof of the small experience which we have had of war. The French and German codes are on this subject much fuller.

"The provisions as to imagining the death of the Prince of Wales, the violation of a queen-consort or the wife of the heir-apparent, and the killing of the chancellor and the judges in the actual exercise of their duties, are worth bare mention only."

A much fuller account of the same subject is given in Stephen, 2 Hist. Crim. Law, c. 23.

Law of treason in the United States.—Treason is defined by the constitution of the United States, art. III, § 3, to consist in levying war against the United States, adhering to its enemies, giving them aid and comfort. The same article of the constitution provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. An able discussion of the subject is given by Mr. Justice Field in United States v. Greathouse, 4 Sawy. 457, Fed. Cas. No. 15,254.

Henry VI were punished under Edward IV, though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, or king *de jure* and not *de facto*, who hath never had plenary possession of the throne, as was the case of the house of York during the three reigns of the line of Lancaster, is not a king within this statute against whom treasons may be committed.[l] And a very sensible writer on the c' wn law carries the point of possession so far, that he holds[m] that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him; a doctrine which he grounds upon the statute 11 Henry VII, c. 1 (Treason, 1495), which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture which do assist and obey a king *de facto*. But, in truth, this seems to be confounding all notions of right and wrong, and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power (though not the name) of king, the people were bound in duty to hinder the son's restoration: and were the king of Poland or Morocco to invade this kingdom, and by any means to get possession of the crown (a term, by the way, of very loose and indistinct signification), the subject would be bound by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry [78] the Seventh does by no means *command* any opposition to a king *de jure*, but *excuses* the obedience paid to a king *de facto*. When, therefore, a usurper is in possession, the subject is *excused* and *justified* in obeying and giving him assistance: otherwise, under a usurpation, no man could be safe, if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay, further, as the mass of people are imperfect judges of title, of which in all cases possession is *prima facie* evidence, the law compels no man to yield obedience to that prince whose right is by want of possession rendered uncertain and disputable till Providence shall think fit to interpose in his favor and decide the am-

[l] 3 Inst. 7. 1 Hal. P. C. 104. [m] 1 Hawk. P. C. 36.

biguous claim: and therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. Lastly, a king who has resigned his crown, such resignation being admitted and ratified in parliament, is, according to Sir Matthew Hale, no longer the object of treason.[n] And the same reason holds in case a king abdicates the government, or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution: since, as was formerly observed,[o] when the fact of abdication is once established and determined by the proper judges, the consequence necessarily follows that the throne is thereby vacant, and he is no longer king.

§ 77. **(a) Meaning of "compassing."**—Let us next see what is a *compassing* or *imagining* the death of the king, etc. These are synonymous terms; the word *compass* signifying the purpose or design of the mind or will,[p] and not, as in common speech, the carrying such design to effect.[q] And therefore an accidental stroke, which may mortally wound the sovereign, *per infortunium* (by mischance), without any traitorous intent, is no treason; as was the case of Sir Walter Tyrrel, who, by the command of King William Rufus, [79] shooting at a hart, the arrow glanced against a tree and killed the king upon the spot.[r] But, as this compassing or imagination is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open, or *overt*, act. And yet the tyrant Dionysius is recorded[s] to have executed a subject barely for dreaming that he had killed him, which was held for a sufficient proof that he had thought thereof in his waking hours. But such is not the temper of the English law, and therefore in this, and the three next species of treason, it is necessary that there appear an open or *overt* act of a more full and explicit nature to convict the traitor upon. The statute expressly requires that the accused "be thereof upon sufficient

n 1 Hal. P. C. 104.

o Book I. pag. 212.

p By the ancient law *compassing* or intending the death of any man, demonstrated by some evident fact, was equally penal as homicide itself. (3 Inst. 5.)

q 1 Hal. P. C. 107.

r 3 Inst. 6.

s Plutarch. *in vit.*

proof attainted of some open act by men of his own condition." Thus, to provide weapons or ammunition for the purpose of killing the king is held to be a palpable overt act of treason in imagining his death.[t] To conspire to imprison the king by force, and move towards it by assembling a company, is an overt act of compassing the king's death;[u] for all force used to the person of the king, in its consequence may tend to his death, and is a strong presumption of something worse intended than the present force, by such as have so far thrown off their bounden duty to their sovereign: it being an old observation that there is generally but a short interval between the prisons and the graves of princes. There is no question, also, but that taking any measures to render such treasonable purposes effectual, as assembling and consulting on the means to kill the king, is a sufficient overt act of high treason.[w]

§ 78. **(b) Treasonable words.**—How far mere *words*, spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. We have two instances in the reign of Edward the Fourth [80] of persons executed for treasonable 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 favorite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly. These were esteemed hard cases; and the Chief Justice Markham rather chose to leave his place than assent to the latter judgment.[x] But now it seems clearly to be agreed that, by the common law and the statute of Edward III, words spoken amount only to a high misdemeanor, and no treason. For they may be spoken in heat, without any intention, or be mistaken, perverted or misremembered by the hearers; their meaning depends always on their connection with other words and things; they may signify differently even according to the tone of voice with which they are delivered; and sometimes silence itself is more expressive than any discourse. As, therefore, there can be nothing more equivocal

t 3 Inst. 12.
u 1 Hal. P. C. 109.
w 1 Hawk. P. C. 38. 1 Hal. P. C. 119.
x 1 Hal. P. C. 115.

and ambiguous than words, it would indeed be unreasonable to make them amount to high treason. And accordingly, in 4 Car. I (1628), on a reference to all the judges concerning some very atrocious words spoken by one Pyne, they certified to the king "that though the words were as wicked as might be, yet they were no treason: for, unless it be by some particular statute, no words will be treason."[y] If the words be set down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of treason, for *scribere est agere* (to write is to act). But even in this case the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason: particularly in the cases of one Peacham, a clergyman, for treasonable passages in a sermon never preached;[z] and of Algernon Sidney, for some papers found in his closet, which had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence as overt [81] acts of that treason, which was specially laid in the indictment.[a] But being merely speculative, without any intention (so far as appeared) of making any public use of them, the convicting the authors of treason upon such an insufficient foundation has been universally disapproved. Peacham was therefore pardoned, and though Sidney indeed was executed, yet it was to the general discontent of the nation, and his attainder was afterwards reversed by parliament. There was, then, no manner of doubt but that the publication of such a treasonable writing was a sufficient overt act of treason at the common law;[b] though of late even that has been questioned.

§ 79. (2) Violation of the king's companion, etc.—The second species of treason is, "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 is understood 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 the Eighth

y Cro. Car. 125.
z *Ibid.*
a Foster. 198.
b 1 Hal. P. C. 118. 1 Hawk. P. C. 38.

by fatal experience evinced. The plain intention of this law is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious, and therefore, when this reason ceases, the law ceases with it; for to violate a queen or princess dowager is held to be no treason:[c] in like manner as, by the feudal law, it was a felony and attended with a forfeiture of the fief if the vassal vitiated the wife or daughter of his lord;[d] but not so, if he only vitiated his widow.*

§ 80. **(3) Levying war against the king.**—The third species of treason is, "if a man do levy war against our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretense to reform religion, or the laws, or to remove evil counselors, or other grievances, whether real or pretended.[f] For the law does not, neither can it, permit [82] any private man, or set of men, to interfere forcibly in matters of such high importance, especially as it has established a sufficient power, for these purposes, in the high court of parliament; neither does the constitution justify any private or particular resistance for private or particular grievances; though in cases of national oppression the nation has very justifiably risen as one man to vindicate the original contract subsisting between the king and his people. To resist the king's forces by defending a castle against them is a levying of war; and so is an insurrection with an avowed design to pull down *all* inclosures, *all* brothels, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority.[g] But a tumult with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a riot; this being no general defiance of public government. So, if two subjects quarrel and levy war against each other (in that spirit of private war which prevailed all over Europe[h] in the early feudal times), it is only a great riot and contempt, and no treason. Thus it happened between the Earls of Hereford and Gloucester in 20 Edward I (1292), who

c 3 Inst. 9.
d Feud. l. 1. t. 5.
e *Ibid.* t. 21.
f 1 Hawk. P. C. 37.
g 1 Hal. P. C. 132.
h Robertson Ch. V. i. 45. 286.

raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives; yet this was held to be no high treason, but only a great misdemeanor.[i] A bare conspiracy to levy war does not amount to this species of treason; but (if particularly pointed at the person of the king or his government) it falls within the first, of compassing or imagining the king's death.[j]

§ 81. **(4) Adhering to the king's enemies.**—"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 also declared guilty of high treason. This must likewise be proved by some overt act, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the [83] like.[k] By enemies are here understood the subjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving them any assistance is also clearly treason; either in the light of adhering to the public enemies of the king and kingdom,[l] or else in that of levying war against his majesty. And, most indisputably, the same acts of adherence or aid which (when applied to foreign enemies) will constitute treason under this branch of the statute will (when afforded to our own fellow-subjects in actual rebellion at home) amount to high treason under the description of levying war against the king.[m] But to relieve a rebel, fled out of the kingdom, is no treason: for the statute is taken strictly, and a rebel is not an *enemy;* an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England.[n] And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or

i 1 Hal. P. C. 136.
j 3 Inst. 9. Foster. 211. 213.
k 3 Inst. 10.
l Foster. 219.
m *Ibid.* 216.
n 1 Hawk. P. C. 38.

enemies *in* the kingdom, provided he leaves them whenever he hath a safe opportunity.[o]

§ 82. **(5) Counterfeiting the king's seal.**—"If a man counterfeit the king's great or privy seal," this is also high treason. But if a man takes wax bearing the impression of the great seal off from one patent and fixes it to another, this is held to be only an abuse of the seal, and not a counterfeiting of it: as was the case of a certain chaplain who in such manner framed a dispensation for nonresidence. But the knavish artifice of a lawyer much exceeded this of the divine. One of the clerks in chancery glued together two pieces of parchment, on the uppermost of which he wrote a patent, to which he regularly obtained the great seal, the label going through both the skins. He [84] then dissolved the cement, and taking off the written patent, on the blank skin wrote a fresh patent, of a different import from the former, and published it as true. This was held no counterfeiting of the great seal, but only a great misprision; and Sir Edward Coke[p] mentions it with some indignation that the party was living at that day.

§ 83. **(6) Counterfeiting the king's money.**—The sixth species of treason under this statute is "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 payment withal."[4] As to the first branch, counterfeiting the king's money; this is treason, whether the false money be uttered in payment or not. Also if the king's own minters alter the standard or alloy established by law, it is treason. But gold and silver money only are held to be within

[o] Foster. 216.

[p] 3 Inst. 16.

---

[4] Under the Treason Act of 1351 it was treason to "counterfeit the king's great or privy seal," and to "counterfeit the king's money." The first of these was, by the Forgery Act of 1861, now replaced by the Forgery Act of 1913, reduced to ordinary felony; and the second now ranks merely as the offense of coining.

In the United States, counterfeiting coin is a felony, Congress being given by the constitution, art. I, § 8, authority to "provide for the punishment of counterfeiting the securities and current coin of the United States."

this statute.[q] With regard, likewise, to the second branch, importing foreign counterfeit money, in order to utter it here; it is held that uttering it, without importing it, is not within the statute.[r] But of this we shall presently say more.

§ 84. (7) Slaying the chancellor, treasurer, or king's justices. The last species of treason ascertained by this 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."[5] These high magistrates, as they represent the king's majesty during the execution of their offices, are therefore for the time equally regarded by the law. But this statute extends only to the actual killing of them, and not to wounding, or a bare attempt to kill them. It extends, also, only to the officers therein specified, and therefore the barons of the exchequer, as such, are not within the protection of this act;[s] but the lord keeper or commissioners of the great seal now seem to be within it, by virtue of the statutes 5 Elizabeth, c. 18 (Great Seal, 1562), and 1 W. & M., c. 21 (Great Seal, 1689).

§ 85. (8) Merits of the Statute of Treason.—[85] Thus careful was the legislature, in the reign of Edward the Third, to specify and reduce to a certainty the vague notions of treason that had formerly prevailed in our courts. But the act does not stop here, but goes on. "Because other like cases of treason may happen in time to come, which cannot be thought of nor declared at present, it is accorded, that if any other case supposed to be treason, which is not above specified, doth happen before any judge; the judge shall tarry without going to judgment of the treason, till the cause be showed and declared before the king and his parliament, whether it ought to be judged treason, or other felony." Sir Matthew Hale[t] is very high in his encomiums on

q 1 Hawk. P. C. 42.
r *Ibid.* 43.
s 1 Hal. P. C. 231.
t 1 Hal. P. C. 259.

5 It is supposed that the principles embodied in this provision of the Treason Act of 1351 would apply to the judges of the high court of justice, at least to those of the king's bench division.

the great wisdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this act, by not suffering them to run out (upon their own opinions) into constructive treasons, though in cases that seem to them to have a like parity of reason, but reserving them to the decision of parliament. This is a great security to the public, the judges, and even this sacred act itself, and leaves a weighty *memento* to judges to be careful, and not over-hasty in letting in treasons by construction or interpretation, especially in new cases that have not been resolved and settled. 2. He observes that as the authoritative decision of these *casus omissi* (cases unsettled) is reserved to the king and parliament, the most regular way to do it is by a new declarative act: and therefore the opinion of any one or of both houses, though of very respectable weight, is not that solemn declaration referred to by this act, as the only criterion for judging of future treasons.

§ 86. c. Statutes of treason under Richard II, Henry IV, Henry VIII and Mary.—In consequence of this power, not indeed originally granted by the statute of Edward III, but constitutionally inherent in every subsequent parliament (which cannot be abridged of any rights by the act of a precedent one), the legislature was extremely liberal in declaring new treasons in the unfortunate reign of King Richard the Second: as, particularly, the killing of an ambassador was made so, [86] which seems to be founded upon better reason than the multitude of other points that were then strained up to this high offense: the most arbitrary and absurd of all which was by the statute 21 Richard II, c. 3 (1397), which made the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it, high treason. And yet so little effect have over-violent laws to prevent any crime, that within two years afterwards this very prince was both deposed and murdered. And in the first year of his successor's reign, an act was passed [u] reciting "that no man knew how he ought to behave himself, to do, speak, or say, for doubt of such pains of treason: and therefore it was accorded that in no time to come any treason be judged, otherwise than was ordained

[u] Stat. 1 Hen. IV. c. 10 (1399).

by the statute of King Edward the Third." This at once swept away the whole load of extravagant treasons introduced in the time of Richard the Second.

But afterwards, between the reign of Henry the Fourth and Queen Mary, and particularly in the bloody reign of Henry the Eighth, the spirit of inventing new and strange treasons was revived, among which we may reckon the offenses of clipping money; breaking prison or rescue, when the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welchmen; counterfeiting foreign coin; willful 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 license, 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* (manifested by any overt act) the king to have been lawfully married to Anne of Cleve; derogating from the king's royal style and title; impugning his supremacy; and assembling riotously to the [87] number of twelve, and not dispersing upon proclamation: all which new-fangled treasons were totally abrogated by the statute 1 Mar., c. 1 (Treason, 1553), which once more reduced all treasons to the standard of the statute 25 Edward III (1351). Since which time, though the legislature has been more cautious in creating new offenses of this kind, yet the number is very considerably increased, as we shall find upon a short view.

§ 87. d. New treasons by later statutes.—These new treasons, created since the statute 1 Mar., c. 1 (1553), and not comprehended under the description of statute 25 Edward III (1351), I shall comprise under three heads: 1. Such as relate to papists. 2. Such as relate to falsifying the coin or other royal signatures. 3. Such as are created for the security of the Protestant succession in the house of Hanover.*

*The student will notice that all these treasons have never been such in this country. Even when enacted before its settlement (4 Jac. I—1606) they must be held to be inconsistent with its circumstances.—HAMMOND.

§ 88. (1) Relating to papists.—The first species, relating to *papists*, was considered in a preceding chapter, among the penalties incurred by that branch of nonconformists to the national church; wherein we have only to remember that by statute 5 Elizabeth, c. 1 (Supremacy of the Crown 1562), to defend the pope's jurisdiction in this realm is, for the first time, a heavy misdemeanor, and, if the offense be repeated, it is high treason. Also by statute 27 Elizabeth, c. 2 (Jesuits, 1584), if any popish priest, born in the dominions of the crown of England, shall come over hither from beyond the seas, unless driven by stress of weather,[w] and departing in a reasonable time,[x] or shall tarry here three days without conforming to the church, he is guilty of high treason. And by statute 3 Jac. I, c. 4 (Popish Recusants, 1605), if any natural-born subject be withdrawn from his allegiance, and reconciled to the pope or See of Rome, or any other prince or state, both he and all such as procure such reconciliation shall incur the guilt of high treason. These were mentioned under the division before referred to, as spiritual offenses, and I now repeat them as temporal ones also: the reason of distinguishing these overt acts of popery from all others, by setting the mark of high treason upon them, being certainly on a civil, and not on a religious, account. For every popish priest of course renounces his allegiance to his [88] temporal sovereign upon taking orders; that being inconsistent with his new engagements of canonical obedience to the pope: and the same may be said of an obstinate defense of his authority here, or a formal reconciliation to the See of Rome, which the statute construes to be a withdrawing from one's natural allegiance, and therefore, besides being reconciled "to the pope," it also adds, "or any other prince or state."

§ 89. (2) Relating to the coin and royal signature.—With regard to treasons relative to the *coin* or other *royal signatures*, we may recollect that the only two offenses respecting the coinage which are made treason by the statute 25 Edward III (1351), are the actual counterfeiting the gold and silver coin of this kingdom, or the importing such counterfeit money with intent to utter it.

w Sir. T. Raym. 377. x Latch. 1.

knowing it to be false.[6] But these not being found sufficient to restrain the evil practices of coiners and false moneyers, other statutes have been since made for that purpose. The crime itself is made a species of high treason; as being a breach of allegiance, by infringing the king's prerogative, and assuming one of the attributes of the sovereign, to whom alone it belongs to set the value and denomination of coin made at home, or to fix the currency of foreign money: and besides, as all money which bears the stamp of the kingdom is sent into the world upon the public faith, as containing metal of a particular weight and standard, whoever falsifies this is an offender against the state, by contributing to render that public faith suspected. And upon the same reasons, by a law of the Emperor Constantine,[y] false coiners were declared guilty of high treason, and were condemned to be burnt alive: as, by the laws of Athens,[z] all counterfeiters, debasers and diminishers of the current coin were subjected to capital punishment. However, it must be owned that this method of reasoning is a little overstrained, counterfeiting or debasing the coin being usually practiced rather for the sake of private and unlawful lucre than out of any disaffection to the sovereign. And [89] therefore both this and its kindred species of treason, that of counterfeiting the seals of the crown or other royal signatures, seem better denominated by the later civilians a branch of the *crimen falsi* or forgery (in which they are followed by Glanvill,[a] Bracton,[b] and Fleta[c]) than by Constantine and our Edward the Third, a species of the *crimen læsæ majestatis* or high treason. For this confounds the distinction and proportion of offenses; and, by affixing the same ideas of guilt upon the man who coins a leaden groat and him who assassinates his sovereign, takes off from that horror which ought to attend the very mention of the crime of high treason, and makes

y C. 9. 24. 2. Cod. Theod. de Falsa. moneta, l. 9.

z Pott. Ant. l. 1. c. 26.

a l. 14. c. 7.

b l. 3. c. 3. §§ 1 & 2.

c l. 1. c. 22.

---

6 The offenses relating to the coinage of the realm or to foreign coin are now governed by the Coinage Offenses Act, 1861. For its provisions, see 4 Stephen, Comm. 131.

it more familiar to the subject. Before the statute 25 Edward III the offense of counterfeiting the coin was held to be only a species of petit treason,[d] but subsequent acts in their new extensions of the offense have followed the example of that statute, and have made it equally high treason with an endeavor to subvert the government, though not quite in its punishment.

In consequence of the principle thus adopted the statute 1 Mar., c. 1 (Treason, 1553), having at one stroke repealed all intermediate treasons created since the 25 Edward III, it was thought expedient by statute 1 Mar., st. 2, c. 6 (Treason, 1553), to revive two species thereof, *viz.*: 1. That if any person falsely forge or counterfeit any such kind of coin of gold or silver as is not the proper coin of this realm, but shall be current within this realm by consent of the crown; or, 2. Shall falsely forge or counterfeit the sign manual, privy signet or privy seal: such offenses shall be deemed high treason. And by statute 1 & 2 P. & M., c. 11 (Counterfeit Coin, 1554), if any persons do bring into this realm such false or counterfeit foreign money, being current here, knowing the same to be false, with intent to utter the same in payment, they shall be deemed offenders in high treason. The money referred to in these statutes must be such as is absolutely current here, in all payments, by the king's proclamation; of which there is none at present, Portugal money being only taken by consent, as approaching the nearest to our standard, [90] and falling in well enough with our divisions of money into pounds and shillings: therefore, to counterfeit it is not high treason, but another inferior offense. Clipping or defacing the genuine coin was not hitherto included in these statutes, though an offense equally pernicious to trade, and an equal insult upon the prerogative, as well as personal affront to the sovereign; whose very image ought to be had in reverence by all loyal subjects. And therefore, among the Romans,[e] defacing or even melting down the emperor's statues was made treason by the Julian law, together with other offenses of the like sort, according to that vague conclusion, "*aliudve quid simile si admisse int* (or if they committed anything of a like kind)." And now, in England, by statute 5 Elizabeth, c. 11 (Clipping Coin,

[d] 1 Hal. P. C. 224.

[e] Ff. 48. 4. 6.

1562), clipping, washing, rounding or filing, for wicked gain's sake, any of the money of this realm, or other money suffered to be current here, shall be adjudged high treason; and by statute 18 Elizabeth, c. 1 (Coin, 1575) (because "the same law, being penal, ought to be taken and expounded strictly according to the words thereof, and the like offenses not by any equity to receive the like punishment or pains"), the same species of offense is therefore described in other more general words; *viz.*, impairing, diminishing, falsifying, scaling, and lightening, and made liable to the same penalties. By statute 8 & 9 W. III, c. 26 (Coin, 1696), made perpetual by 7 Ann., c. 25 (Perpetuation of Statutes, 1708), whoever, without proper authority, shall knowingly make or mend, or assist in so doing, or shall buy, sell, conceal, hide or knowingly have in his possession any implements of coinage specified in the act, or other tools or instruments proper only for the coinage of money, or shall convey the same out of the king's mint, he, together with his counselors, procurers, aiders and abettors, shall be guilty of high treason: which is by much the severest branch of the coinage law. The statute goes on further, and enacts, that to mark any coin on the edges with letters, or otherwise, in imitation of those used in the mint, or to color, gild or case over any coin resembling the current coin, or even round blanks of base metal, shall be construed high treason. But all prosecutions on this act are to be commenced within *three* [91] months after the commission of the offense, except those for making or mending any coining tool or instrument, or for marking money round the edges, which are directed to be commenced within *six* months after the offense committed.[t] And, lastly, by statute 15 & 16 George II, c. 28 (Counterfeiting Coin, 1741), if any person colors or alters any shilling or sixpence, either lawful or counterfeit, to make them respectively resemble a guinea or half guinea, or any halfpenny or farthing to make them respectively resemble a shilling or sixpence, this is also high treason: but the offender shall be pardoned in case (being out of prison) he discovers and convicts two other offenders of the same kind.

§ 90. (3) For securing the Protestant succession.—The other new species of high treason is such as is created for the secur-

[t] Stat. 7 Ann. c. 25 (1708).

ity of the *Protestant succession*, over and above such treasons against the king and government as were comprised under the statute 25 Edward III. For this purpose, after the act of settlement was made, for transferring the crown to the illustrious house of Hanover, it was enacted by statute 13 & 14 W. III, c. 3 (1701), that the pretended Prince of Wales, who was then thirteen years of age, and had assumed the title of king James III, should be attainted of high treason; and it was made high treason for any of the king's subjects by letters, messages or otherwise to hold correspondence with him, or any person employed by him, or to remit any money for his use, knowing the same to be for his service. And by the statute 17 George II, c. 39 (Treason, 1743), it is enacted, that if any of the sons of the pretender shall land or attempt to land in this kingdom, or be found in Great Britain, or Ireland, or any of the dominions belonging to the same, he shall be judged attainted of high treason, and suffer the pains thereof. And to correspond with them, or to remit money for their use, is made high treason in the same manner as it was to correspond with the father. By the statute 1 Ann., st. 2, c. 17 (Treason, 1702), if any person shall endeavor to deprive or hinder any person, being the next in succession to the crown according to the limitations of the act of settlement, from succeeding to the crown, and shall maliciously and directly attempt the same by any [92] overt act, such offense shall be high treason. And by statute 6 Ann., c. 7 (1706), if any person shall maliciously, advisedly and directly, by writing or printing, maintain and affirm 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, such persons shall be guilty of high treason. This offense (or indeed maintaining this doctrine in any wise, that the king and parliament cannot limit the crown) was once before made high treason, by statute 13 Elizabeth c. 1 (Treason, 1571), during the life of that princess. And after her decease it continued a high misdemeanor, punishable with forfeiture of goods and chattels, even in the most flourishing era of indefeasible hereditary right and *jure divino* (by divine right) succession. But it was again raised into high treason, by

the statute of Anne before mentioned, at the time of a projected invasion in favor of the then pretender, and upon this statute one Matthews, a printer, was convicted and executed in 1719, for printing a treasonable pamphlet entitled *Vox populi vox Dei* (the voice of the people is the voice of God)."[g]

Thus much for the crime of treason, or *læsæ majestatis*, in all its branches; which consists, we may observe, originally, in grossly counteracting that allegiance which is due from the subject by either birth or residence: though, in some instances, the zeal of our legislators to stop the progress of some highly pernicious practices has occasioned them a little to depart from this its primitive idea. But of this enough has been hinted already: it is now time to pass on from defining the crime to describing its punishment.

§ 91. **e. Punishment of high treason.**—The punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually (by connivance,[h] at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement.[i] 2. That he [93] be hanged by the neck, and then cut down alive. 3. That his entrails be taken out, and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal.[j7]

The king may, and often doth, discharge all the punishment, except beheading, especially where any of noble blood are attainted. For, beheading being part of the judgment, that may be executed, though all the rest be omitted by the king's command.[k] But where

g State Tr. IX. 680.

h 33 Ass. pl. 7.

i 1 Hal. P. C. 382.

j This punishment for treason, Sir Edward Coke tells us, is warranted by divers examples in Scripture; for Joab was drawn, Bithan was hanged, Judas was embowelled, and so of the rest. (3 Inst. 211.)

k 1 Hal. P. C. 351.

---

7 By the Forfeiture Act, 1870, the punishment of high treason is that the traitor shall be hanged by the neck until dead; unless the king, with proper formalities, substitutes death by decapitation.

beheading is no part of the judgment, as in murder or other felonies, it hath been said that the king cannot change the judgment, although at the request of the party, from one species of death to another.[1] But of this we shall say more hereafter.[m]

In the case of coining, which is a treason of a different complexion from the rest, the punishment is milder for male offenders; being only to be drawn, and hanged by the neck till dead.[n] But in treasons of every kind the punishment of women is the same, and different from that of men. For, as the decency due to the sex forbids the exposing and publicly mangling their bodies, their sentence (which is to the full as terrible to sensation as the other) is to be drawn to the gallows, and there to be burned alive.[o]

The consequences of this judgment (attainder, forfeiture and corruption of blood) must be referred to the latter end of this book, when we shall treat of them all together, as well in treason as in other offenses.

1 3 Inst. 52.
m See c. 32.
n 1 Hal. P. C. 351.
o 2 Hal. P. C. 399.

[94]

CHAPTER THE SEVENTH.

OF FELONIES, INJURIOUS TO THE KING'S PREROGATIVE.

§ 92. II. Felonies injurious to the king's prerogative.—As, according to the method I have adopted, we are next to consider such felonies as are more immediately injurious to the king's prerogative, it will not be amiss here, at our first entrance upon this crime, to inquire briefly into the nature and meaning of *felony*, before we proceed upon any of the particular branches into which it is divided.

§ 93. 1. Nature and meaning of felony.—Felony, in the general acceptation of our English law, comprises every species of crime which occasioned at common law the forfeiture of lands or goods. This most frequently happens in those crimes for which a capital punishment either is or was liable to be inflicted: for those felonies which are called clergyable, or to which the benefit of clergy extends, were anciently punished with death in all lay, or unlearned, offenders, though now by the statute law that punishment is for the first offense universally remitted. Treason itself, says Sir Edward Coke,[a] was anciently comprised under the name of felony: and in confirmation of this we may observe that the statute of treasons, 25 Edward III, c. 2 (1351), speaking of some dubious crimes, directs a reference to parliament, [95] that it may be there adjudged "whether they be treason or *other* felony." All treasons, therefore, strictly speaking, are felonies, though all felonies are not treason. And to this, also, we may add, that not only all offenses, now capital, are in some degree or other felony: but this is likewise the case with some other offenses, which are not punished with death; as suicide, where the party is already dead; homicide by chance-medley, or in self-defense; and petit larceny or pilfering; all which are, strictly speaking, felonies, as they subject the committers of them to forfeitures. So that upon the whole the only adequate definition of felony seems to be that which is before laid down, *viz.*, an offense which occasions a total forfeiture

[a] 3 Inst. 15.

of either lands or goods, or both, at the common law, and to which capital or other punishment may be superadded, according to the degree of guilt.

§ 94. 2. Feudal origin of the word "felony."—To explain this matter a little further: the word *felony*, or *felonia*, is of undoubted feudal original, being frequently to be met with in the books of feuds, etc.; but the derivation of it has much puzzled the juridical lexicographers, Prateus, Calvinus, and the rest: some deriving it from the Greek, φηλος, an imposter or deceiver, others from the Latin, *fallo, fefelli* (to deceive), to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has given us a still stranger etymology;[b] that it is *crimen animo felleo perpetratum*, with a bitter or gallish inclination. But all of them agree in the description that it is such a crime as occasions a forfeiture of all the offender's lands or goods. And this gives great probability to Sir Henry Spelman's Teutonic or German derivation of it,[c] in which language, indeed, as the word is clearly of feudal original, we ought rather to look for its signification than among the Greeks and Romans. *Fe-lon*, then, according to him, is derived from two northern words: fee, which signifies (we well know), the fief, feud, or beneficiary estate, and lon, which signifies price or value. Felony is therefore the same as *pretium feudi*, the consideration [96] for which a man gives up his fief; as we say in common speech, such an act is as much as your life, or estate, is worth. In this sense it will clearly signify the feudal forfeiture, or act by which an estate is forfeited, or escheats to the lord.

To confirm this we may observe that it is in this sense, of forfeiture to the lord, that the feudal writers constantly use it. For all those acts,[e] whether of a criminal nature or not, which at this day are generally forfeitures of copyhold estates,[d] are styled *feloniæ* in the feudal law: "*scilicet, per quas feudum amittitur* (that is, by which the fee is lost)."[e] As, "*si domino deservire noluerit;*[f] *si per annum et diem cessaverit in petenda investitura;*[g] *si dominum ejuravit, i. e., negavit se a domino feudum habere;*[h]

b 1 Inst. 391.
c Glossar, tit. Felon.
d See Book II. pag. 284.
e Feud. l. 2. t. 16. in calc.
f Feud. l. 1. t. 21.
g Feud. l. 2. t. 24.
h Feud. l. 2. t. 34. l. 2. t. 26. § 3.

si a domino, in jus eum vocante, ter citatus non comparuerit (if he be unwilling to serve his lord; if for a year and a day he has failed to demand for possession; if he deny his master upon oath, i. e., deny that he holds his feud of his lord, or if being thrice called in court he does not appear);[1] all these, with many others, are still causes of forfeiture in our copyhold estates, and were denominated felonies by the feudal constitutions. So, likewise, injuries of a substantial or criminal nature were denominated felonies, that is, forfeitures: as assaulting or beating the lord;[k] vitiating his wife or daughter, "*si dominum cucurbitaverit, i. e., cum uxore ejus concubuerit* (if he dishonor his lord, that is, lie with his wife)";[l] all these are esteemed felonies, and the latter is expressly so denominated, "*si fecerit feloniam, dominum forte cucurbitando* (if he commit felony, as by dishonoring his lord)."[m] And as these contempts, or smaller offenses, were felonies or acts of forfeiture, of course greater crimes, as murder and robbery, fell under the same denomination. On the other hand, the lord might be guilty of felony, or forfeit his seigniory to the vassal, by the same acts as the vassal would have forfeited his feud to the lord. "*Si dominus commisit feloniam, per quam vasallus amitteret feudum si eam commiserit in dominum, feudi proprietatem etiam dominus perdere debet* (If the lord commit a felony for which a vassal would lose his fee, had he committed such an offense against his lord, the lord ought also (in such a case) to lose his seigniory)."[n] One instance given of this sort of felony in the lord is beating the servant of his vassal, so as that he loses his service; which seems merely in the nature of a civil [97] injury, so far as it respects the vassal. And all these felonies were to be determined "*per laudamentum sive judicium parium suorum* (by the verdict or judgment of his peers)" in the lord's court; as with us forfeitures of copyhold lands are presentable by the homage in the court-baron.

§ 95. **3. Forfeiture a consequence of all felonies.**—Felony, and the act of forfeiture to the lord, being thus synonymous terms in the feudal law, we may easily trace the reason why, upon the intro-

[1] Feud. l. 2. t. 22.
[k] Feud. l. 2. t. 24, § 2.
[l] Feud. l. 1. t. 5.
[m] Feud. l. 2. t. 38. Britton. l. 1. c. 22.
[n] Feud. l. 2. t. 26 & 47.

duction of that law into England, those crimes which induced such forfeiture or escheat of lands (and, by a small deflexion from the original sense, such as induced the forfeiture of goods also) were denominated felonies. Thus it was said that suicide, robbery and rape were felonies; that is, the consequence of such crimes was forfeiture; till by long use we began to signify by the term of felony the actual crime committed, and not the penal consequence. And upon this system only can we account for the cause why treason in ancient times was held to be a species of felony, *viz.*, because it induced a forfeiture.

§ 96. 4. Capital punishment not necessary element of felony. Hence it follows that capital punishment does by no means enter into the true idea and definition of felony.[1] Felony may be without inflicting capital punishment, as in the cases instanced of self-murder, excusable homicide and petit larceny; and it is possible that capital punishments may be inflicted and yet the offense be no felony; as in case of heresy by the common law, which, though capital, never worked any forfeiture of lands or goods,[o] an inseparable incident to felony. And of the same nature was the punishment of standing mute without pleading to an indictment, which at the common law was capital, but without any forfeiture, and therefore such standing mute was no felony. In short, the true criterion of felony is forfeiture;[2] for, as Sir Edward Coke justly observes,[p] in all felonies which are punishable with death, the offender loses all his lands in fee simple, and also his goods and chattels; in such as are not punishable, his goods and chattels only.

[o] 3 Inst. 43.

[p] 1 Inst. 391.

---

[1] Yet, by the common law, the idea of felony was in general associated with that of capital punishment. The Report of the Criminal Code Bill Commission (page 14) says: "The distinction between felony and misdemeanor was, in early times, nearly, though not absolutely, identical with the distinction between crimes punishable with death and crimes not so punishable; but the great changes which have taken place in our criminal law have made the distinction nearly, if not altogether, unmeaning."—STEPHEN, 4 Comm. (16th ed.), 8 n.

[2] By the Forfeiture Act, 1870, it was enacted that no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* should, save where the matter proceeds to outlawry, cause any forfeiture.

[98] The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offense felony, the law[q] implies that it shall be punished with death, *viz.*, by hanging, as well as with forfeiture, unless the offender prays the benefit of clergy, which all felons are entitled once to have, unless the same is expressly taken away by statute. And in compliance herewith, I shall for the future consider it also in the same light as a generical term, including all capital crimes below treason; having premised thus much concerning the true nature and original meaning of felony, in order to account for the reason of those instances I have mentioned, of felonies that are not capital, and capital offenses that are not felonies, which seem at first view repugnant to the general idea which we now entertain of felony, as a crime to be punished by death, whereas properly it is a crime to be punished by forfeiture, and to which death may, or may not be, though it generally is, superadded.[3]

§ 97. 5. Classes of felonies injurious to the king's prerogative. I proceed now to consider such felonies as are more immediately in-

[q] 1 Hawk. P. C. 107. 2 Hawk. P. C. 444.

---

3 **Felony as distinguished from minor crimes.**—In American law the term "felony" is used perhaps oftener to distinguish the higher class of offenses from misdemeanors than the word "crime" itself. In many states, indeed, "crime" or "public offense" is the generic term for all wrongs punished by the state, while "felony" and "misdemeanor" constitute the two species. The line between them is drawn by statutes, but these usually agree in ranking as felonies all crimes punishable by death or by imprisonment in a state prison, whether actually so punished or not; while those which subject the offender only to fine and imprisonment in a county jail, or to other minor punishments, are termed "misdemeanors." As the forfeiture of property for crime has now been done away with altogether, and capital punishment confined to a very few offenses, the disquisition of Blackstone on the original meaning of the word is of only historical interest, and the statutes of each state furnish the only safe criterion between the two kinds of offense.

Yet the importance of the distinction has not thus been diminished. The ancient common-law felonies, murder, rape, mayhem, arson, burglary, robbery and larceny, remain the typical forms of felony, although many common-law misdemeanors, such as embezzlement, perjury, bribery and newly-defined

jurious to the king's prerogative. These are, 1. Offenses relating to the coin, not amounting to treason. 2. Offenses against the king's council. 3. The offense of serving a foreign prince. 4. The offense of embezzling or destroying the king's armor or stores of war. To which may be added a fifth: 5. Desertion from the king's armies in time of war.*

§ 98. a. **Felonies relating to the coin.**—Offenses relating to the *coin*, under which may be ranked some inferior misdemeanors not amounting to felony, are thus declared by a series of statutes, which I shall recite in the order of time. And, first, by statute 27 Edward I, c. 3 (1299), none shall bring pollards and crockards, which were foreign coins of base metal, into the realm, on pain of forfeiture of life and goods. By statute 9 Edward III, st. 2 (Money, 1331), no sterling moneys shall be melted down, upon pain of forfeiture thereof. [99] By statute 17 Edward III (Money, 1343), none shall be so hardy to bring false and ill money into the realm, on pain of forfeiture of life and member by the persons importing and the searchers permitting such importation. By statute 3 Henry V, st. 1 (1415), to make, coin, buy or bring into the realm any gally-halfpence, suskins, or dotkins, in order to utter them, is felony; and knowingly to receive or pay either them or *blanks*[r] is forfeiture of an hundred shillings. By statute 14 Elizabeth, c. 3 (Coin, 1572), such as forge any foreign coin, although

*Of course none of these are common-law offenses in the United States. Those which are punishable here are so by statute.—HAMMOND.

r Stat. 2 Hen. VI. c. 9 (Currency, 1423).

---

offenses like seduction, have been added to the list, not by special provision that they shall be felonies, but by mere operation of the criterion above mentioned.

It is commonly held, too, that the constitutional guaranties of the rights of persons charged with crime, such as indictment by a grand jury and trial by a common-law jury of twelve men, personal presence in court, etc., apply with peculiar force to the entire class of felonies, old and new, while in cases of misdemeanor these may be changed by the legislature, or their application waived by the prisoner himself, with much greater freedom. But the decisions on these points vary much in the different states. (United States v. De Walt, 128 U. S. 393, 32 L. Ed. 485, 9 Sup. Ct. Rep. 111; State v. Reeves, 97 Mo. 668, 10 Am. St. Rep. 349, 10 S. W. 841.)—HAMMOND.

it be not made current here by proclamation, shall (with their aiders and abettors) be guilty of misprision of treason: a crime which we shall hereafter consider. By statute 13 & 14 Car. II, c. 31 (Coin, 1662), the offense of melting down any current silver money shall be punished with forfeiture of the same, and also the double value, and the offender, if a freeman of any town, shall be disfranchised; if not, shall suffer six months' imprisonment. By statute 6 & 7 W. III, c. 17 (Coin, 1694), if any person buys or sells, or knowingly has in his custody, any clippings or filings of the coin, he shall forfeit the same and 500*l*., one moiety to the king, and the other to the informer, and be branded in the cheek with the letter "R." By statute 8 & 9 W. III, c. 26 (Coin, 1696), if any person shall blanch, or whiten, copper for sale (which makes it resemble silver), or buy or sell or offer to sale any malleable composition, which shall be heavier than silver, and look, touch and wear like gold, but be beneath the standard, or if any person shall receive or pay any counterfeit or diminished milled money of this kingdom, not being cut in pieces (an operation which is expressly directed to be performed when any such money shall be produced in evidence, and which any person to whom any gold or silver money is tendered is empowered by statutes 9 & 10 W. III, c. 21 (Coin, 1697), 13 George III, c. 71 (Counterfeiting of Gold Coin, 1773), and 14 George III, c. 70 (Coin, 1774), to perform at his own hazard, and the officers of the exchequer and receivers general of the taxes are particularly required to perform), at a less rate than it shall import to be of (which demonstrates a consciousness of its baseness, and a fraudulent design), all such persons shall be guilty of felony, and may be prosecuted for the same at any time within three months after the offense committed. [100] But these precautions not being found sufficient to prevent the uttering of false or diminished money, which was only a misdemeanor at common law, it is enacted by statute 15 & 16 George II, c. 28 (Counterfeiting Coin, 1741), that if any person shall utter or tender in payment any counterfeit coin, knowing it so to be, he shall for the first offense be imprisoned six months, and find sureties for his good behavior for six months more; for the second offense, shall be imprisoned two years, and find sureties for two years longer; and, for the third offense, shall be guilty of felony without benefit of

clergy. Also if a person knowingly tenders in payment any counterfeit money, and at the same time has more in his custody, or shall, within ten days after, knowingly tender other false money, he shall be deemed a common utterer of counterfeit money, and shall for the first offense be imprisoned one year, and find sureties for his good behavior for two years longer, and for the second, be guilty of felony without benefit of clergy. By the same statute it is also enacted, that, if any person counterfeits the copper coin, he shall suffer two years' imprisonment, and find sureties for two years more. By statute 11 George III, c. 40 (Counterfeiting of Copper Coin, 1770), persons counterfeiting copper halfpence or farthings, with their abettors, or buying, selling, receiving or putting off any counterfeit copper money (not being cut in pieces or melted down) at a less value than it imports to be of, shall be guilty of single felony. And by a temporary statute (14 George III, c. 42, Light Silver Coin, 1774), if any quantity of money, exceeding the sum of five pounds, being or purporting to be the silver coin of this realm, but below the standard of the mint in weight or fineness, shall be imported into Great Britain or Ireland, the same shall be forfeited in equal moieties to the crown and prosecutor. Thus much for offenses relating to the coin, as well misdemeanors as felonies, which I thought it most convenient to consider in one and the same view.

§ 99. b. Felonies against the king's council.—Felonies against the king's *council*[s] are, first, by statute 3 Henry VII, c. 14 (King's Household, 1487), if any sworn servant of the king's household conspires or confederates to kill any lord of this [101] realm, or other person, sworn of the king's council, he shall be guilty of felony. Secondly, by statute 9 Ann., c. 16 (Assaulting a Privy Counselor, 1710), to assault, strike, wound or attempt to kill any privy counselor in the execution of his office, is made felony without benefit of clergy.

§ 100. c. Felonies in serving foreign states.—Felonies in *serving foreign states*, which service is generally inconsistent with allegiance to one's natural prince, are restrained and punished by

[s] See Book I. pag. 332.

statute 3 Jac. I, c. 4 (1605), which makes it felony for any person whatever to go out of the realm, to serve any foreign prince without having first taken the oath of allegiance before his departure. And it is felony also for any gentleman, or person of higher degree, or who hath borne any office in the army, to go out of the realm to serve such foreign prince or state, without previously entering into a bond with two sureties, not to be reconciled to the See of Rome, or enter into any conspiracy against his natural sovereign. And further, by statute 9 George II, c. 30 (Foreign Enlistment, 1735), enforced by statute 29 George II, c. 17 (Foreign Enlistment, 1755), if any subject of Great Britain shall enlist himself, or if any person shall procure him to be enlisted, in any foreign service, or detain or embark him for that purpose, without license under the king's sign manual, he shall be guilty of felony without benefit of clergy; but if the person so enlisted or enticed shall discover his seducer within fifteen days, so as he may be apprehended and convicted of the same, he shall be indemnified. By statute 29 George II, c. 17, it is moreover enacted that to serve under the French king as a military officer shall be felony without benefit of clergy, and to enter into the Scotch brigade, in the Dutch service, without previously taking the oaths of allegiance and abjuration, shall be a forfeiture of 500*l*.

§ 101. d. Felonies by embezzling or destroying the king's warlike stores.—Felony, by *embezzling* or *destroying* the king's *armor* or warlike *stores*, is, in the first place, so declared to be by statute 31 Elizabeth, c. 4 (Embezzlement, 1588), which enacts that if any person having the charge or custody of the king's armor, ordnance, ammunition or habiliments of war, or of any victual provided for victualing the king's soldiers or mariners, shall, either for gain or to impede his majesty's service, embezzle the same [102] to the value of twenty shillings, such offense shall be felony. And the statute 22 Car. II, c. 5 (Benefit of Clergy, 1670), takes away the benefit of clergy from this offense, and from stealing the king's naval stores to the value of twenty shillings. Other inferior embezzlements and misdemeanors that fall under this denomination are punished by statutes 9 & 10 W. III, c. 41 (Embezzlement of Public Stores, 1697), 1 George I, c. 25 (1714), 9 George I, c. 8

(1722), and 17 George II, c. 40 (Universities Wine Licenses, 1743), with fine, corporal punishment and imprisonment. And by statute 12 George III, c. 24 (Dock-yards Protection, 1772), to set on fire, burn or destroy any of his majesty's ships of war, whether built, building or repairing, or any of the king's arsenals, magazines, dock-yards, rope-yards or victualing offices, or materials thereunto belonging, or military, naval or victualing stores, or ammunition, or causing, aiding, procuring, abetting or assisting in such offense, shall be felony without benefit of clergy.

§ 102. e. Felonies for desertion.—Desertion from the king's armies in time of war, whether by land or sea, in England or in parts beyond the seas, is by the standing laws of the land (exclusive of the annual acts of parliament to punish mutiny and desertion), and particularly by statute 18 Henry VI, c. 19 (Soldiers, 1439), and 5 Elizabeth, c. 5 (Navy, 1562), made felony, but not without benefit of clergy. But by the statute 2 & 3 Edward VI, c. 2 (Soldiers, 1548), clergy is taken away from such deserters, and the offense is made triable by the justices of every shire. The same statutes punish other inferior military offenses with fines, imprisonment and other penalties.

[103]

CHAPTER THE EIGHTH.

OF PRÆMUNIRE.

§ 103. III. Præmunire.—A third species of offense more immediately affecting the king and his government, though not subject to capital punishment, is that of *præmunire*, so called from the words of the writ preparatory to the prosecution thereof: "*præmunire*[a] *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.[b]

§ 104. 1. Origin of præmunire.—It took its original from the exorbitant power claimed and exercised in England by the pope, which even in the days of blind zeal was too heavy for our ancestors to bear.

§ 105. 2. Relation of religion and civil government.—It may justly be observed that religious principles, which (when genuine and pure) have an evident tendency to make their professors better citizens as well as better men, have (when perverted and erroneous) been usually subversive of civil government, and been made both the cloak and the instrument of every pernicious design that can be harbored in the heart of man. The unbounded authority that was exercised by the druids in the west, under the influence of pagan superstition, and the terrible ravages committed by the Saracens in the east, to propagate the religion of Mahomet, both witness to the truth of that ancient universal observation, that in all ages and in all countries civil and ecclesiastical tyranny are mutually productive of each other. It is therefore the glory of the Church of England that she inculcates due obedience to lawful authority, and hath been (as her prelates on [104] a trying occasion once expressed it[c]) in her principles and practice ever most unquestionably loyal. The clergy of her persuasion, holy in their doctrines and unblemished in their lives and conversation, are also moderate in their ambition, and entertain just notions of the ties

[a] A barbarous word for *præmoneri.*

[b] Old Nat. Brev. 101. edit. 1534.

[c] Address to James II. 1687.

of society and the rights of civil government. As in matters of faith and morality they acknowledge no guide but the Scriptures, so, in matters of external polity and of private right, they derive all their title from the civil magistrate; they look up to the king as their head, to the parliament as their lawgiver, and pride themselves in nothing more justly than in being true members of the church emphatically *by law* established. Whereas the notions of ecclesiastical liberty, in those who differ from them, as well in one extreme as the other (for I here only speak of extremes), are equally and totally destructive of those ties and obligations by which all society is kept together, equally encroaching on those rights which reason and the original contract of every free state in the universe have vested in the sovereign power, and equally aiming at a distinct independent supremacy of their own where spiritual men and spiritual causes are concerned. The dreadful effects of such a religious bigotry, when actuated by erroneous principles, even of the Protestant kind, are sufficiently evident from the history of the Anabaptists in Germany, the covenanters in Scotland, and that deluge of sectaries in England who murdered their sovereign, overturned the church and monarchy, shook every pillar of law, justice and private property, and most devoutly established a kingdom of the saints in their stead. But these horrid devastations, the effects of mere madness or of zeal that was nearly allied to it, though violent and tumultuous, were but of a short duration. Whereas the progress of the papal policy, long actuated by the steady counsels of successive pontiffs, took deeper root, and was at length in some places with difficulty, in others never yet, extirpated. For this we might call to witness the black intrigues of the jesuits, so lately triumphant over Christendom, but now universally abandoned by even the Roman Catholic powers: but the subject of our present [105] chapter rather leads us to consider the vast strides which were formerly made in this kingdom by the popish clergy; how nearly they arrived to effecting their grand design; some few of the means they made use of for establishing their plan; and how almost all of them have been defeated or converted to better purposes, by the vigor of our free constitution and the wisdom of successive parliaments.

§ 106. **3. History of papal encroachments in England.**—The ancient British church, by whomsoever planted, was a stranger to the Bishop of Rome and all his pretended authority. But, the pagan Saxon invaders having driven the professors of Christianity to the remotest corners of our island, their own conversion was afterwards effected by Augustin the Monk and other missionaries from the court of Rome. This naturally introduced some few of the papal corruptions in point of faith and doctrine, but we read of no civil authority claimed by the pope in these kingdoms till the era of the Norman Conquest, when the then reigning pointiff having favored Duke William in his projected invasion, by blessing his host and consecrating his banners, he took that opportunity also of establishing his spiritual encroachments, and was even permitted so to do by the policy of the Conqueror, in order more effectually to humble the Saxon clergy and aggrandize his Norman prelates: prelates who, being bred abroad in the doctrine and practice of slavery, had contracted a reverence and regard for it, and took a pleasure in riveting the chains of a free-born people.

The most staple foundation of legal and rational government is a due subordination of rank and a gradual scale of authority, and tyranny also itself is most surely supported by a regular increase of despotism, rising from the slave to the sultan: with this difference, however, that the measure of obedience in the one is grounded on the principles of socicty, and is extended no further than reason and necessity will warrant; in the other, it is limited only by absolute will and pleasure, without permitting the inferior to examine the title upon which it is founded. More effectually, therefore, to enslave the consciences and minds of the people, the Romish [106] clergy themselves paid the most implicit obedience to their own superiors or prelates, and they, in their turns, were as blindly devoted to the will of the sovereign pontiff, whose decisions they held to be infallible and his authority coextensive with the Christian world. Hence his legates *a latere* (in attendance) were introduced into every kingdom of Europe, his bulls and decretal epistles became the rule both of faith and discipline, his judgment was the final resort in all cases of doubt or difficulty, his decrees were enforced by anathemas and spiritual censures, he dethroned even kings that were refractory, and denied to whole kingdoms (when

undutiful) the exercise of Christian ordinances and the benefits of the gospel of God.

But, though the being spiritual head of the church was a thing of great sound, and of greater authority, among men of conscience and piety, yet the court of Rome was fully apprised that (among the bulk of mankind) power cannot be maintained without property, and therefore its attention began very early to be riveted upon every method that promised pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchase of masses to redeem the souls of the deceased. New-fangled offenses were created, and indulgences were sold to the wealthy, for liberty to sin without danger. The canon law took cognizance of crimes, enjoined penance *pro salute animæ* (for the safety of the soul), and commuted that penance for money. Nonresidence and pluralities among the clergy and marriages among the laity related within the seventh degree were strictly prohibited by canon, but dispensations were seldom denied to those who could afford to buy them. In short, all the wealth of Christendom was gradually drained, by a thousand channels, into the coffers of the Holy See.

The establishment, also, of the feudal system in most of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince, gave a hint to the court of Rome for 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 [107] 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* (benefices); 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 nonpresentation 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; and the *primer seisins* of our military tenures, whereby the first profits of an heir's estate were cruelly extorted by his lord, gave birth to as cruel an exaction of first-fruits from the beneficed clergy. And the occasional aids and talliages, levied by the prince on his vassals, gave a handle to the pope to levy, by the means of his legates *a latere* (in attendance), peter-pence and other taxations.

At length the holy father went a step beyond any example of either emperor or feudal lord. He reserved to himself, by his own apostolical authority,[d] the presentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occasion, or on his journey thither, or back again, and moreover such, also, as became vacant by his promotion to a bishopric or abbey: "*etiamsi ad illa personæ consueverint et debuerint per electionem aut quemvis alium modum assumi* (although persons were accustomed, and ought to be admitted to them by election, or some other manner)." And this last, the canonists declared, was no detriment at all 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 papal *provisions* were the previous nomination to such benefices, by a kind of anticipation, before they became [108] actually void, though afterwards indiscriminately applied to any right of patronage exerted or usurped by the pope. In consequence of which the best livings were filled by Italian and foreign clergy, equally unskilled in and adverse to the laws and constitution of England. The very nomination to bishoprics, that ancient prerogative of the crown, was wrested from King Henry the First,* and afterwards from his successor, King John, and seemingly, indeed, conferred on the chapters belonging to each see, but by means of the frequent appeals to Rome, through the intricacy of

* This transaction, instead of a usurpation peculiar to England, was a part of that great controversy between church and state known as the investiture controversy which convulsed a large part of Europe. (See Freeman's Life of William Rufus.)—HAMMOND.

d Extrav. l. 3. t. 2. c. 13.

the laws which regulated canonical elections, was eventually vested in the pope. And, to sum up this head with a transaction most unparalleled and astonishing in its kind, Pope Innocent III had at length the effrontery to demand, and King John had the meanness to consent to, a resignation of his crown to the pope, whereby England was to become forever St. Peter's patrimony, and the dastardly monarch reaccepted his scepter from the hands of the papal legate, to hold as the vassal of the Holy See, at the annual rent of a thousand marks.

Another engine set on foot, or at least greatly improved, by the court of Rome, was a masterpiece of papal policy. Not content with the ample provision of tithes which the law of the land had given to the parochial clergy, they endeavored to grasp at the lands and inheritances 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 kingdom. To this end they introduced the monks of the Benedictine and other rules, men of sour and austere religion, separated from the world and its concerns by a vow of perpetual celibacy, yet fascinating the minds of the people by pretenses to extraordinary sanctity, while all their aim was to aggrandize the power and extend the influence of their grand superior, the pope. And as, in those times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they 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 [109] century after the Conquest, and endowed, not only with the tithes of parishes which were ravished from the secular clergy, but also with lands, manors, lordships and extensive baronies. And the doctrine inculcated was, that whatever was so given to, or purchased by, the monks and friars, was consecrated to God himself, and that to alienate or take it away was no less than the sin of sacrilege.

I might here have enlarged upon other contrivances, which 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 court from the temporal; the appointment of its judges by merely spiritual authority, without any interposition from the crown; the exclusive jurisdiction it claimed 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. But the history and progress of ecclesiastical courts,[e] as well as of purchases in mortmain,[f] have already been fully discussed in the preceding volumes, and we shall have an opportunity of examining at large the nature of the *privilegium clericale* in the progress of the present book. And therefore I shall only observe at present, that notwithstanding this plan of pontifical power was so deeply laid, and so indefatigably pursued by the unwearied politics of the court of Rome through a long succession of ages; notwithstanding it was polished and improved by the united endeavors of a body of men who engrossed all the learning of Europe for centuries together; notwithstanding it was firmly and resolutely executed by persons the best calculated for establishing tyranny and despotism, being fired with a bigoted enthusiasm (which prevailed not only among the weak and simple, but even among those of the best natural and acquired endowments), unconnected with their fellow-subjects, and totally indifferent what might befall that posterity to which they bore no endearing relation,—yet it vanished into [110] nothing when the eyes of the people were a little enlightened and they set themselves with vigor to oppose it. So vain and ridiculous is the attempt to live in society without acknowledging the obligations which it lays us under, and to affect an entire independence of that civil state, which protects us in all our rights, and gives us every other liberty, that only excepted of despising the laws of the community.

§ 107. 4. Statutes of præmunire: a. Edward I to Richard II. Having thus in some degree endeavored to trace out the original and subsequent progress of the papal usurpations in England, let us now return to the statutes of *præmunire*, which were framed to encounter this overgrown yet increasing evil. King Edward I, a wise and magnanimous prince, set himself in earnest to shake

[e] See Book III. pag. 61.

[f] See Book II. pag. 268.

off this servile yoke.[g] 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 papal bulls and processes, attacking Scotland in defiance of one, and seizing the temporalities of his clergy, who under pretense 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, according to the ancient law.[h] And in the thirty-fifth year of his reign was made the first statute against papal provisions, which, according to Sir Edward Coke,[i] is the foundation of all the subsequent statutes of *præmunire*, which we rank as an offense immediately against the king, because every encouragement of the papal power is a diminution of the authority of the crown.

In the weak reign of Edward the Second the pope again endeavored to encroach, but the parliament manfully withstood him, and it was one of the principal articles charged against that unhappy prince that he had given allowance to the bulls of the See of Rome. But Edward the Third was of a temper extremely different, and, to remedy these [111] inconveniences first by gentle means, he and his nobility 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 Nuremberg, A. D. 1323, had established a law against provisions[k]), 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 defense of the liberties of the crown. Hereupon more sharp and penal laws were devised against provisors,[l] which enact severally that the court of Rome shall present or collate to no

g Dav. 83, etc.

h Bro. Abr. tit. Coron. 115. Treason. 14. 5 Rep. part 1. fol. 12. 3 Ass. 19.

i 2 Inst. 583.

k Mod. Un. Hist. xxix. 293.

l Stat. 25 Ed. III. st. 6 (1351). 27 Edw. III. st. 1. c. 1 (Suing in Foreign Court, 1353). 38 Edw. III. st. 1. c. 4. & st. 2. c. 1, 2, 3, 4 (1364).

bishopric or living in England, and that whoever disturbs any patron in the presentation to a living by virtue of a papal provision, such provisor shall pay fine and ransom to the king at his will, and be imprisoned till he renounces such provision; and the same punishment is inflicted on such as cite the king, or any of his subjects, to answer in the court of Rome. And when the Holy See resented these proceedings, and Pope Urban V attempted to revive the vassalage and annual rent to which King John had subjected his kingdom, it was unanimously agreed by all the estates of the realm in parliament assembled, 40 Edward III (1366), that King John's donation was null and void, being without the concurrence of parliament, and contrary to his coronation oath; and all the temporal nobility and commons engaged, that if the pope should endeavor by process or otherwise to maintain these usurpations, they would resist and withstand him with all their power.[m]

In the reign of Richard the Second it was found necessary to sharpen and strengthen these laws, and therefore it was enacted by statutes 3 Richard II, c. 3 (Benefice, 1379), and 7 Richard II, c. 12 (Benefice, 1383), first, that no alien should be capable of letting his benefice to farm, in order to compel such as had crept in at least to reside on their preferments; and, afterwards, that no alien [112] should be capable to be presented to any ecclesiastical preferment, under the penalty of the statutes of provisors. By the statute 12 Richard II, c. 15 (Benefice, 1388), all liegemen of the king, accepting of a living by any foreign provision, are put out of the king's protection, and the benefice made void. To which the statute 13 Richard II, st. 2, c. 2 (Benefice 1389), adds banishment and forfeiture of lands and goods; and by c. 3 of the same statute, any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of provisors, shall be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member.

§ 108. b. The Statute of Præmunire: 16 Richard II (1392).— In the writ for the execution of all these statutes the words *præmunire facias*, being (as we said) used to command a citation of the party, have denominated in common speech, not only the

[m] Seld. in Flet. 10. 4.

writ, but the offense itself of maintaining the papal power, by the name of *præmunire*. And accordingly the next statute I shall mention, which is generally referred to by all subsequent statutes, is usually called the statute of *præmunire*. It is the statute 16 Richard II, c. 5 (*Præmunire*, 1392), which 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.

§ 109. c. Præmunire under Henry IV, Henry V and Henry VI.—By the statute 2 Henry IV, c. 3 (Religious Houses, 1400), 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*. And this is the last of our ancient statutes touching this offense; the usurped civil power of the Bishop of Rome being pretty well broken down by these statutes, as his usurped religious power was in about a century afterwards; the spirit of the nation being so much raised [113] against foreigners, that about this time, in the reign of Henry the Fifth, the alien priories, or abbeys for foreign monks, were suppressed, and their lands given to the crown. And no further attempts were afterwards made in support of these foreign jurisdictions.

A learned writer, before referred to, is therefore greatly mistaken when he says[n] that in Henry the Sixth's time the Archbishop of Canterbury and other bishops offered to the king a large supply if he would consent that all laws against provisors, and especially the statute 16 Richard II, might be repealed, but that this motion was rejected. This account is incorrect in all its branches. For, first, the application, which he probably means, was made not by the bishops only, but by the unanimous consent of a provincial synod, assembled in 1439, 18 Henry VI, that very synod which at the same time refused to confirm and allow a papal bull,

[n] Dav. 96.

which then was laid before them. Next, the purport of it was not to procure a repeal of the statutes against provisors, or that of Richard II in particular, but to request that the penalties thereof, which by a forced construction were applied to all that sued in the spiritual, and even in many temporal, courts of this realm, might be turned against the proper objects only, those who appealed to Rome or to any foreign jurisdictions: the tenor of the petition being, "that those penalties should be taken to extend only to those that commenced any suits or procured any writs or public instruments at Rome, or elsewhere out of England; and that no one should be prosecuted upon that statute for any suit in the spiritual courts or lay jurisdictions of this kingdom." Lastly, the motion was so far from being rejected, that the king promised to recommend it to the next parliament, and in the meantime that no one should be molested upon this account. And the clergy were so satisfied with their success, that they granted to the king a whole tenth upon this occasion.[o]

[114] And, indeed, so far was the archbishop who presided in this synod from countenancing the usurped power of the pope in this realm, that he was ever a firm opposer of it. And, particularly, in the reign of Henry the Fifth he prevented the king's uncle from being then made a cardinal and legate *a latere* (in attendance) from the pope, upon the mere principle of its being within the mischief of papal provisions, and derogatory from the liberties of the English church and nation. For, as he expressed himself to the king in his letter upon that subject, "he was bound to oppose it by his ligeance, and also to quit himself to God, and the church of this land, of which God and the king had made him governor." This was not the language of a prelate addicted to the slavery of the See of Rome, but of one who was indeed of principles so very opposite to the papal usurpations, that in the year preceding this synod, 17 Henry VI (1438), he refused to consecrate a bishop of Ely that was nominated by Pope Eugenius IV. A conduct quite consonant to his former behavior in 6 Henry VI (1427), when he refused to obey the commands of Pope Martin V, who had required him to exert his endeavors to repeal the statute of *præmunire* ("*execrabile illud statutum* (that execrable stat-

[o] Wilk. Concil. Mag. Brit. III. 533.

ute),'' as the holy father phrases it), which refusal so far exasperated the court of Rome against him, that at length the pope issued a bull to suspend him from his office and authority, which the archbishop disregarded and appealed to a general council. And so sensible were the nation of their primate's merit, that the lords spiritual, and temporal, and also the University of Oxford, wrote letters to the pope in his defense, and the house of commons addressed the king to send an ambassador forthwith to his holiness, on behalf of the archbishop, who had incurred the displeasure of the pope for opposing the excessive power of the court of Rome.[p]

§ 110. d. Statutes of præmunire under Henry VIII, Elizabeth and James I.—[115] This, then, is the the original meaning of the offense which we call *præmunire; viz.*, introducing a foreign power into this land, and creating *imperium in imperio* (a government within a government), by paying that obedience to papal process, which constitutionally belonged to the king alone, long before the Reformation in the reign of Henry the Eighth, at which time the penalties of *præmunire* were indeed extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the See of Rome, though not all the corrupted doctrines of the Roman church. And therefore by the several statutes of 24 Henry VIII, c. 12 (Appeals to Rome, 1532), and 25 Henry VIII, c. 19 and 21 (Crown, and Peter-pence, 1533), to appeal to Rome from any of the king's courts, which (though illegal before) had at times been connived at, to sue to Rome for any license or dispensation, or to obey any process from thence, are made liable to the pains of *præmunire*. And, in order to restore to the king in effect the nomination of vacant bishopries, and yet keep up the established forms, it is enacted by statute 25 Henry VIII, c. 20 (Annates, 1533), that if the dean and chapter refuse to elect the person named by the king, or any archbishop

p See Wilk. Concil. Mag. Br. Vol. III. *passim*. and Dr. Duck's life of Archbishop Chichele, who was the prelate here spoken of, and the munificent founder of All Souls college in Oxford: in vindication of whose memory the author hopes to be excused this digression; if indeed it be a digression, to show how contrary to the sentiments of so learned and pious a prelate, even in the days of popery, those usurpations were, which the statutes of *præmunire* and provisors were made to restrain.

or bishop to confirm or consecrate him, they shall fall within the penalties of the statutes of *præmunire*. Also by statute 5 Elizabeth, c. 1 (Queen's Supremacy, 1562), to refuse the oath of supremacy will incur the pains of *præmunire*, and to defend the pope's jurisdiction in this realm is a *præmunire* for the first offense, and high treason for the second. So, too, by statute 13 Elizabeth, c. 2 (See of Rome, 1571), to import any *agnus Dei*, crosses, beads or other superstitious things pretended to be hallowed by the Bishop of Rome, and tender the same to be used, or to receive the same with such intent, and not discover the offender, or if a justice of the peace, knowing thereof, shall not within fourteen days declare it to a privy counselor, they all incur a *præmunire*. But importing or selling mass-books, or other popish books, is by statute 3 Jac. I, c. 5, § 25 (1605), only liable to a penalty of forty shillings. Lastly, to contribute to the maintenance of a jesuit's college, or any popish seminary whatever, beyond sea, or any person in the same, or to contribute to the maintenance of any jesuit or popish priest in England, is by statute 27 Elizabeth, c. 2 (Jesuits, 1584), made liable to the penalties of *præmunire*.

[116] Thus far the penalties of *præmunire* seem to have kept within the proper bounds of their original institution, the depressing power of the pope, but, they being pains of no inconsiderable consequence, it has been thought fit to apply the same to other heinous offenses, some of which bear more and some less relation to this original offense, and some no relation at all.

§ 111. e. Other statutes imposing the penalties of præmunire. Thus, 1. By the statute 1 & 2 Ph. & Mar., c. 8 (See of Rome, 1554), to molest the possessors of abbey lands granted by parliament to Henry the Eighth and Edward the Sixth is a *præmunire*. 2. So, likewise, is the offense of acting as a broker or agent in any usurious contract, where above ten *per cent* interest is taken, by statute 13 Elizabeth, c. 10 (Dilapidations, 1571). 3. To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a *præmunire*, by statute 21 Jac. I, c. 3 (Monopolies, 1623). 4. To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder

others from importing them, is also a *præmunire* by two statutes; the one 16 Car. I, c. 21 (Gunpowder, 1640), the other 1 Jac. II, c. 8 (Importing of Gunpowder, 1685). 5. On the abolition, by statute 12 Car. II, c. 24 (Military Tenures, 1660), of purveyance,[q] and the prerogative of pre-emption, or taking any victual, beasts or goods for the king's use, at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *præmunire*. 6. To assert, maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, is declared a *præmunire* by statute 13 Car. II, c. 1 (Treason, 1661). 7. By the *habeas corpus* act, also, 31 Car. II, c. 2 (1679), it is a *præmunire*, and incapable of the king's pardon, besides other heavy penalties,[r] to send any subject of this realm a prisoner into parts beyond the seas. 8. By the statute 1 W. & M., st. 1, c. 8 (Oaths of Allegiance and Supremacy, 1688), persons of eighteen years of age, refusing to take the new oaths of allegiance, as well as supremacy, upon tender by the proper magistrate, are subject to the penalties of a *præmunire;* and by statute 7 & [117] 8 W. III, c. 24 (Oaths, 1695), serjeants, counselors, proctors, attorneys and all officers of courts, practicing without having taken the oaths of allegiance and supremacy, and subscribed the declaration against popery, are guilty of a *præmunire*, whether the oaths be tendered or no. 9. By the statute 6 Ann., c. 7 (1706), to assert maliciously and directly, by preaching, teaching or advised speaking, that the then pretended Prince of Wales, or any person other than according to the acts of settlement and union, hath any right to the throne of these kingdoms, or that the king and parliament cannot make laws to limit the descent of the crown, such preaching, teaching or advised speaking is a *præmunire:* as writing, printing or publishing the same doctrines amounted, we may remember, to high treason. 10. By statute 6 Ann., c. 23 (1706), if the assembly of peers of Scotland, convened to elect their sixteen representatives in the British parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *præmunire*. 11. The statute 6 George I. c. 18,—Royal Exchange,

[q] See Book I. pag. 287.

[r] See Book I. pag. 138. Book III. pag. 137.

etc., Assurance Corporations, 1719 (enacted in the year after the infamous South Sea project had beggared half the nation), makes all unwarrantable undertakings by unlawful subscriptions, then commonly known by the name of bubbles, subject to the penalties of a *præmunire*. 12. The statute 12 George III, c. 11 (Royal Marriages, 1772), subjects to the penalties of the statute of *præmunire* all such as knowingly and willfully solemnize, assist or are present at any forbidden marriage of such of the descendants of the body of King George II as are by that act prohibited to contract matrimony without the consent of the crown.[s]

§ 112. 5. Penalties of præmunire.—Having thus inquired into the nature and several species of *præmunire*, its punishment may be gathered from the foregoing statutes, which are thus shortly summed up by Sir Edward Coke:[t] "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;* [118] or (as other authorities have it) *during life*":[u] both which amount to the same thing; as the king by his prerogative may any time remit the whole, or any part, of the punishment, except in the case of transgressing the statute of *habeas corpus*.[1] These forfeitures, here inflicted, do not (by the way) bring this offense within our former definition of felony; being inflicted by particular statutes, and not by the common law. But so odious, Sir Edward Coke adds, was this offense of *præmunire*, that a man that was attainted of the same might have been slain by any other man without danger of law: because it was provided by law[w] that any man might do to him as to the king's enemy, and any man may lawfully kill an enemy. However, the position itself, that it is at

s See Book I, c. 4.

t 1 Inst. 129.

u 1 Bulst. 199.

w Stat. 25 Edw. III. st. 5. c. 22 (Provisors, 1351).

1 While the offense of *præmunire* seems to be still formally subsisting, prosecutions thereunder are almost unheard of, and the offense may be ranked among the "monuments of past times, devoid of any interest except by way of antiquarian curiosity."—STEPHEN, 1 Hist. Crim. Law, 491.

any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the law of nature and nations, to kill him in the heat of battle, or for necessary self-defense. And to obviate such savage and mistaken notions,[x] the statute 5 Elizabeth, c. 1 (Supremacy of the Crown, 1562), provides that it shall not be lawful to kill any person attainted in a *præmunire*, any law, statute, opinion or exposition of law to the contrary notwithstanding. But still such delinquent, though protected as a part of the public from public wrongs, can bring no action for any private injury, how atrocious soever; being so far out of the protection of the law 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 with safety give him comfort, aid or relief.[y]

x Bro. Abr. t. Corone. 196.

y 1 Hawk. P. C. 55.

[119]

CHAPTER THE NINTH.

OF MISPRISIONS AND CONTEMPTS AFFECTING THE KING AND GOVERNMENT.

§ 113. IV. Misprisions and contempts.—The fourth species of offenses, more immediately against the king and government, are entitled misprisions and contempts.

§ 114. 1. Definition of misprision.—Misprisions (a term derived from the old French, *mespris*, a neglect or contempt) are, in the acceptation of our law, generally understood to be all such high offenses as are under the degree of capital, but nearly bordering thereon; and it is said that a misprision is contained in every treason and felony whatsoever, and that, if the king so please, the offender may be proceeded against for the misprision only.[a] And upon the same principle, while the jurisdiction of the star-chamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court merely for a high misdemeanor: as happened in the case of Roger, Earl of Rutland, in 43 Elizabeth (1601), who was concerned in the Earl of Essex's rebellion.[b]

§ 115. 2. Kinds of misprision.—Misprisions are generally divided into two sorts: negative, which consist in the concealment of something which ought to be revealed, and positive, which consist in the commission of something which ought not to be done.

§ 116. a. Negative misprisions: (1) Misprision of treason.—[120] Of the first, or negative kind, is what is called *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 principal traitor, as indeed the concealment, which was construed aiding and abetting, did at the common law, in like manner as the knowledge of a plot against the state, and not revealing it, was a capital crime at Florence and other states of Italy.[c]

a Yearb. 2 Rich. III. 10. Staundf. P. C. 37. Kel. 71. 1 Hal. P. C. 374. 1 Hawk. P. C. 55, 56.

b Hudson of the Court of Star-chamber. MS. in Mus. Brit.

c Guicciard. Hist. b. 3 & 13.

But it is now enacted by the statute 1 & 2 Ph. & Mar., c. 10 (Treason, 1554), that a bare concealment of treason shall be only held a misprision. This concealment becomes criminal if the party apprised of the treason does not, as soon as conveniently may be, reveal it to some judge of assize or justice of the peace.[d] But if there be any probable circumstances of assent, as if one goes to a treasonable meeting, knowing beforehand that a conspiracy is intended against the king, or, being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of it, but conceals it, this is an implied assent in law, and makes the concealer guilty of actual high treason.[e]

There is also one positive misprision of treason, created so by act of parliament. The statute 13 Elizabeth, c. 2 (1571), enacts that those who forge foreign coin, not current in this kingdom, their aiders, abettors and procurers, shall all be guilty of misprision of treason. For, though the law would not put foreign coin upon quite the same footing as our own, yet, if the circumstances of trade concur, the falsifying it may be attended with consequences almost equally pernicious to the public, as the counterfeiting of Portugal money would be at present; and therefore the law has made it an offense just below capital, and that is all. For the punishment of misprision of treason is loss of the profits of lands during life, forfeiture of goods and imprisonment during life.[f][1] Which total forfeiture of the goods was originally inflicted while [*121] the offense amounted to principal treason,

[d] 1 Hal. P. C. 372.
[e] 1 Hawk. P. C. 56.
[f] 1 Hal. P. C. 374.

---

1 There is no modern precedent of an indictment for misprision of treason, which is probably the reason why the Forfeiture Act, 1870, takes no notice of misprisions; and consequently the excessive severity of the punishment for misprision of treason remains unaltered, though the offense itself is practically obsolete.—STEPHEN, 4 Comm. (16th ed.), 148.

The Congress of the United States has declared: "Every person, owing allegiance to the United States and having knowledge of the commission of any treason against them, who conceals, and does not, as soon as may be, disclose and make known the same to the President or to some judge of the United States, or to the governor, or to some judge or justice of a particular

and of course included in it a felony by the common law; and therefore is no exception to the general rule laid down in a former chapter,[g] that wherever an offense is punished by such total forfeiture it is felony at the common law.

§ 117. (2) Misprision of felony.—Misprision *of felony* is also the concealment of a felony which a man knows, but never assented to; for, if he assented, this makes him either principal or accessory.[2] And the punishment of this, in a public officer, by the statute Westm. I, 3 Edward I, c. 9 (Pursuit of Felons, 1275), is imprisonment for a year and a day; in a common person, imprisonment for a less discretionary time; and, in both, fine and ransom at the king's pleasure: which pleasure of the king must be observed, once for all, not to signify any extrajudicial 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* (the will of the king in his court, not in his chamber)."[h]

§ 118. (3) Concealing treasure-trove.—There is another species of negative misprisions, namely, the *concealing of treasure-trove,* which belongs to the king or his grantees by prerogative royal, the concealment of which was formerly punishable by death,[i] but now only by fine and imprisonment.[j]

[g] See pag. 94.

[h] 1 Hal. P. C. 375.

[i] Glanv. l. 1, c. 2.

[j] 3 Inst. 133.

---

state, is guilty of misprision of treason, and shall be imprisoned not more than seven years, and fined not more than one thousand dollars." Act of April 30, 1790, c. 9; 1 Stats. at L. 112; Rev. Stats. U. S., § 5333; 7 Fed. Stats. Ann. 352; 3 U. S. Comp. Stats. 3623.

2 There has been no prosecution for this offense in England for many years. The expression "misprision of felony" has "somewhat passed in desuetude." Lord Westbury, in Williams v. Bayley (1866), L. R. 1 H. L. 200, 220.

In some states the offense is recognized by statute. State v. Hann, 40 N. J. L. 228. "But the whole doctrine of guilt by misprision, like that of guilt in being accessory after the fact, has become practically obsolete, and perhaps not a single case can be cited in which punishment for such connection with a felony has been inflicted in the United States. If such criminal liability is recognized in any form it is by statute making particular acts of that character substantive offenses rather than by the preservation of the common-law doctrine of misprision of felony." McClain, 2 Crim. Law, § 938.

§ 119. b. Positive misprisions — High misdemeanors. — Misprisions, which are merely positive, are generally denominated *contempts* or *high misdemeanors;* of which

§ 120. (1) Maladministration of public officers. — The first and principal is the *maladministration* of such high officers as are in public trust and employment. This is usually punished by the method of parliamentary impeachment:[3] wherein such penalties, short of death, are inflicted, as to the wisdom of the house of peers shall seem proper; consisting usually of banishment, imprisonment, fines or perpetual disability. Hitherto, also, may be referred the [122] offense of *embezzling the public money,* called among the Romans *peculatus,* which the Julian law punished with death in a magistrate, and with deportation, or banishment, in a private person.[k] With us it is not a capital crime, but subjects the committer of it to a discretionary fine and imprisonment.[4] Other misprisions are, in general, such contempts of the executive magistrate as demonstrate themselves by some arrogant and undutiful behavior towards the king and government. These are

§ 121. (2) Contempts against the king's prerogative.—Contempts against the king's *prerogative.* As, by refusing to assist him for the good of the public, either in his councils, by advice, if called upon, or in his wars, by personal service for defense of the

k Inst. 4. 18. 9.

---

3 The Constitution of the United States, art. II, § 41, provides that "the President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." The several state constitutions have similar provisions with respect to state officers.

4 Now, by the Embezzlement by Collectors Act, 1810, if any officer, entrusted with the receipt or management of the public revenues, knowingly furnishes false statements or returns of the moneys collected by him, or of the balances left in his hands, he is guilty of a misdemeanor, and may be fined and imprisoned at the discretion of the court, and forever rendered incapable of holding any office under the crown. And special provisions have been made with regard to the stealing or embezzlement, by a person in the service of the crown, of any chattel, money, or valuable security in his possession, or coming under his control by virtue of such employment.—STEPHEN, 4 Comm. (16th ed.), 157.

realm against a rebellion or invasion.[1] Under which class may be ranked the neglecting to join the *posse comitatus*, or power of the county, being thereunto required by the sheriff or justices, according to the statute 2 Henry V, c. 8 (Riot, 1414), which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel.[m] Contempts against the prerogative may also be, by preferring the interests of a foreign potentate to those of our own, or doing or receiving anything that may create an undue influence in favor of such extrinsic power; as, by taking a pension from any foreign prince without the consent of the king.[n 5] Or, by disobeying the king's lawful commands, whether by writs issuing out of his courts of justice, or by a summons to attend his privy council, or by letters from the king to a subject commanding him to return from beyond the seas (for disobedience to which his lands shall be seized till he does return, and himself afterwards punished), or by his writ of *ne exeat regnum* (let him not leave the kingdom), or proclamation, commanding the subject to stay at home.[o] Disobedience to any of these commands is a high misprision and contempt; and so, lastly, is disobedience to any act of parliament, where no particular penalty is assigned, for then it is punishable, like the rest of [123] these contempts,

[1] 1 Hawk. P. C. 59.
[m] Lamb. Eir. 315.
[n] 3 Inst. 144.
[o] See Book I. pag. 266.

---

5 The offense of betraying official secrets, by disclosing matters which, in the interests of the state, ought not to be divulged to foreign powers, has now been provided for by statute, and may be ranked with this miscellaneous group of contempts (Official Secrets Act, 1911; R. v. Parrott (1913), 8 Cr. App. R. 186). It is a felony punishable by penal servitude or imprisonmen for anyone unlawfully to obtain or communicate to any other person any sketch, plan, model, article or note or other document or information, which is calculated to be, or might be, or is intended to be, directly or indirectly useful to an enemy. If a person has in his possession or control any sketch, etc., which has been entrusted in confidence to him by any person holding office under the king, or which he has obtained as holding or having held office under the king, or under a contract made on behalf of the king, or as employed under a person who holds such office or contract, and communicates such sketch to an unauthorized person, or unlawfully retains it, he is guilty of a misdemeanor.—STEPHEN, 4 Comm. (16th ed.), 166.

by fine and imprisonment, at the discretion of the king's courts of justice.[p]

§ 122. (3) Contempts against the king's person and government.—Contempts and misprisions against the king's *person* and *government* may be by speaking or writing against them, cursing or wishing him ill, giving out scandalous stories concerning him, or doing anything that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people. It has been also held an offense of this species to drink to the pious memory of a traitor, or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which they die, these being acts which impliedly encourage rebellion. And for this species of contempt a man may not only be fined and imprisoned, but suffer the pillory[6] or other infamous corporal punishment:[q] in like manner as, in the ancient German empire, such persons as endeavored to sow sedition, and disturbed the public tranquillity, were condemned to become the objects of public notoriety and derision, by carrying a dog upon their shoulders from one great town to another. The emperors Otho I and Frederic Barbarossa inflicted this punishment on noblemen of the highest rank.[r]

§ 123. (4) Contempts against the king's title.—Contempts against the king's *title*, not amounting to treason or *præmunire*, are the denial of his right to the crown in common and unadvised discourse; for, if it be by advisedly speaking, we have seen[s] that it amounts to a *præmunire*. This heedless species of contempt is, however, punished by our law with fine and imprisonment. Likewise, if any person shall in any wise hold, affirm or maintain that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England, this is a misdemeanor, by statute 13 Elizabeth, c. 1 (Treason, 1571), and punishable with forfeiture of goods and chattels. A contempt may also

p 1 Hawk. P. C. 60.
q *Ibid.*
r Mod. Un. Hist. xxix. 28. 119.
s See pag. 91.

6 The pillory was abolished in 1837.

arise from refusing or neglecting to take the oaths, appointed by statute for the better securing the government, and yet acting [124] in a public office, place of trust or other capacity, for which the said oaths are required to be taken, *viz.*, those of allegiance, supremacy and abjuration, which must be taken within six calendar months after admission. The penalties for this contempt, inflicted by statute 1 George I, st. 2, c. 13 (Succession to the Crown, 1714), are very little, if anything, short of those of a *præmunire*, being an incapacity to hold the said offices, or any other, to prosecute any suit, to be guardian or executor, to take any legacy or deed of gift, and to vote at any election for members of parliament, and after conviction the offender shall also forfeit 500*l.* to him or them that will sue for the same. Members on the foundation of any college in the two universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college register within one month after; otherwise, if the electors do not remove him, and elect another within twelve months or after, the king may nominate a person to succeed him by his great seal or sign manual. Besides thus taking the oaths for offices, any two justices of the peace may by the same statute summon, and tender the oaths to, any person whom they shall suspect to be disaffected; and every person refusing the same, who is properly called a nonjuror, shall be adjudged a popish recusant convict, and subjected to the same penalties that were mentioned in a former chapter,[t] which in the end may amount to the alternative of abjuring the realm or suffering death as a felon.

§ 124. (5) Contempts against the king's palaces and courts of justice.—Contempt against the king's *palaces* or *courts of justice* have always been looked upon as high misprisions, and by the ancient law, before the Conquest, fighting in the king's palace, or before the king's judges, was punishable with death.[u] So, too, in the old Gothic constitution, there were many places privileged by law, *quibus major reverentia et securitas debetur, ut templa et judicia, quæ sancta habebantur,—arces et aula regis,—denique locus quilibet præsente aut adventante rege* (to which a greater

t See pag. 5.

u 3 Inst. 140. LL. Alured. cap. 7 & 34.

reverence and inviolability is due; as churches and courts of justice which were held sacred—the king's courts and castles—lastly, the place where the king resides or to which he is approaching).[v] And at present, with us, by the statute [125] 33 Henry VIII, c. 12 (Murder, 1541), malicious striking in the king's palace, wherein his royal person resides, whereby blood is drawn, is punishable by perpetual imprisonment, and fine at the king's pleasure, and also with loss of the offender's right hand, the solemn execution of which sentence is prescribed in the statute at length.[7]

§ 125. (a) Striking in the superior courts.—But *striking* in the king's superior courts of justice, in Westminster Hall, or at the assizes, is made still more penal than even in the king's palace. The reason seems to be, that those courts being anciently held in the king's palace, and before the king himself, striking there included the former contempt against the king's palace, and something more; *viz.*, the disturbance of public justice. For this reason, by the ancient common law before the Conquest,[w] striking in the king's courts of justice, or drawing a sword therein, was a capital felony, and our modern law retains so much of the ancient severity as only to exchange the loss of life for the loss of the offending limb. Therefore, a stroke or blow in such a court of justice, whether blood be drawn or not, or even assaulting a judge sitting in the court, by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life.[x]

[v] Stierrh. de Jure Goth. l. 3. c. 3.
[w] LL. Inæ. c. 6. LL. Canut. c. 56. LL. Alured. c. 7.
[x] Staundf. P. C. 38. 3 Inst. 140, 141.

---

[7] By statute 9 George IV (1828), c. 31, the part of this act which authorized mutilation was repealed. It appears, however, to be a contempt of the kind now in question to execute the ordinary process of the law, by arrest or otherwise, within the verge of a royal palace, or in the tower; unless permission be first obtained from the proper authority. (Elderton's Case (1703), 2 Ld. Raym. 978, 92 Eng. Reprint, 152; Rex v. Stobbs (1790), 3 Term Rep. 735, 100 Eng. Reprint, 830; Winter v. Miles (1808), 1 Camp. 475; Bell v. Jacobs (1828), 1 Moo. & P. 369; Attorney General v. Dakin (1867), L. R. 2 Ex. 290; L. R. 3 Ex. 288; L. R. 4 H. L. 338.)—STEPHEN, 4 Comm. (16th ed.), 156.

§ 126. (b) Rescue of prisoner.—A *rescue*, also, of a prisoner from any of the said courts, without striking a blow, is punished with perpetual imprisonment and forfeiture of goods, and of the profits of lands during life; being looked upon as an offense of the same nature with the last; but only, as no blow is actually given, the amputation of the hand is excused. For the like reason an affray, or riot, near the said courts, but out of their actual view, is punished only with fine and imprisonment.[z]

§ 127. (c) Threatening a judge.—[126] Not only such as are guilty of an actual violence, but of threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision, and have been punished with large fines, imprisonment and corporal punishment.[a] And, even in the inferior courts of the king, an affray, or contemptuous behavior, is punishable with a fine by the judges there sitting; as by the steward in a court-leet or the like.[b]

§ 128. (d) Threatening or assaulting a party.—Likewise all such as are guilty of any injurious treatment to 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 counselor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody, and properly executing his duty,[c] which offenses, when they proceeded further than bare threats, were punished in the Gothic constitutions with exile and forfeiture of goods.[d]

§ 129. (e) Dissuading witnesses, etc.—Lastly, to endeavor to dissuade a witness from giving evidence, to disclose an examination before the privy council, or to advise a prisoner to stand mute (all of which are impediments of justice); are high misprisions and contempts of the king's courts, and punishable by fine and imprisonment. And anciently it was held that if one of the grand jury disclosed to any person indicted the evidence that appeared against

z 1 Hawk. P. C. 57.
x Cro. Car. 373.
a Cro. Car. 503.
b 1 Hawk. P. C. 58.
c 3 Inst. 141, 142.
d Stiernh. de Jure Goth. l. 3. c. 3.

him, he was thereby made accessory to the offense, if felony, and in treason a principal. And at this day it is agreed that he is guilty of a high misprision,[e] and liable to be fined and imprisoned.[f 8]

[e] See Barr. 212. 27 Ass. pl. 44. § 4. fol. 138.

[f] 1 Hawk. P. C. 59.

---

8 "Christian, in his note on page 126, 4 Bl. Comm., says: 'A few years ago, at York, a gentleman of the grand jury heard a witness swear in court, upon the trial of a prisoner, directly contrary to the evidence which he had given before the grand jury. He immediately communicated the circumstance to the judge, who, upon consulting the judge of the other court, was of opinion that public justice in this case required that the evidence which the witness had given before the grand jury should be disclosed; and the witness was committed for perjury, to be tried upon the testimony of the gentlemen of the grand jury. It was held that the object of this concealment was only to prevent the testimony produced before them from being contradicted by subornation of perjury on the part of the persons against whom bills were found. This is a privilege which may be waived by the crown.' Mr. Justice Parke, in his charge to the grand jury at Middlesex special commission, said: 'You are assembled in consequence of a commission directed to myself and others empowering us to try certain offenders. This is an extraordinary proceeding. You are aware that it arose from an irregularity in the mode of serving the witnesses who were to give evidence before the grand jury, which irregularity would prevent those persons from being indicted for perjury. This, in the opinion of the judges, prevented the persons from being legally convicted.' 6 Car. & P. 90. 'There is no doubt that the witnesses before the grand jury should be sworn in such a manner that, if the testimony was false, they might be indicted for perjury.' State v. Fasset, 16 Conn. 457; State v. Broughton, 7 Ired. (N. C.) 96, 45 Am. Dec. 507; People v. Young, 31 Cal. 563. It follows, then, that there was no error in the ruling of the court upon the demurrer, nor in its rulings set forth in the fourth and fifth bills of exception. The docket entries and the ticket given by the deputy clerk to Izer, showing that Izer had been sworn as a witness to the grand jury, were competent and admissible evidence, and there was no error in allowing them to go to the jury."—McSherry, J., in Izer v. State, 77 Md. 110, 26 Atl. 282, 283.

[127]

CHAPTER THE TENTH.

OF OFFENSES AGAINST PUBLIC JUSTICE.

§ 130. Offenses affecting the commonwealth: five species.—The order of our distribution will next lead us to take into consideration such crimes and misdemeanors as more especially affect the *commonwealth*, or public polity of the kingdom, which however, as well as those which are peculiarly pointed against the lives and security of private subjects, are also offenses against the king, as the *pater-familias* of the nation, to whom it appertains by his legal office to protect the community, and each individual therein, from every degree of injurious violence, by executing those laws which the people themselves in conjunction with him have enacted, or at least have consented to, by an agreement either expressly made in the persons of their representatives or by a tacit and implied consent presumed and proved by immemorial usage.

The species of crimes which we have now before us is subdivided into such a number of inferior and subordinate classes, that it would much exceed the bounds of an elementary treatise and be insupportably tedious to the reader were I to examine them all minutely, or with any degree of critical accuracy. I shall therefore confine myself principally to general definitions or descriptions of this great variety of offenses, and to the punishments inflicted by law for each particular offense, with now and then a few incidental observations, referring the student for more particulars to other voluminous authors who have treated of these subjects with greater precision and more in detail than is consistent with the plan of these Commentaries.

The crimes and misdemeanors that more especially affect the commonwealth may be divided into five species; *viz.*, [128] offenses against public *justice*, against the public *peace*, against public *trade*, against the public *health*, and against the public *police* or *economy*: of each of which we will take a cursory view in their order.

§ 131. I. Offenses against public justice.—First, then, of offenses against public *justice*, some of which are felonious whose punishment may extend to death, others only misdemeanors. I

shall begin with those that are most penal, and descend gradually to such as are of less malignity.

§ 132. **1. Embezzling or falsifying judicial records.**—Embezzling or vacating *records*, or falsifying certain other proceedings in a court of judicature, is a felonious offense against public justice. It is enacted by statute 8 Henry VI, c. 12 (Amendment, 1429), that if any clerk, or other person, shall willfully take away, withdraw or avoid any record or process in the superior courts of justice in Westminster Hall, by reason whereof the judgment shall be reversed or not take effect, it is felony not only in the principal actors, but also in their procurers and abettors. And this may be tried either in the king's bench or common pleas by a jury *de medietate*, half officers of any of the superior courts and the other half common jurors. Likewise by statute 21 Jac. I, c. 26 (Fines and Recoveries, 1623), to acknowledge any fine, recovery, deed enrolled, statute, recognizance, bail or judgment in the name of another person not privy to the same is felony without benefit of clergy. Which law extends only to proceedings in the courts themselves; but by statute 4 W. & M., c. 4 (Bail, 1692), to personate any other person (as bail) before any judge of assize or other commissioner authorized to take bail in the country is also felony; for no man's property would be safe if records might be suppressed or falsified or persons' names be falsely usurped in courts or before their public officers.[1]

§ 133. **2. Duress of prisoner.**—To prevent abuses by the extensive power, which the law is obliged to repose in gaolers, it is enacted by statute 14 Edward III, c. 10 (Custody of Gaols, 1340), that if any *gaoler* by too great duress of imprisonment makes any prisoner that he hath in ward become [129] an *approver* or an *appellor* against his will, that is, as we shall see hereafter, to accuse and turn evidence against some other person, it is felony in the gaoler. For, as Sir Edward Coke observes,[a] it is not lawful to in-

[a] 3 Inst. 91.

---

[1] Various modern statutes, from the Larceny Act, 1861, on, have been passed covering the offenses mentioned in the above paragraph. See United States v. De Groat, 30 Fed. 64; People v. Bussey, 82 Mich. 49, 46 N. W. 97.

duce or excite any man even to a just accusation of another, much less to do it by duress of imprisonment, and least of all by a gaoler to whom the prisoner is committed for safe custody.

§ 134. 3. Obstructing execution of process.—A third offense against public justice is *obstructing* the execution of lawful *process*. This is at all times an offense of a very high and presumptuous nature, but more particularly so when it is an obstruction of an arrest upon criminal process. And it hath been holden that the party opposing such arrest becomes thereby *particeps criminis;* that is, an accessory in felony, and a principal in high treason.[b] Formerly, one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent persons assembled together to shelter themselves from justice (especially in London and Southwark) under the pretext of their having been ancient palaces of the crown or the like:[c] all of which sanctuaries for iniquity are now demolished, and the opposing of any process therein is made highly penal, by the statutes 8 & 9 Will. III, c. 27 (Imprisonment for Debt, 1697), 9 George I, c. 28 (Liberty of the Mint, 1722), and 11 George I, c. 22 (Criminal Law, 1724), which enact that persons opposing the execution of any process in such pretended privileged places within the bills of mortality, or abusing any officer in his endeavors to execute his duty therein, so that he receives bodily hurt, shall be guilty of felony, and transported for seven years; and persons in disguise, joining in or abetting any riot or tumult on such account, or opposing any process, or assaulting and abusing any officer executing or for having executed the same, shall be felons without benefit of clergy.[2]

b 1 Hawk. P. C. 121.

c Such as *White-Friars*, and its environs; the *Savoy* and the *Mint* in Southwark.

---

2 Although these old statutes are, for the most part, now repealed, yet the offenses with which they dealt are treated in more recent enactments; and such an offense may amount, in certain cases, to a crime of the same malignity as an attempt to murder. Further, whoever assaults, resists or willfully obstructs any peace officer in the due execution of his duty, or any person acting in his aid, or assaults any person with intent to resist or prevent his own

§ 135. **4. Escapes.**—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 offense against public justice, and the party himself [130] is punishable by fine or imprisonment.[d] But the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner; the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody till cleared by the due course of justice. Officers, therefore, who, after arrest, *negligently* permit a felon to escape, are also punishable by fine,[e] but *voluntary* escapes, by consent and connivance of the officer, are a much more serious offense; for it is generally agreed that such escapes amount to the same kind of offense, and are punishable in the same degree as the offense of which the prisoner is guilty, and for which he is in custody, whether treason, felony or trespass. And this whether he were actually committed to gaol or only under a bare arrest.[f] But the officer cannot be thus punished till the original delinquent hath actually received judgment or been attainted upon verdict, confession or outlawry of the crime for which he was so committed or arrested; otherwise it might happen that the officer might be punished for treason or felony, and the person

[d] 2 Hawk. P. C. 122.
[e] 1 Hal. P. C. 600.
[f] 1 Hal. P. C. 590. 2 Hawk. P. C. 134.

---

lawful apprehension or detainer, or that of anyone else, for any offense, is guilty of a misdemeanor, and punishable with imprisonment. Moreover, the Prevention of Crimes Act, 1871, makes every assault on a constable, while in the execution of his duty as such, a criminal offense. It is not, however, an obstruction of a police officer, merely to warn another person against the commission of a crime on the ground that he is being watched; although it is obstruction to give false information to a police officer so as to allow the criminal an opportunity to escape.—STEPHEN, 4 Comm. (16th ed.), 203.

Resisting an officer who is acting legally in the performance of his duty is generally in the United States a crime, though in some courts and under some statutes there has been a tendency to restrict the offense to cases of resisting arrest or the service of a process. State v. Putnam, 35 Iowa, 561; Broxton v. State, 9 Tex. App. 97; United State v. Lukins, 3 Wash. C. C. 335, Fed. Cas. No. 15,639. The resistance of an officer usually constitutes a common-law assault. United States v. Doyle, 6 Sawy. 612, 5 Fed. 680.

arrested and escaping might turn out to be an innocent man.[g] But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor.[g]

§ 136. **5. Breach of prison.**—Breach of prison by the offender himself, when committed for *any* cause, was felony at the common law:[h] or even conspiring to break it.[i] But this severity is mitigated by the statute *de frangentibus prisonam* (concerning those breaking prison), 1 Edward II (Prison-breakers, 1307), which enacts that no person shall have judgment of life or member for breaking prison unless committed for some capital offense. So that to break prison and escape, when lawfully committed for any treason or felony, remains still felony as at the common law; and to break prison (whether it be the county gaol, the stocks or other usual place of security), when lawfully confined upon any other inferior charge, is still [131] punishable as a high misdemeanor by fine and imprisonment. For the statute which ordains that such offense shall be no longer capital never meant to exempt it entirely from every degree of punishment.[j] [4]

§ 137. **6. Rescues.**—Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally

g 1 Hal. P. C. 588, 9. 2 Hawk. P. C. 134, 5.
h 1 Hal. P. C. 607.
i Bract. l. 3. c. 9.
j 2 Hawk. P. C. 128.

---

3 Where the arrest has been for treason, the officer permitting the escape is liable even before the conviction of the prisoner. And in all cases, even before the conviction of the principal party, an officer or any private person, who in violation of his duty permits an escape from prison or from custody, may be fined and imprisoned for a misdemeanor. Criminal Procedure Act, 1851.

In the United States an officer who willfully or negligently allows a prisoner to escape, or any person who assists in the escape, or the prisoner who escapes, is guilty of a crime. Smith v. State, 76 Ala. 69; Meehan v. State, 46 N. J. L. 355; People v. Thompson, 9 Johns. (N. Y.) 70; Williams v. State, 24 Tex. App. 17, 5 S. W. 655; Ex parte Clifford, 29 Ind. 106; 2 McClain, Crim. Law, § 930.

4 The offense is now punishable with penal servitude or with imprisonment. Criminal Procedure Act, 1851.

the same offense in the stranger so rescuing as it would have been in a gaoler to have *voluntarily* permitted an escape. A rescue, therefore, of one apprehended for felony, is felony; for treason, treason; and for a misdemeanor, a misdemeanor also. But here likewise, as upon voluntary escapes, the principal must first be attainted before the rescuer can be punished, and for the same reason; because perhaps in fact it may turn out that there has been no offense committed.[k] By statute 11 George II, c. 26 (Retailers of Spirits, 1737), and 24 George II, c. 40 (Sale of Spirits, 1750), if five or more persons assemble to rescue any retailers of spirituous liquors, or to assault the informers against them, it is felony, and subject to transportation for seven years. By the statute 16 George II, c. 31 (Prison Escape, 1742), to convey to any prisoner in custody for treason or felony any arms, instruments of escape or disguise, without the knowledge of the gaoler, though no escape be attempted, or any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony, and subjects the offender to transportation for seven years; or if the prisoner be in custody for petit larceny or other inferior offense, or charged with a debt of 100*l.*, it is then a misdemeanor, punishable with fine and imprisonment. And by several special statutes,[l] to rescue, or attempt to rescue, any person committed for the offenses enumerated in those acts, is felony without benefit of clergy; and to rescue or attempt to rescue, the body of a felon executed for murder, is single felony, and subject to transportation for seven years. Nay, even if any person be charged with any of the offenses against the black-act, 9 George I, c. 22 (Criminal Law, 1722), and, being required by order [132] of the privy council to surrender himself, neglects so to do for forty days, both he and all that knowingly conceal, aid, abet or succor him are felons without benefit of clergy.[5]

[k] 1 Hal. P. C. 607. Fost. 344.

[l] 6 Geo. I. c. 23, 1719. (Transportation.) 9 Geo. I. c. 22, 1722. (Black-act.) 8 Geo. II. c. 20, 1734. (Destroying turnpikes, etc.) 19 Geo. II. c. 34, 1745. (Smuggling.) 25 Geo. II. c. 37, 1751. (Murder.) 27 Geo. II. c. 15, 1753. (Black-act.)

---

[5] By statutes the rescuer of any person charged with felony is guilty of felony, and may be sentenced to penal servitude or to imprisonment. Rescue Act, 1821.

§ 138. 7. Returning from transportation.—Another capital offense against public justice is the *returning from transportation* or being seen at large in Great Britain before the expiration of the term for which the offender was ordered to be transported or had agreed to transport himself. This is made felony without benefit of clergy in all cases by statutes 4 George I, c. 11 (Piracy, 1717), 6 George I, c. 23 (Robbery, 1719), 16 George II, c. 15 (Return of Offenders from Transportation, 1742), and 8 George III, c. 15 (Transportation, 1767), as is also the assisting them to escape from such as are conveying them to the port of transportation.[6]

§ 139. 8. Accepting reward for return of stolen goods.—An eighth is that of *taking a reward* under pretense of *helping* the owner to his *stolen goods*. This was a contrivance carried to a great length of villainy in the beginning of the reign of George the First, 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 owner at half price; to prevent which audacious practice, to the ruin and in defiance of public justice, it was enacted by statute 4 George I, c. 11 (Piracy, 1717), that whoever shall take a reward under the pretense of helping anyone to stolen goods, shall suffer as the felon who stole them, unless he causes such principal felon to be apprehended and brought to trial, and also gives evidence against him. Wild, still continuing in his old practice, was upon this statute at last convicted and executed.[m 7]

§ 140. 9. Receiving stolen goods.—Receiving of stolen goods, *knowing them to be stolen*, is also a high misdemeanor and affront to public justice. We have seen in a former chapter[n] that this

[m] See Stat. 6 Geo. I. c. 23. § 9 (Robbery, 1719).

[n] See pag. 38.

---

6 Transportation has been abolished and penal servitude substituted. Penal Servitude Acts, 1853–91.

7 This offense is now punishable with penal servitude or imprisonment, under the Larceny Act, 1861.

offense, which is only a misdemeanor at common law, by the statutes 3 & 4 W. & M., c. 9 (1691), and 5 Ann., c. 31 (1706), makes the offender accessory to the theft and felony. But because the accessory cannot in [133] general be tried unless with the principal, or after the principal is convicted, the receivers by that means frequently eluded justice. To remedy which it is enacted by statute 1 Ann., c. 9 (1702), and 5 Ann., c. 31 (1706), that such receivers may still be prosecuted for a misdemeanor, and punished by fine and imprisonment, though the principal felon be not before taken so as to be prosecuted and convicted. And, in case of receiving stolen lead, iron and certain other metals, such offense is by statute 29 George II, c. 30 (Stealing of Lead, 1755), punishable by transportation for fourteen years.[o] [g] So that now the prosecutor has two methods in his choice: either to punish the receivers for the misdemeanor immediately before the thief is taken,[p] or to wait till the felon is convicted and then punish them as accessories to the felony. But it is provided by the same statutes that he shall only make use of one, and not both of these methods of punishment. By the same statute, also, 29 George II, c. 30, persons having lead, iron and other metals in their custody, and not giving a satisfactory account how they came by the same, are guilty of a misdemeanor and punishable by fine or imprisonment. And by statute 10 George III, c. 48 (Receiving Stolen Jewels, 1770), all knowing receivers of stolen plate or jewels, taken by robbery on the highway, or when a burglary accompanies the stealing, may be tried as well before as after the conviction of the principal, and

o See, also, statute 2 Geo. III. c. 28, § 12 (Thefts upon the Thames, 1761), for the punishment of receivers of goods stolen by bum-boats, etc., in the Thames.

p Foster. 373.

---

g This offense is now punishable with penal servitude or imprisonment, under the Larceny Act, 1861.

In the United States, under statutes making the receiver punishable as principal or for a substantive offense, he is indictable for an independent crime, and not for the larceny. Bieber v. State, 45 Ga 569; State v. Hodges, 55 Md. 127; Brown v. State, 15 Tex. App. 581. Some statutes make the receiver a principal in the larceny. State v. Ward, 49 Conn. 429; Price v. Commonwealth, 21 Gratt. (Va.), 846; McClain, 1 Crim. Law, § 713.

whether he be in or out of custody; and, if convicted, shall be adjudged guilty of felony, and transported for fourteen years.

§ 141. 10. Compounding a felony. — Of a nature somewhat similar to the two last is the offense of *theft-bote*, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute.[9] This is frequently called compounding of felony, and formerly was held to make a man an accessory, but is now punished only with fine and imprisonment.[q] This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. And the Salic law "*latroni eum* [134] *similem habuit, qui furtum celare vellet, et occulte sine judice compositionem ejus admittere* (considers him, who would conceal a theft, and secretly receive a composition for it without the knowledge of the judge, in the same light as the thief)."[r] By statute 25 George II, c. 36 (Disorderly Houses, 1751), even to advertise a reward for the return of things stolen, with no questions asked, or words to the same purport, subjects the advertiser and the printer to a forfeiture of 50*l.* each.

q 1 Hawk. P. C. 125.

r Stiernh. de Jure Goth. l. 3. c. 5.

---

9 Judge McClain says: "There are but few illustrations of the crime of compounding a felony. It seems that it is immaterial whether any offense was actually committed, such as is charged to have been compounded, the mere agreement to stifle a prosecution being in itself a wrong which the law punishes. Therefore the acquittal of the person charged with the crime which it is claimed was compounded is immaterial. Neither is it necessary to allege that the defendant actually desisted from the prosecution in consideration of his agreement; indeed, the offense of compounding may be committed by a person other than the one injured by the crime. It is the receiving of anything of value in consideration for an agreement not to prosecute which is criminal, and the offense may therefore be committed by receiving a note, even though such a note is never collected nor collectible. Knowledge of the commission of the crime must be alleged and proven in a prosecution for compounding. It is sufficient to charge in general terms the commission of an offense by one party, and knowledge thereof by the defendant, and the receipt by him of some consideration to compound or conceal it or abstain from the prosecution thereof. The person who pays the consideration for the agreement to stifle prosecution is not an accomplice in the crime of compounding, and therefore his testimony does not require corroboration." (McClain, 2 Crim. Law, § 940.)

§ 142. **11. Common barratry.**—Common *barratry* is the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise.[s] [10] The punishment for this offense, in a common person, is by fine and imprisonment, but if the offender (as is too frequently the case) belongs to the profession of the law, a barrator, who is thus able as well as willing to do mischief, ought also to be disabled from practicing for the future.[t] And, indeed, it is enacted by statute 12 George I, c. 29 (Frivolous Arrests, 1725), that if anyone who hath been convicted of forgery, perjury, subornation of perjury or common barratry shall practice as an attorney, solicitor or agent in any suit, the court, upon complaint, shall examine it in a summary way, and, if proved, shall direct the offender to be transported for seven years.[11] Hereunto may also be referred another offense, of equal malignity and audaciousness, 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 offense, if committed in any of the king's superior courts, is left, as a high contempt, to 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 directed by statute 8 Elizabeth, c. 2 (Law Costs, 1566), to be punished by six months' imprisonment, and treble damages to the party injured.

§ 143. **12. Maintenance.**—Maintenance is an offense that bears a near relation to the former, being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either

[s] 1 Hawk. P. C. 243. [t] *Ibid.* 244.

---

[10] No one can be a barrator in respect of one act only. The indictment must charge the defendant with being a *common* barrator. 1 Hawk. P. C., c. 27, § 5. Voorhees v. Dorr, 51 Barb. (N. Y.) 580; Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1035. The proof must show at least three instances of offending. Commonwealth v. McCulloch, 15 Mass. 227. With the exception of Regina v. Bellgrave (Guildford Assizes, 1889, referred to in Archbold, Crim. Pleading, 1079), it is believed that there has not been a prosecution in England for barratry for many years.

[11] The punishment is changed to penal servitude for seven years, or to imprisonment with or without hard labor for two years.

party with money or otherwise to prosecute or defend it:[u 12] a practice that was greatly encouraged by the first introduction of uses.[w] This is an offense against public justice, as [135] it keeps alive strife and contention and perverts the remedial process of the law into an engine of oppression. And, therefore, by the Roman law, it was a species of the *crimen falsi* (forgery) to enter into any confederacy or do any act to support another's lawsuit, by money, witnesses or patronage.[x] A man may, however, maintain the suit of his near kinsman,[13] servant or poor neighbor,[14] out of charity and compassion, with impunity. Otherwise the punishment by common law is fine and imprisonment,[y] and by the statute 32 Henry VIII, c. 9 (Maintenance, 1540), a forfeiture of ten pounds.

§ 144. **13. Champerty.**—Champerty, *campi-partitio*, is a species of maintenance, and punished in the same manner,[z] being a bargain with a plaintiff or defendant *campum partire* to divide the land or other matter sued for between them, if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense.[a 15] Thus *champart*, in the French law, signifies a

u *Ibid.* 249.
w Dr. & St. 203.
x Ff. 48. 10. 20.
y 1 Hawk. P. C. 255.
z *Ibid.* 257.
a Stat. of Conspirat. 33 Edw. I (1305).

12 Alabaster v. Harness (1895), L. R. 1 Q. B. 339.

13 But see Hutley v. Hutley (1873), L. R. 8 Q. B. 112.

14 Harris v. Brisco (1886), L. R. 17 Q. B. D. 504.

15 **Champerty and maintenance in United States.**—"The common law rules of champerty and maintenance were based on the notions then existing as to public policy and the proper mode of conducting legal proceedings, which have undergone a great change in modern times. It is indisputable that the old common-law doctrine of maintenance is to a large extent obsolete, and the present legal doctrine of maintenance is due to an attempt on the part of the courts to carve out of the old law such remnant as is in consonance with our modern notions of public policy. (Davis v. Webber, 66 Ark. 190, 74 Am. St. Rep. 81, 45 L. R. A. 196, 49 S. W. 822; Thallhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Reece v. Kyle, 49 Ohio St. 475, 16 L. R. A. 723, 31 N. E. 747; Brown v. Bigne, 21 Or. 260, 28 Am. St. Rep. 752, 14 L. R. A. 745, 28 Pac. 11; British Cash & Parcel Conveyors v. Lamson Store Service Co. [1908], 1 K. B. 1006, 14 Ann. Cas. 554, 1 Brit. Rul. Cas. 159.) The statute of limitations, statutes of frauds, and the giving of costs against

similar division of profits, being a part of the crop annually due to the landlord by bargain or custom. In our sense of the word it signifies the purchasing of a suit, or right of suing: a practice so much abhorred by our law, that it is one main reason why a *chose* in action, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretense to sue in another's right. These pests of

the unsuccessful party, have all taken place since the law of maintenance was enacted; and all these have contributed to prevent groundless and vexatious litigation, and have caused a relaxing of the severe rules against champerty and maintenance. (Gruber v. Baker, 20 Nev. 453, 9 L. R. A. 302, 23 Pac. 858; Thallhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Reece v. Kyle, 49 Ohio St. 475, 16 L. R. A. 723, 31 N. E. 747.) In this country it has been said that the reason for the ancient doctrine of champerty and maintenance does not exist. (Bernstein v. Humes, 60 Ala. 582, 31 Am. Rep. 52; Brown v. Bigne, 21 Or. 260, 28 Am. St. Rep. 752, 14 L. R. A. 745, 28 Pac. 11.) Where the offenses exist at all, there has been a great modification of the harsher features of the law (Thallhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308 and note), and in a number of jurisdictions the law relating to champerty and maintenance is deemed to be wholly unsuited to the social and political system, and so not to have been adopted as a part of the common law. (Gilman v. Jones, 87 Ala. 691, 5 South. 785, 7 South. 48, 4 L. R. A. 113, and note; Adye v. Hanna, 47 Iowa, 264, 29 Am. Rep. 484; Manning v. Sprague, 148 Mass. 18, 12 Am. St. Rep. 508, 1 L. R. A. 516, 18 N. E. 673; Huber v. Johnson, 68 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806; Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314; Gruber v. Baker, 20 Nev. 453, 9 L. R. A. 302, 23 Pac. 858; Schomp v. Schenck, 40 N. J. L. 195, 29 Am. Rep. 219; Thallhimer v. Brickerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308, and note; Irwin v. Curie, 171 N. Y. 409, 58 L. R. A. 830, 64 N. E. 161; Weakly v. Hall, 13 Ohio, 167 42 Am. Dec. 194; Reece v. Kyle, 49 Ohio St. 475, 16 L. R. A. 723, 31 N. E. 747; Powers v. Van Dyke, 27 Okl. 27, 36 L. R. A. (N. S.) 96, 111 Pac. 939; Brown v. Bigne, 21 Or. 260, 28 Am. [illegible] 752, 14 L. R. A. 745, 28 Pac. 11; Croco v. Oregon Short Line R. Co. [illegible] 311, 44 L. R. A. 285, 54 Pac. 985.) Furthermore, in some instances [illegible] consideration seems to be whether or not contracts formerly void for champerty and maintenance are, in light of modern ideas, contrary to public policy. (Metropolitan Life Ins. Co. v. Fuller, 61 Conn. 252, 29 Am. St. Rep. 196, 23 Atl. 193; Adye v. Hanna, 47 Iowa, 264, 29 Am. Rep. 484.)"—5 Ruling Case Law, 273.

Mr. Bishop says that contrary to some opinions (Hickox v. Elliott, 10 Sawy. 415, 22 Fed. 13, 23; Schomp v. Schenck, 40 N. J. L. 195, 29 Am. Rep. 219; Duke v. Harper, 2 Mo. App. 1), champerty, regarded as a branch of maintenance, is by most of our tribunals held to be indictable, and as such, or as

civil society that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law: "*qui improbe coeunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Julia de vi privata tenentur* (those

being contrary to public policy, rendering the champertous contract void. equally in our states and in England. Thurston v. Percival, 1 Pick. (Mass.) 415; Rust v. Larue, 4 Litt. (Ky.) 411, 425, 14 Am. Dec. 172; Brown v. Beauchamp, 5 T. B. Mon. (Ky.) 413, 416, 17 Am. Dec. 81; Douglass v. Wood, 1 Swan (Tenn.), 393; Meeks v. Dewberry, 57 Ga. 263; Hayney v. Coyne, 10 Heisk. (Tenn.) 339; Jenkins v. Bradford, 59 Ala. 400; Stanton v. Haskin, 1 McAr. (D. C.), 558, 29 Am. Rep. 612; Orr v. Tanner, 12 R. I. 94. In Ohio this offense is not indictable, simply because there are no common-law offenses there. Key v. Vattier, 1 Ohio, 132. So in one or two other states. Wright v. Meek, 3 Greene (Iowa), 472; Newkirk v. Cone, 18 Ill. 449; Danforth v. Streeter, 28 Vt. 490; Richardson v. Rowland, 40 Conn. 565. See 2 Bishop New Crim. Law, § 131.

Champertous contracts between attorney and client.—"By the great weight of modern authority contingent fees charged for professional services dependent on the amount of recovery are not within the rules against champerty and maintenance. (Gilman v. Jones, 87 Ala. 691, 4 L. R. A. 113, and note, 5 South. 785, 7 South. 48; Stanton v. Haskin, 1 McAr. (D. C.) 558, 29 Am. Rep. 612; Perry v. Dicken, 105 Pa. St. 83, 51 Am. Rep. 181.) Such a contract may, however, be so framed as to be champertous. Thus, if the contract provides that the attorney shall pay witness fees out of a contingent fee (Barngrover v. Pettigrew, 128 Iowa, 533, 111 Am. St. Rep. 206, 2 L. R. A. (N. S.) 260, 104 N. W. 904), or shall bear the costs of the suit (Stevens v. Sheriff, 76 Kan. 124, 11 L. R. A. (N. S.) 1153, 90 Pac. 799), or if it contains a stipulation that the client shall not compromise or settle his claim without the consent of the attorney (Davis v. Webber, 66 Ark. 190, 74 Am. St. Rep. 81, 45 L. R. A. 196, 49 S. W. 822; North Chicago St. R. Co. v. Ackley, 171 Ill. 100, 44 L. R. A. 177, 49 N. E. 222; Davis v. Chase, 159 Ind. 242, 95 Am. St. Rep. 294, and note, 64 N. E. 88, 853; Kansas City E. R. Co. v. Service, 77 Kan. 316, 14 L. R. A. (N. S.) 1105, 94 Pac. 262; Lipscomb v. Adams, 193 Mo. 530, 112 Am. St. Rep. 500, and note, 91 S. W. 1046; Davy v. Fidelity & Casualty Ins. Co., 78 Ohio St. 256, 125 Am. St. Rep. 694, 17 L. R. A. (N. S.) 443, 85 N. E. 504; Jackson v. Stearns, 48 Or. 25, 5 L. R. A. (N. S.) 390, and note, 84 Pac. 798), it is champertous. Furthermore, if it appears that the contingent fee was a reward for the attorney's services as a witness (Perry v. Dicken, 105 Pa. St. 83, 51 Am. Rep. 181), or for the quashing of a criminal prosecution (Ormerod v. Dearman, 100 Pa. St. 561, 45 Am. Rep. 391), it will not be upheld. The rule sustaining contingent fees also

who knavishly interfere in other men's suits, for the purpose of sharing whatever may be awarded by the verdict, are liable to the penalties of the Julian law '*de vi privata*'—of secret influence)'';[b] and they were punished by the forfeiture of a third part of their goods, and perpetual infamy. Hitherto, also, must be referred the provision of the statute 32 Henry VIII, c. 9 (Mainte-

[b] Ff. 48. 7. 6.

---

does not apply, according to some authorities, if the attorney is given an interest in the thing to be recovered (Geer v. Frank, 179 Ill. 570, 45 L. R. A. 110, 53 N. E. 965; Blaisdell v. Ahern, 144 Mass. 393, 59 Am. Rep. 99, 11 N. E. 621), without reference to any agreement on his part to pay expenses. (Gargano v. Pope, 184 Mass. 571, 100 Am. St. Rep. 575, 69 N. E. 343.) Other authorities, however, take the position that an agreement by an attorney for compensation out of the recovery is not champertous, unless he undertakes to bear the expenses of the suit; since, in contributing his services, he does nothing unlawful, that being a part of his professional duty, and since his contracting for a part of the thing recovered is not in itself illegal. (Johnson v. Van Wyck, 4 App. Cas. (D. C.) 294, 41 L. R. A. 520; Geer v Frank, 179 Ill. 570, 45 L. R. A. 110, 53 N. E. 965; Shelton v. Franklin, 224 Mo. 342, 135 Am. St. Rep. 537, 123 S. W. 1084; Croco v. Oregon Short Line R. Co., 18 Utah, 311, 44 L. R. A. 285, 54 Pac. 985; In re Evans, 22 Utah, 366, 83 Am. St. Rep. 794, 53 L. R. A. 952, 62 Pac. 913.) Still other courts take the position that a contract between an attorney and client allowing the former a contingent interest in the subject matter as compensation for his professional services is valid and not champertous unless unfair advantage is taken of the client. (Davis v. Webber, 66 Ark. 190, 74 Am. St. Rep. 81, 45 L. R. A. 196, 49 S. W. 822; Lipscomb v. Adams, 193 Mo. 530, 112 Am. St. Rep. 500, and note, 91 S. W. 1046; Reece v. Kyle, 49 Ohio St. 475, 16 L. R. A. 723, 31 N. E. 747.) Where it is regarded as champertous to stipulate for a portion of the amount recovered as a fee, it is not so considered to contract for a fee equal to a specified per cent of the amount of the recovery (Blaisdell v. Ahern, 144 Mass. 393, 59 Am. Rep. 99, 11 N. E. 621), and similarly, it has been held not champerty to agree to allow and pay an attorney the first fifty dollars collected by him in a suit. (Scott v. Harmon, 109 Mass. 237, 12 Am. Rep. 685.) Conveyances to attorneys by their clients pending litigation of an interest in the suit are generally examined with great scrutiny, when drawn in question, not only because of the doctrines of champerty and maintenance, but because of the confidential relations existing in such cases. (Davis v. Webber, 66 Ark. 190, 74 Am. St. Rep. 81, 45 L. R. A. 196, 49 S. W. 822; Reece v. Kyle, 49 Ohio St. 475, 16 L. R. A. 723, 31 N. E. 747.) Where the contract is champertous, it has been ruled that the client may recover in an action against the attorney for

nance, 1540), that no one shall sell or purchase any pretended right or title to land unless the vendor [136] hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder, on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor. These offenses relate chiefly to the commencement of *civil* suits; but

§ 145. 14. Compounding informations.—The *compounding of informations* upon penal statutes are an offense of an equivalent nature in *criminal* causes, and are, besides, an additional misdemeanor against public justice, by contributing to make the laws odious to the people. At once, therefore, to discourage malicious informers and to provide that offenses, when once discovered, shall be duly prosecuted, it is enacted by statute 18 Elizabeth, c. 5 (Common Informers, 1575),[16] that if any person, informing under

money he has received (Butler v. Legro, 62 N. H. 350, 13 Am. St. Rep. 573), but the right of recovery against an attorney has been der . where the plaintiff was one who agreed with the attorney to have his employment procured as counsel for litigants for a share of the fees. (Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. A. R. 483, 24 Pac. 846.) Champerty is no defense to an action against an attorney for negligence and want of skill. (Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134.) After the litigation is ended an attorney may lawfully contract for remuneration out of the subject of the suit, even where such a contract, if previously made, would be regarded as champertous (Floyd v. Goodwin, 8 Yerg. (Tenn.) 484, 29 Am. Dec. 130), and it has been held that an attorney may lawfully purchase an interest in the suit in consideration of services already rendered, as well as future services. An agreement of a client to transfer certain property and pay his attorneys a lump sum to get him a divorce and settle his wife's claim for alimony in an action against him for the annulment of the marriage is champertous as speculating on the terms of settlement, and is against public policy as facilitating divorce. (Farngrover v. Pettigrew, 128 Iowa, 533, 111 Am. St. Rep. 206, 2 L. R. A. (N. S.) 260, 104 N. W. 904; Donaldson v. Eaton, 136 Iowa, 650, 125 Am. St. Rep. 275, and note, 14 L. R. A. (N. S.) 1168, 114 N. W. 19.)"—5 Ruling Case Law, 276.

For the history of champerty and maintenance and review of English cases, see article in 6 Law Quart. Rev., 169, entitled "The Law of Maintenance and Champerty," by A. H. Dennis.

[16] The act of 18 Elizabeth, c. 5, was amended as regards punishment by the Pillory Abolition Act of 1816. Mr. Bishop says that "while this statute is sufficiently early to be common law with us, it is of a penal class not

pretense of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him (which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not for the public good), he shall forfeit 10*l*., shall stand two hours on the pillory, and shall be forever disabled to sue on any popular or penal statute.

§ 146. 15. Conspiracy to indict.—A conspiracy, also, to indict an innocent man of felony falsely and maliciously, who is accordingly indicted and acquitted, is a further abuse and perversion of public justice,[17] for which the party injured may either have a

generally so regarded. Yet we have no decisions directly to the question as to it, or informing us what was the anterior common law; but an American judge has left a *dictum* that 'the compounding of penalties is an offense at common law' (Collamer, J., in Hinesburgh v. Sumner, 9 Vt. 23, 26, [31 Am. Dec. 599]), which, if in any degree correct, requires modifications. (See Rex v. Crisp, 1 Barn. & Ald. 282 [106 Eng. Reprint, 104]; Rex v. Southerton, 6 East, 126, [102 Eng. Reprint, 1235])."—Bishop, 1 New Crim. Law, § 712.

17 **Crime of conspiracy.**—Conspiracy in general may be described as a combination or agreement between two or more persons to do an unlawful act, or to do a lawful act by unlawful means. Pettibone v. United State, 148 U. S. 197, 203, 37 L. Ed. 419, 13 Sup. Ct. Rep. 542. The law of conspiracy has been adopted as a part of the common law in the United States. State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; Commonwealth v. Hunt, 4 Met. (Mass.) 111, 38 Am. Dec. 346; State v. Eastern Coal Co., 29 R. I. 254, 132 Am. St. Rep. 817, 17 Ann. Cas. 96, 70 Atl. 1. Any combination to commit a crime, or contemplating the commission of a crime to attain the desired end, is indictable as a conspiracy. State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; Seville v. State, 49 Ohio St. 117, 15 L. R. A. 516, 30 N. E. 621. Likewise combinations to induce another to commit a crime are unlawful conspiracies. There may be a conspiracy to injure the reputation of a person (State v. Hickling, 41 N. J. L. 208, 32 Am. Rep. 198); to seduce a woman (State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79; Smith v. People, 25 Ill. 17, 76 Am. Dec. 780); to interfere, at least by coercion, with the right of a person to enter into or continue in any lawful business, profession or employment (State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; State v. Duncan, 78 Vt. 364, 112 Am. St. Rep. 922, 6 Ann. Cas. 602, 4 L. R. A. (N. S.) 1144, 63 Atl. 225).

It is, however, only of conspiracies to obstruct justice that Blackstone speaks. The perversion or obstruction of the administration in a criminal or civil proceeding is an unlawful act, and a combination to accomplish such an object is an indictable conspiracy. Garland v. State, 112 Md. 83, 21

civil action by writ of conspiracy (of which we spoke in the preceding book),[c] or the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the king, and were by the ancient common law[d] to receive what is called the *villeinous* judgment; *viz.*, to lose their *liberam legem* (free law—legal rights), whereby they are discredited and disabled as jurors or witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their own bodies committed to prison.[e] But it now is the better opinion that the villeinous judgment is by long [137] disuse become obsolete, it not having been pronounced for some ages, but instead thereof the delinquents are usually sentenced to imprisonment, fine and pillory. To this head may be referred the offense of sending letters, threatening to accuse any person of a crime punishable with death, transportation, pillory or other infamous punishment, with a view to extort from him any money or other valuable chattels. This is punishable by statute 30 George II, c. 24 (Obtaining Money Under False Pretenses, 1756), at the discretion of the court, with fine, imprisonment, pillory, whipping or transportation for seven years.

[c] See Book. III. pag. 126.
[d] Bro. Abr. t. Conspiracy. 28.
[e] 1 Hawk. P. C. 193.

Ann. Cas. 28, 75 Atl 631; People v. Flack, 125 N. Y. 324, 11 L. R. A. 807, 26 N. E. 267. It has been held to be an unlawful combination to procure criminal process for wrongful purposes (Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786), to interfere with a sheriff or his deputy in the performance of his duty as an officer of the court (State v. McNally, 34 Me. 210, 56 Am. Dec. 650), or to suppress or fabricate evidence (State v. Hardin, 144 Iowa, 264, 138 Am. St. Rep. 292; 120 N. W. 470; State v. De Witt, 2 Hill (S. C.), 282, 27 Am. Dec. 371).

The Criminal Procedure Act of 1851 now provides punishment by fine and imprisonment, to which may be added hard labor, for the offenses mentioned by Blackstone. This statute also makes it an offense to conspire, obstruct, defeat, pervert or prevent the course of public justice; whether by preventing or persuading a witness from giving evidence in a criminal prosecution, or by willfully producing false evidence to the court, or by publishing information that may prejudicially affect the court or the jurors. 4 Stephen, Comm. (16th ed.), 212.

See an article ir 6 Law Quart. Rev. 129, entitled "The Law of Criminal Conspiracy in England and Ireland," by Kenelm E. Digby.

§ 147. 16. Perjury.—The next offense against public justice is when the suit is past its commencement and come to trial. And that is the crime of willful and corrupt *perjury*, which is defined by Sir Edward Coke[t] to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *willfully*, *absolutely* and *falsely*, in a matter *material* to the issue or point in question.[18] The law takes no notice of any per-

[t] 3 Inst. 164.

---

[18] **Elements of the crime of perjury.**—"False oaths taken, and false statements made in certain cases, though not of a judicial kind, are now, by statute, punishable with the same penalties as perjury. Moreover, these penalties attach also to willful falsehood in an *affirmation*, and whether uttered as a witness, or as a juror, or in any other capacity. The law relating to perjury has been consolidated by the Perjury Act, 1911, which provides, that if any person, lawfully sworn as a witness or as an interpreter in a judicial proceeding, willfully makes a statement material in that proceeding, which he knows to be false, or does not believe to be true, he is guilty of perjury. A mere voluntary oath, however—that is, an oath administered in a case, and in circumstances, for which the law has not provided—is not one on which perjury can be assigned; for as such a proceeding is not required, so neither is it protected, by the law. Indeed, such voluntary oaths are expressly prohibited by the Statutory Declarations Act, 1835, which provides that a certain form of declaration may be substituted for them. Any party falsely making such statutory declaration is guilty of a misdemeanor. . . .

"Perjury is a misdemeanor, the punishments for which have varied from time to time; but now under the Perjury Act, 1911, the punishment is penal servitude for a term not exceeding seven years, or imprisonment, with or without hard labor for a term not exceeding two years, or a fine, or penal servitude or imprisonment with a fine. Aiders and abettors are punishable as principals; and persons who incite or attempt to procure any offense against the act are guilty of a misdemeanor, and liable to imprisonment or fine, or both. Any court, whether civil or criminal, and whether of summary jurisdiction or otherwise, has, in general, the power to direct a witness to be prosecuted for perjury, in regard to the evidence he has given in any cause or proceeding had therein.—STEPHEN, 4 Comm. (16th ed.), 215.

The rules obtaining in the United States for holding one guilty of perjury are as follows: (1) The intention must be willful. United States v. Babcock, 4 McLean, 113, Fed. Cas. No. 14,488; People v. Brown, 74 Cal. 306, 16 Pac. 1. (2) The oath must be false. State v. Tappan, 21 N. H. 56; Thomas v. State, 71 Ga. 252; State v. Nickerson, 46 Iowa, 447; Commonwealth v. Monahan, 9 Gray (Mass.), 119; Urquhart v. State, 103 Ala.

jury but such as is committed in some court of justice, having power to administer an oath, or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution; for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason it is much to be questioned how far any magistrate is justifiable in taking a voluntary *affidavit* in any extrajudicial matter, as is now too frequent upon every petty occasion; since it is more than possible that by such idle oaths a man may frequently *in foro conscientiæ* (at the tribunal of conscience) incur the guilt, and at the same time evade the temporal penalties, of perjury. The perjury must also be corrupt (that is, committed *malo animo*—with an evil intent), willful, 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 no more penal than in the voluntary extrajudicial oaths before mentioned. *Subornation* of perjury is the offense of procuring another to [138] take such a false oath as constitutes perjury in the principal.[19] The punishment of perjury and subornation at common law has been various. It was anciently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment, and never more

90, 16 South. 17; (3) The party must be lawfully sworn. State v. Wymberley, 40 La. Ann. 460, 4 South. 161; United States v. Hall, 131 U. S. 50, 33 L. Ed. 97, 9 Sup. Ct. Rep. 663. (4) The proceedings must be judicial. Commonwealth v. Warden, 11 Met. (Mass.) 406. Proceedings before those who are entrusted with the administration of justice, with respect to matters regularly before them, are considered to be judicial. Arden v. State, 11 Conn. 408. (5) The assertion must be absolute. Commonwealth v. Cornish, 6 Binn. (Pa.) 249. (6) The oath must be material to the question depending. People v. Perazzo, 64 Cal. 106, 28 Pac. 62; State v. Beard, 25 N. J. L. 384; State v. Geer, 46 Kan. 529, 26 Pac. 1027; United States v. Shinn, 8 Sawy. 403, 14 Fed. 447.

[19] Subornation of perjury is now punishable in England in the same way as perjury, under the Perjury Act of 1911.

One who procures the perjury to be committed is regarded as an accessory before the fact to that crime. Commonwealth v. Smith, 11 Allen (Mass.), 243. It is essential that perjury be actually committed by the person suborned. United States v. Wilcox, 4 Blatchf. 393, Fed. Cas. No. 16,693; United States v. Evans, 19 Fed. 912.

capable of bearing testimony.[g] But the statute 5 Elizabeth, c. 9, Perjury, 1562 (if the offender be prosecuted thereon), inflicts the penalty of perpetual infamy and a fine of 40*l*. on the suborner, and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with six months' imprisonment, perpetual infamy and a fine of 20*l*., or to have both ears nailed to the pillory. But the prosecution is usually carried on for the offense at common law; especially as, to the penalties before inflicted, the statute 2 George II, c. 25 (Perjury, 1728), superadds a power for the court to order the offender to be sent to the house of correction for a term not exceeding seven years, or to be transported for the same period, and makes it felony without benefit of clergy to return or escape within the time. It has sometimes been wished that perjury, at least upon capital accusations, whereby another's life has been or might have been destroyed, was also rendered capital, upon a principle of retaliation, as it is in all cases by the laws of France.[h] And certainly the odiousness of the crime pleads strongly in behalf of the French law. But it is to be considered that there they admit witnesses to be heard only on the side of the prosecution, and use the rack to extort a confession from the accused. In such a constitution, therefore, it is necessary to throw the dread of capital punishment into the other scale, in order to keep in awe the witnesses for the crown, on whom alone the prisoner's fate depends: so naturally does one cruel law beget another. But corporal and pecuniary punishments, exile and perpetual infamy, are more suited to the genius of the English law, where the fact is openly discussed between witnesses on *both* sides, and the evidence for the crown may be contradicted and disproved by those of the prisoner. Where, [139] indeed, the death of an innocent person has actually been the consequence of such willful perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment, which our ancient law in fact inflicted.[i] But the mere attempt to destroy life by other means not being capital, there is no reason that an attempt by perjury should, much less that this crime should in *all* judicial cases be punished with death. For to multiply cap-

[g] 3 Inst. 163.

[h] Montesq. Sp. L. b. 29. c. 11.

[i] Britton. c. 5.

ital punishments lessens their effect when applied to crimes of the deepest dye, and, detestable as perjury is, it is not by any means to be compared with some other offenses, for which only death can be inflicted: and therefore it seems already (except perhaps in the instance of deliberate murder by perjury) very properly punished by our present law, which has adopted the opinion of Cicero,[k] derived from the law of the twelve tables, "*perjurii pœna divina, exitium; humana, dedecus* (the divine punishment of perjury is death, the human, disgrace)."

§ 148. 17. Bribery.—Bribery is the next species of offense against public justice; which is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behavior in his office.[l] [20] In the east it is the custom never to petition any superior for justice, not excepting their kings, without a present. This is calculated for the genius of despotic countries, where the true principles of government are never understood, and it is imagined that there is no obligation from the superior to the inferior, no relative duty owing from the governor to the governed. The Roman law, though it contained many severe injunctions against bribery, as well for selling a man's vote in the senate or other public assembly as for the bartering of common justice, yet, by a strange indulgence in one instance, it tacitly encouraged this practice, allowing the magistrate to receive small presents, provided they did not in the whole exceed a hundred crowns in the year:[m] not considering the insinuating nature and

k de Leg. 2, 9.

l 1 Hawk. P. C. 168.

m Ff. 48. 11. 6.

---

20 The more important existing statutes in England to prevent and punish bribery are the Public Bodies (Corrupt Practices) Act, 1889, the Corrupt and Illegal Practices Prevention Act, 1883, the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, and the Prevention of Corruption Act, 1906. See Stephen, 4 Comm. (16th ed.), 218.

The crime of bribery has been greatly enlarged, both by action of the courts and by statute, beyond the limits given by Blackstone. It applies both to the actor and to the receiver, and extends to voters, legislators, and public officers generally. An attempt to bribe, though unsuccessful, has been held criminal. United States v. Worrall, 2 Dall. (Pa.) 384, 1 L. Ed. 426, Fed. Cas. No. 16,766; State v. Ellis, 33 N. J. L. 102, 97 Am. Dec. 707.

gigantic progress of this vice, when once admitted. Plato therefore more wisely, in his ideal republic,[n] [140] orders those who take presents for doing their duty to be punished in the severest manner; and by the laws of Athens he that offered was also prosecuted, as well as he that received a bribe.[o] In England this offense of taking bribes is punished, in inferior officers, with fine and imprisonment, and in those who offer a bribe, though not taken, the same.[p] But in judges, especially the superior ones, it hath been always looked upon as so heinous an offense, that the Chief Justice Thorp was hanged for it in the reign of Edward III. By a statute[q] 11 Henry IV (1409), all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service forever. And some notable examples have been made in parliament of persons in the highest stations, and otherwise very eminent and able, but contaminated with this sordid vice.

§ 149. **18. Embracery.**—Embracery is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments and the like.[r] [21] The punishment for the person embracing is by fine and imprisonment; and for the juror so embraced, if it be by taking money, the punishment is (by divers statutes of the reign of Edward III) perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value.

n de Leg. l. 12.
o Pott. Antiq. b. 1. c. 23.
p 3 Inst. 147.
q *Ibid.* 146.
r 1 Hawk. P. C. 259.

---

21 Embracery in England is now governed by the Juries Act, 1825, which provides punishment of fine and imprisonment.

Embracery is said to consist in all such practices as tend corruptly to influence a juror. The crime is made up of the attempt thus to influence a juror. Upon such attempt being made, whether successful or not, the crime is consummate. The *corpus delicti*, the essence and body of the offense, being a corrupt attempt, it is wholly immaterial whether the would-be corrupter gains his point or not, or whether the juror thus approached gives any verdict or not, or whether the verdict is true or false. State v. Woodward, 182 Mo. 391, 103 Am. St. Rep. 646, 81 S. W. 857; Grannis v. Branden, 5 Day (Conn.), 260, 5 Am. Dec. 143; State v. Brown, 95 N. C. 685; People v. Glen, 64 App. Div. 167, 71 N. Y. Supp. 893; State v. Sales, 2 Nev. 268.

§ 150. 19. False verdicts.—The *false verdict* of jurors, whether occasioned by embracery or not, was anciently considered as criminal, and therefore exemplarily punished by attaint in the manner formerly mentioned.[s]

§ 151. 20. Negligence of public officers.—Another offense of the same sp is the *negligence of public officers*, entrusted with the administration of justice, as sheriffs, coroners, constables and the like, which makes the offender liable to be fined, and in very notorious cases will amount to a forfeiture of his office, if it be a beneficial one.[t] Also the omitting to apprehend persons, offering stolen [141] iron, lead and other metals to sale, is a misdemeanor, and punishable by a stated fine, or imprisonment, in pursuance of the statute 29 George II, c. 30 (Stealing of Lead, 1755).

§ 152. 21. Oppression by judges.—There is yet another offense against public justice, which is a crime of deep malignity, and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the *oppression* and tyrannical partiality of judges, justices and other *magistrates*, in the administration and under the color of their office. However, when prosecuted, either by impeachment in parliament or by information in the court of king's bench (according to the rank of the offenders), it is sure to be severely punished with forfeiture of their offices (either consequential or immediate), fines, imprisonment or other discretionary censure, regulated by the nature and aggravations of the offense committed.

§ 153. 22. Extortion.—Lastly, *extortion* is an abuse of public justice, which consists in any officer's unlawful taking, by color of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due.[u] [22] The punish-

[s] See Book III. pag. 402.
[t] 1 Hawk. P. C. 168.
[u] 1 Hawk. P. C. 170.

22 Extortion is the obtaining of property from another with his consent, induced by a wrongful use of force or fear, or under color of official right. Cal. Penal Code, § 518; People v. Hoffman, 126 Cal. 366, 58 Pac. 856. Under

ment is fine and imprisonment, and sometimes a forfeiture of the office.

this definition, it is no defense to his accusation of extortion that the charges or publications threatened to be made by the defendant, and by which he obtained valuable property, were true. The truth or validity of these matters form no element in establishing the guilt or innocence of a defendant charged with extortion. Morrill v. Nightingale, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068. See Commonwealth v. O'Brien, 66 Mass. 84; State v. Logan, 104 La. 760, 29 South. 336; People v. Barondess, 16 N. Y. Supp. 436; Dudley v. Stansberry, 5 Ala. App. 491, 59 South. 379; State v. Louanis, 79 Vt. 463, 9 Ann. Cas. 194, 65 Atl. 532.

[142] # CHAPTER THE ELEVENTH.

OF OFFENSES AGAINST THE PUBLIC PEACE.

§ 154. II. Offenses against the public peace.—We are next to consider offenses against the public *peace*, the conservation of which is entrusted to the king and his officers, in the manner and for the reasons which were formerly mentioned at large.[a] These offenses are either such as are an actual breach of the peace, or constructively so, by tending to make others break it. Both of these species are also either felonious or not felonious. The felonious breaches of the peace are strained up to that degree of malignity by virtue of several modern statutes: and, particularly,

§ 155. 1. Riotous assembling of twelve persons.—The *riotous assembling* of *twelve* persons, or more, and not dispersing upon proclamation. This was first made high treason by statute 3 & 4 Edward VI, c. 5 (Unlawful Assemblies, 1549), when the king was a minor, and a change in religion to be effected, but that statute was repealed by statute 1 Mar., c. 1 (Treason, 1553), among the other treasons created since the 25 Edward III (1350), though the prohibition was in substance re-enacted, with an inferior degree of punishment, by statute 1 Mar., st. 2, c. 12 (Riot, 1554), which made the same offense a single felony. These statutes specified and particularized the nature of the riots they were meant to suppress; as, for example, such as were set on foot with intention to offer violence to the privy council, or to change the laws of the kingdom, or for certain other specific purposes: in which cases, if the persons were commanded by proclamation to disperse, and they did not, it was by the statute of Mary made felony, but within the benefit of clergy; and [143] also the act indemnified the peace officers and their assistants if they killed any of the mob in endeavoring to suppress such riot. This was thought a necessary security in that sanguinary reign, when popery was intended to be re-established, which was like to produce great discontents: but at first it was made only for a year, and was afterwards continued for that queen's life. And, by statute 1 Elizabeth, c. 16 (Riot, 1558), when

[a] Book I. pag. 117. 268. 350.

a reformation in religion was to be once more attempted, it was revived and continued during her life also, and then expired. From the accession of James the First to the death of Queen Anne, it was never once thought expedient to revive it, but in the first year of George the First it was judged necessary, in order to support the execution of the act of settlement, to renew it, and at one stroke to make it perpetual, with large additions. For, whereas the former acts expressly defined and specified what should be accounted a riot, the statute 1 George I, c. 5 (Riot, 1714), enacts, generally, that if any twelve persons are unlawfully assembled to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff or mayor of a town shall think proper to command them by proclamation to disperse, if they contemn his orders and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy. And further, if the reading of the proclamation be by force opposed, or the reader be in any manner willfully hindered from the reading of it, such opposers and hinderers are felons, without benefit of clergy; and all persons to whom such proclamation *ought to have been made*, and knowing of such hindrance, and not dispersing, are felons, without benefit of clergy. There is the like indemnifying clause in case any of the mob be unfortunately killed in the endeavor to disperse them; being copied from the act of Queen Mary. And, by a subsequent clause of the new act, if any persons, so riotously assembled, begin even before proclamation to pull down any church, chapel, meeting-house, dwelling-house or outhouses, they shall be felons without benefit of clergy.

§ 156. 2. Unlawful hunting.—By statute 1 Henry VII, c. 7 (Hunting in Forests, 1485), *unlawful hunting* in any legal forest, park or warren not being the king's property, [144] *by night*, or with *painted faces*, was declared to be single felony. But now by the statute 9 George I, c. 22 (Criminal Law, 1722), to appear armed in any inclosed forest or place where deer are usually kept, or in any warren for hares or conies, or in any high road, open heath, common or down, by day or night, with faces blacked or otherwise *disguised*, or (being so disguised) to hunt, wound, kill or steal any deer, to rob a warren, or to steal fish, or to procure by

gift or promise of reward any person to join them in such unlawful act, is felony without benefit of clergy. I mention these offenses in this place, not on account of the damage thereby done to private property, but of the manner in which that damage is committed; namely, with the face blacked or with other disguise, and, being armed with offensive weapons, to the breach of the public peace and the terror of his majesty's subjects.

§ 157. 3. Threatening letters.—Also, by the same statute 9 George I, c. 22 (Criminal Law, 1722), amended by statute 27 George II, c. 15 (1753), knowingly to send any *letter* without a name, or with a fictitious name, *demanding* money, venison or any other valuable thing, or *threatening* (without any demand) to kill any of the king's subjects, or to fire their houses, outhouses, barns or ricks, is made felony, without benefit of clergy.[1] This offense was formerly high treason by the statute 8 Henry V, c. 6 (1420).

§ 158. 4. Destroying public works on navigable streams or highways.—To pull down or destroy any *lock*, *sluice* or *floodgate*, erected by authority of parliament on a navigable river, is by statute 1 George II, st. 2, c. 19 (Destruction of Turnpikes, etc., 1727), made felony, punishable with transportation for seven years. By the statute 8 George II, c. 20 (Destruction of Turnpikes, etc., 1734), the offense of destroying such works, or rescuing any person in custody for the same, is made felony, without benefit of clergy, and it may be inquired of and tried in any adjacent county, as if the fact had been therein committed. By the statute 4 George III, c. 12 (1763), maliciously to damage or destroy any banks, sluices or other works on such navigable river, to open the floodgates, or otherwise obstruct the navigation, is again made felony, punishable with transportation for seven years. And by the statute 7 George III, c. 40 (Turnpike Roads, 1766), [145] (which repeals all former acts relating to turnpikes), maliciously to pull down or otherwise destroy any *turnpike-gate*, or fence, toll-house, or weighing-engine thereunto belonging, erected by authority of parliament, or to rescue any person in custody for the same, is made felony

1 This offense is now punished under the provisions of the Larceny Act, 1861.

without benefit of clergy, and the indictment may be inquired of and tried in any adjacent county. The remaining offenses against the public peace are merely misdemeanors and no felonies; as,

§ 159. 5. Affrays.—Affrays (from *affraier*, to terrify) are the fighting of two or more persons in some public place, to the terror of his majesty's subjects; for, if the fighting be in private, it is no *affray*, but an *assault*.[b] [2] Affrays may be suppressed by any private person present who is justifiable in endeavoring to part the combatants, whatever consequence may ensue.[c] But more especially the constable, or other similar officer however denominated, is bound to keep the peace, and to that purpose may break open doors to suppress an affray or apprehend the affrayers, and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over, and may then, perhaps, also make them find sureties for the peace.[d] The punishment of common affrays is by fine and imprisonment, the measure of which must be regulated by the circumstances of the case; for, where there is any material aggravation, the punishment proportionably increases; as where two persons coolly and deliberately engage in a duel: this being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray, though no mischief has actually ensued.[e] Another aggravation is, when thereby the officers of justice are disturbed in the due execution of their office, or where a respect to the particular place ought to restrain and regulate men's behavior more than in common ones, as in the king's court and the like. And upon the same account also all affrays in a church or churchyard are esteemed very [146] heinous offenses, as being indignities to Him to whose service those places are consecrated. Therefore, mere quarrelsome words, which are neither an affray nor an offense in any other place, are penal here.

[b] 1 Hawk. P. C. 134.
[c] *Ibid.* 136.
[d] *Ibid.* 137.
[e] *Ibid.* 138.

---

[2] An affray is the fighting of two or more persons in a public place, to the terror of the citizens. State v. Perry, 50 N. C. 9, 69 Am. Dec. 768; Childs v. State, 15 Ark. 204; Supreme Council etc. v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818.

For it is enacted by statute 5 & 6 Edward VI, c. 4 (Brawling in Church, 1551), that if any person shall, by words only, quarrel, chide or brawl in a church or churchyard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiæ* (from entering the church), and, if a clerk in orders, from the ministration of his office during pleasure. And, if any person in such church or churchyard proceeds to smite or lay violent hands upon another, he shall be excommunicated *ipso facto;* or if he strikes him with a weapon, or draws any weapon with intent to strike, he shall besides excommunication (being convicted by a jury) have one of his ears cut off; or, having no ears, be branded with the letter "F" in his cheek. *Two* persons may be guilty of an affray: but,

§ 160. 6. Riots and unlawful assemblies.—Riots, *routs* and *unlawful assemblies* must have *three* persons at least to constitute them. An *unlawful assembly* is when three or more do assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren or the game therein, and part without doing it, or making any motion towards it.[f] A *rout* is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common, or of way, and make some advances towards it.[g] A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel:[h] as if they beat a man; or hunt and kill game in another's park, chase, warren or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner.[3] The punishment of unlawful assemblies, if to the number of twelve, we have just now seen, may be capital, according to

f 3 Inst. 176.
g Bro. Abr. t. Riot. 4, 5.
h 3 Inst. 176.

3 A riot is such disorderly conduct in three or more assembled persons, actually accomplishing an object, as is calculated to terrify others. State v. Stalcup, 23 N. C. 30, 35 Am. Dec. 732; State v. Johnson, 43 S. C. 123, 20 S. E. 988; Marshall v. Ruffalo, 50 App. Div. 149, 64 N. Y. Supp. 411. By statute in some states the concurrence of two persons is sufficient to constitute the offense of rioting. Rachels v. State, 51 Ga. 374; Bell v. Mallory, 61 Ill. 167.

the circumstances that attend it, but from the number of three to eleven, is by fine and imprisonment only. The same is the case in riots and routs by the common law, to [147] which the pillory in very enormous cases has been sometimes superadded.[i] And by the statute 13 Henry IV, c. 7 (Riots and Unlawful Assemblies, 1414), any two justices, together with the sheriff or under-sheriff of the county, may come with the *posse comitatus* (power of the county), if need be, and suppress any such riot, assembly or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction; which record alone shall be a sufficient conviction of the offenders. In the interpretation of which statute it hath been holden that 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, and that any battery, wounding or killing the rioters that may happen in suppressing the riot is justifiable.[j] So that our ancient law, previous to the modern riot act, seems pretty well to have guarded against any violent breach of the public peace; especially as any riotous assembly on a public or general account, as to redress grievances or pull down all inclosures, and also resisting the king's forces if sent to keep the peace, may amount to overt acts of high treason by levying war against the king.

§ 161. 7. Tumultuous petitioning.—Nearly related to this head of riots is the offense of *tumultuous petitioning*, which was carried to an enormous height in the times preceding the grand rebellion. Wherefore, by statute 13 Car. II, st. 1, c. 5 (Riot, 1661), it is enacted that not more than twenty names shall be signed to any petition to the king or either house of parliament for any alteration of matters established by law in church or state, unless the contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assizes or quarter sessions, and, in London, by the lord mayor, aldermen and common council;[k] and that no petition shall be delivered by a com-

[i] 1 Hawk. P. C. 159.

[j] 1 Hal. P. C. 495. 1 Hawk. P. C. 161.

[k] This may be one reason (among others) why the corporation of London has, since the restoration, usually taken the lead in petitions to parliament for the alteration of any established law.

pany of more than ten persons, on pain [148] in either case of incurring a penalty not exceeding 100*l.* and three months' imprisonment.

§ 162. 8. Forcible entry and detainer.—An eighth offense against the public peace is that of a *forcible entry* or *detainer*, which is committed by violently taking or keeping possession of lands and tenements, with menaces, force and arms, and without the authority of law.[4] This was formerly allowable to every person dissciscd, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances; which were explained more at large in a former volume.[l] But this being found very prejudicial to the public peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods, even of doing themselves justice; and much more if they have no justice in their claim.[m] So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence, and unusual weapons. By the statute 5 Richard II st. 1, c. 8 (Forcible Entry, 1381), all forcible entries are punished with imprisonment and ransom at the king's will. And by the several statutes of 15 Richard II, c. 2 (Forcible Entries, 1391), 8 Henry VI, c. 9 (Forcible Entries, 1429), 31 Elizabeth, c. 11 (1588), and 21 Jac. I, c. 15 (Restitution of Tenancies, 1623), upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view, as in case of riots, and upon such conviction may commit the offender to gaol till he makes fine and

[l] See Book III. pag. 174, etc.

[m] 1 Hawk. P. C. 141.

---

4 To make an entry forcible there must be such acts of violence, or such threats or gestures, as may give reason to apprehend personal injury or danger in standing in defense of the possession. Commonwealth v. Dudley, 10 Mass. 409; State v. Smith, 100 N. C. 466, 6 S. E. 84; Oakes v. Aldridge, 46 Mo. App. 11. Proceedings in case of a forcible entry or detainer are regulated by the statutes of the several states, and relate to a restitution of the property, as well as to the punishment of the offender for a breach of the public peace.

ransom to the king. And, moreover, the justice or justices have power to summon a jury, to try the forcible entry or detainer complained of, and, if the same be found by that jury, then, besides the fine on the offender, the justices shall make restitution by the sheriff of the possession, without inquiring into the merits of the title; for the force is the only thing to be tried, punished and remedied by them: and the same may be done by indictment at the general sessions. But this provison does not extend to such as endeavor to maintain possession by force, where they [149] themselves, or their ancestors, have been in the peaceable enjoyment of the lands and tenements, for three years immediately preceding.[n 5]

§ 163. 9. Carrying arms. — The offense of *riding* or *going armed* with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by the statute of Northampton, 2 Edward III, c. 3 (Wearing Arms, 1328), upon pain of forfeiture of the arms, and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armor.[o]

§ 164. 10. Spreading false news. — Spreading *false news*, to make discord between the king and nobility, or concerning any

[n] Holding over by force, where the tenant's title was under a lease, now expired, is said to be a forcible detainer. (Cro. Jac. 199.)

[o] Pott. Antiqu. b. 1. c. 26.

---

[5] **Forcible entry and detainer.**—One of the few instances known to our law when crime may exist without tort, even in the case of a wrong to private property, is where the rightful owner of land assaults and expels tenants holding over without right, or other persons holding possession of his land wrongfully without his will. He may commit a breach of the peace, for which he will be responsible to the public in the shape of an indictment for forcible entry; but he will not be liable to the other party, and has a perfect justification to an action of tort. (See Harvey v. Bridges 14 Mees. & W. 342; 1 Ex. 261, and other cases quoted and cited in 1 Addison on Torts, 331, § 383, and notes *s-x*; 1 Washburn on Real Property, 622-627 [4th ed.], and cases; 4 Kent, 188, and Holmes' note [1]; 4 Am. Law Rev. 336.) Though he has been held liable to tort also in Vermont and Illinois, and perhaps in some other states. (See cases cited by Washburn.)—HAMMOND.

great man of the realm, is punished by common law[p] with fine and imprisonment, which is confirmed by statutes Westm. I, 3 Edward I, c. 34 (Slander, 1275), 2 Richard II, st. 1, c. 5 (Slander, 1378), and 12 Richard II, c. 11 (Slander, 1388).

§ 165. 11. False prophecies.—False and *pretended prophecies*, with intent to disturb the peace, are equally unlawful, and more penal; as they raise enthusiastic jealousies in the people, and terrify them with imaginary fears. They are, therefore, punished by our law, upon the same principle that spreading of public news of any kind, without communicating it first to the magistrate, was prohibited by the ancient Gauls.[q] Such false and pretended prophecies were punished capitally by statute 1 Edward VI, c. 12 (Criminal Law, 1547), which was repealed in the reign of Queen Mary. And now by the statute 5 Elizabeth, c. 15 (False Prophecies, 1563), the penalty for the first offense is a fine of 100*l*. and one year's imprisonment; for the second, forfeiture of all goods and chattels and imprisonment during life.[6]

§ 166. 12. Challenges to fight.—[150] Besides actual breaches of the peace, anything that tends to provoke or excite others to break it is an offense of the same denomination.[7] Therefore, *challenges to fight*, either by word or letter, or to be the bearer of such challenge, are punishable by fine and imprisonment, ac-

[p] 2 Inst. 226. 3 Inst. 198.

[q] "*Habent legibus sanctum, si quis quid de republica a finitimis rumore aut fama acceperit, uti ad magistratum deferat, neve cum alio communicet: quod sæpe homines temerarios atque imperitos falsis rumoribus terreri, et ad facinus impelli, et de summis rebus consilium capere, cognitum est* (They make it an inviolable rule, that if anyone shall have received any intelligence in the neighborhood concerning the republic by rumor or report, he shall make it known to a magistrate, and not communicate it to anyone else; for rash and ignorant men, it is well known, alarmed by false reports, are often driven to violent measures, and interfere in affairs of the highest consequence)." Cæs. de Bell. Gall. lib. 6. cap. 19.

---

[6] All of these enactments have been repealed.

[7] Sending a challenge to fight is regarded, apart from statute, as indictable at common law. State v. Gibbons, 4 N. J. L. 40; State v. Farrier, 8 N. C. 487. In most of the states there are statutes providing punishment for duelling or sending challenges to fight.

cording to the circumstances of the offense.[r] If this challenge arises on account of any money won at gaming, or if any assault or affray happen upon such account, the offender by statute 9 Ann., c. 14 (Gaming, 1710), shall forfeit all his goods to the crown and shall suffer two years' imprisonment.

§ 167. **13. Libel.**—Of a nature very similar to challenges are *libels, libelli famosi* (defamatory writings), which, taken in their largest and most extensive sense, signify any writings, pictures or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs or pictures, in order to provoke him to wrath or expose him to public hatred, contempt and ridicule.*[8] The direct tendency of these libels is the breach of the public peace,

[r] 1 Hawk. P. C. 135. 138. * *Ibid.* 193.

---

[8] **Criminal libel.**—The Libel Act, 1843, as amended by the Libel Act, 1845, enacts, that any person who shall publish, or threaten to publish, any libel upon any other person, or shall directly or indirectly propose to abstain from printing or publishing, or offer to prevent the printing or publishing of any matter touching any other person, with intent to extort any money, security for money, or valuable thing from such person or any other, or with intent to induce any person to confer or procure any appointment or office of profit or trust, shall be liable to imprisonment; that any person who shall maliciously publish any defamatory libel, knowing the same to be false, may be imprisoned, and may have to pay such fine as the court shall award; and that if any person, though without such knowledge, shall maliciously publish any defamatory libel, he shall be liable to a fine or imprisonment, or both, as the court shall award, such imprisonment not to exceed one year.

And the same act provides that, upon the trial of any indictment or information for a defamatory libel, the truth of the matters charged may be inquired into, but shall not amount to a defense, unless it was for the public benefit that the said matters charged should be published. This is a most important provision, which differentiates the criminal offense of libel from the civil offense of the same name, in which truth is a defense to an action.

Before the passing of the Libel Act, 1792 (commonly known as "Fox's Act"), it had been frequently held by the judges (notably by Lord Mansfield and the rest of the court of king's bench in the case of Rex v. Woodfall) that, as the question whether a document amounted to a libel or not was a question of law upon the face of the record which must be decided by the judge, the only questions for the jury upon the trial were whether the ac-

by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law;[ss] and therefore the sending an abusive

[ss] Moor. 813.

---

cused had in fact published the alleged libel, and whether it bore the meaning alleged by the prosecution; or, as it was expressed in legal phrase, the *truth of the innuendoes*. By the Libel Act of 1792, however, it was provided that on every such trial of an indictment or information for libel, the jury sworn to try the issue were to give a general verdict of guilty or not guilty upon the whole matter put in issue; and should not be required or directed by the court or judge to find the defendant guilty, merely on the proof of the publication of the paper charged to be a libel, and of the sense ascribed to the same. The act, however, reserves the right of the judge presiding at the trial, as in other criminal cases, to give directions to the jury as to what in law constitutes a libel, and to express his own opinion to them upon the case before them. Trials of indictments and informations for libel are still regulated by this act.

But, besides libels of the sorts referred to, the term "libel" includes such writings as are blasphemous, treasonable seditious or immoral; and the publication of any of these latter is a common-law misdemeanor, because of the outrage which it inflicts on the religious feelings of the community, and subjects the person by whom the libel was composed, written, printed or published, to fine and imprisonment. The Criminal Libel Act, 1819, also expressly provides, as to libels of a blasphemous or seditious kind, that, in every case in which there shall be judgment against any person for composing, printing, or publishing the same, the court may order the seizure of all copies of the libel which shall be in the possession of such person, or in the possession of any other person for his use; and that, upon the proper evidence of such possession, any justice of the peace, constable, or other peace officer, acting under such order, may search for such copies, in any house, building or place belonging to the person named in such order and may enter therein in the daytime by force, if admission be refused or unreasonably delayed.—STEPHEN, 4 Comm. (16th ed.), 85.

In most of the states of the Union there are either constitutional or statutory provisions entitling the defendant in the criminal prosecution to introduce evidence of the truth of the publication, and in some states the truth is made a justification without regard to the motive or purpose with which the publication is made. Hartford v. State, 96 Ind. 461, 49 Am. Rep. 185; State v. Hosmer, 85 Mo. 553; Johnson v. State, 31 Tex. Cr. 464, 20 S. W. 980. The usual form of constitution or statute is that the truth may be given in evidence and will constitute a defense if it appears that it was published with good motives and for justifiable ends. Commonwealth v. Bonner, 9 Met. (Mass.) 410; State v. Conable, 81 Iowa, 60, 46 N. W. 759.

private letter to a man is ar much a libel as if it were openly printed, for it equally tends to a breach of the peace.[t] For the same reason it is immaterial with respect to the essence of a libel, whether the matter of it be true or false;[u] 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, we may remember, a libel must appear to be false as well as scandalous;[w] for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever [151] offense it may be against the public peace, and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animosities and to disturb the public peace is the sole consideration of the law. And therefore, in such prosecutions, the only points to be considered 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 offense against the public is complete. The punishment of such libellers, for either making, repeating, printing or publishing the libel, is fine and such corporal punishment as the court in its discretion shall inflict; regarding the quantity of the offense and the quality of the offender.[x] By the law of the twelve tables at Rome, libels which affected the reputation of another were made a capital offense, but, before the reign of Augustus, the punishment became corporal only.[y] Under the Emperor Valentinian,[z] it was again made capital not only to write, but to publish,

t 2 Brownl. 151. 12 Rep. 35. Hob. 215. Poph. 139. 1 Hawk. P. C. 195.

u Moor. 627. 5 Rep. 125. 11 Mod. 99.

w See Book III. pag. 125.

x 1 Hawk. P. C. 196.

y ———*Quinetiam lex*
Pœnaque lata, malo quæ nollet carmine quenquam
Describi: — vertere modum formidine fustis.

(And so a law was passed and punishment imposed, to forbid that anyone should be described by malicious verses:—they changed their note, compelled through dread of death by *cudgelling*.—Trans. by Lonsdale and Lee.) Hor. *ad Aug.* 152. [Epist. ii, 1, 152].

z Cod. 9. 36.

or even to omit destroying them. Our law, in this and many other respects, corresponds rather with the middle age of Roman jurisprudence, when liberty, learning and humanity were in their full vigor, than with the cruel edicts that were established in the dark and tyrannical ages of the ancient *decemviri* or the later emperors.

§ 168. a. Liberty of the press.—In this, and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious or scandalous libels are punished by the English law, some with a greater, others with a less, degree of severity, the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and [152] not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution,[a] is to subject all free-

[a] The art of printing, soon after its introduction, was looked upon (as well in England as in other countries) as merely a matter of state and subject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of license, and finally by the decrees of the court of star-chamber; which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers. On the demolition of this odious jurisdiction in 1641, the long parliament of Charles I, after their rupture with that prince, assumed the same powers as the star-chamber exercised with respect to the licensing of books; and in 1643, 1647, 1649, and 1652 (Scobell. i. 44, 134, ii. 88, 230.), issued their ordinances for that purpose, founded principally on the star-chamber decree of 1637. In 1662 was passed the statute 13 & 14 Car. II. c. 33 (Press Licensing), which (with some few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by statute 1 Jac. II. c. 17 (1685), and continued to 1692. It was then continued for two years longer by statute 4 W. & M., c. 24 (1692), but though frequent attempts were made by the government to revive it, in the subsequent part of that reign (Com. Journ. 11 Feb. 1694. 26 Nov. 1695. 22 Oct. 1696. 9 Feb. 1697. 31 Jan. 1698.), yet the parliament resisted it so strongly, that it finally expired, and the press became properly free, in 1694; and has ever since so continued.

dom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish (as the law does at present) any dangerous or offensive writings which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion,—the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive to the ends of society, is the crime which society corrects. A man (says a [153] fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And to this we may add, that the only plausible argument heretofore used for restraining the just freedom of the press, "that it was necessary, to prevent the daily abuse of it," will entirely lose its force when it is shown (by a seasonable exertion of the laws) that the press cannot be abused to any bad purpose without incurring a suitable punishment; whereas it never can be used to any good one, when under the control of an inspector. So true will it be found, that to censure the licentiousness, is to maintain the liberty, of the press.

[154]

CHAPTER THE TWELFTH.

OF OFFENSES AGAINST PUBLIC TRADE.

§ 169. III. Offenses against public trade. — Offenses against public *trade*, like those of the preceding classes, are either felonious or not felonious. Of the first sort are,

§ 170. 1. Owling.—Owling, so called from its being usually carried on in the night, which is the offense of transporting wool or sheep out of this kingdom, to the detriment of its staple manufacture. This was forbidden at common law,[a] and more particularly by statute 11 Edward III, c. 1 (Wool, 1336), when the importance of our woolen manufacture was first attended to; and there are now many later statutes relating to this offense, the most useful and principal of which are those enacted in the reign of Queen Elizabeth, and since. The statute 8 Elizabeth, c. 3 (Exportation, 1566), makes the transportation of live sheep, or embarking them on board any ship, for the first offense forfeiture of goods and imprisonment for a year, and that at the end of the year the left hand shall be cut off in some public market, and shall be there nailed up in the openest place; and the second offense is felony. The statutes 12 Car. II, c. 32 (Exportation, 1660), and 7 & 8 W. III, c. 28 (Wool, 1695), make the exportation of wool, sheep or fuller's earth liable to pecuniary penalties, and the forfeiture of the interest of the ship and cargo by the owners, if privy; and confiscation of goods and three years' imprisonment to the master and all the mariners. And the statute 4 George I, c. 11, Piracy, 1717 (amended and further enforced by 12 George [155] II, c. 21, Wool, 1738, and 19 George II, c. 34, Offenses Against Customs or Excise, 1745), makes it transportation for seven years if the penalties be not paid.

§ 171. 2. Smuggling.—Smuggling, or the offense of importing goods without paying the duties imposed thereon by the laws of the customs and excise,[1] is an offense generally connected and

[a] Mirr. c. 1. § 3.

---

[1] "I find myself unable to concur in the opinion of the court in this case, and particularly in a definition of smuggling, which requires that the goods

carried on hand in hand with the former. This is restrained by a great variety of statutes, which inflict pecuniary penalties and seizure of the goods for clandestine smuggling, and affix the guilt of felony with transportation for seven years, upon more open, daring and avowed practices; but the last of them, 19 George II, c. 34 (Offenses Against Customs or Excise, 1745), is for this purpose *instar omnium* (equal to them all), for it makes all forcible acts of smuggling, carried on in defiance of the laws, or even in disguise to evade them, felony without benefit of clergy, enacting that if three or more persons shall assemble, with firearms or other offensive weapons, 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 offenses, or shall pass with such goods in disguise, or shall wound, shoot at, or assault any officers of the revenue when in the execution of their duty, such persons shall be felons, without the benefit of clergy. As to that branch of the

shall be actually unladen and carried upon shore. This definition rests only upon the authority of Hawkins' Pleas of the Crown (A. D. 1716), repeated in Bacon's Abridgment (A. D. 1736), and copied into Russell on Crimes (A. D. 1819), and Gabbet's Criminal Law, a work but little known. The diligence of counsel has failed to find support for it in a single adjudicated case in England or this country. If it were ever the law in England, it never found a lodgment in its standard dictionaries, either general or legal, and has never been recognized as such by writers upon criminal law, with the exceptions above stated. It was never treated as the law in America. The truth seems to be that smuggling *co nomine* was formerly, whatever it may be now, not a crime in England, but a large number of acts leading up to an unlawful unlading of goods were made criminal. Smuggling appears to have been rather a popular than a legal term, and the fact that it was usually accompanied by the landing of goods on shore may have led to the definition made use of by Bacon and Hawkins. Indeed, in all the old English statutes cited in the opinion of the court it is recognized that the ultimate object of all smugglers is to get their goods ashore without payment of duties. If, as stated by these authors, the actual unlading and carriage of the goods to the shore were an essential ingredient of the offense, it is somewhat singular that it should have escaped the notice of so learned a writer as Sir William Blackstone, who defines it in accordance with the views of the other writers upon the subject as 'the offense of importing goods without paying the duties imposed thereon by the laws of the customs and excise.' 4 Bl. Comm. 154."—BROWN, J. (Fuller, C. J., and Harlan and Brewer, JJ., concurring) in Keck v. United States, 172 U. S. 434, 460, 43 L. Ed. 505, 515, 19 Sup. Ct. Rep. 254.

statute which required any person charged upon oath as a smuggler, under pain of death, to surrender himself upon proclamation, it seems to be expired; as the subsequent statutes,[b] which continue the original act to the present time, do in terms continue only so much of the said act as relates to the *punishment* of the offenders, and not to the extraordinary method of apprehending or causing them to surrender; and for offenses of this positive species, where punishment (though necessary) is rendered so by the laws themselves, which by imposing high duties on commodities increase the temptation to evade them, we cannot surely be too cautious in inflicting the penalty of death.[c 2]

§ 172. 3. Fraudulent bankruptcy. — Another offense against public trade is fraudulent *bankruptcy*, which was sufficiently spoken of in a former volume,[d] [156] when we thoroughly examined the nature of these unfortunate traders. I shall therefore here barely mention over again some abuses incident to bankruptcy, *viz.*, the bankrupt's neglect of surrendering himself to his creditors; his nonconformity to the directions of the several statutes; his concealing or embezzling his effects to the value of 20*l.*; and his withholding any books or writings with intent to defraud his creditors,—all which the policy of our commercial country has made capital in the offender,[e] or felony without benefit of clergy.[3] And, indeed, it is allowed in general, by such as are the most averse to the infliction of capital punishment, that the offense of fraudulent bankruptcy, being an atrocious species of the *crimen falsi*, ought to be put upon a level with those of forgery and falsifying the coin.[f] To this head we may also subjoin, that by statute 32

[b] Stat. 26 Geo. II. c. 32 (1753). 32 Geo. II. c. 18 (1758). 4 Geo. III. c. 12 (1763).

[c] See Book. I. pag. 317. Beccar. c. 33.

[d] See Book. II. pag. 481, 482.

[e] Stat. 5 Geo. II. c. 30. (Bankrupts, 1731.)

[f] Beccar. c. 34.

---

2 The subject of smuggling is now governed by modern statutes such as the Customs Consolidation Act, 1876, and the Customs and Inland Revenue Act, 1881.

3 Offenses committed by a bankrupt are now governed by the Debtors Act, 1869, as modified by the Bankruptcy Acts, 1883 to 1913.

George II, c. 28 (Debtors' Imprisonment, 1758), it is felony punishable by transportation for seven years if a prisoner, charged in execution for any debt under 100*l.*, neglects or refuses on demand to discover and deliver up his effects for the benefit of his creditors. And these are the only felonious offenses against public trade, the residue being mere misdemeanors; as,

§ 173. 4. Usury.—Usury, which is an unlawful contract upon the loan of money, to receive the same again with exorbitant increase.[4] Of this also we had occasion to discourse at large in a former volume.[5] We there observed that by statute 37 Henry VIII, c. 9 (Usury, 1545), the rate of interest was fixed at 10*l. per cent per annum*, which the statute 13 Elizabeth, c. 8 (Usury, 1571), confirms, and ordains that all brokers shall be guilty of a *præmunire* that transact any contracts for more, and the securities themselves shall be void. The statute 21 Jac. I, c. 17 (Usury, 1623), reduced interest to eight *per cent*, and, it having been lowered in 1650, during usurpation, to six *per cent*, the same reduction was re-enacted after the restoration by statute 12 Car. II, c. 13 (Usury,

5 See Book II. pp. 455, etc.

The subject of bankruptcy is now regulated in the United States by the Federal Bankruptcy Act of 1898. Section 29 provides that a person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy or attorney, or as agent, proxy or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

4 The old usury laws were repealed by the Usury Laws Repeal Act, 1854.

1660), and, lastly, the statute 12 Ann., st. 2, c. 16 (Usury, 1713), has reduced it to five *per cent.* Wherefore, not only all contracts for taking more are in themselves totally void, but also the lender shall forfeit treble the [157] money borrowed. Also, if any scrivener or broker takes more than five shillings *per cent* procuration money, or more than twelvepense for making a bond, he shall forfeit 20*l.* with costs, and shall suffer imprisonment for half a year. And by statute 17 George III, c. 26 (Grants of Life Annuities. 1776), to take more than ten shillings *per cent* for procuring any money to be advanced on any life annuity is made an indictable misdemeanor, and punishable with fine and imprisonment; as is also the offense of procuring or soliciting any infant to grant any life annuity, or to promise, or otherwise engage, to ratify it when he comes of age.*

§ 174. **5. Cheating.**—Cheating is another offense more immediately against public trade: as that cannot be carried on without a punctilious regard to common honesty and faith between man and man.[5] Hither, therefore, may be referred that prodigious multitude of statutes which are made to prevent deceits in particular trades, and which are chiefly of use among the traders themselves. For so cautious has the legislature been, and so thoroughly abhors all indirect practices, that there is hardly a considerable fraud incident to any branch of trade but what is restrained and punished by some particular statute. The offense, also, of *breaking the assize* of bread, or the rules laid down by law, and particularly by statutes 31 George II, c. 29 (Making of Bread, 1757), 3 George III,

*All laws fixing a maximum rate of legal interest or punishing the taking of usury are now repealed in England.—HAMMOND.

5 **Cheating.**—Numerous statutes have been passed in England to restrain and punish the practice of criminal cheating in trade. Falsification of Accounts Act, 1875; Weights and Measures Act, 1889; Markets and Fairs (Weighing of Cattle) Act, 1891. The general punishment of all cheating indictable at common law is fine and imprisonment, to which, by the Criminal Procedure Act, 1851, hard labor may be added. The statute 33 Henry VIII, c. 1, has either been adopted as part of the common law in the states of the Union or else expressly enacted therein. Commonwealth v. Warren, 6 Mass. 72; People v. Johnson, 12 Johns. (N. Y.) 292.

c. 11 (Bread, 1762), and 13 George III, c. 62 (Bread, 1772), for ascertaining its price in every given quantity, is reducible to this head of cheating; as is likewise in a peculiar manner the offense of selling by *false weights and measures*, the standard of which fell under our consideration in a former volume.[h] The punishment of bakers breaking the assize was anciently to stand in the pillory, by statute 51 Henry III, st. 6 (1266), and for brewers (by the same act) to stand in the tumbrel or dung-cart:[i] which, as we learn from Domesday Book, was the punishment for knavish brewers in the city of Chester so early as the reign of Edward the Confessor. "*Malam cerevisiam faciens, in cathedra ponebatur stercoris* (he who made bad beer was placed in a dung-cart)."[j] But now the general punishment for all frauds [158] of this kind, if indicted (as they may be) at common law, is by fine and imprisonment, though 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. Lastly, any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice or the like, is punishable with fine, imprisonment and pillory.[k] And by the statutes 33 Henry VIII, c. 1 (Counterfeit Letters, 1541), and 30 George II, c. 24 (Obtaining Money by False Pretenses, 1756), if any man defrauds another of any valuable chattels by color of any false token, counterfeit letter or false pretense, or pawns or disposes of another's goods without the consent of the owner, he shall suffer such punishment by imprisonment, fine, pillory, transportation, whipping or other corporal pain as the court shall direct.

§ 175. 6. Forestalling.—The offense of *forestalling* the market is also an offense against public trade.[6] This, which (as well as

h See Book I. pag. 274.
i 3 Inst. 219.
j Seld. Tit. of Hon. b. 2. c. 5. § 3.
k 1 Hawk. P. C. 188.

---

6 The early English statutes against forestalling, regrating and engrossing were repealed in 1844.

"It is reasonably plain that the common law of our states has not adopted these offenses in terms as defined by Blackstone, yet it does not follow that the principle from which the law proceeded has not become an inheritance with us. Modified, therefore, and thus adapted to our altered situation and circumstances, there is ground for deeming them criminal misdemeanors in states that recognize common-law crimes."—BISHOP, 1 New Crim. Law, § 520.

the two following) is also an offense at common law,[l] was described by statute 5 & 6 Edward VI, c. 14 (Forestallers, 1551), to be the buying or contracting for any merchandise or victual coming in the way to market, or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there: any of which practices make the market dearer to the fair trader.

§ 176. 7. Regrating.—Regrating was described by the same statute to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.

§ 177. 8. Engrossing.—Engrossing was also described to be the getting into one's possession, or buying up, large quantities of corn or other dead victuals, with intent to sell them again. This must, of course, be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any other commodity, with intent to sell it at an unreasonable [159] price, is an offense indictable and finable at the common law.[m] And the general penalty for these three offenses by the common law (for all the statutes concerning them were repealed by 12 George III, c. 71—1772) is, as in other minute misdemeanors, discretionary fine and imprisonment.[n] Among the Romans these offenses and other malpractices to raise the price of provisions were punished by a pecuniary mulct. *"Pœna viginti aureorum statuitur adversus eum, qui contra annonam fecerit, societatemve coierit quo annona carior fiat* (Those who entered into any association, or employed any other means by which the price of provisions was enhanced, were amerced in a fine of twenty *aurei.*"[o]

§ 178. 9. Monopolies.—Monopolies are much the same offense in other branches of trade that engrossing is in provisions, being a license or privilege allowed by the king for the sole buying and selling, making, working or using of anything whatsoever, whereby

l 1 Hawk. P. C. 234.
m Cro. Car. 232.
n 1 Hawk. P. C. 235.
o Ff. 48. 12, 2.

the subject in general is restrained from that liberty of manufacturing or trading which he had before.[p 7] These had been carried to an enormous height during the reign of Queen Elizabeth, and were heavily complained of by Sir Edward Coke [q] in the beginning of the reign of King James the First, but were in great measure remedied by statute 21 Jac. I, c. 3 (Statute of Monopolies, 1623), which declares such monopolies to be contrary to law and void (except as to patents, not exceeding the grant of fourteen years,

p 1 Hawk. P. C. 231. q 3 Inst. 181.

---

7 **Mr. Justice Field on Monopolies.**—It will not be pretended that under the fourth article of the Constitution ["The citizens of each shall be entitled to all the privileges and immunities of citizens in the several states,"] any state could create a monoply in any known trade or manufacture in favor of her own citizens, or any portion of them, which would exclude an equal participation in the trade or manufacture monopolized by citizens of other states. She could not confer, for example, upon any of her citizens the sole right to manufacture shoes, or boots, or silk, or the sole right to sell those articles in the state so as to exclude nonresident citizens from engaging in a similar manufacture or sale. The nonresident citizens could claim equality of privilege under the provisions of the fourth article with the citizens of the state exercising the monopoly as well as with others, and thus, as respects them, the monopoly would cease. If this were not so it would be in the power of the state to exclude at any time the citizens of other states from participation in particular branches of commerce or trade, and extend the exclusion from time to time so as effectually to prevent any traffic with them.

Now, what the clause in question does for the protection of citizens of one state against the creation of monopolies in favor of citizens of other states, the fourteenth amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States, of every one of them, is secured against abridgment in any form by any state. The fourteenth amendment places them under the guardianship of the national authority. All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at common law in the great Case of Monopolies, decided during the reign of Queen Elizabeth.

A monopoly is defined "to be an institution or allowance from the sovereign power of the state by grant, commission or otherwise, to any person or corporation, for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before or hindered in their

to the authors of new inventions; and except, also, patents concerning printing, saltpetre, gunpowder, great ordnance, and shot), and monopolists are punished with the forfeiture of treble damages and double costs to those whom they attempt to disturb; and if they procure any action brought against them for these damages to be stayed by any extrajudicial order other than of the court wherein it is brought, they incur the penalties of *præmunire*. Combinations, also, among victualers or artificers to raise the price of

lawful trade." All such grants relating to any known trade or manufacture have been held by all the judges of England, whenever they have come up for consideration, to be void at common law as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it into the power of the grantees to enhance the price of commodities. The definition embraces, it will be observed, not merely the sole privilege of buying and selling particular articles, or of engaging in their manufacture, but also the sole privilege of using anything by which others may be restrained of the freedom or liberty they previously had in any lawful trade, or hindered in such trade. It thus covers in every particular the possession and use of suitable yards, stables and buildings for keeping and protecting cattle and other animals, and for their slaughter. Such establishments are essential to the free and successful prosecution by any butcher of the lawful trade of preparing animal food for market. The exclusive privilege of supplying such yards, buildings and other conveniences for the prosecution of this business in a large district of country, granted by the act of Louisiana to seventeen persons, is as much a monopoly as though the act had granted to the company the exclusive privilege of buying and selling the animals themselves. It equally restrains the butchers in the freedom and liberty they previously had, and hinders them in their lawful trade. . . .

The struggle of the English people against monopolies forms one of the most interesting and instructive chapters in their history. It finally ended in the passage of the statute of 21 James I, by which it was declared "that all monopolies and all commissions, grants, licenses, charters, and letters patent, to any person or persons, bodies politic or corporate, whatsoever, of or for the sole buying, selling, making, working, or using of anything" within the realm or the dominion of Wales were altogether contrary to the laws of the realm and utterly void, with the exception of patents for new inventions for a limited period, and for printing, then supposed to belong to the prerogative of the king, and for the preparation and manufacture of certain articles and ordnance intended for the prosecution of war.

The common law of England, as is thus seen, condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they pre-

provisions or any commodities, or the rate of labor, are in many cases severely punished by particular statutes, and, in general, by statute 2 & 3 Edward VI, c. 15 (Victualers, 1548), with the forfeiture of 10*l.*, or twenty days' imprisonment, with an allowance of only bread and water, for the first offense, 20*l.* or the pillory for the second, and [160] 40*l.* for the third, or else the pillory, loss of one ear, and perpetual infamy. In the same manner, by a constitution of the Emperor Zeno,[r] all monopolies and combinations

[r] Cod. 4. 59. 1.

---

viously had, or be hindered in their lawful trade. The statute of James I, to which I have referred, only embodied the law as it had been previously declared by the courts of England, although frequently disregarded by the sovereigns of that country.

The common law of England is the basis of the jurisprudence of the United States. It was brought to this country by the colonists, together with the English statutes, and was established here so far as it was applicable to their condition. That law and the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their circumstances, were claimed by the Congress of the United Colonies in 1774 as a part of their "indubitable rights and liberties." Of the statutes, the benefits of which was thus claimed, the statute of James I against monopolies was one of the most important. And when the colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others. The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed all men "with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness; and that to secure these rights governments are instituted among men. . . ."

So fundamental has this privilege of every citizen to be free from disparaging and unequal enactments, in the pursuit of the ordinary avocations of life been regarded, that few instances have arisen where the principle has been so far violated as to call for the interposition of the courts. But whenever this has occurred, with the exception of the present cases from Louisiana, which are the most barefaced and flagrant of all, the enactment interfering with the privilege of the citizen has been pronounced illegal and void. When a case under the same law, under which the present cases have arisen, came before the circuit court of the United States in the district of Louisiana, there was no hesitation on the part of the court in declar-

to keep up the price of merchandise, provisions or workmanship were prohibited upon pain of forfeiture of goods and perpetual banishment.

§ 179. **10. Exercising a trade without apprenticeship.**—To exercise a *trade* in any town without having previously served as an *apprentice* for seven years[s] is looked upon to be detrimental to public trade, upon the supposed want of sufficient skill in the trader, and therefore is punished by statute 5 Elizabeth, c. 4 (Arti-

[s] See Book I. pag. 427.

---

ing the law, in its exclusive features, to be an invasion of one of the fundamental privileges of the citizen. The presiding justice, in delivering the opinion of the court, observed that it might be difficult to enumerate or define what were the essential privileges of a citizen of the United States, which a state could not by its laws invade, but that so far as the question under consideration was concerned, it might be safely said that "it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, without unreasonable regulation or molestation, and without being restricted by any of those unjust, oppressive, and odious monopolies or exclusive privileges which have been condemned by all free governments." And again: "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."

After reviewing the cases, the opinion concludes: "In all these cases there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void.

"This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex and condition. The state may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. The fourteenth amendment, in my judgment, makes it es-

ficers and Apprentices, 1562), with the forfeiture of forty shillings by the month.[8]

§ 180. 11. Transporting artists abroad. — Lastly, to prevent the destruction of our home manufactures, by *transporting and seducing our artists* to settle abroad, it is provided by statute 5 George I, c. 27 (Artificers, 1718), that such as so entice or seduce them shall be fined 100*l.*, and be imprisoned three months, and for the second offense shall be fined at discretion, and be imprisoned a year: and the artificers so going into foreign countries, and not returning within six months after warning given them by the British ambassador where they reside, shall be deemed aliens, and forfeit all their lands and goods, and shall be incapable of any legacy or gift. By statute 23 George II, c. 13 (Artificers, 1749), the seducers incur, for the first offense, a forfeiture of 500*l.* for each artificer contracted with to be sent abroad, and imprisonment for twelve months, and, for the second, 1,000*l.*, and are liable to two years' imprisonment: and by the same statute, connected with 14 George III, c. 71 (Exportation, 1774), if any person exports any tools or utensils used in the silk, linen, cotton or woolen manufactures (excepting woolcards to North America [t]), he forfeits the same and 200*l.*, and the captain of the ship (having knowledge

[t] Stat. 15 Geo. III. c. 5. (Exportation, 1774).

---

sential to the validity of the legislation of every state that this equality of right should be respected. How widely this equality has been departed from, how entirely rejected and trampled upon by the act of Louisiana, I have already shown. And it is to me a matter of profound regret that its validity is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated. As stated by the supreme court of Connecticut, in the case cited, grants of exclusive privileges, such as is made by the act in question, are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws."—FIELD, J., in dissenting opinion (concurred in by Chase, C. J., and Swayne and Bradley, JJ.), in Slaughter-house Cases, 16 Wall. 36, 101, 21 L. Ed. 394, 417.

[s] These provisions were repealed by the Apprentice Act, 1814.

thereof) 100*l.*; and if any captain of a king's ship, or officer of the customs, knowingly suffers such exportation, he forfeits 100*l.* and his employment, and is forever made incapable of bearing any public office; and every person collecting such tools or utensils, in order to export the same, shall, on conviction at the assizes, forfeit such tools and also 200*l.*[9]

9 All the statutes prohibiting artificers from going abroad were repealed in 1824.

CHAPTER THE THIRTEENTH. [161]

OF OFFENSES AGAINST THE PUBLIC HEALTH AND THE PUBLIC POLICE OR ECONOMY.

§ 181. IV. Offenses against the public health.—The fourth species of offenses, more especially affecting the commonwealth, are such as are against the public *health* of the nation; a concern of the highest importance, and for the preservation of which there are in many countries special magistrates or curators appointed.

§ 182. 1. Violating quarantine.—The first of these offenses is a felony, but, by the blessing of Providence for more than a century past, incapable of being committed in this nation.[1] For by statute 1 Jac. I, c. 31 (Plague Sufferers, 1603), it is enacted that if any person infected with the plague, or dwelling in any infected house, be commanded by the mayor or constable or other head officer of his town or vill to keep his house, and shall venture to disobey it, he may be enforced, by the watchmen appointed on such melancholy occasions, to obey such necessary command, and, if any hurt ensue by such enforcement, the watchmen are thereby indemnified. And further, if such person so commanded to confine himself goes abroad, and converses in company, if he has no plague sore upon him, he shall be punished as a vagabond by whipping, and be bound to his good behavior; but if he has any infectious sore upon him uncured, he then shall be guilty of felony. By the statute 26 George II, c. 6, Quarantine, 1753 (explained and amended by 29 George II, c. 8, 1755), the [162] method of performing *quarantine,* or forty days' probation, by ships coming from infected countries, is put in a much more regular and effectual order than formerly, and masters of ships coming from infected places and disobeying the directions there given, or having the plague on board and concealing it, are guilty of felony without benefit of clergy. The same penalty also attends persons escaping from the *lazarets,* or places wherein quarantine is to be performed, and

[1] Previous acts were replaced by the Quarantine Act of 1825, which provided pecuniary penalties for the enforcement of quarantine, and these penalties were left to the discretion of the judge by 29 & 30 Vict., c. 90 (1866).

officers and watchmen neglecting their duty, and persons conveying goods or letters from ships performing quarantine.

§ 183. 2. Selling unwholesome provisions. — A second but much inferior species of offense against public health is the selling of *unwholesome provisions*,[2] to prevent which the statute 51 Henry, III, st. 6 (1266), and the ordinance for bakers, c. 7, prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew, under pain of amercement for the first offense, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. And by the statute 12 Car. II, c. 25, § 11 (Wine, 1660), any brewing or adulteration of wine is punished with the forfeiture of 100*l.*, if done by the wholesale merchant, and 40*l.* if done by the vintner or retail trader. These are all the offenses which may properly be said to respect the public health.

§ 184. V. Offenses against the public police.—The last species of offenses which especially affect the commonwealth are those against the public *police* and *economy*. By the public police and economy I mean 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 behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations. This head of offenses must therefore be very miscellanous, as it comprises all such crimes as especially affect public society, and are not comprehended under any of the four preceding species. Those amount, some of them to felony and others to misdemeanors only. Among the former are,

§ 185. 1. Clandestine marriages.—[163] The offense of *clandestine marriages;* for by the statute 26 George II, c. 33 (Clandes-

[2] "If putting upon the community of unwholesome food and drink were assumed not to be punishable under the ancient common law, still it is under English statutes so old as to be common law with us." 1 Bishop, New Crim. Law, § 491; State v. Buckman, 8 N. H. 203, 29 Am. Dec. 646; People v. Parker, 38 N. Y. 85, 97 Am. Dec. 774; Blumhardt v. Rohr, 70 Md. 328, 17 Atl. 266. There are modern enactments, English and American, in affirmance of the earlier law.

tine Marriages, 1753), 1. To solemnize marriage in any other place besides a church, or public chapel wherein banns have been usually published, except by license from the Archbishop of Canterbury: and, 2. To solemnize marriage in such church or chapel without due publication of banns, or license obtained from a proper authority,—do both of them not only render the marriage void, but subject the person solemnizing it to felony, punished by transportation for fourteen years: as, by three former statutes,[a] he and his assistants were subject to a pecuniary forfeiture of 100*l*. 3. To make a false entry in a marriage register; to alter it when made; to forge, or counterfeit, such entry, or a marriage license; to cause or procure, or act or assist in such forgery; to utter the same as true, knowing it to be counterfeit; or to destroy or procure the destruction of any register, in order to vacate any marriage, or subject any person to the penalties of this act,—all these offenses, knowingly and willfully committed, subject the party to the guilt of felony, without benefit of clergy.[3]

§ 186. **2. Bigamy.**—Another felonious offense with regard to this holy estate of matrimony is what some have corruptly called

[a] 6 & 7 W. III. c. 6 (Duties on Marriages, 1694). 7 & 8 W. III. c. 35 (Marriage Without Banns, 1695). 10 Ann. c. 19. § 176 (Taxation, 1711).

---

[3] The Marriage Act of 1836 enacts: "Every person who after the said first day of March (1837), shall knowingly and willfully solemnize any marriage in England, except by special license, in any other place than a church or chapel in which marriages may be solemnized according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate as aforesaid, shall be guilty of felony (except in the case of a marriage between two of the Society of Friends, commonly called Quakers, according to the usages of the said society, or between two persons professing the Jewish religion, according to the usages of the Jews), and every person who in any such registered building or office shall knowingly and willfully solemnize any marriage in the absence of a registrar of the district in which such registered building or office is situated, shall be guilty of felony: and every person who shall knowingly and willfully solemnize any marriage in England after the said first day of March (except by license) within twenty-one days after the entry of the notice to the superintendent registrar as aforesaid, [or if the marriage is by license, within seven days after such entry,] or after three calendar months after such entry, shall be guilty of felony."

bigamy, which properly signifies being twice married, but is more justly denominated *polygamy*, or having a plurality of wives at once.[b] Such second marriage, living the former husband or wife, is simply void, and a mere nullity, by the [164] ecclesiastical law of England; and yet the legislature has thought it just to make it felony, by reason of its being so great a violation of the public economy and decency of a well-ordered state.[4] For polygamy can never be endured under any rational civil establishment, whatever

[b] 3 Inst. 88. Bigamy, according to the canonists, consisted in marrying two virgins successively, one after the death of the other, or in once marrying a widow. Such were esteemed incapable of orders, etc.; and by a canon of the council of Lyons, A. D. 1274, held under Pope Gregory X. were *omni privilegio clericali nudati et coercioni fori secularis addicti* (they were stripped of every clerical privilege and given up to the power of the secular court). (6 *Decretal. I.* 12.) This canon was adopted and explained in England, by statute 4 Edw. I. st. 3. c. 5 (1276), and *bigamy* thereupon became no uncommon counterplea to the claim of the benefit of clergy. (M. 40 Edw. III. 42. M. 11 Hen. IV. 11. 48. M. 13 Hen. IV. 6. Staunf. P. C. 134.) The cognizance of the plea of *bigamy* was declared by statute 18 Edw. III. st. 3. c. 2 (Bigamy, 1344), to belong to the court Christian, like that of *bastardy*. But by Stat. 1 Edw. VI. c. 12. § 16 (1547), *bigamy* was declared to be no longer an impediment to the claim of clergy. See Dal. 21. Dyer 201.

---

4 Bigamy consists in going through the form of marriage by one who has a husband or wife still living, whether the second marriage shall have taken place in England, Ireland or elsewhere; and although such second marriage is simply void, and a mere nullity. The legislature has made this offense felony, punishable with penal servitude or imprisonment. Bigamous or polygamous marriages, even though contracted in a country where polygamy is lawful, are not recognized in England. A second marriage, even within the prohibited degrees of affinity, or void apart from that fact, may be bigamous; but if the first marriage is void by reason of consanguinity, affinity, lunacy, or any other defect, the second marriage is not bigamous, nor is a marriage ceremony out of the United Kingdom, between persons not being subjects of the crown, bigamous, even though by English law it would be so. Where, however, a husband or a wife has been continually absent for the space of seven years immediately preceding the second marriage, and is not known to be living within that time by the party marrying, the second marriage does not render the party liable to a prosecution for bigamy; and, even if this period has not elapsed, the *bona fide* belief of the prisoner, at the time of the second marriage, that the husband or wife was dead (if there was reasonable ground for presuming the death of such former husband or wife), affords a good defense to an indictment for bigamy. But, of course, if the former

specious reasons may be urged for it by the eastern nations, the fallaciousness of which has been fully proved by many sensible writers; but in northern countries the very nature of the climate seems to reclaim against it, it never having obtained in this part of the world, even from the time of our German ancestors, who, as Tacitus informs us,[c] "*prope soli barbarorum singulis uxoribus contenti sunt* (almost the only barbarians who are contented with one wife)." It is therefore punished by the laws both of ancient and modern Sweden with death.[d] And with us in England it is enacted by statute 1 Jac. I, c. 11 (Bigamy, 1603), that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony, but within the benefit of clergy. The first wife in this case shall not be admitted as a witness against her husband, because she is the true wife, but the second may, for she is indeed no wife at all;[e] and so, *vice versa*, of a second husband. This act makes an exception to five cases, in which such second marriage, though in the three first it is void, is yet no felony:[f] 1. Where either party hath been continually *abroad* for seven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years *within* this kingdom, and the remaining party hath had no knowledge of the other's being alive

[c] De Mor. Germ. 18.

[d] Stiernh. de Jure Sueon. l. 3. c. 2.

[e] 1 Hal. P. C. 693.

[f] 3 Inst. 89. Kel. 27. 1 Hal. P. C. 694.

---

husband or wife is not actually dead, then, unless the former marriage has been legally dissolved, the second marriage is void.

Upon a prosecution for bigamy, the first wife cannot be admitted as a witness against her husband, because she is the true wife; but the second wife may, when the first marriage has been proved, because she is no wife. And so, *vice versa*, of a second husband. In order to secure a conviction, it is necessary to prove that the first marriage was duly solemnized; mere proof of cohabitation not being sufficient.—STEPHEN, 4 Comm. (16th ed.), 83.

In a prosecution for bigamy the state must prove a valid first marriage, and that the lawful spouse of the defendant was living at the time of the second marriage. Sokel v. People, 212 Ill. 238, 72 N. E. 382. Belief of the death of spouse is no defense in prosecution for bigamy. Cornett v. Commonwealth, 134 Ky. 613, 21 Ann. Cas. 399, 121 S. W. 424.

within that time. 3. Where there is a divorce (or separation *a mensa et thoro*, from bed and board) by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any such sentence, and the parties loosed *a vinculo* (from the bond of matrimony). Or, 5. Where either of the parties was under the age of consent at the time of the first marriage, for in such case the first marriage was voidable by the disagreement of either party, which the second marriage very clearly amounts to. But [165] if at the age of consent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage, and afterwards one of them should marry again, I should apprehend that such second marriage would be within the reason and penalties of the act.

§ 187. **3. Wandering soldiers and sailors.**—A third species of felony against the good order and economy of the kingdom is by idle *soldiers* and *mariners wandering* about the realm, or persons pretending so to be, and abusing the name of that honorable profession.[g] Such a one not having a testimonial or pass from a justice of the peace, limiting the time of his passage, or exceeding the time limited for fourteen days, unless he falls sick, or forging such testimonial, is by statute 39 Elizabeth, c. 17 (Vagabonds. 1597), made guilty of felony, without benefit of clergy.[5] This sanguinary law, though in practice deservedly antiquated, still remains a disgrace to our statute-book, yet attended with this mitigation, that the offender may be delivered if any honest freeholder or other person of substance will take him into his service, and he abides in the same for one year; unless licensed to depart by his employer, who in such case shall forfeit ten pounds.

§ 188. **4. Gipsies.**—Outlandish persons calling themselves *Egyptians*, or *gipsies*, are another object of the severity of some of our unrepealed statutes. These are a strange kind of commonwealth among themselves of wandering impostors and jugglers, who made their first appearance in Germany about the beginning

g 3 Inst. 85.

5 The stat. 39 Elizabeth, c. 17, was repealed in 1812.

of the sixteenth century, and have since spread themselves all over Europe. Munster, it is true,[h] who is followed and relied upon by Spelman,[i] fixes the time of their first appearance to the year 1417; but, as he owns, that the first whom he ever saw were in 1524, it is probably an error of the press for 1517, especially as other historians[j] inform us that when Sultan Selim conquered Egypt, in the year 1517, several of the natives refused to submit to the Turkish yoke, but being [166] at length subdued and banished, they agreed to disperse in small parties all over the world, where their supposed skill in the black art gave them an universal reception in that age of superstition and credulity. In the compass of a very few years they gained such a number of idle proselytes (who imitated their language and complexion, and betook themselves to the same arts of chiromancy, begging and pilfering), that they became troublesome and even formidable to most of the states of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591.[k] And the government in England took the alarm much earlier, for in 1530 they are described by statute 22 Henry VIII, c. 10 (Egyptians, 1530), as "outlandish people, calling themselves Egyptians, using no craft nor feat of merchandise, who have come into this realm and gone from shire to shire and place to place in great company, and used great, subtle and crafty means to deceive the people; bearing them in hand, that they by palmistry could tell men's and women's fortunes; and so many times by craft and subtlety 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, and, upon their trials for any which they may have committed, they shall not be entitled to a jury *de medietate linguæ* (of half natives and half aliens). And afterwards, it is enacted by statutes 1 & 2 Ph. & M., c. 4 (Egyptians, 1554), and 5 Elizabeth, c. 20 (Egyptians, 1562), that if any such persons shall be imported into this kingdom, the importer shall forfeit 40*l*.[6] And if the

[h] Cosmogr. l. 3.
[i] Gloss. 193.
[j] Mod. Univ. Hist. xliii. 271.
[k] Dufresne. Gloss. I. 200.

[6] The stat. 5 Elizabeth, c. 20, was repealed in 1783, and gipsies are now only punishable under the vagrant acts.

Egyptians themselves remain one month in this kingdom, or if any person, being fourteen years old (whether natural-born subject or stranger), which hath been seen or found in the fellowship of such Egyptians, or which hath disguised him or herself like them, shall remain in the same one month, at one or several times, it is felony, without benefit of clergy; and Sir Matthew Hale informs us[l] that at one Suffolk assizes no less than thirteen gipsies were executed upon these statutes a few years before the restoration. But, to the honor of our [167] national humanity, there are no instances more modern than this of carrying these laws into practice.

§ 189. **5. Common nuisances.**—To descend next to offenses whose punishment is short of death. *Common nuisances* are a species of offenses against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires.[m] The nature of *common* nuisances and their distinction from *private* nuisances were explained in the preceding volume,[n] when we considered more particularly the nature of the private sort, as a civil injury to individuals. I shall here only remind the student that common nuisances are such inconvenient or troublesome offenses as annoy the whole community in general, and not merely some particular person, and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow-subjects.

§ 190. a. **Annoyances in highways and rivers.**—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. And a presentment thereof by a

[l] 1 Hal. P. C. 671.
[m] 1 Hawk. P. C. 197.
[n] Book III. pag. 216.

judge of assize, etc., or a justice of the peace, shall be in all respects equivalent to an indictment.[o] [7]

§ 191. **(1) Purprestures.**—Where there is an house erected, or an inclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a *purprestur*e.[p] [8]

§ 192. **b. Offensive trades.**—All those kinds of nuisances (such as offensive trades and manufactures), which when injurious to a private man are actionable, are, when detrimental to the public, [168] punishable by public prosecution, and subject to fine according to the quantity of the misdemeanor; and particularly the keeping of hogs in any city or market town is indictable as a public nuisance.[q]

§ 193. **c. Disorderly houses.**—All disorderly *inns* or *ale-houses, bawdy-houses, gaming-houses, staye plays* unlicensed, booths and stages for *rope-dancers, mountebanks* and the like are public nuisances, and may upon indictment be suppressed and fined.[r] Inns, in particular, being intended for the lodging and receipt of travelers, may be indicted, suppressed and the innkeepers fined if they refuse to entertain a traveler without a very sufficient cause;

[o] Stat. 7 Geo. III. c. 42 (Highways, 1766).

[p] Co. Litt. 277; from the French *pourpris*, an inclosure.

[q] Salk. 460.

[r] 1 Hawk. P. C. 198. 225.

---

7 In addition to the liability at the common law, many specific offenses have been created as to highways and bridges, by the express provisions of the Highway Acts, 1835 to 1885, which are punishable by summary proceedings before magistrates.

8 An inclosure by a private person of a part of that which belongs to, and ought to be free and open to the enjoyment of, the public at large, is a purpresture. Attorney General v. Evart Booming Co., 34 Mich. 462. "The unlawful construction of a railroad, a statue, or any building upon the park, is a purpresture. But every purpresture is not a nuisance. It may, or may not, be a nuisance. In the case of a park, if it unlawfully obstructs the free passage or use, in the customary manner, of such park by the public, it is a nuisance and may be abated as such by a court of equity." People v. Park & Ocean R. Co., 76 Cal. 156, 18 Pac. 141.

for thus to frustrate the end of their institution is held to be disorderly behavior.[8] Thus, too, the hospitable laws of Norway punish, in the severest degree, such innkeepers as refuse to furnish accommodations at a just and reasonable price![8a]

§ 194. d. Lotteries.—By statute 10 & 11 W. III, c. 17 (Lottery, 1698), all *lotteries* are declared to be public nuisances, and all grants, patents or licenses for the same to be contrary to law.[9]

§ 195. e. Fireworks.—The making and selling of *fireworks* and *squibs*, or throwing them about in any street, is, on account of the danger that may ensue to any thatched or timber buildings, declared to be a common nuisance by statute 9 & 10 W. III, c. 7 (Fireworks, 1697), and therefore is punishable by fine. And to this head we may refer (though not declared a common nuisance) the making, keeping or carriage of too large a quantity of *gunpowder* at one time, or in one place or vehicle, which is prohibited by statute 12 George III, c. 61 (Gunpowder, 1772), under heavy penalties and forfeiture.[10]

§ 196. f. Eavesdroppers.—*Eavesdroppers*, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous

[8] 1 Hawk. P. C. 225.

[8a] Stiernh. de Jure Sueon. l. 2. c. 9.

---

[9] Until 1823, when state lotteries were abolished (4 George IV, c. 60), it had been the practice of the state at intervals to resort, as a means of obtaining public funds, to lotteries in the same manner still used by public bodies in Germany and by the state in Italy; and the first statutes against lotteries were directed against them as having a mischievous effect on persons enticed to take part in them, and as interfering with state enterprises in the same direction.

Lotteries are now generally discountenanced by statutes in the several states, and a United States enactment of 1895 provides for the "suppression of lottery traffic through national and interstate commerce and the postal service." Lottery Case (Champion v. Ames), 188 U. S. 321, 47 L. Ed. 492, 23 Sup. Ct. Rep. 321.

[10] The manufacture and sale of fireworks is now regulated by the Explosives Act, 1875. The leading case as to civil liability for injuries by fireworks is Scott v. Shepherd (1773), 2 W. Black. 892, 96 Eng. Reprint, 525.

tales, are a common nuisance and presentable at the court-leet,[t] or are indictable at the sessions, and punishable by fine and finding sureties for their good behavior.[u] [11]

§ 197. g. Common scolds.—Lastly, a *common scold, communis rixatrix* (for our law Latin confines it to the feminine gender), is a public nuisance to her neighborhood, for which offense she may be indicted,[v] [169] and, if convicted, shall[w] be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or *cucking*-stool, which in the Saxon language is said to signify the scolding-stool, though now it is frequently corrupted into *ducking*-stool, because the residue of the judgment is, that when she is so placed therein, she shall be plunged in the water for her punishment.[x] [12]

t Kitch. of Courts. 20.
u *Ibid.* 1 Hawk. P. C. 132.
v 6 Mod. 213.
w 1 Hawk. P. C. 198. 200.
x 3 Inst. 219.

---

11 There is no modern instance of a prosecution or precedent of an indictment for eavesdropping, but see 5 Selden Society Pub. 70, for a presentment in 1390 in the court-leet of Norwich of a chaplain for eavesdropping by night.

Eavesdropping is held to be an indictable common-law offense in the United States. Commonwealth v. Lovett, 4 Clark (Pa.), 5; State v. Williams, 2 Overt. (Tenn.) 108; State v. Pennington, 3 Head (Tenn.), 299, 75 Am. Dec. 771. In the last-mentioned case it was held that one was guilty of eavesdropping who secretly and stealthily approached the room occupied by a grand jury, while they were engaged in the performance of their duties, for the purpose of overhearing what was said and done.

12 The offense of being a common scold was cognizable by courts-leet, and since the disappearance of those courts has not been prosecuted.

In James v. Commonwealth (1825), 12 Serg. & R. (Pa.), 220, it was held that while the ducking-stool was not a punishment of a common scold in Pennsylvania, the offense was, however, indictable, and to be punished by fine and imprisonment. In Baker v. State (1890), 53 N. J. L. 45, 20 Atl. 858, it was said: "A woman does not necessarily become a common scold by scolding several persons on several occasions. It is the habit of scolding, resulting in a public nuisance, which is criminal; and whether the scoldings to which the state's witnesses testified were so frequent as to prove the existence of the habit, and whether the habit was indulged under such circumstances as to disturb the public peace, were questions which the jury alone could lawfully decide, and which were no less important than the credibility of witnesses."

§ 198. **6. Vagrants, rogues and vagabonds.**—Idleness in any person whatsoever is also a high offense 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 produce of the lands not being more than sufficient, with culture, to maintain the inhabitants, and therefore, though the idle person may shift off the want from himself, yet it must in the end fall somewhere. The court, also, of Areopagus at Athens punished idleness, and exerted a right of examining every citizen in what manner he spent his time; the intention of which was,[y] that the Athenians, knowing they were to give an account of their occupations, should follow only such as were laudable, and that there might be no room left for such as lived by unlawful arts. The civil law expelled all sturdy vagrants from the city,[z] and, in our own 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 whether they go," or such as are more particularly described by statute 17 George II, c. 5 (Justice's Commitment, 1743), and divided into three classes, *idle* and *disorderly* persons, *rogues* and *vagabonds*, and *incorrigible rogues*,—all these are offenders against the good order and blemishes in the government of any kingdom.[13] They are therefore all punished by the statute last mentioned; that is to say, idle and disorderly persons with one month's imprisonment in the house of correction; rogues and vagabonds with whipping and imprisonment not exceeding six [170] months; and incorrigible rogues with the like discipline and confinement, not exceeding two years: the breach and escape from which confinement in one of an inferior class ranks him among incorrigible rogues, and in a rogue (before incorrigible) makes him a felon, and liable to be

y Valer. Maxim. l. 2. c. 6. z Nov. 80. c. 5.

13 The law as to vagrants and vagabonds in England now rests on the Vagrancy Act, 1824, and acts adding to or amending the same.

In the United States it is held that vagrancy where not defined by statute must be considered such vagabondage as fairly comes within the common-law meaning of the word. In re Way, 41 Mich. 299, 1 N. W. 1021; In re Jordan, 90 Mich. 3, 50 N. W. 1087.

transported for seven years. Persons harboring vagrants are liable to a fine of forty shillings, and to pay all expenses brought upon the parish thereby: in the same manner as, by our ancient laws, whoever harbored any stranger for more than two nights, was answerable to the public for any offense that such his inmate might commit.[a]

§ 199. **7. Sumptuary laws.**—Under the head of public economy may also be properly ranked all sumptuary laws against *luxury* and extravagant expenses in dress, diet and the like; concerning the general utility of which to a state there is much controversy among the political writers. Baron Montesquieu lays it down[b] that luxury is necessary in monarchies, as in France, but ruinous to democracies, as in Holland. With regard, therefore, to England, whose government is compounded of both species, it may still be a dubious question how far private luxury is a public evil, and as such cognizable by public laws. And, indeed, our legislatures have several times changed their sentiments as to this point; for formerly there were a multitude of penal laws existing to restrain excess in apparel,[c] chiefly made in the reigns of Edward the Third, Edward the Fourth, and Henry the Eighth, against piked shoes, short doublets and long coats, all of which were repealed by statute 1 Jac. I, c. 25 (1603). But, as to excess in diet, there still remains one ancient statute unrepealed, 10 Edward III, st. 3 (Sumptuary Law, 1336), which ordains that no man shall be served, at dinner or supper, with more than two courses, except upon some great holy days there specified, in which he may be served with three.

§ 200. **8. Gaming.**—Next to that of luxury naturally follows the offense of *gaming*, which is generally introduced to supply or retrieve [171] 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 be saved a little longer. But, taken in

[a] LL. Edw. c. 27. Bracton. l. 3. tr. 2, c. 10. § 2.
[b] Sp. L. b. 7. c. 2. & 4.
[c] 3 Inst. 199.

any light, it is an offense of the most alarming nature, tending by necessary consequence to promote public idleness, theft and debauchery among those of a lower class, and among persons of a superior rank it hath frequently been attended with the sudden ruin and desolation of ancient and opulent families, an abandoned prostitution of every principle of honor and virtue, and too often hath ended in self-murder. To restrain this pernicious vice among the inferior sort of people, the statute 33 Henry VIII, c. 9 (Gaming, 1541), was made, which prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls and other unlawfull diversions there specified,[d] unless in the time of Christmas, under pecuniary pains and imprisonment. And the same law, and also the statute 30 George II, c. 24 (Obtaining Money by False Pretenses, 1756), inflict pecuniary penalties, as well upon the master of any public house wherein servants are permitted to game, as upon the servants themselves who are found to be gaming there. But this is not the principal ground of modern complaint: it is the gaming in high life that demands the attention of the magistrate; a passion to which every valuable consideration is made a sacrifice, and which we seem to have inherited from our ancestors, the ancient Germans, whom Tacitus[e] describes to have been bewitched with the spirit of play to a most exorbitant degree. "They addict themselves," says he, "to dice (which is wonderful) when sober, and as a serious employment, with such a mad desire of winning or losing, that, when stripped of everything else, they will stake at last their liberty and their very selves. The loser goes into a voluntary slavery, and, though younger and stronger than his antagonist, suffers himself to be bound and sold. And this perseverance in so bad a cause they call the point of honor: [172] *ea est in re prava pervicacia, ipsi fidem vocant.*" One would almost be tempted to think Tacitus was describing a modern Englishman.[14] When men are thus intoxicated with so frantic a spirit,

[d] Logetting in the fields, slide-thrift or shove-groat, cloysh-cayles, half bowl, and coyting.

[e] De Mor. Germ. c. 24.

---

14 The principal recent statutes are the Gaming Act, 1845, and the Gambling-House Act, 1854. Gaming is not in itself unlawful at common law. Unlaw-

laws will be of little avail, because the same false sense of honor that prompts a man to sacrifice himself will deter him from appealing to the magistrate.

§ 201. a. **Statutes against gaming.**—Yet it is proper that laws should be, and be known publicly, that gentlemen may consider what penalties they willfully incur, and what a confidence they repose in sharpers, who, if successful in play, are certain to be paid with honor, or, if unsuccessful, have it in their own power to be still greater gainers by informing. For by statute 16 Car. II, c. 7 (Gaming, 1664), if any person by playing or betting shall lose more than 100*l.* at one time, he shall not be compellable to pay the same, and the winner shall forfeit treble the value,—one moiety to the king, the other to the informer. The statute 9 Ann., c. 14 (Gaming, 1710), enacts that all bonds and other securities, given for money won at play, or money lent at the time to play withal, shall be utterly void; that all mortgages and encumbrances of lands, made upon the same consideration, shall be and inure to the use of the heir of the mortgager; that if any person at one time loses 10*l.* at play, he may sue the winner and recover it back by action of debt at law, and, in case the loser does not, any other person may sue the winner for treble the sum so lost, and the plaintiff in either case may examine the defendant himself upon oath; and that in any of these suits no privilege of parliament shall be allowed. The statute further enacts that if any person cheats at play, and at one time wins more than 10*l.* or any valuable thing, he may be indicted thereupon, and shall forfeit five times the value, shall be deemed infamous, and suffer such corporal punishment as in case of willful perjury. By several statutes of

ful gaming is either playing at any unlawful game or playing at any game in a common gaming-house. Unlawful games, under the various English statutes, are ace of hearts, faro, basset and hazard, passage, and every other game played with dice (except backgammon), roulette, baccarat, and every game of cards which is not a game of mere skill, and probably every other game of mere chance. Jenks v. Turpin (1884), 13 Q. B. D. 505.

While, in the absence of statute, gaming is not a crime, yet the peculiar nature of a game may render it such; as the element of cruelty in cock-fighting. Commonwealth v. Tilton, 8 Met. (Mass.), 232.

the reign of King George II,[f] all private lotteries by tickets, cards or dice (and particularly the games of faro, basset, ace of hearts, hazard, passage, rolly-polly, and all other games with dice, except backgammon), are prohibited under a penalty of 200*l*. for him that shall erect such lotteries, and 50*l*. a time for the players. Public [173] lotteries, unless by authority of parliament, and all manner of ingenious devices, under the denomination of sales or otherwise, which in the end are equivalent to lotteries, were before prohibited by a great variety of statutes[g] under heavy pecuniary penalties. But particular descriptions will ever be lame and deficient, unless all games of mere chance are at once prohibited; the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another. The statute 13 George II, c. 19 (Gaming, 1739), to prevent the multiplicity of horse-races, another fund of gaming, directs that no plates or matches under 50*l*. value shall be run, upon penalty of 200*l*. to be paid by the owner of each horse running, and 100*l*. by such as advertise the plate. By statute 18 George II, c. 34 (Gaming, 1744), the statute 9 Ann. is further enforced, and some deficiencies supplied: the forfeitures of that act may now be recovered in a court of equity, and, moreover, if any man be convicted upon information or indictment of winning or losing at any sitting 10*l*., or 20*l*. within twenty-four hours, he shall forfeit five times the sum. Thus careful has the legislature been to prevent this destructive vice; which may show that our laws against gaming are not so deficient as ourselves and our magistrates in putting those laws in execution.

§ 202. 9. Killing game.—Lastly, there is another offense, constituted by a variety of acts of parliament, which are so numerous and so confused, and the crime itself of so questionable a nature, that I shall not detain the reader with many observations thereupon. And yet it is an offense which the sportsmen of England

[f] 12 Geo. II. c. 28 (Gaming, 1738). 13 Geo. II. c. 19 (Gaming, 1739). 18 Geo. II. c. 34 (Gaming, 1744).

[g] 10 & 11 W. III. c. 17 (1698). 9 Ann. c. 6. § 53 (Lotteries, 1710). 10 Ann. c. 26. § 109 (1711). 8 Geo. I. c. 2. § 36, 37 (Lotteries, 1721). 9 Geo. I. c. 19. § 4, 5 (Lotteries, 1722). 6 Geo. II. c. 35. § 29, 30 (Lotteries, 1732).

seem to think of the highest importance, and a matter, perhaps the only one, of general and national concern, associations having been formed all over the kingdom to prevent its destructive progress. I mean the offense of destroying such beasts and fowls as are ranked under the denomination of *game:* which, we may remember, was formerly observed [h] (upon the old principles of the forest law) [174] to be a trespass and offense in all persons alike, who have not authority from the crown to kill game (which is royal property) by the grant of either a freewarren or at least a manor of their own. But the laws, called the game laws, have also inflicted additional punishments (chiefly pecuniary) on persons guilty of this general offense, unless they be people of such rank or fortune as is therein particularly specified. All persons, therefore, of what property or distinction soever, that kill game out of their own territories, or even upon their own estates, without the king's license expressed by the grant of a franchise, are guilty of the first original offense, of encroaching on the royal prerogative. And those indigent persons who do so, without having such rank or fortune as is generally called a qualification, are guilty not only of the original offense, but of the aggravations also, created by the statutes for preserving the game, which aggravations are so severely punished, and those punishments so implacably inflicted, that the offense against the king is seldom thought of, provided the miserable delinquent can make his peace with the lord of the manor. This offense, thus aggravated, I have ranked under the present head, because the only rational footing, upon which we can consider it 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 offense against the public police and economy of the commonwealth.

§ 203. a. Game laws.—The statutes for preserving the game are many and various, and not a little obscure and intricate; it being remarked [1] that in one statute only, 5 Ann., c. 14 (Game, 1706), 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 these statutes, I shall not at

h See Book II. pag. 417, etc.

1 Burn's Justice, tit. Game. § 3.

present inquire.[15] It is in general sufficient to observe that the *qualifications* for killing game, as they are usually called, or more properly the *exemptions* from the penalties inflicted by the statute law, are, 1. The having a freehold estate of 100*l.* [175] *per annum;* there being fifty times the property required to enable a man to kill a partridge as to vote for a knight of the shire; 2. A leasehold for ninety-nine years of 150*l.* *per annum;* 3. Being the son and heir apparent of an esquire (a very loose and vague description) or person of superior degree; 4. Being the owner, or keeper, of a forest, park, chase or warren. For unqualified persons transgressing these laws, by killing game, keeping engines for that purpose, or even having game in their custody, or for persons (however qualified) that kill game, or have it in possession, at unseasonable times of the year, or unseasonable hours of the day or night, on Sundays or on Christmas Day, there are various penalties assigned, corporal and pecuniary, by different statutes;[k] on any of which, but only on one at a time, the justices may convict in a summary way, or (in most of them) prosecutions may be carried on at the assizes. And, lastly, by statute 28 George II, c. 12 (Game, 1754), no person, however qualified to *kill*, may make merchandise of this valuable privilege, by *selling* or exposing to sale any game, on pain of like forfeiture as if he had no qualification.

[k] *Ibid. eod. tit.*

---

15 The English game laws are regarded as a series of statutes passed with the object of protecting persons who have exclusive or concurrent sporting rights over lands, from the invasion of the lands, and the capture or killing thereon of certain wild animals by trespassers. The cause or excuse for the passing of these statutes is that wild animals, even when valuable for food, are not the subject of larceny (Rex v. Townley (1871), L. R. 1 C. C. R. 315), and that it has been deemed desirable to create the special crimes known as "poaching" rather than to apply the law of larceny, so as to vest in the owners or occupiers of land an absolute property in wild animals found thereon. (6 Ency. Laws of Eng. 328.) The more important modern English statutes are the Night Poaching Act, 1828, the Game Act, 1831, Poaching Prevention Act, 1862, the Game Licenses Act, 1860, and the Wild Birds Protection Acts, 1880 to 1904.

CHAPTER THE FOURTEENTH. [176]

OF HOMICIDE.

§ 204. Summary of preceding chapters.—In the ten preceding chapters we have considered, first, such crimes and misdemeanors as are more immediately injurious to God and His holy religion; secondly, such as violate or transgress the law of nations; thirdly, such as more especially affect the king, the father and representative of his people: fourthly, such as more directly infringe the rights of the public or commonwealth, taken in its collective capacity; and are now, lastly, to take into consideration those which in a more peculiar manner affect and injure *individuals* or private subjects.

§ 205. Offenses against individuals.—Were these injuries indeed confined to individuals only, and did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs, for which a satisfaction would be due only to the party injured: the manner of obtaining which was the subject of our inquiries in the preceding volume.

Grounds for regarding them as public wrongs.—But the wrongs which we are now to treat of are of a much more extensive consequence: 1. Because it is impossible they can be committed without a violation of the laws of nature, of the moral as well as political rules of right; 2. Because they include in them almost always a breach of the public peace; 3. Because by their example and evil tendency they threaten and endanger the subversion of all civil society. Upon these accounts it is [177] that, besides the private satisfaction due, and given in many cases to the individual, by action for the private wrong, the government also calls upon the offender to submit to public punishment for the public crime. And the prosecution of these offenses is always at the suit and in the name of the king, in whom by the texture of our constitution the *jus gladii* (the right of the sword) or executory power of the law entirely resides. Thus, too, in the old Gothic constitution there was a threefold punishment inflicted on all delinquents: First, for the private wrong to the party injured; secondly, for the offense

against the king by disobedience to the laws; and, thirdly, for the crime against the public by their evil example.[a] Of which we may trace the groundwork in what Tacitus tells us of his Germans,[b] that, whenever offenders were fined, "*pars mulctæ regi, vel civitati, pars ipsi qui vindicatur vel propinquis ejus, exsolvitur* (part of the fine is paid to the king or the state, and part to the plaintiff or to his relations)."

§ 206. **Of three kinds: I. Against the person; II. Against habitations; III. Against property.**—These crimes and misdemeanors against private subjects are principally of three kinds: Against their *persons*, their *habitations* and their *property*.

§ 207. **I. Offenses against the person: 1. Homicide.**—Of crimes injurious to the *persons* of private subjects, the most principal and important is the offense of taking away that life which is the immediate gift of the great Creator, and of which, therefore, no man can be entitled to deprive himself or another, but in some manner either expressly commanded in, or evidently deducible from, those laws which the Creator has given us; the divine laws, I mean, of either nature or revelation. The subject, therefore, of the present chapter will be the offense of *homicide* or destroying the life of man, in its several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it.

§ 208. **a. Three kinds of homicide.**—Now, homicide, or the killing of any human creature, is of three kinds: *Justifiable*, *excusable* and *felonious*. The first has no share of guilt at all; the second very little; but the [178] third is the highest crime against the law of nature that man is capable of committing.

§ 209. **(1) Justifiable homicide.**—Justifiable homicide is of divers kinds.[1]

[a] Stiernhook, l. 1. c. 5. [b] De Mor. Germ. c. 12.

---

[1] **Justifiable and excusable homicide considered.**—To our present ways of thinking one committing homicide is either guilty or not guilty, either justifiable or not justifiable. The line between guilt and innocence may be

§ 210. (a) Homicide owing to inevitable necessity.—Such as is owing to some unavoidable *necessity*, without any will, intention or desire, and without any inadvertence or negligence, in the party killing, and therefore without any shadow of blame.

hard to draw in any particular case, but there is no room for a twilight zone, such as is implied by the distinction made by the class of excusable homicides. Historically the distinction is intelligible enough. The close relation between the pleas of the crown and the crown revenues is sufficient reason for declaring the goods forfeited of one who has killed another even in self defense. "The man who commits homicide by misadventure or in self-defense deserves but needs a pardon." 2 Pollock and Maitland, History of English Law, 2d ed., 479. The perpetuation of the distinction was undoubtedly due to the feeling mentioned by Blackstone that in quarrels both parties are usually in some fault. Practically, therefore, it tends to discourage the taking of life if one killing in self-defense be held not entirely guiltless though it may be very unjust to one protecting his life from a vicious murderer. Logically, however, and under the modern law, where the establishment of self-defense requires a verdict of not guilty, there is no reason for the distinction between justifiable and excusable homicide. It is true that there are limitations on the right of self-defense that do not apply to cases of so-called justifiable homicide such as in the prevention of serious felonies. Nevertheless the scientific classification is to make all lawful homicide justifiable and then define the limits of the right in different situations. The distinction between justifiable and excusable homicide continues in some jurisdictions though disregarded in others.

The ignoring of the distinction has led to a marked divergence of authority in the United States. As Blackstone lays down the law there is a right, indeed it is so commendable as to rise almost but not quite to a duty, to resist the commission of an atrocious forcible felony, such as robbery, and to resist by killing the felon if necessary. Suppose, however, we have a pure case of an unjustifiable assault with intent to kill. One resisting such an assault by killing would be exercising his right of self-defense. Such killing under Blackstone's definition would be merely excusable, not justifiable. The practical difference is this. In resisting the robber one may stand his ground and kill if the felony can be prevented or the felon apprehended in no other way. In self-defense the one assaulted must retreat if danger can be avoided by so doing. In other words, the right to stand one's ground does not exist where the felony intended is murder and nothing else, but only where the intention is to commit some collateral felony like robbery. 2 L. R. A. (N. S.) 4, note. Many courts in the United States, however, ignore the distinction between justifiable and excusable homicide, but attempt to rationalize the law by holding that inasmuch as murder is a most atrocious felony one may stand his ground and resist the attack even to death, if necessary, without retreating to the wall. This theory has been characterized as the code of the duelist, the German officer and the buccaneer. Professor Beale, 16 Harv. Law Rev. 567,

§ 211. **(i) Homicide by command of the law.**—As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who hath forfeited his life by the laws and verdict of his country. This is an act of

where the authorities are collected. The other point of view is well expressed in Von Ihering, The Struggle for Law, Lalor's Translation, 122 ff. The doctrine of retreat has the merit of saving life and discouraging the use of weapons. On the other hand, the doctrine involves the absurdity that one must retreat, if he can, from a murderer when his life is at stake, but not from a robber to save a few cents.

The exercise of the right of self-defense is of course carefully guarded. The danger must involve life or serious bodily harm; it must be real or, at least, apparent to a man of reasonable firmness; must be actually believed in, necessary, and imminent. A person may be deprived of the right of self-defense unless he can withdraw from the conflict and make his withdrawal plain to his opponent, by committing a felonious assault, by engaging in a mutual combat, by the debauching of a wife or daughter in his immediate presence, but not after the act is completed. Brown v. State, 135 Ga. 656, 70 S. E. 329. Or even by mere words when the same were used without intention of provoking an assault and taking advantage thereof. State v. Scott, 41 Minn. 365, 43 N. W. 62. In general, words, mere trespasses or minor crimes should not deprive of the right of self-defense (People v. Hecker, 109 Cal. 451, 30 L. R. A. 403, 42 Pac. 307), although some jurisdictions seem to require entire freedom from fault as a prerequisite to the exercise of the right of self-defense. State v. Trammell, 40 S. C. 331, 42 Am. St. Rep. 874, 18 S. E. 940. It has been held that going armed to a place where trouble is expected does not deprive of the right of self-defense (People v. Gonzales, 71 Cal. 569, 12 Pac. 783; State v. Evans, 124 Mo. 397, 28 S. W. 8), although there is now a tendency to deal more severely with one who is acting on the extreme of his legal rights by going to the place of expected attack for no purpose other than to look for trouble. Zaner v. State, 90 Ala. 651, 8 South. 698; People v. Webster, 13 Cal. App. 348, 109 Pac. 637.

In those jurisdictions where retreat is not a prerequisite to the exercise of the right of self-defense the doctrine is limited to "stand your ground when in the right." Various acts may put one so far in the wrong that while not depriving him of his right of self-defense may nevertheless require retreat where that is possible; such as for example the commission of a trespass (People v. Flannelly, 128 Cal. 83, 60 Pac. 670), and possibly mere words (Hays v. Territory (Okl.), 52 Pac. 950).

As to the felonies for prevention of which life may be taken, Blackstone lays down the humane doctrine that homicide is justifiable only for the prevention of a forcible and atrocious crime, not, for example, any crime unaccompanied with force, and this is clearly the doctrine of the best considered cases. Storey v. State, 71 Ala. 329; Thomas v. Kinkead, 55 Ark. 502, 29 Am.

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; therefore wantonly to kill the greatest of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled and extrajudicially, is murder.[c] For, as Bracton[d] very justly observes, "*istud homicidium si fit ex livore, vel delectatione effundendi humanum sanguinem, licet juste occidatur iste, tamen occisor peccat mortaliter, propter intentionem corruptam* (if the homicide be committed through malice, or a thirst of human blood, the perpetrator is guilty of murder on account of his evil intention, although the sufferer deserved death)." And further, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder.[e] And upon this account Sir Matthew Hale himself, though he accepted the place of a judge of the common pleas under Cromwell's government (since it is necessary to decide the disputes of civil property in the worst of times), yet declined to sit on the crown side at the assizes and try prisoners, having very strong objections to the legality of the usurper's commission:[f] a distinction, perhaps, rather too refined, since the punishment of crimes is at least as necessary to society as maintaining the boundaries of property. Also such judgment, when legal, must be executed by the proper officer, or his appointed deputy, for no

[c] 1 Hal. P. C. 497.
[d] Fol. 120.
[e] 1 Hawk. P. C. 70. 1 Hal. P. C. 497.
[f] Burnet in His Life.

St. Rep. 68, 15 L. R. A. 558, 18 S. W. 854. Strangely enough, a more severe doctrine is laid down by some later authorities adopting the law as stated in the Penal Code of California, section 197, that homicide is justifiable when resisting any attempt to commit a felony. When we reflect that felony, which once meant an offense capitally punished, now means merely imprisonment in the state's prison and that legislatures have made felonies such trivial acts as the killing of certain animals, and when we consider that some crimes may be either felonies or misdemeanors, according to the discretion of the court imposing sentence, the absurdity of making the right to take life in the prevention of a crime depend upon whether the crime is a felony or not is apparent. The right should be limited as Blackstone states to atrocious felonies committed by force or the felonies should themselves be enumerated as Stephen has done. Stephen, Digest of the Criminal Law, 4th ed., § 199.—A. M. KIDD.

one else is *required* by law to do it, which requisition it is, that justifies the homicide. If another [179] person doth it of his own head, it is held to be murder,[g] even though it be the judge himself.[h] It must further be executed, *servato juris ordine* (according to the order of the court); it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versa*, it is murder,[i] for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law; but if a sheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commission of homicide: and, besides this license might occasion a very gross abuse of his power. The king, indeed, may remit part of a sentence, as, in the case of treason, all but the beheading; but this is no change, no introduction of a new punishment; and in the case of felony, where the judgment is *to be hanged*, the king (it hath been said) cannot legally order even a peer to be beheaded.[k] But this doctrine will be more fully considered in a subsequent chapter.

§ 212. (ii) Homicide by permission of the law.—Again: In some cases homicide is justifiable, rather by the *permission*, than by the absolute *command*, of the law: either for the *advancement* of public *justice*, which without such indemnification would never be carried on with proper vigor, or, in such instances, where it is committed for the *prevention* of some atrocious *crime*, which cannot otherwise be avoided.

§ 213. (aa) Homicide to advance public justice.—Homicides, committed for the *advancement* of public *justice*, are: 1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him.[l] 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted, and, in the endeavor to take him, kills him.[m] This is similar to the old Gothic constitutions, which (Stiernhook in-

[g] 1 Hal. P. C. 501. 1 Hawk. P. C. 70.

[h] Dalt. Just. c. 150.

[i] Finch. L. 31. 3 Inst. 52. 1 Hal. P. C. 501.

[k] 3 Inst. 52. 212.

[l] 1 Hal. P. C. 494. 1 Hawk. P. C. 71.

[m] 1 Hal. P. C. 494.

forms us[n]) "*furem, si aliter capi non posset, occidere permittunt* (it is allowable to kill a thief if he cannot otherwise be taken)." [180] 3. In case of a riot, or rebellious assembly, the officers endeavoring to disperse the mob are justifiable in killing them, both at common law[o] and by the riot act, 1 George I, c. 5 (Riot, 1714). 4. Where the prisoners in a gaol, or going to gaol, assault the gaoler or officer, and he in his defense kills any of them, it is justifiable, for the sake of preventing an escape.[p] 5. If trespassers in forests, parks, chases or warrens will not surrender themselves to the keepers, they may be slain, by virtue of the statute 21 Edward I, st. 2, *de male factoribus in parcis* (Trespassers in Forests, 1293), and 3 & 4 W. & M., c. 10 (Deer Stealers, 1691).[2] But 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, the deer stealers could not but escape, unless such homicide were committed: otherwise, without such absolute necessity, it is not justifiable. 6. If the champions in a trial by battel killed either of them the other, such homicide was justifiable, and was imputed to the just judgment of God, who was thereby presumed to have decided in favor of the truth.[q 3]

§ 214. (bb) Homicide to prevent crime.—In the next place, such homicide as is committed for the *prevention* of any forcible and atrocious *crime* is justifiable by the law of nature,[r] and also by the law of England, as it stood so early as the time of Bracton,[s] and as it is since declared by statute 24 Henry VIII, c. 5 (Killing a Thief, 1532).[4] If any person attempts a robbery or murder of another, or attempts to break open a house *in the night-time* (which

n De Jure Goth. l. 3. c. 5.
o 1 Hal. P. C. 495. 1 Hawk. P. C. 161.
p 1 Hal. P. C. 496.
q 1 Hawk. P. C. 71.
r Puff. L. of N. l. 2. c. 5.
s Fol. 155.

2 These statutes were repealed in the reigns of George III and George IV.

3 The trial by battel was abolished in 1819.

4 Now, by the Offenses Against the Person Act, 1861, no punishment is to be incurred by any person who shall kill another in his own defense or in any other manner without felony.

extends also to an attempt to burn it[t]), and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets, or to the breaking open of any house *in the daytime*, unless it carries with it an attempt of robbery also. So the Jewish law, which punished no theft with death, makes homicide only justifiable, in case of *nocturnal* house-breaking: "if a thief be found breaking up, and he be smitten [181] that he die, no blood shall be shed for him: but if the sun be risen upon him, there shall blood be shed for him; for he should have made full restitution."[u] At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact;[w] and, by the Roman law of the twelve tables, a thief might be slain by night with impunity, or even by day if he armed himself with any dangerous weapon:[x] which amounts very nearly to the same as is permitted by our own constitutions.

Homicide in defense of chastity.—The Roman law also justifies homicide when committed in defense of the chastity either of one's self or relations,[y] and so, also, according to Selden,[z] stood the law in the Jewish republic. The English law likewise justifies a woman killing one who attempts to ravish her;[a] and so, too, the husband or father may justify killing a man who attempts a rape upon his wife or daughter, but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other.[b] And I make no doubt but the forcibly attempting a crime of a still more detestable nature may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this, that where a crime, in itself capital, is endeavored to be committed by force,

t 1 Hal. P. C. 488.

u Exod. xxii. 2.

w Potter. Antiq. b. 1. c. 24.

x Cic. pro. Milone. 3. Ff. 9. 2. 4.

y "*Divus Hadrianus rescripsit, eum qui stuprum sibi vel suis inferentem occidit, dimittendum.*" (Ff. 48. 8. 1.)

z De legib. Hebræor. l. 4. c. 3.

a Bac. Elem. 34. 1 Hawk. P. C. 71.

b 1 Hal. P. C. 485, 486.

it is lawful to repel that force by the death of the party attempting.[5] But we must not carry this doctrine to the same visionary length that Mr. Locke does, who holds[c] "that all manner of force without right upon a man's person puts him in a state of war with the aggressor, and, of consequence, that, being in such a state of war, he may lawfully kill him that puts him under this unnatural restraint." However just this conclusion may be in a state of uncivilized nature, yet the law of England, like that of every other [182] well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system, nor will suffer with impunity any crime to be *prevented* by death unless the same, if committed, would also be *punished* by death.

In these instances of *justifiable* homicide it may be observed that the slayer is in no kind of fault whatsoever, not even in the minutest degree, and is therefore to be totally acquitted and discharged with commendation rather than blame. But that is not quite the

[c] Ess. on Gov. p. 2. c. 5.

---

5 If one person forcibly assaults another, the person assaulted is justified in repelling force by force; and if he uses no more force than is reasonably necessary, and, in the use of such force, kills his assailant, he is not criminally liable. There must be a reasonable necessity for the act that causes the death, or an honest belief that there is such a necessity. (R. v. Smith (1837), 8 Car. & P. 160; R. v. Knock (1877), 14 Cox C. C. 1; R. v. Weston (1879), 14 Cox C. C. 346; R. v. Rose (1884), 15 Cox C. C. 540; R. v. Symondson (1896), 60 J. P. 645; R. v. Carman Deana (1909), 2 Cr. App. R. 75.) If the violence used is excessive, or is used after the danger is past or by way of revenge, the act is not justifiable. (R. v. Driscoll (1841), Car. & M. 214.) And a person is not justified in using a deadly weapon to repel a merely trivial assault. To justify the use of such a weapon in self-defense, he must be in fear of serious bodily danger (Cockcroft v. Smith (1705), 2 Salk. 642, 91 Eng. Reprint, 541; R. v. Hewlett (1858), 1 Fost. & F. 91), and must first have retreated as far as possible, and must not use more violence than is appropriate to the occasion. (R. v. Odgers (1843), 2 Mood. & R. 479.) The justification of self-defense is available for masters and servants, parents and children, husbands and wives, killing an assailant in the necessary defense of each other respectively; the act of the defender being construed as the act of the person attacked. (1 Hale P. C. 484.)—STEPHEN, 4 Comm. (16th ed.), 46.

See note 1, *ante*.

case in *excusable* homicide, the very name whereof imports some fault, some error or omission; so trivial, however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment.

§ 215. (2) Excusable homicide.—Excusable homicide is of two sorts: Either *per infortunium*, by misadventure, or *se defendendo*, upon a principle of self-preservation. We will first see wherein these two species of homicide are distinct and then wherein they agree.

§ 216. (a) Homicide by misadventure.—Homicide *per infortunium*, or *misadventure*, 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, qualified to keep a gun, is shooting at a mark, and undesignedly kills a man:[d] for the act is lawful, and the effect is merely 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 was lawful; but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder,[e] for the act of immoderate correction is unlawful. [183] Thus by an edict of the Emperor Constantine,[f] when the rigor of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment, and, if death accidentally ensued, he was guilty of no crime; but if he struck him with a club or a stone, and thereby occasioned his death, or if in any other yet grosser manner "*immoderate suo jure utatur, tunc reus homicidii sit* (he use his right beyond the bounds of moderation, then he is guilty of homicide)."

But to proceed. A tilt or tournament, the martial diversion of our ancestors, was, however, an unlawful act; and so are boxing

[d] 1 Hawk. P. C. 73, 74.
[e] 1 Hal. P. C. 473, 474.
[f] Cod. l. 9. t. 14.

and sword-playing, the succeeding amusement of their posterity: and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony of manslaughter. But, if the king command or permit such diversion, it is said to be only misadventure; for then the act is lawful.[g] In like manner as, by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games, authorized or permitted by the state, was not held to be guilty of homicide.[h] Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he has done nothing unlawful; but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence.[i] And, in general, if death ensues in consequence of an idle, dangerous and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cases the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts.[k]

§ 217. **(b) Homicide in self-defense.** — Homicide in *self-defense*, or *se defendendo*, upon a sudden affray, is also excusable rather than justifiable, by the English law. This species of self-defense must be distinguished from that just now mentioned, as calculated to hinder [184] the perpetration of a capital crime, which is not only a matter of excuse, but of justification. But the self-defense which we are now speaking of is that whereby a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him.

Chance-medley.—And this is what the law expresses by the word *chance-medley*, or (as some other choose to write it) *chaud-medley*, the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion; both of them of pretty much the same import. But the former is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Henry VIII, c. 5

g 1 Hal. P. C. 473. 1 Hawk. P. C. 74.
h Plato. de LL. lib. 7. Ff. 9. 2. 7.
i Hawk. P. C. 73.
k *Ibid.* 74. 1 Hal. P. C. 472. Fost. 261.

(Killing a Thief, 1532), and our ancient books,[l] that it is properly applied to such killing as happens in self-defense upon a sudden rencounter.[m] This right of natural defense does not imply a right of attacking; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot, therefore, legally exercise this right of preventive defense, but in sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defense, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.

Distinction between chance-medley and manslaughter.—It is frequently difficult to distinguish this species of homicide (upon *chance-medley* in self-defense) from that of manslaughter in the proper legal sense of the word.[n] But, the true criterion between them 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 hath not begun to fight, or (having begun) endeavors to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defense.[o] For which reason the law requires that the person who kills another in his own defense [185] should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy, yet between two fellow-subjects the law countenances no such point of honor; because the king and his courts are the *vindices injuriarum* (avengers of injuries), and will give to the party wronged all the satisfaction he deserves.[p] In this the civil law also agrees with ours, or perhaps goes rather further, "*qui cum aliter*

l Staundf. P. C. 16.
m 3 Inst. 55. 57. Fost. 275, 276.
n 3 Inst. 55.
o Fost. 277.
p 1 Hal. P. C. 481. 483.

tueri se non possunt, damni culpam dederint, innoxii sunt (those who when they cannot otherwise defend themselves kill their adversary are held innocent)."[q] The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch or other impediment, or as far as the fierceness of the assault will permit him;[r] for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm, and then in his defense he may kill his assailant instantly. And this is the doctrine of universal justice,[s] as well as of the municipal law.

Time of self-defense.—And, as the *manner* of the defense, so is also the *time* to be considered; for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defense. Neither, under the color of self-defense, will the law permit a man to screen himself from the guilt of deliberate murder; for if two persons, A and B, agree to fight a duel, and A gives the first onset, and B retreats as far as he safely can, and then kills A, this is murder, because of the previous malice and concerted design.[t] But if A upon a sudden quarrel assaults B first, and upon B's returning the assault, A really and *bona fide* flees, and, being driven to the wall, turns again upon B and kills him, this may be *se defendendo* (in self-defense), according to some of our writers:[u] [186] though others[w] have thought this opinion too favorable; inasmuch as the necessity to which he is at last reduced originally arose from his own fault. Under this excuse, of self-defense, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defense of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself.[x]

[q] Ff. 9. 2. 45.

[r] 1 Hal. P. C. 483.

[s] Puff. b. 2. c. 5. § 13.

[t] 1 Hal. P. C. 479.

[u] 1 Hal. P. C. 482.

[w] 1 Hawk. P. C. 75.

[x] 1 Hal. P. C. 484. [See, also, Book III, c. 1, upon the civil consequences of such mutual defense.]

Saving one's own life at the expense of another's.—There is one species of homicide *se defendendo* (in self-defense) where the party slain is equally innocent as he who occasions his death; and yet this homicide is also excusable from the great universal principle of self-preservation which prompts every man to save his own life preferable to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by Lord Bacon,[y] 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 man's is excusable through unavoidable necessity and the principle of self-defense; since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and endangering of, each other's life.[6]

§ 218. (i) Comparison of homicide in self-defense and by misadventure.—Let us next take a view of those circumstances wherein these two species of homicide, by misadventure and self-defense, agree, and those are in their blame and punishment. For the law sets so high a value upon the life of a man, that it always intends some misbehavior in the person who takes it away, unless by the command or express permission of the law. In the case of misadventure, it presumes negligence, or at least a want of sufficient caution, in him who was so unfortunate as to commit it; who therefore is not altogether faultless.[z] And as to the necessity

y Elem. c. 5. See, also, 1 Hawk. P. C. 73.

z 1 Hawk. P. C. 72.

---

6 In the English case of "The Mignonette," in which sailors were prosecuted for having in extremity killed one of their number with a view to preserving their own lives, Lord Coleridge dismissed Lord Bacon's dictum by saying, that if Lord Bacon meant to lay down the broad proposition, that a man may save his life by killing, if necessary, an innocent and unoffending neighbor, that certainly is not the law at the present day. The conviction of murder was unanimously sustained. Reg. v. Dudley (1884), 14 Q. B. D. 273. And in the American case of United States v. Holmes, 1 Wall. Jr. 1, Fed. Cas. No. 15,383, it was held that seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers, for the sake of preserving their own.

which excuses a man who [187] kills another *se defendendo* (in self-defense), Lord Bacon [a] entitles it *necessitas culpabilis* (culpable necessity), and thereby distinguishes it from the former necessity of killing a thief or a malefactor. For the law intends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed: and since in quarrels both parties may be, and usually are, in some fault, and it scarce can be tried who was originally in the wrong, the law will not hold the survivor entirely guiltless. But it is clear, in the other case, that where I kill a thief that breaks into my house, the original default can never be upon my side. The law, besides, may have a further view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining that he who slays his neighbor, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.

§ 219. (ii) All homicides culpable.—Nor is the law of England singular in this respect. Even the slaughter of enemies required a solemn purgation among the Jews, which implies that the death of a man, however it happens, will leave some stain behind it. And the Mosaical law [b] appointed certain cities of refuge for him "who killed his neighbor unawares; as if a man goeth into the wood with his neighbor to hew wood, and his hand fetcheth a stroke with the ax to cut down a tree, and the head slippeth from the helve, and lighteth upon his neighbor that he die, he shall flee unto one of these cities and live." But it seems he was not held wholly blameless, any more than in the English law; since the avenger of blood might slay him before he reached his asylum, or if he afterwards stirred out of it till the death of the high priest. In the imperial law likewise [c] casual homicide was excused by the indulgence of the emperor signed with his own sign manual, "*adnotatione principis* (with the signature of the prince)"; otherwise the death of a man, however committed, was in some degree punishable. Among the Greeks [d] homicide by misfortune was expiated by volun-

[a] Elem. c. 5.
[b] Numb. c. 35, and Deut. c. 19.
[c] Cod. 9. 16. 5.
[d] Plato de Leg. lib. 9.

tary [188] banishment for a year.[e] In Saxony a fine is paid to the kindred of the slain, which also, among the western Goths, was little inferior to that of voluntary homicide;[f] and in France[g] no person is ever absolved in cases of this nature without a largess to the poor and the charge of certain masses for the soul of the party killed.

§ 220. (iii) Penalty of excusable homicide.—The penalty inflicted by our laws is said by Sir Edward Coke to have been anciently no less than death,[h] which, however, is with reason denied by later and more accurate writers.[i] It seems rather to have consisted in a forfeiture, some say of all the goods and chattels, others of only part of them, by way of fine or *weregild*,[k] which was probably disposed of, as in France, *in pios usus* (for pious purposes), according to the humane superstition of the times, for the benefit of *his* soul who was thus suddenly sent to his account with all his imperfections on his head. But that reason having long ceased, and the penalty (especially if a total forfeiture) growing more severe than was intended, in proportion as personal property has become more considerable; the delinquent has now, and has had as early as our records will reach,[l] a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same.[m 7] And, indeed, to prevent this expense, in cases

[e] To this expiation by banishment the spirit of Patroclus in Homer may be thought to allude, when he reminds Achilles, in the twenty-third Iliad, that, when a child, he was obliged to flee his country for casually killing his playfellow; "*νηπιος ὀυχ ἑθελων* (careless but unintentional)."

[f] Stiernh. de Jure Goth. l. 3. c. 4.

[g] De Mornay, on the Digest.

[h] 2 Inst. 148. 315.

[i] 1 Hal. P. C. 425. 1 Hawk. P. C. 75. Fost. 282, etc.

[k] Fost. 287.

[l] Fost. 283.

[m] 2 Hawk. P. C. 381.

---

[7] It was provided by the 9 George IV (1828), c. 31, that no punishment or forfeiture should be thenceforth incurred by any person who should kill another by misadventure or in any other manner without felony; and though this provision was afterwards repealed, a clause to the same purpose was inserted in the Offenses Against the Person Act, 1861, the statute by which

where the death has notoriously happened by misadventure or in self-defense, the judges will usually permit (if not direct) a general verdict of acquittal.[n]

§ 221. (3) Felonious homicide.—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.

§ 222. (a) Suicide.—[189] Self-murder, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law,[o] yet was punished by the Athenian law with cutting off the hand which committed the desperate deed.[p] And also the law of England wisely and religiously considers that no man hath a power to destroy life, but by commission from God, the author of it; and, as the suicide is guilty of a double offense, one spiritual, in invading the prerogative of the Almighty, and rushing into His immediate presence uncalled for, the other temporal, against the king, who hath an interest in the preservation of all his subjects, the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder.[q] A *felo de se* (suicide), therefore, is he that deliberately puts an end to his own existence, or

[n] Fost. 288.

[o] "*Si quis impatientia doloris, aut tædio vitæ, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum* (If anyone, sinking under the pressure of grief, or weariness of life, disease, madness, or shame, shall prefer death, his conduct shall not be considered to the prejudice of his character)." Ff. 49. 16. 6.

[p] Pott. Antiq. b. 1. c. 26.

[q] Keilw. 136.

---

offenses against the person are at present regulated. So that now all practical distinction between justifiable and excusable homicide is, in our law, wholly done away.—STEPHEN, 4 Comm. (16th ed.), 49.

commits any unlawful malicious act, the consequence of which is his own death; as if attempting to kill another he runs upon his antagonist's sword, or, shooting at another, the gun bursts and kills himself.[r 8] 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 coroner's juries are 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 very rationally judges that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong, which is necessary, as was observed in a former chapter,[s] to [190] form a

r 1 Hawk. P. C. 68. 1 Hal. P. C. 413. s See pag. 24.

---

8 **Suicide as a crime.**—That suicide is a crime under the English common law appears from the resulting forfeiture of an offender's goods; that this crime is, moreover, regarded as a form of murder appears from the line of cases holding that one who persuades another to kill himself is guilty either as principal or accessory to the crime of murder. (Rex v. Dyson, Russ. & R. 523; Regina v. Allison, 8 Car. & P. 418; Rex v. Russell, 1 Mood. C. C. 356.)

The fact that no punishment by way of forfeiture of goods or otherwise is prescribed for the suicide under our law has given rise to the belief that suicide is not a crime. Expressions of various courts to this effect (see Commonwealth v. Mink, 123 Mass. 422, 429, 25 Am. Rep. 109) are recorded even in jurisdictions in which the common law still prevails. On the other hand, in those same jurisdictions, one who accidentally kills another in an attempt to commit suicide is held for murder (Commonwealth v. Mink, *supra;* State v. Levelle, 34 S. C. 120, 27 Am. St. Rep. 799, 13 S. E. 319), and one who persuades another to kill himself is guilty of the same crime either as principal or accessory. (Commonwealth v. Bowen, 13 Mass. 356, 7 Am. Dec. 154.) The two positions taken by the courts seem irreconcilable. If suicide is not a crime it is hard to understand how one who persuades another to commit suicide is guilty of any crime. And if suicide is not murder it is hard to see how one who persuades to suicide can be accessory to murder. A Texas court (Grace v. State, 44 Tex. Cr. 193, 69 S. W. 529), after asserting that the suicide is innocent of violating the laws of that state, is at least consistent in making the further assertion that the party furnishing the means to the suicide must likewise be innocent.

In jurisdictions in which the common law has been entirely superseded by statute and the statutory definition of murder is not broad enough to comprehend suicide, the law on this point would seem to be finally determined; nevertheless, there exists the same tendency on the part of the courts, while hold-

legal excuse. And therefore if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man.[88]

Punishment of suicide.—But now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune; on the former by an ignominious burial in the highway, with a stake driven through his body; on the latter by a forfeiture of all his goods and chattels to the king, hoping that his care for either his own reputation or the welfare of his family would be some motive to restrain him from so desperate and wicked an act.[9] And it is observable that this

[88] 1 Hal. P. C. 412.

---

ing the suicide himself innocent of any crime, to punish the abettor. In a recent Illinois case suicide was held to be no crime under the statutes of that state, and, therefore, no defense to recovery on a contract of insurance providing that the certificate should be void if the member died in consequence of a violation of the laws of the state. Royal Circle v. Achterrath, 204 Ill. 549, 98 Am. St. Rep. 224, 63 L. R. A. 452, 68 N. E. 492. The same court in another case (see Burnett v. People, 204 Ill. 208, 98 Am. St. Rep. 206, 66 L. R. A. 304, 68 N. E. 505, 511), suggests that, although suicide is no crime, the one who procures another to commit the act of self-destruction may be held liable as a principal to the crime of murder, on grounds somewhat analogous to the theory of agency in civil cases. But, since the agent's act for which the principal is to be held guilty is suicide, it follows that if this suggestion is correct, suicide must be murder in spite of the court's express disaffirmation.

The foregoing seems to indicate that under our law suicide is no less criminal than under the English common law, but that the policy of our law in dealing with the suicide is radically different. No punishment is, in general, prescribed either for one who kills himself or for one who unsuccessfully attempts to do so, not because his act is not criminal, but because the futility of such measures in preventing future crime is now generally recognized. These considerations, however, cannot be invoked to shield one who encourages, abets or assists another in committing suicide, and he should, therefore, be punished as any other criminal. Although, under a code which makes no mention of suicide and which defines murder as the malicious killing of another, there may be no logical ground upon which the abettor can be held guilty of any crime, nevertheless, in jurisdictions in which the common-law definition of murder still obtains, suicide may well be considered as one form of murder, and the abettor punished accordingly.—17 HARVARD LAW REVIEW, 566.

[9] In modern times, this ignominious burial has ceased; the Interments (*Felo de se*) Act, 1882, having provided that the coroner shall not in future direct

forfeiture has relation to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land, and the husband drowns himself, the land shall be forfeited to the king, and the wife shall not have it by survivorship. For by the act of casting himself into the water he forfeits the term, which gives a title to the king, prior to the wife's title by survivorship, which could not accrue till the instant of her husband's death.[t] And, though it must be owned that the letter of the law herein borders a little upon severity, yet it is some alleviation that the power of mitigation is left in the breast of the sovereign, who upon this (as on all other occasions) is reminded by the oath of his office to execute judgment in mercy.

§ 223. (b) Killing another person.—The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt, which divide the offense into *manslaughter* and *murder*. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles, and principally consists in this, that manslaughter (when voluntary) arises from the sudden heat of the passions, murder from the wickedness of the heart.

§ 224. (i) Manslaughter.—[191] Manslaughter is therefore thus defined:[u] 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. These were called in the Gothic constitutions "*homicidia*

[t] Finch. L. 216.

[u] 1 Hal. P. C. 466.

---

the interment of a *felo de se* in any public highway or with any stake driven through the body, but shall direct him to be interred in the churchyard or other burial ground; though nothing in the Act authorizes the performing of any of the rites of Christian burial on the remains of any person found *felo de se*. A deceased person shown to have been *non compos mentis* at the time of his self-destruction is not, however, debarred from such rites; the forfeiture of the felon's goods has also now ceased to be a consequence of this, as of any other felony. An attempt to commit suicide is an indictable misdemeanor at common law, punishable by fine or imprisonment, without hard labor.—STEPHEN, 4 Comm. (16th ed.), 51.

vulgaria; quæ aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiæ calore et impetu (common homicides which are committed by accident, or even willingly, but in the sudden heat and violence of passion)."[w] And hence it follows that in manslaughter there can be no accessories before the fact; because it must be done without premeditation.

§ 225. (aa) Voluntary manslaughter.—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;[x] and the law pays that regard to human frailty as not to put a hasty and deliberate act upon the same footing with regard to guilt. So, also, if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendo* (in self-defense), since there is no absolute necessity for doing it to preserve himself, yet neither is it murder, for there is no previous malice, but it is manslaughter.[y] But in this, and in every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder.[z 10] So if a man takes another in the act of adultery with his wife, and kills him directly upon the spot, though this was allowed by the laws of Solon,[a] as likewise by the Roman civil law (if the adulterer was found in the husband's own house[b]), and also among the ancient Goths,[c] yet in England it is not absolutely ranked

w Stiernh. de Jure Goth. l. 3. c. 4.
x 1 Hawk. P. C. 82.
y Kelyng. 135.
z Fost. 296.
a Plutarch. in Vit. Solon.
b Ff. 48. 5. 24.
c Stiernh. de Jure Goth. l. 3. c. 2.

10 The provocation, in order to reduce murder to manslaughter, must be very gross. Mere words are hardly ever sufficient to reduce murder to manslaughter —at any rate, if the killing be with a deadly weapon (Rex v. Mason (1913), 8 Cr. App. R. 121; Rex v. Palmer [1913], 2 K. B. 29; 2 Bishop, New Crim. Law, § 704; Collins v. United States, 150 U. S. 62, 37 L. Ed. 998, 14 Sup. Ct. Rep. 9.) Even an actual assault is not enough, unless it is very insulting or violent. (Rex v. Deana (1909), 2 Cr. App. R. 75.)

in the class of justifiable homicide, as in case of a forcible rape, [192] but it is manslaughter.[d] It is, however, the lowest degree of it; and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation.[e] Manslaughter, therefore, on a sudden provocation differs from excusable homicide *se defendendo* (in self-defense) in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other no necessity at all, being only a sudden act of revenge.

§ 226. (bb) Involuntary manslaughter.—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 if two persons play at sword and buckler, unless by the king's command, and one of them kills the other: this is manslaughter; because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischief.[f] So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: 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 under which the original act was done: if it were 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 it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning,[g] and murder, if he knows of their passing and gives no warning at all, for then it is malice against all mankind.[h] [11] And, in general, when an involuntary kill-

[d] 1 Hal. P. C. 486.
[e] Sir T. Raym. 212.
[f] 3 Inst. 56.
[g] Kel. 40.
[h] 3 Inst. 57.

[11] **Death from negligence.**—Where one by his negligence has caused or contributed to the death of another he is guilty of manslaughter. The death must, however, have been the direct result wholly or in part of the defendant's negligence. If the negligence of the deceased or of others intervened so as to constitute the proximate, efficient cause of the death, it will not be criminal

ing happens in consequence of an unlawful act, it will be either murder or manslaughter,[1] according to the nature of the act which occasioned it. If it be in prosecution of a felonious [193] intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter.[1]

§ 227. (cc) Punishment of manslaughter.—Next, as to the *punishment* of this degree of homicide: the crime of manslaughter amounts to felony, but within the benefit of clergy, and the offender shall be burned in the hand and forfeit all his goods and chattels.[12]

[1] Our statute law has severely animadverted on one species of criminal negligence, whereby the death of a man is occasioned. For by statute 10 George II. c. 31 (Thames Watermen, 1736), if any waterman between Gravesend and Windsor receives into his boat or barge a greater number of persons than the act allows, and any passenger shall then be drowned, such waterman is guilty (not of manslaughter, but) of felony, and shall be transported as a felon.

[1] Foster. 258. 1 Hawk. P. C. 84.

---

homicide in the defendant. The question whether the negligence was in fact so gross as to render it culpable is a question of evidence for a jury to decide; and the negligence may consist in not observing either statutory requirements respecting fencing of machinery in factories, and the like, or those rules which arise at common law out of the position in which persons stand towards each other or the public, as in the use of dangerous things, or in the conduct of operations which, if carelessly conducted, may cause injury or death. Instances of such negligence are—negligent driving or riding of horses or vehicles; negligent navigation; negligent driving of a railway train; negligence in the control of machinery; negligence in the use of a weapon or other dangerous thing; negligence in throwing or letting fall stones, rubbish, etc., on to a street or place of public resort; negligence in the control of vicious or dangerous animals; neglect in a person who has the charge or care of a child or young or helpless person to provide sufficient food, clothing and bedding, or proper medical aid; gross want of skill or care in the treatment of a sick person by one (whether a qualified medical practitioner or not) who undertakes the cure of such person. See 4 Stephen, Comm. (16th ed.), 53; 1 McClain, Crim. Law, § 349.

[12] **Modern punishment of manslaughter in England.**—I do not think that any writer subsequent to Foster has added much to the subject of the law of homicide. In Blackstone's Commentaries there is a chapter on homicide which has all the merits peculiar to its author, both in style and arrangement, but it adds nothing to what had been said by earlier authors. From Blackstone to our own days the matter has been handled exclusively by writers of books of

Statutory punishment for mortally stabbing.—But there is one species of manslaughter which is punished as murder, the benefit of clergy being taken away from it by statute, namely, the offense of mortally *stabbing* another, though done upon sudden provocation. For by statute 1 Jac. I, c. 8 (Stabbing, 1603), when

practice—East, Russell, Archbold, Roscoe and some others—who repeat each other and abstract an immense number of reported cases, but add practically nothing to the history or to the theory of the subject. One change only has been made by statute in the law on the subject, which, though of the greatest importance, has passed almost unnoticed. I refer to the act which altered the punishment of manslaughter. Manslaughter was originally a clergyable felony, punishable under the statutes already referred to with burning in the hand and imprisonment for not exceeding a year. That this punishment should have been considered adequate for the more aggravated class of manslaughter is surprising, as, for instance, for cases in which a slight blow was revenged by a deadly stab, or in which life was taken in a mutual combat conducted with circumstances of extreme brutality, and probably the consciousness of this may have been connected with the harsh constructions which were put by the judges on the phrase "malice aforethought." It may be hard to say that a man who kills another by means neither likely nor intended to kill in an attempt to commit a robbery, is to be regarded as a murderer, but it must be owned that for such an offense burning in the hand and a year's imprisonment would be a very inadequate sentence. The law, however, remained unaltered upon this point till 1822, when, by 3 George IV, c. 38, manslaughter was made punishable by transportation for life or for any less term, or by imprisonment with or without hard labor for three years as a maximum, or by fine. This enactment was repealed and re-enacted by 9 George IV, c. 31, § 9, which was similarly dealt with by 24 & 25 Vict., c. 100, § 5, which is still in force. The maximum term of imprisonment is, however, lowered to two years.—STEPHEN, 3 Hist. Crim. Law, 78.

The crime of manslaughter amounts to felony; and, at one time, certain kinds of manslaughter (e. g., stabbing) were capital felonies. At the present day, anyone who is convicted of manslaughter may be sentenced, at the discretion of the court, either to be kept in penal servitude for life or for a term of not less than three years, or to be imprisoned, with or without hard labor, for any term not exceeding two years; or to pay such fine as the court shall award, either in addition to, or in substitution for, other punishment. By the Offenses Against the Person Act, 1861, the court may require the offender to give security for keeping the peace. In addition to this criminal liability, the offender may also be subject to a civil liability in certain cases of manslaughter, either under the Fatal Accidents Act, 1846 (Lord Campbell's Act), or (if the deceased was in the service of the man to blame) under the Employers' Liability Act, 1880, or under the Workmen's Compensation Act, 1906.—STEPHEN, 4 Comm. (16th ed.), 55.

one thrusts or stabs another, not then having a weapon drawn, or who hath not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. This statute was made on account of the frequent quarrels and stabbings with short daggers, between the Scotch and the English, at the accession of James the First,[k] and, being therefore of a temporary nature, ought to have expired with the mischief which it meant to remedy. For, in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling or shooting, can either extenuate or enhance the guilt; unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law hath construed the statute so favorably in behalf of the subject, and so strictly when against him, that the offense of stabbing now stands almost upon the same footing as it did at the common law.[l] Thus (not to repeat the cases before mentioned, of stabbing an adulteress, etc., which are barely manslaughter, as at common law), in the construction of this statute it hath been doubted whether, if the deceased had struck at all before the mortal blow given, this does not take it out of the statute, though in the preceding quarrel the stabber had given the first blow; and [194] it seems to be the better opinion, that this is not within the statute.[m] Also, it hath been resolved that the killing a man by throwing a hammer or other blunt weapon is not within the statute; and whether a shot with a pistol be so or not is doubted.[n] But if the party slain had a cudgel in his hand, or had thrown a pot or a bottle, or discharged a pistol at the party stabbing, this is a sufficient having a weapon drawn on his side within the words of the statute.[o]

§ 228. **(ii) Murder.**—We are next to consider the crime of deliberate and willful *murder;* a crime at which human nature starts, and which is, I believe, punished almost universally throughout the world with death. The words of the Mosaical law (over

k 1 Lord Raym. 140.
l Fost. 299, 300.
m Fost. 301. 1 Hawk. P. C. 77.
n 1 Hal. P. C. 470.
o 1 Hawk. P. C. 77.

and above the general precept to Noah,[p] that "whoso sheddeth a man's blood, by man shall his blood be shed") are very emphatical in prohibiting the pardon of murderers.[q] "Moreover ye shall take no satisfaction for the life of a murderer, who is guilty of death, but he shall surely be put to death; for the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it." And therefore our law has provided one course of prosecution (that by appeal, of which hereafter), wherein the king himself is excluded the power of pardoning murder; so that, were the King of England so inclined, he could not imitate that Polish monarch mentioned by Puffendorf,[r] who thought proper to remit the penalties of murder to all the nobility, in an edict with this arrogant preamble, "*nos, divini juris rigorem moderantes, etc.* (we, mitigating the rigor of divine law, etc.)." But let us now consider the definition of this great offense.

The name of murder.—The name of *murder* was anciently applied only to the secret killing of another[s 13] (which the word, *moerda,* signifies in the Teutonic language[t]), and it was defined "*homicidium quod nullo vidente, nullo sciente, clam perpetratur* (homicide, which is committed privately, no one witnessing, no one knowing it)"; [u] for which the vill wherein it was committed, or (if that were too poor) the whole hundred was liable to a heavy amerce-

p Gen. ix. 6.
q Numb. xxxv. 31.
r L. of N. b. 8. c. 3.
s Dial de Scacch. l. 1. c. 10.
t Stiernh. de Jure Sueon. l. 3. c.
u Glanv. l. 14. c. 3.

---

13 **The name of murder.**—*Morth* occurs in the Anglo-Saxon as meaning secret crime in general. Morth-slayer in Athelstan, 6, is the first occasion in which any phrase resembling murder is used for homicide, according to Stephen, Hist. of the Criminal Law, iii, 25. *Murdrum* appears first in the Laws of the Confessor, chs. 15, 16, but is said there to have been invented in the time of Cnut, a remarkable instance of transition from the view of homicide as a wrong to that of an offense against the state, says Stephen, iii. 26. But *murdrum* here is not the crime itself, but the peculiar fine for it introduced by Cnut to protect his Danes, and revived by William for his Normans, but abolished in 14 Edward III, c. 4. (Text, p. *195.) As the name of a crime it appears first in Glanvill, xiv, 3, where as a secret killing it is distinct from *simplex homicidium.* Bracton treats of it in the treatise De Corona, cap. 4, Twiss' ed., vol. 2, pp. 274, 275. See Twiss' preface, p. lviii, for the origin of Bracton's divisions, from the Decretals of Bernhard of Pavia.—HAMMOND.

ment, [195] which amercement itself was also denominated *murdrum*.[w] This was an ancient usage among the Goths in Sweden and Denmark, who supposed the neighborhood, unless they produced the murderer, to have perpetrated or at least connived at the murder,[x] and, according to Bracton,[y] was introduced into this kingdom by King Canute, to prevent his countrymen the Danes from being privily murdered by the English, and was afterwards continued by William the Conqueror for the like security to his own Normans.[z] And therefore if, upon inquisition had, it appeared that the person found slain was an Englishman (the presentment whereof was denominated *englescherie*[a] the country seems to have been excused from this burden. But this difference being totally abolished by statute 14 Edward III, c. 4 (Engleschrie, 1340), we must now (as is observed by Staundforde[b]) define murder in quite another manner, without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction.

§ 229. **(aa) Definition of murder.**—Murder is therefore now thus defined,* or rather described, by Sir Edward Coke:[c] "When a person, of sound memory and discretion, unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, either express or implied."[14] The best way of ex-

* Notice Blackstone's careful distinction between a true definition (which fixes the *genus* or class to which the thing defined belongs, and its specific difference from other members of the class) and a mere description by an aggregation of qualities.—HAMMOND.

w Bract. l. 3. tr. 2. c. 15. § 7. Stat. Marlbr. c. 26. Fost. 281.
x Stiernh. l. 3. c. 4.
y l. 3. tr. 2. c. 15.
z 1 Hal. P. C. 447.
a Bract. *ubi supr.*
b P. C. l. 1. c. 10.
c 3 Inst. 47.

14 **Premeditated and unpremeditated killing.**—Turning to culpable homicide, originally killing was killing, no distinction in guilt being made. But by the statutes 23 Henry VIII, c. 1, and others, certain kinds of killing were deprived of the benefit of clergy. Apparently the distinction intended by these statutes was based on the difference between premeditated and unpremeditated killing, but the courts construed the words "malice aforethought"

amining the nature of this crime will be by considering the several branches of this definition.

§ 230. (aaa) Capacity of person killing.—First, it must be committed by *a person of sound memory and discretion;* for luna-

in the statutes as requiring neither malice under any general or legal definition of the word nor actual premeditation. The words "malice aforethought," therefore, not only do not define the difference between murder and manslaughter, but are positively misleading. What the courts have actually done is to treat as murder any killing which in the language of Foster carries with it "the plain indications of an heart regardless of social duty and fatally bent upon mischief." Foster, Crown Law, 257. This includes intentional killing where there is no considerable provocation and unintentional killing where the circumstances indicate wickedness as in the commission of a felony or by the use of a dangerous weapon. Under manslaughter are included cases of intentional homicide where some considerable provocation exists but not sufficient for a complete defense, together with most homicides by negligence. The differences can be described only by enumeration.

Degrees of murder.—The division between murder and manslaughter not seeming to be sufficient to mark the amount of guilt, murder has been divided into degrees. "The first statute for this purpose seems to have been passed in Pennsylvania so early as 1794, and may serve for a general example. It makes murder of the first degree consist of: (1) That perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing; (2) that committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery or burglary. A full account of the statutes of like kind in other states will be found in 18 Am. Dec. 744–777." (Hammond's Bl., Bk. IV, note 15.) Apparently, one of the purposes of this division was to make premeditated murder a more serious offense, but just as the judges construed actual premeditation out of the English statutes of Henry VIII, so the majority of courts have construed actual premeditation out of the statutes dividing murder into degrees. By the weight of authority the deliberation essential to establish murder in the first degree need not have existed for any particular length of time before the killing. 1 Michie, Homicide, 147. The result is that with the distinction that actual premeditation is not required, first degree murder consists of the cases enumerated, leaving to the second degree murder principally those cases of killing in the perpetration of other felonies and in the heat of passion where the circumstances are not sufficient to mitigate the offense to manslaughter. Some states have established a third degree of murder and four degrees of manslaughter. Michie, 1 Homicide, pp. 163, 269. The principal accomplishment of these minute distinctions seems to be the opening up of opportunities for technical errors in instructions with consequent reversals. Fine distinctions in the degree of guilt should be measured by the punishment.—A. M. KIDD.

tics or infants, as was formerly observed, 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.

§ 231. **(bbb) Unlawfulness of killing.**—Next, it happens when a person of such sound discretion *unlawfully killeth*. The unlawfulness arises from the killing [196] 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, though formerly it was held to be murder.[d] The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. And if a person be indicted for one species of killing, as by *poisoning*, he cannot be convicted by evidence of a totally different species of death, as by *shooting*, with a pistol or *starving*. But where they only differ in circumstance, as if a *wound* be alleged to be given with a sword, and it proves to have arisen from a staff, an ax or a hatchet, this difference is immaterial.[e] Of all species of deaths the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought.[f] And therefore by the statute 22 Henry VIII, c. 9 (Poisoning, 1530), it was made treason, and a more grievous and lingering kind of death was inflicted on it than the common law allowed, namely, boiling to death; but this act did not live long, being repealed by 1 Edward VI, c. 12 (Criminal Law, 1547). There was also, by the ancient common law, one species of killing held to be murder, which may be dubious at this day, as there hath not been an instance wherein it has been held to be murder for many ages past:[g] I mean by bearing false witness against another, with an express premeditated

[d] 1 Hal. P. C. 425.

[e] 3 Inst. 319. 2 Hal. P. C. 185.

[f] 3 Inst. 48.

[g] Fost. 132. In the case of Macdaniel and Berry, reported by Sir Michael Foster, though the then attorney general declined to argue this point of law, I have good grounds to believe it was not from any apprehension of his that the point was not maintainable, but from other prudential reasons. Nothing, therefore, should be concluded from the waiving of that prosecution.

design to take away his life, so as the innocent person be condemned and executed.[h] The Gothic laws punished in this case, both the judge, the witnesses, and the prosecutor; "*peculiari pœna judicem puniunt; peculiari testes, quorum fides judicem seduxit; peculiari denique et maxima auctorem, ut homicidam* (there is one particular punishment inflicted on the judge, another on the witnesses whose testimony misled the judge; and lastly, one of the greatest severity on the prosecutor, who is treated as a murderer)."[i] And, among the Romans, the *lex Cornelia de sicariis* (the Cornelian law concerning assassins), punished the false witness with death, as being guilty of a species of assassination.[k] And there is no doubt but this is equally murder *in foro conscientiæ* (in the tribunal of conscience) as killing [197] with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such. If a man, however, does such 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;[l] of the harlot who laid her child under leaves in an orchard, where a kite struck it and killed it;[m] and of the parish officers who shifted a child from parish to parish, till it died for want of care and sustenance.[n] So, too, if a man hath a beast that is used to do mischief, and he, knowing it, *suffers* it to go abroad, and it kills a man, even this is manslaughter in the owner; but if he had purposely *turned it loose*, though barely to frighten people and make what is called sport, it is with us (as in the Jewish law) as much murder as if he had incited a bear or dog to worry them.[o] If a physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to expectation kills him, this is neither murder nor manslaughter, but

[h] Mirror. c. 1. § 9. Brit. c. 52. Bract. l. 3. c. 4.

[i] Stiernh. de Jure Goth. l. 3. c. 3.

[k] Ff. 48. 8. 1.

[l] 1 Hawk. P. C. 78.

[m] 1 Hal. P. C. 432.

[n] Palm. 545.

[o] *Ibid.* 431.

misadventure,[15] and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance:[p] but it hath been holden that if it be not a *regular* physician or surgeon who administers the medicine or performs the operation, it is manslaughter at the least;[q] yet Sir Matthew Hale very justly questions the law of this determination.[r] 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.[s]

§ 232. (ccc) The person killed.—Further; the person killed must be "*a reasonable creature in being, and under the king's peace,*" at the time of the [198] killing.[16] Therefore, to kill an

p Mirr. c. 4. § 16. See Book III. pag. 122.
q Britt. c. 5. 4 Inst. 251.
r 1 Hal. P. C. 420.
s 1 Hawk. P. C. 79.

---

15 **Criminal liability of the physician and surgeon.**—The basis of the criminal liability of the physician or surgeon is still a matter of dispute. By some authorities the physician must live up to the external standards of professional skill in the community. Commonwealth v. Pierce, 138 Mass. 165, 52 Am. Rep. 264. By other authorities there is applied the internal standard of the physician's own state of mind, so that actual good intent and expectation of favorable results is an absolute justification. State v. Schulz, 55 Iowa, 628, 39 Am. Rep. 187, 8 N. W. 469. The tendency is stronger to apply the internal standard when the liability of the parent for the care of the child is in issue. Reg. v. Wagstaffe, 10 Cox C. C. 530. But see Reg. v. Senior [1899], L. R. 1 Q. B. 283, *dictum contra.* The question is becoming more and more important practically, owing to the rise of unorthodox schools of medicine and systems of exclusive mental healing. There is a marked tendency to adopt a compromise between the internal and external standards by requiring the physician to live up not to the standard of the profession in general, but to the standard of his particular school. State v. Smith, 25 Idaho, 541, 138 Pac. 1107. Legislatures are now beginning to act on the principle of licensing separately each school and fixing definite prerequisites for each kind of a license. See note on Construction of Statutes Regulating the Practice of Medicine, 25 L. R. A. (N. S.) 1297n.—A. M. KIDD.

16 The old definitions of criminal homicide refer to the killing of a person in the king's peace, but this phrase seems to be used in later times only to exclude cases of killing an alien enemy in war. In general, every person

alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the most regular born Englishman; except he be an alien enemy in time of war.[t] To kill a child in its mother's womb is now no murder, but a great misprision; but if the child be born alive and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.[u 17] But, as there is one case where it is difficult to prove the child's being born alive, namely, in the case of the murder of bastard children by the unnatural mother, it is enacted by statute 21 Jac. I, c. 27 (Concealment of Birth of Bastards, 1623), that if any woman be delivered of a child which if born alive should by law be a bastard, and endeavors privately to conceal its death, by burying the child or the like, the mother so offending shall suffer death as in the case of murder, unless she can prove by one witness at least that the child was actually born dead.[18] This law, which savors pretty strongly of severity, in making the concealment of the death almost conclusive evidence of the child's being murdered by the mother, is nevertheless to be also met with in the criminal codes of many other nations of Europe, as the Danes, the Swedes, and the French;[v] but I apprehend it has of late years been usual with us in England, upon trials for this offense, to require some sort of presumptive evidence that the child was born alive, before the other constrained presumption (that the child whose death is concealed was therefore killed by its parent) is admitted to convict the prisoner.

[t] 3 Inst. 50. 1 Hal. P. C. 433.

[u] 3 Inst. 50. 1 Hawk. P. C. 80. but see 1 Hal. P. C. 433.

[v] See Barrington on the Statutes. 425.

---

is entitled to protection against unlawful violence, and, whether he be a felon or an alien or a person outlawed, to cause his death except in a lawful manner, or in a way such as to render the homicide justifiable or excusable, will be criminal. 1 McClain, Crim. Law, § 295.

17 On the question of both criminal and civil liability for killing a child in its mother's womb, see the opinion of Mr. Justice Holmes in Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242, quoted in note 7, p. 221, Book I.

18 The act of 21 Jac. I. c. 27, being regarded as too severe was repealed, together with an Irish act on the same subject in 1802.

§ 233. (ddd) Malice aforethought.—Lastly, the killing must be committed *with malice aforethought*, to make it the crime of murder.[19] 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:[w] *un disposition a faire un male chose* (a disposition to commit a bad action);[x] and it may be either *express* or *implied* in law.

Express malice.—Express [199] 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.[y] This takes in the case of deliberate dueling, where both parties meet avowedly with an intent to murder: thinking it their duty, as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow-creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man: and therefore the law has justly fixed the crime and punishment of murder, on them, and on their seconds also.[z] Yet it requires such a degree of passive valor, to combat the dread of even undeserved contempt, arising from the false notions of honor too generally received in Europe, that the strongest prohibitions and penalties of the law will never

w Foster. 256.
x 2 Roll. Rep. 461.
y 1 Hal. P. C. 451.
z 1 Hawk. P. C. 82.

---

19 "Malice aforethought is defined in the Century Dictionary as actual malice, particularly in cases of homicide; in Webster, 'malice previously and deliberately entertained.' Thus it appears that the adjective 'aforethought' describes, not the intent to take life, but the malice, and that malice must be previously and deliberately entertained when the purpose to take life is formed, and must co-operate with the blow in producing death to constitute murder. To understand malice aforethought, malice must not be confounded with the intent to take life. It is the malice that must previously exist or be deliberately entertained. The intent may spring into existence, and be immediately followed by the fatal blow, and that, at common law, is murder." State v. Fiske, 63 Conn. 388, 28 Atl. 572.

be entirely effectual to eradicate this unhappy custom, till a method be found out of compelling the original aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally reputable, as that which is now given at the hazard of the life and fortune, as well of the person insulted, as of him who hath given the insult. 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 justly 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.[a] Neither shall he be guilty of a less crime who kills another in [200] consequence of such a willful act as shows him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief,[b] upon a horse used to strike, or coolly discharging a gun, among a multitude of people.[c] So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And, if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed, as to beat a man, to commit a riot, or to rob a park, and one of them kills a man, it is murder in them all, because of the unlawful act, the *malitia præcogitata*, or evil intended beforehand.[d]

Implied malice.—Also, in many cases where no malice is expressed, the law will imply it; as, where a man willfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved.[e] And if a man kills another suddenly without any, or without a considerable, provocation, the law implies malice; for no person, unless of an abandoned heart,

a 1 Hal. P. C. 454. 473, 474.
b Lord Raym. 143.
c 1 Hawk. P. C. 74.
d *Ibid.* 84.
e 1 Hal. P. C. 455.

would be guilty of such an act upon a slight or no apparent cause. No affront, by words or gestures only, is a sufficient provocation so as to excuse or extenuate such acts of violence as manifestly endanger the life of another.[f] But if the person so provoked had unfortunately killed the other, by beating him in such a manner as showed only an intent to chastise and not to kill him, the law so far considers the provocation of contumelious behavior, as to adjudge it only manslaughter, and not murder.[g] In like manner if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants, endeavoring to conserve the peace, or any private person endeavoring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder.[h] And if one intends to do another felony, [201] and undesignedly kills a man, this is also murder.[i] Thus if one shoots at A and misses *him*, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A, and B, against whom the prisoner had no malicious intent, takes it, and it kills him, this is likewise murder.[j] So, also, if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it.[k]

General rule as to malice.—It were endless to go through all the cases of homicide which have been adjudged, either expressly or impliedly, malicious: these, therefore, may suffice as a specimen; and we may take it 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 (voluntary) occasioned by some sudden and sufficiently violent

[f] 1 Hawk. P. C. 82. 1 Hal. P. C. 455, 456.
[g] Fost. 291.
[h] 1 Hal. P. C. 457. Foster. 308, etc.
[i] 1 Hal. P. C. 465.
[j] *Ibid.* 466.
[k] *Ibid.* 429.

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. For all homicide is presumed to be malicious until the contrary appeareth upon evidence.[1]

§ 234. (bb) Punishment of murder. — The punishment of murder and that of manslaughter were formerly one and the same, both having the benefit of clergy; so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime.[m] But now, by several statutes,[n] the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers and counselors.[20] In atrocious cases it was frequently usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains near the place [202] where the act was committed, but this was no part of the legal judgment; and the like is still sometimes practiced in the case of notorious thieves. This, being quite contrary to the express command of the Mosaical law,[o] seems to have been borrowed from the civil law, which, besides the terror of the example, gives also another reason for this practice, *viz.*, that it is a comfortable sight to the relations and friends of the deceased.[p] But now in England

1 Fost. 255.

m 1 Hal. P. C. 450.

n 23 Hen. VIII. c. 1 (Benefit of Clergy, 1531). 1 Edw. VI. c. 12 (Criminal Law, 1547). 4 & 5 Ph. & M. c. 4 (Accessories to Felony, 1558).

o "The body of a malefactor shall not remain all night upon the tree; but thou shalt in any wise bury him that day, that the land be not defiled." Deut. xxi. 23.

p "*Famosos latrones, in his locis, ubi grassati sunt, furca figendos placuit; ut, et conspectu deterreantur alii, et solatio sit cognatis interemptorum, eodem*

---

20 Benefit of clergy was wholly abolished by the Criminal Law Act, 1827; by the Offenses Against the Person Act, 1861, it is expressly enacted that every person convicted of murder shall suffer death as a felon; but by the Children Act, 1908, sentence of death cannot be pronounced against a person under the age of sixteen. Such person when convicted is to be detained during the king's pleasure.

it is enacted by statute 25 George II, c. 37 (Murder, 1751), that the judge, before whom any person is found guilty of willful murder, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it, and shall in passing sentence direct him to be executed on the next day but one (unless the same shall be Sunday, and then on the Monday following), and that his body be delivered to the surgeons to be dissected and anatomized;[q] and that the judge may direct his body to be afterwards hung in chains, but in no wise to be buried without dissection.[21] And, during

loco pœna reddita, in quo latrones homicidia fecissent (Notorious robbers were fastened to a gibbet in the places where they had committed the act: that others might be deterred by the sight, and also that the relations of the deceased might be comforted with the knowledge that punishment was inflicted on the very spot where the murder had been done)." Ff. 48. 19. 28. § 15. [But this refers to the execution of the criminal, not to the hanging in chains or anything like it, afterwards.—HAMMOND.]

q Fost. 107.

---

21 **Modern practice of execution.**—The legality of a direction that the body should be hung in chains was declared by the Murder Act, 1751, and 9 George IV (1828), c. 31. By the Murder Act, 1751, moreover, dissection was required to be—and by the 9 George IV (1828), c. 31, might be—a part of the sentence; and by the same statutes, the judge, in passing sentence, was to direct the offender to be executed on the next day but one after that on which the sentence was passed, unless that day should happen to be a Sunday, and then on the Monday following. These severities, however, were successively laid aside; and it has now been provided, by the Offenses Against the Person Act, 1861, that sentence of death, on every conviction for murder, shall be pronounced and carried into execution, in the same manner as for other crimes which were capital before the act.

At the time of the last-mentioned statute, all executions took place in public; but by the Capital Punishment Amendment Act, 1868, public executions were abolished, and it was thereby enacted, that the judgment of death, to be executed on any prisoner for murder, should be carried into effect within the walls of the prison in which he was confined at the time of execution, in the presence only of the sheriff, gaoler, chaplain, surgeon, and such other officers of the prison as the sheriff required, and of such magistrates of the prison jurisdiction as chose to be present, and of such relatives of the prisoner, or other persons, as the sheriff or visiting justices should think proper to admit. And, a coroner's jury having first found the fact of death, the body of the offender (subject to the discretion of a Secretary of State) is to be buried within the prison precincts.—STEPHEN, 4 Comm. (16th ed.), 63.

the short but awful interval between sentence and execution, the prisoner shall be kept alone, and sustained with only bread and water. But a power is allowed to the judge upon good and sufficient cause to respite the execution, and relax the other restraints of this act.

Parricide.—By the Roman law *parricide,* or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leathern sack, with a live dog, a cock, a viper and an ape, and so cast into the sea.[r] Solon, it is true, in his laws, made none against parricide; apprehending it impossible that anyone should be guilty of so unnatural a barbarity.[s] And the Persians, according to Herodotus, entertained the same notion, when they adjudged all persons who killed their reputed parents to be bastards. And, upon some such reason as this, we must account for [203] the omission of an exemplary punishment for this crime in our English laws, which treat it no otherwise than as simple murder, unless the child was also the servant of his parent.[ss]

§ 235. (cc) Petit treason.—For, though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connections, when coupled with murder, denominates it a new offense, no less than a species of treason, called *parva proditio,* or *petit treason;*[22] which, however, is nothing else but an aggravated de-

[r] Ff. 48. 9. 9.

[s] Cic. pro. S. Roscio. § 25.

[ss] 1 Hal. P. C. 380.

---

[22] **Petit treason.**—"In the latter days of the Anglo-Saxon monarchy treason was added to the rude catalogue of crimes, under continental influence ultimately derived from Roman law; but the sin of plotting against the sovereign was the more readily conceived as heinous above all others by reason of the ancient Germanic principle of faith between a lord and his men. This prominence of the personal relation explains why down to quite modern times the murder of a husband by his wife, of a master by his servant, and of an ecclesiastical superior by a clerk, secular or regular, owing him obedience, were specially classed as 'petit treason' and distinguished from murder in general."—POLLOCK, 14 Law Quart. Rev. 300.

The crime of petit treason, as distinct from ordinary murder, is now abolished; it being provided by the Offenses Against the Person Act, 1861,

gree of murder;[t] although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treason.[u] And thus, in the ancient Gothic constitution we find the breach both of natural and civil relations ranked in the same class with crimes against the state and the sovereign.[w]

Kinds of petit treason.—Petit treason, according to the statute 25 Edward III, c. 2 (1351), may happen three ways: By a servant killing his master, a wife her husband, or an ecclesiastical person (either secular or regular) his superior, to whom he owes faith and obedience. A servant who kills his master whom he has left, upon a grudge conceived against him during his service, is guilty of petit treason, for the traitorous intention was hatched while the relation subsisted between them; and this is only an execution of that intention.[x] So if a wife be divorced *a mensa et thoro* (from bed and board), still the *vinculum matrimonii* (bond of matrimony) subsists; and if she kills such divorced husband, she is a traitress.[y] And a clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocesan bishop, and therefore to kill any of these is petit treason.[z] As to the rest, whatever has been said, or remains to be observed hereafter, with respect to willful murder, is also applicable to the crime of petit treason, which is no other than murder in [204] its most odious

t Foster. 107. 324. 336.

u See pag. 75.

w "*Omnium gravissima censetur vis facta ab incolis in patriam, subditis in regem, liberis in parentes, maritis in uxores* (*et vice versa*), *servis in dominos, aut etiam ab homine in semet ipsum* (That violence which is exerted by inhabitants against their country, by subjects against their king, by children against their parents, by husbands against their wives, by wives against their husbands, by servants against their masters, or even by man against himself, is considered as the worst of all crimes)." Stiernh. de Jure Goth. l. 3. c. 3.

x 1 Hawk. P. C. 89. 1 Hal. P. C. 380.

y 1 Hal. P. C. 381.

z *Ibid.*

---

that any killing which amounted to that offense before the 9 George IV (1828), c. 31, shall now be deemed to be murder only, and no greater offense. It was never practically recognized in America, although mentioned in a few colonial acts.

degree, except that the trial shall be as in cases of high treason, before the improvements therein made by the statutes of William III.[a] But a person indicted of petit treason may be acquitted thereof, and found guilty of manslaughter or murder;[b] and in such case it should seem that *two* witnesses are not necessary, as in case of petit treason they are. Which crime is also distinguished from murder in its punishment.

Punishment of petit treason.—The punishment of petit treason, in a man, is to be drawn and hanged, and, in a woman, to be drawn and burned:[c] the idea of which latter punishment seems to have been handed down to us by the laws of the ancient Druids, which condemned a woman to be burned for murdering her husband;[d] and it is now the usual punishment for all sorts of treasons committed by those of the female sex.[e] Persons guilty of petit treason were first debarred the benefit of clergy by statute 12 Henry VII. c. 7 (Benefit of Clergy, 1496), which has been since extended to their aiders, abettors and counselors, by statutes 23 Henry VIII, c. 1 (Benefit of Clergy, 1531), and 4 & 5 P. & M., c. 4 (Accessories in Murder, 1557).

a Fost. 337.
b Foster. 106. 1 Hal. P. C. 378. 2 Hal. P. C. 184.
c 1 Hal. P. C. 382. 3 Inst. 311.
d Cæsar de Bell. Gal. l. 6. c. 18.
e See pag. 93.

CHAPTER THE FIFTEENTH. [205]

OF OFFENSES AGAINST THE PERSONS OF INDIVIDUALS.

§ 236. I. Continued. Offenses against the person, other than homicide.—Having in the preceding chapter considered the principal crime, or public wrong, that can be committed against a private subject, namely, by destroying his life, I proceed now to inquire into such other crimes and misdemeanors as more peculiarly affect the security of his person while living.

Of these some are felonious, and in their nature capital; others are simple misdemeanors, and punishable with a lighter animadversion. Of the felonies the first is that of *mayhem*.

§ 237. 1. Mayhem. — Mayhem, *mayhemium*, was in part considered in the preceding volume,[a] as a civil injury; but it is also looked upon in a criminal light by the law, being an atrocious breach of the king's peace, and an offense tending to deprive him of the aid and assistance of his subjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself or to annoy his adversary.[b] And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates their courage, are held to [206] be mayhems. But the cutting off his ear, or nose, or the like, are not held to be mayhems at common law; because they do not weaken but only disfigure him.

§ 238. a. Earlier punishment of mayhem.—By the ancient law of England he that maimed any man, whereby he lost any part of his body, was sentenced to lose the like part, *membrum pro membro* (limb for limb);[c] which is still the law in Sweden.[d] But this went

[a] See Book III. pag. 121.

[b] Brit. l. 1. c. 25. 1 Hawk. P. C. 111.

[c] 3 Inst. 118.—*Mes, si la pleynte soit faite de femme qu' avera tollet a home ses membres, en tiel case perdra la feme la une meyn par jugement, come le membre dount ele avera trespasse* (But if the complaint be preferred against a woman that she had mutilated a man, she shall be adjudged to lose her hand, as the member with which she had offended). (Brit. c. 25.)

[d] Stiernhook de Jure Sueon. l. 3. t. 3.

afterwards out of use, partly because the law of retaliation, as was formerly shown,[e] is at best an inadequate rule of punishment, and partly because upon a repetition of the offense the punishment could not be repeated. So that, by the common law, as it for a long time stood, mayhem was only punishable with fine and imprisonment;[f] unless, perhaps, the offense of mayhem by castration, which all our old writers held to be felony; "*et sequitur aliquando pœna capitalis, aliquando perpetuum exilium, cum omnium bonorum ademptione* (and sometimes capital punishment follows, sometimes perpetual exile with the loss of all his goods)."[g] And this although the mayhem was committed upon the highest provocation.[h] [1]

§ 239. **b. Later punishment of mayhem.**—But subsequent statutes have put the crime and punishment of mayhem more out of doubt. For first, by statute 5 Henry IV, c. 5 (Maiming, 1403), to remedy a mischief that then prevailed, of beating, wounding or robbing a man, and then cutting out his *tongue* or putting out his *eyes*, to prevent him from being an evidence against them, this offense is declared to be felony if done of malice prepense; that is, as Sir Edward Coke[i] explains it, voluntarily and of set purpose, though done upon a sudden occasion. Next in order of time is the

[e] See pag. 12.

[f] 1 Hawk. P. C. 112.

[g] Bract. fol. 144.

[h] Sir Edward Coke (3 Inst. 62.) has transcribed a record of Henry the Third's time (Claus. 13. Hen. III. m. 9.), by which a gentleman of Somersetshire and his wife appear to have been apprehended and committed to prison, being indicted for dealing thus with John the Monk, who was caught in adultery with the wife.

[i] 3 Inst. 62.

---

[1] The subject is now dealt with by the Offenses Against the Person Act, 1861, which provides that the offenses enumerated shall be regarded as felonies or as misdemeanors, punishable with penal servitude or imprisonment.

The Coventry Act is regarded as common law in the United States, and has also been generally re-enacted in the states. The California Penal Code, section 203, provides: "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem." People v. Wright, 93 Cal. 564, 29 Pac. 240.

statute 37 Henry VIII, c. 6 (Criminal Law, 1545), which directs that if a man shall maliciously and unlawfully cut off the *ear* of any of the [207] king's subjects, he shall not only forfeit treble damages to the party grieved, to be recovered by action of trespass at common law as a civil satisfaction, but also 10*l*. by way of fine to the king, which was his criminal amercement. The last statute, but by far the most severe and effectual of all, is that of 22 & 23 Car. II, c. 1 (Maiming, 1670), called the Coventry act; being occasioned by an assault on Sir John Coventry in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in parliament. By this statute it is enacted that if any person shall of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person, *with intent to maim or to disfigure him,* such person, his counselors, aiders and abettors, shall be guilty of felony, without benefit of clergy.[k]

Thus much for the felony of mayhem, to which may be added the offense of willfully and maliciously shooting at any person in any dwelling-house or other place; an offense of which the probable consequence may be either killing or maiming him. This, though no such evil consequence ensues, [208] is made felony without benefit

[k] On this statute Mr. Coke, a gentleman of Suffolk, and one Woodburn, a laborer, were indicted in 1722; Coke for hiring and abetting Woodburn, and Woodburn for the actual fact, of slitting the nose of Mr. Crispe, Coke's brother-in-law. The case was somewhat singular. The murder of Crispe was intended, and he was left for dead, being terribly hacked and disfigured with a hedge bill; but he recovered. Now the bare intent to murder is no felony: but to disfigure, with an intent to disfigure, is made so by this statute; on which they were therefore indicted. And Coke, who was a disgrace to the profession of the law, had the effrontery to rest his defense upon this point, that the assault was not committed with an intent to disfigure, but with an intent to murder, and therefore not within the statute. But the court held, that if a man attacks another to murder him with such an instrument as a hedge bill, which cannot but endanger the disfiguring him, and in such attack happens not to kill, but only to disfigure him, he may be indicted on this statute: and it shall be left to the jury whether it were not a design to murder by disfiguring, and consequently a malicious intent to disfigure as well as to murder. Accordingly the jury found them guilty of such previous intent to disfigure, in order to effect their principal intent to murder, and they were both condemned and executed. (State Trials. VI. 212.)

of clergy by statute 9 George I, c. 22 (Criminal Law, 1722), and thereupon one Arnold was convicted in 1723 for shooting at Lord Onslow, but, being half a madman, was never executed, but confined in prison, where he died about thirty years after.

§ 240. 2. Abduction and marriage of an heiress.—The second offense more immediately affecting the personal security of individuals relates to the female part of his majesty's subjects; being that of their *forcible abduction* and *marriage*,[2] which is vulgarly called *stealing an heiress*. For by statute 3 Henry VII, c. 2 (Abduction, 1487), it is enacted that if any person shall for lucre take any woman, being maid, widow or wife, and having substance either in goods or lands, or being heir apparent to her ancestors, contrary to her will, and afterwards she be married to such misdoer, or by his consent to another, or defiled, such person, his procurers and abettors, and such as knowingly receive such woman, shall be deemed principal felons; and by statute 39 Elizabeth, c. 9 (Abduction, 1597), the benefit of clergy is taken away from all such felons, who shall be principals, procurers or accessories *before* the fact.

§ 241. a. Construction of statutes against abducting an heiress. In the construction of this statute it hath been determined, 1. That the indictment must allege that the taking was for lucre, for such are the words of the statute.[l] 2. In order to show this, it must appear that the woman has substance either real or personal, or is an heir apparent.[m] 3. It must appear that she was taken away against her will. 4. It must also appear that she was afterwards married, or defiled. And though possibly the marriage or defilement might be by her subsequent consent, being won thereunto by flatteries after the taking, yet this is felony if the first taking were

[l] 1 Hawk. P. C. 110.

[m] 1 Hal. P. C. 660. 1 Hawk. P. C. 109.

---

2 Forcible abduction of women is now regulated by the Offenses Against the Person Act, 1861. The punishment is penal servitude or imprisonment; and the offender is made incapable of taking any estate or interest in any real or personal property of the woman, and if a marriage has taken place, the property is to be settled in such manner as shall be appointed by the court. And the Criminal Law Amendment Acts, 1885 and 1912, contain further and more stringent provisions for the protection of women and girls generally.

against her will;[n] and so *vice versa*, if the woman be originally taken away with her own consent, yet if she afterwards refuse to continue with the offender, and be forced against her will, she may, from that time, as properly [209] be said to be taken against her will as if she never had given any consent at all; for, till the force was put upon her, she was in her own power.[o] It is held that a woman thus taken away and married may be sworn and give evidence against the offender, though he is her husband *de facto;* contrary to the general rule of law: because he is no husband *de jure,* in case the actual marriage was also against her will.[p] In cases, indeed, where the actual marriage is good, by the consent of the inveigled woman obtained after her forcible abduction, Sir Matthew Hale seems to question how far her evidence should be allowed; but other authorities[q] seem to agree that it should even then be admitted, esteeming it absurd that the offender should thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, should (by a forced construction of law) be made use of to stop the mouth of the most material witness against him.

§ 242. b. Abducting girls under sixteen.—An inferior degree of the same kind of offense, but not attended with force, is punished by the statute 4 & 5 Ph. & Mar., c. 8 (Abduction, 1558), which enacts that if any person above the age of fourteen unlawfully shall convey or *take away any woman child unmarried* (which is held[r] to extend to bastards as well as to legitimate children), within the age of sixteen years, from the possession and against the will of the father, mother, guardians or governors, he shall be imprisoned two years, or fined at the discretion of the justices; and if he deflowers such maid or woman child, or, without the consent of parents, contracts matrimony with her, *he* shall be imprisoned five years, or fined at the discretion of the justices, and *she* shall forfeit all her lands to her next of kin during the life of her said husband. So

[n] 1 Hal. P. C. 660.
[o] 1 Hawk. P. C. 110.
[p] 1 Hal. P. C. 661.
[q] Cro. Car. 488. 3 Keb. 193. State Trials. V. 455.
[r] Stra. 1162.

that as these stolen marriages, under the age of sixteen, were usually upon mercenary views, this act, besides punishing the seducer, wisely removed the temptation. But this latter part of the act is now rendered [210] almost useless by provisions of a very different kind, which make the marriage totally void,[s] in the statute 26 George II, c. 33 (Marriages, 1753).

§ 243. 3. Rape.—A third offense against the female part also of his majesty's subjects, but attended with greater aggravations than that of forcible marriage, is the crime of *rape, raptus mulierum*, or the carnal knowledge of a woman forcibly and against her will. This, by the Jewish law,[t] was punished with death in case the damsel was betrothed to another man, and, in case she was not betrothed, then a heavy fine of fifty shekels was to be paid to the damsel's father, and she was to be the wife of the ravisher all the days of his life, without that power of divorce which was in general permitted by the Mosaic law.

§ 244. a. Punishment of rape under the civil law.—The civil law[u] punishes the crime of ravishment with death and confiscation of goods, under which it includes both the offense of forcible abduction, or taking away a woman from her friends, of which we last spoke, and also the present offense of forcibly dishonoring them; either of which, without the other, is in that law sufficient to constitute a capital crime. Also, the stealing away a woman from her parents or guardians, and debauching her, is equally penal by the emperor's edict, whether she consent or is forced: "*sive volentibus, sive nolentibus mulieribus, tale facinus fuerit perpetratum* (the crime will be the same whether the woman consent or not)." And this, in order to take away from women every opportunity of offending in this way, whom the Roman laws suppose never to go astray without the seduction and arts of the other sex, and therefore, by restraining and making so highly penal the solicitations of the men, they meant to secure effectually the honor of the women. "*Si enim ipsi raptores metu, vel atrocitate pœnæ, ab hujusmodi facinore se temperaverint, nulli mulieri, sive volenti*

[s] See Book I. pag. 437, etc.

[t] Deut. xxii. 25.

[u] Cod. 9. tit. 13.

sive nolenti, peccandi locus relinquetur; quia hoc ipsum velle mulierum, ab insidiis nequissimi hominis, qui meditatur rapinam inducitur. [211] *Nisi etenim eam solicitaverit, nisi odiosis artibus circumvenerit, non faciet eam velle in tantum dedecus sese prodere* (for if the ravisher be restrained from a crime of this nature, either through fear, or the severity of the punishment, no opportunity is left for a woman to offend either willingly or unwillingly, because the desire is always raised in her by the wicked seductions of the man who meditates the violence. For unless he solicit her, unless he compass his design by odious arts, he could never make her wish to betray herself to such dishonor).'' But our English law does not entertain quite such sublime ideas of the honor of either sex as to lay the blame of a mutual fault upon one of the transgressors only; and therefore makes it a necessary ingredient in the crime of rape that it must be against the woman's will.*

§ 245. b. Earlier common-law punishment of rape.—Rape was punished by the Saxon laws, particularly those of King Athelstan,[w] with death: which was also agreeable to the old Gothic or Scandinavian constitution.[x] 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,[y] which continued till after Bracton wrote, in the reign of Henry the Third. But in order to prevent malicious accusations, it was then the law (and, it seems, still continues to be so in appeals of rape[z]) that the woman should immediately after, ''*dum recens fuerit maleficium* (while the injury be recent),'' go to the next town, and there make discovery to some credible persons of the injury she has suffered, and afterwards should acquaint the high constable of the hundred, the coroners and the sheriff with the outrage.[a] This seems to correspond in some degree with the laws of

* But in most American states the seduction of a chaste woman by arts that induce her consent, upon the same reasoning with that of the Roman law, is now made a crime by statutes.—HAMMOND.

w Bracton l. 3. c. 28.

x Stiernh. de Jure Sueon. l. 3. c. 2.

y LL. Guil. Conqu. c. 19.

z 1 Hal. P. C. 632.

a Glanv. l. 14. c. 6. Bract. l. 3. c. 28.

Scotland and Arragon,[b] which require that complaint must be made within twenty-four hours; though afterwards, by statute Westm. I, c. 13 (3 Edward I, Rape, 1275), the time of limitation in England was extended to forty days. At present there is no time of limitation fixed, for, as it is usually now punished by indictment at the suit of the king, the maxim of law takes place, that *nullum tempus occurrit regi* (no time runs against the king); but the jury will rarely give credit to a stale complaint. During the former period, also, it was held for law[c] that the woman (by consent of the judge and her parents) might redeem the offender from the execution of his sentence, by accepting him for her husband, if he also was willing to agree to the exchange, but not otherwise.*

§ 246. c. Later statutes against rape.—[212] In the 3 Edward I, by the statute Westm. I, c. 13 (1275), the punishment of rape was much mitigated, the offense itself, of ravishing a damsel within age (that is, *twelve* years old), either with her consent or without, or of any other woman against her will, being reduced to a trespass if not prosecuted by appeal within forty days, and subjecting the offender only to two years' imprisonment and a fine at the king's will. But, this lenity being productive of the most terrible consequences, it was in ten years afterwards, 13 Edward I (1285), found necessary to make the offense of forcible rape felony by statute Westm. II, c. 34 (Rape, 1285). And by statute 18 Elizabeth, c. 7 (Criminal Law, 1575), it is made felony without benefit of clergy, as is also the abominable wickedness of carnally knowing or abusing any woman child under the age of ten years; in which case the consent or nonconsent is immaterial, as by reason of her tender years she is incapable of judgment and discretion.[3]

* And even now marriage closes the mouth of the principal witness, and thus practically operates as a condonation of the offense.—HAMMOND.

b Barrington. 142.

c Glanv. l. 14. c. 6. Bract. l. 3. c. 28.

---

3 The offense is no longer capital. It is now regulated by the Offenses Against the Person Act, 1861, as amended by the Penal Servitude Act, 1891. Under the provisions of these statutes rape is a felony; and the offender is liable to be kept in penal servitude for life, or for any term not less than three years, or imprisoned for any term not exceeding two years, with or without hard labor.

Sir Matthew Hale is indeed of opinion that such profligate actions committed on an infant under the age of *twelve* years, the age of female discretion by the common law, either with or without consent, amount to rape and felony, as well since as before the statute of Queen Elizabeth;[d] but that law has, in general, been held only to extend to infants under *ten*, though it should seem that damsels between *ten* and *twelve* are still under the protection of the statute Westm. I, the law with respect to their seduction not having been altered by either of the subsequent statutes.

§ 247. d. Capacity to commit rape.—A male infant under the age of fourteen years is presumed by law incapable to commit a rape, and therefore, it seems, cannot be found guilty of it. For though in other felonies *malitia supplet ætatem* (malice supplies the want of age), as has in some cases been shown, yet, as to this particular species of felony, the law supposes an imbecility of body as well as mind.[e]

§ 248. e. Against whom rape may be committed.—The civil law seems to suppose a prostitute or common harlot incapable of any injuries of this kind,[f] not allowing [213] any punishment for violating the chastity of her who hath indeed no chastity at all, or at least hath no regard to it.[4] But the law of England does not judge so hardly of offenders as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment. It therefore holds it to be a felony to force

[d] 1 Hal. P. C. 631.
[e] *Ibid.*
[f] Cod. 9. 9. 22. Ff. 47. 2. 39.

---

[4] **Age of consent.**—Under the statute 18 Elizabeth, c. 7, it was declared that, as a child under ten years of age is incapable of giving consent, rape might be committed upon a girl under ten years old whether she consent or not. By the Criminal Law Amendment Act, 1885. any person is guilty of felony who unlawfully has carnal knowledge of a girl under thirteen years of age, and of a misdemeanor if the girl be between thirteen and sixteen, consent being immaterial.

The trend of legislation in the United States is to raise the age of consent. Statutes in the several states fix the age of consent at varying ages from twelve to eighteen. An act of Congress of 1909 fixes the age at sixteen on the high seas or on waters within the jurisdiction of the United States.

even a concubine or harlot, because the woman may have forsaken that unlawful course of life;[g] for, as Bracton well observes,[h] "*licet meretrix fuerit antea, certe tunc temporis non fuit, cum reclamando nequitiæ ejus consentire noluit* (although she had been a harlot formerly, she surely was not at that time, when by crying out she showed herself unwilling to consent to his wickedness)."

§ 249. f. Proof of crime of rape.—As to the material facts requisite to be given in evidence and proved upon an indictment of rape, they are of such a nature that though necessary to be known and settled, for the conviction of the guilty and preservation of the innocent, and therefore are to be found in such criminal treatises as discourse of these matters in detail, yet they are highly improper to be publicly discussed, except only in a court of justice. I shall therefore merely add upon this head a few remarks from Sir Matthew Hale with regard to the competency and credibility of witnesses, which may *salvo pudore* be considered.

And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: If the witness be of good fame; if she presently discovered the offense, and made search for the offender; if the party accused fled for it, these and the like are concurring circumstances, which give greater probability to her evidence. But, 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 [214] like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned.

Moreover, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness if she hath sense and understanding to know the nature and obligations of an oath, and, even if she hath not, it is thought by Sir

g 1 Hal. P. C. 629. 1 Hawk. P. C. 108.

h Fol. 147.

Matthew Hale[1] that she ought to be heard without oath, to give the court information; though that alone will not be sufficient to convict the offender. And he is of this opinion, first, because the nature of the offense being secret, there may be no other possible proof of the actual fact, though afterwards there may be concurrent circumstances to corroborate it, proved by other witnesses; and, secondly, because the law allows what the child told her mother, or other relations, to be given in evidence, since the nature of the case admits frequently of no better proof; and there is much more reason for the court to hear the narration of the child herself than to receive it at second hand from those who swear they heard her say so. And, indeed, it seems now to be settled that in these cases infants of any age are to be heard, and if they have any idea of an oath, to be also sworn; it being found by experience that infants of very tender years often give the clearest and truest testimony. But in any of these cases, whether the child be sworn or not, it is to be wished, in order to render her evidence credible, that there should be some concurrent testimony of time, place and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be, therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard, and yet, after being heard, may prove not to be credible, or such as the jury is bound to believe. For one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses as well as of the truth of the fact.

[215] "It is true," says this learned judge,[1] "that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent." He then relates two very extraordinary cases of malicious prosecution for this crime that had happened within his own observation, and concludes thus: "I mention these instances, that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and

[1] 1 Hal. P. C. 634.

[1] 1 Hal. P. C. 635.

vigilance;* the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over-hastily carried to the conviction of the person accused thereof, by the confident testimony of sometimes false and malicious witnesses."

§ 250. 4. Crime against nature.—What has been here observed, especially with regard to the manner of proof, which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offense, of a still deeper malignity: the infamous *crime against nature,* committed either with man or beast. A crime which ought to be strictly and impartially proved, and then as strictly and impartially punished.[5] But it is an offense of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out; for, if false, it deserves a punishment inferior only to that of the crime itself.

I will not act so disagreeable a part to my readers as well as myself as to dwell any longer upon a subject the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named; "*peccatum illud horribile, inter christianos non nominandum* (that horrible crime not to be named among Christians)."[k] A taciturnity observed likewise [216] by the edict of Constantius and Constans;[l] "*ubi scelus est id, quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis pœnis subdantur infames, qui sunt, vel qui futuri sunt rei* (where that crime is found, which it is unfit even to know, we command the law to arise armed with an avenging sword, that the infamous men who are, or shall in future be guilty of it, may undergo the most severe punishments)." Which leads me to add a word concerning its punishment.

This the voice of nature and of reason, and the express law of God,[m] determine to be capital. Of which we have a signal instance,

k See in Rot. Parl. 50. Edw. III. n. 58. a complaint, that a Lombard did commit the sin "that was not to be named." (12 Rep. 37.)

l Cod. 9. 9. 31.

m Levit. xx. 13. 15.

---

5 The offense is now punishable, under the Offenses Against the Person Act, 1861, by penal servitude or imprisonment.

long before the Jewish dispensation, by the destruction of two cities by fire from Heaven; so that this is an universal, not merely a provincial, precept. And our ancient law in some degree imitated this punishment, by commanding such miscreants to be burnt to death,[n] though Fleta[o] says they should be buried alive: either of which punishments was indifferently used for this crime among the ancient Goths.[p] But now the general punishment of all felonies is the same, namely, by hanging, and this offense (being in the times of popery only subject to ecclesiastical censures) was made felony without benefit of clergy by statute 25 Henry VIII, c. 6 (Buggery, 1533), revived and confirmed by 5 Elizabeth, c. 17 (Sodomy, 1562). And the rule of law herein is, that, if both are arrived at years of discretion, *agentes et consentientes pari pœna plectantur* (the perpetrator and consenting party are both liable to the same punishment).[q]

These are all the felonious offenses more immediately against the personal security of the subject. The inferior offenses, or misdemeanors, that fall under this head are *assaults, batteries, wounding, false imprisonment* and *kidnapping*.

§ 251. 5, 6, 7. Assaults, batteries and woundings.—With regard to the nature of the three first of these offenses in general, I have nothing further to add to what has already been observed in the preceding book of these Commentaries,[r] when we considered them as private wrongs, or civil injuries, for which a satisfaction or remedy is given to the party aggrieved. But, taken in a public light, as a [217] breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with fines and imprisonment, or with other ignominious corporal penalties, where they are committed with any very atrocious design.[s] As in case of an assault with an intent to murder, or with an intent to commit either of the crimes last spoken of; for which intentional assaults, in the two last cases, indictments are much more usual than for the absolute perpetration of the facts themselves, oh account of the difficulty of proof: and herein, be-

n Brit. c. 9.
o l. 1. c. 37.
p Stiernh. de Jure Goth. l. 3 c. 2.
q 3 Inst. 59.
r See Book III. pag. 120.
s 1 Hawk. P. C. 65.

sides heavy fine and imprisonment, it is usual to award judgment of the pillory.[6]

Beating a clergyman.—There is also one species of battery more atrocious and penal than the rest, which is the beating of a clerk in orders, or clergyman, on account of the respect and reverence due to his sacred character, as the minister and ambassador of peace. Accordingly, it is enacted by the statute called *articuli cleri*, 9 Edward II, c. 3 (1315), that if any person lay violent hands upon a clerk, the amends for the peace broken shall be before the king, that is, by indictment in the king's courts, and the assailant may also be sued before the bishop, that excommunication or bodily penance may be imposed: which, if the offender will redeem by money, to be given to the bishop or the party grieved, it may be sued for before the bishop; whereas otherwise to sue in any spiritual court, for civil damages for the battery, falls within the danger of *præmunire*.[t] But suits are, and always were, allowable in the spiritual court for money agreed to be given as a commutation for penance.[u] So that upon the whole it appears that a person guilty of such brutal behavior to a clergyman is subject to three kinds of prosecution, all of which may be pursued for one and the same offense: An indictment, for the breach of the king's peace by such assault and battery; a civil action, for the special damage sustained by the party injured; and a suit in the ecclesiastical court, first, *pro correctione et salute animæ* (for the amendment and health of his soul) by *enjoining* penance, and then again for such sum of money as shall be agreed on for *taking off* the penance enjoined, [218] it being usual in those courts to exchange their spiritual censures for a round compensation in money;[v] perhaps because poverty is generally esteemed by the moralists the best medicine *pro salute animæ*.

§ 252. 8. False imprisonment.—The two remaining crimes and offenses against the persons of his majesty's subjects are in-

t 2 Inst. 492. 620.

u Artic. Cler. 9 Edw. II. c. 4 (1315). F. N. B. 53.

v 2 Roll. Rep. 384.

---

6 The different kinds of assaults and batteries are now dealt with by various statutes inflicting punishment by penal servitude or imprisonment.

fringements of their natural liberty, concerning the first of which, *false imprisonment*, its nature and incidents, I must content myself with referring the student to what was observed in the preceding volume,[w] when we considered it as a mere civil injury.[7] But, besides the private satisfaction given to the individual by action, the law also demands public vengeance for the breach of the king's peace, for the loss which the state sustains by the confinement of one of its members, and for the infringement of the good order of society. We have before seen[x] that the most atrocious degree of this offense, that of sending any subject of this realm a prisoner into parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is punished with the pains of *præmunire*, and incapacity to hold any office, without any possibility of pardon.[y] And we may also add that by statute 43 Elizabeth, c. 13 (Outrages in Northern Counties), to carry anyone by force out of the four northern counties, or imprison him within the same, in order to ransom him or make spoil of his person or goods, is felony without benefit of clergy in the principals and all accessories before the fact. Inferior degrees of the same offense, of false imprisonment, are also punishable by indictment (like assaults and batteries) and the delinquent may be fined and imprisoned.[z] And, indeed,[a] there can be no doubt but that all kinds of crimes of a public nature, all disturbances of the peace, all oppressions, and other misdemeanors whatsoever, of a notoriously evil example, may be indicted at the suit of the king.

§ 252a. 9. Kidnapping.—[219] The other remaining offense, that of *kidnapping*, being the forcible abduction or stealing away of a man, woman or child from their own country, and sending them

w See Book III. pag. 127.

x See pag. 116.

y Stat. 31 Car. II. c. 2 (Habeas Corpus, 1679).

z West. Symbol. part. 2. pag. 92.

a 1 Hawk. P. C. 210.

---

7 Although false imprisonment is said to be a common-law misdemeanor, it is not usually alone made the subject of a separate indictment; it may be treated as an aggravation of an assault.

into another, was capital by the Jewish law.[8] "He that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death."[b] So, likewise, in the civil law, the offense of spiriting away and stealing men and children, which was called *plagium*, and the offenders *plagiarii*, was punished with death.[c] This is unquestionably a very heinous crime, as it robs the king of his subjects, banishes a man from his country, and may in its consequences be productive of the most cruel and disagreeable hardships; and therefore the common law of England has punished it with fine, imprisonment and pillory.[d] And also the statute 11 & 12 W. III, c. 7 (Piracy, 1698), though principally intended against pirates, has a clause that extends to prevent the leaving of such persons abroad as are thus kidnapped or spirited away, by enacting that if any captain of a merchant vessel shall (during his being abroad) force any person on shore, or willfully leave him behind, or refuse to bring home all such men as he carried out, if able and desirous to return, he shall suffer three months' imprisonment. And thus much for offenses that more immediately affect the *persons* of individuals.

b Exod. xxi. 16.

c Ff. 48. 15. 1.

d Raym. 474. 2 Show. 221. Skin. 47. Comb. 10.

---

8 The Offenses Against the Person Act, 1861, make kidnapping of any child under the age of fourteen punishable with penal servitude or imprisonment. The Children Act, 1908, confers additional powers upon the court and the police authorities, with a view to the more effectual prevention or detection of offenses of this kind.

CHAPTER THE SIXTEENTH. [220]

OF OFFENSES AGAINST THE HABITATIONS OF INDIVIDUALS.

§ 253. II. Offenses against the habitations of individuals.—The only two offenses that more immediately affect the *habitations* of individuals or private subjects are those of *arson* and *burglary*.

§ 254. 1. Arson.—Arson, *ab ardendo*, is the malicious and willful burning of the house or outhouse of another man.[1] This is an offense of very great malignity, and much more pernicious to the public than simple theft: because, first, it is an offense against that right of habitation which is acquired by the law of nature as well as by the laws of society; next, because of the terror and confusion that necessarily attends it; and, lastly, because in simple theft the thing stolen only changes its master, but still remains *in esse* for the benefit of the public, whereas by burning the very substance is absolutely destroyed. It is also frequently more destructive than murder itself, of which, too, it is often the cause; since murder, atrocious as it is, seldom extends beyond the felonious act designed, whereas fire too frequently involves in the common calamity persons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies. For which reason the civil law[a] punishes with death such as maliciously set fire to houses in towns,

[a] Ff. 48. 19. 28. § 12.

---

1 **Burning one's own house.**—To burn one's own house was not a felony at common law, unless it were done with intent to burn one's neighbor's, and the attempt succeeded. (See text, p. *221.) But in modern times the common practice of insuring has given a strong motive, and to do it with intent to defraud the insurers is now an offense by statute in most cases of the same rank with arson, or nearly so.

It seems to be occupancy or possession rather than property that constitutes "one's own house" or "another's," within the meaning of the rule; and thus the case mentioned by Blackstone (text, p. *221) of the landlord's burning his tenant's house is not an exception to the rule, but within it. Blackstone indeed says "during the lease, the house is the property of the tenant," but this is a needless refinement, since the reason of the rule does not require it.—HAMMOND.

and contiguous to others, but is more merciful to such as only fire a cottage or house standing by itself.

[221] Our English law also distinguishes with much accuracy upon this crime. And therefore we will inquire, first, what is such a house as may be the subject of this offense; next, wherein the offense itself consists, or what amourts to a burning of such house; and, lastly, how the offense is punished.

§ 255. a. The subject of arson.—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.[b] And this by the common law; which also accounted it felony to burn a single barn in the field, if filled with hay or corn, though not parcel of the dwelling-house.[c] The burning of a stack of corn was anciently likewise accounted arson.[d] And, indeed, all the nicetics and distinctions which we meet with in our books concerning what shall or shall not amount to arson seems now to be taken away by a variety of statutes, which will be mentioned in the next chapter, and have made the punishment of willful burning equally extensive as the mischief. The offense of arson (strictly so called) may be committed by willfully setting fire to one's own house, provided one's neighbor's house is thereby also burnt; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's.[e 2] For by the common law no intention to commit a felony amounts to the same crime; though it does, in some case, by particular statutes. However, such willful firing one's own house, *in a town*, is a high misdemeanor and punishable by fine, imprison-

[b] 1 Hal. P. C. 567.
[c] 3 Inst. 69.
[d] 1 Hawk. P. C. 105.
[e] Cro. Car. 377. 1 Jon. 351.

---

2 Now, by the Malicious Damage Act, 1861, it is a felony to set fire to any dwelling-house, being inhabited, and certain other specified buildings whether in the possession of the offender or not, with intent to injure or defraud any person. And the malicious firing of practically any kind of building, public or private, domestic or industrial, or of any stack of vegetable produce or coals, or of any mine of fuel, or of any ship, ranks as arson, and is punishable by penal servitude or imprisonment, and, if the offender is a male under sixteen years, with or without whipping.—STEPHEN, 4 Comm. (16th ed.), 89.

ment, pillory and perpetual sureties for the good behavior.[f] And if a landlord or reversioner sets fire to his own house, of which another is in possession under a lease from himself or from those whose estate he hath, it shall be accounted arson; for, during the lease, the house is the property of the tenant.[g]

§ 256. **b. The requisite of arson.**—[222] As to what shall be said a *burning*, so as to amount to arson: A bare intent, or attempt to do it, by actually setting fire to an house, unless it absolutely *burns*, does not fall within the description of *incendit et combussit* (he hath burned and consumed); which were words necessary, in the days of law Latin, to all indictments of this sort. But the burning and consuming of any part is sufficient, though the fire be afterwards extinguished.[h 3] Also it must be a *malicious* burning; otherwise it is only a trespass, and therefore no negligence or mischance amounts to it. For which reason, though an unqualified person, by shooting with a gun, happens to set fire to the thatch of a house, this Sir Matthew Hale determines not to be felony, contrary to the opinion of former writers.[i] But by statute 6 Ann., c. 31 (1706), any servant negligently setting fire to a house or outhouses shall forfeit 100*l.* or be sent to the house of correction for eighteen months: in the same manner as the Roman law directed "*eos, qui negligenter ignes apud se habuerint, fustibus vel flagellis cædi* (those who have fire carelessly about them shall be beaten with whips or sticks)."[k]

§ 257. **c. Punishment of arson.**—The *punishment* of arson was death by our ancient Saxon laws.[l] And, in the reign of Edward the First, this sentence was executed by a kind of *lex talionis* (the law of retaliation), for the incendiaries were burned to death,[m] as

[f] 1 Hal. P. C. 568. 1 Hawk. P. C. 106.
[g] Fost. 115.
[h] 1 Hawk. P. C. 106.
[i] 1 Hal. P. C. 569.
[k] Ff. 1. 15. 4.
[l] LL. Inæ. c. 7.
[m] Britt. c. 9.

3 The fire was set in old rags, saturated with coal oil, and lying upon the floor of the house, but was quickly discovered and put out. The defendant contended that there was not sufficient burning of the house to constitute the crime of arson. Held, that it is a sufficient burning if the fibre of the wood is destroyed. (People v. Haggerty, 46 Cal. 355.)

they were also by the Gothic constitutions.[n] The statute 8 Henry VI, c. 6 (Treason, 1429), made the willful burning of houses, under some special circumstances therein mentioned, amount to the crime of high treason. But it was again reduced to felony by the general acts of Edward VI and Queen Mary; and now the punishment of all capital felonies is uniform, namely, by hanging. The offense of arson was denied the benefit of clergy by statute 21 Henry VIII, c. 1 (General Pardon, 1529), but that statute was repealed by 1 Edward VI, c. 12 (Criminal Law, 1547), and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference and deduction from the statute 4 & 5 P. & M., c. 4 (Accessories to Felony, 1558), [223] which expressly denied it to the accessory before the fact;[o] though now it is expressly denied to the principal in all cases within the statute 9 George I, c. 22 (Criminal Law, 1722).

§ 258. 2. Burglary.—Burglary, or nocturnal housebreaking, *burgi latrocinium*, which by our ancient law was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offense, not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation, which every individual might acquire even in a state of nature; an invasion which in such a state would be sure to be punished with death, unless the assailant were the stronger. But in civil society, the laws also come in to the assistance of the weaker party; and, besides that they leave him this natural right of killing the aggressor, if he can (as was shown in a former chapter[p]), they also protect and avenge him, in case the might of the assailant is too powerful. And the law of England has so particular and 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; agreeing herein with the sentiments of ancient Rome, as expressed in the words of Tully:[q] "*quid enim*

n Stiernh. de Jure Goth l. 3. c. 6.

o 11 Rep. 35. 2 Hal. P. C. 346, 347. Foster. 336.

p See pag. 180.

q Pro domo, 41.

sanctius, quid omni religione munitius, quam domus uniuscujusque civium? (For what is more sacred, what more inviolable, than the house of every citizen?)" For this reason no outward doors can in general be broken open to execute any civil process; though, in criminal cases, the public safety supersedes the private. Hence, also, in part arises the animadversion of the law upon eavesdroppers, nuisancers and incendiaries; and to this principle it must be assigned that a man may assemble people together lawfully (at least if they do not exceed eleven) without danger of raising a riot, rout or unlawful assembly, in order to protect and defend his house, which he is not permitted to do in any other case.[r]

§ 259. a. Definition of burglary.—[224] The definition of a burglar, as given us by Sir Edward Coke,[s] is, "he that by night breaketh and entereth into a mansion-house, with intent to commit a felony." In this definition there are four things to be considered: The *time*, the *place*, the *manner* and the *intent*.

§ 260. (1) Time of committing burglary.—The *time* must be by night, and not by day; for in the daytime there is no burglary. We have seen,[t] in the case of justifiable homicide, how much more heinous all laws made an attack by night, rather than by day, allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night and what day for this purpose: Anciently the day was accounted to begin only at sunrising and to end immediately upon sunset, but the better opinion seems to be that if there be daylight or *crepusculum* (twilight) enough, begun or left, to discern a man's face withal, it is no burglary.[u] But this does not extend to moonlight; for then many midnight burglaries would go unpunished: and besides, the malignity of the offense does not so properly arise from its being done in the dark, as at the dead of night, when all the creation, except beasts of prey, are at rest;

r 1 Hal. P. C. 547.

s 3 Inst. 63.

t See pag. 180, 181.

u 3 Inst. 63. 1 Hal. P. C. 350. 1 Hawk. P. C. 101.

when sleep has disarmed the owner, and rendered his castle defenseless.[4]

§ 261. (2) Place of committing burglary.—As to the *place:* It must be, according to Sir Edward Coke's definition, in a *mansion-house*; and therefore to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is *domus mansionalis Dei* (the mansion house of God).[v] But it does not seem absolutely necessary that it should in all cases be a mansion-house; for it may also be committed by breaking the gates or walls of a *town* in the night;[w] though that, perhaps, Sir Edward Coke would have called the mansion-house of the garrison or corporation. Spelman defines burglary to be "*nocturna diruptio alicujus* [225] *habitaculi, vel ecclesiæ, etiam murorum portarumve burgi, ad feloniam perpetrandam* (the noctural breaking open of any habitation or church, or even the walls or gates of a town, for the purpose of committing a felony)." And therefore we may safely conclude that the requisite of its being *domus mansionalis* is only in the burglary of a private house, which is the most frequent, and in which it is indispensably necessary to form its guilt that it must be in a mansion or dwelling-house. For no distant barn, warehouse or the like are under the same privileges, nor looked upon as a man's castle of defense; 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. A house, however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi* (with the intention of returning), is the object to burglary, though no one be in it at the time of the fact

v 3 Inst. 64.

w Spelm. Gloss. t. Burglary. 1 Hawk. P. C. 103.

---

4 By the Larceny Act, 1861, it is provided that so far as regards the crime of burglary, the night shall be deemed to commence at 9 in the evening and to end at 6 the next morning.

In some of the American states, by statute, the breaking and entering in the daytime with intent to commit a misdemeanor or felony is burglary. (State v. Miller, 3 Wash. 131, 28 Pac. 375; State v. Hutchinson, 111 Mo. 257, 20 S. W. 34.)

committed.[x] And if the barn, stable or warehouse be parcel of the mansion-house and within the same common fence,[y] though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenants, if within the curtilage or home stall.[z 5] A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is, to all other purposes as well as this, the mansion-house of the owner.[a] So, also, is a room or lodging in any private house the mansion for the time being of the lodger, if the owner doth not himself dwell in the house, or if he and the lodger enter by different outward doors. But if the owner himself lies in the house, and hath but one outward door at which he and his lodgers enter, such lodgers seem only to be inmates, and all their apartments to be parcel of the one dwelling-house of the owner.[b] Thus, too, the house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation, and not of the respective officers.[c] But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there, it is no dwelling-house; nor can burglary be committed therein: for by the [226] lease it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part; neither can I be said to dwell therein when I never lie there.[d] Neither can burglary be com-

x 1 Hal. P. C. 566. Fost. 77.

y K. v. Garland. P. 16 Geo. III. by all the judges.

z 1 Hal. P. C. 558. 1 Hawk. P. C. 104.

a 1 Hal. P. C. 556.

b Kel. 84. 1 Hal. P. C. 556.

c Foster. 38, 39.

d 1 Hal. P. C. 558.

---

5 It is now provided by the Larceny Act, 1861, that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be a part of such dwelling-house for the purpose of the act, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from one to the other.

Judge Cooley (Stearns v. Vincent, 50 Mich. 219, 45 Am. Rep. 37, 15 N. W. 86), says that in the law of burglary the dwelling-house is deemed to include whatever is within the curtilage even though not inclosed with the dwelling, if used with it for domestic purposes.

mitted in a tent or booth erected in a market or fair, though the owner may lodge therein;[e] for the law regards thus highly nothing but permanent edifices: a house, or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstances.

§ 262. **(3) Manner of committing burglary.**—As to the *manner* of committing burglary: There must be both a breaking and an entry to complete it. But they need not be both done at once; for, if a hole be broken one night and the same breakers enter the next night through the same, they are burglars.[f] There must, in general, be an actual breaking, not a mere legal *clausum fregit*, breaking the close (by leaping over invisible ideal boundaries, which may constitute a civil trespass), but a substantial and forcible irruption; as at least by breaking, or taking out the glass of, or otherwise opening, a window; picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided. But if a person leaves his doors or windows open, it is his own folly and negligence, and if a man enters therein, it is no burglary; yet if he afterwards unlocks an inner or chamber door, it is so.[g] But to come down a chimney is held a burglarious entry; for that is as much closed as the nature of things will permit.[h] So, also, to knock at a door, and upon opening it to rush in, with a felonious intent; or, under pretense of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house, all these entries have been adjudged burglarious, though there was [227] no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process.[i] And so, if a servant opens and enters his master's chamber door with a felonious design, or if any other

[e] 1 Hawk. P. C. 104.
[f] 1 Hal. P. C. 551.
[g] *Ibid.* 553.
[h] 1 Hawk. P. C. 102. 1 Hal. P. C. 552.
[i] 1 Hawk. P. C. 102.

person lodging in the same house, or in a public inn, opens and enters another's door, with such evil intent, it is burglary. Nay, if the servant conspires with a robber, and lets him into the house by night, this is burglary in both;[k] 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, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries.[l] The entry may be before the breaking, as well as after; for by statute 12 Ann., c. 7 (Robberies in Houses, 1712), if a person enters into the dwelling-house of another, without breaking in, either by day or by night, with intent to commit felony, or, being in such house, shall commit any felony, and shall in the night break out of the same, this is declared to be burglary; there having before been different opinions concerning it, Lord Bacon[m] holding the affirmative and Sir Matthew Hale[n] the negative.[6] But it is universally agreed that there must be both a breaking, either in fact or by implication, and also an entry, in order to complete the burglary.

§ 263. (4) Intent in burglary.—As to the *intent:* It is clear that such breaking and entry must be with a felonious intent, otherwise it is only a trespass. And it is the same whether such

k Stra. 881. 1 Hal. P. C. 553. 1 Hawk. P. C. 103.

l 1 Hal. P. C. 555. 1 Hawk. P. C. 103. Fost. 108.

m Elem. 65.

n 1 Hal. P. C. 554.

---

6 By the Larceny Act, 1861, it is enacted that whoever shall enter the dwelling-house of another with intent to commit any felony therein, or, being in such dwelling-house, shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary.

In the United States there are different views as to whether breaking out of a dwelling-house constitutes burglary at common law. For the view that it was not burglary at common law, see Rolland v. Commonwealth, 82 Pa. 306, 324, 22 Am. Rep. 758. That it was burglary at common law, see State v. Ward, 43 Conn. 489, 21 Am. Rep. 665.

intention be actually carried into execution or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, [228] a murder, a rape or any other felony, is burglary, whether the thing be actually perpetrated or not. Nor doe. it make any difference whether the offense were felony at common law or only created so by statute; since that statute which makes an offense felony gives it incidentally all the properties of a felony at common law.[o]

§ 264. b. Punishment of burglary.—Thus much for the nature of burglary, which is a felony at common law, but within the benefit of clergy. The statutes, however, of 1 Edward VI, c. 12 (Criminal Law, 1547), and 18 Elizabeth, c. 7 (Criminal Law, 1575), take away clergy from the principals, and that of 3 & 4 W. & M., c. 9 (Benefit of Clergy, 1691), from all abettors and accessories before the fact.[p] And, in like manner, the laws of Athens, which punished no simple theft with death, made burglary a capital crime.[q]

o 1 Hawk. P. C. 105.

p Burglary in any house belonging to the plate-glass company, with intent to steal the stock or utensils, is by statute 13 Geo. III. c. 38 (1772), declared to be single felony, and punished with transportation for seven years.

q Pott. Antiq. b. 1. c. 26.

CHAPTER THE SEVENTEENTH. [229]

OF OFFENSES AGAINST PRIVATE PROPERTY.

§ 265. **III. Offenses against private property.**—The next, and last, species of offenses against private subjects are such as more immediately affect their property. Of which there are two which are attended with a breach of the peace, *larceny* and *malicious mischief*, and one that is equally injurious to the rights of property, but attended with no act of violence, which is the crime of *forgery*. Of these three in their order.

§ 266. **1. Larceny.**—Larceny, or *theft*, by contraction for latrociny, *latrocinium*, is distinguished by the law into two sorts; the one called *simple* larceny, or plain theft unaccompanied with any other atrocious circumstance; and *mixed* or *compound* larceny, which also includes in it the aggravation of taking from one's house or person.

§ 267. **a. Simple larceny: grand and petit.**—And, first, of *simple* larceny, which, when it is the stealing of goods above the value of twelvepence, is called *grand* larceny; when of goods to that value, or under, is *petit* larceny: offenses which are considerably distinguished in their punishment, but not otherwise. I shall therefore first consider the nature of simple larceny in general, and then shall observe the different degrees of punishment inflicted on its two several branches.

§ 268. **(1) Definition of larceny.**—Simple larceny, then, is "the felonious taking and carrying away of the personal goods of another." This offense [230] certainly commenced then, whenever it was, that the bounds of property, or laws of *meum* and *tuum* (mine and thine), were established. How far such an offense can exist in a state of nature, where all things are held to be common, is a question that may be solved with very little difficulty. The disturbance of any individual in the occupation of what he has seized to his present use seems to be the only offense of this kind incident to such a state. But, unquestionably, in social communities, when property is established, the necessity whereof we have

formerly seen,* any violation of that property is subject to be punished by the laws of society; though how far that punishment should extend is matter of considerable doubt. At present we will examine the nature of theft, or larceny, as laid down in the foregoing definition.

§ 269. **(a) The "taking," in larceny.**—It must be a *taking*. This implies the consent of the owner to be wanting. Therefore, no delivery of the goods from the owner to the offender, upon trust, can ground a larceny.[1] As if A lends B a horse and he rides away with him, or, if I send goods by a carrier and he carries

* See Book II. pag. 8. etc.

---

1 **Larceny by means of fraud or mistake.**—But where the delivery of possession (not merely the property in goods) is obtained by fraud, and therefore void at the owner's option, it may by the modern cases be treated as a theft. (People v. Abbott. 53 Cal. 284, 31 Am. Rep. 59; Zink v. People, 77 N. Y. 114, 33 Am. Rep. 589; Miller v. Commonwealth, 78 Ky. 15, 39 Am. Rep. 194.) And the American statutes so generally punish embezzlement and like offenses as larceny, or even declare them to be larceny, that the rule above given cannot be depended on in practice. (See 2 Bishop on Criminal Law, §§ 318–383.)

So lately as 1885 the judges of England were equally divided, seven to seven, upon the question whether one who took and retains a sovereign, both parties supposing it at the time to be a shilling, was guilty of larceny or not; in other words, whether mistake will have the same effect upon the delivery with fraud.

The case was Queen v. Ashwell, first tried at the Leicestershire assizes, January 23, 1885, before Lord Chief Justice Denman. Defendant A. asked K. for the loan of a shilling, and received a sovereign, both at the time supposing it to be a shilling. K. soon discovered his mistake and asked for his sovereign back. A. at first denied he had it, but afterwards admitted that he had it and had spent it. Upon his conviction the judge himself took the question to the court for consideration of crown cases reserved, saying that the principle involved was unprecedented. It was heard in March by five judges, who could not agree, and again in June before all the judges, with the result stated above, though their judgments were not delivered till December 5, 1885. The seven judges who held it larceny put it on the ground that the "taking," or possession of the defendant, did not begin when he received the coin, but only when he ascertained it to be a sovereign; and as he then resolved to keep it, the felonious intent and the taking coincided in time. The others held that he was innocently in possession as soon as he received the coin, and

them away, these are no larcenies.[b] But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are larcenies:[c] for here the *animus furandi* (intention of stealing) is manifest; since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. But bare nondelivery shall not, of course, be intended to arise from a felonious design; since that may happen from a variety of other accidents. Neither by the common law was it larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust. But by statute 33 Henry VI, c. 1 (Embezzlement, 1455), the servants of persons deceased, accused of embezzling their master's goods, may by writ out of chancery (issued by the advice of [231] the chief justices and chief baron, or any two of them) and proclamation made thereupon be summoned to appear personally in the court of king's bench to answer their master's executors in any civil suit for such goods, and shall, on default of appearance, be attainted of felony. And by statute 21 Henry VIII, c. 7 (Embezzlement, 1529), if any

[b] 1 Hal. P. C. 504.

[c] 3 Inst. 107.

---

therefore no subsequent appropriation could be a larceny at common law. (Moreover they pointed out that as a shilling was actually loaned him, even that wrongful appropriation was only of nineteen shillings, and not of the coin itself.)

In a similar case, State v. Ducker, 8 Or. 394, 34 Am. Rep. 590, the defendant asked B. to change a ten-dollar gold piece, and B., intending to hand him a roll of ten silver dollars, by mistake gave him a roll of ten twenty-dollar gold coins. As the money was rolled up, neither knew the mistake at the time, but D. converted the coins to his own use as soon as he learned what they were. The court held it larceny, reasoning much as the English judges did on that side, that the taking and felonious intent were contemporaneous: only they argue that possession did not pass with the manual delivery, because the delivery was under a mistake. "While it may be said that it was the physical act of the owner in handing that which was his to another, yet there was lacking his intellectual and intelligent assent to the transfer." This reasoning in both cases is based on the civilian doctrine that possession can only pass *animo et corpore* alike as to giver and recipient; a doctrine somewhat too refined to be easily made consistent with our common-law rule of larceny, which treats possession as a mere fact.—HAMMOND.

servant embezzles his master's goods to the value of forty shillings, it is made felony, except in apprentices and servants under eighteen years old. But if he had not the possession, but only the care and oversight of the goods, as the butler of plate, the shepherd of sheep, and the like, the embezzling of them is felony at common law.[d 2] So if a guest robs his inn or tavern of a piece of plate, it is larceny; for he hath not the possession delivered to him, but merely the use,[e] and so it is declared to be by statute 3 & 4 W. & M., c. 9 (1691), if a lodger runs away with the goods from his ready furnished lodgings. Under some circumstances, also, a man may be guilty of felony in taking his own goods; as if he steals them from a pawnbroker, or anyone to whom he hath delivered and intrusted them, with intent to charge such bailee with the value; or if he robs his own messenger on the road, with intent to charge the hundred with the loss according to the statute of Winchester.[f]

§ 270. (b) The "carrying away" in larceny.—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 in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, has removed them from his chamber downstairs,—these have been adjudged sufficient

d 1 Hal. P. C. 506.
e 1 Hawk. P. C. 90.
f Foster. 123, 124.

---

2 The principle of the common law, as to the necessity of the owner not consenting to the original taking, in order to support a charge of larceny, has been to some extent qualified by the legislature; for whoever steals any chattel or fixture, let to be used by him in any house or lodging, will be guilty of felony, and may be punished, if the value of what is stolen shall exceed five pounds, with penal servitude or imprisonment, and, if the value of what is stolen does not exceed five pounds, with imprisonment only. (Larceny Act. 1861, § 74.) And, by the same statute, the bailee of any chattel, money or valuable security, who shall fraudulently take or convert the same to his own use, or to the use of any person other than the owner thereof, shall be guilty of larceny, although he shall not break bulk or otherwise determine the bailment; which latter determination was, at common law, a condition precedent to larceny by such bailee.—STEPHEN, 4 Comm. (16th ed.), 98.

carryings away to constitute a larceny.[g] Or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it, this is larceny.[h]

§ 271. (c) The felonious intent in larceny.—[232] This taking and carrying away must also be *felonious*, that is, done *animo furandi* (with the intention of stealing), or, as the civil law expresses it, *lucri causa* (for the sake of gain).[i] This requisite, besides excusing those who labor under incapacities of mind or will (of whom we spoke sufficiently at the entrance of this book[k]) indemnifies also mere trespassers and other petty offenders. As if a servant takes his master's horse, without his knowledge, and brings him home again; if a neighbor takes another's plow that is left in the field and uses it upon his own land, and then returns it; if, under color of arrear of rent, where none is due, I distrain another's cattle or seize them,—all these are misdemeanors and trespasses, but no felonies.[l] The ordinary discovery of a felonious intent is where the party doth 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, or *animum furandi:* wherefore they must be left to the due and attentive consideration of the court and jury.[3]

g 3 Inst. 108, 109.
h 1 Hawk. P. C. 93.
i Inst. 4. 1. 1.
k See pag. 20.
l 1 Hal. P. C. 509.

---

3 **Proof of the felonious intent.**—The vast number of cases in recent books on the crime of larceny, usually quoted here, should be distinguished into two classes of very unequal importance.

The first and more numerous class deals with the facts that constitute the common-law crime of larceny; i. e., the evidence that will prove the various elements of that crime, especially the taking and carrying away, and the felonious intent with which this is done. These furnish a large body of illustrations, taken together, but are of little weight as precedents when taken severally; for, as in all questions of evidence, the force of each particular

§ 272. **(d) Subjects of larceny.**—This felonious taking and carrying away must be *of the personal goods of another;* for if they are things *real,* or savor of the realty, larceny at the common law cannot be committed of them. Lands, tenements and hereditaments (either corporeal or incorporeal) 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 by the rules of the common law; but the severance of them was, and in many things is still, merely

fact is not given it by a rule of law, but depends largely on the other circumstances of the case; e. g., when the felonious intent is clearly established, a very trifling asportation will prove the crime: as in the case of a pickpocket who has grasped and moved a pocketbook without withdrawing it from the owner's pocket. (Commonwealth v. Luckis, 99 Mass. 431, 96 Am. Dec. 769; Harrison v. People, 50 N. Y. 518, 10 Am. Rep. 517. And see cases collected in 57 Am. Dec. 272.) On the other hand, where the taking is evident and complete, the guilty intent may be inferred from slight evidence. The secrecy with which the taking is accomplished is often an evidential fact of the greatest weight in determining the intent, but the holding that it is an essential mark of it, as in State v. Ledford, 67 N. C. 60, has been generally recognized as an error.

The felonious intent must exist at the time of taking. Hence there could be no larceny where the wrongdoer was in possession already as bailee, finder or otherwise. To appropriate such goods was only embezzlement, a crime that corresponded very closely with the civil wrong of conversion, as larceny with trespass *de bonis.* But mere corporal detention is not legal possession. The servant who has no possession distinct from that of the master can steal from him. A person with whom a chattel is left for a particular purpose, e. g., a note on which an indorsement is to be made by the recipient, is retained by him. This was held larceny, his felonious intent and the taking of possession in his own name being coincident. (People v. Call, 1 Denio, 120, 43 Am. Dec. 655.) This, however, is a construction that can hardly be applied to all cases. It has never been held that the finder of another's goods could become a thief by the subsequent intent to appropriate them. (Cases in 57 Am. Dec. 283; Commonwealth v. Titus, 116 Mass. 42, 17 Am. Rep. 138; Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670.)

Though the taking must be from the owner's possession, the felonious intent must be to deprive him permanently of his property. To take a chattel without this intent may be a trespass, or malicious mischief, but not larceny. (Text, p. *244; State v. South, 28 N. J. L. 28, 75 Am. Dec. 250; Queen v. Holloway, 2 Car. & K. 946.) But whether this implies that the intent must also be to profit by it one's own self is not so clear. The phrase *lucri causa,* often

a trespass, which depended on a subtilty in the legal notions of our ancestors. These things were parcel of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable.[m] And if they were [233] severed by violence, so as to be changed into movables, and at the same time, by one and the same continued act, carried off by the person who severed them, they could never be said to be taken *from* the *proprietor*, in this their newly acquired state of mobility (which is essential to the nature of larceny),

m See Book II. p. 16.

---

used as equivalent to the *animus furandi*, belongs to the civil law, not ours. (Text, p. *233.) The thief's motive is, no doubt, profit in the vast majority of cases, but is it necessarily so in all? The latest writers differ on this point. Wharton's American Criminal Law, section 898, holds the affirmative; Bishop on Criminal Law, section 848, the negative. Most of the cases where the exact point has been considered seem to deny it. (State v. Ryan. 12 Nev. 401, 28 Am. Rep. 802; People v. Juarez, 28 Cal. 380; Rex v. Cabbage, Russ. & R. C. C. 292. And see cases collected in 57 Am. Dec. 274.) On principle, too, the motive of an act, as distinct from the intent, is matter of evidence only, not an element of the crime or ultimate fact.

The second class of cases, of much greater importance to the student, are those which show the changes made in the legal facts constituting larceny, either by the advance of the common law or by statutes. The most important instance of the former kind is shown by the cases which put a possession fraudulently obtained from the owner on the same footing with one taken against his will. (Miller v. Commonwealth, 78 Ky. 15, 39 Am. Rep. 194; Smith v. People. 53 N. Y. 111, 13 Am. Rep. 474; Defrese v. State, 3 Heisk. (50 Tenn.) 53, 8 Am. Rep. 1.) Even the intentional appropriation of property or money delivered by mistake has been held larceny. (State v. Ducker, 8 Or. 394, 34 Am. Rep. 590; State v. Anderson, 25 Minn. 66, 33 Am. Rep. 455; People v. McGarren, 17 Wend. (N. Y.) 460). These cases, however, must be distinguished from those where the owner is induced to deliver property as well as possession. The offense there is obtaining goods under false pretenses.

The statutory changes by which larceny and embezzlement, and even the obtaining of goods under false pretenses, have been made felonies of like character and equal punishment, have been too numerous for mention here, and must be consulted in the books of each state. The student should carefully distinguish between those provisions that have extended larceny itself, so as to include offenses formerly belonging to the other categories, and those which retain the common-law distinctions, while allowing a conviction for larceny on evidence amounting to the other crimes, or making their consequences similar.—HAMMOND.

being never, as such, in the actual or constructive possession of anyone but of him who committed the trespass. He could not in strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at *one* time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid, and comes again at *another* time, when they are so turned into personalty, and takes them away, it is larceny; and so it is if the owner, or anyone else, has severed them.[n] And now, by the statute 4 George II, c. 32 (Theft, 1730), to steal, or rip, cut or break, with intent to steal, any lead or iron bar, rail, gate or palisado, fixed to a dwelling-house or outhouse, or in any court or garden thereunto belonging, or to any other building, is made felony, liable to transportation for seven years; and to steal, damage or destroy underwood or hedges and the like, to rob orchards or gardens of fruit growing therein, to steal or otherwise destroy any turnips, potatoes, cabbages, parsnips, pease or carrots, or the roots of madder when growing, are[o] punishable criminally, by whipping, small fines, imprisonment and satisfaction to the party wronged, according to the nature of the offense. Moreover, the stealing by night of any trees, or of any roots, shrubs or plants to the value of 5*s*., is by statute 6 George III, c. 36 (Cultivation of Trees, 1765), made felony in the principals, aiders and abettors, and in the purchasers thereof knowing the same to be stolen; and by statutes 6 George III, c. 48 (1765), and 13 George III, c. 33 (Preservation of Timber, 1772), the stealing of any timber trees therein specified,[p] and of any root, [234] shrub or plant, by day or night, is liable to pecuniary penalties for the two first offenses, and for the third is constituted a felony liable to transportation for seven years. Stealing ore out of mines is

n 3 Inst. 109. 1 Hal. P. C. 510.

o Stat. 43 Eliz. c. 7 (Robbing of Orchards, 1601). 15 Car. II. c. 2 (Destruction of Trees, 1663). 31 Geo. II. c. 35 (1757). 6 Geo. III. c. 48 (Preservation of Timber Trees, 1765). 9 Geo. III. c. 41 (1768). 13 Geo. III. c. 32 (Stealing of Vegetables, 1772).

p Oak, beech, chestnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, birch, poplar, alder, larch, maple, and hornbeam.

also no larceny, upon the same principle of adherence to the freehold; with an exception only to mines of black lead, the stealings of ore out of which, or entering the same with intent to steal, is felony, punishable with imprisonment and whipping, or transportation not exceeding seven years; and to escape from such imprisonment, or return from such transportation, is felony without benefit of clergy, by statute 25 George II, c. 10 (Stealing from Black Lead Mines, 1751). Upon nearly the same principle the stealing of writings relating to a real estate is no felony, but a trespass,[q] because they concern the land, or (according to our technical language) *savor* of the *realty*, and are considered as part of it by the law; so that they descend to the heir together with the land which they concern.[r]

Larceny of choses in action.—Bonds, bills and notes which concern mere *choses in action* were also at the common law held not to be such goods whereof larceny might be committed; being of no intrinsic value,[s] and not importing any property in *possession* of the person from whom they are taken.[4] But by the statute 2 George II, c. 25 (Perjury, 1728), they are now put upon the same footing, with respect to larcenies, as the money they were meant to secure. By statute 15 George II, c. 13 (Bank of England, 1741), officers or servants of the bank of England secreting or embezzling any note, bill, warrant, bond, deed, security, money

q 1 Hal. P. C. 510. Stra. 1137.
r See Book II. pag. 438.
s 8 Rep. 33.

---

4 **Larceny of things in action.**—It is difficult to see how *choses in action* could have been considered subject to larceny at common law; not merely for the reason given by the author, "being of no intrinsic value, and not importing any property in possession of the person from whom they are taken" (text, *supra*); but also because no change of property of any kind could be worked by the theft. Some of the earlier American cases followed this doctrine, and held the rule to be changed only by express statute. (Culp v. State, 1 Port. 33, 26 Am. Dec. 357; United States v. Davis, 5 Mason, 356, Fed. Cas. No. 14,930.) But the change in the general civil law of the country in regard to the assignability of such *choses* has had a necessary effect upon the criminal law also, and all obligations, stock certificates and other documents having any pecuniary value are now regarded as subjects of larceny without question.—HAMMOND.

or effects, entrusted with them or with the company, are guilty of felony without benefit of clergy. The same is enacted by statute, 24 George II, c. 11 (National Debt, 1750), with respect to officers and servants of the South Sea company. And, by statute 7 George III, c. 50 (Postoffice, 1766), if any officer or servant of the postoffice shall secrete, embezzle or destroy any letter or packet containing any bank note or other valuable paper particularly specified in the act, or shall steal the same out of any letter or packet, he shall be guilty of felony without benefit of clergy Or, if he shall destroy any letter or packet [235] with which he has received money for the postage, or shall advance the rate of postage on any letter or packet sent by the post, and shall secrete the money received by such advancement, he shall be guilty of single felony. Larceny, also, could not at common law be committed of treasure-trove or wreck till seized by the king or him who hath the franchise; for till such seizure no one hath a determinate property therein. But by statute 26 George II, c. 19 (Stealing Shipwrecked Goods, 1753), plundering or stealing from any ship in distress (whether wreck or no wreck) is felony without benefit of clergy; in like manner as, by the civil law,[ss] this inhumanity is punished in the same degree as the most atrocious theft.

Larceny of animals.—Larceny, also, cannot be committed of such animals in which there is no property, either absolute or qualified; as of beasts that are *feræ naturæ* (of a wild nature) 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.[t] But if they are reclaimed or confined, and may serve for food, it is otherwise, even at common law; for of deer so inclosed 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.[u] And now, by statute 9 George I, c. 22 (Criminal Law, 1722), to hunt, wound, kill or steal any deer; to rob a warren; or to steal fish from a river or pond (being in these cases armed and disguised), also to hunt, wound, kill or steal any deer, in the king's forests or chases inclosed, or in any other inclosed place

ss Cod. 6. 2. 18.

t 1 Hal. P. C. 511. Fost. 366.

u 1 Hawk. P. C. 94. 1 Hal. P. C. 511.

where deer have been usually kept; or by gift or promise of reward to procure any person to join them in such unlawful act,—all these are felonies without benefit of clergy. And the statute 16 George III, c. 30 (Stealing of Deer, England, 1775), enacts that every unauthorized person, his aiders and abettors, who shall course, hunt, shoot at or otherwise attempt to kill, wound or destroy any red or fallow deer, in *any* forest, chase, purlieu or ancient walk, or in any *inclosed* park, paddock, wood or other ground [236] where deer are usually kept, shall forfeit the sum of 20*l*., or for every deer actually killed, wounded, destroyed, taken in any toil or snare, or carried away, the sum of 30*l*., or double those sums in case the offender be a keeper, and, upon a second offense (whether of the same or a different species), shall be guilty of felony, and transportable for seven years. Which latter punishment is likewise inflicted on all persons armed with offensive weapons who shall come into such places with an intent to commit any of the said offenses, and shall there unlawfully beat or wound any of the keepers in the execution of their offices, or shall attempt to rescue any person from their custody. Also by statute 5 George III, c. 14 (Preservation of Fish and Conies, 1765), the penalty of transportation for seven years is inflicted on persons stealing or taking fish in any water within a park, paddock, garden, orchard or yard, and on the receivers, aiders, and abettors; and the like punishment, or whipping, fine or imprisonment, is provided for the taking or killing of conies [v] by night in open warrens, and a forfeiture of five pounds, to the owner of the fishery, is made payable by persons taking or destroying (or *attempting* so to do) any fish in any river or other water within any inclosed ground, being private property. Stealing hawks, in disobedience to the rules prescribed by the statute 37 Edward III, c. 19 (1363), is also felony.[w] It is also said [x] 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 draft, and of all animals *domitæ*

[v] See Stat. 22 & 23 Car. II. c. 25 (Game, 1670).

[w] 3 Inst. 98.

[x] Dalt. Just. c. 156.

naturæ (of a tame nature), 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,[y] larceny may be committed; and also of the flesh of such as are either *domitæ* or *feræ naturæ* (of a tame or wild nature), when killed.[z] As to those [235A] 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,[a] yet they are not of such estimation as that the crime of stealing them amounts to larceny.[aa] But by statute 10 George III, c. 18 (Dog-stealing, 1770), very high pecuniary penalties, or a long imprisonment and whipping in their stead, may be inflicted by two justices of the peace (with a very extraordinary mode of appeal to the quarter sessions), on such as steal or knowingly harbor a stolen *dog*, or have in their custody the skin of a dog that has been stolen.[b 5]

Larceny of property of unknown owner.—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,[c] in like manner as, among the Romans, the *lex Hostilia de furtis* (the Hos-

[y] Dal. 21. Crompt. 36. 1 Hawk. P. C. 93. 1 Hal. P. C. 507. The King v. Martin, by all the judges, P. 17 Geo. III.

[z] 1 Hal. P. C. 511.

[a] See Book II. pag. 393.

[aa] 1 Hal. P. C. 512.

[b] See the remarks in page 4. This statute hath now continued seven sessions of parliament unrepealed.

[c] 1 Hal. P. C. 512.

---

5 Most of the articles which were not the subject of larceny at common law have been made the subject of theft by express statute. Larceny Act, 1861, §§ 18–20 (dogs); §§ 21, 22 (birds, beasts or other animals ordinarily kept in a state of confinement or for any domestic purposes); § 23 (pigeons); §§ 24, 25 (fish); § 26 (oysters); § 27 (bonds, bills, etc.); § 28 (title deeds relating to real property); § 29 (wills); § 30 (records); § 31 (metal, etc., fixed to houses or land); §§ 32, 33 (trees); § 34 (fences); §§ 36, 37 (fruit and vegetables); §§ 38, 39 (minerals).—STEPHEN, 4 Comm. (16th ed.), 101 n.

tilian law concerning theft) provided that a prosecution for theft might be carried on without the intervention of the owner.[d 6] 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-cloths be stolen with it.[e] Very different from the law of the Franks, which seems to have respected both as equal offenses, when it directed that a person who had dug a corpse out of the ground in order to strip it should be banished from society and no one suffered to relieve his wants till the relations of the deceased consented to his readmission.[f]

§ 273. (2) Punishment of larceny. — Having thus considered the general nature of simple larceny, I come next to treat of its *punishment*. Theft, by the [236A] Jewish law, was only punished with a pecuniary fine and satisfaction to the party injured.[g] And in the civil law, till some very late constitutions, we never find the punishment capital. The laws of Draco at Athens punished it with death; but his laws were said to be written in blood, and Solon afterwards changed the penalty to a pecuniary mulct. And so the Attic laws in general continued;[h] except that once, in a time of dearth, it was made capital to break into a garden and steal figs: but this law, and the informers against the offense, grew so odious, that from them all malicious informers were styled sycophants— a name which we have much perverted from its original meaning. From these examples, as well as the reason of the thing, many learned and scrupulous men have questioned the propriety, if not lawfulness, of inflicting capital punishment for simple theft.[1] And

d Gravin. l. 3. § 106.

e See Book II. pag. 429.

f Montesq. Sp. L. b. 30. ch. 19.

g Exod. c. xxii.

h Petit. LL. Attic. l. 7. tit. 5.

1 *Est enim ad vindicanda furta nimis atrox, nec tamen ad refrœnanda sufficiens: quippe neque furtum simplex tam ingens facinus est, ut capite debeat*

---

6 Larceny may be committed by a finder of lost money, or goods, if, knowing or having reason to know who is the owner of them he conceals or fraudulently appropriates them to his own use. (Perrin v. Commonwealth, 87 Va. 554, 13 S. E. 76.)

certainly the natural punishment for injuries to property seems to be the loss of the offender's own property, which ought to be universally the case were all men's fortunes equal. But as those who have no property themselves are generally the most ready to attack the property of others, it has been found necessary instead of a pecuniary to substitute a corporal punishment; yet how far this corporal punishment ought to extend is what has occasioned the doubt. Sir Thomas More[j] and the Marquis Beccaria,[k] at the distance of more than two centuries, have very sensibly proposed that kind of corporal punishment which approaches the nearest to a pecuniary satisfaction; *viz.*, a temporary imprisonment, with an obligation to labor, first for the party robbed and afterwards for the public, in works of the most slavish kind; in [237] order to oblige the offender to repair, by his industry and diligence, the depredations he has committed upon private property and public order. But notwithstanding all the remonstrances of speculative politicians and moralists, the punishment of theft still continues, throughout the greatest part of Europe, to be capital; and Puffendorf,[l] together with Sir Matthew Hale,[m] are of opinion that this

plecti; neque ulla pœna est tanta, ut ab latrociniis cohibeat eos, qui nullam aliam artem quærendi victus habent. (Mori *Utopia. edit. Glasg.* 1750. *pag.* 21.)—*Denique, cum lex Mosaica, quanquam inclemens et aspera, tamen pecunia furtum, haud morte, mulctavit; ne putemus Deum, in nova lege clementiæ qua pater imperat filiis, majorem indulsisse nobis invicem sæviendi licentiam. Hæc sunt cur non licere putem: quam vero sit absurdum, atque etiam perniciosum reipublicæ, furem atque homicidam ex æquo puniri, nemo est (opinor) qui nesciat.* (*Ibid.* 39.) (Death is too severe a punishment for theft, nor yet sufficient to restrain it; for neither is simple theft such a heinous offense, that it should be made capital, nor can there be any punishment so severe as to restrain those from robbing who have no other means of obtaining a livelihood. In short, since the Mosaic law, although rigorous and severe, only punished theft by a fine, not by death, we cannot think that God, in that new law of mercy by which as a father He governs His children, has granted us a greater liberty of harshness or severity towards each other. These are the reasons why I deem it unlawful. And there is no one, I think, but must be sensible how absurd it is, and even pernicious to the commonwealth, that a thief and murderer should receive the same punishment.)

j Utop. pag. 42.
k C. 22.
l L. of N. b. 8. c. 3.
m 1 Hal. P. C. 13.

must always be referred to the prudence of the legislature, who are to judge, say they, when crimes are become so enormous as to require such sanguinary restrictions.[n] Yet both these writers agree that such punishment should be cautiously inflicted, and never without the utmost necessity.

Our ancient Saxon laws nominally 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.[o] But in the ninth year of Henry the First (1108), this power of redemption was taken away, and all persons guilty of larceny above the value of twelvepence were directed to be hanged; which law continues in force to this day.[p] For though the inferior species of theft, or petit larceny, is only punished by whipping at common law,[q] or by statute 4 George I, c. 11 (Piracy, 1717), may be extended to transportation for seven years, as is also expressly directed in the case of the plate-glass company,[r] yet the punishment of grand larceny, or the stealing above the value of twelvepence (which sum was the standard in the time of King Athelstan, eight hundred years ago), is at common law regularly death. Which, considering the great intermediate alteration[s] in the price or denomination of [238] money, is undoubtedly a very rigorous constitution, and made Sir Henry Spelman (above a century since, when money was at twice its present rate) complain that while everything else was risen in its nominal value, and become dearer, the life of man had continually grown cheaper.[t] It is true that the mercy of juries will often make them strain a point, and bring in larceny to be under the value of twelvepence, when it is really of much greater value; but

[n] See pag. 9.

[o] Tac. de Mor. Germ. c. 12.

[p] 1 Hal. P. C. 12. 3 Inst. 53.

[q] 3 Inst. 218.

[r] Stat. 13 Geo. III. c. 38 (1772).

[s] In the reign of King Henry I., the stated value at the exchequer of a pasture-fed ox was one shilling: (Dial. de Scacc. l. 1. § 7.) which if we should even suppose to mean the *solidus legalis*, mentioned by Lyndewode (Prov. l. 3. c. 13. See Book II. page 509.) or the 72d part of a pound of gold, is only equal to 13*s.* 4*d.* of the present standard.

[t] Gloss. 350.

this, though evidently justifiable and proper, when it only reduces the present nominal value of money to the ancient standard,[u] is otherwise a kind of pious perjury, and does not at all excuse our common law in this respect from the imputation of severity, but rather strongly confesses the charge. It is likewise true that, by the merciful extensions of the benefit of clergy by our modern statute law, a person who commits a simple larceny to the value of thirteen pence or thirteen hundred pounds, though guilty of a capital offense, shall be excused the pains of death; but this is only for the first offense. And in many cases of simple larceny the benefit of clergy is taken away by statute; as from horse-stealing in the principals, and accessories both *before* and *after* the fact;[w] theft by great and notorious thieves in Northumberland and Cumberland;[x] taking woolen cloth from off the tenters,[y] or linens, fustians, calicoes or cotton goods from the place of manufacture[z] (which extends, in the last case, to aiders, assisters, procurers, buyers and receivers); feloniously driving away or otherwise stealing one or more sheep or other cattle specified in the [239] acts, or killing them with intent to steal the whole or any part of the carcass,[a] or aiding or assisting therein; thefts on navigable rivers above the value of forty shillings,[b] or being present, aiding and as-

u 2 Inst. 189.

w Stat. 1 Edw. VI. c. 12 (Criminal Law, 1547). 2 & 3 Edw. VI. c. 33 (Horse-stealing, 1548). 31 Eliz. c. 12 (Horse-stealing, 1589).

x Stat. 18 Car. II. c. 3 (Moss-troopers, 1666).

y Stat. 22 Car. II. c. 5 (Benefit of Clergy, 1670). But, as it sometimes is difficult to prove the identity of the goods so stolen, the *onus probandi* (the burden of proof) with respect to innocence is now by statute 15 Geo. II. c. 27 (Thefts of Cloth, 1741), thrown on the persons in whose custody such goods are found: the failure whereof is, for the first time, a misdemeanor punishable by forfeiture of the treble value; for the second, by imprisonment also; and the third time it becomes a felony, punished with transportation for seven years.

z Stat. 18 Geo. II. c. 27 (Stealing from Bleaching-grounds, 1744). Note, in the three last cases an option is given to the judge to transport the offender; for *life* in the first case, for *seven years* in the second, and for *fourteen years* in the third;—in the first and third cases *instead of* sentence of death, in the second *after* sentence is given.

a Stat. 14 Geo. II. c. 6 (Cattle-stealing, 1740). 15 Geo. II. c. 34 (Cattle-stealing, 1741). See Book I. pag. 88.

b Stat. 24 Geo. II. c. 45 (Robberies on Rivers, 1750).

sisting thereat; plundering vessels in distress or that have suffered shipwreck;[c] stealing letters sent by the post;[d] and also stealing deer, fish, hares and conies under the peculiar circumstances mentioned in the Waltham black-act.[e] Which additional severity is owing to the great malice and mischief of the theft in some of these instances, and, in others, to the difficulties men would otherwise lie under to preserve those goods, which are so easily carried off. Upon which last principle the Roman law punished more severely than other thieves the *abigei*, or stealers of cattle;[f] and the *balnearii*, or such as stole the clothes of persons who were washing in the public baths;[g] both which constitutions seem to be borrowed from the laws of Athens.[h] And so, too, the ancient Goths punished with unrelenting severity thefts of cattle, or corn that was reaped and left in the field; such kind of property (which no human industry can sufficiently guard) being esteemed under the peculiar custody of Heaven.[i] And thus much for the offense of *simple* larceny.[7]

§ 274. b. Compound larceny.—Mixed or *compound* larceny is such as 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*. First, therefore, of larceny from the *house*, and then of larceny from the *person*.

§ 275. (1) Larceny from the house.—Larceny from the *house*, though it seems (from the considerations mentioned in the preced-

[c] Stat. 12 Ann. st. 2. c. 18 (Stranded Ships, 1713). 26 Geo. II. c. 19 (Stealing Shipwrecked Goods, 1753).

[d] Stat. 7 Geo. III. c. 50 (Postoffice, 1766).

[e] Stat. 9 Geo. I. c. 22 (Criminal Law, 1722).

[f] Ff. 47. t. 14.

[g] *Ibid.* t. 17.

[h] Pott. Antiq. b. 1. c. 26.

[i] Stiernh. de Jure Goth. l. 3. c. 5.

---

[7] At the present day, in England, there is no distinction recognized by the law between grand and petty larceny, though that between simple and aggravated larceny still remains; and now the maximum punishment for simple larceny, or of any felony made punishable like larceny, is in general penal servitude for five years or imprisonment for two years, and, in case of a male under the age of sixteen years, a whipping. Larceny Act, 1861.

ing chapter[j]) to have a higher degree of guilt than simple larceny, yet is not at all [240] distinguished from the other at common law;[k] unless where it is accompanied with the circumstance of breaking the house by night, and then we have seen that it falls under another description, *viz.*, that of burglary.[8] But now by several acts of parliament (the history of which is very ingeniously deduced by a learned modern writer,[l] who hath shown them to have gradually arisen from our improvements in trade and opulence) the benefit of clergy is taken from larcenies committed in an house in almost every instance: except that larceny of the stock or utensils of the plate-glass company from any of their houses, etc., is made only single felony, and liable to transportation for seven years.[m] The multiplicity of the general acts is apt to create some confusion; but upon comparing them diligently, we may collect that the benefit of clergy is denied upon the following domestic aggravations of larceny, *viz.*: First, in larcenies *above the value of twelvepence*, committed, 1. In a church or chapel, with or without violence, or breaking the same;[n] 2. In a booth or tent in a market or fair, in the daytime or in the night, by violence or breaking the same, the owner or some of his family being therein;[o] 3. By robbing a dwelling-house in the daytime (which *robbing* implies a breaking), any person being therein;[p] 4. In a dwelling-house by day or by night, without breaking the same, any person being therein and put in fear,[q] which amounts in law to a robbery: and

j See pag. 223.

k 1 Hawk. P. C. 98.

l Barr. 375, etc.

m Stat. 13 Geo. III. c. 38 (1772).

n Stat. 23 Hen. VIII. c. 1 (Benefit of Clergy, 1531). 1 Edw. VI. c. 12 (Criminal Law, 1547). 1 Hal. P. C. 518.

o Stat. 5 & 6 Edw. VI. c. 9 (Robbery, 1551). 1 Hal. P. C. 522.

p Stat. 3 & 4 W. & M. c. 9 (1691).

q *Ibid.*

---

8 The crime is now regulated by the Larceny Act, 1861, by the effect of which whoever shall steal, in any dwelling-house. any chattel, money or valuable security, to the value of five pounds or more, or any chattel, money or valuable security, and shall by menace or threat, put anyone, being therein, in bodily fear, shall be liable to penal servitude or to be imprisoned.

in both these last cases the accessory before the fact is also excluded from his clergy. Secondly, in larcenies *to the value of five shillings* committed, 1. By breaking any dwelling-house, or any outhouse, shop or warehouse thereunto belonging, in the daytime, although no person be therein,[r] which also now extends to aiders, abettors and accessories before the fact;[s] 2. By privately stealing goods, [241] wares or merchandise in any shop, warehouse,[t] coachhouse or stable, by day or by night, though the same be not broken open and though no person be therein;[u] which likewise extends to such as assist, hire or command the offense to be committed. Lastly, in larcenies *to the value of forty shillings* in a dwelling-house or its outhouses, although the same be not broken, and whether any person be therein or no; unless committed against their masters by apprentices under the age of fifteen.[v] This also extends to those who aid or assist in the commission of any such offense.

§ 276. **(2) Larceny from the person.**—Larceny from the *person* is either by *privately* stealing, or by open and violent assault, which is usually called *robbery*.

§ 277. **(a) Privately stealing from the person.**—The offense of *privately* stealing from a man's *person*, as by picking his pocket or the like, privily without his knowledge, was debarred of the benefit of clergy so early as by the statute 8 Elizabeth, c. 4 (Benefit of Clergy, 1566). But then it must be such a larceny as stands in need of the benefit of clergy, *viz.*, of above the value of twelvepence; else the offender shall not have judgment of death. For the statute creates no new offense, but only prevents the prisoner from praying the benefit of clergy, and leaves him to the regular judgment of the ancient law.[w] This severity (for a most severe law

r Stat. 39 Eliz. c. 15 (Robbery, 1597).

s Stat. 3 & 4 W & M. c. 9 (1691).

t See Foster. 78. Barr. 379.

u Stat. 10 & 11 W. III. c. 23 (1698).

v Stat. 12 Ann. stat. 1. c. 7 (Robberies in Houses, 1712).

w 1 Hawk. P. C. 98. The like observation will certainly hold in the cases of horse-stealing (1 Hal. P. C. 531.) thefts in Northumberland and Cumberland, and stealing woolen cloth from the tenters; and possibly in such other cases

it certainly is) seems to be owing to the ease with which such offenses are committed, the difficulty of guarding against them, and the boldness with which they were practiced (even in the queen's court and presence) at the time when this statute was made; besides that this is an infringement of property, in the manual occupation or corporal possession of the [242] owner, which was an offense even in a state of nature. And therefore the *saccularii*, or cutpurses, were more severely punished than common thieves by the Roman and Athenian laws.[x]

§ 278. **(b) Robbery.**—Open and violent larceny from the *person*, or *robbery*,[9] the *rapina* of the civilians, is the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear.[y] 1. There must be a taking, otherwise it is no robbery. A mere attempt to rob was indeed held to be felony so late as Henry the Fourth's time;[z] but afterwards it was taken to be only a misdemeanor, and punishable with fine and imprisonment, till the statute 7 George II, c. 21 (Assault With Intent to Rob, 1733), which makes it a felony (transportable for seven years) unlawfully and maliciously to assault

where it is provided by any statute that simple larceny, under certain circumstances, shall be felony without benefit of clergy.

x Ff. 47. 11. 7. Pott. Antiqu. l. 1. c. 26.

y 1 Hawk. P. C. 95.

z 1 Hal. P. C. 532.

---

9 **Robbery.**—In some of the older books robbery is treated as a distinct kind of felony, ranking among the crimes against the person, like rape and mayhem, not as a mere form of compound larceny. The practical difference of the two methods of classification is not great; and as robbery from the dwelling, to be consistent with the former. should be reckoned among the offenses against the habitation, the arrangement of Blackstone is perhaps the more convenient.

Yet essentially robbery, as treated here, is rather a crime against the person than the property. It is the violence or fear produced that forms its distinctive element, and as the amount taken is of no consequence, an important distinction of larceny is lacking.

Where the keys of a bank were taken thus from the cashier, and the robbery of the bank was afterwards committed by the use of them in his absence, it was held that a robbery was committed in the taking of the keys. (Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460.)—HAMMOND.

another with any offensive weapon or instrument; or by menaces, or by other forcible or violent manner, to demand any money or goods, with a felonious intent to rob. 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.[a] But if the taking be not either directly from his person or in his presence, it is no robbery.[b] 2. It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery.[c] 3. Lastly, the taking must be by force, or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing. For, according to the maxim of the civil law,[d] "*qui vi rapuit, fur improbior esse videtur* (he who hath taken by force seems to be the more iniquitous thief)." This previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcenies. For if one [243] 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;[e] neither is it capital, as privately stealing, being under the value of twelvepence. Not that it is indeed necessary, though usual, to lay in the indictment that the robbery was committed by *putting in fear;* it is sufficient if laid to be done by *violence.*[f] And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed; it is enough that so much force, or threatening by word or gesture, be used as might create an apprehension of danger, or induce a man to part with his property without or against his consent.[g] Thus, 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 I give it him through mistrust and apprehension of violence, this is a felonious robbery.[h] So if, under a pretense of sale, a man forcibly extorts money from

a 1 Hal. P. C. 533.
b Comyns. 478. Stra. 1015.
c 1 Hawk. P. C. 97.
d Ff. 4. 2. 14. § 12.
e 1 Hal. P. C. 534.
f Trin. 3 Ann. by all the Judges.
g Fost. 128.
h 1 Hawk. P. C. 96.

another, neither shall this subterfuge avail him. But it is doubted [i] whether the forcing a higler, or other chapman, to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery.[10]

§ 279. (i) Punishment of robbery.—This species of larceny is debarred of the benefit of clergy by statute 23 Henry VIII, c. 1 (Benefit of Clergy, 1531), and other subsequent statutes; not indeed in general, but only when committed in a dwelling-house, or in or near the king's highway. A robbery, therefore, in a distant field, or footpath, was not punished with death,[k] but was open to the benefit of clergy, till the statute 3 & 4 W. & M., c. 9 (Benefit of Clergy, 1691), which takes away clergy from both principals and accessories before the fact, in robbery, wheresoever committed.

§ 280. 2. Malicious mischief.—[*244] Malicious *mischief*, or damage, is the next species of injury to private property which the law considers as a public crime. This is such as is done, not *animo furandi* (with the intention of stealing), or with an intent of gaining by another's loss, which is some, though a weak, excuse, but either out of a spirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of 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

[i] *Ibid.* 97.

[k] 1 Hal. P. C. 535.

---

10 Various statutes were from time to time passed dealing with this offense; but all these were repealed, and the subject is now dealt with by the Larceny Act, 1861, which enacts that anyone is guilty of felony, and punishable by various terms of penal serviture or imprisonment, who robs anyone, or steals any chattel, money or valuable security from his person; who commits an assault with intent to rob; who robs, or assaults with intent to rob, being at the time armed with an offensive weapon or instrument, or in company with one or more other persons; or who robs, and at the time of, or immediately before or after, such robbery, wounds, beats, strikes or uses personal violence to, any person.—STEPHEN, 4 Comm. (16th ed.), 108.

by a multitude of statutes made penal in the highest degree.[11] Of these I shall extract the contents in order of time.

§ 281. **a. Statutes against malicious mischief: Henry VIII to George III.**—And, first, by statute 22 Henry VIII, c. 11 (1530), perversely and maliciously to cut down or destroy the powdike, in the fens of Norfolk and Ely, is felony. And in like manner it is by many special statutes, enacted upon the occasions, made felony to destroy the several sea-banks, river-banks, public navigations and bridges erected by virtue of those acts of parliament. By statute 43 Elizabeth, c. 13, 1601 (for preventing rapine on the northern borders), 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 being accessory before the fact to such carrying away or imprisonment; or to give or take any money or contribution, there called *blackmail*, to secure such goods from rapine,—is felony without benefit of clergy. By statute 22 & 23 Car. II, c. 7 (Burning of Houses, 1670), maliciously, unlawfully and willingly, in the night-time, to burn or cause to be burned or destroyed any ricks or stacks of corn, hay or grain, barns, houses, buildings or kilns, or to kill any horses, sheep or other cattle, is felony; but the offender may make his election to be transported for seven years: and to maim or hurt such [245] horses, sheep or other cattle is a trespass, for which treble damages shall be recovered. By statute 4 & 5 W. & M., c. 23 (1692), to burn on any waste, between Candlemas and Midsummer, any grig, ling, heath, furze, goss or fern, is punishable with whipping and confinement in the house of correction. By statute 1 Ann., st. 2, c. 9 (1702), captains and mariners belonging to ships, and destroying the same, to the prejudice of the owners (and by 4 George I, c. 12, Stranded Ships, 1717, to the prejudice of insurers also), are guilty of felony without benefit of clergy. And by statute 12 Ann., st. 2, c. 18

[11] This subject is now dealt with by the Malicious Damage Act, 1861. Although malice is the usual motive for the crime, the statute equally applies, whether the offense is committed from malice conceived against the owner of the property or not.

(Stranded Ships, 1713), making any hole in a ship in distress, or stealing her pumps, or aiding or abetting such offense, or willfully doing anything tending to the immediate loss of such ship, is felony without benefit of clergy. By statute 1 George I, c. 48 (Preservation of Timber Trees, 1714), maliciously to set on fire any underwood, wood or coppice is made single felony. By statute 6 George I, c. 23 (Robbery 1719), the willful and malicious tearing, cutting, spoiling, burning or defacing of the garments or clothes of any person passing in the streets or highways, with intent so to do, is 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. By statute 9 George I, c. 22 (Criminal Law, 1722), commonly called the Waltham black-act, occasioned by the devastations committed near Waltham in Hampshire, by persons in disguise or with their faces blacked (who seem to have resembled the Roberdsmen, or followers of Robert Hood that in the reign of Richard the First committed great outrages on the borders of England and Scotland [1]); by this black-act, I say, which has in part been mentioned under the several heads of riots, menaces, mayhem and larceny,[m] it is further enacted that to set fire to any house, barn or outhouse (which is extended by statute 9 George III, c. 29 (Malicious Injury, 1768), to the [246] malicious and willful burning or setting fire to all kinds of mills), or to any hovel, cock, mow or stack of corn, straw, hay or wood; or unlawfully and maliciously to break down the head of any fish-pond, whereby the fish shall be lost or destroyed; or in like manner to kill, maim or wound any cattle; or cut down or destroy any trees planted in an avenue, or growing in a garden, orchard or plantation, for ornament, shelter or profit,—all these malicious acts, or procuring by gift or promise of reward any person to join them therein, are felonies, without benefit of clergy: and the hundred shall be chargeable for the damages, unless the offender be convicted. In like manner, by the Roman law, to cut down trees, and especially vines, was punished in the same degree

1 3 Inst. 197.

m See pag. 144. 208. 235. 240.

as robbery.[n] By statutes 6 George II, c. 37 (1732), and 10 George II, c. 32 (1736), it is also made felony without the benefit of clergy maliciously to cut down any river or sea-bank, whereby lands may be overflowed or damaged; or to cut any hop-binds growing in a plantation of hops, or willfully and maliciously to set on fire, or cause to be set on fire, any mine, pit or delph of coal. By statute 11 George II, c. 22 (Corn Exportation, 1737), to use any violence in order to deter any person from buying corn or grain; to seize any carriage or horse carrying grain or meal to or from any market or seaport; or to use any outrage with such intent; or to scatter, take away, spoil or damage such grain or meal,—is punished for the first offense with imprisonment and public whipping, and the second offense, or destroying any granary where corn is kept for exportation, or taking away or spoiling any grain or meal in such granary, or in any ship, boat or vessel intended for exportation, is felony, subject to transportation for seven years. By statute 28 George II, c. 19 (Thefts, 1754), to set fire to any goss, furze or fern growing in any forest or chase, is subject to a fine of five pounds. By statutes 6 George III, c. 36 and 48 (1765), and 13 George III, c. 33 (Preservation of Timber, 1772), willfully to spoil or destroy any timber or other trees, roots, [247] shrubs or plants is for the two first offenses liable to pecuniary penalties, and for the third, if in the daytime, and even for the first if at night, the offender shall be guilty of felony, and liable to transportation for seven years. By statute 9 George III, c. 29 (Malicious Injury, 1768), willfully and maliciously to burn or destroy any engine or other machines, therein specified, belonging to any mine, or any fences for inclosures pursuant to any act of parliament, is made single felony, and punishable with transportation for seven years, in the offender, his advisers and procurers. And by statute 13 George III, c. 38 (1772), the like punishment is inflicted on such as break into any house, etc., belonging to the plate-glass company with intent to steal, cut or destroy any of their stock or utensils, or shall willfully and maliciously cut or destroy the same. And these are the principal punishments of malicious mischief.[12]

[n] Ff. 47. 7. 2.

---

[12] **Malicious mischief.**—This being only a misdemeanor, was lightly treated at common law, and the statutes enumerated by Blackstone increasing

§ 282. **3. Forgery.**—Forgery, or the *crimen falsi*, is an offense which was punished by the civil law with deportation or banishment, and sometimes with death.° It may with us be defined (at common law) to be, "the fraudulent making or alteration of a writing to the prejudice of another man's right," for which the offender may suffer fine, imprisonment and pillory. And also, by a variety of statutes, a more severe punishment is inflicted on the offender in many particular cases, which are so multiplied of late as almost to become general.[13] I shall mention the principal instances.

° Inst. 4. 18. 7.

---

the punishment had no force in this country. Hence it has had little attention from American courts until recently, when by statutes in most of the states the punishment has been made so severe as to rank it with other felonies. That some of the cases brought by ingenious construction under the head of larceny would have been reckoned here in a more systematic arrangement of the law, had the punishment been adequate, is clear. In an indictment for larceny of a slave, against one who had aided her to obtain her freedom (under a statute making the larceny of a slave capital), the act was held to be malicious mischief, on the ground that no conversion to his own use was proved to constitute larceny, in State v. Hawkins, 8 Port. (Ala.) 461, 33 Am. Dec. 294. (See, also, note 3, *ante*, p. *232.)—HAMMOND.

[13] **Forgery.**—Forgery was not a felony at common law, and probably unknown to the earliest form of it, and until the clergy took the conception from the *crimen falsi*. Yet some forms of it, such as the falsification of seals (royal or private), the forgery of writs, etc., appear in Glanvill and other early books. Whether there was a common-law rule limiting it to these sealed instruments, as sometimes stated (1 Hawk. P. C. 70, §§ 8–10, cited by Judge Cooley, note 16), is historically doubtful, and denied as a matter of law in The King v. Ward, 2 Ld. Raym. 1461, 92 Eng. Reprint. 451, and in Commonwealth v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446. But there can be no question that the common law had neither an adequate definition nor a sufficient punishment for the crime, until the numerous statutes here collected by Blackstone had added one new provision after another, as new forms of the wrong attracted notice. Fortunately for American law, Blackstone added a general definition (quoted above), which has taken the place of all those given before, and has made the crime, when sufficiently punished by statute, as clear in its conception, and grave in its consequences, as any of the common-law felonies.

Whether anything has been gained by expanding Blackstone's definition into "the false making or materially altering with intent to defraud of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability" (2 Bishop on Criminal Law, § 572), opinions may differ. It

§ 283. a. Statutes against forgery: Elizabeth to George III.—By statute 5 Elizabeth, c. 14 (Forgery, 1562), to forge or make, or knowingly to punish or give in evidence, any forged deed, court-roll or will, with intent to affect the right of real property, either freehold or copyhold, is punished by a forfeiture to the party grieved of double costs and damages, by standing in the pillory, and having both his ears cut off, and his nostrils slit and seared; by forfeiture to the crown of the profits of his lands, and by perpetual imprisonment. For any forgery relating [248] to a term of years, or annuity, bond, obligation, acquittance, release or discharge of any debt or demand of any personal chattels, the same forfeiture is given to the party grieved; and on the offender is inflicted the pillory, loss of one of his ears, and half a year's imprisonment; the second offense in both cases being felony without benefit of clergy.

Besides this general act, a multitude of others, since the revolution (when paper credit was first established), have inflicted capital punishment on the forging, altering or uttering as true, when forged, of any bank bills or notes, or other securities:[p] of bills of credit issued from the exchequer;[q] of South Sea bonds, etc.;[r] of

p Stat. 8 & 9 W. III. c. 20. § 36 (1696). 11 Geo. I. c. 9 (1724). 12 Geo. I. c. 32 (1725). 15 Geo. II. c. 13 (1741). 13 Geo. III. c. 79 (1772).

q See the several acts for issuing them.

r Stat. 9 Ann. c. 21 (1710). 6 Geo. I. c. 4 & 11 (1719). 12 Geo. I. c. 32 (1725).

---

brings out more distinctly the point that the "prejudice of another man's right" need not be actually accomplished to complete the offense, or even capable of accomplishment in fact (Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639; State v. Jones, 4 Halst. (9 N. J. L.) 357, 17 Am. Dec. 483; Arnold v. Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302, with note), though the forged instrument must not be a mere nullity.

Other definitions will be found collected, and a large number of cases, English and American, cited to illustrate them, in a note to the last cited case, 22 Am. Dec. 306-321. Much the larger part of them, however, deal only with the evidential facts which will or will not make out the various elements of the crime, without touching its proper definition.—HAMMOND.

The English law of forgery is now governed by the Forgery Act, 1913, which went into effect on January 1, 1914. See 4 Stephen's Comm. (16th ed.), 120.

lottery tickets or orders;[s] of army or navy debentures;[t] of East India bonds;[u] of writings under seal of the London, or royal exchange, assurance;[w] of the hand of the receiver of the pre-fines,[x] or of the accountant general and certain other officers of the court of chancery;[y] of a letter of attorney or other power to receive or transfer stock or annuities; and on the personating a proprietor thereof, to receive or transfer such annuities, stock or dividends:[z] also on the personating, or procuring to be personated, any seaman or other person entitled to wages or other naval emoluments, or any of his personal representatives; and the taking, or procuring to be taken, any false oath in order to obtain a probate, or letters of administration, in order to receive such payments; and the forging, or procuring to be forged, and likewise the uttering or publishing, as true, of any counterfeited seaman's [249] will or power:[a] to which may be added, though not strictly reducible to this head, the counterfeiting of Mediterranean passes, under the hands of the lords of the admiralty, to protect one from the piratical states of Barbary;[b] the forging or imitating of any stamps to defraud the public revenue;[c] and the forging of any marriage register or license:[d] all which are by distinct acts of parliament made felonies without benefit of clergy. By statutes 13 George III, c. 52 and 59 (Plate Assay and Plate Offenses, 1773), forging or counterfeiting any stamp or mark to denote the standard of gold and silver plate, and certain other offenses of the like tendency, are punished with transportation for fourteen years. By statute 12 George III, c. 48 (Stamps, 1772), certain frauds on the stamp duties, therein described, principally by using the same stamps more than once, are

[s] See the several acts for the lotteries.
[t] Stat. 5 Geo. I. c. 14 (1718). 9 Geo. I. c. 5 (1722).
[u] Stat. 12 Geo. I. c. 32 (1725).
[w] Stat. 6 Geo. I. c. 18 (1719).
[x] Stat. 32 Geo. II. c. 14 (1758).
[y] Stat. 12 Geo. I. c. 32 (1725).
[z] Stat. 8 Geo. I. c. 22 (1721). 9 Geo. I. c. 12 (1722). 31 Geo. II. c. 22. § 77 (1757).
[a] Stat. 31 Geo. II. c. 10 (1757). 9 Geo. III. c. 30 (1768).
[b] Stat. 4 Geo. II. c. 18 (1730).
[c] See the several stamp acts.
[d] Stat. 26 Geo. II. c. 33 (1753).

made single felony, and liable to transportation for seven years. And the same punishment is inflicted by statute 13 George III, c. 38 (1772), on such as counterfeit the common seal of the corporation for manufacturing plate-glass (thereby erected) or knowingly demand money of the company by virtue of any writing under such counterfeit seal.

There are also two other general laws, with regard to forgery; the one 2 George II, c. 25 (Perjury, 1728), whereby the first offense in forging or procuring to be forged, acting or assisting therein, or uttering or publishing as true any forged deed, will, bond, writing obligatory, bill of exchange, promissory note, indorsement or assignment thereof, or any acquittance or receipt for money or goods, with intention to defraud any person (or corporation[e]), is made felony without benefit of clergy. And by statute 7 George II, c. 22 (Forgery, 1733), it is equally penal to forge or cause to be forged or utter as true a counterfeit acceptance of a bill of exchange, or the number or principal sum of any accountable receipt for any note, bill or any [250] other security for money; or any warrant or order for the payment of money or delivery of goods. So that, I believe, through the number of these general and special provisions, there is now hardly a case possible to be conceived wherein forgery that tends to defraud, whether in the name of a real or fictitious person,[f] is not made a capital crime.

These are the principal infringements of the rights of property, which were the last species of offenses against individuals or private subjects, which the method of our distribution has led us to consider. We have before examined the nature of all offenses against the public, or commonwealth; against the king or supreme magistrate, the father and protector of that community; against the universal law of all civilized nations; together with some of the more atrocious offenses, of publicly pernicious consequence, against God and His holy religion. And these several heads comprehend the whole circle of crimes and misdemeanors, with the punishment annexed to each, that are cognizable by the laws of England.

[e] Stat. 31 Geo. II. c. 22. § 78 (Pension Duties, 1757).
[f] Fost. 116, etc.

[251]

CHAPTER THE EIGHTEENTH.

OF THE MEANS OF PREVENTING OFFENSES.

§ 284. Prevention of crime.—We are now arrived at the fifth general branch or head, under which I propose to consider the subject of this book of our Commentaries; *viz.*, the means of *preventing* the commission of crimes and misdemeanors. And really it is an honor, and almost a singular one, to our English laws, that they furnish a title of this sort; since *preventive* justice is upon every principle, of reason, of humanity, and of sound policy, preferable in all respects to punishing justice;[a] the execution of which, though necessary, and in its consequences a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.

§ 285. 1. Giving securities or recognizances.—This preventive justice consists in obliging those persons whom there is a probable ground to suspect of future misbehavior to stipulate with and to give full assurance to the public that such offense as is apprehended shall not happen, by finding pledges or securities for keeping the peace, or for their good behavior. This requisition of sureties has been several times mentioned before, as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors; but there also it must be understood rather as a caution against the repetition of the offense than any immediate pain or punishment. And, indeed, if we consider all human [252] punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes than to expiate the past; since, as was observed in a former chapter,[b] all punishments inflicted by temporal laws may be classed under three heads: such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example; all of which conduce to one and the same end, of preventing future crimes, whether that be effected by amendment, disability or example. But the caution which we speak of at present is such as is intended merely for prevention, without any crime actually com-

[a] Beccar. c. 41.

[b] See pag. 11.

mitted by the party, but arising only from a probable suspicion, that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless perhaps for a man's impudence in giving just ground of apprehension.

By the Saxon constitution these sureties are always at hand, by means of King Alfred's wise institution of decennaries or frank-pledges;[1] wherein, as has more than once been observed,[c] the whole neighborhood or tithing of freemen were mutually pledges for each other's good behavior. But this great and general security being now fallen into disuse and neglected, there hath succeeded to it the method of making suspected persons find particular and special securities for their future conduct, of which we find mention in the laws of King Edward the Confessor;[d] "*tradat fide jussores de pace et legalitate tuenda* (let him deliver sureties for maintaining peace and good behavior)." Let us there-

c See Book I. pag. 113. d Cap. 18.

---

1 **Frank-pledge and gesammtburgschaft.**—The belief that these tithings or tenmentales formed a part of the primitive constitution of England was universal in the seventeenth and eighteenth centuries; and these were supposed to be identical with the view of frank-pledge, a part of the jurisdiction exercised by the sheriff in his tourn, after the Conquest. From Blackstone and other English writers it was taken up by the Germans, who saw in it an institution common to the whole Germanic race, known as *gesammtburgschaft*, of prehistoric origin, and drew conclusions from it with the utmost confidence. Rogge, Unger, G. Phillips, W. Maurer, and others made it the principal basis of procedure, especially in criminal cases, and thus set a fashion that has not yet quite died out. But the assumption on which the whole edifice rests was shattered a generation ago by a little treatise, Ueber Haft und Burgschaft, written 1854, by H. Marquardsen, then a privat-docent at Heidelberg, since professor at Erlangen. Professor Marquardsen showed very convincingly not only the lack of positive evidence for any such institution in England before the Conquest, but also its inconsistency with the provisions of the Anglo-Saxon laws for individual bail or security, and other portions of the system, together with the proof that the view of frank-pledge in England was of Norman, or possibly, and at the earliest, of Danish origin.

Since this work appeared there have been few believers in the *gesammtburgschaft* of Germanic law, or in the decennaries of Alfred in England, with the large fabric of conclusions as to the early Germanic law and social structure that was built upon them, by Kemble, Spence and others in England, following the continental writers.—HAMMOND.

fore consider, first, what this security is; next, who may take or demand it; and, lastly, how it may be discharged.

§ 286. a. **What are recognizances.**—This security consists in being bound, with one or more sureties, in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer, whereby the parties acknowledge themselves to be indebted to the crown in the sum required (for instance 100*l.*), with condition to be void and of none effect if the [253] party shall appear in court on such a day, and in the meantime shall keep the peace, either generally, towards the king and all his liege people, or particularly also, with regard to the person who craves the security. Or, if it be for the good behavior, then on condition that he shall demean and behave himself well (or be of good behavior), either generally or specially, for the time therein limited, as for one or more years, or for life.[2] This recognizance, if taken by a justice of the peace, must be certified to the next sessions, in pursuance of the statute 3 Henry VII, c. 1 (Star-chamber, 1487), and if the condition of such recognizance be broken, by any breach of the peace in the one case or any misbehavior 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 the king's absolute debtors, are sued for the several sums in which they are respectively bound.[3]

§ 287. b. **Who may require recognizances.**—Any justices of the peace, by virtue of their commission, or those who are *ex-officio* conservators of the peace, as was mentioned in a former volume,[a] may demand such security according to their own discretion,[4] or it may be granted at the request of any subject, upon due cause

[a] See Book I. pag. 350.

---

2 See Rex v. Edgar [1913], 9 Cr. App. R. 13.

3 Various modern acts from the Levy of Fines Acts, 1822 and 1823, to the Summary Jurisdiction Act, 1879, regulate these recognizances.

4 Or application may be made therefor, by exhibiting articles of peace, supported by the oath of the applicant, in the king's bench division, or to quarter sessions. Crown Office Rules, 1906.

shown, provided such demandant be under the king's protection; for which reason it has been formerly doubted whether Jews, pagans or persons convicted of a *præmunire* were entitled thereto.[f] Or, if the justice is averse to act, it may be granted by a mandatory writ, called a *supplicavit* (he hath supplicated), issuing out of the court of king's bench or chancery, which will compel the justice to act, as a ministerial and not as a judicial officer; and he must make a return to such writ, specifying his compliance, under his hand and seal.[g] But this writ is seldom used; for, when application is made to the superior courts, they usually take the recognizances there, under the directions of the statute 21 Jac. I, c. 8 (*Certiorari*, 1623). And indeed a peer or peeress cannot be bound over in any other place than the courts of [254] king's bench or chancery; though a justice of the peace has a power to require sureties of any other person, being *compos mentis* and under the degree of nobility, whether he be a fellow-justice or other magistrate, or whether he be merely a private man.[h] Wives may demand it against their husbands, or husbands, if necessary, against their wives.[i] But *feme coverts* and infants under age ought to find security by their friends only, and not to be bound themselves, for they are incapable of engaging themselves to answer any debt; which, as we observed, is the nature of these recognizances or acknowledgments.[5]

f 1 Hawk. P. C. 126.
g F. N. B. 80. 2 P. Wms. 202.
h 1 Hawk. P. C. 127.
i 2 Stra. 1207.

5 The power of a court of summary jurisdiction, upon complaint, to adjudge a person to find sureties, is exercised in the same way as in the case of any other complaint, i. e., the defendant is first heard in his own defense. Where the parties live in the country at a distance from London, the king's bench division will not in general entertain an application of this description; which it is usual, in such case, to make to a justice of the peace in the neighborhood, or to a court of quarter sessions. But a peer or peeress can only be bound over in the high court; though a justice of the peace has power to require sureties of any person, being *compos mentis* and under the degree of nobility, whether he be a fellow-justice or other magistrate, or whether he be merely a private man. Wives may demand security against their husbands; and husbands, if necessary, against their wives. But infants ought to find security by their next friends only, and not to be bound themselves; for they are incapable of engaging themselves to answer any debt. Further, the power of a court of summary

§ 288. **c. Discharge of recognizances.**—A recognizance may be discharged, either by the demise of the king, to whom the recognizance is made, or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which such recognizance is certified by the justices (as the quarter sessions, assizes, or king's bench) if they see sufficient cause; 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.[j]

§ 289. **2. Distinction between recognizances for the peace and for good behavior.**—Thus far what has been said is applicable to both species of recognizances, for the *peace* and for the *good behavior; de pace, et legalitate tuenda,* as expressed in the laws of King Edward. But as these two species of securities are in some respects different, especially as to the cause of granting, or the means of forfeiting them, I shall now consider them separately, and, first, shall show for what cause such a recognizance, with sureties for the *peace,* is grantable, and then how it may be forfeited.

§ 290. **a. Who may be bound over to keep the peace.**—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 hot and angry words; or go about with unusual weapons [255] or attendance, to the terror of the people; and all such as he knows to be common barretors; and such as 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.[k] Also, wherever any private man hath just cause to

j 1 Hawk. P. C. 129.

k 1 Hawk. P. C. 126.

---

jurisdiction to adjudge a person to enter into a recognizance and find sureties to keep the peace or be of good behavior must be exercised by an order upon complaint made under the provisions of the Summary Jurisdiction Acts; so that the complainant and the defendant and the witnesses may be examined and cross-examined. And the parties are subject to costs, as in other cases. The defendant, should he disobey the order, may be imprisoned for six months or for fourteen days; according as the court is a petty sessional court or otherwise.—STEPHEN, 4 Comm. (16th ed.), 224.

fear that another will burn his house, or do him a corporal injury, by killing, imprisoning or beating him, or that he will 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, and will show that he has just cause to be so, by reason of the other's menaces, attempts or having lain in wait for him, and will also further swear that he does not require such surety out of malice or for mere vexation.[l] 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.[m]

§ 291. (1) Forfeiture of recognizance to keep the peace.— Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault or menace, to the person of him who demanded it, if it be a special recognizance; or, if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace; or, more particularly, by any one of the many species of offenses which were mentioned as crimes against the public peace in the eleventh chapter of this book; or, by any private violence committed against any of his majesty's subjects. But a bare trespass upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a willful breach of the peace, is no forfeiture of the recognizance.[n] 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 [256] upon to be merely the effect of unmeaning heat and passion) unless they amount to a challenge to fight.[o]

The other species of recognizance, with sureties, is for the *good abearance*, or *good behavior*. This includes security for the peace, and somewhat more; we will therefore examine it in the same manner as the other.

§ 292. b. Who may be bound over for good behavior.—First, then, the justices are empowered by the statute 34 Edward III,

l *Ibid.* 127.
m *Ibid.* 128.
n *Ibid.* 131.
o 1 Hawk. P. C. 130.

c. 1 (Justices of the Peace, 1360), to bind over to the good behavior 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 holden that a man may be bound to his good behavior for causes of scandal, *contra bonos mores* (against good morals), as well as *contra pacem* (against the peace); as, for haunting bawdy-houses with women of bad fame; or for keeping such women in his own house; or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus, also, a justice may bind over all night-walkers; eavesdroppers; such as keep suspicious company or are reported to be pilferers or robbers; such as sleep in the day and wake in the night; common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons, whose misbehavior 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 convenient certainty, and take care that such cause be a good one.[p] [6]

[p] *Ibid.* 132.

---

[6] In addition to these older powers, special provision has been made by modern statute for the giving of recognizances for keeping the peace, or for being of good behavior, or both. For, by the Criminal Law Consolidation Acts, 1861, any person who has been convicted of an *indictable misdemeanor*, punishable under the acts, may not only be fined, but required to enter into his own recognizance, and to find sureties, either for keeping the peace or for being of good behavior, or both; and in the case of a person convicted of felony punishable under any of these acts, the offender may be required to enter into such recognizance and to find sureties, in addition to any other punishment. But no person is to be kept in prison under these acts, for not finding sureties, for any period exceeding one year.

And, by the Probation of Offenders Act, 1907, it is provided that a court of summary jurisdiction before which any person is properly charged, though the charge is proved, may, notwithstanding, if it thinks such a course expedient,

§ 293. (1) Forfeiture of recognizance for good behavior.—[257] A recognizance for the good behavior may be forfeited by all the same means, as one for the security of the peace may be; and also by some others. As, by going armed with unusual attendance, to the terror of the people; by speaking words tending to sedition; or, by committing any of those acts of misbehavior, which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen;[q] for though it is just to compel suspected persons to give security to the public against misbehavior that is apprehended, yet it would be hard, upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.

q 1 Hawk. P. C. 133.

---

on the ground of the character, antecedents, age, health, or mental condition of the person charged, or of the trivial nature of the offense, or of extenuating circumstances, either dismiss the charge entirely, or discharge the offender conditionally on his entering into a recognizance for good behavior, to come up for judgment, if called upon, at any time within three years. . . . The act is also noteworthy as providing for the appointment of probation officers in every petty sessional division, whose business it shall be to supervise the fulfillment of the conditions of his recognizance by the offender, to report to the court as to his behavior, and to advise, assist, and befriend him, and, when necessary, to endeavor to find him suitable employment. Special probation officers are to be appointed, where circumstances permit, for offenders under sixteen.—STEPHEN, 4 Comm. (16th ed.), 226.

[258] # CHAPTER THE NINETEENTH.

OF COURTS OF A CRIMINAL JURISDICTION.

§ 294. Courts of criminal jurisdiction.—The sixth, and last, object of our inquiries will be the method of *inflicting* those *punishments* which the law has annexed to particular offenses, and which I have constantly subjoined to the description of the crime itself, in the discussion of which I shall pursue much the same general method that I followed in the preceding book, with regard to the redress of civil injuries, by first pointing out the several *courts* of criminal jurisprudence, wherein offenders may be prosecuted to punishment, and by, secondly, deducing down in their natural order, and explaining, the several *proceedings* therein.

First, then, in reckoning up the several *courts* of criminal jurisdiction, I shall, as in the former case, begin with an account of such as are of a *public* and *general* jurisdiction throughout the whole realm, and afterwards proceed to such as are only of a *private* and *special* jurisdiction, and confined to some particular parts of the kingdom.[1]

§ 295. I. Courts of public and general criminal jurisdiction.—In our inquiries into the criminal courts of *public* and *general* jurisdiction, I must in one respect pursue a different order from that in which I considered the civil tribunals. For there, as the several courts had a gradual subordination to each other, the superior correcting and reforming the errors of the inferior, I thought it best to begin with the lowest, and so ascend gradually to the courts of appeal, or those of [259] the most extensive powers. But as it is contrary to the genius and spirit of the law of England to suffer any man to be tried twice for the same offense in a criminal way, especially if acquitted upon the first trial, therefore these criminal courts may be said to be all independent of each

1 For history of the courts of criminal jurisdiction, see 1 Stephen, Hist. Crim. Law, c. IV, "The Ordinary Criminal Courts—Queen's Bench of the High Court, the Courts of Assize, the Courts of Quarter Sessions, Courts of Summary Jurisdiction, Franchise Courts, Welsh Courts"; c. V, "The Criminal Jurisdiction of Parliament and the court of Lord High Steward"; and c. VI, "The Criminal Jurisdiction of the Privy Council."

other; at least so far as that the sentence of the lowest of them can never be controlled or reversed by the highest jurisdiction in the kingdom, unless for error in matter of law, apparent upon the face of the record, though sometimes causes may be removed from one to the other before trial. And therefore as, in these courts of criminal cognizance, there is not the same chain and dependence as in the others, I shall rank them according to their dignity, and begin with the highest of all; *viz.:*

§ 296. 1. High court of parliament.—The high court of *parliament,* which is the supreme court in the kingdom, not only for the making, but also for the execution, of laws, by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attaint particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made *pro re nata* (for the present emergency), and by no means an execution of such as are already in being.* But an impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put in practice;[2] being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom.[a] † A commoner cannot, however, be impeached

* The United States constitution expressly forbids bills of attainder by either federal or state legislatures. Upon the interpretation of this clause see Ex parte Garland, 4 U. S. 333; Cummings v. Missouri, 4 U. S. 277.—HAMMOND.

† The method of trying impeachments in the Senate of the United States upon presentation by the House of Representatives, as prescribed by the constitution, and the similar provisions in most of the states, are all copied from this model.—HAMMOND.

[a] 1 Hal. P. C. *150.

---

2 Theoretically, impeachment is a legal form of proceeding in England, but it has apparently fallen out of use.

The constitution of the United States provides for impeachment proceedings, the House of Representatives presenting the charges, and the Senate sitting as the court. The constitutions of the several states make like provisions for impeachment trials in their jurisdictions.

before the lords for any capital offense, but only for high misdemeanors;[b] a peer may be impeached for any [260] crime. And they usually (in case of an impeachment of a peer for treason) address the crown to appoint a lord high steward, for the greater dignity and regularity of their proceedings, which high steward was formerly elected by the peers themselves, though he was generally commissioned by the king;[c] but it hath of late years been strenuously maintained[d] that the appointment of an high steward in such cases is not indispensably necessary, but that the house may proceed without one. The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried by the lords, who are in cases of misdemeanors considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the ancient German, who in their great councils sometimes tried capital accusations relating to the public: "*licet apud consilium accusare quoque, et discrimen capitis intendere* (it is allowed to bring accusations before the council, and to commence capital prosecutions)."[e] And it has a peculiar propriety in the English constitu-

[b] When, in 4 Edw. III (1330), the king demanded the earls, barons, and peers, to give judgment against Simon de Bereford, who had been a notorious accomplice in the treasons of Roger, Earl of Mortimer, they came before the king in parliament, and said all with one voice, that the said Simon was not their *peer;* and therefore they were not bound to judge him as a peer of the land. And when afterwards, in the same parliament, they were prevailed upon, in respect of the notoriety and heinousness of his crimes, to receive the charge and to give judgment against him, the following protest and proviso was entered on the parliament-roll. "And it is assented and accorded by our lord the king, and all the great men, in full parliament, that albeit the peers, as judges of the parliament, have taken upon them in the presence of our lord the king to make and render the said judgment; yet the peers who now are, or shall be in time to come, be not bound or charged to render judgment upon others than peers; nor that the peers of the land have power to do this, but thereof ought ever to be discharged and acquitted: and that the aforesaid judgment now rendered be not drawn to example or consequence in time to come, whereby the said peers may be charged hereafter to judge others than their peers, contrary to the laws of the land, if the like case happen, which God forbid." (Rot. Parl. 4 Edw. III. n. 2 & 6. 2 Brad. Hist. 190. Selden. Judic. in Parl. c. 1.)

[c] 1 Hal. P. C. 350.

[d] Lords Journ. 12 May 1679. Com. Journ. 15 May 1679. Fost. 142, etc.

[e] Tacit. de Mor. Germ. 12.

tion, which has much improved upon the ancient model imported hither from the Continent. For, though in general the union of the legislative and judicial powers ought to be most carefully avoided,[f] yet it may happen that a subject, entrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes as the ordinary magistrate either [261] 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 would naturally 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 have neither the same interests nor the same passions as popular assemblies.[g] This is a vast superiority which the constitution of this island enjoys, over those of the Grecian or Roman republics, where the people were at the same time both judges and accusers. 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,[h] and is now enacted by statute 12 & 13 W. III, c. 2 (Act of Settlement, 1700), that no pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in parliament.[i]

§ 297. **2. Court of the lord high steward.**—The court of the *lord high steward* of Great Britain[k] is a court instituted for the trial of peers, indicted for treason or felony, or for misprision of either.[l] The office of this great magistrate is very ancient, and

f See Book I. pag. 269.

g Montesq. Sp. L. xi. 6.

h Com. Journ. 5 May 1679.

i See chap. 31.

k 4 Inst. 58. 2 Hawk. P. C. 5. 421. 2 Jon. 54.

l 1 Bulstr. 198.

was formerly hereditary, or at least held for life, or *dum bene se gesserit* (while he shall have conducted himself well); but now it is usually, and hath been for many centuries past,[m] granted *pro hac vice* (for the special case) only, and it hath been the constant practice (and therefore seems now to have become necessary) to grant [262] it to a lord of parliament, else he is incapable to try such delinquent peer.[n] When such an indictment is therefore found by a grand jury of freeholders in the king's bench, or at the assizes before the justices of *oyer* and *terminer*, it is to be removed by writ of *certiorari* into the court of the lord high steward, which only has power to determine it.[3] A peer may plead a pardon before the court of king's bench, and the judges have power to allow it, in order to prevent the trouble of appointing an high steward, merely for the purpose of receiving such plea. But he may not plead in that inferior court any other plea, as *guilty*, or *not guilty*, of the indictment, but only in this court; because, in consequence of such plea, it is possible that judgment of death might be awarded against him. The king, therefore, in case a peer be indicted for treason, felony or misprision, creates a lord high steward *pro hac vice* (for the special case) by commission 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* (according to the law and custom of England). Then, when the indictment is regularly removed, by writ of *certiorari*, commanding the inferior court to certify it up to him, the lord high steward directs a precept to a serjeant-at-arms, to summon the

m Pryn. on 4 Inst. 46.

n *Quand un* seigneur de parlement *serra arrein de treason ou felony, le roy par ses lettres patents fera un grand et sage* seigneur *d'estre le grand seneschal d'Angleterre: qui—doit faire un precept—pur faire venir xx* seigneurs, *ou xviii, etc.* (When a lord of parliament is arraigned on a charge of treason or felony, the king by his letters patent shall create some wise and noble peer lord high steward of England, who shall issue out a precept to summon eighteen or twenty lords, etc.) (Yearb. 13 Hen. VIII. 11.) See Staundf. P. C. 152. 3 Inst. 28. 4 Inst. 59. 2 Hawk. P. C. 5. Barr. 234.

---

3 This is only in case the offense be treason, felony or misprision of treason or felony; for if it be of any other kind, the privilege does not exist, and the peer must be tried by a jury in the court in which the indictment is found.—STEPHEN, 4 Comm. (16 ed.), 237.

lords to attend and try the indicted peer. This precept was formerly issued to summon only eighteen or twenty, selected from the body of the peers; then the number came to be indefinite, and the custom was for the lord high steward to summon as many as he thought proper (but of late years not less than twenty-three[o]), and that those lords only should sit upon the trial, which threw a monstrous weight of power into the hands of the crown, and this its great officer of selecting only such peers as the then predominant party should most approve of. And accordingly, when the Earl of Clarendon fell into disgrace with Charles II, [263] there was a design 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.[p] But now, by statute 7 W. III, c. 3 (Treason, 1695), upon all trials of peers for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned at least twenty days before such trial, to appear and vote therein, and every lord appearing shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy and subscribing the declaration against popery.

§ 298. a. **Trial of peers by parliament.**—During the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward, but before the court last mentioned, of our lord the *king in parliament*.[q 4] It is true, a lord high steward is always appointed in that case, to regulate and add weight to the proceedings; but he is rather in the nature of a speaker *pro tempore*, or chairman of the court, than the judge of it; for the collective body of the peers are therein the judges both of law and fact, and the high steward has a vote with the rest, in right of his peerage. But in the court of the lord high steward, which is held in the recess of parliament, he is the sole judge of matters of law, as the lords triers are in matters of fact;

o Kelynge. 56.
p Carte's Life of Ormonde. Vol. 2.
q Fost. 141.

4 For a modern trial of a peer before the peers in the high court of parliament, see the Trial of Earl Russell, [1901] App. Cas. 446.

and as they may not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial.[r] Therefore, upon the conviction and attainder of a peer for murder in full parliament, it hath been holden by the judges[s] that in case the day appointed in the judgment for execution should lapse before execution done, a new time of execution may be appointed by either the high court of parliament, during its sitting, though no high steward be existing, or, in the recess of parliament, by the court of king's bench, the record being removed into that court.

§ 299. b. Right of bishops to sit in court of lord high steward. [264] It has been a point of some controversy whether the bishops have now a right to sit in the court of the lord high steward to try indictments of treason and misprision. Some incline to imagine them included under the general words of the statute of King William, "all peers, who have a right to sit and vote in parliament"; but the expression had been much clearer if it had been, "all *lords*," and not "all *peers*," for though bishops, on account of the baronies annexed to their bishoprics, are clearly lords of parliament, yet, their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility: and perhaps this word might be inserted purposely with a view to exclude them. However, there is no instance of their sitting on trials for capital offenses, even upon impeachments or indictments in full parliament, much less in the court we are not treating of; for indeed they usually withdraw voluntarily, but enter a protest declaring their right to stay. It is observable that, in the eleventh chapter of the constitutions of Clarendon, made in parliament 11 Henry II (1165), they are expressly excused, rather than excluded, from sitting and voting in trials, when they come to concern life or limb: "*episcopi, sicut cæteri barones, debent interesse judiciis cum baronibus, quousque perveniatur ad diminutionem membrorum, vel ad mortem* (the bishops ought to be present at trials, as well as the other barons, unless they involve the loss of life or limb)"; and Becket's quarrel with the king hereupon was

[r] State Trials, Vol. IV. 214. 232, 3. [s] Fost. 139.

not on account of the exception (which was agreeable to the canon law), but of the general rule that compelled the bishops to attend at all. And the determination of the house of lords in the Earl of Danby's case,[t] which hath ever since been adhered to, is consonant to these constitutions, "that the lords spiritual have a right to stay and sit in court in capital cases till the court proceeds to the vote of guilty or not guilty." It must be noted that this resolution extends only to trials *in full parliament*, for to the court of the lord high steward (in which no vote can be given, but merely that of guilty or not guilty) no bishop, as such, ever was or could be summoned; and though the statute of King William [265] regulates the proceedings in that court, as well as in the court of parliament, yet it never intended to new-model or alter its constitution, and consequently does not give the lords spiritual any right in cases of blood which they had not before.[u] And what makes their exclusion more reasonable is, that they have no right to be tried themselves in the court of the lord high steward,[w] and therefore surely ought not to be judges there. For the privilege of being thus tried depends upon nobility of blood, rather than a seat in the house; as appears from the trials of popish lords, of lords under age, and (since the union) of the Scots nobility, though not in the number of the sixteen; and from the trials of females, such as the queen-consort or dowager, and of all peeresses by birth, and peeresses by marriage also, unless they have, when dowagers, disparaged themselves by taking a commoner to their second husband.

§ 300. 3. Court of king's bench on the crown side.—The court of *king's bench*,[x 5] concerning the nature of which we partly inquired in the preceding book,[y] was (we may remember) divided into a *crown* side and a *plea* side. And on the crown side, or crown

t Lords Journ. 15 May 1679.

u Fost. 248.

w Bro. Abr. t. Trial. 142.

x 4 Inst. 70. 2 Hal. P. C. 2. 2 Hawk. P. C. 6.

y See Book III. pag. 41.

5 Now since the Judicature Act of 1873, the king's bench division of the high court of justice, the jurisdiction of which is regulated by this act.

office, it takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace. Into this court, also, indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar or at *nisi prius*, by a jury of the county out of which the indictment is brought. The judges of this court are the supreme coroners of the kingdom. And the court itself is the principal court of criminal jurisdiction (though the two former are of greater dignity) known to the laws of England. For which reason by the coming of the court of king's bench into any county (as it was removed to Oxford on account of the sickness in 1665), all former commissions of *oyer* and *terminer*, and general gaol delivery, are at once absorbed and determined *ipso facto*, in the same manner as by the old Gothic and Saxon constitutions, [266] "*jure vetusto obtinuit, quievisse omnia inferiora judicia, dicente jus rege* (it was the ancient practice that all inferior courts of justice should be discontinued in those places where the king administered justice)."[z]

§ 301. a. Former court of star-chamber. — Into this court of king's bench hath reverted all that was good and salutary of the jurisdiction of the court of *star-chamber, camera stellata;*[a] which

[z] Stiernhook. l. 1. c. 2.

[a] This is said (Lamb. Arch. 154.) to have been so called, either from the Saxon word steoran, to *steer* or govern;—or from its punishing the *crimen stellionatus*, or cosenage;—or because the room wherein it sate, the old council chamber of the palace of Westminster (Lamb. 148.). which is now converted into the lottery office, and forms the eastern side of the new palace yard, was full of windows;—or (to which Sir Edward Coke, 4 Inst. 66. accedes) because *haply* the roof thereof was at the first garnished with gilded *stars*. As all these are merely conjectures (for no stars are now in the roof, nor are any said to have remained there so late as the reign of Queen Elizabeth) it may be allowable to propose another conjectural etymology, as plausible perhaps as any of them. It is well known that, before the banishments of the Jews under Edward I., their contracts and obligations were denominated in our ancient records *starra* or *starrs*, from a corruption of the Hebrew word, *shetar*, a covenant (Tovey's Angl. Judaic. 32. Selden Tit. of Hon. ii. 34. Uxor Ebraic. i. 14.) These starrs, by an ordinance of Richard the First, preserved by Hoveden, were commanded to be enrolled, and deposited in chests under three keys in certain places; one, and the most considerable, of which was in

was a court of very ancient original,[b] but new-modeled by statutes 3 Henry VII, c. 1 (Star-chamber, 1487), and 21 Henry VIII, c. 20 (President of the Council, 1529), consisting of divers lords spiritual and temporal, being privy counselors, together with two judges of the courts of common law, without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehavior of sheriffs, and other notorious [267] misdemeanors, contrary to the laws of the land. Yet this was afterwards (as Lord Clarendon informs us[c]) stretched "to the asserting of all proclamations and orders of state; to the vindicating of illegal commissions, and grants of monopolies; holding for honorable that which pleased, and for just that which profited, and becoming both a court of law to determine civil rights, and a court of revenue to enrich the treasury: the council table by proclamations enjoining to the people that which was not enjoined by the laws, and prohibiting that which was not prohibited, and the star-chamber, which consisted of the same persons in different rooms, censuring the breach and disobedience to those proclamations by very great fines, imprisonments and corporal severities; so that any disrespect to any acts of state, or to the persons of statesmen, was in no time more penal and the foundations of right never more in danger to be destroyed." For

the king's exchequer at Westminster: and no starr was allowed to be valid, unless it were found in some of the said repositories. (Memorand. in Scacc. P. 6 Edw. I. prefixed to Maynard's Year-Book of Edw. II. fol. 8. Madox Hist. Exch. c. vii. § 4, 5, 6.) The room at the exchequer, where the chests containing these starrs were kept, was probably called the *star-chamber;* and, when the Jews were expelled the kingdom, was applied to the use of the king's council, sitting in their judicial capacity. To confirm this, the first time the star-chamber is mentioned in any record, it is said to have been situated near the receipt of the exchequer at Westminster (the king's council, his chancellor, treasurer, justices, and other sages, were assembled *en la chambre des esteilles pres la resceipt al Westminster* (in the star-chamber near the exchequer at Westminster).—Claus. 41 Edw. III. m. 13.) For in process of time, when the meaning of the Jewish *starrs* was forgotten, the word *star-chamber* was naturally rendered in law French *la chaumbre des esteilles,* and in law Latin *camera stellata;* which continued to be the style in Latin till the dissolution of that court.

[b] Lamb. Arch. 156.

[c] Hist. of Reb. Book. 1 & 3.

which reasons it was finally abolished by statute 16 Car. I, c. 10 (Star-chamber, 1640), to the general joy of the whole nation.[d]

§ 302. **4. Court of chivalry.**—The court of *chivalry*,[e] of which we also formerly spoke[f] as a military court, or court of honor, when held before the earl marshal only, is also a criminal court when held before the lord high constable of England jointly with the earl marshal. And then it has jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it. But the criminal as [268] well as civil part of its authority is fallen into entire disuse, there having been no permanent high constable of England (but only *pro hac vice* (for the special case) at coronations and the like) since the attainder and execution of Stafford, Duke of Buckingham, in the thirteenth year of Henry VIII (1522); the authority and charge, both in war and peace being deemed too ample for a subject: so ample, that when the Chief Justice Fineux was asked by King Henry the Eighth how far they extended, he declined answering, and said the decision of that question belonged to the law of arms and not to the law of England.[g]

§ 303. **5. High court of admiralty.**—The high court of *admiralty*,[h] held before the lord high admiral of England, or his deputy,

[d] The just odium, into which this tribunal had fallen before its dissolution, has been the occasion that few memorials have reached us of its nature, jurisdiction, and practice; except such as, on account of their enormous oppression, are recorded in the histories of the times. There are however to be met with some reports of its proceedings in Dyer, Croke, Coke, and other reporters of that age, and some in manuscript; of which the author hath two; one from 40 Eliz. (1598) to 13 Jac. I. (1616), the other for the first three years of King Charles (1625–1627); and there is in the British Museum (Harl. MSS. Vol. I. No. 1226) a very full, methodical, and accurate account of the constitution and course of this court, compiled by William Hudson of Gray's Inn, an eminent practitioner therein; and a short account of the same, with copies of all its process, may also be found in 18 Rym. Feod. 192, etc.

[e] 4 Inst. 123. 2 Hawk. P. C. 9.

[f] See Book III. pag. 68.

[g] Duck de Authorit. jur. Civ.

[h] 4 Inst. 134. 147.

styled the judge of the admiralty, is not only a court of civil, but also of criminal, jurisdiction.[6] This court hath cognizance of all crimes and offenses committed either upon the sea or on the coasts, out of the body or extent of any English county, and, by statute 15 Richard II, c. 3 (Admiralty, 1391), of death and mayhem happening in great ships being and hovering in the main stream of great rivers, below the bridges of the same rivers, which are then a sort of ports or havens; such as are the ports of London and Gloucester, though they lie at a great distance from the sea. But, as this court proceeded without jury, in a method much conformed to the civil law, the exercise of a criminal jurisdiction there was contrary to the genius of the law of England; inasmuch as a man might be there deprived of his life by the opinion of a single judge, without the judgment of his peers. And besides, as innocent persons might thus fall a sacrifice to the caprice of a single man, so very gross offenders might, and did frequently, escape punishment; for the rule of civil law is, how reasonably I shall not at present inquire, that no judgment of death can be given against offenders, without proof by two witnesses, or a confession of the fact by themselves. This was always a great offense to the English nation, and therefore in the eighth year of Henry VI (1429) it was endeavored to apply a [269] remedy in parliament, which then miscarried for want of the royal assent. However, by the statute 28 Henry VIII, c. 15 (Offenses at Sea, 1536), it was enacted that these offenses should be tried by commissioners nominated by the lord chancellor; namely, the admiral, or his deputy, and three or four more (among whom two common-law judges are constantly appointed, who in effect try all the prisoners), the indictment being first found by a grand jury of twelve men, and afterwards tried by another jury, as at common law, and that the course of proceedings should be according to the law of the land. This is now the only method of trying marine felonies in the court of admiralty, the judge of the admiralty still presiding therein, as the lord mayor is the president of the sessions of *oyer* and *terminer* in London.

These five courts may be held in any part of the kingdom, and their jurisdiction extends over crimes that arise throughout the

6 The criminal jurisdiction of the court of admiralty seems now to have been wholly transferred to other tribunals. Stephen, 4 Comm. (16th ed.), 243.

whole of it, from one end to the other. What follow are also of a general nature, and universally diffused over the nation, but yet are of a local jurisdiction, and confined to particular districts. Of which species are,

§ 304. 6, 7. Courts of oyer and terminer and general gaol delivery. — The courts of *oyer* and *terminer* and general *gaol delivery*,[i] which are held before the king's commissioners, among whom are usually two judges of the courts at Westminster, twice in every year in every county of the kingdom, except the four northern ones, where they are held only once, and London and Middlesex, wherein they are held eight times. These were slightly mentioned in the preceding book.[k] We then observed that, at what is 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*, being principally of a civil nature, were then explained at large; to which I shall only add, that these justices have, by virtue of several statutes, a criminal jurisdiction also in certain special cases.[l] The third, which is the [270] commission of the *peace*, was also treated of in a former volume,[m] when we inquired into the nature and office of a justice of the peace. I shall only add, that all the justices of the peace of any county wherein the assizes are held are bound by law to attend them, or else are liable to a fine; in order to return recognizances, etc., and to assist the judges in such matters as lie within their knowledge and jurisdiction, and in which some of them have probably been concerned, by way of previous examination. But the fourth authority is the commission of *oyer* and *terminer*, to hear and determine all treasons, felonies and misdemeanors. This is directed to the judges and several others, or any two of them; but the judges or serjeants at law only are of the *quorum*, so that the rest cannot act without the presence of one of them. The words of the commission are, "to inquire, hear and determine," so that by virtue of this commission they can only proceed upon an indictment found

i 4 Inst. 162. 168. 2 Hal. P. C. 22. 32. 2 Hawk. P. C. 14. 23.
k See Book III. pag. 58.
l 2 Hal. P. C. 39. 2 Hawk. P. C. 28.
m See Book I. pag. 351.

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*,[o] 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. It was anciently the course to issue special writs of gaol delivery for each particular prisoner, which were called the writs *de bono et malo* (of good and evil);[p] but these being found inconvenient and oppressive, a *general* commission for all the prisoners has long been established in their stead. So that, one way or other, the gaols are in general cleared, and all offenders tried, punished or delivered twice in every year: a constitution of singular use and excellence. Sometimes also, upon urgent occasions, the king issues a special or extraordinary commission of *oyer* and *terminer* and *gaol delivery*, confined to those offenses which stand in need of immediate inquiry and punishment, upon which the course of proceeding is much the same as upon general and ordinary commissions. Formerly it was held, in pursuance [271] of the statutes 8 Richard II, c. 2 (Civil Procedure, 1384), and 33 Henry VIII, c. 4 (1541), that no judge or other lawyer could act in the commission of *oyer* and *terminer*, or in that of gaol delivery, within his own county where he was born or inhabited; in like manner as they are prohibited from being judges of assize and determining civil causes. But that local partiality which the jealousy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemeanors than in matters of property and disputes between party and party, it was thought proper by the statute 12 George II, c. 27 (Justices of Assize, 1738), to allow any man to be a justice of *oyer* and *terminer* and general gaol delivery within any county of England.[7]

o *Ibid.*

p 2 Inst. 43.

7 The relationship of the circuit courts to the superior courts in London was formerly a matter of some doubt and practical difficulty; but by a provision of the Judicature Act, 1873, his majesty is enabled, by commission of assize or any other commission, to assign to any judge or judges of the high court,

§ 305. 8. **Court of general quarter sessions.**—The court of general *quarter sessions* of the peace[q] is a court that must be held in every county, once in every quarter of a year; which by statute 2 Henry V, c. 4 (Justice of the Peace, 1414), is appointed to be in the first week after Michaelmas Day; the first week after the Epiphany; the first week after the close of Easter; and in the week after the translation of Saint Thomas the Martyr, or the seventh of July. It is held before two or more justices of the peace, one of which must be of the *quorum*. The jurisdiction of this court[8] by statute 34 Edward III, c. 1 (Justices of the Peace, 1360), extends to the trying and determining all felonies and trespasses whatsoever, though they seldom, if ever, try any greater offense than small felonies within the benefit of clergy; their commission providing that, if any case of difficulty arises, they shall not proceed to judgment, but in the presence of one of the justices of the courts of king's bench or common pleas, or one of the judges of assize. And therefore murders and other capital felonies are usually remitted for a more solemn trial to the assizes. They cannot also try any new-created offense without express power given them by the statute which creates it.[r] But there are many offenses, and particular matters, which by particular statutes belong properly to this jurisdiction and ought to be prosecuted in this court; as, the [272] smaller misdemeanors, against the public or commonwealth, not amounting to felony, and especially offenses relating to the game, highways, ale-houses, bastard children, the settlement and provision for the poor, vagrants, servants' wages, apprentices and popish recusants.[s] Some of these are proceeded upon by indictment, and

q 4 Inst. 170. 2 Hal. P. C. 42. 2 Hawk. P. C. 32.

r 4 Mod. 379. Salk. 406. Lord Raym. 1144.

s See Lambard Eirenarcha and Burn's Justice.

---

or other persons usually named in commissions of assize, the duty of trying and determining, within any district, any cause or matter depending in the high court, or the exercise of any jurisdiction capable of being exercised by the high court. And it is provided by the same enactment that any commissioner acting under such commission shall be deemed to constitute a court of the said high court of justice. The effect of these provisions is to make the assize courts branches of the high court of justice.—STEPHEN, 4 Comm. (16th ed.), 247.

8 The jurisdiction of the courts of quarter sessions is regulated by numerous modern statutes from the Quarter Sessions Act, 1842, down to the present time.

others in a summary way by motion and order thereupon; which order may for the most part, unless guarded against by particular statutes, be removed into the court of king's bench by writ of *certiorari facias*, 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* (Keeper of the Rolls), who is always a justice of the *quorum;* and among them of the *quorum* (saith Lambard [ss]) a man for the most part especially picked out, either for wisdom, countenance or credit. The nomination of the *custos rotulorum* (who is the principal *civil* officer in the county, as the lord lieutenant is the chief in *military* command) is by the king's sign manual; and to him the nomination of the clerk of the peace belongs, which office he is expressly forbidden to sell for money.[t]

§ 306. a. **Quarter sessions in towns; petty sessions.**—In most corporation 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 from orders of removal of the poor, which, though they be from the orders of corporation justices, must be to the sessions of the county, by statute 8 & 9 W. III, c. 30 (Poor Relief, 1697).[9] In both corporations and counties at large there is

ss B. 4. c. 3.

t Stat. 37 Hen. VIII. c. 1 (*Custos Rotulorum*, 1545). 1 W. & M. st. 1. c. 21 (Clerk of the Peace, 1689).

---

9 In boroughs under the Municipal Corporations Act, 1882, which have the franchise of a separate court of quarter sessions, the recorder is the sole judge of the court, and the borough justices are not to act as justices at any court of gaol delivery or quarter sessions.

Central Criminal Court.—This court has been established by the Central Criminal Court Act, 1834, for the trial of offenses committed in London, Middlesex, and certain parts of Essex, Kent and Surrey. All indictments found at the different sessions of the peace, held within the jurisdiction of the Central Criminal Court, may be removed into this court by *certiorari*. The jurisdiction also extends to hear and determine any offenses committed, or alleged to be committed, on the high seas or elsewhere within the jurisdiction of the admiralty of England, and also murders or manslaughters of persons subject to military

sometimes kept a special or petty session, by a few justices, for dispatching smaller business in the neighborhood between the times of the general sessions; as, for licensing ale-houses, passing the accounts of the parish officers, and the like.

§ 307. 9. The sheriff's tourn.—[273] The *sheriff's tourn*,[u] or rotation, is a court of record, held twice every year within a month after Easter and Michaelmas, before the sheriff, in different parts of the county; being indeed only the turn of the sheriff to keep a court-leet in each respective hundred.[w] This, therefore, is the great court-leet of the county, as the county court is the court-baron, for out of this, for the ease of the sheriff, was it taken.[10]

u 4 Inst. 259. 2 Hal. P. C. 69. 2 Hawk. P. C. 55.

w Mirr. c. 1. § 13 & 16.

---

law, alleged to be committed by persons subject to such law. A special power is also conferred upon the central criminal court in respect of offenses committed out of its ordinary jurisdiction, which may (by order of the king's bench division) be tried in the court, under the provisions of the Central Criminal Court Act, 1856, and the Jurisdiction in Homicides Act, 1862. The court has also jurisdiction to try indictments under the Corrupt Practices Act, 1883, which have been instituted or removed into the high court, if, on the suggestion of the attorney general, the high court shall so order. The judges or commissioners, constituting or presiding over the court, include the lord mayor of London, the lord chancellor, the judges of the high court of justice, the dean of the arches, the aldermen, and the recorder and common serjeant, of London, the judges of the city of London court, any person who has been lord chancellor, or a judge of the high court, and such others as the crown shall from time to time appoint; but the court is, in general, constituted of one or more of the judges of the high court, the recorder of London, the common serjeant, and the judges of the city of London court. It is provided, that the crown may issue its commission of oyer and terminer and gaol delivery to such court; and that the judges thereof, or any two or more of them, shall hold a session in the city of London or suburbs thereof, at least twelve times in every year (and oftener if need be)—such times to be .xed by general orders of the court, which orders any four or more of the judges of the high court of justice are empowered from time to time to make.—STEPHEN, 4 Comm. (16th ed.), 248.

10 The sheriff's tourn was expressly abolished by the Sheriffs Act, 1887. The court-leet, where it is still maintained, is merely a court periodically held before the steward of a manor, for the hearing of offenses of a trivial character. (4 Stephen, Comm. (16th ed.), 258, 260.)

§ 308. **10. Court-leet.**—The *court-leet*, or *view of frank-pledge*,[x] which is a court of record, held once in the year and not oftener,[y] within a particular hundred, lordship or manor, before the steward of the leet; being the king's court granted by charter to the lords of those hundreds or manors. Its original intent was to view the frank-pledges, that is, the freemen within the liberty, who (we may remember[z]), according to the institution of the great Alfred, were all mutually pledges for the good behavior of each other. Besides this, the preservation of the peace, and the chastisement of divers minute offenses against the public good, are the objects both of the court-leet and the sheriff's tourn; which have exactly the same jurisdiction, one being only a larger species of the other, extending over more territory, but not over more causes. All freeholders within the precinct are obliged to attend them, and all persons commorant therein, which commorancy consists in usually lying there: a regulation which owes its original to the laws of King Canute.[a] But persons under twelve and above sixty years old, peers, clergymen, women and the king's tenants in ancient demesne, are excused from attendance there; all others being bound to appear upon the jury, if required, and make their due presentments. It was also anciently the custom to summon all the king's subjects, as they respectively grew to years of discretion and strength, to [274] come to the court-leet and there take the oath of allegiance to the king. The other general business of the leet and tourn was to present by jury all crimes whatsoever that happened within their jurisdiction, and not only to present, but also to punish, all trivial misdemeanors, as all trivial debts were recoverable in the court-baron and county court; justice in these minuter matters of both kinds being brought home to the doors of every man by our ancient constitution. Thus in the Gothic constitution, the *hæreda*, which answered to our court-leet, "*de omnibus quidem cognoscit, non tamen de omnibus judicat* (takes cognizance of all offenses, but does not give judgment in all)."[b] The objects of their jurisdiction are

x 4 Inst. 261. 2 Hawk. P. C. 72.

y Mirror. c. 1. § 10.

z See Book I. pag. 113. [And note 1, *ante*, p. *252.]

a Part. 2. c. 19.

b Stiernh. de Jur. Goth. l. 1. c. 2.

therefore unavoidably very numerous, being such as in some degree, either less or more, affect the public weal, or good governance of the district in which they arise, from common nuisances and other material offenses against the king's peace and public trade down to eavesdropping, waifs and irregularities in public commons. But both the tourn and the leet have been for a long time in a declining way, a circumstance, owing in part to the discharge granted by the statute of Marlbridge, 52 Henry III, c. 10 (1267), to all prelates, peers and clergymen from their attendance upon these courts, which occasioned them to grow into disrepute. And hence it is that their business hath for the most part gradually devolved upon the quarter sessions, which it is particularly directed to do in some cases by statute 1 Edward IV, c. 2 (Justices and Sheriffs, 1461).

§ 309. 11. Court of the coroner.—The court of the *coroner*[c] is also a court of record, to inquire, when anyone dies in prison, or comes to a violent or sudden death, by what manner he came to his end. And this he is only entitled to do *super visum corporis* (on view of the body). Of the coroner and his office we treated at large in a former volume,[d] among the public officers and ministers of the kingdom, and therefore shall not here repeat our inquiries, only mentioning his court, by way of regularity, among the criminal courts of the nation.

§ 310. 12. Court of the clerk of the market.—[275] The court of the *clerk of the market*[e] is incident to every fair and market in the kingdom, to punish misdemeanors therein, as a court of *pie-poudre* is, to determine all disputes relating to private or civil property. The object of this jurisdiction[f] is principally the cognizance of weights and measures, to try whether they be according to the true standard thereof, or no—which standard was anciently committed to the custody of the bishop, who appointed some clerk under him to inspect the abuse of them more narrowly and hence this officer, though now usually a layman, is called the *clerk* of the

c 4 Inst. 271. 2 Hal. P. C. 53. 2 Hawk. P. C. 42.

d See Book I. pag. 349.

e 4 Inst. 273.

f See stat. 17 Car. II. c. 19 (1665). 22 Car. II. c. 8 (1670). 23 Car. II. c. 12 (1670).

market.[g] If they be not according to the standard, then, besides the punishment of the party by fine, the weights and measures themselves ought to be burned.[11] This is the most inferior court of criminal jurisdiction in the kingdom, though the objects of its coercion were esteemed among the Romans of such importance to the public, that they were committed to the care of some of their most dignified magistrates, the curule ædiles.

§ 311. II. Criminal courts of limited jurisdiction.—There are a few other criminal courts of greater dignity than many of these, but of a more confined and partial jurisdiction, extending only to some particular places, which the royal favor, confirmed by act of parliament, has distinguished by the privilege of having peculiar courts of their own, for the punishment of crimes and misdemeanors arising within the bounds of their cognizance. These, not being universally dispersed, or of general use, as the former, but confined to one spot, as well as to a determinate species of causes, may be denominated private or special courts of criminal jurisdiction.

I speak not here of ecclesiastical courts, which punish spiritual sins, rather than temporal crimes, by penance, contrition and excommunication, *pro salute animæ* (for the health of the soul); or, which is looked upon as equivalent to all the rest, by a sum of money [276] to the officers of the court by way of commutation of penance. Of these we discoursed sufficiently in the preceding book.[h] I am now speaking of such courts as proceed according to the course of the common law, which is a stranger to such unaccountable barterings of public justice.

§ 312. 1, 2. Courts of the king's household.—And, first, the court of the *lord steward, treasurer* or *comptroller* of the king's *household*[1] was instituted by statute 3 Henry VII, c. 14 (King's Household, 1487), to inquire of felony by any of the king's sworn servants, in the cheque roll of the household, under the degree of

[g] Bacon of English Gov. b. 1. c. 8. [1] 4 Inst. 133.

[h] See Book III. pag. 61.

---

11 The functions of this court have been superseded by the provisions of the Weights and Measures Act, 1878, under which offenses may be prosecuted, and all fines and forfeitures recovered, before a court of summary jurisdiction, that is, before petty sessions, with an appeal to general or quarter sessions.

a lord, in confederating, compassing, conspiring and imagining the death or destruction of the king, or any lord or other of his majesty's privy council, or the lord steward, treasurer or comptroller of the king's house. The inquiry, and trial thereupon, must be by a jury according to the course of the common law, consisting of twelve sad men (that is, sober and discreet persons), of the king's household.

The court of the *lord steward* of the king's *household*, or (in his absence) of the treasurer, comptroller and steward of the *Marshalsea*,[k] was erected by statute 33 Henry VIII, c. 12 (1541), with a jurisdiction to inquire of, hear and determine all treasons, misprisions of treason, murders, manslaughters, bloodshed and other malicious strikings, whereby blood shall be shed in any of the palaces and houses of the king, or in any other house where the royal person shall abide. The proceedings are also by jury, both a grand and a petit one, as at common law, taken out of the officers and sworn servants of the king's household. The form and solemnity of the process, particularly with regard to the execution of the sentence for cutting off the hand, which is part of the punishment for shedding blood in the king's court, is very minutely set forth in the said statute 33 Henry VIII, and the several officers of the servants of the household in and about such execution are [277] described, from the serjeant of the wood-yard, who furnishes the chopping-block, to the serjeant farrier, who brings hot irons to sear the stump.[12]

§ 313. 3. Courts of the universities. — As in the preceding book[1] we mentioned the courts of the two universities, or their chancellor's courts, for the redress of civil injuries, it will not be improper now to add a short word concerning the jurisdiction of their criminal courts, which is equally large and extensive. The chancellor's court of Oxford (with which university the author hath been chiefly conversant, though probably that of Cambridge hath

k *Ibid.* 2 Hal. P. C. 7.

[1] See Book III. pag. 83.

[12] So much of the act of 33 Henry VIII, c. 12, "as relates to the punishment of manslaughter, and of malicious striking by reason whereof blood shall be shed," was expressly repealed by the 9 George IV, c. 31 (1828); and the jurisdiction of the court itself has long since fallen into complete disuse.

also a similar jurisdiction) hath authority to determine all causes of property wherein a privileged person is one of the parties, except only causes of freehold; and also all criminal offenses or misdemeanors, under the degree of treason, felony or mayhem. The prohibition of meddling with freehold still continues, but the trial of treason, felony and mayhem, by a particular charter, is committed to the university jurisdiction in another court, namely, the court of the *lord high steward* of the university. For by the charter of 7 Jun. 2 Henry IV, 1400 (confirmed, among the rest, by the statute 13 Elizabeth, c. 29—Oxford and Cambridge Universities, 1571) cognizance is granted to the University of Oxford of all indictments of treasons, insurrections, felony and mayhem which shall be found in any of the king's courts against a scholar or privileged person; and they are to be tried before the high steward of the university, or his deputy, who is to be nominated by the chancellor of the university for the time being. But, when his office is called forth into action, such high steward must be approved by the lord high chancellor of England, and a special commission under the great seal is given to him and others to try the indictment then depending, according to the law of the land and the privileges of the said university. When, therefore, an indictment is found [278] at the assizes, or elsewhere, against any scholar of the university, or other privileged person, the vice-chancellor may claim the cognizance of it, and (when claimed in due time and manner) it ought to be allowed him by the judges of assize; 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 I take it that the high steward cannot proceed originally *ad inquirendum* (to inquire), but only, after inquest in the common-law courts, *ad audiendum et determinandum* (to hear and determine). Much in the same manner as, when a peer is to be tried in the court of the lord high steward of Great Britain, the indictment must first be found at the assizes, or in the court of king's bench, and then (in consequence of a writ of *certiorari*) transmitted to be finally heard and determined before his grace the lord high steward and the peers.

When the cognizance is so allowed, if the offense be *inter minora crimina* (among the lesser crimes), 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 the king's special commission to try the same. The process of the trial is this: The high steward issues one precept to the sheriff of the county, who thereupon returns a panel of eighteen freeholders, and another precept to the bedells of the university, who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio universitatis gaudentes* (laymen enjoying the privilege of the university)," and by a jury formed *de medietate*, half of freeholders and half of matriculated persons, is the indictment to be tried, and that in the guildhall of the city of Oxford. And if execution be necessary to be awarded, in consequence of finding the party guilty, the sheriff of the county must execute the university process; to which he is annually bound by an oath.[13]

[279] I have been the more minute in describing these proceedings, as there has happily been no occasion to reduce them into practice for more than a century past; nor will it perhaps ever be thought advisable to revive them, though it is not a right that merely rests *in scriptis* or theory, but has formerly often been carried into execution. There are many instances—one in the reign of Queen Elizabeth, two in that of James the First, and two in that of Charles the First—where indictments for murder have been challenged by the vice-chancellor at the assizes and afterwards tried before the high steward by jury. The commissions under the great seal, the sheriff's and bedell's panels, and all the other proceedings on the trial of the several indictments, are still extant in the archives of that university.

13 The University of Oxford still enjoys the privileges substantially as explained by Blackstone.

As regards the University of Cambridge, the like privilege of a general criminal jurisdiction appears to have been at one time enjoyed by that university; but, after long disputes with the corporation of the town of Cambridge, the jurisdiction was expressly excluded by the Cambridge Award Act, 1856, in all criminal matters, as well as in all civil actions, unless both parties are members of the university. Where, however, both parties are members of the university, treason, felony and mayhem may be tried in the court of high steward of the university before a jury; if cognizance is claimed by the vice-chancellor.—STEPHEN, 4 Comm. (16th ed.), 265.

CHAPTER THE TWENTIETH. [280]

OF SUMMARY CONVICTIONS.

§ 314. Summary proceedings.—We are next, according to the plan I have laid down, to take into consideration the proceedings in the courts of criminal jurisdiction, in order to the punishment of offenses. These are plain, easy and regular; the law not admitting any fictions, as in civil causes, to take place where the life, the liberty and the safety of the subject are more immediately brought into jeopardy. And these proceedings are divisible into two kinds, *summary* and *regular*, of the former of which I shall briefly speak before we enter upon the latter, which will require a more thorough and particular examination.

By a *summary* proceeding I mean principally such as is directed by several acts of parliament (for the common law is a stranger to it, unless in the case of contempts) for the conviction of offenders and the inflicting of certain penalties created by those acts of parliament. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only as the statute has appointed for his judge; an institution designed professedly for the greater ease of the subject, by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offense. [281] But it has of late been so far extended, as if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases.[1] For,

[1] In England now the largest class of summary proceedings are those which take place before the justices of the peace in the exercise of their ordinary jurisdiction in petty sessions, in respect of a variety of minor offenses. Some of these were formerly punishable at the court-leet, while that court was still in use; but the greater part of them have been created, and have been placed under the summary jurisdiction of the justices, by the provisions of modern acts of parliament, and are dealt with, under these acts, by the justices, in accordance with what are known as the Summary Jurisdiction Acts. But, besides these minor offenses, there are others of a graver description, which may also now be dealt with by the justices, and for which the punishment is in some cases a pecuniary penalty, and in others is either such a penalty or else imprisonment with hard labor for a term of six months, or (in the case of a second conviction) twelve months, or (in the case of a third or other subse-

§ 315. **1. For violating excise laws.**—Of this summary nature are all trials of offenses 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. And though such convictions are absolutely necessary for the due collection of the public money, and are a species of mercy to the delinquents, who would be ruined by the expense and delay of frequent prosecutions by action or indictment, and though such has usually been the *conduct* of the commissioners as seldom (if ever) to afford just grounds to complain of oppression, yet when we again[a] consider the various and almost innumerable branches of this revenue, which may be in their turns the subjects of frauds, or at least complaints of fraud, and of course the objects of this summary and arbitrary jurisdiction, we shall find that the *power* of these officers of the crown over the property of the people is increased to a very formidable height.

§ 316. **2. Proceedings before justices of the peace.**—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 offenses; such as common swearing, drunkenness, vagrancy, idleness and a vast variety of others, for which I must refer the student to the justice-books formerly cited,[b] and which used to be formerly punished by the verdict of a jury in the court-leet. This change in the administration of justice hath, however, had some mischiev-

[a] See Book I. pag. 318, etc.

[b] Lambard and Burn.

---

quent conviction) a longer period. These graver offenses include the abetment of any offense made punishable by way of summary conviction under the Larceny Act, 1861, and the Malicious Damage Act, 1861. Likewise, under the Offenses Against the Person Act, 1861, summary jurisdiction may be had in certain cases before two justices of the peace. The general cause of a proceeding before a court of summary jurisdiction is regulated by the Summary Jurisdiction Act, 1848. (4 Stephen, Comm. (16th ed.), 266.)

ous effects; as, 1. The almost entire disuse and contempt of the court-leet, and sheriff's tourn, the king's ancient courts of common law, formerly much revered and respected. [282] 2. The burdensome increase of the business of a justice of the peace, which discourages so many gentlemen of rank and character from acting in the commission, from an apprehension that the duty of their office would take up too much of that time which they are unwilling to spare from the necessary concerns of their families, the improvement of their understandings, and their engagements in other services of the public. Though if *all* gentlemen of fortune had it both in their power and inclinations to act in this capacity, the business of a justice of the peace would be more divided, and fall the less heavy upon individuals, which would remove what in the present scarcity of magistrates is really an objection so formidable, that the country is greatly obliged to any gentleman of figure who will undertake to perform that duty which in consequence of his rank in life he owes more peculiarly to his country. However, this backwardness to act as magistrates, arising greatly from this increase of summary jurisdiction, is productive of, 3. A third mischief, which is, that this trust, when slighted by gentlemen, falls of course into the hands of those who are not so, but the mere tools of office. And then the extensive power of a justice of the peace, which even in the hands of men of honor is highly formidable, will be prostituted to mean and scandalous purposes, to the low ends of selfish ambition, avarice or personal resentment. And from these ill consequences we may collect the prudent foresight of our ancient lawgivers, who suffered neither the property nor the punishment of the subject to be determined by the opinion of any one or two men; and we may also observe the necessity of not deviating any further from our ancient constitution, by ordaining new penalties to be inflicted upon summary convictions.

§ 317. a. Process in summary convictions. — The process of these summary convictions, it must be owned, is extremely speedy. Though the courts of common law have thrown in one check upon them, by making it necessary to *summon* the party accused before

he is [283] condemned. This is now held to be an indispensable requisite,[c] though the justices long struggled the point, forgetting that rule of natural reason expressed by Seneca,

> *"Qui statuit aliquid, parte inaudita altera,*
> *Æquum licet statuerit, haud æquus fuit."*
>
> (He who prefers a charge against another, however just it may be, will himself be unjust, unless the accused be heard in his own defense.)

A rule, to which all municipal laws that are founded on the principles of justice have strictly conformed; the Roman law requiring a citation at the least, and our own common law never suffering any fact (either civil or criminal) to be tried till it has previously compelled an appearance by the party concerned. After this summons, the magistrate, in summary proceedings, may go on to examine one or more witnesses, as the statute may require, upon oath, and then make his conviction of the offender, in writing, upon which he usually issues his warrant, either to apprehend the offender, in case corporal punishment is to be inflicted on him, or else to levy the penalty incurred, by distress and sale of his goods. This is, in general, the method of summary proceedings before a justice or justices of the peace; but for particulars we must have recourse to the several statutes, which create the offense, or inflict the punishment, and which usually chalk out the method by which offenders are to be convicted. Otherwise they fall, of course, under the general rule, and can only be convicted by indictment or information at the common law.

§ 318. 3. Contempt proceedings. — To this head of summary proceedings may also be properly referred the method, immemorially used by the superior courts of justice, of punishing contempts by *attachment*, and the subsequent proceedings thereon.

§ 319. a. Kinds of contempt. — 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

[c] Salk. 181. 2 Lord Raym. 1405.

opposition) [284] plainly tend to create an universal disregard of their authority. The principal instances, of either sort, that have been usually [d] punishable by attachment are chiefly of the following kinds: 1. Those committed by inferior judges and magistrates; by acting unjustly, oppressively or irregularly, in administering those portions of justice which are entrusted to their distribution, or by disobeying the king's writs issuing out of the superior courts, by proceeding in a cause after it is put a stop to or removed by writ of prohibition, *certiorari*, error, *supersedeas* and the like. For, as the king's superior courts (and especially the court of king's bench) have a general superintendence over all inferior jurisdictions, any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority whose duty it is to keep them within the bounds of justice. 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 acts of oppression, extortion, collusive behavior or culpable neglect of duty. 3. Those committed by attorneys and solicitors, who are also officers of the respective courts; by gross instances of fraud and corruption, injustice to their clients or other dishonest practice. For the malpractice of the officers reflects some dishonor on their employers, and, if frequent or unpunished, creates among the people a disgust against the courts themselves. 4. Those committed by jurymen, in collateral matters relating to the discharge of their office; such as making default, when summoned, refusing to be sworn or to give any verdict, eating or drinking without the leave of the court, and especially at the cost of either party, and other misbehaviors or irregularities 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 examine[illegible]varicating in their evidence when sworn. 6. Those comm[illegible]arties to any suit or proceeding before the court; as by disobed[illegible] to any [285] rule or order, made in the progress of a cause, by nonpayment of costs awarded by the court upon a motion, or by nonobservance of awards duly made by arbitrators or umpires, after having entered

[d] 2 Hawk. P. C. 142, etc.

into a rule for submitting to such determination.* Indeed, the attachment for most of this species of contempts, and especially for nonpayment of costs and nonperformance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. And therefore it hath been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by a general act of pardon. And, upon a similar principle, obedience to any rule of court may also, by statute 10 George III, c. 50 (Parliamentary Privilege, 1770), be enforced against any person having privilege of parliament by the process of distress infinite. 7. Those committed by any other persons under the degree of a peer, and even by peers themselves, when enormous and accompanied with violence, such as forcible *rescous* and the like;[f] or when they import a disobedience to the king's great prerogative writs, of prohibition, *habeas corpus*[g] and the rest. Some of these contempts may arise in the face of the courts; as by rude and contumelious behavior, by obstinacy, perverseness or prevarication, by breach of the peace, or any willful disturbance whatever; others in the absence of the party, as by disobeying or treating with disrespect the king's writ, or the rules or process of the court, by perverting such writ or process to the purposes of private malice, extortion or injustice, by speaking or writing contemptuously of the court or judges acting in their judicial capacity,[2] by printing false accounts (or even true ones without proper permission) of causes then depending in judgment, and by anything, in short, that demonstrates a gross want of that regard and respect which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.

* See Book III. pag. 17.

f Styl. 227. 2 Hawk. P. C. 152. Cro. Jac. 419. Salk. 586.

g 4 Burr. 632. Lords Journ. 7 Febr. 8 Jun. 1757.

---

2 "Blackstone includes under contempts punishable by attachment 'speaking or writing contemptuously of the court or judges acting in their judicial capacity,' but he cites no authorities. Where Hawkins, Wilmot, and Blackstone have failed to cite authority, we may reasonably conclude that none is to be found." ("King v. Almon," by John Charles Fox, 24 Law Quart. Rev. 192.)

§ 320. **b. Attachment in contempt cases.**—[286] The process of attachment, for these and the like contempts, must necessarily be as ancient as the laws themselves.[3] For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the supreme courts of justice 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 superior tribunal. Accordingly, we find it actually exercised as early as the annals of our law extend. And, though a very learned author [h] seems inclinable to derive this process from the statute of Westm. II, 13 Edward I, c. 39, 1285 (which ordains, that in case the process of the king's courts be *resisted* by the power of any great man, the sheriff shall chastise the resisters by imprisonment, "*a qua non deliberentur sine speciali præcepto domini regis* (from which they may not be released without special command of the king)"; and if the sheriff himself be resisted, he shall certify to the courts the names of the principal offenders, their aiders, consenters, commanders and favorers, and by a special writ judicial they shall be *attached* by their bodies to appear before the court, and if they be convicted thereof, they shall be punished at the king's pleasure, without any interfering by any other person whatsoever), yet he afterwards more justly concludes, that it is a part

h Gilb. Hist. C. P. c. 3.

---

3 "Blackstone refers to attachment as the method immemorially used by the superior courts of justice of punishing contempts, and states that the process must necessarily be as ancient as the laws themselves. To prove the antiquity of 'attachment in general' he refers to two authorities only. The first is Year-Book 20 Henry VI, 37, where an attorney was taken under an attachment to answer for issuing a *capias* of which there was no original. Upon examination he confessed the offense, and was sent to the Fleet; afterwards he came to the court, and was put to his fine and received judgment that he be struck off the roll;—an instance apparently of the exercise by the court of a statutory jurisdiction over its own officer. The other case is in Year-Book 22 Edward IV, 29, where, upon a prohibition, an attachment issued to enforce obedience to a writ requiring the Ordinary of St Albans to assoilize a party who was excommunicate. Here the process was applied to enforce obedience to the king's writ in a civil action." ("King v. Almon," by John Charles Fox. 24 Law Quart. Rev. 193.)

of the *law of the land*, and, as such, is *confirmed* by the statute of *Magna Carta*.[4]

If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges,[1] without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon *affidavit* see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him,[3] or, in very flagrant in-

[1] Staundf. P. C. 73. b. [3] Styl. 277.

---

[4] **The punishment of contempts.**—Whatever form the answer of a person charged with contempt may have taken at any particular period, or however the process may have been abused, it can hardly be doubted that it was a part of "the law of the land" from the earliest period of that law, and coeval with process for contempt. Without such an answer the defendant has no opportunity of stating his own side of the case: he has not that "day in court" which is essential to "due process of law" in every form. Instead of an innovation, borrowed from equity procedure, as Blackstone thinks, it is much more probably a relic of the primitive Anglo-Saxon process by which a freeman was entitled to meet every charge against him, civil or criminal, by his own oath, alone or with compurgators. That this took, in a case of contempt, the form of answers to interrogatories by the court, seems due to the fact that there was here no adverse or prosecuting party but the court itself, and consequently no other form in which the facts, as defendant was willing to admit them, could be so properly stated. By statute in many of the states it is now required that the judge should place on the record his statement of the contempt committed in open court before inflicting punishment, and thus give the accused an opportunity to meet it. This is only a more formal way of securing the same object.

The American courts have accepted without question Blackstone's doctrine that the power to punish contempts is necessarily as ancient as the laws themselves (text, p. *286), and an incident of judicial power. Hence the majority of them have disregarded Blackstone's limitation to "superior tribunals" (text, p. *286), and held that all courts of justice, whether of record or not, possess it. A few, however, deny it to justices' and municipal or police courts. (Matter of Kerrigan, 33 N. J. L. 344; Rutherford v. Holmes, 66 N. Y. 368; Brooker v. Commonwealth, 12 Serg. & R. (Pa.) 175; Morrison v. McDonald, 21 Me. 550.) It has been denied to a court commissioner in Haight v. Lucia, 36 Wis. 355.

The decisions allowing it to all judicial tribunals are too numerous to cite here. It has even been held that the power to punish contempts committed

stances of contempt, the attachment issues in the first instance,[k] as it also [287] does if no sufficient cause be shown to discharge, and thereupon the court confirms and makes absolute the original rule. This process of attachment is merely intended to bring the party into court, and, when there, he must either stand committed, or put in bail, in order to answer upon oath to such *interrogatories* as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the court be exhibited within the first four days;[l] and,

k Salk. 84. Stra. 185. 564. l 6 Mod. 73.

---

in their presence, or others tending to overthrow their authority and dignity, is so inherent that it cannot be taken away by statute. (Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. Ed. 242; State v. Morrill, 16 Ark. 384; United States v. New Bedford Bridge, 1 Wood. & M. 401, 440; Fed. Cas. No. 15,867; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528.)

As to other contempts the question of jurisdiction is almost inextricably mixed up in the cases with the question what acts constitute a contempt. (See cases collected in 12 Am. Dec. 179–186.)

One class of contempts at least should be much more carefully distinguished than they sometimes are. These are the cases of disobedience to some order or judgment of the court for the payment of money or act to be done in the interest of another party; where the contempt lies in a mere nonfeasance, and is punished not in the interest of the court or public, but in that of another suitor. Here the procedure is only a private remedy in disguise, and should be governed by the same rules.

Thus it has been held that a judge had no power to imprison a judgment defendant for contempt in not paying over money found in his pocket by supplementary proceedings. (Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529.) So, also, the punishment of attorneys for unprofessional conduct is not, properly speaking, a case of contempt, but rests on a different principle. (State v. Start, 7 Iowa, 499; People v. Turner, 1 Cal. 143, 52 Am. Dec. 295; Ex parte Smith, 28 Ind. 47.)

This last distinction is of special importance with reference to the question of appeal. The procedure to punish a contempt belonging to each court as a matter of self-protection, no other court can interfere with its action. The supreme court cannot punish contempt of an inferior court (Penn v. Messenger, 1 Yeates (Pa.), 2; Tillinghast's Case, 4 Pet. 108, 7 L. Ed. 798); nor can any appellate court interfere by mandamus, prohibition or otherwise to compel or to restrain a lower court in such vindications of its own dignity. (Chamberlain's Case, 4 Cow. (N. Y.) 49; Sanders v. Metcalf, 1 Tenn. Ch. 419.) On the same principle a judgment for contempt is not reviewable in any other

if any of the interrogatories is improper, the defendant may refuse to answer it, and move the court to have it struck out.[m] If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury.[n] If he confesses the contempt, the court will proceed to correct him by fine or imprisonment, or both, and sometimes by a corporal or infamous punishment.[o] If the contempt be of such a nature that, when the fact is once acknowledged, the court can receive no further information by interrogatories than it is already possessed of (as in the case of a *rescous*[p]), the defendant may be admitted to make such simple

m Stra. 444.
n 6 Mod. 73.
o Cro. Car. 146.
p The King v. Elkins, M. 8 Geo. III. B. R.

---

court at common law. The cases on this subject are collected in Yates v. Lansing, 9 Johns. 395, 6 Am. Dec. 290, and also in 12 Am. Dec. 184. The leading ones are Chambers' Case, Ld. Raym. 1108; Cro. Car. 168, 579, 79 Eng. Reprint. 717, 746; Brass Crosby's Case, 2 W. Black. 754, 96 Eng. Reprint, 441; Trewyniard's Case, 1 Dyer, 59 b. Wherever a review or an appeal lies from it in this country, it is by virtue of a statute.

But to apply such a rule to the so-called contempts that consist in a mere denial of private remedies or rights would of course be unjust and unconstitutional. (Buel v. Street, 9 Johns. 443; McCredie v. Senior, 4 Paige, 378; Shannon v. State, 18 Wis. 604; Dillon v. State, 6 Tex. 55; Jackson v. State, 21 Tex. 668.)

The punishment of contempt in this country is limited to fine and imprisonment. I know of no attempt to extend it, as in England (text p. *287), to a corporal or infamous punishment.—HAMMOND.

The statement by Hammond that the power to punish contempts "is so inherent that it cannot be taken away," is generally sustained by the courts. (Carter v. Commonwealth, 96 Va. 791, 45 L. R. A. 310, 32 S. E. 780. See note in 36 L. R. A. 254, to Hale v. State, 55 Ohio St. 210, 60 Am. St. Rep. 691, 45 N. E. 199.) The subject of contempt is treated in 6 Ruling Case Law, 486.

The origin and history of contempt, with some criticism of Blackstone's views, is given in two able articles by John Charles Fox, in 25 Law Quart. Rev. 238 and 354, entitled "The Summary Process to Punish Contempt." The concluding paragraphs are as follows:

"The law as it stands is so firmly established that parliament alone can effect an alteration, if alteration be necessary. Attempts to introduce legislation with the object of regulating the punishment of contempt of court have been made in recent times. Bills for this purpose were brought in in 1883, 1892, 1894 and 1908, but failed to pass. In the session of 1906 the house of commons passed a resolution 'That the jurisdiction of judges in dealing with

acknowledgment, and receive his judgment, without answering to any interrogatories; but if he willfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court.

§ 321. 4. Reflections on proceedings by summary conviction. It cannot have escaped the attention of the reader that this method of making the defendant answer upon oath to a criminal charge is not agreeable to the genius of the common law in any other instance,[q] and seems, indeed, to have been derived to the courts of king's bench and common pleas through the medium of the courts of equity. For the whole process of the courts of equity, in the several stages of a cause, and finally to enforce their decrees, was, till [288] the introduction of sequestrations, in the nature of a process of contempt, acting only *in personam* (against the person) and not *in rem* (against the matter or thing). And there, after the party in contempt has answered the interrogatories, such his answer may be contradicted and disproved by *affidavits* of the adverse

q See Book III. pag. 100, 101.

---

contempt of court is practically arbitrary and unlimited and calls for the action of parliament with a view to its definition and limitation,' and the house passed a similar resolution in 1908.

"At the present day there can be no complaint that this branch of the law is administered in an arbitrary manner by the judges, but there are some blemishes in principle which it might be well to remove. Thus, the power to examine an offender by interrogatories might be entirely abolished; a right of appeal might be given in all cases of contempt in which the right does not already exist; a limited power to fine and imprison might be given in the case of contempts punished by summary process; contempts punishable by indictment or information might be clearly defined. When the time comes, perhaps the opportunity may be taken to provide that striking in court shall no longer subject the offender to the risk, however slight, of losing his right hand, for as late as 1799 this was said to be still the penalty at common law, and it was considered that upon conviction the court would be bound to pronounce this sentence (Rex v. Earl of Thanet (1799), 27 How. St. Tr. 821). The offense of striking in court, it will be remembered, is distinct from the statutory one of striking in the king's palace so as to draw blood, created by 33 Henry VIII, c. 12, and abolished by 9 George IV, c. 31, § 1 (see 3 Inst. 140–142)."

party; whereas, in the courts of law, the admission of the party to purge himself by oath is more favorable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed. And, with regard to this singular mode of trial, thus admitted in this one particular instance, I shall only for the present observe, that as the process by attachment in general appears to be extremely ancient,[r] and has in more modern times been recognized, approved and confirmed by several express acts of parliament,[s] so the method of examining the delinquent himself upon his oath, with regard to the contempt alleged, is at least of as high antiquity,[t] and by long and immemorial usage is now become the law of the land.

[r] Yearb. 20 Hen. VI. 37 (1441). 22 Edw. IV. 29 (1482).

[s] Stat. 43 Eliz. c. 6. § 3 (1601). 13 Car. II. st. 2. c. 2. § 4 (1661). 9 & 10 W. III. c. 15 (1697). 12 Ann. st. 2. c. 15, § 5 (1713).

[t] M. 5. Edw. IV. rot. 75. cited in Rast. Ent. 268. pl. 5.

CHAPTER THE TWENTY-FIRST. [289]

OF ARRESTS.

§ 322. Ordinary proceedings in courts of criminal jurisdiction. We are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction, which may be distributed under twelve general heads, following each other in a progressive order, *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. Clergy; 9. Judgment, and its consequences; 10. Reversal of judgment; 11. Reprieve, or pardon; 12. Execution,—all which will be discussed in the subsequent part of this book.[1]

§ 323. I. Arrest.—First, then, of an *arrest*, which is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable in all criminal cases; but no man is to be arrested unless charged with such a crime as will at least justify holding him to bail when taken. And, in general, an arrest may be made four ways: 1. By warrant; 2. By an officer without warrant; 3. By a private person also without warrant; 4. By an hue and cry.

§ 324. 1. Arrests under warrants.—[290] A warrant may be granted in extraordinary cases by the privy council, or secretaries of state;[a] but ordinarily by justices of the peace., This they may do in any cases where they have a jurisdiction over the offense, in order to compel the person accused to appear before them;[b] for it would be absurd to give them power to examine an offender un-

[a] 1 Lord Raym. 65.

[b] 2 Hawk. P. C. 84.

---

[1] For history of the proceedings in the courts of criminal jurisdiction, see 1 Stephen, Hist. Crim. Law, c. VII, "History of the Law of Criminal Procedure—Procedure Down to Committal for Trial or Bail"; c. VIII, "Forms of Accusation and Trial—Appeals—Ordeals—Trial by Jury"; c. IX, "Legal Incidents of a Criminal Trial—Indictment and Information—Arraignment, Trial, and Verdict"; c. X, "Proceedings by Way of Appeal."

less they had also a power to compel him to attend and submit to such examination. And this extends undoubtedly to all treasons, felonies and breaches of the peace, and also to all such offenses as they have power to punish by statute.

§ 325. a. Warrants issued by justices of the peace.—Sir Edward Coke, indeed,[c] hath laid it down, that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion,—no, not even till an indictment be actually found,—and the contrary practice is by others[d] held to be grounded rather upon connivance than the express rule of law, though now by long custom established; a doctrine which would in most cases give a loose to felons to escape without punishment, and therefore Sir Matthew Hale hath combated it with invincible authority and strength of reason, maintaining: 1. That a justice of peace hath power to issue a warrant to apprehend a person *accused* of felony, though not yet *indicted;*[e] and, 2. That he may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted, as also to *prove* the cause and probability of suspecting the party against whom the warrant is prayed.[f] This warrant ought to be under the hand and seal of the justice, should set forth the time and place of making and the cause for which it is made, and should be directed to the [291] constable, or other peace officer (or it may be to any private person by name[g]), requiring him to bring the party either generally before *any* justice of the peace for the county, or only before the justice who granted it; the warrant in the latter case being called a *special* warrant.[h]

§ 326. b. General warrants illegal.—A *general* warrant to apprehend all persons suspected, without naming or particularly

[c] 4 Inst. 176.
[d] 2 Hawk. P. C. 84.
[e] 2 Hal. P. C. 108.
[f] *Ibid.* 110.
[g] Salk. 176.
[h] 2 Hawk. P. C. 85.

describing any person in special, is illegal and void for its uncertainty;[1] for it is the duty of the magistrate, and ought not 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;[k] whereas a warrant, properly penned (even though the magistrate who issues it should exceed his jurisdiction), will, by statute 24 George II, c. 44 (Constable's Protection, 1750), at all events indemnify the officer who executes the same ministerially.

§ 327. **c. Execution of warrants.**—And, 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 justice of the court of king's bench extends all over the kingdom, and is *tested*, or dated, *England*, not *Oxfordshire*, *Berks* or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed by a justice of the [292] peace in another, as Middlesex, before it can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county; but the practice of backing warrants had long prevailed without law, and was at last authorized by statutes 23 George II, c. 26 (1749), and 24 George II, c. 55 (Apprehension on Indorsed War-

[1] 1 Hal. P. C. 580. 2 Hawk. P. C. 82.

[k] A practice had obtained in the secretaries' office ever since the restoration, grounded on some clauses in the acts for regulating the press, of issuing *general* warrants to take up (without naming any person in particular) the authors, printers and publishers of such obscene or seditious libels, as were particularly specified in the warrant. When those acts expired in 1694, the same practice was inadvertently continued, in every reign and under every administration, except the four last years of Queen Anne, down to the year 1763; when such a warrant being issued to apprehend the authors, printers and publishers of a certain seditious libel, its validity was disputed; and the warrant was adjudged by the whole court of king's bench to be void, in the case of Money v. Leach. Trin. 5 Geo. III. B. R. After which, the issuing of such general warrants was declared illegal by a vote of the house of commons. (Com. Journ. 22 Apr. 1766.)

rants, 1750). And now by statute 13 George III, c. 31 (Criminal Law, 1772), any warrant for apprehending an English offender who may have escaped into Scotland, and *vice versa*, may be indorsed and executed by the local magistrates, and the offender conveyed back to that part of the United Kingdoms in which such offense was committed.* [2]

§ 328. 2. Arrests by officers without warrants. — Arrests by *officers without warrant* may be executed, 1. By a justice of the 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.[l] 2. The sheriff, and 3. The coroner, may apprehend any felon within the county without warrant. 4. The constable, of whose office we formerly spoke,[m] hath great original and inherent authority with regard to arrests.[3] He may, without war-

* All criminal process of a state is of course valid only within the state. The extradition of a criminal found in another state *must* be obtained, through a request made by the one executive upon the other.—HAMMOND.

[l] 1 Hal. P. C. 86.

[m] See Book I. pag. 355.

---

2 The principles stated by Blackstone stand substantially under the modern statutes regulating the issue of warrants.

3 **Arrests by officers without warrant.**—In England, under the common law, sheriffs, justices of the peace, coroners, constables and watchmen were entrusted with special powers as conservators of the peace, with authority to arrest felons and persons reasonably suspected of being felons. Whenever a charge of felony was brought to their notice, supported by reasonable grounds of suspicion, they were required to apprehend the offenders, or at least to raise hue and cry, under penalty of being indicted for neglect of duty. (Porter v. State, 124 Ga. 297, 2 L. R. A. (N. S.) 730, 52 S. E. 283; Doering v. State, 49 Ind. 56, 19 Am. Rep. 669; Simmons v. Vandyke, 138 Ind. 380, 46 Am. St. Rep. 411, 26 L. R. A. 33, 37 N. E. 973; Palmer v. Maine Cent. R. Co., 92 Me. 399, 69 Am. St. Rep. 513, 44 L. R. A. 673, 42 Atl. 800; Baltimore & O. R. Co. v. Cain, 81 Md. 87, 28 L. R. A. 688, 31 Atl. 801; Pinkerton v. Verberg, 78 Mich. 573, 18 Am. St. Rep. 473, 7 L. R. A. 507, 44 N. W. 579; State v. Evans, 161 Mo. 95, 84 Am. St. Rep. 669, and note, 61 S. W. 590; Somerset Bank v. Edmund, 76 Ohio St. 396, 10 Ann. Cas. 726, 11 L. R. A. (N. S.) 1170, 81 N. E. 641.) Conservators of the peace also had the authority to make arrests without warrants in case of a misdemeanor which involved a breach of the peace committed in the presence of the officer making the arrest. (Veneman v. Jones,

rant, arrest anyone for a breach of the peace, committed in his view, and carry him before a justice of the peace. 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 justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken, and, if he or his assistants be killed in attempting such arrest, it is murder in all concerned.[n] 5. Watchmen

[n] 2 Hal. P. C. 88–96.

---

118 Ind. 41, 10 Am. St. Rep. 100, 20 N. E. 644; Commonwealth v. Wright, 158 Mass. 149, 35 Am. St. Rep. 475, and note, 19 L. R. A. 206, 33 N. E. 82; Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97, and note; State v. Dierberger, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168; State v. McAfee, 107 N. C. 812, 10 L. R. A. 607, 12 S. E. 435; Martin v. Houck, 141 N. C. 317, 7 L. R. A. (N. S.) 576, 54 S. E. 291.) The right to dispense with warrants in these instances probably had its origin in the necessity of preventing the escape of offenders during the period of delay incident to procuring warrants if such formality had been required. (Porter v. State, 124 Ga. 297, 2 L. R. A. (N. S.) 730, 52 S. E. 283.) Although policemen were unknown to the common law, they are generally considered as being the legal equivalent of watchmen (State v. Evans, 161 Mo. 95, 84 Am. St. Rep. 669, and note, 61 S. W. 590; Angell v. State, 36 Tex. 542, 14 Am. Rep. 380), and where public officials are expressly authorized by statute or by municipal ordinance to conserve the peace, they have, in making arrests, all the common-law authority of constables and watchmen, and may arrest any person who they, upon reasonable ground, believe has committed a felony (People v. Kilvington, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799; Croom v. State, 85 Ga. 718, 21 Am. St. Rep. 179, 11 S. E. 1035; Robinson v. State, 93 Ga. 77, 44 Am. St. Rep. 127, 18 S. E. 1018; Veneman v. Jones, 118 Ind. 41, 10 Am. St. Rep. 100, 20 N. E. 644; Cook v. Hastings, 150 Mich. 289, 13 Ann. Cas. 194, 14 L. R. A. (N S.) 1123, 114 N. W. 71; State v. Evans, 161 Mo. 95, 84 Am. St. Rep. 669, and note, 61 S. W. 590; Lawton v Harkins, 34 Okl. 545, 42 L. R. A. (N. S.) 69, 126 Pac. 727), although it afterwards appears that no felony was actually perpetrated. (Doering v. State, 49 Ind. 56, 19 Am. Rep. 669; Palmer v. Maine Cent. R. Co., 92 Me. 399, 69 Am. St. Rep. 513, 44 L. R. A. 673, 42 Atl. 800; Scott v. Eldridge, 154 Mass. 25, 12 L. R. A. 379, 27 N. E. 677; Diers v. Mallon, 46 Neb. 121, 50 Am. St. Rep. 598, and note, 64 N. W. 722; Eanes v. State, 6 Humph. (Tenn.) 53, 44 Am. Dec. 289, and note.) This right of an officer to make an arrest for a felony is absolute (84 Am. St. Rep. 685, note; 8 L. R. A. 530, note), and exists in cases of felonies created by statute as well as those recognized by the common law (Burroughs v. Eastman, 101 Mich. 419, 45 Am. St. Rep. 419, 24 L. R. A. 859, 59 N. W. 817; Wade v. Chaffee, 8 R. I. 224, 5 Am. Rep. 572), and a constable or other police

either those appointed by the statute of Winchester, 13 Edward I, c. 4 (1285), to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to the constable, may *virtute officii* (by virtue of their office) arrest all offenders, and particularly night-walkers, and commit them to custody till the morning.[o]

§ 329. 3. Arrests by private persons.—Any private person (and *a fortiori* a peace officer) that is present when any felony is committed is bound by the law [293] to arrest the felon, on pain of fine and imprisonment if he escapes through the negligence of the standers-by.[p4] And they may justify breaking open doors

[o] *Ibid.* 98.

[p] 2 Hawk. P. C. 74.

---

officer is not bound to procure a warrant before making an arrest for a felony, although there may be no reason to fear an escape in consequence of delay in procuring the warrant. (Wade v. Chaffee, 8 R. I. 224, 5 Am. Rep. 572.) It seems that an officer also has authority to take steps to prevent the commission of a felony by arresting a person when he has reasonable ground to believe that the latter is about to commit a felony (Cunningham v. Baker, 104 Ala. 160, 53 Am. St. Rep. 27, 16 South. 68; Cook v. Hastings, 150 Mich. 289, 13 Ann. Cas. 194, 14 L. R. A. (N. S.) 1123, 114 N. W. 71), and that persons acting and recognized as *de facto* police officers have the same right as *de jure* officers in making arrests. (State v. Dierberger, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168; Weatherford v. State, 31 Tex. Crim. 530, 37 Am. St. Rep. 828, and note, 21 S. W. 251.) Police officers likewise have the right to arrest without a warrant any person who commits a breach of the peace in their presence, although the offense does not amount to a felony. (Doering v. State, 49 Ind. 56, 19 Am. Rep. 669; Diers v. Mallon, 46 Neb. 121, 50 Am. St. Rep. 598, and note, 64 N. W. 722.)—RULING CASE LAW, II, 446.

4 **Arrest by private persons without warrant.**—The rule at common law was that every person, whether an officer or not, who was present when a felony was committed was bound by the law to arrest the felon on pain of fine and imprisonment (Kennedy v. State, 107 Ind. 144, 57 Am. Rep. 99, 6 N. E. 305; Brooks v. Commonwealth, 61 Pa. St. 352, 100 Am. Dec. 645), and a private person as well as an officer could, to prevent a felony, make an arrest without a warrant if he was sure that a felony was about to be committed in his presence. (State v. Davis, 50 S. C. 405, 62 Am. St. Rep. 837, 27 S. E. 905; Spalding v. Preston, 21 Vt. 9, 50 Am. Dec. 68.) Nevertheless the authority of a private individual to make arrests was at common law, and is at the present time, much more limited and confined than that of officers. (Palmer v. Maine Cent. R. Co., 92 Me. 399, 69 Am. St. Rep. 513, 44 L. R. A. 673, 42 Atl. 800.) If

upon following such felon, and if *they kill him*, provided he cannot be otherwise taken, it is justifiable; though if *they are killed* in endeavoring to make such arrest, it is murder.[q] Upon probable suspicion, also, a private person may arrest the felon or other person so suspected.[r] But he cannot justify breaking open doors to do it, and if either party kill the other in the attempt, it is manslaughter, and no more.[s] It is no more, because there is no malicious design to kill; but it amounts to so much because it would be of most pernicious consequence if, under pretense of suspecting felony, any private person might break open a house or kill another, and also because such arrest upon suspicion is barely *permitted* by the law, and not *enjoined*, as in the case of those who are present when a felony is committed.

q 2 Hal. P. C. 77.

r Stat. 30 Geo. II. c. 24 (1756).

s 2 Hal. P. C. 82, 83.

---

a felony has in fact been committed by the person arrested, the arrest may be justified by any person without a warrant; but if an innocent person is arrested on suspicion by a private individual, the person making the arrest must be prepared to prove in justification both that a felony had been committed (Porter v. State, 124 Ga. 297, 2 L. R. A. (N. S.) 730, and note, 52 S. E. 283; Simmons v. Vandyke, 138 Ind. 380, 46 Am. St. Rep. 411, 26 L. R. A. 33, 37 N. E. 973; Brooks v. Commonwealth, 61 Pa. St. 352, 100 Am. Dec. 645; Bergeron v. Peyton, 106 Wis. 377, 80 Am. St. Rep. 33, 82 N. W. 291), and that in making the arrest he had probable cause, and that the circumstances under which he acted were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the person arrested committed or was implicated in the crime. (Bright v. Patton, 5 Mackey (D. C.), 534, 60 Am. Rep. 396; Doering v. State, 49 Ind. 56, 19 Am. Rep. 669; Palmer v. Maine Cent. R. Co., 92 Me. 399, 69 Am. St. Rep. 513, 44 L. R. A. 673, 42 Atl. 800; Baltimore & O. R. Co. v. Cain, 81 Md. 87, 28 L. R. A. 688, 31 Atl. 801; Maliniemi v. Gronlund, 92 Mich. 222, 31 Am. St. Rep. 576, 52 N. W. 627; Filer v. Smith, 96 Mich. 347, 35 Am. St. Rep. 603, and note, 55 N. W. 999; Brockway v. Crawford, 48 N. C. 433, 67 Am. Dec. 250; Brooks v. Commonwealth, 61 Pa. St. 352, 100 Am. Dec. 645.) If, in fact, no felony was committed by anyone, an arrest by a private individual, without warrant, is illegal, and may give rise to an action for damages, although an officer would have been justified in making an arrest under similar circumstances. (Bright v. Patton, 5 Mackey (D. C.), 534, 60 Am. Rep. 396; Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; Martin v. Houck, 141 N. C. 317, 7 L. R. A. (N. S.) 576, 54 S. E. 291; Brooks v. Commonwealth, 61 Pa. St. 352, 100 Am. Dec. 645.) If a felony has in fact been committed by the person arrested, the arrest without a warrant by a pri-

§ 330. **4. Arrest by hue and cry.**—There is yet another species of arrest wherein both officers and private men are concerned, and that is upon an *hue* and *cry* raised upon a felony committed. An 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.[t] [5] It is also mentioned by statute Westm. I, 3 Edward I, c. 9 (Pursuit of Felons, 1275), and 4 Edward I, *de officio coronatoris* (of the office of coroner, 1276). But the principal statute relative to this matter is that of Winchester, 13 Edward I, c. 1 & 4 (1285), which directs that from thenceforth every county shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town and from county to county; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry, with all the town and the towns near, and so hue and cry shall be made from town to town, until they be taken and delivered to the sheriff. And, that such hue and cry may more effectually be made, the [294] hundred is bound by the same statute, c. 3, to answer for all robberies therein committed, unless they take the felon, which is the foundation of an action

[t] Bracton. l. 3. tr. 2. c. 1. § 1. Mirr. c. 2. § 6.

---

vate individual may be justified whether there was or was not time to obtain a warrant (Bright v. Patton, 5 Mackey (D. C.), 534, 60 Am. Rep. 396; Baltimore & O. R. Co. v. Cain, 81 Md. 87, 28 L. R. A. 688, 31 Atl. 801; Diers v. Mallon, 46 Neb. 121, 50 Am. St. Rep. 598, 64 N. W. 722; Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; Martin v. Houck, 141 N. C. 317, 7 L. R. A. (N. S.) 576, 54 S. E. 291), or whether he was present or absent at the time of the offense. (Martin v. Houck, 141 N. C. 317, 7 L. R. A. (N. S.) 576, 54 S. E. 291.) A private person may arrest for an affray or breach of the peace committed in his presence, and while it is continuing, but not for a misdemeanor on suspicion, no[illegible]tter how well-grounded. (Palmer v. Maine Cent. R. Co., 92 Me. 399, 69 A[illegible]. Rep. 513, 44 L. R. A. 673, 42 Atl. 800; Ross v. Leggett, 61 Mich. 445, 1 Am. St. Rep. 608, 28 N. W. 695.)—RULING CASE LAW, II, 449.

5 From the twelfth century on the hue and cry was gradually replaced by summons and warrants, and the hue and cry practically fell into disuse.

Where a person ran from his place of business to join the hue and cry and shot the fugitive, it was held that his conviction of manslaughter ought to be reversed. (People v. Lillard, 18 Cal. App. 343, 123 Pac. 221.)

against the hundred,[u] in case of any loss by robbery. By statute 27 Elizabeth, c. 13 (Hue and Cry, 1584), no hue and cry is sufficient, unless made with both horsemen and footmen. And by statute 8 George II, c. 16 (Hue and Cry, 1734), the constable or like officer refusing or neglecting to make hue and cry forfeits 5*l*.; and the whole vill or district is still in strictness liable to be amerced, according to the law of Alfred, if any felony be committed therein and the felon escapes: an institution which hath long prevailed in many of the eastern countries, and hath in part been introduced even into the Mogul empire about the beginning of the last century, which is said to have effectually delivered that vast territory from the plague of robbers by making in some places the villages, in others the officers of justice, responsible for all the robberies committed within their respective districts.[w] Hue and cry[x] may be raised either by precept of a justice of the peace, or by a peace officer, or by any private man that knows of a felony. The party raising it must acquaint the constable of the vill with all the circumstances which he knows of the felony and the person of the felon, and thereupon the constable is to search his own town, and raise all the neighboring vills, and make pursuit with horse and foot; and in the prosecution of such hue and cry the constable and his attendants have the same powers, protection and indemnification as if acting under the warrant of a justice of the peace. But if a man wantonly or maliciously raises an hue and cry without cause, he shall be severely punished as a disturber of the public peace.[y]

§ 331. 5. Rewards for apprehending felons.—In order to encourage further the apprehending of certain felons, rewards and immunities are bestowed on such as bring them to justice, by divers acts of parliament. The statute 4 & 5 W. & M., c. 8 (Apprehension of Highwaymen, 1692), enacts that such as apprehend a highwayman and prosecute him to conviction shall receive a reward of 40*l*. from the public, to be paid to them (or, if [295] killed in the endeavor to take him, their executors) by the sheriff of the county, besides the horse, furniture, arms, money and other goods taken

u See Book III. pag. 160.
w Mod. Un. Hist. vi. 383. vii. 156.
x 2 Hal. P. C. 100–104.
y 1 Hawk. P. C. 75.

upon the person of such robber, with a reservation of the right of any person from whom the same may have been stolen; to which the statute 8 George II, c. 16 (Hue and Cry, 1734), superadds 10*l.* to be paid by the hundred indemnified by such taking. By statutes 6 & 7 W. III, c. 17 (Coin, 1694), and 15 George II, c. 28 (Counterfeiting Coin, 1741), persons apprehending and convicting any offender against those statutes, respecting the coinage, shall (in case the offense be treason or felony) receive a reward of forty pounds, or ten pounds if it only amount to counterfeiting the copper coin. By statute 10 & 11 W. III, c. 23 (1698), any person apprehending and prosecuting to conviction a felon guilty of burglary, housebreaking, horse-stealing or private larceny to the value of 5*s.* from any shop, warehouse, coach-house or stable, shall be excused from all parish offices. And by statute 5 Ann., c. 31 (Apprehension of Housebreakers, 1706), any person so apprehending and prosecuting a burglar or felonious housebreaker (or, if killed in the attempt, his executors), shall be entitled to a reward of 40*l.*[z] By statute 6 George I, c. 23 (Robbery, 1719), persons discovering, apprehending and prosecuting to conviction any person taking reward for helping others to their stolen goods shall be entitled to forty pounds. By statute 14 George II, c. 6 (Cattle-stealing, 1740), explained by 15 George II, c. 34 (1741), any person apprehending and prosecuting to conviction such as steal, or kill with intent to steal, any sheep or other cattle specified in the latter of the said acts, shall for every such conviction receive a reward of ten pounds. Lastly, by statute 16 George II, c. 15 (Return of Offenders from Transportation, 1742), and 8 George III, c. 15 (Transportation, 1767), persons discovering, apprehending and convicting felons and others being found at large during the term for which they are ordered to be transported shall receive a reward of twenty pounds.[6]

[z] The statutes 4 & 5 W. & M. c. 8 (1692), 6 & 7 W. III. c. 17 (1694), and 5 Ann. c. 31 (1706), (together with 3 Geo. I. c. 15, § 4 (1716), which directs the method of reimbursing the sheriffs) are extended to the county palatine of Durham, by stat. 14 Geo. III. c. 46 (1774).

[6] There are modern statutes regulating the bestowing of rewards.

CHAPTER THE TWENTY-SECOND. [296]

OF COMMITMENT AND BAIL.

§ 332. II. Commitment and bail.—When a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace; and how he is there to be treated, I shall next show, under the second head of *commitment* and *bail*.[1]

§ 333. 1. Examination of accused.—The justice before whom such prisoner is brought is bound immediately to examine the circumstances of the crime alleged; and to this end, by statute 2 & 3 Ph. & M., c. 10 (Criminal Law, 1555), he is to take in writing the examination of such prisoner, and the information of those who bring him: which, Mr. Lambard observes,[a] was the first warrant given for the examination of a felon in the English law. For, at the common law, *nemo tenebatur prodere seipsum* (no one was obliged to betray himself); and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men. If upon this inquiry it manifestly appears, either that no such crime was committed or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison or give bail; that is, put in securities for his appearance, to answer the charge against him.[2] This commitment, therefore, being only for safe custody, wherever bail will answer the same intention, it ought to be taken, as in most of the inferior crimes; but

[a] Eirenarch. b. 2. c. 7. See pag. 357.

---

1 Commitment and bail are now chiefly regulated by the Indictable Offense Act, 1848, and the Criminal Law Amendment Act, 1867.

2 The constitutions of the United States and of the several states provide that excessive bail shall not be required. Most of the state constitutions require that all accused persons shall be bailable by sufficient sureties, unless for capital offenses where the proof is evident or the presumption great. In other states, there are statutes of character similar to the English. Where neither the constitution nor state law contains such a provision, bail is allowed under the common-law rule, and the court may grant or refuse the privilege in its discretion. (Vanderford v. Brand, 126 Ga. 67, 9 Ann. Cas. 617, 54 S. E. 822.)

in felonies and other offenses of a capital [297] nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit to save his own life? And what satisfaction or indemnity is it to the public to seize the effects of them who have bailed a murderer if the murderer himself be suffered to escape with impunity? Upon a principle similar to which the Athenian magistrates, when they took a solemn oath never to keep a citizen in bonds that could give three sureties of the same quality with himself, did it with an exception to such as had embezzled the public money, or been guilty of treasonable practices.[b] What the nature of bail is hath been shown in the preceding book,[c] *viz.*, a delivery, or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance: he being supposed to continue in their friendly custody instead of going to gaol.* In civil cases we have seen that every defendant is bailable; but in criminal matters it is otherwise. Let us therefore inquire in what cases the party accused ought or ought not to be admitted to bail.

§ 334. **2. Rules as to taking bail.**—And, first, to refuse or delay to bail any person bailable is an offense against the liberty of the subject, in any magistrate, by the common law,[d] as well as by the statute Westm. I, 3 Edward I, c. 15 (Bail, 1275), and the *habeas corpus* act, 31 Car. II, c. 2 (1679). And, lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute 1 W. & M., st. 2, c. 1 (1688), that excessive bail ought not to be required; though what bail shall be called excessive must be left to the courts, on considering the circumstances of the case, to determine. And, on the other hand, if the magistrate takes insufficient bail, he is liable to be fined if the criminal doth not ap-

* Notice the connection between *bail* in criminal cases and the bailment of chattels. The prisoner is bailed to his sureties, and supposed to be always in the custody of his bail: whence the rules allowing them to retake him at any time and without legal process.—HAMMOND.

b Pott. Antiq. b. 1. c. 18.

c See Book III. pag. 290.

d 2 Hawk. P. C. 90.

pear.[e] Bail may be taken either in court or in some particular cases by the sheriff, coroner or other magistrate, but most usually by the justices of the peace. Regularly, in all offenses either against the common [298] law or act of parliament that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some special act of parliament.[f] In order, therefore, more precisely to ascertain what offenses *are* bailable,

§ 335. 3. Offenses not bailable.—Let us next see who may *not* be admitted to bail, or, what offenses are *not* bailable. And here I shall not consider any one of those cases in which bail is ousted by statute from prisoners *convicted* of particular offenses, for then such imprisonment without bail is part of their sentence and punishment. But where the imprisonment is only for safe custody *before* the conviction, and not for punishment *afterwards*, in such cases bail is ousted or taken away wherever the offense is of a very enormous nature; for then the public is entitled to demand nothing less than the highest security that can be given, *viz.*, the body of the accused, in order to insure that justice shall be done upon him, if guilty. Such persons, therefore, as the author of the Mirror observes,[g] have no other sureties but the four walls of the prison. By the ancient common law before[h] and since[i] the Conquest, all felonies were bailable till murder was excepted by statute; so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. I, 3 Edward I, c. 15 (Bail, 1275), takes away the power of bailing in treason and in divers instances of felony. The statutes 23 Henry VI, c. 9 (Sheriffs, 1444), and 1 & 2 Ph. & Mar., c. 13 (Criminal Law, 1554), give further regulations in this matter; and upon the whole we may collect[k] that no justice of the peace can bail, 1. Upon an accusation of treason;

[e] *Ibid.* 89.

[f] 2 Hal. P. C. 127.

[g] Ch. 2. § 24.

[h] 2 Inst. 189.

[i] *In omnibus placitis de felonia solet accusatus per plegios dimitti, præterquam in placito de homicidio, ubi ad terrorem aliter statutum est.* (In all pleas of felony the accused is usually discharged upon bail, except in the plea of murder, where, to deter others, it is otherwise decreed.) (Glanv. l. 14. c. 1.)

[k] 2 Inst. 186. 2 Hal. P. C. 129.

nor, 2. Of murder; nor, 3. In case of manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so, or if any indictment be found against him; nor, 4. Such as, being committed for felony, have broken prison, because it not only carries a presumption of guilt, but is also superadding one felony to another; 5. Persons outlawed; 6. Such as have abjured the realm; 7. Approvers, [299] of whom we shall speak in a subsequent chapter, and persons by them accused; 8. Persons taken with the mainour, or in the fact of felony; 9. Persons charged with arson; 10. Excommunicated persons, taken by writ of *de excommunicato capiendo* (for taking an excommunicated person): all which are clearly not admissible to bail by the justices. Others are of a dubious nature; as, 11. Thieves openly defamed and known; 12. Persons charged with other felonies, or manifest and enormous offenses not being of good fame; and 13. Accessories to felony, that labor under the same want of reputation. These seem to be in the discretion of the justices, whether bailable or not. The last class are such as *must* be bailed upon offering sufficient surety; as, 14. Persons of good fame, charged with a bare suspicion of manslaughter or other inferior homicide; 15. Such persons being charged with petit larceny or any felony not before specified; or, 16. With being accessory to any felony.

§ 336. **a. Power of king's bench to bail.**—Lastly, it is agreed that the court[l] of king's bench (or any judge[m] thereof in time of vacation) may bail for any crime whatsoever, be it treason,[n] murder[o] or any other offense, according to the circumstance of the

[l] 2 Inst. 189. Latch. 12. Vaugh. 157. Comb. 111. 298. 1 Comyns Dig. 495.

[m] Skin. 683. Salk. 105. Stra. 911. 1 Comyns Dig. 497.

[n] In the reign of Queen Elizabeth it was the unanimous opinion of the judges, that no court could bail upon a commitment, for a charge of high treason by any of the queen's privy council. (1 Anders. 298.)

[o] *In omnibus placitis de felonia solet accusatus per plegios dimitti, præterquam in placito de homicidio.* (Glanvil. l. 14. c. 1.) *Sciendum tamen quod, in hoc placito, non solet accusatus per plegios dimitti, nisi ex regiæ potestatis beneficio.* (*Ibid.* c. 3.) (In all pleas of felony the accused is usually discharged upon bail, except in the plea of murder. Nevertheless it should be observed that, in this plea, it is not customary to discharge the accused on bail, unless through favor of the royal authority.)

case. And herein the wisdom of the law is very manifest. To allow bail to be taken commonly for such enormous crimes would greatly tend to elude the 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 offense. The law has therefore provided one court, and only one, which has a discretionary power of bailing in any case, except only, even to this high jurisdiction, and of course to all inferior ones, such persons as are committed by either house of parliament so long as the session [300] lasts, or such as are committed for contempts by any of the king's superior courts of justice.[p]

§ 337. b. Commitment for offenses not bailable. — Upon the whole, if the offense be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment; there to abide till delivered by due course of law.[q] But this imprisonment, as has been said, is only for safe custody, and not for punishment; therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters nor subjected to other hardships than such as are absolutely requisite for the purpose of confinement only; though what are so requisite must too often be left to the discretion of the gaolers, who are frequently a merciless race of men, and, by being conversant in scenes of misery, steeled against any tender sensation. Yet the law (as formerly held) would not justify them in fettering a prisoner, unless where he was unruly, or had attempted to escape:[r] this being the humane language of our ancient lawgivers,[s] "*custodes pœnam sibi commissorum non augeant, nec eos torqueant; sed omni sævitia remota, pietateque adhibita, judicia debite exequantur* (let not gaolers torture or augment the punishment of those entrusted to their keeping; but let the sentence of the law be duly yet mercifully executed)."

p Staundf. P. C. 73. b.
q 2 Hal. P. C. 122.
r 2 Inst. 381. 3 Inst. 34.
s Flet. l. 1. c. 26.

[301] # CHAPTER THE TWENTY-THIRD.

OF THE SEVERAL MODES OF PROSECUTION.

§ 338. III. Prosecution.—The next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation. And this is either upon a previous finding of the fact by an inquest or grand jury, or without such previous finding. The former way is either by *presentment* or *indictment*.

§ 339. 1. Presentment.—A presentment, *generally* taken, is a very comprehensive term, including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, *properly* speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation,[a] without any bill of indictment laid before them at the suit of the king; as the presentment of a nuisance, a libel and the like, upon which the officer of the court must afterwards frame an indictment[b] before the party presented can be put to answer it.[1] An inquisition of office is the act of a jury, summoned by the proper officer to inquire of matters relating to the crown upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traversed or denied, and therefore the inquest, or jury, ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of *felo de se;* of flight in persons accused of felony; of deodands and the like; and presentments of petty offenses in the sheriff's tourn or court-leet, whereupon the presiding officer may set a fine.[2] Other inquisi-

a Lamb. Eirenarch. l. 4. c. 5. b 2 Inst. 739.

---

1 The better known meaning of the term "presentment" is where the grand jury, who sit to inquire whether a bill of indictment presented for trial is a true bill or not, after hearing evidence in support of the bill, find that there is sufficient ground to warrant its being sent forward for trial. This finding is known as a presentment.—STEPHEN, 4 Comm. (16th ed.), 299.

2 An inquisition of *felo de se* cannot be traversed nor presentments of petty offenses in the leet; nor could presentments of such petty offenses in the tourn, or inquisitions of deodands, be traversed. (See note to this passage by Mr. Justice Coleridge, in 4 Lewis' Blackstone, *301.)

tions may be afterwards traversed and examined; as particularly the coroner's inquisition [302] of the death of a man, when it finds anyone 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, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely.

§ 340. 2. Indictment.—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.[3]

3 **Functions of the grand jury.**—The functions of the grand jury are so admirably stated by Mr. Justice Field, while on circuit, that an extended quotation is given from his charge to the grand jury in the United States circuit court.

"You are summoned as grand jurors of the circuit court of the United States for the district of California, and the duties with which you are charged are of the highest importance to the due administration of justice. By the constitution of the United States, no person can be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. No steps, therefore, can be taken, with the exceptions mentioned, for the prosecution of any crime of an infamous character—and under that designation the whole series of felonies is classed—beyond the arrest, examination and commitment of the party accused, until the grand jury have deliberated and acted upon the accusation. Your functions are, therefore, not only as already stated, important; they are indispensable to the administration of criminal justice.

"The institution of the grand jury is of very ancient origin in the history of England: it goes back many centuries. For a long period its powers were not clearly defined; and it would seem, from the accounts of commentators on the laws of that country, that it was at first a body, which not only accused, but which also tried public offenders. However this may have been in its origin, it was, at the time of the settlement of this country, an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown.

"In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen, which re-

§ 341. 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 of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do and execute all those things which on the part of our lord the king shall then and there be com-

quired the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it come from government or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes, unless this body, consisting of not less than sixteen, nor more than twenty-three, good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.

"From these observations, it will be seen, gentlemen, that there is a double duty cast upon you as grand jurors of this district; one a duty to the government, or, more properly speaking, to society, to see that parties against whom there is just ground to charge the commission of crime, shall be held to answer the charge; and, on the other hand, a duty to the citizen to see that he is not subjected to prosecution upon accusations having no better foundation than public clamor or private malice. . . .

"In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions and hearsay evidence. Subject to this qualification, you will receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused. And more: if, in the course of your inquiries, you have reason to believe that there is other evidence, not presented to you, within your reach, which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced. Formerly, it was held that an indictment might be found if evidence were produced sufficient to render the truth of the charge probable. But a different and a more just and merciful rule now prevails. To justify the finding of an indictment, you must be convinced, so far as the evidence before you goes, that the accused is guilty—in other words, you ought not to find an indictment unless, in your judgment, the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury.

"How far you should proceed to inquire into other matters than such as are brought to your consideration by the government, through its prosecuting

manded them.[d] They ought to be freeholders, but to what amount is uncertain:[e] which seems to be *casus omissus*, and as proper to be supplied by the legislature as the qualifications of the petit jury, which were formerly equally vague and uncertain, but are now settled by several acts of parliament. However, they are usually gentlemen of the best figure in the county. As many as appear

[d] 2 Hal. P. C. 154. [e] *Ibid.* 155.

---

officer, the district attorney, has been a matter of much conflict of opinion among different judges.

"Before giving our views upon this subject, it is proper to state that there is a wide difference between the powers and duties of grand juries of the state courts of California and of grand juries of the national courts.

"By a statute of the state, grand juries of the state courts possess very great inquisitorial powers. They are required to inquire into the official misconduct of public officers of every description in their county, and are entitled to the examination of all its public records. They are bound by their oath to inquire into and presentment make of all public offenses against the laws of the state committed or triable in their county, of which they have, or 'can obtain,' legal evidence. In order to ascertain whether or not there has been any official misconduct in any public officer, they have, under the statute, authority to inspect all his books and records, and to subject him to a searching examination.

"No such general authority to inspect the books of the officers of the United States, and to subject the officers themselves to examination in respect to the entries in those books, is possessed by the grand juries of the national courts. The exercise of such authority might prove of serious detriment to the public service, for it might interfere with the established system by which the accountability of the local officers of the United States to the executive departments at Washington is secured. You will readily perceive that an inspection by the grand jury, for instance, of the books of the collector of customs at this port, and requiring that officer to explain his entries and his conduct, often directed by private and confidential communications from those departments, might seriously embarrass the government in its action. So, too, embarrassment might follow from a similar inspection of the records and examination of other officers of the United States. . . .

"We return now to the inquiry as to what matters you can direct your investigation beyond those which are brought to your notice by the district attorney. Your oath requires you to diligently inquire, and true presentment make, 'of such articles, matters and things as shall be given you in charge, or otherwise come to your knowledge touching the present service.'

"The first designation of subjects of inquiry are those which shall be given you in charge; this means those matters which shall be called to your attention

upon this panel are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty-three; that twelve may be a majority. Which number, as well as the constitution itself, we find exactly described so early as the laws of King Ethelred.[f] "*Excant seniores duodecim thani, et præfectus cum eis, et jurent super sanctuarium quod eis in manus datur, quod nolint*

[f] Wilk. LL. Angl. Sax. 117.

---

by the court, or submitted to your consideration by the district attorney. The second designation of subjects of inquiry are those which shall 'otherwise come to your knowledge touching the present service'; this means those matters within the sphere of and relating to your duties which shall come to your knowledge, other than those to which your attention has been called by the court or submitted to your consideration by the district attorney.

"But how come to your knowledge?

"Not by rumors and reports, but by knowledge acquired from the evidence before you, or from your own observations. Whilst you are inquiring as to one offense, another and a different offense may be proved, or witnesses before you may, in testifying, commit the crime of perjury.

"Some of you, also, may have personal knowledge of the commission of a public offense against the laws of the United States, or of facts which tend to show that such an offense has been committed, or possibly attempts may be made to influence corruptly or improperly your action as grand jurors. If you are personally possessed of such knowledge, you should disclose it to your associates; and if any attempts to influence your action corruptly or improperly are made, you should inform them of it also, and they will act upon the information thus communicated as if presented to them in the first instance by the district attorney.

"But unless knowledge is acquired in one of these ways, it cannot be considered as the basis for any action on your part.

We, therefore, instruct you that your investigations are to be limited: First, to such matters as may be called to your attention by the court; or, second, may be submitted to your consideration by the district attorney; or, third, may come to your knowledge in the course of your investigations into the matters brought before you, or from your own observations; or, fourth, may come to your knowledge from the disclosures of your associates.

"You will not allow private prosecutors to intrude themselves into your presence, and present accusations. Generally such parties are actuated by private enmity, and seek merely the gratification of their personal malice.

"If they possess any information justifying the accusation of the person against whom they complain, they should impart it to the district attorney, who will seldom fail to act in a proper case. But if the district attorney should refuse to act, they can make their complaint to a committing magis-

ullum innocentem accusare, nec aliquem noxium celare (Let twelve elder freemen and the foreman with them retire and swear upon the Holy Book which is given into their hands that they will not accuse any innocent person nor screen any criminal)." In the time of King Richard the First (according to Hoveden) the process of electing the grand jury, ordained by that prince, was as follows: Four knights were to be taken from the county at large, who chose two more out of every hundred, which two associated

trate, before whom the matter can be investigated, and if sufficient evidence be produced of the commission of a public offense by the accused, he can be held to bail to answer to the action of the grand jury.

"When the court does not deem the matter of sufficient importance to call your attention to it, and the district attorney does not think it expedient to submit the matter to your consideration, and the private prosecutor neglects to proceed before the committing magistrate, we think it may be safely inferred that public justice will not suffer, if the matter is not considered by you.

"A preliminary examination of the accused before a magistrate, where he can meet his prosecutor face to face, and cross-examine him, and the witnesses produced by him, and have the benefit of counsel, is the usual mode of initiating proceedings in criminal cases, and is the one which presents to the citizen the greatest security against false accusations from any quarter. And this mode ought not to be departed from, except in those cases where the attention of the jury is directed to the consideration of particular offenses by the court, or by the district attorney, or the matter is brought to their knowledge in the course of their investigations, or from their own observations, or from disclosures made by some of their number.

"We have been led, gentlemen, to give these instructions upon the nature of your duties and the limits to the sphere of your investigations, because an impression widely prevails that the institution of the grand jury has outlived its usefulness, an impression which has been created from a disregard of those limits, and the facility with which it has, unfortunately, often been used as an instrument for the gratification of private malice. . . .

"The oath which you have taken indicates the impartial spirit with which your duties should be discharged. You are to present no one from envy, hatred or malice; nor shall you leave anyone unpresented for fear, favor, affection, hope of reward or gain; but shall present all things truly as they come to your knowledge according to the best of your understanding.

"You are also to keep your own deliberations secret; you are not at liberty even to state that you have had a matter under consideration. Great injustice and injury might be done to the good name and standing of a citizen if it were known that there had ever been before you for deliberation the question of his guilt or innocence of a public offense. You will allow no one to ques-

to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably [303] found too large and inconvenient; but the traces of this institution still remain, in that some

tion you as to your own action or the action of your associates on the grand jury.

"To authorize you to find an indictment or presentment there must be a concurrence of at least twelve of your number; a mere majority will not suffice.

"The constitution, as you have observed, speaks of a presentment or indictment by a grand jury. The latter—the indictment—is a formal accusation made by the grand jury charging a party with the commission of a public offense. Formerly it was the practice in all courts having jurisdiction to inquire by the intervention of a grand jury of public offenses, amounting to the grade of felonies—and such is the practice now in many courts—for the public prosecutor to hand to the grand jury an instrument of this character—that is, a bill of an indictment in form, with a list of the witnesses to establish the offense charged. If in such case the jury found that the evidence produced justified the finding of an indictment they indorsed on the instrument 'A true bill'; otherwise, 'Not found,' or 'Not a true bill,' or the words 'Ignoramus'—we know nothing of it—from the use of which latter word the bill was sometimes said to be ignored.

"A presentment differs from an indictment in that it wants technical form, and is usually found by the grand jury upon their own knowledge, or upon the evidence before them, without having any bill from the public prosecutor. It is an informal accusation, which is generally regarded in the light of instructions upon which an indictment can be framed.

"This form of accusation has fallen in disuse since the practice has prevailed—and the practice now obtains generally—for the prosecuting officer to attend the grand jury and advise them in their investigations.

"The government now seldom delivers bills of indictment to the grand jury in advance of their action, but generally awaits their judgment upon the matters laid before them. The district attorney has the right to be present at the taking of testimony before you for the purpose of giving information or advice touching any matter cognizable by you, and may interrogate witnesses before you, but he has no right to be present pending your deliberations on the evidence. When your vote is taken upon the question whether an indictment shall be found or a presentment made, no person besides yourselves should be present.

"These, gentlemen, are all the general instructions which we have thought important to give you at this time."—FIELD, J., Charge to Grand Jury, 2 Sawy. 667, Fed. Cas. No. 18,255.

of the jury must be summoned out of every hundred.[4] This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king but at the suit of any private prosecutor, and they are only to hear evidence on behalf of the prosecution; for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes, and not to rest satisfied merely with remote probabilities: a doctrine that might be applied to very oppressive purposes.[5]

§ 342. (1) Offenses cognizable by the grand jury.—The grand jury are sworn to inquire only for the body of the county, *pro corpore comitatus;* and therefore they cannot regularly inquire of a fact done out of that county for which they are sworn, unless particularly enabled by act of parliament. And to so high a nicety was this matter anciently carried, that where a man was wounded in one county and died in another, the offender was at common law indictable in neither, because no complete act of felony was done in any one of them: but by statute 2 & 3 Edward VI, c. 24 (Criminal Law, 1548), he is now indictable in the county where the party died. And, by statute 2 George II, c. 21 (Murder, 1728), if the stroke or poisoning be in England, and the death upon the sea or out of England, or, *vice versa*, the offenders and their accessories may be indicted in the county where either the death, poisoning or stroke shall happen. And so in some other cases; as, particularly, where treason is committed out of the

5 State Trials. IV. 183.

---

4 Until the Juries Act, 1825. At the sessions of the peace, the qualification of grand jurors is the same as that required for petty jurors in the trial of civil causes at the assizes, or *nisi prius;* grand jurors at the assizes or at borough sessions require no qualification by estate; grand jurors need not be freeholders. (7 Ency. Laws of Eng., 576.)

realm, it may be inquired of in any county within the realm as the king shall direct, in pursuance of statutes 26 Henry VIII, c. 13 (High Treason, 1534), 33 Henry VIII, c. 23 (Criminal Law, 1541), 35 Henry VIII, c. 2 (Treason, 1543), and 5 & 6 Edward VI, c. 11 (Treason, 1551). And counterfeiters, washers or minishers [304] of the current coin, together with all manner of felons and their accessories, may by statute 26 Henry VIII, c. 6—Marches in Wales, 1534 (confirmed and explained by 34 & 35 Henry VIII, c. 26, §§ 75, 76—Wales (Government), 1542) be indicted and tried for those offenses, if committed in any part[h] of Wales, before the justices of gaol delivery and of the peace in the next adjoining county of England, where the king's writ runneth; that is, at present in the county of Hereford or Salop, and not, as it should seem, in the county of Chester or Monmouth; the one being a county palatine where the king's writ did not run, and the other a part of Wales, in 26 Henry VIII (1534).[i] Murders, also, whether committed in England or in foreign parts,[k] may by virtue of the statute 33 Henry VIII, c. 23 (Criminal Law, 1541), be inquired of and tried by the king's special commission in any shire or place in the kingdom. By statute 10 & 11 W. III, c. 25 (Trade to Newfoundland, 1698), all robberies and other capital crimes committed in Newfoundland may be inquired of and tried in any county in England. Offenses against the black-act, 9 George I, c. 22 (Criminal Law, 1722), may be inquired of and tried in any county of England at the option of the prosecutor.[l] So felonies in destroying turnpikes, or works upon navigable rivers, erected by authority of parliament, may by statutes 8 George II, c. 20 (Destruction of Turnpikes, 1734) and 13 George III, c. 84 (Turnpike Roads, 1772), be inquired of and tried in any adjacent county. By statute 26 George II, c. 19 (Stealing Shipwrecked Goods, 1753), plundering or stealing from any vessel in distress or wrecked, or breaking any ship contrary to 12 Ann., st. 2, c. 18 (Stranded Ships, 1713),[m]

h Stra. 533. 8 Mod. 134.

i See Hardr. 66.

k Ely's Case, at the Old Bailey. Dec. 1720. Roache's Case. Dec. 1775.

l So held by all the judges, H. 11 Geo. III (1770), in the case of Richard Mortis on a case referred from the Old Bailey.

m See page 246.

may be prosecuted either in the county where the fact is committed or in any county next adjoining, and, if committed in Wales, then in the next adjoining English county, by which is understood to be meant such English county as, by the statute 26 Henry VIII above mentioned, had before a concurrent jurisdiction with the great sessions of felonies committed in Wales.[n] Felonies committed out of the realm, in burning or destroying the king's ships, [305] magazines or stores, may by statute 12 George III, c. 24 (Dock-yards Protection, 1771), be inquired of and tried in any county of England, or in the place where the offense is committed. By statute 13 George III, c. 63 (East India Company, 1772), misdemeanors committed in India may be tried upon information or indictment in the court of king's bench in England; and a mode is marked out for examining witnesses by commission and transmitting their depositions to the court. But, in general, all offenses must be inquired into as well as tried in the county where the fact is committed. Yet if larceny be committed in one county and the goods carried into another, the offender may be indicted in either; for the offense is complete in both.[o] Or he may be indicted in England for larceny in Scotland and carrying the goods with him into England, or *vice versa*, or for receiving in one part of the United Kingdom goods that have been stolen in another.[p] But for robbery, burglary and the like, he can only be indicted where the fact was actually committed; for though the carrying away and keeping of the goods is a continuation of the original taking, and is therefore larceny in the second county, yet it is not a robbery or burglary in that jurisdiction. And if a person be indicted in one *county* for larceny of goods originally taken in another, and be thereof convicted or stands mute, he shall not be admitted to his clergy; provided the original taking be attended with such

[n] At Shrewsbury summer assizes, 1774, Parray and Roberts were convicted of plundering a vessel which was wrecked on the coast of Anglesey. It was moved in arrest of judgment, that Chester and not Salop was the next adjoining English county. But all the judges (in Mich. 15 Geo. III, 1774) held the prosecution to be regular.

[o] 1 Hal. P. C. 507.

[p] Stat. 13 Geo. III. c. 31 (Criminal Law, 1772).

circumstances as would have ousted him of his clergy by virtue of any statute made previous to the year 1691.[q 5]

§ 343. (2) Proceedings of the grand jury.—When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill, "*ignoramus*," or, we know nothing of it, intimating that though the

q Stat. 25 Hen. VIII. c. 3 (Standing Mute, 1533). 3 W. & M. c. 9 (Benefit of Clergy, 1691).

---

5 **Extraterritorial offenses.**—The statutes cited in this paragraph alone sufficiently refute the assertion often made of late, that the common law of England took no cognizance of crimes committed out of the realm. For if any such rule or principle had been recognized by it, a statute punishing offenses at sea, in Newfoundland, or in India, then a foreign country, would have been grossly inconsistent with it. The courts of the constable and marshal in the middle ages were constantly exercising a jurisdiction of this kind over the king's subjects abroad, "having jurisdiction in pleas of life and member, as well out of the realm as within it." (Text, p. *263. And see, also, Book III, p. *68.)

In the early books are many cases proving jurisdiction of wrongs out of the territory. In the Parl. 18 Edward I. (Ryley, p. 39, pl. xxi.) is a case of a woman suing for the death of (*sequentem pro morte;* probably this means an appeal, though the word in any other connection would mean an ordinary action) her husband, slain on the coast (*costera*) of Britanny in the kingdom of France. It is said by the king that the woman should sue where she saw fit, and that justice should be done her *according to the law and custom of the kingdom of England.*

Again, in 21 Edward I. (Ryley, pp. 184–186) is a case brought by merchants of Tours and Rochelle against an English shipmaster on a contract made for a voyage from Rochelle to Dam in Flanders, the master being accused of barratry, etc. And it is to be noticed that when an issue had been formed as to freight due under the contract (*conventio*), both the English shipmaster and the foreign merchants put themselves on the country, and the record is sent down to be tried in the king's bench.

In 22 Edward I (Ryley, p. 188) the case is between a Dutch merchant and English master for the wrongful taking of a ship and tackle, etc., and it is tried by a jury of Gloucester. But the issue seems to have been on facts occurring in Bristol.

Upon the common-law doctrine see 2 Stephen, Hist. of Common Law, pp. 12–16. He cites 33 Henry VIII, c. 23, as authorizing trials for treason or murder without the king's dominions as well as within. Subsequent acts to same effect are 43 George III, c. 11, § 6, which adds to the list manslaughter; repealed

facts might possibly be true, that truth did not appear to them; but now they assert in English, more absolutely, "not a true bill," or (which is the better way) "not found," and then the party is discharged without further answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then [306] indorse upon it, "a true bill"; anciently, "*billa vera.*" 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 so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offense unless by the unanimous voice of twenty-four of his equals and neighbors; 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. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree.[r] And the indictment, when so found, is publicly delivered into court.

§ 344. b. Requisites of an indictment. — Indictments must have a precise and sufficient certainty. By statute 1 Henry V, c. 5 (Legal Procedure, 1413), all indictments must set forth the Christian name, surname and addition of the state and degree, mystery,

r 2 Hal. P. C. 161.

---

and re-enacted by 9 George IV, c. 31, and this by 24 & 25 Vict., c. 100, 1861, now in force; covering murder and manslaughter on land out of the United Kingdom, and whether within the queen's dominions or without.

Lord Coke says distinctly that the crimes of Englishmen abroad are under the jurisdiction of the constable and marshal, and felonies at sea under that of the admiral; and the procedure is governed by the laws of the realm. (2 Inst. 5; citing, Year-Book, 13 Henry IV, 5, and 19 Henry VI, 7.)

The fact is that the only limit known to the common law in the punishment of crime was that resulting from the doctrine of *venue* (text, p. *306), and the impossibility of finding either a grand or petit jury to indict or try such offenses, unless one was provided by statute. Practically this had a large effect to prevent not only the punishment of serious crimes, but the prosecution of private torts committed abroad. But to convert this into the recognition of a formal theory of criminal law, as stated by modern writers, is a gross anachronism, and productive of serious misconceptions.—HAMMOND.

town or place, and the county of the offender; and all this to identify his *person*. The *time* and *place* are also to be ascertained, by naming the day and township in which the fact was committed; though a mistake in these points is in general not held to be material, provided the *time* be laid previous to the finding of the indictment and the *place* to be within the jurisdiction of the court, unless where the place is laid not merely as a *venue*, but as part of the description of the fact.[s] But sometimes the *time* may be very material, where there is any limitation in point of time assigned for the prosecution of offenders; as by the statute 7 Will. III, c. 3 (Treason, 1695), which enacts that no prosecution shall be had for any of the treasons or misprisions therein mentioned (except an assassination designed or attempted on the person of the king) unless the bill of indictment be found within three years after the offense committed;[ss] and, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The offense itself must also be set forth with clearness and certainty, and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offense, [307] that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done, "treasonably, and against his allegiance"; anciently, "*proditorie et contra ligeantiæ suæ debitum*": else the indictment is void. In indictments for murder it is necessary to say that the party indicted "murdered," not "killed," or "slew," the other, which till the late statute was expressed in Latin by the word "*murdravit.*"[t] In all indictments for felonies the adverb "feloniously, *felonice*," must be used; and for burglaries also, "*burglariter*," or in English, "burglariously": and all these to ascertain the intent. In rapes, the word "*rapuit*," or "ravished," is necessary, and must not be expressed by any periphrasis, in order to render the crime certain. So in larcenies, also, the words "*felonice cepit et asportavit*, feloniously took and carried away," are necessary to every indictment; for these only can express the very offense. Also in indictments for murder, the length and depth of the wound should in general be expressed,

[s] 2 Hawk. P. C. 435.

[ss] Fost. 249.

[t] See Book III. pag. 321.

in order that it may appear to the court to have been of a mortal nature; but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also, where a limb or the like is absolutely cut off, there such description is impossible.[u] Lastly, in indictments the *value* of the thing, which is the subject or instrument of the offense, must sometimes be expressed. In indictments for larcenies this is necessary, that it may appear whether it be grand or petit larceny, and whether entitled or not to the benefit of clergy. In homicide of all sorts it is necessary, as the weapon with which it is committed is forfeited to the king as a deodand.

Other methods of prosecution formerly in use.—The remaining methods of prosecution are without any previous finding by a jury, to fix the authoritative stamp of verisimilitude upon the accusation. One of these, by the common law, was when a thief was taken *with the mainour*, that is, with the thing stolen upon him, *in manu* (in his hand). For he might, when so detected *flagrante delicto* (in open crime), be brought into court, arraigned and tried, without indictment; as by the [308] Danish law he might be taken and hanged upon the spot, without accusation or trial.[w] But this proceeding was taken away by several statutes in the reign of Edward the Third,[x] though in Scotland a similar process remains to this day.[y] So that the only species of proceeding at the suit of the king, without a previous indictment or presentment by a grand jury, now seems to be that of *information*.[6]

[u] 5 Rep. 122.
[w] Stiernh. de Jure Sueon. l. 3. c. 5.
[x] 2 Hal. P. C. 149.
[y] Lord Kayms. I. 331.

[6] In some of the American states felonies must be prosecuted by indictment, and the federal constitution provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." This requirement applies, however, only to federal courts, and a state law which permits the prosecution of felonies by information does not violate the United States constitution. Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232, 4 Sup. Ct. Rep. 111; Bolln v. Nebraska, 176 U. S. 83, 44 L. Ed. 382, 20 Sup. Ct. Rep. 287. In a number of the states the law provides that the usual mode of prosecution shall be information. The proceeding by criminal information

§ 345. 3. Informations. — Informations are of two sorts: First, those which are partly at the suit of the king and partly at that of a subject, and, secondly, such as are only in the name of the king.

§ 346. a. Qui tam prosecutions. — The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king and another to the use of the informer, and are a sort of *qui tam* actions (the nature of which was explained in a former volume[z]), only carried on by a criminal instead of a civil process; upon which I shall therefore only observe that by the statute 31 Elizabeth, c. 5 (Common Informers, 1588), no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the king and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offense, nor on behalf of the crown after the lapse of two years longer; nor, where the forfeiture is originally given only to the king, can such prosecution be had after the expiration of two years from the commission of the offense.

§ 347. b. Informations in the name of the king.—The informations that are exhibited in the name of the king alone are also of two kinds: First, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney general; secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or com-

[z] See Book III. pag. 160.

---

comes from the common law without the aid of statutes. It is widely permissible; the rule appearing to be that it is a concurrent remedy with indictment for all misdemeanors except misprision of treason, which is a misdemeanor, but not for treason or any felony. 1 Bishop, New Crim. Proc., § 141; Prynn's Case, 5 Mod. 459, 87 Eng. Reprint, 764; State v. Hewlett, 124 Ala. 471, 27 South. 18; State v. Dover, 9 N. H. 468; State v. Whitlock, 41 Ark. 403. In Connecticut, from an early period, all criminal prosecutions have been carried on by information, except where the punishment is death or imprisonment for life. Romero v. State, 60 Conn. 92, 22 Atl. 496. In states allowing information, it is usually made, not upon knowledge of an officer, but of some other person called the relator.

mon informer, and they are filed by the king's coroner and attorney in the court of king's bench, usually called the master of the crown office, who is for this purpose the standing officer of the public.

§ 348. **(1) Ex officio.**—The objects of the king's own prosecutions, filed *ex officio* by his own attorney general, are properly such enormous [309] misdemeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal; the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal; which power, thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts.

§ 349. **(2) Ex relatione.**—The objects of the other species of informations filed by the master of the crown office upon the complaint or relation of a private subject are any gross and notorious misdemeanors, riots, batteries, libels and other immoralities of an atrocious kind,[a] not peculiarly tending to disturb the government (for those are left to the care of the attorney general), but which, on account of their magnitude or pernicious example, deserve the most public animadversion. And when an information is filed, either thus, or by the attorney general *ex officio*, it must be tried by a petit jury of the county where the offense arises; after which, if the defendant be found guilty, the court must be resorted to for his punishment.

§ 350. **c. History of prosecutions by information.**—There can be no doubt but that this mode of prosecution by information (or suggestion) filed on record by the king's attorney general, or by his coroner or master of the crown office in the court of king's bench, is as ancient as the common law itself.[b] For as the king was bound

[a] 2 Hawk. P. C. 260.

[b] 1 Show. 118.

to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal suit, so, when these, his immediate officers, were otherwise sufficiently assured that a man had committed a gross misdemeanor, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any further intelligence, to convey that information to the court of king's bench by a [310] suggestion on record, and to carry on the prosecution in his majesty's name. But these informations (of every kind) are confined by the constitutional law to mere misdemeanors only; for wherever any capital offense is charged, the same law requires that the accusation be warranted by the oath of twelve men before the party shall be put to answer it. And, as to those offenses in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his majesty's court of king's bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment. But when the statute 3 Henry VII, c. 1 (Star-chamber, 1487), had extended the jurisdiction of the court of star-chamber, the members of which were the sole judges of the law, the fact and the penalty, and when the statute 11 Henry VII, c. 3 (Offenses Against Statutes, 1495), had permitted informations to be brought by any informer upon any penal statute, not extending to life or member, at the assizes or before the justices of the peace, who were to hear and determine the same according to their own discretion, then it was that the legal and orderly jurisdiction of the court of king's bench fell into disuse and oblivion, and Empson and Dudley (the wicked instruments of King Henry VII) by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices,[c] continually harassed the subject and shamefully enriched the crown. The latter of these acts was soon indeed repealed by

[c] 1 And. 157.

statute 1 Henry VIII, c. 6 (Justices of the Peace, 1509), but the court of star-chamber continued in high vigor, and daily increasing its authority, for more thar. a century longer, till finally abolished by statute 16 Car. I, c. 10 (Star-chamber, 1640).

Upon this dissolution the old common-law [d] authority of the court of king's bench, as the *custos morum* (keeper of the morals), of the nation, being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived in practice.[e] [311] And it is observable that, in the same act of parliament which abolished the court of star-chamber, a conviction by information is expressly reckoned up, as one of the legal modes of conviction of such persons as should offend a third time against the provisions of that statute.[f] It is true, Sir Matthew Hale, who presided in this court soon after the time of such revival, is said [g] to have been no friend to this method of prosecution; and, if so, the reason of such his dislike was probably the ill use which the master of the crown office then made of his authority, by permitting the subject to be harassed with vexatious informations whenever applied to by any malicious or revengeful prosecutor, rather than his doubt of their legality or propriety upon urgent occasions.[h] For the power of filing informations, without any control, then resided in the breast of the master, and, being filed in the name of the king, they subjected the prosecutor to no costs, though on trial they proved to be groundless. This oppressive use of them, in the times preceding the revolution, occasioned a struggle, soon after the accession of King William,[i] to procure a declaration of their illegality by the judgment of the court of king's bench. But Sir John Holt, who then presided there, and all the judges, were clearly of opinion that this proceeding was grounded on the common law, and could not be then impeached. And, in a few years afterwards, a more temperate remedy was applied in parliament, by statute

[d] 5 Mod. 464.

[e] Styl. Rep. 217. 245. Styl. Pract. Reg. tit. Information. pag. 187. (edit. 1657.) 2 Sid. 71. 1 Sid. 152.

[f] Stat. 16 Car. I. c. 10. § 6 (Star-chamber, 1640).

[g] 5 Mod. 460.

[h] 1 Saund. 301. 1 Sid. 174.

[i] M. 1 W. & M. 5 Mod. 459. Comb. 141. Far. 361. 1 Show. 106.

4 & 5 W. & M., c. 18 (Criminal Procedure 1692), which enacts that the clerk of the crown shall not file any information without express direction from the court of king's bench, and that every prosecutor permitted to promote such information shall give security by a recognizance of twenty pounds (which now seems to be too small a sum) to prosecute the same with effect, and to pay costs to the defendant, in case he be acquitted thereon, unless the judge who tries the information shall certify there was reasonable cause for filing it, and, at all events, to pay costs, unless [312] the information shall be tried within a year after issue joined. But there is a proviso in this act that it shall not extend to any other informations than those which are exhibited by the master of the crown office; and, consequently, informations at the king's own suit, filed by his attorney general, are no way restrained thereby.

§ 351. d. Informations in the nature of quo warranto.—There is one species of information still further regulated by statute 9 Ann., c. 20 (Municipal Offices, 1710), *viz.*, those in the nature of a writ of *quo warranto*, which was shown in the preceding volume[k] to be a remedy given to the crown against such as had usurped or intruded into any office or franchise. The modern information tends to the same purpose as the ancient writ, being generally made use of to try the civil rights of such franchises, though it is commenced in the same manner as other informations are, by leave of the court, or at the will of the attorney general; being properly a criminal prosecution, in order to fine the defendant for his usurpation as well as to oust him from his office, yet usually considered at present as merely a civil proceeding.

These are all the methods of prosecution at the suit of the king. There yet remains another, which is merely at the suit of the subject, and is called an *appeal*.

§ 352. 4. Appeals.—An appeal, in the sense wherein it is here used, does not signify any complaint to a superior court of an injustice done by an inferior one, which is the general use of the word, but it here means an original suit, at the time of its first

[k] See Book III. pag. 262.

commencement.'[7] An appeal, therefore, when spoken of as a criminal prosecution, denotes an accusation by a private subject against another, for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offense against the public. As this method of prosecution is still in force, I cannot omit to mention it; but, as it is very little in use, on account of the [313] great nicety required in conducting it, I shall

1 It is derived from the French, "*appeller*," the verb active, which signifies to call upon, summon, or challenge one; and not the verb neuter, which signifies the same as the ordinary sense of "appeal" in English.

---

7 **Prosecution by appeal.**—On the subject of prosecutions by appeal, see Lect. III. in Ames, Lect. on Legal Hist., 47. The closing paragraph of this lecture is as follows:

"There was originally no restitution of goods after conviction on an indictment. (22 Edw. III, Fitz. Cor. 460; Y. B. 4 Hen. VII, 5, 1; Markham v. Cobb, Latch, 144.) A statute (21 Hen. VIII, c. 11) remedied this, by providing that one whose goods had been stolen should have restitution on indictment if he procured conviction or gave evidence against the convicted thief. Appeal of robbery disappears after this statute, and was abolished by law in 1819. The statute is construed liberally; e. g., if thief had parted with the stolen property, but had other property, procured by means of the stolen goods, the party despoiled obtained the substituted property. (5 Jac. Haris' Case, Noy, 128; 41 Eliz., Holiday v. Hicks, Cro. El. 661, 78 Eng. Reprint, 909; Golightly v. Reynolds, Lofft, 88, a good case. Historical note.) An executor had restitution, though not expressly mentioned in the statute. (3 Eliz., Austen v. Baker, Dy. 201, 73 Eng. Reprint, 444, 6 Rep. 80, Benl. 87.) The writ of restitution soon became obsolete; action of trover was allowed instead. (Golightly v. Reynolds, *supra.*) Restitution or trover is allowed against a purchaser in market overt (Kelying, 35, 47. See Worcester's Case, Moore, 360, Poph. 84, 1 And. 344, 5 Rep. 83 b; Smart's Case, Freem. 460, 89 Eng. Reprint, 344; Scattergood v. Sylvester, 15 Q. B. 506, 115 Eng. Reprint, 551; Walker v. Matthews, 8 Q. B. D. 109), but only in case defendant retains the goods purchased after conviction. If he has resold them before conviction, the remedy is only against the new possessor. (Horwood v. Smith, 2 T. R. 750, 100 Eng. Reprint, 404.) By a late English statute (24–25 Vict., c. 96, § 100) restitution is allowed where goods are obtained under false pretenses, even though the false pretenses are such as to vest a defeasible title in the fraudulent pretender, and the latter has sold to an innocent purchaser. (Vilmont v. Bentley, 18 Q. B. D. 322; Bentley v. Vilmont, 12 App. Cas. 471, overruling Moyce v. Newington, 4 Q. B. D. 32. See Rex v. Powell, 7 C. & P. 640; Queen v. Justices, 18 Q. B. D. 314. Nothing of the kind known in the United States.)"

treat of it very briefly, referring the student for more particulars to other more voluminous compilations.[m]

This private process for the punishment of public crimes had probably its original in those times when a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous offenses. This was a custom derived to us, in common with other northern nations,[n] from our ancestors, the ancient Germans; among whom, according to Tacitus,[o] "*luitur homicidium certo armentorum ac pecorum numero; recipitque satisfactionem universa domus* (the whole family receives satisfaction, and the homicide is expiated by a certain recompense in flocks and herds)."[p] In the same manner by the Irish Brehon law, in case of murder, the Brehon or judge was used to compound between the murderer, and the friends of the deceased who prosecuted him, by causing the malefactor to give unto them, or to the child or wife of him that was slain, a recompense which they called an *eriach*.[q] And thus we find in our Saxon laws (particularly those of King Athelstan[r]) the several weregilds for homicide established in progressive order, from the death of the ceorl or peasant up to that of the king himself.[s] And in the laws of King Henry I,[t] we have an account of what other offenses were then redeemable by weregild and what were

[m] 2 Hawk. P. C. c. 23.

[n] Stiernh. de Jure Sueon. l. 3. c. 4.

[o] De M. G. c. 21.

[p] And in another place (c. 12.), "*Delictis, pro modo pœnarum, equorum pecorumque numero convicti mulctantur. Pars mulctæ regi vel civitati; pars ipsi qui vindicatur, vel propinquis ejus, exsolvitur.* (Those who are convicted of offenses are punished by a fine of a certain number of horses and cattle. One part of the fine is paid to the king or state, the other part to the plaintiff or his relations.)"

[q] Spenser's State of Ireland, pag. 1513. edit. Hughes.

[r] Judic. Civit. Lund. Wilk. 71.

[s] The weregild of a ceorl was 266 thrymsas, that of the king 30,000; each thrymsa being equal to about a shilling of our present money. The weregilds of a subject was paid entirely to the relations of the party slain; but that of the king was divided; one half being paid to the public, the other to the royal family.

[t] Ch. 12.

not so.[u] As, therefore, during the continuance of this custom a process was certainly given for recovering the weregild by the party to whom it was due it seems that, when [314] these offenses by degrees grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation for the offense.

But, though appeals were thus in the nature of prosecutions for some atrocious injury committed more immediately against an individual, yet it also was anciently permitted that any subject might appeal another subject of high treason, either in the courts of common law[w] or in parliament, or (for treasons committed beyond the seas) in the court of the high constable and marshal. The cognizance of appeals in the latter still continues in force, and so late as 1631 there was a trial by battel awarded in the court of chivalry on such an appeal of treason;[x] but that in the first was *virtually* abolished[y] by the statutes 5 Edward III, c. 9 (Confirmation of Great Charter, 1331), and 25 Edward III, c. 24 (1351), and in the second *expressly* by statute 1 Henry IV, c. 14 (1399). So that the only appeals now in force for things done within the realm are appeals of felony and mayhem.

An appeal of *felony* may be brought for crimes committed either against the parties themselves or their relations. The crimes against the parties themselves are *larceny*, *rape* and *arson*. And for these, as well as for mayhem, the persons robbed, ravished, maimed, or whose houses are burned may institute this private process. The only crime against one's relation for which an appeal can be brought is that of *killing* him, by either murder or manslaughter. But this cannot be brought by every relation, but only by the wife for the death of her husband, or by the heir male for

u In Turkey this principle is still carried so far, that even murder is never prosecuted by the officers of the government, as with us. It is the business of the next relations, and them only, to revenge the slaughter of their kinsmen; and if they rather choose (as they generally do) to compound the matter for money, nothing more is said about it. (Lady M. W. Montague, lett. 42.)

w Britt. c. 22.

x By Donald Lord Rea against David Ramsey. (Rushw. vol. 2. part. 2. pag. 112.)

y 1 Hal. P. C. 349.

the death of his ancestor; which heirship was also confined, by an ordinance of King Henry the First, to the four nearest degrees of blood.[z] It is given to the wife on account of the loss of her husband; therefore, if she marries again, before or pending her appeal, it is lost and gone, or, if she marries after judgment, she shall not demand execution. The heir, as was said, must also be heir male, and such a one as was the [315] next heir by the course of the common law, at the time of the killing of the ancestor. But this rule has three exceptions: 1. If the person killed leaves an innocent wife, she only, and not the heir, shall have the appeal; 2. If there be no wife, and the heir be accused of the murder, the person who next to him would have been heir male shall bring the appeal; 3. If the wife kills her husband, the heir may appeal her of the death. And, by the statute of Gloucester, 6 Edward I, c. 9 (Homicide, 1278), all appeals of death must be sued within a year and a day after the completion of the felony by the death of the party, which seems to be only declaratory of the old common law; for in the Gothic constitutions we find the same, "*præscriptio annalis, quæ currit adversus actorem, si de homicida ei non constet intra annum a cæde facta, nec quenquam interea arguat et accuset* (the limitation of a year, which runs against the appellor, if he prove not the homicide within a year from its perpetration, or bring his accusation within that time)."[a]

§ 353. a. Trial on appeal constituted jeopardy.—These appeals may be brought previous to any indictment; and if the appellee be acquitted thereon, he cannot be afterwards indicted for the same offense. In like manner as by the old Gothic constitution, if any offender gained a verdict in his favor, when prosecuted by the party injured, he was also understood to be acquitted of any crown prosecution for the same offense;[b] but, on the contrary, if he made his peace with the king, still he might be prosecuted at the suit of the party. And so, with us, if a man be acquitted on an indictment of murder, or found guilty, and pardoned by the king, still he ought not (in strictness) to go at large, but be imprisoned or let to bail till the year and day be past, by virtue

[z] Mirr. c. 2. § 7.

[a] Stiernh. de Jure Goth. l. 3. c. 4.

[b] See page 335.

of the statute 3 Henry VII, c. 1 (Star-chamber, 1487), in order to be forthcoming to answer any appeal for the same felony, not having as yet been punished for it; though, if he hath been found guilty of manslaughter on an indictment, and hath had the benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed, for it is a maxim in law, that "*nemo bis punitur pro eodem delicto* (no one is punished twice for the same offense)." Before this statute was made, it was not usual to indict a man for homicide within the time limited for appeals; which produced very great inconvenience, of which more hereafter.[c]

[316] If the appellee be acquitted, the appellor (by virtue of the statute of Westm. II, 13 Edward I, c. 12, Appeal of Felony, 1285), shall suffer one year's imprisonment, and pay a fine to the king, besides restitution of damages to the party for the imprisonment and infamy which he has sustained; and if the appellor be incapable to make restitution, his abettors shall do it for him, and also be liable to imprisonment. This provision, as was foreseen by the author of Fleta,[d] proved a great discouragement to appeals, so that thenceforward they ceased to be in common use.

§ 354. b. Punishment for conviction in appeals.—If the appellee be found guilty, he shall suffer the same judgment as if he had been convicted by indictment, but with this remarkable difference: that on an indictment, which is at the suit of the king, the king may pardon and remit the execution; on an appeal, which is at the suit of a private subject, to make an atonement for the private wrong, the king can no more pardon it than he can remit the damages recovered on an action of battery.[e] In like manner as, while the weregild continued to be paid as a fine for homicide, it could not be remitted by the king's authority.[f] And the ancient usage was, so late as Henry the Fourth's time, that all the relations of the slain should drag the appellee to the place of execution:[g] a custom founded upon that savage spirit of family resentment which prevailed universally through Europe after the irruption of the northern nations, and is peculiarly attended to in their several

c *Ibid.* l. 1. c. 5.
d l. 1. c. 34. § 48.
e 2 Hawk. P. C. 392.
f LL. Edm. § 3.
g M. 11 Hen. IV. 12. 3 Inst. 131.

codes of law, and which prevails even now among the wild and untutored inhabitants of America, as if the finger of nature had pointed it out to mankind, in their rude and uncultivated state.[h] However, the punishment of the offender may be remitted and discharged by the concurrence of all parties interested, and as the king by his pardon may frustrate an indictment, so the appellant by his release may [317] discharge an appeal:[i] "*nam quilibet potest renunciare juri pro se introducto* (for anyone may relinquish a right introduced for his own avail)."

These are the several methods of prosecution instituted by the laws of England for the punishment of offenses, of which that by indictment is the most general. I shall therefore confine my subsequent observations principally to this method of prosecution, remarking by the way the most material variations that may arise from the method of proceeding by either information or appeal.

h Robertson Cha. V. i. 45.

i 1 Hal. P. C. 9.

CHAPTER THE TWENTY-FOURTH. [318]

OF PROCESS UPON AN INDICTMENT.

§ 355. IV. Process after indictment found.—We are next, in the fourth place, to inquire into the manner of issuing *process*, after indictment found, to bring in the accused to answer it. We have hitherto supposed the offender to be in custody before the finding of the indictment; in which case he is immediately (or as soon as convenience permits) to be arraigned thereon. But if he hath fled, or secretes himself in capital cases, or hath not, in smaller misdemeanors, 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, then process must issue to bring him into court; for the indictment cannot be tried unless he personally appears: according to the rules of equity in all cases, and the express provision of statute 28 Edward III, c. 3 (Right of Trial, 1354), in capital ones, that no man shall be put to death without being brought to answer by due process of law.

§ 356. 1. Venire facias.—The proper process on an indictment for any petty misdemeanor, or on a penal statute, is a writ of *venire facias*, which is in the nature of a summons to cause the party to appear. And if by the return to such *venire* it appears that the party hath lands in the county whereby he may be distrained, then a *distress infinite* shall be issued from time to time till he appears.

§ 357. 2. Capias.—But if the sheriff returns that he hath no lands in his bailiwick, then (upon his nonappearance) a writ of *capias* [319] shall issue, which commands the sheriff to take his body, and have him at the next assizes; and if he cannot be taken upon the first *capias*, a second and a third shall issue, called an *alias* and a *pluries capias*. But, on indictments for treason or felony, a *capias* is the first process, and for treason or homicide, only one shall be allowed to issue,[a] or two in the case of other felonies, by statute 25 Edward III, c. 14 (Outlawry, 1351), though the usage is to issue only one in any felony; the provisions of this statute

[a] Appendix, § 1.

being in most cases found impracticable.[b] And so, in the case of misdemeanors, it is now the usual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant.

§ 358. **3. Process in outlawry.**—But if he absconds, and it is thought proper to pursue him to an outlawry, then a greater exactness is necessary. For, in such case, after the several writs have issued in a regular number, according to the nature of the respective crimes, without any 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* (required the fifth time), and does not appear at the fifth exaction or requisition, then he is adjudged to be *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.*

§ 359. **a. Punishment for outlawries.**—The punishment for outlawries upon indictments for misdemeanors is the same as for outlawries upon civil actions (of which, and the previous process by writs of *capias, exigi facias,* and *proclamation,* we spoke in the preceding book[c]); *viz.*, forfeiture of goods and chattels.[1] But an outlawry in treason or felony amounts to a conviction and attainder of the offense charged in the indictment as much as if the offender has been found guilty by his country.[d] His life is, however, still under the protection of the law, as hath formerly been [320] ob-

* The usual process to bring in a defendant in America is in substance a *capias,* issued by the clerk under seal of the court, or by a magistrate and signed by him, and known as a bench-warrant or warrant of arrest.—HAMMOND.

b 2 Hal. P. C. 195.

c See Book III. pag. 283, 4.

d 2 Hal. P. C. 205.

---

1 Outlawry in civil proceedings was abolished by the Civil Procedure Act, 1879; but it is still available, though practically obsolete, in criminal proceedings. The last such proceedings were in 1859. (4 Stephen's Comm. (16th ed.), 320.)

served;[e] so that though anciently an outlawed felon was said to have *caput lupinum* (a wolf's head), and might be knocked on the head like a wolf by anyone that should meet him,[f] because, having renounced all law, he was to be dealt with as in a state of nature, when everyone that should find him might slay him, yet now, to avoid such inhumanity, it is holden that no man is entitled to kill him wantonly or willfully, but in so doing is guilty of murder,[g] unless it happens in the endeavor to apprehend him.[h] For any person may arrest an outlaw on a criminal prosecution, either of his own head or by writ or warrant of *capias utlagatum* (that you take the outlaw), in order to bring him to execution. But such outlawry may be frequently 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.

§ 360. **4. Certiorari.**—Thus much for process to bring in the offender after indictment found, during which stage of the prosecution it is that writs of *certiorari facias* are usually had, though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench, which is the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of these four purposes; either, 1. To consider and determine the validity of appeals or indictments and the proceedings thereon, and to quash or confirm them as there is cause; or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the court of king's bench or before the justice of *nisi prius;* or, 3. It is so removed, in order to plead the king's pardon there; or, 4. To issue process of outlawry against the offender in those [321] counties or places where the process of the inferior judges will not reach

[e] See pag. 178.
[f] Mirr. c. 4. § 4. Co. Litt. 128.
[g] 1 Hal. P. C. 497.
[h] Bracton. fol. 125.

him.[1] Such writ of *certiorari*, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the court of king's bench remands the record to the court below, to be there tried and determined. A *certiorari* may be granted at the instance of either the prosecutor or the defendant; the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the justices of gaol delivery or after issue joined or confession of the fact in any of the courts below.[k 2]

At this stage of prosecution, also, it is that indictments found by the grand jury against a peer must in consequence of a writ of

[1] 2 Hal. P. C. 210.

[k] 2 Hawk. P. C. 287. 4 Burr. 749.

---

2 Certiorari in England.—A prosecutor was at one time entitled to demand a *certiorari* as a matter of right, though the application of a defendant has always been dependent on the discretion of the court. But now, under the Crown Office Rules, 1906, no *certiorari* will issue at the instance of the prosecutor, or of any other person except the attorney general, without motion first made in the king's bench division, or before some judge thereof, and leave obtained in the same manner as where application is made on the part of the defendant. And moreover, before the allowance of any writ of *certiorari*, the party on whose behalf it is applied for must enter into a recognizance, before a judge of the high court, or before the court in which the proceedings sought to be removed are pending, in such sum and with such sureties as the court or judge may direct, to appear and plead to, or prosecute, the indictment (as the case may be), and proceed to trial of the same. But no such recognizance is required from the prosecutor, in the case of an indictment found at quarter sessions against a corporation.

A writ of *certiorari*, when issued and delivered to the inferior court, for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless indeed the record is remanded to the court below, to be there tried and determined.

It is to be noted that, though the avowed object of the writ of *certiorari* is to remove the case to the king's bench division, yet that tribunal may, in the case of any felony or misdemeanor alleged to have been committed in a place out of the jurisdiction of the central criminal court, order the trial to be held in the central criminal court; provided it appear expedient to the ends of justice that such course should be taken. (Central Criminal Court Act, 1856, § 1.) And, even before any such writ has been issued, the king's bench division may,

certiorari be certified and transmitted into the court of parliament, or into that of the lord high steward of Great Britain; and that, in places of exclusive jurisdiction, as the two universities, indictments must be delivered (upon challenge and claim of cognizance) to the courts therein established by charter, and confirmed by act of parliament, to be there respectively tried and determined.

in a like case, where the accused has been committed or held to bail, order the writ to be directed to the inferior tribunal, bidding it certify any indictment or inquisition then pending, or that shall thereafter be found against the accused, into the central criminal court. When a *certiorari* is delivered to any court, for the purpose of removing an indictment or inquisition therefrom, a person charged thereby, who shall then be in prison, must not be discharged by such court, but must remain there till discharged by due course of law.—STEPHEN, 4 Comm. (16th ed.), 326.

Certiorari in the United States.—The writ of *certiorari* was commonly used in England, as the text shows, to obtain a more satisfactory trial in a higher court than could be had below. But in this country it is rarely issued until after judgment below, and then only for the purpose of reviewing errors of law or irregularities. The only question of evidence entertained will be where there is an entire lack of it to sustain a conclusion of law. (People v. Assessors, 39 N. Y. 81; 40 N. Y. 154.) Consistently with this it is confined in its operation to proceedings judicial or *quasi*-judicial in character. It will not bring up for review legislative, ministerial or executive action, in neither of which are questions of law and fact carefully discriminated. (Stone v. Mayor of New York, 25 Wend. 157; People v. Corwin, 68 N. Y. 403; Locke v. Selectmen, 122 Mass. 290.) It will usually be refused, in the discretion of the court, where there is a sufficient remedy by appeal; unless in cases where it is used as auxiliary to the appeal, to bring up additional parts of the record.

These are the general features of the remedy in the majority of states; but in a few there are divergencies of statute or decision, affecting every one of these points. These will be found collected in a long note in 12 Am. Dec. 529–537. For the early history of the writ, see F. N. B. 554.—HAMMOND.

[322] # CHAPTER THE TWENTY-FIFTH.

OF ARRAIGNMENT, AND ITS INCIDENTS.

§ 361. V. Arraignment.—When the offender either appeals voluntarily to an indictment or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be *arraigned* thereon; which is the fifth stage of criminal prosecution.

To arraign is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment.[a] The prisoner is to be called to the bar by his name; and it is laid down in our ancient books[b] that, though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds, unless there be evident danger of an escape, and then he may be secured with irons. But yet in Layer's Case, A. D. 1722, a difference was taken between the time of arraignment and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment.[c 1]

§ 362. 1. Identifying the prisoner.—[323] When he is brought to the bar he is called upon by name to hold up his hand, which, though it may seem a trifling circumstance, yet is of this import-

a 2 Hal. P. C. 216.

b Bract. l. 3. de Coron. c. 18. § 3. Mirr. c. 5. sect. 1. § 54. Flet. l. 1. c. 31. § 1. Brit. c. 5. Staundf. P. C. 78. 3 Inst. 34. Kel. 10. 2 Hal. P. C. 219. 2 Hawk. P. C. 308.

c State Trials. VI. 230.

---

1 **The chaining of prisoners.**—Bracton says (fol. 137) that a defendant when brought before the justices on a criminal charge should not have his *hands* bound, "and this that he may not seem forced to undergo any purgation." I do not understand this last, but it may put us on the track of an interesting point in the procedure of ordeals, to which it seems to refer. Bracton allows, however, the fettering of his feet sometimes, because of the danger of escape. (Fol. 137.) Compare the manner in which Sir T. Smith speaks three centuries later of the prisoners brought in as a matter of course chained together. (Commonwealth of England, c. 25.) See Britton, as cited in Blackstone's note b, where a note in Nichol's edition shows that the practice was more harsh than the language of the books warranted.—HAMMOND.

ance, that by the holding up of his hand *constat de persona* (there is evidence of the person), and he owns himself to be of that name by which he is called.[d] However, it is not an indispensable ceremony; for, being calculated merely for the purpose of identifying the person, any other acknowledgment will answer the purpose as well; therefore, if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient.[e]

§ 363. 2. Reading the indictment.—Then 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.

§ 364. a. Trial of accessories.—By the old common law the accessory could not be arraigned till the principal was attainted, unless he chose it, for he might waive the benefit of the law; and therefore principal and accessory might, and may still, be arraigned, and plead, and also be tried together. But otherwise if the principal had never been indicted at all, had stood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessory in any of these cases could not be arraigned; for *non constitit* (it was not evident) whether any felony was committed or no till the principal was attainted, and it might so happen that the accessory should be convicted one day and the principal acquitted the next, which would be absurd. However, this absurdity could only happen where it was possible that a trial of the principal might be had subsequent to that of the accessory; and therefore the law still continues that the accessory shall not be tried so long as the principal remains liable to be tried hereafter. But by statute [324] 1 Ann., c. 9 (Criminal Procedure, 1702), if the principal be once convicted, and before attainder (that is, before he receives judgment of death or outlawry), he is delivered by pardon, the benefit of clergy or otherwise; or if the principal stands

[d] 2 Hal. P. C. 219.

[e] Raym. 408.

mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all,—in any of these cases, in which no subsequent trial can be had of the principal, the accessory may be proceeded against as if the principal felon had been attainted; for there is no danger of future contradiction. And upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better opinion, and founded on the true spirit of justice,[f] that the accessory is at liberty (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact as in point of law.

§ 365. 3. Incidents of the arraignment.—When a criminal is arraigned, he either *stands mute* or *confesses* the fact, which circumstances we may call *incidents* to the arraignment; or else he *pleads* to the indictment, which is to be considered as the next stage of proceedings. But, first, let us observe these incidents to the arraignment, of standing mute or confession.

§ 366. a. Standing mute.—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; or, 3. Upon having pleaded not guilty, refuses to put himself upon the country.[g] If he says nothing, the court ought *ex officio* to impanel a jury to inquire whether he stands obstinately mute or whether he be dumb *ex visitatione Dei* (by the visitation of God). If the latter appears to be the case, the judges of the court (who are to be of counsel for the prisoner, and to see that he hath law and justice) shall proceed to the trial, and examine all points as if he had pleaded not guilty.[h] But whether judgment of death can be given against such a prisoner [325] who hath never pleaded, and can say nothing in arrest of judgment, is a point yet undetermined.[i]

§ 367. (1) Consequences of standing mute.—If he be found to be obstinately mute (which a prisoner hath been held to be that

f Foster. 365, etc.
g 2 Hal. P. C. 316.
h 2 Hawk. P. C. 327.
i 2 Hal. P. C. 317.

hath cut out his own tongue[k]), then, if it be on an indictment of high treason, it hath long been clearly settled that standing mute is equivalent to a conviction, and he shall receive the same judgment and execution.[1] And as in this the highest crime, so also in the lowest species of felony, *viz.*, in petit larceny, and in all misdemeanors, standing mute hath always been equivalent to conviction. But upon appeals or indictments for other felonies, or petit treason, the prisoner was not, by the ancient law, looked upon as convicted, so as to receive judgment for the felony, but should, for his obstinacy, have received the terrible sentence of *penance*, or *peine* (which, as will appear presently, was probably nothing more than a corrupted abbreviation of *prisone*) *forte et dure*[2] (strong and hard).

k 3 Inst. 178.

1 2 Hawk. P. C. 329. 2 Hal. P. C. 317.

---

2 **Standing mute in modern law.**—Now, however, in England, if any person being arraigned upon, or charged with, any indictment or information for treason, felony, piracy or misdemeanor, shall stand mute of malice, a question which must still be determined by the jury, or will not answer directly to the indictment or information, it is lawful for the court to order the proper officer to enter a plea of "not guilty" on behalf of the accused; and the plea so entered is to have the same force and effect, as if it had been actually pleaded by the accused. When there is reason to doubt, however, whether the prisoner is *sane*, a jury, consisting of any twelve persons who may happen to be present, should be charged to inquire whether he is sane or not. And upon this issue, the question will be, whether he has intellect enough to plead and to comprehend the course of the proceedings. And if the jury find in the affirmative, the plea of not guilty may be entered, and the trial will proceed. But if in the negative, the provision of the Criminal Lunatics Act, 1800, is then applicable; by which it is enacted, that insane persons indicted for any offense, and on their arraignment found to be insane by a jury lawfully impaneled for that purpose, so that they cannot be tried upon the indictment, shall be ordered by the court to be kept in strict custody till the royal pleasure be known.—STEPHEN, 4 Comm. (16th ed.), 330.

The rule in the United States is that a prisoner standing mute shall be considered as having pleaded not guilty. United States v. Borger, 7 Fed. 193, 19 Blatchf. 249; In re Smith, 13 Fed. 27; State v. Ward, 48 Ark. 39, 3 Am. St. Rep. 213, 2 S. W. 191.

Probably the only person pressed to death in America, under sentence of *peine forte et dure*, was Giles Corey, accused of witchcraft. 3 Bancroft's Hist. U. S. 93. For history of this punishment see White, Legal Antiquities, c. VI; Thayer, Prelim. Treatise on Evidence, 74.

§ 368. **(a) Trina admonitio.**—Before this was pronounced the prisoner had not only *trina admonitio* (a third warning), but also a respite of a few hours, and the sentence was distinctly read to him, that he might know his danger;[m] and, after all, if he continued obstinate, and his offense was clergyable, he had the benefit of his clergy allowed him, even though he was too stubborn to pray it;[n] thus tender was the law of inflicting this dreadful punishment. But if no other means could prevail, and the prisoner (when charged with a capital felony) continued stubbornly mute, the judgment was then given against him, without any distinction of sex or degree. A judgment, which was purposely ordained to be exquisitely severe, that by that very means it might rarely be put in execution.

§ 369. **(b) Former use of torture.**—The rack, or question, to extort a confession from criminals, is a practice of a different nature: *this* having been only [326] used to compel a man to put himself upon his trial; *that* being a species of trial in itself. And the trial by rack is utterly unknown to the law of England; though once when the Dukes of Exeter and Suffolk, and other ministers of Henry VI, had laid a design to introduce the civil law into this kingdom as the rule of government, for a beginning thereof they erected a rack for torture, which was called in derision the Duke of Exeter's daughter, and still remains in the tower of London,[o] where it was occasionally used as an engine of state, not of law, more than once in the reign of Queen Elizabeth.[p] But when, upon the assassination of Villiers, Duke of Buckingham, by Felton, it was proposed in the privy council to put the assassin to the rack in order to discover his accomplices, the judges, being consulted, declared unanimously, to their own honor and the honor of the English law, that no such proceeding was allowable by the laws of England.[q] It seems astonishing that this usage of administering the torture should be said to arise from a tenderness to the lives of men, and yet this is the reason given for its introduction in the civil law, and its subsequent adoption by the French and other

m 2 Hal. P. C. 320.
n 2 Hal. P. C. 321. 2 Hawk. P. C. 332.
o 3 Inst. 35.
p Barr. 92. 496.
q Rushw. Coll. i. 638.

foreign nations;[r] *viz.*, because the laws cannot endure that any man should die upon the evidence of a false, or even a single, witness, and therefore contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession; thus rating a man's virtue by the hardiness of his constitution and his guilt by the sensibility of his nerves! But there needs only to state accurately,[s] in order most effectually to expose, this inhuman species of mercy; the uncertainty of which, as a test and criterion of truth, was long ago very elegantly pointed out by Tully, though he lived in a state wherein it was [*327] usual to torture slaves in order to furnish evidence: "*tamen*, says he, *illa tormenta gubernat dolor, moderatur natura cujusque tum animi tum corporis, regit quæsitor, flectit libido, corrumpit spes, infirmat metus; ut in tot rerum angustiis nihil veritati loci relinquatur* (nevertheless, these torments are regulated by pain, they are more or less great in each sufferer, according to his strength of mind or body, the inquisitor directs them, the will bends, hope corrupts, fear enfeebles, so that in the dread and distraction of his situation, there is no place left for the consideration of truth)."[t]

§ 370. **(c) Penance for standing mute.**—The English judgment of penance for standing mute[u] was as follows: That the prisoner be remanded to the prison from whence he came, and put into a low, dark chamber, and there be laid on his back, on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he could bear, and more; that he have no sustenance, save only, on the first day, three morsels of the worst bread, and, on the second day, three draughts of standing water, that should be nearest to the prison door; and in this situation this should be alternately his daily diet, *till he died*, or (as anciently the judgment ran) *till he answered*.[v]

r Cod. l. 9. t. 41. l. 8. & t. 47. l. 16. Fortesc. de LL. Angl. c. 22.

s The Marquis Beccaria (c. 16.), in an exquisite piece of raillery, has proposed this problem, with a gravity and precision that are truly mathematical: "the force of the muscles and the sensibility of the nerves of an innocent person being given, it is required to find the degree of pain, necessary to make him confess himself guilty of a given crime."

t Pro Sulla. 28.

u 2 Hal. P. C. 319. 2 Hawk. P. C. 329.

v Britton. c. 4. & 22. Flet. l. 1. c. 34. § 33.

It hath been doubted whether this punishment subsisted at the common law,[w] or was introduced in consequence of the statute Westm. I, 3 Edward I, c. 12 (Standing Mute, 1275),[x] which seems to be the better opinion. For not a word of it is mentioned in Glanvill or Bracton, or in any ancient author, case or record (that hath yet been produced), previous to the reign of Edward I; but there are instances on record in the reign of Henry III[y] where persons accused of felony and standing mute were tried in a particular manner, by two successive juries, and convicted; and it is asserted by the judges in 8 Henry IV (1406), that, by the common law before the statute, standing mute on an appeal amounted to a conviction of the felony.[z] This statute of Edward I directs such persons [328] "as will not put themselves upon inquests of felonies before the judges at the suit of the king, to be put into hard and strong prison (*soient mys en la prisone fort et dure*) as those which refuse to be at the common law of the land." And, immediately after this statute, the form of the judgment appears in Fleta and Britton to have been only a very straight confinement in prison, with hardly any degree of sustenance, but no weight is directed to be laid upon the body, so as to hasten the death of the miserable sufferer; and, indeed, any surcharge of punishment on persons adjudged to penance, so as to shorten their lives, is reckoned by Horne in the Mirror[a] as a species of criminal homicide. It also clearly appears by a record of 31 Edward III (1357),[b] that the prisoner might then possibly subsist for forty days under this lingering punishment. I should therefore imagine that the practice of loading him with weights, or, as it was usually called, *pressing him to death*, was gradually introduced between 31 Edward III (1357), and 8 Henry IV (1406), at which last period it first appears upon our books,[c] being intended as a species of mercy to the delinquent, by delivering him the sooner from his torment; and hence I pre-

w 2 Inst. 179. 2 Hal. P. C. 322. 2 Hawk. P. C. 330.

x Staundf. P. C. 149. Barr. 82.

y Emyln on 2 Hal. P. C. 322.

z *Al common ley, avant le statute de West.* 1. c. 12. *si ascun ust estre appeal, et ust estre mute, il serra convict de felony.* (M. 8 Hen. IV. 2.)

a Ch. 1. § 9.

b 6 Rym. 13.

c Yearb. 8 Hen. IV. 1.

sume it also was, that the duration of the penance was then first [a] altered, and instead of continuing *till he answered*, it was directed to continue *till he died*, which must very soon happen under an enormous pressure.

The uncertainty of its original, the doubts that were conceived of its legality, and the repugnance of its theory (for it rarely was carried into practice) to the humanity of the laws of England, all concurred to require a legislative abolition of this cruel process and a restitution of the ancient common law, whereby the standing mute in felony, as well as in treason and in trespass, amounted to a confession of the charge. Or, if the corruption of the blood and the consequent escheat in felony had been removed, the judgment of *peine forte et dure* might perhaps have still innocently remained, [329] as a monument of the savage rapacity with which the lordly tyrants of feudal antiquity hunted after escheats and forfeitures; since no one would ever have been tempted to undergo such a horrid alternative. For the law was, that by standing mute, and suffering this heavy penance, the judgment, and of course the corruption of the blood and escheat of the *lands*, were saved in felony and petit treason, though not the forfeiture of the *goods;* and therefore this lingering punishment was probably introduced, in order to extort a plea, without which it was held that no judgment of death could be given, and so the lord lost his escheat. But in high treason, as standing mute is equivalent to a conviction, the same judgment, the same corruption of blood, and the same forfeitures always attended it, as in other cases of conviction.[b] And very lately, to the honor of our laws, it hath been enacted by statute 12 George III, c. 20 (Criminal Procedure, 1772), that every person who, being arraigned for felony or piracy, shall stand mute or not answer directly to the offense, shall be convicted of the same; and the same judgment and execution (with all their consequences in every respect) shall be thereupon awarded as if the person had been convicted by verdict or confession of the crime. And thus much for the demeanor of a prisoner upon his arraignment by standing mute, which now, in all cases, amounts to a constructive confession.

[a] *Et fuit dit, que le contrarie avoit estre fait devant ces heures.* (And it was said that the contrary had been done before this time.) (*Ibid.* 2.)

[b] 2 Hawk. P. C. 331.

§ 371. **b. Confession of the prisoner.**—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 hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject, and will generally advise the prisoner to retract it, and plead to the indictment.[f]

§ 372. **(1) "Approvement."**—But there is another species of confession, which we read much of in our ancient books, of a far more complicated kind, which is called *approvement*. And that is when a person, [330] indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded, and appeals or accuses others, his accomplices, of the same crime, in order to obtain his pardon. In this case he is called an *approver* or prover, *probator*; and the party appealed or accused is called the *appellee*. Such approvement can only be in capital offenses, and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it; and if he hath no reasonable and legal exceptions to make to the person of the approver, which indeed are very numerous, he must put himself upon his trial, either by battle or by the country; and, if vanquished or found guilty, must suffer the judgment of the law, and the approver shall have his pardon *ex debito justitiæ* (as due to justice). On the other hand, if the appellee be conqueror, or acquitted by the jury, the approver shall receive judgment to be hanged, upon his own confession of the indictment; for the condition of his pardon has failed, *viz.*, the convicting of some other person, and therefore his conviction remains absolute.[3]

f 2 Hal. P. C. 225.

---

3 **King's or state's evidence.**—In England the testimony of an accomplice is in all cases regarded with suspicion; and unless his statement be corroborated in some material point by unimpeachable evidence, the jury are usually directed by the judge to acquit the prisoner. (Reg. v. Addis (1834), 6 Car. & P. 388; Rex v. Everest (1909), 2 Cr. App. 130; Rex v. Mason (1910), 5 Cr. App. 171.) Still, the jury may legally convict on the unsupported testimony of an accomplice. (Reg. v. Hastings (1835), 7 Car. & P. 152; Reg. v. Stubbs (1855), Dears. & P. C. C. 555; but see Rex v. Mason (1910), 5 Cr.

But it is purely in the discretion of the court to permit the approver thus to appeal or not; and, in fact, this course of admitting approvements hath been long disused, for the truth was, as Sir Matthew Hale observes, that more mischief hath arisen to good men by these kinds of approvements, upon false and malicious accusations of desperate villains, than benefit to the public by the discovery and conviction of real offenders. And therefore, in the times when such appeals were more frequently admitted, great strictness and nicety were held therein;[s] though, since their dis-

[s] 2 Hal. P. C. c. 29. 2 Hawk. P. C. c. 24.

App. 171.) Moreover, if a felon after having confessed the crime and been admitted as king's evidence, fails in the condition on which he was so received, and refuses to give the jury, on the trial of his accomplice, such fair and full information as shall be in his knowledge, he is then himself liable to be tried for the offense, and may be convicted on his own confession. (4 Stephen's Comm. (16th ed.), 333.)

In the United States it is a rule of practice that a jury shall not convict on the unsupported testimony of an accomplice. There is no rule of law on the subject, and it is within the competency of the jury to convict on such testimony. The law is clearly set forth in the case of Collins v. People, 98 Ill. 584, 38 Am. Rep. 105, where the court says: "The tendency with us, at present, is to arbitrarily exclude as little as possible, but to listen and give credence to whatever tends to establish the truth. The innocent should not be convicted, nor should the guilty escape punishment, by reason of any merely arbitrary rule preventing the free and full exercise of the judgment as to the truthfulness or untruthfulness of testimony, and the reliance to be placed upon it in the trial of cases. In many, probably in most, cases, the evidence of an accomplice, uncorroborated in material matters, will not satisfy the honest judgment beyond a reasonable doubt—and then it is clearly insufficient to authorize a verdict of guilty. But there may frequently occur other cases, where, from all the circumstances, the honest judgment will be as thoroughly satisfied from the evidence of the accomplice of the guilt of the defendant, as it is possible it could be satisfied from human testimony,—and in such case it would be an outrage upon the administration of justice to acquit."

The generally accepted view is that an accomplice upon making a full disclosure has a just claim to a pardon, but not a claim thereto as of legal right. (State v. Graham, 41 N. J. L. 15, 32 Am. Rep. 174; State v. Lyon, 81 N. C. 600, 31 Am. Rep. 518; United States v. Ford, 99 U. S. 594, 25 L. Ed. 399.) In one case, however, it has apparently been held that where an accomplice has carried out his compact with the state for exemption from prosecution, he is entitled to his remedy of pardon as a matter of right. (Camron v. State, 32 Tex. Cr. 180, 22 S. W. 682, 40 Am. St. Rep. 763.)

continuance, the doctrine of approvements is become a matter of more curiosity than use. I shall only observe that all the good, whatever it be, that can be expected from this method of approvement is fully provided for in the cases of coining, robbery, burglary, housebreaking, horse-stealing, and larceny to the value of five shillings from shops, warehouses, stables and coach-houses, by statutes 4 & 5 W. & M., c. 8 (Apprehension of Highwaymen, 1692), [331] 6 & 7 W. III, c. 17 (Coin, 1694), 10 & 11 W. III, c. 23 (Criminal Procedure, 1698), and 5 Ann., c. 31 (Apprehension of Housebreakers, 1706), which enact that if any such offender, being out of prison, shall discover two or more persons, who have committed the like offenses, so as they may be convicted thereof, he shall, in case of burglary or housebreaking, receive a reward of 40*l*., and in general be entitled to a pardon of all capital offenses, excepting only murder and treason; and of them, also, in the case of coining.[h] And if any such person, having feloniously stolen any lead, iron or other metals, shall discover and convict two offenders of having illegally bought or received the same, he shall by virtue of statute 29 George II, c. 30 (Stealing of Lead, 1755), be pardoned for all *such* felonies committed before such discovery. It hath also been usual for the justices of the peace, by whom any persons charged with felony are committed to gaol, to admit some one of their accomplices to become a witness (or, as it is generally termed, king's evidence) against his fellows, upon an implied confidence, which the judges of gaol delivery have usually countenanced and adopted, that if such accomplice makes a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offense of the same degree.[i]

[h] The pardon, for discovering offenses against the coinage act of 15 Geo. II. c. 28 (Counterfeiting Coin, 1741), extends only to all *such* offenses.

[i] The King v. Rudd, Mich. 16 Geo. III. on a case reserved from the Old Bailey. Oct. 1775.

CHAPTER THE TWENTY-SIXTH. [332]

OF PLEA, AND ISSUE.

§ 373. **VI. Pleas of the prisoner.**—We are now to consider the plea of the prisoner, or defensive matter alleged by him on his arraignment,[1] if he does not confess or stand mute. This 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.

Plea of sanctuary.—Formerly, there was another plea, now abrogated, that of *sanctuary*, which is, however, necessary to be lightly

1 **Pleading in criminal cases.**—The forms and rules of pleading in criminal cases were formerly the same in substance with those in civil; the indictment being the king's declaration, and followed by plea, replication, etc. But partly the advantage given the prisoner by the plea of "not guilty," the general issue, and partly the technical requirements of all other forms of pleading, led gradually to their disuse in practice; nearly every advantage which the defendant could take by them being allowed him under that general plea.

This change has been confirmed by statute in most if not all American states; and the only forms of defense now in use are the following:

The defendant may demur to the indictment, if it does not set forth a public offense of any kind with the requisite certainty as to person, offense or circumstances necessary to constitute such offense; or if it shows a legal excuse or justification for it; or if it charges more than one offense in a single count. Want of jurisdiction is also ground of demurrer. But it is not necessary to demur where there is a total want of jurisdiction, as distinguished from a mere irregularity, as this, and indeed most of the substantial grounds of demurrer, may be taken advantage of under the general issue, or in arrest of judgment.

Defects in the form of the indictment, or disregard of the requirements of law in the mode of finding or presenting it, should be met by a motion to quash or set aside the indictment, which is properly made upon arraignment and before demurring or pleading, though courts frequently allow a demurrer or plea to be withdrawn in order to make it.

If the demurrer is overruled, the usual course in felony is to allow it to be withdrawn and a plea of not guilty entered. In misdemeanors it is often final.

Pleas in abatement are now almost unknown, and in many states not allowed. The only special pleas in bar now in use are those of a former acquittal, conviction or jeopardy. The last is properly used in cases where the prisoner has once been put on trial for the same offense before a competent jury and upon a sufficient indictment, but no valid verdict of acquittal or conviction has been rendered, and the jury discharged without his consent, or there has

touched upon, as it may give some light to many parts of our ancient law; it being introduced and continued during the superstitious veneration that was paid to consecrated ground in the times of popery. First, then, it is to be observed that if a person accused of any crime (except treason, wherein the crown, and sacrilege, wherein the church, was too nearly concerned) had fled to any church or churchyard, and within forty days after went in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offense, and thereupon took the oath in that case provided, *viz.*, that he abjured the realm, and would depart from thence forthwith at the port that should be assigned him, and would never return without leave from the king, he by this means saved his life, if he observed the conditions of the oath, by going with a cross in [333] his hand and with all con-

been a mistrial, for which he is not responsible. As none of these put the prisoner's guilt or innocence directly in issue, they can only be tried on such a plea.

The plea of not guilty, or general issue, which puts in issue every material averment of the indictment and every defense, except those above mentioned. All these pleas are put in orally, and in felonies by the prisoner himself, who must be present at the proceedings throughout. In misdemeanors they may be put in by attorney, and the trial proceed in the prisoner's absence.

Finally, the plea of guilty, put in in open court and in person, cures all formal defects and confesses the indictment. Even this, if improvidently made, may be withdrawn by leave of the court and other pleas entered.

While almost every state has some slight variations in the rules of criminal pleading, due chiefly to unintentional differences in the wording of statutes, or to their interpretation by the courts, yet for the most part they agree in substantial matters. There is no such distinction between them as is known in civil cases between the common-law system of pleading and that of the new codes. The strict forms of indictment and other parts of the system being all intended for the safety of the innocent (if not to facilitate the escape of the guilty upon technical grounds, as is often charged), there is no disposition to discard them. Even where the statute allows the indictment to be in ordinary language, etc., no lawyer has ever undertaken to substitute a familiar and colloquial style of charging the offense, which could only have the effect of destroying all precision and uniformity in the grounds of punishment, and leaving the fate of every man accused of crime to the unrestrained temper of the jury. The latter have already great discretion in finding what evidential facts shall constitute the crimes so exactly defined by the law: there could be no advantage in destroying these definitions, as such a change would almost certainly do.—HAMMOND.

venient speed to the port assigned, and embarking. For if, during this forty days' privilege of sanctuary, or in his road to the sea-side, he was apprehended and arraigned in any court for this felony, he might plead the privilege of sanctuary, and had a right to be remanded if taken out against his will.[a] But by this abjuration his blood was attainted and he forfeited all his goods and chattels.[b] The immunity of these privileged places was very much abridged by the statutes 27 Henry VIII, c. 19 (Sanctuary, 1535), and 32 Henry VIII, c. 12 (Sanctuaries, 1540). And now, by the statute 21 Jac. I, c. 28 (1623), all privilege of sanctuary, and abjuration consequent thereupon, is utterly taken away and abolished.[2]

Plea of benefit of clergy.—Formerly, also, the benefit of clergy used to be pleaded before trial or conviction, and was called a *declinatory* plea; which was the name also given to that of sanctuary.[c] But, as the prisoner upon a trial has a chance to be acquitted, and totally discharged, and, if convicted of a clergyable felony, is entitled equally to his clergy after as before conviction, this course is extremely disadvantageous, and therefore the benefit of clergy is now very rarely pleaded, but, if found requisite, is prayed by the convict before judgment is passed upon him.[3]

I proceed, therefore, to the five species of pleas before mentioned.

§ 374. 1. Plea to the jurisdiction.—A plea to the *jurisdiction* is where an indictment is taken before a court that hath no cognizance of the offense; as if a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions: in these or similar cases he may except to the jurisdiction of the court, without answering at all to the crime alleged.[d 4]

a Mirr. c. 1. § 13. 2 Hawk. P. C. 335.
b 2 Hawk. P. C. 52.
c 2 Hal. P. C. 236.
d *Ibid.* 256.

---

2 On the privilege of sanctuary, see White, Legal Antiquities, c. IX; 1 Stephen, Hist. Crim. Law, 491.

3 Benefit of clergy was abolished in 1827.

4 A formal plea to the jurisdiction is of rare occurrence, the defendant being able to raise this question under the general issue of "not guilty," or even by way of motion in arrest of judgment. (4 Stephen's Comm. (16th ed.), 334.)

§ 375. 2. Demurrer to the indictment.—A demurrer to the indictment. This is incident to criminal cases, as well as civil, when the fact as alleged is [334] allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason or whatever the crime is alleged to be.[5] Thus, for instance, if a man be indicted for *feloniously* stealing a greyhound, which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass, to steal it: in this case the party indicted may demur to the indictment, denying it to be felony, though he confesses the act of taking it. Some have held[e] that if, on demurrer, the point of law be adjudged *against* the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others,[f] who hold that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him. Which appears the more reasonable, because it is clear that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony or no, and upon the fact thus shown it appears to be felony, the court will not record the confession, but admit him afterwards to plead not guilty.[g] And this seems to be a case of the same nature, being for the most part a mistake in point of law and in the conduct of his pleading; and, though a man by mispleading may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used; since the same advantages may be taken upon a plea of not guilty, or afterwards, in arrest of judgment, when the verdict has established the fact.

e 2 Hal. P. C. 257.
f 2 Hawk. P. C. 334.
g 2 Hal. P. C. 225.

---

5 **Motion to quash.**—When an indictment or information is so defective upon its face that no judgment can be given upon it, the proper procedure is for the defendant to move to quash the same. Instances are where the court has no jurisdiction of the offense charged, or where the matter is not indictable. (United States v. Wardell, 49 Fed. 914.) The motion is addressed to the discretion of the court, and when well taken will generally be sustained. When the application is made on the part of the prosecution, the indictment will be quashed whenever it is so defective that the defendant cannot be convicted. A *nolle prosequi* has the same effect when the prosecution has been instituted by the attorney general.

§ 376. 3. Plea in abatement.—A plea in *abatement* is principally for a *misnomer*, a wrong name, or a false addition to the prisoner. As, if *James* Allen, *gentleman*, is indicted by the name *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.[6] And, if either fact is found by a jury, then the indictment [335] shall be abated, as writs or declarations may be in civil actions; of which we spoke at large in the preceding volume.[h] But, in the end, there is little advantage accruing to the prisoner by means of these dilatory pleas; because, if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition. For it is a rule, upon all pleas in abatement, that he who takes advantage of a flaw must at the same time show how it may be amended. Let us therefore next consider a more substantial kind of plea, *viz.*,

§ 377. 4. Special pleas in bar.—Special pleas in *bar;* which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: A former acquittal, a former conviction, a former attainder or a pardon. There are many other pleas which may be pleaded in bar of an appeal,[i] but these are applicable to both appeals and indictments.

§ 378. a. Plea of former acquittal.—First, the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal

[h] See Book III. pag. 302.

[i] 2 Hawk. P. C. c. 23.

---

[6] In England, in the case of a misnomer, no advantage any longer accrues to the defendant by a plea in abatement; for no indictment or information is abated by reason of any dilatory plea of misnomer, and if the court is satisfied, by affidavit or otherwise, of the truth of such plea, it forthwith causes the indictment or information to be amended (Criminal Law Act, 1826, § 19), and calls upon the party to plead thereto. And no indictment is now to be held insufficient for want of, or imperfection in, the addition of any defendant. (Criminal Procedure Act, 1851, § 24).—STEPHEN, 4 Comm. (16th ed.), 335.

In the United States it is held that for a misnomer in the indictment, the proper recourse for the defendant is a plea in abatement. (Commonwealth v. Fredericks, 119 Mass. 199; Turner v. People, 40 Ill. App. 17.)

maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense.[7] And hence it is allowed as a consequence that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offense,[j] he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore, an acquittal on an appeal is a good bar to an indictment on the same offense. And so, also, was an acquittal on an indictment a good bar to an appeal by the common law;[k] and therefore, in favor of appeals, a general practice was introduced not to try any person on an indictment of homicide till

j 3 Mod. 194.

k 2 Hawk. P. C. 373.

---

7 **Twice in jeopardy.**—Blackstone says it is a universal maxim of the common law that a man shall not be twice put in jeopardy of his life for the same offense. It is not confined to capital cases, but extends to misdemeanors. It has sometimes been questioned whether it is a fundamental principle of law or only a matter of practice. The doubt has arisen from the language of Cockburn, C. J., in Winsor v. The Queen (1866), L. R. 1 Q. B. 289. But the better opinion seems to be that Lord Cockburn was characterizing as a matter of practice, not the existence of the doctrine of jeopardy, but the applicability of it in a particular instance.

In the United States the doctrine of jeopardy has been erected into a constitutional principle. Amendment V of the federal constitution declares that "no man shall be subject for the same offense to be twice put in jeopardy of life or limb." This provision binds only the federal courts and not the state courts (Fox v. Ohio, 5 How. (U. S.) 410, 12 L. Ed. 213), on the principle that the first eight amendments are limitations on federal and not on state action. (Barron v. Baltimore, 7 Pet. (U. S.) 243, 8 L. Ed. 672.) But the same declaration is found in most of the state constitutions. A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impaneled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution; and he cannot be deprived of this bar by a *nolle prosequi* entered by the prosecuting officer against his will, or by a discharge of the jury and a continuance of the cause. (Cooley, Const. Lim. (7th ed.), 467; State v. Rook, 61 Kan. 382, 49 L. R. A. 186, 59 Pac. 653; O'Brian v. Commonwealth, 9 Bush (Ky.), 333, 15 Am. Rep. 715; Ex parte Fenton, 77 Cal. 183, 19 Pac. 267; McFadden v. Commonwealth, 23 Pa. St. 12; Commonwealth v. Tuck, 20 Pick. (Mass.) 356.)

after the year and day within which appeals may be brought were past, by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which inconvenience the statute 3 Henry VII, c. 1 (Star-chamber, 1487), enacts that indictments [336] shall be proceeded on, immediately, at the king's suit for the death of a man, without waiting for bringing an appeal, and that the plea of *autrefois acquit* on an indictment shall be no bar to the prosecuting of any appeal.

§ 379. b. Plea of former conviction. — Secondly, the plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime.[1] Hereupon it has been held that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment, of murder; for the fact prosecuted is the same in both, though the offenses differ in coloring and in degree. It is to be observed that the pleas of *autrefois acquit* and *autrefois convict*, or a former acquittal and former conviction, must be upon a prosecution for the same identical act and crime. But the case is otherwise, in

§ 380. c. Plea of former attainder.—Thirdly, the plea of *autrefois attaint*, or a former attainder, which is a good plea in bar, whether it be for the same or any other felony.[8] For wherever a man is attainted of felony, by judgment of death either upon a verdict or confession, by outlawry, or heretofore by abjuration, and whether upon an appeal or an indictment, he may plead such attainder in bar to any subsequent indictment or appeal for the same or for any other felony.[m] And this because, generally, such pro-

[1] 2 Hawk. P. C. 377.

[m] *Ibid.* 375.

[8] Attainder for treason and felony, except in the case of outlawry, was abolished by the Forfeiture Act, 1870, since which date the plea of *autrefois attaint* has been obsolete.

ceeding on a second prosecution cannot be to any purpose; for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had, so that it is absurd and superfluous to endeavor to attaint him a second time. But to this general rule, however, as to all others, there are some exceptions, wherein, *cessante ratione, cessat et ipsa lex* (the reason ceasing, the law itself ceases). As, 1. Where the former attainder is reversed for error, for then it [337] is the same as if it had never been. And the same reason holds where the attainder is reversed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. 2. Where the attainder was upon indictment, such attainder is no bar to an appeal, for the prior sentence is pardonable by the king, and if that might be pleaded in bar of the appeal, the king might in the end defeat the suit of the subject, by suffering the prior sentence to stop the prosecution of a second, and then, when the time of appealing is elapsed, granting the delinquent a pardon. 3. An attainder in felony is no bar to an indictment of treason, because not only the judgment and manner of death are different, but the forfeiture is more extensive, and the land goes to different persons. 4. Where a person attainted of one felony is afterwards indicted as principal in another, to which there are also accessories, prosecuted at the same time, in this case it is held that the plea of *autrefois attaint* is no bar, but he shall be compelled to take his trial, for the sake of public justice, because the accessories to such second felony cannot be convicted till after the conviction of the principal.[n] And from these instances we may collect that the plea of *autrefois attaint* is never good, but when a second trial would be quite superfluous.[o]

§ 381. d. Plea of pardon.—Lastly, a *pardon* may be pleaded in bar, as at once destroying the end and purpose of the indictment, by remitting that punishment which the prosecution is calculated to inflict. There is one advantage that attends pleading a pardon in bar, or in arrest of judgment, *before* sentence is past, which gives it by much the preference to pleading it *after* sentence or attainder; this is, that by stopping the judgment it stops the attainder, and

[n] Poph. 107.

[o] Staund. P. C. 107.

prevents the corruption of the blood, which, when once corrupted by attainder, cannot afterwards be restored otherwise than by act of parliament.[9] But, as the title of pardons is applicable to other stages of prosecution, and they have their respective force and efficacy as well after as before conviction, outlawry or [338] attainder, I shall therefore reserve the more minute consideration of them till I have gone through every other title, except only that of execution.

On failure of these pleas, prisoner may plead the general issue.—Before I conclude this head of special pleas in bar, it will be necessary once more to observe that, though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another if that be determined against him (as, if on an action of debt the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, *nil debet* (he owes nothing), as he might at first, for he has made his election what plea to abide by, and it was his own folly to choose a rotten defense), though, I say, this strictness is observed in civil actions, *quia interest reipublicæ ut sit finis litium* (because it is for the public good that there be an end to contentions), yet in criminal prosecutions *in favorem vitæ* (from a regard to life), as well upon appeal as indictment, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court, still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty.[p] For the law allows many pleas by which a prisoner may escape death, but only one plea in consequence whereof it can be inflicted, *viz.*, on the general issue, after an impartial examination and decision of the facts, by the unanimous verdict of a jury. It remains, therefore that I consider,

§ 382. 5. Plea of not guilty: the general issue.—The general issue, or plea of *not guilty*, upon which plea alone the prisoner can

[p] 2 Hal. P. C. 239.

---

[9] As stated several times before, there is now no such thing as corruption of blood on conviction.

receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of plea; as, on an indictment for murder, a man cannot *plead* that it was in his own defense against a robber on the highway or a burglar, but he must plead the general issue, not guilty, and give this special matter in evidence. For (besides that these pleas do in effect amount to the general issue; since, if true, the prisoner is most clearly not guilty) as the facts in treason are [339] laid to be done *proditorie et contra ligeantiæ suæ debitum* (traitorously and against his due allegiance), and, in felony, that the killing was done *felonice* (feloniously), these charges of a traitorous or felonious intent, are the points and very *gist* of the indictment, and must be answered directly, by the general negative, not guilty; and the jury upon the evidence will take notice of any defensive matter, and give their verdict accordingly as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous plea for the prisoner.[r]

§ 383. a. Replication of "cul. prit."—When the prisoner hath thus pleaded not guilty, *non culpabilis*, or *nient culpable*, which was formerly used to be abbreviated upon the minutes thus, "*non* (or *nient*) *cul.*," the clerk of the assize, or clerk of the arraigns, on behalf of the crown replies that the prisoner is guilty, and that he is ready to prove him so. This is done by two monosyllables in the same spirit of abbreviation, "*cul. prit.*," which signifies, first, that the prisoner is guilty (*cul. culpable*, or *culpabilis*), and then that the king is ready to prove him so; *prit*, *præsto sum*, or *paratus verificare*.[10] This is therefore a replication on behalf of

r 2 Hal. P. C. 258.

---

10 **The word "culprit."**—Blackstone gives a curious account of the word "culprit." The word, he says, was coined out of two abbreviations used in taking notes in the indictment for making up the record, if necessary. When the prisoner pleaded "not guilty," the clerk of assize wrote on the indictment the two words *non cul.*; for "*non*" or "*nient culpable*" not guilty. The officer of the court then joined issue on behalf of the king by saying that the prisoner was guilty and that he (the officer) was ready to prove it. The note which was made of this was "cul." for "culpable," guilty; and "prit.," which was the abbreviation for "*paratus verificare*," the two abbreviations making

the king *viva voce* at the bar; which was formerly the course in all pleadings, as well in civil as in criminal causes. And that was done in the concisest manner; for when the pleader intended to demur, he expressed his demurrer in a single word, "*judgment*," signifying that he demanded judgment whether the writ, declaration, plea, etc., either in form or matter, were sufficiently good in law, and if he meant to rest on the truth of the facts pleaded, he expressed that also in a single syllable, "*prit*," signifying that he was ready to prove his assertions: as may be observed from the year-books and other ancient repositories of law.[s] By this replication the king and the prisoner are therefore at issue; for we may remember, in our strictures upon pleadings in the preceding book,[t] it was observed that when the parties come to a fact which is affirmed on one side and denied on the other, then they are said to be at issue in point of [340] fact, which is evidently the case here, in the plea of *non cul.* by the prisoner and the replication of *cul.* by the clerk. And we may also remember that the usual conclusion of all affirmative pleadings, as this of *cul.* or *guilty* is, was by an averment in these words, "and this he is *ready* to verify; *et hoc paratus est verificare*," which same thing is here expressed by the single word "*prit.*"

How our courts came to express a matter of this importance in so odd and obscure a manner, "*rem tantam tam negligenter*," can hardly be pronounced with certainty. It may, perhaps, however, be accounted for by supposing that these were at first short notes, to help the memory of the clerk and remind him what he was to reply; or else it was the short method of taking down in court,

[s] North's Life of Lord Guildford. 98. [t] See Book III. pag. 312.

"cul. prit." In the present day, for some reason which I do not pretend to understand, as soon as a prisoner pleads "not guilty," the clerk of assize writes on the indictment the words "puts." Does this mean "puts himself on the country," or can it in any way be connected with the old "prit"? The forms used in court are all very old and mostly extremely curious. They are preserved all the more carefully because they are mere forms the significance of which is not usually understood by those who use them. The derivation of "culprit" given in dictionaries is "culpatus." (See Johnson's Dictionary by Latham; Skeat's Etymological Dictionary and Imperial Dictionary.)—STEPHEN, 1 Hist. Crim. Law, 297 n.

upon the minutes, the replication and averment, "*cul. prit,*" which afterwards the ignorance of succeeding clerks adopted for the very words to be by them spoken.[u]

§ 384. b. Issue joined.—But however it may have arisen, the joining of issue (which though now usually entered on the record, is no otherwise joined[x] in any part of the proceedings), seems to be clearly the meaning of this obscure expression,[y] which has puzzled our most ingenious etymologists, and is commonly understood as if the clerk of the arraigns, immediately on plea pleaded, had fixed an opprobrious name on the prisoner, by asking him, "*culprit,* how wilt thou be tried?" for immediately upon issue joined it is inquired of the prisoner by what trial he will make his innocence appear. This form has at present reference to appeals and approvements only, wherein the appellee has his choice either to try the accusation [341] by battle or by jury. But upon indictments, since the abolition of ordeal, there can be no other trial but by jury, *per pais,* or by the country, and therefore, if the prisoner refuses to put himself upon the inquest in the usual form, that is, to answer that he will be tried by God and the country,[z] if a commoner, and, if a peer, by God and his peers,[a] the indictment, if in treason, is taken *pro confesso* (as confessed), and the prisoner, in cases of

u Of this ignorance we may see daily instances, in the abuse of two legal terms of ancient French; one the prologue to all proclamations, "*oyez,*" or hear ye, which is generally pronounced most unmeaningly "O yes"; the other, a more pardonable mistake, *viz.,* when a jury are all sworn, the officer bids the crier number them, for which the word in law-French is "*countez*"; but we now hear it pronounced in very good English, "count these."

x 2 Hawk. P. C. 399.

y 2 Hal. P. C. 258.

z A learned author, who is very seldom mistaken in his conjectures, has observed that the proper answer is, "*by God* or *the country,*" that is, either by *ordeal* or by *jury;* because the question supposes an option in the prisoner. And certainly it gives some countenance to this observation, that the trial by *ordeal* used formerly to be called *judicium Dei* (the judgment of God). But it should seem that when the question gives the prisoner an option, his answer must be positive, and not in the disjunctive, which returns the option back to the prosecutor.

a Kelynge. 57. State Trials, *passim.*

felony, is adjudged to stand mute, and, if he perseveres in his obstinacy, shall now [b] be convicted of felony.

When the prisoner has thus put himself upon his trial, the clerk answers in the humane language of the law, which always hopes that the party's innocence rather than his guilt may appear, "God send thee a good deliverance." And then they proceed, as soon as conveniently may be, to the trial; the manner of which will be considered at large in the next chapter.

[b] Stat. 12 Geo. III. c. 20 (Criminal Procedure, 1772).

[342] # CHAPTER THE TWENTY-SEVENTH.

OF TRIAL AND CONVICTION.

§ 385. VII. The several methods of trial. — The several methods of trial and conviction of offenders established by the laws of England were formerly more numerous than at present, through the superstition of our Saxon ancestors, who, like other northern nations, were extremely addicted to divination, a character, which Tacitus observes of the ancient Germans.[a] They therefore invented a considerable number of methods of purgation or trial, to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would always interpose miraculously to vindicate the guiltless.

§ 386. 1. Trial by ordeal.—The most ancient[b] species of trial was that by *ordeal*, which was peculiarly distinguished by the appellation of *judicium Dei* (the judgment of God), and sometimes *vulgaris purgatio* (common purgation), to distinguish it from the canonical purgation, which was by the oath of the party.[1] This was of two sorts,[c] either *fire* ordeal, or *water* ordeal; the former being confined to persons of higher rank, the latter to the common people.[d] Both these might be performed [343] by deputy, but the principal was to answer for the success of the trial; the deputy only venturing some corporal pain, for hire, or perhaps for friendship.[e]

[a] De Mor. Germ. 10.

[b] LL. Inæ. c. 77.

[c] Mirr. c. 3. § 23.

[d] *Tenetur se purgare is qui accusatur, per Dei judicium; scilicet per calidum ferrum, vel per aquam, pro diversitate conditionis hominum: per ferrum calidum, si fuerit homo liber; per aquam, si fuerit rusticus.* (The accused party is bound to clear himself by the judgment of God, that is, either by hot iron, or by water, according to his rank: by hot iron, if he be a freeman; by water, if of inferior degree.) (Glanv. l. 14. c. 1.)

[e] This is still expressed in that common form of speech, "of going through fire and water to serve another."

---

1 On trial by ordeal, see Lea, Superstition and Force, 217; White, Legal Antiquities, c. V.

§ 387. **a. Fire ordeal.**—Fire ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron, of one, two or three pounds weight, or else by walking, barefoot and blindfold, over nine red-hot plowshares, laid lengthwise at unequal distances, and if the party escaped being hurt, he was adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty. However, by this latter method Queen Emma, the mother of Edward the Confessor, is mentioned to have cleared her character when suspected of familiarity with Alwyn, Bishop of Winchester.[f]

§ 388. **b. Water ordeal.**—Water ordeal was performed either by plunging the bare arm up to the elbow in boiling water and escaping unhurt thereby, or by casting the person suspected into a river or pond of cold water, and if he floated therein without any action of swimming, it was deemed an evidence of his guilt; but, if he sunk, he was acquitted. It is easy to trace out the traditional relics of this water ordeal in the ignorant barbarity still practiced in many countries to discover witches, by casting them into a pool of water and drowning them to prove their innocence. And in the eastern empire the fire ordeal was used to the same purpose by the Emperor Theodore Lascaris, who, attributing his sickness to magic, caused all those whom he suspected to handle the hot iron; thus joining (as has been well remarked[g]) to the most dubious crime in the world the most dubious proof of innocence.

§ 389. **c. History of trial by ordeal.**—And, indeed, this purgation by ordeal seems to have been very ancient, and very universal, in the times of superstitious barbarity. It was known to the ancient Greeks; for in the [344] Antigone of Sophocles,[h] a person, suspected by Creon of a misdemeanor, declares himself ready "to handle hot iron, and to walk over fire," in order to manifest his innocence, which, the scholiast tells us, was then a very usual purgation. And Grotius[i] gives us many instances of water ordeal in

f Tho. Rudborne Hist. Maj. Winton. l. 4. c. 1.

g Sp. L. b. 12. c. 5.

h V. 270.

i On Numb. v. 17.

Bithynia, Sardinia and other places. There is also a very peculiar species of water ordeal said to prevail among the Indians on the coast of Malabar, where a person accused of any enormous crime is obliged to swim over a large river abounding with crocodiles, and, if he escapes unhurt, he is reputed innocent. As, in Siam, besides the usual methods of fire and water ordeal, both parties are sometimes exposed to the fury of a tiger let loose for that purpose, and if the beast spares either, that person is accounted innocent; if neither, both are held to be guilty; but if he spares both, the trial is incomplete, and they proceed to a more certain criterion.[k]

One cannot but be astonished at the folly and impiety of pronouncing a man guilty unless he was cleared by a miracle, and of expecting that all the powers of nature should be suspended by an immediate interposition of Providence to save the innocent whenever it was presumptuously required. And yet in England, so late as King John's time, we find grants to the bishops and clergy to use the *judicium ferri, aquæ, et ignis* (the judgment of iron, water and fire).[l] And, both in England and Sweden, the clergy presided at this trial, and it was only performed in the churches or in other consecrated ground; for which Stiernhook[m] gives the reason, "*non defuit illis operæ et laboris pretium; semper enim ab ejusmodi judicio aliquid lucri sacerdotibus obveniebat* (they did not go without reward for their pains and labor, for from judgments of this kind some gain always accrued to the priests)." But, to give it its due praise, we find the canon law very early declaring against trial by ordeal, or *vulgaris purgatio* (common purgation), as being the fabric of the devil, "*cum sit contra præceptum Domini, non tentabis Dominum Deum tuum* (since it is against the commandment of the Lord—thou shalt not tempt the Lord thy God)."[n] Upon this authority, though the canons [345] themselves were of no validity in England, it was thought proper (as had been done in Denmark above a century before[o]) to disuse

k Mod. Univ. Hist. vii. 266.

l Spelm. Gloss. 435.

m De Jure Sueonum, l. 1. c. 8.

n Decret. part. 2. caus. 2. qu. 5. dist. 7. Decretal. lib. 3. tit. 50. c. 9 & Gloss. *ibid.*

o Mod. Un. Hist. xxxii. 105.

and abolish this trial entirely in our courts of justice by an act of parliament in 3 Henry III (1218), according to Sir Edward Coke,[p] or rather by an order of the king in council.[q]

§ 390. **2. Trial by the corsned.**—Another species of purgation somewhat similar to the former, but probably sprung from a presumptuous abuse of revelation in the ages of dark superstition, was the *corsned,* or morsel of execration,[2] being a piece of cheese or bread, of about an ounce in weight, which was consecrated with a form of exorcism, desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty, but might turn to health and nourishment if he was innocent;[r] as the water of jealousy among the Jews[s] was, by God's special appointment, to cause the belly to swell and the thigh to rot if the woman was guilty of adultery. This corsned was then given to the suspected person, who at the same time also received the holy sacrament;[t] if, indeed, the corsned was not, as some have suspected, the sacramental bread itself; till the subsequent invention of transubstantiation preserved it from profane uses with a more profound respect than formerly. Our historians assure us that Godwin, Earl of Kent, in the reign of King Edward the Confessor, abjuring the death of the king's brother, at last appealed to his corsned, "*per buccellam deglutiendam abjuravit* (he abjured it by swallowing the morsel of execration)," [u] which stuck in his throat and killed him. This custom has been long since gradually abolished, though the remembrance of it still subsists in certain phrases of abjuration retained among the common people.[w]

[346] However, we cannot but remark that though in European countries this custom most probably arose from an abuse of re-

p 9 Rep. 32.

q 1 Rym. Fœd. 228. Spelm. Gloss. 326. 2 Pryn. Rec. Append. 20. Seld. Eadm. fol. 48.

r Spelm. Gl. 439.

s Numb. c. y.

t LL. Canut. c. 6.

u Ingulph.

w As, "I will take the sacrament upon it; may this morsel be my last"; and the like.

---

2 The ordeal of corsned is explained in Lea, Superstition and Force, 299.

vealed religion, yet credulity and superstition will, in all ages and in all climates, produce the same or similar effects. And therefore we shall not be surprised to find that in the kingdom of Pegu there still subsists a trial by the corsned, very similar to that of our ancestors, only substituting raw rice instead of bread.[x] And, in the kingdom of Monomotapa, they have a method of deciding lawsuits equally whimsical and uncertain. The witness for the plaintiff chews the bark of a tree, endued with an emetic quality, which, being sufficiently masticated, is then infused in water, which is given the defendant to drink. If his stomach rejects it, he is condemned; if it stays with him, he is absolved, unless the plaintiff will drink some of the same water, and, if it stays with him also, the suit is left undetermined.[y]

These two antiquated methods of trial were principally in use among our Saxon ancestors. The next, which still remains in force, though very rarely in use, owes its introduction among us to the princes of the Norman line. And that is

§ 391. 3. Trial by battle.—The trial by *battle*, duel or single combat, which was another species of presumptuous appeals to Providence, under an expectation that Heaven would unquestionably give the victory to the innocent or injured party.[3] The nature of this trial in cases of civil injury, upon issue joined in a writ of right, was fully discussed in the preceding book,[z] to which I have only to add, that the trial by battle may be demanded at the election of the appellee, in either an appeal or an approvement; and that it is carried on with equal solemnity as that on a writ of right: but with this difference, that there each party might hire a champion, but here they must fight in their proper persons. And therefore, if the appellant [347] or approver be a woman, a priest, an infant or of the age of sixty, or lame or blind, he or she may counterplead and refuse the wager of battle, and compel the appellee to put himself upon the country. Also peers of the realm, bringing an appeal, shall not be challenged to wage battle, on ac-

x Mod. Univ. Hist. vii. 129.
y *Ibid.* xv. 464.
z See Book III. pag. 337.

3 On wager of battel, see Lea, Superstition and Force, 93; White, Legal Antiquities, c. IV.

count of the dignity of their persons, nor the citizens of London, by special charter, because fighting seems foreign to their education and employment. So, likewise, if the crime be notorious; as if the thief be taken with the *mainour*, or the murderer in the room with a bloody knife, the appellant may refuse the tender of battle from the appellee;[a] for it is unreasonable that an innocent man should stake his life against one who is already half convicted.

§ 392. Procedure in trial by battle.—The form and manner of waging battle upon appeals are much the same as upon a writ of right; only the oaths of the two combatants are vastly more striking and solemn.[b] The appellee, when appealed of felony, pleads *not guilty*, and throws down his glove, and declares he will defend the same by his body: the appellant takes up the glove, and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the Book in his right hand, and in his left the right hand of his antagonist, swears to this effect. "*Hoc audi, homo, quem per manum teneo,*" *etc.*, "Hear this, O man, whom I hold by the hand, who callest thyself John by the name of baptism, that I, who call myself Thomas by the name of baptism, did not feloniously murder thy father, William by name, nor am any way guilty of the said felony. So help me God, and the saints; and this I will defend against thee by my body, as this court shall award." To which the appellant replies, holding the Bible and his antagonist's hand in the same manner as the other: "Hear this, O man, whom I hold by the hand, who callest thyself Thomas by the name of baptism, that thou art perjured; and therefore perjured, because that thou feloniously didst murder my [348] father, William by name. So help me God and the saints; and this I will prove against thee by my body, as this court shall award."[c] The battle is then to be fought with the same weapons,

a 2 Hawk. P. C. 427.

b Flet. l. 1. c. 34. 2 Hawk. P. C. 426.

c There is a striking resemblance between this process and that of the court of *Areopagus* at Athens for murder; wherein the prosecutor and prisoner were both sworn in the most solemn manner; the prosecutor, that he was related to the deceased (for none but near relations were permitted to prosecute in that court) and that the prisoner was the cause of his death; the prisoner, that he was innocent of the charge against him. (Pott. Antiq. b. 1. c. 19.)

viz., batons, the same solemnity, and the same oath against amulets and sorcery, that are used in the civil combat; and if the appellee be so far vanquished that he cannot or will not fight any longer, he shall be adjudged to be hanged immediately, and then, as well as if he be killed in battle, Providence is deemed to have determined in favor of the truth, and his blood shall be attainted. But if he kills the appellant, or can maintain the fight from sunrising till the stars appear in the evening, he shall be acquitted. So, also, if the appellant becomes recreant, and pronounces the horrible word of *craven*, he shall lose his *liberam legem* (free law), and become infamous; and the appellee shall recover his damages, and also be forever quit, not only of the appeal, but of all indictments likewise for the same offense.

§ 393. 4. Trial of an indicted peer.—The fourth method of trial used in criminal cases is that by the peers of Great Britain, in the court of parliament, or the court of the lord high steward, when a peer is capitally *indicted;* for in case of an *appeal*, a peer shall be tried by jury.[d] Of this enough has been said in a former chapter,[e] to which I shall only now add that, in the method and regulations of its proceedings, it differs little from the trial *per patriam*, or by jury, except that the peers need not all agree in their verdict, and except, also, that no special verdict can be given in the trial of a peer;[f] because the lords of parliament, or the lord high steward (if the trial be [349] had in his court) are judges sufficiently competent of the law that may arise from the fact, but the greater number, consisting of twelve at the least, will conclude, and bind the minority.[g]

§ 394. 5. Trial by jury.—The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter:[h] "*nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale judicium*

d 9 Rep. 30. 2 Inst. 49.
e See pag. 259.
f Hutt. 116.
g Kelynge. 56. Stat. 7 W. III. c. 3. § 11 (Treason, 1695). Foster. 247.
h 9 Hen. III. c. 29 (1225).

parium suorum, vel per legem terræ (no free man shall be taken, or imprisoned, or exiled, or anywise injuriously affected, except by the lawful judgment of his peers, or by the law of the land)."[4]

§ 395. **a. Value of jury trial in criminal cases.**—The antiquity and excellence of this trial, for the settling of civil property, has before been explained at large.[1] And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary for preserving the admirable balance of our constitution to vest the executive power of the laws in the prince, and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control by justices of *oyer* and *terminer* occasionally named by the crown, who might then, as in France or Turkey, imprison, dispatch or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English laws have with excellent forecast contrived that no man should be called to answer to the king for any capital crime unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury, and that the truth of every accusation, whether preferred in the shape of indictment, information or appeal, [350] should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion. So that the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary

1 See Book III. pag. 379.

---

4 On trial by jury and its development, see the authoritative chapters in Thayer, Prelim. Treatise on Evidence, 47–182.

methods of trial by justices of the peace, commissioners of the revenue and courts of conscience. And however *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

What was said of juries in general, and the trial thereby, in *civil* cases, will greatly shorten our present remarks with regard to the trial of *criminal* suits; indictments, informations and appeals: which trial I shall consider in the same method that I did the former, by following the order and course of the proceedings themselves as the most clear and perspicuous way of treating it.

§ 396. b. Impaneling the jury.—When, therefore, a prisoner on his arraignment has pleaded *not guilty*, and for his trial hath 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, freeholders, without just exception, and of the *visne* or neighborhood, which is interpreted to be of the county where the fact is committed.[1] If the proceedings are before the court of king's bench, there is time allowed between the arraignment and the trial for a jury to be impaneled [351] by writ of *venire facias* to the sheriff, as in civil causes; and the trial in case of a misdemeanor is had at *nisi prius*, unless it be of such consequence as to merit a trial at bar, which is always invariably had when the prisoner is tried for any capital offense. But, before commissioners of *oyer* and *terminer* and gaol delivery, the sheriff, by virtue of a general precept directed to him beforehand, returns to the court a panel of forty-eight jurors, to try all felons that may be called upon their trial at that session; and therefore it is there usual to try all felons immediately or soon after their arraignment. But it is not customary, nor agreeable to the gen-

[1] 2 Hal. P. C. 264. 2 Hawk. P. C. 403.

eral course of proceedings (unless by consent of parties or where the defendant is actually in gaol), to try persons indicted of smaller misdemeanors at the same court in which they have pleaded *not guilty*, or *traversed* the indictment. But they usually give security to the court to appear at the next assizes or session, and then and there to try the traverse, giving notice to the prosecutor of the same.

Requirements in trial for high treason.—In cases of high treason, whereby corruption of blood may ensue (except treason in counterfeiting the king's coin or seals) or misprision of such treason, it is enacted by statute 7 W. III, c. 3 (Treason, 1695), first, that no person shall be tried for any such treason except an attempt to assassinate the king, unless the indictment be found within three years after the offense committed; next, that the prisoner shall have a copy of the indictment (which includes the caption[k]), but not the names of the witnesses, five days at least before the trial, that is, upon the true construction of the act, before his arraignment,[l] for then is his time to take any exceptions thereto, by way of plea or demurrer; thirdly, that he shall also have a copy of the panel of jurors two days before his trial; and, lastly, that he shall have the same compulsive process to bring in his witnesses *for* him as was usual to compel their appearance *against* him. And, by statute 7 Ann., c. 21, Treason, 1708 (which did not take place till after the decease of the late pretender), all persons indicted for high treason or misprision [352] thereof shall have not only a copy of the indictment, but a list of all the witnesses to be produced and of the jurors impaneled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses, the better to prepare him to make his challenges and defense. But this last act, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, is repealed by the statute 6 George III, c. 53 (Treason, 1765), else it had been impossible to have tried those offenses in the same circuit in which they are indicted; for ten clear days between the finding and the trial of the indictment will exceed the

[k] Fost. 229.

[l] *Ibid.* 230.

time usually allotted for any session of *oyer* and *terminer*.[m] And no person indicted for felony is, or (as the law stands) ever can be, entitled to such copies before the time of his trial.[n]

§ 397. c. Challenges to the jury.—When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party.

§ 398. (1) Challenges for cause.—Challenges may here be made either on the part of the king or on that of the prisoner, and either to the whole array or to the separate polls, for the very same reasons that they may be made in civil causes.[o] For it is here at least as necessary as there that the sheriff or returning officer be totally indifferent; that where an alien is indicted the jury should be *de medietate*,[5] or half foreigners, if so many are found in the place (which does not indeed hold in treasons,[p] aliens being very improper judges of the breach of allegiance; nor yet in the case of Egyptians under the statute 22 Henry VIII, c. 10, Egyptians, 1530); that on every panel there should be a competent number of hundredors; and that the particular jurors should be *omni exceptione majores* (above all objection), not liable to objection either *propter honoris respectum*, *propter defectum*, *propter affectum*, or *propter delictum* (on account of dignity, on account of incompetency, on account of partiality, on account of the commission of some offense).

§ 399. (2) Peremptory challenges.—[353] Challenges upon any of the foregoing 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* (from a regard to life), allowed to the prisoner an arbitrary

m Fost. 250.
n 2 Hawk. P. C. 410.
o See Book III. pag. 359.
p 2 Hawk. P. C. 420. 2 Hal. P. C. 271.

5 The privilege formerly allowed to aliens of challenging the array, on the ground that the sheriff had not returned a jury *de medietate linguæ*, was taken away in the case of treason by 1 & 2 Ph. & M., c. 10 (1554), and though preserved by implication in the Juries Act, 1825, was expressly abolished by the Naturalization Act, 1870. (4 Stephen's Comm. (16th ed.), 348.)

and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous. This is grounded on two reasons: 1. As everyone 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 (when put to defend his life) 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, even without being able to assign a reason for such his dislike. 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 sometimes provoke a 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 king by the statute 33 Edward I, st. 4 (1305), which enacts that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However, it is held that the king need not assign his cause of challenge till all the panel is gone though, and unless there cannot be a full jury without the persons so challenged. And then, and not sooner, the king's counsel must show the cause; otherwise the juror shall be sworn.[q 6]

q 2 Hawk. P. C. 413. 2 Hal. P. C. 271.

---

6 In Mansell v. The Queen (1857), 8 El. & Bl. 54, 120 Eng. Reprint, 20, 8 St. Tr. (N. S.) 831, the law, as here laid down by Blackstone, was confirmed; the court of queen's bench observing that neither by 33 Edw. I (*Ord'n. de Inquis.*), nor by the Juries Act, 1825, was there any intention to take away "all power of peremptory challenge from the crown, etc. And the course has invariably been to permit the crown to challenge without cause, till the panel has been called over and exhausted, and then to call over the names of the jurors peremptorily challenged by the crown, and put the crown to assign cause; so that if twelve of those upon the panel remain, as to whom no just cause of exception can be assigned, the trial may proceed." (4 Stephen's Comm. (16th ed.), 349 n.)

The peremptory challenges of the prisoner must, however, have some reasonable boundary; otherwise he might never [354] be tried. This reasonable boundary is settled by the common law to be the number of thirty-five; that is, one under the number of three full juries.[7] For the law judges that five and thirty are fully sufficient to allow the most timorous man to challenge through mere caprice, and that he who peremptorily challenges a greater number, or three full juries, has no intention to be tried at all. And therefore it dealt with one who peremptorily challenges above thirty-five, and will not retract his challenge, as with one who stands mute or refuses his trial, by sentencing him to the *peine forte et dure* in felony, and by attainting him in treason,[r] And so the law stands at this day with regard to treason of any kind.

But by statute 22 Henry VIII, c. 14, Abjuration, 1530 (which, with regard to felonies, stands unrepealed by statute 1 & 2 Ph. & Mar., c. 10, Treason, 1554), by this statute, I say, no person arraigned for felony can be admitted to make any more than *twenty* peremptory challenges. But how if the prisoner will peremptorily challenge twenty-one? What shall be done? The old opinion was, that judgment of *peine et forte dure* should be given, as where he challenged thirty-six at the common law;[s] but the better opinion seems to be[t] that such challenge shall only be disregarded and overruled. Because, first, the common law doth not inflict the judgment of penance for challenging twenty-one, neither doth the statute inflict it; and so heavy a judgment (nor that of conviction,

r 2 Hal. P. C. 268.
s 2 Hawk. P. C. 414.
t 3 Inst. 227. 2 Hal. P. C. 270.

---

7 This question is dealt with by statute both in England and in the United States. In England, by the Juries Act, 1825, the peremptory challenges of a person arraigned for murder or felony are now limited to twenty. This is also the extreme number in such cases of high treason as come under the provisions of the Treason Act, 1842; though in other kinds of high treason, the number remains thirty-five, as at common law. If any person indicted for treason, felony or piracy challenges peremptorily a greater number of the jury than such person is entitled by law to challenge in any of the said cases, every such peremptory challenge beyond the number allowed by law is void, and the trial proceeds as if no such challenge had been made. (4 Stephen's Comm. (16th ed.), 350.)

which succeeds it) shall not be imposed by implication. Secondly, the words of the statute are, "that he be not *admitted* to challenge more than twenty"; the evident construction of which is, that any further challenge shall be disallowed or prevented, and therefore, being null from the beginning and never in fact a challenge, it can subject the prisoner to no punishment; but the juror shall be regularly sworn.

§ 400. **d. Swearing the jury.**—If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a *tales* [355] may be awarded as in civil causes,[u] till the number of twelve is sworn "well and truly to try, and true deliverance make, between our sovereign lord the king, and the prisoner whom they have in charge; and a true verdict to give, according to their evidence."[8]

§ 401. **e. Proceedings after the jury is sworn.**—When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshaled, examined and enforced by the counsel for the crown or prosecution. But it is a settled rule at common law that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated.[w] A rule which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular[x]) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English

[u] See Book III. pag. 364. But, in mere commissions of gaol delivery, no *tales* can be awarded; though the court may *ore tenus* order a new panel to be returned *instanter*. (4 Inst. 68. 4 St. Tr. 728. Cooke's Case.)

[w] 2 Hawk. P. C. 400.

[x] Sir Edward Coke (3 Inst. 137.), gives another additional reason for this refusal, "because the evidence to convict a prisoner should be so manifest, as it could not be contradicted." Which, Lord Nottingham (when high steward) declared (3 St. Tr. 726.) was the only good reason that could be given for it.

---

[8] Oaths Act, 1909, § 2. Under this act, the person taking the oath holds the New Testament in his uplifted hand, and repeats the words of the oath. Before this act, the oath was administered by the officer of the court in the

law. For upon what face of reason can that assistance be denied to save the life of a man which yet is allowed him in prosecutions for every petty trespass? Nor, indeed, is it, strictly speaking, a part of our ancient law; for the Mirror,[y] having observed the necessity of counsel in civil suits, "who know how to forward and defend the cause, by the rules of law and customs of the realm," immediately afterwards subjoins, "and more necessary are they for defense upon indictments and appeals of felony, than upon other venial causes."[z] And the judges themselves are so sensible of this defect, that they never scruple to allow a prisoner counsel to instruct him what questions to [356] ask, or even to ask questions for him, with respect to matters of fact; for as to matters of law arising on the trial, they are *entitled* to the assistance of counsel. But, lest this indulgence should be intercepted by superior influence in the case of state criminals, the legislature has directed by statute 7 W. III, c. 3 (Treason, 1695), that persons *indicted* for

[y] Ch. 3. § 1.

[z] Father Parsons, the jesuit, and after him Bishop Ellys (of English Liberty. ii. 26.), have imagined, that the benefit of counsel to plead for them was first denied to prisoners by a law of Henry I, meaning (I presume) chapters 47 and 48 of the code which is usually attributed to that prince. "*De causis criminalibus vel capitalibus nemo quærat consilium; quin implacitatus statim perneget, sine omni petitione consilii.—In aliis omnibus potest et debet uti consilio* (In criminal or capital cases let no man crave imparlance, but without pleading and without craving leave to imparl, let him immediately and positively deny. In all other cases he can and ought to have imparlance). But this *consilium*, I conceive, signifies only an *imparlance*, and the *petitio consilii* is *craving leave to imparl* (See Book III. pag. 298.); which is not allowable in any criminal prosecution. This will be manifest by comparing this law with a contemporary passage in the *grand coustumier* of Normandy (c. 85.), which speaks of imparlances in personal actions. *Apres ce, est tenu le querelle a respondre; et aura congie de soy conseiller, s'il le demande; et quand il sera conseille, il peut nyer le faict dont il est accuse,*" Or, as it stands in the Latin text (*edit.* 1539.), "*Querelatus autem postea tenetur responderc; et habebit licentiam consulendi, si requirat; habito autem consilio, debet factum negare quo accusatus est.* (But the defendant is afterwards bound to answer, and he shall have the liberty of imparling if he require it; but imparlance being had, he ought to deny the fact of which he is accused.)"

following form. "You shall, well and truly try, etc., so help you God," and the person taking the oath kissed the Testament. A witness may still be sworn in the old way, if he so desires (Rex v. Palm (1910), 4 Cr. App. R. 201).—STEPHEN, 4 Comm. (16th ed.), 351 n.

such high treason as works a corruption of the blood, or misprision thereof (except treason in counterfeiting the king's coin or seals), may make their full defense by counsel, not exceeding two, to be named by the prisoner and assigned by the court or judge; and the same indulgence, by statute 20 George II. c. 30 (Treason, 1746), is extended to parliamentary *impeachments* for high treason which were excepted in the former act.[9]

§ 402. **f. Evidence in criminal cases.**—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, by several statutes and resolutions, a difference is made between civil and criminal evidence.

[9] **Counsel for the accused.**—Early in the twentieth century, a further step was taken by the legislature in its solicitude to secure a proper trial for all accused persons; and, accordingly, it was provided that where it appears, having regard to the nature of the defense set up by any poor prisoner, as disclosed in the evidence given or statement made by him before the committing justices, that it is desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defense, and that his means are insufficient to enable him to obtain such aid, either the committing justices or the judge before whom he is tried may certify that the prisoner ought to have such legal aid; and thereupon the prisoner shall be entitled to have solicitor and counsel assigned to him; and their remuneration, and the costs of a copy of the depositions and of any necessary witnesses, are defrayed in the same manner as the costs of prosecution. But although there is now no restriction on a prisoner retaining counsel to appear for him at the trial, it is of importance to remember that this applies to junior counsel only, and that, if the services of a king's counsel are desired, the formal license of the crown, obtained through the home office, is necessary.

Calling of evidence.—The case for the prosecution is opened by counsel in a speech to the jury; after which the evidence in support of it is called. When the case for the prosecution is finished, and there is a *prima facie* case to answer, the evidence for the defense is called. With regard to the calling of evidence, and especially of the admissibility of evidence, there were formerly great differences between criminal and civil trials; but with the view of assimilating these differences as far as possible, it was enacted, by the Criminal Procedure Act, 1865, that if a person on his trial for felony or misdemeanor should be defended by counsel, but not otherwise, it should be the duty of the presiding judge, at the close of the case for the prosecution, to ask such counsel whether he intended to adduce evidence, and that, in the event of his not thereupon announcing his intention to adduce evidence, the counsel for the prosecu-

§ 403. (1) Evidence in cases of treason.—First, in all cases of high treason, petit treason and misprision of treason, by statutes 1 Edward VI, c. 12 (Criminal Law, 1547), and 5 & 6 Edward VI, c. 11 (Treason, 1551), *two* lawful witnesses are required to convict a prisoner, unless he shall willingly and without violence *confess* the same. By statute 1 & 2 Ph. & Mar., c. 10 (Treason, 1554), a further exception is made as to treasons in counterfeiting the king's seals or signatures, and treasons concerning coin current within this realm, and more particularly by c. 11, the offenses of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting or forging any current coin. The statutes 8 & 9 W. III, c. 25 (Stamps, 1697), and 15 [357] & 16 George II, c. 28 (Counterfeiting Coin, 1741), in their subsequent extensions of this species of treason do also provide that the offenders may be indicted, arraigned, tried, convicted and attainted by the like evidence and in such manner and form as may be had and used against offenders for counterfeiting the king's money. But by statute 7 W. III, c. 3 (1695), in prosecutions for those treasons to which that act extends, the same rule (of requiring *two* witnesses) is again enforced, with this addition, that the *confession* of the prisoner, which shall countervail the necessity of such proof, must be in *open court.* In the construction of which act it hath been holden[a] that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty un-

[a] Foster. 240–44.

---

tion should then be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against the person on his trial. Moreover, the act provided that, upon every trial for felony or misdemeanor, whether the prisoner is defended by counsel or not, the person charged (or his counsel) should be allowed, if he should think fit, to open his defense, and, after the conclusion of such opening, to examine any witnesses he might think fit to call, and then to sum up his evidence, and that "the right of reply should be as at present." And a still greater assimilation has been effected by the Criminal Evidence Act, 1898; but the rules as to summing up the evidence and as to the right of reply are not affected by these provisions, save that, where the accused is the only witness called for the defense, that fact does not of itself confer on the prosecution the right of reply.—STEPHEN, 4 Comm. (16th ed.), 352.

guarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute. And, indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favor or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence. By the same statute 7 W. III, it is declared that 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 [b] and not of distinct heads or kinds; and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. And therefore, in Sir John Fenwick's case, in King William's time, where there was but one witness, an act of parliament [c] was made on purpose to attaint him of treason, and he was executed.[d] But in almost every other accusation one positive witness is sufficient. Baron Montesquieu lays it down for a rule [e] that those laws which condemn a man to death *in any case* on the deposition of a single witness are fatal to liberty; and he adds this reason, that the witness who affirms, and the accused who denies, make an equal balance.[f] There is a necessity, therefore, to call [358] in a third man to incline the scale. But this seems to be carrying matters too far; for there are some crimes in which the very privacy of their nature excludes the possibility of having more than one witness. Must these, therefore, escape unpunished? Neither, indeed, is the bare denial of the person accused equivalent to the positive oath of a disinterested witness. In cases of indictments for perjury this doctrine is better founded, and there our law adopts it; for one witness is not allowed to convict a man indicted for perjury, because then there is only one oath against another.[ff 10] In cases of treason, also,

b See St. Tr Foster. 235.
c Stat. 8 W (1696).
d St. Tr. V. 40.
e Sp. L. b. 12. c. 3.
f Beccar. c. 13.
ff 10 Mod. 194.

10 So, too, in the case of certain offenses under the Criminal Law Amendment Act, 1885, it is provided that no person shall be convicted of such offenses upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused.—STEPHEN, 4 Comm. (16th ed.), 355.

there is the accused's oath of allegiance to counterpoise the information of a single witness; and that may, perhaps, be one reason why the law requires a double testimony to convict him, though the principal reason undoubtedly is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

§ 404. (2) Evidence of handwriting.—Secondly, though from the reversal of Colonel Sidney's attainder by act of parliament in 1689 [g] it may be collected [h] that the mere similitude of handwriting in two papers shown to a jury, without other concurrent testimony, is no evidence that both were written by the same person; yet undoubtedly the testimony of witnesses well acquainted with the party's hand that they believe the paper in question to have been written by him is evidence to be left to a jury.[i]

§ 405. (3) Evidence in concealment of death of bastard child. Thirdly, by the statute 21 Jac. I, c. 27 (Concealment of Birth of Bastards, 1623), a mother of a bastard child concealing its death must prove by one witness that the child was born dead; otherwise such concealment shall be evidence of her having murdered it.[k]

§ 406. (4) Presumptive evidence of felony.—Fourthly, all presumptive evidence of felony should be admitted cautiously; for the law holds that it is better that ten guilty persons escape than that one innocent suffer.[11] [359] And Sir Matthew Hale in particular [l] lays down two rules most prudent and necessary to be observed: 1. Never to convict a man for stealing the goods of a per-

g St. Tr. VIII. 472.

h 2 Hawk. P. C. 431.

i Lord Preston's Case. A. D. 1690. St. Tr. IV. 453. Francia's Case. A. D. 1716. St. Tr. VI. 69. Layer's Case. A. D. 1722. *Ibid.* 279. Henzey's Case. A. D. 1758. 4 Burr. 644.

k See pag. 198.

l 2 Hal. P. C. 290.

---

11 **Presumption of innocence.**—Mr. Justice White gives an extended discussion of the presumption of innocence in the case of Coffin v. United States, 156 U. S. 432, 456, 39 L. Ed. 481, 492, 15 Sup. Ct. Rep. 394. This opinion has been subjected to a searching examination by the late Professor Thayer in a scholarly paper printed as Appendix B to his Preliminary Treatise on Evidence.

son unknown merely because he will give no account how he came by them, unless an actual felony be proved of such goods; and, 2. Never to convict any person of murder or manslaughter till at least the body be found dead,—on account of two instances he mentions, where persons were executed for the murder of others who were then alive, but missing.

§ 407. (5) Witnesses for the accused.—Lastly, it was an ancient and commonly received practice[m] (derived from the civil law, and which also to this day obtains in the kingdom of France[n]) that, as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. And therefore it deserves to be remembered, to the honor of Mary I (whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous[o]), that when she appointed Sir Richard Morgan chief justice of the common pleas, she enjoined him, "that notwithstanding the old error, which did not admit any witness to speak, or any other matter to be heard, in favor of the adversary, her majesty being party, her highness' pleasure was, that whatsoever could be brought in favor of the subject should be admitted to be heard; and moreover, that the justices should not persuade themselves to sit in judgment otherwise for her highness than for her subject."[p] Afterwards, in one particular instance (when embezzling the queen's military stores was made felony by statute 31 Elizabeth, c. 4,—Embezzlement, 1588), it was provided that any person impeached for such felony "should be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his discharge and defense"; and in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually [360] introduced of examining witnesses for the prisoner, but not upon oath,[q] the consequence of which still was, that the jury gave less credit to the prisoner's evidence than

m St. Tr. I. *passim.*

n Domat. Publ. Law. b. 3. t. 1. Montesq. Sp. L. b. 29. c. 11.

o See pag. 17.

p Hollingsh. 1112. St. Tr. I. 72.

q 2 Bulstr. 147. Cro. Car. 292.

to that produced by the crown. Sir Edward Coke[r] protests very strongly against this tyrannical practice, declaring that he never read in any act of parliament, book-case or record that in criminal cases the party accused should not have witnesses sworn for him, and therefore there was not so much as *scintilla juris* (a spark of law) against it.[s] And the house of commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland,[t] when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties, they insisted on a clause, and carried it[u] against the efforts of both the crown and the house of lords, against the practice of the courts in England and the express law of Scotland,[w] "that in all such trials for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the party arraigned the benefit of such credible witnesses, to be examined upon oath, as can be produced for his clearing and justification." At length, by the statute 7 W. III, c. 3 (Treason, 1695), the same measure of justice was established throughout all the realm in cases of treason within the act, and it was afterwards declared by statute 1 Ann., st. 2, c. 9 (Criminal Procedure, 1702), that in all cases of treason and felony all witnesses *for* the prisoner should be examined upon oath in like manner as the witnesses *against* him.[12]

r 3 Inst. 79.

s See also 2 Hal. P. C. 283. and his summary. 264.

t Stat. 4 Jac. I. c. 1 (Union of England and Scotland, 1606).

u Com. Journ. 4, 5, 12, 13, 15, 29, 30 Jun. 1607.

w *Ibid.* 4 Jun. 1607.

---

12 **Swearing the witnesses for the prisoner.**—Recent researches into the history of trial by jury have made the origin and reason of the rule here referred to—by which only the witnesses for the prosecution and not those for the prisoner were sworn—much clearer than they could be in Blackstone's time. In its first form it excluded the latter altogether: the jury heard the witnesses for the prosecution only. But this was not from an "old error," that nobody should testify against the king, as Queen Mary seems to have supposed it in her speech to Sir B. Morgan. (Text, p. *359.) The primitive assize or jury, being themselves witnesses and not judges of fact, had nothing to do with the task of hearing evidence on both sides and thus eliciting the truth. They were impaneled in behalf of one party only, and had to determine only whether

§ 408. g. The verdict.—When the evidence on both sides is closed, the jury cannot be discharged 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.[x] But an open verdict may be either general, guilty or not guilty, [361] 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 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. And, if their verdict be notoriously wrong, they may be punished and the verdict set aside by attaint at the suit of the king; but not at the suit of the prisoner.[y] But the practice heretofore in use of

x 2 Hal. P. C. 300. 2 Hawk. P. C. 439.
y 2 Hal. P. C. 310.

---

they would swear to his contention or not. It was not until some time in the fourteenth century that the modern notion of an *issue* submitted to them for decision made its appearance. No such conception was known to the Anglo-Saxon or early Germanic courts. They had no means of trying a contested fact; hence the importance that then attached to the prior right of one party or the other to prove his assertion, and the success or failure of his proof. Even in France, under Louis the Pious, the only means prescribed by the capitularies for deciding a case where witnesses disagreed was to select a champion from either side and let them decide the issue by battle.

In England, long after the Conquest, the plaintiff's case and the defendant's were never tried by the same jury. One submitted to his, the points of his writ: the other, if needful, proved by his the truth of his plea, or *exceptio;* and the court decided the relative effect of the two findings. Even after the *jurati* were allowed to hear testimony from others to found their verdict upon, it did not at once follow that they heard it on both sides. With the opposing witnesses they had nothing to do, for the reason already assigned. In pleas of the crown (the procedure in which was formed on the same model with common pleas) the jury impaneled to try the truth of the indictment heard only such witnesses as the king's officers presented to sustain a conviction. If the defendant produced any, it was only under an *exceptio* or special plea, and to another *jurata*. But most prisoners had no such plea, and their fate depended on the simple question whether the king had made out his case. If

fining, imprisoning or otherwise punishing jurors merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional and illegal, and is treated as such by Sir Thomas Smith two hundred years ago, who accounted "such doings to be very violent, tyrannical and contrary to the liberty and custom of the realm of England."[z] For, as Sir Matthew Hale well observes,[a] it would be a most unhappy case for the judge himself if the prisoner's fate depended upon his directions—unhappy also for the prisoner; for, if the judge's opinion must rule the verdict, the trial by jury would be useless. Yet in many instances[b] where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of king's bench; for in such case, as hath been said, it cannot be set right by attaint. But there hath yet been no instance of granting a new trial where the prisoner was *acquitted* upon the first.[c]

§ 409. h. Effect of acquittal.—If the jury, therefore, find the prisoner not guilty, he is then forever quit and discharged of the

z Smith's Commonw. 1. 3. c. 1.
a 2 Hal. P. C. 313.
b 1 Lev. 9. T. Jones. 163. St. Tr. X. 416.
c 2 Hawk. P. C. 442.

---

the court chose to hear what the prisoner or his friends could say in his behalf, this did not go to the jury to affect their verdict, but was heard much as a court now admits what the prisoner has to offer in mitigation of his sentence. It is not surprising that the practice remained unchanged in criminal cases long after the conception of an issue, to be tried by the jury on conflicting evidence between two private litigants, was fully formed. We find traces of it in this chapter of Blackstone, and even down to the present century, when for the first time in English law the prisoner was admitted to the full rights of a private defendant. It may even be said to survive still in the doctrine that the king or state must satisfy the jury of his guilt beyond all reasonable doubt, without reference to the preponderance of testimony.

The compass of a note is too brief to show the entire evidence that this is the true explanation of the ancient rules, which while apparently unjust to the prisoner were really for his benefit. But the truth of the primary position, that there was no conflict of testimony in the primitive law, is evident from all the early books. Without it their discussions of the *assisa* and the *jurata*, and the conversion of one into the other, are quite unintelligible, as well as early pleadings.—HAMMOND.

accusation,[d] except he be appealed of felony within the time limited by law. And upon such his acquittal, or discharge for want of prosecution, [362] he shall be immediately set at large, without payment of any fee to the gaoler.[e]

§ 410. i. Effect of conviction.—But if the jury find him guilty,[f] he is then said to be *convicted* of the crime whereof he stands indicted: which conviction may accrue two ways: either by his confessing the offense and pleading guilty, or by his being found so by the verdict of his country.

§ 411. (1) Costs.—When the offender is thus convicted, there are two collateral circumstances that immediately arise: 1. On a conviction, in general, for any felony, the reasonable expenses of prosecution [13] are by statute 25 George II, c. 36 (Disorderly Houses,

d The civil law in such case only discharges him from the same accuser, but not from the same accusation. (Ff. 48. 2. 7. § 2.)

e Stat. 14 Geo. III. c. 20 (Discharged Prisoners, 1774).

f In the Roman republic, when the prisoner was convicted of any capital offense by his judges, the form of pronouncing that conviction was something peculiarly delicate: not that he was guilty, but that he had not been enough upon his guard; *"parum cavisse videtur."* (Festus. 325.)

---

13 By the Costs in Criminal Cases Act, 1908, the court before whom any indictable offense is prosecuted or tried is empowered to allow such costs of the prosecution or defense as appear reasonably sufficient to compensate the prosecutor for the expenses properly incurred by him in carrying on the prosecution, and to compensate any persons properly attending to give evidence for the prosecution or defense, or called to give evidence at the instance of the court, for the expenses, trouble or loss of time properly incurred, in or incidental to the attendance and giving of evidence. Such costs may be allowed, whether the case terminate in a conviction or in an acquittal, or in no bill being found. Where a prisoner has been granted legal aid under the Poor Prisoners Defense Act, 1903, the costs which the court may allow include the fees of solicitor and counsel for the prisoner, the costs of a copy of the depositions, and any other expenses properly incurred in carrying on the defense. The same power to allow costs is given to a court of summary jurisdiction where an indictable offense is dealt with summarily under the Summary Jurisdiction Acts, and to a justice or justices who conduct the preliminary inquiry in the case of an indictable offense. The costs are payable out of the borough fund or borough rate, in the case of offenses committed or supposed to have been committed in a county borough, and in other cases out of the county fund of

1751), to be allowed to the prosecutor out of the county stock, if he petitions the judge for that purpose; and by statute 27 George II, c. 3 (Offenders' Conveyance, 1753), poor persons bound over to give evidence (except in *Middlesex*) are likewise entitled to be paid their charges, as well without conviction as with it.

§ 412. (2) Restitution of stolen goods.—On a conviction of larceny in particular, the prosecutor shall have restitution of his goods, by virtue of the statute 21 Henry VIII, c. 11 (Restitution of Goods Stolen, 1529). For by the common law there was no restitution of goods upon an indictment, because it is at the suit of the king only; and therefore the party was enforced to bring an appeal of robbery in order to have his goods again.[g 14] But it being considered that the party prosecuting the offender by indictment deserves to the full as much encouragement as he who prosecutes by appeal, this statute was made, which enacts that if any person be convicted of larceny by the evidence of the party robbed, he shall have full restitution of his money, goods and chattels, or the value

g 3 Inst. 242.

---

the administrative county in which the offense is committed or supposed to have been committed.

By the Costs in Criminal Cases Act, 1908, the court before which a person is convicted of an indictable offense may also order such person to pay the whole or any part of the costs of the prosecution; and, in certain cases, if an accused person is acquitted, the court may order the prosecutor to pay the whole or any part of the costs of the defense. These cases are where a person acquitted on an indictment or information by a private prosecutor for a defamatory libel, or for any offense under the Corrupt Practices Prevention Act, 1854, or for the offense of any corrupt practice within the meaning of the Corrupt and Illegal Practices Prevention Act, 1883, or for an offense under the Merchandise Marks Acts, 1887 to 1894, or on an indictment presented to a grand jury under the Vexatious Indictments Act, 1859, has not been committed [illegible] detained in custody, or bound by recognizances to answer the indictment [illegible] a charge of any indictable offense, not dealt with summarily, is dismissed by the examining justices, they may, if they think the charge was not made in good faith, order the prosecutor to pay the whole or any part of the costs of the defense.—STEPHEN, 4 Comm. (16th ed.), 363.

14 The Larceny Acts, 1861 to 1901, and other modern statutes have taken the place of 21 Henry VIII, c. 11. Likewise, in the United States, if 21 Henry VIII, c. 11, is common law here, it has generally been replaced by state statutes.

of them out of the offender's goods, if he has any, by a writ to be granted by the justices. And the construction of this act having been in great measure conformable to the law of appeals, it has therefore in practice superseded the use of appeals of larceny. For instance: As formerly upon appeals,[h] so now upon indictments of larceny, this writ of restitution [363] shall reach the goods so stolen, notwithstanding the property[i] of them is endeavored to be altered by sale in market overt.[k] And, though this may seem somewhat hard upon the buyer, yet the rule of law is that "*spoliatus debet, ante omnia, restitui* (restitution should be made to the person robbed before all others)"; especially when he has used all the diligence in his power to convict the felon. And, since the case is 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 condign punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction. And it is now usual for the court, upon the conviction of a felon, to order (without any writ) immediate restitution of such goods as are brought into court to be made to the several prosecutors; or, else, secondly, without such writ of restitution, the party may peaceably retake his goods wherever he happens to find them,[l] unless a new property be fairly acquired therein; or, lastly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods, and recover a satisfaction in damages. But such action lies not before prosecution, for so felonies would be made up and healed;[m] and also recaption is unlawful, if it be done with intention to smother or compound the larceny; it then becoming the heinous offense of theft-bote, as was mentioned in a former chapter.[n 15]

[h] Bracton. de Coron. c. 32.
[i] See Book II. pag. 450.
[k] 1 Hal. P. C. 543.
[l] See Book III. pag. 4.
[m] 1 Hal. P. C. 546.
[n] See pag. 133.

15 **Public prosecution and civil remedy for same injury.**--The compounding of offenses was formerly regarded as a grave menace to the order of society, and an encouragement to crime, without distinguishing between those that were purely public in their effects and those that harmed individuals chiefly. Hence it was a settled rule of the common law that even where an action lay for the

Allowing the defendant to speak with the prosecutor.—It is not uncommon; when a person is convicted of a misdemeanor, which principally and more immediately affects some 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

private injury in such cases, it was postponed to the public prosecution, or merged in it; and as attainder or forfeiture usually carried off all that the felon had, the party injured lost his remedy entirely.

An act which amounts to felony cannot, according to English law, be made the ground of any civil judicial proceeding against the person committing it, until he has been prosecuted for the felony. (Ex parte Elliott, 2 Deac. 179, 3 Mont. & Ayr. 110, 123; Crosby v. Leng, 12 East, 409, 104 Eng. Reprint, 160; Stone v. Marsh, 6 Barn. & C. 551, 108 Eng. Reprint, 554; Wickham v. Gatrill, 18 Jur. 768; Metcalf's note to Higgins v. Butcher, Yel. 89; and the American cases mentioned in a note to 13 Mees. & W. 608, and in 18 Com. B. 609; Broom's Legal Maxims, p. *162; 1 Hilliard on Torts, c. 2, §§ 5–7, 9; 1 Bishop on Criminal Law, §§ 553–563.)

This rule is generally said to be one of public policy, to encourage prosecutions, and prevent the compromise of felonies. Probably its original reason was that the crown had a forfeiture of all property of a felon, and therefore that a private party suing for recompense before the felony was tried, interfered with the acquisitions of the crown.

It should be remembered, however, that this doctrine only applies to actions against the felon himself, or those so connected with him that he must be a codefendant in the suit. It has repeatedly been held that one can sue third persons not implicated in the felony, for property lost by it, which has come to their hands; as for money paid into their bank by a party who has obtained it by forgery (Stone v. Marsh (1827), 6 Barn. & C. 551, 108 Eng. Reprint, 554), or for books stolen from the plaintiff, but honestly come to the defendant's possession (White v. Spettigue (1845), 13 Mees. & W. 603), though the case might be different if the defendant were a guilty receiver (White v. Spettigue (1845), 13 Mees. & W. 603), for a horse under same circumstances; if property has not passed in *market overt.* (Lee v. Bayes (1856), 18 Com. B. 599, 139 Eng. Reprint, 1504. And see 1 Bishop on Criminal Law, § 554.) In Whitfield v. De Spencer, Cowp. 761, it is assumed (*arg.*) and not denied by the court, that an action may be brought against the master for an act which is felony in the servant.

This principle of the common law has been differently received in different states. The doctrine of the different states is stated in 1 Bishop on Criminal Law, section 557, and the cases on both sides collected in the notes. Of those

the trouble and circuity of a civil action. But it surely is a dangerous practice; [364] and, though it may be entrusted to the prudence and discretion of the judges in the superior courts of record, it ought never to be allowed in local or inferior jurisdictions, such as the quarter sessions, where prosecutions for assaults are by this means too frequently commenced, rather for private lucre than for the great ends of public justice. Above all, it should never be suffered where the testimony of the prosecutor himself is necessary

which hold that the rule is not in force under the general policy of our institutions, the most noticeable are Boston v. Dana, 1 Gray (Mass.), 83, and White v. Fort, 3 Hawks (N. C.), 251; 1 Lead. Crim. Cases, 34. The note to this, 1 Lead. Crim. Case, 34–50, contains a good account of the whole subject. In some states it has been declared by statute that the right of civil remedy is not *merged* in a public offense, but may in all cases be enforced independently of and in addition to the punishment of the latter.

Such statutes probably would be held to do away with the English rule *entirely*. But if the rule of interpreting strictly statutes in derogation of the common law were applicable, it would be very doubtful whether the words of this section amount to that, because they are not absolutely inconsistent with the postponement of the civil to the criminal remedy. (Almost the very same language is used in Stone v. Marsh, *supra*, at p. 557, as *explaining*, not *negativing*, the rule, and is approved by the court. Cf. 564.)

The law permits the party injured by a tort to compromise his action, that is, to accept from the wrongdoer a compensation for the injury, instead of being obliged to sue for it. This is plain enough, for it would be against common sense if a tort-feasor were not allowed to pay voluntarily what the law holds him liable to pay; and equally so if the party paid could not bind himself not to sue again for the same purpose. But it is against public policy to allow grave offenses to go unpunished by a bargain between the injured party and wrongdoer. It is a general rule, therefore, that in compromising a tort, the injured party must not stifle the prosecution of the criminal offense. (Jones v. Rice, 18 Pick. (Mass.) 440, 29 Am. Dec. 612; Keir v. Leeman, 6 Q. B. 308, 9 Q. B. 371, 115 Eng. Reprint, 118, 1315; and also in 2 Lead. Crim. Cases, with notes, pp. 216–247, where the earlier cases are collected.)

And any contract founded on a promise to withdraw a prosecution, or not to give evidence, or the like, is voidable. (Collins v. Blantern, 2 Wils. 341, 95 Eng. Reprint, 847, 850, 1767; also in 1 Smith's Lead. Cas. p. 154, with note on the subject; Brook v. Hook, 24 L. T. 34; 3 Alb. L. J. 255; Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546, with note.) But one executed is irrevocable by the party executing. (Hill v. Freeman, 73 Ala. 200, 49 Am. Rep. 48, with note; Allison v. Hess, 28 Iowa, 388.)

But by statute in a number of states, a tort, which is at the same time a misdemeanor (*not* a felony), may be compromised by the injured party, unless

to convict the defendant, for by this means the rules of evidence are entirely subverted; the prosecutor becomes in effect a plaintiff, and yet is suffered to bear witness for himself. Nay, even a voluntary forgiveness by the party injured ought not in true policy to intercept the stroke of justice. "This," says an elegant writer[o] (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."

[o] Becc. c. 46.

---

committed by or upon an officer in the discharge of his duty, or riotously, or with intent to commit a felony. Such cases are excepted because it is evident that in them the public has an interest which no private party should be allowed to resign. In other cases, if the injured party acknowledges that he is satisfied, the court may *in its discretion* discharge the prisoner, and then no further prosecution will be allowed. But in any case the court may refuse to approve the transaction and insist upon the criminal prosecution proceeding, if in its legal discretion it sees ground therefor.

Except as provided by such statutes, all compromising of offenses against the law is itself a high offense. It should be needless to remark that when the same act is the foundation of both civil and criminal actions, the result of neither one is dependent on the other, either in law or in fact. As a technical rule this follows from the fact that the parties are always different, the plaintiff in a civil action being the injured party, in a criminal one the state, though the defendant may be the same. As a rule of reason and justice it follows from the considerations, (*a*) that very different elements enter into the definition of a crime and a tort, even when both are composed of substantially the same acts. Thus, an assault and battery may be a gross misdemeanor as a breach of the public peace, while it is perfectly excusable so far as the immediate parties are concerned, or *vice versa*. (*b*) That the evidence admissible on the two cases differs in very important respects, the chief of which now is that the defendant's mouth is closed against the state, while in a civil case both he and plaintiff may be heard. (Cf. Hilliard on Torts, c. 2. § 2, and not *a;* 1 Starkie on Evidence, 197, § 63; 1 Greenleaf on Evidence, § 537.)—HAMMOND.

CHAPTER THE TWENTY-EIGHTH. [365]

OF THE BENEFIT OF CLERGY.

§ 413. VIII. Benefit of clergy.—After trial and conviction the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance, of which the principal is the *benefit of clergy*;[1] a title of no small curiosity as well as use, and concerning which I shall therefore inquire, 1. Into its original, and the various mutations which this privilege of clergy has sustained; 2. To what persons it is to be allowed at this day; 3. In what cases; 4. The consequences of allowing it.

§ 414. 1. Origin and history of benefit of clergy.—Clergy, the *privilegium clericale*, or, in common speech, *the benefit of clergy*, had its original from the pious regard paid by Christian princes to the church in its infant state, and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the church were principally of two kinds: 1. Exemptions of *places* consecrated to religious duties from criminal arrests, which was the foundation of sanctuaries; 2. Exemption of the *persons* of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the *privilegium clericale*.

But the clergy, increasing in wealth, power, honor, number and interest, began soon to set up for themselves, and that which they obtained by the favor of the civil government they now claimed as their inherent right, and as a [366] right of the highest nature indefeasible, and *jure divino* (by divine right).[a] By their canons,

a The principal argument, upon which they founded this exemption, was that text of Scripture; "touch not mine anointed, and do my prophets no harm." (Keilw. 181.)

---

1 **Benefit of clergy in America.**—Mr. Edward J. White, in his Legal Antiquities, page 239, gives the following account of the application of the privilege of benefit of clergy in America:

"The benefit of clergy was set up and recognized in many criminal cases in the United States, during the Colonial period and the great patriot, James Otis, successfully urged the exemption in favor of Massachusetts soldiers, convicted of murder for their participation in the Boston massacre. The federal court

therefore, and constitutions they endeavored at, and where they met with easy princes obtained, a vast extension of these exemptions, as well in regard to the crimes themselves, of which the list became quite universal,[b] as in regard to the persons exempted, among whom were at length comprehended not only every little subordinate officer belonging to the church or clergy, but even many that were totally laymen.

In England, however, although the usurpations of the pope were very many and grievous till Henry the Eighth entirely extermi-

[b] See Book III. pag. 62.

---

decided, in the year 1817, in the case of United States v. Lambert, that a person convicted of bigamy, in Alexandria, was entitled to clergy, and, if able to read, should be burned in the hand and recognized for good subsequent behavior. In the year 1830, the federal court held, in the case of United States v. Jarnegan, that on a conviction for bigamy, in granting the benefit of clergy, it was discretionary with the trial court to dispense with the burning in the hand.

"In the year 1806 the supreme court of North Carolina held that females could claim the benefit of clergy, the same as males. The legislature of North Carolina, having, in 1816 passed a statute abolishing the punishment of 'burning in the hand' for clergyable felonies, the supreme court of that state, construing this statute, in 1825, in the case of State v. Yeater, held that corporal punishment and imprisonment could not both be inflicted upon a person found guilty of the crime of manslaughter.

"In 1837, however, in the same state the same court held that one found guilty of manslaughter could be burned in the hand and also imprisoned for one year. And in the year 1855, the supreme court of North Carolina held that when a new felony was created by statute, the privilege of clergy was an incident thereto, unless it was expressly taken away by the statute creating the offense. And in State v. Carroll, the same court held that when the defendant prayed the benefit of clergy, for a clergyable offense, if the state objected because the defendant had before had clergy, this objection must be set up by a plea in writing.

"In State v. Sutcliff, decided in South Carolina, in 1855, a defendant, convicted of burning a dwelling-house, was held entitled to the benefit of clergy, and in the same state, the same year, another person convicted of arson in the night-time, was held entitled to clergy.

"In Indiana, in 1820, and in Minnesota, in 1859, the supreme courts of those states held that the benefit of clergy did not, and never had, existed in those commonwealths, and in the year 1787 the supreme court of Virginia held that the crime of arson was not a clergyable offense in the courts of that state.

nated his supremacy, yet a total exemption of the clergy from secular jurisdiction could never be thoroughly effected, though often endeavored by the clergy;[c] and therefore, though the ancient *privilegium clericale* was in *some* capital cases, yet it was not *universally*, allowed. And in these particular cases the use was for the bishop or ordinary to demand his clerks to be remitted out of the king's courts as soon as they were indicted; concerning the allowance of which demand there was for many years a great uncertainty,[d] till at length it was finally settled in the reign of Henry the Sixth that the prisoner should first be arraigned, and might either *then* claim his benefit of clergy by way of declinatory plea, or, *after conviction,* by way of arresting judgment. This latter way is most usually practiced, as it is more to the satisfaction of the court to have the crime previously ascertained by confession or the verdict of a jury; and also it is more advantageous to the prisoner himself, who may possibly be acquitted, and so need not the benefit of his clergy at all.

[c] Keliw. 180. [d] 2 Hal. P. C. 377.

But in the same state, in 1795, two persons were convicted for stealing a horse, in 1793, and before the *sentence of death* was pronounced, they both prayed the benefit of clergy and the supreme court held that they were entitled to clergy.

"One of the last cases where clergy was recognized, in the United States, was in a Kentucky case. A negro was convicted of rape upon a white woman, after a trial had before Judge Buckner, in Bonner county, at Glasgow. Under the statute, the punishment to be assessed was death and the judge believed the defendant innocent of the crime for which he had been convicted. The defendant's counsel claimed the benefit of clergy for him and the defendant was found able to read the constitution of the United States and he was accordingly burned in the hand and discharged.

"These instances are not nearly all that could be found in England or the United States to illustrate the application of this exemption from crime, at common law, but the random cases mentioned will show the general recognition of the privilege until comparatively recent times."

Benefit of clergy was abolished in 1827 (7 & 8 Geo. IV, c. 28). The subject is dealt with in 1 Pollock & Maitland, Hist. Eng. Law (2d ed.), 441–457, as to the earliest records; by Hale (2 P. C. 323–390), and Blackstone (4 Comm. 365), as to the state of the law at their respective periods; by Chitty (1 Crim. Law, 666–690) just before its abolition; and the subject is summed up in 1 Stephen, Hist. Crim. Law, 459–472, and in White, Legal Antiquities, 223–243.

§ 415. a. To whom benefit of clergy allowed.—Originally, the law was held that no man should be admitted to the privilege of clergy but such as had the *habitum* [367] *et tonsuram clericalem* (the clerical habit and tonsure).[e] But in process of time a much wider and more comprehensive criterion was established; every-one that could read (a mark of great learning in those days of ignorance and her sister superstition) being accounted a clerk or *clericus*, and allowed the benefit of clerkship, though neither initiated in holy orders nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing and other concurrent causes, began to be more generally disseminated than formerly, and reading was no longer a competent proof of clerkship or being in holy orders, it was found that as many laymen as divines were admitted to the *privilegium clericale*, and therefore by statute 4 Henry VII, c. 13 (Benefit of Clergy, 1488), a distinction was once more drawn between mere lay scholars and clerks that were really in orders. And, though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly, the statute directs that no person once admitted to the benefit of clergy shall be admitted thereto a second time, unless he produces his orders; and in order to distinguish their persons, all laymen who are allowed this privilege shall be burned with a hot iron in the brawn of the left thumb. This distinction between learned laymen and real clerks in orders was abolished for a time by the statutes 28 Henry VIII, c. 1 (Abjuration, 1536), and 32 Henry VIII, c. 3 (1540), but is held[f] to have been virtually restored by statute 1 Edward VI, c. 12 (Criminal Law, 1547), which statute also enacts that lords of parliament and peers of the realm having place and voice in parliament may have the benefit of their peerage, equivalent to that of clergy, for the first offense (although they cannot read, and without being burned in the hand), for all offenses then clergyable to commoners, and also for the crimes of housebreaking, highway robbery, horse-stealing and robbing of churches.

[e] 2 Hal. P. C. 372. M. Paris. A. D. 1250. See Book I. pag. 24.

[f] Hob. 294. 2 Hal. P. C. 375.

§ 416. b. Effect of allowing benefit of clergy.—[368] After this burning the laity, and before it the real clergy, were discharged from the sentence of the law in the king's courts, and delivered over to the ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the ordinary, not satisfied with the proofs adduced in the profane secular court, set himself formally to work to make a purgation of the offender by a new canonical trial; although he had been previously convicted by his country, or perhaps by his own confession. This trial was held before the bishop in person, or his deputy, and by a jury of twelve clerks, and there, first, the party himself was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who swore they believed he spoke the truth; then, witnesses were to be examined upon oath, but on behalf of the prisoner only; and, lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner; otherwise, if a clerk, he was degraded, or put to penance.[g] A learned judge, in the beginning of the last century,[h] remarks with much indignation the vast complication of perjury and subornation of perjury in this solemn farce of a mock trial; the witnesses, the compurgators, and the jury being all of them partakers in the guilt: the delinquent party also, though convicted before on the clearest evidence, and conscious of his own offense, yet was permitted and almost compelled to swear himself not guilty; nor was the good bishop himself, under whose countenance this scene of wickedness was daily transacted, by any means exempt from a share of it. And yet by this purgation the party was restored to his credit, his liberty, his lands, and his capacity of purchasing afresh, and was entirely made a new and an innocent man.

This scandalous prostitution of oaths and the forms of justice in the almost constant acquittal of felonious clerks by purgation was the occasion that, upon very heinous and [369] notorious circumstances of guilt, the temporal courts would not trust the ordinary with the trial of the offender, but delivered over to him the convicted clerk, *absque purgatione faciendâ* (without making purgation); in which situation the clerk convict could not make purgation, but was to continue in prison during life, and was incapable

g 3 P. Wms. 447. Hob. 289. h Hob. 291.

of acquiring any personal property, or receiving the profits of his lands, unless the king should please to pardon him. Both these courses were in some degree exceptionable; the latter being perhaps too rigid, as the former was productive of the most abandoned perjury. As, therefore, these mock trials took their rise from factious and popish tenets, tending to exempt one part of the nation from the general municipal law, it became high time, when the Reformation was thoroughly established, to abolish so vain and impious a ceremony.

§ 417. c. Statutes regulating benefit of clergy.—Accordingly, the statute 18 Elizabeth, c. 7 (Criminal Law, 1575), enacts that, for the avoiding of such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary, as formerly, but, upon such allowance and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued for above a century unaltered; except only that the statute 21 Jac. I, c. 6 (Female Convicts, 1623), allowed that women convicted of simple larcenies under the value of ten shillings should (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand, and whipped, stocked or imprisoned for any time not exceeding a year. And a similar indulgence, by the statutes 3 & 4 W. & M., c. 9 (Benefit of Clergy, 1691), and 4 & 5 W. & M., c. 24 (Continuation of Statutes, 1692), was extended to women guilty of any clergyable felony whatsoever, who were allowed once to claim the benefit of the *statute* in like manner as men might claim the benefit of *clergy*, and to be discharged upon being burned in the hand and imprisoned for any time not exceeding a year. All women, all peers of parliament and peeresses, and all male commoners who could read were therefore discharged [370] in such felonies; absolutely, if clerks in orders, and for the first offense, upon burning in the hand, if lay, yet all liable (excepting peers and peeresses), if the judge saw occasion, to imprisonment not exceeding a year. And those men who could not read, if under the degree of peerage, were hanged.

Afterwards, indeed, it was considered that education and learning were no extenuations of guilt, but quite the reverse, and that, if the punishment of death for simple felony was too severe for those who had been liberally instructed, it was, *a fortiori*, too severe for the ignorant also. And thereupon by statute 5 Ann., c. 6 (1706), it was enacted that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read by way of conditional merit. And experience having shown that so very universal a lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony, and that, though capital punishments were too rigorous for these inferior offenses, yet no punishment at all (or next to none, as branding or whipping) was as much too gentle, it was enacted by the same statute, 5 Ann., c. 6, that when any person is convicted of any theft or larceny, and burned in the hand for the same, he shall also, at the discretion of the judge, be committed to the house of correction or public workhouse, to be there kept to hard labor for any time not less than six months, and not exceeding two years; with a power of inflicting a double confinement in case of the party's escape from the first. And it was also enacted by the statutes 4 George I, c. 11 (Piracy, 1717), and 6 George I, c. 23 (Robbery, 1719), that when any persons shall be convicted of any larceny, either grand or petit, or any felonious stealing or taking of money or goods and chattels either from the person or the house of any other, or in any other manner, and who by the law shall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, the court in their discretion, instead of such burning in the hand or whipping, may direct such offenders to be transported to America for seven years; and if they [371] return or are seen at large in this kingdom within that time, it shall be felony without benefit of clergy. And now, by the statute 16 George III, c. 43 (Criminal Law, 1775), all offenders liable to transportation may in lieu thereof, at the discretion of the court, if males, be employed in hard labor for the benefit of the navigation of the River Thames, or, whether males or females, be confined to hard labor in the house of correction, for any term not less than three years nor more than that for which they are liable to be transported, nor in any case exceeding ten years, with a power of subsequent mitiga-

tion in case of their good behavior. In cases of escapes, for the first time the term of their confinement is doubled; and a second escape is felony without benefit of clergy.

§ 418. **d. Reflections on benefit of clergy.**—In this state does the benefit of clergy at present stand, very considerably different from its original institution; the wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients, and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics into a merciful mitigation of the general law, with respect to capital punishment.

From the whole of this detail we may collect that however in times of ignorance and superstition that monster in true policy may for a while subsist, of a body of men, residing in the bowels of a state, and yet independent of its laws, yet, when learning and rational religion have a little enlightened men's minds, society can no longer endure an absurdity so gross as must destroy its very fundamentals. For, by the original contract of government, the price of protection by the united force of individuals is that of obedience to the united will of the community. This united will is declared in the laws of the land, and that united force is exerted in their due and universal execution.

§ 419. **2. Persons entitled to benefit of clergy.**—I am next to inquire to what *persons* the benefit of clergy is to be allowed at this day; and this must be chiefly collected from what has been observed in the preceding article. [372] For, upon the whole, we may pronounce that all clerks in orders are, without any branding, and of course without any transportation (for that is only substituted in lieu of the other), to be admitted to this privilege and immediately discharged; and this as often as they offend.[1] Again, all lords of parliament and peers of the realm having place and voice in parliament, by the statute 1 Edward VI, c. 12, Criminal Law, 1547 (which is likewise held to extend to peeresses[k]), shall be discharged in all clergyable and other felonies provided for by the act,

[1] 2 Hal. P. C. 374.

[k] Duchess of Kingston's Case, 22 Apr. 1776.

without any burning in the hand or imprisonment, in the same manner as real clerks convict; but this is only for the first offense. Lastly, all the commons of the realm, not in orders, whether male or female, shall for the first offense be discharged of the punishment of felonies, within the benefit of clergy, upon being burned in the hand and suffering a discretionary imprisonment, or, in case of larceny, upon being transported for seven years, if the court shall think proper. It hath been said that Jews and other infidels and heretics were not capable of the benefit of clergy, till after the statute 5 Ann., c. 6 (1705), as being under a legal incapacity for orders.[1] But I much question whether this was ever ruled for law, since the reintroduction of the Jews into England in the time of Oliver Cromwell. For, if that were the case, the Jews are still in the same predicament, which every-day's experience will contradict; the statute of Queen Anne having certainly made no alteration in this respect, it only dispensing with the necessity of reading in those persons who, in case they could read, were before the act entitled to the benefit of their clergy.

§ 420. 3. Crimes for which benefit of clergy allowed. — The third point to be considered is, for what *crimes* the *privilegium clericale*, or benefit of clergy, is to be allowed. And, it is to be observed, that neither in high treason, nor in petit larceny, nor in any mere misdemeanors it was indulged at the common law; and therefore we may lay it down for a rule that it was allowable only in petit treason and capital felonies, which for the most part became legally entitled to this indulgence [373] by the statute *de clero*, 25 Edward III, st. 3, c. 4 (1350), which provides that clerks convict for treasons or felonies, touching other persons than the king himself or his royal majesty, shall have the privilege of holy church. But yet it was not allowable in all felonies whatsoever; for in some it was denied even by the common law, *viz.*, *insidiatio viarum*, or lying in wait for one on the highway; *depopulatio agrorum*, or destroying and ravaging a country;[11] and *combustio domorum*, or arson, that is, the burning of houses,[m]—all which are a

1 2 Hal. P. C. 373. 2 Hawk. P. C. 338. Fost. 306.
11 2 Hal. P. C. 333.
m 1 Hal. P. C. 346.

kind of hostile acts, and in some degree border upon treason. And further, all these identical crimes, together with petit treason, and very many other acts of felony, are ousted of clergy by particular acts of parliament; which have, in general, been mentioned under the particular offenses to which they belong, and therefore need not be here recapitulated. Of all which statutes for excluding clergy I shall only observe, that they are nothing else but the restoring of the law to the same rigor of capital punishment in the first offense that it exerted before the *privilegium clericale* was at all indulged, and which it still exerts upon a second offense in almost all kinds of felonies, unless committed by clerks actually in orders. We may also remark that, by the marine law, as declared in statute 28 Henry VIII, c. 15 (Offenses at Sea, 1536), the benefit of clergy is not allowed in any case whatsoever; and therefore when offenses are committed within the admiralty jurisdiction, which would be clergyable if committed by land, the constant course is to acquit and discharge the prisoner.[n] And lastly, under this head of inquiry, we may observe the following rules: 1. That in all felonies, whether new-created or by common law, clergy is now allowable, unless taken away by express words of an act of parliament.[o] 2. That, where clergy is taken away from the principal, it is not, of course, taken away from the accessory, unless he be also particularly included in the words of the statute.[p] 3. That, when the benefit of clergy is taken away from the *offense* (as in case of murder, buggery, robbery, rape and burglary), a principal in the second degree, being present, aiding and abetting the crime, is as well excluded [374] from his clergy as he that is principal in the first degree; but 4. That, where it is only taken away from the *person committing* the offense (as in the case of stabbing, or committing larceny in a dwelling-house, or privately from the person), his aiders and abettors are not excluded; through the tenderness of the law, which hath determined that such statutes shall be taken literally.[q]

§ 421. 4. Consequences of benefit of clergy.—Lastly, we are to inquire what the consequences are to the party of allowing him this

[n] Moor. 756. Fost. 288.
[o] 2 Hal. P. C. 330.
[p] 2 Hawk. P. C. 342.
[q] 1 Hal. P. C. 529. Foster. 356, 357.

benefit of clergy. I speak not of the branding, imprisonment or transportation; which are rather concomitant conditions, than consequences of receiving this indulgence. The consequences are such as affect his present interest and future credit and capacity; as having been once a felon, but now purged from that guilt by the privilege of clergy, which operates as a kind of statute pardon.

And, we may observe, 1. That by his conviction he forfeits all his goods to the king, which, being once vested in the crown, shall not afterwards be restored to the offender.[r] 2. That, after conviction, and till he receives the judgment of the law, by branding or the like, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of a felon.[s] 3. That, after burning or pardon, he is discharged forever of that, and all other felonies before committed, within the benefit of clergy, but not of felonies from which such benefit is excluded; and this by statutes 8 Elizabeth, c. 4 (Benefit of Clergy, 1566), and 18 Elizabeth, c. 7 (Benefit of Clergy, 1575). 4. That by the burning, or pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted.[t] 5. That what is said with regard to the advantages of commoners and laymen subsequent to the burning in the hand is equally applicable to all peers and clergymen, although never branded at all; for they have the same privileges, without any burning, which others are entitled to after it.[u]

r 2 Hal. P. C. 388.
s 3 P. Wms. 487.
t 2 Hal. P. C. 389. 5 Rep. 110.
u 2 Hal. P. C. 389, 390.

[375]

CHAPTER THE TWENTY-NINTH.

OF JUDGMENT AND ITS CONSEQUENCES.

§ 422. IX. Judgment.—We are now to consider the next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemeanors as are either too high or too low to be included within the benefit of clergy: which is that of *judgment*. For when, upon a capital charge, the jury have brought in their verdict, 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. And in case the defendant be found guilty of a misdemeanor (the trial of which may, and does usually, happen in his absence, after he has once appeared), a *capias* is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry.

§ 423. 1. Moving in arrest of judgment.—But whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment in *arrest* or stay of judgment; as for want of sufficient certainty in setting forth either the person, the time, the place or the offense. And if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again.[a 1] And we may take notice, 1. That none of the statutes of

[a] 4 Rep. 45.

---

1 **Arrest of judgment.**—Formerly, the judgment might be arrested for merely formal defects, as for want of sufficient certainty in setting forth the person, the time, or the place; but now defects of a merely formal kind are in some cases wholly immaterial, and in all other cases must be brought forward either by way of demurrer or by motion to quash the indictment. A motion in arrest of judgment can, therefore, only be grounded on a matter of substance, and, even then, only where the defect is not aided by verdict. If the objection taken appears to be sufficient, the court will arrest the judgment, that is to say, will abstain from pronouncing any judgment, and will acquit the prisoner; in which case he may be indicted again.

There is a further method of protecting a prisoner found guilty by verdict from having judgment pronounced against him, where the case is a proper one by reason of some question of law involved, which the court finds too diffi-

jeofails,[b] for amendment of errors, extend to indictments or proceedings in criminal [378] cases; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. 2. That, in favor of life, great strictness has at all times been observed, in every point of an indictment. Sir Matthew Hale, indeed, complains "that this strictness is grown to be a blemish and inconvenience in the law, and the administration thereof; for

[b] See Book III. pag. 406.

---

cult for its determination. For, supposing the trial has taken place in a court of *oyer* and *terminer*, gaol delivery, or quarter sessions, such question may, by the Crown Cases Act, 1848, be reserved and stated in the form of a special case for the consideration of the court of criminal appeal; and in the meantime, the court may postpone the judgment, or respite the execution of it, as may be thought fit. (Criminal Appeal Act, 1907, § 20 (4).) . . .

Another proceeding which may be adopted on behalf of an accused person between conviction and judgment is by way of motion that the verdict of the jury may be set aside, and a fresh jury summoned for the purpose of rehearing the case. This proceeding is effected by a writ called a *venire de novo*.

A *venire de novo* is said to be as ancient as the law. It may be granted either before or after judgment, and both in felonies and misdemeanors. It is, however, a remedy of limited application; inasmuch as it is confined to formal defects in the proceedings—as where a prisoner is denied his right of challenge, or there is a defect of jurisdiction in the court, or the jury process is wrongly awarded, or the jury misbehave, or return an imperfect or contradictory verdict, or are discharged without giving a verdict. In any such case where there has been a mistrial or no trial at all, the court which tries the case, even where it is an inferior court, such as quarter sessions, may forthwith, before judgment, itself order a *venire de novo*. And this, it would seem, is the correct way of dealing with mere irregularities in the trial.

Until recently, a further method of obtaining protection after verdict was available to a prisoner, viz., a motion for a new trial. But the powers and practices formerly existing in the high court in respect of motions for new trials, or the granting thereof in criminal cases, were abolished by the Criminal Appeal Act, 1907, and the court of criminal appeal has no power to order a new trial.—STEPHEN, 4 Comm. (16th ed.), 370.

New trial in the United States.—In this country the practice is to extend to criminal cases, so far as the revision of verdicts is concerned, the same principles which have been established in civil actions. No instance, indeed, exists, except in cases of fraud, where an acquittal has been disturbed; but new trials in cases of conviction will be granted whenever it appears there was misconduct of the jury, misdirection by the judge, or injustice in the procedure. (Wharton, Crim. Pl. and Pr., 9th ed., § 791; 2 Bishop, New Crim. Proc., § 1272.)

that more offenders escape by the overeasy ear given to exceptions in indictments than by their own innocence, and many times gross murders, burglaries, robberies and other heinous and crying offenses remain unpunished by these unseemly niceties: to the reproach of the law, to the shame of the government, to the encouragement of villainy and to the dishonor of God."[c] And yet, notwithstanding this laudable zeal, no man was more tender of life than this truly excellent judge.

§ 424. **a. Pardon.**—A pardon also, as has been before said, may be pleaded in arrest of judgment, and it has the same advantage when pleaded here as when pleaded upon arraignment; *viz.*, the saving the attainder, and of course the corruption of blood: which nothing can restore but parliament, when a pardon is not pleaded till after sentence. And certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible.

§ 425. **b. Benefit of clergy.**—Praying the benefit of clergy may also be ranked among the motions in arrest of judgment; of which we spoke largely in the preceding chapter.

§ 426. **2. Punishment pronounced.**—If all these resources fail, the court must pronounce that judgment which the law hath annexed to the crime, and which hath been constantly mentioned, together with the crime itself, in some or other of the former chapters.[2] Of these some are capital, which extend to the life of the

c 2 Hal. P. C. 193.

---

2 **Modern punishments in England.**—Imprisonment may be with or without hard labor. Imprisonment with hard labor is a statutory punishment; imprisonment without hard labor is both a common law and a statutory punishment. Whipping is both a common law and a statutory form of punishment. Women may not now be whipped. Boys under sixteen may be sentenced to whipping for certain offenses; and numerous statutes provide whipping for adult men. Penal servitude is a sentence which has been introduced in substitution of the older punishment of transportation beyond the seas. Transportation is said to have been first inflicted as a punishment by 39 Elizabeth, c. 4 (1597). As to its history, see Bullock v. Dodds (1819), 2 Barn. & Ald. 258, 106 Eng. Reprint, 361; Reg. v. Baker (1837), 9 Ad. & E. 502, 112 Eng.

offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain or disgrace are superadded: as, in treasons [377] of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, embowelling alive, beheading and quartering; and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive. But the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savor of torture or cruelty; a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn, and there being very few instances (and those accidental or by negligence) of any person's being emboweled or burned till previously deprived of sensation by strangling. Some punishments consist in exile or banishment, by abjuration of the realm, or transportation to the American colonies; others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors and the like. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears; others fix a lasting stigma on the offender by slitting the nostrils, or branding in the hand or face.

Reprint, 559; Whitehead v. The Queen (1845), 7 Q. B. 582, 115 Eng. Reprint, 608. The punishment by way of transportation was revised and consolidated by the Transportation Act, 1824, and was abolished, and penal servitude substituted therefor by the Penal Servitude Acts, 1853, to 1891. The passing of a sentence of penal servitude deprives the convict of any public employment, benefice or emolument under any corporation, including universities or colleges, and of any pension payable by the public or out of the public money. During the currency of his term he is deprived of all civil rights so far as concerns voting and the like, and the right to sue or to alienate any property. The general result is that during the term of his sentence the convict is a slave of the state. An alternative sentence of imprisonment for a term not exceeding two years is usually allowed. Police supervision, under the Prevention of Crimes Act, 1871, may be imposed on any convict, to follow his release from imprisonment or penal servitude. Or, under the Prevention of Crimes Act, 1908, in the case of habitual criminals preventive detention may follow imprisonment and penal servitude. Finally, death may be inflicted by hanging. See 4 Stephen, Comm. (16th ed.), 378.

Some are merely pecuniary, by stated or discretionary fines; and lastly there are others that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain, and these are inflicted chiefly for such crimes as either arise from indigence or render even opulence disgraceful,—such as whipping, hard labor in the house of correction or otherwise, the pillory, the stocks and the ducking-stool.

§ 427. a. **Reflections on the punishments of the English law.**—Disgusting as this catalogue may seem, it will afford pleasure to an English reader, and do honor to the English law, to compare it with that shocking apparatus of death and torment to be met with in the criminal codes of almost every other nation in Europe. And it is moreover one of the glories of our English law that the species, though not always the quantity or degree, of punishment is *ascertained* for every offense, and that it is not left in the breast of any [378] judge, or even of a jury, to alter that judgment which the law has beforehand ordained for every subject alike without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates, and would live in society without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so on the other it stifles all hopes of impunity or mitigation, with which an offender might flatter himself if his punishment depended on the humor or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their 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 our courts are enabled to impose may seem an exception to this rule. But the general nature of the punis' ment, *viz.*, by fine or imprisonment, is in these cases fixed and determinate; though the duration and quantity of each must frequently vary, from the aggravations or otherwise of the offense, the quality and condition of the parties, and from innumerable other circumstances. The *quantum*, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The

value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's. Thus the law of the twelve tables at Rome fined every person that struck another five and twenty *denarii:* this, in the more opulent days of the empire, grew to be a punishment of so little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomsoever he pleased and then tender them the legal forfeiture. Our statute law has not, therefore, often ascertained the quantity of fines, nor the common law ever, it directing such an offense to be punished by fine in general, without specifying the certain sum; which is fully sufficient, when we consider that however [379] unlimited the power of the court may seem, it is far from being wholly arbitrary, but its discretion is regulated by law. For the Bill of Rights[d] has particularly declared that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted (which had a retrospect to some unprecedented proceedings in the court of king's bench, in the reign of King James the Second); and the same statute further declares that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void. Now, the Bill of Rights was only declaratory throughout of the old constitutional law of the land, and accordingly we find it expressly holden, long before,[e] that all such previous grants are void; since thereby many times undue means, and more violent prosecution, would be used for private lucre than the quiet and just proceeding of law would permit.

§ 428. b. Reasonableness of fines.—The reasonableness of fines in criminal cases has also been usually regulated by the determination of *Magna Carta*[f] concerning amercements for misbehavior in matters of civil right. "*Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti; salvo contenemento suo: et mercator eodem modo, salva mercandisa sua; et villanus eodem modo amercietur, salvo wainagio suo* (a free man shall be amerced for a small offense only according to its measure; and for a great

[d] Stat. 1 W. & M. st. 2. c. 2 (1688). [f] Cap. 14.
[e] 2 Inst. 48.

offense only according to its magnitude, saving his land; and the merchant in the same manner, saving his merchandise; and a villein shall be amerced in the same manner, saving his wainage)." A rule that obtained even in Henry the Second's time,[g] and means only 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 merchandise; and to the countryman his wainage, or team and instruments of husbandry. In order to ascertain which, the great charter also directs that the amercement, which is always inflicted in general terms ("*sit in misericordia*—let him be at the mercy"), shall be set, *ponatur*, or reduced to a certainty, by the oath of a jury. This method of liquidating the amercement to a precise sum is usually done in the court-leet and court-baron by [380] *affeerors*, or jurors sworn to *affeere*, that is, tax and moderate the *general* amercement, according to the *particular* circumstances of the offense and the offender. In imitation of which, in courts superior to these, the ancient practice was to inquire by a jury, when a fine was imposed upon any man, "*quantum inde regi dare valeat per annum, salva sustentatione sua, et uxoris, et liberorum suorum* (how much he could pay a year to the king saving his maintenance and the maintenance of his wife and children)."[h] And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood, but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that amounts to imprisonment for life. And this is the reason why fines in the king's court are frequently denominated ransoms, because the penalty must otherwise fall upon a man's person, unless it is redeemed or ransomed by a pecuniary fine:[i] according to an ancient maxim, *qui non habet in crumena luat in corpore* (let him who has nothing in purse pay in person). Yet, where any statute speaks both of fine and ransom, it is holden that the ransom shall be treble to the fine at least.[j]

g Glanv. l. 9. c. 8 & 11.
h Gilb. Exch. c. 5.
i Mirr. c. 5. § 3. Lamb. Eirenarch. 575.
j Dyer. 232.

§ 429. c. Attainder.—When sentence of death, the most terrible and highest judgment in the laws of Englan , is pronounced, the immediate inseparable consequence by the common law is *attainder*.[3] For when it is now clear beyond all dispute that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him than barely to see him executed. He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in law.[k] This is after *judgment;* for there is great difference between a man *convicted* and *attainted*, though they are frequently, through inaccuracy, confounded together. After conviction [381] only a man is liable to none of these disabilities; for there is still in contemplation of law a possibility of his innocence.

k 3 Inst. 213.

---

3 **Forfeiture and corruption of blood abolished.**—The whole doctrine of forfeiture and corruption of blood, consequent on attainder or conviction for treason or felony, was abolished by the Forfeiture Act, 1870, by which it was provided that no confes or . rdict, inquest, conviction or judgment, of or for any treason, felony or *fel* ce, should cause any attainder or corruption of blood, or any forfeiture or escheat. The act, however, expressly excludes from its operation the law of forfeiture consequent upon outlawry; and therefore the ancient consequences of criminal outlawry would seem to be still in force, process of outlawry having been abolished in civil cases only.

The constitution of the United States expressly forbids both Congress and the states from passing any bills of attainder. And further that no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted. The act of Congress of July 17, 1862, for the seizure and condemnation of enemies' estates, provided for forfeiture only during the life of the offender. (Bigelow v. Forrest, 9 Wall. 339, 19 L. Ed. 696.) In a North Carolina case it is said: "Forfeitures of property for crime are unknown to our law, nor does it intercept for such cause the transmission of an intestate's property to heirs and distributees, nor can we recognize any such operating principle. We have searched in vain for an authority or ruling on the question, and find no adjudged case. The fact that none such is met with affords a strong presumption against the proposition." Owens v. Owens, 100 N. C. 240, 6 S. E. 794, 795.

Something may be offered in arrest of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed; he may obtain a pardon, or be allowed the benefit of clergy; both which suppose some latent sparks of merit which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of anything to be said in his favor. Upon judgment, therefore, of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry or of death, for treason or felony, a man shall be said to be attainted.

The consequences of attainder are forfeiture and corruption of blood.

§ 430. **(1) Forfeiture of property.**—Forfeiture is twofold: of real and personal estates. First, as to real estates: by attainder in high treason[l] a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands and tenements which he had at the time of the offense committed, or at any time afterwards, to be forever vested in the crown; and also the profits of all lands and tenements which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backwards to the time of the treason committed, so as to avoid all intermediate sales and encumbrances,[m] but not those before the fact; and therefore a wife's jointure is not forfeitable for the treason of her husband, because settled upon her previous to the treason committed. But her dower [382] is forfeited by the express provision of statute 5 & 6 Edward VI, c. 11 (Treason, 1551). And yet the husband shall be tenant by the curtesy of the wife's lands if the wife be attainted of treason;[n] for that is not prohibited by the statute.

l Co. Litt. 392. 3 Inst. 19. 1 Hal. P. C. 240. 2 Hawk. P. C. 448.
m 3 Inst. 211.
n 1 Hal. P. C. 359.

But, though after attainder the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits; and therefore if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands: for he never was attainted of treason.[o] But if the chief justice of the king's bench (the supreme coroner of all England) in person, upon the view of the body of one killed in open rebellion, records it and returns the record into his own court, both lands and goods shall be forfeited.[p]

§ 431. (a) Reasons for forfeiture.—The natural justice of forfeiture or confiscation of property for treason[q] is founded in this consideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with society, and hath 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. Such forfeitures, moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty and dread of personal punishment, but also by his passions and natural affections, and will interest every dependent and relation he has to keep him from offending: according to that beautiful sentiment of Cicero,[r] "*nec vero me fugit quam sit acerbum, parentum scelera filiorum pœnis lui: sed hoc præclare legibus comparatum est, ut caritas liberorum amiciores parentes reipublicæ redderet* (nor has it escaped me how hard it is that the crimes of parents should be atoned for by the punishment of their sons; but it is wisely provided by the laws that affection for their children may make parents more faithful to the republic)." And therefore Aulus Cascellius, a Roman lawyer in the time of the triumvirate, used to boast that he had two reasons for despising [383] the power of the tyrants: his old age and his want of children; for children are

o Co. Litt. 13.

p 4 Rep. 57.

q See Book I. pag. 259.

r Ad Brutum. ep. 12.

pledges to the prince of the father's obedience.[s] Yet many nations have thought that this posthumous punishment savors of hardship to the innocent; especially for crimes that do not strike at the very root and foundation of society, as treason against the government expressly does. And therefore, though confiscations were very frequent in the times of the earlier emperors, yet Arcadius and Honorius in every other instance but that of treason thought it more just, "*ibi esse pœnam, ubi et noxa est* (where the crime is there the punishment should be)"; and ordered that "*peccata suos teneant auctores, nec ulterius progrediatur metus, quam reperiatur delictum* (crimes should affect only the perpetrators of them, and the dread of punishment not extend beyond the sphere of offense)":[t] and Justinian also made a law to restrain the punishment of relations,[u] which directs the forfeiture to go, except in the case of *crimen majestatis*, to the next of kin to the delinquent. On the other hand, the Macedonian laws extended even the capital punishment of treason, not only to the children but to all the relations of the delinquent;[w] and of course their estates must be also forfeited, as no man was left to inherit them. And in Germany, by the famous golden bulle,[x] (copied almost *verbatim* from Justinian's code[y]), the lives of the sons of such as conspire to kill an elector are spared, as it is expressed, by the emperor's *particular bounty*. But they are deprived of all their effects and rights of succession, and are rendered incapable of any honor, ecclesiastical or civil: "to the end that, being always poor and necessitous, they may forever be accompanied by the infamy of their father; may languish in continual indigence; and may find (says this merciless edict) their punishment in living and their relief in dying."

§ 432. (b) Origin of forfeiture of lands in England.—With us in England forfeiture of lands and tenements to the crown for treason is by no means derived from the feudal policy (as has been already observed[z]), but was antecedent to the establishment of that system in this island; being [384] transmitted from our

[s] Gravin. 1. § 68.
[t] Cod. 9. 47. 22.
[u] Nov. 134. c. 13.
[w] Qu. Curt. l. 6.
[x] Cap. 24.
[y] L. 9. t. 8. l. 5.
[z] See Book II. pag. 251.

Saxon ancestors,[a] and forming a part of the ancient Scandinavian constitution.[b] But in certain treasons relating to the coin (which, as we formerly observed, seem rather a species of the *crimen falsi*, than the *crimen læsæ majestatis*), it is provided by some of the modern statutes[c] which constitute the offense that it shall work no forfeiture of lands save only for the life of the offender; and by all, that it shall not deprive the wife of her dower.[d] And, in order to abolish such hereditary punishment entirely, it was enacted by statute 7 Ann., c. 21 (Treason, 1708), that, after the decease of the late pretender, no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person, other than the traitor himself. By which the law of forfeitures for high treason would by this time have been at an end had not a subsequent statute intervened to give them a longer duration. The history of this matter is somewhat singular and worthy observation. At the time of the union, the crime of treason in Scotland was, by the Scots law, in many respects different from that of treason in England, and particularly in its consequence of forfeitures of entailed estates, which was more peculiarly English; yet it seemed necessary that a crime so nearly affecting government should, both in its essence and consequences, be put upon the same footing in both parts of the United Kingdoms. In new-modeling these laws the Scotch nation and the English house of commons struggled hard, partly to maintain and partly to acquire a total immunity from forfeiture and corruption of blood; which the house of lords as firmly resisted. At length a compromise was agreed to, which is established by this statute, *viz.*, that the same crimes, and no other, should be treason in Scotland that are so in England, and that the English forfeitures and corruption of blood should take place in Scotland, till the death of the then pretender, and then cease throughout the whole of Great Britain;[e] the lords artfully proposing this temporary clause in

[a] LL. Aelfr. c. 4. Canut. c. 54.

[b] Stiernh. de Jur. Goth. l. 2. c. 6. & l. 3. c. 3.

[c] Stat. 5 Eliz. c. 11 (Clipping Coin, 1562). 18 Eliz. c. 1 (Coin, 1575).

[d] *Ibid.* 8 & 9 W. III. c. 26 (Coin, 1696). 15 & 16 Geo. II. c. 28 (Counterfeiting Coin, 1741).

[e] Burnet's Hist. A. D. 1709.

[385] hopes (it is said [f]) that the prudence of succeeding parliaments would make it perpetual.[g] This has partly been done by the statute 17 George II, c. 39, Treason, 1743 (made in the year preceding the late rebellion), the operation of these indemnifying clauses being thereby still further suspended till the death of the sons of the pretender.[h]

§ 433. (c) Forfeiture in felony.—In petit treason and felony the offender also forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life, and, 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; for the king shall have them for a year and a day, and may commit therein what waste he pleases; which is called the king's *year, day* and *waste*.[i] Formerly, the king had only a liberty of committing waste on the lands of felons, by pulling down their houses, extirpating their gardens, plowing their meadows, and cutting down their woods. And a punishment of a similar spirit appears to have obtained in the oriental countries, from the decrees of Nebuchadnezzar and Cyrus in the books of Daniel[k] and Ezra,[l] which, besides the pain of death inflicted on the delinquents there specified, ordain, "that their houses shall be made a dunghill." But this tending greatly to the prejudice of the public, it was agreed in the reign of Henry the First, in this kingdom, that the king should have the profits of the land for one year and a day, in lieu of the destruction he was otherwise at liberty to commit;[m] and therefore *Magna Carta*[n] provides, that the king shall only hold such lands for a year and a day, and then restore them to the lord of the fee, without any mention made of waste. But the statute

[f] Considerations on the Law of Forfeiture. 6.

[g] See Fost. 250.

[h] The justice and expediency of this provision were defended at the time, with much learning and strength of argument, *in the considerations on the law of forfeiture*, first published A. D. 1744. (See Book I. pag. 244.)

[i] 2 Inst. 37.

[k] Ch. iii. v. 29.

[l] Ch. vi. v. 11.

[m] Mirr. c. 4. § 16. Flet. l. 1. c. 28.

[n] 9 Hen. III. c. 22 (1225).

17 Edward II, *de prærogativa regis* (1324), seems to suppose that the king shall have his [386] year, day *and* waste, and not the year and day *instead* of waste. Which Sir Edward Coke (and the author of the Mirror, before him) very justly look upon as an encroachment, though a very ancient one, of the royal prerogative.[o] This year, day and waste are now usually compounded for; but otherwise they regularly belong to the crown, and, after their expiration, the land would naturally have descended to the heir (as in gavelkind tenure it still does), did not its feudal quality intercept such descent and give it by way of escheat to the lord. These forfeitures for felony do also arise only upon attainder; and therefore a *felo de se* forfeits no lands of inheritance or freehold, for he never is attainted as a felon.[p] They likewise relate back to the time of the offense committed, as well as forfeitures for treason; so as to avoid all intermediate charges and conveyances. This may be hard upon such as have unwarily engaged with the offender; but the cruelty and reproach must lie on the part, not of the law, but of the criminal, who has thus knowingly and dishonestly involved others in his own calamities.

These are all the forfeitures of real estates created by the common law, as consequential upon attainders by judgment of death or outlawry. I here omit the particular forfeitures created by the statutes of *præmunire* and others, because I look upon them rather as a *part* of the judgment and penalty, inflicted by the respective statutes, than as *consequences* of such judgment; as in treason and felony they are. But I shall just mention, under this division of real estates, the forfeiture of the profits of lands during life; which extends to two other instances besides those already spoken of: misprision of treason,[q] and striking in Westminster Hall, or drawing a weapon upon a judge there, sitting in the king's courts of justice.[r]

The forfeiture of goods and chattels accrues in every one of the higher kinds of offense: in high treason or misprision [387] thereof, petit treason, felonies of all sorts, whether clergyable or not,

o Mirr. c. 5. § 2. 2 Inst. 37.
p 3 Inst. 55.
q *Ibid.* 218.
r *Ibid.* 141.

self-murder or felony *de se*, petty larceny, standing mute, and the above-mentioned offenses of striking, etc., in Westminster Hall. For *flight*, also, on an accusation of treason, felony or even petit larceny, whether the party be found guilty or acquitted, if the jury find the flight, the party shall forfeit his goods and chattels; for the very flight is an offense, carrying with it a strong presumption of guilt, and is at least an endeavor to elude and stifle the course of justice prescribed by the law. But the jury very seldom find the flight;[s] forfeiture being looked upon, since the vast increase of personal property of late years, as too large a penalty for an offense to which a man is prompted by the natural love of liberty.

Difference between the forfeiture of lands and of goods and chattels.—There is a remarkable difference or two between the forfeiture of lands and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before; goods and chattels are forfeited by *conviction*. Because in many of the cases where goods are forfeited there never is any attainder; which happens only where judgment of death or outlawry is given: therefore, in those cases the forfeiture must be upon conviction, or not at all, and, being necessarily upon conviction in those, it is so ordered in all other cases, for the law loves uniformity. 2. In outlawries for treason or felony, lands are forfeited only by the judgment; but the goods and chattels are forfeited by a man's being first put in the *exigent*, without staying till he is *quinto exactus*, or finally outlawed; for the secreting himself so long from justice is construed a flight in law.[ss] 3. The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and encumbrances: but the forfeiture of goods and chattels has no relation backwards; so that those only which a man has at the time of conviction shall be forfeited. Therefore, a traitor or felon may *bona fide* sell any of his chattels, real or personal, for the sustenance of himself and family between the fact and conviction;[t] for personal property is of [388] so fluctuating a nature, that it passes through many hands in a short time, and no buyer could be safe if he were liable to return

[s] Staundf. P. C. 183. b.
[ss] 3 Inst. 232.
[t] 2 Hawk. P. C. 454.

the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony. Yet if they be collusively and not *bona fide* parted with, merely to defraud the crown, the law (and particularly the statute 13 Elizabeth, c. 5, Fraudulent Conveyances, 1571) will reach them, for they are all the while truly and substantially the goods of the offender; and as he, if acquitted, might recover them himself, as not parted with for a good consideration, so in case he happens to be convicted, the law will recover them for the king.

§ 434. (2) Corruption of blood. — Another immediate consequence of attainder is the *corruption of blood*, both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor.[u]

This is one of those notions which our laws have 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, or gavelkind, wherein, though by treason, according to the ancient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of descents, ensues, and, on judgment of mere felony, no escheat accrues to the lord. And therefore, as every other oppressive mark of feudal tenure is now happily worn away in these kingdoms, it is to be hoped 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, may in process of time be abolished by act of parliament, as it stands upon a very different footing from the forfeiture of lands for high [389] treason affecting the king's person or government. And, indeed, the legislature has, from time to time, appeared very inclinable to give way to so equitable a provision, by enacting that, in certain treasons respecting the papal

[u] See Book II. pag. 251.

supremacy [w] and the public coin,[x] and in many of the new-made felonies created since the reign of Henry the Eighth by act of parliament, corruption of blood shall be saved. But as in some of the acts for creating felonies (and those not of the most atrocious kind) this saving was neglected, or forgotten, to be made, it seems to be highly reasonable and expedient to antiquate the whole of this doctrine by one undistinguishing law; especially as by the afore-mentioned statute of 7 Ann., c. 21, Treason, 1708 (the operation of which is postponed by statute 17 George II, c. 39, Treason, 1743), after the death of the sons of the late pretender no attainder for treason will extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself; which virtually abolishes all corruption of blood for treason, though (unless the legislature should interpose) it will still continue for many sorts of felony.

[w] Stat. 5 Eliz. c. 1 (Supremacy of the Crown, 1562).

[x] Stat. 5 Eliz. c. 11 (Clipping Coin, 1562). 18 Eliz. c. 1 (Coin, 1575). 8 & 9 W. III. c. 26 (Coin, 1696). 15 & 16 Geo. II. c. 28 (Counterfeiting Coin, 1741).

CHAPTER THE THIRTIETH. [390]

OF REVERSAL OF JUDGMENT.

§ 435. X. Reversal of judgment.—We are next to consider how judgments, with their several connected consequences of attainder, forfeiture and corruption of blood, may be set aside. There are two ways of doing this: either by falsifying or reversing the judgment, or else by reprieve or pardon.

§ 436. 1. Reversal without writ of error.—A judgment may be falsified, reversed or avoided, in the first place, *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 in the superior court, which can only judge from what appears in the record itself: and therefore, if the whole record be not certified, or not truly certified, by the inferior court, the party injured thereby (in both civil and criminal cases) may allege a *diminution* of the record and cause it to be rectified. Thus, if any judgment whatever 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 [391] of either A or B, in this case all proceedings, trials, convictions and judgments are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection without the trouble of a writ of error;[a] it being a high misdemeanor in the judges so proceeding, and little (if anything) short of murder in them all, in case the person so attainted be executed and suffer death. So, likewise, if a man purchases land of another, and afterwards the vendor is, either by outlawry or his own confession, convicted and attainted of treason or felony previous to the sale or alienation, whereby such land becomes liable to forfeiture or escheat, now, upon any trial, the purchaser is at liberty, without bringing any writ of error, to falsify not only the time of the felony

[a] 2 Hawk. P. C. 459.

or treason supposed, but the very point of the felony or treason itself, and is not concluded by the confession or the outlawry of the vendor; though the vendor himself is concluded, and not suffered now to deny the fact which he has by confession or flight acknowledged. But if such attainder of the vendor was by verdict, on the oath of his peers, the alienee cannot be received to falsify or contradict the *fact* of the crime committed; though he is at liberty to prove a mistake in *time*, or that the offense was committed after the alienation, and not before.[b]

§ 437. 2. Reversal by writ of error.—Secondly, a judgment may be reversed *by writ of error*, which lies from all inferior criminal jurisdictions to the court of king's bench, and from the king's bench to the house of peers, and may be brought for notorious mistakes in the judgment or other part of the record: as where a man is found guilty of perjury and receives the judgment of felony, or for other less palpable errors; such as any irregularity, omission or want of form in the process of outlawry or proclamations; the want of a proper *addition* to the defendant's name, according to the statute of additions; for not properly naming the sheriff or other officer of the court, or not duly describing where his county court was held; for laying an offense committed in the time of the late king to be done [392] against the peace of the present; and for many other similar causes which (though allowed out of tenderness to life and liberty) are not much to the credit or advancement of the national justice. These writs of error to reverse judgments in case of misdemeanors are not to be allowed of course, but on sufficient probable cause shown to the attorney general; and then they are understood to be grantable of common right, and *ex debito justitiæ* (as due to justice). But writs of error to reverse attainders in capital cases are only allowed *ex gratia* (as matter of favor), and not without express warrant under the king's sign manual, or at least by the consent of the attorney general.[c] These, therefore, can rarely be brought by the party himself, especially where he is attainted for an offense against the state; but they may be brought by his heir, or executor, after his death, in more favorable times,—

b 3 Inst. 231. 1 Hal. P. C. 361. c 1 Vern. 170. 175.

which may be some consolation to his family. But the easier, and more effectual way, is,

§ 438. 3. Reversal of attainder. — Lastly, to reverse the attainder by act of parliament. This may be, and hath been frequently done, upon motives of compassion, or perhaps from the zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowledged and confessed, yet the merits of the criminal's family shall after his death obtain a restitution in blood, honors and estate, or some or one of them, by act of parliament, which (so far as it extends) has all the effect of reversing the attainder, without casting any reflections upon the justice of the preceding sentence.

§ 439. 4. Effect of reversal of judgment.—The effect of falsifying or reversing an outlawry is that the party shall be in the same plight as if he had appeared upon the *capias*, and, if it be before plea pleaded, he shall be put to plead to the indictment; if after conviction, he shall receive the sentence of the law: for all the other proceedings, except only the process of outlawry for his nonappearance, [393] remain good and effectual as before.[1] But when judg-

1 Proceedings to set aside or vary a judgment or conviction in a criminal case are now practically always conducted by the machinery provided by the Criminal Appeal Act, 1907.

The court of criminal appeal must allow an appeal against conviction, if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice; and in any other case must dismiss the appeal. But the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favor of the appellant, dismiss the appeal; if it considers that no substantial miscarriage of justice has actually occurred.

Acting under these powers, the court will, on an appeal being properly brought, quash a conviction where, on a material point, the judge at the trial has substantially misdirected the jury, or has insufficiently directed them, or has not directed them at all, or where the judge has improperly admitted inadmissible evidence. The court will also quash a conviction, if there was no substantial evidence to go to the jury in support of the case for the prosecu-

ment pronounced upon conviction is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused: restored in his credit, his capacity, his blood, and his estates; with regard to which last, though they be granted away by the crown, yet the owner may enter upon the grantee with as little ceremony as he might enter upon a disseisor.[d] But he still remains liable to another prosecution for the same offense; for, the first being erroneous, he never was in jeopardy thereby.

[d] 2 Hawk. P. C. 462.

---

tion, or of a material point in the case, or if the verdict was unsatisfactory or not justified by the evidence, or if the jury have considered or been affected by matters which they ought not to have regarded, or if there has been gross irregularity in the procedure at the trial, or if the conviction is wrong in law.

If the court hears fresh evidence on an appeal and thinks that, had such evidence been given at the trial, the jury might have acquitted, the conviction will be quashed. The court will not, however, set aside a jury's finding of fact, except on the strongest grounds.

Even if there has been misdirection, or insufficient direction, or a failure to direct, or misreception of evidence, or irregularity in the procedure, the court will not quash the conviction, if it comes to the conclusion that, had there been no such mistake or omission at the trial, the jury would have come to the same conclusion.—STEPHEN, 4 Comm. (16th ed.), 393.

CHAPTER THE THIRTY-FIRST. [394]

OF REPRIEVE AND PARDON.

§ 440. XI. Reprieve and pardon.—The only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

§ 441. 1. Reprieves.—A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended.

§ 442. a. Reprieves ex arbitrio judicis.—This may be, first, *ex arbitrio judicis* (at the will of the judge), 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 he is doubtful whether the offense be within clergy; or sometimes if it be a small felony, or any favorable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished and their commission expired: but this rather by common usage than of strict right.[a]

§ 443. b. Reprieves ex necessitate legis.—Reprieves may also be *ex necessitate legis* (from legal necessity); as where a woman is capitally convicted and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy [395] dictated by the law of nature, *in favorem prolis* (in favor of the offspring); and therefore no part of the bloody proceedings in the reign of Queen Mary hath been more justly detested than the cruelty that was exercised in the Island of Guernsey of burning a woman big with child, and when, through the violence of the flames, the infant sprang forth at the stake and was preserved by the bystanders, after some deliberations of the priests who assisted at the sacrifice, they cast it again into the fire as a young heretic,[b]—a barbarity which they never learned

[a] 2 Hal. P. C. 412.

[b] Fox Acts and Mon.

from the laws of *ancient* Rome, which direct,[c] with the same humanity as our own, "*quod prægnantis mulieris damnatæ pœna differatur, quoad pariat* (that the punishment of a pregnant woman condemned shall be deferred till after her delivery)"; which doctrine has also prevailed in England as early as the first memorials of our law will reach.[d] In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact, and if they bring in their verdict *quick with child* (for barely, *with child*, unless it be alive in the womb, is not sufficient), execution shall be stayed generally till the next session, and so from session to session, till either she is delivered or proves by the course of nature not to have been with child at all. But if she once hath had the benefit of this reprieve and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a further respite for that cause.[e] For she may now be executed before the child is quick in the womb, and shall not, by her own incontinence, evade the sentence of justice.[1]

Reprieve where offender becomes insane between judgment and award of execution.—Another cause of regular reprieve is, if the offender become *non compos* between the judgment and the award of execution;[f] for regularly, as was formerly[g] observed, 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 [396] shall not be ordered for execution: for "*furiosus solo furore punitur* (a madman is punished by his madness alone)," and the law knows not but he might have

c Ff. 48. 19. 3.
d Flet. l. 1. c. 38.
e 1 Hal. P. C. 369.
f *Ibid.* 370.
g See pag. 24.

1 "With us, early in South Carolina, a plea of pregnancy in delay of sentence was accepted by the courts and tried by a jury of matrons (State v. Arden, 1 Bay, 487, 489, 490); in Arkansas, pregnancy in a penitentiary case was held not to require a new trial (Holeman v. State, 13 Ark. 105). These two cases, each decided with the true doctrine quite out of view, would seem to be all we have on the subject. Practically, the judge, where this cause is suspected, will with the consent of counsel grant such continuances as will prevent any question of law often arising." 2 Bishop, New Crim. Proc., § 1324.

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 attainder and the award of execution, to demand of the prisoner what he hath 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 repricve him.

Pleas in bar of execution.—Or, the party may *plead* in bar of execution; which plea may be either pregnancy, the king's pardon, an act of grace, or diversity of person, *viz.*, that he is not the same that was attainted, and the like. In this last case a jury shall be impaneled to try this collateral issue, namely, the identity of his person, and not whether guilty or innocent; for that has been decided before. And in these collateral issues the trial shall be *instanter*,[h] and no time allowed the prisoner to make his defense or produce his witnesses, unless he will make oath that he is not the person attainted:[i] neither shall any peremptory challenges of the jury be allowed the prisoner;[j] though formerly such challenges were held to be allowable whenever a man's life was in question.[k]

§ 444. 2. Pardon.—If neither pregnancy, insanity, nonidentity nor other plea will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is in the king's most gracious *pardon;* the granting of which is the most amiable prerogative of the crown. Laws (says an able writer) cannot be framed on principles of compassion to guilt; yet justice, by the constitution of England, is bound to be administered in mercy: this is promised by the king in his coronation oath, and it is that act of his government which is the most personal and most entirely his own.[l] The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his scepter is [397] mercy. His power of pardoning was said by our Saxon ancestors[m] to be derived *a lege suæ dignitatis* (from the law of his

h 1 Sid. 72.

i Fost. 42.

j 1 Lev. 61. Fost. 42. 46.

k Staundf. P. C. 163. Co. Litt. 157. Hal. Sum. 259.

l Law of Forfeit. 99.

m LL. Edw. Conf. c. 18.

dignity), and it is declared in parliament, by statute 27 Henry VIII, c. 24 (1536), that no other person hath power to pardon or remit any treason or felonies whatsoever, but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm.[n 2]

This is indeed one of the great advantages of monarchy in general, above any other form of government, that there is a magistrate who has it in his power to extend mercy wherever he thinks it is deserved, holding a court of equity in his own breast, to soften the rigor of the general law, in such criminal cases as merit an exemption from punishment. Pardons (according to some theorists[o]) should be excluded in a perfect legislation, where punish-

[n] And this power belongs only to a king *de facto*, and not to a king *de jure* during the time of usurpation. (Bro. Abr. t. Charter de Pardon. 22.)

[o] Beccar. c. 46.

---

2 **Effect of pardon in United States.**—The constitution [of the United States] provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

The power thus conferred is unlimited, with the exception stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.

The pardon produced by the petitioner is a full pardon "for all offenses by him committed, arising from participation, direct or implied, in the Rebellion," and is subject to certain conditions which have been complied with. The effect

ments are mild but certain: for that the clemency of the prince seems a tacit disapprobation of the laws. But the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter;[p] or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender (though they alter not the essence of the crime) ought to make no distinction in the punishment. In democracies, however, this power of pardon can never subsist; for there nothing higher is acknowledged than the magistrate who administers the laws, and it would be impolitic for the power of judging and of pardoning to center in one and the same person. This (as the President Montesquieu observes[q]) would oblige him very often to contradict himself, to make and to unmake his decisions; it would tend to confound all ideas of right among the mass of the people, as they would find it difficult to tell whether a prisoner were discharged by his innocence or obtained a pardon through favor. In [398] Holland, therefore, if there be no stadtholder, there is no power of pardoning lodged in any other member of the state. But in monarchies the king acts in a superior sphere, and, though he regulates the whole government as the first mover, yet he does not appear in any of the disagreeable or invidious parts of it. Whenever the nation see him personally engaged, it is only in works of legislature, magnificence or compassion. To him, therefore, the people look up as the foun-

[p] *Ibid.* c. 4. [q] Sp. L. b. 6. c. 5.

---

of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offense of treason, committed by his participation in the Rebellion. So far as that offense is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offense, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offense notwithstanding the pardon. If such exclusion can be effected by the exaction of an expurgatory oath covering the offense, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the power of Congress thus to inflict punishment beyond the reach of executive clemency.—FIELD, J., in Ex parte Garland, 4 Wall. 333, 380, 18 L. Ed. 366, 371.

In this case and in that of Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356, the subjects of pardons, of bills of attainder, and of *ex post facto* laws were discussed ably and at length.

tain of nothing but bounty and grace, and these repeated acts of goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than anything to root in their hearts that filial affection and personal loyalty which are the sure establishment of a prince.

Under this head of pardons let us briefly consider, 1. The *object* of pardon; 2. The *manner* of pardoning; 3. The method of *allowing* a pardon; 4. The *effect* of such pardon, when allowed.

§ 445. a. Object of pardon.—And, first, the king may pardon all offenses merely against the crown or the public; excepting, 1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm is by the *habeas corpus* act, 31 Car. II, c. 2 (1679), made a *præmunire*, unpardonable even by the king; nor, 2. Can the king pardon where private justice is principally concerned in the prosecution of offenders: "*non potest rex gratiam facere cum injuria et damno aliorum* (the king cannot confer a favor by the injury and loss of others)."[r] Therefore, in appeals of all kinds (which are the suit, not of the king, but of the party injured) the prosecutor may release, but the king cannot pardon.[s] Neither can he pardon a common nuisance while it remains unredressed, or so as to prevent an abatement of it, though afterwards he may remit the fine; because though the prosecution is vested in the king to avoid multiplicity of suits, yet (during its continuance) this offense savors more of the nature of a *private* [399] injury to each individual in the neighborhood than of a *public* wrong.[t] Neither, lastly, can the king pardon an offense against a popular or penal statute after information brought; for thereby the informer hath acquired a private property in his part of the penalty.[u]

§ 446. (1) Pardon not pleadable in impeachments.—There is also a restriction of a peculiar nature that affects the prerogative of pardoning, in case of parliamentary impeachments; *viz.*, that the king's pardon cannot be *pleaded* to any such impeachment, so as to impede the inquiry and stop the prosecution of great and notorious offenders. Therefore, when, in the reign of Charles the Second,

r 3. Inst. 236.
s *Ibid.* 237.
t 2 Hawk. P. C. 391.
u 3 Inst. 233.

the Earl of Danby was impeached by the house of commons of high treason and other misdemeanors, and pleaded the king's pardon in bar of the same, the commons alleged[v] "that there was no precedent that ever any pardon was granted to any person impeached by the commons of high treason, or other high crimes, *depending the impeachment,*" and thereupon resolved,[w] "that the pardon so pleaded was illegal and void, and ought not to be allowed *in bar* of the impeachment of the commons of England"; for which resolution they assigned[x] this reason to the house of lords, "that the setting up a pardon to be a *bar* of an impeachment defeats the whole use and effect of impeachments: for should this point be admitted, or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of the government would be destroyed." Soon after the revolution the commons renewed the same claim, and voted,[y] "that a pardon is not *pleadable in bar* of an impeachment." And, at length, it was enacted by the act of settlement, 12 & 13 W. III, c. 2 (1700), "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 solemnly heard and determined, it is not understood that the [400] king's royal grace is further restrained or abridged; for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon.

§ 447. **(2) Manner of pardoning.**—As to the *manner* of pardoning. 1. First, it must be under the *great* seal. A warrant under the privy seal, or sign manual, though it may be a sufficient authority to admit the party to bail, in order to plead the king's pardon, when obtained in proper form, yet is not of itself a complete irrevocable pardon.[z] 2. Next, it is a general rule that, wherever it may reasonably be presumed the king is deceived, the pardon is void.[a] Therefore, any suppression of truth or suggestion of falsehood in a charter of pardon will vitiate the whole; for the king

v Com. Journ. 28 Apr. 1679.
w *Ibid.* 5 May 1679.
x *Ibid.* 26 May 1679.
y *Ibid.* 6 Jun. 1689.
z 5 St. Tr. 166. 173.
a 2 Hawk. P. C. 383.

was misinformed.[b] 3. General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony (for it is presumed the king knew not of those proceedings); but the conviction or attainder must be particularly mentioned.[c] And a pardon of felonies will not include piracy;[d] for that is no felony punishable at the common law. 4. It is also enacted by statute 13 Richard II, st. 2, c. 1 (Pardons, 1389), that no pardon for treason, murder or rape shall be allowed unless the offense be particularly specified therein; and particularly in murder it shall be expressed whether it was committed by lying in wait, assault or malice prepense. Upon which Sir Edward Coke observes,[e] that it was not the intention of the parliament that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive it possible that the king would ever excuse an offense by name which was attended with such high aggravations. And it is remarkable enough that there is no precedent of a pardon in the register for any other homicide than that [401] which happens *se defendendo* (in self-defense) or *per infortunium* (through misadventure); to which two species the king's pardon was expressly confined by the statutes 2 Edward III, c. 2 (Pardons for Felony, 1328), and 14 Edward III, c. 15 (Pardon for Felony, 1340), which declare that no pardon of homicide shall be granted, but only where the king may do it *by the oath of his crown;* that is to say, where a man slayeth another in his own defense, or by misfortune. But the statute of Richard the Second, before mentioned, enlarges by implication the royal power; provided the king is not deceived in the intended object of his mercy. And therefore pardons of murder were always gra ted with a *non obstante* (notwithstanding) of the statute of King Richard till the time of the revolution, when the doctrine of *non obstante's* ceasing, it was doubted whether murder could be pardoned generally; but it was determined by the court of king's bench[f] that the king may pardon on an indictment of murder as well as a subject may discharge an appeal. Under these and a few other restrictions it is

b 3 Inst. 238.
c 2 Hawk. P. C. 383.
d 1 Hawk. P. C. 99.
e 3 Inst. 236.
f Salk. 499.

a general rule that a pardon shall be taken most beneficially *for* the subject, and most strongly against the king.

§ 448. **(a) Conditional pardons.**—A pardon may also be *conditional;* that is, the king may extend his mercy upon what terms he pleases, and 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.[g] Which prerogative is daily exerted in the pardon of felons, on condition of being confined to hard labor for a stated time, or of transportation to some foreign country (usually to some of his majesty's colonies and plantations in America) for life, or for a term of years; such transportation or banishment[h] being allowable and warranted by the *habeas corpus* act, 31 Car. II, c. 2, § 14 (1679), and rendered more easy and effectual by statute 8 George III, c. 15 (Transportation, 1767).

§ 449. **(3) Allowance of pardons.**—With regard to the manner of *allowing*[3] pardons, we may observe that a pardon by act of

g 2 Hawk. P. C. 394.

h Transportation is said (Bar. 352) to have been first inflicted as a punishment, by statute 39 Eliz. c. 4 (Vagrancy, 1597).

---

3 **Exile by conditional pardon.**—See article on "Compulsion of Subjects to Leave the Realm," in 6 Law Quart. Rev. 388, especially 401. On page 407, the writer says: "Though this prerogative of exile by conditional pardon is still exercised, it is likely to create ever-growing difficulties, in consequence of the modern view that a state ought not to relieve itself of its worst criminals at the expense of other countries. Our colonies strongly resent the exportation of criminals. The Victorians would not let the Phœnix Park approvers land; and a Canadian statute empowers the exclusion of convicts. They equally object to the expatriated criminals of other states, e. g., in the case of the even time-expired convicts of New Caledonia, and this objection is shared and expressed by law in the United States. So that as matters now stand the crown can neither compel acceptance of a pardon, nor, if it be accepted, insure the recipient a place of exile. The use of conditional pardon is therefore in the main restricted to the case of political or *quasi*-political offenders, or foreigners who have broken English law, and in whom their national governments have shown an interest, as in the case of the Americans who meddled in the Fenian rising. And O'Donovan Rossa lately testified before the authorities of his adopted country to the disservice done it by pardoning him, and treating him as a political offender."

parliament is more beneficial [402] than by the king's charter; for a man is not bound to plead it, but the court must *ex officio* take notice of it.[i] Neither can he lose the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon.[k] The king's charter of pardon must be specially pleaded, and that at a proper time; for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon.[l] But if a man avails himself thereof as soon as by course of law he may, a pardon may either be pleaded upon arraignment, or in arrest of judgment, or in the present stage of proceedings, in bar of execution. Anciently, by statute 10 Edward III, c. 2 (1336), no pardon of felony could be allowed, unless the party found sureties for the good behavior before the sheriff and coroners of the county.[m] But that statute is repealed by the statute 5 & 6 W. & M., c. 13 (Pardon of Felony, 1694), which, instead thereof, gives the judges of the court a discretionary power to bind the criminal pleading such pardon to his good behavior, with two sureties, for any term not exceeding seven years.

§ 450. (4) Effect of pardon.—Lastly, the *effect* of such pardon by the king is to make the offender a new man, to acquit him of all corporal penalties and forfeitures annexed to that offense for which he obtains his pardon, and not so much to restore his former, as to give him a new, credit and capacity. But nothing can restore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and transcendent power of parliament. Yet, if a person attainted receives the king's pardon, and afterwards hath a son, that son may be heir to his father, because the father being made a new man, might transmit new inheritable blood: though, had he been born before the pardon, he could never have inherited at all.[n]

i Fost. 43.
k 2 Hawk. P. C. 397.
l *Ibid.* 396.
m Salk. 499.
n See Book II. pag. 254.

CHAPTER THE THIRTY-SECOND. [403]

OF EXECUTION.

§ 451. XII. Execution.—There now remains nothing to speak of but *execution:* the completion of human punishment. And this, in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff or his deputy; whose warrant for so doing was anciently by precept under the hand and seal of the judge, as it is still practiced in the court of the lord high steward, upon the execution of a peer,[a] though, in the court of the peers in parliament, it is done by writ from the king.[b] Afterwards it was established[c] that, in case of life, the judge may command execution to be done without any writ. And now the usage is for the judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff. As, for a capital felony, it is written opposite to the prisoner's name, "Let him be hanged by the neck"; formerly, in the days of Latin and abbreviation,[d] "*sus. per coll.*" for "*suspendatur per collum.*" And this is the only warrant that the sheriff has for so material an act as taking away the life of another.[e] It may certainly afford matter of speculation that in civil causes there should be such a variety of writs of execution to recover a trifling debt, issued in the king's name and under the seal of the court, without which the sheriff [404] cannot legally stir one step; and yet that the execution of a man, the most important and terrible task of any, should depend upon a marginal note.

§ 452. 1. How the warrant is executed.—The sheriff, upon receipt of his warrant, is to do execution within a convenient time, which in the country is also left at large. In London, indeed, a more solemn and becoming exactness is used, both as to the warrant of execution and the time of executing thereof; for the recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleasure that the law must take its course, issues his warrant to the sheriffs, directing them to do exe-

[a] 2 Hal. P. C. 409.
[b] Appendix, § 5.
[c] Finch. L. 478.
[d] Staundf. P. C. 182.
[e] 5 Mod. 22.

cution on the day and at the place assigned.[f] And, in the court of king's bench, if the prisoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for his execution, either specifying the time and place,[g] or leaving it to the discretion of the sheriff.[h] And, throughout the kingdom, by statute 25 George II, c. 37 (Murder, 1751), it is enacted that, in case of murder, the judge shall in his sentence direct execution to be performed on the next day but one after sentence passed.[i] But, otherwise, the time and place of execution are by law no part of the judgment.[k] It has been well observed [l] that it is of great importance that the punishment should follow the crime as early as possible; that the prospect of gratification or advantage, which tempts a man to commit the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas; and then the execution itself affects the minds of the spectators rather as a terrible sight than as the necessary consequence of transgression.

§ 453. **2. Change in mode of execution.**—The sheriff cannot alter the manner of the execution by substituting one death for another without being guilty of felony himself, as has been formerly said.[m] It is held, also, [405] by Sir Edward Coke[n] and Sir Matthew Hale,[o] that even the king cannot change the punishment of the law by altering the hanging or burning into beheading; though, when beheading is part of the sentence, the king may remit the rest. And, notwithstanding some examples to the contrary, Sir Edward Coke stoutly maintains that "*judicandum est legibus, non exemplis* (we must judge by the laws, not by examples)." But others have thought,[p] and more justly, that this prerogative, being founded in mercy and immemorially exercised by the crown, is part

f Appendix, § 4.
g St. Trials. VI. 332. Fost. 43.
h Appendix, § 3.
i See pag. 202.
k So held by the twelve judges, Mich. 10 Geo. III.
l Beccar. c. 19.
m See pag. 179.
n 3 Inst. 52.
o 2 Hal. P. C. 412.
p Fost. 270. F N. B. 244. h. 19 Rym. Fœd. 284.

of the common law. For hitherto, in every instance, all these exchanges have been for more merciful kinds of death; and how far this may also fall within the king's power of granting conditional pardons (*viz.*, by remitting a severe kind of death, on condition that the criminal submits to a milder), is a matter that may bear consideration. It is observable that when Lord Stafford was executed for the popish plot in the reign of King Charles the Second, the then sheriffs of London, having received the king's writ for beheading him, petitioned the house of lords for a command or order from their lordships how the said judgment should be executed; for, he being prosecuted by impeachment, they entertained a notion (which is said to have been countenanced by Lord Russel) that the king could not pardon any part of the sentence.[q] The lords resolved[r] 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[s] 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[t] sullenly resolved that the house was *content* that the sheriff do execute Lord Stafford by severing his head from his body. It is further related that when afterwards the same Lord Russel was condemned for high treason upon indictment, the king, while he remitted the ignominious part of [406] 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."[u] One can hardly determine (at this distance from those turbulent times) which most to disapprove of, the indecent and sanguinary zeal of the subject, or the cool and cruel sarcasm of the sovereign.

§ 454. Conclusion of the Commentaries.—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[w]; for the former hanging was no execution of the sentence, and if a false tenderness were to be indulged in

q 2 Hume Hist. of G. B. 328.
r Lords Journ. 21 Dec. 1680.
s Com. Journ. 21 Dec. 1680.
t *Ibid.* 23 Dec. 1680.
u 2 Hume. 360.
w 2 Hal. P. C. 412. 2 Hawk. P. C. 463.

such cases, a multitude of collusions might ensue. Nay, even while abjurations were in force,[x] such a criminal, so reviving, was not allowed to take sanctuary and abjure the realm; but his fleeing to sanctuary was held an escape in the officer.[y] [1]

And, having thus arrived at 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, it may now seem high time to put a period to these Commentaries, which, the author is very sensible, have already swelled to too great

x See pag. 326.

y Fitzh. Abr. t. Corone. 335. Finch. L. 467.

---

1 **Fairness of English criminal justice.**—No reader who has perused with attention even the outlines of the English law of criminal procedure and evidence can have failed to notice how effectually its rules have been molded into such a shape as now affords the amplest practicable security against the condemnation of any innocent man. Accused persons find themselves protected by the humane attitude of the judge and of the prosecuting counsel, by the freedom conceded to the counsel for the defense, by the publicity of the proceedings and the right of reporting them to a still wider public, by the stringency of the rules which prescribe the quantity and the character of the evidence which the crown must produce, by the facilities for securing witnesses for the defense at the cost of public funds, and by the rejection of all convictions from which even a single juror dissents. In the sense of security against miscarriages of justice, thus inspired in the nation at large, we may find adequate explanation of an anomaly which has often surprised foreign observers of English institutions. They have remarked that our criminal courts, the courts which come most violently into conflict with the interests of the defendants against whom they adjudicate, are not—as would seem natural, and as has actually been the case in many countries—the most unpopular of all our tribunals, but the least so. Moreover, the confidence universally felt that every accused person shall be tried by a fair method and in a fair spirit goes far to facilitate the protection of life and property, by rendering it far easier in England than in many countries for the police to obtain information and assistance in their efforts to bring criminals to justice.

The spirit of fairness and humanity which characterizes English criminal courts is not of recent origin. Recent years have, however, done so much to improve the procedure which this spirit animates, that they have now raised those courts to a degree of efficiency perhaps greater even than that attained by some of the tribunals that have inherited to the fullest the spirit of Anglo-Saxon justice.—KENNY, Outlines of Criminal Law, 493.

a length. But he cannot dismiss the student, for whose use alone these rudiments were originally compiled, without endeavoring to recall to his memory some principal outlines of the legal constitution of this country; by a short historical review of the most considerable revolutions that have happened in the laws of England from the earliest to the present times. And this task he will attempt to discharge, however imperfectly, in the next or concluding chapter.

[407]

CHAPTER THE THIRTY-THIRD.

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

§ 455. Historical review of the more remarkable changes in the laws of England.—Before we enter on the subject of this chapter, in which I propose, by way of supplement to the whole, to attempt an historical review of the most remarkable changes and alterations that have happened in the laws of England, I must first of all remind the student that the rise and progress of many principal points and doctrines have been already pointed out in the course of these Commentaries, under their respective divisions, these having therefore been particularly discussed already, it cannot be expected that I should re-examine them with any degree of minuteness; which would be a most tedious undertaking. What I therefore at present propose is only to mark out some outlines of an English juridical history, by taking a chronological view of the state of our laws and their successive mutations at different periods of time.[1]

1 Mr. Edward Jenks, in editing this chapter of the Commentaries, says: "The important contributions which have been made in recent years to our knowledge of the history of English law have thrown a good deal of doubt on some of Blackstone's statements, contained in this chapter. Inasmuch, however, as, in the present state of historical criticism, many important questions are still open to doubt, it has been thought better to leave Blackstone's statements substantially unaltered, calling attention in footnotes to some of the more debatable points." (4 Stephen's Comm. (16th ed.), xiii.

On the history of the English law the attention of the reader is called to the following works: Pollock & Maitland, History of the English Law (2d ed.), 2 vols., 1898, which ends at the reign of Edward I; Holdsworth, History of the English Law, 3 vols. 1903, which now ends at 1485, but is being continued; Jenks, A Short History of the English Law, 1 vol., 1912, which covers the whole history of the law; Maitland & Montague, Sketch of English Legal History, edited by James F. Colby, 1 vol., 1915; Wilson, History of Modern English Law, 1 vol., 1875, covering the period from Blackstone to 1875; Dicey, Law and Public Opinion in England During the Nineteenth Century, 2d ed., with an Introduction on the Relation Between Law and Public Opinion in England in the first thirteen years of the Twentieth Century, 1914; Digby, History of the Law of Real Property, 1 vol. (5th ed.), 1897; Stephen, History of the Criminal Law of England, 3 vols., 1883.

§ 456. The several periods of English legal history.—The several periods under which I shall consider the state of our legal polity are the following six: 1. From the earliest times to the Norman Conquest; 2. From the Norman Conquest to the reign of King Edward the First; 3. From thence to the Reformation; 4. From the Reformation to the [408] restoration of King Charles the Second; 5. From thence to the revolution in 1688; 6. From the revolution to the present time.

I. FROM THE EARLIEST TIMES TO THE NORMAN CONQUEST.

§ 457. First period.—And, first, with regard to the ancient Britons, the *aborigines* of our island, we have so little 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 and discipline of the ancient Druids in Gaul, in whom centered all the learning of these western parts, and who were, as he tells us, sent over to Britain (that is, to the island of Mona or Anglesey), to be instructed, we may collect a few points which bear a great affinity and resemblance to some of the modern doctrines of our English 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 the industry of the moderns has discovered, there is not in any of them the least trace of any character or letter to be found. The partible quality also of lands, by the custom of gavelkind, which still obtains in many parts of England, and did universally over Wales till the reign of Henry VIII is undoubtedly of British original. So, likewise, is the ancient division of the goods of an intestate between his widow and children, or next of kin; which has since been revived by the statute of distributions. And we may also remember an instance of a slighter nature mentioned in the present volume, where the same custom has continued from Cæsar's time to the present,—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 and destroyed both the British inhabitants and constitution, [409] the Romans, the Picts, and, after them, the various clans of Saxons and Danes, must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom; as they were very soon incorporated and blended together, and, therefore, we may suppose, mutually communicated to each other their respective usages,[a] in regard to the rights of property and the punishment of crimes. So that it is morally impossible to trace out, with any degree of accuracy, *when* the several mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution of them to their first and component principles.[2] We can seldom pronounce 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. First, from the nature of traditional laws in general, which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice;[b] so that, though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes of the bed of a river which varies its shores by continual decreases and alluvions. 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 original of its laws; unless we had as authentic monuments thereof, as the Jews had by the hand of Moses.[c] Thirdly, [410] this uncertainty of the true origin of par-

a Hal. Hist. C. L. 62.
b *Ibid.* 57.
c *Ibid.* 59.

2 "It is an impossible piece of Chemistry," says Sir Matthew Hale, "to reduce every *caput legis* to its true original." Hale, Hist. Com. Law, 64.

ticular customs must also in part have arisen from the means whereby Christianity was propagated among our Saxon ancestors in this island, 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 our holy religion, and to introduce many others that were more conformable thereto. And this, perhaps, may have partly been the cause that we find not only some rules of the Mosaical, but also of the imperial and pontifical laws, blended and adopted into our own system.

A further reason may also be given for the great variety, and of course the uncertain original, of our ancient established customs, even after the Saxon government was firmly established in this island; *viz.*, the subdivision of the kingdom into an heptarchy, consisting of seven independent kingdoms, peopled and governed by different clans and colonies. This must necessarily create 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.

§ 458. 1. Alfred's legal measures. — When, therefore, the West-Saxons had swallowed up all the rest, and King Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a most great and necessary work, which he is said to have executed in as masterly [411] 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 a vast and rude irregularity, to form one uniform and well-connected whole. This he effected by reducing the

whole kingdom under one regular and gradual subordination of government, wherein each man was answerable to his immediate superior for his own conduct and that of his nearest neighbors; for to him we owe 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 been preserved for near a thousand years unchanged, from Alfred's to the present time. He also, like another Theodosius, collected the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his dom-bec, or *liber judicialis.* 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 inspected, 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.[3]

§ 459. 2. Dane-Lage, West-Saxon-Lage, and Mercen-Lage.—The Danish invasion and conquest, which introduced new foreign 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 [412] under the name of *Dane-*

3 The legend which attributes to Alfred the actual invention of all these institutions is, of course, only an example of the tendency of tradition to assign a personal authorship to famous measures, the origin of which is obscure. In particular, the theory of the king as the fountain of all justice is comparatively modern; and the common law itself is not older than the thirteenth century.—EDWARD JENKS, in 4 Stephen's Comm. (16th ed.), 417 n.

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 probably abounded with many British customs, 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 (as we shall see) often suffered considerable changes.

§ 460. 3. Laws of Edgar and of Edward the Confessor.—For King Edgar (who besides his military merit, as founder of the English navy, was also a most excellent civil governor), 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 King Edward the Confessor, afterwards completed; *viz.,* one uniform digest or body of laws, to be observed throughout the whole kingdom, being probably no more than a revival of King Alfred's code, with some improvements suggested by necessity and experience; particularly the incorporating some of the British or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the *West-Saxon-Lage,* which was still the groundwork of the whole. And this appears to be the best supported and most plausible conjecture (for certainty is not to be expected) of the rise and original 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, and which is doubtless of Saxon parentage.[4]

4 "That the local customs which, in the thirteenth century, were, by the action of the king's courts, and especially of the itinerant justices, welded into the *common law,* were largely of Anglo-Saxon origin, cannot be doubted; but there is certainly no proof that there was a common law, i. e., a law common to the whole country, before the Conquest. The so-called *Laws of Edward the Confessor* are a private compilation, dating from the late twelfth century."—JENKS, in 4 Stephen's Comm. (16th ed.), 418 n.

§ 461. 4. The more remarkable of the Saxon laws.—Among the most remarkable of the Saxon laws we may reckon: 1. The constitution of parliaments, or, rather, general assemblies of the principal and wisest men in the nation, the *wittena-gemote*, or *commune consilium* (the common council) of the ancient Germans, which was not yet reduced to the forms and distinctions [413] 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 dear bought experience evinced the convenience and necessity of establishing an hereditary succession to the crown. But that of all subordinate magistrates, their military officers or heretochs, their sheriffs, their conservators of the peace, their coroners, their portreeves (since changed into mayors and bailiffs), and even their tithingmen 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 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 offense: even the most notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment, perpetual bondage; to which our benefit of clergy has now in some measure succeeded. 5. The prevalence of certain customs, as heriots and military services in proportion to every man's land, which much resembled the feudal constitution, but yet were exempt from all its rigorous 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 intended as 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, with-

out 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 [414] Conquest, though really inconvenient, and more especially destructive to ancient families; which are in monarchies necessary to be supported, in order to form and keep up a nobility or intermediate state between the prince and the common people. 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, according as he kept the three great festivals of Christmas, Easter, and Whitsuntide; an institution which was adopted by King Alonso VII of Castile, about a century after the Conquest, who at the same three great feasts was wont to assemble his nobility and prelates in his court, who there heard and decided all controversies, and then, having received his instructions, departed home.[d] 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 *corsned* or morsel of execration, or by *wager of law* with compurgators, if the party chose it; but frequently they were also by *jury*, for whether or no their juries consisted precisely of twelve men, or were bound to a strict unanimity, yet the general constitution of this admirable criterion of truth, and 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, when the second period of our legal history commences.

II. FROM THE NORMAN CONQUEST TO EDWARD I.

§ 462. Second period. — This remarkable event wrought as great an alteration in our laws as it did in our ancient line of

[d] Mod. Un. Hist. xx. 114.

kings; and though the alteration of the former was effected rather by the [415] consent of the people than 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.

§ 463. 1. Separation of the ecclesiastical and civil courts.—Among the first of these alterations we may reckon the separation of the ecclesiastical courts from the civil, effected in order to ingratiate the new king with the popish clergy, who for some time before had been endeavoring all over Europe to exempt themselves from the secular power, and whose demands the Conqueror, like a politic prince, thought 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 interest. And this was the more easily effected because, the disposal of all the Episcopal Sees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates.

§ 464. 2. The forest laws.—Another violent alteration of the English constitution consisted in the depopulation of whole countries for the purposes of the king's 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 the rigor of these new constitutions vested the sole property of all the game in England 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 royal amusement of the sovereign, without express license from the king, by a grant of a chase or freewarren; 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 forest laws are now mitigated and by

degrees [416] grown entirely obsolete, yet from this root has sprung a bastard slip,[4a] known by the name of the game law, now arrived to and wantoning in its highest vigor, 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 have 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 freewarren might kill game in every part of his franchise, but now, though a freeholder of less than 100*l.* a year is forbidden to kill a partridge upon his own estate, yet nobody else (not even the lord of the manor, unless he hath a grant of freewarren) can do it without committing a trespass and subjecting himself to an action.

§ 465. 3. Restriction of the influence of the county courts.— 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 to 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 capital judiciary appointed, with powers so large and 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 naturally 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 King Edward the Third obtained a double victory over the armies of France in their own country and their language in our courts here at home. But there

[4a] An interesting account of the history of the law as to offenses relating to game is given by Sir James Stephen, who considers it probable that the earliest game laws were not a "bastard slip" from the forest laws, but rather the result of a new order of ideas. See Stephen, Hist. Crim. Law, 275–282.

was one mischief too deeply rooted thereby, and which this caution of [417] King 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 of refinement and 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; but which serves no other purpose than to show the vast powers of the human intellect, however vainly or preposterously employed. Hence law in particular which (being intended for universal reception) ought to be a plain rule of action, became a science of the greatest intricacy; especially when blended with the new refinements engrafted upon feudal property: which refinements were from time to time gradually introduced by the Norman practitioners, with a view to supersede (as they did in great measure) the more homely, but more intelligible, maxims of distributive justice among the Saxons. And, to say the truth, these [418] scholastic reformers have transmitted their dialect and finesses to posterity, so interwoven in the

body of our legal polity, that they cannot now be taken out without a manifest injury to the substance. Statute after statute has in later times been made, to pare off these troublesome excrescences and restore the common law to its pristine simplicity and vigor; and the endeavor has greatly succeeded, but still the scars are deep and visible, and the liberality of our modern courts of justice is frequently 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.

§ 466. 4. Introduction of trial by combat.—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,[5] 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 honor to establish it here, though clearly an unchristian, as well as most uncertain, method of trial. But it was a sufficient recommendation of it to the Conqueror and his warlike countrymen that it was the usage of their native Duchy of Normandy.

§ 467. 5. System of feudal tenure.—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 genuine consequences of the maxim then adopted that all the lands in England were derived from and holden, mediately or immediately, of the crown.

§ 468. 6. Resulting debasement of society.—The nation at this period seems to have groaned under as absolute a slavery as was

5 "Probably a survival of the ancient blood-feud, which was itself a beneficent substitute for the indiscriminate vengeance of primitive times."—JENKS, in 4 Stephen's Comm. (16th ed.), 423 n.

in the power of a warlike, an ambitious, [419] and a politic prince to create. The consciences of men were enslaved by sour ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived, who now imported from Rome for the first time the whole *farrago* and superstitious novelties which had been engendered by the blindness and corruption of the times between the first mission of Augustine the Monk and the Norman Conquest; such as transubstantiation, purgatory, communion in one kind, and the worship of saints and images, not forgetting the universal supremacy and dogmatical infallibility of the Holy See. The laws, too, as well as the prayers, were administered in an unknown tongue. The ancient trial by jury gave way to the impious decision by battle. The forest laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to disperse, and fire and candle to be extinguished, by eight at night, at the sound of the melancholy *curfew*. 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 favorites, 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 confiscating their estates, to attend him in time of invasion, or to quell any domestic insurrection. Trade, or foreign merchandise, such as it then was, was carried on by the Jews and Lombards; and the very name of an English fleet, which King 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 insignificancy happily retained, in their socage and burgage tenure, some [420] points of their ancient freedom. All the rest were villeins or bondmen.

§ 469. **7. Gradual restoration of society.**—From so complete and well-concerted a scheme of servility, it has been the work of generations of our ancestors to redeem themselves and their posterity into that state of liberty which we now enjoy, and which therefore is not to be looked upon as consisting of mere encroachments on the crown and infringements on the prerogative, as some slavish and narrow-minded writers in the last century endeavored to maintain, but as, in general, 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, I now proceed to inquire.

§ 470. **a. William Rufus and Henry I.**—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 the First, found it expedient, when first he came to the crown, to ingratiate himself with the people, by restoring (as our monkish historians tell us) the laws of King Edward the Confessor. The ground whereof is this: that by charter he gave up 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 curfew;[e] for, though it is mentioned in our laws a full century afterwards,[f] yet it is rather spoken of as a known *time* of night (so denominated from that abrogated usage) than as 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.[6] It contains some directions as to crimes and their punishments (that of theft being

e Spelm. Cod. LL. W. I. 288. Hen. I. 299.

f Stat. Civ. Lond. 13 Edw. I. (1285).

6 "There does not seem any evidence that Henry the First himself had anything to do with the compilation which bears his name. The book acquired its title from the fact that it began with Henry's coronation charter."—JENKS, in 4 Stephen's Comm. (16th ed.), 426 n.

made capital in his reign) and a few things relating to estates particularly [421] 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, King 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: *conge d'eslire* (leave to elect), 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; from whence we may easily perceive how far short this was of a thorough restitution of King Edward's, or the Saxon, laws.

§ 471. b. Stephen.—The usurper Stephen, as the manner of usurpers is, 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 points. It is from his reign, however, that we are to date the introduction of the Roman civil and canon laws into this realm; and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

§ 472. c. Henry II.—By the time of King Henry the Second, if not earlier, the charter of Henry the First seems to have been forgotten; for we find the claim of marriage, ward and relief then flourishing in full vigor. The right of primogeniture seems also to have tacitly revived, being found more convenient for the public than the parceling 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 that excellent treatise of Glanvill, which, though some of it be now antiquated and altered, yet, when compared with the code of Henry the First, [422] it carries a manifest superiority.[g] Throughout

[g] Hal. Hist. C. L. 138.

his reign, also, was continued the important struggle, which we have had occasion so often to mention, between the laws of England and Rome; the former supported by the strength of the temporal nobility, when endeavored to be supplanted in favor of the latter by the popish clergy. Which dispute was kept on foot till the reign of Edward the First, when the laws of England, under the new discipline introduced by that skillful commander, obtained a complete and permanent victory. In the present reign of Henry the Second, 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 pope and his clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction; though his further progress was unhappily stopped, by the fatal event of the disputes between him and Archbishop Becket. 2. The institution of the office of justices in eyre, *in itinere;* the king having divided the kingdom into six circuits (a little different from the present) and commissioned these new created judges to administer justice, and try writs of assize, 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, traveling 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 barbarous and Norman trial by battle.[7] 4. To this time must also be referred the introduction of escuage, or pecuniary [423] commutation for personal military service; which in process of time was the parent of

7 "It is, in fact, to the reign of Henry the Second that we owe the introduction of trial by jury; not, as Blackstone seems to suppose, by way of reviving ancient custom, but as a royal innovation, stoutly resisted by popular prejudice."—JENKS, in 4 Stephen's Comm. (16th ed.), 428 n.

the ancient subsidies granted to the crown by parliament and the land tax of later time.

§ 473. d. Richard I.—Richard the First, a brave and magnanimous prince, was a sportsman as well as a soldier, and therefore enforced the forest laws with some rigor, which occasioned many discontents among his people; though (according to Matthew Paris) 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 also, when abroad, composed a body of naval laws at the Isle of Oleron, which are still extant and of high authority; for in his time we began again to discover that (as an island) we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable 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 against the Saracens in the holy land.

§ 474. e. John and Henry III.—In King John's time, and that of his son Henry the Third, the rigors 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 King John, and afterwards his son, consented to the two famous charters of English liberties, *Magna Carta* and *Carta de Foresta*.[8] 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 [424] from the tyrannical abuse of the prerogative of purveyance

8 "The Forest Charter was, probably, not actually issued till after the death of John."—JENKS, in 4 Stephen's Comm. (16th ed.), 429 n.

and pre-emption. It fixed the forfeiture of lands for felony in the same manner as it still remains; prohibited for the future the grants of exclusive fisheries; and the erection of new bridges so as to oppress the neighborhood. 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, as it hath continued ever since; and prohibited the appeals of 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 battle; directed the regular awarding of inquests for life or 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.[9]

[425] However, by means of these struggles, the pope in the reign of King John gained a still greater ascendant here than he

9 The following is the celebrated 29th chapter of *Magna Carta*, the foundation of the liberty of Englishmen, and of those who have inherited their institutions: "*Nullus liber homo capiatur vel imprisonetur, aut dissaisiatur de libero tenemento suo, vel libertatibus vel liberis consuetudinibus suis, aut utlagetur,*

ever had before enjoyed, which continued through the long reign of his son, Henry the Third, in the beginning of whose time the old Saxon trial by ordeal was also totally abolished. And we may by this time perceive, in Bracton's treatise, a still further improvement in the method and regularity of the common law, especially in the point of pleadings.[h] 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 King John, though omitted in that of Henry III, and that, towards the end of the latter of these reigns, we find the first record of any writ for summoning knights, citizens and burgesses to parliament. And here we conclude the second period of our English legal history.

III. FROM EDWARD I TO THE REFORMATION.

§ 475. Third period.—The third commences with the reign of Edward the First, who hath justly been styled our English Justinian. For in his time the law did receive so sudden a perfection, that Sir Matthew Hale does not scruple to affirm[i] 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.

[h] Hal. Hist. C. L. 156.

[i] *Ibid.* 158.

aut exuletur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae. Nulli vendemus, nulli negabimus aut differemus rectum vel justitiam. (No freeman shall be taken, or imprisoned, or disseised of his freehold, or of his liberties or free customs, or outlawed, or exiled, or in any way harmed; nor will we proceed against him, save by the lawful judgment of his peers or by the law of the land. To none will we sell, to none will we deny or delay, right or justice.)" In reference thereto, Mr. Jenks says: "Unfortunately for the reputation of a good many orators and writers, it seems now to be quite clear that the *liber homo* of *Magna Carta* was an exceptional person, i. e., a land owner of substantial estate. The whole document is, in fact, a monument of class privilege, which imaginative writers of later times have converted into a democratic manifesto." 4 Stephen's Comm. (16th ed.), 431 n. Nevertheless, it was obtained by the class who were able to secure it in the thirteenth century, and has served as the protection of expanding liberties throughout succeeding generations.

§ 476. 1. Legal reforms of Edward I.—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 pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction, and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction, those of the king's bench, common pleas and exchequer, so as [426] they might not interfere with each other's proper business: to do which, they must now have recourse to a fiction, very necessary and beneficial in the present enlarged state of property. 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; though of considerably greater, than by the alteration of the value of money they are now permitted to determine.[10] 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 effects of fines levied in the court of common pleas; though the thing itself was of Saxon original. 8. He first established a repository for the public records of the kingdom; few of which are ancienter than the reign of his father, and those were by him collected. 9. He improved upon the laws of King 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

10 "This is probably an allusion to the statute of Gloucester of 1278 (Edward I, c. 8), by which it was provided that no one should have a writ of trespass before the justices, unless he would swear that the goods were worth forty shillings. This provision seems to have resulted, somewhat illogically, in limiting the jurisdiction of the local courts to that sum."—JENKS, in 4 Stephen's Comm. (16th ed.), 432 n.

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 ideas, 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 of the kingdom was in danger of being swallowed, by his reiterated statutes of mortmain; most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be evaded by the invention of uses. [427] 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 the Eighth); 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.

§ 477. a. Character of Edward I's reforms.—I might continue this catalogue much further, but, upon the whole, we may observe that the very scheme and model of the administration of common justice between party and party was entirely settled by this king,[k] and has continued nearly the same, in all succeeding ages, to this day; abating some few alterations, which the humor or necessity of subsequent times hath occasioned. The forms of writs by which actions are 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. 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 *observation* of *Magna Carta*, rather than from its *making* or *renewal*, in the days of his

k Hal. Hist. C. L. 162.

grandfather and father, 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.

I cannot give a better proof of the excellence of his constitutions than that from his time to that of Henry the Eighth there happened very few, and those not very considerable, alterations in the legal *forms* of proceedings. As to matter of *substance:* the old Gothic powers of electing the principal subordinate magistrates, the sheriffs and conservators [428] 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 the Third 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-modeled 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 of the pope, 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 luster to the close of the fourteenth century; though the seeds of general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of per-

secution introduced into the laws of the land by the influence of the regular clergy.

§ 478. 2. During the civil wars.—From this time to that of Henry the Seventh the civil wars and disputed titles to the crown gave no leisure for further [429] judicial improvement: "*nam silent leges inter arma* (for laws are silent midst the din of arms)." And yet it is to these very disputes that we owe 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, we owe 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 the Fourth,[11] for the purpose of unfettering estates, and making them more liable to forfeiture; while, on the other hand, the owners endeavored to protect them by the universal establishment of *uses,*—another of the clerical inventions.

§ 479. 3. Henry VII.—In the reign of King Henry the Seventh, 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-modeled, and armed with powers, the 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

11 "*Taltarum's Case* occurred in the reign of Edward the Fourth; but the practice of barring entails by means of common recoveries is probably as old as the fourteenth century."—JENKS, in 4 Stephen's Comm. (16th ed.), 436 n.

clergy (which so often intervened to stop attainders and save the inheritance) was now allowed only once to lay offenders, who only could have inheritances to lose. A writ of *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, [430] introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

IV. FROM THE REFORMATION TO THE RESTORATION OF CHARLES II.

§ 480. Fourth period.—This brings us to the fourth period of our legal history, *viz.*, the reformation of religion under Henry the Eighth and his children, which opens an entirely new scene in ecclesiastical matters; the usurped power of the pope being now forever routed and destroyed, all his connections with this island cut off, the crown restored to its supremacy over spiritual men and causes, and the patronage of bishopries being once more indisputably vested in the king. And, had the spiritual courts been at this time reunited to the civil, we should have seen the old Saxon constitution with regard to *ecclesiastical* polity completely restored.

§ 481. 1. Progress of the law under Henry VIII. — 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 endeavoring to destroy the intricate nicety of *uses*, though the narrowness and pedantry 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 (notwithstanding they may differ in forms) are now equally adopted by the courts of both law and equity. 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 practiced, 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 [431] and family settlements, which may be molded to a thousand useful purposes by the ingenuity of an able artist.

The further 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 reassume, of a great commercial people. The incorporation of Wales and 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 before observed upon, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the administration of Henry VIII a very distinguished era in the annals of juridical history.

§ 482. 2. Edward VI and Mary.—It must be, however, remarked, that (particularly in his later years) the royal prerogative was then 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.[1] Happily for the nation, this arbitrary reign was succeeded by the minority of an amiable prince,

[1] See pag. 86.

during the short sunshine of which great part of these extravagant laws were repealed. And, to do justice to the shorter reign of Queen Mary, [432] many salutary and popular laws, in civil matters, were made under her administration; perhaps the better to reconcile the people to the bloody measures which she was induced to pursue for the re-establishment of religious slavery; the well-concerted schemes for effecting which were (through the providence of God) defeated by the seasonable accession of Queen Elizabeth.

§ 483. **3. Elizabeth.** — The religious liberties of the nation being, by that happy event, established (we trust) on an eternal basis (though obliged in their infancy to be guarded, against papists and other nonconformists, by laws of too sanguinary a nature); the forest laws having fallen into disuse; and the administration of civil rights in the courts of justice being carried on in a regular course, according to the wise institutions of King Edward the First, without any material innovations, all the principal grievances introduced by the Norman Conquest seem 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 house had (through the former abuse of it) gone over to such a contrary extreme, and the princes of the house of Tudor and their favorites had fallen with such avidity upon the spoils of the church, that a decent and honorable 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 the reign of Queen Elizabeth, 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 further any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved.

[433] However, considering the reign of Queen Elizabeth in a great and political view, we have no reason to regret many subsequent alterations in the English 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 formerly were taught to believe: for, surely, the true liberty of the subject consists not so much in the gracious behavior, as in the limited power, of the sovereign.

§ 484. 4. General condition of society and influence of the Renaissance.—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, [434] 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 and the progress of religious reformation, began to be universally disseminated, when trade and navigation were suddenly carried to an amazing extent, by the use of the compass and the consequent 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 popish clergy, detected in their frauds and 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 rivaled 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 [435] 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 dreamed 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 the Eighth 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.

§ 485. 5. Use of the prerogative by Queen Elizabeth.—Queen Elizabeth, and the intermediate princes of the Tudor line, had almost the same legal powers, and sometimes exerted them as roughly, as their father, King Henry the Eighth. 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 drew 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 the people.

§ 486. 6. Pretensions of James I.—[436] On the accession of King James I, no new degree of royal power was added to, or exercised, by him; but such a scepter 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 awakened 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 I cannot class the laws against witchcraft and conjuration 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.

§ 487. 7. Pretensions of Charles I.—Indeed, when Charles the First succeeded to the crown of his father, and attempted to revive some enormities, which had been dormant in the reign of King James, 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 [437] 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 befall 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 monarchical government. A conduct so opposite to his temper and principles, joined with some rash 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, [438] 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 murder of their sovereign.

I pass by the crude and abortive schemes for amending the laws in the times of confusion which followed; the most promising and sensible whereof (such as the establishment of new trials, the abolition of feudal tenures, the act of navigation and some others) were adopted in the

V. FROM THE RESTORATION TO THE REVOLUTION OF 1688.

§ 488. Fifth period.—Fifth period, which I am next to mention, *viz.*, after the restoration of King Charles II, immediately upon which the principal remaining grievance, 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, and with it our ancient constitution, 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 we may date not only the re-establishment of our church and monarchy, but also the complete restitution of English liberty, for the first time, since its total abolition at the Conquest. For therein not only these slavish tenures, the badge of foreign dominion, with all their oppressive appendages, were removed from encumbering 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 Running-Mead. That only pruned the luxuriances of the feudal system; but the statute of Charles the Second extirpated all its [439] slaveries, except, perhaps, in copyhold tenure, and there, also, they are now in great measure enervated by gradual custom and the interposition of our courts of justice. *Magna Carta* 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, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him.

To these I may add the abolition of the prerogatives of purveyance and pre-emption; the statute for holding triennial parliaments; the test and corporation acts, which 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 intes-

tates' estates; and that of amendments and *jeofails*, which cut off those superfluous nicetics which so long had 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: and the whole, when we likewise consider the freedom from taxes and armies which the subject then enjoyed, will be sufficient to demonstrate this truth, "that the constitution of England had arrived to its full vigor, and the true balance between liberty and prerogative was happily established by *law* in the reign of King Charles the Second."

It is far from my intention to palliate or defend many very iniquitous proceedings, *contrary to all law*, in that reign, through the artifices of wicked politicians, both in and out of employment. What seems incontestable is this: that *by the law* [m] as it then stood (notwithstanding some invidious, nay dangerous, branches of the prerogative have since been lopped [440] off and the rest more clearly defined) the people had as large a portion of real liberty as is consistent with a state of society, and sufficient power residing in their own hands to assert and preserve that liberty if invaded by the royal prerogative. For which I need but appeal to the memorable catastrophe of the next reign; for when King Charles' 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 last period of our legal history, *viz.*,

VI. FROM THE REVOLUTION OF 1688 TO THE REIGN OF GEORGE III.

§ 489. Sixth period. — From the revolution of 1688 to the present time. In this period many laws have 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

m The point of time, at which I would choose to fix this *theoretical* perfection of our public law, is the year 1679; after the *habeas corpus* act was passed and that for licensing the press had expired; though the years which immediately followed it were times of great *practical* oppression.

have asserted our liberties in more clear and emphatical terms; have regulated the succession of the crown by parliament, as the exigencies of religious and civil freedom required; have confirmed and exemplified the doctrine of resistance, when the executive magistrate endeavors to subvert the constitution; have maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal; have indulged tender consciences with every religious liberty consistent with the safety of the state; have established triennial, since turned into septennial, elections of members to serve in parliament; have excluded certain officers from the house of commons; have restrained the king's pardon from obstructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow peers; have regulated trials for high treason; have afforded our posterity a hope that corruption of blood may one day be abolished and forgotten; have (by the desire of his present majesty) set bounds to the civil list, and placed the administration of that revenue in hands that are accountable to parliament; and have (by the like desire) made the judges completely independent of the king, his ministers and his successors. Yet, though these provisions have in appearance and nominally [441] reduced the strength of the executive power to a much lower ebb than in the preceding period, if, on the other hand, we throw into the opposite scale (what perhaps the immoderate reduction of the ancient prerogative may have rendered in some degree necessary) the vast acquisition of force, arising from the riot act and the annual expedience 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 has, gradually and imperceptibly, gained almost as much in influence as it has apparently lost in prerogative.

§ 490. 1. Chief alterations in the law during the sixth period. The chief alterations of moment (for the time would fail me to descend to *minutiæ*) in the administration of private justice during this period are 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 regulations of trials by jury, and the admitting witnesses for prisoners upon oath; the further restraints upon alienation of lands in mortmain; the annihilation of the terrible judgment of *peine fort 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 new and effectual methods for the speedy recovery of rents; the improvements which have been made in ejectments for the trying of titles; the introduction and establishment of paper credit, by indorsements upon bills and notes, which have shown the legal possibility and convenience (which our ancestors so long doubted) 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, and (which is much the better plan) the reformation of county courts; the great system of marine jurisprudence, of which the foundations have been laid, by clearly developing [442] 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 (though late) has now taken possession of our courts of common law and induced them to adopt (where facts can be clearly ascertained) the same principles of redress as have 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 setoffs), but by extending the remedial influence of the equitable writ of trespass on the case, according to its primitive institution by King Edward the First, to almost every instance of injustice not remedied by any other process. And these, I think, are all the material alterations that have happened with respect to private justice in the course of the present century.[12]

12 **General view of the progress of English law in the nineteenth century.** To come nearer our own time, we may single out for particular enumeration, the Parliamentary Reform Act of 1832, the first statute by which municipal corporations were regulated, and the acts further to amend the representation of the people, which were passed in the years 1867 and 1884—all statutes of

§ 491. The author's concluding reflections.—Thus, therefore, for the amusement and instruction of the student, I have endeavored 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 in this and the former volumes, 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

transcendent importance, as having been designed to abate the indirect influence immemorially exercised by wealth and power, in general and local institutions; while to these we may add the renewed efforts made in recent statutes to secure the purity of parliamentary and municipal elections, and to extend the scope of local self-government.

Of other measures of importance passed in the last century, those relating to the church may next attract our attention. And here we may notice those by which Protestant dissenters of all denominations, and such persons as profess the Jewish religion, or the faith of the Church of Rome, have been in general relieved from all restraints which before excluded them from free participation with their fellow-subjects in political rights, as well as from all forfeitures and penalties in respect of their religious tenets; the acts for the commutation of tithes, for the reform of the laws relative to pluralities and residence, and for the better application of cathedral revenues; and those measures which have been devised for the extension of the places of worship belonging to the established church, and the general increase of her efficiency as regards the cure of souls.

Of the merits of many of these changes, indeed, opinions have been much divided, as will always be the case upon questions connected with politics or religion; but a more unmixed applause may reasonably be claimed for the abolition of the slave trade, and of slavery in the colonies, and for the improvements which have been introduced in relation to our social economy, particularly in regard to trade and navigation, to the sanitary condition of the people, to banking, registration, to lunatic asylums, to gaols, to the law of marriage, to the all-important subject of the education of the masses of the people, to copyright and patent right, to trademarks and designs, to charitable trusts and benevolent institutions, to the compensation of workers for injuries sustained in the course of their employment, and to the general relief of the poor.

It is, however, with regard to the rights of property and the administration of justice, that the genius of reform has latterly displayed its chief activity,

now fraught with the accumulated wisdom of ages; that the forms of administering justice came to perfection under Edward the First, and have not been much varied, nor always for the better, since; that 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 King Charles, nor fully and explicitly acknowledged and defined till the era of the happy revolution. Of a constitution so wisely contrived, [443]

and where its achievements have been, upon the whole, the most triumphant. It would be impossible, without a tedious minuteness of detail, to do more than glance at these. But under the first head, our notice is particularly due to the improvements which have taken place in the law of inheritance, of prescription, of dower, and of the limitation of actions; to the better regulation of wills and testaments; to the deliverance of entails and the estates of married women from the thraldom of expensive and cumbrous forms of conveyance, and the substitution of better methods; to the introduction of greater simplicity and uniformity in several other particulars, and greater freedom of disposition, into that part of our legal system which relates to the alienation of land; and to the provisions for facilitating the conversion of copyhold estates into freehold, and thus emancipating them from the burdens of an oppressive tenure.

Under the reforms in the administration of civil justice may be particularized the better regulation of juries; the abolition of the antiquated forms of real actions, which had survived the lapse of ages only to subserve the purposes of chicanery; fresh improvements in the proceedings by way of the prerogative writs of prohibition and *mandamus;* the many important and elaborate alterations which have been introduced in the forms of process and pleading; the reformation of the law of evidence; the establishment of county courts throughout the kingdom, for the decision of civil cases up to a certain amount, so as to dispense justice cheaply and speedily at the doors of the people; the transfer of matters matrimonial, and the jurisdiction over wills and intestacies, from the feeble and dilatory rule of the ecclesiastical courts, to a more vigorous secular jurisdiction; the creation of a more satisfactory tribunal than before existed, for administering the laws regulating public worship in the churches; and the improvements which have been made in the appellate jurisdiction of the house of lords, and of the privy council.

With respect to the improvements of the criminal law, we may notice the consolidation of the law relating to most of the principal offenses; the abolition of the benefit of clergy, and of prosecution by appeals; the better regulation of the law of principal and accessory, and of commitment and bail; the intro-

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 hath been the endeavor 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 unskillful improvements in later ages. To sustain, to reduction of a variety of provisions tending to simplify the course of criminal procedure, and to deliver it from technical difficulties; the allowance of counsel, in all cases, to address the jury for the prisoner; the opportunity now given to prisoners (and to their wives and husbands) to give evidence; the remarkable mitigation which has generally taken place in the ancient severity of punishments; the establishment of a tribunal for the decision of such points of law as shall arise in the course of the trial and be reserved by the judge; the withdrawal from the eye of the general public of the execution of criminals who have been sentenced to death for murder; and, finally, the recognition of the right of a convicted felon to appeal, even on a question of fact, to the judgment of a higher tribunal.

In conclusion, we may here refer to the attempt which has been made to remove such obstacles as still remain to the speedy and effectual administration of justice, by the establishment of a supreme court of judicature, uniting and consolidating in itself the former superior courts, and forming a grand tribunal of both original and appellate jurisdiction, in one or other department whereof redress may be sought for all injuries, whether civil or criminal, in accordance with the rules of law as modified by the principles of equity.

Of the amount of success which has attended this effort it is perhaps as yet too early to pronounce a confident opinion; but many abuses which previously deformed judicial proceedings have doubtless been removed by the new system, the advantages of which, as a whole, may be expected to develop themselves more clearly, when the difficulties inseparable from so considerable a change shall have gradually subsided, and a settled practice in the several divisions of the high court of justice become gradually established on a firm basis.—EDWARD JENKS, in 4 Stephen's Comm. (16th ed.), 450.

pair, to beautify this noble pile is a charge entrusted 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.

2692

APPENDIX.

(2693)

APPENDIX.

§ 1. *Record of an indictment and conviction of murder, at the assizes.*

Warwickshire, to wit, } **Be it remembered,** that at the general session of the lord the king of *oyer* and *terminer*, holden at Warwick in and for the said county of Warwick, on Friday, the twelfth day of March, in the second year of the reign of the Lord George the Third, now King of Great Britain, before Sir Michael Foster, Knight, one of the justices of the said lord the king, assigned to hold pleas before the king himself, Sir Edward Clive, Knight, one of the justices of the said lord the king, of his court of common bench, and others their fellows, justices of the said lord the king, assigned by letters patent of the said lord the king, under his great seal of Great Britain, made to them the aforesaid justices and others, and any two or more of them (whereof one of them, the said Sir Michael Foster and Sir Edward Clive, the said lord the king would have to be one), to inquire (by the oath of good and lawful men of the county aforesaid, by whom the truth of the matter might be the better known, and by other ways, methods, and means, whereby they could or might the better know, as well within liberties as without) more fully the truth of all treasons, misprisions of treasons, insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the moneys of Great Britain, and of other kingdoms or dominions whatsoever; and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, unlawful assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champerties, deceits, and all other misdeeds, offenses and injuries whatsoever, and also the accessories

Session of oyer and terminer.

Commission of

of the same, within the county aforesaid, as well within liberties as without, by whomsoever and howsoever done, had, perpetrated, and committed, and by whom, to whom, when, how, and in what manner; and of all other articles and circumstances in the said letters patent of the said lord the king specified, the premises and every or any of them howsoever concerning; and for this time to hear and determine the said treasons and other the premises, according to the law and custom of the realm of England; and also keepers of the peace, and justices of the said lord the king, assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed within the county aforesaid, by the oath of Sir James Thompson, Baronet, Charles Roper, Henry Dawes, Peter Wilson, Samuel Rogers, John Dawson, James Philips, John Mayo, Richard Savage, William Bell, James Morris, Laurence Hall, and Charles Carter, Esquires, good and lawful men of the county aforesaid, then and there impaneled, sworn, and charged to inquire for the said lord the king and for the body of the said county, it is presented, that Peter Hunt, late of the parish of Lighthorne, in the said county, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fifth day of March, in the second year of the reign of the said lord the king, at the parish of Lighthorne aforesaid, with force and arms, in and upon one Samuel Collins, in the peace of God and of the said lord the king, then and there being, feloniously, willfully, and of his malice aforethought, did make an assault; and that the said Peter Hunt with a certain drawn sword, made of iron and steel, of the value of five shillings, which he, the said Peter Hunt, in his right hand then and there had and held, him the said Samuel Collins, in and upon the left side of the belly of him, the said Samuel Collins, then and there feloniously, willfully, and of his malice aforethought, did strike, thrust, stab, and penetrate; giving unto the said Samuel Collins, then and there, with the sword drawn as aforesaid, in and upon the left side of the

oyer and terminer,

and of the peace.

Grand jury.

Indictment.

belly of him the said Samuel Collins, one mortal wound of the breadth of one inch, and the depth of nine inches, of which said mortal wound he, the said Samuel Collins, at the parish of Lighthorne aforesaid, in the said county of Warwick, from the said fifth day of March in the year aforesaid until the seventh day of the same month in the same year, did languish, and languishing did live; on which said seventh day of March in the year aforesaid, the said Samuel Collins, at the parish of Lighthorne aforesaid, in the county aforesaid, of the said mortal wound did die: and so the jurors aforesaid, upon their oath aforesaid, do say that the said Peter Hunt him the said Samuel Collins, in manner and form aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, against the peace of the said lord the now king, his crown and dignity. **Whereupon** the sheriff of the county afore- Capias.
said is commanded, that he omit not for any liberty in his bailiwick, but that he take the said Peter Hunt, if he may be found in his bailiwick, and him safely keep, to answer to the felony and murder whereof he stands indicted. **Which** said indictment the said justices of the lord the Session of gaol delivery.
king above named, afterward, to wit, at the delivery of the gaol of the said lord the king, holden at Warwick in and for the county aforesaid, on Friday, the sixth day of August, in the said second year of the reign of the said lord the king, before the Right Honorable William Lord Mansfield, chief justice of the said lord the king, assigned to hold pleas before the king himself, Sir Sidney Stafford Smythe, Knight, one of the barons of the Exchequer of the said lord the king, and others their fellows, justices of the said lord the king, assigned to deliver his said gaol of the county aforesaid of the prisoners therein being, by their proper hands to deliver here in court of record in form of the law to be determined. **And afterward,** to wit, at the Arraign-
same delivery of the gaol of the said lord the king of his ment.
county aforesaid, on the said Friday, the sixth day of August, in the said second year of the reign of the said lord the king, before the said justices of the lord the king

last above named and others their fellows aforesaid, here cometh the said Peter Hunt, under the custody of William Browne, Esquire, sheriff of the county aforesaid (in whose custody in the gaol of the county aforesaid, for the cause aforesaid, he had been before committed), being brought to the bar here in his proper person by the said sheriff, to whom he is also here committed: **And** forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he saith that he is not guilty thereof; and thereof for good and evil he puts himself upon the country; **And** John Blencowe, Esquire, clerk of the assizes for the county aforesaid, who prosecutes for the said lord the king in this behalf, doth the like: **Therefore** let a jury thereupon here immediately come before the said justices of the lord the king last above mentioned, and others their fellows aforesaid, of free and lawful men of the neighborhood of the said parish of Lighthorne, in the county of Warwick aforesaid, by whom the truth of the matter may be the better known, and who are not of kin to the said Peter Hunt, to recognize upon their oath, whether the said Peter Hunt be guilty of the felony and murder in the indictment aforesaid above specified, or not guilty; because as well the said John Blencowe, who prosecutes for the said lord the king in this behalf, as the said Peter Hunt, have put themselves upon the said jury. And the jurors of the said jury by the said sheriff for this purpose impaneled and returned, to wit, David Williams, John Smith, Thomas Horne, Charles Nokes, Richard May, Walter Duke, Matthew Lion, James White, William Bates, Oliver Green, Bartholomew Nash, and Henry Long, being called, come; who being elected, tried, and sworn to speak the truth of and concerning the premises, upon their oath say, that the said Peter Hunt is guilty of the felony and murder aforesaid, on him above charged in the form aforesaid, as by the indictment aforesaid is above supposed against him; and that the said Peter Hunt at the time of committing the said felony and murder, or at any time since to this

Plea: not guilty.

Issue.

Venire.

Verdict: guilty of murder.

time, had not nor hath any goods or chattels, lands or tenements, in the said county of Warwick, or elsewhere, to the knowledge of the said jurors. And upon this it is forthwith demanded of the said Peter Hunt, if he hath or knoweth anything to say, wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: who nothing further saith, unless as he before had said. **Whereupon** all and singular the premises being seen and by the said justices here fully understood, **It is considered** by the court here, that the said Peter Hunt be taken to the gaol of the said lord the king of the said county of Warwick, from whence he came, and from thence to the place of execution on Monday now next ensuing, being the ninth day of this instant August, and there be hanged by the neck until he be dead; and that afterward his body be dissected and anatomized.

Judgment of death,

and dissection.

§ 2. *Conviction of manslaughter.*

—— upon their oath say, that the said Peter Hunt is not guilty of the murder aforesaid, above charged upon him; but that the said Peter Hunt is guilty of the felonious slaying of the aforesaid Samuel Collins; and that he had not nor hath any goods or chattels, lands or tenements, at the time of the felony and manslaughter aforesaid, or ever afterward to this time, to the knowledge of the said jurors. And immediately it is demanded of the said Peter Hunt, if he hath or knoweth any thing to say wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: **Who saith** that he is a clerk, and prayeth the benefit of clergy to be allowed him in this behalf. **Whereupon** all and singular the premises being seen, and by the said justices here fully understood, **It is considered** by the court here, that the said Peter Hunt be burned in his left hand, and delivered. And immediately he is burned in his left hand, and is delivered according to the form of the statute.

Verdict: not guilty of murder; guilty of manslaughter.

Clergy prayed.

Judgment to be burned in the hand and delivered.

§ 3. *Entry of a trial instanter in the court of king's bench, upon a collateral issue, and rule of court for execution thereon.*

Michaelmas Term, in the sixth year of the reign of King George the Third.

Kent; The King against Thomas Rogers.

Habeas corpus.

The prisoner at the bar being brought into this court in custody of the sheriff of the county of Sussex, by virtue of his majesty's writ of *habeas corpus*, **It is ordered** that the said writ and the return thereto be filed. **And** it appearing by a certain record of attainder, which hath been removed into this court by his majesty's writ of *certiorari*, that the prisoner at the bar stands attainted, by the name of Thomas Rogers, of felony for a robbery on the highway, and the said prisoner at the bar having heard the record of the said attainder now read to him, is now asked by the court here what he hath to say for himself why the court here should not proceed to award execution against him upon the said attainder. **He** for plea saith, that he is not the same Thomas Rogers in the said record of attainder named, and against whom judgment was pronounced; and this he is ready to verify and prove, etc. **To** which said plea the Honorable Charles Yorke, Esquire, attorney general of our present sovereign lord the king, who for our said lord the king in this behalf prosecuteth, being now present here in court, and having heard what the said prisoner at the bar hath now alleged, for our said lord the king by way of reply saith, that the said prisoner now here at the bar is the same Thomas Rogers in the said record of attainder named, and against whom judgment was pronounced as aforesaid; and this he prayeth may be inquired into by the country; and the said prisoner at the bar doth the like: **Therefore** let a jury in this behalf immediately come here into court, by whom the truth of the matter will be the better known, and who have no affinity to the said prisoner, to try upon their oath whether the said prisoner at the bar be the same Thomas Rogers in

Record of attainder read:

for felony and robbery.

Prisoner asked what he can say in bar of execution. Plea: not the same person.

Replication, averring that he is.

Issue joined.

Venire awarded instanter.

the said record of attainder named, and against whom judgment was so pronounced as aforesaid, or not; because as well the said Charles Yorke, Esquire, attorney general of our said lord the king, who for our said lord the king in this behalf prosecutes, as the said prisoner at the bar, have put themselves in this behalf upon the said jury. **And** Jury. immediately thereupon the said jury come here into court; and being elected, tried, and sworn to speak the truth touching and concerning the premises aforesaid, and having heard the said record read to them, do say upon their oath that the said prisoner at the bar is the same Thomas Rogers in the said record of attainder named, and against whom judgment was so pronounced as aforesaid, in manner and form as the said attorney general hath by his said replication to the said plea of the said prisoner now here at the bar alleged. **And hereupon** the said attorney general, on behalf of our said lord the king, now prayeth that the court here would proceed to award execution against him the said Thomas Rogers upon the said attainder. **Whereupon** all and singular the premises being now seen and fully understood by the court here, **It is ordered** by the court here, that execution be done upon the said prisoner at the bar for the said felony in pursuance of the said judgment, according to due form of law: **And** it is lastly ordered, that the said Thomas Rogers, the prisoner at the bar, be now committed to the custody of the sheriff of the county of Kent (now also present here in court) for the purpose aforesaid; and that the said sheriff of Kent do execution upon the said defendant, the prisoner at the bar, for the said felony, in pursuance of the said judgment, according to due form of law.

Verdict: that he is the same.

Award of execution.

On the motion of Mr. Attorney General.

By the Court.

§ 4. *Warrant of execution on judgment of death, at the general gaol delivery in London and Middlesex.*

London and Middlesex. } To the sheriffs of the city of London; and to the sheriff of the county of Middlesex; and to the keeper of his majesty's gaol of Newgate.

Whereas, at the session of gaol delivery of Newgate for the city of London and county of Middlesex, holden at Justice Hall in the Old Bailey, on the nineteenth day of October last, Patrick Mahoney, Roger Jones, Charles King, and Mary Smith received sentence of death for the respective offenses in their several indictments mentioned: **Now it is hereby ordered** that execution of the said sentence be made and done upon them the said Patrick Mahoney and Roger Jones, on Wednesday, the ninth day of this instant month of November, at the usual place of execution. **And** it is his majesty's command that execution of the said sentence upon them, the said Charles King and Mary Smith, be respited until his majesty's pleasure touching them be further known.

Given under my hand and seal this fourth day of November, one thousand seven hundred and sixty-eight.

JAMES EYRE, Recorder. [L. S.]

§ 5. *Writ of execution upon a judgment of murder, before the king in parliament.*

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the sheriffs of London and sheriff of Middlesex, greeting. **Whereas** Lawrence Earl Ferrers, Viscount Tamworth, hath been indicted of felony and murder by him done and committed, which said indictment hath been certified before us in our present Parliament; and the said Lawrence Earl Ferrers, Viscount Tamworth, hath been thereupon arraigned, and upon such arraignment hath pleaded not guilty; and the said Lawrence Earl Ferrers, Viscount Tamworth, hath before us in our said Parliament been tried, and in due form of law convicted thereof; and

whereas judgment hath been given in our said Parliament, that the said Lawrence Earl Ferrers, Viscount Tamworth, shall be hanged by the neck till he is dead, and that his body be dissected and anatomized, the execution of which judgment yet remaineth to be done: **We** require, and by these presents strictly command you, that upon Monday, the fifth day of May instant, between the hours of nine in the morning and one in the afternoon of the same day, him the said Lawrence Earl Ferrers, Viscount Tamworth, without the gate of our Tower of London (to you then and there to be delivered, as by another writ to the lieutenant of our Tower of London, or to his deputy, directed, we have commanded) into your custody you then and there receive; and him, in your custody so being, you forthwith convey to the accustomed place of execution at Tyburn; and that you do cause execution to be done upon the said Lawrence Earl Ferrers, Viscount Tamworth, in your custody so being, in all things according to the said judgment. And this you are by no means to omit, at your peril. **Witness** ourself at Westminster the second day of May, in the thirty-third year of our reign.

YORKE AND YORKE.

GENERAL INDEX.

GENERAL INDEX.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Abandoned property, 428.
Abatement of freehold, 1737, 1892 n.
of nuisance, 1496, 1496 n, 1796.
of suit in equity, 2073.
plea in, 1892, 2569.
plea in, to indictment. 2569.
Abbey-lands, 749, 2288.
Abbot of Torun's Case, 32 n.
Abbreviations in legal proceedings, 1920.
Abdication, 2250.
of James I, 325.
Abduction, of child, 1687.
of heiress, 2414.
of ward, 1688.
of wife, 1685.
of women, 632; modern punishment of, 2414 n.
or kidnapping, 2425.
Abearance, good, security for, 2466.
Abeyance, fee in, 858.
Abigei, or cattle-stealers, 245.
Abjuration, oath of, 510.
of the realm, 2225, 2298, 2566, 2621.
Abridgments, 131 n.
Absolute property, 1237.
Absolute rights and duties, 207.
Absolute and relative rights, 207, 207 n.
Academic training, importance of, for lawyer, 42.
Accedas ad curiam, 1541.
Acceptance of bills, 1352.
Accession, property by, 1256.
Accession and confusion, 1256 n.
Accessories, 2202.
after the fact, 2204.
before the fact, 2203.
distinction of principals and, 2206 n.
when to be tried, 2555.
Accident, bodily harm resulting from, 2188 n.
remedy in case of, 2056.
Accomplices, discovery of, 2562, 2564.
Accord and satisfaction, 1509, 1509 n.
Account, action of, 1724, 1850 n.
books of, 1977.
cognizable in equity, 2062.
modern action of, 1724 n.
Account, writ of, 1724.
Accroaching royal power, 2246.
Ac etiam clause, 1552 n, 1875.
Acknowledgment of fine, 1189.
Acquittal, effect of, 2600.
plea of former, 2569.
Act of bankruptcy, 1363.
Act of grace, how passed, 297.
when pleaded, 2641.
Act of parliament, 149, 1180.
Actio personalis moritur cum persona, 1893 n.
Action, abolition of distinction between forms of in United States, 1643 n.
at law, 1643, 1644.
chose in, 1244.
effect of Judicature Act of 1873 on forms of, 1642 n.
forms of under code system, 1643 n.
larceny of things in, 2445 n.
of *assumpsit*, 1716.
of covenant, 1714.
of debt, 1711.
of replevin, 1698.
of trespass, 1781.
of trover, 1707.
on the case, 1561, 1562, 1708 n, 1781, 1798, 1802.
on the case in the nature of waste, 1803 n.
pleas to the, 1895.
property in, 1244.
distinction between real and personal, 1647 n.
classification of actions in common law, 1843 n.
ex contractu, 1647.
ex delicto, 1647.
ex contractu and *ex delicto*, 1846 n.
feudal, 1646.
real, 1641 n.
real and mixed, 1774 n.
real and personal, 1844 n.
real and personal distinguished, 1808 n.
in rem, 27 n.
in rem and *in personam*, 1844 n.
mixed, 1647.
personal, 1646.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Action, popular, 1302.
possessory, 1749.
real, 1647.
scheme of the common law, 1640 n.
Adams, Brooks, in Centralization and Law, quoted, 281 n.
Additions, 1892, 1894, 2568.
Adherence to the king's enemies, 2254.
Adjoining county, trial in, 1995.
Adjournment of parliament, 300.
Admeasurement, of dower, 895, 1752.
of pasture, 1816.
Administration, 1375.
cum testamento annexo, 1393.
de bonis non, 1397.
durante absentia, 1393.
durante minore ætate, 1393.
limited, 1397.
special, 1397.
title by, 1375.
Administrator, 1394, 2675.
Admiralty, causes, 1628.
court of, 348, 1585, 1585 n, 2434.
jurisdiction of United States, 1627 n.
jurisdiction on inland waters, 1628 n.
law in, 148.
Admittance, in copyholds, 1211.
Admittendum clericum, writ *ad*, 1827.
Adoption of children, 635 n.
Ad quod damnum, writ of, 1076.
Adultery, 623, 1687, 2235, 2391.
Adverse possessions, 981 n.
Advocate, 1528.
Advocatus fisci, 1529.
Advowson, 738, 2674.
collative, 740.
donative, 740.
in gross, 739.
lapse of, 1084.
presentative, 740.
Æquitas sequitur legem, 1160, 2066.
Affectum, challenge *propter*, 1963, 2588.
Affeerors of amercements, 2624.
Affidavit, 1896.
Affirmance of judgments, 2027.
Affray, 2329.
breach of peace chargeable upon one beginning, 1491.
Age, action suspended by nonage, 1891.
of consent to marriage, 612.
of criminal responsibility, 2177.
how reckoned, 661, 2177.
Agency and service distinguished, 570 n.
Aggravating circumstances, in criminal law, 2169.
Agistment, 1328.
Agnati, 1022.
Agnus Dei, 2288.
Agreement, concord or, 1189.
Agriculture, its origin, 717.
Aid-prayer, 1890.
Aids, feudal, 800, 829, 2658.
parliamentary, 443.
Air, property in, 1253.
right to, 724.
Albinagii, jus, 516 n.
Albinatus, jus, 516.
Alderman, 193.
Alderney, Island of, 177.
Ale-houses, offenses in, 2234, 2361.
Alfred, King, as legislator, 2658 n.
his dome book, 109, 190. 2658.
Alias writ, 1869, 2549.
Alien priories, 2285.
Alienage, and naturalization, 523 n.
Alienation, 1098.
as destroying joint tenancy, 961, 962 n.
deed, 1112.
by matter of record, 1180.
by special custom, 1206.
different modes of, 1098 n, 1109.
fine for, 810, 2665.
forfeiture for, 1071.
freedom of, 1100.
license for, 811.
restraints upon, 1098, 1102 n.
title by, 1098.
who may alien; who may purchase, 1103.
Aliens, 507, 1040, 1080, 2284.
capacity to convey, 1107, 1110 n.
descent through, 1041.
disabilities of, 514.
duties of, 452, 516.
goods of alien enemy, 1251.
incapacity as to descent and purchase, 1040.
inability to hold land, 515 n.
property rights of in United States, 514 n.
rights of, 514.
right to exclude, 517 n.
Alimony, 625, 1613.
Allegation, 1621.
Allegiance, 508, 514, 2244.
change in oath of, 511 n.

Allegiance, local, or temporary, 512.
natural or perpetual, 511.
oath of, 509, 787, 2491.
personal, 514.
refusing oath of, 2289.
withdrawing from, 2258.
Allodial property, supplanted by feudal tenure, 780.
Allodium, 777 n, 796, 853.
meaning of, 796 n.
Allowance, of franchise, 1840.
of pardon, 2647.
of writs of error, 2636.
to bankrupts, 1368.
Alluvion, 1057, 1057 n.
Almanac, its authority, 1930.
Alteration of deeds, 1130, 1130 n.
Amadi, reputed discovery of Pandects at, 16, 17 n.
Ambassadors, 376.
privileges of, 376.
diplomatic privileges act of 1708, 380.
killing of, 2257.
Amendments, and jeofails, 2022, 2619, 2686.
of judgments, 2019.
of variances in indictments, 2685.
origin of, 2022.
Amercement, 1440, 1986, 2623, 2670.
action for, 1721.
America, authority of common law in, 180, 180 n.
English statutes in, 143 n.
rights of European governments in, 179 n.
American colonies, 178.
charter governments in, 182.
proprietary governments in, 181.
provincial governments in, 180.
relation of, to parliament, 183, 183 n.
transportation to, 2647.
Ames, J. B., Lectures on Legal Hist., quoted, 224 n, 600 n, 925 n, 978 n, 983 n, 1166 n, 1167 n, 1308 n, 1312 n, 1331 n, 1562 n, 2543 n; cited, 1706 n, 1707 n, 1711 n, 1714 n, 1725 n.
History of Trover, quoted, 1699 n.
Ancestors, number of one's, 990.
Ancestral actions, 1757.
Ancient demesne, 417, 833, 844, 845 n.
Ancient lights, in America, 1791 n.
Anderson, Criminals and Crime, cited 2163 n.
Animals, impounding, 1505.
killing, 2459.
larceny of, 2446.
maiming, 2446.
trespasses by, 1784.
trespass in hunting wild, 1707.
property in, 715, 1237, 1252.
Animus furandi, 2439, 2441, 2443 n.
Animus revertendi, 1240.
Anne, Queen, 329.
Annual parliaments, 257.
Annuities, 767, 768 n, 1342
Annulum et baculum, investiture *per*, 530.
Annus luctus, 652.
Answer, in chancery, 2071.
upon oath, 1621.
Apostasy, 2210.
Apparel, excess in, 2365.
Appeal, 1568.
by approvers, 1926.
is jeopardy, 2546.
of arson, 2545.
of death, 2545, 2671.
of felony, 2545.
of larceny, 2545.
of mayhem, 2545.
of rape, 2545.
of treason, 2545.
prosecution by, 2543, 2543 n, 2671.
to parliament, 2080.
to Rome, 2287, 2668.
Appearance to actions, 1878.
day of the term or return, 1863.
Appellee on approvement, 2562.
Appointing power, 400 n.
Appointment to charitable uses, 1217.
Appraisement, commission of, 1839.
Apprentice-fee, duty on, 460.
Apprentices, 588, 2350.
indentures of, 588.
or barristers, 35.
Apprenticii ad legem, 1528.
Appropriations, ecclesiastical, 536.
"Approve," meaning of word, 753 n.
Approvement, of common, 753, 1818.
in felony and treason, 2562.
Approvers, 2562.
compelling prisoners to become, 2303.
"Appurtenant," meaning of word, 751 n.
Arbitration, 1510.
change of property by, 1512 n.
effect of submission to, 1511 n.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Archbishops, 529.
of Canterbury and York, 532 n.
court of, 148.
option of, 533.
rights and duties of, 529.
Archdeacon, 535.
his court, 1580.
Archdeaconry, 187.
Arches, court of, 1580.
dean of, 1580.
Areopagus, court of, 1967, 2364, 2583 n.
Aristocracy, 85, 549.
Armed, being unusually, 2333.
Armour, repeal of statutes of, 566.
embezzling the king's, 2274.
Arms and ammunition, exporting them, 392.
right to bear, 246.
Army, history of, 563.
regular, 473, 569.
standing, 569, 2666, 2686, 2687.
Arraignment, 2554, 2697.
incidents to, 2556.
Array, challenge to, 1958, 2588.
Arrha, 1322.
Arrest, by officers without warrant, 2512 n.
by private persons without warrant, 2514 n.
of judgment, 2006, 2618, 2618 n.
of persons, 1875, 2509.
service on a person in his dwelling, 1876 n.
what constitutes, 1875 n.
Arson, 2427.
appeal of, 2545.
burning one's own house, 2427 n.
not clergyable, 2615.
Articles of the peace, 2470.
Articles of war, 571.
Artificers, 562.
residing abroad, 2351.
transporting them, 2351.
As, Roman divisions of, 1344 n.
Ascendants excluded from inheriting, 997.
Asportation, 2440,
Assault, 1652, 2329, 2423.
costs in actions for, 2014.
Assembly of estates, 250.
Assembly, riotous or unlawful, 2330.
Assensu patris, dower *ex*, 892, 892 n.
Assessments, 446.
Assets, 1403.
by descent, or real, 1031, 1122, 1174.
estate, *pur autre vie*, 1056.
Assignees of bankrupt, 1366.
Assignment, of bankrupt's effects, 1371.
of *chose* in action, 1308, 1308 n.
of dower, 894.
of estate, 1154, 1154 n.
of bills of exchange, 1351.
of reversions, 1716.
Assignments, 1154, 1154 n.
f[illegible]ulent, 1114, 1306.
Assig[illegible] 1101.
Assize, certificate of, 2002.
commission of, 1577, 2486, 2671.
court of, 1572.
general, 251.
grand, 1950, 2576, 2669.
justices of, 1573, 2486.
killing justices of, 2256.
meaning of, 1755 n.
of arms, 566, 804.
of bread, 2344.
turned into a jury, 2016.
writ of, 1754, 2669.
Assize utrum, 1843 n.
Association, writ of, 1574.
Assumpsit, 1850 n.
common count in declaration of, 1723 n.
consideration to support, 1313.
express, 1717.
general, 1640 n, 1641 n.
implied, 1722.
special, 1640 n, 1641 n.
trespass on the case in, 1659 n.
assurances, common, 1110.
covenant for further, 1431.
Atheling, Edgar, 312.
Attachment, against witnesses, 1978.
for contempts, 2500.
in chancery, 2069.
with proclamations, 2069.
writ of, 1866.
Attachments, court of, 1588.
Attainder, 1042, 2625.
abolished, 2571 n.
act of, 2475.
and doctrine of escheat, 1043.
in United States, 1042 n, 2625 n.
Attaint, grand jury in, 1950, 2017.
history of writ of, 2015 n, 2017 n.
plea of former, 2571.
writ of, 2015.
Attainted persons, 1104, 2625.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Attempt, to rob, 2456.
to steal fish, 2448.
Attestation of deeds, 1128, 1417, 14[illegible], 1433, 1440.
devises, 1217, 1390.
Attorney, 1526.
action against, 1727.
to deliver seisin, 1139.
warrant of, to confess judgment, 2011.
Attorney general, 1529.
information by, 1839, 2050, 2539.
Attorneys, origin of, 1527 n.
Attornment, 811, 1083, 1099, 1100 n, 1102.
Auditors in account, 1725.
Aubaine, droit d', 516.
Audita querela, writ of, 1914, 2018.
in United States, 2018 n.
Aula regia, or *regis*, 33, 1547, 2663, 2669.
Aulnager, 405.
Aurum reginæ, 334.
Austin, John, definition of law, 51 n.
Authorities in law, 125.
Autre droit, 951.
Auterfois acquit, 2569.
attaint, 2571.
convict, 2571.
Autre vie, tenant *pur*, 873.
Averium, 1284.
Averment, 1904, 1910, 2575.
Avowry, 1703.
Avulsion of land, 1057, 1057 n.
Award, 1510.
change of property by, 1512 n.
Ayle, writ of, 1757.
Azo, 21 n.

Backing warrants, 2511.
Bail, above, 1878.
above and below, 1878 n.
and bailment, 2520 n.
below, 1878.
bond, 1878 n.
common, 1874.
excepting to, 1879.
excessive, 235, 2520.
excessive forbidden in United States, 2519 n.
in criminal cases, 2520, 2570.
in error, 2026.
insufficient, 2520.
justifying or perfecting, 1879.
refusing, 2521.
Bail, special, 1874.
to the action, 1878.
to sheriff, 1878.
Bailable or not, 2520, 2521, 2522.
Bail-piece, 1879.
Bailee, interest of, 1331, 1331 n, 1333 n.
Bailiffs, 483, 589.
of hundreds, 192, 484.
Bailiwick, 483, 762.
Bailment, 1244, 1326.
Ballot, election by in England, 290 n.
for jurors, 1957.
Baldwin, American Judiciary, cited, 1522 n, 1526 n.
Balnearii, 2453.
Banishment, 237, 2621, 2647.
civil death, 226.
Bank, 463.
misbehavior of its officers, 2446.
Bankrupt, 1355, 2678, 2683.
Bankruptcy, 1095, 1355.
applies only to traders, 1359.
cognizance of, 2052.
construction of statutes, 1364.
distribution of assets, 1372.
early bankrupt acts, 1360.
effect of bankruptcy, 1370.
English bankrupt act of 1883, 1095 n.
fraudulent, 2342.
law of in United States, 2343 n.
proceedings in bankruptcy, 1365.
recent bankrupt laws, 1365.
Roman law of, 1358.
title by, 1355.
what are bankrupt acts, 1363.
what constitutes trading, 1361.
who may become bankrupt, 1356.
Banneret Knight, 558.
Banns, 616.
Bar, call to, 45 n.
references for American, 1526 n.
Bar, of dower, 896.
plea in, 1899, 2569, 2641.
trial at, 1951, 2586.
Bargain and sale, 1170, 1171 n.
Baron, 552.
of the exchequer, 1555 n.
Baron and feme, 604.
Baronage, 552 n.
Baronet, 558.
Baronies, 799, 801 n, 834.
of bishops, 261.
Bargemaster, action against, 1727.
Barratry, 2311.
Barristers, 35, 45 n, 1528.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Base fees, 880, 860 n.
Base services, 797.
Base tenants, 911.
Bastards, 649.
  administration to, 1396.
  concealment of death of, 2402, 2596.
  eigne, 1038, 1039n.
  punishment for having, 2235.
  rights and incapacity of, 656, 1037.
  support of, 654.
  without collateral kindred, 1039.
Bath, knight of the, 558.
Battery, 1653, 2423.
  actions for, 1654 n.
  in defense of kin, 644 n.
  inspection of, 1930.
  of a clergyman, 2424.
  servant, 1695.
Battle, trial by, 1934, 2582, 2666, 2669, 2671.
  abolished, 1934 n.
Baty, Polarized Law, cited, 2082 n.
Beale Cases on Conflict of Laws, cited, 2082 n.
Beaumont, Viscount, 551.
Bawdy-houses, 2196, 2234, 2361.
Beaconage, suit for, 1631.
Bees, property in, 1240.
Behavior, good, security, for, 2466, 2471, 2648.
Beheading, 2264, 2621.
Bench, American, references for, 1526 n.
Benchers, 45 n.
Benefices, 2280.
  cession of, 544.
Benefit of clergy, 2607, 2660, 2677, 2688.
  abolished, 2174 n, 2406 n, 2567 n.
  in America, 2607 n.
  plea of, 2567.
Benevolence, compulsive, 243, 2683.
Bentham, Jeremy, Fragment on Government, quoted, 398 n.
  his attack on the Commentaries, xxiv.
  his doctrine that law is based on wrongs, 1488 n.
  views of Blackstone and, on the English law, 1852 n.
Bequests. See Wills.
Besayle, writ of, 1757.
Berwick-upon-Tweed, 168.
Bigamy, 2355.
  meaning and punishment of, 2356 n.
Bigelow, M. M., Centralization and the Law, quoted, 69 n.
  History of Procedure in England, cited, 1948 n.
Bill, in equity, 2067.
  of exceptions, 1982.
  in parliament, how passed, 294.
  of indictment, 2525.
  of Middlesex, 1872.
  of privilege, 1877.
  of rights, 217, 328, 2686.
Billa vera, 2535.
Bills and notes, 1348.
  American uniform negotiable instruments act, 1352 n.
  bills of exchange, 1348.
  forging, 2463, 2465.
  stealing, 2445.
Bills of exchange, 1348.
  action on, 1353.
  English act of 1882, 1351 n.
  foreign and inland, 1349.
Bishop, New Criminal Law, quoted, 2314 n, 2316 n; cited, 2313 n.
Bishoprics, nomination to, 530, 2280, 2287, 2662, 2677.
Bishops, 529.
  certificate of, 1932.
  nomination of, 411.
  not electing or consecrating, 2288.
  not peers, 555.
  right of, to try or be tried, as peers, 2480.
  rights and duties, 534.
Bissextile year, 902.
Black act, 1722, 2173 n, 2328, 2413, 2447, 2459.
Black lead, stealing of, 2445.
Blackmail, 772, 2459.
Blackstone, sketch of life of, xv.
Blanch-holding, 772.
Blanch rent, 772.
Blasphemy, 2228.
  American law of, 2228 n.
Blind persons, wills by, 1385.
Blood, corruption of, 1044, 2572.
  corruption of, abolished, 2625 n.
  inheritable, 1035.
  of the first purchaser, 1007.
  restitution in, 2648.
  whole and half, 121, 1011.
Bodies, remedy for stealing dead, 1290.
Bodily immunity, 230.
Boiling to death, 2399.
Bologna, school of law at, 17 n, 18.
Bona, confiscata, 432.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Bona, forisfacta, 432.
Bona, notabilia, 1401, 1402 n, 1582 n.
Bona, vacantia, 431.
Bona, waviata, 429.
Bond, 2688.
  obligation or, 1173, 1433.
  of arbitration, 1509.
  tenants, 911.
Bono et malo, writ *de*, 2487.
Book-land, 833.
Books, copyright in, 1259.
Books and papers, production of, 1993.
  importing or selling popish, 2288.
Bordeaux, mayor of, his certificate, 1931.
Borough courts, 1598.
Borough-English, 136, 823.
  origin of name, 823 n.
Boroughs, 190, 822.
  electors of, 285.
Borrowing, contract of hiring and, 1333.
Borsholder, 190, 496, 2660.
Botes or estovers, 756, 874.
Bottomry, 1339.
Bounties on exportation, 451.
Bounty, Queen Anne's, 417.
Bowker, Copyright, cited, 1261.
Bouvier, Law Dictionary, cited, 1261 n, 1264 n, 1612 n, 1676 n, 1878 n, 1894 n, 2030 n; quoted, 892 n, 921, 1076 n, 1078 n, 1247 n, 1698 n, 1718 n, 1998 n.
Boycotts, 1692 n.
Bracton, 21 n, 126, 126 n, 2672.
Bradbury, Workmen's Compensation Acts, quoted, 600 n.
Branding, in the hand or face, 2610, 2621.
Brannon, Negotiable Instruments Law, cited, 1352 n.
Breach, of close, 1782.
  of covenant, 1714.
  of duty, action for, 1727.
  of peace, 2326.
  of pound, 1699.
  of prison, 2306.
Brehon laws of Ireland, 170, 2544.
Brevia testata, 1129.
Bribery, in elections, 292.
  modern law of, 2322 n.
  of magistrates, 2322.
Bridges, 2671.
  annoyances in, 2360.
  destroying, 2459.
British constitution, 87, 88.
British islands, 176.
Britons, laws of ancient, 107, 2655.
Britton, 126, 129 n, 2023, 2674.
Brooke, 126, 131 n.
Broom, Legal Maxims, quoted, 67 n, 139 n; cited, 1516 n, 1553 n, 1660 n, 1760 n, 1894 n.
Brothels, 2234.
  frequenting, 2234.
  keeping, 2196, 2361.
Brunner, H., Sources of English Law, cited, 126 n.
Bryce, James, Holy Roman Empire, cited, 361 n.
  Studies in History and Jurisprudence, quoted, 43 n, 634 n.
Bubbles, 2290.
Buggery, 2422.
Bulles, papal, 2278, 2283.
Bulwarks of personal rights, 213.
Burdick, Torts, quoted, 1254 n.
Burgage tenure, 822, 2666.
Burgesses in parliament, election of, 285.
Burglary, 2430.
  meaning of dwelling-house, 2433 n.
Burial charges, 1400.
Burial of *felo de se*, 2389.
Burning, in the cheek, 2272, 2613, 2621.
  in the hand, 2610, 2612, 2613, 2615, 2621.
  malicious, 2459, 2461.
  the king's ships, etc., 2275.
  to death, 2264, 2410, 2423, 2429, 2621, 2655.
Butlerage, 451.
By-laws, action of debt on, 1721.

Cabinet, 346 n.
Calais, captain of, his certificate, 1931.
Calendar of prisoners, 2649.
Calling the plaintiff, 1987.
Camera stellata, 2482.
Cambridge University, government of, 678 n.
Canceling, deeds, 1131.
  letters patent, 1557, 1558.
  wills, 1392.
Canon and civil law, 142 n.
Canon law, 21, 142, 146, 2469, 2668.
  authority of, in ecclesiastical courts, 1619 n.
  degrees of consanguinity under, 992.
  value of study of, 13
Canonical, obedience, 2278, 2285, 2409.
  purgation, 1941, 2611.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Canonists should study the common law, 13.
Canons, of a church, 535.
of Edward VI, 147.
of 1603, 148.
Canons of inheritance, 994.
Canterbury, Archbishop of, 533.
Capacity, of guilt, 2175.
Capias, ad audiendum judicium, 2618.
ad respondendum, 1867, 1867 n. 1868 n, 2549.
ad satisfaciendum, 2032, 2030 n.
in withernam, 1674, 1702, 2029.
pro fine, 2012.
utlagatum, 1870, 2551.
Capiatur, judgment *quod*, 2012.
Capita, distribution *per*, 1410.
succession *per*, 1005.
Capite, tenants *in*, 797.
Captives, property in, 1252.
Capital punishment, 2162, 2172, 2449, 2621, 2660, 2688.
Caption of indictment, 2587.
Caput lupinum, 2551.
Carnal knowlegde, of girls under twelve, 2419.
of women by force, 2416.
Carriers, 1326 n.
action against, 1727.
larceny by, 2439.
Carta de Foresta, 1241, 1275.
Cart-bote, 756.
Carter, A. T., History of English Legal Institutions, quoted, 434 n, 1619 n, cited, 347 n, 1540 n, 1561 n, 1586 n, 1594 n.
Carter, J. C., Law: Its origin, Growth and Function, quoted, 112 n.
Carting the jury, 1986 n.
Case, action on the, 1562, 1657, 1640 n, 1641 n, 1708 n, 1850 n, 2688.
action on the, in the nature of waste, 1803 n.
reserved at *nisi prius*, 1988.
stated out of chancery, 2078.
Castigatory for scolds, 2363.
Castle, 735.
Castration, 2412.
Casu consimili, writ *in*, 1561.
Casual ejector, 1775.
Catholics, abolition of laws against, 1049 n.
removal of disabilities of, 2227 n.
Cattle, malicious killing or maiming, 2459, 2460.
owner answerable for, 1710, 1784, 2400.
Causa matrimonii prælocuti, writ of entry, 1753.
Causa proxima sed non remota spectata, 1658 n.
Cause, challenge for, 2588.
Caveat, against admission of clerk, 1824.
against proving will, 1618.
Centenarius, 193.
Centeni, 193, 1542.
Central criminal court, 2489 n.
Centumviri, 1912.
Cepi corpus, 1875.
Certificate of bankrupt, 1368, 1373.
for costs, 1789.
into chancery, 2078.
of assize, 2002.
trial by, 1930.
Certiorari, facias, 2478, 2482, 2489, 2551, 2552, 2660.
in United States, 2553 n.
modern rule in England, 2552 n.
Cessavit, writ of, 1810.
Cessio bonorum, 1358, 1369 n.
Cestui que trust, 1157, 1157 n.
Cestui que use, 1157, 1157 n.
Cestui que vie, 876.
Chaining of prisoners, 2554, 2554 n.
Chains, hanging in, 2406.
Challenge, of jury, 1958, 2588.
peremptory, modern rule of, 2590 n.
to fight, 2334.
to the polls, 1960 n.
Challis, Real Property, quoted, 954 n.
Chamberlain, lord great, 1547.
Champerty, 2312.
and maintenance in United States, 2312 n.
champertous contracts between attorney and client, 2314 n.
Champions, in trial by battle, 1936.
Chance, 2188.
Chancellor of a diocese, 534.
Chancellor, his name and office, 1557.
killing him, 2256.
lord, 1547, 1557.
of the duchy of Lancaster, 1595.
of the exchequer, 1554.
of the university, his court, 1601.
Chancellor's foot, the, 2057 n.
Chance-medley, 2382.
Chancery, court of, 1557, 2683.
Chapters, ecclesiastical, 534.
Charge to grand jury, 2531.
Chariots and cabriolets, 461.

Charitable uses, 1078, 1217.
acts of 1888 and 1891, 1080 n.
commission of, 2051.
corporations, 693.
estate-tail appointed to, 871.
Charities, cognizance of, 2050.
informations for, 2051.
Charles I, 324.
Charles II, 324.
Charter, or deed, 1112.
Charter, of incorporation, 679.
of the king, 1183.
of liberties, 215.
Charter-land, 833.
Chase, 2662.
beasts of, 763.
franchise of, 762.
Chastity, homicide in defense of, 2378.
Chattels, real and personal, 900 n, 907, 929, 1229, 1234, 1297.
Chaud-medley, 2382.
Cheat, action against, 1728.
Cheating, at play, 2368.
offense of, 2344, 2344 n.
Checks and balances, 260.
Cheek, burning in, 2272, 2613, 2621.
Chester, county palatine, 195.
courts of, 1596.
Chief rents, 771.
Chichele, archbishop, vindicated, 2285.
Chief, baron of the exchequer, 1554.
justices, 1549, 1550.
justiciary of England, 1547, 2663.
Child in *ventre sa mere*, 221.
Children, correction of, 646.
duties of, 648.
evidence of, 2420.
legitimate, 635.
protection of, 644.
support of, 636, 641.
Chirograph, 1113.
of a fine, 1436.
Chivalry, court of, 1584, 2484.
its jurisdiction, 1625, 2484.
obsolete, 1584 n.
Chivalry, tenure in, 799.
Chose in action, 1237, 1229 n, 1244, 1308.
and debt, 1247n.
assignability of, 1308 n.
larceny of, 2445 n.
meaning of, 1245 n.
Christian courts, 1579.
Christian, editor of Blackstone, quoted, 183 n.
Christianity, offenses against, 2210.
part of the laws of England, 2229.
Church, affrays in, 2329,
burglary in, 2432.
king head of, 410.
larceny in, 2454.
offenses against, 2218.
rate, 1610.
Churchwardens, 546.
Cinque ports, courts of, 1597, 1597 n.
Circuits, 1573, 2369, 2671.
Circumspecte agatis, statute of, 1564 n.
Circumstantial evidence, 1980.
Citation in ecclesiastical courts, 1621.
Citizens, 507 n.
born abroad, 519 n.
Citizenship, elective, 521 n.
City, 191.
Civil death, 226, 226 n, 874.
Civil injuries, 1487.
and crimes, 204 n.
Civil law, 132 n, 143, 148, 2668, 2669.
degrees of consanguinity according to, 992.
its study forbidden by King Stephen, 19.
reputed conflict with common law, 21.
value of study of, 13.
Civil liberty, 4 n, 211, 374.
definition of, 231 n.
in England, 213.
vicissitudes of English, 214.
Civil list, 467, 2687.
modern, 470 n.
Civil remedy, for criminal injury, 2603 n.
Civil state, 549.
Civil subjection, 2194.
Civilians, should study common law, 13.
Claimant, occupying, 1061 n.
Clarendon, constitution of, 2669.
Clausum fregit, writ *quare*, 1782.
Clementine constitutions, 147.
Clergy, 528.
adverse to the common law, 21.
formerly proficient in law, 16.
orders of, 529.
privileges and disabilities, 528.
role in mediæval law, 29 n.
should study law, 12.
Clergy, benefit of, 2567, 2607, 2660, 2677, 2688.
abolished, 2174 n, 2406 n, 2567 n.
in America, 2607 n.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Clergymen, beating of, 2424.
when prohibited from hunting, 1272.
Clerical habit and tonsure, 2610.
Clerico admittendo, writ *de*, 2028.
Clerk, in orders, 540, 2610.
of the market, his court, 2492.
of the peace, 2489.
parish, 547.
Clients, 1531.
Clipping the coin, 2262.
Clocks, when introduced, 2025.
Clogging the equity, 923 n.
Close, breach of, 1782.
Close writs and rolls, 1183.
Clothes, malicious destroying of, 2459.
Cloths, stealing from the tenters, 2452.
Coach licenses, 491.
Coal-mines, setting fire to, 2459.
Coat-armor, 1626.
Code, of Justinian, 145.
of Theodosius, 144.
Code pleading, 1881 n.
denials and new matter in, 1898 n.
inconsistent counts in, 1884 n.
inconsistent defenses in, 1903 n.
Code system of procedure, 1643 n.
Codicil, 1389.
Cognati, 1022.
Cognizance, claim of, 1888, 2495.
in replevin, 1703.
of wrongs, 1604.
de droit, come ceo, etc., fine *sur*, 1191.
de droit tantum, fine *sur*, 1191.
Cognizee of a fine, 1189, 1715.
Cognizor of a fine, 1189, 1715.
Cognovit actionem, 1896, 2011.
Coif, antiquity of, 35 n.
order of, 1530 n.
Coin, falsifying, etc., 2255, 2260, 2262, 2271, 2293.
felonies and misdemeanors relating to, 271.
standard of, 408.
treasons relating to, 2255, 2260, 2262, 2271, 2293.
Coinage, duties, 407.
instruments of, treason relative to, 2262.
of money, 407.
Coke, Sir Edward, 127, 132 n.
Collateral attack on legality of corporation, 685 n.
Collateral consanguinity, 989.
Collateral issue, 2641.
Collateral warranty, 1122.
Collatio bonorum, 1410.
Collation to a benefice, 542.
Colleges, 678.
leases by, 1146.
their visitors, 695.
Collegia, in the civil law, 673.
Colligendum bona defuncti, letters *ad*, 1396.
Colonial assemblies, 182.
Colonies, in America, 178.
Color, in pleading, 1904.
Combinations, 2348.
Comburendo heretico, writ *de*, 2214, 2685.
Combustio domorum, 2615.
Commenda, 545, 2280.
Commentaries, divisions of the, 202.
estimate of the, xxi.
plan of the, 45.
Commerce, king the arbiter of, 403.
Roman view of, 387 n.
and navigation, regulation of, 391.
Commission, court of, 1584.
in bankruptcy, 136.
of array, 366.
of lieutenancy, 566.
of lunacy, 440.
of review, 1583.
of the peace, 491, 2486.
to examine witnesses, 1994, 2063, 2074.
to take answers in equity, 2073.
under statute of charitable uses, 2051.
Commitment, of bankrupt, 1366.
of persons accused, 2519.
Commitment and bail, 2519 n.
Committees, of parliament, 296.
Common, appendant, 750.
approvement and inclosure of, 753.
appurtenant, 751.
because of vicinage, 752.
disturbance of, 1814.
estate in, 969, 1248.
in gross, 752.
right of, 750.
sans nombre, 1816.
surcharge of, 1815.
tenants in, 969, 1248, 1425.
without stint, 752, 753 n.
Common, of estovers, 755.
pasture, 752.
piscary, 754, 755 n.
turbary, 755, 755 n.
Common assurances, 1110.
Common bail, 1874.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Common barrator, 2311.
Common bench, court of, 1545.
killing justices of, 2256.
Common farrier, etc., action against, 1727.
Common informer, 1722.
Common jury, 1957.
Common law, 107, 2659.
antiquity of, 1172, 1172 n.
as an element of culture, 3.
beginning of, 2659 n.
despised by the clergy, 30.
divisions of, 113.
dower by, 891.
early neglect of, 14, 31.
origin of, 109 n.
restoration of, 32 n.
schools of, Inns of Court, 34.
Common nuisance, 2360.
Common occupancy, 1055.
Common pleas, court of, 34, 1545, 1549, 2671.
Common possibility, 939.
Common prayer-book, reviling of, 2218.
Common recoveries, 869, 1195, 1202, 1752, 1765, 2676.
Common scolds, 2363.
in United States, 2363 n.
Common utterer of false money, 2272.
Common vouchee, 1198, 1200, 1439, 1440.
mmonalty, orde· · of, 558.
Commons, house of, 264.
election of members, 279.
its privileges, 277.
qualifications, 287.
representation in, 264 n.
Commons, inclosure of, 754 n.
Commonwealth, the, 324.
offenses against, 2302.
Commorancy, 2491.
Communem legem, writ of entry *ad*, 1753.
Communion of goods, 711.
Community property, 1200 n.
Commutation of penance, 2279, 2423, 2493.
Compassing the death of the king, etc., 2247.
Compensatio, 1897.
Competent witnesses, 1979.
Composition, with creditors, 1370.
Compound larceny, 2453.
Compounding, a felony, 2310, 2310 n.
other prosecutions, 2316.
Compulsion, 2194.
Compurgators, 1941, 2611, 2661.
Computation of degrees, in descent, 992, 992n.
Comyns, 133 n.
Concessit, fine *sur*, 1191.
Concealment, from the c· wn, 2683.
of bastard's death, 2402, 2596.
Conclusion of deeds, 1124, 1417, 1418, 1420, 1433.
Concord in a fine, 1124, 1715.
Concord or agreement, 1189.
Condition, 862, 1118, 1427.
breach of, 1088.
distinguished from a limitation, 918.
estate in mortgage, 925.
estate on, 915.
implied or express, 915, 916, 1118.
impossible or illegal, 920, 1174.
in deed, 917 n, 918.
in law, 918.
precedent or subsequent, 917.
Condition of a bond, 1174, 1433.
Conditional estates, distinguished from estates upon condition, 872 n.
Conditional fees, 861, 862 n.
old law of, 862.
Conditional limitation, 919.
Conditional pardon, 2647.
Coneys, taking, killing, or stealing, 2447, 2453.
Confess and avoid, 1905.
Confession, of cause of action, 1895, 2011.
of indictment, 2562.
of prisoner, 2562, 2594.
Confesso, bill taken *pro*, 2070, 2071.
Confirmatio cartarum, 215.
Confirmation of lands, 1152, 1152 n.
Confirmation of bishops, 2288.
Confiscation, 432, 2621.
Conflict of laws, 2081.
administration of estates, 2093.
contract, 2098.
definition, 2082.
divorce, 2104.
doctrine of renvoi, 2086.
domicile, 2087.
domicile and nationality, 2085.
enforcement of rights, 2083.
jurisdiction, 2101.
legitimacy and adoption, 2089.
marriage, 2089.
personal status, 2088.
property, 2090.
quasi contract, 2096.
succession, 2091.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Conflict of laws, torts, 2095.
what law should apply, 2084.
Confusion, title by, 1259.
Conge d'eslire, 531, 534.
Conquest, Norman, 313.
"Conquest" of the feudists, 1030.
Consanguinity, 986.
collateral, 989.
table of, 988.
Conscience, liberty of, 219 n.
Consensus non concubitus facit nuptias, 607 n.
Conservators of the peace, 489, 2660.
Consideration, of contracts, 1312, 1312 n, 1317.
of deeds, 1114, 1114 n, 1419, 1421.
Consideratum est per curiam, 2009.
Consimili casu, cases arising in, 1561.
writ of entry *in*, 1753.
Consistory court, 1580.
Consortium, remedy for loss of, 1684 n.
Conspiracy, action of, 1669.
crime of, 2317 n.
law of, 2317.
Constable, 495.
court of lord high, 1584, 2484.
duties of, 497.
high, 192.
history of officer, 496.
lord high, 496, 1546, 2484.
petty, 496, 2514.
Constat de persona, 2555.
Constitution, British, 87, 215, 246, 265, 327, 332, 351, 355, 1575, 2685.
Constitutions, 89 n.
Constructive treason, 2246, 2257.
Construction, of deeds and wills, 1221, 1221 n, 1247.
of statutes, 153.
Consuetudinibus et servitiis, writ *de*, 1809.
Consultation, writ of, 1639.
Contempt, against the king, 2295.
attachment in, 2503 n.
in courts of equity, 2069.
in courts of law, 2500.
origin and history of, 2506 n.
punishment of, 2504 n.
Contenement, 2623.
Contentious jurisdiction, 1582.
Contestatio litis, 1886.
Contingent remainder, 938.
trustees to support, 941, 1423.
Contingent uses, 1165.
Continual claim, 1745.
Continuances, 1913, 1952.
Continuando, in trespass, 1786.
Contract, action on, 1646.
social, 82 n.
original between king and people, 351.
title by, 1307.
Contracts, 1312.
agreement, 1308.
consideration to support, 1114, 1114 n, 1312, 1312 n, 1313.
definition of, 1307 n.
executed and executory, 1312.
express, 1710.
express and implied, 1310.
implied, 1718.
nudum pactum, 1317, 1317 n.
of marriage, 616, 1612.
Roman law of, 1314 n.
species of, 1319.
Contractu, action *ex*, 1647.
Contractual relations, interference with, 1689 n.
Convention of 1688, 256.
Convention parliament of 1660, 255, 323.
Conventional estates for life, 873.
Conversion, 1707.
Conveyances, 719, 1098, 1106, 2678.
assignment, 1154, 1154 n.
at common law, 1132.
attornment, 1099, 1100 n, 1102.
by gift, 1141.
by grant, 1141.
by lease, 1142.
by matter of record, 1180.
confirmation, 1152, 1152 n.
defeasance, 1154, 1156 n.
exchange, 1147.
feoffment or grant, 1132.
forms of, 1116.
fraudulent, 1114.
lease and release, 1172, 1172 n.
of freehold, 1133.
original, 1132.
partition, 1148.
partition in United States, 1149 n.
quitclaim, 1150, 1150 n.
release, 1149.
rules for construing, 1221, 1221 n.
surrender, 1153, 1153 n.
to be signed, 1125.
under Statute of Uses, 1156.
Conviction, 2601.
plea of former, 2571.
summary, 2497.
when quashed, 2637 n.

Convocation, 410.
of Canterbury and York, 411 n.
court of bishops in, 1583.
Cooley, Constitutional Limitations, cited, 2233 n.
editor of Blackstone, quoted, 229 n.
Coparcenary, in United States, 969 n.
Coparceners, 964.
Copper coin, counterfeiting, 2273.
Copyhold, 833, 838, 911.
Act of 1894, 842 n.
antiquity of, 836 n.
customary freeholds, 913.
evolution of, 912.
forfeiture for breach of custom, 1093.
forms of, 911.
free bench, 891.
history of, 839 n.
incidents of, 841.
modern forfeitures of, 1093 n.
modes of alienation, 1206.
not liable to *elegit*, 2036.
of frank tenure, 846, 913.
services of tenants, 845.
Copyright, 1259, 1260 n, 1266.
Coram nobis, writ of, 2019 n, 2021 n.
Coram vobis, writ of, 2019 n, 2021 n.
Corn-rents, 1146.
Cornage, tenure by, 813.
Corodies, 415, 767 768 n.
Corn, grain, etc., destroying, 2459.
Coronation oath, 352.
anti-Catholic feature removed, 354 n.
Coronatore, eligendo, writ *de*, 486.
exonerando, writ *de*, 487.
Coroner, 485, 2512, 2660.
court of, 2492.
Corporation act, 2227, 2685.
Corporations, civil, 677.
collateral attack on legality of, 685 n.
creation of, 679.
criminal liability of, 689 n.
de facto, 684 n.
dissolution of, 699.
duties of, 693.
ecclesiastical, 677.
eleemosynary, 677.
estate of, 1047 n.
exception to rule of escheat, 1047.
founder of, 695.
history of, 673.
implied powers, 693 n.
incidents and powers, 684.
lands, if dissolved, 1047.
Corporations, lay, 677.
leases by, 1143.
majority rule in, 691.
name of, 683.
privileges and disabilities of, 687.
property passes by succession, 1292.
public, and municipal, 673 n.
real or fictitious persons, 670 n.
seal, 685 n.
sole, 674, 676 n.
tort liability of, 688 n.
visitation of, 694, 694 n, 700.
when may take chattel by succession, 1292.
Corporations, courts of, 1598.
Corpse, property in, 1290, 1290 n.
stealing of, 2449.
Corpus juris canonici, 147.
civilis, 145.
Correction, house of, 2613, 2621.
Corruption of blood, 1044, 2633, 2660, 2685, 2687.
abolished, 1047 n, 2573 n, 2625 n.
in United States, 1042 n.
Corse-present, 1286.
Corsned, trial by, 2581, 2661.
Cosinage, writ of, 1757.
Costigan, George P., Jr., Conveyance of Lands by Disseisee, quoted, 1733 n.
Costs, 1759, 2012.
in criminal cases, 2601, 2601 n.
in equity, 2077.
no more than damages, 2014.
on not going to trial, 1956.
title to, by judgment, 1304.
Council, the Norman great, 252.
Councils, ancient, 251.
Counsel, 1528.
action against, 1727.
compensation of, 1531 n.
for prisoners, 2591.
king's, 1529, 1529 n.
when silenced, 1532.
Count, 193, 551.
in declaration, 1881, 1884.
Counterfeiting, no longer treason, 2255 n.
the king's coin or seals, 2255, 2260, 2261.
Counties, divisions into, 194 n.
Countors, or serjeants, 35 n.
Country, trial by the, 1948, 2584.
County, 190, 193.
corporate, 198.
electors for, 282.
palatine, 194, 2678.

[References are to pages of this Edition. Letter "n" refers to note on page.]

County court, 1543, 2658, 2661, 2663, 2669, 2671, 2688.
  holden by the sheriff, 482.
  of Middlesex, 1600.
Court-baron, 626, 1540, 2658.
Court hand, 1920.
Courts, 394, 1521, 2474, 2661.
  admiralty, 1585 n.
  American, references for, 1522 n.
  appeal, 1536 n.
  assize and *nisi prius*, 1572.
  aula regis, 1546.
  baron, 834.
  bulwark of personal rights, 243.
  central criminal, 2489 n.
  chancery, 1557.
  chivalry, obsolete, 1584 n.
  Christian, 148, 1578 n, 1579.
  commissioner of sewers, 1591.
  common pleas, 1546.
  conscience, 1599, 2288.
  counties palatine, 1594 n, 1596.
  county, 1543, 1600 n.
  criminal jurisdiction, history of, 2474 n.
  customary, 834.
  divisional, 1535 n.
  divisions of the high court, 1534 n.
  due process of law, 243.
  ecclesiastical, 1576, 1578 n.
  exchequer, 1554.
  exchequer chamber, 1568.
  fines and fees, 420.
  house of lords, 1569, 1569 n.
  forest, 1588.
  hundred, 1542.
  judges of the high court, 1534 n.
  judicial committee of the privy council, 1571 n.
  king's bench, 1550.
  leet, 2491, 2658, 2671.
  London, 1598.
  Marshalsea, 1592, 1594 n.
  martial, 571.
  maritime, 1585.
  meaning of, 1521 n.
  Middlesex, 1600.
  military, 1584.
  modern county courts in England, 1543 n.
Oxford and Cambridge, 2496 n.
  palace, 1592, 1594 n.
  piepoudre, 1539, 1540 n.
  policies of assurance, 1591.
  power to erect, 394, 1522.
  principality of Wales, 1594.
Courts, principals of procedure in the high court, 1537 n.
  proceedings before the high court, 1534 n.
  of requests, 1559; history of, 1561 n.
  role of the king's courts in development of common law, 1546 n.
  special jurisdiction, 1588.
  stannary, 1597.
  star-chamber, 347.
  testamentary jurisdiction of ecclesiastical, 1614 n.
  ultimate courts of appeal, 1569 n.
  universities, 1601, 1602 n, 2496 n.
  vice-admiralty in America, 1586 n.
  wards and liveries, 807.
Coustumier of Normandy, 177.
Covenant, 1715.
  action of, 1640 n, 1641 n, 1850 n; where lies, 1715 n.
  for title, 1124.
  in a deed, 1124, 1428, 1430.
  in United States, 1124 n.
  real, 1715.
  to stand seised to uses, 1169, 1169 n.
  writ of, 1188, 1434, 1715.
Coventry Act, in United States, 2412 n.
Covert-baron, 626.
Coverture, 625, 625 n.
Craven, 1938, 2584.
Credible witness, 1979.
Creditors, payment of debts of, by executor, 1403.
Crime, age of criminal responsibility, 2176 n.
  Blackstone's definition of, 2151 n.
  difference between tort and, 2152 n.
  modern conception of philosophy and science of, 2156 n.
  relation of madness to criminal responsibility, 2179 n.
Crime against nature, 2422.
Crimen falsi, 2462 n.
Crimes, 2147, 2148, 2151.
  civil injuries and, 204 n.
  extraterritorial, 2534 n.
  of corporations, 689 n.
Criminal conversation, 1687.
Criminal jurisdiction, 396.
Criminal courts, 2474.
Criminal Law, 2148.
  aggravating circumstances, 2169.
  amelioration of English, 2172 n.
  character of Blackstone's account of, 2147 n.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Criminal Law, fairness of English, 2652 n.
mitigating circumstances, 2169.
pleading in, 2565 n.
reduction to statutory form, 2155 n.
Croft, 735.
Cross, sign of, in deeds, 1126.
Cross-bills, 2073.
Cross-causes, 2076.
Crown, 355.
Act of Settlement (1700), 330.
Act of Succession (1405), 317.
Acts of Succession (1536, 1543, 1554), 321.
Act of Succession (1603), 323.
Act of Succession (1707), 331.
constitutional basis of, 332.
demise of, 302, 371.
descent of the, 2660.
feudal succession to, 307.
forfeiture of lands to, 1069.
grants by, 1182.
hereditary right to, 305.
hereditary, subject to parliament, 324.
lands, 417.
leases, 418.
no general occupancy against, 1054.
no interregnum in succession to, 309.
pleas of the, 2148.
reversion in, not barrable, 871.
succession to, 304.
succession to not indefeasible, 308.
title to chattels by prerogative, 1265.
Cucking-stool, 2363.
Crown office, 2482, 2539.
Cui ante divortium, writ of, 1753.
Cui in vita, writ of, 1753.
Cujus est solum, ejus est usque ad cœlum, 733, 734 n.
Cul. prit., replication of, 2594.
Culprit, etymology, of, 2574 n.
Curate, 546.
salary of, 1608.
Curator, in Roman law, 658.
Curialitas, 879, 880 n.
Curfew, 2666.
Currency, 407.
relation to national debt, 464.
Cursing, 2229.
Curtesy, tenancy by, 879, 883, 884 n.
idiocy of wife, 881 n.
origin of, 880 n.
requisites of, 881, 881 n.
tenancy initiate, 884.
tenancy consummate, 884.
Curtis, Jurisdiction of Courts of the United States, cited, 1522 n; quoted, 1553 n.
Custody, of idiots and lunatics, 2048.
of temporalities, 2668.
Custom, 1061.
assurance by, 1206.
distinction between custom and prescription, 1062.
dower by, 891.
how regarded by Roman law, 129.
of London, how tried, 1931.
title by, 1282.
Customary freehold, 913.
Customs, 107.
and usage, 134 n.
general, 114.
particular, 134, 138.
special in the United States, 1206 n.
Customs-duties, 449, 452.
Custos rotulorum, 489, 2489.
Cutpurses, 2456.

Damage to things personal, 1708.
Damage-feasant, 1497.
distress, 1500 n.
Damages, 1758, 1759.
civil suit for after conviction for felony, 2154 n.
penal and exemplary, 1683 n.
Dane-lage, 110, 2658.
Danish and Saxon laws, 110.
Danish kings, 312.
Date of a deed, 1124, 1417, 1418, 1419, 1433.
D'aubaine, droit, 516 n.
Darrein presentment, 1822, 1843 n.
execution in, 2028.
Day, 902, 903 n.
in bank, 1862.
in court, 1862.
of grace, 1863.
Deacon, 540.
Dead body, property in, 1290, 1290 n
Deadly feud, 2459.
Dead man's part, 1411.
Deaf, dumb and blind, 439, 1385.
Dean, and chapter, 534.
rural, 535.
Deanery, rural, 187.
Death, appeal of, 2545, 2671.
accidental, Lord Campbell's act of, 1846, 1650 n.
civil, 226, 226 n, 874.
from negligence, 2392 n.
De bene esse, 1994.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Debet et detinet, action in, 1713, 1714 n.
Debt, national, 463.
Debt, 1346, 1711.
  action of, 1640 n, 1641 n, 1711, 1850 n, 2039.
  for rent, 1807 n.
  on amercement, 1721.
  on by-law, 1721.
  on escape, 1722.
  on judgment, 1718, 2039.
  on penal statutes, 1721.
  and wager of law, 1711 n.
  by simple contract, 1348.
  by specialty, 1347.
  for penalties, 1721 n.
  information of, 1839.
  of record, 1347.
  public, 2687.
Debtee executor, 1515.
Debtor, refusing to discover his effects, 2342.
Debts, priority of, 1403.
Deceased wife's sister, act of 1907, 609 n.
Deceit, action of, 1732, 1733, 2018.
  modern law of, 1732 n.
Decennary, 190, 2467.
Decisions of the court, 116, 120, 122.
Decisive oath, 1941.
Declaration, 1881.
Declaratory part of a law, 92.
Declinatory plea, 2568.
Decree in equity, 2077.
Decretals, 147, 1619 n.
Decretum Gratiani, 146, 1619 n.
Dedimus potestatem, writ of, 492, 1189, 2073.
De Donis, statute, 864, 1123.
Deed, 1112.
  attestation, 1128.
  avoiding by judgment or decree, 1130.
  by feme covert, 1202.
  cancellation, 1130.
  conclusion, date, etc., 1124.
  condition, 1118.
  consideration not essential to, 1114.
  construction of, 1221, 1221 n.
  conveyance by, 1112.
  covenants by or with persons not parties, 1114.
  covenants for title, 1124.
  deed poll, 1113, 1113 n.
  defeasance, 1154.
  delivery, 1127.
  disclaimer, 1131.
Deed, erasure or alteration of, 1130.
  escrow, 1128.
  form of conveyance of estate for life, 873.
  formal parts of, 1116.
  habendum and *tenendum*, 1116.
  indenture or deed poll, 1112, 1113 n.
  original and counterpart, 1113.
  parties and subject matter, 1114.
  premises, 1116.
  recitals in, 1116.
  reddendum, 1117.
  requisites of, 1112, 1113.
  several species of, 1131.
  signing and sealing, 1125.
  statute of frauds, 1127, 1127 n.
  stealing of, 2445.
  tenendum, 1117.
  warranty, 1118.
  writing, 1115.
De facto, corporations, 684 n.
  king, 513.
Deer, stealing, 2327, 2447, 2453.
Defamation, 1660 n.
Default, judgment by, 1886, 2008.
Defeasance, deed of, 1154, 1175.
Defectum, challenge *propter*, 1962, 2588.
Defendant, 1526.
Defense, 1886.
  of vouchee, 1439.
Defensive allegation, 1621.
Definitive sentence, 1622.
Deforceant, 1189, 1435, 1436, 1744.
Deforcement, 1742.
Degrees, of consanguinity, 992, 992 n, 1011.
  in writs of entry, 1757.
  of guilt, 2201.
De la plus belle, dower, 891, 891 n.
Dehors, matter, 1998, 2635.
Delay of the law, 2040.
Delegates, court of, 1582, 1586.
  in academical causes, 1603.
Delictum, challenge *propter*, 1964, 2588.
Deliverance, second, writ of, 1703.
Delivery, of a deed, 1127, 1420, 1433, 1434.
  of goods, 1306.
  symbolical, 1137.
Demesne and *dominium*, 856 n.
Demesne lands, 833, 845.
Demesne, seisin in one's own, 854.
Demesnes of the crown, 417.
De minimis non curat lex, 1059.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Demise, 1142.
of the crown, 302, 371.
Demi-vills, 191.
Democracy, 85.
Demurrer, 1911.
for lack of jurisdiction, 1892 n.
in equity, 2071.
to evidence, 1982.
to indictment, 2568.
Demurrer book, 1914.
Denizen, 520, 1040.
Dennis, A. H., in Law Quarterly Review, cited, 2316 n.
Deodand, 433 n, 434, 1067.
Departments of government, theory of their separation, 397.
Departure, in pleading, 1906.
Deportation, 237 n.
Depopulatio agrorum, 2615.
Depositions, 1994.
in chancery, 2074.
in ecclesiastical courts, 1621.
Deputy sheriff, 483.
De Quiros, Modern Theories of Criminality, cited, 2161 n.
Dereliction of property, 719, 1057.
Derivative conveyances, 1149.
Descender, writ of *formedon in*, 1763.
Descent, 984.
ancient partible descent in socage, 1002.
canons of, 994.
collateral consanguinity, 989.
corruption of blood, 1044.
common law, 985.
different kinds of, 985.
distinguished from purchase and escheat, 984, 1030.
doctrine of, 9[illegible].
escheat, 1032.
estates prescribed, 1068.
feudal, 791.
fiction of *feudum novum* held *ut antiquum*, 1008.
half blood, 1014, 1019.
heirs apparent and presumptive, 995.
immediate descent between brothers and sisters, 1011, 1041.
in borough-English and gavelkind, 823.
lineal descent, 995, 997.
males preferred to females, 999. 1022.
modes of failure of hereditary blood, 1035.
no lineal ascent, 997.
Descent, of lands, 2660, 2668.
of the crown, 2660.
partible descent among daughters, 1003.
possessio fratris, 1015.
primogeniture, 791, 1001.
principal of collateral inheritance, 1010.
representation, 1003.
rules of, 994, 994 n.
seisin necessary in ancestor, 996.
table of, 987.
through an alien, 1041.
title by, 984.
Desertion, 571, 2275.
Detainer, forcible entry and, 1749, 2332, 2333 n.
unlawful, 1704.
Detinet, action of debt in the, 1714.
Detinue, action of, 1640 n, 1641 n, 1706, 1850 n.
steps in development of, 1705 n.
Devastation, 1400.
Devise, alienation by, 1213, 2677.
as conveyance, 1220 n.
executory, 941.
feudal restraints on power of, 1213.
operation of, 1220 n.
revocation of, 1217.
title by, 1213.
Devisee, liable to debts of devisor, 1219.
Dialogus de Scaccario, 126 n.
Dicey, A. V., Law and Opinion, quoted, 267 n, 268 n, 1294 n, 1297 n, 2654 n.
Law of the Constitution, quoted, 63 n, 372 n.
National Review, quoted, xxiv.
on the Parliament Act of 1911, 281 n.
Conflict of Law, cited, 2082 n.
Dickens, Charles, quoted, xvii.
Dictator, Roman, 236.
Dictum, 121 n.
Die, cat inde sine, 1713, 2012.
Diet, excess in, 2365.
Diets, 251.
Digby, History of Law of Real Property, quoted, 777 n, 790 n, 792 n, 821 n, 849 n, 1033 n, 1035 n, 1063 n, 1172 n; cited, 797 n, 825 n, 834 n, 835 n, 884 n, 892 n, 899 n, 1134 n, 1147 n, 1171 n.
Digest of Justinian, 145.
Dignities, 759.
descent of, 1003.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Dilapidations, 1610.
Dilatory pleas, 1891.
Dillon, Laws and Jurisprudence, quoted, 1852 n, 1989 n.
municipal corporations, cited, 369 n.
Diminishing the coin, 2262.
Diminution of record, 2635.
Diocese, 187.
Diplomatic agents, jurisdiction over, 378 n.
Directory part of a law, 95.
Disability, plea to, 1892.
Disabling a man's limbs or members, 2411, 2413.
Disabling statutes of leases, 1144, 2679.
Disclaimer of estate, 1131.
of tenure, 1083, 1811.
of title, in United States, 1083 n.
Discontinuance, of action, 1885.
of estate, 1741.
Discovery, by bankrupt, 1369.
of accomplices, 2564.
on oath, 1993, 2063.
Discretionary fines and imprisonment, 2622.
Disguise, offenses in, 2327.
Dishonor, of bills and notes, 1353.
Disinheriting of children, 644.
Disfiguring, 2413.
Dismembering, punishment by, 2621.
Dismission, of bill in equity, 2076.
Disorderly, houses, 2361.
persons, 2364.
Dispensation, from the king, 1077.
from the pope, 2287.
Dispensing power, of the king, 245, 299, 480, 2683, 2687.
Dispossession, 1737, 1770.
Dissection of murderers, 2407, 2621.
Disseisin, 974, 1739.
at the party's election, 1740, 1741.
nature of, 1739 n.
release of right, 1150.
termor's remedy for, 1772 n.
warranty commencing by, 1122.
writ of entry *sur*, 1753.
Dissenters, Protestant, 2221.
Dissolution of parliament, 301.
Distraint, nature of remedy by, 1498 n.
Distress, 1329, 1497.
development of the law of, 1505 n.
excessive, 1504.
for rent in the United States, 1497 n.
Distress, hazardous character of remedy of, 1508 n.
illegal, for crown debts, 2670.
infinite, 1807, 1866.
nature of remedy by, 1498 n.
sale of, 1507.
second, 1504.
Distribution of intestate's effects 1408. 2657, 2671, 2686.
Distribution, statute of, 1408.
Distringas, in chancery, 2070.
in detinue, 2029.
juratores, 1953.
to compel appearance, 1866.
Disturbance, 1814.
of common, 1814.
of franchises, 1814.
of patronage, 1820.
of religious assemblies, 2222.
of tenure, 1819.
of ways, 1819.
Disturber, 1086.
Diversity of person, plea of, 2641.
Dividend of bankrupt's effects, 1372.
Divine law, 64.
Divine right of kings, 305, 2683.
Divine service, tenure by, 847.
Divorce, 620, 1612.
alimony, 625.
a vinculo matrimonii, 620.
a mensa et thoro, 623.
effect on legitimacy, 654 n.
legislative, 620 n.
Docket, of judgment, 2011.
Doctrines, illegal, asserting or publishing, 2263, 2289, 2297.
Dog, carrying, as punishment for contempt, 2297.
damage by, 1708.
owner answerable for, 1710.
property in, 1241.
right to keep, 1275.
stealing, 2448.
Dome-book of Alfred, 109, 190, 2658.
Domesday Book, 782, 844, 845, 1928.
Domestic relations, 579.
in law and ethics, 604 n.
interference with, 1684 n.
Domicile, change of, 513 n.
Dominion, right of, 707.
Dominions, foreign, 184.
Domitæ naturæ, animals, 1237.
Donatio mortis causa, 1407.
Done, grant, et render, fine, *sur*, 1191.
Donis, statute *de*, 864, 1123.
Dos rationabilis, 893.
Double fine, 1191.

Double plea, 1903.
Double voucher, 1437.
Do ut des, 1314.
Do ut facias, 1317.
Dowager, princess, 2253.
queen, 338, 2253.
Dower, 884, 2671.
act of 1833, 891 n.
ad ostium ecclesiæ, 891, 892 n.
assignment of, 894.
bar of, 896.
by common law, 891.
by custom, 891.
de la plus belle, 891, 891 n.
estate in, its original nature and incidents, 884.
ex assensu patris, 892, 892 n.
history of dower, 892.
how dower attaches, 891.
in the United States, 885 n.
jointure in lieu of, 896.
of what one may be endowed, 890.
relative advantages of dower and jointure, 898.
seisin requisite for, 881 n.
unde nihil habet, writ of, 1752.
who may be endowed, 888.
writ of right of, 1752, 1766.
Drawbacks, 451.
Drawing to the gallows, 2264, 2621.
Droit d'aubaine, 516 n.
Droit droit, 892.
Druids, their customs, 107, 2655.
Drunkenness, 2186, 2234.
as an excuse for crime, 2187 n.
will made during, 1385.
Due process of law, 229, 234, 243.
Duchy court of Lancaster, 1595.
Ducking-stool, 2363, 2621
Duelling, 2329, 2383, 2404.
Dues, ecclesiastical, nonpayment of, 1608.
Dukes, 549, 564.
Dumb and deaf persons, wills by, 1385.
Dum fuit infra ætatem, writ of, 1753.
Dum fuit non compos mentis, writ of, 1753.
Duodecima manus, 1942.
Duplex querela, 1824.
Duplicatio, 1905.
Duplicity, in pleading, 1903, 1908.
Durante absentia, administration, 1393.
Durante minore ætate, administration, 1393.
Duress, 224, 1104.
conveyance by persons under, 1104.
defense of, 224 n.
Duress, of goods, 225 n.
of imprisonment, 224, 236.
of testator, 1385.
per minas, 224, 2197.
wills made under, 1385.
Durham, county palatine of, 195, 1596.
Duties, of persons, 207.
rights and, 705 n.
Dwelling-house, meaning of, 2432.

Ealdormen, 550.
Ear, loss of, 2330, 2349, 2411, 2463, 2621.
Earl, 193, 550, 551 n.
Earl marshal, court of, 1584, 2484.
Earnest-money, 1322.
Easements, 1064 n.
in gross, 757 n.
right of way, by grant, by prescription, by necessity, 756.
Eat inde sine die, 1913, 2012.
Eavesdropping, 2362.
in United States, 2363 n.
Ecclesiastical, causes, appeals in, 411.
corporations, leases and renewals by, 1143.
matters, modern jurisdiction in, 1580 n.
orders, 529.
punishments, existing, 1622 n.
revenues, 413.
Ecclesiastical courts, 1576, 1578 n.
authority of canon law in, 1619 n.
cognizance of, 1605, 2493, 2673.
restriction on jurisdiction of, 1605 n.
source of English law in matrimonial causes, 1621 n.
testamentary jurisdiction of, 1614 n.
when separated from the civil, 1577, 2662, 2668.
Economy, offenses against public, 2354.
Edgar, King, his laws, 111, 2559.
Edmund Ironside, 311.
Education of children, 645.
Edward the Confessor, 312.
reputed laws of, 109 n, 110, 2659, 2659 n, 2667.
Edward I, 315.
Edward II, 315.
Edward III, 315.
Edward IV, 318.
Edward V, 318.
Edward VI, 321.
Edward VII, 331 n.
Egbert, King, 311.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Egyptians, 2358.
Ejectione firmæ, writ *de*, 1771, 1849 n.
Ejectment, action of, 1640 n, 1641 n, 1771, 2688.
Election of bishops, 2288, 2668.
of magistrates, 478, 2660, 2675.
of members of house of commons, 279, 289.
of Scots peers, 2289.
Elections, purity of, 291.
Electors of members of parliament, qualifications of, 281.
in counties, 282.
in boroughs, 285.
Elegit, estate by, 928.
writ of, 928 n, 2035, 2035 n, 2674.
Elisors, 1954.
Elizabeth, Queen, 322.
Eloignment of goods, 1674, 1702.
Elopement, effect on dower, 889.
Eliot, George, in Felix Holt, cited, 861 n.
Ely, Isle of, 198.
courts of, 1596.
Emancipation of slaves, 581.
Embargo, proclamation laying, 399.
Embezzlement, of king's stores, 2274.
of public money, 2295.
of records, 2303.
Emblements, 875, 903.
distress of, 1256.
go to the executor, 1255.
of tenant at will, 909.
of tenant for life, 875.
of tenant for years, 908.
right to, 1285.
Embowelling alive, 2264, 2621.
Embracery, 2323 n, 2324.
Eminent domain, 240 n, 756.
right of, 240.
Emphyteusis, 1810.
Employers' liability acts, 594 n.
Employment, interference with business or, 1690 n.
scope of, 595.
Empson and Dudley, 2540.
Enabling statute of leases, 1143.
Enceinte, capacity of child of woman, 938.
inquiry whether woman is, 1962.
protection of a woman, 221.
reprieve for woman, 2639.
Enchantments, 2230.
Enclosure, disseisin by, 1740.
Enclosure of common, 753, 754 n.
Encyclopedia of the Laws of England, quoted, 967 n, 1281 n.
Enemy, adhering to, 2254.
captives, 1253.
goods of alien, 1251.
rights of alien, 1251.
Enfranchisement, of copyhold, 913.
of villeins, 838.
England, 187.
civil divisions, 190.
countries subject to, 162.
ecclesiastical divisions, 187.
king of, 304.
laws of, 107.
parliament of, 248.
people of, 507.
English statutes, in America, 143 n.
Englescherie, 2397.
Engrossing, 2346.
modern law of, 2345 n.
Enlarger l'estate, 1149.
Enrollments, statute of, 1171, 1171 n.
Entails, 864, 2674, 2678.
of personalty, 1249.
words necessary to make, 867, 867 n.
Entry, 1495, 1744.
forcible, 1749, 2332.
on lands, 1137.
tolled by descent, 1745, 1747.
writ of, 1750.
Equity, 103, 159, 1559, 2053.
a settled system, 2056.
Chancellor's foot, 2057 n.
clogging the, 923 n.
difference between law and, 1562 n.
follows the law, 2054.
law and, under Judicature Acts, 1538 n.
of redemption, 925.
origin and history of, 160 n.
reserved, 2079.
side of the chancery, 1554, 1560.
Equity, courts of, 2043.
differences between courts of law and, 2054, 2062, 2688.
history of courts of, 1560, 2677.
interpretation in courts of, 2055.
procedure in courts of, 2067.
similarity between courts of law and, 2059.
Equity jurisdiction, 2045 n.
amalgamation of law and equity in England, 2051 n.
Blackstone's treatment of, 2043 n.
court of equity as court of conscience, 2047 n.

Equity jurisdiction, enumeration of equitable proceedings, 2049 n.
equitable rights regarded as *in rem*, 2048 n.
equity a supplemental system, 2046 n.
equity proceeds *in personam*, 2046 n.
history of equity in the United States, 2051 n.
modern treatment of, 2044 n.
Pomeroy's criticism of Blackstone, 2044 n.
reformed procedure in the United States, 2052 n.
tendency toward adoption of equitable principles in law, 2050 n.
Erasure in deed, effect of, 1130.
Eriach, 2544.
Error, writ of, 2019, 2019 n, 2022, 2635.
amendment of judgments, 2021.
bail on writ of, 2026.
costs in, 2012.
courts from which lies, 2026, 2635.
Escape, 1878, 2031, 2305.
action for, 1727.
assisting in, 2307.
liability of officer for, 2306 n.
Escheat, 436, 721, 721 n, 812, 832, 1032, 2633, 2660, 2665.
distinguished from purchase and descent, 985.
failure of hereditary blood, 1035.
feudal and modern, 1033 n.
in case of corporation, 1047.
in case of gavelkind lands, 826.
principle of, 1035.
writ of, 1766.
Escrow, 1128.
Escuage, 813, 2669.
Esmein, History of Continental Procedure, cited, 2157 n.
Esplees, 1438.
Esquire, 561.
Essoign day, 1863.
Essoigns, 1863.
Estate, by the curtesy, 879.
by statute and *elegit*, 927.
civil death, 874.
definition of, 849.
entail of, 865, 1056.
estovers and emblements, 875.
forcible ejectment, 914.
for years, 901.
duration, 904.
entail of term, 1248.
Estate, estovers and emblements, 908.
goes to executor, 1293.
incidents of, 908.
interesse termini, 907.
origin of, 901.
from year to year, 907.
in case of copyhold, 1056.
in dower, 884.
in incorporeal hereditaments, 1056.
in lands, 849.
joint life, 874.
merger, 951, 952 n.
pur autre vie, occupancy of, 1052.
Estate at sufferance, 913.
Estate at will, 909.
cannot support a remainder, 935.
copyholders, 911.
emblements in case of, 909.
rights after termination, 910.
termination, 909.
Estates, abeyance of the freehold, 858.
alienation of, 1098.
base fee, 860.
conception of, 849 n.
defined, 849.
destruction of entail, 869, 1186, 1193, 1205.
different, in same land, 858.
disclaimer of, 1131.
distinction between conditional estates and estates upon condition, 872 n.
division of, 932.
fee-tail in personalty, 1248.
forfeiture of, 1080.
forfeiture of entail, 969.
for life determinable, 874.
frank-marriage, 867, 868 n.
freehold of inheritance, 849.
freehold to commence *in futuro*, 907, 933.
in annuity, 864.
in common, 969.
in coparcenary, 964.
in demesne, 854.
in fee simple, 853.
in gage or pledge, 921.
in joint tenancy, 953.
in lands, 849.
in personalty, 1248
in remainder, 932.
in reversion, 948.
in severalty, 953.
in term for years, 1248
leases of, 1142.
less than freehold, 900.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Estates, meaning and kinds of, 849 n.
not of inheritance, 873.
on condition, 915.
origin of, 790 n.
partition of, 965.
rule in Shelley's Case, 942 n, 943 n, 944 n.
severance, 961.
Estates of the realm, 258, 258 n.
Estates-tail, 861.
after possibility of issue extinct, 877, 879 n.
evils of, 868.
final condition of, 872.
incidents of, 868.
liable to debts of the crown or of a bankrupt, 871.
revived by the statute *de donis*, 864.
species of, 865.
Estoppel, 1112, 1901.
by deed, 1112, 1130.
by fine, 1193.
by record, 1347.
by recovery, 1202.
Estoveriis habendis, writ *de*, 625.
Estovers, common of, 755.
of a wife, 625.
of tenant for life, 874.
of tenant for years, 908.
tenant's right to, 756.
Estrays, 430, 724.
Estreat, of recognizance, etc., 2468.
Estrepement, writ of, 1801, 1801 n.
Evidence, 1968, 2598.
calling of, 2593 n.
historical development of rules of, 1969 n.
king's or state's, 2562 n.
the best, 1976 n.
Examination in chancery, 2074.
of bankrupt, 1367.
of prisoners, 2519.
of witnesses, 1982.
trial by, 1928.
Exceptio, 1905.
Exception, distinguished from a reservation, 1117.
Exceptions, bill of, 1982.
to answer in chancery, 2073.
Exchange, 1319.
bill of, 1348.
deed of, 1147, 1148 n.
Exchequer, court of, 1554.
receipt of, 1554.
Exchequer chamber, court of, 1568.
Excise, 419.
laws, 453.
offenses against, how tried, 2498.
Exclusion bill (1679–1681), 325.
Excommunication, 1622.
Excommunicato capiendo, writ *de*, 1624.
Excommunicato deliberando, writ *de*, 1624.
Excusable homicide, 2380.
Executed, contract, 1312.
estate, 931.
fine, 1191.
remainder, 936.
Execution, by *elegit*, 928.
of devises, 1217.
of uses, 1164.
Execution, civil, 1865, 2028.
Execution, criminal, 2651.
award of, 2480, 2650.
modern practice of, 2407 n.
plea in bar of, 2641.
precept of, 2649.
rule for, 2651.
varying from judgment, 2376, 2650.
warrant of, 2651.
writ of, 2649.
Executive power, 304, 372.
Executor, appointment of, 1393.
administration *durante minoritate*, 1393.
administration *cum testamento annexo*, 1393.
de bonis non, 1397.
infant, 1393.
of executor, 1397.
where there are no relations, 1396.
Executors, acts before probate, 1397.
burial of deceased, 1400.
collecting and converting assets, 1403.
de son tort, 1398, 1399 n.
distribution among next of kin, 1408.
distribution by custom, 1410.
duties of, 1397.
inventory, 1403.
payment of debts, in what order, 1403.
payment of legacies, 1405.
probate of will, 1400.
right to residue, 1406.
Executory, contract, 1312.
devise, 941, 1165.
estate, 931, 941 n.
remainder, 938.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Exigent, writ of, 1870, 2550.
Exigi facias, writ of, 1870, 2550.
Exile, 237, 237 n, 2621.
Ex officio, informations, 2539.
  oath, 1622, 2072.
Ex parte, proceedings, 1526 n.
Expectancy, estates in, 931.
Expenses, of prosecution, 2601.
  of witnesses, 1978, 2601.
Exports, duties on, 450.
Exportation, of wool, etc., 2340, 2675.
Ex post facto laws, 78, 78 n.
Express, condition, 916
  contract, 1310, 1710.
  malice, 2403.
  warranty, 1121.
Ex relatione, informations, 2539.
Extendi facias, 2037.
Extent, writ of, 2037, 2037 n, 2038 n.
Extinguishment of estates, 1150.
Extortion, by officers, 2324, 2324 n.
  or blackmail, 2459.
Extradition, 237 n.
Extra-parochial places, 190.
Extra-parochial tithes, 415.
Extraterritorial offenses, 2534 n.
Extravagants of John, 147.
Eye, putting out, 2411, 2413.
Eyre, justices in, 1572, 1589, 2669, 2670.
  killing of, 2256.

Facio ut des, 1316.
Facio ut facias, 1315.
Facto, king *de*, 2248.
Factors, 589, 2063.
Fair, 762, 1793.
False imprisonment, 236, 1762, 2424.
  action of, 1683.
False judgment. writ of, 1541, 2022
False news, 2333.
False return, action for, 1635, 1728.
False verdict, 2015, 2324.
False weights and measures, 2345.
Falsi, crimen, 2260, 2312, 2345, 2462.
Falsifying, attainder, 2635.
  coin, 2255, 2260, 2262, 2271.
  judgment, 2635.
Fame, good or ill, 2472, 2522.
Farm, 1142.
Farrier, common, action against, 1727.
Father, rights and liabilities of, 637 n.
"Father to the bow, son to the plow," 826.
Favor, challenge to, 1964.

Fealty, 508, 829.
  and homage, 787 n.
  incident to the reversion, 949.
  oath of, 778, 787.
Fear, putting in, 2457.
Fee, 777, 853, 856.
  after a fee, 1165.
  conditional, 861, 862 n.
  contrasted with allodium, 854.
  ecclesiastical, 1608.
  farm rent, 772.
  simple, 853, 853 n, 1417, 1425.
  tail, 862, 1424.
  tail and reversion, 864.
Fees, base, 860.
  limited, 860.
  qualified, 860, 918 n.
  to counsel, 452.
Feigned issue, 2077.
Fellow-servant, law of, 592 n.
Felo de se, 1388, 2387.
Felonious homicide, 2387.
Felony, 2266.
  and misdemeanor, 2152 n.
  appeal of, 2545.
  compounding, 2310, 2310 n.
  distinction between misdemeanor and, 2269 n.
  distinguished from minor crimes, 2370 n.
  misprision of, 2294.
  punishment of, 2270, 2423, 2429.
Feme covert, 626, 1106, 1386.
Feoffment, 1132, 1417.
  history of, 1132 n.
Feoda, 777.
Feorm, 1142.
Feræ naturæ, animals, 431, 724, 1237, 1252.
Ferry, 1793.
Fetters, 2523, 2554.
Feud, 776.
Feudal, actions, 1647.
  descent, 791.
  homage, 789.
  relation, 778.
  reliefs, 791, 829.
  services, 789.
  tenures, 780, 784, 2660, 2665.
Feudal system, 774.
  corruption of, 793.
  extent of, 778.
  history of, 774, 774 n.
  military character of, 565.
  modifications in, 785.
  origin of, 781 n.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Feudal system, on the Continent, 779.
theory of, 786.
Feudatory, 786.
Feuds, 776.
duration of, 789.
hereditary, 791.
honorary, 791.
inalienable, 792.
proper and improper, 793.
Feudum, antiquum, 999, 1008.
apertum, 1035.
honorarium, 1002.
improprium, 793.
individium, 1002.
maternum, 999.
meaning of, 777 n.
novum held *ut antiquum*, 999, 1009.
paternum, 999.
proprium, 793.
Fictions, legal, 1553, 1553 n, 1630.
in fictione juris consistit æquitas, 1869.
Fictitious bail, 1879.
plaintiff, 2311.
Fideicommissum, 1156, 1157 n.
Fidejussores, 1631, 1879.
Fief, 777.
d'haubert, 799.
Field, Mr. Justice, on effect of pardon, 2642 n.
on functions of the grand jury, 2525 n.
on monopolies, 2347 n.
Fieri facias, writ of, 2033, 2033 n, 2035 n.
Fifteenths, 444.
Filial portion, 1412.
Final, decree, 2077.
judgment, 2012.
Finding of goods, 1253.
Finding of indictments, 2535.
Fine for alienation, 810, 832.
Fine for endowment, 894.
Fine incident to copyhold, 842.
Fine of lands, 870, 1186, 1715, 1744, 2673, 2676.
bar by nonclaim, 1193.
cognizance de droit, come ceo, 1191, 1434.
cognizance de droit tantum, 1191.
concessit, 1191.
deeds to declare uses of, 1203.
evasion of statute *de donis*, 1200.
force and effect of, 1192.
freehold interest essential to, 1195.
kinds of, 1191.
Fine of lands, parties to, 1193.
privies to, 1194.
strangers to, 1194.
sur done, grant et render, 1191.
Fines, 1186.
abolition of, 1186 n.
nature of, 1187.
mode of levying, 1188.
solemnities attending, 1190.
statute of, 1540, 870.
Fines and fees, judicial, 420.
Fine for misdemeanors, 2621, 2622.
Fines and forfeitures, when grantable, 1837, 2623.
Finger, disabling, 2411.
Fire, liability of tenant for accidental, 1090.
negligence in keeping, 601, 2429.
Fire-bote, 756.
Fire-ordeal, 2579.
Fireworks, 2362.
First-fruits, 415, 804, 2280.
First purchaser, descent to blood of, 1007.
Fiscal prerogatives, 412.
Fish, royal, 337, 421, 1255.
stealing, 2327, 2447.
Fishery, 1276.
common of, 754.
franchise of free, 764, 764 n.
free, 2671.
right of, in public waters, 754.
several, 764, 764 n, 765, 1059 n.
Fish-ponds, destroying, 2459.
Fitzherbert, 126, 131 n, 1753.
Fleets, 2666.
Fleta, 126, 128 n, 2674.
Flight, 2632.
Flotsam, 424, 1629.
Fœnus nauticum, 1340.
Folkland, 834, 835.
Foot of a fine, 1190, 1436.
Force, injuries with and without, 1648.
when repellable by death, 2378.
Forcible, abduction and marriage, 2414.
entry and detainer, 1749, 2332, 2333 n.
Foreclosure, 926.
Foreign, bills, 1349.
coin, forging it, 2261, 2271, 2293.
county, indictment in, 2532.
dominions, 184.
prince, pension from, 2296.
service, 2273.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Forest, Charter, 2670 n.
courts, 1588.
franchise of, 762.
laws, 1272, 1590, 2662, 2666, 2668, 2670, 2679, 2683.
profits from, 420.
right in, 724.
Foresta, carta de, 1241, 2670, 2673.
Forestaller, disseisin by, 1740.
Forestalling, 2345.
modern law of, 2345 n.
Foretooth, striking out, 2411.
Forfeiture, 432, 1069.
abolished, 432 n, 826 n, 1280 n, 2625 n.
by bankruptcy, 1095.
by breach of condition, 1088.
by disclaimer, 1083.
by simony, 1086.
by tortious alienation, 1081.
for alienation in mortmain, 1071.
for alienation to an alien, 1080.
for crimes and misdemeanors, 1070, 1266, 1279, 2621, 2626, 2660, 2671.
for waste, 1088.
in America, 1069 n.
of copyholds by breach of custom, 1093.
of estate-tail for treason, 870.
of goods and chattels, 2631.
of lands, 2626.
of life, 228.
on lapse of presentation, 1083.
title by, 432, 915, 1069, 1279.
Forgery, 2462, 2462 n.
Forgiveness by prosecutor, 2604.
Forma pauperis, suit in, 2014.
Formedon, writ of, 1763.
Fornication, 2234.
Fortescue, 129 n.
Forty days' court, 1588.
Fortune-tellers, 2231.
Foundling hospitals, 226.
Fox, J. C., in Law Quarterly Review, quoted, 2502 n, 2503 n, 2506 n.
Franchise, allowance of, 1841.
disturbance of, 1814.
elective, under modern English legislation, 284 n, 289 n.
Franchises, 402, 759.
meaning of, 761 n.
various kinds of, 761.
Frankalmoigne, 817, 847, 967.
Franked letters, 458, 459.
abolished, 459 n.
Frank-marriage, 867, 868 n.
Frank-pledge, 191, 2467.
and *gesammtburgschaft*, 2467 n.
view of, 2491.
Frank-tenement, 798, 851.
Frater, consanguineus, 1020.
uterinus, 1020.
Fraud, 154.
civil, where cognizable, 2056, 2063, 2064.
criminal, 2346.
Frauds and perjuries, statute of, 928, 1055, 1115, 1127, 1127 n. 1168 n, 1175, 1205, 1217, 1322, 1348, 1390, 1408, 1717, 2038, 2685.
parol leases, when valid, 1155.
Fraudulent concealment of death, statute of, 950.
Fraudulent conveyances, 1306.
Fraudulent devises, 1219, 2054.
Fraunke ferme, 820.
Free, bench, 89.
fishery, 764, 764 n, 1276.
warren, 763, 1276, 2662.
Freehold, 851.
by wrong, 1134.
customary, 913.
leases, 873, 1142.
Free socage, 819.
feudal character of, 826.
not of feudal origin, 827 n.
French, law, 1914 n.
Fright, physical injury resulting from, 1652 n.
Fruit, stealing, 2444.
Fumage, 460.
Funds, public, 467.
Funeral expenses, 1400.
Futuro, freehold *in*, 907, 933
Furandi animus, 2439, 2441.

Gage and pledges, 1866.
Gage, estates in, 921.
Game, destroying, 2369.
history of game laws, 2663 n.
laws, 1268 n, 1272, 2369, 2370 n, 2663.
Norman customs as to, 1274.
of freewarren, 763.
of park or chase, 763.
property in, 724, 725, 1242, 1255, 1267.
Saxon customs as to, 1273.
selling, 2370.
Gaming, 2365, 2366 n.
Gaming-houses, 2361, 2365.
Gaol delivery, 2486.
courts of, 1534 n.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Gaolers, 484, 2523.
compelling prisoners to be approvers, 2303.
when guilty of murder by cruelty, 2400.
Gaols, 484.
Gardens, robbing of, 2444.
Garter, knight of the, 558.
Gavelkind, 135, 138, 825, 882, 2655.
Geldart, W. M., Elements of English Law, quoted, 118 n, 121 n.
in Law Quart. Rev., quoted, 670 n.
General, demurrer, 1912.
imparlance, 1891.
issue, 1898, 2573.
sessions, 2489.
verdict, 1988, 2599.
warrant, 2510.
Gentlemen, 561.
should know the law, 5.
Gentium, jus, 68 n
George I, 331.
George II, 331.
George III, 331.
George IV, 331 n.
George V, 331 n.
Gifts, of chattels personal, 1306, 1306 n.
of chattels real, 1305.
lands and tenements, 1141.
Gilda mercatoria, 682.
Gipsies, 2358.
modern punishment of, 2359 n.
Glanvill, 21 n, 126, 126 n, 2668.
Gleaning and hunting, 1786, 1786 n.
God and religion, offenses against, 2210.
Good behavior, security for, 2466, 2471.
Good consideration, 1114.
Goods and chattels, 1229.
Government, 249.
annihilation of, 268.
contempts against, 2297.
departments of, 249.
establishment of, 84.
forms of, 85.
nature of, 84.
separate departments, 397.
Grand assize, 1938, 1950, 2669.
Grand coustumier of Normandy, 177.
Grand juror, disclosing evidence, 2300.
Grand jury, 2526.
functions of, 2525 n.
in attaint, 1950, 2016.
Grand larceny, 2437.
Grand serjeanty, 812, 817.
Grant, by the crown, 1182.
of chattels, 1305.
of hereditaments, 1141.
Gratian, his decretals, 146.
Gray, J. C., Restraints on Alienation, cited, 948 n, 1104 n.
Rule against Perpetuities, cited, 945 n.
Great council, Norman, 252.
Great seal of the king, 1557.
counterfeiting, 2255.
Gregorian code, 144.
Gregory, his decretals, 147.
Guardian and ward, 466.
reciprocal rights and duties, 660.
Guardian *ad litem*, 2046.
Guardians, kinds of, 658.
by custom, 658.
by nature, 658.
by statute, 658.
by testament, 658.
for nurture, 658.
in chivalry, 805.
in socage, 658, 831.
Guardianship, law of, 657 n.
Guernsey, Isle of, 177.
Guild or guildhall, 682 n.
Gunpowder, hindering importation of, 2289.
keeping or carrying it illegally, 2362.

Habeas corpus, act, 217, 232, 233, 1680, 2685.
suspension of, 233, 235.
Habeas corpus, ad deliberandum, 1675.
ad faciendum et recipiendum, 1675.
ad prosequendum, 1675.
ad respondendum, 1675.
ad satisfaciendum, 1675.
ad subjiciendum, 1676.
ad testificandum, 1675.
cum causa, 1594.
Habeas corpora juratorum, 1953.
Habendum of a deed, 1116, 1417, 1420, 1423.
Habere facias, possessionem, 2028.
seisinam, 2028.
Habitation, property in, 713.
offenses against, 2427.
Hackney coaches and chairs, duty on, 461.
Hale, 133 n.
Half-blood, 1019.
exclusion of, 1014.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Halsbury, Laws of England, quoted, 137 n, 609 n, 778 n, 796 n, 814 n, 821 n, 833 n, 845 n, 846 n, 1346 n, 1351 n, 1605 n, 1622 n; cited, 801 n, 825 n, 835 n, 981 n, 1355 n, 1586 n, 1597 n.
Hame-secken, 2430.
Hamlets, 191.
Hammond, W. G., notes by:
Definition of liberty, 4 n.
General map of the law, 46 n.
Ex post facto laws, 78 n.
Retrospective legislation, 79 n.
Constitutions, 89 n
The parts of a law, 91 n.
Malum in se and *malum prohibitum*, 94 n.
Authentic interpretation and declaratory laws, 99 n.
Equitable interpretation, 104 n.
Antiquity of the common law, 12 n.
Customary law, 115 n.
Particular customs and usage, 134 n.
The canon and civil law in England, 142 n.
English statutes in America, 143 n.
Parliament cannot bind its successors, 157 n.
Authority of the common law in America, 180 n.
Appeals to the king in council, 182 n.
The nature of legal rights and duties, 212 n.
Liberty of conscience, 219 n.
Duress of goods, 225 n.
Civil death, 226 n.
Definition of civil liberty, 231 n.
Transportation, extradition, deportation, and exile, 237 n.
Eminent domain, 240 n.
Right to bear arms, 246 n.
The estates of the realm, 258 n.
On veto power of the king, 298 n.
Title of Henry VII, 319 n.
No action lies against the state, 362 n.
Jurisdiction over diplomatic agents, 378 n.
Safe-conducts, 385 n.
Roman view of commerce, 387 n.
The king's ubiquity, 398 n.
Wreck of the sea, 424 n.
Local allegiance, 512 n.
Change of domicile, 513 n.
Citizens born abroad, 519 n.
Elective citizenship, 521 n.
Hammond, W. G., notes by:
Alienage and naturalization, 523 n.
Service and agency discriminated, 579 n.
Is perpetual service legal? 586 n.
Assault on master, 590 n.
The domestic relations in law and ethics, 604 n.
Marriage in the ecclesiastical law, 605 n.
Consensus non concubitus facit nuptias, 607 n.
Marriage as a contract, 608 n.
Disappearance of spouse, 611 n.
Disagreement to marriage of infant, 612 n.
Insanity as avoiding marriage, 614 n.
Marriage formal or by reputation, 616 n.
Law of divorce, 620 n.
Coverture of wife, 625 n.
Liabilities of husband, 628 n.
Adoption, 635 n.
Legitimation by subsequent marriage, 635 n.
Rights and liabilities of father, 637 n.
Rights of mother, 648 n.
Effect of divorce on legitimacy, 654 n.
The law of guardianship, 657 n.
Privileges and disabilities of infancy, 662 n.
Public and municipal corporations, 673 n.
Escheat, 721 n.
Real and personal property distinguished, 726 n.
Incorporeal hereditaments, 736 n.
Common of vicinage, 752 n.
Ways of necessity, 757 n.
Way out of repair, 758 n.
Free fishery, 764 n.
Annuities and corodies, 768 n.
Rent-charge, 770 n.
Fealty and homage, 787 n.
Livery of seisin, 787 n.
Tenure, 795 n.
Heriot and relief, 803 n.
Tenants of the king, 807 n.
Socage tenure not of feudal origin, 827 n.
Ancient demesne, 845 n.
Meaning and kinds of estates, 849 n.
Livery of seisin and grant, 852 n.
Tenant in fee simple, 853 n.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Hammond, W. G., notes by:
Demesne and dominion, 856 n.
Fees conditional, 862 n.
Idiocy of wife, 881.
Seisin requisite to dower or curtesy, 881 n.
Tenancy by curtesy, 883 n.
Dower in the United States, 885 n.
Seisin of termor, 904 n.
Seisin of remainderman, 934 n.
Vested and contingent remainders, 938 n.
Executory estates, 941 n.
Correction of a criticism on Blackstone, 953 n.
Seisin *per my et per tout*, 956 n.
Joint tenancies, 959 n.
Computation of degrees, 992.
Exclusion of the half-blood, 1015 n.
Escheat, feudal and modern, 1035 n.
Inheritance of a legitimated child, 1038 n.
Estate of a corporation, 1047 n.
Title by occupancy, prescription and limitation, 1051 n.
Pre-emption and homestead rights, 1052 n.
Special occupancy, 1056 n.
Prescription and limitation; occupying claimants, 1061 n.
Forfeiture in America—Military occupation, 1069 n.
Modes of alienation, 1098 n.
Stultifying one's self, 1106 n.
Warranty of title, 1118 n.
Freehold by wrong, 1134 n.
Church leases, 1144 n.
Release and quitclaim, 1150 n.
Revocation and resulting uses, 1155 n.
Resulting uses and trusts, 1168 n.
Private acts as conveyances, 1180 n.
Interpretation of public grants, 1184 n.
Power to devise, 1213 n.
Statutes of mortmain, 1216 n.
Devise as a conveyance, 1220 n.
Operation of devise, 1220 n.
Definition of things personal; choses in action, 1229 n.
Property in dead bodies, 1290 n.
Paraphernalia, 1297 n.
Sales in fairs or markets overt, 1323 n.
Carriers, 1326 n.
Will revoked by marriage, 1387 n.
Nuncupative wills, 1389 n.
Holographic wills, 1391 n.

Hammond, W. G., notes by:
Bentham's doctrine that law is based on wrongs, 1488 n.
Accord and satisfaction, 1509 n.
Change of property by award, 1512 n.
Ubijus ibi remedium, 1520 n.
Origin of attorneys, 1527 n.
Compensation of counsel, 1531 n.
Piepoudre courts, 1540 n.
Ecclesiastical courts, 1578 n.
Vice-admiralty courts in America, 1586 n.
Testamentary jurisprudence, 1614 n.
Admiralty jurisprudence of the United States, 1627 n.
Admiralty jurisdiction on inland waters, 1628 n.
Action for threats, 1651 n.
Actions for battery, 1655 n.
Replevin for detention of a distress, 1705 n.
Wager of law, 1707 n.
Indebitatus assumpsit, 1713 n.
Debt for penalties, 1721 n.
Importance of real property law, 1736 n.
Meaning of assize, 1755 n.
Statute of Marlberge, 1759 n.
Morte d'ancestor, 1759 n.
Termor's remedy for disseisin, 1772 n.
Gleaning and hunting, 1786 n.
Subtraction, 1806 n.
The real and personal remedies distinguished, 1808 n.
Office of the original writ, 1857 n.
Demurrer for lack of jurisdiction—Abatement, 1892 n.
Effect of statute of limitations, 1901 n.
Issues of law, 1911 n.
Meaning and kinds of trial, 1927 n.
Jury process, 1953 n.
Challenge to the polls, 1960 n.
Bias or favor in the judge, 1961 n.
Jurors and *jurata*, 1966 n.
Presumptions, 1980 n.
Judgments formed by the act of the law, not of the judge, 2009 n.
The chancellor's foot, 2057 n.
Controversy over Blackstone's treatment of nonconformists, 2217 n.
Change in the conception of treason, 2244 n.
Felony as distinguished from minor crimes, 2270 n.
Forcible entry and detainer, 2333 n.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Hammond, W. G., notes by:
The name of murder, 2396 n.
Burning one's own house, 2427 n.
Larceny by means of fraud or mistake, 2438 n.
Proof of the felonious intent, 2441 n.
Larceny of things in action, 2445 n.
Robbery, 2456 n.
Malicious mischief, 2461 n.
Forgery, 2462 n.
Frank-pledge and *gesammtburgschaft*, 2467 n.
The punishment of contempts, 2504 n.
Extraterritorial offenses, 2534 n.
Certiorari in the United States, 2553 n.
The chaining of prisoners, 2554 n.
Pleading and criminal cases, 2565 n.
Swearing witnesses for the prisoner, 2598 n.
Public prosecution and civil remedy for same injury, 2603 n.
Hanaper office, 1559.
Hand, burning in, 2610, 2612, 2613, 2621.
cutting of, 2494.
disabling, 2411.
holding up, 2554.
loss of, 2299, 2340, 2621.
Hand sale, 1322, 1322 n.
Handwriting, evidence of, 2596.
Hanging, 2621.
Hanover, 185.
house of, 331.
Harold, King, 312.
Harrison, M. E., author of notes, 1643 n, 1881 n, 1884 n, 1895 n, 1898 n, 1903 n.
Havens and ports, 392.
Hawkins, 133 n.
Hawks, stealing of, 2447.
Hawthorne, Nathaniel, quoted, xvii.
Hay-bote, 756.
Hazeltine, Essay on Early Equity, quoted, 1637 n; cited, 1808 n.
Head of the church, 2677.
Headborough, 190.
Healy, The Individual Delinquent, cited, 2163 n.
Health, injuries to, 1656.
offenses against public, 2353.
protection of, 230.
Hearing in equity, 2076.
Hearsay evidence, 1976.
Hearth-money, 461.
Hedge-bote, 756.
stealing, 2444.
Heir, 985.
apparent and presumptive, 339, 995.
meaning of, 858.
nemo est heres viventis, 858.
relation of, to fee simple, 854 n.
Heiress, stealing of, 2414.
Heirlooms, 1287.
in America, 1289 n.
Heirs, when word necessary to create fee, 858, 873.
when not necessary, 859.
Hengham, 126, 129 n, 2024, 2674.
Henry I, 313.
his laws, 2667, 2667 n.
Henry II, 314.
trial by jury introduced in reign of, 2669 n.
Henry III, 315.
Henry IV, 316.
Henry V, 318.
Henry VI, 318.
Henry VII, 319.
Henry VIII, 320.
Heptarchy, Saxon, 2657.
Heralds, 1627.
Heraldry, 1626.
Herbage, right to, 755.
Hereditaments, 731, 856.
corporeal, 732.
corporeal and incorporeal, 732 n.
incorporeal, 736, 736 n.
Hereditas jacens, 1055.
Heresy, 2212.
Herctico comburendo, writ *de*, 2214, 2685.
Heretochs, 550, 563, 2660.
Heriots, 803 n, 842, 1282.
a modern instance of, 1282 n.
and reliefs, 803 n.
incident to copyholds, 842.
seizing of, 1509.
Hermogenian code, 144.
High commission court, 1584, 2680, 2683.
High constable of England, 2484.
High seas, jurisdiction as to, 186, 186 n.
High treason, 2244.
trials in, 2587.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Highways, 756.
annoyances in, 2360.
robbery in or near, 2458.
surveyors of, 497.
Hiring, contract of, 1333.
History of the English law, 2654.
Hogs, keeping of in towns, 2361.
Holding over by tenant, 1783, 1784.
Holdsworth, History of English Law, quoted, 123 n, 130 n, 131 n, 132 n, 357 n, 1385 n, 1498 n, 1564 n; cited, 822 n, 1492 n, 2015 n, 2654 n.
Holland, Jurisprudence, quoted, 51 n, 199 n, 202 n, 203 n, 204 n, 248 n, 434 n, 1335 n, 1490 n, 2152 n, 2189 n; cited, 978 n, 2082 n.
Holmes, Common Law, quoted, 202 n, 221 n, 2190 n; cited, 978 n.
The Path of the Law, quoted, 1787 n.
Holographic wills, 1391.
Homage, 787, 787 n.
ancestral, 1120.
by bishops, 413, 531.
liege, 509.
of a court-baron, 834.
simple, 509.
Home & Headlam, Inns of Court, quoted, xviii, xix.
Homestead rights, 1052 n.
Home rule in Ireland, 174 n.
Homicide, 2372.
justifiable and excusable, 2372 n.
killing another to save one's own life, 2384 n.
premeditated and unpremeditated killing, 2397 n.
Homine replegiando, writ *de*, 1674.
Honeste vivere, alterum non lædere, suum cuique tribuere, 62 n.
Honor, 801 n.
court of, 1625.
titles of, 400, 1003.
Honorary feuds, 1002.
Honoris respectum, challenge *propter*, 1962, 2588.
Hop-binds, destroying, 2461.
Horse-races, 2368.
Horses, sale of, 1325.
stealing, 2452.
Hospitals, 678, 682.
their visitors, 697.
Hotchpot, 967, 967 n, 1408, 1410.
House-bote, 756.
House, immunities of, 2430.
is land, 732.
larceny from, 2453.
House of Commons, 264.
how elected, 287, 289.
privileges of, 277.
regulation of elections 289.
House of Lords, 261, 262, 263.
privileges of, 275.
House tax, 460.
Hue and cry, 2516, 2516 n.
Hundred, 192, 2658.
action against, 1721, 2460, 2517.
court, 1542, 2658.
Hundredors, challenge for defect of, 1958, 2588.
Hunger, as excuse for stealing, 2199.
Hunter, Roman Law, quoted, 17 n. 68 n.
Hunting, 1786.
by inferior tradesmen, 1789, 2014.
by night, or in disguise, 2327.
gleaning and, 1786 n.
privilege of, 1278.
Hurdle, 2264, 2621.
Husband and wife, 604, 2195.
action by husband for battery to wife, 1684.
community property, 1300 n.
competency as witnesses, 632 n.
coverture, 625, 625 n.
deceased wife's sister, 609 n.
disappearance of spouse, 611 n.
divorce, 620.
husband's power over wife's property, 1295.
husband's right of correction, 633.
husband's title by administration, 1299, 1395.
joint estate of, 956, 957 n.
law of property of married women, 1295 n.
lease of wife's lands, 1143.
liabilities of husband, 627, 628 n.
liability of wife to be made bankrupt, 1363, 1373.
marriage, 604.
separate acts of wife, 633.
separate domicile of wife, 626 n.
separate estate and restraint on anticipation, 1298.
suits between, 628.
transactions between, 627.
wife's equity to a settlement, 1298.
wife's power to convey, 1106, 1109 n, 1202.

Husband and wife, wife's title by survivorship, 1296.
will of *feme covert*, 1386.
Hustings, court of, in London, 1598.
Huxley, Thomas, quoted, 55 n.
Hydage, 446.
Hypotheca, 926.

Ice as realty, 733 n.
Identity of person, 2641.
Idiota irquirendo, writ de, 438.
Idiots, 437, 1104, 1107 n.
cannot make wills, 1385.
cognizance of, 2048.
custody of lands of, 437, 437 n.
inspection of, 1929.
marriage of, 614.
Idleness, 2364.
Ignominious punishments, 2621.
Ignoramus, 2534.
Ignorance, as excuse for crime, 2193.
"Ignorance excuses no one," 2189 n.
Illegal conditions, 920.
Illegitimate children, 649.
legitimatizing, 649.
maintenance of, 654.
right to inherit, 1037, 1037 n.
rights and capacities, 655.
Imagining the king's death, 2247.
Imparlance, 1439, 1889, 1891.
Impeachment, in parliament, 2475.
in United States, 2295 n, 2475 n.
Impeachment of waste, 1092.
Imperial chamber, 1548.
Imperial constitutions, 144.
Implied, conditions, 915.
contract, 1310, 1718.
malice, 2404.
warranty, 1118.
Importing, *agnus Dei*, crosses, etc., 2288.
counterfeit money, 2255, 2261.
Impossible act of parliament, 158.
Impossible condition, 920.
Impostures, religious, 2231.
Impotentiæ, property *ratione*, 1242.
Impressment of seamen, 575.
Imprisonment, 231, 2621, 2683.
beyond sea, 237, 2289.
false, 1672, 1673.
Improper feuds, 793.
Incapacities, as punishments, 2621.
Incendiaries, 2427.
Incest, 2235.
Inclosure and Commons Acts, 754 n.
See Enclosure.
Inclosures, destroying, 2461.
In consimili casu, 1562 n, 1708 n.
Incorporation, power of, 680.
Incorporeal hereditaments, 856.
Incorrigible roguery, 2364.
Incumbrances, covenant against, 1431.
Indebitatus assumpsit, 1640 n, 1641 n, 1713, 1713 n, 1724 n.
Indentures, 112, 113 n.
of a fine, 1189, 1436.
Indicavit, writ of, 1609.
Indictable offenses, 2425.
Indictment, 2525.
American requirement of presentment or, 2537 n.
copy of, 1670, 2
locality of, 2531.
Indorsement of bills and notes, 1352, 2688.
Induction to a benefice, 543, 1137, 2279.
Industriam, property *per*, 1239.
Infamous witness, 1979.
Infancy, incidents of, 662, 667.
privileges and disabilities of, 652 n.
Infants, 661, 1385.
carnal knowledge of, 2419.
cognizance of, 2045.
contracts by, 665.
conveyances by and to, 1104, 1107 n
criminal liability of, 2176.
evidence by, 2420.
inspection of, 3, 332.
executors, 1393.
in *ventre sa mere*, 221, 938.
marriage of, 612 n.
mortgages, 665.
necessaries, 668.
privileges and disabilities, 662.
trustees, 665.
who are, 661.
wills of, 1385.
Information, compounding of, 2316.
criminal, 2538, 2676, 2683.
ex officio, 2051, 2539.
ex relatione, 2539.
for charities, 2051.
in American criminal proceedings, 2537 n.
in crown office, 2539.
in ecclesiastical courts, 1622.
in exchequer, 1838.
in nature of *quo warranto*, 2542, 2688.
in rem, 1839.
of superstitious uses, 2053.
Informer, common, 1302, 1722, 2538.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Infortunium, homicide *per*, 2380.
Inheritable blood, failure of, 1035.
Inheritance, 720, 985.
  canons of, 994.
  common-law doctrines of, 985.
  estates of, 853.
  words of, essential to create a fee, 858.
Injunction in equity, 2068.
Injuries, civil, 1487, 1648.
  civil injuries and crimes, 204 n.
  difference between violent and non-violent, 1648 n.
  resulting from fright, 1652 n.
Inland bill of exchange, 1349.
Innkeeper, 34 n.
  action against, 1727.
Innocence, presumption of, 2596 n.
Inns, disorderly, 2361.
Inns of court and chancery, XVI, 34, 34 n, 36, 37.
Inofficious testament, 640, 1392.
Inquest of office, 1835, 2524.
Inquiry, writ of, 2011.
Inquisitio post mortem, 807, 1836.
Inquisition of office, 1835, 2524.
Insanity, as avoiding marriage, 614 n.
  relation of, to criminal responsibility, 2179 n. See Lunatics.
Insidiatio viarum, 2615.
Insimul computassent, 1724.
Insolvency, act of, 1370.
Insolvent debtors, 1370, 2032.
Inspection, trial by, 1928.
Institutes of Justinian, 145.
Institution to a benefice, 542, 2279.
Instanter, trial, 2641.
Insurance, 1340, 1591, 2688.
  bottomry and *respondentia*, 1339.
  interest or no interest, 1341.
  life, 1341.
  marine, 1341.
  wagering policies, 1341.
Interesse termini, 907, 935 n, 1138.
Interest on money, 1336.
  rates of, 1343.
Interested witnesses, 1979.
Interlineation in a deed, 1130.
Interlocutory, decree in chancery, 2077.
  decree in ecclesiastical courts, 1622.
  judgment, 2010.
Interpleader, bill of, 2074.
Interpretation of laws, 58, 99 n, 103.
  authentic, 99 n.
  equitable, 103.
  according to context, 102.
  according to subject matter, 102.
  according to effect, 103.
  according to the reason of the law, 103.
  by meaning of words, 100.
Interregnum, 371.
Interrogatories, examination on, 1994, 2063, 2505.
  in chancery, 2074.
Intestate estates, 1381, 1409.
Intestates, their debts and effects, 2673, 2675.
Intestate succession, 721.
Intoxication, as an excuse for crime, 2187 n.
Intrusion, information of, 1839.
  on freehold, 1738.
  writ of, 1753.
Inventions, patents for, 1263, 1263 n.
Inventory of deceased's effects, 1403.
Investiture, 787, 1135.
Involuntary manslaughter, 2392.
Ireland, 169.
  appeal from Irish courts, 174.
  dependence of, 173.
  home rule in, 174 n.
  union with Great Britain, 174 n.
  parliament of, 171.
Irnerius, 17 n.
Iron, stealing, 2444.
Irons to secure prisoners, 2523, 2554.
Irrepealable laws, 157.
Islands, rights to, 1057, 1057 n.
Issuable terms, 1953.
Issue, at law, 1911, 1911 n.
  collateral, 2641.
  feigned, 2077.
  in criminal cases, 2574.
  in equity, 2074.
  joinder of, 1912, 2576.
  on a *distringas*, 1866.
  plea of the general, 2573.
Itinerant, courts, 2658, 2669.
  justices, 1572, 2669.

Jactitation of marriage, 1612, 1612 n.
Jails and jailers, 484.
James I, 322.
James II, 325.
  abdication of, 257, 325.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Jenks, Edward, Modern Land Law, quoted, 1079 n, 1080 n, 1093 n, 1132 n; cited, 963 n, 1147 n, 1186 n.
in Law Quarterly Review, quoted, 1728 n.
Short History of English Law, cited, 924 n, 925 n, 1134 n, 1171 n, 1948 n, 2654 n.
in Stephen's Commentaries, quoted, 229 n, 277 n, 563 n, 878 n, 906 n, 951 n, 2654 n, 2658 n, 2659 n, 2667 n, 2669 n, 2670 n, 2672 n, 2673 n, 2676 n, 2688 n; cited, 814 n, 910 n.
Jeofails, 2022, 2619, 2686.
Jeopardy, 2546, 2570, 2570 n.
Jersey, Island of, 177.
Jetsam, 424, 1629.
Jew bill of, 1753, 526.
Jews, 2615.
abolition of laws against, 1049 n.
children of, 643.
exclusion of, 526.
John, King, 315.
Magna Carta, 215.
his resignation of the crown to the pope, 2281, 2284.
Joinder, in demurrer, 1912.
of issue, 1912, 2576.
Joint owner of chattel, crown cannot be, 1265.
Joint tenancy, 953.
creation of, 954.
dissolution of, 960.
in lands, 953.
in things personal, 1250.
preferred to tenancy in common, 970.
unities of, 954, 954 n.
Jointure, 896, 954, 1423.
modern law of, 898 n.
relative advantages of dower and, 898.
Judges, 395, 1526, 2687.
as counsel for prisoners, 2591.
assaults upon, 2299.
bias or favor in, 1961 n.
counselors to the king, 345.
depositories of the common law, 116.
killing of, 2256.
of the high court, 1534 n.
tenure of, 395.
threatening or reproaching, 2300.
puisne, 1534 n, 1549 n.
Judgment, 1440, 2008.
action on, 1718, 2040.
arrest of, 2006 n, 2618 n.
debt by, 1347.
in criminal cases, 2618.
in tort, 1303.
nature of obligation arising from, 1718 n.
origin of lien of, 928.
property by, 1300.
relieved against in equity, 2063.
remedy by *elegit*, 928.
title to chattels by, 1300.
Judicature Acts of 1873 and 1875, 1533 n, 1546 n, 1569 n.
effect of, on forms of action, 1642 n.
pleading under, 1905 n.
supreme court of, 1533 n.
Judices, 1967 n.
Judices ordinarii, 1912.
Judicial decisions, 107.
Judicial power, 394, 397.
Judicial writs, 1868.
Judicium Dei, 2576 n, 2578.
Judicium ferri, aquæ et ignis, 2580.
Judicium parium, 1949.
Judicium redditur in invitum, 1719 n.
Juramentum fidelitatis, 778.
Jura rerum, 204 n, 706.
Jure, kin[illegible] *de*, 2249.
Juris et seisinæ conjunctio, 1136.
Jurisdiction, criminal, 396.
ecclesiastical, 148.
demurrer for lack of, 1892 n.
encroachment of, 1635.
of courts of equity, 2043.
of courts, settled by Edward I, 2672, 2673.
plea to, 1891, 2567, 2567 n.
private, 834 n.
Juris utrum, writ of, 1829.
Jurists of the common law, 125.
Jurors, and *jurata*, 1966 n.
qualifications, of, 1963 n.
should understand law, 7.
Jury, carting the, 1986 n.
common, 1957.
grand, 2526.
grand, functions of, 2525 n.
history of trial by, 1948 n.
introduction of trial by, 2669 n.
merits and defects of system, 1989 n.
modern oath of, 2591 n.
number of, 1835 n.
of women, 1962.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Jury, process, 1953 n.
trial by, 1948, 2584, 2661, 2688.
Jus, accrescendi, 960, 1423.
ad rem, 1137.
albinagii, 516 n.
duplicatum, 982.
fiduciarium, 1157.
gentium, meaning of, 68 n.
imaginum, 561.
in re, 1137.
legitimum, 1157.
patronatus, 1824.
prætorium, 1560.
precarium, 1157.
proprietatis, 980.
scriptum and *non scriptum*, 107 n.
Justice, free course of, 243.
homicide in advancement of, 2376.
neglect or refusal of, 1635.
offenses against, 2302.
right to, 243.
Justice-seat, court of, 1589.
Justices of the peace, 489.
appointment of, 491.
jurisdiction of, 494.
number and qualification, 492.
term of office of, 493.
Justicies, writ of, 1544.
Justifiable homicide, 2372.
Justification, in slander, 1666.
of bail, 1878.
plea of, 1899.
Justinian, code of, 145.
corpus juris of, 145.
digest of, 145.
institutes of, 145.
novels of, 145.
pandects of, 145.

Kales, Future Interests, cited, 944.
Keeper, lord, 1557.
Kenney, Outlines of Criminal Law, quoted, 2652 n.
Kidd, A. M., author of notes, 2155 n, 2156–2163 n, 2182–2184 n, 2187 n, 2195 n, 2206 n, 2209 n, 2372–2375 n, 2397 n, 2401 n.
Kidnapping, 2425.
modern punishment of, 2426 n.
Killing, unlawful, 2399.
Kindred, number of collateral, 991.
King, 304.
absolute character of his power, 273
appointing power, 401.
arbiter of commerce, 403.
King, as *generalissimo*, 389.
assent to bills, 259, 297.
can do no wrong, 366.
cannot be joint owner with subject, 1265.
cannot be sued, 361.
compassing or imagining his death, 2247.
constituent part of parliament, 259, 358.
corrective for his mistakes, 367.
councils of, 343.
counsel of, 1529.
courts of, contempts against, 2298.
de facto and *de jure*, 318.
dignity of, 360.
duties of, 351.
enemies of, adhering to, 2254.
expenditures of, 471.
fountain of honor, 400.
fountain of justice, 394.
government of, contempts against, 2297.
grants of, 1182.
guardian or regent, 370.
head of the church, 410.
household and civil list, 467.
injuries to or by, 1831.
legal ubiquity of, 397.
levying war against, 2253.
lord paramount, 791.
money, counterfeiting his, 2255.
legal ubiquity of, 397.
lord paramount, 791.
negative on legislation, 259.
no general occupancy against, 1054
no minority in, 370.
nullum tempus occurrit regi, 368.
palaces of, contempts against, 2298.
pardoning power of, 396.
parliamentary right of remonstrance, 367.
perfection of, 366.
perpetuity of, 371.
person of, contempts against, 2297.
pleasure of, how understood, 2294.
prerogative copyright, 1266.
prerogative of, 355.
contempts against, 2270, 2296.
in debts, judgments and executions, 2038.
proclamations of, 398.
regent, 370.
relation to officers of state, 475 n.
remedy for his oppressions, 364.
refusal to advise or assist, 2296.

King, responsibility of his advisers, 364, 374.
revenue, extraordinary, 442.
ordinary, 412.
royal family, 333.
royal fish, 1255.
seals of, 1557.
counterfeiting, 2255, 2261.
sources of power of, 472.
sovereignty of, 333.
special property of, 1266.
subject to law, 356.
the national representative, 375.
theory of his abdication, 365.
title of, 304.
contempts against, 2297.
title to chattels by prerogative, 1265.
"time runs not against," 368.
to govern according to law, 351.
ubiquity of, 397.
words of limitation in grants to, 860.
King's bench, court of, 1550, 2481.
killing justices of, 2256.
King's court, 33.
King's evidence, 2562 n.
King in council, appeals to, 182 n.
Kings of England, historical review, 310.
Knight to be returned on a lord's jury, 1958.
Knighthood, 559, 807, 2684.
Knight service, 799.
corruption of, 815.
incidents of, 800.
Knights, bachelor, 559.
banneret, 558.
of the bath, 558.
of the garter. 558.
of the shire, electors of, 282.
Knight's fees, 559, 565, 799.

Labor, hard, 2613, 2621.
Laborers, 562, 588.
Laches, 368.
of infant, 665.
Lancaster, county palatine of, 195, 196.
courts of, 1595.
house of, 316.
Land, 729. 732.
entry upon to repossess, 1495 n.
origin of property in, 707 n.
ownership of, 716.
Landed proprietors should know law, 6.
Land tax, 444, 2691.
Langdell, C. C., Brief Survey of Equity Pleading, quoted, 206 n; cited, 925 n, 1725 n.
Summary of Contract, quoted, 1510 n, 1511 n.
Læsæ majestatis crimen, 2246, 2260.
Læsione fidei, suits *pro*, 1564, 1564 n
Lapse, right of, 1083.
of benefices, 2279.
of devise and bequest, 1405.
Larceny, 2437.
appeal of, 2545.
by means of fraud or mistake, 2438 n.
compound, 2453.
from the house, 2453.
from the person, 2455.
grand, 2437.
grand and petit, 2453 n.
mixed, 2453.
modern extended scope of, 2448 n.
of goods found, 2449 n.
of things in action, 2445 n.
petit, 2437.
proof of the felonious intent, 2441 n.
simple, 2437.
simple and aggravated, 2453 n.
subjects of, 2442.
Lathes, 193.
Latitat, writ of, 1552 n, 1872.
Law, 37, 52.
advantages of university teaching of, 40.
a branch of ethics, 38.
as an academic study, 37.
as a rule of human action, 53.
as order of the universe, 52.
Austin's and Holland's definitions of, 51 n.
canon, 21, 142, 146.
authority of, 2668, 2669.
study of, 13.
civil, 143, 148.
reputed conflict with canon law, 21.
study of, 13, 43 n.
common, 107.
consistency with natural justice, 72
courts of, fines and fees, 420.
customary, 115.
definition of, 69 n.
divine or revealed, 64.

Law, offenses against, 3210.
English, in the nineteenth century, 2688 n.
feudal, 2665.
general, map of, 46, 46 n.
Greek, 1918.
hints to student of, 49.
history of English, 2654, 2654 n.
martial, 568, 2683.
meaning of, 51.
merchant, 137, 403, 2237.
modern education in, 45 n.
moral obligation of, 97.
municipal, 68.
definition, 69.
objects of, 199.
of God, 64.
of nations, 67, 2237.
of nature, 56.
religion and, 65 n.
statute, 149.
statutes for amendment of, 2687.
study of, interest in, 5 n.
teaching of, mediæval, 15.
parts of, 54, 91 n.
declaratory part, 54.
directory part, 55.
remedial part, 55.
vindicatory part, or sanction, 56.
university instruction in, 37.
university schools of, 40 n.
unwritten, 107, 2655.
wager of, 1939, 2661, 2671.
written, 149.
written and unwritten, 107 n.
Law French, 1914, 2663.
Law Latin, 1916, 2663.
Law-merchant, 137, 137 n, 403, 2237.
Law of nations, 67, 2237.
whether alterable by legislation, 2236 n.
Law of the land, 229, 232.
Law Quarterly Review, quoted, 670 n.
Law Reporters, 123 n.
Law schools—Inns of Court, 34.
Laws, declaratory, 99 n.
distinction between public and private, 150 n.
interpretation of, 99.
manner of enacting, 293.
of nature and of man, 53 n.
Laws of Alfred, 109.
Laws of Edward the Confessor, 109 n, 110.
Laws of England, countries subject to, 162.
Lawing of mastiffs, 1588.
Lazarets, escaping from, 2353.
Lea, Superstition and Force, cited, 1934 n, 1940 n, 2578 n, 2581 n, 2582 n.
Lead, stealing, 2444.
Leading interrogatories, 2074.
Leaming, A Philadelphia Lawyer in the London Courts, quoted, xviii.
Leap-year, 902.
Lease, 1142, 1419.
and release, 1172, 1172 n, 1419.
defeasance of, 1154.
entry and ouster, rule to confess, 1776.
nonresidence of incumbent, 1147.
to an alien, 1107.
Leasehold interests, as chattels real, 900 n.
present status of, 1147 n.
Leases, 1142.
church leases, 1144 n.
college leases, 1146.
disabling statutes of, 1144.
enabling statutes of Henry VIII, 1143.
right to make, 1142.
statute of 1540, 870.
Leet, 2491, 2658, 2671.
Legacies, 1405.
subtraction of, 1618.
Legacies, 1405.
Legal memory, 113, 748.
Legal treatises, 125 n.
Legatine constitutions, 147.
Legis actiones, 1499 n, 1508 n.
Legislative power, 89.
how far controllable, 266.
supremacy of, 89.
transfer of private titles, 1182 n.
Legislators should study the law, 8.
Legitimacy, 635.
presumption of, 638.
Legitimated children, right to inherit, 1038 n.
Legitimation by subsequent marriage, 635 n.
Lese-majesty, 2246, 2260.
Letter missive, in chancery, 2070.
Letters of marque and reprisal, 384.
Letters patent, 1183.
for inventions, 1263.
Letters, threatening, 2318, 2328.
Levant and conchant, meaning of, 1501, 1816.
Levari facias, writ of, 2034.
Levitical degrees, 610.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Levying money without consent of parliament, 242.
Levying war against the king, 2253.
Lewdness, 2234.
Lex manifesta, 1942.
Lex mercatoria, 137, 403.
Lex non scripta, 107.
Lex scripta, 107.
Liability, primitive notion of legal, 600 n.
Libel, 1660 n, 1666.
  fair comment and criticism, 1662 n.
  indictable, 2336.
  in ecclesiastical courts, 1621.
  modern criminal, 2335 n.
  privilege, 1663 n.
  truth as justification, 1662 n.
Liberam legem, losing one's, 1938, 2017, 2584.
Liber homo, in Magna Carta, 2672 n.
Liberties, English charter of, 215.
Libertics or franchises, 759.
Liberty, civil, 374.
  definition of civil, 1231 n.
  definition of, 5 n.
  natural, 210.
  of the press, 2338.
  personal, 230.
    crimes against, 2424.
    injuries to, 1672.
  political, 211, 374.
Liberum tenementum, 851.
License, from the pope, 2287.
  in *mortmain*, 1073.
  to administer oaths, 1573.
  to agree, in a fine, 1188, 1435.
  wine, 419.
Licensing of books, 4, 439.
Licentia concordandi, 1188, 1435.
Licentia loquendi, 1889.
Liege, 509.
Lieutenant, lord, 2489.
Life, annuities, 1342.
  crimes against, 2372.
  estate for, 873, 1423.
  right of, 220.
Ligan, 424, 1629.
Light, property in, 1253.
  right to, 724.
Lighthouses, 392.
Light presumptions, 1982.
Lights, ancient, in America, 1791 n.
Lightwood, Possession in Roman Law, cited, 978 n.
Limbs, security of, 222.
Limitation, and condition distinguished, 918.
  of actions, 1747, 1760, 1764, 1766, 1827, 2535.
  of indictments, 2525, 2538, 2546, 2587, 2683.
  prescription and, 1061 n.
  statutes of, 981 n, 1900, 1901 n.
  title by, 981.
Limited fee, 860.
Lineal consanguinity, 986.
  warranty, 1122.
Linen, stealing, from place of manufacture, 2452.
Liquor licenses, 419.
Lip, cutting of, 2412.
Littera Pisana, 17 n.
Literary property, 1259.
Littleton, 126, 130 n.
Litigious church, 1822, 1824.
Littoral rights, 1057, 1057 n.
Liturgy, reviling, 2218.
Livery, in chivalry, 807.
  in deed, 1139.
  in law, 1140.
  of seisin, 787 n, 852, 853 n, 1135, 1138, 1417.
Loans, compulsory, 243, 2683.
Local actions, 1883.
Local customs, 134.
Local government, modern legislation on, 192 n.
Locality of trial, 1995, 2532.
Locks on rivers, destroying, 2328.
Locus vastatus, 1093.
Lollardy, 2215.
London, courts of, 1598.
  customs of, 1411.
  franchises of, not forfeitable, 1841, 2671.
  market overt in, 1324.
  mayor and alderman of, their certificate, 1931.
Lord, feudal, 786.
Lord and vassal, 786.
Lord Campbell's act of 1846, 1650 n.
Lords, house of, 261.
  privileges of, 275.
  proxies in, 277 n.
  spiritual, 261.
  temporal, 262.
Lords committees for courts of justice, 1571.
Lords triers, 2445, 2476, 2681.
Lotteries, 2362.
  abolished, 2362 n.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Lucri causa, 2442 n.
Lunatics, 439, 1104, 1107 n, 2180, 2640.
  cognizance of, 2048.
  marriage of, 614.
  wills of, 1385.
Luxury, 2365.
Lynch, M. C., author of notes, 701 n.

McClain, Criminal Law, cited, 2195 n, 2294 n, 2306 n, 2309 n, 2393 n, 2402 n; quoted, 2310 n.
McMurray, O. K., author of notes, 945 n, 949 n, 1102 n, 1176 n, 1300 n, 2043, 2053 n.
  author of Chapter on Conflict of Laws, 2081.
Madder roots, stealing, 2444.
Madness, relation to criminal responsibility, 2179 n.
Magistracy, Blackstone's conception of, 443.
Magistrates, 249.
  oppression of, 2324.
  subordinate, 475.
  supreme, 249.
Magna Carta, 149, 215, 229, 244, 785, 835, 835 n, 1074, 1275, 2670, 2671, 2673.
  celebrated 29th chapter, 2671 n.
  source of parliament, 253.
Magna assisa eligenda, writ *de*, 1950.
Maine, Ancient Law, quoted, 32 n, 712 n; cited, 68 n, 1213 n, 1376 n, 1553 n.
  Early History of Institutions, cited, 778 n.
Mainour, 1588, 2537.
Mainpernors, 1673.
Mainprize, writ of, 1673.
Maintenance of suits, 591, 2311.
  champerty and, in United States, 2312 n.
Maitland, F. W., Collected Papers, quoted, 366 n, 774 n, 978 n.
  Constitutional History of England, quoted, 174 n, 381 n, 400 n, 475 n, 775 n.
Domesday Book, cited, 565 n.
English Law and the Renaissance, quoted, 18 n, 34 n.
Equity, cited, 2043 n.
Law, Quart. Rev., cited, 670 n, 671 n, 677 n.
Maitland and Montague, Sketch of English Legal History, cited, 2654 n.
Making law, 1941.
Maladministration of government, 2295.
Mala in se, 93, 94 n, 98.
Mala prohibita, 94 n, 98.
Male preferred to female, 999, 1022.
Malice, aforethought or prepense, 2403.
  definition of, 2403 n.
  express, 2403.
  implied, 2404.
Malicious mischief, 2458, 2461 n.
Malicious prosecution, 1668, 1671 n.
Malt tax, 449.
Malum in se and *malum prohibitum*, 94 n.
Malus usus est abolendus, 139 n.
Mau, Isle of, 105, 176.
Mandamus, writ of, 1633, 1842, 2688.
  in modern practice, 1633 n.
Mandates, royal, to the judges in private causes, 2673.
Manes, 3 n.
Manors, 833.
  demesne lands, 833.
  origin and definition of, 833 n.
Mansion-house, 2432.
Manslaughter, 2390.
  modern punishment of, in England, 2393 n.
Man-stealing, 2425.
Manumission of villeins, 838.
Manufacturers, encouragement of, 2675.
  seducing them abroad, 2351.
Marchers, lords, 550.
Marches, 550.
Marine insurance, 1341.
Marine felonies, how clergyable, 2616.
  how triable, 2485.
Marines, impressment of, 575.
Mariners, wandering, 2358.
Maritagium, 809.
Maritime, causes, 1627.
  courts, 1585.
  state, 573.
Mark, subscribed to deeds, 1126.
Markby, Elements of Law, cited, 978n; quoted 2192 n.
Market, 403, 762, 1793.
  clerk of, his court, 2492.
  overt, 1323, 1323 n.
  towns, 191.

Marlberge, statute of, 1759 n.
Marque and reprisal, 384, 385 n.
Marquesses, 550.
Marriage, 604.
absence of ceremony in canonical, 618 n.
as a contract, 608 n.
capacity of parties, 608.
celebration of, 616.
civil and canonical disabilities, 610 n.
clandestine or irregular, 617, 2354.
consent of parties, 606.
contract, suit for, 1612.
coverture, 625.
disagreement to marriage of infant, 612.
disabilities, 608.
dissolution of, 620.
ecclesiastical jurisdiction over, 605.
effect on will, 1387.
existing prior marriage, 611.
forcible, 2414.
formal or by reputation, 616 n.
incapacity of husband and wife as witnesses, 631.
in chivalry, 809, 2665, 2667.
in ecclesiastical law, 605 n.
insanity as avoiding, 614 n.
jactitation of, 1612 n.
legal consequences of, 625.
liabilities of husband, 627.
license for, 616.
licenses and registers, forging or destroying, 2355, 2464.
mental incapacity as affecting, 614.
nonconsent of parents, 612.
of royal family, 2290.
of ward, 809, 831.
penalty for solemnizing clandestine, 2355 n.
property by, 1294.
separate acts of wife, 633.
suits by and against wife, 628.
transactions between husband and wife, 627.
void and voidable, 619.
want of age, 612.
Marriage settlement, 1205.
Married women, capacity to convey, 1107, 1109 n.
law of property of, 1295 n.
Marshal, earl, court of, 1546, 1584.
Marshal of the king's bench, 1552, 1872.
Marshal of the king's host, certificate of, 1931.
Marshalsea, court of, 1592, 1594 n, 2494.
Martial, courts, 568.
law, 568, 2683.
Mary, Queen, 321.
Mass books, 2288.
Master in chancery, 2068.
Master of the rolls, 2068.
judicial authority of, 2076.
Master and servant, 579.
actions for enticing away a servant, 1686 n, 1691.
assault on master, 590 n.
battery of a servant, 1695.
classes of servants, 581.
employers' liability acts, 594 n.
fellow-servant, law of, 592 n.
injuries to master, 1689.
master's liability, 592.
master's right of correction, 590.
relation of service, 589.
servant's negligence, 600.
service and agency distinguished, 579 n.
slavery, 581.
workmen's compensation acts, 596 n.
workmen's industrial insurance, 598 n.
Materia prima, 1918.
Matrimonial causes, 1610.
Matrons, jury of, 1762, 2640.
Maxims of the law, 115.
Mayhem, 222, 1655, 2411.
appeal of, 2545.
inspection of, 1930.
offense of, 2411.
Mayors among the Saxons, 2660.
Measures, weights and, 2492, 2671.
false, 2345.
Medietate linguæ, jury *de*, 1959, 2303, 2359, 2496, 2588.
abolished, 2588 n.
Medio, writ *de*, 1812.
Mediterranean passes, counterfeiting of, 2464.
Members of parliament, 258.
privileges of, 271.
qualifications of, 287.
qualifications of electors of, 281.
Memory, time of legal, 113, 748.
Menaces, 1651.
Mensa et thoro, divorce *a*, 623, 1613.
Mercen-lage, 110, 2659.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Merchants, custom of, 137.
foreign, 2677.
protection of, 386.
Merchant trader, who is, 1361.
Mercheta, 824.
Merger, doctrine of, 951, 952 n.
as distinguishing joint tenancy, 962.
Merton, parliament of, 29.
Mesne lords, 796.
Mesne process, 1865, 2031.
Mesne profits, action for, 1778.
Mesne, writ of, 1812.
Messuage, 735.
Michel-gemote, 251.
Michel-synoth, 251.
Middlesex, bill of, 1552 n, 1871.
county court of, 1600.
Military, causes, 1625.
courts, 148, 1584.
feuds, 792.
occupation, 1069 n.
offenses, 571, 2275.
power of the crown, 389.
service, 418, 789, 792, 799.
state, history of, 563.
tenures, 418.
abolition of, 810.
Militia, act of 1661, 339.
Alfred's, 564.
from time of Henry II, 566.
reorganization of in 1661 and 1663, 567.
Miller, W. G., Data of Jurisprudence, quoted, 65 n.
Mines, 427.
destroying their works, 2460.
included in land, 733.
royal, 426.
stealing ore out of, 2445.
Ministers, responsibility of the king's, 374.
Minor, R. C., Conflict of Laws, quoted, 1248 n; cited, 2082 n.
Minority, incidents of, 662.
Mirror, The, 129 n.
Misuser in office, ground of forfeiture, 915.
Misadventure, homicide by, 2380.
Mischief, malicious, 2458.
Misdemeanors, 2147, 2151, 2295.
high, 2295.
treason, felony and, 2152 n.
Mise, or issue, 1898.
Misfortune, unlawful act by, 2183.
Misnomer, consequence of, 1892, 2569, 2569 n.
Mispleading, when cured by verdict, 2007.
Misprision, 2292.
of felony, 2294.
modern law of, 2294 n.
of treason, 2293.
modern law of, 2293 n.
Mistake, as excuse for crime, 2191 n.
killing by, 2192 n.
Mitigating circumstances, in criminal law, 2169.
Mitter le droit, 1150.
Mitter l'estate, 1150.
Mittimus, 2523.
Mixed actions, 1647.
Mixed larceny, 2453.
Modern Criminal Science Series, cited, 2163 n.
Modus decimandi, 746.
Moerda, Teutonic word for murder, 2396.
Moieties between husband and wife, 957 n.
Molliter manus imposuit, 1655.
Monarchy, 85.
monarchies elective and hereditary, 306.
Money, 407.
bills, 277, 297.
counterfeiting, 2255, 2260.
expended for another, action for, 1724.
interest upon, 1336.
legal tender, 407.
payment of, into court, 1896.
received to another's use, action for, 1723.
Monopolies, 2349, 2683.
Mr. Justice Field on, 2347 n.
statute against, 1263.
stay of suits therein, 2288.
Monks, civil death, 226.
Monsters, cannot inherit, 1036.
Month, 902, 903 n.
Monstrans de droit, 1833.
obsolete, 1833 n.
Moral consideration, 1317.
Morawetz, Private Corporations, quoted, 684 n, 686 n; cited, 688 n.
Mort d'ancestor, 1755, 1759 n, 1843 n.
Mortgage, 921, 921 n, 923.
jurisdiction of equity, 2060.
mortgagee's right of possession, 925.
tacking, 924 n.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Mortmain, 693, 1071, 1071 n.
act of 1888, 1079 n.
devises in, 1216, 1216 n.
license of, 1073.
meaning of word, 1071 n.
personal annuities of inheritance, 768.
statutes of, 693, 1072, 1078, 2281, 2671, 2674, 2688.
Mortuaries, 1285.
Mortuo vadio, estate *in*, 923.
Mother, rights of, 648 n.
Mother-church, 189.
Motion in court, 1896.
Mountebanks, 2361.
Movables, 1229.
property in, 715.
Mulier puisne, 1038.
Multiplicity of laws, 1922.
Municipal corporations, 673 n.
Municipal law, definition, 69.
Murder, 2395.
by perjury, 2321, 2399.
degrees of, 2398 n.
malice aforethought, 2403.
name of, 2396 n.
when subject to pardon, 2396, 2645
Murdrare, 1917.
Murdrum, 1917, 2397.
Mute, standing, 2300, 2556.
in modern law, 2557 n.
Muta canum, 1287.
Mutilation, 1655, 2412, 2413.
punishment by, 2621.
Mutiny act, 570.
Mutual debts, 1898.

Nanium vetitum, vel repetitum, 1702, 1702 n.
National debt, 463, 2687.
amount of British in 1913, 463 n.
Nations, law of, 67.
offenses against, 2236.
Nativi, 837, 840 n.
Natural-born subjects, 507, 513.
Natural liberty, 210.
Natural life, 226, 874.
Naturalization, 402, 521, 1042 n.
act of 1870, 516 n.
alienage and, 523 n.
Nature, crime against, 2422.
Nature, law of, 53 n, 56, 56 n.
Navigation, destroying, 2459.
hard labor for the benefit of, 2613.
Navigation acts, 574, 2686.
Navy, articles of, 576.
the royal, 575.
recruiting of, 575.
Necessaries, liability for, 642.
Ne admittas, writ of, 1826.
Necessity, excuse for crime, 2194.
homicide by, 2373.
Ne exeat regno, 237, 2246.
writ of, 392.
Ne injuste vexes, writ of, 1811.
Neglect of duty, action for, 1727.
Negligence, 1657 n, 1726, 1728 n.
death from, 2392 n.
of officers, 2324.
responsibility for, 1784 n.
Negligent escape, 2031, 2305.
Negotiability of bills and notes, 1351.
Negotiable instruments, 1351.
American uniform acts, 1352 n.
See Bills and Notes.
Negro, 214, 586, 1253.
slavery abolished, 586.
Neife, 837.
Nembda, 1948.
Nemo est heres viventis, 858.
Next of kin, 1011.
distribution among, 1408.
right of, to administer, 1395.
Nervous shock, injury resulting from, 1652 n.
New assignment, 1907.
New trial, 1998.
grounds of, 1998 n.
history of, 1998 n.
in United States, 2619 n.
News, spreading false, 2333.
Nient culpable, plea of, 2574.
Night, in burglary, what is, 2431.
Night-walkers, 2514.
Nihil, return of a, 1868.
Nihil debet, plea of, 1898.
Nihil dicit, judgment by, 1886, 2010.
Nisi prius, 1574 n.
courts of, 1572.
justices of, 1572, 2482.
trial at, 1954, 2586.
writ of, 1853.
Nobility, 263, 549.
how created, 553.
how lost, 557.
incidents of, 555.
its uses, 263.
study of law by, 10.
titles of, 400.
Nocturnal crimes, preventing or resisting, 2377.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Nolle prosequi, 2568 n.
Nolumus leges Angliæ mutare, 20 n.
Non assumpsit infra sex annos, 1901.
  plea of, 1898.
Nonclaim, right of, 1192.
Non compos mentis, 439, 1104, 1107 n, 1385, 2179, 2640.
Nonconformists, 2219, 2679.
  controversy over Blackstone's treatment of, 2217 n.
  Toleration Act, 2223 n.
Non constitit, 2555.
Non cul., 2574.
Non culpabilis, plea of, 1898, 2574.
Non decimando, prescription *de*, 748.
Non est factum, plea of, 1898.
Non est inventus, return of, 1869.
Nonjuror, 2298.
Non obstante, doctrine of, 480, 1078, 2646.
Nonpayment of ecclesiastical dues, 1608.
Non prosequitur, 1885.
Nonsuit, 1885, 1913, 1986.
  judgment as in case of, 1956.
Non sum informatus, judgment by, 2011.
Nonuser, ground of forfeiture, 915.
Norman Conquest, 313, 781, 1030, 2661.
Norman isles, 177.
Norman line, 313.
Normandy, *grand coustumier* of, 177.
Northern borders, rapine on, 2459.
Nose, cutting or slitting, 2413, 2463, 2621.
Not guilty, plea of, 1898, 2573.
Note of a fine, 1189, 1435.
Notice, to quit, 909.
  in ejectment, 1776.
  of trial, 1956.
  to terminate estate at will, 909.
Novel disseisin, assize of, 1758, 1843 n.
  writ of, 21 n.
Novels of Justinian, 145.
Nude pact, 1317, 1317 n.
Nudum pactum, 1317, 1317 n.
Nuisance, abatement of, 1496, 1496 n.
  assize of, 1797.
  coming to a, 1254 n.
  common, 2360.
  kinds, 1794 n.
  nature of, 1790 n.
  private, 1790.
  remedies for, 1794 n.
Nullum tempus occurrit regi, 368, 368 n, 1054, 1085.
Nul disseisin, plea of, 1439.
Nul tiel record, 1927.
Nul tort, plea of, 1898.
Nuncupative wills, 1389, 1389 n.
Nuper obiit, writ of, 1757.

Oath, of allegiance, 509.
  coronation, 352.
    anti-Catholic features removed, 354 n.
  ex officio, 1622, 2073.
  of the party, 1993.
  to the government, refusal or neglect to take, 2289, 2298.
  voluntary and extrajudicial, 2320.
Obiter dictum, 121 n.
Objects of the law, 199.
Obligation, arising from a judgment, 1718 n.
  ex delicto and *quasi ex delicto* 2153 n.
  or bond, 1173, 1433.
Obligation of human laws, 97, 99.
Obstructing of process, 2304.
Occupancy, 711, 1050, 1251.
  common, 1055.
  estate *pur autre vie*, 1052.
  military, 1069 n.
  of new lands left by sea or river, 1057, 1057 n.
  original occupancy obsolete in England, 1050 n.
  original title to property, 718.
  special, 1055, 1056 n.
Occupying claimant, 1061.
Odgers, Libel and Slander, cited, 1665 n.
Odhal right, 777 n.
Odio et atia, writ *de*, 1673.
Offensive trades, nuisance by, 1792.
Office, inquest of, 1835.
  of the six clerks, 2068.
"Office found," 1836.
Officers, arrest by, 2512.
  without warrant, 2512 n.
  killing of, in execution of office, 2409.
  of courts, their certificates, 1933.
  refusal to admit, 1842.
  removal of, 1842.
  resisting, 2304 n.
Offices, 758.
  and pensions, duty on, 462.
  appointment to, 401.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Offices, whether right to office is property, 758 n.
Officio, oath *ex*, 1622, 2072.
information, *ex*, 2051, 2539.
Oleron, laws of, 574, 2670.
Opening counsel, 1968.
Oppression of magistrates, 2324.
Optional writs, 1859.
Orchards, robbing of, 2444.
Ordeal, trial by, 2578, 2661, 2672.
Orders, holy, 540.
Order of sessions, 2489.
Original compact, 82.
Original contract, of king and people, 351.
of society, 82.
Original conveyances, 1132.
Original process, 1865.
Original writ, 1856.
in United States, 1856 n.
office of, 1857 n.
Ostium ecclesiæ, dower *ad*, 891, 892 n.
Ouster le main, 806.
Ouster, of chattels real, 1770.
of freehold, 1737.
Outlawry, 244, 1047 n, 1870, 2550.
obsolete or abolished, 2550 n.
Overseers of the poor, 500.
Overt, act of treason, 2250, 2257, 2594.
market, 1323.
pound, 1505.
Owling, 1281, 2340.
Ownerless things, 725.
Ownership, 975 n.
and possession distinguished, 975 n.
in common, 711.
individual, 712.
nature of, 983.
transfer of, 719.
Oxford University, government of, 678 n.
Oyer, 1890.
Oyer and terminer, commission of, 2486.
justices of, killing them, 2256.
Oyez, 2576 n.

Pains and penalties, act to inflict, 2475.
Pais, matter *in*, 1111.
trial *per*, 1948, 2584.
Palace, court of the, 1593, 1594 n.
Palatine counties, 194, 196, 2678.
courts of, 1596.
Paley, Moral Philosophy, quoted, 373 n.
Pandectæ Florentinæ, 17 n.
Pandects of Justinian, 145.
reputed discovery at Amalfi, 16, 17 n.
Panel of jurors, 1953, 2526, 2586.
Papal encroachments, 2277.
process, obedience to, 2287.
Paper books, 1914.
Paper credit, 1345.
Papists, 643, 1048, 1108.
abolition of law against, 1049 n.
children of, 643, 646.
disabilities of, 1048, 1108.
laws against, 2223, 2259, 2679.
removal of disabilities of, 2227 n.
Paramount lord, 795, 835.
Paraphernalia, 1299, 1299 n.
Paravail, tenant, 796.
Parceners, 964.
Parco fracto, writ *de*, 1699.
Pardon, 2547, 2620, 2639.
effect of in United States, 2642 n.
exile by conditional, 2647 n.
for discovering accomplices or receivers, 2564.
not pleadable to impeachment, 2477, 2641, 2687.
plea of, 2572.
prerogative of, 2641.
Pardoning power, 396.
Parent and child, 635.
injuries affecting a parent, 1687.
Parents, 635.
duties of, 636, 641 n.
of bastard children, 654.
powers of, 647.
support of, 649.
Parcs curiæ, 787.
Parcs, trial *per*, 1949.
Paris, Declaration of, 1252 n.
Parish, 187, 739.
Parks, 763, 1275.
Parliament, 243, 248, 2660, 2672, 2675, 2687.
a bulwark of personal rights, 243.
adjournment, 300.
beginnings of, 250.
consent of all parts, 265.
constituent parts of, 258.
convoking of, 257.
court of the king in, 2475, 2479.
democratization of, 267 n.
dissolution of, 301.
disuse of, 2684.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Parliament, Irish, 171.
jurisdiction of each house over its own affairs, 270.
law and custom of, 266.
may judges disregard acts of, 63 n.
meeting of, 254.
under Parliament Act of 1911, 281 n.
number of members of, 264.
of France, 251.
of Merton, 29.
omnipotence of, 266.
origin of, 253 n.
Parliament Act of 1911, 266 n, 279 n, 297 n, 303 n.
power to legislate for colonies, 18.
power over Irish Parliament, 173.
privileges of, 271, 275 n.
prorogation of, 300.
qualification of members of, 269.
rolls, 295.
septennial, 303.
sessions of, 299.
triennial, 303.
Parliamentum indoctum of 1404, 289.
Parol, contracts, 1309.
demurrer, 1870.
evidence, 1978.
pleadings, 1881.
Parricide, 2408.
Parsons and vicars, 536.
appointment of, 540.
powers and duties of, 542.
Particular, estate, 933.
tenants, alienation by, 1081.
Partidas, las, 111.
Parties to a deed, 1114, 1419, 1421.
to a fine, 1193.
Partition, 961, 972.
deed of, 1148.
in United States, 1149 n.
of joint tenancy, 961.
of tenancies in common, 972.
writ of, 961, 963, 1895.
abolished, 961 n.
Partners, interest of, in personalty, 1250.
survivorship between, 1250.
Passports, 385.
violation of, 2238.
Pasturage, right of, 750.
Pasture, common of, 750.
Patent, letters, 1183.
of precedence, 1529.
rights, 1263, 1263 n. 2348.
Patriam, trial *per*, 1948, 2584.
Patron, 738.
Patronage, 738.
disturbance of, 1820.
Pauper, excused from paying costs, 2014.
Pawnbroker, 1328.
Payment, of deceased's debts, 1403.
of money into court, 1896.
Peace and war, right of making, 382.
Peace, breach of, 2326.
clerk of, 2489.
commission of, 491, 2486.
conservators of the, 489.
justices of, 489, 2488, 2498, 2510, 2512, 2675.
offenses against, 2326.
security for, 2466, 2470.
the king's, 195, 396, 490.
Peculatus, 2295.
Peculiars, court of, 1581.
Pecuniary causes, in ecclesiastical courts, 1606.
Pedigree, tracing a, 1024.
Peerage, benefit of, in offenses, 2610.
privileges of, 554 n.
varieties of, 557 n.
Peeresses, 556.
Peers, 553, 555.
great council of, 343.
house of, 1569.
how created, 553.
modern trial of, 2479 n.
of the lord's court, 789.
pedigrees of, 1627.
privileges of, 555, 1958, 2469, 2491, 2610.
right of audience, 344.
trial by, 555, 2476, 2584.
Peine forte et dure, 2557.
in America, 2557 n.
Penal statutes, 2676.
Penalties, title to, by judgment, 1302.
Penalty of a bond, 2060.
Penance, commutation of, 2279, 2423, 2493.
for standing mute, 2557.
in ecclesiastical courts, 2279, 2493, 2611.
Pendente lite, administration, 1393.
Penitentiary houses, 2613.
Pensions, duty on, 462.
from foreign princes, 2296.
People, the, 507.
Permissive waste, 1089.
Per and *cui*, form of writ of entry, 1751.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Per my et per tout, seisin, 956, 956 n.
Peremptory, challenges, 2588, 2641.
mandamus, 1635, 1842.
writ, 1858.
Perjury, 2319.
elements of crime of, 2319 n.
in capital cases, 2321, 2400.
Perpetuating testimony, 2075.
Perpetuities, rule against, 945, 945 n.
Per quod, 1665.
Per quod consortium amisit, 1687.
Perry, Common Law Pleading, quoted, 1856 n, 1857 n, 1871 n, 1873 n; cited, 1911 n.
Persecution, religious, 2213, 2676, 2679.
Person, injuries to the, 1650.
larceny from the, 2455.
offenses against the, 2372.
Personal, actions, 1646.
chattels, 1236.
liberty, 230.
security, 220.
things, 1229.
where actions die with the person, 1893.
Personalty, 1229, 1237.
animals *feræ naturæ*, 1254.
chattels real and chattels personal, 1233.
chose in action, 444.
copyright, 1259, 1262.
emblements, 1255.
entail of, 1248.
goods found, 1253.
may be settled for life with remainder over, 1248.
property in animals, 1237.
recaption of, 1494 n.
title by accession, confusion, and intermixture, 1256.
title by gift, grant, and contract, 1305.
title by occupancy, 1251.
title by prerogative, 1265.
title of partners to, 1250.
Personating, others in court, etc., 2303.
proprietors of stock, 2464.
Persons, artificial, 205, 667.
natural, 205.
rights of, 205.
Persons, rights and law, divisions of, 228 n.
Peter-pence, 2280.
Petit serjeanty, 822.
Petit. See Petty.
Petition, of appeal, 2080.
of bankruptcy, 1365.
right of, 245.
Petition of right, 216, 363, 1832, 2683.
proceedings upon, 1832 n.
Petitioning, right of, 2331.
tumultuous, 2331.
Petty, bag office, 1559.
jury, 1950.
larceny, 2437.
session, 2489.
treason, 2246, 2408.
Pews, rights in, 1290, 1290 n.
Physicians, 1656, 2401.
criminal liability of, 2401 n.
degree of skill required of, 1656 n.
should be acquainted with law, 12.
Picketing, 1692 n.
Piepoudre, court of, 1539, 1540 n.
Pignus, 926.
Pillory, 2621.
Piracy, 2241.
Piscary, common of, 754, 755 n.
Placemen, excluded from house of commons, 2687.
Plagiarii, 2426.
Plague, irregularity during, 2353.
Plaint, 1858.
Plaintiff, 1526.
Plantagenet, house of, 314.
Plantations, destroying of, 2459.
Plantations in America, 178.
Plants, destroying of, 2459.
stealing of, 2444.
Plea, at law, 1439, 1891.
declinatory, 2567, 2609.
dilatory, 1891.
in bar of execution, 2641.
in denial or bar, 1898.
in equity, 1596.
to indictment, 2565.
to the action, 1895.
to the jurisdiction, 2567 n.
Pleading, 1881, 2674.
in criminal cases, 2565 n.
in equity, 2067.
under the codes, 1881 n.
under the Judicature Act, 1905 n.
Pleas of the crown, 1549, 2148, 2671.
Pleasure of the king, meaning, 2307.
Pledge, 1328.
estate in, 921.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Pledges, of appearance, 1866.
of prosecution, 1434, 1438, 1859.
Plegii de prosequendo, in replevin, 1700.
Plegii de retorno habendo, 1701.
Plenarty, 1821.
Plenum dominium, 1136.
Plough-bote, 756.
Pluries, habeas corpus, 1681.
Pluries writ, 1867, 2549.
Pocket sheriffs, 480.
Poisoning, 2399.
Political, liberty, 211.
rights, 218, 247.
Police, offenses against public, 2354.
Policies of assurance, 2688.
court of, 1591.
Poll, deed, 1113, 1113 n.
Polling at elections, 292.
Polls, challenge to the, 1960, 2588.
Pollock, Essays in Jurisprudence and Ethics, quoted, 53 n.
First Book of Jurisprudence, quoted, 123 n, 975 n, 976 n, 978 n; cited, 1914 n.
Genius of the Common Law, cited, 978 n.
Land Laws, quoted, 753 n, 772 n, 839 n, 860 n, 1071 n, 1147 n, 1161 n, 1162 n, 1164 n, 1195 n, 1498 n, 1505 n.
Law Quart. Rev., quoted, 671 n, 2408 n.
notes to Maine's Ancient Law, quoted, 676 n, 715 n; cited, 68 n.
Oxford Lectures, quoted, iii, 489 n.
Torts, quoted, 62 n.
Pollock & Maitland, History of English Law, quoted, 29 n, 127 n, 421 n, 433 n, 437 n, 485 n, 515 n, 551 n, 552 n, 618 n, 778 n, 788 n, 790 n, 800 n, 811 n, 823 n, 880 n, 900 n, 1072 n, 1492 n, 1702 n, 1754 n, 1807 n, 1887 n; cited, 738 n, 750 n, 792 n, 796 n, 804 n, 814 n, 822 n, 825 n, 832 n, 834 n, 835 n, 868 n, 884 n, 899 n, 1377 n, 1558 n, 1810 n, 1865 n, 1867 n, 1932 n, 1933 n, 1934 n, 1940 n, 1984 n, 2609 n, 2654 n.
Pollock & Wright, Possession in the Common Law, quoted, 973 n, 974 n, 1050 n.
Polygamy, 611, 2356.
Pomeroy, Code Remedies, cited, 1884 n.
Equity Jurisprudence, quoted, 921 n; cited, 2044 n.
Pone, writ of, 1541, 1545, 1767, 1866.
Poor, 500.
certificate of, 505.
laws, 226, 500.
overseers of, 501.
relief act of 1601, 501.
relief act of 1662, 502.
removal of, 504.
Pope, destruction of his authority, 2277, 2675, 2677.
encroachments of, 2277, 2666, 2671.
jurisdiction, defending, 2259, 2288.
reconciliation to, 2259.
Popery, 2224.
Popish, books, importing or selling, 2288.
priest, 2225, 2259, 2288.
recusants, 2224, 2298.
seminaries, 646, 2224, 2288.
Popular actions, 1722.
Portland, Isle of, 176.
Port-reeve, 2660.
Ports and havens, 392.
Positive proof, 1980.
Posse comitatus, 482.
neglecting to join, 2296.
Possessio fratris, 1015.
Possession, actual right of, 1749.
adverse, 1068.
and ownership, distinction between, 975 n.
apparent right of, 1747, 1749.
estates in, 931.
mere naked, 973, 1746.
nature of, 973 n.
property in, 1237.
right of, 978.
title by, 973.
writ of, 1775, 2028.
Possessory action, 1750.
Possibility upon a possibility, 939.
Post, writ of entry *sur disseisin* in the, 1752.
Post-disseisin, writ of, 1759.
Postea, 1997.
Post fine, 1189.
Posthumous children, 939.
Postliminium, 518 n.
Postman in the exchequer, 1530.
Postoffice, 456.
misbehavior of officers of, 2446.
stealing letters from the, 245.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Pound, 1505.
breach of, 1699.
Pound, Roscoe, Common Law and Legislation, quoted, 158 n, 159 n.
Readings on the History and System of the Common Law, quoted, 203 n, 1640 n; cited, 1522 n.
in Harvard Law Review, quoted, 2236 n.
Readings in Roman Law, cited, 1553 n; quoted, 1712 n.
Poundage, 450, 2683.
Pow-dike, cutting, 2459.
Poynings' law, 171.
Præcipe, 1188, 1188 n, 1843 n.
common recoveries, 1198, 1437.
fines, 1188, 1434.
tenant to, 1198, 1752.
writ of, 1766, 1859.
Præmunire, 2276, 2675.
penalty for unlawful imprisonment, 238.
penalties of, 266 n.
prosecutions for, obsolete, 2290 n.
Prærogativa regis, reputed statute of, 421 n, 835.
Prebendary, 535.
Preaudience, 1529.
Precedence, 1626.
patents of, 1529, 1529 n.
Precedent conditions, 917.
Precedents, doctrine of, 116, 118 n.
Precontract, 609.
Pre-emption, 2289, 2671, 2685.
prerogative of, 418.
rights, 1052 n.
Pregnancy, plea of, 2639.
trial of, 651, 2639.
Premises of a deed, 1166, 1417, 1418, 1419.
Prerogative, 355, 375, 2678.
causes of its increase and decline, 2680.
classes, direct and incidental, 358.
contempts against, 2295.
constitutional, 355.
copyright, 1266.
court, 1401, 1581.
domestic, 388.
felonies against, 2270.
fiscal, 412.
former pretentions, 355.
historical view of king's, 357 n.
limited, 243.
meaning of, 357.
Prerogative, property by, 1265.
restrictions on, 470.
title to chattels by, 1265.
Prescription, 1061.
act of 1832, 1063 n.
commencement of time of legal memory, 748.
corporation by, 680.
discharge from tithes, 766.
distinction between custom and, 1062.
in a *que* estate, 1067, 1068 n.
in respect of common, 750.
none in matter of record, 1067.
sixty year period of, 1768 n.
time of, 748.
title by, 978 n, 1061.
to right of way, 757.
Presentation to benefice, 541.
Presentment of offenses, 2524, 2524 n.
American requirement of indictment or, 2537 n.
Press, liberty of, 2338.
Pressing to death, 2560.
in America, 2557 n.
Presumptions, 1980.
meaning of, 1981 n.
of innocence, 2596 n.
Presumptive evidence of felony, 2596.
heir, 995.
Pretended titles, selling or buying, 2316.
Pretender and his sons, treasons relating to, 2263.
Prevention of crime, 2466.
homicide in, 2378.
Price, 1320.
Priest, 540.
Primariæ preces, 533.
Primary conveyances, 1135.
Primer fine, 1189.
Primer seisin, 804, 830, 2665.
Primitiæ, 415.
Primogeniture, 791, 825 n, 1001, 1002, 2668.
Prince consort, 338.
Prince of Wales, 162, 339.
Princes and princesses of the royal blood, 342.
Princess of Wales, 162, 339.
violation of, 2252.
Principal and accessory, 2201.
distinction between, 2206 n.
Principal, challenge, 1963.
Priories, alien, 538.
Priority of debts, 1403.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Prisage, 450.
Privacy, right of, 220 n.
Prison, breach of, 2306.
Prisoners, chaining of, 2554 n.
counsel for, 2593 n.
swearing the witnesses for, 2598 n.
Prit., 2574.
Privacy, right of, 1667 n.
Private, act of parliament, 1180, 1180 n.
nuisance, 1790.
persons, arrest by, 2514.
property, right of, 239.
wrongs, 1487.
Privately stealing from the person, 2455.
Privies to a fine, 1294.
Privilege, 402.
bill of, 1877.
from arrests, 1876.
parliamentary, 275 n.
writ of, 273.
Privileged, places, 2384.
villeinage, 843.
Privileges, 402.
Privilegium, property *propter*, 1242.
Privilegium clericale, 2607.
Privy council, 345.
appointment, 346.
duties, 347.
dissolution, 350.
judicial committee of, 1571 n.
jurisdiction, 347, 348 n.
privileges, 348.
qualifications, 346.
Privy counselor, 346.
appointment of, 346.
duties of, 347.
killing or attempting to kill, 2273.
privileges of, 348.
qualifications of, 346.
Privy, seal, 1183.
signet, 1183.
verdict, 1987, 2599.
Prize, causes, 1631.
commission of, 1585.
Probable presumption, 1987.
Probate of wills, 1382, 1397.
Probation of offenders, 2472 n.
Procedendo, writ of, 493.
Procedure of courts, alterable only by parliament, 244.
Procedure, in courts of equity, 2067.
in ecclesiastical courts, 1619.
in prohibition, 1638.
simplicity of, 1926.
Process after indictment, 2549.
civil, 1865.
obstructing its execution, 2304.
in equity, 2043.
Prochein ami, 663.
Proclamation of a fine, 1437.
Proclamation, by the king, 2678.
on attachment in chancery, 2069.
on *exigent*, 1870, 2550.
on the riot act, 2327.
writ of, 1870.
Pro confesso, 2576.
Proctor, 1526.
Procuration money, 2344.
Prodigals, 441.
Profanity, 2229.
Professor of the laws, character of his duties, 46.
Profits *à prendre*, 1064 n.
Progress, of the laws of England, 2654.
royal, 2658.
Prohibition, declaration in, 1638.
historical uses of writ of, 1637 n.
procedure in, 1638.
province of writ of, 1635 n.
writ of, 1635.
Promise, action of *assumpsit*, 1716.
Promissory notes, 1350.
Promulgation of laws, 75, 298.
Proofs, 1973.
in ecclesiastical courts, 1621.
Proper feuds, 793.
Property, 705.
crimes against, 2437.
definition of, 705.
injuries to personal, 1697.
in animals, 1237, 1254.
in land, 708 n, 716.
in things personal, 1237.
in personalty, as to time of enjoyment and number of owners, 1248.
in waters, 732.
meaning of, 1233.
mere right of, 980.
origin of, 707.
qualified, limited or special, 1238, 1244.
real and personal, distinguished, 726, 726 n.
right of, 239, 1762.
right of presentation to church, 740.
rights to, in general, 980.
succession to on death, 720.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Property, superjucent and subjacent space, 733, 734 n.
things in common, 724.
title by occupancy, 1241.
Prophecies, pretended, 2334.
Proprietary governments in America, 181.
Proprietate probanda, writ *de*, 1701.
Prorogation of parliament, 300, 300 n, 301 n.
Prosecution, expenses of, 2601.
of offenders, 2524.
malicious, 1668.
Prostitutes, 2364.
Protection, writ of, 1877.
Protest of bills and notes, 1353.
Protestant succession, 330.
treason against, 2263.
Protestant dissenters, 2221.
Protestation, 1908.
Proving will in chancery, 2075.
Provinces of Canterbury and York, 181.
Provincial, constitutions, 147.
governments in America, 180.
Provisions, selling unwholesome, 2354, 2354 n.
Proviso, trial by, 1956.
Provisors, statutes against, 2283.
Proxies in house of lords, 277 n.
Puberty, age of, 2177.
Public calling, law of, 1327 n.
corporations, 673 n.
funds, liability of custodian of, 1725 n.
grants, 1184 n.
interpretation of, 1184 n.
verdict, 1987.
wrongs, 2147.
Publication of depositions, 2075.
Pueritia, 2177.
Puis darrein continuance, plea, 1913.
Puisne, barons of the exchequer, 1554.
judges, 1534 n, 1549 n.
justices, 1550.
Pulsation, 1654.
Punishment, 2157, 2449, 2683.
capital, 2163, 2172.
certainty of, 2622.
extent of, in England, 228.
infliction of, 2474.
measure of, 2166.
modern, in England, 2620 n.
object of, 2165, 2466.
power of, 2156.
severity of, 2170.
Pur autre vie, tenant to, 873.
Purchase, 1029.
defined, 1029.
distinguished from escheat and descent, 984, 1029.
rule in Shelley's Case, 1030, 1030 n.
title by, 1029.
of writs, 1856.
Purchaser, first, 1007.
Purgatio vulgaris, 2578.
Purgation, canonical, 1941, 2611.
oath of, 1621, 2073.
Purpresture, 2361.
whether a nuisance, 2361 n.
Pure villeinage, 833.
Pursuit of remedies, 1854.
Purveyance, 2289, 2670, 2685.
prerogative of, 418.

Quadruplicatio, 1905.
Qualification, for killing game, 2370.
of jurors, 1962, 2588.
Qualified, fees, 860.
property, 1238.
Quantum meruit, 1723.
Quantum valebat, 1723.
Quarantine, widows', 295.
irregularity in, 2353.
Quare clausum fregit, 1868.
Quare ejecit infra terminum, writ of, 1780, 1849 n.
Quare impedit, 1085, 1823.
Quare incumbravit, 1825.
Quare non admisit, writ of, 1827.
Quarreling in church or churchyard, 2329.
Quartering of soldiers, 569.
Quartering traitors, 2264, 2621.
Quarter sessions, court of, 2488.
Quarto die post, 1863.
Quash, to, 1895.
motion to, 2568 n, 2637 n.
Quasi contracts, 1310 n.
Que estate, 1063, 1063 n.
prescription in, 1067, 1068 n.
Queen, 333.
compassing or imagining her death, 2247.
consort, 333.
dowager, 338.
husband of, 338.
violation of, 2252.
Queen Anne's bounty, 417, 1078.
Queen gold, 334.
Querela inofficiosi testamenti, 1393.
Question, or torture, 2557.
Quia dominus remisit curiam, 1767.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Quia emptores, statute of, 796 n, 811, 833 n, 835, 847, 895, 1048, 1076, 1101, 1119, 2674.
Quiet enjoyment, covenant for, 1431.
Quick with child, 2640.
Qui facit per alium facit per se, 592.
Quinto exactus, 1870, 2550.
Qui tam actions, 1303, 1722, 2538.
Quitclaim, 1435.
  deeds, 1151 n.
Quit rents, 771.
Quod ei deforceat, writ of, 1765.
Quod permittat, writ of, 1818.
Quod permittat prosternere, writ of, 1797.
Quo minus, writ of, 1556, 1556 n, 1873 n.
Quorum, justices of the, 491.
Quo warranto, for dissolving corporations, 701.
  information in nature of, 1840, 2542.
  writ of, 1840.

Rabbits, stealing, 2446.
Rack, 2557.
Rack-rent, 772, 772 n.
Rank, distinction of, 262.
Ransom, 2624.
Rape, 2416.
  appeal of, 2545.
  assault to commit, 2423.
Rapes in counties, 193.
Rapina, 2456.
Rasure in a deed, 1130.
Ratio decidendi, 121 n.
Rationabili parte bonorum, writ *de*, 1379, 1409, 1614 n, 1766.
Rationabilis dos, 893.
Ravishment, of children, 1688.
  of ward, 1688.
  of wife, 1686.
Reading on claim of clergy, 2610, 2688.
Reading of deeds, 1125.
Real actions, 27 n, 1647, 1747, 1770, 1808.
Real property, injuries to, 1736.
  law, importance of, 1736 n.
Real and personal property, distinguished, 726 n.
Reason of the law, 121.
Reasonable part, 1379, 1409, 2671.
Rebellion, commission of, 2069.
Rebutter, 1905.
Recall of subjects from abroad, 2296, 2351.
Reception, 1493, 1494 n, 1704, 2603.
Receiving stolen goods, 2308.
Recitals in a deed, 1115, 1421.
Recognizance, 1175.
  for the peace or good behavior, 2468.
  in nature of statute staple, 927, 2678.
  of fine, 1436.
  to prosecute, 2519.
Reconciliation to the pope, etc., 2259.
Record, 1524, 2673.
  assurances by, 1180.
  court of, 1524.
  debt of, 1347.
  embezzling of, 2303.
  no prescription of right by, 1067.
  of actions, 1438, 1914.
  of forcible entry or detainer, 2332.
  of riot, 2331.
  trial by, 1927.
  vacating of, 2303.
Recordari facias loquelam, 1541, 1545, 1767.
Recording acts and registration of title, 1176 n.
Recoveries, 1195.
  abolished, 1186, 1205.
  common, 869, 1076, 1195, 1437.
  deeds to lead or declare the uses of, 1203.
  in value, 1199, 1440.
  roll, 1438.
  tenant to the *præcipe*, 1202.
  vouchers in, 1198.
Recreant, 1938, 2584.
Rector of a church, 536.
Recusants, popish, 2224, 2298.
Recusatio judicis, 1960.
Reddendum of a deed, 1117, 1417, 1418, 1420.
Redemption, equity of, 925.
Redisseisin, writ of, 1759.
Redress of injuries, 1490.
Reeves, Real Property, quoted, 1130 n, 1154 n, 1171 n, 1173 n, 1206 n.
Reference to master in chancery, 2078.
Reformation, the, 2677.
Regalia majora et minora, 360.
Regard, court of, 1588.
Register, of deeds, 1176, 1176 n.
  of marriages, 2355.
Registrum omnium brevium, 1753.
Registry of conveyances, 1176, 1176 n.
Regrating, 2346.
  modern law of, 2345 n.
Rehearing in equity, 2079.
Rejoinder, 1905.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Relation back, in forfeiture, 2631, 2632.
of judgments, 2038.
Relations, domestic, 579.
interference with, 1684 n.
Relator, in informations, 1892, 2050. 2539.
Relative rights and duties, 206.
Release, by entry and feoffment, 1150.
by extinguishment, 1150.
by way of enlargement, 1149.
lease and, 1172, 1172 n.
of lands, 1149, 1421.
per mitter le droit, 1150.
per mitter l'estate, 1150.
Relief, 791, 802, 829, 2665, 2667.
Religion, and law, 65 n.
entry into: civil death, 226.
offenses against, 2209 n, 2210.
Religiosis, statute *de*, 1075.
Religious, houses, purchases of land by, 1074.
impostures, 2231.
instruction in American public schools, 643 n.
Remainder, in chattels personal, 932.
of lands, 1248.
writ of formedon in, 1764.
Remainderman, seisin of, 935 n.
Remainders, contingent, 937.
conveyance of contingent estates, 1104.
cross, implication of, 1226.
destruction of, 869, 941, 1193.
distinguished from conditional limitations, 919.
distinguished from reversions, 950.
executory devises, 941.
fee limited in remainder on a fee, 933.
how defeated, 940, 941.
in personalty, 1248.
particular estate, 933, 936.
possibility upon a possibility, 939.
rule against perpetuities, 945, 945 n.
rule in Shelley's Case, 942, 942 n, 943 n, 944 n.
rules on creation of, 933.
trustees to preserve contingent, 941.
vested or contingent, 937, 937 n, 938.
vesting of, 936.
Remedial part of laws, 95.
Remedies, essential to rights, 243.
real and personal distinguished, 1808 n.
nature of by distraint, 1498 n.
Remise, 1435.
Remitter, 1516, 1761.
obsolete, 1516 n.
Remoteness, rule against, 945, 945 n.
Rent, 768.
apportionment of, 877.
charge, 770, 770 n.
distress for in the United States, 1497 n.
general rules as to, 772.
incident to the reversion, 949.
origin of, 793, 828.
remedy for, 2688.
rent of assize, quit-rents, rack-rents, and fee farm-rents, 770.
rent service, rent-charge, and rent-seek, 771.
subtraction of, 1806.
Repetitum namium, 1702.
Repleader, 2008.
Replegiando, de homine, writ, 1674.
Replevin, 1506, 1640 n, 1641 n, 1740, 1850 n.
action of, 1698.
bond, 1701.
for detention of a distress, 1705 n.
present scope of, 1698 n.
role of in history of trover, 1699 n.
Replicatio, 1905.
Replication, at law, 1904.
in criminal cases, 2574.
in equity, 2074.
Reporters, law, 123 n.
Reports of adjudged cases, 122.
Reports by the master in chancery, 2079.
Representation, in descent, 1003.
in descent of real property, 1003.
in distribution, 1410.
parliament, 264.
with taxation, 242.
Reprieves, 2639.
Reprisal, letters of marque and, 384.
Reprisal of goods, 1493.
Repugnant conditions, 920.
Reputation, injuries to, 1660.
protection of, 230.
Requests, court of, 347.
for small debts, 1599.
Rere-fiefs, 793.
Rescous, writ of, 1699.
Rescripts of the emperors, i, 59.
Rescue, 1505, 1740, 2300, 2306.
Reservations, in deeds, 1117.
Residuum of intestates' effects, 1407.
Resistance, 2683, 2686.
right of, 374.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Respite of jury, 1953.
Respondeat ouster, 1895, 2010, 2573.
Respondeat superior, 592 n.
Respondentia, 1339.
Responsa pruæntum, 144.
Restitution, of conjugal rights, 1612.
in blood, etc., 2648.
of stolen goods, 2602.
of temporalities, 2668.
writ of, 2386.
Restoration of 1660, 324, 2685.
Restraining of leases, 2679.
Restraining statute, 1143, 1144.
Resulting uses, 1155 n, 1165, 1168 n.
Retainer, 1514, 1514 n.
Retainer of servant by another, 1691.
Retaliation, 2166.
Retorno habendo, plegii de, 1701, 1703, 2029.
Retraxit, 1885, 2008.
Retrospective legislation, 79 n.
Return, action for, 1635, 1982.
and canvass of vote, 293.
irreplevisable, writ of, 1703.
of writs, 1857.
form of, 1434, 1438, 1440.
Return-day of writs, 1860.
Returns of the term, 1863.
Revealed law, 64.
Revenue, extraordinary, 442.
ordinary, 412.
internal, or excise, 453.
Revenue causes, cognizance of, 2053.
trial of, 2498.
Reversal, of attainder, 2637.
of judgment, 2027, 2635.
of outlawry, 1870, 2551, 2637.
Reversion, 864, 948.
assignee, entitled to what remedies, 1716.
distinguished from remainder, 950.
fee-tail and reversion, 864.
incidents to, 949.
merger, 951, 952 n.
Revertendi animus, 1240.
Reverter, writ of formedon in, 1764.
Review, bill of, 2079.
commission of, 1583.
Reviling church ordinances, 2218.
Revival of persons hanged, 2651.
Revivor, bill of, 2073.
Revocation, 1155 n.
of devises, 1217.
of uses, 1166, 1173, 1432.
of wills, 1217, 1392.
Revolution of 1688, 325, 2686.
Rewards, for apprehending offenders, 2517.
for discovering accomplices, 2564.
Rhudhland, statute of, 163, 163 n.
Richard I, 315.
Richard II, 315.
Richard III, 318.
Rider to a bill, 296.
Ridings, 193.
Right, meaning of, 199 n.
de rationabili parte, writ of, 1766.
of advowson, writ of, 1821, 1827.
of dower, writ of, 1752.
of ward, writ of, 1688.
patent, writ of, 1767.
petition of, 217, 1832.
quia dominus remisit curiam, writ of, 1767.
sur disclaimer, writ of, 1811.
to property, 239.
writ of mere, 1765.
Right close, writ of, 844, 1766.
secundum consuetudinem manerii, writ of, 1767.
Rights, 199.
absolute, 207.
bill of, 217, 2686.
how secured, 243.
in rem and *in personam*, 203 n.
legal, divisions of, 202, 202 n.
meaning of, 200 n.
of persons and things, 205.
of things, 705.
personal, 218.
political, 219.
scheme of in Anglo-American law, 203 n.
Stephen's classification of, 204 n.
Rights and duties, 705 n.
nature of legal, 212 n.
Rights and wrongs, 199.
Riot, 2300, 2326, 2330.
number of persons needed for, 2330 n.
Riot act, 2326, 2327.
Riotous assemblies, felonious, 2326.
Rivers, annoyances in, 2360.
banks of, destroying, 2459.
sluices on, destroying, 2328.
thefts on navigable, 2452.
Roberdsmen, 2460.
Robbery, 2456, 2456 n.
Rogues, 2364.
Roman Catholics, abolition of laws against, 1049 n.
disabilities of, 1048, 1108.
schools of, 646.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Roman division of money and interest, 1344 n.
Roman law, history of, 143.
in England, 20 n, 32 n.
in legal education, 43 n.
revival of study of, 17 n.
Roman law of contracts, 1314 n.
Roman view of commerce, 387 n.
Romney-marsh, laws of, 1590 n.
Roots, destroying of, 2461.
stealing of, 2444.
Rope-dancers, 2361.
Route, 2331.
Royal authority, real character of, 372 n.
Royal family, 333.
marriages of, 340.
meaning of, 339.
Rule of court, 1896.
Rule in Shelley's Case, 942 n, 943 n, 944 n, 1030, 1030 n.
Ruling Case Law, quoted, 2312 n, 2314 n, 2512 n, 2514 n.
Rural deanery, 187.
Russell on Crimes, quoted, 2152 n.

Sabbath-breaking, 2232.
Sunday laws in United States, 2232 n.
Sacculariі, 2456.
Sacrament, reviling of, 2218.
Sacramentum decisionis, 1941.
Safe-conducts, 385, 385 n.
violation of, 2238.
Saint as owner of church property, 1072 n.
Saint Martin le Grand, court of, 1598.
Saladine tenth, 444.
Sale, 1319.
after execution, 1321.
American uniform sales acts, 1320 n.
by one not owner, 1323.
English sale of goods act of 1893, 1320 n.
knowledge of defective title, 1325.
market overt, 1323, 1323 n.
of distress, 1507.
of horses, 1325.
statute of frauds, 1322.
stolen goods, 1324.
warranty, 1326.
when title passes, 1323.
Salmond, Jurisprudence, quoted, 107 n. 200 n, 1310n, 1696 n.
Salt tax, 456.
Salvage, 425, 1339.
Sanction, or vindicatory part, of laws, 95.
Sanctuary, 2565, 2607, 2683.
plea of, 2567 n.
Sark, Isle of, 177.
Satisdatio, 1879.
Satisfaction, entry of, on record, 2039.
Saxon laws, 107, 2657, 2660.
Scaccario, dialogus de, 126 n.
Scale of crimes and punishment, 2171.
Scandal or impertinence in bills of equity, 2068.
Scandalum magnatum, 557, 1663.
Schiremen, 550.
Schism, 2220.
Schoolmaster, 2222.
Scire facias, against bail, 2032.
in detinue, 2029.
to remove a usurper's clerk, 1825.
to repeal letters patent, 1838.
to revive a judgment, 2039.
Scold, common, 2363.
in United States, 2363 n.
Scots, or assessments, 1590.
Scotch peers, election of, 277, 2289.
privileges of, 166.
Scotland, 164, 2674.
Scripture, scoffing at, 2229.
Scrutton, Roman Law influence, quoted, 1621 n.
Scutage, 445, 813.
Sea-banks, destroying, 2459, 2461.
Seal, counterfeiting the king's, 2255. 2261.
great and privy, 1183, 1557.
of a corporation, 684, 685, 685 n.
Sealing of deeds, 1125, 1420, 1433, 1434.
Seals, their antiquity, 1125.
Seamen, 395.
impressment of, 575.
privileges of, 576.
wages of, 1629.
wills or powers, counterfeiting, 2464.
Second deliverance, surcharge, writ of, 1617.
writ of, 1703.
Secondary conveyances, 1149.
use, 1165.
Secretaries of state, 475.
Secret sales discouraged, 1323.
Secta, 1884, 1943.
ad molendinum, writ *de*, 1812.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Secunda superoneratione, writ *de*; 1817.
Securities for money, their true construction, 2064.
Security, for good behavior, 2466, 2471.
for the peace, 2466, 2470.
of persons, 220.
Se defendendo, homicide, 223.
Sedgwick and Wait, Ejectment, quoted, 1647 n, 1771 n, 1776 n; cited, 1754 n.
Seduction, 2415, 2419.
Seisin, 995, 1135.
in deed, 996.
in one's demesne, as of fee, 854, 931 n.
livery of, 787 n, 852, 852 n, 1135, 1138, 1417.
of heriots, 1509.
of incorporeal hereditaments, 856.
of remainderman, 934 n.
writ of, 1199, 1440.
Selden, 132 n.
Selecti judices of the Romans, 1967.
Self-defense, 1491.
homicide in, 223, 2381.
limits of, 1493 n, 2379 n.
Self-help, theory and history of, 1490 n.
Self-murder, 2387.
Semi-plena probatio, 1980.
Senatus, consulta, 151.
decreta, 151.
Separate estate of married women, 1106.
Septennial elections, 2687.
Septennial parliament, 303.
Sequestration, in chancery, 2070.
of a benefice, 2035.
Serjeants at law, or countors, 35, 1528.
obsolete, 1528 n.
Serjeanty, grand, 812, 817.
petit, 822.
Servants, battery of, 1695.
classes of, 581.
fellow-servant, law of, 592 n.
liability of, 592.
embezzling their master's goods, 2439, 2440.
firing houses by negligence, 2429.
larceny by, 2439.
menial, 587.
negligence of, 600.
Servants, responsibility of master for, 592, 1710.
tax on, 461.
Service, feudal, 789, 828.
differs from agency, 579 n.
incidents of, 589.
on a person in his dwelling, 1876 n.
Services, free and base, certain and uncertain, 797.
subtraction of, 1806.
Sessions, great, of Wales, 1594.
of parliament, 299.
quarter, 2488, 2492.
Setoff, 1897, 2688.
application of, 1897 n.
Si te fecerit securum, 1843 n.
Settlement, act of, (1700), 218, 330, 2686.
Settlements, 503, 941, 1248.
law of for the poor, 503.
marriage, trustees to preserve contingent remainders, 941.
Severalty, estates in, 953.
Severance, of joint estates, 963.
of jointures, 961.
Severity of punishment, 2170.
Sewers, commissioners of, 1590.
Sextons, 547.
Shaking hands over a bargain, 1322 n.
Shardelowe. 32 n.
Sheep-stealing or killing with intent to steal, 2452.
Shelley's Case, rule in, 942 n, 943 n, 944 n, 1030, 1030 n.
Shepway, court of, 1597.
Sheriff, 193, 476, 2512, 2660, 2675.
court of, in London, 1598.
court, or tourn of, 2490, 2658, 2671.
duration of office, 481.
expenses of, 485.
how chosen, 477.
officers of, 483.
powers and duties, 481.
Shifting use, 1165.
Ship, bottomry and *respondentia*, 1339.
in distress, plundering them, 425, 2446, 2453, 2459.
Ship money, 2683.
Shipwrecks, 422.
Shire, 193.
Shooting at another, 2413.
Shop-books, 1977.
Shroud, stealing of, 2449.
Shrubs, destroying of, 2461.
stealing of, 2444.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Si fecerit te securum, 1859.
Si non omnes, 1574.
Sic utere tuo ut alienum non lædas, 1785 n, 1790 n.
Sign manual, 1184.
  forging, 2261.
Signature, by a mark, 1125, 1218.
  to deed, 1125.
Signet, privy, 1183.
Significavit, writ of, 1624.
Similitude of handwriting, 2596.
Simony, 540, 545, 1086, 1087, 2231.
Simple larceny, 2437.
Sinecure, 538.
Single combat, 2582.
Sinking fund, 466.
Sittings of court, 1862 n.
Six clerks in chancery, 2068.
Slander, 1660.
Slavery, 581.
  danger of, 571.
Slaves, 214, 581, 1253.
Sledge, 2264, 2621.
Sluices on rivers, destroying, 2328.
Small debts, courts for, 1599, 2688.
Smoke farthings, 460.
Smuggling, 453, 2340.
  definition of, 2340 n.
Soca, 821 n.
Socage, 818, 821 n, 2666.
  free and common, 798, 819.
  villein, 798, 843.
Social contract, 82 n.
Society, nature of, 82.
  object of, 209.
Socmen, 821 n.
Sodomy, 2422.
Sodor and Man, bishopric of, 177 n, 187.
Sohm, Institutes of Roman Law, quoted, 68 n, 1157 n.
Sokeman, 845.
Soldiers, 563.
  privileges of, 573.
  profession of, 563.
  quartering, 569.
  wandering, 2358.
  wills of, 573.
Somersett, case of, 58 n.
Son assault demesne, 1655, 1879.
Sophia, Princess, heirs of, 331.
Sorcery, 2230.
Soul-scot, 1285.
South Sea company, misbehavior of its officers, 2440.
Sovereign, not suable except by consent, 361.
Sovereign power, necessity of, in society, 85.
Sovereignty of the king, 361.
Speaker of each house of parliament, 293, 294 n.
Speaking with prosecutor, 2604.
Special, administration, 1396.
  case, 1988.
  demurrer, 1912.
  imparlance, 1891.
  jury, 1957.
  matter in evidence, 1899.
  occupant, 1055, 1056 n.
  plea, 1899.
  property, 1238
  session, 2489.
  tail, 865.
  verdict, 1987, 2599.
  warrant, 2510.
Specialty, debt by, 1347, 1712.
Specific relief in equity, 2063.
Speech, freedom of, 271.
Spendthrifts, 441.
Spiriting away men and children, 2425.
Spiritual, court, 1576.
  lords, 261.
Spiritualities, guardian of, 532.
Spitz, Conditional and Future Interests, quoted, 942 n.
Spoliation, 1609.
Sponsio judicialis, 2078.
Springing uses, 1165.
Squibs, 2362.
St. Germain, 131 n.
Stabbing, 2394.
Stage-plays, 2361.
Stake driven through the body, 2389.
Stamp duties, 459.
Stamps, forging of, 2464.
Standard of weights and measures, 2492.
Standing mute, 2556.
  in modern law, 2557 n.
Stannary courts, 1597.
Star-chamber, 397.
  court of, 347, 2070, 2482, 2540, 2676, 2680, 2689.
Stare decisis, 118.
Starrs, 1178, 2482 n.
Staple commodities, 451.
State, no action against, 362 n.
Stated damages, 2061.
State's evidence, 2562 n.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Statham, 126, 131 n.
Statute, 149.
de donis, 864.
de religiosis, 1075.
law, 149.
merchant, 297, 298 n, 2674.
of labor, 98.
of distributions, 1408.
of fines, 870.
of frauds and perjuries, 928, 1055, 1115, 1127, 1127 n, 1168 n, 1175, 1205, 1217, 1322, 1348, 1390, 1408.
of leases, 870.
of limitations, 1901 n.
of Marlbridge, 1092.
of uses, 896, 1162.
of Westminster the Second, 1076.
private, 1180.
quia emptores, 796 n, 811, 833 n, 835, 847, 895, 1048, 1076, 1101, 1119.
recognizance in nature of, 927
rolls, 295.
staple, 927, 928 n, 2675.
recognizance in nature of, 2678.
Statutes, division of, 149.
how cited, 150 n.
how passed, 293.
impossible and unreasonable, 158.
promulgation of, 75, 298.
rules for construction of, 153.
Staundforde, 126, 132 n.
Stealing an heiress, 2414.
Stephen, King, 314.
Stephen, Commentaries on the Laws of England, quoted, 29 n, 45 n, 109 n, 160 n, 178 n, 189 n, 191 n, 192 n, 194 n, 204 n, 227 n, 229 n, 237 n, 253 n, 262 n, 265 n, 266 n, 275 n, 284 n, 289 n, 295 n, 301 n, 303 n, 312 n, 345 n, 348 n, 357 n, 368 n, 390 n, 394 n, 412 n, 470 n, 480 n, 555 n, 557 n, 610 n, 678 n, 683 n, 686 n, 694 n, 701 n, 732 n, 740 n, 742 n, 753 n, 754 n, 755 n, 756 n, 829 n, 832 n, 836 n, 866 n, 872 n, 875 n, 878 n, 906 n, 907 n, 910 n, 918 n, 931 n, 934 n, 943 n, 951 n, 962 n, 981 n, 992 n, 995 n, 1039 n, 1047 n, 1057 n, 1063 n, 1100 n, 1114 n, 1250 n, 1261 n, 1263n, 1271 n, 1355 n, 1384 n, 1388 n, 1392 n, 1394 n, 1528 n, 1529 n, 1531 n, 1533 n, 1539 n, 1569–1571 n, 1602 n, 1606 n,
Stephen, Commentaries on the Laws of England, quoted (Continued). 1642 n, 1832 n, 2154 n, 2269 n, 2293 n, 2295 n, 2296 n, 2299 n, 2304 n, 2319 n, 2335 n, 2356 n, 2379 n, 2386 n, 2389 n, 2394 n, 2407 n, 2428 n, 2440 n, 2448 n, 2458 n, 2469 n, 2472 n, 2478 n, 2487 n, 2489 n, 2496 n, 2524 n, 2552 n, 2557 n, 2569 n, 2591 n, 2593 n, 2595 n, 2601 n, 2618 n, 2637 n; cited, 1544 n, 1574 n, 1580 n, 1582 n, 1586 n, 1613 n, 2260 n, 2318 n, 2322 n, 2393 n, 2463 n, 2490 n, 2498 n, 2550 n, 2567 n, 2588 n, 2594 n, 2621 n.
Stephen, Common Law Pleading, quoted, 2019 n.
Stephen, J. F., General View of Criminal Law of England, quoted, 2179–2182 n, 2188 n, 2247 n.
History of the Criminal Law of England, quoted, 347 n, 377 n, 2148 n, 2172 n, 2217 n, 2223 n, 2227 n, 2290 n, 2393 n, 2574 n; cited, 2151 n, 2156 n, 2176 n, 2210 n, 2228 n, 2248 n, 2474 n, 2509 n, 2567 n, 2609 n, 2654 n, 2663 n.
Sterling, 409.
Steward, 589.
lord high, 1547.
his court, 2477, 2584.
in parliament, 2477, 2479.
of the university, his court, 2494.
of the household, 1547.
his court, 1593, 2494.
Stint, common without, 1817.
Stipulatio, 1879.
Stipulation in the admiralty court, 1631.
Stirpes, distribution *per*, 1004, 1410.
Stocks for punishment, 2621.
Stocks of descent, male and female, 1022.
Stolen goods, receiving, 2308, 2452.
sale of, 1324.
Stolen marriages, 2415.
Stoppage, 1897.
Stores, embezzling the king's, 2274.
Story, Conflict of Laws, cited, 2081 n, 2082 n.
Strangers to a fine, 1194.
Stream of water, property in, 732, 1253.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Street, Foundations of Legal Liability, quoted, 1245 n, 1310 n, 1318 n, 1333 n, 1508 n, 1648 n, 1705 n, 1708 n, 1711 n, 1724 n, 1728 n, 1732 n, 1790 n, 1799 n, 1803 n, 1843–1850 n; cited, 1665 n, 1670 n, 1707 n, 1714 n, 1725 n, 1894 n.
Strikes, 1692 n.
Striking in the king's palace or courts of justice, 2299, 2494.
Stuart, house of, 322.
Stubbs, Constitutional History of England, quoted, 445 n, 555 n; cited, 804 n, 821 n.
Select Charters, cited, 254 n.
Study of the Law, 1.
abroad by Englishmen, 3.
as an element of culture, 3.
general interest in, 5, 5 n.
groundwork for, 43.
importance of academic training therewith, 40.
neglected in the universities, 14.
on the Continent and in Scotland, 2.
restricted in London by Henry III, 36.
utility of, 4.
Stultifying one's self, 1106, 1106 n.
Subinfeudations, statute against, 834.
Subjects, protection of, 363.
recall from abroad, 393.
born abroad, 517.
Subjection, civil, 2194.
Subornation of perjury, 2320.
Subpœna, ad testificandum, 1978.
duces tecum, 1994.
Subpœna in equity, 2070.
its original, 1565.
Subscriptions, unlawful, 2290.
Subsequent conditions, 917.
Subsequent evidence, 2018, 2079, 2080.
Subsidies, ecclesiastical, 447.
lay, 446, 447, 2670.
on exports and imports, 450.
Subtenants, rights of, 877.
Subtraction, of conjugal rights, 1612.
of legacies, 1618.
of rents and services, 1806, 1806 n.
of tithes, 1606, 1623.
Succession to property on death, 720.
ab intestato, 1409.
in stirpes, 1004.
history of, 1006.
reason of, 1005.
Succession to property on death, testamentary, 722.
title to personalty by, 1292.
Succession to the crown, 310, 317, 323, 2689.
act of (1405), 317.
act of (1534), 320.
acts of (1536, 1543, 1554), 321.
act of (1603), 323.
history of, 310.
Sufferance, estate at, 913.
Suffrage, who entitled to, 281.
Suggestion for prohibition, 1638.
Suicide, 2383.
as a crime, 2388 n.
forfeiture of goods on, 1266.
Suit, at law, 1644.
in equity, 2068.
meaning of, 1645 n.
of witnesses, 1884.
Suit and service, 789.
Summary convictions, 2497.
Summary proceedings, modern jurisdiction in, 2497 n.
Summoners, 1434, 1438, 1865.
Summons, 1865.
before conviction, 2499.
to parliament, 253, 254.
Sumptuary laws, 211, 2365.
Sunday, no juridical day, 1863, 1877.
Sunday laws, 2232 n.
Superjacent and subjacent space, rights in, 733, 734 n.
Supersedeas, writ of, 493.
Superstitious uses, 1077, 2053.
Supplemental bill in equity, 2073.
Suppletory oath, 1980.
Supplicavit, 2469.
Supplies, 443, 448.
Supremacy, 2677.
oath of, 510.
refusing it, 2288.
Supreme magistrates, 249.
Supreme power, 249.
Sur la pie, 1192 n.
Surcharge of common, 1815.
Surgeon, criminal liability of, 2401 n.
degree of skill required of, 1656 n.
Surplus of intestate's effects, 1407.
Surrebutter, 1905.
Surrejoinder, 1905.
Surrender, 1153.
deed of, 1153, 1153 n.
express and implied, 1153 n.
of bankrupt, 1366.
of copyholds, 1206.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Surveyors of highways, 497.
Survivorship, 959, 1250, 1426.
of things personal, 1250.
Suspension of *habeas corpus* act, 235.
Sus. per coll., 2649.
Swans, stealing of, 1238, 2447.
Swearing, profane, 2229.
the peace, 2471.
Sweinmote, court of, 1589.
Sycophants, 2449.
Symbolical delivery, 1137.
Syngrapha, 1113.
Synods, 410.

Table of consanguinity, 988.
Tacking mortgages, 924 n.
Tail, after possibility of issue extinct, 878, 879 n.
female, 866.
general, 865, 1424.
male, 866.
special, 865.
tenant in, 864.
Taking, felonious, 2438, 2441.
unlawful, 1698.
Tale, or count, 1881.
Tales de circumstantibus, 1965, 2591.
Taliones lex, 2166.
Talliage, 446, 2666, 2673.
Tailor, common, action against, 1727.
Taltarum's Case, 869, 869 n, 2676 n.
Tariff, 452.
Taxation, and representation, 242.
by the house of commons, 277.
principle of, 454.
species of, 444.
Taxes, 242, 443.
their annual amount, 463.
Taylor, Hannis, Science of Jurisprudence, quoted, 51 n.
Teacher and scholar, 649.
Temporal peers, 262.
Temporalities of bishops, 413, 2668.
their restitution, 532.
Tenancy, in common, 969.
dissolution of, 972.
incidents of, 971.
in tail, 861.
incidents of, 867.
Tenant, 795.
in capite, 799.
greater and lesser, 800 n.
of the king, 807 n.
paravail, 797.
to the *præcipe*, 1200.
Tender, of amends, 1510.
of issue, 1910.
of money, 407, 1896.
of oaths, 2298.
plea of, 1895.
Tenement, 730, 795.
Tenemental lands, 833.
Tenendum of a deed, 1117, 1417, 1418.
Tenths, ecclesiastical, 415, 2279.
temporal, 444.
Tenure, abolition of military tenures, 816.
aids, 800, 829.
ancient demesne, 844.
attornment, 811.
borough-English, 823.
burgage, 822.
by divine service, 847.
certain and uncertain services, 797.
copyholds, 841.
cornage, 813.
court of wards and liveries, 807.
destruction of military tenures, 816.
disturbance of, 1819.
distinguished from allodial holding, 818.
escheat, 812, 832.
escuage, 813.
fines for alienation, 810, 832.
frank tenement and villeinage, 798.
frankalmoigne, 847.
free and base services, 819.
free socage, 819.
gavelkind, 825.
grand serjeanty, cornage, 812, 822.
in chivalry, 799.
incidents of socage tenures, 828.
incidents to knight's service, 800.
knighthood, 807.
manors, 833.
marriage of ward, 809, 831.
meaning of, 795 n, 818.
petit serjeanty, 822.
primer seisin of first fruits, 804, 830.
profits of military, 418.
reliefs, 802, 829.
species of, 798.
spiritual or frankalmoigne, 847.
statute *quia emptores*, 835, 847.
tenant *paravail* and tenant *in capite*, 797.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Tenure, villeinage, 832, 835, 843.
wardship, 805, 830.
Tenures, feudal, 784, 795.
modern English, 818.
surviving act of 12 Car. II, 818.
Term of court, essoign day, 1863.
first day of, 1863.
modern, 1862 n.
original of, 1860.
returns of, 1863.
Term of years, 907, 1420, 1424, 2678.
Terminum qui præteriit, writ of entry *ad*, 1745, 1753.
Terminus, estate for years, 906.
Termor, 905.
seisin of, 904 n.
Terre-tenant, 833–1158.
Test act, 2228, 2685.
Testament, 721, 1213, 1375, 1387, 2671, 2677.
Testamentary causes, 1613.
Testamentary guardian, 831.
Testamentary jurisdiction, in equity, 2062.
in spiritual courts, 1617, 2668.
Testamento annexo, administration, *cum*, 1393.
Testators should know the law, 6.
Testatum capias, 1869.
Teste of writs, 292, 1860.
Testes, proof of will, *per*, 1400.
trial, *per*, 1933.
Thackeray, quoted, xvii.
Thanet, Isle of, 176.
Thayer, J. B., Legal Essays, quoted, xxix, 40 n, 507 n.
Preliminary Treatise on Evidence. quoted, 1671 n, 1835 n, 1939 n, 1940 n, 1952 n, 1976 n, 1979 n, 2000 n; cited, 1933 n, 1934 n, 1948 n, 1998 n, 2015 n, 2557 n, 2585 n, 2596 n.
Theft, 2437.
punishment of, 2444, 2666.
Theft-bote, 2310, 2602.
Theodosian code, 144.
Things, in common, 724.
personal, 1229.
real and personal, 726.
right of, 705.
Third persons, defense of, 1493 n.
Thompson, Corporations, quoted, 677 n; cited, 688 n.
Thornton, 129 n.
Threatening letters, 2318, 2328.
Threats, 1651.
action for, 1651 n.
duress by, 224.
of accusation, to extort money, 2318.
Throne. See Crown, and King.
Timber, 1090.
destroying, 2460.
stealing, 2444.
Time, computation of, 661, 902.
Tithes, 189, 415, 536, 540, 741.
cognizable in equity, 2062.
of forest land, 1558.
origin of, 742.
privy or small, 539.
rectorial, 539.
subtraction of, 1606, 1623.
vicarial, 539.
Tithing, 191, 2608.
Tithingman, 191, 496.
Title, by alienation, 1098.
by bankruptcy, 1355.
by custom, 1282.
by descent, 984.
by forfeiture, 1069.
by gift, grant and contract, 1305.
by judgment, 1300.
by limitation, 981.
by marriage, 1294.
by occupancy of lands left by sea or rivers, 1057, 1057 n.
by possession, 973, 978.
by prescription, 978 n, 1065.
by succession, 1292.
by testament and administration, 1375.
complete, 982.
definition of, 973.
implied warranty of, 1728n.
of honor, descent to daughters, 1003.
of chattels by occupancy, 1251.
requisites of, 973.
right of possession, 978.
right of property, 980.
things personal, 1251.
to lands, 973.
to things real, 973.
under statute of limitations, 1068.
Toft, 735.
Toleration, 2220, 2221, 2681.
Act of, 2223 n.
Tolt, writ of, 1541, 1767.
Tongue, cutting out, 2412.
Tonnage, 450.
Tonsura clericalis, 2610.
Torrens system, 1178 n.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Torts, actions on, 1646.
and crimes, 204 n.
difference between, 2152 n.
distinction between violent and non-violent, 1648 n.
judgment on, 1303.
of corporations, 688 n.
Torture, 229, 2557.
Torun, case of the Abbot of, 32 n.
Tourn of the sheriff, 2490, 2658, 2671.
Tout temps prist, 1896.
Town, city and borough, 191.
Trade, its progress in England, 2666, 2671, 2675, 2678, 2680, 2686.
offenses against, 2341, 2361.
unlawful exercise of, 2349.
Trademarks, 1260, 1260 n.
Traders, 1359, 1373.
may become bankrupt, 1359.
what constitutes trading, 1361.
Tradesmen, 562.
actions against, 1728.
Traitors, 1388, 2245.
Transitory actions, 1883.
Transportation, 237, 237 n, 2613, 2621, 2647.
abolished, 2308 n.
returning from, 2308, 2613.
Traverse, of indictment, 2587.
of offices, 1837.
of plea, 2544.
Treason, 2244.
appeal of, 2545.
change in conception of, 2244 n.
high, 2246.
law of in United States, 2248 n.
misprision of, 2292.
modern punishment of, 2264 n.
petit, 2246, 2408, 2408 n.
abolished, 2170 n, 2240 n.
kinds of, 2409.
present law of in England, 2247 n.
statute of (1534), 870.
Treason, felony and misdemeanor, 2152 n.
trials in, 2587, 2687.
Treasurer, lord high, 1547.
killing him, 2256.
Treasure-trove, 427, 427 n, 428, 1253.
concealment of, 2294.
Treaties, leagues and alliances, 381.
Treatises, legal, 125 n.
Treaty-making and war-making authority, 381 n.
Trebucket, 2363.
Trees, destroying, 2460.
right to cut, 1090.
stealing, 2444.
Tresayle, 1757.
Trespass, *ab initio*, 1508, 1508 n, 1787 n.
action of, 1640 n, 1641 n, 1850 n.
costs in, 2014.
on lands, 1781, 1782.
on the case, 1562, 1640 n, 1641 n, 1657.
vi et armis, 1652, 1655, 1660, 1847 n.
waste and, 1799 n.
Trial, 1927, 2658, 2578.
by battle, abolition of, 1934 n.
by witnesses, 1933 n.
history of trial by jury, 1948 n.
introduction of trial by jury, 2669 n.
meaning and kinds of, 1927 n.
Trial, new, 1998, 2684.
in United States, 2619 n.
Tribonian, 145.
Triennial elections, 2687.
Triennial parliaments, 258, 303, 2684. 2687.
Triers, lords, 2476, 2479.
Triers of jurors, 1964.
Trina admonitio, 2558.
Trinitarians, 2217 n.
Trinity, denial of, 2216.
Trinity-house, corporation of, 392.
Trinoda necessitas, 390, 498, 847.
Triplicatio, 1905.
Trithing, 193.
Triverbial days, 2042.
Trover, 1640 n, 1641 n, 1707, 1850 n, 2603.
references on history of, 1707 n.
where lies, 1707 n.
Truce, breakers of, 2239.
conservators, 2239.
Trusts, 1167, 1424, 1425.
modern law of, 1168.
where cognizable, 2056.
Tubman, in the exchequer, 1530.
Tudor, house of, 319.
Tumultuous petitioning, 2331.
Turbary, common of, 755, 755 n.
Turnips, stealing, 2444.
Turnpikes, destroying of, 2328.
Tutor, Roman law, 658.
Twelve tables, laws of the, 143.
Two witnesses, when necessary, 1980, 2594.
Tyrrel's Case and origin of uses, 1166 n.

Ubi us ibi remedium, 1520 n, 1709 n.
Ubiquity of the king, 397.
Bentham's criticism of, 398 n.
Udal right, 777 n.
Ulpian's *juris præcepta*, 62 n.
Ultra vires, 694.
Umpire, 1511.
Unanimity of juries, 1986, 2661.
Uncertainty of the law, 1922
Uncore prist, 1896.
Underwood, stealing, 2444.
Union, articles of, between England and Scotland, 165, 2674, 2686.
between Great Britain and Ireland, 173, 2674, 2686.
Unities of joint estates, 954, 954 n.
Universitates, civil law, 673.
Unitarians, 2217 n, 2223 n.
University, 678.
University, chancellor of, his certificate, 1932.
University, courts of, 148, 1601, 1602 n, 2494.
nature of, 678.
representation in parliament, 286, 286 n.
right of, to popish advowsons, 1828.
University education, value of for the lawyer, 40.
Unknown persons, larceny from, 2448, 2597.
Unreasonable act of parliament, 158.
Uses, 1076, 1156, 1563, 2674, 2676, 2677.
active not executed by statute of, 1166.
and trusts, 1077, 1156.
continued as trusts, 1167.
covenant to stand seised to, 1169, 1169 n.
deeds to lead, declare or revoke, 1173, 1203, 1429, 1430.
doctrine of, 1159.
invention of, 1076.
springing, shifting and resulting, 1155 n, 1165.
statute of, 896, 1162, 1164 n, 2077.
Usura maritima, 1340.
Usurpation, of advowson, 1820.
of franchises or offices, 1840.
Usury, 1336, 2288, 2346.
laws, 1345, 1345 n.
laws against repealed, 2343 n.
Usus fructus, 1156.
Utlagatum, 1870, 2551.
Uttering false money, 2271.
Vacantia bona, 431.
Vacarius, Roger, 19, 19 n.
Vacating records, 2303.
Vacations, 1861.
Vadium, mortuum, 923.
vivum, 922.
Vagabonds, 2369.
Vagrants, 2364.
harboring them, 2365.
modern law of, 2364 n.
Valor, beneficiorum, 416.
maritagii, 809, 831,
Valuable consideration, 1114.
Valvasors, 558.
Vassal, 786.
Vendor's lien, 925.
Venary, beasts of, 1274.
Venire de novo, 2619 n.
Venire facias, writ of, 1950, 2549, 2586.
Ventre inspiciendo, writ *de*, 651, 651 n.
Ventre sa mere, child in, 221, 221 n, 938.
Venue, 1883.
when changed, 1883, 1995.
Verberation, 1654.
Verdict, 1987, 2509.
false, 2015, 2324.
setting aside, 1999 n.
Verderors, 1588.
Verge, tenant by, 911.
Verge of the court, 1593, 2494.
Vert, venison and covert, injuries to, 1588.
Vested remainder, 936, 945.
Vetitum namium, 1702.
Veto, King's, 259 n, 297 n, 298 n.
Vicar, 536, 539.
Vicarages, 539.
when established, 2675.
Vice-admiralty courts, 1586.
Vicineto, jury *de*, 958, 1995.
Vicontiel writs, 1816.
Vidames, 558.
View, by jurors, 1889, 1890, 1957.
of frank-pledge, 2491.
Vill, 191.
Villein, 836, 2666.
enfranchisement of, 838.
in gross, 836.
regardant, 836.
services, 798.
socage, 797, 843, 846.
Villeinage, 798, 835, 843.
privileged, 843.
pure, 798, 833.
tenure, 832.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Villeinous judgment, 2318.
Viscount, 551.
Vinculo matrimonii, divorce *a*, 620, 1613.
Vindicatory part, or sanction, of a law, 95.
Viner, founder of Vinerian professorship, 39 n.
Vinerian professorship of law, xx, xxix, 39.
Blackstone's election thereto, 1.
Vinogradoff, Common Sense in Law, quoted, 5 n, 56 n.
Roman Law in Mediæval Europe, quoted, 17 n, 19 n, 20 n.
Villeinage in England, cited, 821 n, 832 n.
Violent presumption, 1981.
Virgin Mary, a civilian and a canonist, 30 n.
Viscount, 551.
Visne, 1883, 2586.
Vivum vadium, 922.
Voir dire, oath of, 1929.
Voluntary, escape, 2031, 2305.
jurisdiction, 1582.
manslaughter, 2391.
oaths, 2320.
waste, 1089.
Vouchee, in recoveries, 1199, 1438.
Voucher, 1890.
in recoveries, 1198, 1438.
Vulgaris purgatio, 2578.

Wager of battle, 1934, 1936, 2582, 2671.
Wager of law, 1707 n, 2661, 2671.
action of debt and, 1711 n.
extinction of in England, 1939 n.
in America, 1939 n.
Wagering policies, 1342.
Wagers, when illegal, 1341.
Wages of servants, 590.
Waifs, 429.
Wainage, 2624.
Wales, 162, 2674, 2678.
courts of, 1594.
Prince of, 339.
compassing and imagining his death, 2247.
Princess of, 339.
violating her, 2252.
united to England, 162.
Wandering soldiers and mariners, 2358.
Wapentakes, 192.
War, articles of, 571.
levying against the king, 2253.
War and peace, right of making, 382.
Ward by constables, etc., 2514, 2673.
Wards, 661.
Wards and liveries, court of, 1836.
Wardship, 805, 830.
delivery from, 806.
incident to copyhold, 842.
in chivalry, 2665, 2667.
of body, 806.
of lands, 806.
socage, 830.
Warrant, 236, 2509.
Warrantia chartæ, 1890.
Warranty, express and implied, 1118.
effect of, 1122.
goods sold, 1728.
lineal and collateral, 1122.
of chattels, 1326.
of lands, 1118, 1417, 1436, 1439.
of title, 1118 n.
of title, implied, 1728 n.
of wholesomeness, implied, 1731 n.
on exchange, 1148.
Warrant of attorney, 2011.
Warren, 1276.
beasts and fowls of, 763.
robbery of, 2327, 2447.
Warren, E. H., in Harvard Law Review, quoted, 680 n, 684 n.
Warren, History of American Bar, cited, 1526 n.
Waste, 875, 1088, 1799.
acts constituting, 1089.
action on the case in the nature of, 1803 n.
and trespass, 1799 n.
estates without impeachment of, 875.
how prevented in equity, 2064.
injunction to stay, 1091.
in United States, 1089 n.
liability for, 875 n, 1091.
punishment for, 1093.
voluntary or permissive, 1089.
Waste lands, 724, 834.
Watch, 2513, 2673.
Watch and ward, by constables, 497.
Water, 724, 732.
ordeal, 2578.
property in, 732, 1068, 1253.
Way, out of repair, 757, 758 n.
right of, by grant, prescription and necessity, 756.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Ways, 756.
common, 756.
disturbance of, 1819.
of necessity, 757.
private, 756.
Weights and measures, 405, 2492. 2493 n, 2671.
false, 2345.
Wells, property in, 715.
Wensleydale Peerage Case, 262 n. 555 n.
Weregild, 2386, 2544, 2660.
West-Saxon-lage, 110, 2558.
Westlake, Private International Law, cited, 2082 n.
Whales, property of king and queen, 337.
Wharfs, 392.
Wharton, Conflict of Laws, cited, 2081 n, 2082 n.
Criminal Pleading and Practice, cited, 2619 n.
Wheaton, International Law, quoted, 186 n, 516 n, 1252 n.
Whipping, 2615, 2621.
White, Legal Antiquities, cited, 1934 n, 1940 n, 2557 n, 2567 n, 2578 n, 2582 n; quoted, 2607 n.
White rents, 772.
Wholesomeness, implied warranty of, 1731 n.
Widow's chamber, 1411.
Widow's quarantine, 895.
Wife, 604.
authority of husband over, 633.
battery of, 1687.
capacity as witness, 631.
coerced by husband in criminal law, 2195 n.
coverture of, 625 n.
elopement of, 625.
separate acts of, 633.
separate domicile of, 626 n.
Wight, Isle of, 176.
Wigmore, Responsibility for Tortious Acts, quoted, 1784 n.
Treatise on Evidence, quoted, 1969–1976 n.
Will, defect of, 2175.
estate at, 909.
vicious, 2175.
William I, 313.
in what sense "conqueror," 1030.
William II, 313.
William and Mary, 329.
Williams, Real Property, quoted, 751 n, 775 n, 776 n, 777 n, 854 n, 879 n, 1546 n, 1768 n, 1774 n; cited, 884 n, 899 n, 995 n, 1088 n, 1095 n.
Williams, T. Cyprian, in Law Quart. Rev., quoted, 1246 n.
Williston, Samuel, History of Business Corporations, quoted, 679 n, 686 n, 700 n.
Sales, quoted, 1258 n, 1731 n.
Wills, 721, 1213, 1375, 1388, 2671, 2677.
administration *cum testamento annexo*, 1393.
alienation by devise, history of, 1213.
appointment of executor, 1393.
codicil, 1389.
customary power of devising, 1213.
definition of, 1388.
devise of use, 1215.
devises to charity, 1215.
donatio mortis causa, 1407.
gifts to witnesses, 1218.
holographic, 1391 n.
how avoided, 1392.
jurisdiction over, 1377.
lapse of gifts, 1405.
nature of, 1219.
nuncupative, 1389.
origin of, 720, 1213, 1375.
payment of legacies, 1405.
probate of, 1382, 1397.
revocation of by spoliation, 1217, 1392.
right of executor to residue, 1407.
rules of construction, 1221, 1221 n.
signature and attestation of, 1218, 1390.
statute of 1540, 1215.
statute of 1837, 1057 n.
testamentum inofficiosum, 1392.
verbal or nuncupative, 1389.
what words pass a fee, 859, 873.
who may make, 1384.
Wilson, R. K., History of Modern English Law, quoted, 1045 n, 2654 n.
Winchester, standard of measure, 405.
Window tax, 460.
Windows, ancient, 1253.
Wine, adulteration of, 2354.
licenses, 419.
Witchcraft, 2230, 2683.
Withdrawing from allegiance, 2259.

[References are to pages of this Edition. Letter "n" refers to note on page.]

Withernam, 1674, 1702, 2029.
Witnesses, 1978.
  expenses of, 1978, 2601.
  for prisoners, 2597, 2688.
  swearing witnesses for the prisoner, [illegible] n.
  tampering with, 2300.
  to [illegible], 1129.
  to wills, 1218, 1390.
  trial by, 1933, 1933 n.
  two, where necessary, 1980, 2594.
Wittena-gemote, 251, 2660.
Woerner, American Law of Administration, quoted, 1396 n, 1400 n, 1402 n, 1514 n.
Women, appeals by, 2671.
  jury of, 1962.
  guilty of clergyable felonies, 2612.
Wood, stealing, 2444.
Woodmote, court of, 1588.
Wool, transporting, 2340, 2675.
Words, action for, 1661.
  treasonable, 2251.
  costs in action for, 2014.
Workhouse, 2613.
Workmen's Compensation Acts, 598 n.
Wounding, 1655, 2423.
Wreck and salvage, law of, 426 n.
Wrecks, 422, 725, 1629, 2446.
Writs, 1856.
  close and patent, 1183.
  coram nobis or *vobis*, 2019 n.
  forms of, 1561, 1753, 1856, 2674.
Writs, of election to parliament, 290.
  of *clegit*, 928 n.
  of entry, relation to possessory assizes, 1754 n.
  of entry, the most usual, 1753 n.
  of error, 2019 n.
  of right patent and right close, 1766 n.
  original, office of, 1857 n.
  original, in the United States, 1856 n.
Writing of a deed, 1115.
Writing, treason by, 2252.
Writings, stealing of, 2445.
Written and unwritten law, 107 n.
Written, conveyances, 1115.
  evidence, 1972.
Wrongs, 199.
  private, 1487.
  public, 2147.
Wyman, Public Service Corporations, quoted, 1329 n.

Year, 902, 902 n.
Year-books, 123, 123 n.
Year and day, continual claim, 1745.
  and waste, 2630.
  in appeals of death, 2546, 2571.
  in murder, 2401, 2536.
Years, estates for, 900.
Yeoman, 561.
York, custom of the province of, 1410.
  house of, 318.