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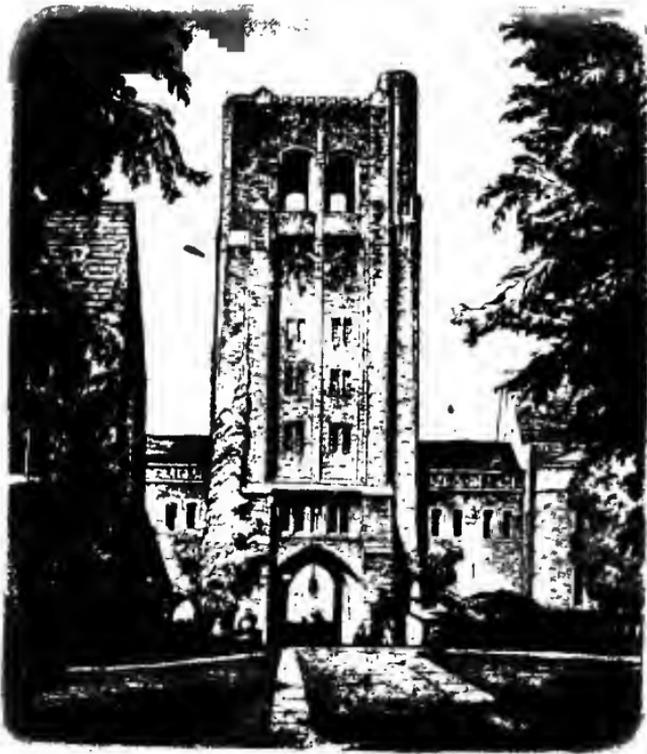
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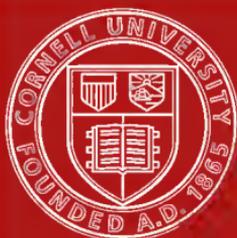
FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS



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MR. SERJEANT STEPHEN'S

NEW

COMMENTARIES

ON

THE LAWS OF ENGLAND.

(PARTLY FOUNDED ON BLACKSTONE.)

"For hoping well to deliver myself from mistaking, by the order and perspicuous expressing of that I do propound, I am otherwise zealous and affectionate to recede as little from antiquity, either in terms or opinions, as may stand with truth, and the proficience of knowledge."—Lord Bac. Adv. of Learning.

The Sixth Edition,

BY

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NEW COMMENTARIES
ON
THE LAWS OF ENGLAND.

BOOK IV.
OF PUBLIC RIGHTS—(*continued*).

PART II.
OF THE CHURCH.

HAVING now finished our examination of that division of public rights which concerns the relation between persons in *civil* authority, and those who are subject to that authority,—which involved the whole law relating to the *State* or *civil* government,—we are next to turn our attention to such public rights as are connected with the relation between those who have powers in matters *ecclesiastical*, and those over whom that power is exercised,—which latter subject we shall discuss, as proposed in a former place, under the general head of the *Church* (*a*).

The Church, in that sense of the term to which these Commentaries refer, may be defined as an institution

(*a*) Vide sup. vol. II. p. 341.

established by the law of the land, in reference to religion; in treating of which we shall find it convenient to consider, *first*, the authorities established in the Church; *secondly*, the law relating to its doctrines, worship and discipline; *thirdly*, the law relating to its benefices or endowments. And, first, of the authorities established in the Church.

CHAPTER I.

OF THE ECCLESIASTICAL AUTHORITIES.

THE ecclesiastical authorities consist (under the sovereign, the supreme head of the Church) principally of the *clergy*,—a venerable body of men set apart from the rest of the people (or *laity*), in order to superintend the public worship of Almighty God and the other ceremonies of religion, and to administer spiritual counsel and instruction.

The clergy consist of such, and such only, as have been admitted into *holy orders*; which, in the Church of England (*a*), are the orders of bishops (including archbishops), priests, and deacons (*b*): and the ordination in that Church must take place according to the form prescribed in the Book of Common Prayer (*c*). By 13 Eliz. c. 12, and 44 Geo. III. c. 43, it is now provided (conformably to the canons and the rubric prefixed to the

(*a*) "Bishops, Priests and Deacons are the ministerial orders known to the episcopal establishment of England. In the *Bishop* lies the power of ordination. *Deacons*, when ordained, may, licensed by the bishop, preach and administer the right of baptism. *Priests*, by this ceremony, are further empowered to administer the Lord's Supper, and to hold a benefice with cure of souls."—Report of the Registrar-General on the Religious Worship of England and Wales, December, 1853, (founded on the census of 1851), p. xxxiv.

(*b*) The Roman canonists had the orders of bishops (in which the pope

and archbishops were included), priest, deacon, subdeacon, psalmist, acolyte, exorcist, reader, ostiarins. Corv. Jus Canon. 38, 39; Gibs. Cod. 115.

(*c*) See 2 Burn's Eccl. Law, 103; Wats. C. L. ch. xiv. As to the *fees* payable on ordination, see 30 & 31 Vict. c. 135. By 59 Geo. 3, c. 60, s. 3, no person ordained by a *foreign* bishop can officiate in any church or chapel of England, without special permission from the archbishop of the Province; or be admitted to any ecclesiastical preferment in England, without consent both of archbishop and bishop.

office of ordination in that Book), that none shall be ordained deacon under twenty-three years, nor priest under twenty-four years of age;—though as to deacons, the Archbishop of Canterbury has the privilege of admitting them, (by faculty or dispensation,) at an earlier period. By the same statute of Elizabeth, it was also prescribed that none should be ordained either priest or deacon, without first *subscribing* the Thirty-nine Articles of religion. But in lieu of this, it is now provided by 28 & 29 Vict. c. 122, that before his ordination the priest or deacon shall make and subscribe such declaration of *assent* to such Articles, the Book of Common Prayer, and the ordination service, as is provided in that Act,—a declaration which includes also an assertion of belief that the doctrine of the Church as therein set forth is agreeable to the Word of God, and a pledge to use the forms thereby prescribed in public worship and the administration of the sacraments (*c*). It is also requisite that the candidate shall, prior to his ordination, take the oath of allegiance to the Queen (*d*), and also the oath of canonical obedience to the bishop (*e*). Moreover, by the canonlaw (*f*), no person shall be admitted into holy orders without a *title* (as it is called); that is, unless he produce to the bishop a presentation to some ecclesiastical living within the diocese, or such certificate of preferment or provision as in the canon described; unless, indeed, he be a fellow or chaplain in Oxford or Cambridge, or master of arts of five years' standing in either of such universities, and living there at his own charge; or unless the bishop himself intends shortly to admit him to some benefice or curacy. And we may observe further, that, [by 31

(*c*) 28 & 29 Vict. c. 122, ss. 1, 4.

(*d*) The form of oath is now prescribed by the 31 & 32 Vict. c. 72 (see sect. 14). By 24 Geo. 3, c. 35, an *alien* may be ordained to exercise the office of deacon or priest out of

the dominions of the crown, without requiring him to swear allegiance to the sovereign of these realms.

(*e*) See 28 & 29 Vict. c. 122, s. 12; 31 & 32 Vict. c. 72, s. 14.

(*f*) Can. 33; Wats. C. L. 147.

[Eliz. c. 6, if any person obtain orders, or a licence to preach, by money or corrupt practices, (which seems to be the true, though not the common, notion of *simony*,) the person giving such orders shall forfeit 40*l.*, and the person receiving, 10*l.*; and the latter is incapable of any ecclesiastical preferment for seven years afterwards.]

In order to attend the more closely to their duties, the clergy have certain privileges: [and had formerly much greater, which were abridged at the time of the Reformation, on account of the ill use which the popish clergy had endeavoured to make of them. For the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie (*g*). But it is observed by Sir Edward Coke (*h*), that as the overflowing of waters doth many times make the river to lose its proper channel, so in times past, ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost, or enjoyed not, those which of right belonged to them.] The personal exemptions do indeed, in several instances, continue. [A clergyman cannot be compelled to serve on a jury (*i*);] nor [can he be chosen to any temporal office, as bailiff, reeve, constable, or the like—in regard of his own continual attendance on the sacred function (*k*). During his attendance on divine service,] that is to say, *eundo, morando, et redeundo*, [he is privileged from being arrested in any civil suit (*l*):] and the glebe and tithes of his

(*g*) The marriage of the clergy was, in the time of popery, prohibited; but the prohibition was taken away by 2 & 3 Edw. 6, c. 21. Among the privileges by which the clergy were once very particularly distinguished, was what was called the *benefit of clergy*, antiently allowed to them alone. As to this vide post, vol. iv. p. 530, *in notis*.

(*h*) 2 Inst. 4.

(*i*) 6 Geo. 4, c. 50, s. 2.

(*k*) Finch, L. 88.

(*l*) See stat. 50 Edw. 3, c. 5; 1 Ric. 2, c. 15; 29 Car. 2, c. 7, s. 6; 9 Geo. 4, c. 31, s. 23; 24 & 25 Vict. c. 100, s. 36, by which last enactment, to arrest a clergyman in defiance of this privilege is made a misdemeanor, punishable with imprisonment, with or without hard labour, to the extent of two years.

parsonage are not liable to be seized in execution to satisfy a judgment in the same manner as lay property, but to a *sequestration*; by which the sum due on such judgment is directed to be levied by the churchwardens out of the profits of his benefice, after making provision for the service of the church (*n*). [But as they have their privileges, so also the clergy have their disabilities, on account of their spiritual avocations.] For by 41 Geo. III. c. 63, they are made incapable of being elected members of the House of Commons (*o*); and by 5 & 6 Will. IV. c. 76, s. 28, of being councillors or aldermen in boroughs. They are also prohibited from farming or trading; for by 1 & 2 Vict. c. 106, ss. 28—30, (repealing some former enactments on this subject,) no spiritual person holding any cathedral preferment or benefice, or any curacy or lectureship, or allowed to perform the duties of any ecclesiastical office,—shall take to farm for occupation by himself any lands exceeding eighty acres in the whole, without permission in writing from the bishop of the diocese; nor shall such spiritual person, by himself or any other to his use, carry on any trade or dealing for profit, unless it be carried on by more than six partners, or his share in it shall have devolved to him by inheritance, or other such representative title as in the Act specified; and even in these excepted cases it is illegal for him to act as director or managing partner, or to carry on the trade in person (*p*). But notwithstanding these prohibitions, the

(*n*) Upon the subject of sequestration, the following authorities may be consulted: Burn's Eccles. Law, in tit. Sequestration; Arbuckle v. Cowtan, 3 Bos. & Pul. 326; Marsh v. Fawcett, 2 H. Bl. 582; Bishop v. Hatch, 1 Ad. & E. 171; Pack v. Tarpley, 9 Ad. & E. 468; Harding v. Hall, 10 Mees. & W. 42; Phelps v. St. John, 10 Exch. 895. See also

as to the remedies of sequestrators, 12 & 13 Vict. c. 67.

(*o*) Vide sup. vol. II. p. 393.

(*p*) See also 4 & 5 Vict. c. 14. It is to be observed, that a contract entered into by a clergyman engaged in trade, contrary to the 29th section of 1 & 2 Vict. c. 106, may be enforced against him, under section 31 of the same Act,

Act allows him to carry on the business of a schoolmaster; or to deal with booksellers as to the sale of books; or to be a managing director, partner, or shareholder in any benefit society, or fire or life insurance society; or to buy or sell to the extent necessarily incidental to his lawful occupation of land, or to sell minerals, the produce of his land,—provided that none of such transactions be conducted in person, in any market or place of public sale.

[In the frame and constitution of ecclesiastical polity there are divers ranks and degrees, which we now shall consider in their respective order, merely as they are taken notice of by the secular laws of England.]

I. Both *archbishops* and *bishops* are constituted by election, confirmation, consecration, and installation (*q*); though an archbishop is more properly said to be enthroned and not installed (*r*).

The election of an archbishop or of a bishop is by the [chapter of his cathedral church, by virtue of a licence from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair, throughout all Christendom; and this was promiscuously performed by the laity as well as the clergy (*s*), till at length it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands, by reserving to themselves the right of confirming these elections, and

though both parties contracted with a knowledge of the facts constituting the illegality. (*Lewis v. Bright*, 4 Ell. & Bl. 917.)

(*q*) As to archbishops and bishops, vide sup. vol. I. p. 121, et vol. II. p. 353.

(*r*) *Bishop of St. David's v. Lucy*, 1 Salk. 137; 3 Salk. 72. See 5 & 6 Vict. c. 26, as to providing

episcopal houses of residence; and 14 & 15 Vict. c. 60, as to the improper assumption of the title of archbishop, bishop, or dean, of any place in the united kingdom, under authority from the see of Rome.

(*s*) *Per clericum et populum*, Palm. 25; *Sobreán v. Kevan*, 2 Roll. Rep. 102; *M. Paris*, A.D. 1095.

[of granting investiture of the temporalities, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture, the elected bishop could neither be consecrated nor receive any secular profits. This right was acknowledged in the Emperor Charlemagne, A.D. 773, by Pope Hadrian I. and the Council of Lateran (*t*), and universally exercised by other Christian princes: but the policy of the Court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy; which at length was completely effected: the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishoprics is said to have been in the crown of England, (as well as other kingdoms in Europe,) even in the Saxon times (*u*): because the rights of confirmation and investiture were in effect, (though not in form,) a right of complete donation (*v*). But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting these investitures, which was *per annulum et baculum*, by the prince's delivering to the prelate a ring and pastoral staff or crosier,—pretending that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction; and Pope Gregory the seventh, towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them (*w*). This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent

(*t*) Decret. 1, dist. 63, c. 22.

(*w*) Decret. 2, caus. 16, qu. 7, c.

(*u*) Palm. 28.

12 et 13.

(*v*) Selden, Jan. Ang. 1, 1, s. 39.

[of the civil authority; and long and eager were the contests occasioned by this papal claim. But at length, when the Emperor Henry the fifth agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future, *per sceptrum*, and not *per annulum et baculum*,—and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier, the court of Rome found it prudent to suspend for awhile its other pretensions (*x*).

This concession was obtained from King Henry the first in England, by means of that obstinate and arrogant prelate, Archbishop Anslem (*y*); but King John, (about a century afterwards,) in order to obtain the protection of the pope against the discontented barons, was also prevailed upon to give up, by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops; reserving only to the crown the custody of the temporalities during the vacancy; the form of granting a licence to elect (on refusal whereof the electors might proceed without it); and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause (*z*). This grant was expressly recognized and confirmed in King John's *Magna Charta* (*a*), and was again established by statute 25 Edw. III. st. 6, c. 3.]

But by statute 25 Hen. VIII. c. 20 (*b*), the law was

(*x*) Mod. Un. Hist. xxv. 363; xxix. 115.

(*y*) M. Paris, A.D. 1107.

(*z*) M. Paris, A.D. 1214; 1 Rym. Feod. 198.

(*a*) Cap. 1, edit. Oxon. 1759.

(*b*) Repealed by 1 & 2 Ph. & Mary, c. 8, s. 9, but afterwards revived by 1 Eliz. c. 1, ss. 7, 10. As

to the bishoprics created by Hen. 8, viz., Chester, Gloucester, Peterborough, Bristol and Oxford, it is said in Co. Litt. by Harg. 134, a, n. (5), that they are donative. But it seems to be the practice as to all these, to issue a *congé d'élire* (see The Queen v. Archbishop of Canterbury, 11 Q. B. 513;) and in the

again altered, and the right of nomination secured to the Crown as it exists at the present day; [it being then enacted that, at every future avoidance of a bishopric, the king may send the dean and chapter his usual licence (called his *congé d'élire*) to proceed to election; which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect; and if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king, who may then by letters patent appoint such person as he pleases. This election or nomination, if it be of a bishop, must be signified by the king's letters-patent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; in either case, requiring them to confirm, invest, and consecrate the person so elected:] which they are bound forthwith to perform (*c*). [After which, the bishop elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this Act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *præmunire*;) that is, the loss of all civil rights, with forfeiture of lands, goods, and chattels, and imprisonment during the royal pleasure (*d*).

case of Gloucester and Bristol (now united), it is expressly directed that there shall be an election by the dean and chapter of each alternately. (Order in Council, 5 Oct. 1836.) No *congé d'élire* is issued with respect to the *Irish* bishoprics. (Bishop of St. David's *v.* Lucy, 1 Salk. 136.)

(*c*) A bishop, when consecrated, must be full thirty years of age (see the rubric prefixed to the office

of ordination in the Book of Common Prayer); but antiently there seems to have been no such restriction. (See Godw. Comm. de Præsul. 693.)

(*d*) 25 Hen. 8, c. 20. As to a *præmunire*, vide post, vol. iv. p. 260. It may be here noticed that, in the year 1848, the see of Hereford being vacant, the dean and chapter thereof received a *congé*

There are two archbishops for England and Wales (*e*); the Archbishop of Canterbury (*f*), who has within his province all the bishoprics, (which are at present twenty-six in number,) except those of Chester, Durham, Carlisle, Ripon, Manchester, and that of Sodor and Man; and the Archbishop of York, whose province comprises the six bishoprics just named.

The two archbishops, and the bishops of London, Durham, and Winchester, have the right, in virtue of their respective sees, to sit as lords spiritual, (having first received a writ of summons for the purpose,) in the House of Lords; and among the other bishops for the time being, there are always twenty-one who sit there, under the like summons. But the number does not exceed this; the bishop of Sodor and Man being in no case a lord spiritual, and the bishop most recently appointed (not being one of the above three) not receiving a writ of summons to parliament until a fresh vacancy occurs among the sees conferring a seat in the house of lords in rotation. This is by the effect of the statute

d'élire to elect Dr. Hampden, who was in due course elected; but at the time of his *confirmation*, on the usual challenge to all objectors to come forward and be heard being delivered, certain objections were tendered; but the officers in ministrations refused to receive them. Upon this a rule was obtained by the objectors, in the Court of Queen's Bench, to show cause why a *mandamus* should not issue to the Archbishop of Canterbury to receive the objections. After solemn argument, however, it was decided (though the judges were not unanimous in their opinions) that the rule should be discharged; the chief ground of the decision being that the *congé d'élire* was imperative. (Queen *v.* Arch-

bishop of Canterbury, 11 Q. B. 483.)

(*e*) Antiently there were three archbishoprics, the third being of Caerleon in Wales; but in the time of Henry the first both that see and all Wales became subject to the Archbishop of Canterbury. (Rogers's Eccl. L. 105.) With respect to the Welch dioceses notice may here be taken of a recent Act (26 & 27 Vict. c. 82), providing facilities for the performance of divine service in the English as well as the Welch language, when so desired by the inhabitants of any parish.

(*f*) The Archbishop of Canterbury was antiently Primate of Ireland also; Ireland having had no archbishop of its own till the year 1152. (Ibid. 106.)

10 & 11 Vict. c. 108, for establishing the bishopric of Manchester; for, though theretofore all the bishops (except the bishop of Sodor and Man) were summoned as a matter of course to the House of Lords, this statute provides that the number of lords spiritual shall not be increased by the creation of the new bishopric.

[An archbishop is the chief of the clergy in a whole province; and has the inspection of the bishops of that province, as well as of the inferior clergy,] or, as the law expresses it, the power to *visit* them (*g*). He confirms the election of the bishops, and afterwards consecrates them (*h*). [As archbishop, upon receipt of the king's writ, he calls the bishops and clergy of his province to meet him in Convocation; but without the king's writ he cannot assemble them (*i*).] To him, as a superior ecclesiastical judge, [all appeals are made from inferior jurisdictions within his province (*k*). And as an appeal lies from the bishops, in person, to him in person; so it also lies from the consistory courts of each diocese, to the archiepiscopal court (*l*):] in addition to which the archbishop of Canterbury has also a court of original jurisdiction over thirteen parishes in London; which is held for him by his official principal called the Dean of the Arches (*m*). [During the vacancy of any see in his province, the

(*g*) Bishop of St. David's *v.* Lucy, 1 Salk. 134; and see *Re Dean of York*, 2 Q. B. 1. As to the *fees* payable on the visitation, to the officials of the archbishop, see 30 & 31 Vict. c. 135.

(*h*) 2 Rol. Ab. 223. As to the power of the archbishop to consecrate a British subject, or the subject or citizen of a foreign state, to be a bishop in a foreign country, see 26 Geo. 3, c. 84; 5 Vict. c. 6. As to his power in relation to the bishops and archdeacons of the West Indies, see 6 Geo. 4, c. 88;

5 & 6 Vict. c. 4.

(*i*) 4 Inst. 322, 323. As to Convocation, vide sup. vol. II. p. 559 et seq.

(*h*) The *secular* jurisdiction formerly belonging to the Archbishop of York and Bishop of Ely, was abolished by 6 & 7 Will. 4, c. 87; 7 Will. 4 & 1 Vict. c. 53; that belonging to the Bishop of Durham, by 6 & 7 Will. 4, c. 19.

(*l*) See *Ex parte Denison*, 4 Ell. & Bl. 292.

(*m*) 2 Chitt. Gen. Pract. 496. See *Burgoyne v. Free*, 2 Add. 406.

[archbishop is guardian of the spiritualities thereof, as the king is of the temporalities, and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of Prior of Canterbury was abolished at the Reformation (*n*). The archbishop is entitled to present by lapse, to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan bishop (*o*); in lieu of which it is now usual for the bishop to make over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice within the bishop's disposal, within that see, as the archbishop himself shall choose. Which is, therefore, called his *option* (*p*): which options are only binding on the bishop himself who grants them, and not on his successors (*q*). The prero-

(*n*) 2 Rol. Abr. 22.

(*o*) "Bishops are styled *suffragan* (a word signifying *deputy*), in respect of their relation to the archbishops of their province. But formerly each archbishop and bishop had also his suffragan to assist him in conferring orders, and in other *spiritual* parts of his office within his *diocese*. These, in our ecclesiastical law, are called *suffragan* bishops, and resemble the *chorepiscopi*, or *bishops of the country*, in the early times of the Christian church. How this inferior order of bishops may be elected and consecrated, is regulated by 26 Hen. 8, c. 14; but, notwithstanding this statute, it is not usual to appoint them. They should not be confounded with the *coadjutors* of a bishop; the latter being appointed in case of a

"bishop's infirmity to superintend his *jurisdiction* and *temporalities*, neither of which was within the interference of the former. See fully on this subject in 1 Gibs. Cod. 1st edit. 155."—Co. Litt. by Harg. 94a, note (3).

(*p*) Cowel's Interp. tit. Option.

(*q*) These options become the private patronage of the archbishop, and upon his death are transmitted to his personal representatives; or the archbishop may direct, by his will, whom, upon a vacancy, his executor shall present;—which direction, according to a decision in the House of Lords, his executor is compellable to observe. (1 Burn's Eccl. Law, 226.) If a bishop dies during the vacancy of any benefice within his patronage, the presentation devolves to the crown; so likewise if a bishop dies after an option

[gative itself seems to be derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury (*t*.)] It is [likewise the privilege, by custom, of the archbishop of Canterbury to crown the kings and queens of this kingdom (*u*). And he hath also by the statute 25 Hen. VIII. c. 21 (*x*), the power of granting dispensations in any case, not contrary to the Holy Scriptures and the law of God, where the pope used formerly to grant them; which is the foundation of his granting special licences to marry at any place or time (*y*)], or his giving dispensation [to hold two livings and the like (*z*); and on this also is founded the right he exercises of conferring degrees,] called Lambeth degrees (*a*), [in prejudice of the universities (*b*).] In un-

becomes vacant, and before the archbishop or his representatives has presented and the clerk is instituted, the crown *pro hac vice* will be entitled to present to that dignity or benefice; (Potter *v.* Chapman, Amb. 101;) for the grant of the option by the bishop to the archbishop has no efficacy beyond the life of the bishop. (Christian's Blackstone, vol. i. p. 381.)

(*t*) Blackstone remarks (vol. i. p. 283), that the papal claim itself, like most others of that encroaching see, was probably set up in imitation of the imperial prerogative called *primæ* or *primariæ preces*; whereby the emperor had immemorially exercised (Goldast. Constit. Imper. tom. 3, p. 406) a right of naming to the first prebend that became vacant after his accession, in every church of the empire. (Dufresne, v. 806; Mod. Univ. Hist. xxix. 5.) He adds that a similar right was exercised in England by the sovereign in the reign of Edw. 1 (Brev. 11, Edw. 1; 3 Fryn. 1264), which probably gave rise to the royal *corodies*; viz. the right (now

disused) to send one of the royal chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promoted him to a benefice. There were also other species of *corodies*; as to which, vide sup. vol. i. p. 668.

(*u*) It is said that the archbishop of York has the privilege to crown the queen consort, and to be her perpetual chaplain. (1 Burn's Eccl. Law, 178.)

(*x*) And see 28 Hen. 8, c. 16. As to dispensation, see Colt *v.* Bishop of Lichfield, Hob. 147.

(*y*) See 4 Geo. 4, c. 76, s. 20.

(*z*) See 1 & 2 Vict. c. 106, s. 6.

(*a*) Although the archbishop can confer all the degrees which are taken in the universities of Oxford and Cambridge, yet the graduates of these universities, by various acts of parliament and other regulations, are entitled to many privileges which are not extended to what is called a "Lambeth" degree. (Christian's Blackstone, vol. i. p. 381.)

(*b*) See the Bishop of Chester's case, Oxon. 1721.

accustomed cases, however, the archbishop has no power to grant dispensations, but must refer the matter to the sovereign in council (*c*).

A bishop is the chief of the clergy within a diocese (*d*); but is subordinate to the archbishop of the province, to whom he is sworn to pay due obedience (*e*). His dignity is usually called a see (*sedes*), and the church of his diocese a cathedral (*f*). Among the principal powers which he exercises are those of ordaining priests and deacons (*g*), consecrating churches, and [inspecting the manners of the people and clergy (*h*);] for which purpose [he may *visit* at pleasure every part of his diocese (*i*). He is also an

(*c*) 25 Hen. 8, c. 21, s. 5.

(*d*) As to dioceses, vide sup. vol. I. p. 121.

(*e*) See preamble to 26 Geo. 3, c. 84. A clergyman is said to owe "canonical obedience" to the bishop who ordained him, to the bishop in whose diocese he is beneficed and also to the metropolitan of such bishop. (4 Bl. Com. 203; 1 Hale, P. C. 381.)

(*f*) As to the government and arrangement of cathedrals and collegiate churches, see 6 Ann. c. 21; 3 & 4 Vict. c. 113; 4 & 5 Vict. c. 39; 27 & 28 Vict. c. 70. We may remark here, that a *collegiate church* is a church consisting of a body corporate of dean and canons, such as Westminster, Windsor, &c., independently of any cathedral. The Report of the Cathedral Commission (published in 1854) divides cathedrals and collegiate churches into four classes. The first class consists of thirteen, being the *cathedrals of the old foundation*, or *Ecclesiæ Cathedralis Canoniarum Secularium*. The second class con-

sists of *eight conventual cathedrals*, constituted with *deans and chapters* by Hen. 8. The third class contains the *five cathedrals founded together, with new bishoprics*, by Hen. 8. The fourth class are the new cathedrals of Ripon and Manchester.

(*g*) See 59 Geo. 3, c. 60; 3 & 4 Vict. c. 33; 15 & 16 Vict. c. 52, s. 2; 26 & 27 Vict. c. 121, as to the ordination of priests or deacons for or in the colonies.

(*h*) See Re Dean of York, Q. B. 1.

(*i*) As to the *fees* payable on the visitation to the bishop's officials, see 30 & 31 Vict. c. 135. It may be here noticed that the bishop is also often, by virtue of his office, a *trustee* for charitable and other purposes within his diocese. And by 21 & 22 Vict. c. 71, in certain cases where the limits of the diocese have become altered, power is given to the charity commissioners to substitute in the place of such bishop, the bishop of another diocese, or to enable the one to act jointly with the other.

ecclesiastical judge (*j*): but [his chancellor is appointed to hold his consistory courts for him, and to assist him in matters of ecclesiastical law (*k*).]. In case of complaint, however, against a clerk in holy orders, for any ecclesiastical offence under the Church Discipline Act, (3 & 4 Vict. c. 86,) the bishop of the diocese wherein such offence has been committed (*l*) issues a commission for inquiry into the same (*m*); and, if it shall then appear to him that there is sufficient ground for proceeding farther, he is to hold a court to hear the cause, assisted by three assessors: of whom the dean of his cathedral, or one of his archdeacons, or his chancellor, must be one; and a serjeant at law or an advocate who has practised five years in the court of the archbishop of the province, or a barrister of seven years' standing, another. The bishop may either determine such cause himself or may send it to the court of appeal for the province, there to be determined: and in either case an appeal lies ultimately to the queen in council (*n*). [It is moreover the business of a bishop to institute, and to direct induction, to all ecclesiastical

(*j*) As to the local limits of the jurisdiction of the bishop, see the temporary Act of 10 & 11 Vict. c. 98; continued by 31 & 32 Vict. c. 111, to 1st August, 1869, and end of then next session.

(*k*) By 37 Hen. 8, c. 17, it is declared that the chancellor of a diocese may be a layman, married or single, provided he be doctor of the civil law lawfully create and made in some university. By the canons of 1603, he must be either a bachelor of law or a master of arts. See Godolph. Ab. 82.

(*l*) In case the bishop is the patron of the preferment held by the clerk proceeded against, the *archbishop* acts. (See *Ex parte Denison*, 4 Ell. & Bl. 292; *The Queen v.*

The Archbishop of Canterbury, 6 Ell. & Bl. 546.) As to the appeal in such case, see *The Queen v. The Judge of the Arches Court*, 7 Ell. & Bl. 313.

(*m*) The Act directs that there shall be five commissioners for this purpose, one of whom shall be the bishop's vicar-general, or an archdeacon or rural dean of the diocese (sect. 3). It seems that the bishop has a discretion whether or no he will issue a commission. (*The Queen v. The Bishop of Chichester*, 2 Ell. & Bl. 209.)

(*n*) If the bishop himself gives judgment, there is an appeal, in the first instance, to the court of appeal for the province. (3 & 4 Vict. c. 86, s. 15.)

[livings in his diocese,] to license to perpetual curacies (*o*), and also to license temporary curates, and regulate their salaries (*p*).

[Archbishoprics and bishoprics may become void by deprivation for any very gross and notorious crime, and also by resignation (*q*). All resignations must be made to some superior (*r*). Hence a bishop may resign to his metropolitan; but the archbishop can resign to none but the sovereign himself.]

The claims of the crown on archbishoprics and bishoprics, in respect of the custody of the temporalities, and in respect of the first fruits and tenths of all spiritual preferments, have been already noticed in a former part of the work (*s*). They need not, therefore, be again discussed in this place. We may mention however here, that, when any spiritual person is made an English bishop, the preferments of which he was before possessed become, in general, void upon his consecration (*t*); and the sovereign may present to them by his prerogative royal (*u*).

(*o*) Vide post, p. 26.

(*p*) 1 & 2 Vict. c. 106, s. 77. See also 3 & 4 Vict. c. 33, authorizing the bishops to permit clergy of the Protestant episcopal Church in Scotland, or of the United States, to officiate in their respective dioceses.

(*q*) See 19 & 20 Vict. c. 115, providing for the retirement of the then Bishops of London and Durham. By 6 & 7 Vict. c. 62, provisions are made for the performance of the episcopal functions in the event of the *incapacity* of any archbishop or bishop.

(*r*) Gibs. Cod. 822.

(*s*) Vide sup. vol. II. p. 565.

(*t*) The doctrine does not apply to the case of a promotion to a *colonial* bishopric. The Queen *v.* Eton

College, 8 Ell. & Bl. 610.

(*u*) 1 Bl. Com. 383. See *Basset v. Gee*, Cro. Eliz. 790; *Att.-Gen. v. Bishop of London*, 4 Mod. 210; *Grocers' Company v. Archbishop of Canterbury*, 2 W. Bl. 770. It is laid down also by Sir E. Coke, 2 Inst. 491, that, on the death of every prelate in England, the crown is entitled to six things, viz., the bishop's best horse or palfrey, with his furniture; his cloak or gown, and tippet; his cup and cover; his bason and cover; his gold ring; and, lastly, his *muta canum*, his mew or kennel of hounds. (2 Bl. Com. 426.) The right to these things is considered by Blackstone as in the nature of a *mortuary*; but Lord Coke says it was a *fine* to the crown

II. [A dean and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see (*u*). When the rest of the clergy were settled in the several parishes of each diocese (*v*), these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or dean (*w*).]

The chapter, who, as distinct from the dean, consist of certain dignitaries called canons (*x*), [are sometimes appointed by the crown, sometimes by the bishop, and sometimes by each other (*y*).] And antiently the deans were elected by the chapter, by *congé d'élire* from the crown, and letters missive of recommendation, in the same manner as bishops; but in the modern deaneries, viz. those that were founded by Henry the eighth out of the spoils of the dissolved monasteries, the title has always been donative, and the installation merely by letters-patent from the crown (*z*). And now this is the course with respect to the antient deaneries also; it being provided by 3 & 4 Vict. c. 113, that every such deanery (except in Wales) shall thenceforth be in the direct patronage of her Majesty; who may, on the vacancy thereof, appoint a dean by letters-patent (*a*). And by the same Act it is further enacted, that no person shall hereafter be capable of receiving the appointment

for empowering the bishops to grant probates, &c. (See *Mirehouse v. Rennell*, 8 Bing. 497.)

(*u*) Dean and Chapter of Norwich's case, 3 Rep. 75; Co. Litt. 103, 300.

(*v*) Vide sup. vol. I. p. 122.

(*w*) This, says Blackstone (vol. i. p. 382), was probably because he was at first appointed to superintend *ten* canons or prebendaries.

(*x*) By 3 & 4 Vict. c. 113, s. 1, all the members of Chapters, except the dean, in every cathedral and collegiate church in England, shall be

styled canons. Such canons, however, as are *prebendaries*, differ from such as are not, as having a *prebend*, or fixed portion of the rents and profits of the cathedral or collegiate church for their maintenance.

(*y*) See 3 & 4 Vict. c. 113, ss. 24, 26; and 4 & 5 Vict. c. 39, as to the right of appointment to certain canonries.

(*z*) See the learned note by Mr. Hargrave, Co. Litt. 95; and 1 Bl. Com. 383.

(*a*) 3 & 4 Vict. c. 113, s. 24.

either of dean, archdeacon, or canon, until he shall have been six years complete in priest's orders,—except, indeed, in the case of a canonry annexed to any professorship, headship, or other office in some university (*b*): that the dean shall reside for at least eight months in the year (*c*): that the term of a canon's residence shall be at least three months in the year (*d*): that the right of nominating a regulated number of *minor* canons, with salaries, shall in future be in all cases vested in the respective chapters (*e*): and that *honorary* canons, without salaries, shall be appointed for every cathedral church in which there are not already founded any non-residential prebends, dignities and offices (*f*): which honorary canonries shall be in the gift of the archbishops and bishops respectively (*g*).

[The dean and chapter are, as was before observed, the nominal electors of a bishop. The bishop is their immediate superior and ordinary (*h*); and has, generally speaking the power, of *visiting* them (*i*); and correcting their excesses and enormities. At common law, they had, on the other hand, a check on the bishop:] for till the statute 32 Hen. VIII. c. 28, (which enabled him to grant leases not exceeding twenty-one years or three lives, on his sole authority,) his grant or lease would not have bound his successors, unless confirmed by the dean and chapter (*j*).

Deaneries and canonries may become void by deprivation, or by resignation either to the king or the bishop (*k*).

(*b*) 3 & 4 Vict. c. 113, s. 27.

(*c*) Sect. 3.

(*d*) *Ibid.*

(*e*) Sect. 45.

(*f*) Since the 3 & 4 Vict. c. 113, non-residential prebendaries have ceased to be members of the chapters. (*Randolph v. Milman*, Law Rep., 2 C. P. 60.)

(*g*) 3 & 4 Vict. c. 113, s. 23.

(*h*) As to the ordinary, see vol. II. p. 200, n. (*x*).

(*i*) See *Re Dean of York*, 2 Q.B. 1.

(*j*) Co. Litt. 44 a, 103 a; vide sup. vol. I. p. 488.

(*k*) *Grendon v. Bishop of Lincoln*, Plowd. 498.

III. [An *archdeacon* hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, throughout the whole of a diocese or in some particular part of it (*l*). He is usually appointed by the bishop himself; and hath a kind of episcopal authority, originally derived from the bishop, but now independent and distinct from his (*m*). He therefore *visits* the clergy (*n*); and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance (*o*.)] As a general rule (but subject to exception in the case of particular archdeacons), the jurisdiction of the archdeacon and the bishop are *concurrent*, so that a suit may be commenced in the court of either (*p*). An archdeaconry may become void by deprivation or resignation.

IV. [The *rural deans* are very antient officers of the church (*q*),] but their authority is almost grown out of use; [though their deaneries still subsist as an ecclesiastical division of the diocese, or archdeaconry (*r*).] They seem originally to have been deputies of the bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and

(*l*) As to the ecclesiastical division of dioceses into archdeaconries, of archdeaconries into rural deaneries, and of rural deaneries into parishes, vide sup. vol. I. p. 122.

(*m*) 1 Burn's Eccl. Law, 68, 69.

(*n*) As to the *fees* payable to his officials on his visitation, see 30 & 31 Vict. c. 135.

(*o*) By 6 & 7 Will. 4, c. 77, s. 19, it is provided that all archdeacons throughout England and Wales shall have and exercise full and equal jurisdiction within their respective archdeaconries, any usage to the contrary notwithstanding.

And see 6 & 7 Will. 4, c. 77; 3 & 4 Vict. c. 113; and 4 & 5 Vict. c. 39, for provisions as to the endowment and arrangement of archdeaconries.

(*p*) Rogers's Eccl. Law, 60. See further as to the archdeacon's court, post, bk. v. c. v.

(*q*) Kennett, Par. Antiq. 633; Dansey, Horæ Decanicæ Rurales.

(*r*) See 6 & 7 Will. 4, c. 77, s. 1, and 3 & 4 Vict. c. 113, s. 32. In the Report on Public Religious Worship, by the Registrar-General, under the census of 1851, it is said there were then 463 rural deaneries in England and Wales (p. xxxvi).

report dilapidations, and to examine the candidates for confirmation; and were armed, in minuter matters, with an inferior degree of judicial and coercive authority (*s*).

V. The next, and indeed the most numerous, order of men in the system of ecclesiastical polity are the *rectors* and *vicars* of churches: in treating of whom, we shall first mark out the distinction between them; shall next observe the method by which one may become a rector or vicar; shall then briefly touch upon their rights and duties; and shall, lastly, show how one may cease to be either.

1. The rector (or governor) of a church is also properly called “a parson,” *persona ecclesiæ*, that is [one that hath full possession of all the rights of a parochial church (*t*). He is called *parson*, because by his person the church, which is an invisible body, is represented: [and this appellation (however it may be depreciated by familiar, clownish and indiscriminate use,) is the most legal, most beneficial, and most honourable title that a parish priest can enjoy; because such a one, (Sir Edward Coke observes,) and he only, is said *vicem seu personam ecclesiæ gerere*.] And the freehold of the parsonage house, the glebe, the tithes, and other dues, vests, during his life, in the parson. But here we must take occasion to explain the doctrine of appropriations, with which the distinction between rectors and *vicars* is closely connected.

[This contrivance of appropriating livings seems to have sprung from the policy of the monastic orders, who have never been deficient in subtle inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed in a four-fold division; one

(*s*) Gibs. Cod. 972, 1550.

(*t*) The proper term for a parson in full possession of his living

is, in law, *persona impersonata*, or parson imparsonee. (See Co. Litt. 300.)

[for the use of the bishop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incumbent. But when the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was thenceforth into three parts only. Hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities, (the endowment of which was construed to be a work of the most exalted piety,) subject to the burthen of repairing the church and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then *appropriated* the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the king's licence, and the consent of the bishop, had first to be obtained; because both the king and the bishop might some time or other have an interest, by lapse, in the presentation to the benefice (which can never happen if it be appropriated to the use of a corporation, which never dies); and also because the law reposed a confidence in them, that they would not consent to anything that should be to the prejudice of the church. The consent of the patron also was necessarily implied: because (as was before observed) the appropriation could be originally made to none, but to such spiritual corporation as was also the patron of the church; the whole being indeed nothing else but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church (*u*). When the appropriation was thus made, the appropriators and their successors became

(*u*) *Grendon v. Bishop of Lincoln*, Plowd. 496—500.

[perpetual parsons of the church, so as to sue and be sued, in all matters concerning the rights of the church, by the name of parsons (*x*).]

Appropriators were thus in their origin always persons spiritual,—such as bishops, prebendaries, monasteries, and other religious houses, [nay, even nunneries, and certain military orders; all of which were spiritual corporations.] But the case is now different; for by 27 Hen. VIII. c. 28, and 31 Hen. VIII. c. 13, the monasteries and religious houses were dissolved, and the appropriations which belonged to them respectively, amounting to more than one-third of all the parishes in England, were thereby given to the king in as ample a manner as the appropriators held the same at the time of their dissolution (*y*); a proceeding which, though perhaps scarcely defensible, was not without example; for the same thing was done in former reigns with respect to the alien priories, that is, such as were filled by foreigners only (*z*); and many of the appropriations so vested in the crown by the effect of these several dissolutions, being afterwards from time to time granted out by the crown to subjects, are now in the hands of lay persons,—who are usually styled, by way of distinction, *lay appropriators*, though the term of *appropriators* is in strictness as applicable to these as to the original holders (*a*).

Appropriations of either class are capable, it is held, of being severed, so that the church may become disappropriate; as [if the appropriator presents a clerk, who is instituted and inducted to the rectory: for the incumbent so instituted and inducted is to all intents and purposes a complete parson; and the appropriation,

(*x*) *Wright v. Gerard*, Hob. 307.

(*y*) 1 Bl. Com. 386; *Seld. Review of Tithes*, c. 9; *Spelm. Apology*, 35.

(*z*) 2 Inst. 584.

(*a*) See *Burn's Eccl. Law*, vol. i. 66; *Christian's Blackstone*, vol. i. 388, (n.); *Spelm. Tithes*, c. 29.

[being once severed, can never be reunited again, unless by a repetition of the same solemnities (*b*).]

In appropriations there is generally a spiritual person attached to the same church, under the name of *vicar*, to whom the spiritual duty, or *cure of souls* (as it is termed), belongs: and to whom, on the other hand, a certain portion of the tithes or other emoluments of the church, by way of exception out of those enjoyed by the appropriator, is assigned. The origin of these vicars is as follows (*c*):

[The appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service, and administer the sacraments, in those parishes of which the society was thus the parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *vicarius* or *vicar* (*d*). His stipend was at the discretion of the appropriator; who was however bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus debeat respondere* (*e*). But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose: and, accordingly, it was enacted by statute 15 Ric. II. c. 6, that in all appropriations of churches the diocesan bishop shall ordain, (in proportion to the value of the church,) a competent sum to be distributed among the poor parishioners

(*b*) Co. Litt. 46. Blackstone (vol. i. p. 386) mentions another method of disappropriating a living, namely, by the corporation which has the appropriation becoming dissolved.

(*c*) As to vicarages, see 40 Edw. 3, pl. 27; Britton *v.* Wade, Cro. Jac. 516; Spelm. Tithes, 153; Bird *v.* Relfh, 2 Ad. & El. 780; Rogers's Eccl. L. 890.

(*d*) See Grendon *v.* Bishop of Lincoln, Plowd. 493; Seld. c. 11, s. 1. It would seem that such ministers existed as long ago as the reign of Henry the second, but they are said to have been then few in number. (Bird *v.* Relfh, 2 Ad. & El. 780.)

(*e*) Seld. Tith. c. 11, 1.

[annually; and that the vicarage shall be *sufficiently* endowed. It seems the parish were frequently sufferers, not only by the want of divine service, but also by withholding those alms, for which, among other purposes, the payment of tithes was originally imposed: and therefore in this Act a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend: and therefore by statute 4 Hen. IV. c. 12, it was ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, not removable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed at the discretion of the ordinary, for these three express purposes,—to do divine service, to inform the people, and to keep hospitality (*f*). The endowments in consequence of these statutes have usually been by a portion of the glebe or lands belonging to the parsonage, and a particular share of the tithes, which the appropriators found it most troublesome to collect:] the greater part being still reserved to their own use. [But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally, and some more scantily, endowed: and hence the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial tithes.]

Such is the history of the distinction between rectors

(*f*) From this Act (4 Hen. 4, c. 12) may be dated the origin of the *present* vicarages; for before this time the vicar was nothing more than a temporary curate, and when the church was appropriated to a monastery, he was generally one of their own body, that is, one of the *regular* clergy; for the monks who

lived *secundum regulas* of their respective houses or societies, were denominated *regular* clergy, in contradistinction to the parochial clergy, who performed their ministry in the world, *in seculo*, and who from thence were called *secular* clergy. (Christian's Blackstone, vol. i. p. 387, n.)

and vicars, the law on which subject may be summarily stated thus. Of parochial churches some have been appropriated, others have not: in a non-appropriated living there is no vicar, but a rector only, who must be a spiritual person, and has the cure of souls in the parish, with the exclusive title to all the emoluments (*g*): in an appropriated living, there is generally, besides the appropriator, a vicar: and in churches so circumstanced (termed *vicarages*), the appropriator never (as appropriator) has the cure of souls within the parish; which is committed to the vicar. And as to the emoluments in vicarages, they belong in part to the appropriator, in part to the vicar, according to distinctions already in part referred to, but to be discussed more fully hereafter. To these explanations it may be proper to add, that, in non-appropriated churches, the rector,—in those which are appropriated, the vicar,—is seised for his life only, the fee being in abeyance (*h*); but the appropriator may be seised in fee, (subject to the incumbent's life interest,) or of a less estate, according to the circumstances of his title (*i*).

But it is not in all appropriations that a vicar exists; for in some it happens, in consequence of their being exempted (for particular reasons) from the statute of 4 Hen. IV. c. 12, that no vicar has ever been endowed (*j*). Such churches, however, usually possess a permanent minister in holy orders, of the same general description,—who, under the denomination of *perpetual curate*, is charged with the cure of souls, and entitled to emolu-

(*g*) By 2 & 3 Vict. c. 30, reciting that there are several benefices, in which more than one spiritual person has the general cure of souls, the bishop is empowered, where such is the case, to order an apportionment of the spiritual services.

(*h*) Vide sup. vol. I. p. 235.

(*i*) As to the subject of appropriation, see *Grendon v. Bishop of Lincoln*, Plowd. 493; *Duke of Portland v. Bingham*, 1 Hagg. Consist. Rep. 162.

(*j*) 1 Bl. Com. 394; 1 Burn's Eccl. L. 427; Wats. C. L. 172. As to 4 Hen. 4, c. 12, vide sup. p. 25.

ment for his services (*k*). But the law of perpetual curacies (*l*) must now be taken in connection with a recent statute (31 & 32 Vict. c. 117), which enacts that the incumbent of the church of every parish or new parish for ecclesiastical purposes, not being a *rector*, who is entitled to perform marriages, churchings, and baptisms, and to claim the fees thereof for his own use, shall for the purpose of style and designation, but not for any other purpose, be deemed and styled the *vicar*, and his benefice a *vicarage*.

It is to be observed also, as another anomaly in the law of vicarages, that in former times the rector of a benefice, having cure of souls, sometimes obtained permission from superior authority to appoint a vicar to officiate under him; so that, by this means, two persons were instituted to the same church, and both had cure of souls; the effect of which was, that by custom the rector became at length entirely relieved from residence, and from all other spiritual duties. An incumbent so circumstanced is commonly called a *sinecure rector*, or rector without cure of souls (*m*). But by 3 & 4 Vict. c. 113, it is now provided that all ecclesiastical rectories without cure of souls (having a vicar endowed or a perpetual curate), which are in the sole patronage of the crown or of any ecclesiastical corporation aggregate or sole, shall, immediately upon the future vacancies thereof respectively, be suppressed; and that the patronage of all others may be at any time sold to the Ecclesiastical Commissioners, and shall thereupon be suppressed (*n*); and that

(*k*) It may be noticed that "a perpetual curate" is liable to his successor for dilapidations. (Mason v. Lambert, 12 Q. B. 795.) And for other points with regard to him, see Doe v. Thomas, 9 A. & E. 556; Hine v. Reynolds, 2 Man. & Gr. 71; Doe d. Brammall v. Collinge, 7 C. B. 939; see also 1 Geo. 1, c. 10, ss. 4

and 21.

(*l*) See this law further stated, post, pp. 32, 33.

(*m*) See 2 Burn's Eccl. L. 347; Christian's Blackstone, vol. i. p. 386, (*n*.); Rogers's Eccl. L. 890; Gibs. Cod. 753.

(*n*) 3 & 4 Vict. c. 113, s. 48.

the lands, tithes, and endowments of any such suppressed sinecure rectory may be annexed, when it shall appear expedient, to the vicarage or perpetual curacy attached to such rectory: which shall be thereupon constituted a rectory with cure of souls (*n*).

We have thus had occasion to speak of three several kinds of parochial preferments, viz., rectories, vicarages, and perpetual curacies (*o*). And as to each of these we may remark, that they are usually comprehended under the general term of *benefice* (*p*); a term indeed which, in its technical sense, (though not in its popular acceptation,) extends not only to these, but also to any ecclesiastical preferment to which rank or public office is attached, and which are described in our books as ecclesiastical *dignities* or *offices*, such as bishoprics, deaneries, and the like (*q*).

2. [The method of becoming a parson (or rector) and becoming a vicar is much the same. To both there are] in general [four requisites necessary: *holy orders*; *presentation*; *institution*; and *induction*.] The method of conferring *holy orders* has been already so far noticed as the purpose of these Commentaries required. We have seen that the age of twenty-three years is now the earliest at which a man may (except by faculty or dispensation of the Archbishop of Canterbury) be ordained deacon;

(*n*) 3 & 4 Vict. c. 113, s. 55.

(*o*) But vide sup. p. 27, as to the effect of 31 & 32 Vict. c. 117, on perpetual curacies.

(*p*) As to the primary meaning of the word *benefice* (a term derived from the feudal law), vide sup. vol. I. p. 181.

(*q*) 3 Inst. 174. By 1 & 2 Vict. c. 106, s. 124, a distinction is made between *benefices* and such preferments as have either rank or public office connected with them,—that statute having adopted the two

general terms of *benefices* and *cathedral preferments*; by the former of which it is to be understood to mean all parochial or district churches, and endowed chapels and chapelries; by the latter, all deaneries, archdeaconries, and canonries, and (generally) all dignities and offices in any cathedral or collegiate church below the rank of a bishop. See also as to the term *benefice*, 5 & 6 Vict. c. 27, s. 15; c. 108, s. 31; and 13 & 14 Vict. c. 98, s. 3.

and that twenty-four is the earliest age at which he may be ordained priest (*r*): and, in reference to this qualification of holy orders, we shall here only add, that, (by 13 & 14 Car. II. c. 4, s. 14,) no person is capable of being admitted to any benefice unless he shall have been first ordained priest.

Any person [may be *presented* to a rectory or vicarage (*s*); that is, the patron, to whom the advowson of the church belongs, may offer his nominee to the bishop of the diocese to be instituted. Of advowsons, or the right of presentation, being a species of private property, we shall find] it more convenient to treat when discussing the endowments and provisions of the church (*t*); and shall for the present only remark, that [when a clerk is presented, the bishop may refuse him upon many accounts. As, 1. If the patron is excommunicated, and remains in contempt forty days (*u*). Or, 2. If the clerk be unfit; which unfitness is of several kinds (*x*). First, with regard to his person; as if he be a bastard (*y*), an outlaw, an excommunicate, an alien, under age, or the like (*z*). Next with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se*: but if the bishop alleges only in generals, as that he is *schismaticus, inveteratus*, or objects a fault that is *malum prohibitum* merely, as haunting taverns, playing at unlawful games, or the like, it is not good cause of refusal (*a*). Or, lastly, the clerk may be

(*r*) Vide sup. p. 4.

(*s*) If a layman or a deacon be presented, he must take priest's orders before admission. (1 Burn's E. L. 103.)

(*t*) Vide post, chap. III.

(*u*) 2 Roll. Abr. 355.

(*x*) Glanv. l. 13, c. 20.

(*y*) Though this be classed in the books among the causes of refusal, yet such is the liberality of the present times, that no one need appre-

hend that his presentment would be impeded by the incontinence of his parents, or by any demerit but his own. Christian's Blackstone, vol. i. p. 389, (n.).

(*x*) 2 Roll. Abr. 356; 2 Inst. 632; stat. 3 Ric. 2, c. 3; 7 Ric. 2, c. 12.

(*a*) Specot's case, 5 Rep. 58. It may be here remarked, that a bishop, called on to institute a clerk presented to a living within his diocese,

[unfit to discharge the pastoral office for want of learning, In any of which cases the bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning, or other matter of ecclesiastical cognizance, there the bishop must give notice to the patron of such his cause of refusal (*e*),] at least if he be a layman, for in that case he is presumably unaware of the disability. But if the objection be a temporal one, the bishop is not bound to give such notice (*f*).

[If an action at law be brought by the patron against the bishop, for refusing his clerk, the bishop must assign the cause. If the cause be of a temporal nature, and the fact admitted, (as, for instance, outlawry,) the judges of the superior courts of law must determine its validity, or whether it be sufficient cause of refusal; but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature, (as heresy, particularly alleged,) the fact, if denied, shall also be determined by a jury; and if the fact be admitted or found, the court, upon consultation and advice of learned divines, shall decide its sufficiency (*g*). If the cause be want of learning, the bishop need not specify in what points the clerk is deficient, but only allege that he is deficient (*h*): for the statute 9 Edw. II. st. 1, c. 13, is express, that the examination of the fitness of a person presented to a benefice, belongs to the ecclesiastical judge. But because it would be nugatory in this case to demand the

is not entitled to demand from the bishop of another diocese, in which such clerk has had the cure of souls, a testimonial as to "his honest conversation, ability and conformity to the ecclesiastical law of England." (Marshall *v.* Bishop of Exeter, 13 C. B., N. S. 820.)

(*e*) Bedingfield *v.* Archbishop of Canterbury, Dyer, 292 (*b*); Hele *v.* Bishop of Exeter, 2 Salk. 539; Albany *v.* Bishop of St. Asaph, Cro.

Eliz. 119. When the refusal is on the ground of the clerk's having been ordained under the proper age, notice must be given. (44 Geo. 3, c. 43.)

(*f*) 2 Inst. 632; 2 Burn, Eccl. L. 157; Hele *v.* Bishop of Exeter, 2 Salk. 539.

(*g*) 3 Inst. 632.

(*h*) Specot's case, 5 Rep. 58; Hele *v.* Bishop of Exeter, 2 Salk. 539; 3 Lev. 313.

[reason of refusal from the ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit; therefore, if the bishop returns the clerk to be *minus sufficiens in literaturá*, the court shall write to the metropolitan to re-examine him, and certify his qualifications: which certificate of the archbishop is final (*i*).

If the bishop hath no objections, but admits the patron's presentation, the clerk so admitted is next to be *instituted* by him; which is a kind of investiture of the spiritual part of the benefice; for by institution the care of the souls of the parish is committed to the charge of the clerk (*j*). But when the bishop is also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a *collation* to the benefice.] And before institution or collation (as the case may be), the clerk must renew the "declaration of assent" he made previously to his ordination, and must also make and subscribe the declaration against simony, and take the oath of allegiance to the Queen (as framed by 31 & 32 Vict. c. 72), before the archbishop or bishop or their commissary; and he must also take the oath of canonical obedience to the bishop (*k*). [By institution or collation, the church is full, so that there can be no fresh presentation till another vacancy,—at least in the case of a common patron: but the church is not full against the crown, till induction: nay, even if a clerk is instituted upon the crown's presentation, the crown may revoke it before induction, and present another clerk (*l*). Upon institution the clerk may enter on the parsonage

(*i*) 2 Inst. 632.

(*j*) The clerk was formerly bound, upon institution, to take an oath of perpetual residence. (1 Bl. Com. 390.) But this is now abolished. See 1 & 2 Vict. c. 106, s. 61.

(*k*) 28 & 29 Vict. c. 122, s. 5, and

see sect. 12. The above declaration and oath must also be taken previously to being *licensed* as vicar of a new parish (vide sup. p. 27, post, p. 119).

(*l*) Co. Litt. 344.

[house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the parishioners due notice and sufficient certainty of their new minister, to whom their tithes are to be paid. This, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted, and inducted into a living, he is then, and not before, in full and complete possession (*m*).] The title, however, of any person instituted, collated or licensed to any benefice with cure of souls will be afterwards devested, unless on the first Lord's day on which he officiates in the church, or such other Lord's day as the ordinary shall appoint and allow, he shall publicly read in the church of the benefice, in the presence of the congregation, the Thirty-nine Articles of religion, and immediately afterwards repeat the "declaration of assent" prescribed by 28 & 29 Vict. c. 122, which he made previously to his ordination (*n*).

In addition to the methods of acquisition which have been mentioned, it is to be observed, that there are benefices which a clerk may obtain by mere *donation*, that is, by deed of gift alone, without presentation, institution, or induction; in which cases he is in a great measure free from episcopal superintendence.

(*m*) Co. Litt. 300.

(*n*) Vide sup. p. 4; 28 & 29 Vict. c. 122, s. 7. See also 13 & 14 Car. 2, c. 4, by which statute (the "Act of Uniformity") two thousand of the clergy, refusing to comply with its

provisions (which also required them to read in the church, and assent to, the morning and evening service according to the Book of Common Prayer), were in fact deprived of their preferments.

Nor are either presentation, institution, or induction required in order to become a perpetual curate (*o*); but an appointment only from the patron, though, on the other hand, the perpetual curate cannot legally officiate until he obtains the bishop's licence (*p*). As to these perpetual curacies, their origin has been already explained (*q*). With respect to *donatives* they are created whenever [the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, shall be subject to his visitation only, and not to that of the ordinary, and shall become vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction (*r*). This is said to have been antiently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not being established more early than the time of Archbishop à Becket, in the reign of Henry the second (*s*). And therefore though Pope Alexander the third (*t*), in a letter to à Becket, severely inveighs against the *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this however shows what was then the common usage. Others contend that the claim of the bishops to institution is as old as the first planting of Christianity in this island: and in proof of it they allege a letter from the English nobility to the Pope in the reign of Henry the third, recorded by Matthew Paris, which speaks of presentation to the bishop as a thing immemorial (*u*). The truth seems to be, that where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was

(*o*) Wats. C. L. 172.

(*p*) R. v. Bishop of Chester, 1 T. R. 403; see also Wats. C. L. 172.

(*q*) Vide sup. p. 26.

(*r*) Co. Litt. 344; 2 Bl. Com. 23.

(*s*) Seld. Tith. c. 12, s. 2.

(*t*) Decretal. l. 3, t. 7, c. 3.

(*u*) A.D. 1239.

[already in orders, the living was usually vested in him by the sole donation of the patron; and that this practice prevailed till about the middle of the twelfth century, when the Pope and his bishops endeavoured to introduce a kind of feudal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.]

However this may be, if the patron of a donative *once* waives his privilege, and presents to the bishop, and his clerk is thereon admitted and instituted, the advowson becomes for ever presentative, and shall never be donative any more (*a*). For these exceptions to general rules and common right, are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If therefore the patron, in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever: and will therefore reduce it the standard of other ecclesiastical livings (*b*).]

3. The rights of the clergy in their tithes and ecclesiastical dues fall more properly under our third division, as to the endowments and provisions of the Church: [and as to their duties, they are principally of ecclesiastical cognizance; those only excepted which are laid upon them by statute. And these are indeed so numerous, that it is impracticable to recite them here with any tolerable conciseness or accuracy. Some of them we may remark upon as they arise in the progress of our inquiries; but for the rest it will be sufficient to refer to such authors as have compiled treatises ex-

(*a*) Co. Litt. 344; *Farchild v. Gayre*, Cro. Jac. 63.

(*b*) As to donative benefices, see Co. Litt. 344; Wats. C. L. 170; 2 Bl. Com. 23, note by Christian;

Reppington v. Governor of Tamworth School, 2 Wils. 150; *Rennell v. Bishop of Lincoln*, 8 Bing. 490; *Queen v. Foley*, 2 C. B. 664.

[pressly upon this subject (*c*). We shall only just mention the article of residence, upon the supposition of which the law doth style every parochial minister an *incumbent*.]

Enactments on this subject were contained in 21 Hen. VIII. c. 13, and 57 Geo. III. c. 99, but those at present in force will be found in 1 & 2 Vict. c. 106, which statute provides that every spiritual person holding a benefice (*d*), shall reside thereon, and in the house of residence (if any) belonging thereto; and that if he absents himself for a period exceeding three months, (either accounted together or at several times,) in any one year, he shall forfeit, unless resident at some other benefice to him belonging, a certain portion, (increasing with the length of absence,) of the annual value of the benefice at which he so fails to reside (*e*). But this rule is subject to various exceptions and modifications, of which the principal are as follows: 1st. No head of any college or hall in the universities of Oxford or Cambridge, or warden of the university of Durham, or head master of Eton, Winchester or Westminster school, shall be liable to the penalties of non-residence (*f*). 2ndly. Deans and archdeacons,—and a variety of public professors, readers, preachers and chaplains specified in the Act,—as likewise the provost of Eton, the warden of Winchester, the master of the Charterhouse, the principal of St. David's and of King's College, London, and also (provided they are not absent from their benefices more than five months in the year,) the fellows of Eton and Winchester—and canons,

(*c*) Among the treatises on the law of the Church which may be relied upon with confidence, are Bishop Gibson's Codex, Dr. Burn's Ecclesiastical Law, and the earlier editions of the Clergyman's Law, published under the name of Dr. Watson, but compiled by Mr. Place, a barrister. (1 Bl. Com. p. 392.)

(*d*) The term *benefice*, for the purpose of this Act, comprises all parochial churches, perpetual curacies, chapels, and church or chapel districts whatever, with cure of souls (sect. 124).

(*e*) 1 & 2 Vict. c. 106, s. 32. See Rackham v. Bluck, 9 Q. B. 691.

(*f*) 1 & 2 Vict. c. 106, s. 37.

minor canons, priest vicars, and vicars choral—are severally entitled to count the time of their official residences or duties, as if it had been passed upon their benefices (*i*). 3rdly. If there be no house, or no fit house, of residence, the bishop may from time to time license the incumbent to reside in some fit house elsewhere, provided it be within a certain specified distance from his church or chapel; and such house shall thereupon become a legal house of residence for all purposes. 4thly. If there be no house, or no fit house, of residence, and such certificate be also produced as by the Act provided, that no convenient house can be obtained within the parish, or within the specified distance from the church or chapel; or if the incumbent cannot reside by reason of any incapacity of mind or body, or owing to the dangerous illness of his wife or child, (but subject in the latter case to certain restrictions as to time and otherwise); the bishop may grant a licence of non-residence, and in case of his refusal, there is an appeal to the archbishop of the province (*k*). 5thly. If the incumbent should happen to occupy, in the same parish, any mansion whereof he is the owner, the bishop may grant him a licence to reside therein; and, if he refuses, remedy may be had by the same course of appeal (*l*). 6thly. The bishop is empowered, in any other case besides those enumerated, to grant, if he shall think it expedient, a licence to reside out of the limits of the benefice;—but in a case of this description the special circumstances and reasons must be transmitted to the archbishop, without whose allowance such licence will be ineffectual (*m*).

It is farther provided by the Act, that annual returns of residents and non-residents shall be made to her majesty in council (*n*); and that, in case of non-residence, the bishop, instead of proceeding to enforce the penalties above mentioned, may issue a monition against the

(*i*) 1 & 2 Vict. c. 106, ss. 31, 39.

(*k*) Sect. 43.

(*l*) Ibid.

(*m*) Sect. 44.

(*n*) Sects. 51, 53.

offender, to be followed up, where requisite, by an order to reside; and, in case of non-compliance with such order, may sequester the profits of the benefice, and apply them to the purposes in the Act specified (*o*). Indeed, in case of long continued or repeated sequestration, the benefice is to become void, and a new presentation may be made, as if the former holder were dead (*p*).

For the more effectual promotion of this important duty of residence, among the parochial clergy, there are also contained in this Act, (as in several others,) a variety of provisions for repairing the houses in which they are to reside, and for building or purchasing new ones; and for raising money, for these purposes, by mortgage of the benefices (*q*).

4. There are many ways by which a clerk may lose his preferment; and 1st. By *cession*, or taking another benefice (*r*). For by the statute 1 & 2 Vict. c. 106, before mentioned (in substitution of the previous provisions of the 21 Hen. VIII. c. 13, as to pluralities, which the Act repeals), and also by 13 & 14 Vict. c. 98, it is enacted, that in future, (and subject to exception in the case of rights already vested,) no spiritual person shall hold together any two benefices (*s*),—except in the case of two whereof the churches are within three miles of one another, by the nearest road, and the annual value of one of which does not exceed 100*l.* (*t*): that no

(*o*) 1 & 2 Vict. c. 106, s. 54. As to the proceedings to sequestration for non-residence, see *Ex parte Bartlett*, 12 Q. B. 488; *Daniel v. Morton*, 20 L. J. (Q. B.) 98; *Bartlett v. Kirwood*, 2 Ell. & Bl. 771.

(*p*) Sect. 58.

(*q*) For such provisions, see 17 Geo. 3, c. 53; 21 Geo. 3, c. 66; 43 Geo. 3, cc. 107, 108; 51 Geo. 3, c. 115; 55 Geo. 3, c. 147; 56 Geo. 3, c. 152; 5 Geo. 4, c. 89; 6 Geo. 4, c. 8; 7 Geo. 4, c. 66; 1 & 2 Vict.

cc. 23, 29, 106, ss. 25, 62, &c.; 3 & 4 Vict. c. 113, s. 59; 4 & 5 Vict. c. 39, s. 18; 5 & 6 Vict. c. 26 (repealing 2 & 3 Vict. c. 18); 19 & 20 Vict. c. 104, s. 27; 28 & 29 Vict. c. 69.

(*r*) 1 Bl. Com. 392.

(*s*) As to the law of cession and pluralities under the 21 Hen. 8, c. 13, see *Alston v. Atlay*, 7 A. & E. 289; *King v. Alston*, 12 Q. B. 985.

(*t*) See, however, the provisions of 1 & 2 Vict. c. 106; 13 & 14 Vict.

spiritual person holding a benefice with cure of souls with a population of more than 3,000, shall hold therewith any other having a population of more than 500; nor *vice versâ*: that no spiritual person holding more than one benefice with cure of souls, shall hold therewith any other, or any cathedral preferment (*u*): and that, upon every admission to a new benefice or preferment contrary to the Acts, every benefice previously held shall be void *ipso facto* (*x*):—all of which prohibitions, however, in respect of population and yearly value, are subject to a provision whereby the Archbishop of Canterbury is enabled, in certain cases, to grant a dispensation therefrom on recommendation of the bishop of the diocese (*y*). 2ndly. [By *consecration*; for, as was mentioned before, when a clerk is promoted to a bishopric, all his other preferments are void the instant that he is consecrated (*z*). But a method was formerly in use, by the favour of the crown, of holding such livings *in commendam*. *Commenda*, or *ecclesia commendata*, is a living commended by the crown to the care of a clerk, to hold till a proper pastor is provided for it. This might be temporary—for one, two or three years, or perpetual: being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere*:] and used to be granted to bishops in the poorer sees, to aid the deficiency of their episcopal revenue. And there was [also a *commenda recipere*, which is, to take a benefice *de novo*, in the bishop's own gift, or the gift of some other patron consenting to the same; and this was the same to him as

c. 98; and 23 & 24 Vict. c. 142, as to effecting the union of contiguous benefices.

(*u*) 1 & 2 Vict. c. 106, s. 2.

(*x*) Sect. 11; 13 & 14 Vict. c. 98, s. 7.

(*y*) 1 & 2 Vict. c. 106, ss. 5, 6. See also provisions against various

cases of plurality, as regards *persons holding cathedral preferments*, 1 & 2 Vict. c. 106, s. 11; 4 & 5 Vict. c. 39; 13 & 14 Vict. c. 98, s. 11; *deans of cathedrals*, 13 & 14 Vict. c. 94, s. 19; *heads of colleges*, 13 & 14 Vict. c. 98, ss. 5, 6.

(*z*) Vide sup. p. 17.

[institution and induction are to another clerk (*a*.)] But now, by 6 & 7 Will. IV. c. 77, s. 18 (*b*), no ecclesiastical dignity, office or benefice shall be held in *commendam* by any bishop, unless he shall have held the same when the Act passed; and every *commendam* thereafter granted, whether to retain or to receive, and whether temporary or perpetual, shall be absolutely void to all purposes. 3rdly. [By *resignation*; but this is of no avail, till accepted by the ordinary; into whose hands the resignation must be made (*c*.)] 4thly. By *deprivation*; which is either upon sentence declaratory in the ecclesiastical or other proper court (*d*), or else [on such nonfeasance or neglect, malfeasance or crime, as some penal statute declares shall avoid the benefice;] in which cases, [the benefice is *ipso facto* void without any formal sentence of deprivation (*e*.)] Deprivation may take place on any fit and sufficient cause (*f*), among which the following may be instanced:—[conviction of treason, felony, or other infamous crime (*g*); or of heresy (*h*), infidelity (*i*), gross immorality, and the like;] a third conviction of having engaged in trade (*j*); simony (*k*) or plurality (*l*); [maintaining any doctrine in derogation of the king's

(*a*) *Colt v. Bishop of Lichfield and Coventry*, Hob. 144.

(*b*) See also as to Sodor and Man, 1 & 2 Vict. c. 30.

(*c*) *Fane's case*, Cro. Jac. 198. The resignation of a benefice (though duly accepted) will not of course devert the holy orders of the clerk. In reference to this subject, it may be noticed that by an order of Lincoln's Inn, made in the year 1865, no person in holy orders is eligible to be there called to the bar *unless* he first sign a declaration that he has not held any clerical preferment or duty or performed any clerical functions for the previous year, and that he intends no longer to act as a

clergyman.

(*d*) See the Church Discipline Act, (3 & 4 Vict. c. 86); and *Re Dean of York*, 2 Q. B. 1; *Ex parte Denison*, 4 Ell. & Bl. 292.

(*e*) 1 Bl. Com. p. 393.

(*f*) See *Green's case*, 6 Rep. 29, 30.

(*g*) *Bishop of Chichester v. Webb*, Dyer, 108; Jenk. 210.

(*h*) See *Ex parte Denison*, ubi sup.

(*i*) Fitz. Abr. tit. Trial, 54.

(*j*) 1 & 2 Vict. c. 106, s. 31.

(*k*) Stat. 31 Eliz. c. 6; 12 Ann. c. 12.

(*l*) Vide sup. p. 37.

[supremacy, or of the thirty-nine articles, or of the book of common-prayer (*l*);] neglecting to read in church the thirty-nine articles, and to make the proper “declaration of assent” at the time appointed by the ordinary (*m*); using [any other form of prayer than the liturgy of the Church of England (*n*);] and continued neglect, after order from the bishop followed by sequestration, to reside on the benefice (*o*).

VI. The lowest degree in the Church is that of a *curate*: who is a clerk in holy orders employed (as the general rule) by the rector, vicar, or other incumbent of a living, either to serve in his absence, or as his assistant, as the case may be (*p*). Every stipendiary curate, before he enters on his duties, must be *licensed* by the archbishop or bishop of the diocese (*q*); and before such licence is granted to him he must present to the archbishop or bishop a declaration prescribed by the 28 & 29 Vict. c. 122, as to the *bonâ fide* character of the engagement, signed both by himself and the incumbent (*r*). He must also (unless having been ordained on the same day he has already done so) then make and subscribe the “declaration of assent” in that Act prescribed (*s*); and on the first Lord’s day on which he officiates, publicly and openly make such last-mentioned

(*l*) Stat. 1 Eliz. cc. 1, 2; 13 Eliz. c. 12.

(*m*) 28 & 29 Vict. c. 122; vide sup. p. 32.

(*n*) Stat. 1 Eliz. c. 2.

(*o*) 1 & 2 Vict. c. 106, s. 58. As to the order of the bishop to reside, and the sequestration thereon, vide sup. p. 37.

(*p*) Burn’s Ecc. Law, by Tyrw., vol. ii. p. 54 (*a*). As to the common law right of the rector to appoint his curate, see *Arnold v. Bishop of Bath*,

5 Bing. 316. As to *lecturers* and *preachers*, see 7 & 8 Vict. c. 59; 18 & 19 Vict. c. 127, s. 12. As to a *perpetual curate*, vide sup. p. 26.

(*q*) Burn’s Ecc. Law, by Tyrw., vol. i. p. 61; Watson, C. L. 147, 207, 335. Such licence, on due cause, is liable to be *revoked*. See *The Queen v. Archbishop of Canterbury*, 1 E. & E. 545.

(*r*) 28 & 29 Vict. c. 122, s. 6.

(*s*) Vide sup. p. 4.

declaration in the presence of the congregation, and at the time of divine service (*t*). On the other hand, the law has made several provisions for the proper sustentation and payment of curates. For by 28 Hen. VIII. c. 11, such curates as [serve a church during its vacancy shall be paid such stipend as the ordinary thinks reasonable out of the profits of the vacancy; or, if that be not sufficient, by the successor, within fourteen days after he takes possession (*u*).] And by 1 & 2 Vict. c. 106, numerous provisions are made as to the *appointment and payment of curates* during an incumbency, among which are the following:—that, in certain cases of non-residence by the incumbent, the bishop may, in his default, appoint a proper curate with a stipend (*v*); and require the curate to reside (*w*);—that where the bishop sees reason to believe that the duties of any benefice are inadequately performed, or where the benefice is of a certain value or extent, he may (though in the first case only after referring the matter to certain commissioners appointed by him for that purpose) require the incumbent, whether actually resident or not, to nominate a proper curate with sufficient stipend, and on his default may himself make such appointment (*x*);—that the stipend of every curate appointed by the bishop shall be adjusted in proportion to the value and population of the benefice; that the stipend of a curate shall not in any case fall short of 80*l.* per annum, or of the annual value of the benefice, if it be under that amount (*y*); and that in all cases of dispute between the incumbent and the curate as to his stipend, the bishop may summarily decide without appeal, and enforce his sentence by monition and sequestration (*z*).

Thus much of the clergy, properly so called. There

(*t*) 28 & 29 Vict. c. 122, s. 8.

(*u*) 28 Hen. 8, c. 11, ss. 5, 10.

(*v*) 1 & 2 Vict. c. 106, s. 85.

(*w*) Sect. 76.

(*x*) 1 & 2 Vict. c. 106, ss. 77, 78.

(*y*) Sect. 85.

(*z*) Sect. 83. See *Daniel v. Morton*,

16 Q. B. 198.

are also certain inferior officers connected with the church of whom the secular law takes notice; [and that, principally, to assist the ecclesiastical jurisdiction where it is deficient in powers.] On these officers we shall now make a few cursory remarks.

VII. [*Churchwardens* (*a*) are the guardians or keepers of the church, and representatives of the body of the parish;] but though in some sort ecclesiastical officers, they are always lay persons (*b*). [They are sometimes appointed by the minister, sometimes by the parish,] in vestry assembled (*c*), [sometimes by both together, as custom directs (*d*).] But where there is no custom, it is said the election must be according to the canons (*e*): and these direct that they shall be chosen by the joint consent of the minister and parishioners, if it may be; but if they cannot agree, then the minister is to choose one, and the parishioners another (*f*). They are to be chosen yearly in Easter week, and are generally two in number; are obliged, when chosen, to serve (*g*); and are

(*a*) As to the legal position of *churchwardens*, see Bac. Abr. and Burn's Ecc. Law, *in tit.* "Churchwardens," and the following cases; *Ex parte Winfield*, 3 Ad. & El. 614; *R. v. Marsh*, 5 Ad. & El. 468; *Bray v. Somer*, 2 B. & Smith, 374.

(*b*) Per Hale, Hard. 379; 1 Rol. Ab. 653; 2 Rol. Rep. 107.

(*c*) As to vestries, vide sup. vol. I. p. 125.

(*d*) As to the manner of the election, see *Campbell v. Maund*, 5 Ad. & El. 865; *R. v. Rector of Lambeth*, 8 Ad. & El. 856; *Bremner v. Hull*, Law Rep., 1 C. P. 748. The manner of electing them, for churches built under the *Church Building Acts*, is fixed by 58 Geo. 3, c. 45, s. 73; 1 & 2 Will. 4, c. 38, ss. 16, 25, and 8 & 9 Vict. c. 70, ss. 7, 8. With

respect to churchwardens under the New Parishes Act, see 6 & 7 Vict. c. 37, s. 17; 19 & 20 Vict. c. 104, s. 28.

(*e*) *Catten v. Barwick*, Str. 145. See Bac. Abr. Churchwardens, A. and the authorities there cited in the margin.

(*f*) Canon 89.

(*g*) Several classes of persons, however, are either ineligible, or are exempted from the office, viz., peers of the realm; members of parliament; clergymen of the church of England; Roman Catholic Clergy; dissenting ministers; barristers; attorneys; clerks in court; physicians, surgeons and apothecaries (if duly registered under the 21 & 22 Vict. c. 90); aldermen and dissenting teachers; and all persons

sworn to execute their office faithfully (*h*). [They are taken, in favour of the church, to be for some purposes a kind of corporation, at the common law; that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish (*i*):] and one of their chief duties, accordingly, is the care and management of the goods belonging to the church, such as the organ, bells, bible and parish books (*j*). But as to the church and churchyard [they have no sort of interest in the property thereof (*k*); and if any damage be done thereto, the rector only, or vicar, shall have the action (*l*).] It is also part of their office, unless other persons are appointed by the ordinary for that purpose, to have the care of the benefice, during its vacancy; or while it is under sequestration for the debts of the incumbent (*m*). They are moreover required to see to the reparation of the church, and the making of the *church rates*, by which the expenses of it are to be defrayed. These rates are charged on all lands and houses in the parish; are assessed on the occupiers; and are made by the parishioners at large,—that is, by the *majority* of the parishioners present at a vestry to be summoned for that purpose by the churchwardens (*n*). But they are not now (as until very recently was the case) *compulsory* on the persons rated (*o*), and the only conse-

living out of the parish, unless they occupy a house of trade there. (See Steer's Parish Law, p. 84.)

(*h*) Canon 88. As to granting a mandamus to swear them in, see *Ex parte Wingfield*, 3 Ad. & El. 614, 615.

(*i*) See 9 Geo. 1, c. 7, s. 4; and as to their duties in regard to *parish lands*, see 59 Geo. 3. c. 12, ss. 8, 17; 5 & 6 Will. 4, c. 69, s. 4; *Smith v. Adkins*, 8 Mee. & W. 362.

(*j*) Bac. Abr. Churchwardens, B.; Wats. C. L. 390; Addison *v.* Round, 4 Ad. & El. 799; Jackson *v.* Adams, 2 Bing. N. C. 402.

(*k*) As to the consecration and enlargement of churchyards, see 30 & 31 Vict. c. 133; and 31 & 32 Vict. c. 47.

(*l*) 1 Bl. Com. 395. Churchwardens cannot set up monuments; *Beckwith v. Harding*, 1 B. & Ald. 508.

(*m*) Steer, P. L. 91.

(*n*) See the Braintree case (*Burder v. Veley*, 12 Ad. & Ell. 247; *Gosling v. Veley*, 7 Q. B. 409; 12 Q. B. 328; 4 House of Lords' Cases, 679).

(*o*) They were formerly recover-

quence of refusing to pay them is a disqualification from interfering with the monies arising from the rate. This important change in the law has been carried into effect by the 31 & 32 Vict. c. 109—which recites, that “church rates have for some years ceased to be made or collected in many parishes by reason of the opposition thereto, and in many other parishes where church rates have been made, the levying thereof has given rise to litigation and ill-feeling” (*s*). Churchwardens are also to make such order relative to seats in the church and chancel, not appropriated to particular persons, as the ordinary—who has in general the sole power in this matter (*t*)—shall direct; and, in practice, the arrangements are usually made by the churchwardens, even without any special direction from the ordinary (*u*). It is incident also to their office to enforce proper and orderly behaviour during divine service (*v*); and, to this end, [it has been held that churchwardens may justify the pulling off a man’s hat] irreverently worn there, or the removal of the offender from the church (*w*). And besides these, there are a multitude of other parochial powers committed to their charge (*x*), which cannot be particularized without descending to inconvenient minuteness. Formerly, too, they were joined with the overseers in the care and maintenance of the poor; but

able before justices, or, in some cases, in the ecclesiastical court. (See 7 & 8 Will. 3, c. 44, s. 3; 53 Geo. 3, c. 107, s. 7; 5 & 6 Will. 4, c. 74; 4 & 5 Vict. c. 36; 12 & 13 Vict. c. 14, s. 9.)

(*s*) The Act, however, excepts from its operation rates called church rates, but partly applicable to other than ecclesiastical purposes; and, also, some other cases. (31 & 32 Vict. c. 109, s. 2.)

(*t*) 3 Inst. 202; Clifford *v.* Wicks, 1 B. & Ald. 506; *contra* as to the chancel, Wats. C. L. 288.

(*u*) Rogers’s Ecc. L. 179.

(*v*) See Burton *v.* Henson, 10 Mee. & W. 105; Worth *v.* Torrington, 13 Mee. & W. 781.

(*w*) Hawk. P. C. b. 1, c. 63, s. 29; Hawe *v.* Planner, 1 Saund. 10; S. C. 1 Sid. 301.

(*x*) Among these was formerly the duty imposed upon them by a provision of 1 Eliz. c. 2, of levying a forfeiture of one shilling on all such as do not resort to their parish church on Sundays and holidays. But this, with other provisions against non-conformity, is now repealed by 9 & 10 Vict. c. 59.

this duty is now in general taken from them by the effect of 4 & 5 Will. 4, c. 76, (the Act for amendment of the poor law,) and of the regulations introduced, under its authority, by the Poor Law Board (*y*).

Such then, in general, are the duties of churchwardens (*z*); to which we shall only add, that, in case of their wasting the goods of the church, or being guilty of other misbehaviour, they are liable to removal (*a*); and that, at the end of their year, they are bound to render an account of all their receipts and disbursements (*b*).

VIII. *Parish clerks* and *sextons* are also persons connected with the church, and by the common law have freeholds in their office (*c*); though the former may, by 7 & 8 Vict. c. 59, s. 5, be suspended or removed by the archdeacon or other ordinary for misconduct or neglect (*d*). The duties of the parish clerk are too familiarly known to require description. In some few instances he is in holy orders (*e*): but his general qualification is only that he should be at least twenty years of age; known to the rector, vicar, or other minister, to be of honest

(*y*) As to this Board, vide post, bk. iv. pt. III. c. II.

(*z*) In any parish the population of which exceeds 2,000 persons, and which is brought under the provisions of 13 & 14 Vict. c. 57, a *vestry clerk* may be appointed, who is to assist and advise the churchwardens and overseers in the duties of their office.

(*a*) Steer, P. L. 95.

(*b*) Steer, P. L. 92; *Leman v. Gonlty*, 3 T. R. 3; *Astle v. Thomas*, 2 B. & C. 271. It is said that in London, the case of churchwardens is in some respects peculiar; that they are generally chosen there by the parishioners independently of

the parson; are a corporation for all purposes; have the disposal of the seats in the church, independently of the bishop; and, in most of the churches, repair not only the church, but the chancel. (*Pulling's Laws of London*, p. 263.) The legality of such a custom as above mentioned with regard to seats, has however been questioned. (See *Rogers's Ecc. L.* p. 185.)

(*c*) See Steer, P. L. 96.

(*d*) As to the former law on this subject, see 2 Roll. Abr. 234; *R. v. Davies*, 9 D. & R. 234; *R. v. Neale*, 4 Nev. & M. 868.

(*e*) See as to parish clerks in orders, 7 & 8 Vict. c. 59, ss. 2, 3, 4.

conversation, and sufficient for his office (*f*). [He is generally appointed by the incumbent (*g*); but by custom may be chosen by the inhabitants (*h*):] his appointment may be by word of mouth only (*i*): and his remuneration depends altogether upon the custom of the particular parish (*j*). The *sexton* (*k*) is, in the ordinary course, chosen by the incumbent; though sometimes by the parishioners, where a usage to that effect prevails (*l*). His salary depends on custom, and is paid by the churchwardens (*m*); his duty is to cleanse the church, to open the pews, to dig the graves for the dead, to provide candles and other necessaries, and to prevent disturbance in the church (*n*).

(*f*) Canon 91.

(*g*) *Ibid.* As to the appointment of a parish clerk in parishes united by special act of parliament, see *Hartley v. Cook*, 9 Bing. 728. In churches built under the Church Building Acts, he is to be *annually* appointed by the minister. (See 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; *Pinder v. Barr*, 4 Ell. & Bl. 105; *Jackson v. Courtenay*, 8 Ell. & Bl. 8.) And in a parish constituted under the New Parishes Acts, he is appointed by the incumbent for the time being of such church, and is removable by him, with the consent of the bishop of the diocese, for any misconduct. (19 & 20 Vict. c. 104, s. 9.)

(*h*) 13 Rep. 70; *Jermyn's case*, Cro. Jac. 670; *Peak v. Bourne*, Str. 942.

(*i*) *R. v. Inhabitants of Bobbing*, 5 A. & E. 682.

(*j*) *Steer*, P. L. 97. As to the fees and emoluments of the clerk and the sexton, in a parish constituted under the Church Building Acts, see 59 Geo. 3, c. 134, ss. 6, 10.

(*k*) Apparently from *sacristan*,

the keeper of things belonging to divine worship.

(*l*) *Rogers's Ecc. L.* p. 834. And see *R. v. Inhabitants of Bobbing*, 5 A. & E. 682; *Cansfield v. Blenkinsop*, 4 Exch. 234. So in parishes constituted under the New Parishes Acts, he is (by 19 & 20 Vict. c. 104, s. 9) appointed by the incumbent, and may be removed by him for misconduct with the consent of the bishop of the diocese.

(*m*) As to the sexton of a parish constituted under the Church Building Acts, see 59 Geo. 3, c. 134, ss. 6, 10.

(*n*) *R. v. Inhabitants of Liverpool*, 3 T. R. 119; and see *Shaw's P. L.* 71. Besides the parish clerk and sexton, there is often attached to the church a *beadle*, (from the Saxon *beodan*, to bid,) who is chosen by the vestry, and whose business is to attend the vestry, to give notice of its meetings to the parishioners, and execute its orders, and to assist the constable in apprehending vagrants, &c. (See *Shaw's P. L.* c. 19.)

CHAPTER II.

OF THE DOCTRINES AND WORSHIP OF THE CHURCH,
AND HEREIN OF THE LAWS AS TO HERESY AND
NONCONFORMITY.

THOUGH this nation has constantly adhered to the principle of an established Church,—that is, a church endowed, and (as occasion has required) protected, by the provision of the temporal law—yet no claim was at first made by such law to interfere with the regulation of its faith, ceremonies, or discipline. These, being matters *merè spiritualia*, fell under the exclusive province of the ecclesiastical authorities; who (so long as the spiritual supremacy of the Roman pontiff was acknowledged within these realms) exercised it in accordance with the law of the popes and councils, modified from time to time by our own legatine and provincial constitutions. But at the era of the Reformation it was found necessary to resort to the legislature, for an authoritative exposition of the true Protestant faith, for the establishment of appropriate forms of worship, and for a declaration of the crown's supremacy, in lieu of that of the pope, in matters ecclesiastical; and from this time the power of the ecclesiastical authorities has been exercised in subordination to these paramount institutions of the civil government (a).

Accordingly, the *Articles of Faith*, originally forty-two in number, but afterwards reduced to thirty-nine, (and commonly called the *Thirty-nine Articles*,) were framed

(a) Vide sup. vol. I. p. 66, et seq.

by Archbishop Cranmer, with the assistance of other persons of distinguished learning and piety, in the reign of Edward the sixth; and were reduced to their present form in the convocation of the archbishops and bishops of both provinces, held at London in the reign of Queen Elizabeth, A.D. 1562 (*b*). By these Articles (among other matters) the canonical authority of the different books of the Bible was settled—a new version of the Holy Scriptures being afterwards made in the reign of James the first, which is still in use under the denomination of King James's Bible.

The *Form of Prayer and Church Service*, commonly called the *Liturgy*, was also first framed in the reign of Edward the sixth, and by the same prelates (*c*). Prior to the Reformation various liturgies had been in use in different parts of the realm (*d*). But a new ritual (chiefly founded, however, on the antient services), with *rubrics* prescribing the order and form to be pursued, was now compiled, under the direction of that prince, for the uniform observance of the whole reformed Church of England. This ritual (which was, for the most part, the same with our present Book of Common Prayer) was established by statute 2 & 3 Edw. VI. c. 1; and being afterwards

(*b*) The first draft of the Articles was made by Cranmer, assisted by Bishop Ridley, in 1551; and after being corrected by the other bishops, Latimer, Hooper, Poynt, Coverdale, &c., they were published in 1553. In 1562, 1571, and 1662, they were successively revised and confirmed. (Adams, *Relig. World Displayed*, vol. i. p. 399.)

(*c*) Adams, *Relig. World Displayed*, vol. i. p. 402; see 2 & 3 Edw. 6, c. 1, s. 1.

(*d*) The statute 2 & 3 Edw. 6, c. 1, recites, that "of long time there hath been had in this realm of England

"divers forms of common prayer
"commonly called the service of the
"Church, that is to say, the use of
"Sarum, of York, of Bangor, and of
"Lincoln; and besides the same,
"now of late much more divers and
"sundry forms and fashions have
"been in use in the cathedral and
"parish churches of England, Wales,
"&c." Almost the whole of our
Liturgy was taken from the forms
here described; particularly from
that of Sarum; and most of it can
be traced to periods before the Con-
quest. See Palmer's *Origines Li-
turgicæ*.

revised, was confirmed by 5 & 6 Edw. VI. c. 1, and 1 Eliz. c. 2; and, after two other successive revisions in the reigns of Kings James the first and Charles the second, was finally confirmed in its present form by 13 & 14 Car. II. c. 4, usually described as *the Act of Uniformity (e)*.

As to the *Crown's supremacy* in matters ecclesiastical, it was definitively established by 1 Eliz. c. 1, usually called the Act of Supremacy; a statute which, in the first place, provides that no foreign prince or potentate, spiritual or temporal, shall exercise any manner of jurisdiction or privilege, spiritual or ecclesiastical, within this realm or the dominions thereof; and next, that such jurisdictions and privileges as had before been exercised by any spiritual or ecclesiastical power for visitation and correction of the Church, shall for ever be united and annexed to the imperial crown of this realm (*f*).

The new regulations thus introduced by parliament,—taken in connection with other legislative enactments of the same era, but of subordinate importance, and in connection also with the national canon law, (which still gives the rule where these are silent,)—have constituted, from the period of which we speak, and still constitute, the standard of faith, worship, and discipline in the Church of England. And we have seen that for a beneficed clergyman advisedly to maintain any doctrine in derogation of the king's supremacy, the thirty-nine articles, or the liturgy by law established,—or even to neglect publicly, in his church, to declare his assent

(e) Wats. C. L. p. 321. However the Church services for some particular days, viz., 30th January, 29th May, 5th November, and 23rd October, have been recently abolished by 22 Vict. c. 2.

(f) The supremacy of the Crown

had been before declared by 26 Hen. 8, c. 1, and indeed prior to the Reformation, by the Statute of Præmunire, 16 Ric. 2, c. 5. As to the supremacy, see also 5 Eliz. c. 1; *Introd.* to 4 Rep.; and 4 Inst. 42, 331, 341.

to such articles and liturgy at the time appointed for that purpose, or to use any other form of prayer than is contained in such liturgy,—is ground for deprivation (*i*). It remains, however, to consider on what persons, and in what cases, this standard is to be deemed imperative—whether it is binding merely on those who claim the benefits of the church establishment, or generally on all the subjects of the realm, whatever may be in fact the state of their religious opinions. And here we shall find that the law has passed through changes of a very remarkable description. Though the statute of Elizabeth just cited effected an emancipation from the Papal yoke, and may therefore be justly considered as having laid the foundation of spiritual freedom, it was not till long afterwards that the nation learned the lesson of religious toleration: and our temporal law in the mean time proceeded not only to imitate the persecutions of the Popish time, but in some respects to surpass them: for while it continued to punish as it had long done, (in aid of the ecclesiastical authorities,) the offence of *heresy*, it began now to exercise new rigours of its own with respect to that of *nonconformity*. In the remainder of this chapter we propose to enter into some detail upon both of the subjects just enumerated; and to show both the former state of the law respecting them, and the alterations which it has latterly sustained.

1. *Heresy* was described among the canonists, in vague and general terms, as consisting of any deviation from the true Catholic faith, as understood by Holy Mother Church (*k*),—[very contrary to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness (*l*);] and spoke of heretics by name as in the case of the Manichæans,

(*i*) Vide sup. pp. 32, 39.

(*k*) "*Hæreticus, qui de articulis fidei aliter prædicat, sentit,*

vel doceat, quàm docet sancta mater ecclesia."—See 1 Hale, P. C. 383.

(*l*) 4 Bl. Com. p. 45.

Nestorians, and others(*m*). The cognizance of heresy has always been held in every country, where the canon law has prevailed, to belong to the ecclesiastical judge(*n*); and the canonists have ever treated it with great severity. On the continent, they [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 offence: 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* (*o*), well knowing at the same time that they were delivering the unhappy victim to certain death. Hence the capital punishments inflicted on the antient Donatists and Manichæans, by the Emperors Theodosius and Justinian (*p*): hence also the constitution of the Emperor Frederic, mentioned by Lyndewode (*q*): adjudging all persons without distinction to be burned by fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution (*r*), 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 somewhat singular, and may serve to illustrate at once the gratitude of the

(*m*) See 1 Hale, P. C. 383.

(*n*) Year Book, 27 Hen. 8, 14 b ;
stat. 2 Hen. 4, c. 15 ; 1 Hale, P. C.
384; 4 Bl. Com. p. 45.

(*o*) Greg. Decret. lib. 5, t. 40, c. 27.

(*p*) Cod. l. i. tit. 5.

(*q*) C. de Hæreticis.

(*r*) Cod. 1, 5, 4.

[holy see and the just 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 (z).

Christianity being thus deformed by the demon of persecution upon the continent, we cannot expect that our own island should have been entirely free from the same scourge.] And accordingly we not only find that our ecclesiastical courts were always in the habit of proceeding against heretics by spiritual punishments, such as penance, excommunication and the like; but we also discover [among our antient precedents a writ *de hæretico comburendo*, which is thought by some to be as antient as the common law itself (a).] However, it appears that it was not the practice to issue this writ except upon a conviction for contumacy or relapse; nor unless such conviction took place before the archbishop himself in a provincial synod or convocation. And even that authority could not lawfully award the writ, but merely left the delinquent to the secular power: so that the crown might pardon him, if it thought proper, by forbearing to issue the writ; which was not grantable as of course, but issued by the special direction of the sovereign (b). [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 (c)—took root in this kingdom, the clergy,

(z) Baldus in Cod. 1, 5, 4.

(a) 1 Hale, P. C. 392; 1 Hawk. b. 1, c. 2, s. 10; and see St. Tr. vol. ii. 275. It seems clear, however, that, at common law, heresy was not punishable by forfeiture of lands or goods. 1 Hale, P. C. 388, (n.)

(b) 1 Hale, P. C. 385, 393, 395. According to some opinions, the writ *de hæretico comburendo* was, at common law, not only in *practice*

confined to convictions before the archbishop in provincial synod, but could not *legally* be awarded on a conviction before any court of inferior authority, such as that of the diocesan. See 1 Hale, P. C. 391; 12 Rep. 56, 57.

(c) So called not from *lolium* or tares (an etymology which was afterwards devised in order to justify the burning of them, see Matth. xiii. 30),

[taking advantage, from the king's dubious title, to demand an increase of their own power, obtained an act of parliament (2 Hen. IV. c. 15), which sharpened the edge of persecution to its utmost keenness(*d*). 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. And again, by the stat. 2 Hen. V. c. 7, Lollardism was also made a temporal offence, and indictable in the king's courts; which did not however thereby gain an exclusive but only a concurrent jurisdiction with the bishop's consistory.]

Afterwards, as the reformation of religion advanced, the power of the ecclesiastics became somewhat moderated; for though in what heresy consisted was still not precisely defined, yet the legislature explained in some points what it was *not*. [For the statute 25 Hen. VIII. c. 14, declared that offences against the see of Rome were not heretical; and restrained the ordinary from proceeding in any case of alleged heresy upon mere suspicion,—that is, unless the party was accused by two credible witnesses, or an indictment for the offence was first 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 Hen. VIII. c. 14, the bloody law of the Six Articles was made; which established the six most contested points of popery—transubstantiation—communion in one kind—the celibacy of the clergy—monastic

but from one Walter Lolhard, a German reformer, A.D. 1315 (Mod. Un. Hist. xxvi. 13; Spelm. Gloss. 371); or, as some hold, from *Lollen*, to sing, in reference to their psalm-singing. (D'Aubigné, Hist. of Reformation, vol. v. p. 130.)

(*d*) A previous Act, (5 Ric. 2, st. 2, c. 5,) had been aimed at the followers of Wickliffe, but the people would not assent to it, and it was revoked the following year. (See Hist. Eng. L. by Reeves, vol. iii. p. 163.)

[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 high- “ness 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.

We shall not enter into 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 established] on a firm and permanent basis. [By stat. 1 Eliz. c. 1, all former statutes relating to heresy were repealed, which left the jurisdiction of heresy as it stood at common law;] that is, left the simple offence to be visited by spiritual punishments in the ecclesiastical courts; and the offence, when aggravated by contumacy or relapse, to be dealt with by the writ *de hæretico comburendo*, after a conviction in the provincial synod. [But the principal point then gained was, that by this statute a boundary was for the first time set to what should be accounted heresy;] that is to say, such tenets only as had been theretofore [so declared, 1, by the words of the Canonical Scriptures, or 2, by the first four general councils, or such others as had only used the words of the Holy Scriptures; or which should thereafter be declared heresy by the parliament, with the assent of the clergy in convocation.

The writ, however, *de hæretico comburendo* still re-

[remained in force ; and we have instances of its being put in execution upon two Anabaptists in the seventeenth year of Elizabeth, and upon two Arians in the ninth year of James the first. But that writ was totally abolished, and heresy at length again subjected only to ecclesiastical correction *pro salute animæ*, by virtue of the statute 29 Car. II. c. 9.] Thus in one and the same reign, by the joint effect of this and of other Acts referred to in our former volume, [our lands were delivered from the slavery of military tenures, our bodies from arbitrary imprisonment, and our minds from the tyranny of superstitious bigotry (*f*).] For the subsequent provisions still in force in reference to apostasy, blasphemy and reviling the ordinances of the Church, are directed rather to the preservation of good order and decency in civil society, than to the maintenance of orthodoxy (*g*).

2. We next proceed to the consideration of *non-conformity*, or dissent from the worship and ceremonies of the reformed Established Church. And this so early as the 5 & 6 Edw. VI. c. 1, was made highly penal ; it being thereby enacted that if any person should willingly be present at any other manner or form of Common Prayer, of administration of the sacraments, of ordination, or of any other rites contained in the Book of Common Prayer, than is, in such Book, set forth,—he should suffer imprisonment, and for the third offence imprisonment for life. And by the same statute, and by 1 Eliz. c. 2, s. 14, it was provided that every inhabitant of the realm should diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour themselves to resort to their parish church or chapel accustomed—or, upon reasonable let, to some usual place where common prayer should be used—on all Sundays and holidays, upon

(*f*) As to the abolition of military tenures by 12 Car. 2, c. 24, vide sup. vol. I. p. 213; and as to the Habeas Corpus Act, 31 Car. 2, c. 2, vide sup.

vol. I. p. 152.

(*g*) As to these offences, vide post, vol. IV. p. 292, et seq.

penalty of forfeiting for every non-attendance twelve pence, to be levied by the churchwardens to the use of the poor. And these enactments, though for a long course of time fallen into neglect, yet remained in our statute book, till, in common with many other penal and disabling laws in regard to religious opinions, they were swept away by the statute 9 & 10 Vict. c. 59, to which we shall make farther allusion before we close this chapter.

In the reign, however, of Queen Elizabeth, a schism began to develop itself in the newly-established Protestant Church. Certain sectaries, who received the appellation of *Puritans*, deserting the use of the liturgy, betook themselves (in defiance of the above enactments) to forms of worship of their own institution (*h*); and ultimately, increasing in number, branched out into various divisions of religious opinion, and various modes of religious ceremonial and Church government. From this stock descended all those Protestant seceders from the Established Church, described at a later period as *Non-conformists*; and, in modern times, as *Dissenters* (*i*).

The jealousies to which these growing innovations gave rise, and the alarm from time to time not unreasonably excited by the enterprising spirit of Popery, gave birth to a variety of enactments, having for their object the repression of Non-conformity and the discouragement of Papists. Of the gradual relaxation and final repeal

(*h*) Hallam, Const. Hist. vol. i. pp. 246, 251, 280.

(*i*) The most numerous bodies of Dissenters in this country are, 1. The *Wesleyan Methodists*; 2. The *Independents*, or *Congregationalists*; and 3. The *Baptists*; but the first and last of these are subdivided into various other denominations. From a Report "on Church Rate," by a committee appointed by

the House of Lords in 1859, it appears that the population of England and Wales at that date might be distributed in the following proportions:—Churchmen, 67 per cent.: Wesleyans, 13 per cent.: Independents, &c., $7\frac{1}{2}$ per cent.: Baptists, $2\frac{1}{2}$ per cent.: other Sects, Jews, &c., $6\frac{1}{4}$ per cent.: and Roman Catholics, $3\frac{1}{2}$ per cent.

of these enactments, such general account as is consistent with the plan of this work shall now be given.

And, first, with reference to the Protestant Sectaries, the laws against these fell during the times of the Rebellion into abeyance (*j*), but revived at the Restoration; and the parliament of Charles the second proceeded to enforce systematically, by new measures of rigour, the principle of universal conformity to the Established Church. Accordingly, by the Act of Uniformity (13 & 14 Car. II. c. 4), it was in that reign, among other things, enacted, that the book of Common Prayer, as then recently revised, should be used in every parish church and other place of public worship; and that every schoolmaster as well as any person instructing youth in a private house should make a written declaration that he would conform to the Liturgy, and must also obtain from the ordinary a *licence* to teach (*k*). And another measure of the same reign was at Act against Conventicles, 22 Car. II. c. 1, by which all meetings consisting of five persons or more, (exclusive of the family,) assembled for the exercise of religion in any manner other than according to the liturgy and practice of the Church of England, were prohibited, and subjected to pecuniary forfeitures (*l*).

The Revolution of 1688, however, was the commencement of an era of more liberal legislation in matters of religion, as well as politics; and by the Toleration Act, 1 W. & M. st. 1, c. 18 (confirmed by 10 Ann. c. 2), all persons dissenting from the Church of England (except

(*j*) On the other hand, by an ordinance of this period, viz., that of 23 Aug. 1645 (which continued till the Restoration), to preach, write or print against the *directory*, or form appointed to be used for the then established Presbyterian worship, subjected the offender, upon indictment, to a fine not exceeding

50*l*. See Neale's Hist. of Puritans, vol. ii. p. 109.

(*k*) See as to this 9 & 10 Vict. c. 59.

(*l*) As to the *Corporation Act* and *Test Act* of this reign, which affected only such persons as sought *office*, and not the general body of Nonconformists, vide sup. vol. II. p. 660), *in notis*.

Papists and persons denying the Trinity) were allowed freely to assemble for religious worship according to their own forms,—on condition of their taking the oaths of allegiance and supremacy, and making a declaration against transubstantiation, and (in the case of dissenting ministers), subscribing also to certain of the Thirty-nine Articles. And it was by this Act made penal to disturb any congregation lawfully assembled, or to misuse their preachers (*u*); though, on the other hand, it provided that no congregation should be lawful, unless the place of meeting was certified to and registered with the bishop, the archdeacon, or the court of quarter sessions: and it was also required, that the doors of the meeting-house should not be locked, barred, nor bolted.

In the same spirit of toleration it was afterwards provided by 19 Geo. III. c. 44, that dissenting preachers or teachers might be entitled to the benefits of the Toleration Act (without signing any of the Articles), on subscribing a declaration professing themselves to be Christians and Protestants, and a belief that the Scriptures contain the revealed will of God, and are the rule of doctrine and practice; and the same statute relieved dissenters in general, on those conditions, from the prohibitory requirements of the Act of Uniformity in reference to the teaching of youth (*v*). Then followed the 52 Geo. III. c. 155, by which dissenters were relieved from the necessity of taking any oaths or subscribing any declaration, unless required so to do by some justice of the peace; and by which it was enacted, that all persons might lawfully officiate in, or resort to,

(*u*) See also 9 & 10 Vict. c. 59, s. 4, and 24 & 25 Vict. c. 100, s. 36; by the last of which provisions to obstruct or endeavour to prevent any clergyman, or *other minister*, from celebrating divine service or otherwise officiating in any church,

chapel, meeting-house, or other place of divine worship, is made a misdemeanor, punishable by imprisonment, with or without hard labour, to the extent of two years.

(*v*) See also 9 & 10 Vict. c. 59.

any place of religious worship duly certified as required by the Toleration Act; though, in order to prevent irregular assemblies or conventicles, this last Act prohibits all religious assemblies in any place (other than a church or chapel of the Church of England), at which more than *twenty* persons besides the family shall be present, unless such place shall be duly certified (*x*). And in the next year was passed the statute 53 Geo. III. c. 160, by which that clause of the Toleration Act, which excepted persons *denying the Trinity* from the benefit of its enactments, was repealed (*y*).

And to the foregoing list of concessions we have to add, that by 18 & 19 Vict. c. 81, (repealing a prior Act of 15 & 16 Vict. c. 36, in reference to the same subject,) dissenters are now allowed to register their places of worship with the Registrar-General of Births, Deaths and Marriages, instead of the episcopal or other authorities mentioned in the Toleration Act (*z*); and that by 18 & 19 Vict. c. 86, passed “for securing the liberty of religious worship,” it is further enacted, that the provisions of the Toleration or other Act which prohibit congregations of above twenty persons from assembling for religious worship unless in a church or chapel of the established church, or in some place duly certified, shall henceforth not be applicable to any religious meeting in any parish or ecclesiastical district, if conducted by the incumbent; or, in case the incumbent is not resident, by his curate; or by any person authorized by

(*x*) By this statute the previous Conventicle Act, 22 Car. 2, c. 1 (as to which vide sup. p. 57) is repealed.

(*y*) By 7 & 8 Vict. c. 45, the benefits of 1 W. & M. sess. 1, c. 18; 19 Geo. 3, c. 44; and 53 Geo. 3, c. 160, are extended to endowments for dissenters made prior to those Acts, and which at the time when so made

were unlawful.

(*z*) A place of meeting for religious worship, duly certified and recorded by the Registrar-General under these statutes, is exempt from the operation of the Charitable Trusts Acts. (18 & 19 Vict. c. 81, s. 9.)

them respectively: nor to any congregation in a private dwelling-house; or meeting, occasionally, in some building not usually appropriated to purposes of religious worship (*d*).

We have hitherto confined our view to the progress of toleration in regard to Protestant dissenters. As respects the subjects of this realm who profess the Roman Catholic religion, by statutes 18 Geo. III. c. 60, 31 Geo. III. c. 32, and 43 Geo. III. c. 30, most of the severer penalties and disabilities to which these were at one time subject (and which are mentioned in detail by Blackstone), were removed on condition of their taking such oaths and declarations as in those Acts provided (*e*); and, in particular, assemblies for Roman Catholic worship were legalized on condition of their being held in places certified at the sessions of the peace,—for which the certificate of the Registrar General has been since substituted (*f*):—and at length by 10 Geo. IV. c. 7, commonly called the Catholic Emancipation Act, Roman Catholics were restored, in general, to the full enjoyment of all civil rights (*g*). By the provisions of that statute, all enactments by which any declaration against transubstantiation, the invocation of the saints, or the sacrifice of the mass, was required from any persons, as a qualification for the exercise or enjoyment of any civil office, franchise or right within the realm, were repealed (*h*); and subjects who profess the Roman Catholic religion are now competent to be members of any lay

(*d*) As to certified places of worship, see also 19 & 20 Vict. c. 119, ss. 17, 24; by the last of which provisions, it appears that prior to June, 1852, the total number of places of meeting duly returned to the Registrar-General under 15 & 16 Vict. c. 36, amounted to 54,804.

(*e*) See 4 Bl. Com. p. 55.

(*f*) By 18 & 19 Vict. c. 81, s. 2.

(*g*) See the effect of this Act discussed in the recent case of the Earl of Shrewsbury *v.* Scott, 6 C. B. (N. S.) 177.

(*h*) See also to the same effect the recent statute, 30 & 31 Vict. c. 62.

corporation, to sit and vote in Parliament; and, in short, to exercise any franchise or civil right whatever, except in certain cases where their doing so would presumably be prejudicial to Protestantism, as in the case of presenting to a benefice (*i*). They may now also hold any office whatever, with the exception of the following: viz., the office of guardian or regent of the united kingdom; of lord chancellor, or keeper of the great seal; of lord lieutenant, or other chief governor of Ireland (*j*); of high commissioner to the general assembly of the church of Scotland; or any office in the United Church of England and Ireland, or in the Church of Scotland, or in the ecclesiastical courts, or in the universities, colleges, or public schools (*k*).

But inasmuch as even after the Catholic Emancipation Act doubts were entertained as to the right of Roman Catholic subjects in England to acquire and hold, in real estate, the property necessary for religious worship, and for educational or charitable purposes,—it was afterwards, by another Act of the 2 & 3 Will. IV. c. 115, provided that they should be subject, in respect of their schools and places for religious worship, education and charitable purposes, and in respect of the property held therewith, and of the persons employed in and about the same, to the same laws as were applicable to Protestant dissenters (*l*). And the triumph of toleration, as regards the Roman Catholic subjects of the realm, was consummated by the Acts of 7 & 8 Vict.

(*i*) See Jac. 1, c. 5; 11 Geo. 2, c. 17; 10 Geo. 4, c. 7, s. 16, and 7 & 8 Vict. c. 102, as to the inability of papists to present to benefices or grant advowsons; and 10 Geo. 4, c. 7, ss. 29, 31, prohibiting Jesuits and monks to come into the realm without licence. This last enactment is recognized by 23 & 24 Vict. c. 134, s. 7.

(*j*) As to the office of *Lord Chancellor* of Ireland, see now 30 & 31 Vict. c. 75.

(*k*) See 10 Geo. 4, c. 7, ss. 12, 16, 17.

(*l*) See also 23 & 24 Vict. c. 134, by which provisions are made for mitigation of the law relative to *charitable trusts* connected with the Roman Catholic religion.

c. 102, and 9 & 10 Vict. c. 59, which recite and repeal almost the whole of such enactments as still remained in force (however fallen into oblivion), and were thought calculated in any manner to oppress this portion of the community on account of their religious persuasion. To which we may add, that the obligation for them to use the special oath, which was provided by the Catholic Emancipation Act,—by which they abjure any intention to subvert the Church establishment, and promise never to exercise any privilege so as to disturb or weaken the Protestant religion or government,—appears to have been for almost all purposes, (if not altogether,) removed by the effect of 29 & 30 Vict. c. 19, 30 & 31 Vict. c. 75, s. 5, and 31 & 32 Vict. c. 72.

Before we conclude this chapter, it seems desirable also to take some notice here of that class of persons, who, being born in this realm, profess the *Jewish* religion; for these were formerly subject to many hardships and degradations, and appear to have been scarcely considered in any other light than as aliens (*l*). It is long since any sufferings of this description can be said to have fallen to their share; but they, nevertheless, remained till recently liable to some peculiar disqualifications. Thus, being unable, consistently with their belief, to take the oath of abjuration, which was made “upon the true faith of a Christian,” they could not, until lately, sit in parliament. But a Jew’s inability, on this ground, to sit in parliament was, in effect, though by a somewhat circuitous method, removed in the year 1858 (*m*). And the statute-book contains several other provisions framed with the express object of relieving this portion of British subjects from the disqualifications and restrictions to which they

(*l*) See 2 Inst. 507.

(*m*) This was by the effect of 21 & 22 Vict. c. 49, and 23 & 24 Vict. c. 63, enabling either House to re-

solve that a member professing the Jewish religion might omit the above words in the parliamentary oath.

were at one period liable by reason of their religion (*n*). Thus, amongst others, to which our space forbids us to refer, we may mention, that by 9 & 10 Vict. c. 59, and 18 & 19 Vict. c. 86, s. 2, such subjects as profess the Jewish faith are now placed—in respect of schools and places established for worship, education or charitable purposes, and the property held therewith—on the same footing as Protestant dissenters, and are thereby relieved from certain disadvantages to which they were formerly liable in respect of these matters. On the other hand, a subject professing the Jewish faith is still under the following disabilities, viz., that of being incompetent to fill certain high offices in the state, from which (as we have seen) Roman Catholics also are excluded (*o*); and of being unable to present to an ecclesiastical benefice, the right to appoint to which belongs to any office in her Majesty's gift, which he may happen to fill (*p*).

Thus amply has the law at length provided for the freedom of religious opinion (*q*). In all other respects,

(*n*) A special *declaration* was framed by 8 & 9 Vict. c. 52, for the use of persons professing the Jewish religion, on taking any municipal office, but the necessity for making any such declaration was removed by 29 & 30 Vict. c. 22.

(*o*) Vide *sup.* p. 61.

(*p*) 21 & 22 Vict. c. 49, s. 4.

(*q*) Among the statutes *connected* with this subject, may be ranked the 1 & 2 Vict. c. 105, by which an oath lawfully administered to any person on any occasion whatever is allowed to be binding, provided it be administered in such form and with such ceremonies as he declares to be binding. And the provision contained in the Common Law Procedure Act,

1854 (17 & 18 Vict. c. 125), allowing any person called as a *witness*, or required or desiring to make an affidavit or deposition, who shall refuse or be unwilling from alleged conscientious motives to be sworn, to obtain from the court, (on its being satisfied of the sincerity of the objection,) permission to make solemn affirmation or declaration instead. (Sect. 20.) The statute last-mentioned applied only to the *civil* courts, but by 24 & 25 Vict. c. 66, a similar relief is now given in courts of *criminal* jurisdiction, and by 30 & 31 Vict. c. 35, s. 8, has been since extended to *jurors*, in both civil and criminal cases.

however, the rights and pre-eminence of the Established Church have been hitherto maintained inviolate; and though no longer upheld by penal laws against non-conformity, she retains, in full possession, all those dignities and endowments which, at the period of the Reformation, were allotted exclusively to her ministers.

CHAPTER III.

OF THE ENDOWMENTS AND PROVISIONS OF THE
CHURCH.

THE endowments and provisions of the Church consist of lands, advowsons, and tithes; all of which have been at different times annexed to ecclesiastical preferments by the munificence of antient or modern donors; and the last are incident of common right to every parochial church. But in almost every parish the tithes have now been commuted (as will be presently explained) into a rent-charge,—which must be considered as in some measure a different species of endowment,—though it is the representative and equivalent for tithe, and subject in many respects to the same legal incidents (*a*).

These church endowments we propose to consider, first, as regards the subject of property itself; secondly, as to the estates which ecclesiastical persons, as such, may hold therein: thirdly, as to the power of alienation in regard to them which they are competent to exercise.

I. As regards the subject of property.

And herein, first, as to *lands*—a term which, it is to be recollected, includes, in law, houses and other buildings (*b*),—there are but few particulars requiring notice in this place, the incidents relating to land in general having been sufficiently explained in an earlier part of the work; and there being no distinction, in these mat-

(*a*) See 6 & 7 Will. 4, c. 71, s. 71.

(*b*) Vide sup. vol. i. p. 176.

ters, between lands held by clergymen in right of their churches, and such as are held by laymen.

We may observe, however, that the boundaries of church lands are often subject to great uncertainty; and therefore by 2 & 3 Will. IV. c. 80—reciting that a variety of corporations, sole and aggregate, that is to say, the archbishops and bishops, deans, deans and chapters, archdeacons, prebendaries, canons, and other dignitaries of the cathedral and collegiate churches and chapels of England and Wales, and the societies of the colleges and halls of Cambridge and Oxford and Winchester and Eton, are proprietors of divers manors, messuages, lands, tithes and hereditaments, and that in many cases the boundaries or quantities and identity of such property are disputed,—it is provided that it shall be lawful for any of them (with such consent or consents as in the Act mentioned,) to agree with their tenants or undertenants, or the owners of adjoining hereditaments, that any such disputed point shall be referred to arbitration.

We may remark, too, that in most benefices there is an official house of residence; in which, as explained in a former place, the law requires the incumbent actually to reside (*c*). This he is also bound, both by statute and by the common law of the realm, to keep in repair. And not only may he be compelled to do so during his incumbency, by authority of the bishop of the diocese (*d*), but, if he commits or suffers waste upon it, remedy may be had against his personal representatives, by the succeeding incumbent, in respect of such *dilapidation*, as it is called: and this remedy may be had either in the ecclesiastical or in the temporal courts (*e*). Numerous provisions, moreover, as before noticed, are made

(*c*) Vide sup. p. 34.

(*d*) See 13 Eliz. c. 10; 1 & 2 Vict. c. 106, ss. 35, 41; *North v. Barker*, 3 Phill. 309; *Rogers's Ecc. L.* 307.

(*e*) 13 Eliz. c. 10; 14 Eliz. c. 11,

s. 18. As to the action for dilapidations in a court of law, see *Wise v. Metcalfe*, 10 B. & C. 299; *Bird v. Relph*, 2 Ad. & El. 773; *Downes v. Craig*, 9 M. & W. 166; *Bunbury v.*

by law, to aid a beneficed clergyman in repairing or rebuilding his house of residence or to provide a new one. The methods of doing this, are by enabling him to raise money to a limited amount, according to the value of the benefice, by mortgage of its profits—money which the governors of Queen Anne's bounty (*f*) are specially empowered to advance;—or by allowing him to sell or exchange the existing house, in order to obtain another which is more convenient. And the principal statutes on these subjects are 17 Geo. III. c. 53 (commonly called Gilbert's Act), 1 & 2 Vict. c. 23, 5 & 6 Vict. c. 26, and 28 & 29 Vict. c. 69 (*g*). In addition to which provisions, we may remark, that, by 1 & 2 Vict. c. 106, the bishop of the diocese is directed, on avoidance of any benefice within his jurisdiction, to issue a commission to ascertain whether there is a fit house of residence, and supposing none to exist and the profits to exceed 100*l.* per annum, to ascertain whether such house can be conveniently provided; and if it shall report such to be the case, then the bishop, by mortgage of the profits, is to raise the sum required, or else to state in detail his reasons for not doing so to her majesty in council (*h*). And by 19 & 20 Vict. c. 50, it is further provided, as to advowsons vested in (or in trustees for) *inhabitants*, or other persons forming a numerous class, and deriving no pecuniary advantage therefrom,—that the same may be sold by order of such persons, and the proceeds applied to such beneficial purposes as therein specified, including the erection of a parsonage house if there be none, or the rebuilding, repair or improvement of any house already existing (*i*).

Hewson, 3 Exch. 558; Warren *v.* Lugg, ib. 579; Bryan *v.* Clay, 1 Ell. & Bl. 38; Jenkins *v.* Betham, 15 C. B. 168. As to the proceedings in the ecclesiastical court, see Whinfield *v.* Watkins, 2 Phil. 3.

(*f*) Vide sup. vol. II. p. 569.

(*g*) See also the other statutes cited sup. p. 37, n. (*g*).

(*h*) 1 & 2 Vict. c. 106, ss. 62, 63.

(*i*) Advowsons belonging to en-

With respect to an incumbent of a living, it is also to be observed, that he is generally seised for his life not only of the rectory or vicarage house, but of the *glebe*, i. e. of a portion of land attached to his benefice, as part of its endowment (*j*); and by 5 & 6 Vict. c. 54, it is provided that the tithe commissioners shall have power to ascertain and define the boundaries of the glebe lands of any benefice (*k*); and, with consent of the ordinary and patron, to exchange them for other lands within the same or any adjoining parish, or otherwise conveniently situated (*l*). And, moreover, by 17 & 18 Vict. c. 84, any incumbent entitled to glebe may (after obtaining the consent of such parties as in the Act specified) annex the same, by deed, to any church or chapel within the parish, district or place wherein such glebe is situate; to the intent that it may be held and enjoyed by the incumbent thereof for the time being (*m*). A rector or vicar is also seised, in every case, of the edifice of the church itself. In rectories, not merely the body of the church, but the chancel and the churchyard also, are the freehold of the rector (*n*). In vicarages, the body of the church and the churchyard are the vicar's freehold; the chancel that of the impropriator (*o*). Yet, with the exception of the chief pew in the chancel, which belongs to the rector,—or (in case of a vicarage) to the impro-

dowed charities within the provisions of the Charitable Trusts Acts, 1853, 1855, are not within this statute. (19 & 20 Vict. c. 50, s. 1.)

(*j*) "*Gleba est terra in qua consistit dos ecclesiæ.*"—Com. Dig. Dismes, B. 2, where it is also said that every church of common right ought to have a manse and glebe. As to the providing and exchanging of glebes, see 43 Geo. 3, c. 108; 51 Geo. 3, c. 115; 55 Geo. 3, c. 147; 6 Geo. 4, c. 8.

(*k*) 5 & 6 Vict. c. 54, s. 5.

(*l*) 5 & 6 Vict. c. 54, s. 5.

(*m*) 17 & 18 Vict. c. 84, s. 2. This statute is in extension of 29 Car. 2, c. 8; 1 & 2 Will. 4, c. 45; and 1 & 2 Vict. c. 107, s. 14,—former provisions for the augmentation of benefices.

(*n*) See *Clifford v. Wicks*, 1 B. & Ald. 498; *Beckwith v. Harding*, ib. 508; *Rich v. Bushnell*, 4 Hagg. 164; *Churton v. Frewen*, Law Rep. 1 Eq. Ca. 634.

(*o*) *Wats. C. L.* 391.

priator (*p*),—the disposal of the pews and seats in the church appertains, by law, not to the rector, vicar, or impropiator, but (as formerly shown) to the ordinary; and, practically, to the churchwardens, to whom the authority of the ordinary, in this respect, is delegated (*q*). Moreover, no monument can be set up without the ordinary's consent (*r*). And an aisle or side chapel in the church, or a pew in its nave, may be granted, by *faculty* of the ordinary, to an individual and his heirs as appurtenant to a particular message in the parish. Indeed a man may prescribe for these, as so appurtenant, without showing a faculty (*s*).

Among the subjects of church property we enumerated *advowsons* and *tithes*; and to these it will now be proper to devote a more particular attention.

1. And, first, as to *Advowsons*.—Advowsons are of the class of hereditaments incorporeal; but were simply mentioned, without being discussed, in that part of the first volume allotted to that class of property (*t*); because their close connection with the law of the Church seemed naturally to assign them to the present division of our work (*u*).

An advowson, *advocatio*, is the right of presentation to a rectory, vicarage, or other ecclesiastical benefice; and this word, which [*signifies in clientelam recipere*, the taking into protection, is synonymous with patronage,

(*p*) Rogers's Ecc. L. 171; Clifford *v.* Wicks, 1 B. & Ald. 498.

(*q*) Vide sup. p. 43; Rogers's Ecc. L. 179.

(*r*) Beckwith *v.* Harding, 1 B. & Ald. 498; Rich *v.* Bushnell, 4 Hagg. 164.

(*s*) Wats. C. L. 643, 644; 2 Bl. Com. 429. Reference may be here made to recent provisions by which a person giving land to be added to

any consecrated churchyard may reserve a portion thereof in perpetuity of burial, and of placing monuments and gravestones thereon. See 30 & 31 Vict. c. 133, amended by 31 & 32 Vict. c. 47.

(*t*) Vide sup. vol. I. p. 667.

(*u*) As to the law and origin of advowsons, see Rennell *v.* Bp. of Lincoln, 3 Bing. 223; 7 B. & C. 113; Mirehouse *v.* Rennell, 8 Bing. 490.

[*patronatus* : and he who has the right of advowson is called the patron of the church (*y*).] For, in antient times, when lords of manors built churches on their own demesnes, endowed them with glebe, and appointed those tithes to be paid to the ministers thereof, which before were given to the clergy in common,—from whence arose the division of parishes,—he who thus built and endowed a church had of common right a power annexed of nominating any person (provided he were canonically qualified) to officiate in that church, of which such lord of the manor was the founder, endower, maintainer, or, in a word, the patron (*z*). And this power is, by derivation of title from the lords of manors, now claimed by many other private persons; and by many corporations, both lay and ecclesiastical (*a*). But it is to be observed, that neither an alien or a person who professes the Roman Catholic faith is in a position to exercise the rights of a patron, and present to a living; for if the former purchase an advowson and a vacancy should occur, the crown shall present (*b*); if the latter, the University of Oxford or of Cambridge (*c*). And if a person professing the Jewish religion shall hold any office in the gift of the crown, to which belongs the right of presentation to any ecclesiastical benefice, such right will devolve upon the Archbishop of Canterbury for the time being (*d*). An incumbent may be constituted, as

(*y*) 2 Bl. Com. p. 21.

(*z*) Vide sup. vol. 1. p. 122 et seq.; 1 Bl. Com. p. 118; Co. Litt. 119 b; Gibs. Cod. 7, 57, 2nd edit. This original of the *jus patronatus*, viz. building and endowing the church, appears also to have been allowed in the Roman empire. (Nov. 26, t. 12, c. 2; Nov. 118, c. 23.)

(*a*) Municipal corporations, however, are disabled from exercising,

in their *corporate* capacity, any church patronage. (See 5 & 6 Will. 4, c. 76, s. 139; 6 & 7 Will. 4, c. 77, s. 26; and 1 & 2 Vict. c. 31.)

(*b*) Watson, Clerg. Law, 105.

(*c*) Rogers, Ecc. L. 17; 3 Jac. 1, c. 5; 1 W. & M. st. 1, c. 26; 12 Ann. st. 2, c. 14, s. 1; and see *Edwards v. Bishop of Exeter*, 5 Bing. N. C. 654.

(*d*) 21 & 22 Vict. c. 49, s. 4.

explained in a former chapter (*e*), either by way of presentation, or collation, or donation; and, according to this distinction, an advowson is said, as the case may be, to be either *presentative*, *collative*, or *donative* (*f*).

Advowsons also are either *appendant* or *in gross*. [Lords of manors being originally the only founders, and of course the only patrons, of churches (*g*), the right of patronage or presentation, so long as it continues annexed to the possession of the manor—as some have done from the foundation of the church to this day—is called an advowson appendant (*h*); and it will pass or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words (*i*). But where the property of the advowson has been once separated from the property of the manor by legal conveyance, it is called an advowson *in gross* or at large;] being annexed no longer to the manor or lands, but to the person of the owner (*k*). And where the inheritance either of the manor or the advowson has been thus separately conveyed, the advowson remains for ever in gross, and cannot be appendant any more (*l*). When thus in gross, it may be conveyed in the same manner as any other incorporeal hereditament (*m*). Moreover, not only the advowson itself, but the next or any number of future *presentations* may, during an existing incumbency, be conveyed (in like manner) by the owner (*n*); and the grantee of a next pre-

It may be observed, that by 30 & 31 Vict. c. 75, every subject is made eligible to fill the office of Lord Chancellor of *Ireland* without reference to his religious belief; and if the said office is held by any one not being a member of the United Church of England and Ireland, any ecclesiastical patronage belonging to the office is to devolve on the archbishop of *Armagh*. (Sect. 2.)

(*e*) Vide sup. pp. 29, 31, 32.

(*f*) 2 Bl. Com. 22; Co. Litt. 119 b.

(*g*) Co. Litt. 119 b.

(*h*) Ibid. 121.

(*i*) Ibid. 307.

(*k*) Ibid. 120.

(*l*) 2 Bl. Com. 22.

(*m*) Vide sup. vol. I. p. 701.

(*n*) Co. Litt. 249 a; Plowd. 150; Crisp's case, Cro. Eliz. 164; Elvis

sentation becomes, *pro hâc vice*, the patron. And as to either species of patron, this rule is to be observed, that if he dies after a vacancy has happened, and before it is filled up, the right to present for the then next turn, (being as it were a fruit fallen,) is considered as personal, not real estate, and goes to his executor, and not to his heir (*o*). The exercise of his right, by a patron of either description, is also subject to the restrictions imposed by the law of *lapse*, and by the law of *simony*.

As to *Lapse*, it is [a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary, by neglect of the patron to present; to the metropolitan, by neglect of the ordinary; and to the crown, by neglect of the metropolitan. For, it being for the interest of religion and the good of the public, that the church should be provided with an officiating minister, the law has, therefore, given this right of lapse in order to quicken the patron; who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors. The right of lapse was first established about the time, though not by the authority (*p*), of the Council of Lateran (*q*): which was in the reign of our Henry the second, when the bishops first began to exercise universally the right of institution to churches (*r*). And, therefore, where there is no right of institution, there is no right of lapse (*s*): so that no donative can lapse to the ordinary, unless it hath been augmented by Queen Anne's bounty;] when, by statute, it is made subject to that incident (*t*).

v. Abp. of York, Hob. 322; Alston v. Atlay, 7 A. & E. 289; and see Rogers, Ecc. L. 9.

(*o*) *Rennell v. Bp. of Lincoln, 7 B. & C. 113.*

(*p*) *2 Roll. Ab. 54; Presentment, Lapse (O).*

(*q*) *Bract. l. 4, tr. 2, c. 3.*

(*r*) *Vide sup. p. 33.*

(*s*) *Bro. Ab. tit. Quare Impedit; Fitton v. Hall, Cro. Jac. 518.* The ordinary, however, may, by ecclesiastical censures, constrain the patron to fill a vacant donative. *2 Burn, Ecc. L. 363.*

(*t*) *1 Geo. 1, st. 3, c. 10, ss. 6, 7; Rogers, Ecc. L. 354.*

And it is also to be observed, that [no right of lapse can accrue when the original presentation is in the crown (*u*).

The term, after which the title to present by lapse accrues from the one to the other successively, is six calendar months,] that is, 182 days (*x*); [and this, exclusive of the day of the avoidance (*y*). But, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in (*z*); for the forfeiture accrues whenever the negligence has continued six months in the same person. And also if the bishop doth not collate his own clerk immediately to the living, and the patron presents, though after the six months are elapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk (*a*). For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the archbishop has filled up the benefice; and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop (*b*). For he had no permanent right and interest in the advowson, as the patron hath, but merely a temporary one; which having neglected to make use of during the time, he cannot afterwards retrieve it. But if the presentation lapses to the crown, prerogative here intervenes and makes a difference; and the patron shall never recover his right till the sovereign has satisfied his turn by presentation; for *nullum tempus occurrit regi* (*c*).

(*u*) St. 17 Edw. 2, c. 8; 2 Inst. 273.

(*a*) Wats. C. L. 109; Bp. of Peterborough *v.* Catesby, Cro. Jac. 166; 2 Inst. 360; Catesby's case, 6 Rep. 62; Regist. 42.

(*y*) 2 Inst. 231; Wats. C. L. 109.

(*z*) Gibs. Cod. 769.

(*a*) 2 Inst. 273.

(*b*) 2 Roll. Ab. 368.

(*c*) Doctor and Student, d. 2, c. 36; R. *v.* Abp. of Canterbury, Cro. Car. 355.

[And therefore it may seem as if the church might continue void for ever, unless the crown shall be pleased to present, and a patron thereby be absolutely defeated of his advowson. But to prevent this inconvenience, the law hath lodged a power in the patron's hands of, as it were, compelling the crown to present. For if, during the delay of the crown, the patron himself presents, and his clerk is instituted, the sovereign, indeed, by presenting another, may turn out the patron's clerk; or, after induction, may remove him by bringing an action called a *quare impedit*: but if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the crown hath lost the right, which was only to the next or first presentation (*e*).]

In case the benefice becomes void by death, or by reason of plurality (*f*), the patron is bound at his own peril to take notice of the vacancy; and the six months date from its occurrence (*g*); [for these are matters of equal notoriety to the patron and ordinary (*h*). But in case of a vacancy by resignation or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, here the law requires him to give notice thereof to the patron (*i*).] And, in this case, the six months shall date only from the time when such notice shall in fact be given (*j*). Though as to this, a distinction is made in the case of an *ecclesiastical* patron, who is held not entitled to notice of insufficiency, because he is competent to choose an able clerk (*k*). Neither shall any lapse accrue to the metropolitan or the sovereign in cases where the bishop is

(*e*) Baskerville's case, 7 Rep. 28; Beverley v. Cornewall, Cro. Eliz. 44. As to *quare impedit*, vide post, bk. v. c. XI.

(*f*) As to cession through plurality, vide sup. p. 37.

(*g*) See Wats. C. L. 5; Rogers,

Ecc. L. 488.

(*h*) 2 Bl. Com. p. 278.

(*i*) Vide sup. p. 30.

(*j*) 2 Burn, Ecc. L. 157.

(*k*) 2 Roll. Ab. 364; 2 Burn, ubi sup.

precluded, by his having neglected to give notice to the patron, from himself presenting (*l*). [For it is universally true, that neither the archbishop nor the crown shall ever present by lapse, but where the immediate ordinary might have collated by lapse within the six months, and hath exceeded his time: for the first step or beginning faileth, *et quod non habet principium, non habet finem* (*m*). If the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned, or notice given, he is styled a disturber, by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong (*n*). Also, if the right to presentation be litigious and contested, and an action be brought to try the title,] making the bishop a defendant, [no lapse shall incur until the question of right be decided (*o*).]

As to *Simony*, this, also, is a cause of forfeiture, whereby [the right of presentation is forfeited and vested *pro hâc vice* in the crown. Simony means the corrupt presentation of any person to an ecclesiastical benefice, for money, gift, or reward (*p*). It is so called from the resemblance it is said to bear to the sin of Simon Magus; though the purchasing of holy orders, or a licence to preach, seems to approach nearer to his offence (*q*). It is by the canon law a very grievous crime:] but whether it was an offence punishable at the common law has been doubted (*r*); and though the clerk who committed simony was always subject to ecclesiastical censures (*s*), these

(*l*) 2 Bl. Com. ubi sup.

(*m*) Co. Litt. 344, 345.

(*n*) Co. Litt. 344.

(*o*) 2 Bl. C. 278; Wats. Ch. L. 112; 2 Burn, Ecc. L. 358; Rogers, Ecc. L. 488.

(*p*) Baker v. Rogers, Cro. Eliz. 790.

(*q*) Vide sup. p. 5.

(*r*) Blackstone says (ubi sup.)

it was *not* an offence at common law; but see Bp. of St. David's v. Lucy, 1 Ld. Raym. 449; Greenwood v. Bp. of London, 5 Taunt. 745; and the other authorities cited, Rogers, Ecc. L. 840.

(*s*) Spelm. Concil. 2, 12; vide Whish v. Hesse, 3 Hagg. 659; Degge, 36.

were not efficacious enough to repel the notorious practice of the thing; particularly as they did not affect the simoniacal patron; so that divers acts of parliament have been made to restrain it (*s*). And these enactments shall be briefly considered in this place.

By the statute 31 Eliz. c. 6 (which also contains provisions against corrupt resignations and exchanges), it is provided, that if any person or corporation, for any sum of money or reward, or promise of money or reward, shall present (or collate) any person to any benefice with cure of souls or other 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 any one who will sue for the same (*t*);] and [such presentation also shall be void, and the presentee be rendered incapable of ever enjoying the same benefice, and the crown shall present to it for that turn.] But it is enacted by stat. 1 W. & M. c. 16, that the simoniacal contract shall not prejudice any innocent patron in reversion, on pretence of a lapse to the crown or otherwise, unless the presentee, or his patron, was convicted in the lifetime of such presentee of the offence of simony. Again, [by the Statute 12 Anne, st. 2, c. 12, if any person, for money or reward, or promise of money or reward, shall procure in his own name, or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the offender is subject to all the ecclesiastical penalties of simony,—is disabled from holding the benefice, and the presentation devolves to the crown.] And, by the recent Act of 28 & 29 Vict. c. 122 (already mentioned) every person instituted or collated to any benefice, or licensed to any

(*s*) See 2 Bl. Com. p. 279.

(*t*) 4 Bl. Com. 63. As to pleading this statute, in bar of an action

on a contract, see *Goldham v. Edwards*, 18 C. B. 389.

perpetual curacy, lectureship or preachership, must previously make and subscribe, in addition to the other declarations required by that statute, a declaration that he has not committed simony (*u*).

Many questions have arisen in our courts with regard to what is, and what is not, simony; and, among others, these points seem to be clearly settled. 1. That the sale of an *advowson*, (whether the living be full or not,) is not simoniacal, unless connected with a corrupt contract or design as to the next presentation; though if an *advowson* be granted during the vacancy of the benefice, the presentation on that vacancy can in no case pass by the grant (*v*). 2. [That to purchase a next *presentation*, the living being actually vacant, is open and notorious simony; this being expressly in the face of the statute (*x*).] 3. [That for a *clerk* to bargain for the next presentation, the incumbent being sick and about to die, is simony, and was so even before the statute of Queen Anne (*y*). And now, by that statute, for a clerk to purchase, either in his own name or another's, the next presentation, and be thereupon presented at any future time to the living, is direct and palpable simony.] But 4, a bargain by *any other* person for the next presentation, (even if the incumbent be *in extremis*,) if without the privity, and without any view to the nomination, of the particular clerk afterwards presented, is not simony (*z*).

(*u*) Vide *sup.* p. 39. Prior to this Act, the presentee took an *oath* to the same effect, which occasions Sir E. Coke to remark that simony "is the more odious because it is ever accompanied with perjury" (3 *Inst.* 156).

(*v*) As to sale of an *advowson*, see *Bac. Ab. tit. Simony*, 189; *Grey v. Hesketh*, *Ambl.* 268; *Barret v. Glubb*, 2 *Bl. Rep.* 1052; *Bishop of Lincoln v. Wolforstan*, 2 *Wils.* 175; 3 *Burr.* 1504, *S. C.* in error; *Green-*

wood v. Bishop of London, 5 *Taunt.* 745; *Fox v. Bishop of Chester*, 6 *Bing.* 1; *Alston v. Atlay*, 6 *Nev. & M.* 686; 26 & 27 *Vict. c.* 120; and see 19 & 20 *Vict. c.* 50, mentioned *sup.* p. 68.

(*w*) *Baker v. Rogers*, *Cro. Eliz.* 788; *Moor.* 914, *S. C.*

(*y*) *Winchcombe v. Bp. of Winchester*, *Hob.* 165.

(*z*) *Fox v. Bishop of Chester*, *ubi sup.*; 3 *Bligh*, *N. S.* 123, *S. C.*

5. [That if a simoniacal contract be made with the patron, the clerk] presented not being privy thereto, such presentation indeed cannot take effect, but shall devolve to the crown, as a punishment of the guilty patron (*a*); but the clerk who is innocent, does not otherwise incur any disability or forfeiture (*b*). 6. [That bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal (*c*), provided the patron or his relations be not benefited thereby (*d*); for this is no corrupt consideration moving to the patron.] In addition to these points, we may notice that it has been a frequent practice for the patron to take from the presentee a bond, (usually called a *resignation* bond,) or other engagement, to resign the benefice at a future period, in favour of some particular individual named by the patron; or, at the request of the latter, generally: and, at one period, all such engagements were void, as being within the prohibition of the laws relating to simony (*e*). Such a contract is now, however, to a certain extent, sanctioned by statute. For by 9 Geo. IV. c. 94 (*f*), a written promise to resign, if made to the intent (manifested by the terms of it) that some one nominee, or one of two nominees, shall be presented, shall be valid to all intents and purposes. But this is subject, however, to these provisions: first, that where there are two nominees, each of them shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand-nephew, of the patron; secondly, that the writing shall in all cases be deposited, within two months after its date, with the registrar of the diocese, and be open to public inspection; and, thirdly, that the

(*a*) See *Whish v. Hesse*, 3 Hagg. 659.

(*b*) 2 Bl. Com. p. 280; 3 Inst. 154; *R. v. Bishop of Norwich*, Cro. Jac. 385.

(*c*) *Noy*, 142.

(*d*) *Peele v. Capel*, Stra. 534.

(*e*) See *Dashwood v. Peyton*, 18 Ves. 37; *Jac. & Walk.* 283; *Bishop of London v. Ffytche*, 1 East, 487, (*u.*); *Fletcher v. Lord Sondes*, 3 Bing. 502; 5 B. & Ald. 835, S. C.

(*f*) See also 7 & 8 Geo. 4, c. 25; *Burton*, Comp. 416.

resignation made in pursuance of such engagement shall be followed by a presentation, within six months, of him therein named as the person for whose benefit it is made.

2. Secondly, as to *Tithes*.—These are a species of incorporeal hereditaments (*g*); and are capable of being held either by laymen or by the clergy in right of their churches. And it is to the latter indeed that they properly, and for the most part, belong (*h*); for when tithes are owned by a layman it is usually only in the character of impropiator: the origin and nature of whose right to the property of the Church has already been sufficiently explained in a former chapter (*i*).

Tithes [are defined to be the tenth part of the increase (*k*), yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants: the first species being usually called *prædial*, as of corn, grass, hops (*l*), and wood (*m*); the second *mixed*, as of wool, milk (*n*), pigs, &c. (*o*), consisting of natural products, but nurtured and preserved in part by the care of man; and of these two species the tenth must be paid in gross: the third *personal*, as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due;] nor is tithe of this kind generally due at all, except so far as the particular custom of the place may authorize the claim (*p*). From the above definition it may be inferred, that whatever is [of the substance of the earth, or is not of annual increase, as stone, lime,

(*g*) Vide sup. vol. I. p. 667.

(*h*) Bac. Ab. Tythes, (E).

(*i*) Vide sup. p. 23.

(*k*) From the Saxon *Teotha*, tenth, Jac. Dict.

(*l*) As to tithe of hop grounds and market gardens, see Trimmer v. Walsh, 4 B. & Smith, 18.

(*m*) 1 Roll. Ab. 635; 2 Inst. 649.

As to the manner of taking tithes of *turnips*, see 5 & 6 Will. 4, c. 75.

(*n*) As to this tithe, see Fisher v. Birrell, 2 Q. B. 239.

(*o*) Roll. Abr. ubi sup.; 2 Inst. 649.

(*p*) Roll. Abr. nbi sup.; 2 & 3 Edw. 6, c. 13; 7 Bro. P. C. 3; Com. Dig. Dimes (E. 3).

[chalk and the like,] is not in its nature titheable: nor is tithe demandable, except by force of special custom, in respect to animals *feræ naturæ*.

The establishment of tithes in the Christian Church is generally ascribed to the fourth century, though [we cannot precisely ascertain the time when they were first introduced into this country (*g*). Possibly they were contemporary with the planting of Christianity among the Saxons by Augustin the monk, about the end of the sixth century. But the first mention of them, perhaps, in any written English law, is in a decree made in a synod held A.D. 786, wherein the payment of tithes to the Church in general is strongly enjoined (*r*). This canon, or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in their parliamentary conventions of estates, respectively consisting of the kings of Mercia and Northumberland, the bishops, dukes, senators and people: which was a very few years later than the time that Charlemagne established the payment of them in France (*s*), and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy (*t*).

The next authentic mention of tithes is in the *feodus Edwardi et Guthruni*; or the laws agreed upon between king Guthrun the Dane, and Alfred and his son Edward the elder, successive kings of England, about the year 900. This was a kind of treaty between these monarchs, which may be found at large in the Anglo-Saxon laws (*u*); wherein it was necessary, as Guthrun was a pagan, to provide for the subsistence of the Christian clergy under his dominion; and accordingly we find the payment of

(*g*) See *Rennell v. Bp. of Lincoln*, 7 Barn. & Cress. 153.

(*r*) *Selden*, c. 8, s. 2.

(*s*) A.D. 778.

(*t*) *Seld.* c. 6, s. 7.

(*u*) See *Wilkins*, *Leges Anglo-Sax.* p. 51.

[tithes not only *enjoined*, but a *penalty* added upon non-observance: which law is seconded by the laws of Athelstan about the year 930 (*x*).

For some time after the introduction of tithes into this country, though every man was obliged to pay tithes in general, yet (as hath been formerly observed) he might give them to what priests he pleased (*y*); which were called *arbitrary* consecrations of tithes: or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common (*z*). But, when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister; first, by common consent or the appointment of lords of manors, and afterwards by the written law of the land (*a*).

However, arbitrary consecrations of tithes took place again afterwards, and became in general use till the time of King John (*b*); which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under Archbishop Dunstan and his successors. Who endeavoured to wean the people from paying their dues to the secular or parochial clergy, (a much more valuable set of men than themselves,) and were then in hopes to have drawn, by sanctimonious pretences of extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged

(*x*) Wilk. ubi sup.; LL. Athel. c. 1.

(*y*) Vide sup. vol. I. p. 122.

(*z*) Seld. c. 9, s. 4; 2 Inst. 646; Slade v. Drake, Hob. 296.

(*a*) LL. Edgar. c. 1 and 2; Canut. c. 11. See 1 & 2 Will. 4,

c. 45 (extended by 28 & 29 Vict. c. 42), as to the annexation by a rector or vicar of any part of his tithes to any chapel of ease, parochial chapel or district church within the limits of the rectory or vicarage.

(*b*) Seld. c. 11.

[to pay his tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to some abbey already erected: since, for this dotation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever sung for his soul. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by Pope Innocent the third about the year 1200; in a decretal epistle sent to the Archbishop of Canterbury, and dated from the palace of Lateran (*d*). And this has occasioned Sir Henry Hobart and others to mistake it for a decree of the Council of Lateran, held A.D. 1179 (*e*), which only prohibited what was called the *infeudation* of tithes, or their being granted to mere laymen (*f*); whereas this letter of Pope Innocent to the archbishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same Pope in other countries (*g*). This epistle, says Sir Edward Coke (*h*), bound not the lay subjects of this realm; but, being reasonable and just, it was allowed of, and so became *lex terræ*. And it put an effectual stop to all the arbitrary consecrations of tithes; except some footsteps, which still continue in those *portions* of tithes,] as they are called, [which the parson of one parish hath, though rarely, a right to claim in another (*i*). For it is now universally held that tithes are due of common right to the parson of the parish, unless there be a special exception; which parson (or rector), we have seen in a former chapter (*k*), may be either the actual incumbent, or else the impropriator of

(*d*) Opera Innocent. III. tom. 2, p. 452.

(*e*) See Steel v. Houghton, 1 H. Bl. 52.

(*f*) Decretal. l. 3, t. 30, c. 19.

(*g*) Decretal. l. 3, t. 30, cc. 2, 6.

(*h*) 2 Inst. 641.

(*i*) Ib. 641, 653.

(*k*) Vide sup. p. 21.

[the benefice; appropriations being a method of endowing monasteries, which seems to have been devised by the regular clergy by way of substitute to arbitrary consecration of tithes.] In impropriations, indeed, the vicar, as well as the impropriator (or rector), is generally entitled to some part of the tithes; but as between these parties, it is to be observed, that all tithes, *primâ facie*, and by presumption of law, belong to the latter; except such as can be shown, by evidence, to belong to the vicar (*l*). Such evidence may consist either of the production of a deed of endowment, vesting certain tithes in the vicar; or of such proof of long usage as is sufficient to raise the presumption that an endowment of that description, though now lost, was antiently made (*m*). It sometimes happens that an endowment is found to vest all the “small” tithes *eo nomine* in the vicar (*n*); and this raises the question what are *small* and what *great* tithes—to determine which, no clear line of demarcation seems ever to have been drawn. Yet tithes “mixed and personal” are universally agreed to fall always under the former denomination (*o*); and tithes of corn, hay and wood are generally comprised under the latter (*p*).

We have observed that tithes are due to the parson of common right, unless by special exception. Let us therefore now see who may be exempted from their payment.

And here, first, we may notice, that some persons are exempt by personal privilege. [Thus the crown by its prerogative is discharged from all tithes (*q*). So a vicar shall pay no tithes to the rector, nor the rector to

(*l*) *Daws v. Benn*, 1 B. & C. 763; 2 Bligh, N. S. 83.

(*m*) *Jackson v. Walker*, Gwill. 1231; 2 Bligh, N. S. 94, 103.

(*n*) *Bac. Ab. Tithes*, (K).

(*o*) *Ibid.*

(*p*) *Com. Dig. Dismes*, G. 1. Small tithes are sometimes called

privy tithes. (See *Clee v. Hall*, 7 C. & F. 744.)

(*q*) *Wright v. Wright*, Cro. Eliz. 511. According to other authorities, however, the crown is not discharged, except by special prescription. (*Bac. Ab. Tithes* (Q) 1; *Hardr.* 315.)

[the vicar; the maxim in such cases being that *ecclesia decimas non solvit ecclesie* (*g*). But these privileges are not annexed to the land, but personally confined to the crown and the clergy; for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally titheable (*r*).]

Next, spiritual corporations, (as monasteries, abbots, bishops, and the like,) were always capable of having their lands totally discharged of tithes in various ways (*s*). [But, upon the dissolution of abbeys by Henry the eighth, most of these exemptions from tithes would have fallen with them, and the lands become titheable again, had they not been supported and upheld by the statute 31 Hen. VIII. c. 13; which enacts, that all persons, who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeys themselves formerly held them.] And [if a man can show his lands to have been such abbey lands, and also immemorially discharged of tithes by any of the means before mentioned,] this is still a good exemption (*t*).

Again, any owner of lands may claim an exemption, either partial or total, from tithes in respect thereof, by reason of a *real composition*; which is an agreement [made between such owner and the incumbent, with the consent of the ordinary and the patron, that the lands shall, for the future, be discharged from payment

(*g*) *Blinco v. Marston*, Cro. Eliz. 479; *Wright v. Wright*, *ibid.* 511; Sav. 3; *Moore*, 910, S. C.

(*r*) *Blinco v. Marston*, Cro. Eliz. 479.

(*s*) *Wright v. Gerrard*, Hob. 309. These were chiefly as follows:—
1. Real composition; 2. Unity of possession, *i. e.*, where the rectory and titheable lands both came to the same religious house; 3. Pre-

scription; 4. Papal bull, or exemption in virtue of their order,—as Knights Templars, Cistercians, and the like. 2 Bl. Com. p. 31.

(*t*) See Black. Com. *ubi sup.*, where it is added, that “from this original “have sprung all the lands which, “being in lay hands, do at present “claim to be tithe free.” See also 2 & 3 Vict. c. 62, s. 11.

[of tithes, by reason of some land or other *real* recompence given in lieu and satisfaction thereof (*u*). This was permitted by law, because it was supposed that the clergy would be no losers by such composition; since the consent of the ordinary, whose duty it is to take care of the church in general,—and of the patron, whose interest it is to protect that particular church,—were both made necessary to render the composition effectual: and hence have arisen all such compositions as exist to this day, by force of the common law. But experience showing that even this caution was ineffectual, and the possessions of the church being, by this and other means, every day diminished, the disabling statute 13 Eliz. c. 10, was made; which prevents, among other spiritual persons, all incumbents of livings from making any conveyances of the estates of their churches other than for three lives, or twenty-one years (*v*). So that now, by virtue of this statute (*x*), no real composition made since the thirteenth year of Elizabeth,] (though by consent of the patron and incumbent,) is, in general, sufficient to support a claim of exemption from tithes. However, by 2 & 3 Will. IV. c. 100, s. 2, it is enacted, that every composition for tithes, which had at that date been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron and incumbent were parties, and which had not been since set aside or departed from, shall be valid in law.

Moreover all persons, spiritual or lay, may claim by custom a partial exemption from tithes (or *modus*); which is where, by immemorial usage, a particular manner of tithing has been allowed, different from the payment of one-tenth of the annual increase (*y*). [And this imme-

(*u*) 2 Inst. 490 ; 13 Rep. 40.

(*v*) 2 Bl. Com. p. 29.

(*x*) Wright *v.* Wright, Cro. Eliz.

511. It is, however, to be remarked that the statute of Eliz. here referred to by Blackstone, does not seem to

have been aimed at the practice of real compositions, but rather against long and improvident *leases* by the clergy.

(*y*) As to customs in general, vide sup. vol. 1. p. 55.

[morial usage is binding upon all parties; as it is in its nature an evidence of universal consent and acquiescence, and with reason supposes a real composition to have been formerly made;] though, on the other hand, it is a general rule that (as regards the laity at least) no total exemption can be claimed by custom, the maxim being *modus de non decimando non valet* (*z*). Such customary mode of tithing, or *modus decimandi*, [is sometimes a pecuniary compensation; as twopence per acre for the tithe of land: sometimes it is a compensation in work and labour; as that the parson shall have only the twelfth cock of hay and not the tenth, in consideration of the owner's making it for him; sometimes, in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity when arrived to greater maturity; as a couple of fowls in lieu of tithe eggs: and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing.

To make a good and sufficient *modus*, the following rules must be observed; 1. It must be *certain* and *invariable* (*a*); for payment of different sums will prove it to be no *modus*, that is, no original real composition; because that must have been one and the same from its first original to the present time. 2. The thing given in lieu of tithes must be beneficial to the *parson*, and not for the emolument of third persons only (*b*): thus a *modus* to repair the *church*, in lieu of tithes, is not good, because that is an advantage to the parish only; but to repair the *chancel* is a good *modus*, for that is an advantage to the parson (*c*). 3. It must be something *different* from the thing compounded for (*d*). One load of hay in lieu of *all* tithe hay is no good *modus*; for no parson would

(*z*) 2 Bl. Com. p. 29.

(*c*) Vide sup. p. 69.

(*a*) *Towerson v. Winget*, 1 Keb. 602.

(*d*) *Sheppard v. Penrose*, 1 Lev. 179.

(*b*) 1 Roll. Abr. 649.

[*bonâ fide* make a composition to receive less than is due in the same species of tithe: and therefore the law will not suppose it possible for such composition to have existed. 4. One cannot be discharged from payment of one species of tithe, by paying a modus for another (*e*). Thus a modus of one penny for every *milch* cow will discharge the tithe of milch kine, but not of *barren* cattle; for tithe is, of common right, due for both; and therefore a modus for one shall never be a discharge for the other. 5. The recompence must be in its nature as durable as the tithes discharged by it,—that is, an inheritance certain (*f*). And therefore a modus that every *inhabitant* of a house shall pay fourpence a year in lieu of the owner's tithes, is no good modus; for possibly the house may not be inhabited, and then the recompence will be lost. 6. The modus must not be too large; which is called a *rank* modus.] For as the real composition, [which is the supposed foundation for the modus, must be assumed to have been an equitable contract,—if the modus set up is so rank and large as that it beyond dispute exceeds the value of the tithes in the time of Richard the first (the date of legal memory), this modus is *felo de se*, and destroys itself. For as it would be destroyed by any direct evidence to prove its non-existence at any time since that era, so also it is destroyed by carrying in itself this internal evidence of a much later original (*g*).]

Lastly. Exemption from tithes may also be claimed in respect of *long usage*; that is, such usage as can be shown to have lasted for a certain period of time, even though it may have fallen short of immemorial duration.

This species of exemption is established by the sta-

(*e*) *Grysmen v. Lewes*, Cro. Eliz. 446; *Startupp v. Dodderidge*, Salk. 657.

(*f*) 2 P. Wms. 462.

(*g*) Vide sup. vol. I. pp. 59, 704, in reference to this doctrine as applied to customs in general, and prescription at common law.

tute 2 & 3 Will. IV. c. 100, passed in the year 1832 (*h*); whereby it is provided, that when tithe is demanded by any lay person, not being a corporation sole, or by any corporation aggregate,—any modus or total discharge in answer to such claim shall be valid, upon showing an usage for *thirty* years; unless met by evidence that such usage has been by virtue of some agreement in writing; or was different before the commencement of the thirty years. And that a modus or discharge shall be indefeasible, upon showing an usage for *sixty* years; unless proved to have been by virtue of some agreement in writing. And further, that when tithe is demanded by any ecclesiastical corporation sole (*i*), any modus or discharge shall be indefeasible, upon evidence of usage during two successive incumbencies, and for three years after the institution of a third incumbent; unless it shall be proved that such usage was by some agreement in writing. But there is a proviso, that if the whole time of such incumbencies shall be less than sixty years, then such usage must be shown not only during the whole of the time thereof, but also during such further period as shall, with such time, be sufficient to make up the period of sixty-three years.

Such, in a general point of view, is the state of the law, with respect to tithes. But a system has for about the last thirty years been in progress, (and has nearly reached its final result,) for commutation of this species of property throughout the kingdom into rent-charge (*k*);

(*h*) The statute was amended by 3 & 4 Will. 4, c. 83.

(*i*) There are, in the Act, analogous provisions for the case of tithe when claimed by a *temporal* corporation sole, in respect of an office or otherwise.

(*k*) About 12,000 commutations

have been now completed, and these virtually include all the tithes of England and Wales. The few cases which still remain unsettled are, for the most part, certain small rent-charges, for the *redemption* (instead of apportionment) of which by the several land-owners, proceedings

and to this subject it is now time to call the reader's attention.

The institution of tithes, though venerable from its scriptural origin and its antiquity,—and though entitled so far as the principle of making a competent provision for the ministers of religion is concerned to universal approbation,—is nevertheless, in its specific form, odious to the people, and unsatisfactory to the political economist (*l*). A tax consisting of a fixed proportion of the gross produce is open to this objection: that it takes advantage of increased fertility, while it makes no allowance for increased expenditure; and thus tends to check the spirit of agricultural improvement. It is obvious, too, that the produce of the soil cannot be collected in kind, without much waste and expense to the tithe-owner; nor without the danger of engendering animosities between him and his flock. It is, however, on the other hand, of not less manifest importance to the Church, that the legal provision for its members should be such as to secure to them, upon some steady basis, a competent portion of the necessaries of life; and to make them independent of any fluctuations in the value of money. It was therefore with great wisdom that parliament in the year 1836 consented to the adoption of a plan for commuting the tithes of every parish into a rent-charge, the amount of which is to be adjusted annually, according to the average price of corn.

This measure has been carried into effect by the Tithe Commutation Act, 6 & 7 Will. IV. c. 71, and the various statutes since passed for its amendment (*m*). They

have been instituted under the provisions of 9 & 10 Vict. c. 73, and 23 & 24 Vict. c. 93, ss. 32–39.

(*l*) It is remarked by Blackstone (vol. ii. p. 24), that, though the "divine right" of the clergy to tithes commenced and ceased with the Jewish theocracy, "an honour-

"able and competent maintenance
"for the ministers of the Gospel
"is undoubtedly *jure divino*, what-
"ever the particular mode of that
"maintenance may be."

(*m*) These are 7 Will. 4 & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 & 6 Vict.

establish a board of tithe commissioners (*n*); and provide (in general) that the commutation may be effected in two ways; either by a voluntary parochial agreement, entered into by a certain proportion of the parties interested and confirmed by the commissioners (*o*); or by compulsory award. And for this latter purpose the commissioners are required to take as the basis of the commutation, (but with power to a certain extent, and in certain cases, to depart from it,) the clear average value of the tithes of the parish—or of the composition payable for the same, where they have been compounded for—for the period of seven years, ending Christmas, 1835 (*p*). The payments to the former tithe owner under such commutation are to be half-yearly, and the amount thereof is to fluctuate according to the price of corn; the machinery for that purpose being as follows:—In January every year, an advertisement is inserted under the authority of the Board of Trade in the London Gazette, stating the average price of British wheat, barley and oats, for the seven years ending on the Thursday before Christmas-day then next preceding (*q*): and every half-year's payment by each parish is to vary so as always to equal the then value (according to the prices as ascertained by the annual advertisement next preceding such half-year's payment) of the number of bushels of wheat, barley and oats, in equal shares, which could have been purchased according to the prices advertised in January, 1837, by the sum (or rent-charge) for which the parish tithes were commuted (*r*).

As to the respective liabilities of the different land

c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; 23 & 24 Vict. c. 93.

(*n*) 6 & 7 Will. 4, c. 71, s. 2. This Board has been since consolidated with that of the Inclosure and of the Copyhold Commissioners. Vide sup. vol. 1. p. 662, n. (*l*).

(*o*) 6 & 7 Will. 4, c. 71, ss. 17, 27. See Re Appledore Tithe Commission, 8 Q. B. 139.

(*p*) 6 & 7 Will. 4, c. 71, s. 37.

(*q*) Sect. 56.

(*r*) 6 & 7 Will. 4, c. 71, s. 67; 3 & 4 Vict. c. 15, s. 20.

owners of the parish in respect of such total rent-charge, provisions are made for the *apportionment* thereof, under the superintendence of the commissioners, among the parish lands, having regard to their average titheable produce and productive quality (*s*); and after such apportionment has been confirmed, such lands are to be absolutely discharged from the payment of tithes, and instead thereof shall be liable for their portion of the rent-charge (*t*).

The rent-charge created under these Acts differs from rent-charges in general (*u*), not only in the variableness of its amount, but in another important particular; for in these, not only the land of the party charged, but his person, is usually liable; but as to a tithe rent-charge, it is expressly provided, that no person whatever shall be personally liable to the payment (*x*). The remedy in general where the rent-charge is in arrear for twenty-one days, is only by distress on the land (*y*); but if it be in arrear for forty days, and there be no sufficient distress, a writ may then be obtained from one of the judges at Westminster, to assess the arrears: after which the owner of the rent-charge may sue out a writ of execution for taking possession of the lands and holding them till his debt and costs be fully satisfied (*z*). But it is provided that neither the distress nor writ of execution shall at any

(*s*) 6 & 7 Will. 4, c. 71, ss. 33, 54.

(*t*) Sect. 67. As to *alteration* of apportionments, see 23 & 24 Vict. c. 93, ss. 15—17.

(*u*) As to rent-charges in general, vide sup. vol. I. p. 693.

(*w*) 6 & 7 Will. 4, c. 71, s. 67. See *Griffinhoofe v. Daubuz*, 4 Ell. & Bl. 230.

(*y*) 6 & 7 Will. 4, c. 71, s. 81 (and see 23 & 24 Vict. c. 93, ss. 29, 30.) As to a *distress*, vide post, bk. V. c. I. As to costs on distraining for a rent-charge, see *Newnham v. Bever*, 8 C. B. 560. When apportioned on

lands taken by a railway, distress may be had on the goods of the company wherever situated. (7 & 8 Vict. c. 83, s. 22.) When an outgoing tenant has quitted, leaving tithe rent-charge unpaid, the succeeding tenant or landlord may pay it to prevent a distress, and may charge him with the amount. (14 & 15 Vict. c. 25, s. 4.)

(*x*) 6 & 7 Will. 4, c. 71, s. 82. See *In re Hammersmith Rent-charge*, 4 Exch. 87; *Ex parte Ar-nison*, Law Rep., 3 Ex. 56.

time be taken out for more than two years' arrears (*a*). These rent-charges, it may also be remarked, were made subject to all parliamentary, parochial, and other rates and charges, to which the tithes commuted had theretofore been subject (*b*); and such rates and charges are to be assessed in the first instance upon the occupier of the lands; who may, after paying them, deduct the amount from the rent next payable to his landlord, and the landlord may, in his turn, recover that amount from the owner of the rent-charge (*c*). But in some cases lands may obtain an exemption, under the Commutation Acts, from all liability either to tithe or rent-charge. For to the extent of twenty acres, land in the parish is allowed to be given to the tithe-owner as an equivalent for the tithes (*d*); and any person seised in possession of an estate in fee simple or fee tail of any tithes or rent-charge, may dispose of the same so that it shall be merged in the inheritance of the lands charged (*e*).

The Commutation Acts provide, that any person having any interest in any tithes shall have the same claim upon the substituted rent-charge (*f*); and that every estate in the rent-charge shall be subject to the same liabilities and incidents as the like estate in the tithes commuted; and that when any lands were exempted from tithe while in the occupation of the owner, by reason of being glebe, or having been heretofore parcel of the possessions of any privileged order,—the same

(*a*) 6 & 7 Will. 4, c. 71, ss. 81, 82.

(*b*) Sect. 69.

(*c*) Sect. 70. As to the assessment, &c. of *property tax* on these rent-charges, see 5 & 6 Vict. c. 35, sched. A. No. IV. As to the assessment of tithe rent-charges to *watching* and *lighting* rates, see 14 & 15 Vict. c. 50. As to their rateability in respect of *poor's rate*, &c., see the cases reported in 1 E. & E. pp. 1—

62.

(*d*) 6 & 7 Will. 4, c. 71, ss. 29, 62, 68; 2 & 3 Vict. c. 62, ss. 19, 20, 21; 5 & 6 Vict. c. 54, ss. 6, 7; 23 & 24 Vict. c. 93, s. 21.

(*e*) 6 & 7 Will. c. 71; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 9 & 10 Vict. c. 73, ss. 18, 19.

(*f*) See *Tasker v. Bullman*, 3 Exch. 351.

lands shall be in like manner exempted from the payment of the rent-charge while in the occupation of the owner thereof (*g*); and that where by any act of parliament tithes are authorized to be sold, exchanged, or applied in any way, the same powers shall apply to the rent-charge (*h*). Moreover, unless by special provision in some parochial agreement, specially approved by the commissioners, the Acts do not extend to any Easter offerings, mortuaries, or surplice fees (*i*), nor to tithes of *fish*, nor (in general) to *personal* tithes, nor to *mineral* tithes (*k*). It follows, therefore, that notwithstanding the new system the former tithe law will always retain some importance, and require to be noticed in our law books. But, on the other hand, many branches of the former law (of which we have endeavoured above to give some general idea) will for all practical purposes be superseded. For it is provided by the Commutation Acts, that if any question shall arise as to any composition real, modus, or exemption from tithe, in respect of any of the lands or produce thereof in any parish, such question shall be definitively settled in the manner therein provided: and that due allowance shall be made in the parochial agreement, or award of the commissioners,

(*g*) 6 & 7 Will. 4, c. 71, s. 71. As to partial exemption, see also 2 & 3 Vict. c. 62, ss. 11, 12; 3 & 4 Vict. c. 15, s. 14. On the other hand, lands not liable to tithe (as being waste), at the time of commutation, may, on being afterwards cultivated, become liable to pay a rent-charge fixed by the commissioners under 6 & 7 Will. 4, c. 71, s. 42. See *Walsh v. Trimmer*, Law Rep., 2 App. Eng. & Irish, 208.

(*h*) 6 & 7 Will. 4, c. 71, s. 71.

(*i*) As to these, vide post, p. 106.

(*k*) 6 & 7 Will. 4, c. 71, s. 90; 2 & 3 Vict. c. 62, s. 9. There are also excluded from the Commuta-

tion Acts (unless by special agreement as above), payments in lieu of tithes in London, or *ad valorem* tithe payments in any city or town under any custom or private Act, or any tithes commuted or extinguished under any former statute, (but in case such payment or commutation under a local Act was by way of *variable corn rent*, see 23 & 24 Vict. c. 93.) As to parishes in *the City of London*, see 37 Hen. 8, c. 12; 22 & 23 Car. 2, c. 15; 44 Geo. 3, c. lxxxix.; 1 Geo. 4, c. lix.; 4 Geo. 4, c. cxviii.; 6 Geo. 4, c. clxxvi.; 7 Geo. 4, c. liv. and c. cxvi.

(as the case may be,) for every modus or exemption that shall be so established (*l*).

II. With regard to the estates which the clergy in right of their benefices may have in the several descriptions of property above enumerated, it is to be remarked, that their case differs from that of ordinary proprietors, in several particulars. A dean and chapter always constitute a corporation aggregate; and every bishop, rector, vicar, or other holder of an ecclesiastical benefice, a corporation sole: and, consequently, they take lands and hereditaments, when granted to them for the use of the benefice in perpetuity, to hold to them and their *successors*, instead of their *heirs* (*m*). And in connection with this is the distinction to be found in the books, that if land be granted to a corporation aggregate, they take a fee simple without the word *successors*; but if to a bishop, parson, or the like, then the word *successors*, (except indeed in case of the antient tenure in frank-almoign,) must be added to give him a perpetuity in right of his church. Indeed, the estate of a rector or vicar, even when perpetual as regards his church, is considered for most purposes, as regards himself personally, an estate for life only, with the fee simple in abeyance; though for other purposes it is said to amount to a fee simple qualified (*n*). But if a bishop or dean, or dean and chapter, have lands in perpetuity in right of their churches, they are always described in law, as seised in their demesne as of fee (*o*). It is also held, that ecclesiastical persons, on account of their corporate character, cannot be seised, as such, in tail; though they may have an estate determinable upon the death of a person without issue. And for the same reason they

(*l*) 6 & 7 Will. 4, c. 71, ss. 21, 24, 44, 45; *Barker v. Tithe Commissioners*, 11 Mee. & W. 320.

(*m*) 3 Inst. 202; Co. Litt. 300;

Wats. C. L. 372. Vide sup. vol. I. p. 368.

(*n*) Co. Litt. 341 d.

(*o*) Wats. C. L. 373.

cannot in general, (and subject to the large exceptions introduced by modern statutes on this subject,) hold the lands that are granted to them, without obtaining a licence of mortmain (*p*).

III. As to the power of alienation which the clergy are competent to exercise in respect of their benefices (*q*).

At common law, though an ordinary tenant for life could make no alienation which would bind longer than while he himself lived (an incapacity to which he is still in general subject), yet some tenants for life, [where the fee simple was in abeyance, might, with the concurrence of such as had the guardianship of the fee, make leases of equal duration with those granted by tenants in fee simple—and this, in particular, was the case in regard to incumbents of livings, provided they obtained the consent of the patron and ordinary (*q*). So also bishops and deans, and such other sole ecclesiastical corporations as are seised of the fee simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, or for life, estates in tail, or in fee, without any limitation or control.] Thus such leases or estates might have been made by archbishops and bishops, with confirmation of the dean and chapter; and by deans, with the confirmation of the bishop and chapter (*r*). And cor-

(*p*) Wats. C. L. 373, et p. 374. As to the law of mortmain, vide sup. vol. I. p. 469 et seq.; where (p. 477) certain Acts are particularized, among those which have introduced exceptions from that law. The following additional statutes, (which contain provisions as to the taking and holding of lands in certain cases by *ecclesiastical* corporations,) may be enumerated in this place: 29 Car. 2, c. 8; 5 Ann. c. 24, s. 4; 1 Geo. 1, sess. 2, c. 10, ss. 4, 21; 17 Geo. 3,

c. 53; 43 Geo. 3, c. 107; 51 Geo. 3, c. 115; 56 Geo. 3, c. 52; 7 Geo. 4, c. 66; 1 & 2 Will. 4, c. 45; 1 & 2 Vict. 107, s. 14; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 20; 4 & 5 Vict. c. 39; 14 & 15 Vict. c. 104; 21 & 22 Vict. c. 57, s. 2; 22 & 23 Vict. c. 46.

(*q*) Co. Litt. 44; Bac. Ab. Leases, (E.); Vivian v. Blomberg, 3 Bing. N. C. 311.

(*r*) Dean of Ely v. Stewart, 2 Atk. 45; Wats. C. L. c. 44.

porations aggregate might have made what estates they pleased in their church or other lands, without the confirmation of any other person whatsoever (*s*). Such were the rules on this subject at common law, but now by several statutes the powers of ecclesiastical persons in regard to alienation have been greatly altered (*t*).

And, first, by the *enabling* statute 32 Hen. VIII. c. 28, all persons of full age, seised of an estate of fee simple in right of their churches, (which extends not to incumbers of livings, who, as just observed, are considered as seised for their lives only,) may, without the concurrence of any other person, make leases to endure for three lives or twenty-one years, so as to bind their successors (*u*). [But then there must be many requisites observed which the statute specifies, otherwise such leases are not binding. 1. The lease must be by indenture; and not by deed-poll, or parol. 2. It must begin from the making, or day of the making, and not at any greater distance of time. 3. If there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring. 4. It must be *either* for twenty-one years *or* three lives, and not for both. 5. It must not exceed the term of three lives or twenty-one years, but may be for a shorter term. 6. It must be of lands and tenements most commonly letten for twenty years past; so that if they had been let for above half the time (or eleven out of the twenty) either for life, for years, at will, or by copy of court roll, it is sufficient. 7. The most usual and customary feorme or rent, for twenty years past, must be reserved yearly on such lease. 8.

(*s*) See 2 Bl. Com. p. 319.

(*t*) See Bac. Abr. tit. *Leases and Terms of Years*, (supposed to be from the pen of Chief Baron Gilbert,) where this subject is learnedly and copiously discussed; and see Doe *d.* Brammall *v.* Collinge, 7 C. B. 939.

(*u*) 2 Bl. Com. 319. The 32 Hen. 8, c. 28, applied, also, to persons seised in their own right or in right of their wives, but was repealed by 19 & 20 Vict. c. 120, ss. 32, 35, except so far as it relates to leases made by persons having an estate in right of their churches.

[Such leases must not be made without impeachment of waste.

Next in order of time follows the *disabling* (or *restraining*) statute, 1 Eliz. c. 19 (made entirely for the benefit of the successor), which enacts, that all grants by archbishops and bishops, (including those confirmed by the dean and chapter, which, however long or unreasonable, were good at common law,) shall be void, unless they be for no longer terms than twenty-one years or three lives from the making, and reserve, at the least, the old annual rent. But by a saving expressly made, this statute of the first year of Elizabeth did not extend to grants made by any bishop to the Crown; by which means Queen Elizabeth procured many fair possessions to be made over to her by the prelates, either for her own use, or with intent to be granted out again to her favourites, whom she thus gratified without any expense to herself. To prevent which for the future, the statute 1 Jac. I. c. 3, extends the prohibition to grants and leases made to the king, as well as to any of his subjects (*v*).

Next comes the statute 13 Eliz. c. 10 (explained and enforced by the statutes 14 Eliz. cc. 11 and 14, 18 Eliz. c. 11, and 43 Eliz. c. 29), which] impose restrictions, not existing at the common law, on ecclesiastical corporations—such as cathedrals, collegiate churches, parsons, and other holders of spiritual livings (*x*). From laying all which together, and examining the particular provisions of these statutes, we may collect that (subject to the relaxations introduced by recent Acts) all such corporations (sole or aggregate) are restrained from making any grants or leases of their lands, unless under the following regulations. 1. They must not (as the general rule) exceed twenty-one years, or three lives, from the

(*v*) See also 21 Jac. 1, c. 1.

Acts extend also to *hospitals* and

(*x*) Some of the provisions of the *colleges*.

making (*y*). 2. The accustomed rent, or more, must be yearly reserved thereon. 3. Where there is an old lease in being, no concurrent lease can be made, unless where the old one will expire within three years. 4. No lease shall be made without impeachment of waste (*z*).

[Concerning these restrictive statutes, there are two observations to be made; first, that they do not, by any construction, enable any persons to make such leases as they were by common law disabled to make. Therefore the incumbent of a living, though he is restrained from making longer leases than for twenty-one years, or three lives, even *with* the consent of the patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor, *without* obtaining such consent (*a*). Secondly, that though leases contrary to these Acts are declared void, yet they are good *against the lessor* during his life, if he be a sole corporation: and are also good against an aggregate corporation, so long as the *head* of it lives, who is presumed to be the most concerned in interest (*b*). For the Acts were intended for the benefit of the successor only; and no man shall make an advantage of his own wrong (*c*).]

In addition to the restrictions on alienation which have been already mentioned,—the object of which is the protection of the successor,—ecclesiastical persons with the cure of souls are restrained from *charging* their benefices so as to render them liable to the payment of pension or profit thereout; even in their own time (*d*); a provision intended for the protection of the incumbents themselves. This is by force of the 13 Eliz. c. 20, a sta-

(*y*) Houses in corporations or market towns, not being the mansion houses of the lessors nor having above ten acres of grounds, may be let on repairing leases for *forty* years. (2 Bl. Com. 321.)

(*z*) As to these statutes, see also 39 & 40 Geo. 3, c. 41, by which they

are explained and amended, as regards the condition as to the “accustomed rent.”

(*a*) Co. Litt. 44.

(*b*) See *Pennington v. Cardale*, 3 H. & N. 656.

(*c*) Co. Litt. 45.

(*d*) See Bac. Abr. Leases (F).

tute which was once repealed by the 43 Geo. III. c. 84. s. 10, but was afterwards revived by 57 Geo. III. c. 99 (*e*). Under this statute of Elizabeth, it has been held that an instrument framed as a lease, but amounting in substance and design to a charge, is illegal and void (*f*); and that not only a direct charge, but an agreement to charge a living, falls under the same consideration (*g*).

Such continued, from the reign of Queen Elizabeth to that of King William the fourth, to be the state of the law in this matter, subject only to partial relaxations from time to time introduced by various acts of parliament, enabling corporations to make, for certain purposes of importance, certain dispositions of property held in their corporate capacity,—such as in general, and under ordinary circumstances, it would have been beyond their power to make (*h*). But in the reign last mentioned, a new series of more general legislation on the subject of grants or leases by ecclesiastical persons,

(*e*) *Shaw v. Pritchard*, 10 B. & C. 241. The 57 Geo. 3, c. 99, has been itself in turn repealed by 1 & 2 Vict. c. 106, but without affecting the revival of 13 Eliz. c. 20.

(*f*) *Shaw v. Pritchard*, 10 B. & C. 241.

(*g*) As to this statute see *Flight v. Salter*, 1 B. & Ad. 673; *Newland v. Watkin*, 9 Bing. 113; *Alchin v. Hopkins*, 1 Bing. N. C. 99; *Saltmarsh v. Hewett*, 1 Ad. & El. 812; *Walthen v. Crofts*, 20 L. J. (Exch.) 257; *Hawkins v. Gathercole*, 24 L. J. (Ch.) 332.

(*h*) Among the Acts of this description, prior to 6 & 7 Will. 4, c. 20, are 17 Car. 2, c. 3, s. 7 (revived by 6 Vict. c. 37); 29 Car. 2, c. 8 (extended by 1 & 2 Will. 4, c. 45; 1 & 2 Vict. c. 107,

and 17 & 18 Vict. c. 84); 17 Geo. 3, c. 53; 21 Geo. 3, c. 66; 55 Geo. 3, c. 147; 1 Geo. 4, c. 6; 5 Geo. 4, c. 89; 6 Geo. 4, c. 8; 7 Geo. 4, c. 66; 5 & 6 Will. 4, c. 76, s. 139. And since the 6 & 7 Will. 4, c. 20, there are (besides the provisions to be presently mentioned in the text) the following:—6 & 7 Will. 4, c. 77, s. 26; c. 104, s. 3; 1 & 2 Vict. c. 31; 17 & 18 Vict. cc. 84, 112; 20 & 21 Vict. c. 13; and also as regards *colleges and hospitals* in particular, 19 & 20 Vict. c. 88; 21 & 22 Vict. c. 44; 22 & 23 Vict. cc. 19, 34; 23 & 24 Vict. c. 59. Some of the enactments in the above group of statutes refer to *lay* as well as to ecclesiastical corporations, but for the most part to those of the latter class.

may be said to have commenced, involving sometimes additional restriction, but more frequently relief from restrictions before existing.

First, by 6 & 7 Will. IV. c. 20 (*i*), relative to the *renewal* of church leases, it is provided, that no archbishop or bishop, ecclesiastical corporation (sole or aggregate), or other spiritual person, nor master or guardian of any hospital, shall grant any new lease by way of renewal of a lease for two or more lives, until one or more of the persons for whose lives it was granted shall be dead: and then only for the surviving life or lives and such new life or lives as shall make up the number of lives, not exceeding three, for which the original lease was granted. And that where the previous lease was for forty, thirty, or twenty-one years, the renewed lease shall not be granted until fourteen, ten, or seven years of the first term shall have expired respectively; and that there shall be no renewal for life, where the original lease was for years only (*k*).

Next, it is provided by 5 & 6 Vict. c. 27 (in reference to *farming* leases) that an incumbent may, with consent of his patron and bishop, demise for a term not exceeding fourteen years any part of the glebe or other church land, provided the best rent that can be gotten be reserved quarterly,—that no fine or foregift be taken for the lease,—that the lessee be not made punishable for waste,—and that the lease contain such covenants as to cultivation, management, and other matters, as the Act particularly specifies (*l*). It is also provided, that where covenants are taken for a particularly expensive mode of cultivation, the term may be extended to twenty

(*i*) Explained and amended by 6 & 7 Will. 4, c. 64.

(*k*) There are, however, provisions in this Act which allow leases to be renewed on other terms in certain specified cases, as to which see

sect. 3; and also allowing such renewals by way of *exchange* (sect. 5), and by way of *confirmation of title* (sect. 7).

(*l*) 5 & 6 Vict. c. 27, s. 1.

years (*m*); but that, on the other hand, before any lease shall be granted, a surveyor shall be appointed in common by the bishop, patron, and incumbent, who shall certify that the lands and buildings are proper to be leased under the provisions of the statute, and otherwise report upon the circumstances of the case (*n*). And further, that no lease shall be valid unless there be excepted out of the same the house of residence, and at least ten acres of land lying within five miles of it, and situate most conveniently for occupation by the incumbent (*o*).

It is also enacted by 5 & 6 Vict. c. 108, known as “The Ecclesiastical Leasing Act, 1842,” that aggregate or sole ecclesiastical corporations may—with consent of the “Ecclesiastical Commissioners for England,” and, where the lessor is incumbent of a benefice, of the patron also,—demise the corporate lands or houses for any term, not exceeding *ninety-nine* years, to any person willing to improve or repair the same; but the best yearly rent, payable half-yearly or oftener, must be reserved; and the lease must be made without fine or fore-gift, and contain such covenants as in the Act particularly specified (*p*). It is also provided, that, in such leases, a small rent may be reserved during the first six years, with an increased rent afterwards (*q*); but that no such lease is to comprise the usual house of residence of the benefice, its out-buildings or pleasure grounds (*r*). The Act also contains a similar power of leasing, (but for the term of *sixty* years only,) with respect to watercourses, way-leaves, railroads, and other like easements upon or over the property belonging to such ecclesiastical persons (*s*); and also with respect to their mines, minerals, or quar-

(*m*) 5 & 6 Vict. c. 27, s. 1.

(*n*) Sect. 3.

(*o*) Sect. 2.

(*p*) There are however excepted from this Act “any college or corporation of vicars choral, priest

vicars, senior vicars, custos and vicars, or minor canons, and also all ecclesiastical hospitals.”

(*q*) 5 & 6 Vict. c. 108, s. 2.

(*r*) Sect. 9.

(*s*) Sect. 4.

ries (*x*). But it directs that any increase in the annual value of benefices and preferments to be obtained by means of the leases thereby authorized, (or a portion of such increase,) shall upon the next vacancy thereof be paid over to the Ecclesiastical Commissioners, to be applied in making additional provision for the cure of souls according to the statutes in that behalf provided (*y*). The Act also provides that, before the grant of any lease, a surveyor, appointed by the Ecclesiastical Commissioners, and approved by the intended lessor, shall report favourably as to the intended plan (*z*). Provisions are also contained as to the surrender of existing leases and underleases, for the purpose of granting a new lease under the Act (*a*). And it is enacted, that no ecclesiastical person or his representatives shall be liable to his successor on account of any *dilapidations* which may occur in houses or buildings, while the same are held under a lease granted by the Act, for building or repairing purposes (*b*). The statute, however, is made without prejudice to any right that ecclesiastical persons have under the former law to grant or lease, whether by renewal or otherwise; except that in every lease hereafter granted under the former law, of lands or houses which shall have been once leased under this Act,—there shall be always reserved the best improved rent (payable half-yearly or oftener), without taking any fine or foregift for the same (*c*).

It is also provided by “The Capitular and Episcopal Estates Act” (14 & 15 Vict. c. 104), that ecclesiastical corporations, sole or aggregate (*d*), may, with the ap-

(*x*) 5 & 6 Vict. c. 108, s. 6. See *Doe v. Brammall v. Collinge*, 7 C. B. 954.

(*y*) Sects. 10—15.

(*z*) Sect. 18.

(*a*) Sects. 16, 17.

(*b*) Sect. 19.

(*c*) Sect. 8.

(*d*) This Act is continued (by 31 & 32 Vict. c. 111) to 1 January,

1869, and end of then next session; and is explained and amended by 16 & 17 Vict. c. 57, ss. 1, 4, &c.; 17 & 18 Vict. c. 116; 20 & 21 Vict. c. 74; 22 & 23 Vict. c. 46; 23 & 24 Vict. c. 124, s. 16; 24 & 25 Vict. c. 105, s. 3; c. 131. It is to be noticed that colleges and hospitals are not included within the provisions of

proval in writing of the Church Estate Commissioners (*e*), sell to their lessees the reversion of the corporation in the premises comprised in the lease; or enfranchise any copyhold or customary land held of any manor belonging to the corporation; or may effect exchanges with their lessees; or may purchase the interest of such lessees, in any corporation lands, or the interest of any holder of copyhold or customary land belonging to such manor. It is however provided, that the Church Estate Commissioners shall pay due regard to the just and reasonable claims of the existing holders of lands under lease or otherwise, arising from the long-continued practice of renewal (*f*).

We have next, in order of time, to notice the “Ecclesiastical Leasing Act, 1858” (21 & 22 Vict. c. 57),—by which it is provided, that the Ecclesiastical commissioners, on being satisfied that such course will tend to the permanent advantage of the corporate property, may make lawful, by their approval under seal (such consents having been first obtained as in the Act mentioned), the lease of any part of the lands or other property of any ecclesiastical corporation, aggregate or sole, (except such as are in the Act specially excepted,) for such considerations, and for such terms, and under such covenants or agreements, on the part of the lessees, and generally in such manner, as to the said commissioners shall seem advisable. And may also authorize the sale, exchange, partition, or other disposition of all or any part of such lands or property, for such equivalent,—either in money or in land, or partly in money and partly in land,—or for such other considerations or purposes as to the commissioners shall seem

these statutes; nor “any parson, vicar, perpetual curate, or other incumbent of a benefice.” (See 14 & 15 Vict. c. 104, s. 11; 24 & 25 Vict. c. 105, s. 3.)

(*e*) As to this Board (who are a committee of the Ecclesiastical

Commissioners), vide post, p. 115, n. (*l*).

(*f*) See also 17 & 18 Vict. c. 116, s. 5, as to the method of ascertaining such right of renewal, in the case of *copyholders*.

reasonable and proper. The Act, however, contains a proviso that no such sale by the incumbent of a benefice shall be sanctioned, unless three months' notice, in writing, thereof shall have been given to the bishop of the diocese. And that all sums of money to become payable in respect of such leases, sales, exchanges, or partitions, shall be paid to the commissioners as if they were the sole lessors or vendors (*g*); and, after payment of the expenses incident to the transaction, shall be by them laid out in the purchase of other lands and hereditaments, to be held by the corporation in whose behalf the same shall have been received. And, again, that no such sale, exchange, or partition shall be made of any lands or hereditaments capable of being sold, enfranchised, or conveyed in exchange, according to the provisions of the 14 & 15 Vict. c. 104. And, further, that no lease of any land purchased or acquired by any ecclesiastical corporation under the Ecclesiastical Leasing Act, 1858, shall (as the general rule) be granted otherwise than from year to year, or for a term of years in possession not exceeding fourteen years, at the best annual rent that can be reasonably gotten for the same without fine; nor shall the lessee be exempted from liability in respect of waste (*h*).

It is also enacted by 23 & 24 Vict. c. 124, that no lands assigned by the Ecclesiastical commissioners as the endowment of any see under that Act, shall be granted by the archbishop or bishop otherwise than from year to year, or for a term of years in possession not exceeding twenty-one years, at the best annual rent that can be reasonably gotten without fine; the lessee not to be punishable for, or exempted from liability in respect of, waste. And that in every such lease such or the like covenants, conditions, and reservations shall be

(*g*) But monies payable by way of provision. (28 & 29 Vict. c. 57.)
perpetual, chief or other rent or (*h*) 14 & 15 Vict. c. 104, s. 9.
rent-charge are not subject to this

entered into, reserved, or contained for the benefit of the archbishop or bishop and his successors, as under the 5 & 6 Vict. c. 27, are to be contained in a lease for the benefit of the incumbent and his successors, or as near thereto as the circumstances of the case will permit (*i*). But there is a proviso that it shall be lawful for the archbishop or bishop, with the approval of the Church Estate Commissioners, to grant mining or building or other leases, for such periods, for such considerations, and generally in such manner as they may think fit; and that it shall be lawful for them to require that any portion of the rent reserved on any such lease, shall be payable to the Ecclesiastical commissioners (*h*).

Again, by 24 & 25 Vict. c. 105 (amended by 25 & 26 Vict. c. 52),—after reciting that there are certain ecclesiastical benefices to which belong manor lands, tenements, and hereditaments, which by custom and otherwise the rectors, vicars, perpetual curates, or incumbents thereof have power to grant and lease out for lives and long terms of years, and that such grants have been made at nominal annual rents to the prejudice of their successors—it is enacted that it shall not be lawful for any prebendary of any prebend, (not being a prebend of a cathedral or collegiate church,) rector, vicar, perpetual curate, or incumbent, who after the passing of the Act shall become possessed or entitled to any manors, lands, tenements, or hereditaments belonging to any ecclesiastical benefice, to lease or to grant out the same by copy of court roll in consideration of any fine, premium, or foregift, or to lease or grant out the same in any other way than is authorized by the provisions of 5 & 6 Vict. cc. 27, 108; 14 & 15 Vict. c. 104; 21 & 22 Vict. c. 57, and 23 & 24 Vict. c. 124 (*l*).

(*i*) Vide sup. p. 101.

(*h*) 23 & 24 Vict. c. 124, ss.
2—8.

(*l*) By 24 & 25 Vict. c. 105, s. 2,
the rights of leasing, &c. possessed
by present prebendaries, rectors,

The last statute connected with our present subject we propose to notice, is the 26 & 27 Vict. c. 120. Its object is to enable the Lord Chancellor for the time being to dispose of, by way of sale, the several advowsons enumerated in the schedule (all of them being benefices whereof the presentation is in his gift), and to apply the purchase-money or consideration, received in respect of each transaction, either in augmentation of the income of the benefice so sold, or of the income of other poor benefices remaining still in his gift.

Having thus endeavoured to explain the state of the law with respect to the endowments and provisions of the Church, properly so called, we shall conclude with some notice of certain profits of little comparative importance, but which, as forming a part (however trivial) of the revenues of the clergy, ought to be considered in connection with the subject of this chapter. We allude to those fees and dues which go by the name of *surplice fees* (being payable on baptisms, burials, marriages, and the like); and to Easter offerings, and mortuaries: all which are mentioned generally in our books by the name of *oblations*, and are of great antiquity. Indeed, it is said that voluntary oblations, (from which these probably emanated,) formed, with the produce of such lands as had been voluntarily bestowed, the whole revenue of the Church—until in the fourth century it was enriched with tithes (*m*).

With respect to the surplice fees, it is said that none are due to the minister as of common right, but that they depend upon special custom only (*n*): while as to

vicars, perpetual curates and incumbents are preserved during their respective incumbencies.

(*m*) Jac. Law Dict. Oblations;

Rennell *v.* Bishop of Lincoln, 7 Barn. & Cress. 153. Vide sup. p. 80.

(*n*) 3 Bl. Com. 90; Com. Dig.

Easter offerings, on the other hand, it has been laid down that they are due of common right to him who exercises the spiritual functions of the parish; and that at twopence per head, for all the parishioners of the age of sixteen and upwards (*o*). However this may be, the liability to pay oblations generally, is recognized by the statute law. For by 2 & 3 Edw. VI. c. 13; it was provided, that all who, by the laws and customs of the realm, ought to pay offerings, shall yearly pay them to the incumbent of the parish at the four most usual offering days; or otherwise at Easter: and by 7 & 8 Will. III. c. 6, and 53 Geo. III. c. 127, that every one shall henceforth pay all offerings, oblations, and obventions to those persons to whom they are due (*p*). And they are made recoverable before two justices of the peace, where their amount does not exceed 10*l.*; or, (where due from Quakers,) 50*l.* (*q*). Moreover, in churches and chapels built under the Church Building Acts, or the "New Parishes Acts," (of which we shall presently speak more at large,) the payment both of fees and offerings to the minister and clerk respectively, is specially regulated and secured (*r*).

As to *mortuaries*, (on which the learning is more

Dismes (B. 1); *Burdeaux v. Lancaster*, 1 Salk. 332; *Andrews v. Cawthorne*, Willes, 536; *Littlewood v. Williams*, 6 Taunt. 277; *Gilbert v. Buzzard*, 3 Pbill. 360; *Spry v. Gallop*, 16 Mee. & W. 716.

(*o*) *Laurence v. Jones*, Bunh. 173; *Egerton v. Still*, ib. 198. Other authorities for the proposition in the text are cited in *The Queen v. Hall*, Law Rep., 1 Q. B. 638, a case in which the court intimated that the common law liability as so stated was liable to argument.

(*p*) It has been held, however, that "mortuaries" do not come

within the provisions of 7 & 8 Will. 3, c. 6. (*Ayrton v. Abbott*, 14 Q. B. 1.)

(*q*) By the same statutes, and by 5 & 6 Will. 4, c. 74, and 4 & 5 Vict. c. 36, no offerings, or other ecclesiastical dues, can be recovered in the superior courts, or in the ecclesiastical courts, unless the amount shall exceed 10*l.* (or, in the case of Quakers, 50*l.*), or unless some matter of title comes in question.

(*r*) As to the Church Building Acts, vide post, p. 114; as to the New Parishes Acts, post, p. 117.

copious,) they are stated by Blackstone to be [a sort of ecclesiastical heriots (*s*), being a customary gift claimed by and due to the minister, in very many parishes, on the death of his parishioners (*t*). They seem originally to have been, like lay heriots, only a voluntary bequest to the church; being intended (as Lyndewoode informs us, from a constitution of Archbishop Langham), as a kind of expiation and amends to the clergy, for the personal tithes and other ecclesiastical duties, which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, after the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary (*u*). And therefore in the laws of King Canute this mortuary is called soul-scot (*raplyceaz*), or *symbolum animæ* (*v*).

It was antiently usual in this kingdom to bring the mortuary to church, along with the corpse when it came to be buried; and thence it is sometimes called a *corse-present*; a term which bespeaks it to have been once a voluntary donation. However, in Bracton's time, so early as Henry the third, we find it riveted into an established custom: insomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. "*Imprimis autem debet quilibet, qui testamentum fecerit, dominum suum de meliori re quam habuerit recognoscere; et postea, ecclesiam de*

(*s*) 2 Bl. Com. p. 425. As to heriots, vide sup. vol. I. p. 648. It is to be observed that "mortuaries" are not the same as "burial fees." Willes, 538, (n.) And see the case of *Ayrton v. Abbott*, above cited.

(*t*) None is due of common right, but by custom only. (2 Inst. 491.)

(*u*) Co. Litt. 185. "*Si decedens plura habuerit animalia, optimo*

cui de jure fuerit debitum reservato, ecclesiæ suæ sine dolo, fraude, seu contradictione quâlibet, pro recompensatione subtractionis decimarum personalium, necnon et oblationum, secundum melius animal reservetur, post obitum, pro salute animæ suæ."—Provinc. l. 1, tit. 3.

(*v*) C. 13.

[*aliâ meliori.*” But yet this custom was different in different places, “*in quibusdam locis habet ecclesia melius animal de consuetudine; in quibusdam secundum, vel tertium melius; in quibusdam nihil: et ideo consideranda est consuetudo loci*” (*x*). This custom still varies in different places, not only as to the mortuary to be paid, but the person to whom it is payable. In Wales, a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese; till abolished, upon a recompence given to the bishop, by the statute 12 Ann. st. 2, c. 6. And in the Archdeaconry of Chester, a custom once prevailed, that the bishop should have at the death of every clergyman dying therein his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring (*y*). But by statute 28 Geo. II. c. 6, this mortuary was directed to cease; and the Act settled upon the bishop an equivalent in its room (*z*).

The variety of customs with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other, it was thought proper by statute 21 Hen. VIII. c. 6, to reduce them to some kind of certainty. For this purpose it is enacted that all mortuaries or corse-presents to parsons of any parish shall be taken in the following manner; unless where by custom less or none at all is due; viz., for every person who does not leave goods to the value of ten marks, nothing: for every person who leaves goods to the value of ten marks and under thirty pounds, 3s. 4d.; if above thirty pounds and under forty pounds, 6s. 8d.; if above forty pounds, of what value

(*x*) Bract. l. 2, c. 26; Flet. l. 2, c. 57.

(*y*) See *Hinde v. Bishop of Chester*, Cro. Car. 237.

(*z*) 2 Bl. Com. p. 426.

[soever they may be, 10s. and no more. And that no mortuary shall, throughout the kingdom, be paid for the death of any *feme covert*; nor for any child; nor for any one of full age, that is not a housekeeper; nor for any wayfaring man; but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries to this day (*a*).]

(*a*) 2 Bl. Com. p. 427.

CHAPTER IV.

OF NEW ECCLESIASTICAL DISTRICTS AND PARISHES,
AND OTHER EXTENSIONS OF THE ORIGINAL CHURCH
ESTABLISHMENT.

THE constitution of the Church of England, in what regards its regular and proper establishment of prelates, ministers, churches and endowments, is, for the most part, as antient as the common law itself. But in modern times, and particularly of late, various alterations have been introduced, tending greatly to improve and enlarge that establishment—and we shall give some account of these in the course of the present chapter.

The spiritual ministrations of the Church are mainly intrusted to the parochial clergy—in other words, the rectors, vicars, and perpetual curates of the different parishes of which the realm is composed, together with the curates whom they may think fit to employ for their assistance. Each parish contains a church, with a permanent incumbent of one of the three descriptions above enumerated,—the parochial division of the kingdom being indeed itself referential to the establishment of churches therein; every place in which a church has happened to be erected and endowed, having received from remote times the denomination of a parish (*a*). These parishes when first founded were presumably, in

(*a*) "*Parochia est locus in quo degit populus alicujus ecclesie.*" (Jeffrey's case, 5 Rep. 67 a.) As to the formation of parishes and parish

churches, vide sup. vol. I. p. 122; Hallam, Mid. Ages, vol. ii. p. 205, 7th edit.

general, of a size and population proportioned to the establishment of the single church and minister thus respectively provided for them; and the number of them has, from a very early period, being such as to comprehend almost the entire realm—there being comparatively but very few and scanty portions of territory which have remained extra-parochial.

To the uniformity of this system the only exception was, that in certain parishes, together with the church, *chapels* were early founded, in which divine service, and (in some instances) the rites of sacrament and burial, might be lawfully celebrated, in the same manner as in the parochial churches themselves. These chapels are of various descriptions. Some are *private*, being erected for the use only of particular persons of rank, to whom this privilege was conceded by the proper authorities—while others are *public*, and designed for the benefit of particular districts lying within the parochial ambit (*b*). These last were, in general, founded at some period later than the parish church itself: and were designed for the accommodation of such of the parishioners as in course of time fixed their residence at a distance from its site; and chapels so circumstanced are described as *chapels of ease*, because built in aid of the original church (*c*). But there are some chapels of ease which seem to have been coeval with, and independent of, the parish church; and to have been designed for the benefit of some particular districts never included within its pale, though locally embraced by the parochial division (*d*). With respect to these chapels of ease—also called *chapels belonging to the mother church* (*e*)—they are either *parochial*, in

(*b*) Godolph. Ab. 145; Farnworth v. Bishop of Chester, 4 B. & C. 568.

(*c*) Wats. C. L. 645; Farnworth v. Bishop of Chester, ubi sup.; Reg. v. Foley, 2 C. B. 664.

(*d*) Craven v. Sanderson, 7 Ad. & El. 880.

(*e*) Wats. C. L. ubi sup. As to making chapels of ease independent of the parish church, see 1 & 2 Will. 4, c. 38; 1 & 2 Vict. c.

which both divine worship and the rites of sacrament and burial are performed—or *mere* chapels of ease, and designed for divine worship only. But as to chapels of ease of either description, these doctrines equally prevail—that of common right the nomination to them is in the incumbent of the parish church, and cannot be taken from him except by agreement between himself, the patron and the ordinary (*f*); and that their establishment in any parish does not of itself deprive the inhabitants accommodated therein of the right of resorting to the parish church; nor, on the other hand, does it exempt them from liability to its repairs, or from any other parochial burthen (*g*).

To the number of chapels thus created in antient times considerable additions have been made in comparatively modern periods—many new chapels of ease (particularly in towns) having latterly been built and endowed, to meet the demands of a population beginning to overflow: and among these may be particularly noticed a species of recent introduction, called *proprietary chapels* (*h*); so called because they are the property of private persons, who have purchased or erected them with a view to profit or otherwise (*i*).

But these casual additions to our regular establishment, though numerous, were not found adequate to the growing exigency of the case. And in 1818 the legis-

107, s. 7. As to annexing thereto part of the parish tithes, 1 & 2 Will. 4, c. 45; 28 & 29 Vict. c. 42.

(*f*) *Farnworth v. Bishop of Chester*, 4 B. & C. 568; and see *Dixon v. Kershaw*, Amb. 528; *Duke of Portland v. Bingham*, 1 Hagg. 168.

(*g*) *Ball v. Cross*, 1 Salk. 165; see *Dent v. Rob*, 1 You. & C. 1. In chapels another distinction exists, with which it did not seem necessary to incumber the text. Some are *free chapels*, so called because

not liable to the visitation of the ordinary, as churches and chapels generally are. These free chapels are always of royal foundation, or founded at least by private persons to whom the crown thought fit to grant the privilege. (*Wats. C. L.* 645; *1 Burn, E. L.* 298.)

(*h*) *Moysey v. Hilcoat*, 2 Hagg. 30.

(*i*) As to proprietary chapels, see *Bosanquet v. Heath*, 9 W. R., Q. B. 34.

lature began to apply itself, systematically, to the great object of extending the accommodation afforded by the national Church, so as to make it more commensurate with the wants of the people. In that year, and during the interval which has since elapsed, a variety of statutes have been passed for this purpose, which are known by the denomination of the Church-building Acts (*k*).

Under authority of these Acts the Crown appointed, for a limited period, a corporate body of commissioners, who were directed to ascertain where the accommodation of additional churches and chapels was required; and out of the funds placed at their disposal by parliament to cause such as they thought necessary to be built, or to assist the parishioners, or any persons subscribing, with grants or loans of money for the purpose. Other and extensive powers were also entrusted to these Commissioners, with respect to the division of parishes, (so far as ecclesiastical purposes were concerned,) into separate parishes or separate ecclesiastical districts—and also with regard to many other matters of the same general character.

As these statutes contain provisions vastly too numerous and complex for particular notice, and as their importance is in some directions partly superseded by the other more recent enactments, of which we are about to speak, we shall content ourselves with stating, that in the year 1856, the powers of the Church-building Commissioners, after being long and largely acted upon, were (by the 19 & 20 Vict. c. 55) transferred to “The Ecclesiastical Commissioners,”—another corporate body, of which we will proceed to state the origin.

(*k*) 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 3 Geo. 4, c. 72; 5 Geo. 4, c. 103; 7 & 8 Geo. 4, c. 72; 1 & 2 Will. 4, c. 38; 2 & 3 Will. 4, c. 61; 7 Will. 4 & 1 Vict. c. 75; 1 & 2 Vict. c. 106, ss. 25, 80; c. 107; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 60; 4 & 5 Vict. c. 38, s. 19; 6 & 7 Vict. c. 37, s. 24; 7 & 8 Vict. c. 56; 8 & 9 Vict. c. 70; 9 & 10 Vict. cc. 68, 88; 11 & 12 Vict. cc. 37, 71; 14 & 15 Vict. c. 97; 17 & 18 Vict. cc. 14, 32; 18 & 19 Vict. c. 127.

During the course of legislation upon church-building and the division of parishes for ecclesiastical purposes that has been just described, the zeal of the nation was also gradually excited for the improvement of our ecclesiastical establishment in other particulars—and this, in the year 1835, resulted in a measure of the utmost importance. This was the issue of certain royal commissions, directed to consider the state of the several dioceses with reference to the amount of their revenues and the more equal distribution of episcopal duties; to consider the state of the cathedral and collegiate churches, with a view to the suggestion of such measures as might render them most conducive to the efficiency of the established church—and, also, to devise the best mode of providing for the cure of souls, with special reference to the residence of the clergy in their respective benefices.

The persons acting under these commissions presented several reports, containing a variety of recommendations for improvement of our ecclesiastical system; and these were followed by an act of parliament, 6 & 7 Will. IV. c. 77, incorporating “The Ecclesiastical Commissioners of England” (*l*); and empowering them to lay before the sovereign in council, such Schemes as might be best adapted to carry the aforesaid recommendations into effect (*m*). And it was enacted that any such Scheme,

(*l*) As regards the Ecclesiastical Commissioners, see also the following statutes: 3 & 4 Vict. c. 113, s. 78; 4 & 5 Vict. c. 39; 6 & 7 Vict. cc. 37, 77; 7 & 8 Vict. c. 94 (repealed as to sect. 17 by 23 & 24 Vict. c. 124, s. 1); 10 & 11 Vict. c. 108; 13 & 14 Vict. cc. 41, 94; 14 & 15 Vict. c. 104; 16 & 17 Vict. cc. 35, 50; 19 & 20 Vict. cc. 55, 104; 20 & 21 Vict. c. 74; 23 & 24 Vict. cc. 69, 124; 29 & 30 Vict. c. 111; 31 & 32 Vict. c. 114. By 13 & 14 Vict. c. 94, ss. 1, 3,

... ||

there was formed out of these commissioners, a distinct committee termed “the Church Estate Commissioners,” to whom the sale, purchase, and management of lands, and all similar matters, are entrusted.

(*m*) By 13 & 14 Vict. c. 94, s. 26, the Ecclesiastical Commissioners are required to lay an annual report before the Secretary of State (to be by him submitted to parliament) of all their proceedings for the current year.

when duly ratified by order in council, should have the same effect as if it had formed part of that Act.

In pursuance of this provision, the Ecclesiastical Commissioners—who now comprise other persons in addition to the original members, and include all the bishops of England and Wales, and the chief justices, as well as some other persons of distinction (*m*)—prepared a variety of such schemes as above described; which have now acquired the force of legislative enactments (*n*). By these Schemes, and by the authority of occasional acts of parliament connected with them, various alterations have been made in the arrangement and limits of dioceses (*o*),—including the erection of the new sees of Ripon and Manchester (*p*), and the union of the sees of Gloucester and Bristol. And, in order to augment the income of the smaller bishoprics, contribution has been required to be made from time to time from the revenues of the larger, without prejudice however, to the rights of existing prelates.

Among the general measures of Church reform, introduced in consequence of the recommendations of the commissioners appointed in 1835, are the provisions contained in 1 & 2 Vict. c. 106, as to the residence of the parochial clergy on their livings, and as to the law of pluralities and various other matters of which we have already given some account (*q*). There are also those which are contained in 3 & 4 Vict. c. 113, and 4 & 5 Vict. c. 39. These statutes, which are commonly called the Cathedral Acts (*r*), among numerous other arrangements,

(*m*) 3 & 4 Vict. c. 113, s. 78.

(*n*) See 31 Vict. c. 19, an Act confirming the validity of certain orders in council ratifying schemes.

(*o*) See one of these, 26 & 27 Vict. c. 36. As to the effect upon the jurisdiction of the different Ecclesiastical Courts produced by alterations thus made, see 10 & 11

Vict. c. 98, continued by 22 & 23 Vict. c. 45.

(*p*) As to these sees, vide sup. vol. I. p. 122, u. (*g*), et sup. p. 11.

(*q*) Vide sup. pp. 34, 39.

(*r*) See also 6 & 7 Vict. c. 77; 23 & 24 Vict. cc. 59, 124; and 31 & 32 Vict. c. 114.

provide for the suspension of a large number of canonries,—subject, in certain events, to a power of revival, upon condition of their being newly endowed(s): for the suppression of all sinecure rectories, except those in the patronage of private persons(*t*); for the suppression of certain deaneries(*u*); for the vesting of the estates and profits of all such preferments, together with the endowments of non-residentiary prebends, and some other dignities and offices, in the Ecclesiastical Commissioners(*v*); and for the consolidation of all the property so vested, with the accruing interest, into a common fund, to be applied, (in general, and under such authority as in the Acts provided,) in making additional provision for the cure of souls, in parishes where such assistance shall be most required(*x*).

But provisions of a not less important character and of still more recent date, in reference to the same great object of putting the Church into a state of full efficiency, are to be found in the 6 & 7 Vict. c. 37 (“The New Parishes Act, 1843”), the 7 & 8 Vict. c. 94, (“The New Parishes Act, 1845,”) and the 19 & 20 Vict. c. 104, (“The New Parishes Act, 1856”). The second of these Acts—relating to matters of detail only—it will be sufficient to have thus mentioned. But of the first and the last, as full an account must be given as is consistent with our limits(*y*).

(*s*) 3 & 4 Vict. c. 113, s. 20.

(*t*) Ibid. ss. 48, 54; 4 & 5 Vict. c. 39, s. 17; et vide sup. p. 27. Provision is also made for suppressing sinecure rectories in private hands, with the concurrence of the patrons. (3 & 4 Vict. c. 113, s. 48.)

(*u*) 3 & 4 Vict. c. 113, ss. 21, 51; 4 & 5 Vict. c. 39, s. 6.

(*v*) 3 & 4 Vict. c. 113, ss. 49, 51; 4 & 5 Vict. c. 39, ss. 6, 7.

(*x*) 3 & 4 Vict. c. 113, s. 67, extended by 23 & 24 Vict. c. 124, s.

12. See Report of Royal Commissioners to inquire into the state and condition of the Cathedrals and Collegiate Churches of England and Wales. This Report was published September, 1854.

(*y*) As to the names given in the text to these Acts, see 19 & 20 Vict. c. 104, s. 35. The first two are also popularly known as Sir Robert Peel’s Acts; and the last, as The Marquis of Blandford’s.

The 6 & 7 Vict. c. 37 (*z*), enables the Ecclesiastical Commissioners to borrow from the governors of Queen Anne's bounty the capital sum of 600,000*l.* three per cent. reduced bank annuities: which capital may, from time to time, be increased by similar loans, if required. And all monies accruing to the said Commissioners, by reason of the suspension of canonries under the Cathedral Acts above referred to, together with all the lands and hereditaments thereby vested in them, are charged by way of security for the repayment of such loans (*a*). The statute in question then proceeds to provide that the Ecclesiastical Commissioners, by Schemes duly ratified by order in council, may form out of populous and large parishes, chapelries and districts, separate districts for spiritual purposes, and (having first obtained the consent of the bishop of the diocese) may proceed to set out such district accordingly by metes and bounds, and fix and declare its name (*b*). The Scheme, however, is to be first laid before the incumbent and patron, so as to give an opportunity for making such remarks or objections as may occur to them (*c*).

Upon the district being thus constituted, a minister is to be nominated thereto, with an income of not less than 100*l.* per annum (*d*): and the right of nomination may be assigned to any ecclesiastical corporation, or to the universities of Oxford, Cambridge, or Durham, or any of their colleges, or to any private person or his nominee or nominees,—upon condition of contributing, in a certain proportion, to the permanent endowment of the minister, or towards a church or chapel for the district (*e*); but, until the patronage shall be so assigned, the right of

(*z*) The 6 & 7 Vict. c. 37, extends to England and Wales, the Isle of Man, Guernsey, Jersey, Alderney, Sark, and the Scilly Islands. (Sect. 26.)

(*a*) 6 & 7 Vict. c. 37, s. 4. As

to Queen Anne's bounty, vide sup. vol. II. p. 569.

(*b*) 6 & 7 Vict. c. 37, s. 9.

(*c*) Ibid.

(*d*) Ibid.

(*e*) Sect. 20.

nomination shall belong to her majesty and the bishop of the diocese alternately (*f*). The funds placed in the hands of the Ecclesiastical Commissioners are also to be made available for the purpose of endowing or augmenting the income of the ministers of the new districts, to such an amount, and in such proportion and manner, as the Commissioners may in their Scheme (ratified by her majesty in council) recommend (*g*).

At any time after the constitution of such district, and while it is still unprovided with a church, the bishop is also empowered to license any building within the same, for performance of divine service (*h*); and may license the nominated minister to perform in the district any pastoral duties, with the exception only of burials and marriages; and the minister so licensed shall be considered as having, to that extent, the cure of souls within the district, and that independently of the incumbent of the parish church (*i*): and he shall be a body corporate, with perpetual succession, by the style of the “minister” of such district. But after a church or chapel shall have been built or purchased for the district, approved by the Commissioners, by an instrument under their common seal, and duly consecrated,—the district shall (immediately upon such consecration) become a new *parish* for ecclesiastical purposes; and shall be known by the name of the new parish of —, instead of the district of —; and it shall thereupon become lawful to solemnize marriages, baptisms, churchings, and burials therein (*k*); and the minister, having been first duly licensed by the bishop to such church, shall thereupon *ipso facto* become the vicar thereof (*l*), and shall be endowed with an in-

(*f*) 6 & 7 Vict. c. 37, s. 21. And
see 7 & 8 Vict. c. 94, s. 1.

(*g*) 6 & 7 Vict. c. 37, s. 19.

(*h*) Sect. 13.

(*i*) Sect. 11.

(*k*) 6 & 7 Vict. c. 37, s. 15.

(*l*) See 31 & 32 Vict. c. 117, prior to which, such ministers were termed “perpetual curates.” (As to this Act, vide sup. p. 27.)

come of not less than 150*l.* *per annum* (*l*). And the new church shall be styled and designated a vicarage, and shall be deemed to be a benefice with cure of souls to all intents and purposes; and two fit persons, being members of the Church of England, shall be annually chosen, by the vicar and inhabitants of the new parish, as churchwardens; who shall be charged with all the ordinary duties of churchwardens in ecclesiastical matters, but not with any duties as overseers of the poor (*m*).

It is further provided by the same Act, that, nothing therein contained shall affect any right or liability, ecclesiastical or civil, of any parish, chapelry, or district, except as therein expressly provided (*n*); and, by way of compensation to the incumbents of mother churches, whose fees or emoluments shall have been diminished by the constitution of new districts or parishes,—an annual sum may, by the proper authority, be allowed out of the fund in the hands of the Ecclesiastical Commissioners (*o*).

Under this Act, no district could be constituted if there already existed within its limits any consecrated church or chapel in use for divine worship (*p*), but this restriction was taken away by the 19 & 20 Vict. c. 104, the latest of the three “New Parishes” Acts already referred to. By this last statute, the Ecclesiastical Commissioners are moreover empowered, on the constitution of any new district, to specify some existing or intended church within it, as the parish church thereof: and the incumbent of such church is made liable to the performance of all pastoral duties within the limits of the new parish (*q*). And the Commissioners are also empowered to recommend the constitution of such a district, without the permanent endowment required by the Act of 6 & 7 Vict. c. 37,—if it shall appear to them, and be declared in

(*l*) 6 & 7 Vict. c. 37, s. 9.

(*m*) Sect. 17.

(*n*) Sect. 18. See *Mills v. Rydon*,

10 Exch. 67.

(*o*) 6 & 7 Vict. c. 37, s. 19.

(*p*) Sect. 9.

(*q*) 19 & 20 Vict. c. 104, s. 2.

their Scheme, that there is reason to expect from other sources an adequate maintenance for the incumbent (*s*).

This last statute contains also a variety of additional enactments with regard to the assignment of patronage of these new churches, in return for endowment (*t*); but of a character too copious and complicated for detail in this place (*u*). It contains also provisions in extension of previous powers of the same general description under the Church Building Acts (*x*)—whereby the Commissioners may, by Scheme ratified in council, divide *any* parish into two or more distinct and separate parishes for *all ecclesiastical purposes whatsoever*, and regulate the duties of the incumbents of the respective divisions, as also the performance of the offices and services in the respective churches, and the fees to be taken for the same respectively; and any other matter or thing which may become necessary or expedient by reason or in consequence of such change (*y*). Such division of a parish, however, as here referred to, can only be made with the consent of the patron and bishop of the diocese, and is in no case to take effect until the next avoidance of the church, unless with the consent in writing of the actual incumbent thereof (*z*).

(*s*) 19 & 20 Vict. c. 104, s. 3.
The commissioners may, with consent of the bishop, order that pew rents may be taken in any church to which a district may be assigned, if other sources fail, but not otherwise. (Sect. 6.)

(*t*) Vide sup. p. 118.

(*u*) 19 & 20 Vict. c. 104, ss. 16, 22.

(*x*) See in particular, 59 Geo. 3, c. 134, one of the group of statutes cited, sup. p. 114.

(*y*) 19 & 20 Vict. c. 104, s. 25.

(*z*) 19 & 20 Vict. c. 104, s. 25.
That heavily loaded branch of law which consists of recent improvements in our church system, comprises some enactments in the present reign, which have not been found capable of convenient arrangement in the text of this chapter and the preceding ones of the present volume. They will chiefly be found in 1 & 2 Vict. cc. 106, 107; 2 & 3 Vict. cc. 30, 49; 14 & 15 Vict. c. 97.

PART III.
*OF THE SOCIAL ECONOMY OF THE
 REALM.*

IN our examination of Public rights, we have been led to treat successively of the *Civil Government* and of the *Church*. But there are many other institutions which belong, equally with these, to the division of public rights,—as relating immediately to the community at large, or to large classes of it, and not merely to the individual; and which yet, as having no connexion with the subject of government, whether civil or ecclesiastical, have hitherto found no proper place in our disquisitions. In conformity with the division already laid down, these may be designated without impropriety, it is conceived, (though perhaps without sufficient authority,) as the laws of *Social Economy*;—and the following Part of the present Book will be devoted to the examination of them under their principal heads (*a*).

(*a*) Vide sup. vol. II. p. 340.

CHAPTER I.

OF THE LAWS RELATING TO CORPORATIONS.



THE principle of those social institutions, called bodies corporate (*corpora corporata*) or corporations, has already been in some measure explained (*a*); and we have seen that they are artificial persons created by the law, and endowed by it with the capacity of perpetual succession (*b*).

Of corporations [there is a great variety, subsisting for the advancement of religion, of learning, or of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. To show the advantages of these incorporations let us consider the case of a college in any of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals which compose it might indeed pray, study, and perform scholastic exercises together, so long as they could agree to do so: but they could neither frame nor receive any laws or rules of their conduct—none, at least, which would have any binding force, for want of a coercive power to create a sufficient legal obligation.]

So also [with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is

(*a*) Vide sup. vol. I. pp. 129, 368,
470, 488.

(*b*) Vide sup. vol. I. p. 368.

[no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other as often as the hands are changed.

But when such grantees are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of the individuals: this one will may establish rules and orders for the regulation of the whole, (which are a sort of municipal laws of this little republic;) or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws (*b*).] Again, [the privileges and immunities, the estates and possessions of the corporation, when once vested therein, will remain for ever vested, without any new conveyance to new successors. For all the individual members that have existed from the foundation to the present time, or that shall ever after exist, are but one person in law, a person that never dies: in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

The honour of originally inventing these political constitutions entirely belongs to the antient Romans. They were introduced, as Plutarch says, by Numa; who finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession. They were afterwards much considered by the civil law, in which they were called *universitates*, as forming one whole out of many individuals; or *collegia*, from being gathered together (*c*). They were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from

(*b*) 1 Bl. Com. p. 468.

(*c*) Ff. l. 3, t. 4, per tot.

[them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation,—particularly with regard to sole corporations, consisting of one person only,—of which the Roman lawyers had no notion; their maxim being that *tres faciunt collegium* (*d*): though they held that if a corporation originally consisting of three persons be reduced to one, *si universitas ad unum redit*, it may still subsist as a corporation, *et stet nomen universitatis* (*e*).]

Before we proceed to say more of corporations, it will be expedient to take a view of the several sorts of them; but here we must premise the general remark, that we have no intention for the present to take any notice of those kinds which may be created (as will appear hereafter) under modern statutes, with new and peculiar incidents by way of innovation upon the principles of the common law; but mean to confine ourselves, in the first instance, to corporations that are governed by those principles,—or, in other words, to corporations ordinarily and properly so called.

[The first division of corporations is into *aggregate* and *sole*. Corporations *aggregate* consist of many persons united together into one society, and are kept up by a perpetual succession of members so as to continue for ever—of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations *sole* consist of one person only and his successors, in some particular station; who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the sovereign is a sole corporation (*f*); so is a bishop; so are some deans dis-

(*d*) Ff. 50, 16, 8, 9.

(*f*) Co. Litt. 43.

(*e*) Ff. 3, 4, 7.

[tinct from their several chapters; and so is every rector and vicar (*g*). And the necessity, or at least use, of this institution will be very apparent, if we consider the case of the parson of a church. At the original endowment of parish churches the freehold of the church, the church-yard, the parsonage-house, the glebe, and the tithes of the parish, were vested in the parson by the bounty of the donor, as a temporal recompence to him for his spiritual care of the inhabitants; and with intent that the same emolument should ever afterwards continue as a recompence for the same care. But how was this to be effected? the freehold was vested in the parson; and if we supposed it vested in its natural capacity, on his death it might descend to his heirs, and would be liable to his debts and incumbrances: or at least the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law, therefore, has wisely ordained that the parson, *quatenus* parson, shall never die, any more than the sovereign—by making him and his successors a corporation. By which means all the rights of the parsonage are preserved entire to the successor; for the present incumbent and his predecessor who lived eight centuries ago, are in law one and the same person: and what was given to the one, was given to the other also.

Another division of incorporations is into *ecclesiastical* and *lay* (*h*). Ecclesiastical (or spiritual) corporations are where the members are entirely spiritual persons, such as bishops, parsons, and the like; which are corporations sole. But there are also ecclesiastical corporations aggre-

(*g*) It has been determined that a "vicar choral" is a corporation *sole*, and as such liable to his successors for dilapidations in his house of residence. (*Greaves v. Parfitt*, 7 C. B. (N. S.) 838.)

(*h*) As to *ecclesiastical* corpora-

tions, considered in reference to their power of alienation and of holding land, vide sup. vol. I. pp. 470 et seq., 488, et sup. pp. 93, 94, n. (*t*), 95 et seq. As to *lay* incorporations in reference to the same subject, vide sup. vol. I. pp. 470, 488, 489, 490.

[gate; as deans and chapters at the present day (*i*); and, formerly, prior and convent, abbot and monks. All these are erected for the furtherance of religion, and perpetuating the rights of the Church.

Lay (or temporal) corporations are of two sorts, *civil* and *eleemosynary*. The *civil* are such as are erected for a variety of temporal purposes.] The sovereign, for instance, is a corporation sole, in order to prevent an *interregnum*, or vacancy of the throne on death, and to preserve the possessions of the crown entire (*h*). Other lay corporations [are erected for the good government of a town or particular district,—as a mayor and commonalty, bailiff and burgesses, and the like.] And these are now commonly denominated municipal corporations, of which we shall have occasion to speak more at large before the conclusion of this chapter. Others, again, are established [for the advancement and regulation of manufactures and commerce,—as the trading companies (or guilds) of London and other towns,—or for the better carrying on of divers special purposes; as] the royal College of Physicians,—the royal College of Surgeons of England,—[the Royal Society, for the advancement of natural knowledge,—the Society of Antiquaries, and a variety of others. And among the same class of lay incorporations, the general corporate bodies of Oxford and Cambridge must be ranked (*l*). For it is clear they are

(*i*) Some *deans* (as distinct from their chapters) are corporations sole. (1 Bl. Com. p. 470.)

(*h*) Vide sup. vol. II. p. 512.

(*l*) *Rex v. Cambridge Vice-Chancellor*, 3 Burr. 1656. It may be worth remark here, that under the 17 & 18 Vict. c. 81 (the Act of 1854), the government of the university of Oxford, is mainly vested in the *Hebdomadal Council*, a body consisting of twenty-two persons, of whom four are *ex officio* members

(the chancellor, the vice-chancellor, and the two proctors), and the other eighteen are elected, viz., six from the heads of houses, six from the professors, and six from masters of arts of not less than five years standing; and that, under the 19 & 20 Vict. c. 88 (the Act of 1856), the government of the university of Cambridge is, in like manner, vested in the *Council of the Senate*, consisting of eighteen persons, of whom two are *ex officio*

[not ecclesiastical corporations, being composed of more laymen than clergy: neither are they eleemosynary foundations, though stipends are annexed to particular magistrates and professors, any more than other corporations where the acting officers have standing salaries. For these are rewards *pro opere et labore*, not charitable donations only, since every stipend is preceded by service and duty.]

The *eleemosynary* sort of lay incorporations, [are such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them, to such persons as he has directed. Of this kind are hospitals for the maintenance of the poor, sick and impotent, and all colleges both in our universities and out of them (*o*); for such colleges are founded for two purposes: 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations,] though in some things partaking of the nature of ecclesiastical bodies, [are strictly speaking lay and not ecclesiastical, even though composed of ecclesiastical persons (*p*).] And accordingly they are not subject to the jurisdiction of the Ecclesiastical Courts, or to the visitation of the ordinary (or diocesan) in his spiritual character (*q*).

[Having thus marshalled the several species of corpo-

members (the chancellor and the vice-chancellor), and the other sixteen are elected, viz., four heads of colleges, four professors, and eight other members of the senate. As to these universities, see also 19 & 20 Vict. c. 31; cap. xvii; 21 & 22 Vict. c. 11; 21 & 22 Vict. c. 44; 22 & 23 Vict. cc. 19, 34; 23 Vict. c. 23; 23 & 24 Vict. cc. 59, 91;

25 & 26 Vict. c. 26.

(*o*) Such as the colleges at Eton, Winchester, Manchester, &c. As to Eton, see 19 & 20 Vict. c. 88; 22 & 23 Vict. c. 34.

(*p*) See 1 Bl. Com. 470; Philips v. Bury, 1 Ld. Raym. 6.

(*q*) Christian's Blackstone, vol. i. p. 472 (note).

[rations, let us next proceed to consider—I. How corporations may be created. II. Their powers, capacities and incapacities. III. How corporations are visited. And IV. How they may be dissolved.

I. Corporations, by the civil law, seem to have been created by the mere act and voluntary association of their members; provided such convention was not contrary to law, for then it was *illicitum collegium* (*r*). It does not appear that the prince's consent was necessary to be actually given to the foundation of them: but merely that the original founders of these voluntary societies,—for they were little more than such,—should not establish any meetings in opposition to the laws of the state. But with us in England, the sovereign's consent (express or implied) is absolutely necessary to the erection of any corporation.

The crown's *implied* consent is to be found in corporations which exist by force of the *common law*, to which our former kings are supposed to have given their concurrence.] Of this sort are [the sovereign himself, and also all ecclesiastical corporations sole, such as bishops, parsons and other incumbents of churches (*s*); who by common law have been held, (as far as our books can show us,) to have been corporations *virtute officii*. And this incorporation is so inseparably annexed to their offices that we cannot frame a complete legal idea of any of these persons, but we must also have an idea of a corporation, capable to transmit his rights to his successors, at the same time. Another method of implication, whereby the crown's consent is presumed, is as to all corporations by *prescription*, such as the city of London and many other (*t*), which have existed as cor-

(*r*) Ff. 47, 22, 1.

(*s*) Blackstone (vol. i. p. 472) enumerates *churohwardens* also. But these are only a *quasi* corpora-

tion, as he himself remarks, *ibid.* p. 394. And see *Smith v. Adkins*, 8 Mee. & W. 362.

(*t*) 2 Inst. 330.

[porations, time whereof the memory of man runneth not to the contrary (*u*); and therefore are looked upon in law to be well created. For though the members thereof can show no legal charter of incorporation, yet, in cases of such high antiquity, the law presumes there once was one; but that, by the variety of accidents which a length of time may produce, the charter has been lost or destroyed.

The methods by which the crown's consent is *expressly* given, are either by act of parliament or charter. By act of parliament, (of which the royal assent is an indispensable ingredient,) corporations may undoubtedly be created;] as well as by royal charter (*x*). But it is observable that the authority of parliament, as regards their creation, has been frequently exercised only in aid or corroboration of the royal prerogative. As when the charter of the Royal College of Physicians, (of the tenth year of Henry the eighth,) was afterwards confirmed by the statute 14 & 15 Hen. VIII. c. 5 (*y*). Or when the

(*u*) Vide sup. vol. I. p. 59.

(*x*) We may remark here, that in acts of parliament for creating or regulating corporations, (which are very frequent in connection with municipal improvements, and with railway, canal, dock companies and similar undertakings,) it has latterly been usual, when certain objects of an ordinary kind are in view, to introduce an adoption, in general terms, of certain *other* Acts, consolidating the provisions usually made by parliament in reference to such objects. These consolidating Acts are chiefly—The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18, amended by 23 & 24 Vict. c. 136); The Railways Clauses Consoli-

ation Act, 1845 (8 & 9 Vict. c. 20); The Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16); The Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27); The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34); The Railway Clauses Act, 1863 (26 & 27 Vict. c. 92); The Waterworks Clauses Acts, 1847 and 1863 (10 & 11 Vict. c. 47, and 26 & 27 Vict. c. 93); The Telegraph Act, 1863 (26 & 27 Vict. c. 112); The Companies Clauses Act, 1863 (26 & 27 Vict. c. 118); The Railway Companies Powers Act (27 & 28 Vict. c. 120); The Railway Construction Facilities Act, 1864 (27 & 28 Vict. c. 121).

(*y*) See Dr. Bonham's case, 8 Rep. 107.

Crown was permitted by statute 5 & 6 W. & M. c. 20, to erect the corporation of the Bank of England with certain powers. Or when by the more recent statute of 5 & 6 Will. IV. c. 76, it was enacted, that, upon petition of the inhabitant householders of any borough in England or Wales, the king might, by his charter, incorporate such borough according to the provisions of that Act (*z*).

The creation by the Crown of a body corporate [may be performed by the words *creamus, erigimus, fundamus, incorporamus*, or the like. Nay, it is held that if the crown grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly (*a*), this is also sufficient to incorporate and establish them for ever (*b*).

The Crown, (it is said,) may grant to a subject the power of erecting corporations (*c*), though the contrary was formerly held (*d*). That is, it may permit the subject to name the persons and powers of the corporation at his pleasure; but it is really the sovereign that erects, and the subject is but the instrument: for, though none but the Crown can make a corporation, yet *qui facit per alium, facit per se*. In this manner, the Chancellor of the University of Oxford has power by charter to erect corporations; and has actually often exerted it, in the erection of several matriculated companies of tradesmen subservient to the students.]

(*z*) See *Rutter v. Chapman*, 8 Mee. & W. 1.

(*a*) *Gild* signified among the Saxons a fraternity, and was derived from the verb *gildan*, to pay, because every man paid his share towards the expenses of the community. Such of these gilds as were commercial gradually took the shape of our present municipal corporations; whose place of meeting, it may be observed, is still called the *Guild-hall*. Some curious infor-

mation as to the Anglo-Saxon gilds or clubs will be found in Turner's *Hist. Ang. Sax.* vol. iii. p. 98, 6th ed.; where mention is made, among other instances, of a gild of the clergy at Canterbury, and a gild of the thegns at Cambridge.

(*b*) 10 Rep. 30; 1 Roll. Ab. 513.

(*c*) Bro. Ab. tit. Prerog. 53; Vin. Prerog. 88, pl. 76.

(*d*) Year Book, 2 Hen. 7, 13. And see by Lord Kenyon, *R. v. Coopers' Company*, 7 T. R. 548.

When a corporation is erected, a name is always given to it (*d*), or, supposing none to be actually given, will attach to it by implication; [and by that name alone it must sue and be sued, and do all legal acts. Yet a very minute variation therein is not material;] and the name is capable of being changed, by competent authority (*e*), without affecting the identity or capacity of the corporation in other respects (*f*). But some name [is the very being of its constitution; and though it is the will of the sovereign that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions (*g*). The name of incorporation, says Sir E. Coke, is as a proper name or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as a god-father: and by that same name the king baptizes the incorporation (*h*).]

II. A corporation has incident thereto a variety of powers, rights, capacities and incapacities; the greater part of which are in their nature applicable only to corporations *aggregate*; though some belong to either class. These shall be now briefly considered.

1. A corporation aggregate [may sue or be sued, implead or be impleaded, grant or receive,] and, in short, perform any act by the corporate name, as a natural person may by his individual name. 2. And, as a corollary from this, it is amenable, in respect of the corporate property only, to such judgments as shall be given against it in any suit; and not so as to fix any personal or individual liability on the corporators (*i*).

(*d*) Blackstone (vol. i. p. 475), says a name *must* be given; but it appears by 1 Salk. 191, that a name of incorporation may be *implied*.

(*e*) See *Queen v. Registrar of Joint-Stock Companies*, 10 Q. B.

839.

(*f*) 4 Rep. 87.

(*g*) Gilb. Hist. C. P. 182.

(*h*) 10 Rep. 28.

(*i*) The maxim of the civil law is the same: "*Si quid universitati*

3. The acts of a corporation aggregate must be under its common seal; for, [being an invisible body, it cannot manifest its intentions by any personal act or oral discourse; and therefore acts and speaks only by its common seal. For though the particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation. It is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole (*h*).] There are cases, however, in which convenience has introduced an exception to this rule. For example, a corporation may (through its head) give command to a bailiff to make a distress, or may retain a solicitor (*l*), and these acts need not to be authenticated under the common seal (*m*). And it has been held that an action will lie against a corporation on an executed contract of which it has received the benefit, though such contract was not under the common seal (*n*). 4. A corporation aggregate may [make bye-laws or private statutes for its own better government (*o*); and these are binding on the members, unless contrary to the laws of the land (*p*),] or contrary to or inconsistent with their

debetur, singulis non debetur; nec quod debet universitas, singuli debent."—Ff. 3, 4, 7.

(*h*) Dav. 44, 48. See the following cases as to the necessity (in general) that the acts of a corporation should be under seal: Governor and Company of Copper Mines *v.* Fox and others, 16 Q. B. 229; Cort *v.* Ambergate, &c., Railway Company, 17 Q. B. 127; Diggle *v.* London and Blackwall Railway Company, 5 Exch. 442. As to the use of the common seal, by an *ecclesiastical* corporation aggregate, see 5 & 6 Vict. c. 108, s. 27.

(*l*) See *Mallam v. Guardians of the Poor of Oxford*, 2 Ell. & Ell. pp. 192, 208.

(*m*) Lutw. 1497; 1 Salk. 191.

(*n*) *Nicholson v. Bradfield Union* Law Rep., 1 Q. B. 620; contra, *Smart v. Guardians of the West Ham Union*, 10 Exch. 867. As to the contracts of *registered joint stock companies*, see 30 & 31 Vict. c. 131, s. 37.

(*o*) Blackstone adds that the same right was recognized by the law of the Twelve Tables at Rome. (1 Bl. Com. 476.)

(*p*) Thus a bye-law, limiting the

charter (*q*), or manifestly unreasonable (*r*). [For as natural reason is given to the natural body for the governing it, so bye-laws or statutes are a sort of political reason to govern the body politic.] And this is held to be a right so much of course, that where a charter of incorporation gave to a select body of the members a power to make bye-laws as to certain specified matters, it was held that the body at large was nevertheless at liberty to legislate with regard to all matters not so specified (*s*). Every corporation, too, has a right, as of course, to alter or repeal the bye-laws which itself has made (*t*).

5. Among the incidents of a corporation aggregate may also be classed the *disabilities* to which it is subject; and these may compendiously be stated as follows. It [must always appear in court by attorney, for it cannot appear in person, being, as Sir E. Coke remarks, invisible, and existing only in intendment and consideration of law (*u*). It cannot be executor or administrator, nor, indeed, perform any personal duties; for it cannot take an oath for the due execution of the office. It cannot be seised of lands to the use of another; for such kind of confidence is foreign to the end of its institution (*x*).] And, as the general rule, it can be guilty of no crime in its corporate capacity (*y*). Yet it is liable, in certain cases, to an indictment,—as where it allows a bridge, the

number of apprentices which each member shall take, is void. (*R. v. Coopers' Company*, 7 T. R. 543.) And see 19 Hen. 7, c. 7, and Ipswich Taylors' Case, 11 Rep. 53.

(*q*) See *Rex v. Cutbush*, 4 Burr. 2204; *Hoblyn v. Rose*, in error, 2 Bro. P. C. 329; *R. v. Cambridge*, 2 Selw. N. P. 1144.

(*r*) See *Piper v. Chappell*, 14 Mee. & W. 624; *Queen (The) v. Powell*, 3 Ell. & Bl. 377.

(*s*) *R. v. Westwood*, 7 Bing. 1; *S. C.* 4 B. & Cress. 781; 4 Bligh,

N. S. 213.

(*t*) *R. v. Ashwell*, 12 East, 22.

(*u*) Hence, contrary to the rule as to individuals, a corporation may obtain discovery of documents on the affidavit of their attorney. See *Kingsford v. Great Western Railway Company*, 16 C. B. (N.S.) 761.

(*x*) Bro. Abr. tit. Feoffment al Uses, 40; Bac. on Uses, 347.

(*y*) 1 Bl. Com. 476. See *The Queen v. Pocock*, 17 Q. B. 34; *Stevens v. Midland Railway Company*, 10 Exch. 352.

repair of which belongs to it by law, to fall into decay. And it is capable of suing or being sued for breach of contract, and for many other kinds of civil injury—as, for example, a libel (*z*). But it cannot [be summoned into the ecclesiastical courts upon any account; for those courts act only *pro salute animæ* (*a*). Moreover, aggregate corporations that have by their constitution a head,—as a dean, warden, master, or the like,—cannot do any acts during the vacancy of the headship, except only the appointing of another: neither are they then capable of receiving a grant; for such corporation is incomplete without its head (*b*). But there may be a corporation aggregate constituted without a head; as, for instance, the collegiate church of Southwell in Nottinghamshire, which consists only of canons (*c*): and the governors of the Charter-house, London; who have no president or superior, but are all of equal authority. 6. Another incident of corporations aggregate is, that the act of the major part is esteemed the act of the whole. By the civil law, the major part must have consisted of two-thirds of the whole; else no act could be performed (*d*): which perhaps may be one reason why they required three at least to make a corporation. But with us, *any* majority is sufficient to determine the act of the whole body (*e*). And whereas, notwithstanding

(*z*) *Whitfield v. The South-Eastern Railway Company*, 1 Ell. B. & Ell. 115. See other instances in which a corporation aggregate has been sued for a tort, *Yarborough v. The Bank of England*, 16 East, 2; *Green v. The London Omnibus Company*, 7 C. B. (N. S.) 290.

(*a*) Blackstone adds (vol. i. p. 477), “Neither can it be excommunicated, for it hath no soul, as is gravely observed by Sir E. Coke, 10 Rep. 32.”

(*b*) Co. Litt. 263, 264.

(*c*) In Blackstone’s time these canons were termed *prebendaries* (1 Bl. Com. p. 478), but see now 3 & 4 Vict. c. 113, s. 1. As to the suspension of canonries or prebends at Southwell, see sects. 18, 36, 41; 4 & 5 Vict. c. 39, s. 12.

(*d*) Ff. 3, 4, 3.

(*e*) Bro. Abr. Corporation, 31, 34. As to the consent of the majority present at a meeting duly convened being sufficient, *Cotton v. Davies*, 1 Str. 53; *Oldknow v. Wainwright*, 2 Burr. 1017.

[the law stood thus, some founders of corporations had made statutes in derogation of the common law,—making, very frequently the unanimous assent of the society to be necessary to any corporate act, (which King Henry the eighth found to be a great obstruction to his favourite scheme of obtaining a surrender of the lands of ecclesiastical corporations,) it was therefore enacted by stat. 33 Hen. VIII. c. 27, “that all private statutes shall “be utterly void, whereby any grant or election made “by the head, with the concurrence of the major part “of the body, is liable to be obstructed by any one or “more being the minority.” But this statute extends not to any negative or necessary voice given, by the founder, to the head of any such society (*f*).] 7. It is also incident to corporations aggregate to have the power of electing their own members and officers, and of thus perpetuating their own succession. When this power is not specially assigned by the charter to a particular portion of the members, it belongs to the major part of the corporation duly assembled for the purpose. It may be delegated, however, by a bye-law,—except in the case of municipal corporations (*g*),—to a select body of the corporators; who then become the representatives, as regards this matter, of the whole community (*h*). But though (to prevent confusion) the number of electors may be thus restrained, on the other hand, the number of persons from amongst whom the choice is to be made cannot be diminished by a bye-law (*i*). 8. It is also incident to corporations aggregate, that

(*f*) It has been remarked by Mr. Justice Coleridge, in his edition of Blackstone (vol. i. p. 479), that “every case in which the doubt has “been, whether the statutes, in fact, “give a negative or necessary voice “to the head or any other member “of the corporation, confirms by “implication Blackstone’s position,

“the accuracy of which has been “questioned. For no such doubt “could have arisen if the statute of “Hen. 8 had taken away such ne- “gative in *all* instances.”

(*g*) As to these, vide post, p. 156.

(*h*) *Rex v. Spencer*, 3 Burr. 1827.

(*i*) *Ibid.* 1833.

they [may take *goods and chattels* for the benefit of themselves and their successors,] just as natural persons may for themselves, their executors and administrators; but a sole corporation cannot take goods in his corporate capacity, because [such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid (*h*).] Yet here [a considerable distinction must be made. For if such sole corporation be the representative of a number of persons; as the master of a hospital, who is a corporation for the benefit of the poor brethren (*l*); or the dean of some antient cathedral, who stands in the place of, and represents, in his corporate capacity, the chapter; such sole corporations as these have, in this respect, the same powers as corporations aggregate have, to take personal property or chattels in succession. And, therefore, a bond to such a master, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society of which he is in law the representative (*m*). Whereas, in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession; and therefore, if a lease for years be made to the Bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it (*n*).] As to *land* and other real property the law is different: for corporations, whether aggregate or sole, may pur-

(*h*) Co. Litt. 46; Bl. Com. vol. i. p. 478. Another reason is stated by Blackstone in another place (vol. ii. p. 431), viz. that if such chattel interest were allowed to descend to a *successor*, the property itself would be in *abeyance* from the death of the owner till a successor be appointed; which is contrary to the nature of a chattel interest.

(*l*) Blackstone (vol. ii. p. 431) adds, as another example, "an abbot or prior by the old law before the Reformation, who represented the whole convent."

(*m*) Dyer, 48; Byrd v. Wilford, Cro. Eliz. 464.

(*n*) 2 Bl. Com. 431, cites Co. Litt. 46.

chase land and hold the same to them and their successors as natural persons may to hold to them and their heirs (*o*); though their power of holding land is subject to the provisions of the statutes of mortmain, of which we have spoken in a former place (*p*); and aggregate corporations are also in general subject to restrictions with regard to the alienation of their lands, a point to which we have also had occasion elsewhere to refer more at large (*q*).

These incidents belong as of course to all bodies corporate; and result from the very act of incorporation, without any express mention being made of them in the charter. But they do not attach to any bodies of persons unincorporated; however connected they may be in point of social position, or however united by express compact. Thus the inhabitants of a particular parish are not capable, without being incorporated, of holding lands to them and their successors; though they are capable of receiving a general grant of incorporation, which would enable them to hold such an inheritance (*r*). And though a voluntary society of individuals should

(*o*) The Case of Sutton's Hospital, 10 Rep. 30; et vide sup. vol. I. p. 470.

(*p*) Vide sup. vol. I. pp. 469 et seq.

(*q*) Vide sup. vol. I. p. 488 et seq. Et sup. p. 95 et seq.

(*r*) *Ashby v. White*, Lord Raym. 951; S. C. 3 Salk. 18; 12 Rep. 121. It is to be observed, however, that there is much property in lands and houses throughout the kingdom which is said, properly, *to belong to the parish*. Such property has generally been given or devised to charitable purposes connected with the poor of that parish; but the instrument of gift or will is often lost, and the trustees not known. In

some instances too it happens that the property is given or devised not to any individual trustees, but to the overseers, &c. in trust, though these officers are not competent in law to hold to them and their successors. (See 9th Poor Law Rep. p. 29.) To meet these inconveniences and some other connected with such *parish land* there exist some legislative provisions. See 59 Geo. 3, c. 12, ss. 12, 17, 24, 25 (*Ex parte Vaughan*, Law Rep., 2 Q. B. 114); 5 & 6 Will. 4, c. 69, s. 5; 5 & 6 Vict. c. 18; 22 Vict. c. 27, s. 4. As to the analogous case of land purchased for the public purposes of a *county*, see 21 & 22 Vict. c. 92.

unite together by mutual agreement for common purposes, should provide a common stock by subscription, and should subject themselves to laws of their own creation for the government of their society,—yet all this will not entitle them to the privilege of suing or being sued in their social capacity, or protect them from individual liability (*s*). Indeed, on the other hand, it has been held that for any persons to assume to themselves the character of a corporation, and to attempt to act and to hold themselves out as such without a charter,—is an invasion of the royal prerogative, and in the nature of a criminal offence at the common law (*t*).

It is obvious that some of the incidents above pointed out as belonging to corporations,—particularly that of the members being exempt from personal and individual liability,—operate strongly to the advantage of persons associated in great numbers for common objects, and more especially for objects of a commercial kind. Yet, as the law stood until a recent period, the only method by which these privileges or any of them could be obtained by any association of persons, was that of procuring itself to be formed into a corporation. And this could be done (as we have seen) only by act of parliament or by royal charter (*u*); while on the other hand, when such incorporation was once obtained, these privileges all attached, as of course, and without any exception or restriction, to these persons and their successors for ever. This state of things gave rise, as the spirit of commercial enterprise advanced, to great dissatisfaction among large classes of the community; there being many cases in which the solicitation of associated persons to be formed into a body corporate, with all its attendant pri-

(*s*) See *Attwood v. Small*, 7 B. & C. 390; *Bramah v. Roberts*, 3 Bing. N. C. 963; *Todd v. Emly*, 8 Mee. & W. 505; et sup. vol. II. p. 101.

(*t*) See *Duvergier v. Fellowes*, 5 Bing. 248; S. C. in error, 10 B. & C. 826.

(*u*) Vide sup. p. 130.

vileges, was found to be ineffectual, owing to the caution exercised both by parliament and the advisers of the crown, in reference to this subject;—a caution suggested by the fact, which experience had so fully established, that the enterprises of such associations are sometimes of rash or fraudulent conception, and of ruinous consequence to those who are tempted to become subscribers (*x*). The desire, however, to obviate this dissatisfaction, as far as consistent with the welfare of the public at large, at length induced the legislature to make the experiment of authorizing the crown to create bodies corporate to which some only of these common law privileges should attach, or to which they should attach in a partial or modified sense, or which should be for a limited period only, or subject in some other respect to restrictive regulation. Accordingly, by statute 7 Will. IV. & 1 Vict. c. 73, her Majesty was empowered by *letters-patent* to grant to any company or body of persons associated for any trading or other purposes whatever, although not incorporated by such letters-patent, any privileges which, according to the common law, it would be competent to the crown to grant to any such company by charter of incorporation.

In the same spirit, but with still more departure from the principle of the common law, than in the instance of companies partially incorporated under the above statute, have been since passed a variety of Acts for the formation of *Joint-Stock Companies*, which may perhaps be accurately defined as *qualified* corporations, constituted neither by charter, Act of Parliament, or letters patent, but by the act of the members themselves, and

(*x*) By recent provisions, any director, member or public officer of any body corporate or public company, in certain specified cases of fraud, is made guilty of a misdemea-

nor, and may be punished by imprisonment or penal servitude. See 24 & 25 Vict. c. 96, s. 81. By c. 95, a previous Act on the same subject (20 & 21 Vict. c. 54) is repealed.

the interest of every member whereof is freely transferable without the consent of the rest (*y*). The latest of these Joint-Stock Companies Acts are the 25 & 26 Vict. c. 89, known as "The Companies Act, 1862," and the 30 & 31 Vict. c. 131, known as "The Companies Act, 1867," in which two statutes most of the existing enactments of the legislature on this subject will be found (*z*). Of these provisions, the first which invites attention is a general one which declares that any *seven* or more persons, associated for any lawful purpose, may, by subscribing their names to a Memorandum of Association (*a*), and otherwise complying with the requisitions of the Acts in respect of registration, form themselves into an incorporated company, with or without limited liability (*b*). And, further, that no company or association consisting of more than *twenty* persons, shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain to the association, or the individual members thereof, *unless* it is registered under the Acts (*c*).

(*y*) The appellation of such companies seems to have been derived from the fact, that they usually consist of a great number of persons with a capital, or *joint stock*, proportionably large.

(*z*) By 25 & 26 Vict. c. 89, most of the preceding enactments relative to joint stock companies are repealed (see sect. 205, and the third Schedule); and as to the effect of the Act on companies previously existing, see sects. 175—198.

(*a*) 25 & 26 Vict. c. 89, s. 6. The Memorandum of Association may, in the case of a company "limited by shares" (as hereafter mentioned), and *shall*, in the case of a company "limited by guarantee," or "unlimited," (as hereafter

mentioned,) be accompanied, when registered, by *Articles of Association*, signed by the subscribers to the Memorandum of Association, and prescribing such regulations for the company as they deem expedient. Such articles may adopt all or any of the provisions contained in Table A. in the First Schedule to this Act. (Sect. 14.)

(*b*) 25 & 26 Vict. c. 89, s. 6.

(*c*) Sect. 4. *Banks*, however, are excepted from this provision and otherwise dealt with as explained hereafter in the chapter on banks (vide post, chap. XIV.) There are also some other excepted cases not requiring registration, though the company or association be established for gain, and consists of more

Upon due registration, the Registrar of Joint Stock Companies—an officer appointed by and under the superintendence of the Board of Trade (*d*), is to certify, under his hand, that the company is incorporated; and in the case of a “limited” company, that it is “limited (*e*);” and thereupon the members become a body corporate by the name contained in the memorandum of association, capable of exercising all the functions of an incorporated company, and having perpetual succession and a common seal (*f*), with power to hold lands (*g*); and also with power to each member to transfer his interest without consent of the rest (*h*): and the certificate of incorporation is made conclusive evidence that the requisitions as to registration have been duly complied with (*i*). The business of the company is managed by Directors, who are appointed by its members (*k*). Though the company

than twenty persons: as, 1. Any company or association formed in pursuance of some other Act or letters-patent; and, 2. Any mining company within and subject to the jurisdiction of the Stannaries. (*Ibid.*)

(*d*) See 25 & 26 Vict. c. 89, s. 174.

(*e*) As the general rule, the word “limited” must be used by any company registering itself as one with limited liability, in all its proceedings and advertisements, as the last word in its name. An exception, however, is made by 30 & 31 Vict. c. 131, s. 23, in favour of any company formed to promote “commerce, art, science, religion, or any other useful object,” and not for individual gain, and licensed by the Board of Trade to be registered with limited liability, without the addition of the word limited to its name.

(*f*) See 27 & 28 Vict. c. 19, as to the seals of joint stock companies

carrying on business in *foreign countries*.

(*g*) 25 & 26 Vict. c. 89, s. 18. But no company, formed for the purpose of promoting *art, science, religion, charity*, or any other like object, (not involving the acquisition of gain by the company, or by the individual members thereof,) shall, without the written licence of the Board of Trade, hold more than two acres of land. (Sect. 21.)

(*h*) 25 & 26 Vict. c. 89, ss. 22—24. See also 30 & 31 Vict. c. 131, s. 26. By the 27th and following sections of the last-mentioned Act, the regulations of the company may provide, that such interest on stock, or fully paid-up shares, may pass through the medium of *share warrants*, payable to bearer and transferable by delivery.

(*i*) 25 & 26 Vict. c. 89, ss. 17, 18.

(*k*) *Ibid.* First Schedule, Table A. (52), &c.

is a body corporate, and has therefore a corporate liability, viz. that of its capital or joint stock (*l*), yet the Act establishes an individual liability also in its members (*m*). And as to such liability, the rule is laid down as follows (*n*),—that, in the event of a company being wound up, every present and past member thereof shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges, and expenses of its winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, but with certain qualifications, and amongst others the following (*o*): 1. That no past member shall be liable if he has ceased to be a member for one year or upwards prior to the commencement of the winding-up;—2. That no past member shall be liable in respect of any debt or liability of the company contracted after he ceased to be a member;—3. That no past member shall be liable, unless it appears to the court before which the winding-up takes place, that the existing members are unable to satisfy the contributions required to be made by them;—and 4. That, in the case of a company *limited by shares*, no contributions shall be required from any member exceeding the amount (if any) unpaid on the

(*l*) By 30 & 31 Vict. c. 131, provisions are made under which any existing limited company may, by special resolution confirmed by the Court of Chancery after consideration of the claims of its creditors, *reduce its capital*; and, even without such confirmation, may *divide* its capital into shares of a smaller amount than was fixed by its memorandum of association (sects. 9—22). See as to this Gen. Ord. 21 March, 1868.

(*m*) It will be observed, that in this respect, amongst others, the

principle of the common law as to a corporation, (vide sup. p. 132,) has been modified in regard to the corporations formed under this Act.

(*n*) 25 & 26 Vict. c. 89, s. 38; and see ss. 7—10.

(*o*) It is also laid down in the Act, that nothing therein contained is to invalidate any provision in any *policy of insurance*, or other contract whereby the liability of individual members therein is restricted, or the funds of the company alone made liable in respect thereof. (25 & 26 Vict. c. 89, s. 38.)

shares in respect of which he is liable as a present or past member. It results, therefore, that, in the case of a “limited” company (*p*), the members are made liable to the amount (if any) unpaid on the shares respectively held or once held by them, while, in the case of an “unlimited” company, the liability of each member thereof is unlimited. On this rule, however, an important modification has now been engrafted by the Companies Act, 1867, in reference to the liability of the directors as distinct from that of the ordinary members,—it being enacted by 30 & 31 Vict. c. 131, s. 4, that the memorandum of association of a “limited” company may provide that the liability of the directors, managers, or managing director thereof, shall be *unlimited*; in which case each of the directors or managers shall, subject to certain restrictions specified in the Act (*q*), be liable to contribute, in the event of a winding-up, as if he were a member of an unlimited company (*r*). As to the circumstances under which companies, whether “limited” or otherwise, may be compulsorily wound up, it is to be remarked that any person to whom the company is indebted at law or in equity, in a sum exceeding 50*l.* then due, and who has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the same, may, if he obtains no satisfaction within three weeks, take proceedings to have the

(*p*) The text refers to the more ordinary case of a company “limited” *by shares*, but there may also be companies “limited” *by guarantee*, in which case the liability of each member is co-extensive with the amount he has undertaken to contribute in the event of the company being *wound up*, a term hereafter explained. (25 & 26 Vict. c. 89, ss. 9, 38.)

(*q*) These restrictions refer, 1. To

the liability of a director who has ceased to hold office; and, 2. To the court being satisfied as to the necessity for the director’s additional contribution, in order to discharge the debts and liabilities of the company, and the costs of the winding-up. (30 & 31 Vict. c. 131, s. 5.)

(*r*) By special resolution this provision may be adopted by existing companies. (30 & 31 Vict. c. 131, s. 8.)

company wound up (*s*); and such course may also be taken by any creditor at law or in equity, if execution or other process issued on a judgment, decree or order obtained in his favour, is returned by the officer who had to levy under it unsatisfied (*t*).

The winding-up is to take place upon a petition presented by the creditor to the High Court of Chancery (*u*), which, however, if it thinks fit, may direct all subsequent proceedings for winding-up to be had in the Court of Bankruptcy having jurisdiction in the place where the registered office is situate (*v*),—or in a county court (*w*). The court which has the winding-up may appoint a person under the name of “*official liquidator*” (*x*), to take into his custody all the property, effects and things in action of the company, and deal with them by sale or otherwise as the court shall sanction, and generally to do all such other things as may be necessary for winding-up the affairs of the company and distributing its assets (*y*). The court is also to proceed to settle a list of *contributories*—or persons liable as members to contribute to the assets of the company (*z*),—and to make *calls* on all or any of the contributories (to the extent of their liability) for payment of the sums necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves (*a*); and, as soon as the affairs of the company have been completely wound up, is to make an order that the company be dissolved (*b*). To this general view of the subject of winding-up, however, it must be added that, whenever a company is unable to pay its debts (and in some other cases also), a petition

(*s*) 25 & 26 Vict. c. 89, ss. 79, 80.

(*t*) *Ibid.*

(*u*) Sects. 81, 82. The winding-up is to be deemed to commence at the time such petition is presented.

(*v*) Sects. 81, 82.

(*w*) 30 & 31 Vict. c. 131, s. 41.

(*x*) 25 & 26 Vict. c. 89, s. 92.

(*y*) Sects. 94, 95.

(*z*) Sects. 38, 74, 98.

(*a*) Sect. 102.

(*b*) Sect. 111.

for winding-up may be presented by the company itself, or by a contributory or contributories, as well as by a creditor or creditors, or by all or any of such parties in conjunction (*t*); and, further, that there may also be a *voluntary* winding-up, which is where the company passes a resolution (*u*) for the purpose (*x*),—of which the effect is that a liquidator is appointed by the company itself, who settles a list of contributories, makes calls, and exercises all the powers by the Act given as above stated to the official liquidator (*y*).

III. Returning from this digression as to qualified corporations, we proceed next to inquire how corporations at common law may be *visited*. [For corporations, being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in them.

With regard to all ecclesiastical corporations, the ordinary is their visitor, so constituted by the canon law, and from thence derived to us (*z*). The pope formerly, and now the crown, as supreme ordinary, is the visitor of the archbishop or metropolitan: the metropolitan has the charge and coercion of all his suffragan bishops: and

(*t*) 25 & 26 Vict. c. 89, ss. 79—82. By 30 & 31 Vict. c. 131, s. 40, however, the right of a *contributory* to present a winding-up petition is restricted to cases where the members of the company have become less in number than seven; or where he is an original allottee; or has held his shares for a certain period; or where such shares have devolved on him through the death of a former holder.

(*u*) As to the definition of, and regulations concerning, *resolutions* by a company, see 25 & 26 Vict. c.

89, s. 51.

(*x*) Sect. 129. A *voluntary* winding-up is to be deemed to commence at the time of passing the resolution. (Sect. 130.) A company registered under a former Joint Stock Companies Act may be wound up voluntarily, without re-registration, under the Act of 1862. (See in re London India Rubber Company, Law Rep., 1 Ch. Ap. 329.)

(*y*) 25 & 26 Vict. c. 89, s. 133.

(*z*) As to what corporations are ecclesiastical, vide sup. p. 126.

[the bishops in their several dioceses are in ecclesiastical matters the visitors of all deans and chapters, of all rectors and vicars, and of all other spiritual corporations (*a*).]

With respect to lay corporations of the eleemosynary kind the founder, his heirs, or assigns, are the visitors; for in a lay incorporation the ordinary cannot visit (*b*). And [if the sovereign and a private man join in endowing an eleemosynary foundation, the sovereign alone shall be the founder of it;] for here the royal prerogative prevails. The founder has also a right to appoint a visitor, and to limit the jurisdiction that he is to possess; and if the heirs of a private founder fail, and no visitor has been appointed by him, the right of visitation devolves in such case upon the crown, and is exercised, on behalf of the crown, in the Court of Chancery (*c*).

As to a civil lay incorporation (*d*), it has no visitor, in the sense of the term here intended—but the misbehaviour of all bodies corporate of this class are inquired into and redressed, and their controversies decided, in the Court of Queen's Bench, according to the rules of the common law (*e*). And accordingly in the case of the College of Physicians, though the king by his letters-patent had subjected that body [to the visitation of four very respectable persons,—the Lord Chancellor, the two Chief Justices, and the Chief Baron,—though the college had accepted this charter with all possible marks of acquiescence, and had acted under it for more than a century; yet, in 1753 the authority of this provision coming into dispute on an appeal preferred to these supposed visitors, they directed the legality of their

(*a*) See *Re Dean of York*, 2 Q. B. 1; *The Queen v. Dean of Rochester*, 17 Q. B. 1.

(*b*) 1 Bl. Com. p. 480. As to what lay corporations are eleemosynary, vide sup. p. 127,

(*c*) *R. v. Catherine Hall*, 4 T. R. 233.

(*d*) Vide sup. p. 127.

(*e*) Per Holt, *Phillips v. Bury*, Ld. Raym. 8.

[own appointment to be argued: and, as this college was merely a civil and not an eleemosynary foundation, they at length determined, upon several days' solemn debate, that they had no jurisdiction as visitors; and remitted the appellant, (if aggrieved,) to his regular remedy in his majesty's Court of King's Bench (*e*).]

With regard to *hospitals*, these were all of them [considered, by the popish clergy, as of mere *ecclesiastical* jurisdiction: however, the laws of the land judged otherwise; and with regard to these institutions, it has long been held, that, if the hospital be spiritual, the bishop shall visit—but if lay, the patron (*f*). The right of lay patrons was indeed abridged by statute 2 Hen. V. c. 1, which ordained that the ordinary should visit *all* hospitals founded by subjects; though the king's right was reserved to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by 14 Eliz. c. 5, which directs the bishops to visit such hospitals only where no visitor is appointed by the founders thereof: and all the hospitals founded by virtue of the statute 39 Eliz. c. 5, are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit (*g*).]

Colleges—though, as before remarked, not the universities of Oxford or Cambridge at large—are also eleemosynary corporations (*h*); [though they, also, were certainly considered by the popish clergy, under whose direction they were, as *ecclesiastical*, or, at least, as clerical corporations; and therefore the right of visitation was claimed by the ordinary of the diocese. This is evident, because in many of our most antient colleges, when the founder had a mind to subject them to a visitor

(*e*) 1 Bl. Com. p. 482.

(*f*) Year Book, 8 Edw. 3, 28; 8 Ass. 29.

(*g*) 2 Inst. 725.

(*h*) The universities themselves rank as *civil* corporations; vide sup. p. 127.

of his own nomination, he obtained for that purpose a papal bull to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the [archives of the respective societies. And in some of the colleges] of Oxford, where no special visitor is appointed, the Bishop of Lincoln, in whose diocese Oxford was formerly comprised, [has immemorially exercised visitatorial authority; which can be ascribed to nothing else but his supposed title as ordinary to visit these among other ecclesiastical foundations (*i*).]

But [whatever might be formerly the opinion of the clergy, it is now held as established law, that colleges are *lay* corporations, though sometimes totally composed of ecclesiastical persons (*j*);] and that, where the founder has appointed no other visitor, and his heirs become extinct, the right of visitation belongs to the crown; that is, to the Lord Chancellor, sitting as the crown's representative in the Court of Chancery (*k*).

So much with respect to the persons by whom the different classes of corporations are respectively to be visited. With respect to the nature of a visitor's duties it may be laid down generally, that they are to control all irregularities in the institution over which he presides, and to decide and give redress in all controversies arising among the members, as to the interpretation of their laws and statutes (*l*)—that, in the exercise of these duties, he is to be guided by the intentions of the founder, so far as they can be collected from the statutes or from the design of the institution—that, as to the course of proceeding, he is restrained to no particular forms (*m*),—and that, while he keeps within his jurisdiction, [his determinations as visitor are final, and examinable in no

(*i*) 1 Bl. Com. 483.

(*j*) Phillips *v.* Bury, Ld. Raym. 8.

(*k*) Rex *v.* Catherine Hall, 4 T.R. 233; Ex parte Wrangham, 2 Ves. jun. 609.

(*l*) See Dr. Lee's case, 1 Ell. Bl.

& E. 863.

(*m*) See Bishop of Ely *v.* Bentley, 2 Bro. & C. 220; R. *v.* Bishop of Ely, 2 T. R. 290; Re Dean of York, 2 Q. B. 1.

[other court whatsoever (*n*).] Also it is said, [that where the founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds these rules, an action lies against him; but it is otherwise where he mistakes in a thing within his power (*o*).]

IV. [We come now, in the last place, to consider how corporations may be dissolved. Any particular member of a corporation may be disfranchised or lose his place therein, by acting contrary to the laws of the society or the laws of the land; or he may resign it by his own voluntary act (*p*). But the body politic may also itself be dissolved in several ways—which dissolution is the civil death of the corporation: and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation; for the law doth annex a condition to every such grant, that, if the corporation be dissolved, the grantor shall have again the lands, because the cause of the grant faileth (*q*). The grant is indeed only during the life of the corporation, which *may* endure for ever—but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. The debts of a corporation aggregate, either to or from it, are totally extinguished by its dissolution (*r*);] for it has no longer a corporate character in which to sue or be sued, and as during its existence the members of it could not recover or be charged with the corporate debts in their natural capacities, so neither can they when it has ceased to exist.

(*n*) See Phillips *v.* Bury, *Ld.* Raym. 5; S. C. 4 Mod. 106; Shaw, 35, 407; Salk. 403; Carth. 180; St. John's College *v.* Toddington, 1 Burr. 200; R. *v.* Bishop of Ely, *ubi sup.*; R. *v.* Bishop of Worcester, 4 M. & S. 415.

(*o*) 2 Lutw. 1566.

(*p*) 11 Rep. 98; see R. *v.* Liverpool, 2 Burr. 723; R. *v.* Harris, 1 B. & Adol. 936.

(*q*) Co. Litt. 13.

(*r*) Edmunds *v.* Brown, 1 Lev. 237.

A corporation may be dissolved—1. By the loss of such an integral part of its members as is necessary, according to its charter, to the validity of the corporate elections; for in such cases the corporation has lost the power of continuing its own succession, and will accordingly be dissolved by the natural death of all its members (*s*). 2. [By surrender of its franchises into the hands of the sovereign, which is a kind of suicide.] 3. By [forfeiture of its charter, through negligence or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void (*t*). And the regular course, in such case, is to bring an information in the nature of a writ of *quo warranto* (*u*); to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law for the purposes of the state, in the reigns of King Charles and King James the second,—particularly by revoking the charter of the city of London,—gave great and just offence; though perhaps, in strictness of law, the proceedings in most of the cases that occurred were sufficiently regular. But the judgment against the charter of London was reversed by act of parliament after the Revolution; and by the same statute it is enacted, that the franchises of the city of London shall never more be forfeited for any cause whatever (*x*).]

(*s*) See 11 Geo. 1, c. 4, s. 5; *R. v. Pasmore*, 3 T. R. 199; *R. v. Miller*, 6 T. R. 268; *R. v. Morris*, 3 East, 813; S. C. 4 East, 17. But by 11 Geo. 1, c. 4, it is provided, that *municipal* corporations shall not be dissolved by the non-election or void election of the mayor or other chief officer on the day mentioned in the charter; and this is held to extend to other officers also. The provisions of this statute are expressly

extended to elections under the Municipal Reform Act, by 7 Will. 4 & 1 Vict. c. 78, s. 26.

(*t*) *R. v. Ponsonby*, 1 Ves. jnn. 8. See *Eastern Archipelago Company v. The Queen*, 2 Ell. & Bl. 856.

(*u*) As to a *quo warranto*, vide post, vol. IV. p. 14.

(*x*) Stat. 2 W. & M. sess. 1, c. 8; see *R. v. Amery*, 2 T. R. 515; S. C. in error, 4 T. R. 122.

We have already remarked, that there is a species of lay corporation, which is erected for the good government of a town (*y*). An institution of this kind has, in modern times, been termed a *municipal corporation*; and may be defined generally as a body politic or corporate, established in some town to protect the interests of its inhabitants as such, and the maintenance of order therein; and consisting of the burgesses or freemen, that is, such persons as are duly and legally admitted as members of the corporate body.

The earlier history of the incorporation of our English towns is involved in some degree of obscurity (*z*). What may be stated with certainty, however, is as follows.

First, a diligent examination of our antient historical remains will suffice to establish the point, that even prior to the Norman Conquest there existed, at least, the germ of municipal corporations in this country: it having been usual for such persons of free condition as were not landowners, to settle in the towns and occupy houses there, as tenants to the crown, or some inferior lord, under the name of burgesses; to form themselves, by licence from the crown, (as many classes of persons did in that age,) into voluntary associations or fraternities, called *gilds*, or *guilds* (*a*); to be entitled in their capacity of burgesses to certain property; and, in the same capacity, to be exempt from certain burthens, and to be subject to certain liabilities (*b*). It is also clear, that very soon after the Conquest, and from thence downwards to the time of Henry the sixth, or thereabouts, charters were from time to time conceded by the Anglo-

(*y*) Vide sup. p. 127.

(*z*) It is suggested in Robertson's Hist. Chas. V. vol. i. p. 33, notes xv.—xviii., that the establishment of communities or corporations in England was posterior to the Conquest, "and that the practice was "borrowed from France." This

statement, however, seems to be incorrect. (See Turner's Hist. Anglo-Sax. vol. iii. pp. 106, 107; Domesday Book, passim. Lord Lyttleton's Hist. Hen. II. vol. ii. p. 317.)

(*a*) As to gilds, vide sup. p. 131, n. (*a*).

(*b*) Domesday, passim.

Norman kings to the same towns (*c*), and to others, either confirming the former grants, or (as the case might be) conferring new ones; and that by such charters the boroughs were frequently demised in fee farm to the burgesses (*d*). And these persons were also authorized to have a *guild-merchant* (*e*); to have officers, such as mayors, aldermen, bailiffs, and the like, for government of their towns; to hold courts of their own for administration of justice within the same precinct (*f*); and to enjoy many other liberties and privileges, of which it may be said, in general, that they chiefly consisted of exemptions from arbitrary taxation, and from feudal oppressions.

And, lastly, we find that from about the reign of Henry the sixth, to the present day, other charters of a similar character, (though varying of course with the change of times, as to the nature of the specific privileges conferred,) have been repeatedly granted to the same and to other towns by our different monarchs. But in a form more strictly adapted to the legal idea of an incorporation: these instruments containing an express grant that the mayor, bailiff, (or other officers,) and burgesses of the particular towns should be “a body corporate” by a certain name; and by that name should have perpetual succession, and be competent to sue and be sued, and the like (*g*).

Under all these different grants a very large proportion of the different towns of England have successively

(*c*) See the Introduction to Domesday by Sir H. Ellis, vol. i. p. 191.

(*d*) See Madox, *Firma Burgi*, p. 37.

(*e*) Thus Henry the second grants to the burgesses of Southampton, “*quod habeant et teneant gildam suam et omnes libertates et consuetudines,*” &c., and King

John grants to Dunwich, “*hansam et gildam mercatoriam.*”—Madox, *Firma Burgi*, 27, where see other instances.

(*f*) Madox, *Firma Burgi*, 28, 116, 136, 139.

(*g*) See the charters of Henry the sixth and Edward the fourth, cited in Madox, *Firma Burgi*, 28.

become incorporated; but until a recent period their constitutions were in many respects defective, and of a nature liable to abuse; and being founded besides on charters granted by different kings at different times, (or on the immemorial custom applicable to each particular town where the charter was lost or silent,) were subject to a great and inconvenient variety of structure. To place these important institutions upon a more satisfactory and uniform basis, and to purify their internal economy, it was deemed necessary in the course of the last reign to pass an Act “to regulate the municipal corporations in England and Wales” (*m*).

By this statute, 5 & 6 Will. IV. c. 76—commonly called “The Municipal Corporation Act” (*n*)—the corporate towns, or, as they are denominated in this statute, *boroughs* (*o*), enumerated in the schedules A. and B. annexed thereto,—comprising, with the exception of London and certain other places, the whole of those in England and Wales (*p*),—are placed under one uniform plan of

(*m*) This Act was preceded by the appointment of a commission (dated 18 July, 4 Will. 4), “to inquire into the existing state of municipal corporations in England and Wales, and to collect information respecting the defects in their constitution, &c.” The first report of the commissioners, dated 30th March, 1835, contained the following statement: “There prevails among the inhabitants of a great majority of the incorporated towns a general, and, in our opinion, a just dissatisfaction with the municipal institutions—a distrust of the self-elected municipal councils, whose powers are subject to no popular control, and whose acts and proceedings being secret are not checked by the in-

fluence of public opinion—a distrust of the municipal magistracy, tainting with suspicion the local administration of justice—a discontent under the burthen of local taxation, while revenues are diverted from their legitimate use,” &c. (First Report, p. 49.)

(*n*) This Act is amended by 24 & 25 Vict. c. 75. See also the Acts cited, post, p. 156, n. (*c*).

(*o*) As to the meaning of the term *borough* in general, vide sup. vol. I. p. 130.

(*p*) But the Act does not apply to such *parliamentary* boroughs as are not *municipal*. A list of these will be found appended to the first Report of the Commissioners (Table iii. p. 59). And it comprises (among others of less importance) the bo-

constitution, thereby newly devised. According to this plan, the definition of a *burgess* in the boroughs comprised in the Act (*q*),—that is, a burgess entitled to such new rights as it for the first time confers on those boroughs (*r*),—is a male person of full age, not an alien, nor having received within the last twelve months parochial relief, or alms, or pension, or charitable allowance from the charitable trustees of the borough; and who on the last day of August in any year shall have occupied any house, warehouse, counting-house or shop within the borough during that year and the whole of the two preceding years; and during such occupation shall also have been an inhabitant householder within the borough, or within seven miles thereof; and shall, during such time, have been rated in respect of such premises to all rates for relief of the poor (*s*), and have

boroughs of Birmingham, Greenwich, Sheffield, Southwark, Taunton, Westminster, &c. Some of the boroughs, however, in this list (including Birmingham and Sheffield) have since received a charter of incorporation under 5 & 6 Will. 4, c. 76, s. 141, and are therefore now governed under the new plan of constitution. As to the *boundaries* of boroughs (municipal and parliamentary), see 2 & 3 Will. 4, c. 64; 6 & 7 Will. 4, c. 103; 7 Will. 4 & 1 Vict. c. 78, ss. 29, 41; 30 & 31 Vict. c. 102; 31 & 32 Vict. c. 46.

(*q*) See 5 & 6 Will. 4, c. 76, ss. 9, 13. Before this Act the title of burgess was generally acquired by birth, marriage or servitude—that is, by being born of a freeman, by marrying the daughter or widow of a freeman, or by apprenticeship for seven years within the borough to a freeman. It might also be obtained by gift or purchase. (First Report

of Commissioners, pp. 18, 19.)

(*r*) A burgess or freeman (for the terms are convertible) may, as such, be entitled not only to these rights, but to those which relate to the corporate property, or to voting at parliamentary elections (vide post, p. 160). The Act also contains several savings of rights in particular instances (see sects. 89, 108, 134, 135, 137, 138).

(*s*) See as to the rating of *small tenements*, 13 & 14 Vict. c. 99, s. 7, and as to the rating of *lodgers*, 59 Geo. 3, c. 12, s. 19; 21 & 22 Vict. c. 43. Although under those enactments the owner may be rated instead of the occupier, the latter has the municipal privileges. It is to be remembered that, by the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), the owner cannot now be rated instead of the occupier in any *parliamentary* borough; vide sup. vol. II. p. 387, n. (*o*).

paid all such poor and borough rates in respect of the same premises, except those payable for the last six calendar months; and shall be duly enrolled in that year as a burgess on the *burgess roll* (*t*). Which definition however is to be understood as subject to the following rule, that when the premises came to the party by descent, marriage, marriage settlement, devise, or promotion to any benefice or office,—he shall be entitled to reckon in the occupancy and rating of the former party from whom they were so derived (*u*).

The new municipal constitution farther provides, that in every borough there shall be elected annually a “mayor” (*x*),—and periodically a certain number of “aldermen” (*y*), and of “councillors” (*z*),—who together shall constitute “the council” (*a*) of the borough (*b*);—that they shall be respectively chosen from among persons on, or entitled to be on, the burgess list, and otherwise qualified as in the Act described (*c*):—that the councillors shall be elected by the burgesses (*d*), and the

(*t*) As to the burgess roll, see 5 & 6 Will. 4, c. 76, s. 22; 7 Will. 4, & 1 Vict. c. 78; 20 & 21 Vict. c. 53, ss. 6, 7; *Hunt v. Hibbs*, 5 H. & N. 123.

(*u*) 5 & 6 Will. 4, c. 76, s. 12; 7 Will. 4 & 1 Vict. c. 78, ss. 8, 9.

(*x*) 5 & 6 Will. 4, c. 76, s. 49. The case of the death, illness, absence or incapacity of the mayor or other municipal officers is provided for by 5 & 6 Will. 4, c. 76, ss. 36, 49; 7 Will. 4 & 1 Vict. c. 78, s. 16; 16 & 17 Vict. c. 79, ss. 7—12. By 6 & 7 Will. 4, c. 105, s. 4, the mayor is to hold over after his year, till acceptance of office by his successor. By 3 & 4 Vict. c. 47, the mayor may be re-elected. By 16 & 17 Vict. c. 79, ss. 7, 8, he may appoint a deputy. By 24 & 25 Vict. c. 75, s. 2, his precedence over the other borough

justices is defined and confirmed.

(*y*) 5 & 6 Will. 4, c. 76, s. 25. See 16 & 17 Vict. c. 79, s. 13.

(*z*) 5 & 6 Vict. c. 76, ss. 25, 31.

(*a*) As to the powers of the council, see sects. 72, 73; 6 & 7 Will. 4, c. 104, s. 2; 6 & 7 Will. 4, c. 105, s. 8; 7 Will. 4 & 1 Vict. c. 78, ss. 45, 46, 47.

(*b*) 5 & 6 Will. 4, c. 76, s. 25.

(*c*) Sect. 28. See 6 & 7 Will. 4, c. 104, s. 7. Since the Municipal Act there have been several additional statutes regulating the subject of municipal *elections*. See 6 & 7 Will. 4, c. 105, s. 5; 7 Will. 4 & 1 Vict. c. 78, ss. 1, 11, 14, 18, 25, 26; 3 & 4 Vict. c. 47, s. 1; 6 & 7 Vict. c. 89, ss. 1, 2, 3, 5; 15 & 16 Vict. c. 5; 16 & 17 Vict. c. 79, ss. 9—13; 22 Vict. c. 35; 31 & 32 Vict. c. 41.

(*d*) 5 & 6 Will. 4, c. 76, ss. 29;

mayor and aldermen by the council (*e*);—that the council shall meet once a quarter (and oftener if due notice be given), for transaction of the general business of the borough (*f*), and make their decisions according to the majority of the members present (if those present amount to one-third of the whole), and that the mayor, or other member presiding in his absence, shall have a casting-vote (*g*);—that at any meeting at which two-thirds at least of the whole shall attend, the council may make bye-laws for the good rule and government of the borough, for the prevention and suppression of nuisances, and for the imposition of fines on persons in that behalf offending (*h*);—that the burgesses shall annually elect, from among those qualified to be councillors, two auditors and two assessors (*i*); the former to audit the accounts of the borough, the latter to assist in revising the burgess list (*k*);—and that the council also may appoint a town clerk and a treasurer (neither of whom is to be a member of the council), and such other officers as have been usual or shall be necessary, and shall be empowered to fix their salaries (*l*),—and, if the borough have a separate

30, 32. It is to be observed that certain boroughs of large population are by the Act divided into *wards* (see 5 & 6 Will. 4, c. 76, s. 39; 6 & 7 Will. 4, c. 103, s. 3; *Baker v. Marsh*, 4 El. & Bl. 144), and it is provided that a certain number of councillors shall be assigned to each ward, and that the burgesses of each ward and none others shall separately elect the number of councillors assigned thereto. (5 & 6 Will. 4, c. 76, s. 43.) Two assessors are also to be separately elected for each ward. (*Ibid.*) By 22 Vict. c. 35, provisions are made for the alteration of these wards, in certain cases, and for a re-settlement of their boundaries and fresh appor-

tionment of councillors.

(*e*) 5 & 6 Will. 4, c. 76, ss. 49, 25.

(*f*) 5 & 6 Will. 4, c. 76.

(*g*) *Ibid.* s. 69.

(*h*) *Ibid.*

(*i*) Sects. 37, 29.

(*k*) Sects. 93, 18. (*See Searle v. The Queen*, 8 Ell. & Bl. 22; *The Queen v. The Mayor of Rochester*, 1 E. Bl. & E. 1024.) By 7 Will. 4 & 1 Vict. c. 78, s. 15, the auditors and assessors are disqualified to be of the council; by sect. 17 the assessor may appoint a deputy.

(*l*) 5 & 6 Will. 4, c. 76, s. 58. As to the *town clerk*, see 20 & 21 Vict. c. 50, s. 5. As to the *treasurer*, see 6 & 7 Vict. c. 89, s. 6.

court of quarter sessions, shall also appoint a coroner (*m*) and a clerk of the peace (*n*).

The council also of any borough, which is desirous that a separate court of quarter sessions (*o*) should be holden there, may petition the Crown for that purpose; and if the application be granted, the Crown shall appoint a barrister at law to be recorder (*p*), who shall be sole judge of such court of quarter sessions; as also of the borough court of record for civil actions, if there be any, provided that it be not regulated by any local act of parliament, and that no barrister of five years' standing sat therein when the Act passed (*q*).

To certain boroughs, and to such others as may petition for it, the Crown may also grant a commission of the peace, and nominate such persons to be justices within the borough as the Crown shall think proper (*r*); and the

(*m*) 5 & 6 Will. 4, c. 76, s. 62. (See 23 & 24 Vict. c. 116, s. 9.) By 6 & 7 Will. 4, c. 105, s. 6, the coroner may appoint a deputy.

(*n*) 5 & 6 Will. 4, c. 76, s. 103. As to an *assistant* clerk of the peace, see 7 Will. 4 & 1 Vict. c. 19. As to the *removal* of the clerk of the peace, see 27 & 28 Vict. c. 65.

(*o*) 5 & 6 Will. 4, c. 76, s. 103. As to borough quarter sessions, see also 5 & 6 Vict. c. 38; 6 & 7 Will. 4, c. 105; 2 & 3 Vict. c. 27; 7 Will. 4 & 1 Vict. c. 38; 14 & 15 Vict. c. 55, ss. 13, 19; c. 19. As to trial in the county at large, or next adjoining county, of offences committed within the borough, see 38 Geo. 3, c. 52, ss. 2, 3; 51 Geo. 3, c. 100; 60 Geo. 3 & 1 Geo. 4, c. 14; 5 & 6 Will. 4, c. 76, ss. 109—111; 7 Will. 4 & 1 Vict. c. 78, s. 50; 14 & 15 Vict. c. 55, s. 19; c. 100, s. 23; 17 & 18 Vict. c. 35.

(*p*) See 5 & 6 Will. 4, c. 76, ss. 105, 118; by which the recorder has,

in general, the same authority within the limits of the borough, as the county quarter sessions for the county at large. But there are the following exceptions. He has no power by virtue of his office to make or levy any county rate or rate in the nature of a county rate, or to grant any licence or authority to keep an inn, alehouse, or victualling house, or to sell exciseable liquors by retail, or to exercise any of the powers by 5 & 6 Will. 4, c. 76, specially vested in the council of the borough. As to the recorder's power to appoint a *deputy*, see 6 & 7 Vict. c. 89, s. 8: as to his *oath of office*, 6 & 7 Will. 4, c. 105, s. 3.

(*q*) As to borough courts of record, see 6 & 7 Will. 4, c. 105, s. 9; 7 Will. 4 & 1 Vict. c. 78, s. 31; 2 & 3 Vict. c. 27; 15 & 16 Vict. c. 76, s. 228; 17 & 18 Vict. c. 125, s. 105; 23 & 24 Vict. c. 126, s. 44.

(*r*) 5 & 6 Will. 4, c. 76, s. 98. And see as to borough justices, 7

mayor (during his year of office), and the recorder, are, respectively, justices of the peace *ex officio* (*s*).

It is provided also, that the council shall not, except by approval of the Lords of the Treasury, sell or mortgage the land or public stock of the borough, or demise them for more than a certain term (*t*): and that the rents, profits, and interest of all corporate property shall be paid to the treasurer, and carried to the account of the *borough fund* (*u*); which, after discharging debts, shall be applied to the payment of salaries, the expenses connected with the corporate elections, prosecutions, constabulary, gaols and maintenance of offenders, and other public purposes (*x*)—that the surplus (if any) shall be

Will. 4 & 1 Vict. c. 78, ss. 30, 31; 12 & 13 Vict. cc. 8, 18, 64; 13 & 14 Vict. c. 91; 15 & 16 Vict. c. 38; 18 & 19 Vict. c. 126; 24 & 25 Vict. c. 75, s. 3. As to their *clerk*, see *The Queen v. Fox*, 1 E. & E. 729, and 24 & 25 Vict. c. 75, s. 5. By 5 & 6 Will. 4, c. 76, s. 11, where a borough has *no* separate quarter sessions, the justices for the county are to exercise jurisdiction as justices for the borough, as fully as they do for the county at large. But where a separate court of quarter sessions is granted, then, if the borough were previously exempt from the jurisdiction of the county justices by reason of a *non intromittant* clause in their charter (as to which, see *R. v. Sainsbury*, 4 T. R. 451), it shall still remain so; but otherwise, the county justices will have concurrent jurisdiction in the borough with the borough justices. (2 Arch. Just. 26.)

(*s*) 5 & 6 Will. 4, c. 76, ss. 57, 103.

(*t*) 5 & 6 Will. 4, c. 76, ss. 94, et seq.; 6 & 7 Will. 4, c. 104, s. 2;

1 & 2 Vict. c. 31; 17 & 18 Vict. c. 104, s. 546; 22 Vict. c. 27, s. 3; 23 Vict. c. 16. See the law as to this more fully stated, sup. vol. i. p. 489.

(*u*) As to the borough fund, see 5 & 6 Will. 4, c. 76, s. 92; 6 & 7 Will. 4, c. 104; 23 Vict. c. 16, s. 12. As to property held by corporations on charitable or other trusts, see 5 & 6 Will. 4, c. 76, ss. 71—75; 16 & 17 Vict. c. 137, s. 65. As to discharge of corporate debt, see 7 Will. 4 & 1 Vict. c. 78, s. 28.

(*x*) 5 & 6 Will. 4, c. 76, s. 92. As to borough prosecutions and maintenance of offenders, see *ibid.* ss. 114, 117; 5 & 6 Vict. c. 98; 13 & 14 Vict. c. 91; 15 & 16 Vict. c. 81, s. 38. As to borough police, 19 & 20 Vict. cc. 69, 118; 22 & 23 Vict. c. 32, ss. 7, 15, 16; 28 & 29 Vict. c. 35. As to local boards of health in boroughs, 23 Vict. c. 16, s. 12. As to borough gaols, 12 & 13 Vict. c. 82; 13 & 14 Vict. c. 91; 28 & 29 Vict. c. 126. As to lunatics in boroughs, 16 & 17 Vict. c. 97;

expended for the public benefit of the inhabitants (*y*), and the deficiency (if any) made up by a rate (*z*),—and that the accounts shall be at all times open to inspection, and regularly audited and printed for the use of the rate-payers (*a*); and submitted to the Secretary of State; and laid before both Houses of Parliament (*b*).

Such are the principal features of the new municipal corporation scheme, as to which however it is further to be understood, that it distinguishes between the rights newly conferred by the Act, and the antecedent rights of the corporators, both with regard to the corporate property and as to their parliamentary franchise. For, as to the first, it is provided that every inhabitant, and every person admitted a freeman or burgess, and the wife, widow, son or daughter of any freeman or burgess, and every person married to the daughter or widow of a freeman or burgess, and every apprentice,—shall respectively enjoy the same share and benefit of the lands and public stock of the borough, as he or she might have

18 & 19 Vict. c. 105; 19 & 20 Vict. c. 87. As to borough bridges, 13 & 14 Vict. c. 64. As to burials in boroughs, 17 & 18 Vict. c. 87, s. 3; 18 & 19 Vict. c. 128. As to the repair of borough roads, 25 & 26 Vict. c. 61, s. 45.

(*y*) As to free public libraries and museums in boroughs, see 18 & 19 Vict. c. 70. As to public gardens therein, see 26 & 27 Vict. c. 13. *Tulk v. Metropolitan Board of Works*, Law Rep., 3 Q. B. 94.

(*z*) 5 & 6 Will. 4, c. 76, s. 92. As to borough and watch rate, see 6 & 7 Will. 4, c. 104, s. 5; 7 Will. 4 & 1 Vict. c. 78, s. 29; 7 Will. 4 & 1 Vict. c. 81; 2 & 3 Vict. c. 28; 3 & 4 Vict. c. 28; 8 & 9 Vict. c. 110;

17 & 18 Vict. c. 71; 22 & 23 Vict. c. 32, s. 5. As to rating the corporate property to poor rates, see 4 & 5 Vict. c. 48. As to overseers of the poor and authority of borough justices in matters relating to the poor, 12 & 13 Vict. cc. 8, 64; 15 & 16 Vict. c. 38; 16 & 17 Vict. c. 79, s. 14. As to borough rates in the nature of county rates, 5 & 6 Will. 4, c. 76, s. 92; 17 & 18 Vict. c. 71. As to the collection of borough rate for certain parishes not subject to county rate, 12 & 13 Vict. c. 65, s. 2; 15 & 16 Vict. c. 81, s. 32.

(*a*) 5 & 6 Vict. c. 76, s. 93.

(*b*) 6 & 7 Will. 4, c. 104, s. 10; 7 Will. 4 & 1 Vict. c. 78, ss. 43, 49.

enjoyed in case the Act had not been passed: subject to the limitation, however, that the total amount to be divided among such persons shall not exceed the surplus which shall remain after payment of the expenses which are charged by the Act upon the borough fund (*c*). And, as to the second, it is provided that every person, who would or might have had as a burgess or freeman the right of voting in the election of members of parliament if the Act had not passed, shall be entitled to such right of voting as fully as he might in that case have done (*d*). It is also enacted that the town clerk of every borough shall make out a list (to be called *the freemen's roll*) of all persons admitted burgesses or freemen for the purpose of such reserved rights as aforesaid (*e*), — as distinguished from the burgesses newly created by the Act, and entitled to the rights which it newly confers. These last are to be entered, (as before explained,) on another roll, called the *burgess roll*.

There are some other points of importance, besides those already noticed, on which the Act has innovated upon the laws and customs which formerly prevailed in corporate towns. Before it passed, the title of burgess (or the freedom of the city, as it was called) was generally acquired by birth, marriage or servitude, (that is, by being born of a freeman, by marrying the daughter or widow of a freeman, or by apprenticeship for seven years within the borough to a freeman). It might also be obtained by gift or purchase (*f*). But by the Act it is provided that no person shall in future be made a burgess or freeman by gift or purchase (*g*); the effect of which provision is to leave no other title in force, as

(*c*) 5 & 6 Will. 4, c. 76, s. 2.

(*d*) Sect. 4. See 7 Will. 4 & 1 Vict. c. 78, s. 27. As to this right in *parliamentary* boroughs, vide sup. vol. II. p. 385 et seq.

(*e*) 5 & 6 Will. 4, c. 76, s. 5. By

1 & 2 Vict. c. 35, no stamp duty is to be paid on any such admission.

(*f*) First Report of Commissioners, pp. 18, 19.

(*g*) 5 & 6 Will. 4, c. 76, s. 3.

regards the right to be placed on the freemen's roll, but those of birth, marriage, and servitude as an apprentice (*h*). It abolishes also (though with a reservation of the rights of the then existing claimants) the exemptions that had been ordinarily claimed by burgesses, inhabitants, or the like, from such tolls or dues as are levied to the use of the body corporate (*i*). And whereas in divers boroughs a custom had prevailed, and bye-laws had been made, that no person not being free of the borough, or of certain guilds, mysteries, or trading companies therein, should keep a shop for merchandise, or use certain trades or occupations for gain within the same,—the Act provides that every person may in future keep any shop in any borough, and use every lawful trade and occupation therein, any such custom or bye-laws notwithstanding (*k*).

It remains only to observe, that the several provisions of this statute are applicable not only to the boroughs enumerated in the schedules, but to every other (whether before incorporated or not) which shall obtain a new charter of incorporation, on petition to the crown for that purpose (*l*). And that with respect to every borough falling within the Act, the former statutes, charters and usages by which it was governed, so far as consistent with these provisions, are to be considered as still in force; while, on the other hand, so much of them as is inconsistent with the Municipal Corporation Act is in express terms repealed (*m*).

(*h*) 5 & 6 Will. 4, c. 76, s. 5.

(*i*) Sect. 2. Sec 6 & 7 Will. 4, c. 104, s. 9.

(*k*) 5 & 6 Will. 4, c. 76, s. 14.

(*l*) Sect. 141. As to boroughs incorporated since the Municipal Corporation Act, see also 7 Will. 4

& 1 Vict. c. 78, s. 49; 5 & 6 Vict. c. 111; 11 & 12 Vict. c. 93; 13 & 14 Vict. c. 42; 16 & 17 Vict. c. 79; 18 & 19 Vict. c. 31; 20 & 21 Vict. c. 10.

(*m*) 5 & 6 Will. 4, c. 76, s. 1.

CHAPTER II.

OF THE LAWS RELATING TO THE POOR.



UNTIL the time of Henry the eighth, the poor [subsisted entirely upon private benevolence, and the charity of well-disposed Christians. For though it appears by the *Mirroure* (*a*), that by the common law the poor were to be “sustained by parsons, rectors of the church, and the “parishioners, so that none of them die for default of “sustenance,”] yet [till the statute 27 Hen. VIII. c. 25, we find no compulsory method chalked out for this purpose; but the poor seem to have been left to such relief as the humanity of their neighbours would afford them. The monasteries were, in particular, their principal resource; and among other bad effects which attended the monastic institutions, it was not perhaps one of the least, (though frequently esteemed quite otherwise,) that they supported and fed a very numerous and very idle poor, whose sustenance depended upon what was daily distributed in alms at the gates of the religious houses. But upon the total dissolution of these, the inconvenience of thus encouraging the poor in habits of indolence and beggary was quickly felt throughout the kingdom: and abundance of statutes were made in the reigns of King Henry the eighth and his children, for providing for the poor and impotent; which, the preambles to some of them recite, had of late years greatly increased.

These poor were principally of two sorts: sick and impotent, and therefore unable to work; idle and sturdy,

(*a*) Chap. 1, sect. 3.

[and therefore able, but not willing to exercise any honest employment. To provide in some measure for both of these in and about the metropolis, Edward the sixth founded three royal hospitals: Christ's and St. Thomas's, for the relief of the impotent, through infancy or sickness; and Bridewell, for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the poor throughout the kingdom at large; and therefore, after many other fruitless experiments, by statute 43 Eliz. c. 2, (which is generally considered as the foundation of the modern poor law,) *overseers* of the poor were appointed in every parish.] And it was provided that the churchwardens of every parish should also be the overseers(*b*); and that there should also be appointed two, three, or four, but not more, of the inhabitants(*c*): such last-mentioned overseers to be substantial householders, and to be nominated yearly by two justices dwelling near the parish(*d*).

(*b*) As to churchwardens and overseers for separate *townships*, see *R. v. Yorkshire*, 6 A. & E. 863, and 7 & 8 Vict. c. 101, ss. 22, 23.

(*c*) By 12 & 13 Vict. c. 103, s. 6, no person shall be appointed overseer who is engaged in any contract for the supply of food for the relief of the poor. By 29 & 30 Vict. c. 113, s. 11, in the case of a small parish, a *single* overseer may be appointed by the justices; and, if need be, he may be an inhabitant householder of an adjoining parish. But as the general rule the appointment of a single person as overseer is *void* (see *The Queen v. Cousins*, 4 B. & Smith, 849). By sects. 10, 12 of the Act just mentioned the same person may hold jointly the offices of churchwarden and overseer, but cannot at the same time be overseer in one

parish and assistant overseer in another. The following classes of persons are exempted from serving the office of overseer:—Peers and members of parliament; justices of the peace; aldermen of London; clergymen; dissenting ministers; practising barristers and attorneys; registered medical practitioners; and officers of the courts of law, of the army and navy, and of the customs and excise. (See Archbold's *Justice of the Peace* in tit. *Poor*, 13; and 21 & 22 Vict. c. 90, s. 34.) On the other hand, the office may be filled by a *woman*. (See *R. v. Stubbs*, 2 T. R. 395.)

(*d*) The appointment is, by 54 Geo. 3, c. 91, to be made on the 25th March, or within fourteen days after. It may be observed here, that wherever, by 43 Eliz. c. 2,

This Act of Elizabeth involves two principles ; first, that every poor person shall be either relieved, or (what is equivalent) provided with work : next that this shall be done *parochially* ; that is, out of funds to be raised and applied by parish officers within the limits of their respective parishes (*e*). It is to be understood, however, that it has not been the policy of the law to allow paupers to resort for relief indiscriminately to any parish they preferred : for, by certain statutes of date anterior to the above Act (*f*), persons unable or unwilling to work were compellable to remain in the particular parishes where they were *settled* ; that is, where they were born, or had made their abode for three years, or (in case of vagabonds) for one year only (*g*). And this was the origin of the law of *settlement*, with which that of *relief* holds a close connection ; these being in fact the two main branches of which the poor-law (as established by 43 Eliz. c. 2) consists. Still there was no regulation either prior to that Act, or for a long period afterwards, to prevent an able-bodied and industrious pauper from resorting to any parish that he pleased for employment. But soon after the Restoration the more restrictive principle was introduced, of confining to his existing place of settlement every person what-

powers are given in respect of the poor to justices in *counties*, the same powers are by 12 & 13 Vict. c. 8, c. 64, (amended by 15 & 16 Vict. c. 38,) given to justices in *boroughs*.

(*e*) As to extra-parochial places, see 13 & 14 Car. 2, c. 12, s. 22, and the modern enactments of 20 Vict. c. 19 ; by which last statute all extra-parochial places where no poor rate is levied, and in respect of which there is no agreement for its contribution to the poor rate of any parish, shall now be deemed a parish for all the purposes of assessment to

the poor rate, the relief of the poor, the county police or borough rate, the burial of the dead, the removal of nuisances, the registration of parliamentary and municipal voters, and the registration of births and deaths. The above enactments are not *retrospective*. (*The Queen v. St. Sepulchre, Northampton, 1 E. & E. 813.*)

(*f*) *Viz.*, 19 Hen. 7, c. 12 ; 1 Edw. 6, c. 3 ; 3 & 4 Edw. 6, c. 16 ; 14 Eliz. c. 5 ; see also 7 Jac. 1, c. 4, s. 8.

(*g*) 1 Bl. Com. 361.

ever whose circumstances were such as to make it probable that he would become a charge upon the public; and new regulations were devised for carrying that principle into full effect. For by stat. 13 & 14 Car. II. c. 12, s. 1, it was (in substance) provided that persons newly coming to settle in any parish, and likely to become chargeable, might be *removed* by the warrant of two justices of the peace, on complaint of the parochial officers, to the parish where they were last legally settled (*h*). But that Act also materially altered the legal idea and definition of settlement; for it abridged the period, at which a man becomes settled by residence, to forty days (*i*): and as it subjected the poor to removal from every place in which they were not settled, it had the farther and indirect effect of attaching to the condition of settlement the quality of a *right*, because that condition gave an exemption from removal. This state of the law led to unforeseen consequences. Persons who were desirous (for any reason) of gaining a settlement-right in particular parishes, were soon found to resort to the expedient of intruding into them furtively, with the view of completing their forty days' residence before they should be discovered (*h*). To prevent which, provision was afterwards made, that the forty days should be computed only from the period when notice in writing of the new comer's abode should be given to the parish officers; such notice being dispensed with only in cases where the residence was attended with certain circumstances of notoriety, such as entering into a yearly service, or an apprenticeship (*l*). At a subsequent period, indeed, the principle of requiring notice

(*h*) In *R. v. St. James*, 10 East, 31, Bayley, J., says, "before the statute of Charles the second, a settlement was gained by mere inhabitaney, and the statute was passed to prevent this."

(*i*) 1 Bl. Com. 362; see Jac. 2. c. 17, s. 3.

(*h*) 1 Bl. Com. 362.

(*l*) *Ibid.*; and see 3 W. & M. c. 11.

was abandoned altogether (*m*): but the circumstances of notoriety remained, and some of them still remain, (as we shall in the course of this chapter explain more particularly,) indispensable accompaniments of the forty days' residence, so that without them no settlement can be gained. Other consequences in the meantime flowed from the principle that settlement was in the nature of an acquired right: for it became established by a series of judicial decisions, that (like other rights) it might be claimed *derivatively*; that is, that the child was entitled to the parent's settlement, and the wife to that of her husband (*n*); and this addition completes the outline of the settlement law as it still exists,—subject, however, to one important alteration established in the reign of George the third (*o*), viz., that a man coming to settle in a parish is no longer liable to removal upon the mere *probability* of his becoming chargeable; but it is required that he should have actually become chargeable, by receiving or applying for relief; an alteration (it may be observed) which reverts, in some measure, to the principle of the system as it stood anterior to the statute of Charles the second.

The law as to *relief* was stationary to a much later period, though it has latterly undergone fundamental alterations of the greatest importance. Not only the collection of the rate, but the relief of the poor, with all its attendant management, was long left (conformably to the institution of the statute of Elizabeth) to the overseers of the respective parishes. But these officers were found unequal to the proper discharge of the latter duty. In modern times at least, when, by the gradual increase

(*m*) 35 Geo. 3, c. 101, s. 3.

(*n*) Fort. 313; 1 Nol. 274.

(*o*) 35 Geo. 3, c. 110, s. 1. As to the effect of a *certificate* of settlement as conferring the status of irremovability, except in the event

of becoming actually chargeable, see the prior statutes 8 & 9 Will. 3, c. 30; 9 & 10 Will. 3, c. 11; 12 Ann. c. 18, s. 2; 3 Geo. 2, c. 29, ss. 8, 9.

of population and of paupers, its services had become more onerous, they were rarely performed to the satisfaction of the public; and various measures were from time to time devised by the legislature, for improvement of the practical system. Thus by the statute 22 Geo. III. c. 83—commonly called Gilbert's Act (*p*),—any parish was authorized, (by consent of two-third parts in number and value of the owners or occupiers, and with the approbation of two justices,) to appoint *guardians* to act in lieu of overseers, in all matters relative to the relief and management of the poor; and also to enter into a voluntary union with one or more other parishes for the more convenient accommodation, maintenance and employment of their paupers in common. This was followed by the 59 Geo. III. c. 12, called "The Select Vestry Act,"—by which any parish, in vestry assembled, was enabled to commit the management of its poor to a committee of the parishioners called a *select vestry*; to whose orders the overseers should conform (*q*).

But these new methods, though found to be beneficial, were upon the whole not attended by results sufficiently effective. Their introduction, too, being left to the option of the parishioners, the conflict of opinions which generally attends all subjects of political economy, or the dislike of change, or some inactivity in the public mind, prevented their general adoption.

In the meantime the evils resulting from the mismanagement of the poor continued to increase.

The negligent and injudicious administration of the parochial funds, in various parts of the kingdom, had the effect of withdrawing a portion of their due provision from the necessitous and impotent poor, and wasting it on those who were able, but unwilling to work: and this led to idleness, improvidence and vice among the lower

(*p*) See *Henderson v. Sherborne*,
2 M. & W. 239; *R. v. Poor Law
Commissioners, in re Whitechapel*

Union, 6 Ad. & E. 49.

(*q*) As to *vestries*, vide sup.
vol. I. pp. 125—127.

classes of society: and, consequently, to an increase in pauperism and in the amount payable for poor rates.

The case was aggravated by some inherent defects in the principle of the then existing system, which tended strongly to prevent any practical improvement.

For the duty of executing the poor law being left to the several parishes, which stood in no subordination, and owed no deference, to any external authority, reforms suggested from without seldom met with much attention, and little benefit was derived from any example of superior management exhibited in other parts of the kingdom. The size of most parishes, also, was so limited, as to expose them to great disadvantages, both with regard to the employment and the maintenance of their poor; the difficulty and expense of which are both obviously reduced, when the field of operation is wider, and provision can be made on a larger scale. It was on these and similar considerations that parliament, in the year 1833, urged the issue of a royal commission to inquire into and report on the laws relating to the poor. And from the recommendations of the commissioners, after they had thoroughly investigated the subject, emanated the important statute 4 & 5 Will. IV. c. 76, known as "The Poor Law Amendment Act, 1834" (*r*).

(*r*) There are a great variety of statutes in amendment of, or connected with, the system introduced by the Poor Law Amendment Act, 1834. These comprise the following:—5 & 6 Will. 4, c. 69 (The Union and Parish Property Act, 1835); 2 & 3 Vict. c. 84; 5 & 6 Vict. c. 18 (Parish Property and Parish Debts Act, 1842); 5 & 6 Vict. c. 57 (Poor Law Amendment Act, 1842); 7 & 8 Vict. c. 101 (Poor Law Amendment Act, 1844); 8 & 9 Vict. c. 117; 9 & 10 Vict. c. 66 (Poor Removal Act, 1846); 10 &

11 Vict. c. 109 (Poor Law Board Act, 1847); 11 & 12 Vict. c. 31 (Poor Law Procedure Act, 1848); c. 82; c. 91 (Poor Law Audit Act, 1848); c. 110 (Poor Law Amendment Act, 1848); c. 111; 12 & 13 Vict. c. 13; c. 103 (Poor Law Amendment Act, 1849); 13 & 14 Vict. c. 11; c. 101 (Poor Law Amendment Act, 1850); 14 & 15 Vict. c. 105 (Poor Law Amendment Act, 1851); 20 Vict. c. 19; 22 & 23 Vict. c. 49; 24 & 25 Vict. c. 55; c. 76; 25 & 26 Vict. c. 113; 26 & 27 Vict. c. 89; 28 & 29 Vict. c. 79 (The

By this statute the general management of the poor and of the funds for their relief throughout the country, was placed for a limited period under the superintendence and control of "The Poor Law Commissioners;" who had power to make such regulations as they thought proper for guidance of the different parochial authorities, and who were aided in their operations by a certain number of assistant commissioners. This commission was superseded in the year 1847. But in lieu thereof a new and permanent board has been established by 10 & 11 Vict. c. 109, and 30 & 31 Vict. c. 106, which is known as the "Poor Law Board," and to which all the powers and duties of the former poor law commissioners have been transferred (*s*). All *general rules*—a term which extends to all rules directed to affect more than one union (*t*)—promulgated by this Board, must be under the seal of the body, and under the hands of a quorum, of whom the president must be one (*u*); and any such rule may be disallowed by her Majesty in council (*x*). And the Board is, moreover, directed, once in every year, to submit to both houses of parliament a general report of its proceedings (*y*). By the Poor Law Amendment Act, 1834, in connection

Union Chargeability Act, 1865); 29 & 30 Vict. c. 113 (Poor Law Amendment Act, 1866); 30 & 31 Vict. c. 6 (The Metropolitan Poor Act, 1867); c. 106 (The Poor Law Amendment Act, 1867); 31 & 32 Vict. c. 122 (The Poor Law Amendment Act, 1868).

(*s*) 10 & 11 Vict. c. 109, s. 10.

(*t*) *Ibid.* s. 15.

(*u*) The *president* and two *secretaries* of the Poor Law Board receive remuneration for their services. The president may sit in the House of Commons; but only *one* of the secretaries, at the same time. (10 &

11 Vict. c. 109, ss. 8, 9.) In addition to those made members by letters-patent, there are certain persons, viz. the lord president of the council, the lord privy seal, the home secretary, and the chancellor of the exchequer, who are *official* members of the board, and act gratuitously.

(*x*) Sect. 17. As to the removal of Poor Law Board orders, into the court of Queen's Bench, see 11 & 12 Vict. c. 110, s. 4; 12 & 13 Vict. c. 103, s. 13; Westbury-on-Severn Union case, 4 Ell. & Bl. 314.

(*y*) 10 & 11 Vict. c. 109, s. 13.

with the subsequent statute of 10 & 11 Vict. just noticed, the Board is empowered, where it is thought desirable, to direct that the relief of the poor in any parish shall be administered by a board of guardians; to be elected by the owners of property and ratepayers in such parish, in such manner as in the Acts particularized (z). It is, also, to appoint a certain number of Inspectors, for the purpose of exercising a visitorial power over workhouses (a), and of being present at meetings of guardians, or other local meetings held for the relief of the poor (b). Moreover, not only is no union for the future to take place under Gilbert's Act without the previous consent of the Board, but it is also entrusted with the important power of consolidating at its own discretion—so far as the relief and management of the poor is concerned,—any two or more parishes into one body, under the government of a single board of guardians, to be elected by the owners and ratepayers of the component parishes (c). And each of such unions is to have a common workhouse provided and maintained at their common expense; and also a *common fund* to which each of the parishes of

(z) 4 & 5 Will. 4, c. 76, ss. 39, 40; (see *Robinson v. Todmorden Union*, 3 Q. B. 675). As to the election of the guardians and the qualification of the voters, see also 7 & 8 Vict. c. 101, ss. 14—21; 14 & 15 Vict. c. 105, ss. 2, 3; 30 & 31 Vict. c. 106, ss. 4—10.

(a) By 12 & 13 Vict. c. 13, the superintendence of the board is extended to the case of poor persons lodged and maintained by contract, in any establishment not being a lunatic asylum or workhouse, nor under the effective control of any parochial or other local authorities.

(b) 10 & 11 Vict. c. 109, ss. 18, 20.

(c) 4 & 5 Will. 4, c. 76, s. 38.

By 7 & 8 Vict. c. 101, s. 24, county justices residing in a union or parish are to be guardians *ex officio*. By 12 & 13 Vict. c. 103, s. 19, the chairman at any meeting of the board of guardians is to have a casting-vote. By the Marriage and Registration Acts (6 & 7 Will. 4, cc. 85, 86, and 7 Will. 4 & 1 Vict. c. 22), the Metropolitan Police Act (2 & 3 Vict. c. 71, s. 41), the Act for protection of apprentices and servants (14 & 15 Vict. c. 11), and the County Rate Act (15 & 16 Vict. c. 81),—the guardians of the poor are now entrusted with various other duties in addition to those more immediately connected with the administration of the poor law.

which it consists shall contribute (*e*); and on this fund is now, by a recent alteration of the law (*viz.*, by 28 & 29 Vict. c. 79, s. 1), charged all the cost of the relief of the union poor as well as certain other expenses incurred by the board of guardians (*f*).

This short historical review of the principles on which the poor law is founded seemed a proper preliminary to the consideration of the practical system now existing, which may be compendiously explained as follows.

According to the present law, a settlement is acquired by the following methods. 1. By *birth*. For wherever a child is first known to be, that is always *primâ facie*, and until some other can be shown, the place of its settlement (*g*). But if its parents can be proved to have acquired a settlement, either by birth or otherwise, in

(*e*) As to the mode of calculating the contribution of the several parishes to the common fund of the union to which they belong, see 24 & 25 Vict. c. 55, ss. 9—11; 28 & 29 Vict. c. 79, s. 12; 30 & 31 Vict. c. 106, s. 15.

(*f*) Prior to this enactment each parish of a union under the Poor Law Amendment Acts was chargeable separately with the expenses of its own poor, as provided by 4 & 5 Will. 4, c. 76, ss. 25, 26. The other expenses charged on the common fund of the union comprise those incurred in the relief "of any destitute wayfarer or wanderer, or foundling" (11 & 12 Vict. c. 110, ss. 1, 10; 12 & 13 Vict. c. 103, s. 2; 24 & 25 Vict. c. 55, s. 4); in the burial of the workhouse paupers (13 & 14 Vict. c. 6; 28 & 29 Vict. c. 79, s. 1); and in the relief of persons temporarily disabled by accident or sickness (24 & 25 Vict. c. 16, s. 5);

and also the expenses incurred in regard to pauper lunatics (*ib.* s. 6); and for vaccination and registration (28 & 29 Vict. c. 79, s. 1). It is to be observed, with regard to the relief of the destitute poor *in the metropolis*, that the cost of their relief is now distributed among the several unions, parishes and places therein, under the assessment of the Poor Law Board (30 & 31 Vict. c. 6). It may be also worth notice, that on a recent occasion of great distress in the counties of Lancaster, Chester and Derby, the Poor Law Board were authorized, by a temporary Act (25 & 26 Vict. c. 110), to call, in certain cases, on the unions of the county at large to contribute to the relief required in particular unions or parishes situated in such county.

(*g*) As to the proof of settlement by birth, see the *Queen v. Crediton*, 1 Ell., Bl. & E. 231.

another parish, then the *primâ facie* settlement of the child will be superseded by a derivative one, viz. the settlement by parentage, of which we are about to speak next (*h*). 2. By *parentage*. For all legitimate children take the last settlement of the father, and, after his death, of the mother; till they are emancipated from parental authority by marriage, or by attaining the age of twenty-one and living permanently separate from the parent, or by contracting some relation inconsistent with domestic subjection (*i*): and when emancipated, they retain the parental settlement last acquired before that event took place. A bastard child, on the other hand (having in the eye of the law no parent) was at one time held incompetent to claim a derivative settlement. By a provision, however, in the Poor Law Amendment Act, an illegitimate child born since that statute passed, is now to follow the settlement of his mother; until he attains the age of sixteen, or gains another for himself (*k*). But besides those of birth or parentage, there are also settlements acquired by the party's own act. For a female gains a derivative settlement: 3. By *marriage*, i. e. she may claim the settlement which belongs to her husband; and she retains that settlement after his death. If her husband has no settlement (being born abroad and having acquired none), or if his settlement is unknown, then she retains that which belonged to her before marriage. But she cannot, in any case, acquire one in her own right during the marriage. A settlement may also be acquired, 4. By *renting a tenement*, coupled with residence in the same

(*h*) See *R. v. St. Mary, Leicester*, 3 Ad. & Ell. 644; *v. Walthamstow*, 6 Ad. & Ell. 301.

(*i*) See *R. v. Witton cum Twanbrookes*, 3 T. R. 355; *v. Sowerby*, 2 East, 276; *v. Everton*, 1 East, 526; *v. Lilleshall*, 7 Q. B. 159; *v. Scammonden*, 8 Q. B. 349; *v. In-*

habitants of Selborne, 2 Ell. & Ell. 275.

(*k*) 4 & 5 Will. 4, c. 76, s. 71. See *R. v. Walthamstow*, ubi sup.; *v. Wendron*, 7 A. & E. 819; *v. St. Mary, Newington*, 4 Q. B. 581; *v. Sutton Le Brailes*, 5 Ell. & Bl. 814; *v. Combs*, ib. 892.

parish for forty days (*l*). For this purpose, however, it is requisite that the person should have *bonâ fide* rented a tenement, consisting of a separate or distinct dwelling-house or building, or of land (or of both), for the sum of 10*l.* a-year at the least for the term of one whole year; and that he should have occupied the same under such hiring, and actually paid the rent to the amount of 10*l.* for the term of one whole year at the least; and that for the same period, he should have been assessed to and paid the poor rate in respect thereof (*m*). 5. A settlement may also be gained by being *bound apprentice* (*n*), under indenture or other deed, and *inhabiting* for forty days under such binding; either in the same parish where the service takes place, or a different one. But no settlement can be acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas, as a fisherman or otherwise (*o*); and the indenture must in all cases be executed by the apprentice, except in the case of one bound by the parish (*p*). 6. A settlement is gained, of a temporary kind, in any parish, by having *an estate of one's own* there, of whatever value,

(*l*) See *R. v. Snape*, 6 A. & E. 278; *v. Berkswell*, *ibid.* 282; *v. Henley-upon-Thames*, *ibid.* 294; *v. Hockworthy*, 7 A. & E. 492; *Overseers of Willesden v. Paddington*, 3 Best & Smith, 593.

(*m*) 6 Geo. 4, c. 57, s. 2; 1 Will. 4, c. 18, s. 1; 4 & 5 Will. 4, c. 76, s. 66. See *R. v. Hertsmonceaux*, 7 Barn. & Cress. 541; *v. Stow*, 4 Barn. & Cress. 87; *v. Kibworth Harcourt*, 7 Barn. & Cress. 790; *v. Usworth*, 5 Ad. & E. 261; *v. Benjeworth*, 3 Ell. & Bl. 637; *v. Halifax*, 4 Ell. & Bl. 647.

(*n*) As to what constitutes a hiring as apprentice, see *R. v. Billingham*, 5 A. & E. 676. As to service by

apprenticeship generally, see *R. v. Sandhurst*, 6 A. & E. 130; *v. Clossworth*, *ibid.* 286; *v. Exminster*, *ibid.* 598; *v. Barmston*, 7 A. & E. 858; *v. Fordingbridge*, 1 Ell. Bl. & Ell. 678; *v. Barton-upon-Irwell*, 3 Best & Smith, 604; *St. Pancras v. Clapham*, 2 Ell. & Ell. 742.

(*o*) 4 & 5 Will. 4, c. 76, s. 67; see *R. v. Maidstone*, 5 A. & E. 326.

(*p*) As to the binding of poor children as apprentices, see also 4 & 5 Will. 4, c. 76, s. 15; 7 & 8 Vict. c. 101, s. 12; *R. v. Arnesby*, 3 Barn. & Ald. 584; *v. St. Mary Magdalen*, 2 Ell. & Bl. 809.

and whether the interest be legal or equitable (*g*). This particular species of settlement is founded on the principle of the common law, that a man shall not be removed from his own property (*r*). It is provided, however, that no person shall retain a settlement gained by virtue of any estate or interest in a parish, for any longer time than he shall inhabit within ten miles thereof (*s*): and that in case he shall cease to inhabit within that distance, and shall afterwards become chargeable, he shall be liable to be removed to the parish in which he was settled previously to such inhabitancy; or if he have gained a settlement in some other parish since the inhabitancy, then to such other parish (*t*). 7. Lastly, a settlement may be gained by being *charged to and paying the public taxes, and levies of the parish* (*u*),—those for scavengers and highways and the duties on houses being however excepted. But it is provided by the 35 Geo. III. c. 101, s. 4, that no person shall gain a settlement on this ground in respect of any tenement or tenements not being of the yearly value of 10*l.*; and by 6 Geo. IV. c. 57, that no settlement shall be acquired by paying parochial rates for any tenement (not being the person's own property), unless it consists of a separate and distinct dwelling-house or building, or land (or both), *bonâ fide* rented by him for 10*l.* a year at the least for a whole year, and be occupied under such hiring for a year at least. This

(*g*) As to settlement by estate, *R. v. Ardleigh*, 7 A. & E. 70; *v. Belford*, 10 B. & C. 54; *v. Knaresborough*, 16 Q. B. 446; *Wendron v. Stythians*, 4 Ell. & Bl. 147; *The Queen v. Belford*, 3 B. & Smith, 662; *v. Thornton*, 2 Ell. & Ell. 788.

(*r*) 2 Nolan, 58.

(*s*) As to the mode of calculating this distance, see *Queen v. Saffron Walden*, 9 Q. B. 76.

(*t*) 4 & 5 Will. 4, c. 76, s. 68; see *R. v. Hendon*, 2 Q. B. 455.

(*u*) 3 W. & M. c. 11, s. 6. See also 6 Geo. 4, c. 37, s. 2; 1 & 2 Will. 4, c. 42, s. 5; and the following cases: *R. v. Stoke Damerel*, 6 A. & E. 308; *v. St. Giles*, 7 Ell. & Bl. 205; *v. Westbury-on-Trym*, *ibid.* 444; *v. St. Anne's Westminster*, 2 Ell. & Ell. 485; *Everton v. South Stoneham*, *ib.* 771.

title to a settlement is therefore nearly merged in that of renting a tenement (*x*).

Such are the modes in which a settlement may now be acquired, and in which it has been capable of being acquired, since the 14th August, 1834, the date of the passing of the Poor Law Amendment Act of that year; by which statute some material alterations were made in this branch of the law. As questions, however, may still arise with respect to settlements gained under the law as it stood immediately before those alterations, it may be desirable to observe, that before the 14th August, 1834, a settlement might be gained by forty days' residence, accompanied with other circumstances of notoriety, in addition to those which have been above enumerated, viz., 1. By hiring and service; which was where a person, being unmarried and childless, was hired for a year, and served a year in the same service. 2. By executing any public annual office or charge within the parish for one whole year. We may also notice that the settlement by renting a tenement was at that period capable of being acquired without payment of the poor rate, or being assessed to the same.

On this part of our subject we shall only add, that when by any of the modes above enumerated a person has gained a settlement in any parish, he is considered as settled there until he acquires a new one in some other place; but the later acquisition supersedes the earlier.

All those who stand in need of relief, and apply for it, are entitled to be relieved in the parish (or union) in which they happen to be, or, as it is commonly expressed, are *chargeable* thereto (*y*). If settled there, they constitute its *settled* poor. If not settled there, they are termed its *casual* poor (*z*).

(*x*) See Arch. P. L. Act, Introduction, p. 3; St. George's Hanover Square v. Cambridge Union, Law Rep., 3 Q. B. 1,

(*y*) As to the *cost* of such relief, vide sup. p. 171.

(*z*) See 33 Geo. 3, c. 35, s. 3; R. v. St. Pancras, 7 A. & E. 750; and

As to the settled poor, the guardians, however, will be immediately exonerated from the burthen, if the pauper has any relation competent, and by law compellable, to maintain him. The relations who are so compellable are the father and grandfather, mother and grandmother, or children of the pauper (*d*). They are liable to maintain him at such rate, as shall be assessed by an order of the justices at their general, quarter or petty sessions (*e*): and on refusal to obey such order, the sums so assessed are recoverable (with penalties) by a summary proceeding before two justices of the peace, and may be levied by distress and sale of the goods and chattels of the offender; in default of which he may be committed to prison (*f*). To secure the performance of this duty it is moreover provided by 5 Geo. I. c. 8, that where any person shall run away from his place of abode, leaving his wife or children chargeable as paupers,—his goods, or any annual profits of his lands, may be seized under the warrant or order of two justices, and (if such warrant or order be confirmed by the sessions) may be applied towards the maintenance of his wife and children. It is also enacted by 5 Geo. IV. c. 83, that all persons wholly or in part able to maintain themselves or families by work or other means, but refusing or neglecting so to do, whereby they become chargeable as paupers, shall be deemed *idle and disorderly persons*; and may be summarily convicted and imprisoned in the house of correction with hard labour, for any time not exceeding one calendar month. And, by the same statute, the *de-*

see 7 & 8 Vict. c. 101, s. 26, as to the relief of wives whose husbands are beyond sea or confined as lunatic or idiot; and the relief (in certain cases) of widows.

(*d*) 43 Eliz. c. 2, s. 7.

(*e*) 59 Geo. 3, c. 12, s. 26.

(*f*) 4 & 5 Will. 4, c. 76, ss. 78, 99; 11 & 12 Vict. c. 110, s. 8. By

sections 56 and 57 of the former statute, relief given to a child under sixteen (not blind or deaf and dumb) shall be considered as given to the parent; and every person is to maintain his wife's children (if any) born before his marriage with her, until they reach the age of sixteen, or until the death of the mother.

sertion of a family is still more severely penal; for persons running away and leaving their wives or children chargeable, are deemed *rogues and vagabonds*; and incur the liability to the like imprisonment for any time not exceeding three calendar months (*g*).

If there are no relations to whom recourse can be had, the settled poor are then to be relieved by the local authorities, so long as their necessity continues; but if paupers who are able to work refuse to do so, they may be committed to the common gaol or house of correction (*h*).

With respect to the casual poor, they may in general be *removed* in the manner to be presently described; and they are entitled to relief only till such removal can be effected. All such as were born in Scotland or Ireland, the Isle of Man, Scilly, Jersey or Guernsey, and are not settled in England,—may, upon complaint of any guardian, relieving officer or overseer, be removed to the place of their birth (*i*), with their families,—that is, with their wives and children, or such of them as are chargeable and have yet acquired no settlement in their own right (*k*),—by the order and warrant of two justices of the peace (*l*).

(*g*) As to offences and arrests under this Act, see *Reeve v. Yeates*, 1 H. & C. 435; *Horley v. Rogers*, 2 Ell. & Ell. 674. As to expense of prosecution of offences thereunder, see 7 & 8 Vict. c. 101, s. 69. By 12 & 13 Vict. c. 103, s. 3, the chargeability to the common fund of a union shall have the same effect, so far as regards such offences, as chargeability to a parish.

(*h*) 43 Eliz. c. 2, s. 4; 55 Geo. 3, c. 137; 7 & 8 Vict. c. 101, ss. 57, 58.

(*i*) The expenses of removal in the case of a parish not forming part of a union, and not containing

more than 30,000 persons, are payable out of the county rate, 8 & 9 Vict. c. 117, s. 5.

(*k*) See *Much Hoole v. Preston*, 17 Q. B. 548; *The Queen v. St. Giles without Cripplegate*, ib. 636; *v. St. Anne, Blackfriars*, 2 Ell. & Bl. 440.

(*l*) 17 Geo. 2, c. 5; 59 Geo. 3, c. 12; 5 Geo. 4, c. 83; 8 & 9 Vict. c. 117, s. 4. See also 24 & 25 Vict. c. 76; 25 & 26 Vict. c. 113, and 26 & 27 Vict. c. 89, by which a removal order to *Scotland* or *Ireland* is required to be made either at petty sessions, or by a stipendiary or metropolitan police magistrate sitting in court.

Those who have a known place of settlement in England (wherever born) may also be removed to it, with their families, under a similar authority (*m*). The removal order is obtained, upon complaint of the parish (or union) to which the paupers have become chargeable (*n*); and notice thereof in writing, accompanied by a statement in writing of the ground of the removal, must be sent to the parish (or union) on which it is made (*o*). If the order is submitted to, or if no notice of appeal is given within twenty-one days, the pauper is to be removed accordingly; but if such notice is given within that period, he shall be kept where he has become chargeable until the appeal (if duly prosecuted) shall have been determined (*p*). The appeal is to the quarter sessions having jurisdiction for the place from which the removal is directed (*q*). If that court think fit, it may order the parish (or union) against which the appeal shall be decided to pay reasonable costs to the other (*r*); and where the respondents succeed such costs will include the relief and maintenance of the pauper, from the time of the notice of the order of removal (*s*). In the event of some

(*m*) As to the procedure in respect of orders of removal, see 11 & 12 Vict. c. 31; 24 & 25 Vict. c. 76. As to the delivery of the pauper thereunder, 9 & 10 Vict. c. 66, s. 7; 14 & 15 Vict. c. 105, s. 13. As to the offence of unlawfully procuring a removal, see 9 & 10 Vict. c. 66, s. 6; 12 & 13 Vict. c. 103, s. 3.

(*n*) 13 & 14 Car. 2, c. 12, s. 1. If the parish form part of a *union* under the Poor Law Amendment Acts, the order of removal and subsequent proceedings may be had by or against the guardians thereof (28 & 29 Vict. c. 79, s. 2). By 7 & 8 Vict. c. 101, s. 69, and 11 & 12 Vict. c. 110, s. 11, the certificate

of the guardians shall be sufficient evidence of the chargeability of a pauper.

(*o*) 4 & 5 Will. 4, c. 76, s. 79; 11 & 12 Vict. c. 31, ss. 2, 3, 4. See *Reg. v. Yorkshire*, 1 Ell. Bl. & Ell. 713; *v. Ruyton*, 1 Best & Smith, 534.

(*p*) 4 & 5 Will. 4, c. 76, ss. 79, 80, 81, 83; *R. v. Kent*, 6 B. & C. 639; *v. Leominster*, 2 B. & Smith, 391.

(*q*) With regard to the practice on removal appeals, a recent and important case is that of the *Queen v. Sussex*, 4 Best & Smith, 966.

(*r*) 4 & 5 Will. 4, c. 76, s. 82; 12 & 13 Vict. c. 45, ss. 4, 5.

(*s*) 4 & 5 Will. 4, c. 76, s. 84.

doubtful point of law arising, the justices have the power of making their order in the appeal subject to a *special case*; that is, to connect it with a statement of the facts proved before them, so that the event may follow the opinion of the Court of Queen's Bench upon the point of law (*t*). When this course is taken, or when the party decided against is dissatisfied with the order made at sessions, a writ of *certiorari* issues from the Queen's Bench to remove the proceedings to its own jurisdiction (*u*), and the case is then argued in banc, and the order of sessions either affirmed or quashed, according to the law as it appears on the facts given in evidence at the sessions, or stated in the special case. If a pauper has no known place of settlement in England, and was not born in Scotland, Ireland or other part of the united kingdom, then he must remain of necessity in the place where he has become chargeable; and he may claim relief there so long as he continues to be in want, upon the same footing with its settled poor, unless some place be afterwards discovered wherein he may claim a settlement.

There are moreover some particular cases in which the removal of a casual pauper to his or her place of settlement or birth is illegal. For the wife of such a pauper cannot be removed to her place of maiden settlement, so as to separate her from her husband, unless by mutual consent (*x*); nor can a child (whether legitimate or otherwise) be taken away from its mother during its

(*t*) A *special case* may also be stated, by consent of parties and order of a judge of the superior court, immediately after notice of appeal, and without any resort to the court of quarter sessions, 12 & 13 Vict. c. 45, s. 11. The matter may also be referred to *arbitration*, *ibid.* ss. 12—15.

(*u*) As to the writ of *certiorari* generally, *vide post*, vol. IV. p. 30.

The decision of the sessions as to the sufficiency of grounds of appeal cannot be reviewed on *certiorari*. (12 & 13 Vict. c. 45, s. 9.) As to the practice on a settlement order of sessions removed by *certiorari*, see *R. v. Abergele*, 5 Ad. & E. 795.

(*x*) See *R. v. Eltham*, 5 East, 113; *R. v. St. Mary, Beverley*, 1 B. & Ad. 201.

time of nurture, that is, until the age of seven years (*y*). And even though an order of removal be duly made, still if the pauper, by reason of sickness or infirmity, be found not in a state to travel, it must be suspended till the justices are satisfied that it may be safely executed (*z*); and such suspension shall moreover extend to any other of the pauper's family who shall be included in the removal order or warrant (*a*). With respect also to persons who are in custody for felony, misdemeanor, debt, or lunacy, it is to be observed they cannot be removed under the poor laws, from the parish where they happen to be confined (*b*). And it is now also provided (in addition to the restrictions against removal already mentioned) that no person can be removed from a parish in which he has resided for *one whole year* next before the application for a warrant for his removal (*c*); nor can he be removed for becoming chargeable in respect of relief made necessary by sickness or accident,

(*y*) *Cald. 6* ; *R. v. Birmingham*, 5 Q. B. 210.

(*z*) See 35 Geo. 3, c. 101, s. 2 ; 49 Geo. 3, c. 124 ; *The Queen v. Llanllechid*, 2 Ell. & Ell. 530. In the case of a removal to *Scotland* or *Ireland*, the justices must see the persons to be removed, before enforcing the order. (See 24 & 25 Vict. c. 76, and 25 & 26 Vict. c. 113.)

(*a*) 49 Geo. 3, c. 124.

(*b*) As to the relief of persons in prison, see 19 Car. 2, c. 4 ; 23 Geo. 3, c. 23, s. 2 ; 52 Geo. 3, c. 160 ; 58 Geo. 3, c. 113 ; 9 Geo. 4, c. 40.

(*c*) 28 & 29 Vict. c. 79, s. 8. Prior to this enactment the period of residence conferring the status of irremovability was (under 24 & 25 Vict. c. 55) *three* years, and under earlier statutes (9 & 10 Vict. c. 66 ;

11 & 12 Vict. c. 111) *five* years. It is to be observed that from the computation of the required period must be excluded any time passed in prison (see *The Queen v. Potterhanworth*, 1 E. & E. 262), or in military or naval service (see *Queen v. East Stonehouse*, 4 Ell. & Bl. 901 ; *Easton v. St. Mary, Marlborough*, Law Rep., 2 Q. B. 128) ; or as an in-pensioner in Greenwich or Chelsea hospitals ; or in confinement in a lunatic asylum ; or as patient in a hospital ; or during which parochial relief shall have been received. (See *The Queen v. St. George's Bloomsbury*, 4 B. & Smith, 108.) As to the effect of *interruption* of the residence, see 12 & 13 Vict. c. 103, s. 4, and the following cases :—*R. v. Stapleton*, 1 E. & B. 766 ; *Wellington v. Whitchurch*, 4 B. & Smith,

unless the justices shall state in the warrant that they are satisfied that the sickness or accident will produce permanent disability (*d*). Moreover, a woman residing with her husband at the time of his death cannot be removed till twelve calendar months afterwards (*e*), if she shall so long continue a widow (*f*); nor can a child under the age of sixteen, whether legitimate or illegitimate, residing with his or her father or mother, stepfather or stepmother, or reputed father, be removed unless the person with whom such child is residing may lawfully be removed (*g*). But, on the other hand, no person exempted by residence from liability to removal shall, by reason of such exemption, acquire any settlement in any parish (*h*).

The duty of administering *relief*, where a parish is under the government of guardians, or of a select vestry, belongs to those authorities, according to the provisions of the Acts under which they have been respectively appointed, and subject to the rules of the poor law board (*i*).

100; *The Queen v. St. Leonard's Shoreditch*, Law Rep., 1 Q. B. 21; *v. Glossop*, ib. 227.

(*d*) See *The Queen v. St. George's, Middlesex*, 2 B. & Smith, 317.

(*e*) See *Reg. v. Cudham*, 1 E. & E. 409.

(*f*) 9 & 10 Vict. c. 66, s. 2. The case of a married woman *deserted* by her husband is provided for by 24 & 25 Vict. c. 55, s. 3; which renders her irremovable after a residence for three years as if she were a widow, unless her husband shall return to cohabit with her.

(*g*) 9 & 10 Vict. c. 66, s. 3. Where a child under the age of sixteen, residing with its surviving parent, shall be left an *orphan*,—and such parent shall, at the time of death, have acquired by continued

residence an exemption from removal,—the orphan shall be exempt from removal, as if he had himself acquired an exemption by residence. (See 24 & 25 Vict. c. 55, s. 2. *The Queen v. St. Mary Arches, Exeter*, 1 B. & Smith, 890.)

(*h*) 9 & 10 Vict. c. 66, s. 5.

(*i*) It has been already stated that where the parish is part of a union under the Poor Law Amendment Acts, *the cost of the relief* is now borne by the common fund (vide sup. p. 174). By 11 & 12 Vict. c. 110, any question as to the expense of relief between any parishes in a union, or between the guardians and any of the parishes therein, may be submitted by the parties to the poor law board.

Where there are no such authorities it belongs (subject to the same rules) to the overseers; or, where there is a local act of parliament on the subject, to the authorities by such Act established (*h*).

In all cases, however, of *sudden and urgent necessity* arising in a parish under the government of guardians or a select vestry, any overseer is empowered and required by law, whether the applicant for relief is settled in the parish or not, to give such temporary relief as the case may require; which he is directed to do in articles of absolute necessity, but not in money. And if the overseer refuses to give such necessary relief, and the pauper is not settled or usually resident in the parish to which the overseer belongs, any justice of the peace may direct it to be given by an order under his hand or seal; and if the overseer disobeys such order he incurs a penalty, not exceeding 5*l.* (*l*). Whatever be the settlement or residence of the pauper, any justice of the peace is also empowered, in a parish similarly circumstanced, to order *medical* relief in all cases of sudden and dangerous illness; the overseer being subject to the same penalty as in the former case of disobedience (*m*). And, in unions formed under the Poor Law Amendment Acts, any two justices of the peace usually acting for the district may, at their discretion, order any adult person, who is entitled to relief, and unable to work, to be relieved, if he desires it, without residing in the work-

(*h*) Where, in any union or parish the relief of the poor, or the making and levying of the poor rate, is regulated by any local Act, the Poor Law Board has nevertheless a general superintendence. (See the Queen *v.* Poor Law Commissioners, 17 Q. B. 445; *v.* Robinson, *ib.* 466.) And by 30 & 31 Vict. c. 106, s. 2, the Board may, at the request of the guardians of any such union or parish, not being within the metro-

polis, make a provisional order (to be submitted to parliament for confirmation) for the repeal or alteration of the local Act. As to parishes under local Acts, see also 7 & 8 Vict. c. 101, ss. 64, 65; and 11 & 12 Vict. c. 91, s. 12. And as to the relief of the poor in extra-parochial places, see 20 Vict. c. 19.

(*l*) 4 & 5 Will. 4, c. 76, s. 54.

(*m*) *Ibid.*

house. It is provided, however, that one of the justices shall certify in such order, of his own knowledge, that the person is unable to work (*n*).

These powers of overseers and magistrates to afford relief in particular cases, apply (it will be observed) only to parishes under the management of guardians or a select vestry (*o*). In parishes not so circumstanced, their authority in this matter is not specific but general. The duty of administering relief belongs universally, and (in the first instance) exclusively, to the overseer. But if he refuses it in any case in which it is reasonably claimed, it may be ordered by any justice of the peace residing in the parish, or (if there be none resident) in the parish next adjoining, or by order of the justices in their respective quarter sessions; and if the overseer disobeys such order he may be indicted (*p*).

The duty of making and levying the poor rate (*q*), or parochial fund, out of which the relief is to be afforded, still belongs (as before the late change in the law of relief) to the churchwardens and overseers; and the concurrence of the inhabitants is not necessary (*r*). But, for the better execution of these duties, recent statutes authorize the appointment of *collectors and assistant overseers* (*s*). The rate is raised prospectively (*t*) for

(*n*) 4 & 5 Will. 4, c. 76, s. 27. As to out-door relief, see 11 & 12 Vict. c. 91, s. 12. As to the power of guardians to grant out-door relief, in order to enable a pauper to provide *education* for his child, vide post, p. 222.

(*o*) 4 & 5 Will. 4, c. 76, s. 54.

(*p*) 3 W. & M. c. 11, s. 11; 9 Geo. 1, c. 7, s. 1.

(*q*) As to the recovery of poor rates and other local taxes, see 43 Eliz. c. 2, ss. 12, 13; 12 & 13 Vict. c. 14; 25 & 26 Vict. c. 82.

(*r*) 43 Eliz. c. 2, s. 1; 7 & 8 Vict. c. 101, s. 63.

(*s*) See 2 & 3 Vict. c. 84; 7 & 8 Vict. c. 101, ss. 61, 62; 29 & 30 Vict. c. 113, s. 10. As to the appointment, &c., of overseers and assistant overseers, see *R. v. Watts*, 7 A. & E. 461; *The Queen v. Greene*, 17 Q. B. 793; *Worth v. Newton*, 10 Exch. 247. As to collectors of poor's rate and their remuneration, see *Smart v. The Guardians of the Poor of the West Ham Union*, 11 Exch. 867.

(*t*) As to the objection that the rate is retrospective, see *R. v. Gloucester*, 5 T. R. 346.

some given portion of the year, at so much in the pound, according to the parochial assessment, and upon a scale adapted to the probable exigencies of the parish (*u*). By 43 Eliz. c. 2, it is directed to be raised by taxation of every “occupier of lands, houses, tithes impropriate, “propriations of tithes, coal mines or saleable under-“woods” in the parish (*x*); and as *occupier* (*y*) a man is rateable for all which he occupies in the parish, whether he is resident therein or not (*z*); but the tenant (and not the landlord) is considered as the occupier within

(*u*) 1 Nolan, 61, 62.

(*x*) As to *underwoods*, see Lord Fitzhardinge v. Pritchett, Law Rep., 2 Q. B. 135.

(*y*) As to occupier as *servant*, see R. v. Wall Lynn, 8 A. & E. 379. And see R. v. Ponsonby, 3 Q. B. 14. As to the principle on which all property capable of *beneficial occupancy* is to be assessed, see The Queen v. Sherford, Law Rep., 2 Q. B. 503.

(*z*) As to *scientific and literary societies*, see 6 & 7 Vict. c. 36; Russell Institution v. St. Giles, 3 Ell. & Bl. 416; St. Anne v. Linnean Society, *ibid.* 793; Marylehone v. Zoological Society, *ibid.* 807; Purchas v. Holy Sepulchre, 4 Ell. & Bl. 156; Bradford v. Bradford, 1 E. & E. 88. As to *public* property, Reg. v. Shee, 4 Q. B. 2; De la Beche v. St. James, 4 Ell. & Bl. 385; Smith v. Birmingham, 7 Ell. & Bl. 483; Re Oxford Poor Rate, 8 Ell. & Bl. 184; Lancashire v. Stretford, 1 Ell. Bl. & Ell. 225; Liverpool v. Liverpool, 5 H. & N. 526; Tyne v. Chirton, 1 E. & E. 516; Jones v. Mersey Docks, 11 H. L. 443; Lancashire v. Cheetham, Law Rep., 3 Q. B. 14. As to *crown* property, Netherton v.

Ward, 3 B. & Ald. 21; Tracey v. Taylor, 3 Q. B. 966; The Queen v. Stewart, 8 Ell. & Bl. 360; Leith Harbour v. Inspector of the Poor, Law Rep., 1 Scotch App. 17; The Queen v. Leicester, Law Rep., 2 Q. B. 493; R. v. M'Cann, Law Rep., 3 Q. B. 141. As to premises used for *charitable purposes*, R. v. Waldo, Cald. 358; R. v. Skerry, 12 A. & E. 84; R. v. Wilson, *ibid.* 94; R. v. Badcock, 6 Q. B. 787. As to *tithes* and *commutation rent charges*, R. v. Joddrell, 1 B. & Ad. 403; R. v. Barker, 6 A. & E. 388; Re Hackney Rent-charges, 1 Ell. Bl. & Ell. 1. As to *gas companies*, R. v. Gas Company, 6 A. & E. 634; R. v. Beverley, *ibid.* 645. As to *machinery*, Reg. v. Guest, 7 A. & E. 951. As to *corporate* property, R. v. York, 6 A. & E. 419; 4 & 5 Vict. c. 48. As to a *box at a theatre*, Reg. v. St. Martin, 3 Q. B. 204. As to *railway companies*, The Queen v. Brighton Railway, 15 Q. B. 313; South-Eastern Railway Company v. Dorking, 3 Ell. & Bl. 491. As to the *treasurer of a county court*, The Queen v. Manchester, 3 Ell. & Bl. 336.

the statute (*a*). The Act of Elizabeth further directs the rate to be raised by the taxation of “every inhabitant, parson, vicar and other” of the parish; and as an *inhabitant* a man was formerly liable to be rated according to his apparent ability, that is, according to the value of the stock in trade and other local and visible personal property he had within the parish, and of which he made profit (*b*); but by 3 & 4 Vict. c. 89, and 31 & 32 Vict. c. 111, the liability to taxation in regard to inhabitancy is now taken away until 1st October, 1869, and thence to the end of the next session of parliament (*c*).

By 6 & 7 Will. IV. c. 96 (an Act for the regulation of parochial assessments), it was provided (*d*), that no poor-rate shall be of any force which shall not be made on an estimate of the net annual value of the several hereditaments rated,—that is to say, the rent at which the same may reasonably be expected to be let from year to year, free of all usual tenant rates and taxes, and tithes commutation rent-charge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any), necessary to maintain them in a state to command such rent. This statute also prescribes in what form the rate shall be made, and what particulars it shall comprise (*e*); and requires that the parish officers shall sign a declaration at the foot of it, to the effect that these particulars are true and cor-

(*a*) *R. v. Welbank*, 4 M. & S. 222. Where, however, the yearly rateable value of the tenement does not exceed 6*l.* the *owner* may (by the effect of certain provisions contained in 59 Geo. 3, c. 12, s. 19; 13 & 14 Vict. c. 99; 21 & 22 Vict. c. 43) be ordered by the vestry to be rated instead of the occupier. But by the Representation of the People Act, 1867 (30 & 31 Vict. c. 102, s. 7), this course cannot be adopted in any

parliamentary borough.

(*b*) See *R. v. Lumsdaine*, 1 W. W. & H. 587.

(*c*) As to the former practice of rating *stock in trade*, see Report on Local Taxation, pp. 21, 35.

(*d*) As to this Act, see Report on Local Taxation, pp. 28, 48.

(*e*) As to the form of the rate, see *The Queen v. Eastern Counties Railway Company*, 5 Ell. & Bl. 974.

rect as far as they have been able to ascertain by their best endeavours. And by 25 & 26 Vict. c. 103, and 27 & 28 Vict. c. 39, further provisions are made for securing (by a fresh valuation where required) the uniform and correct assessment of the rateable hereditaments comprised within all unions formed under the Poor Law Amendment Acts (*f*).

By 43 Eliz. c. 2, s. 1, no rate can be deemed valid unless it be allowed by two justices; and by 17 Geo. II. c. 3, public notice thereof is to be given at the parish church on the Sunday next after the same has been allowed (*g*). The allowance by the justices has been held to be a mere matter of form (*h*); but, after allowance and publication, any person aggrieved by the rate and having reasonable objection to it, as irregular and unequal, may appeal against it to the next practicable quarter sessions of the peace having jurisdiction in the place for which it is made.

But appeals against a poor-rate may also now in most cases be preferred to another jurisdiction; for by 6 & 7 Will. IV. c. 96, the justices in petty sessions shall, four times at least in every year, hold a special sessions for hearing poor-rate appeals within their respective divisions (*i*); and their decision shall be conclusive, unless the parties impugning it shall, within fourteen days, give notice of appeal therefrom to the next general sessions or quarter sessions of the peace. In either course of proceeding the justices have power to affirm, quash, or amend the rate; or, if it become necessary to set the whole aside, may order the overseers to make a new one (*k*). They

(*f*) As to the adoption of these provisions by unions *not* formed under the Poor Law Amendment Acts, see 25 & 26 Vict. c. 103, s. 45.

(*g*) As to the manner of giving notice, see 1 Vict. c. 45; Ormerod *v.* Chadwick, 16 Mee. & W. 367; Burn-

ley, *app. v.* Methley Overseers, 1 E. & E. 789.

(*h*) *R. v. Dorchester (Justices)*, Str. 393.

(*i*) 6 & 7 W. 4, c. 96, s. 6. See also 27 & 28 Vict. c. 39.

(*k*) 17 Geo. 2, c. 38, s. 6; 41 Geo. 3, c. 23; 6 & 7 Will. 4, c. 96, s. 6.

have also authority to award costs to the successful party (*l*): and the court of quarter sessions may make its decision (as in the case of an order of removal) subject to a special case.

It is the duty of the overseers, and of all persons having the collection, receipt, or distribution of the poor-rate, to render to the proper auditors (*m*),—or, if there be none, to the guardians, or (where there are no such officers) to the justices in petty sessions,—once in every half year, (and oftener if required by the rules of the poor law board,) an account of all monies and things received and expended; and to verify the same on oath if required (*n*). And all balances remaining from time to time in their hands may be recovered from them (if necessary) by a summary proceeding before two justices of the peace (*o*). Overseers are also bound to render an account at the end of their year of office (*p*).

Such are the general heads of the law relating to the poor; the great object of the whole system being to give such relief as charity requires to the necessitous and impotent poor, without affording encouragement to the

(*l*) 17 Geo. 2, c. 38, s. 6; 41 Geo. 3, c. 23; 6 & 7 Will. 4, c. 96, s. 6.

(*m*) See 4 & 5 Will. 4, c. 76; 7 & 8 Vict. c. 101, s. 32, and 11 & 12 Vict. c. 91.

(*n*) Any parish officer supplying, for his own profit, any goods given by way of parochial relief, incurs a penalty of 5*l*. (4 & 5 Will. 4, c. 76, s. 77; see *Henderson v. Sherbourne*, 2 Mee. & W. 236.)

(*o*) 4 & 5 Will. 4, c. 76, ss. 47, 99; 2 & 3 Vict. c. 84; 7 & 8 Vict. c. 101, ss. 32—38. See also Sir John Hobhouse's Act (1 & 2 Will. 4, c. 60); *R. v. St. Marylebone*, 5 Ad. & El. 268.

(*p*) 4 & 5 Will. 4, c. 76, s. 47.

It may be here observed, that there are a variety of other local rates which are levied upon the same assessment, and by the same officers, as the *poor's rate*: (see Report on Local Taxation, p. 62); and returns as to most of these are by 23 & 24 Vict. c. 51, directed to be annually laid before parliament. Moreover, the county rate (as to which vide sup. vol. I. p. 134) is now raised through the agency of the guardians and overseers of the poor, and without the intervention (which the law formerly required) of the high constable.

idle (*q*). And it may safely be asserted that its operation can never be considered as satisfactory, except so far as it tends to promote that combined result. For while humanity and religion prescribe the succour of the destitute, nothing is more obviously unreasonable than to compel the industrious part of the community to maintain those who are unwilling to labour. And surely they must be very deficient in foresight as well as in justice, [who suffer one half of a parish to continue dissolute and unemployed and at length are amazed to find that the industry of the other half is not able to maintain the whole.]

(*q*) It has been felt necessary to condense, as far as possible, the account given of this complex subject. No mention has therefore been made in the text, of certain provisions recently introduced, which, though of considerable interest and importance, did not appear to require to be there noticed in so general an exposition of the poor law. And among these may be instanced those which have been passed for the formation of district *asylums for the temporary accommodation of the houseless poor*. (See 7 & 8 Vict. c. 101, ss. 40—54; 15 & 16 Vict. c. 105, s. 14.) For the same reason, the provisions as to the *burial*, and as to *emigration* of paupers, have been omitted. For the former, see 7 & 8 Vict. c.

101, s. 31; 11 & 12 Vict. c. 110; 18 & 19 Vict. c. 79, c. 105, ss. 11—13; 22 Vict. c. 29; 24 & 25 Vict. c. 55, s. 8. For the latter, see 4 & 5 Will. 4, c. 76, s. 62; 7 & 8 Vict. c. 101, s. 29; 11 & 12 Vict. c. 110, s. 5; 12 & 13 Vict. c. 103, s. 20; 13 & 14 Vict. c. 101, s. 4; 18 & 19 Vict. c. 119, s. 6. Among the provisions passed by, may also be mentioned those of 5 & 6 Will. 4, c. 69; 5 & 6 Vict. c. 18; and 20 & 21 Vict. c. 13, which enable parish guardians or trustees, and ecclesiastical corporations sole, to dispose of land by way of sale or exchange to be used as the *site of a workhouse*; or for any purpose relating to the relief of the poor, which the Poor Law Board may approve.

CHAPTER III.

OF THE LAWS RELATING TO CHARITIES AND
BENEVOLENT INSTITUTIONS.

I. CHARITIES.—From the subject of the maintenance provided by law for the poor, we may pass, by no abrupt transition, to that of public charities.

Charities have been always much favoured by the law (*a*). Thus, though gifts to *superstitious* uses were made void by a statute passed at the period of the Reformation (23 Hen. VIII. c. 10), a distinction was allowed in favour of those for charitable purposes; which were held not to fall within the operation of that statute (*b*). For “no time,” as Lord Coke observes, “was so barbarous as to abolish learning, or so uncharitable as to prohibit relieving the poor” (*c*). And again by the 39 Eliz. c. 5, (made perpetual by 21 Jac. I. c. 1,) any person is enabled, by deed enrolled in Chaucery, to found a hospital and to give it a corporate existence, with capacity to take and purchase goods and chattels, lands and tenements, to hold to them and their successors, without the king’s licence (which by the statutes of mortmain is in general required where land is conveyed to a body corporate); subject only to these conditions, that the lands be freehold, in fee simple, of the clear value of 10*l.* and not exceeding that of 200*l.*, per annum (*d*).

(*a*) Bac. Ab. Ch. Uses, E.

(*b*) See also 15 Rich. 2, c. 5; 37 Hen. 8, c. 4; 1 Edw. 6, c. 14.

(*c*) Porter’s case, 1 Rep. 26.

(*d*) It was subsequently enacted

by 13 Geo. 3, c. 82 (see 24 & 25 Vict. c. 101), that all *lying-in* hospitals must be licensed; and provisions were made for regulating the settlement of bastards born therein.

The same disposition to favour and encourage charities has been evinced in other instances. Thus, by the Statute of Charitable Uses, (43 Eliz. c. 4,) the lord chancellor was empowered to award commissions to inquire of all gifts to such uses, and of all abuses and breaches of trust relative thereto, and to make orders for the future management of the fund (*e*); but the universities and cathedrals, and all colleges, hospitals, and free-schools, having special visitors or governors, were excepted from this provision (*f*).

And whereas the statutes of mortmain prohibit in general the endowment of collegiate or corporate bodies with land, without the king's licence; and some doubts arose at the time of the Revolution, as to the right of the crown to exercise this dispensing power (*g*); therefore, by a statute passed at that period (7 & 8 Will. III. c. 37), after reciting that it would be a great hindrance to learning and other good and charitable works, if persons inclined to grant lands to bodies incorporated for good and public uses should not be permitted to do so,—it was enacted (in confirmation and extension of the prerogative antecedently vested in the crown in this particular), that the king might grant to any persons whatever, a licence to alien, purchase or hold, in mortmain (*h*).

So far the interposition of the legislature had been uniformly favourable to charities. Some abuses, however, were afterwards found or supposed to attend the power of devising lands by will, or making them over at the approach of death, for purposes of this description; and by 9 Geo. II. c. 36, (after reciting that many large and improvident alienations of land had of late been made by dying persons to charitable uses,) it was enacted

(*e*) As to the proceedings under such commissions, see 1 Bac. Ab. Ch. Uses, F.; 3 Bl. Com. 436; 2 Vern. 118.

(*f*) See Collison's case, Hob. 186.

(*g*) See Hovenden's Blackst. vol. ii. p. 272.

(*h*) Vide sup. vol. I. p. 474.

that no lands or hereditaments, or money to be laid out in the purchase thereof, shall be given or conveyed, or anyways charged or incumbered, in trust for or for the benefit of any such uses,—unless by such conveyance, and under such conditions, as the Act specifies; and these need not here be further referred to, as we had occasion to consider this statute, and certain recent enactments by which it has been amended, in a former volume (*i*). We shall therefore only remark, in this place, that the Act does not apply to dispositions of mere personal estate, when *not* directed to be laid out in land; and that such dispositions, whether by will or otherwise, may consequently be made, without restraint, to uses of a charitable description.

Commissions under the 43 Eliz. c. 4, to redress abuses in charities, have been long disused, their place being supplied by remedies of a more simple and effective kind. For, independently of any statute, [the king, as *parens patriæ*, has the general superintendence of all charities] not otherwise sufficiently protected (*k*); [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*) files *ex officio* an information in the Court of Chancery, to have the charity properly established (*l*);] and it is not essential that the relators should be the persons principally interested; for any persons (though the most remote of them who fall within the contemplation of the charity) may stand in that capacity (*m*).

By statute 52 Geo. III. c. 101, it is besides provided, that in every case of the breach of a trust created for

(*i*) Vide sup. vol. I. pp. 476, 477.

(*k*) 3 Bl. Com. 427. As to this qualification of Blackstone's doctrine, see Shelford on Charities, Uses and Trusts, p. 268.

(*l*) 3 Bl. Com. 428; Eyre *v.*

Countess of Shaftesbury, 2 P. Wms. 118; Attorney-General *v.* Middleton, 2 Ves. sen. 329; Same *v.* Brereton, *ibid.* 426.

(*m*) Attorney-General *v.* Bucknall, 2 Atk. 328.

charitable purposes, or wherever the direction of a court of equity shall be deemed necessary for the administration of such a trust, any two or more persons may, on obtaining the previous sanction of the attorney or solicitor-general, apply for relief by petition to the lord chancellor, or the master of the rolls. Such petition is to be heard in a summary way, and the order which the court may make is to be final and conclusive, unless within two years afterwards there shall be an appeal to the House of Lords.

By another statute of the same year (52 Geo. III. c. 102) provision was also made for the registration of charitable donations, in order to prevent their benefits from being lost. A memorial—stating the funds and objects of the then existing charities, the names of the founders (when known), the persons having custody of the deeds of endowment, and the trustees or possessors of the estates—was directed to be registered with the clerk of the peace of the county or town, and a duplicate transmitted to the Court of Chancery. So, with respect to future charities, a like memorial was required to be registered within twelve months after the decease of the donor; but donations neither secured on land nor permanently invested in the funds, or the management of which is left to the discretion of trustees, were (with many other particular cases) excepted from the provisions of the Act.

By recent enactments, however, a more complete protection has now been thrown over the charitable endowment of the country (*g*). By the 16 & 17 Vict. c. 137,

(*g*) We pass over in the text a variety of preceding efforts of the legislature in the same direction. The 58 Geo. 3, c. 21, and 59 Geo. 3, cc. 81, 91, authorized the appointment of commissioners, to inquire into endowed charities and to certify to the Attorney-General such cases as

they found to require the interposition of a court of equity. The powers of these commissioners and their successors were from time to time enlarged and continued by temporary Acts, and did not terminate until 1st July, 1837. The following statutes may also be no-

the 18 & 19 Vict. c. 124, and the 23 & 24 Vict. c. 136, were established “The Charity Commissioners for England and Wales,”—a body appointed by the crown, with power to examine into all charities (*r*), and to prosecute such inquiries by certain of their officers called Inspectors;—to require trustees and other persons to render to the Board written accounts and statements, or to attend and be examined on oath, in relation to any charity or its property;—to authorize suits and proceedings concerning the same;—to sanction building leases, repairs or improvements, or the sale or exchange of charity lands;—to certify to parliament their approval of any new scheme devised for the application or better management of a charity (*s*);—and to permit a great variety of other acts to be done in relation to charities, such as the varying circumstances of each case may from time to time require (*t*).

By the latest of the above Acts, it is provided that the

ticed in this place:—1 & 2 Geo. 4, c. 92, empowering trustees of charity lands to exchange them in certain cases for others; 3 Geo. 4, c. 72, s. 11, authorizing the apportionment of the charitable endowments of any parish divided under the Church Building Acts; 9 Geo. 4, c. 85, quieting the titles of lands purchased for charitable purposes; 1 & 2 Will. 4, c. 60, s. 39, directing lists of the charitable endowments of the parish to be made by the vestries adopting that Act; 2 Will. 4, c. 57, s. 3, providing for the supply of new trustees, where the original trustees of a charity are dead and the representative of the last survivor is not to be found; 4 & 5 Will. 4, c. 76, s. 74, empowering the Poor Law Board to require, from trustees for the poor, a true account in writing of the particulars of the trust; 13 & 14 Vict. c. 60, s. 45, giving facilities as to the vesting of lands, &c., by order of the Court of Chancery, in charity trustees; 14 & 15 Vict. c. 56, facilitating the service of notices with regard to charitable institutions.

(*r*) The expression “charity,” as used in these Acts, is to mean “every endowed foundation and institution within the meaning, purview and interpretation” of 43 Eliz. c. 4, or as to which the Court of Chancery has jurisdiction. See 16 & 17 Vict. c. 137, s. 66; *Re Duncan*, Law Rep., 2 Ch. App. 356.

(*s*) 16 & 17 Vict. c. 137, ss. 54, 60. See as an instance of an Act to confirm a scheme, 24 & 25 Vict. c. 32.

(*t*) As to the Commissioners substituting, in certain cases, one bishop for another as trustee, see 21 & 22 Vict. c. 71. And see 25 & 26 Vict. c. 112, an Act to establish the jurisdiction of the Commissioners, in certain cases.

Board may (subject to certain restrictions and right of appeal) appoint or remove the trustees of any charity, or any schoolmaster or mistress or other officer; or order the transfer, or investment, of any charitable estate (*u*). The jurisdiction, however, conferred by this statute is not to be exercised where the gross annual income of the charity shall amount to 50*l.* and upwards, except on the application of the majority of trustees or administrators of the charity; nor shall any trustee be removed on the ground, only, of his religious belief (*v*). Nor shall the Board exercise such jurisdiction, in any case which by reason of its contentious character, or of any special questions of law or fact which it may involve, or for any other reason, they may consider more fit to be dealt with by a judicial court (*w*). The court having jurisdiction in such matters, in a case where the gross annual income of the charity shall exceed 50*l.*, is the High Court of Chancery. But where it shall only reach or be below that sum, then the court of bankruptcy or county court for the district; which court, after hearing the matter in open court, is to make such order therein as the case may require; though, in certain cases, the order will not be effectual until confirmed by the Charity Commissioners (*x*). From the orders of the Board there is moreover an appeal, by way of petition in a summary way, to the Court of Chancery. In the case of any charity, whatever may be the yearly income of its endowments, such petition of appeal may be presented by the attorney-general, or any person authorized by him or by the Board itself;—and in case such income shall exceed 50*l.*, then it may be presented by any trustee or administrator of the charity. A petition of appeal may, also, be presented by any two inhabitants of the parish or district to which an order of the Board shall be spe-

(*u*) 23 & 24 Vict. c. 136, s. 2.

(*v*) Sect. 4.

(*w*) Sect. 5.

(*x*) 16 & 17 Vict. c. 137, s. 3;

23 & 24 Vict. c. 136, s. 11.

cially applicable—and may also be presented by any schoolmaster or mistress or other officer removed without the concurrence of a majority of the trustees, or other persons acting in the administration of the charity (*y*).

The Acts under consideration also authorize the appointment of corporate bodies, called “The Official Trustees of Charity Lands,” and “The Official Trustees of Charitable Funds,” in whom respectively the land, stock, securities and money of charities may, under such circumstances as pointed out therein, from time to time become vested by order of any court having jurisdiction (*z*); and the Charity Commissioners may order these corporations, respectively, to convey the land, or to assign and pay over the stock, securities and money, as they shall think expedient (*a*).

A great number of cases, however, are exempted from the operation of the Acts (*b*); and among others it is provided that they shall not extend to the universities of Oxford, Cambridge, London or Durham; or to any college or hall in those universities; or to any cathedral or

(*y*) 23 & 24 Vict. c. 136, s. 8.

(*z*) 16 & 17 Vict. c. 137, ss. 48, 53; 18 & 19 Vict. c. 124, s. 15, &c.

(*a*) 18 & 19 Vict. c. 124, s. 37.

(*b*) Charities or institutions *exclusively for the benefit of Roman Catholics*, were originally altogether exempted from the jurisdiction of the charity commissioners for a temporary period; which was continued, by successive enactments, till 1st July, 1860 (see 22 & 23 Vict. c. 50). The law, however, regarding these charities now depends on 23 & 24 Vict. c. 134; which—in cases where an estate is given on trust for the exclusive benefit of Roman Catholics, but is invalidated by reason of certain of the trusts being superstitious

or otherwise illegal—empowers the Court of Chancery, on the application of the Attorney-General or any person authorized by the Charity Commissioners,—or the board itself on the application of the administrators of the charity,—to apportion the estate or its income, and to declare that a fixed proportion thereof shall be subject to such of the trusts as are lawful, and the residue to such trusts for the benefit of persons professing the Roman Catholic religion, as the court or board may, under the circumstances, consider to be most just; and to establish any scheme for giving effect to such apportionment.

collegiate church (*c*); or to the colleges of Eton and Winchester (*d*);—though any exempted charities may petition the Board to have the benefit of the above enactments allowed to them; and any charities whatever may refer any question or dispute arising among their members, in relation to the management, to the arbitration of the Board (*e*).

Some account having now been given of the legislative enactments relating to charities, we will next advert to certain general principles which may be collected from the judicial decisions in regard to this subject.

The courts of equity, (for to these the jurisdiction in general belongs,) take cognizance of all charitable uses or trusts of a public description; and exercise, in relation to them, powers of a very extensive kind. Under the authority of these tribunals, trustees may be called to account for the charitable funds committed to their charge, or new trustees, (where circumstances so require,) may be appointed,—improvident alienations of the charitable estates may be rescinded,—schemes for carrying properly into effect the intention of the donor, (where the case calls for such interference,) may be judicially projected and established,—and every species of relief afforded which it is in the nature of such institutions to require. This equitable jurisdiction, however, is not allowed to usurp upon the proper province of those to whom the administration of the charity may have been confided. In the case of corporations endowed for charitable purposes, the management is usually vested by charter in governors, subject to a controlling or visitatorial power in the founder and his heirs, or in such persons as the founder shall appoint (*f*); and with the pro-

(*c*) 16 & 17 Vict. c. 137, s. 62.

(*d*) 18 & 19 Vict. c. 124, s. 47—
49.

(*e*) 16 & 17 Vict. c. 137, ss. 63;
64; 18 & 19 Vict. c. 124, s. 46.

(*f*) See *Eden v. Forster*, 2 P.
Wms. 326; 3 Salk. 379; 1 Bl. Com.
480; *Philips v. Bury, Ld.* Raym. 8;
*R. v. Governors of Darlington Free
School*, 6 Q. B. 682.

ceedings of such functionaries the law does not interfere, unless they have also the management of the revenues, and are found to be abusing their trust (*f*). It is to be observed, however, that when the king is the founder of an eleemosynary lay corporation, the visitatorial power is vested in the crown (*g*), and committed by royal authority to the Lord Chancellor; who may thus be called upon to redress abuses properly falling within the province of a visitor: but this jurisdiction belongs to him in his personal character only, and not as judge of the Court of Chancery (*h*).

With respect to the nature of these charitable trusts, to which the equitable jurisdiction attaches, we may remark that the word *charitable* is to be here understood in a very large sense. For not only gifts for the benefit of the poor are included, but endowments for the advancement of learning (*i*), as well as institutions for the advancement of science and art, and for any other useful and public purpose (*j*).

The term comprises also donations for pious or religious objects; as to which we may remark, that all objects are considered as religious, which tend to the benefit either of the Established Church of England, or of any body of dissenters sanctioned by law (*k*); and that trusts for the maintenance of Roman Catholic worship are now placed on a similar footing (*l*). And though

(*f*) See the case of Kirkby Ravensworth Hospital, 15 Ves. jun. 314; 2 Ves. jun. 42; Case of Berkhamstead Free School, 2 V. & B. 138; Attorney-General *v.* Talbot, 3 Atk. 673; Same *v.* Lock, *ibid.* 165; Same *v.* Price, *ibid.* 108.

(*g*) *R. v. St. Catherine's Hall*, 4 T. R. 233. See 1 Bl. Com. 480; et sup. p. 148.

(*h*) Co. Litt. 96 a; *Ex parte Dann*, 9 Ves. 547.

(*i*) Attorney-General *v.* Whorwood, 1 Ves. sen. 537.

(*j*) See Attorney-General *v.* Heelis, 2 Sim. & Stu. 67; Trustees of British Museum *v.* White, *ibid.* 594; *Howse v. Chapman*, 4 Ves. 551.

(*k*) Attorney-General *v.* Pearson, 3 Meriv. 409; Attorney-General *v.* Cock, 2 Ves. sen. 273. See 18 & 19 Vict. c. 81, s. 9.

(*l*) See 2 & 3 Will. 4, c. 115; 18 & 19 Vict. c. 86, s. 2; 23 & 24 Vict. c. 134; sup. p. 61.

a trust for the advancement of the Jewish religion, or of any faith hostile to Christianity, has been held illegal, so as to be excluded from the protection of a court of equity (*m*); yet as regards the Jews it is now provided by 9 & 10 Vict. c. 59, s. 2, and 18 & 19 Vict. c. 86, s. 2, that her Majesty's subjects professing the Jewish religion shall be liable, in respect to their schools, places for religious worship, education, and charitable purposes, and the property held therewith, to the same laws as those to which her Majesty's protestant subjects dissenting from the Church of England are liable, and to no other (*n*). Though the definition of charitable trusts is thus wide, we are, nevertheless, to remark that it does not extend to gifts of a strictly private character; for if a sum of money be bequeathed with direction to apply it "to such purposes of benevolence and liberality as the executor shall approve," or even "in private charity," no charitable trust will be created, but the property will belong to the next of kin (*o*). On the other hand, where a gift is for a purpose clearly falling within the description of public charity, though expressed in the most general and indefinite terms, the trust will never be allowed to fail on account of the uncertain limitation of the objects, but the law will provide for it some particular mode of application. In some cases of this description, the right of disposition belongs to the sovereign, who makes it under the sign manual; in others, it is made by the courts of equity (*p*).

It is a rule with respect to all charities, that the intention of the donor, so far as it is practicable and legal, shall be strictly observed; the law not permitting it to be varied without necessity, even by consent of his heirs (*q*).

(*m*) See *In re Masters, &c.* of the Bedford Charity, 2 Swanst. 487; 1 Dickens, 258.

(*n*) Vide sup. p. 63.

(*o*) *Morice v. Bishop of Durham*, 10 Ves. 522.

(*p*) *Morice v. Bishop of Durham*, 1 Turn. & Russ. 260; 10 Ves. 522; Bac. Ab. Ch. Uses.

(*q*) *Attorney-General v. The Margaret and Regius Professors in Cambridge*, 1 Vern. 55.

But where it is incapable of being literally acted upon, or its literal performance would be unreasonable, a decree will be made for its execution, *cyprès*, that is, in some method conformable to the general object, and adhering as closely as possible to the specific design of the donor (*r*). For example, where a sum of money was bequeathed to trustees, to be distributed among the inhabitants of several specified parishes, in money, provision, physic, or clothes, as the trustees should think fit, and the fund ultimately became too large to be suitably confined to those objects,—the court directed it to be applied to the further objects of instructing and apprenticing the children of those parishes for which the charity was designed (*s*). On a somewhat similar principle it has been provided by 7 & 8 Vict. c. 45, as to meeting-houses founded for dissenters, that, where no particular religious doctrines or mode of worship shall have been prescribed by the deed or instrument of trust, the usage of the congregation for twenty-five years shall be taken as conclusive evidence of the doctrines and worship which may be properly observed in such meeting-houses.

Lastly, we may remark, that, though among the civilians a legacy to pious or charitable uses was entitled to a preference, it is not so by our law, which directs that in the case of a deficiency of assets, the charitable legacies shall abate in proportion with the others (*t*).

II. BENEVOLENT INSTITUTIONS.—Besides charities (properly so called), there are various institutions in this country, designed to encourage the industrious classes in

(*r*) See Att.-Gen. *v.* Boulton, 2 Ves. jun. 380; Att.-Gen. *v.* The Ironmonger's Company, 2 Mylne & Keen, 576; *New v. Bonaker*, Law Rep., 4 Eq. Ca. 655.

(*s*) Att.-Gen. *v.* Whitchurch, 3 Ves. 141. See also the Bishop of

Hereford *v.* Adams, 7 Ves. 324; Att.-Gen. *v.* Bovill, 1 Phill. 762; Att.-Gen. *v.* Mansfield, 14 Sim. 601.

(*t*) Bac. Ab. Ch. Uses, E. As to *abatement of legacies*, vide *sup.* vol. II. p. 234.

frugal and provident habits, and to afford them some protection from those ordinary casualties which are incident to all men, but fall most severely on persons in the humbler ranks of life. Of these it is remarkable, that they were originally suggested and brought into use by private individuals, though they attracted at length the favourable notice of the legislature, and acts of parliament have been passed to sanction and promote them. Nor is it possible to refer to them, without pausing to pay the tribute justly due to the humanity and wisdom displayed in their establishment; for while materially contributing to the physical and moral welfare of an important portion of society, they tend by direct consequence to prevent the increase of the public burthens connected with pauperism, and the public disorders resulting from distress among the lower classes. It is but seldom that human laws are able so successfully to reconcile the interests of rich and poor; and to blend, in such perfect harmony, the considerations of benevolence and expediency.

1. *Savings banks.*—These are institutions devised for the safe custody and increase of the small savings of the industrious poor (*u*); and when regulated according to act of parliament, certain benefits and protections are afforded to them by law (*v*). The statute containing the existing regulations is the 26 & 27 Vict. c. 87 (*w*), by which the previous enactments in force on this subject

(*u*) By 5 & 6 Vict. c. 71 (amended by 8 & 9 Vict. c. 27; 12 & 13 Vict. c. 71, and 22 & 23 Vict. c. 20), savings banks are provided for non-commissioned officers and soldiers in the army; and by 17 & 18 Vict. c. 104, s. 180; 18 & 19 Vict. c. 91, s. 17; 19 & 20 Vict. c. 41, and 29 & 30 Vict. c. 43, for seamen in the navy and mercantile marine. The

provisions of these statutes are not included in the text.

(*v*) The first Act for this purpose, was the 57 Geo. 3, c. 130.

(*w*) There are also the 16 & 17 Vict. c. 45, and 27 & 28 Vict. c. 43, with respect to the grant of *government annuities* to depositors in savings banks, as to which vide post, p. 204.

were repealed (*x*). The institutions thus sanctioned consist of banks for the receipt of small deposits of money, the produce of which is to accumulate at compound interest, and the principal and interest whereof are to be paid out to the depositors as required, deducting only the necessary expenses of management. The deposits are not to exceed 30*l.* in the whole in any one year (*y*); and no fresh deposit is to be received when the sum (inclusive of interest) amounts to 150*l.* And where the sum standing in the name of any depositor amounts to 200*l.* (principal and interest included), no interest shall be paid thereon so long as it remains at that amount (*z*). The management of these banks is vested in trustees, who must (by the rules of the bank) be prohibited from receiving, directly or indirectly, any benefit from any deposit made therein (*a*); and who are required to remit the money deposited (with the exception of what is retained in the hands of the treasurer to answer exigencies) to the Bank of England (*b*). The monies so remitted are carried to an account kept in the names of the commissioners for reduction of the national debt, and denominated “The Fund for the Banks for Savings;” which affords interest to the trustees at the rate of 3*l.* 5*s.* per cent. per annum, and the arrears of which are carried half-yearly to the account of the principal (*c*). But the interest payable to depositors themselves is limited to 3*l.* 0*s.* 10*d.* per cent. per annum (*d*). Provisions are also

(*x*) Viz. the 9 Geo. 4, c. 92; 3 & 4 Will. 4, c. 14; 7 & 8 Vict. c. 83; 22 & 23 Vict. c. 53, and 23 & 24 Vict. c. 137. As to the *post office* savings banks, vide post, p. 204.

(*y*) 26 & 27 Vict. c. 87, s. 39.

(*z*) Ibid.

(*a*) Sect. 6.

(*b*) Sect. 15.

(*c*) Sect. 21. The commissioners for the reduction of the national

debt are (by sect. 19) required to invest all monies thus remitted in some parliamentary security, created or issued under the authority of acts of parliament, for the interest on which provision is made by parliament; or else in stock, debenture or other security expressly guaranteed by authority of parliament.

(*d*) Sect. 23.

made to save all unnecessary expense and inconvenience to the members of these institutions. Thus, in the case of the decease of a depositor whose estate does not exceed 50*l.*, no legacy duty attaches, and no stamp duty is payable on the probate or administration (*e*). And if any person die having a deposit not exceeding 50*l.* exclusive of interest, and no will or letters of administration be produced within one month afterwards, the money may be paid to such person or persons as shall appear to the trustees or managers to be the widow, or entitled under the Statute of Distributions or the rules of the bank (*f*). Upon the same principle it is directed, that the trustees may pay over a deposit by a married woman to the woman herself, unless her husband shall give notice of the marriage, and require payment to be made to himself (*g*); that deposits by or on behalf of a minor may be paid to such minor (*h*); and that all disputes between the institution at large and any of its members or their representatives shall be referred to a cheap method of arbitration pointed out for that purpose (*i*).

Any persons forming themselves into a society for the purpose of establishing a savings bank, are entitled to claim for it the benefit of the parliamentary provisions, upon causing the established rules and regulations to be entered in a book, to be kept by one of its officers for the inspection of depositors. It is also requisite, however, that two copies of the rules shall be submitted to a barrister officially appointed for the purpose, who is to certify whether the rules are in conformity to law, and pursuant to the legislative enactments (*k*). And the for-

(*e*) 26 & 27 Vict. c. 87, ss. 41, 42.

(*f*) Sect. 43.

(*g*) Sect. 31.

(*h*) Sect. 30.

(*i*) Sect. 48. See the following decisions on the provisions on this subject contained in one or other of

the former Acts: *Crisp v. Bunbury*, 8 Bing. 394; *R. v. Witham Savings Bank*, 1 Ad. & E. 320; *R. v. Mil-denhall Savings Bank*, 6 Ad. & E. 952; *R. v. Norwich Savings Bank*, 9 Ad. & E. 729.

(*k*) 26 & 27 Vict. c. 87, s. 4.

mation of the bank (in the case of one established after the 28th July, 1863) must be also sanctioned by the commissioners for reduction of the national debt (*m*).

In connection with these institutions it may be here noticed that, by 16 & 17 Vict. c. 45 (as amended by 27 & 28 Vict. c. 43), the commissioners just mentioned may grant to any depositor in a savings bank, or other person whom they shall think entitled to become such depositor, an *immediate* or a *deferred* life annuity depending on a single life, or an *immediate* annuity depending on joint lives with benefit of survivorship or on the joint continuance of two lives, or a sum (not exceeding 100*l.*) to be paid on the death of any person. These annuities and insurances are placed under the management of the same officers as those who conduct the *Post Office* savings banks about to be mentioned.

For the institution of savings banks, in general, being considered as of high importance, both in a moral and political aspect, and as well deserving encouragement and aid from the legislature—it has been recently thought expedient to establish a system for the deposit of small savings at interest, which should be managed by the authorities of the Post Office and enjoy the advantage of the direct security of the government for the repayment of the deposits. The Act passed to carry out this design was the 24 & 25 Vict. c. 14 (*n*), which authorizes the post-master general, with the consent of the commissioners of the treasury, to cause his officers to receive deposits, in all towns in which a branch office for that purpose is appointed, for remittance to the principal office; and to repay the same under such regulations as shall from time to time be prescribed (*o*). Each depositor is to receive

(*m*) 26 & 27 Vict. c. 87, s. 2.

(*n*) This statute was amended in some particulars, other than those referred to in the text, by the 26 & 27 Vict. c. 14.

(*o*) 24 & 25 Vict. c. 14, s. 1. By 30 & 31 Vict. c. 142, s. 6, any money paid into a county court in equitable proceedings there instituted, is to be paid in by the registrar into the Post

from the post-master general, through the branch office at which the deposit is made, an acknowledgment of its amount, which shall be conclusive evidence of his claim to repayment within ten days after demand, with interest thereon at the rate of 2*l.* 10*s.* per cent. per annum (*p*). The monies deposited are to be forthwith paid over to the commissioners for the reduction of the national debt (*q*), to be by them invested in such securities as are lawful for the funds of other savings banks (*r*); and if at any time the fund so created shall be insufficient to meet the lawful claims of all depositors, the treasury is empowered to make such deficiency good out of the consolidated fund (*s*). And it is further enacted, that the accounts both of the post-master general and of the commissioners for the reduction of the national debt, in respect to all monies deposited with or invested by them under the Act, shall be audited by the comptroller general of the exchequer and auditor general of the public accounts (*t*), and that an account of all deposits received and paid during the current year shall be submitted to both houses of parliament (*u*). The Act also contains provisions enabling any person making deposit under it, to transfer the amount to any savings bank managed by trustees; and for the transfer, on the other hand, of the amount due to any depositor in any such savings bank, to the post-master general (*x*).

2. *Friendly Societies*.—The statutes by which these are now governed are the 18 & 19 Vict. c. 63, the 21 & 22 Vict. c. 101, and the 23 & 24 Vict. cc. 58, 137 (*y*).

Office Savings Bank established in the town in which the court is held.

(*p*) 24 & 25 Vict. c. 14, ss. 2, 3, 7.

(*q*) Sect. 5.

(*r*) Sect. 9. Vide sup. p. 202, n. (*e*).

(*s*) Sect. 6.

(*t*) Sect. 13. See 29 & 30 Vict.

c. 39, s. 5.

(*u*) 24 & 25 Vict. c. 14, s. 12.

(*x*) Sect. 10. And see 26 & 27 Vict. c. 14.

(*y*) By 18 & 19 Vict. c. 63, the previous enactments as to friendly societies are repealed, with the exception of 17 & 18 Vict. c. 56; but

A society of this description may have for its object the raising of a fund by subscription for any of the following purposes: 1. The insurance of money to be paid on the birth of a member's child or the death of a member, or for the funeral expenses of the wife or child of a member (*z*). 2. The relief or maintenance of the members, their husbands, wives, children, brothers, sisters, nephews or nieces in old age, sickness or widowhood, or the endowment of members or nominees of members of any age. 3. Any other purpose which shall be authorized by a principal secretary of state, as one to which the powers and facilities of the Acts ought to be extended. But for whatever purpose established, the sum payable on death, or other contingency, to any one member, must not exceed 200*l.*; nor can he subscribe for an annuity exceeding 30*l.* per annum (*a*). And special provisions are made to prevent fraud and mal-practices, in the case of the insurance of money payable on the death of a child under ten years (*b*).

The trustees of friendly societies are required from time to time (with the consent of the society), to invest the funds thereof in some savings bank, or in the public funds, or with the commissioners for the reduction of the national debt, or in such other manner as sanctioned in

this Act has reference only to a certain class of societies, viz. those which grant policies of assurance in the event of death exceeding the sum of £1,000, which societies are no longer to be deemed "friendly societies."

(*z*) By 17 & 18 Vict. c. 105, s. 44, 22 & 23 Vict. c. 40, s. 23, and 23 Vict. c. 13, no man shall forfeit any interest he may possess in any friendly or benefit society, by reason of his enrolment or service in the militia, naval coast volunteers, volunteer force of seamen, or in any corps of yeomanry or volunteers.

(*a*) 18 & 19 Vict. c. 63, s. 9.

(*b*) In case of a sum insured to be paid on the death of a member's child, under the age of ten, for the funeral expenses, payment can only be made to the party applying on his producing a medical certificate as to the probable cause of death. And it is unlawful to pay, on the death of such child under the age of five years, any sum which shall raise the whole amount receivable above 6*l.*, or, if between the ages of five and ten, above 10*l.* (21 & 22 Vict. c. 101, s. 2.)

the Acts (*c*). And all real and personal estate belonging to the society becomes vested in the trustees and their successors without any conveyance or assignment whatever, except in the case of stock in the public funds, which shall be transferred into the name of any new trustees (*d*). And in the event of the death or bankruptcy of, or process issued against, any officer of the society having its monies in his hands, a priority of payment is secured to the institution (*e*). It is also provided, that if any officer of the society or other person shall by false representation or imposition obtain possession of any of its property,—or, having the same in his possession, shall withhold or misapply the same,—the money may be recovered, and the offender subjected to a penalty, by a summary proceeding before justices of the peace (*f*). And all applications for the removal of any trustee, or other relief, order, or direction, or for the settlement of disputes,—where there is no other method prescribed by the society's rules (*g*),—are to be made to the county court of the district within which the usual or principal place of business of the society shall be situate (*h*); and the decision of such court is not subject to appeal (*i*).

Persons wishing to establish a society of this description, may make such rules as they think proper for the

(*c*) 18 & 19 Vict. c. 63, ss. 32, 33. As to how the money so remitted may be invested by the commissioners, vide sup. p. 205, n. (*c*).

(*d*) Sect. 18.

(*e*) Sect. 23.

(*f*) Sect. 24. See *Ex parte O'Donnell*, Law Rep., 1 Q. B. 274.

(*g*) 18 & 19 Vict. c. 63, ss. 9, 24, 44; *Hornby v. Close*, Law Rep., 2 Q. B. 153. In some instances, by the rules of the society, disputes are to be settled by justices; as to

which see 21 & 22 Vict. c. 101, s. 5, and *The Queen v. Lambarde*, Law Rep., 1 Q. B. 388.

(*h*) See *Shea v. St. Patrick*, Law Rep., 3 C. B. 21.

(*i*) 18 & 19 Vict. c. 63, s. 41. See *In re Meredith & Whittingham*, 1 C. B. (N. S.) 216; *Hull v. M'Farlane*, 2 C. B. (N. S.) 796; *Smith v. Pryse*, 7 Ell. & Bl. 339; *Hoey v. M'Farlane*, 4 C. B. (N. S.) 718; *Ex parte Wooldridge*, 1 B. & S. 844. See also County Court Rules and Orders, 1867, Nos. 269, 270.

purpose (*j*). But two copies of such rules must be made out and transmitted to the “Registrar of Friendly Societies;” and when certified by him as conformable to law and to the Acts, one of them is to be returned to the society, and the other is to be kept by him in such manner as shall be from time to time directed by one of the principal secretaries of state (*k*). Upon being so certified, the rules take immediate effect, and are binding in point of law on all the parties concerned (*l*).

3. *Benefit building societies*.—The sanction and assistance of the legislature have also been granted to societies established to raise a subscription fund, by advances from which the members shall be enabled to build or purchase dwelling-houses, or to purchase land,—such advances being secured to the society by mortgage of the premises so built or purchased. By the 6 & 7 Will. IV. c. 32, societies of this description, (their rules being duly certified as required by the Acts relative to friendly societies,) are enabled to transfer shares without payment of stamp duty, and to effect reconveyances of the mortgaged property by a mere receipt for the money advanced, without incurring the expense of a formal instrument (*m*). They are also made subject in general

(*j*) 18 & 19 Vict. c. 63, s. 25. As to the manner in which societies may be dissolved, and the funds divided, see 18 & 19 Vict. c. 63, s. 13; 21 & 22 Vict. c. 101, s. 8; 23 & 24 Vict. c. 58, ss. 1, 3, 5.

(*k*) 18 & 19 Vict. c. 63, s. 26.

(*l*) *Ibid.* It is also provided (by sect. 11), as to all benevolent institutions “formed for the purpose of “relieving the physical wants and “necessities of persons in poor circumstances, or for improving the “dwellings of the labouring classes, “or for granting pensions, or for

“providing habitations for the members or other persons elected by “them,” that if two copies of their rules be transmitted to the registrar, and he shall certify them as not repugnant to law, certain portions of this Act shall be applicable to such institutions; and among others, that which establishes the jurisdiction of the county courts in cases of dispute among the members, or between the members and the officers of the society.

(*m*) See *Thorn v. Croft*, Law Rep., 3 Eq. Ca. 193.

to the various provisions of the law relating to friendly societies (*n*).

4. *Industrial and provident societies*.—Lastly, it has been deemed expedient to extend certain of the statutory provisions relating to friendly societies, to such associations of persons (not being less in number than seven) as shall establish themselves for the purpose of carrying on any labour, trade or handicraft, whether wholesale or retail (except the business of banking), and of applying the profits for any purpose allowed by the Friendly Societies Acts, or otherwise permitted by law (*o*): and to such associations (when duly registered) it has been provided by 25 & 26 Vict. c. 87 (amended by 30 & 31 Vict. c. 117), that certain provisions in the Acts relating to friendly societies shall apply; and (amongst others) those which have reference to exemption from stamp duties and income tax,—to the settlement of disputes by arbitration or justices,—to the compensation of members unjustly excluded,—to the power of justices or county courts in case of fraud (*p*),—and to the jurisdiction of the Registrar of Friendly Societies (*q*). It is also enacted that no member of any society under the Act shall be en-

(*n*) See the following cases out of those which have arisen on the Acts relating to Benefit Building Societies:—*Morrison v. Glover*, 4 Exch. 430; *Walker v. Giles*, 6 C. B. 662; *Reeves v. White*, 17 Q. B. 995; *The Queen v. Evans*, 3 Ell. & Bl. 363; *The Queen v. Trafford*, 4 Ell. & Bl. 122; *Card v. Carr*, 1 C. B. (N. S.) 197; *Farmer v. Giles*, 5 H. & N. 753; *Alexander v. Wornman*, 6 H. & N. 100; *Bottomley v. Fisher*, 1 Hurl. & C. 211; *Dean v. Mallard*, 15 C. B., N. S. 19; *Allard v. Bourne*, *ib.* 468; *The Queen v. D'Eyncourt*, 4 B. & Smith, 820;

Parker v. Butcher, Law Rep., 3 Eq. Ca. 762.

(*o*) By 25 & 26 Vict. c. 87, associations for working mines and quarries were excluded from the Act, but this restriction was removed by 30 & 31 Vict. c. 117.

(*p*) See County Court Rules and Orders, 1867, Nos. 269, 270.

(*q*) 25 & 26 Vict. c. 87 (The Industrial and Provident Societies Act, 1862, s. 15). This statute repeals the previous Acts regulating Industrial and Provident Societies, viz., 15 & 16 Vict. c. 31; 17 & 18 Vict. c. 25, and 19 & 20 Vict. c. 40. See also 30 & 31 Vict. c. 117, ss. 3, 12.

titled to hold or claim any interest therein exceeding the sum of 200*l.* (*r*);—that copies of the rules must be forwarded to the Registrar of Friendly Societies, who shall thereupon give his certificate of registration (*s*);—that, on due registration, the members of the society shall become a body corporate, with limited liability, and power to hold lands and buildings (*t*);—and lastly, that any society registered under this Act may be constituted a company under the Companies Act, 1862, by conforming to the provisions of that statute (*u*).

(*r*) 25 & 26 Vict. c. 87, s. 9; 30 & 31 Vict. c. 117, s. 2.

(*s*) 25 & 26 Vict. c. 87, s. 5; 30 & 31 Vict. c. 117, s. 4.

(*t*) 25 & 26 Vict. c. 87, s. 5. See *Queensbury Industrial Society v. Pickles*, Law Rep., 1 Exch. 1.

(*u*) As to the 25 & 26 Vict. c. 89, vide *snp.* p. 142 et seq. In

addition to the societies of which some account has been given in the text, we may also refer to *loan societies*, which are regulated by 3 & 4 Vict. c. 110, and 26 & 27 Vict. c. 56; and to *discharged prisoners' aid societies*, as to which, see 25 & 26 Vict. c. 44; 28 & 29 Vict. c. 126, s. 42.

CHAPTER IV.

OF THE LAWS RELATING TO EDUCATION.



THERE can be no doubt that the subject of national education is one deserving the anxious attention of the legislature: for it is among persons who have to a certain extent had the advantage of intellectual culture, that the temptations to crime will ordinarily be most counteracted by the suggestions of conscience or of prudence; and it is among these, too, that the arts by which the condition of human life is improved and adorned will be found chiefly to flourish. But the object is recommended to us by considerations of a still higher kind than these; it being obvious that a country which professes the Christian faith should endeavour to promote the education of its people at large, to such an extent at least, and in such a method, as may best ensure their full and practical acquaintance with the truths of the Bible. Upon the question, however, whether it is right or expedient to enforce education among us by laws of a compulsory character, there is fairly room for difference of opinion. That it might be done indeed without violating the principles of civil liberty, will not perhaps be doubted by those who consider it as consistent with those principles, that parents should be compellable (as they already are) to provide, out of their means, for the *bodily* wants of those to whom they have given birth; but a real difficulty arises in regard to the doctrinal differences which unhappily prevail on particular tenets of our common faith; for these would make it impossible, consistently with the still

more sacred claims of religious liberty, to devise a system of education which should comprise any prescribed course of religious teaching, and should not at the same time wound the consciences of some section, (more or less numerous,) of the community,—while, on the other hand, the consciences of a large majority would revolt at any national system which should leave unprovided for the need of Christian instruction.

This difficulty serves to explain why the education of the people has not hitherto been made obligatory by the English laws (*a*); but, as there has long been a growing sense among us of the importance of the object itself, our legislature has long been endeavouring to promote it indirectly, by provisions tending to encourage the exertions, and give effect to the views, of such private persons as have been led from time to time, by philanthropic or religious feelings, to establish schools for the benefit of the more indigent classes, conducted upon such Chris-

(*a*) On the 30th June, 1858, a royal commission issued on the address of the House of Commons, “to inquire into the state of popular education in England.” This commission made, on the 18th March, 1861, a report, which contained a variety of recommendations, none of which, however, are in favour of any *compulsory* system of education except in the case of vagrants and criminals.

Also in the year 1861 a royal commission issued to inquire into endowments and management of certain *public schools* (including Eton, Winchester, Westminster, the Charterhouse, Merchant Taylor’s, Harrow, Rugby, and Shrewsbury). On their report being presented, a temporary statute (27 & 28 Vict. c. 92, continued by 31 & 32 Vict. c. 111), was passed to prevent the

future acquisition of any vested interests by those holding office in the above schools, such as might impede the free action of the legislature; and an Act has now been passed (31 & 32 Vict. c. 118), to carry into effect the changes recommended by the commissioners.

Moreover, in the year 1864, a royal commission issued to inquire into the education given in those places of instruction not comprised within the scope of the two previous commissions: viz., 1. Grammar and other endowed schools; 2. Proprietary schools; and 3. Private schools. An elaborate report of this last commission has been now laid before parliament, and a temporary statute passed (31 & 32 Vict. c. 32) to prevent the accrual of vested interests in offices in endowed schools, pending legislation on the subject.

tian principles as the conscience of the founders has in each particular case suggested (*b*). We may subject the provisions on this subject hitherto enacted by parliament to the following arrangement:—

I. As to *Grammar Schools*.

By 3 & 4 Vict. c. 77 (*c*), an Act passed in the year 1840, for improving the condition and extending the benefit of grammar schools,—which it defines to mean any endowed school of either royal or private foundation, founded or maintained for teaching Latin and Greek, or either of such languages (*d*),—it was enacted, that, whenever any question shall come under consideration in a court of equity concerning the system of education thereafter to be established in any grammar school, or the right of admission into the same, it shall be lawful for such court to make decrees or orders for extending the system of education in the school in question, to other useful branches of literature and science, for regulating the right of admission into the same, or for establishing schemes for the application of its revenues,—paying due regard nevertheless to the intentions of the founders and benefactors, as well as to other circumstances; and where any special visitor exists, giving him an opportunity to be heard. In many other respects, also, the Act places the management of such schools under the control of the Court of Chancery; and it provides that all powers

(*b*) By 23 Vict. c. 11, the trustees or governors of any endowed school may make orders for the admission of children whose parents are not in communion with the church or sect according to whose doctrines or formularies religious instruction is to be afforded under the endowment. But this is subject to various exceptions in the Act particularized.

(*c*) On the construction of this Act, see *Attorney-General v. Bi-*

shop of Worcester, 21 L. J. (Ch. Ca.) 25; Manchester School Case, Law Rep., 1 Eq. Ca. 55.

(*d*) 3 & 4 Vict. c. 77, s. 25. The Act however does not extend to the universities, or to such colleges or grammar schools as therein enumerated,—including Eton, and the other schools reported on by the commission of 1861 (with the exception of Shrewsbury), together with some others. (Sect. 24.)

which it confers on that court may be exercised in cases brought before it on mere petition, according to the provisions of the 52 Geo. III. c. 101, with regard to charitable trusts (*e*).

II. As to *Sites for Schools*.

By 4 & 5 Vict. c. 38 (*f*), intituled "An Act to afford "Sites for Schools," it is provided that any person, seised legally or equitably in fee simple, fee tail, or for life, in any lands of freehold, copyhold or customary tenure (*g*), and having the beneficial interest therein in possession,—may grant by way of gift, sale, or exchange in fee simple, or for term of years, any quantity of such land not exceeding *one acre* as a site for a school to educate poor persons, or for the residence of the master or mistress of such a school, or otherwise for the purposes of the education of poor persons in religious and useful knowledge (*h*). But there is a proviso that no such grant

(*e*) 3 & 4 Vict. c. 77, s. 21. As to the 52 Geo. 3, c. 101, vide sup. p. 196. The provisions of the Charitable Trusts Acts, (vide sup. pp. 193, 194,) seem also to apply to the grammar schools in question.

(*f*) This Act (repealing a former statute on the same subject, 6 & 7 Will. 4, c. 70) is itself explained and amended by 7 & 8 Vict. c. 37, 12 & 13 Vict. c. 49, and 14 & 15 Vict. c. 24. See also 22 Vict. c. 27, an Act "to facilitate grants of land to be made near populous places, for the use of regulated recreation of adults and as play-grounds for children." The powers given by the 4 & 5 Vict. c. 38, are also extended by the 30 & 31 Vict. c. 133, to the case of *enlargement of churchyards*.

(*g*) As to the manner of convey-

ing a site for a school in the case of copyhold, see 12 & 13 Vict. c. 49, s. 6.

(*h*) 4 & 5 Vict. c. 38, s. 2. By sect. 9, any person or corporation may grant any number of sites for distinct schools and residences, though the aggregate quantity granted shall exceed one acre, provided that the site of *each* school and residence do not exceed that extent. And, again, by 12 & 13 Vict. c. 49, s. 3, it is declared, that nothing in 4 & 5 Vict. c. 38, shall prevent any person or corporation from granting any number of sites for distinct schools in the same parish, provided the aggregate quantity granted by such person or corporation in the same parish shall not exceed one acre. And by 14 & 15

shall be made by any person seised for life only, unless the person next in remainder in fee simple, or fee tail (if legally competent), shall join in such grant: and also, that if any portion of waste or commonable land shall be gratuitously conveyed by any lord or lady of a manor for such purposes, the rights of all persons in the land so conveyed shall be thereby barred; but that, upon any land granted under the Act ceasing to be used for the purposes above mentioned, it shall revert to and become a portion of the estate of the former possessor thereof, or become again parcel of the manor, as the case may be (*i*). It is also enacted, that land to the extent of an acre may, for the purposes of the Act, be granted, by any *corporation* ecclesiastical or lay, sole or aggregate, in whom it may be, in any manner, vested, (though no ecclesiastical corporation sole below the dignity of a bishop, is to make such grant without the consent in writing of the bishop of the diocese); and that all grants for the purpose of the education of the poor may also be made to any corporation or trustees, to be held by them for such purposes (*j*).

Again, by 15 & 16 Vict. c. 49, all enactments in the Acts relating to grants of sites for schools, shall be construed as applicable to such schools or colleges for the religious or educational training of the sons of yeomen, tradesmen or others, or for the theological training of candidates for holy orders,—as are erected or maintained in part by charitable aid, and which in part are self-supporting. There is, however, a proviso that no ecclesias-

Vict. c. 24, the word “parish” shall—in the case of any parish divided into two or more ecclesiastical districts—be construed to signify each ecclesiastical district.

(*i*) 4 & 5 Vict. c. 38, s. 2.

(*j*) Sects. 6, 7. See also, for explanation and extension of the law

on this subject, 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49; 13 & 14 Vict. c. 28; 14 & 15 Vict. c. 24. And see provisions as to the appropriation, *under inclosures*, of allotments for sites of schools, 8 & 9 Vict. c. 118, s. 34; 20 & 21 Vict. c. 31, s. 13.

tical corporation shall be authorized to grant any site under this Act, except for schools or colleges in union with the Established Church; or to grant by way of gift, without a valuable consideration, for any of the purposes of the Act, any greater quantity of land in the whole than two acres.

Finally, by 17 & 18 Vict. c. 112 (called "The Literary and Scientific Institutions Act, 1854"), with the view to afford greater facilities for procuring sites and buildings for institutions for the promotion of literature, science, or the fine arts, or the diffusion of useful knowledge,—it is provided that such persons and corporations as are described in the 4 & 5 Vict. c. 38 (*h*), may grant in fee simple, or for term of years, any quantity not exceeding *one acre* of their land, (whether built upon or not,) as a site for any such institution as thereafter described (*l*). There is, however, a proviso that no such grant made by a person seised only for life shall be valid, unless the person entitled in remainder in fee simple, or fee tail, if legally competent in that behalf, shall join in the grant. There is also a similar provision, as that in the 4 & 5 Vict. c. 38, enacting that land gratuitously granted for the purposes of an institution shall revert to the estate of the grantor, on its ceasing to be used for that purpose, except only in the case of a removal of site, when such land may be exchanged or sold for

(*h*) Vide sup. p. 214.

(*l*) 17 & 18 Vict. c. 112, ss. 1, 4. The description referred to in the text is in sect. 33, which provides, that the Act shall apply to every institution "for the time being established for the promotion of science, literature or the fine arts, for adult instruction, the diffusion of useful knowledge, the foundation or maintenance of libraries or reading-rooms for general use among the members or open to

"the public, of public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments or designs." By sect. 10, any person or corporation may grant any number of sites for distinct or separate institutions, although the aggregate quantity granted by such person shall exceed one acre, provided the site of each institution do not exceed that extent.

the benefit of the institution. There are also in the Act of 17 & 18 Vict. c. 112 a variety of other provisions with reference to such institutions. These relate chiefly to the persons by and to whom, and the manner in which, conveyances may be made, and as to the form of such conveyances;—as to the subsequent sale or exchange of the land conveyed;—as to the liability of the trustees in whom such land is vested, to rates, taxes, and other charges, and expenses;—as to the manner in which the personal property of the institution shall be deemed to be vested;—as to the manner in which suits by or against them may be brought, and in which judgment shall be satisfied;—as to their power to make bye-laws enforceable in a local court of the district(*m*);—as to the liability of individual members to be sued or prosecuted in matters affecting the property of the institution;—and as to the manner in which the institution may proceed to effect an alteration, extension or abridgment of the purposes for which they were established, or to effect their own dissolution, or the adjustment of their affairs(*n*).

III. As to *Parliamentary grants for the purposes of Education.*

By 7 & 8 Vict. c. 37—after reciting that during several years past divers sums of money had been granted by parliament to her majesty, to be applied for the purpose of promoting the education of the poor in Great Britain, and that similar grants might thereafter be made(*o*), and

(*m*) See County Court Rules and Orders, 1867, Nos. 269, 270.

(*n*) The “Royal Institution” and the “London Institution for the advancement of literature and the diffusion of useful knowledge” are exempted from the provisions of the Act (17 & 18 Vict. c. 112, s. 33).

(*o*) Such grants have accordingly continued to be annually made. In the year 1867 the annual grant

for public education in Great Britain was 705,865*l.*; and for public education in Ireland, 344,700*l.* (30 & 31 Vict. c. 120, sched. I.) The money so voted, from time to time, has been applied by the Education Committee of the Privy Council, without preference of any particular religious denomination, in aid of the the numerous schools established throughout the kingdom by private

that her majesty had appointed a committee of her council to receive application for assistance from such grants, and to report thereon, and to advise her as to the terms and conditions upon which such assistance should be granted, and that many such reports had been made and approved of by her majesty, and the terms and conditions having been assented to by the applicants, grants had been made out of the said fund, and that in some cases, by reason of the deeds of endowment of schools, in respect of which such application had been made, having been executed before the grant was made, such terms and conditions had not been and could not be made permanently binding on the estate—it is provided, that where, in such cases, any such grant has been or shall be made in aid of the purchase of the site, or of the erection, enlargement, or repair of the school, or of the residence of the master or mistress, or of the furnishing of the school, upon terms and conditions providing for the inspection of the school by an Inspector appointed by her majesty, such terms and conditions shall be obligatory on the trustees and managers of the school, in like manner as if they had been inserted in the conveyance of the site of the school, or in the declaration of the trusts thereof: provided that such terms and conditions shall have been, or shall be, set forth in some document in writing, signed by the trustees, or the major part of them, or by the party conveying the site, in the case of a voluntary gift.

Again, by 18 & 19 Vict. c. 131, in order that greater

benevolence, for the religious, moral, and intellectual improvement of the indigent classes. Money out of the grant is given under the existing regulations to *elementary* schools (that is, schools, endowed or otherwise, for the instruction of children), and to *normal* schools (that is, schools for training schoolmasters

and schoolmistresses). The code of regulations in its present revised form is to regulate all grants to be made on applications received after 30th June, 1862, and if hereafter materially altered is not to be acted on till laid on the table of both houses of parliament for at least one calendar month.

security may be afforded for the due application of money advanced to the trustees or managers of schools out of such parliamentary grants for the promotion of education,—it is provided, that where any such grant shall be made to any trustees, manager, or others, (on their application, with the consent of those in whom the legal estate is vested,) for or towards the purchase of the site of any school, or for the erection, enlargement, or repair of a school, or the residence of the master or mistress, or for the furnishing such school or residence,—no sale, exchange, or mortgage of the premises shall be valid, unless either the written consent of a secretary of state shall be given to the same, or else the amount of the grant be repaid. But this provision is not to affect a purchaser for valuable consideration without notice; nor to be deemed to apply to any school in respect of any grant made *previously* to the statute without any such conditions having been imposed.

And, lastly, we may notice that by 19 & 20 Vict. c. 116, her majesty is empowered from time to time, by warrant under her royal sign manual, to appoint any member of the privy council to be during her pleasure *vice-president* of the committee of the privy council on education, and to direct that a salary not exceeding 2,000*l.* per annum be paid to him out of any monies provided for that purpose by parliament; and such *vice-president* shall be capable of being elected, sitting and voting as a member of the House of Commons.

IV. As to *Education under the Poor Law.*

By 7 & 8 Vict. c. 101, s. 40 (amended by 11 & 12 Vict. c. 82, 13 & 14 Vict. cc. 11, 101, and 31 & 32 Vict. c. 122), the Poor Law Board has power to combine parishes and unions into *school districts* for the instruction of such of their chargeable infant poor (not being above the age of sixteen) as are orphans, or are deserted

by their parents, or whose parents or guardians consent to their being placed in the school of such district (*p*). And by sect. 42, a Board of managers, consisting of members chosen from the ratepayers of the district, shall be constituted for every such district school (*q*); and such Board shall, with consent of the bishop of the diocese, appoint at least one chaplain of the Established Church, to superintend the religious instruction of the infant poor in such school (*r*); and it shall be lawful at all times for any Inspector of schools, appointed by her majesty in council, to visit such district schools, and to examine into the proficiency of the scholars taught therein.

By 18 & 19 Vict. c. 34, it is also provided, that the guardians of the poor may (subject to the superintendence of the Poor Law Board) grant relief for the purpose of enabling any poor person, relieved out of the workhouse, to provide education for his children (being between the ages of four and sixteen), in any school to be approved of by the guardians, for such time and under such conditions as they shall see fit. There is, however, a proviso that it shall not be lawful for the guardians to impose such education as a condition of out-door relief.

And by 25 & 26 Vict. c. 43, the guardians of any parish or union are moreover enabled to send any poor

(*p*) It is to be observed, that a portion of the sum annually voted by parliament for administration of the poor laws is distributed (under the advice of the Education Committee of the Privy Council, and in relief of the poor rates) for the schoolmasters and schoolmistresses of the Poor Law Schools. (See the Revised Code, 1862, chap. iii. part ii.)

(*q*) By 22 & 23 Vict. c. 49, provision is made for the payment of debts incurred by school district boards.

(*r*) 7 & 8 Vict. c. 101, s. 43. It is, however, provided, that no scholar shall be educated in any religious creed other than that professed by his parents, or to which his parents may object; or in case of an orphan or deserted child, to which his next of kin may object; and that a minister of the persuasion in which the child has been brought up, or in which the parents or next of kin desire him to be instructed, may *visit* such child for the purpose of giving him religious instruction.

child, (being an orphan, or deserted, or else with the consent of his parents,) to any school certified by the Poor Law Board as fit for the purpose, and supported wholly or in part by voluntary subscriptions, and the manager whereof shall be willing to receive such child(s); and they are authorized to pay the expenses incurred thereby, and for the maintenance, clothing and education of the child at such school, out of the funds in their possession—to the extent, at least, of what the child's maintenance in the workhouse would have cost during the same period.

V. As to *Reformatory Schools*.

By 29 & 30 Vict. c. 117, it is provided that a principal secretary of state (*t*) may, upon application made to him by the managers of any reformatory school for the better training of youthful offenders, direct an inspector of prisons (who shall be styled the inspector of reformatory schools) to examine into the condition and regulations of such school; and (after his report) may certify that the school in question is fitted for the reception of youthful offenders (*u*). And it is made lawful for the court, magistrate or justice before whom any person, under the age of *sixteen*, shall be convicted, and sentenced to receive punishment to the extent of ten days imprisonment at the least,—to direct that, at the expiration of such confinement, the offender shall be sent to some certified reformatory school (selecting, where possible, one conducted according to the religious persuasion to which the offender appears to belong) for a further period of not less than two or more than five years (*v*). But if the offender shall be under the age of *ten*, then, in order that

(*s*) The school must not, however, be one conducted on principles contrary to the religious denomination to which the child belongs (25 & 26 Vict. c. 43, s. 9); nor may it be a reformatory school (sect. 10).

(*t*) Such duties as those referred to in the text, are transacted by the secretary of state for the *home department*.

(*u*) 29 & 30 Vict. c. 117, s. 4.

(*v*) Sect. 14.

he may be so dealt with, the sentence must be at the assizes or the quarter sessions; or, else, he must have been previously charged with some crime punishable with penal servitude or imprisonment (*x*). And with regard to the expenses attendant on the removal, custody and maintenance of such an offender, they are to be defrayed (if of ability) by his parent or such other person as may be legally liable for his maintenance,—to the extent of five shillings per week (*y*); but the commissioners of the treasury are enabled to contribute, out of money provided by parliament, such sum as the secretary of state may recommend towards the expenses of any certified reformatory school (*z*). It is further to be observed, that such secretary may at any time order any particular offender to be discharged from the school to which he has been sent; or may direct that he be removed from one school to another (*a*).

VI. As to *Industrial Schools*.

By 29 & 30 Vict. c. 118, a principal secretary of state may, upon the application of the managers of any industrial school, direct an examination to be made by the inspector of reformatory schools (who is also to be inspector of industrial schools) into its condition: and may then grant a certificate constituting the same a certified Industrial School within the meaning of the Act (*b*). To such a school is liable to be sent any child (not previously convicted of felony) who, being apparently under the age of twelve, is charged before two justices with having committed an offence punishable by imprisonment, or some less punishment; or who, being apparently under the age of fourteen, is brought before them as

(*x*) 29 & 30 Vict. c. 117, s. 14.

(*y*) Sect. 25.

(*z*) Sect. 24. By section 28, any "prison authority" (see 28 & 29 Vict. c. 126, s. 5) may from time to time contribute towards the ex-

penses connected with any certified reformatory school, subject, in certain cases, to the approval of the Home Secretary.

(*a*) Sect. 17.

(*b*) 29 & 30 Vict. c. 118, s. 7.

being found begging or receiving alms, or being in any street or public place for such purpose; or as being found wandering without any home or settled place of abode, or proper guardianship, or visible means of subsistence; or as found destitute (either being an orphan or having a surviving parent who is undergoing penal servitude or imprisonment), or frequenting the company of reputed thieves; or whose parent, step-parent or guardian represents that he is not amenable to his control, and that he desires him to be sent to such school (*c*). Such a child, after full inquiry made into the facts of the case by the justices, may, if they think it expedient, be sent for such period as they may think necessary for his education and training to any certified Industrial School, the managers of which shall be willing to receive him; but not so as to extend the period of detention beyond the time when the child shall attain the age of sixteen; beyond which age, he cannot be detained except with his own consent in writing (*d*). But the Act requires that, if possible, a school shall be selected which is conducted in accordance with the religious persuasion to which the parent appears to belong; and a minister of such persuasion may visit the child for the purpose of religious instruction (*e*). The parent, or other person legally liable, may be ordered to pay a weekly sum, not exceeding five shillings, for the expenses of the child's maintenance and training at school (*f*). And the statute further enacts, that, on the recommendation of the secretary of state, funds for the custody and maintenance of children detained in certificated industrial schools may be contributed, by the Treasury, out of monies provided by parliament (*g*).

(*c*) 29 & 30 Vict. c. 118, ss. 14—16.

(*d*) Sect. 18, 41.

(*e*) Sect. 25.

(*f*) Sect. 39, 40.

(*g*) Sect. 35. If the child has been sent on the application of its

parents or guardians, the amount of such contribution by the Treasury may not exceed two shillings per head per week. (Ib.) Contributions may be also made by poor law guardians (sect. 37), and by prison authorities (sect. 12).

CHAPTER V.

OF THE LAWS RELATING TO LUNATIC ASYLUMS,
AND THEIR MANAGEMENT.

WE have had occasion elsewhere to explain the general state of the law in reference to idiots and lunatics (*a*). But the numerous provisions made by the legislature, in regard to the safe custody and proper treatment of these persons, are of a nature to deserve more particular attention than we have yet been able to bestow upon them; and we shall now advert to them more fully, under the head of Lunatic Asylums.

Houses established for the reception of insane persons are of various descriptions: some being established for the public benefit at the public expense; others being instituted for the public benefit, by endowment of charitable donors (*b*); and others, again, being private houses kept by individuals for their own profit.

We propose in the present chapter to treat, I. Of the provisions made with regard to county lunatic asylums (*c*).

(*a*) Vide sup. vol. I. p. 489; vol. II. 543 et seq.

(*b*) As to the Royal Hospital of Bethlehem, which is one of those so endowed, see 5 & 6 Vict. c. 22; 16 & 17 Vict. c. 96, s. 35; 23 & 24 Vict. c. 60; 24 Vict. c. 12; 25 & 26 Vict. c. 104, s. 5.

(*c*) It may be here observed that most of the provisions in the Acts mentioned in this chapter extend,

also, to lunatic asylums established in *boroughs*, which asylums are subject, in general, to the same regulations as the county asylums. Or the boroughs may, and in certain cases must, unite with the county in which they are situate, in the establishment and maintenance of an asylum. As to which see 16 & 17 Vict. c. 97, ss. 3, 9; 19 & 20 Vict. c. 87; 28 & 29 Vict. c. 80.

II. Of the provisions which have been made in regard to criminal lunatics: and, III. Of the provisions which have been made for the proper treatment of lunatics in general.

I. County lunatic asylums were first established by 48 Geo. III. c. 96; but the regulations respecting them now in force are contained in 16 & 17 Vict. c. 97, (called "The Lunatic Asylums Act, 1853,") as amended by 18 & 19 Vict. c. 105, 19 & 20 Vict. c. 87, 25 & 26 Vict. c. 111, and 26 & 27 Vict. c. 110. By the provisions of these Acts, it is made incumbent on the justices of every county to provide a sufficient asylum for its pauper lunatics, either separately or in union with such other parties as in the Acts mentioned in that behalf (*d*). And the expenses of such an asylum are to be defrayed out of the county rates (*e*); and the management vested in a *committee of visitors*, elected yearly by the justices, or (in case of union with some other asylum supported by voluntary subscriptions), partly by the justices and partly by the subscribers (*f*).

The purpose for which these asylums are mainly designed is, therefore, to receive the insane paupers of the county,—a class of persons for whom it may be said in general that there is no other resource; particularly since the provision of the Poor Law Amendment Act, (4 & 5 Will. IV. c. 76,) s. 45, by which it was made penal to confine any insane person, having dangerous tendencies, for more than fourteen days in any workhouse (*g*).

(*d*) 16 & 17 Vict. c. 97, s. 3.

(*e*) Sect. 46.

(*f*) Sect. 22.

(*g*) In accordance with the design of this provision, it is now further enacted that no alleged lunatic may

be detained in any workhouse more than fourteen days, unless under certificate from the medical officer that he is a proper person to be so kept. (25 & 26 Vict. c. 111, s. 20.)

The provisions for the reception of pauper lunatics into these asylums are briefly as follows:—

Any relieving officer of a parish within a union, or under a board of guardians,—and every overseer of a parish where there is no relieving officer,—who shall have knowledge (by notice from the medical officer or otherwise) that any pauper resident in such parish is, or is deemed to be, a lunatic, is to give notice thereof to some justice of the county, who shall thereupon make an order for the pauper to be brought before him or some other justice of such county; and the justice before whom the pauper shall be brought shall call to his assistance a physician, surgeon, or apothecary; and if upon examination of the pauper such medical man signs a certificate, to the effect that the pauper is a lunatic and a proper person to be taken charge of,—the justice, if satisfied, upon view or other proof, that such is the fact, shall make an order, directing the pauper to be received into the asylum of that county (*h*); or, under special circumstances, into some other asylum, registered hospital, or licensed house (*i*). And it is further provided, that any justice, acting upon his own knowledge, and without any notice as above, may examine any pauper deemed to be a lunatic, at his own abode or elsewhere; and, after such examination, shall proceed in all respects as if the pauper had been brought before him in pursuance of an order made for that purpose (*j*). And also, that if a pauper deemed to be a lunatic cannot, on

(*h*) 16 & 17 Vict. c. 97, s. 67. As to the form of the certificate and order thereon (which are provided by the statutes), see sects. 67, 72; 25 & 26 Vict. c. 111, ss. 19—28.

(*i*) 16 & 17 Vict. c. 97, s. 67. The superintendent of every hospital into which lunatics are received must apply to the commissioners of lunacy (as to whom vide

post, p. 231) to have such hospital *registered* (8 & 9 Vict. c. 100, s. 43); and houses for the reception of lunatics must also be *licensed* either by the commissioners, or if not within their immediate jurisdiction then by the justices in general or quarter sessions (*ibid.* sects. 14—17).

(*j*) 16 & 17 Vict. c. 97, s. 67.

account of his health or other cause, be conveniently taken before any *justice* for examination, he may be examined at his own abode or elsewhere by some clergyman officiating in the parish, in company with the relieving officer (or overseer): and, in such cases, the order for his reception into an asylum may be made, conjointly, by such clergyman and relieving officer or overseer (*h*). And also that where a certificate of lunacy is signed by the medical officer of the parish or union wherein the pauper is resident, and also by some other medical man called in as aforesaid,—such joint certificate shall be received by the justice, (or by the clergyman and relieving officer or overseer,) as conclusive evidence of the fact of lunacy, and he or they shall make an order for the reception of the pauper accordingly (*l*).

It is not, however, to the lunatic paupers, only, of the county, that admission into the asylum is allowed. Hither may be sent any lunatic (whether resident in the county or not) who, on examination by two justices, (assisted by a medical man,) is found to be *meditating* crime (*m*); and, also, any prisoner confined within the county *for debt* who is found, after due examination by a justice and two medical men, to be of unsound mind (*n*). An order for admission may moreover be made in respect of any person found in the county, who (whether a pauper or not) is wandering at large; or not under proper care or control; or is cruelly treated or is neglected by the persons having the care of him (*o*); and where the asylum is more than sufficient for the accom-

(*h*) 16 & 17 Vict. c. 97, s. 67.

(*l*) *Ibid.*

(*m*) 1 & 2 Vict. c. 14. As to the asylum for lunatics who have *already* committed crime, vide post, p. 228.

(*n*) 24 & 25 Vict. c. 134, s. 107.

As to the removal to *Bethlehem* or elsewhere, of prisoners for debt confined in *Whitecross Street Prison* becoming insane, see 25 & 26 Vict. c. 104, s. 5.

(*o*) 16 & 17 Vict. c. 97, s. 68.

modation of cases within the county, it is competent to the visitors to allow the admission of the pauper lunatics of any other county; or (if the visitors think fit) of lunatics who are not paupers (*o*). In the latter case, the visitors are at liberty to prescribe as the condition of admission, that the person by whom it shall be applied for shall give an undertaking for the due payment of the charge to be made for providing lodging, maintenance, and other necessaries for the lunatic; as to which it is provided, that a lunatic not being a pauper shall have the same accommodation in all respects as the pauper lunatics (*p*). In conclusion we may observe that in every case of the reception of a pauper lunatic, he shall be chargeable to the parish from which he is sent, or to any other parish to which he can be shown to belong; or if it appears that his settlement cannot be ascertained, then to the county at large in which he was found (*q*).

II. With regard to criminal lunatics, it is enacted by 3 & 4 Vict. c. 54 (amended by 27 & 28 Vict. c. 29), that if any person while in prison or other confinement under sentence of transportation, penal servitude, or imprisonment, or under a charge of any offence, or for failing to find bail, or in consequence of a summary conviction or order on other than civil process, shall appear to be insane, two or more of the visiting justices, or, failing them, two justices of the place where such prisoner is confined, shall, with the assistance of two physicians or surgeons by them selected, inquire into the alleged insanity, and if they shall certify the same, a secretary of state may order such person to be removed to any proper

(*o*) 16 & 17 Vict. c. 97, s. 43.

(*p*) *Ibid.*

(*q*) Sects. 95—98, 102. (See *Knowles v. Trafford*, 7 Ell. & Bl. 152; *Leeds v. Wakefield*, *ibid.* 258.) If the parish be in a *union* the expense in regard to such pauper

lunatic falls upon the "common fund." (See 24 & 25 Vict. c. 55, ss. 6, 7; 27 & 28 Vict. c. 29, s. 5; *The Queen v. Heaton*, 1 E. & E. 782; *The Queen v. Cheddingstone*, 2 B. & Smith, 294; *All Saints, Poplar v. Middlesex*, 2 E. & E. 829.)

receptacle for insane persons; and if at any time it shall be made to appear to such secretary that there is good reason to believe (either from a certificate to that effect by the visiting justices or by other means whatsoever) that a prisoner in confinement *under sentence of death* is then insane, he shall direct an inquiry by two or more physicians or surgeons, and, on their certificate, shall direct his removal to such a receptacle. And in all cases of removal the lunatic shall be kept in such receptacle till he is in like manner certified to be sane, when he is to be remitted to his former place of confinement, there to undergo his sentence of death or other punishment. The proper receptacle for persons removable under the above provisions is one appropriated, under recent statutes, as an asylum for the custody and care of such criminals as shall become insane during their imprisonment, or of such persons as shall be acquitted at their trial on the ground of insanity under the 39 & 40 Geo. III. c. 94, to which reference will be made in a future place (*r*). For by 23 & 24 Vict. c. 75 (amended by 30 Vict. c. 12), it is enacted that her majesty may, from time to time, by warrant under her royal sign manual, appoint that any asylum or place in England which has been provided or appropriated, and is deemed suitable for the purpose, shall be an *asylum for criminal lunatics*; and that the secretary of state may from time to time appoint any three or more persons to be a council of supervision of such asylum, and also a resident medical superintendent, chaplain, and such other officers and servants as he shall think necessary, and frame rules for the guidance and management of the asylum (*s*). He is also enabled to discharge any criminal therein confined, either absolutely or on conditions; and, if any condition be broken, to cause him to be recaptured (*t*). And he may also permit any criminal lunatic to be absent on trial from

(*r*) Vide post, vol. iv. p. 116.

(*t*) 30 Vict. c. 12, s. 5.

(*s*) 23 & 24 Vict. c. 75, s. 2.

his place of confinement on such conditions as he may think fit; and proper provisions are made in the Acts for the contingency of the term of punishment awarded to any criminal, who shall become lunatic, expiring before he recovers the use of his reason, and for keeping him in security till that event shall happen (*u*).

III. The provisions which have been made to secure the proper treatment of lunatics, wherever confined, may be summarily stated as follows.

By 8 & 9 Vict. c. 100, 16 & 17 Vict. cc. 96, 97, and 25 & 26 Vict. c. 111 (*x*), it is made a *misdemeanor* for any person to receive two or more lunatics into any house, unless it is an asylum (*y*), or a hospital duly registered, or a house duly licensed under the provisions of some act of parliament for the reception of lunatics (*z*). And, as the general rule, no person can be legally received in a *hospital*, or *licensed house*, without a written order from the person sending him, and medical certificates of two physicians, surgeons or apothecaries, in such form as prescribed by the Acts (*a*). But in the case of a *pauper* lunatic, the order is to be under the hand of a justice of the peace, or the officiating clergyman and one of the overseers or the relieving officer of the parish to which he belongs; and the medical certificate is to be signed by one physician, surgeon or apothecary (*b*). Hospitals wherein lunatics may be

(*u*) 30 Vict. c. 12, s. 6.

(*x*) This group of statutes are for some purposes included in the term "Lunacy Acts." (See 25 & 26 Vict. c. 111, s. 1.)

(*y*) That is to say, a county (or borough) lunatic asylum, duly established and maintained under the provisions of some Act of Parliament. (See 8 & 9 Vict. c. 100, s. 114.)

(*z*) 8 & 9 Vict. c. 100, s. 44. Δs

to receiving *one* lunatic into an unlicensed house, see 8 & 9 Vict. c. 100, s. 90; 16 & 17 Vict. c. 96, s. 8.

(*a*) 16 & 17 Vict. c. 96, s. 4. See *Fletcher v. Fletcher*, 1 E. & E. 420.

(*b*) Sect. 7. As to the formalities to be observed with respect to a *pauper* lunatic sent to the county (or borough) asylum, vide sup. p. 226.

received, must be registered under the sanction of the commissioners of lunacy (a board of persons composed, partly, of medical men and of barristers, established by 8 & 9 Vict. c. 100, s. 3); and *licences* for keeping houses for such purpose, are granted by the same commissioners (for any period not exceeding at one time thirteen calendar months), in Middlesex, London, Westminster, Southwark, and all places within the range of seven miles from any part of London, Westminster, or Southwark, at a quarterly or special meeting of the Board: and, in other places, are granted by the justices for the county,—in general or quarter sessions assembled (*c*). And many provisions are made in the above Acts, of a kind too minute and specific to be here detailed, for the effectual superintendence of all such registered hospitals and licensed houses,—among which are comprised, *inter alia*, enactments, that their keepers shall always report the admission, death, removal, discharge, or escape of any patient (*d*); that they shall be provided with proper medical attendance (*e*); that they shall be frequently visited and inspected by the commissioners, and, (in the case of houses in the country,) by visitors appointed by the magistrates at quarter sessions (*f*); that these visits shall be at uncertain and unexpected intervals, and in certain cases even by night (*g*); and that reports shall be made by the visitors to the commissioners, and by the commissioners to the lord chancellor, in March in every year, of the state of the several houses visited by them, and as to the care taken of the patients therein (*h*). Moreover, any person de-

(*c*) 8 & 9 Vict. c. 100, ss. 14—17. Before a licence is granted by the justices, the house must be inspected by the Commissioners of Lunacy. (25 & 26 Vict. c. 111, s. 14.)

(*d*) 8 & 9 Vict. c. 100, ss. 53, 54, 55, and see 25 & 26 Vict. c. 111, s. 44.

(*e*) 8 & 9 Vict. c. 100, ss. 57, 58, 59.

(*f*) Sects. 61, 62; 25 & 26 Vict. c. 111, s. 29.

(*g*) 8 & 9 Vict. c. 100, s. 71.

(*h*) Sect. 88; 16 & 17 Vict. c. 96, s. 32.

tained in a licensed house or hospital without sufficient cause established to the satisfaction of the commissioners, may be directed by them to be set at liberty (*i*). But their power to order a discharge does not extend to the case of a person found lunatic under a *commission* (*k*), or confined by order of the secretary of state for the home department, or under the order of any court of criminal jurisdiction (*l*). In addition to the visitations thus established in regard to *registered hospitals* and *licensed houses*, the commissioners are moreover directed to visit all *asylums* and *gaols* and *workhouses* where any lunatics may be confined, and inquire into their condition, system, and regulations (*m*). Authority is also given by these Acts to the lord chancellor, (in the case of any lunatic under the care of a committee,) and to the lord chancellor or the secretary of state for the home department, (in the case of any lunatic or person under any restraint as a lunatic,) to direct a commissioner or some other person to visit the supposed lunatic, and to make report to him upon the matters into which he shall be directed by such order to inquire (*n*).

(*i*) 8 & 9 Vict. c. 100, ss. 76—81.

(*k*) Vide sup. vol. II. p. 546.

(*l*) Ibid; 16 & 17 Vict. c. 96, s. 38.

(*m*) 8 & 9 Vict. c. 100, s. 110.

In the case of workhouses, they are

to make a report to the Poor Law Board. (16 & 17 Vict. c. 96, s. 28.)

(*n*) 8 & 9 Vict. c. 100, s. 112. See also 16 & 17 Vict. c. 70, ss. 2, 106.

CHAPTER VI.

OF THE LAWS RELATING TO PRISONS.

ANOTHER subject on which much attention has been repeatedly bestowed by the legislature, is that of gaols or prisons (*a*).

It is a principle of law, founded on a due regard to the public liberty and welfare, that a gaol can be erected only by the authority of parliament (*b*): and the same policy has also established the doctrine that when once erected it belongs to the sovereign (*c*); thereby placing it under the general control and protection of the same executive power from which emanates, in contemplation of law, the whole administration of civil and criminal justice.

The gaoler of a prison was formerly, in contemplation of law, the deputy only of the sheriff of the county or place in which such prison is situate; and if he negligently suffered a prisoner to escape, the sheriff, as his principal, was held responsible, in the case of a debtor, to the judgment creditor; and, in the case of a criminal, to the crown. But by a recent Act (28 & 29 Vict. c. 126) every prisoner shall now be deemed to be in the legal custody of the gaoler himself (*d*), and (except with regard to prisoners under *sentence of death*) the jurisdiction and control of the sheriff over the prison is taken

(*a*) By 28 & 29 Vict. c. 126, the word "prison" is, for the purposes of that Act, to mean gaol, house of correction, bridewell and penitentiary (sect. 4).

(*b*) 2 Inst. 705; Bac. Abr. Gaol

(A.); see *R. v. Earl of Exeter*, 6 T. R. 373; *R. v. Justices of Lancashire*, 11 Ad. & Ell. 144.

(*c*) 2 Inst. 589.

(*d*) 28 & 29 Vict. c. 126, s. 58.

away—it being at the same time provided that the sheriff shall not be liable for the escape of any prisoner other than a *debtor*, with respect to whom the gaoler is still regarded as his deputy (*e*).

There is a species of prison which is termed, by way of distinction from a gaol properly so called (or common gaol), a House of Correction, or (in the city of London) a Bridewell.

These houses of correction (which were first established, as it would seem, in the reign of Elizabeth) were originally designed for the penal confinement (after conviction) of paupers refusing to work, and other persons falling under the legal description of *vagrants* (*f*). And this was at first their only application; for in other cases the common gaol of the county, city, or town in which the offence was triable, was (generally speaking) the only legal place of commitment (*g*). However, by 5 & 6 Will. IV. c. 38, ss. 3, 4, it was enacted, that a justice of the peace (or coroner) might commit, for safe custody, to any house of correction situate near the place where assizes or sessions were to be held; and that offenders sentenced in those courts might be committed, in execution of their sentence, to any house of correction for the county. And by 14 & 15 Vict. c. 55, ss. 20, 21, it was provided, that it should be lawful to commit to any approved gaol or house of correction, for trial at the next assizes for the county, any person charged with an offence triable at such assizes; it being directed, however, that every person so committed should, in due time, be removed to the common gaol, in order to take his trial (*h*). But the importance of the distinction between gaols and houses of correction is in a great measure taken away by the

(*e*) 28 & 29 Vict. c. 126, s. 60.

(*f*) 39 Eliz. c. 4; Jacob, Dict. in tit.

(*g*) 5 Hen. 4, c. 10; 23 Hen. 8, c. 2; 6 Geo. 1, c. 19.

(*h*) As to lock-up houses for the temporary confinement of persons taken into custody but not yet committed for trial, see 31 Vict. c. 22.

28 & 29 Vict. c. 126, s. 56, which enacts that, subject to the provisions of that Act with respect to the appropriation of prisons to different classes of prisoners, every prison to which that Act applies shall be deemed to be a gaol and house of correction.

The maintenance and government of prisons is now mainly provided for by the Act just named, by which the statute law on this subject was consolidated and amended, and which is known as the Prisons Act, 1865 (*i*). This statute requires that there shall be provided at the expense of every county, borough, franchise, or other place having a separate prison jurisdiction, adequate accommodation for its prisoners in a prison or prisons conformable to the regulations of that Act (*j*); and the duty of altering, enlarging, building or rebuilding, to attain this result, is entrusted to the several *prison authorities*, *i. e.* the justices at quarter or gaol sessions, the council of the borough, or otherwise, as the case may be (*k*). But the sanction of a secretary of state must be previously obtained to any such alteration of an existing prison; and he may recommend an advance for the purpose by the Public Works Loan Commissioners, to be repaid out of a local rate (*l*); and any prison authority may (with the like sanction) contract with any other prison authority for the reception and maintenance of their prisoners (*m*). The jurisdiction as to visiting these prisons is vested by the Act in the justices of the prison jurisdiction, who, in sessions assembled, are annually to nominate two or more of their number for this duty (*n*).

(*i*) There is a subsequent statute, the 29 & 30 Vict. c. 100, but it refers only to the maintenance of prisoners removed for the purpose of trial. By 28 & 29 Vict. c. 126, the 4 Geo. 4, c. 64, and a variety of other enactments on the subject of gaols and prisons, are repealed.

(*j*) See also 5 & 6 Vict. c. 109, and 11 & 12 Vict. c. 101, as to pro-

viding *lock-up houses* for temporary confinement previous to commitment for trial, and enabling counties and boroughs to enter into agreement with each other as to erecting the same.

(*k*) 28 & 29 Vict. c. 126, s. 5.

(*l*) Sect. 29.

(*m*) Sect. 31.

(*n*) Sect. 53.

These visiting justices are from time to time to inspect the prison, examine into the state of the buildings, the conduct of the officers, the treatment and conduct of the prisoners, the means of setting them to work, and the amount of their earnings and the expenses attending the prison (*o*). They are also, generally, to inquire into all abuses within the prison, to take cognizance of all matters of pressing necessity, and to regulate the same so far as their commissions as justices extend; and once at the least in each quarter of the year to make their report to the justices in sessions assembled (*p*).

Careful regulations have been made in the same statute for the spiritual care of the prisoners during their incarceration. For this purpose it is enacted that there shall be appointed for each prison a chaplain and assistant chaplain (if thought necessary), being respectively clergymen of the established Church (*q*); and notice of the nomination is to be sent to the bishop of the diocese, without whose licence no nominee can officiate (*r*). There shall also be provided in every prison either a chapel or a room suitable for the purposes of a chapel, in which prayers selected from the liturgy of the established Church and portions from the Scriptures shall be daily read, either by the chaplain himself, the gaoler, or such person as shall be selected by the visiting justices (*s*); and there are also other provisions to secure the regular and due performance of divine service in the prison, and the bestowal of religious and moral instruction on such prisoners as are willing to be taught. And in order to meet the spiritual requirements of such prisoners as do not belong to the established Church, an Act was passed in 1863 (the 26 & 27 Vict. c. 79), under the provisions

(*o*) 28 & 29 Vict. c. 126, s. 53.

(*p*) Ibid. Any justice with jurisdiction in the place to which a prison belongs may also, whenever he sees fit, enter and examine into the condition of the prison, and

make observations thereon in a book kept for the purpose (sect. 55).

(*q*) Sect. 10.

(*r*) Sect. 13.

(*s*) Sched. I., Nos. 44, 45.

of which (taken in connection with the 28 & 29 Vict. c. 126, now under consideration), the prison authorities are enabled to appoint a minister of the persuasion to which such prisoners belong; and, if they shall see fit, to award him out of the prison rates a reasonable recompence for his services (*t*).

With respect to the particular management of the prisons, and the rules for the due discipline and care of the prisoners, the Act contains a variety of provisions with regard to their admission and discharge, their food, clothing and bedding, their personal cleanliness, their employment, health and instruction, and other matters too numerous and of too specific a character to be inserted in this place. We must content ourselves with adding, that, besides these, the justices, in sessions assembled, are enabled to frame regulations as to diet and other matters of internal economy,—though rules so issued must receive the approval of one of her majesty's principal secretaries of state before they become valid (*u*). A principal secretary of state is also empowered to appoint a sufficient number of proper persons as Inspectors for every place of imprisonment in Great Britain; who are to visit and inquire into the state of these establishments, call the attention of the visiting justices by letter to any irregularity or complaint (*x*), and report annually the results of their inquiries to the secretary of state. And these reports are afterwards laid before both houses of parliament (*y*).

Besides the prisons to which the above Act applies, there are some particular prisons which are the subject of separate and specific regulation. As—

1. The *Queen's Prison*; wherein are confined debtors (*z*)

(*t*) 28 & 29 Vict. c. 126, s. 47.

(*u*) Sect. 21.

(*x*) Sect. 22.

(*y*) 5 & 6 Will. 4, c. 38, s. 7.

(*z*) As to the confinement of

debtors in a prison certified by an inspector of prisons to be adapted for that class of prisoners, see 17 & 18 Vict. c. 115.

and criminals confined under process or by authority of the Superior courts, and the High Court of Admiralty; and also persons imprisoned under the direction of the London Court of Bankruptcy (*a*). There existed till of late, three separate gaols for the reception of such prisoners. But by 5 & 6 Vict. c. 22 (*b*), these were consolidated into one, under the name of the Queen's Prison. There has been a recent change, however, as to the building used for it; and it is now enacted by 25 & 26 Vict. c. 104, that the debtors' prison for London and Middlesex, referred to in that Act as "Whitecross Street Prison," shall be regarded as the Queen's Prison (*c*); and hither may persons be sent, who, before the passing of that Act, might lawfully have been sent to the Queen's Prison (*d*).

2. The *Millbank Prison*, formerly called "The Penitentiary at Millbank," is used for the temporary reception of convicts (male and female) under sentence of penal servitude (*e*). Although locally situated within their jurisdiction, the justices for Middlesex or Westminster have no authority over this prison (*f*): but it is placed under a board of three persons, appointed by a principal secretary of state,—and established as a body corporate, by the name of "The Directors of Convict Prisons" (*g*).

(*a*) 5 & 6 Vict. c. 22. As to Admiralty prisoners under sentence of courts-martial, sec 5 & 6 Vict. c. 98, s. 27.

(*b*) Amended by 12 & 13 Vict. c. 7, and 23 & 24 Vict. c. 60).

(*c*) The premises formerly known as "The Queen's Prison," were by the same Act (25 & 26 Vict. c. 104, s. 9) vested in the commissioners of public works.

(*d*) By 25 & 26 Vict. c. 104, s. 6, the treasury may enter into agreement with the city of London as to the contribution to be paid to the latter, on account of the safe keep-

ing, lodging, maintenance, and care of the prisoners in the Queen's Prison; and such contribution shall be defrayed out of monies provided by parliament.

(*e*) As to the Millbank Prison, sec 6 & 7 Vict. c. 26; 11 & 12 Vict. c. 104; 13 & 14 Vict. c. 39; and 23 & 24 Vict. c. 60.

(*f*) 5 & 7 Vict. c. 26, s. 8.

(*g*) 13 & 14 Vict. c. 39. These directors also superintend, visit and report upon to parliament other places (not mentioned in the text) used for the confinement of offenders under sentence of penal servitude.

These Directors are to make regulations for the government of the prison, subject to the approbation of a principal secretary of state, and to make yearly reports to such secretary, as to all matters relating to the prison or to the convicts; and these reports are to be afterwards laid before both houses of parliament (*h*). The secretary of state is also to appoint for the prison, a governor, a chaplain, a medical officer, a matron, and such other officers as may be deemed necessary (*i*).

3. The *Parkhurst Prison*; established for the confinement and correction of *young* offenders, male or female, as well those under sentence of penal servitude, as those under sentence of imprisonment (*k*). The rules for this prison (which is in the Isle of Wight) are to be made by one of the principal secretaries of state, and afterwards laid before parliament; and they may include the infliction of corporal punishment on all male offenders therein confined. By the same authority a governor, chaplain, surgeon, and matron, and all other necessary officers, are to be appointed. This establishment also is placed, by 13 & 14 Vict. c. 39, under the superintendence of the "Directors of Convict Prisons;" who, if they discover any abuses, are to report the same to a principal secretary of state; and they are required, also, to make a half-yearly report as to its state and condition, which is submitted annually to parliament (*l*).

4. The *Pentonville Prison*; also established for the temporary confinement of male convicts under sentence

The places here referred to are such as shall be appointed for the purpose by order in council. (See 5 Geo. 4, c. 84, s. 10; 13 & 14 Vict. c. 39; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.) The existing establishments are those at Portland, Portsmouth, Chatham, Dartmoor, Brixton, Woking, and Fulham. Of these, those at Woking and Fulham are appropriated to *invalids*, and those at

Brixton and Fulham to *females*. (See the Report of the Directors of Convict Prisons, for the year 1860.)

(*h*) 6 & 7 Vict. c. 26, ss. 10, 11. And sec 13 & 14 Vict. c. 39, s. 1.

(*i*) 6 & 7 Vict. c. 26, s. 5.

(*k*) See 1 & 2 Vict. c. 82; 5 & 6 Vict. c. 98, s. 12; 20 & 21 Vict. c. 3, s. 3.

(*l*) 1 & 2 Vict. c. 82; 13 & 14 Vict. c. 39.

of penal servitude (*m*). It, too, is placed by 13 & 14 Vict. c. 39, under the superintendence of "The Directors of Convict Prisons;" and power is conferred on them to hold meetings and make rules, subject to the approbation of a principal secretary of state (*n*); and, with the like approbation, to appoint officers,—comprising a governor, a chaplain, a medical officer, and such others as may be found necessary (*o*). And it is provided, that the Directors shall from time to time appoint one or more of themselves to visit the prison during the intervals between their meetings; and that they may delegate power to such visitors to make orders in cases of pressing emergency (*p*). And further, that the Directors shall annually make reports to the secretary of state as to all matters relating to the prison, its discipline and management; which reports shall afterwards be laid before both houses of parliament (*q*).

(*m*) See 5 & 6 Vict. c. 29, ss. 14,
16; 16 & 17 Vict. c. 99, s. 6; 20 &
21 Vict. c. 3, s. 3.

(*n*) 5 & 6 Vict. c. 29, s. 9.

(*o*) Sect. 6.

(*p*) Sect. 10.

(*q*) Sect. 13.

CHAPTER VII.

OF THE LAWS RELATING TO HIGHWAYS AND
BRIDGES.

HIGHWAYS (or public roads) are those ways which all the subjects of the realm have a right to use; and the term, (for some purposes at least,) also applies to ways common to the inhabitants of some particular parish or district only,—as the case of church paths (*a*). The roads now in use have in general either existed by prescription (that is, from time immemorial), or have been constructed under the authority of local acts of parliament. They may be traced, however, in some cases, to a different origin; for the owner of any land may, if he think fit, dedicate a way over it to the use of the public; and if he long permit strangers to pass over it, at their free will and pleasure, and without molestation, a dedication of this kind will be presumed (*b*).

The parish is, of common right, bound (as the general rule) to keep in repair any highway within its boundaries, whatever may be the manner in which the road first originated; but, in some cases, the liability to repair attaches (by prescription) to a particular township (*c*), or other division of a parish; and occasionally *ratione*

(*a*) See 5 & 6 Will. 4, c. 50, s. 5. A highway may exist in a place which is not a thoroughfare. (*Bateman v. Bluck*, 18 Q. B. 870.)

(*b*) As to highways by dedication, see *Barraclough v. Johnson*, 8 A. & E. 99; *Poole v. Huskinson*, 11 Mee. & W. 827; *Roberts v. Hunt*, 15

Q. B. 17; *The Queen v. Petrie*, 4 Ell. & Bl. 737; *Dawes v. Hawkins*, 8 C. B., N. S. 848; *The Queen v. Dukinfield*, 4 B. & Smith, 158; *Bermondsey v. Brown*, Law Rep., 1 Eq. Ca. 204.

(*c*) See *Queen v. Lordsmere*, 15 Q. B. 689.

tenuræ to a private owner of land, bound to repair some particular highway in right of his estate (*e*). Where an individual is bound to repair by his ownership of the soil, he often claims (by grant or prescription), from those who use the road, a toll of that species which is called a *toll traverse* (*f*).

The case of bridges is differently provided for. The expense of maintaining these is defrayed indeed (like that of roads) by the public; this having been part of the *trinoda necessitas*, to which every man's estate was by the antient law subject, viz., *expeditio contra hostem, arcium constructio, et pontium reparatio* (*g*);—but it is incumbent, not on the parishes, but, as the general rule, on the counties at large in which the bridges are situate (*h*). And where a parish is bound by prescription, (as is sometimes the case,) to repair a bridge, there is a statutory provision, which gives effect to any contract between the county and the parish for performing the repairs in future at the expense of the former, and relieving the latter from the charge (*i*). The liability of the county extended at common law, not only to the bridge itself, but to so much of the road as passed over it, and even to so much as formed its ends or approaches,—and, indeed, by stat. 22 Hen. VIII. c. 5, the county

(*e*) 3 Geo. 4, c. 126, s. 107; 5 & 6 Will. 4, c. 50, s. 62. See *R. v. East-rington*, 5 A. & E. 765; *R. v. Heage*, 2 Q. B. 128. See *The Queen v. Ramsden*, 1 Ell. Bl. & Ell. 949.

(*f*) Com. Dig. Toll; Willes, 115; *Brett v. Beales*, 10 B. & C. 508; *Lord Middleton v. Lambert*, 1 A. & E. 401. As to the distinction between a toll traverse and a toll *thorough*, see *R. v. Marquis of Salisbury*, 8 A. & E. 716.

(*g*) 1 Bl. Com. 357. An individual may be liable to repair a bridge *ratione tenuræ*; see *Baker v. Green-*

hill, 3 Q. B. 148; *Queen v. Bedfordshire (Inhabitants)*, 4 Ell. & Bl. 535.

(*h*) Viner's Abridg. Bridges (A). See *Re Newport Bridge*, 2 Ell. & Ell. 377. As to borrowing money on credit of the county rate, for repair of the bridges therein, see 4 & 5 Vict. c. 49. As to the manner of providing for the repair of bridges, in cases where a *borough* and not the county is liable; see 13 & 14 Vict. c. 64.

(*i*) 22 Hen. 8, c. 5. (See *R. v. Hendon*, 4 B. & Ad. 628.)

was made liable to repair three hundred feet either way from the bridge. And such is still the state of the law as to all bridges built prior to the passing of the Highway Act, (5 & 6 Will. IV. c. 50,) in the year 1835. But by that statute it is provided, that, in the case of all bridges thereafter to be built, the repair of the road itself passing over or adjoining to the bridge shall be done by the parish, or other parties bound to the general repair of the highway of which it forms a portion;—the county being still subject, however, to its former obligation, as regards “the walls, banks, or fences of the raised causeways, and raised approaches to any bridge, or the land arches thereof” (*h*).

The same statute contains provisions, designed to protect parishes from being subjected to unreasonable charge, in respect of ways dedicated to the public. It enacts, that no road made at the expense of any individual, or body corporate, shall be deemed a highway which the parish is liable to repair, unless three calendar months' notice shall be given to the parish surveyor, of an intention to dedicate such road to the public (*l*). Upon notice being so given, a vestry is to be called to consider whether the road is of sufficient utility to justify its being kept in repair by the parish; and in the event of the vestry thinking the road unnecessary, the justices, at the next special sessions for the highways, are finally to determine the matter (*m*). Other provisions are added, the object of which is to ensure that the road shall be originally constructed in a proper and substantial manner, before the expense of repairing it is cast upon the parish (*n*).

(*h*) 5 & 6 Will. 4, c. 50, s. 21.

(*l*) Sect. 23. As to the liability of the parish before this statute, see *R. v. Leake*, 5 B. & Ad. 469.

(*m*) As to the discontinuance of the repair of unnecessary highways in places which have adopted the

Highway Acts of 1862, 1864 (vide post, p. 249), see 27 & 28 Vict. c. 101, s. 21.

(*n*) 5 & 6 Will. 4, c. 50, s. 23. See *The Queen v. Thomas*, 7 Ell. & Bl. 399.

Any parish, county, or other party bound to repair a road or bridge, and neglecting the duty, is liable at common law to an indictment (*o*).

Though the maintenance of all the highways in the kingdom is thus legally chargeable, either upon the parishes through which they respectively pass, or on some particular district or individual,—there are also other means to provide funds for repairing the most frequented and important roads. These are kept in order, (and many of them were originally constructed,) under the authority of local acts of parliament, called *Turnpike Acts*: by which the management of such roads is usually vested, for a certain term of years, in trustees or commissioners; who are empowered to erect toll-gates, and to levy tolls from passengers, as a fund for defraying the expense of repairs or improvements. There is thus a distinction between *highways in general*, and *turnpike roads*. It is to be understood, however, with respect to the latter, that the collection of toll does not supersede the other means provided by law for maintaining highways. If a turnpike road or bridge is allowed by the trustees to fall out of repair, the parishes or other parties who would have been bound to make it good (supposing it not to have become the subject of a turnpike trust) are still, in general, liable to that obligation (*p*). But they may be exempt from it under particular circumstances; for the trustees of a turnpike road may, in certain cases, enter into contract with such parties, and undertake to

(*o*) As to the costs of this indictment, see *Reg. v. Inhabitants of Heanor*, 6 Q. B. 745; *The Queen v. Eyton*, 3 Ell. & Bl. 390: and as to its removal by *certiorari* to the Queen's Bench, see *R. v. Inhabitants of Sandon*, 3 Ell. & Bl. 390.

(*p*) See 7 & 8 Geo. 4, c. 24, s. 17; 3 Geo. 4, c. 126, s. 110; *R. v. Netherthong*, 2 B. & A. 179; *Bussey v.*

Storey, 4 Bl. & Adol. 109. It may be observed, that on any turnpike road becoming an ordinary highway (the trust having determined), the trustees or commissioners are required, by 30 & 31 Vict. c. 121, s. 3, to pay over any balance of monies in their hands rateably among the parishes who are bound to repair the road.

repair exclusively out of the trust: and where any contract of this description is in force, the persons originally liable are of course discharged from all responsibility (*q*). The turnpike trusts are very numerous; but there is one, which, from its importance, deserves a specific notice. It is that of the “turnpike roads of the metropolis, north of the Thames;” the different trusts of which were consolidated into one by 7 Geo. IV. c. cxlii, amended by 10 Geo. IV. c. 59, and 26 & 27 Vict. c. 78 (*r*).

With respect to those highways, or parts of highways, which pass through and form the streets of towns, we may observe that they are generally the subject of distinct provision, under acts of parliament of another kind, usually called *Paving Acts* (*s*). In 10 & 11 Vict. c. 34, a consolidation will be found of the provisions ordinarily introduced into special local Acts of this description.

Having thus taken some view of the general state of the law relative to public roads and bridges, we propose now to take some short notice of particular provisions applicable.—I. To highways in general. II. To turnpike roads.

I. *Highways in general*.—Some of these are regulated by 5 & 6 Will. IV. c. 50, 4 & 5 Vict. cc. 51, 59, and 8 & 9 Vict. c. 71,—and others under the provisions of more recent Acts on the same subject, viz., 25 & 26 Vict. c. 61, 26 & 27 Vict. c. 61, and 27 & 28 Vict. c. 101.

(*q*) See 3 Geo. 4, c. 126, ss. 106, 107, 108.

(*r*) By this last statute a considerable number of roads, formerly maintainable by the commissioners under these trusts, are made into *parish highways* and no longer subject to turnpikes.

(*s*) As to the Acts for paving, lighting, &c., in boroughs, see 20 & 21 Vict. c. 50, ss. 2—4. As to the enactments in regard to streets

and highways passing through districts which have adopted the Local Government Act, 1858, (21 & 22 Vict. c. 98,) see 11 & 12 Vict. c. 63, s. 70; 21 & 22 Vict. c. 98, ss. 36—43; 24 & 25 Vict. c. 61, s. 9; 25 & 26 Vict. c. 61, s. 7. And as to the streets of the *metropolis*, see 57 Geo. 3, c. cxxix; 25 & 26 Vict. c. 61, s. 7; c. 102, s. 73 et seq.; 30 & 31 Vict. cc. 5, 134.

We will first consider the provisions of the former group of statutes (*u*).

The general plan of the 5 & 6 Will. IV. c. 50, and the Acts by which it is amended, is, to place highways under the care of *surveyors*, appointed for the respective parishes, (subject to a superintending power to be exercised, in certain cases, by the justices of the peace, at special sessions to be holden for the highways;) and to provide for the expenses connected with their repair by a rate on the occupiers of land, made and levied by the surveyor, upon the same principle (generally) as the poor rate (*x*). Such surveyor is to be elected annually, by the inhabitants in vestry assembled (*y*); and he must possess certain qualifications in point of property. When elected, he is compellable—unless he can show some grounds of exemption (*z*)—to take upon himself the office; but he is permitted to appoint a deputy, who is subject to the same responsibilities with his principal (*a*). The office, as the general rule, is not remunerated, but the vestry may appoint a surveyor, if they think proper, with a salary (*b*). Any two or more

(*u*) The 5 & 6 Will. 4, c. 50, applies to all highways not otherwise provided for. But roads, pavements, bridges and turnpike roads falling under local or personal acts of parliament, are not affected by it. As to the highways of *South Wales*, they are especially regulated by 23 & 24 Vict. c. 68 (repealing 14 & 15 Vict. c. 16); but, in all points not otherwise provided for therein, are within the 5 & 6 Will. 4, c. 50. (And see 25 & 26 Vict. c. 61, s. 7.)

(*x*) 5 & 6 Will. 4, c. 50, ss. 27, 113. (See *Reg. v. Randall*, 4 Ell. & Bl. 564.) As to the recovery of the costs of distraining for highway rates, and the course of proceeding on such distress, see 12 & 13 Vict.

c. 14. As to the power of vestries to order that the *owner*, instead of the *occupier*, shall be assessed to highway rate, in the case of tenements not exceeding 6*l.* per annum in rateable yearly value, see 13 & 14 Vict. c. 99.

(*y*) 5 & 6 Will. 4, c. 50, s. 6. As to the election and appointment of surveyor, see *R. v. Best*, 2 N. S. C. 655; *Reg. v. Justices of Surrey*, 5 D. & L. 40.

(*z*) The same grounds of exemption that apply to an overseer of the poor (vide sup. p. 164, n. (*e*)) hold also as to a surveyor of the roads.

(*a*) 5 & 6 Will. 4, c. 50, ss. 7, 8.

(*b*) Sect. 9.

parishes may,—by mutual agreement and by consent of the justices in sessions assembled,—be united into one district, for the purposes of the Act, under the superintendence of a *district surveyor* (*c*). This officer, however, is to have no authority to make or levy the rate; but each parish must elect its own separate surveyor for that purpose (*d*). On the other hand, in large parishes, the duties of the office of surveyor may be committed to more than one person. For where a parish has a population of more than five thousand, a board of surveyors may be appointed, to be called the “Board for repair of the highways” in that parish; and such board is authorized to appoint paid officers, viz. collectors, an assistant surveyor (*e*), a clerk, and a treasurer (*f*).

The principal duty of the surveyor is to keep the parish highways in repair (*g*). Where any of them is found out of order, complaint may be made to any justice of the peace, (on the oath of one witness,) who may grant a summons thereon: but the charge is to be heard before the justices at special sessions for the highways; and if those justices—either on their own view, or on the report of an inspector to be appointed by them for the purpose,—find that the highway is not in thorough and effectual repair, they may convict the surveyor in a penalty not exceeding 5*l.*, and order him to repair within a limited time (*h*). If the order is not complied with, he incurs the further forfeiture of such sum as shall be judged adequate to the probable expense of the repairs required; and the money is to be applied accordingly to that purpose (*i*). The same course of

(*c*) 5 & 6 Will. 4, c. 50, ss. 13—15;
R. v. King’s Newton, 1 B. & Adol.
826.

(*d*) Sects. 16, 17; R. v. Bush, 9
Ad. & E. 820.

(*e*) See Adams, app. v. Lakeman,
rscsp. 1 Ell. Bl. & Ell. 615.

(*f*) 5 & 6 Will. 4, c. 50, s. 18.

(*g*) Sect. 6.

(*h*) But no action lies against
him at the suit of a person injured
by the road being left out of repair.
(Young v. Davis, 7 H. & N. 760.)

(*i*) Sect. 94.

proceeding, *mutatis mutandis*, is applicable to the case where a body corporate or private person is chargeable *ratione tenuræ*,—and if the highway is part of a turnpike road, the justices are to summon the treasurer, surveyor or other officer of the trust, and to make such order upon him as is already stated with regard to the parish surveyor (*j*). They have however no power to make an order, in any case where the obligation of repairing comes into question (*k*). The only remedy, where that occurs, is by indictment; and this is to be preferred by order of the justices against the parish or party charged before them, at the next assizes or quarter sessions for the county or place where the highway is situate (*l*).

Any injury whatever done to a highway, by which it is rendered less commodious to the passengers, is a public nuisance, and an indictable offence at common law (*m*); and any person is at liberty to abate the nuisance by removing the thing by which it is caused (*n*). But the surveyor is specially required to remove all obstructions and encroachments (*o*) on the highways, and to impound cattle found straying thereon (*p*); and any persons committing certain particular nuisances—or (in general) doing any injury to a highway, or obstructing the free passage thereof,—incurs a penalty not exceeding 40s. (*q*).

(*j*) 5 & 6 Will. 4, c. 50, s. 94.

(*k*) *Ibid.*

(*l*) Sect. 95. See the *Queen v. Arnold*, 8 Ell. & Bl. 550; *The Queen v. Haslemere*, 3 B. & Smith, 313.

(*m*) By 24 & 25 Vict. c. 70, 28 & 29 Vict. c. 83, and 31 & 32 Vict. c. 111, the use of *locomotives* on roads is regulated, and the tolls to be levied thereon. But by 24 & 25 Vict. c. 70, s. 7, it is provided, that whosoever shall use upon any highway a locomotive engine, which shall be so constructed or used as to cause a *public or private nuisance*, shall be liable to any indictment or action

which could, but for the passing of that Act, have been maintained against him.

(*n*) 1 Hawk. P. C. c. 76, ss. 48, 61; *Marriott v. Stanley*, 1 M. & Gr. 568; *Brook v. Jenney*, 1 Gale & D. 567.

(*o*) See 27 & 28 Vict. c. 101, s. 51.

(*p*) See 5 & 6 Will. 4, c. 50, ss. 64—69; 27 & 28 Vict. c. 101, s. 25; *Keane v. Reynolds*, 2 Ell. & Bl. 748.

(*q*) 5 & 6 Will. 4, c. 50, s. 72; 27 & 28 Vict. c. 101, s. 25. See *Queen v. Pratt*, Law Rep., 3 Q. B. 64.

By the common law, the course of an antient (or king's) highway could not be changed without licence from the crown, to be obtained after suing out a writ of *ad quod damnum*, and the finding of an inquisition thereon, that the alteration would not be prejudicial to the public (*r*). But by the 5 & 6 Will. IV. c. 50, any two justices of the division were enabled (subject to certain conditions and restrictions) to order any highway to be widened or enlarged (*s*). The inhabitants in vestry assembled may also direct the surveyor to apply to two justices of the division, to examine a highway with a view to its being diverted or stopped up; and if a certificate of the justices in favour of such proceeding is sent to the quarter sessions, the justices there assembled are to make the order accordingly (*t*). But, in case of a diversion, the proceeding must be by consent of the owner of the lands through which the new highway is to pass (*u*). And in either case, any person who may think himself aggrieved by the proceeding may appeal from the certificate of the justices to the quarter sessions, before the order of that court is made (*v*); and the propriety of the stoppage or diversion is then to be determined by a jury (*x*).

The system of highway regulation and repair above explained not being found to work in all places in a satisfactory manner, the other highway Acts above referred to, (*viz.*, the 25 & 26 Vict. c. 61, the 26 & 27 Vict. c. 61, and the 27 & 28 Vict. c. 101,) have now been passed; and these, without disturbing generally the operation of the Highway Act of 1835, establish a fresh

(*r*) 1 Hawk. P. C. c. 76, s. 35; Fowler v. Sanders, Cr. Jac. 446.

(*s*) 5 & 6 Will. 4, c. 50, s. 82.

(*t*) Sects. 84, 91.

(*u*) Sect. 85; see The Queen v. Justices of Worcestershire, 3 Ell. &

Bl. 477; The Queen v. Phillips, Law Rep., 1 Q. B. 648.

(*v*) Sect. 88; see Selwood v. Mount, 1 Q. B. 726; The Queen v.

Justices of Lancashire, 8 Ell. & Bl. 563.

(*x*) 5 & 6 Will. 4, c. 50, s. 89.

plan which any particular county is at liberty to adopt. By these statutes the justices of any county, in sessions assembled, are empowered to form it (or any part of it) into a *highway district*, governed by a *highway board* (*y*); and in such board will vest all the property, liabilities, and (in general) all the powers which previously belonged to any surveyor of any parish, which lies within such district (*z*). This highway board is to consist of *waywardens* (*a*),—who are to be annually elected in the same manner, and subject to the same qualification, as surveyors of the highways, from the several parishes within the district (*b*),—together with the *justices* acting for the county, and residing within the district (*c*). And the duties, powers and liabilities of such highway board (who may appoint a treasurer, clerk, district surveyor and paid collectors) may be stated, generally, to be the same as those thrown by the 5 & 6 Will. IV. c. 50, upon surveyors of the highways (*d*). And a mode of proceeding is given by the new Acts to compel a highway board to perform its duties, analogous to that already mentioned in reference to such surveyors (*e*). And with regard to the expenses incurred by the board, certain of these are authorized to be charged upon a *district fund*, to which the several parishes forming the district are to contribute; but the other expenses, and, in par-

(*y*) 25 & 26 Vict. c. 61, ss. 5—9. More districts than *one*, may be formed in the county, or in a part of it. (Sect. 5, Schedule A.) But in order to establish *any* highway district, a *provisional* order is to issue in the first instance, which must be afterwards confirmed at a subsequent sessions. (Sects. 5, 6.)

(*z*) Sect. 11.

(*a*) By 26 & 27 Vict. c. 61, no waywarden is to contract for work within his own district.

(*b*) 25 & 26 Vict. c. 61, ss. 9, 10.

See *The Queen v. Lindsey*, Law Rep., 1 Q. B. 68.

(*c*) Sect. 9. See 27 & 28 Vict. c. 101, s. 20. As to the appointment of paid collectors, *ibid.* ss. 31, 45.

(*d*) 25 & 26 Vict. c. 61, s. 17. See, however, certain exceptions, *ibid.* sect. 42. The course of proceeding at highway boards is pointed out in the first schedule to 27 & 28 Vict. c. 101.

(*e*) 25 & 26 Vict. c. 61, ss. 18, 19. Vide *sup.* pp. 247—249.

ticular, the expenses of maintaining and keeping in repair its own highways, (as in places where these Acts are *not* adopted,) are a separate charge on each parish (*f*), and the sum required is to be raised and paid over to the treasurer of the board by the overseers, out of the poor rates (*g*).

II. *Turnpike roads*.—These do not in general fall within the operation of the statutes relative to highways (*h*); but are regulated, primarily, by the local Acts relative to each particular road,—which (though temporary in their character) are continued by the legislature from time to time as they are about to expire (*i*):—and, in the next place, by statutes of a general description, applicable (with very few exceptions) to all turnpike roads;—that is, all roads maintained by tolls and placed under the management of trustees or commissioners for a limited period of time (*k*). Of these general turnpike Acts, the 3 Geo. IV. c. 126, is the principal (*l*).

(*f*) 25 & 26 Vict. c. 61, s. 20. (See the Queen *v.* Farrer, Law Rep., 1 Q. B. 558.) Any waywarden or ratepayer of a parish charged with such repair may appeal to sessions (sect. 26). And see 27 & 28 Vict. c. 101, ss. 33, 37, 38.

(*g*) No contribution, however, is to be required from any parish, at any one time, in excess of 10*d.* in the pound, or in the aggregate in any one year in excess of 2*s.* 6*d.* in the pound, except with consent of four-fifths of the ratepayers. And if, for a period of seven years prior to the Act, there has been a highway rate levied in any parish in respect of property not subject to be assessed to poor rates, such property is still so to be assessed; but in this case, the monies are to be raised and paid by the waywarden of the

parish, and not the overseers (sect. 21.)

(*h*) See 5 & 6 Will. 4, c. 50, s. 113; 25 & 26 Vict. c. 61, s. 7.

(*i*) The following are recent continuing Acts: 29 & 30 Vict. c. 105; 30 & 31 Vict. c. 121; 31 & 32 Vict. c. 99.

(*k*) See 4 Geo. 4, c. 95, s. 90; 3 Chitty's Burn, 177.

(*l*) Enactments with regard to the regulation of turnpike roads are also contained in the following statutes:—4 Geo. 4, cc. 16, 95; 5 Geo. 4, c. 69; 7 & 8 Geo. 4, c. 24; 9 Geo. 4, c. 77; 1 & 2 Will. 4, c. 25; 2 & 3 Will. 4, c. 124; 3 & 4 Will. 4, c. 80; 4 & 5 Will. 4, c. 81; 5 & 6 Will. 4, c. 18; 2 & 3 Vict. c. 46; 3 & 4 Vict. c. 39; 4 & 5 Vict. cc. 33, 51; 12 & 13 Vict. c. 46; 14 & 15 Vict. c. 38. See as to the turnpike roads in

The general effect of their leading provisions is as follows:—

Every trustee or commissioner of a turnpike road must possess a certain qualification in point of property (*m*);— must be sworn to the due execution of his duties (*n*); and is prohibited in general from holding any profitable office or contract under the Act of which he is trustee (*o*). The justices of the peace of the different counties or divisions through which the road passes are, *ex officio*, commissioners of the trust (*p*).

The trustees are not only to maintain and keep in repair roads committed to their management; but to construct and maintain causeways at the sides of them for the use of foot passengers (*q*); to place milestones (*r*); and to widen, divert or improve the roads as they shall think proper. And, for the latter purpose, they are empowered to purchase land; and, (subject to certain conditions and restrictions,) to turn the road over the property of individuals (*s*), and to take materials from the lands of private owners (*t*). To facilitate the performance of the duty relative to repairs, they are also empowered, (if they think proper,) to contract, by the year or otherwise, with any person for repairing or amending the road, or any bridges or buildings thereon (*u*).

The trustees are also bound to prevent or remove all nuisances and annoyances on the roads under their management (*x*); and they may direct prosecutions by in-

South Wales, 7 & 8 Vict. c. 91; 8 & 9 Vict. c. 61; and 10 & 11 Vict. c. 72. See, also, the Acts cited post, p. 255, n. (*q*).

(*m*) 3 Geo. 4, c. 126, s. 62.

(*n*) 4 Geo. 4, c. 95, s. 32.

(*o*) 3 Geo. 4, c. 126, s. 65. But see 30 & 31 Vict. c. 121, s. 2.

(*p*) 3 Geo. 4, c. 126, s. 61.

(*q*) *Ibid.* ss. 111, 112, 113. See *Loveridge v. Hodson*, 2 B. & Adol. 602; *R. v. Higgins*, 5 B. & Adol.

555; *Merivale v. Exeter Road Trustees*, Law Rep., 3 Q. B. 149.

(*r*) 3 Geo. 4, c. 126, s. 119.

(*s*) 9 Geo. 4, c. 77, s. 9; 4 Geo. 4, c. 95, s. 65; 3 Geo. 4, c. 126, s. 84.

(*t*) 3 Geo. 4, c. 126, s. 97.

(*u*) 4 Geo. 4, c. 95, s. 78.

(*x*) See as to *steam engines*, 5 & 6 Will. 4, c. 50, s. 70; 27 & 28 Vict. c. 75, s. 1.

dictment, or otherwise, for offences in respect of the same (*y*).

To meet the expenses incurred, the trustees are to erect toll-gates (*z*); and the tolls are to be taken every day, the computation of them being from twelve at night to twelve the night following (*a*). They are to put up at every toll-gate a table of tolls, and to provide toll tickets to acknowledge the receipt (*b*). No person, unless exempted, may pass without paying (*c*): and if a passenger liable to pay refuses, the collector may seize and distrain his beast or carriage, or any other of his goods and chattels; and, in default of payment for four days, may sell the distress (*d*). If any dispute arises about the amount of the toll due, or the charges of a distress, it may be settled by any justice of the peace acting for the place where the toll-gate is situate (*e*). Of the various cases of exemption from tolls, mentioned in the Acts, we shall only notice the following:—No toll is to be taken on horses or carriages in attendance on her Majesty (*f*), or on any of the royal family, or returning from such duty (*g*): nor from officers or soldiers in uniform (*h*); nor from volunteers on duty and in uniform (*i*);

(*y*) 3 Geo. 4, c. 126, s. 133.

(*z*) 9 Geo. 4, c. 77, s. 5.

(*a*) 9 Geo. 4, c. 77, s. 6.

(*b*) 3 Geo. 4, c. 126, s. 37; 4 Geo. 4, c. 95, s. 28.

(*c*) As to 3 Geo. 4, c. 126, ss. 41, 139, see *R. v. Irving*, 12 Q. B. 429.

(*d*) 3 Geo. 4, c. 126, s. 39.

(*e*) *Ibid.* s. 40. As to toll collectors, and the mode of proceeding against them in case of misconduct, see *Ib.* s. 52; 4 Geo. 4, c. 95, ss. 30, 50; *R. v. Hants (Justices)*, 1 B. & Adol. 84, 654.

(*f*) Independently indeed of the Acts, and in virtue of the prerogative of the crown, her majesty's horses and carriages seem exempt

(though not in attendance on her) if used by her permission. See *Westover v. Perkins*, 2 E. & E. 57.

(*g*) 3 Geo. 4, c. 126, s. 32; 4 Geo. 4, c. 95, s. 24.

(*h*) See 5 & 6 Vict. c. 12, s. 62, (a provision re-enacted in the Annual Mutiny Acts of later dates); and as to the exemption of the *police*, see 2 & 3 Vict. c. 47, s. 10; 3 & 4 Vict. c. 88, s. 1; 14 & 15 Vict. c. 38, s. 4.

(*i*) 24 & 25 Vict. c. 126. As to this exemption in regard to the *yeomanry* see *Humphrey v. Bethel*, *Law Rep.*, 1 C. P. 215; see also *Tunstall v. Lloyd*, 1 B. & S. 95.

nor on carriages carrying, or returning from carrying, commissariat stores (*h*) or materials for turnpike roads or highways; nor (in general) on those employed in the conveyance of manure, or of implements of industry (*l*), or of produce grown on the land of the owner, and not sold or going to be sold (*m*). An exemption is also in general allowed to any person on his road to or from his proper parochial church or chapel,—or his usual place of religious worship, tolerated by law,—either on Sundays, or on any other day on which divine service is by authority ordered to be celebrated (*n*). Parishioners also are exempted in attending or returning from the funeral of persons, who die and are buried in the parish in which the turnpike road lies; as also are rectors, vicars, or curates going to, or returning from, their parochial duties; and persons going to, or returning from, the election of a member for the county in which the road is situated. And all horses or other cattle, as well as vehicles of every description, are also exempted which only cross a turnpike road, or do not pass above a hundred yards thereon (*o*). It is to be observed, however, that any person claiming or taking an exemption, by fraudulent means, is liable to be convicted in a penalty not exceeding 5*l.* (*p*). The trustees are empowered, on obtaining the previous consent in writing of a secretary of state, to borrow money, as they may

(*h*) 3 Geo. 4, c. 126, s. 32; London and S. W. Railway *v.* Reeves, Law Rep., 1 C. P. 580; Toomer *v.* Reeves, Law Rep., 3 C. P. 62.

(*l*) As to what these words include, see 14 & 15 Vict. c. 38, s. 4. By 13 & 14 Vict. c. 79, s. 3, the trustees may, with approval of a principal secretary of state, reduce or take off the tolls on beasts or carriages used in conveying lime for the improvement of land.

(*m*) 3 Geo. 4, c. 126, s. 32; 5 &

6 Will. 4, c. 18; 3 & 4 Vict. c. 51; 14 & 15 Vict. c. 38, s. 4; see *R. v. Adams*, 6 M. & S. 52.

(*n*) 3 Geo. 4, c. 126, ss. 32, 33; see *Lewis v. Hammond*, 2 B. & A. 206.

(*o*) 3 Geo. 4, c. 126, s. 32; 3 & 4 Vict. c. 33; see *Gerrard v. Parker*, 7 Ell. & Bl. 498; *Veitch v. The Trustees of Exeter Roads*, 8 Ell. & Bl. 986; *Warmby v. Deakin*, 14 C. P., N. S. 124.

(*p*) See 3 & 4 Vict. c. 33, s. 36.

think proper, on the credit of the tolls; and may mortgage them, by way of security, to the lenders (*q*). They may also let them to farm for three years at a time (*r*), subject to such regulations as the Acts prescribe—may compound for them with any person or persons for a year at a time—may reduce them (by consent of creditors),—or may advance them to the full amount authorized by the particular Act (*s*).

(*q*) 3 & 4 Vict. c. 33, s. 81. See 12 & 13 Vict. c. 87; 13 & 14 Vict. c. 79; 17 & 18 Vict. c. 58, for provisions with respect to mortgages of turnpike tolls; and 14 & 15 Vict. c. 38; 15 & 16 Vict. c. 33; 17 & 18 Vict. c. 51; 18 & 19 Vict. c. 102; 19 & 20 Vict. c. 12; 20 & 21 Vict. c. 9; 21 & 22 Vict. c. 80; 22 & 23 Vict. c. 33; 23 & 24 Vict. c. 70; c. 73, s. 3; 24 & 25 Vict. c. 46, s. 2; 26 & 27 Vict. c. 98; 27 & 28 Vict. c. 79; 28 & 29 Vict. c. 91; 29 & 30 Vict. c. 92; 30 & 31 Vict. c. 66;

31 & 32 Vict. c. 66, as to arrangements for relief of insolvent turnpike trusts; and 4 & 5 Vict. c. 59; 28 & 29 Vict. c. 119, as to the application of *highway rates* to the repair of turnpike roads.

(*r*) 3 & 4 Vict. c. 33, s. 55. See *Stott v. Clegg*, 13 C. B. (N. S.) 619.

(*s*) 4 Geo. 4, c. 95, s. 13; 3 Geo. 4, c. 126, s. 43; see *R. v. Trustees of Bury and Stratton Roads*, 4 B. & C. 361.

CHAPTER VIII.

OF THE LAWS RELATING TO NAVIGATION,—AND TO
THE MERCANTILE MARINE.

IN attempting to exhibit, in a condensed form, the principal laws relating to the extensive subject indicated in the title to this chapter, we shall distribute our statement under the following heads:—

- I. The laws relating to navigation.
- II. The laws relating to the ownership, registration, and transfer of merchant ships.
- III. The laws relating to merchant seamen.
- IV. The laws relating to pilotage.
- V. The laws relating to lighthouses, beacons, and sea marks.
- VI. The laws relating to the liability of shipowners for loss or damage.
- VII. The laws relating to fisheries.

I. The laws of navigation, which we shall have occasion to consider, are those which concern the united kingdom and the British possessions in general, in reference to the trading intercourse which foreign countries are allowed to hold with them.

This subject was formerly regulated by the celebrated Navigation Act passed in the reign of Charles the second. This statute was an improvement on our earlier system, [which was framed in 1650, with a narrow partial view (*a*); being intended to mortify our own sugar

(*a*) See Scobell, 132.

[islands, which were disaffected to the Parliament, and still held out for Charles the second, by stopping the gainful trade which they carried on with the Dutch (*b*); and at the same time to clip the wings of those our opulent and aspiring neighbours (*c*).] This original navigation law [prohibited all ships of foreign nations from trading with any English plantation without licence from the council of state. In 1651, the prohibition was extended also to the mother country: and no goods were suffered to be imported into England, or any of its dependencies, in any other than English bottoms, or in the ships of that European nation of which the merchandize imported was the genuine growth or manufacture.] At the Restoration, the former provisions were continued by the 12 Car. II. c. 18 (being the Navigation Act first above referred to), with the material addition of requiring that the master and three-fourths of the mariners should also be British subjects,—the object of this Act, as may be gathered from its preamble, being to encourage, by the exclusion of foreign competitors, the ships, seamen, and commerce of Great Britain.

In the reign of King George the fourth both this statute and all the other navigation Acts then in force were repealed, and a new system of regulations established in their place (*d*); and this branch of the law was afterwards amended and consolidated by various Acts in the reign of King William the fourth (*e*), and of her present majesty (*f*); but none of these changes involved any departure from the policy of encouraging our mercantile marine and commerce, by prohibitions of such nature in general as above described. More recently, however, under the influence of the doctrines

(*b*) Mod. Univ. Hist. xii. 289.

(*c*) 1 Bl. Com. 418.

(*d*) See 6 Geo. 4, c. 105.

(*e*) See 3 & 4 Will. 4, cc. 54, 55,

59.

(*f*) See 8 & 9 Vict. cc. 88, 89,

93.

commonly designated as those of free trade (*g*), a new course of legislation has been pursued continually receding from that policy (*h*), until at length it has been relinquished altogether; except only as regards the trade from one part of any British possession in Asia, Africa and America, to another part of the same possession (*i*)—as to which the law still is that it shall not be carried on except in British ships (*k*): though, upon an address from the legislature of any such possession praying that the conveyance of goods or passengers may take place, as far as they are concerned, free from such restriction, her majesty is empowered to authorize it by order in council accordingly, on such terms as she may think fit (*l*). In other respects foreign vessels are now generally allowed a free commercial intercourse with this country and its dependencies, upon terms of perfect equality with our own vessels—a concession qualified, however, by some very important provisions tending to confine it to such nations as consent, on the other hand, to concede to us a reciprocal and equal freedom. For by 16 & 17 Vict. c. 107, ss. 324—326 (*m*), and by 18 &

(*g*) As regards the subject now in question, these doctrines are not of merely recent application. It was held by Adam Smith, that the Act of Navigation “was not favourable to foreign commerce, or the growth of that opulence which can arise from it; that a nation will be most likely to buy cheap, when by the most perfect freedom of trade it encourages all nations to bring to it the goods which it has occasion to purchase; and for the same reason it will be most likely to sell dear, when its markets are thus filled with the greatest number of buyers.” (Wealth of Nations, vol. 2, p. 194.)

(*h*) This commenced with the statute 12 & 13 Vict. c. 29, which repealed 8 & 9 Vict. c. 88, and has since been itself repealed by 17 & 18 Vict. c. 120.

(*i*) Of the other restrictions formerly existing, those which were longest retained were such as related to the coasting trade of the United Kingdom and the Channel Islands. (See 12 & 13 Vict. c. 29; 17 & 18 c. 5; 18 & 19 Vict. c. 96, ss. 13, 14, 15.)

(*k*) See 16 & 17 Vict. c. 107, s. 163.

(*l*) Ibid. s. 328.

(*m*) Called “The Customs Consolidation Act, 1853.”

19 Vict. c. 96, s. 15 (*n*), it is enacted, that if British vessels are subjected in any foreign country to any *prohibitions* or *restrictions* as to the voyages in which they may engage, or the articles which they may import or export, her majesty may, by order in council, impose such prohibitions and restrictions upon the ships of such country in reference to the same subject, as she may think fit,—so as to place such ships as nearly as possible on the same footing as that on which British ships are placed in the ports of the country to which the former ships belong:—and further, that if it shall appear that British ships are directly or indirectly subjected in any foreign country to *duties or charges* from which the national vessels of such country are exempt; or that any duties are imposed there upon articles imported or exported in British ships, which are not equally imposed upon the like articles in national vessels; or that *any preference whatsoever is shown*, either directly or indirectly, to vessels of such country over British vessels, or to articles imported or exported in the former, over the like articles imported or exported in the latter; or that British trade and navigation are not placed by such country on *as advantageous a footing as the trade and navigation of the most favoured nation*;—her majesty may in such case, by order in council, impose such duty or duties of tonnage upon the ships of such nation, or such duty or duties on goods imported or exported in its ships, as may appear justly to countervail the disadvantages to which British trade or navigation is so subjected (*o*).

(*n*) Called “The Supplemental Customs Consolidation Act, 1855.”

(*o*) See also 15 & 16 Vict. c. 47, “An Act to enable her Majesty to abolish otherwise than by treaty, on condition of reciprocity, differential

duties on foreign ships.” And 25 & 26 Vict. c. 63, ss. 57—64, making arrangements concerning lights, sailing rules, salvage, and measurement of tonnage, in the case of foreign ships.

Such, in a summary point of view, is the effect of those laws of navigation of which we proposed to treat. There are also legislative provisions, of a special kind, with respect to the trade with any British possessions on or near the Continent of Europe, or in Africa, or within the Mediterranean Sea; and with respect to the trade with India and China, and the coasting trade of India. But any detail of these would carry us beyond the limits which it is necessary to observe in the present chapter. It must suffice to refer the reader to 3 & 4 Will. 4, c. 93; 3 & 4 Vict. c. 56; 6 & 7 Vict. c. 80; 16 & 17 Vict. c. 107, ss. 327, 329; 17 & 18 Vict. c. 104, s. 108 (*p*).

As to the next five of the subjects enumerated at the outset of this chapter, the laws relating to them were in the year 1854 thrown into one Act, viz. the 17 & 18 Vict. c. 104 (*q*); and the account therefore which we shall have to give of the law under these heads will be in the way of abstract from that Act, as amended in some respects by subsequent statutes, viz., 18 & 19 Vict. c. 91; 25 & 26 Vict. c. 63, and 30 & 31 Vict. c. 124.

With regard to the whole of the matters which are embraced under these five heads, we may make the preliminary remark, that they are all placed under the general superintendence of that committee of the privy council which is commonly described as the Board of

(*p*) These provisions with respect to trade with India and China must be taken as subject to the 21 & 22 Vict. c. 106, vesting in her majesty all the rights and powers of the East India Company. By 21 & 22 Vict. c. 106, §. 21, all the provisions in the above Acts referring to the company and the court of directors, and court of proprietors thereof, are now to be construed as referring to the secretary of state in council (*vide*

sup. vol. I. pp. 115—119.)

(*q*) This Act (known as the Merchant Shipping Act, 1854) embraces the subjects of shipping, masters and seamen, safety and prevention of accidents, pilotage, lighthouses, wrecks and salvage, liability of ship-holders, and legal procedure. By a statute of the same session (c. 120) a great variety of prior enactments on these subjects were repealed.

Trade (*r*). But it will be necessary to treat of those subjects severally and successively; in such general and summary manner, at least, as is suitable to the plan and nature of the present work. We proceed then to consider—

II. The laws relating to the ownership, registration and transfer of merchant ships (*s*).

And here the Merchant Shipping Acts provide, that no ship shall be deemed a British ship unless she belong wholly to owners who are of one of the following descriptions:—Natural-born subjects—persons made denizens, or persons naturalized, either by or pursuant to any act of parliament or the proper legislative authority in some British possession—or bodies corporate established under, subject to the laws of, and having their principal place of business in, the united kingdom or some British possession (*t*). And even as to the capacity of natural-born subjects and persons naturalized or made denizens, there are some restrictive conditions (*u*). It is also provided that every British ship—subject to

(*r*) 17 & 18 Vict. c. 104, s. 6.
Vide sup. II. p. 495.

(*s*) These laws apply to the whole of her majesty's dominions (17 & 18 Vict. c. 104, s. 17).

(*t*) 17 & 18 Vict. c. 104, s. 18.

(*u*) As to natural-born subjects, it is provided by 17 & 18 Vict. c. 104, s. 18, that none can be an owner who has taken the oath of allegiance to any foreign sovereign or state, unless he has subsequently taken the oath of allegiance to her majesty, and is and continues during the whole of his ownership resident within her majesty's dominions, or if not so resident, then a member

of a British factory or partner in a house actually carrying on business within her majesty's dominions. As to persons made denizens or naturalized, it is made a condition that such persons are and continue during the whole of their ownership resident within her majesty's dominions, or if not so resident, then members of a British factory or partners in a house actually carrying on business within those dominions, and have taken the oath of allegiance to her majesty subsequently to their being made denizens or naturalized.

• • •

some few exceptions (*v*)—must be *registered* (*w*); and that, unless registered, she shall not be recognized as such, so as to be entitled to any of the advantages or protection usually enjoyed by British ships, or to use the national flag or assume the national character (*x*). This registration may be made in the united kingdom at any port approved by the commissioners of customs for the registry of ships (*y*); and is to be made with the collector, comptroller, or other principal officer of the customs there (*z*); and the port at which any ship is registered is thereafter to be considered as that to which she belongs; until the registry is transferred (as it may be) to another (*a*). It is further provided, with respect to the registration, that it must comprise, *inter alia*, the name of the ship, which is incapable of being afterwards changed (*b*); and the names and descriptions of the owners (*c*). But in connection with this registration of the owners, the following points require attention:—

1. The property in every ship is always to be divided for this purpose into sixty-four shares (*d*).
2. No person is to be registered as owner of any fractional part of a share (*e*).
3. The individuals registered as owners are

(*v*) 17 & 18 Vict. c. 104, s. 19. The exceptions are—1. Ships registered prior to 1st May, 1855. 2. Ships not exceeding fifteen tons burthen employed solely on the rivers or coasts of the united kingdom, or of some British possession within which the managing owners reside. 3. Ships not exceeding fifty tons burthen, and not having a whole or fixed deck, employed solely coastwise, on the shores of Newfoundland, or parts adjacent, or in the Gulf of St. Lawrence, or such portion of the coasts of Canada, Nova Scotia, or New Brunswick, as lie bordering on such gulf.

(*w*) See 17 & 18 Vict. c. 104, s. 50; *Arkle v. Henzell*, 8 Ell. & Bl. 828; *Wiley v. Crawford*, 1 Ell., B. & Smith, 253.

(*x*) 17 & 18 Vict. c. 104, ss. 19, 106.

(*y*) But see 31 & 32 Vict. c. 129, as to registration in the colonies in certain cases.

(*z*) Sect. 30.

(*a*) Sects. 33, 89; 18 & 19 Vict. c. 91, s. 12.

(*b*) 17 & 18 Vict. c. 104, s. 34. See *Bell v. Bank of London*, 3 H. & N. 730.

(*c*) Sect. 42.

(*d*) Sect. 37.

(*e*) *Ibid.*

not to exceed thirty-two in the whole, except that any number not exceeding five may be registered as joint owners of any share (*f*). 4. The property in the ship or its shares, so far as regards the power of making a valid title as owner to a purchaser, is vested exclusively in the registered owners (*g*); though any number of other persons may be *beneficially or equitably* interested, and may enforce their rights in that capacity, in case of breach of trust, by application to the Court of Chancery (*h*). Again, it is provided, that a registered ship, or any share therein, when disposed of to a person qualified to be owner of a British ship (*i*), shall be *transferred* by a bill of sale under seal, according to a form prescribed; upon which the name of the transferee shall be entered on the register book (*k*); and also that a registered ship or any share therein may be *mortgaged* by instrument in a form prescribed for that purpose (*l*), and the mortgage shall be entered in the register book (*m*). And it is *inter alia* enacted, that, where there are several mortgagees, their respective priorities are to be in all cases according to the time at which each security was registered, and not the time at which it was executed (*n*).

III. The laws relating to merchant seamen.

These have chiefly in view the great national object of promoting the increase of our mercantile mariners, of securing their efficiency and discipline, and of affording them all due encouragement and protection.

The Merchant Shipping Acts provide that local marine

(*f*) 17 & 18 Vict. c. 104, s. 37.

(*g*) Sect. 43.

(*h*) Sects. 37, 65. And see 25 & 26 Vict. c. 63, s. 3.

(*i*) See 17 & 18 Vict. c. 104, ss. 55, 56, 96; 18 & 19 Vict. c. 91, s. 11.

(*k*) 17 & 18 Vict. c. 104, s. 66.

(*l*) Sect. 66. See Dickinson *v.*

Kitchen, 8 Ell. & Bl. 789; Ward *v.* Beck, 13 C. B., N. S. 668. The Innisfallen, Law Rep., 1 Adm. & Ecc. 72.

(*m*) Sect. 67.

(*n*) Sect. 69. Ship transfers and assignments need not be *filed* under 17 & 18 Vict. c. 36.

boards shall be established at certain of the sea ports of the united kingdom, for carrying into effect their provisions, under the superintendence of the Board of Trade (*o*). And that in every such sea port, the local marine board shall establish a mercantile marine office or offices, under the management of *Superintendents* (*p*); whose business it shall be to afford facilities for engaging seamen (*q*) by keeping registries of their names and characters; to superintend and facilitate their engagement and discharge; to provide means for securing the presence on board, at the proper times, of men who are so engaged; to facilitate the making of apprenticeships to the sea service; and generally to perform such other duties relating to merchant seamen and merchant ships, as shall be committed to them by the Board of Trade (*r*).

It is further provided, that examinations shall be instituted for persons intending to become masters or mates of foreign-going ships, or home trade passenger ships, before examiners appointed by the local marine board (*s*). And that no person shall be employed in a foreign-going ship as master, or as first or second or only mate—or in a home trade passenger ship, as master or first or only mate—unless he possesses a “certificate of competency” as the result of such examination: or (in the case of a person who has attained a certain rank in the service of her majesty) a “certificate of service:” either of which certificates (according to the nature of the case) is to be granted by the Board of Trade to such persons as it finds to be entitled to them (*t*).

(*o*) 17 & 18 Vict. c. 104, s. 110.

(*p*) Sect. 122; 25 & 26 Vict. c. 63, s. 15.

(*q*) The expression “seamen” is to include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship. (17 & 18 Vict. c. 104,

s. 2.)

(*r*) 17 & 18 Vict. c. 104, s. 124.

(*s*) Sect. 131. See 25 & 26 Vict. c. 63, s. 17, providing for the examination of candidates at places where there is no local marine board.

(*t*) 17 & 18 Vict. c. 104, ss. 134—140. As to certificates of com-

In addition to these provisions there are a variety of others (*u*), intended for the protection of seamen, and for promoting their health and comfort; from among which we may extract the following.

That the master of every ship—except those of less than eighty tons burthen, exclusively employed in the coasting trade of the united kingdom—shall enter into an agreement with every seaman whom he carries to sea from any part of the united kingdom. This is to be in a form sanctioned by the Board of Trade, and signed by both master and seaman: and it is to set forth the nature and duration of the voyage; the number and description of the crew; the time at which each seaman is to be on board, or to begin work; the capacity in which he is to serve; the amount of wages (*x*); a scale of provisions; regulations as to conduct; and such punishments for misconduct as the form issued by the Board of Trade shall have sanctioned, and as the parties shall agree to adopt (*y*). The Acts also provide that no right to wages shall be dependent on the earning of freight (*z*); and that every stipulation on the part of the seaman for abandoning his right to wages, in the event of the loss of the ship, shall be inoperative (*a*). That every place, occupied by any seaman or apprentice in any ship, shall have such space as is in the Acts particularly specified (*b*); shall be kept free from stores or goods of any kind not

petency and of service for *engineers* in *steamers*, sec 25 & 26 Vict. c. 63, ss. 5—12. As to the cancellation or suspension of certificate, see *ibid.* sects. 23, 24.

(*u*) From some of these provisions (contained in 17 & 18 Vict. c. 104, Part III.), such sea-going ships as are *fishing* or *lighthouse* vessels or *pleasure yachts* are excepted. (See 25 & 26 Vict. c. 63, s. 13.)

(*w*) As to the mode of payment (which, where practicable, is to be

in money and not by bill), see 25 & 26 Vict. c. 63, s. 19.

(*y*) 17 & 18 Vict. c. 104, s. 149.

(*z*) Sect. 183. The maxim of law formerly was, that freight was the mother of wages.

(*a*) Sect. 182. There is an exception as to this, made in the case of ships employed on *salvage* service. (25 & 26 Vict. c. 63, s. 18.)

(*b*) See as to this, 30 & 31 Vict. c. 124, s. 9.

being the property of the crew in use during the voyage; and shall be properly caulked and constructed, and well ventilated (*c*). That every ship navigating between the united kingdom and any place out of the same shall be properly supplied with medicines, to be examined by medical inspectors, to be appointed for that purpose (*d*). That "official log-books" shall be kept in every ship, (except those employed exclusively in the coasting trade of the united kingdom,) in such form as is prescribed by the Board of Trade, either in connection with or distinct from the ordinary log-books; and that in all cases entry shall be made in the official log-books as soon as possible after the occurrence to which it relates; and that among the occurrences shall be entered every punishment inflicted, (together with the offence,) and every case of illness, injury or death (*e*).

To secure also the important object of affording general information from time to time, as to the state of our mercantile marine, it is provided that there shall be in the port of London a "General Register and Record Office for Seamen" (*f*);—that the master of every foreign-going ship shall, within forty-eight hours after her arrival at her final port of destination in the united kingdom, or upon discharge of the crew, (whichever first happens,) deliver to the Superintendent of the Mercantile Marine Office before whom the crew is discharged a list containing, *inter alia*, the number and date of the ship's register and her registered tonnage (*g*); the length and general nature of her voyage or employment; the names, ages and places of birth of the master, the crew, and the apprentices; their qualities on board their last ships or other employment; and the dates and places of their joining the ship. It is further enacted that the master or owner of every home trade ship shall, every

(*c*) 17 & 18 Vict. c. 104, s. 231.

(*e*) Sects. 280—282.

(*d*) Sects. 224, 226. And as to

(*f*) Sect. 271.

the medical inspection of seamen,
see 30 & 31 Vict. c. 124, s. 10.

(*g*) See 25 & 26 Vict. c. 63, s. 4.

half year, transmit or deliver to some such Superintendent in the united kingdom, a similar list for the preceding half year: and that all such lists, together with other documents in the Acts particularized, shall be transmitted by the Superintendents by whom they have been received to the Registrar-general of seamen; to be by him recorded and preserved and produced to any person desirous of inspecting the same (*h*). In addition to which it is directed that the collector or comptroller of customs at every port in the united kingdom shall, every half year, transmit to such Registrar-general a list of all ships registered in such port; and also of all ships whose registers have been transferred or cancelled in such port since the last preceding return (*i*).

IV. The laws relating to pilotage.

The Merchant Shipping Acts (*j*) recognize and confirm the powers and jurisdictions theretofore lawfully exercised by various bodies of persons in different parts of the kingdom, with regard to the appointment and regulation of pilots for those districts respectively (*k*),—the most important of which bodies is the Trinity House of Deptford Strond; which is a company of masters of ships incorporated in the reign of Henry the eighth, and charged by many successive charters and acts of parliament with numerous duties relating to the marine.

These bodies under the common name of “Pilotage Authorities” (*l*)—are severally enabled, by bye-laws, to

(*h*) 17 & 18 Vict. c. 104, ss. 273—277.

(*i*) Sect. 278.

(*j*) See 17 & 18 Vict. c. 104, ss. 330—388; 25 & 26 Vict. c. 63, ss. 39—42. The provisions relative to *pilotage* apply to the united kingdom only. (17 & 18 Vict. c. 104, s. 330.)

(*k*) 17 & 18 Vict. c. 104, s. 331.

See also 16 & 17 Vict. c. 129, ss. 3 et seq.

(*l*) 17 & 18 Vict. c. 104, ss. 2, 331. By 25 & 26 Vict. c. 63, s. 39, the Board of Trade is entrusted with additional powers in reference to *pilotage authorities*; and, in particular, are enabled to constitute a pilotage authority, and to fix its district (in which, however, there shall

be made with consent of her majesty in council, to do various things within their respective districts: and *inter alia* to determine the qualifications to be required from persons applying to them to be licensed as pilots, whether in respect of their age, skill, time of service, character, or otherwise; to issue licences accordingly to such persons as are qualified (*m*); and to make regulations for the government of the pilots they so license (*n*). They are also required to deliver periodically to the Board of Trade returns comprising a variety of particulars; and among these, the names and ages of all pilots or apprentices acting under their authority; and the service for which each is licensed (*o*). And the returns so made are to be laid by the Board of Trade, without delay, before both houses of parliament (*p*).

It is also provided, that every pilotage authority shall have power by bye-law, made with consent of her majesty in council, to exempt (within the limits of their respective districts) the masters of any ships, or of any classes of ships, from being compelled to employ qualified pilots (*q*); and that the Board of Trade shall have power, by provisional order to be confirmed by act of parliament, to exempt masters from being obliged to employ pilots in *any*, or in any part of any, pilotage district (*r*). It is also enacted that the master or mate of any ship may apply to any pilotage authority to be examined as to his capacity to pilot the ship to which he belongs, or any one or more ships belonging to the same owner, within any part of the district of such pilotage authority; and that if he be found competent, a pilotage certificate shall be granted to enable him to pilot any

be no *compulsory* pilotage) in any place in the united kingdom, where there is no such authority.

(*m*) As to *recalling* a licence, see 17 & 18 Vict. c. 104, s. 352, and the case of *Henry v. Newcastle Trinity*

House Board, 8 Ell. & Bl. 723.

(*n*) 17 & 18 Vict. c. 104, s. 333.

(*o*) Sect. 337.

(*p*) Sect. 339.

(*q*) Sect. 332.

(*r*) 25 & 26 Vict. c. 63 s. 30(4.)

of such ships himself within the limits therein described, without incurring a penalty for failing to employ a qualified pilot (*s*). But every master of an *unexempted* ship navigating within any district, who—after a qualified pilot has offered to take charge of her, or has made a signal for that purpose—either himself pilots her without possessing a pilotage certificate enabling him to do so, or employs, or continues to employ, an unqualified person to pilot her; and every master of an *exempted* ship who, under the like circumstances, employs or continues to employ an unqualified person to pilot her;—incurs, for every such offence, a penalty of double the amount of pilotage demandable for the conduct of such ship (*t*).

With regard to the Trinity House in particular, it is allowed to appoint and license pilots for the limits following, that is to say, 1. “The London District,” comprising the waters of the Thames and Medway as high as London Bridge and Rochester Bridge respectively, and also the seas and channels leading thereto or therefrom as far as Orfordness to the north and Dungeness to the south—but so nevertheless that no pilot shall be hereafter licensed to conduct ships both above and below Gravesend. 2. “The English Channel District,” comprising the seas between Dungeness and the Isle of Wight. 3. “The Trinity House Outport Districts,” comprising any pilotage district for the appointment of pilots, within which no particular provision is made by act of parliament or charter (*u*). And it is to be noticed that, as the general rule, the employment of pilots in the first and third of these districts is compulsory (*x*). But this is subject to

(*s*) 17 & 18 Vict. c. 104, s. 340, and see s. 355.

(*t*) Sect. 353. As to this section, see the *Queen v. Stanton*, 8 Ell. & Bl. 445; *The Tyne Improvement Commissioners v. The General Steam Navigation Company*, 2 Law Rep., Q. B. 65.

(*u*) 17 & 18 Vict. c. 104, s. 370.

A separate pilotage authority has been established for the *Bristol Channel*. (See 24 & 25 Vict. cap. ccxxxvi.; 25 & 26 Vict. c. 63, s. 42.)

(*x*) 17 & 18 Vict. c. 104, s. 376. (See the case of *The Hanna*, Law

an enactment that certain ships, *when not carrying passengers*, shall be exempted from compulsory pilotage in the London District and the Trinity House Outport Districts, that is to say, 1. Ships employed in the coasting trade of the united kingdom. 2. Ships of no more than sixty tons burtheu. 3. Ships trading to Boulogne, or to any place in Europe north of Boulogne. 4. Ships from Guernsey, Jersey, Alderney, Sark, or Man, being wholly laden with stone, the produce of those islands. 5. Ships navigating within the limits of the port to which they belong. 6. Ships passing through the limits of any pilotage district, on their voyages between two places, both situate out of such limits, and not being bound to any place within such limits, nor anchoring therein (*y*).

There is also a general provision, that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law (*z*).

V. The laws relating to lighthouses, beacons, and sea marks.

The power of erecting, placing and maintaining these is, as formerly shown, incident to the royal prerogative (*a*). By 8 Eliz. c. 13, however, it was specially committed to the Trinity House; and the authority of this corporation has, since the reign of Elizabeth, been confirmed and regulated by several modern statutes; but principally by the Merchant Shipping Acts now under consideration (*b*), in

Rep. 1 Adm. & Ecc. 283.) As to the penalty for not employing a qualified pilot where it is compulsory to do so, see ss. 354, 376. As to s. 354, vide post, p. 296.

(*y*) 17 & 18 Vict. c. 104, s. 379.
See 25 & 26 Vict. c. 63, s. 41.

(*z*) 17 & 18 Vict. c. 104, s. 388.

(*a*) Vide sup. vol. II. p. 536.

(*b*) See 17 & 18 Vict. c. 104, ss. 2, 389—416; 18 & 19 Vict. c. 91, ss. 1—8; 25 & 26 Vict. c. 63, ss. 43—48.

which are to be found almost all the provisions relating to that subject which are now in force (*c*).

By these Acts, then, it is provided, that, subject to any power or rights theretofore lawfully exercised by any persons having authority over *local* lighthouses, buoys or beacons (*d*),—who are termed Local Authorities,—the superintendence and management of all lighthouses, buoys and beacons shall be vested (for England, Wales, Jersey, Guernsey, Sark and Alderney, and the adjacent seas and islands, Heligoland, and Gibraltar), in the *Trinity House*;—(for Scotland and the adjacent seas and islands, and the Isle of Man), in the *Commissioners of Northern Lighthouses*;—(for Ireland and the adjacent seas and islands), in the *Port of Dublin Corporation* (*e*);—these three bodies being distinguished from the Local Authorities by the name of General Lighthouse Authorities (*f*); and each of the latter having power, with sanction of the Board of Trade, to regulate, within its own jurisdiction, the proceedings of the former (*g*); while the latter are themselves under the inspection of the Board of Trade.

To each of the General Lighthouse Authorities, the Acts give power, within their respective jurisdictions, to erect or make new lighthouses, buoys or beacons, or alter or remove existing ones; and to vary the character of any lighthouse, or the mode of exhibiting lights thereon (*h*). But these powers are not to be exercised in the case of the General Lighthouse Authorities for Scotland or Ireland, without the sanction of the Trinity House; which

(*c*) A variety of former enactments with respect to lighthouses, beacons and sea marks are repealed by 17 & 18 Vict. c. 120.

(*d*) The term "lighthouses" is to include floating and other lights exhibited for the guidance of ships; and "buoys and beacons" includes all other marks and signs of the sea.

(17 & 18 Vict. c. 104, s. 2.)

(*e*) The case of colonial lighthouses is separately provided for by 18 & 19 Vict. c. 91.

(*f*) 17 & 18 Vict. c. 104, s. 389.

(*g*) *Ibid.* s. 394. And as to lighthouses, see 25 & 26 Vict. c. 63, ss. 43—48.

(*h*) Sect. 404.

sanction is itself to be subject, in such manner as the Acts point out, to the paramount control of the Board of Trade (*h*). Power is also given to the *Trinity House*, (acting under the previous sanction of the Board of Trade,) to direct the *Commissioners of Northern Lighthouses*, or the *Port of Dublin Corporation*, (within their respective jurisdictions,) to continue any existing lighthouses, buoys or beacons,—to erect or place, alter or remove, any new ones,—or to vary the character of any lighthouse, or the mode of exhibiting lights therein (*l*).

Again, the Acts provide, that upon the completion of any new lighthouse, buoy or beacon, her majesty may by order in council fix reasonable *dues* to be paid by the master or owner of every ship passing or deriving benefit from the same (*m*). But no such dues in Guernsey, Jersey, Sark or Alderney, are to be taken without consent of the States of those islands respectively. Nor shall any powers given to the Trinity House in respect of any lighthouse, buoy or beacon, placed or hereafter to be placed in Guernsey or Jersey, be exercised without consent of her majesty in council (*n*).

The same Acts contain, moreover, provisions against such persons as shall either wilfully or negligently injure any lighthouse, buoy or beacon; or remove, alter or destroy any light-ship, buoy or beacon; or ride by, make fast to, or run foul of any light-ship or buoy; or who shall burn or exhibit (after being duly warned against it by notice from the proper General Lighthouse Authority) any fire or light so placed as to be liable to be mistaken for a light proceeding from a lighthouse (*o*).

VI. The laws relating to the liability of shipowners for loss or damage.

(*h*) 17 & 18 Vict. c. 104, s. 405,
406.

(*l*) Sects. 408, 409.

(*m*) 17 & 18 Vict. c. 104, s. 410,

As to light dues, see also 25 & 26
Vict. c. 63, ss. 44—47.

(*n*) 17 & 18 Vict. c. 104, s. 411.

(*o*) Sects. 414—416.

In a former portion of this work, while discussing the law of carriers, we had occasion to state the nature and extent of a shipowner's responsibility where loss or damage has occurred to *goods on board of his ship* and entrusted to his care; and to that statement the reader is consequently now referred (*p*). The responsibility of the shipowner, however, is not confined to such case. It exists also where *loss of life or personal injury* has, through mismanagement of his ship, been occasioned to any person; and where loss or damage has, through the like cause, occurred to *any other ship or boat, or to goods on board of the same*. But in these latter cases, as well as with regard to goods on board, a limit is placed by statute to the amount of damages recoverable from an owner who is personally blameless. For, it is provided, by 25 & 26 Vict. c. 63, s. 54 (*q*), that, in case the loss arises without his actual fault or privity, the owners of any ship (whether British or foreign) shall not be answerable in damages in respect of *loss of life or personal injury*, either alone or together with loss or damage to property, to an aggregate amount exceeding *fifteen pounds* for each ton of their ship's registered tonnage; nor in respect of *property*, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding *eight pounds* for each ton of such tonnage (*r*).

With a view also to the protection of the shipowner from the multiplicity of actions to which a single casualty may otherwise expose him, where loss of life or other personal injury has resulted, or is alleged to have resulted, to several persons with different claims and rights—and to mitigate, in other respects, the severity of its conse-

(*p*) Vide sup. vol. II. p. 89.

(*q*) See the case of *The Obey*, Law Rep., 1 Adm. & Ecc. 102. By this section, the provision on this subject (sect. 504) contained in 17 & 18 Vict. c. 104, is repealed.

(*r*) The connection between this

statutable provision and that contained in Lord Campbell's Act (9 & 10 Vict. c. 93), in respect of injuries fatal to life, is discussed in the case of *Glaholm v. Barker*, Law Rep., 1 Ch. App. 223.

quences as regards the compensation to be made by him—the following method of procedure is established by 17 & 18 Vict. c. 104, for settlement of his total liability in regard to all such results.

The Board of Trade may direct any sheriff to summon a jury to inquire into the number, names and descriptions of all persons killed or injured on board ship by reason of any wrongful act, neglect, or default;—at which inquiry the sheriff shall preside, and the Board of Trade shall be deemed plaintiff, and the shipowner by whom the liability is alleged to have been incurred the defendant (*s*). If the verdict is for the defendant, his costs are to be paid him by the Board of Trade, out of the Mercantile Marine Fund (*t*): if for the plaintiff, damages are to be assessed at 30*l.* for each case of death or personal injury (*u*). The aggregate damages are to be paid to her Majesty's paymaster-general, and distributed by him as the Board of Trade directs; the Board having power to direct payment to each person injured,—or in case of a death, to the husband, wife, parent or child of the deceased,—of such compensation, (not exceeding in any case the statutory amount,) as may be thought fit. Until this inquiry has been instituted,—or until the Board has refused to institute it (*v*),—no person is to be entitled to commence any legal proceeding in respect of his claim for loss of life or personal injury arising out of any such accident (*w*): but after its completion, if any

(*s*) 17 & 18 Vict. c. 104, ss. 507 et seq.

(*t*) This fund comprises a variety of different fees and sums received under the Act by the Board of Trade, the Trinity House, and Receivers of Wreck; and it is chargeable with the expense of a variety of services under the Act. The account of it is kept with her Majesty's paymaster-general.—Sect. 417.

(*u*) This limit applies only to damages assessed under inquiries instituted by the Board of Trade, *Glaholm v. Barker*, Law Rep., 1 Eq. Ca. 598.

(*v*) A refusal will be presumed where the Board institutes no inquiry for one month after the service of a notice, by any person, of his desire to commence a legal proceeding.—Sect. 512.

(*w*) *Ibid.*

person injured (or, in case of his death, his personal representative) estimates the damages in respect of such injury at a greater sum than the statutory amount, (or such amount as the Board of Trade thinks fit to take by way of compromise,)—he is to be at liberty, upon repayment to the owner of the amount he has paid for such injury, to bring his action for damages, as if no power of instituting an inquiry had been given to the Board. This however is subject to a proviso, that any damages which he may recover shall be payable only out of the residue (if any) of the aggregate amount for which the owner is liable, after deducting from it all sums paid as aforesaid to the paymaster-general; and that if the damages recovered in such action do not exceed double the statutory amount, he shall pay the defendant all the costs thereof, to be taxed as between attorney and client (*x*).

Nor are these the only provisions of the Acts for protection of the shipowner; for it is also enacted (*y*), that in all cases where there are several claims against any owner for compensation,—whether for loss of life or personal injury, or for the loss or damage of ships, boats or goods—the High Court of Chancery (subject only* to the right given as above mentioned to the Board of Trade) may entertain proceedings at the suit of such owner, for the purpose of determining the amount of his liability; and may distribute the same rateably among the several claimants; and stop all suits and proceedings pending in any other court, in relation to the same subject-matter (*z*).

With regard, however, to all the provisions of these Acts, tending to the benefit of the shipowner, it is ma-

(*x*) 17 & 18 Vict. c. 104, s. 511.

(*y*) Sect. 514.

(*z*) By 17 & 18 Vict. c. 125, s. 88, jurisdiction in such cases is also conferred on the superior courts of

common law. This provision is repealed by 23 & 24 Vict. c. 126, s. 34, but substantially re-enacted by s. 35 of the same Act.

terial to remark, that none of them is to lessen or take away any liability to which any *master* or *seaman*, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman (*a*). Moreover, they do not, in general, extend to any but *recognized British ships* (*b*); but to this an exception is made in favour of owners who are sued for damages in consequence of a loss arising without their actual fault or privity,—the limitation of the damages to which they are in such cases answerable, applying (it will be observed) to a *foreign* as well as a British ship (*c*).

VII. The laws relating to fisheries.

We cannot, consistently with the design and limits of the present work, attempt to detail the numerous provisions which our statute book contains in regard to fisheries. It will suffice to point out some of the principal features of our policy in relation to this subject.

And, first, we may remark, (as to England and Scotland,) that a great variety of enactments have been passed in modern times relating to fisheries; and especially for the protection of the breed of fish, and the prevention of any practices tending to destroy the spawn or fry. These are chiefly contained in the following statutes:—15 Geo. III. c. 31; 18 Geo. III. c. 33; 44 Geo. III. c. xlv; 46 Geo. III. c. xix; 9 Geo. IV. c. 39; 7 & 8 Vict. c. 95; 8 & 9 Vict. c. 26; 9 & 10 Vict. c. 80; 10 & 11 Vict. cc. 91, 92; 13 & 14 Vict. c. 80; 14 & 15 Vict. c. 26; 21 & 22 Vict. c. cxli; 23 & 24 Vict. c. 92; 24 & 25 Vict. c. 72; 24 & 25 Vict. c. 109 (*d*); 25 & 26

(*a*) 17 & 18 Vict. c. 104, s. 514.

(*b*) Sect. 516. As to the term "recognized British ship," vide sup. p. 262.

(*c*) Vide sup. p. 273. It may be here remarked, that *foreign ships*, while within British jurisdiction, are now made subject to certain of the

regulations contained in the Merchant Shipping Acts for preventing collisions, and as to the carriage of dangerous goods, and in reference to salvage of life. (See 25 & 26 Vict. c. 63, ss. 38, 57—59.)

(*d*) By this statute (the temporary provisions of which have been con-

Vict. c. 97 (*f*); 26 & 27 Vict. c. 50; 27 & 28 Vict. c. 118; 28 & 29 Vict. cc. 22, 119; 29 & 30 Vict. c. 102; 30 & 31 Vict. c. 52; 31 & 32 Vict. c. 45 (*g*).

Secondly; that the trade in fish, as regards the cities of London and Westminster, is regulated by certain statutes passed for that special purpose; the general object of which is to secure a supply of fresh fish to those cities, and to prevent the forestalling of the same. The Acts are 22 Geo. II. c. 49; 29 Geo. II. c. 39; 2 Geo. III. c. 15; 30 Geo. III. c. 54, s. 7; 9 & 10 Vict. cap. cccxvi; 22 & 23 Vict. c. 29.

Thirdly, that fresh fish of British taking, and imported in British ships, may be landed without report or entry (*h*).

Fourthly, that Acts have been of late years frequently passed, enabling commissioners, appointed for that purpose, to sanction the loan of monies out of the consolidated fund, for the encouragement of the *fisheries*, as well as of public works and other national undertakings; the last of which Acts was the 30 & 31 Vict. c. 32.

Fifthly, that *bounties* were formerly payable by statute, upon the taking and curing of fish of various descriptions, and on the vessels employed in various branches of the fisheries; but that the policy of the legislature in this respect is now altered, and that these bounties were abolished by 1 & 2 Geo. IV. c. 79; 5 Geo. IV. c. 64; 7 Geo. IV. c. 34 (*i*).

tinued by 31 & 32 Vict. c. 111, to 1st October, 1869, and the end of the then next session) and by 24 & 25 Vict. c. 95, a number of previous enactments for the protection of *salmon* and other fisheries are repealed, and among them some of the clauses of the statutes above enumerated. See also 24 & 25 Vict. c. 96, ss. 24—26, as to *stealing* or

unlawfully destroying fish, and 26 & 27 Vict. c. 10, as to *exportation* of salmon.

(*f*) Continued by 31 & 32 Vict. c. 111.

(*g*) By this last Act a variety of provisions on this subject in earlier statutes were repealed.

(*h*) 16 & 17 Vict. c. 107, s. 49.

(*i*) The 7 Geo. 4, c. 34, and some

Sixthly, that the fisheries of *Ireland* (in particular) are now regulated by recent Acts, viz. 5 & 6 Vict. c. 106; 7 & 8 Vict. c. 108; 8 & 9 Vict. c. 108; 9 & 10 Vict. cc. 3, 114; 10 & 11 Vict. c. 75; 11 & 12 Vict. c. 92; 13 & 14 Vict. c. 88; 26 & 27 Vict. c. 114 (*h*); 28 & 29 Vict. c. 119; and 29 & 30 Vict. c. 45;—and by these almost all the former statutes on that subject are repealed, and their provisions consolidated and amended.

Lastly, that a convention has been entered into between her Majesty and the Emperor of the French concerning the fisheries in the seas adjoining the British Islands and France; and that provisions to carry into effect such of the arrangements of this convention (which amends an earlier one on the same subject, concluded in the year 1839 between her Majesty and the then King of the French) as require the confirmation of the legislature, are contained in the 31 & 32 Vict. c. 45 (*l*). And that in 1854, a treaty was also concluded between her Majesty and the United States of America, relating *inter alia* to the rights of fishery as between the British North American colonies and the United States; and that such last-mentioned treaty was carried into effect by the 18 & 19 Vict. c. 3.

of the provisions of 1 & 2 Geo. 4, c. 79, and of 5 Geo. 4, c. 64, were repealed by 31 & 32 Vict. c. 45. The curing of *herrings* is regulated by 14 & 15 Vict. c. 26.

(*h*) Continued by 31 & 32 Vict. c. 111.

(*l*) By this Act the 6 & 7 Vict. c. 79, and 18 & 19 Vict. c. 101, are repealed.

CHAPTER IX.

OF THE LAWS RELATING TO THE SANITARY
CONDITION OF THE PEOPLE.

THE attention of the legislature has, from the reign of James the first, been at various times directed to the subject of pestilent and contagious disease; and to the establishment of such precautions as human knowledge and sagacity might devise for averting its course or mitigating its effects.

The enactments which have been introduced in reference to this matter, have principally had in view the particular maladies of Plague, Cholera, and Small-pox; but sanitary regulations of a more general character have, within a recent period, been copiously established.

With respect to *Plague*, very stringent enactments were introduced by 1 Jac. I. c. 31;—which indeed made it a capital felony for any person having an infectious sore upon him uncured to go abroad and converse in company, after being commanded by the proper authority to keep his house. The necessity, however, of any regulations adapted to an actual prevalence of this disease among us, has been long since at an end,—no plague having, by the blessing of Providence, been known in this island for more than 170 years past; and the statute, after remaining for so long a period dormant, was repealed in the reign of her present Majesty (*a*).

But besides this Act, our statute book contains several of which the object is not so much to regulate the con-

(*a*) 7 Will. 4 & 1 Vict. c. 91, s. 4.

duct of infected persons during the prevalence of contagious disease, as to prevent its introduction from foreign parts.

We here refer to the laws relating to *quarantine* (*b*); the term applied to that period of probation during which vessels arriving from countries infected with plague, or other contagious disorder, are restrained by law from general intercourse.

The first statute on the subject was 9 Ann. c. 2, which was followed by several others in the reigns of George the first and George the second; but at length all former provisions were repealed by 6 Geo. IV. c. 78, which consolidates the whole law now in force with respect to quarantine.

By this last-mentioned statute it is enacted, that all vessels, as well of war as others, coming from any place whence the crown, by the advice of the privy council, shall have adjudged it probable that the plague or other infectious disease of a highly dangerous kind may be brought; and all vessels and boats receiving persons or goods out of the same; and all persons and goods on board the vessels so arriving, or so receiving as aforesaid;—shall be liable to “quarantine” within the meaning of the Act, and of any order or orders in council concerning quarantine: and shall be obliged to perform quarantine in such place or places (known by the name of *lazarets*), for such time, and in such manner, as shall from time to time be directed by order in council, notified by proclamation or published in the London Gazette: and, until they shall have been discharged from such quarantine, shall not come on shore, or be put on board any other vessel or boat, except in such cases, and by such licence, as the order in council may direct (*c*). And

(*b*) The earliest known regulations in the nature of quarantine laws are those contained in an edict of Justinian, A.D. 542. In modern

times the example has been followed in all the principal countries of Europe.

(*c*) 6 Geo. 4, c. 78, s. 2.

in case of breach of quarantine, either as to persons or goods, the offender is visited with heavy fine, and is besides punishable with imprisonment for six months (*d*). But, on the other hand, the privy council are empowered, if they shall think fit, to shorten in any individual case the period of quarantine; or absolutely release therefrom any particular vessels, persons, or goods (*e*).

Besides many other regulations contained in this statute, too minute to be here set forth, it is provided, that the lords of the privy council, or any two of them, may make such order as they shall see necessary upon any unforeseen emergency, or in any particular case, with respect to any vessel or goods arriving with infectious disease on board, or arriving under any suspicious circumstances as to infection; and this, although such vessels shall *not* have come from any place from which the crown has declared it probable that the plague or other disease may be brought (*f*). And a similar power is, by the same Act, entrusted to the privy council in the case of any infectious disease or distemper breaking out in the united kingdom; so as to enable them to cut off communication between persons afflicted therewith and the rest of the subjects of the realm (*g*).

Again, the visitation of this kingdom by the spasmodic or Indian *cholera*, gave occasion in the year 1832 to a statute (2 Will. IV. c. 10), by which the privy council were empowered to issue such orders as might appear expedient, with a view to prevent the spread of this fearful disease; or for the relief of persons afflicted thereby; or for the interment of those who became its victims. And by the 3 & 4 Will. IV. c. 75, this Act was continued until the end of the then next session of parliament. But at the expiration of that period the cholera had wholly disappeared, and the Act was not further continued; nor, though some partial outbreaks

(*d*) 6 Geo. 4, c. 78, ss. 17, 26.

(*f*) Sect. 6.

(*e*) Sect. 6.

(*g*) Ibid.

of the epidemic have since occurred, has that statute been hitherto re-enacted,—more general provisions for the prevention of disease having now been established, of which we shall presently give some account (*g*).

With regard to *Small-pox*, in order to prevent so far as possible the ravages of that terrible malady, it has been thought fit both to prohibit by penalties its production by way of inoculation or otherwise, and also to institute throughout the country a system of compulsory vaccination. Accordingly, by the statute now in force on this subject, the 30 & 31 Vict. c. 84 (*h*), the guardians of every union or parish which has not already been divided into vaccination districts, are required to make such division forthwith under the general superintendence of the Poor Law Board; and are to enter into a contract (under the approval of the Board) with some duly registered medical practitioner for the vaccination of all persons residing in each district, who shall be termed the public vaccinator of such district.

To such public vaccinator, or in his place to some other medical practitioner, it is made incumbent on every parent (or person *in loco parentis*) to take his child for the purpose of being vaccinated within three months after its birth,—a duty to which his attention is pointedly directed by the Registrar of Births if the child is registered by him,—and he must moreover (in the case of a public vaccination) repeat his visit at the expiration of a week, that the vaccinator may ascertain that the operation was successful, a fact which he is duly to certify to the Registrar of Births; and in case of a private vaccination such certificate must be procured by the parent himself and transmitted to the Registrar of Births. And every parent who shall neglect to perform these duties

(*g*) Vide post, p. 288.

(*h*) This Act is in place of the prior enactments contained in 3 & 4

Vict. c. 29; 4 & 5 Vict. c. 32; 16 & 17 Vict. c. 100; 21 & 22 Vict. c. 25, s. 7, and 24 & 25 Vict. c. 59.

shall be liable to a penalty of twenty shillings on a summary conviction (*i*); while any person who shall by any means attempt to produce in any form the disease of small-pox by variolous matter or otherwise, shall be liable on a summary conviction to be imprisoned for any term not exceeding one month (*j*).

It is moreover provided that a justice of the peace, on being satisfied that any child under the age of fourteen has not been vaccinated, nor has already had the small-pox, may make an order on the parent that such child shall be vaccinated within a certain time, under the penalty of twenty shillings in case of neglect (*k*).

As for the more general provisions which tend to the preservation and improvement of the public health, they have issued from the legislature, during the last few years, with a profusion that makes it impossible to enter into a full detail of them, without allotting more space to the particular subject than the plan of this work permits. We can only advert to such as are of a more directly sanitary character; and which relate either to the public health in general, or more particularly to the removal of nuisances.

First. By 11 & 12 Vict. c. 63 (called "The Public Health Act, 1848"), a "General Board of Health" was constituted, which consisted of the First Commissioner of the Board of Works for the time being, and of two other persons appointed by her Majesty, to which Board large powers bearing on our present subject were entrusted (*l*);

(*i*) 30 & 31 Vict. c. 84, s. 29.
If such penalty is exacted and paid, a subsequent neglect to have the vaccination performed would seem not to amount to any further breach of the law. (See *Pilcher v. Stafford*, 4 B. & S. 775.)

(*j*) Sect. 32.

(*k*) Sect. 31.

(*l*) This Board was continued by several successive Acts till 1st September, 1858, when it ceased to exist, certain of the matters originally placed under its superintendence being (by 21 & 22 Vict. c. 97) transferred to that of the privy council.

and, among others, that Board was enabled, on the petition of a certain proportion of the rated inhabitants of any town, parish or other place having a known and defined boundary, to direct an inspector to visit such place, and, on his reporting in favour of such a course, to cause the Act to be applied to such place—in some cases, by procuring an order in council to that effect; in others, under the authority of a provisional order of the Board afterwards confirmed by parliament (*l*). And by a subsequent Act, viz. the 21 & 22 Vict. c. 98 (called “The Local Government Act, 1858”), the 11 & 12 Vict. c. 63, was amended; and (among other points) in this important particular—that the sanitary arrangements and internal management of any place already subject to or adopting the Act, was thenceforth committed to its *local authorities*, instead of to a Central Board established in London.

The 21 & 22 Vict. c. 98 has, in its turn, been since amended by the 24 & 25 Vict. c. 61, called “The Local Government Act (1858) Amendment Act, 1861;” and by the 26 & 27 Vict. c. 17, called “The Local Government Act Amendment Act, 1863.” And the system of local government in such districts as have adopted or shall hereafter adopt the Acts, is consequently to be ascertained by collating the provisions of the 11 & 12 Vict. c. 63, the 21 & 22 Vict. c. 98; the 24 & 25 Vict. c. 61; and the 26 & 27 Vict. c. 17.

This system is in force in any place to which the 11 & 12 Vict. c. 63 was applied by the Board of Health, either by order in council or by Act of Parliament (*m*); and it is also in force in any place where the Acts above mentioned have been adopted. And for such adoption, neither order in council nor Act of Parliament is now required; but it takes place, as the general rule, by

(*l*) See an act of parliament for such purpose, 20 & 21 Vict. c. 22.

(*m*) 21 & 22 Vict. c. 98, s. 5.

resolution of a certain proportion of the owners and rate-payers, or of the council of the borough, as the case may be. It is, however, to be observed, that such adoption may, in some cases, be partial only, that is, of certain provisions only of the Acts (*n*).

In any place in which the Acts are in force, the duty of carrying them into execution devolves upon a "Local Board of Health," which as regards corporate boroughs is to be the town council, and as regards other places is to be elected by the owners and rate payers. And this Board is charged with a great variety of duties, and is clothed with corresponding powers, in relation to sewerage; scavenging and cleansing streets; buildings; the repair of the highways within the district; the control of streets and roads (*o*); the supply of water, and a variety of other matters more or less closely connected with the sanitary improvement of the place. They have, further, the power to borrow money, purchase land and settle boundaries, and procure the repeal of local Acts, through the agency of a principal secretary of state; who may issue a provisional order for such purposes, which must afterwards be confirmed by parliament (*p*). And the expenses connected with all these duties are to be defrayed out of local rates (*q*), to be made either prospectively or retrospectively, and to be levied in general on the occupiers of property liable to the poor rate.

Secondly. By 18 & 19 Vict. c. 116, called "The Diseases Prevention Act, 1855," (amended by 21 & 22 Vict. c. 97, and 23 & 24 Vict. c. 77, ss. 10—15,) it is provided, that the lords of the privy council, or any three or more of

(*n*) See 21 & 22 Vict. c. 98, ss. 12, 15, and 25 & 26 Vict. c. 61, s. 41.

(*o*) See 24 & 25 Vict. c. 61, s. 20. By 25 & 26 Vict. c. 1, s. 67, no highway district, formed under that Act, is to include (among other places

excepted) any district constituted under 11 & 12 Vict. c. 63, or 21 & 22 Vict. c. 98.

(*p*) 21 & 22 Vict. c. 98, s. 75. See such an Act, 25 & 26 Vict. c. 25.

(*q*) See 23 Vict. c. 16, s. 12.

them (the lord president being one), may, from time to time, cause to be made such inquiries as they see fit, in relation to any matters concerning the public health, in any place or places (*r*); and that when any part of England appears to be threatened with, or to be affected by, any formidable epidemic, endemic, or contagious disease, they may, by order, direct that Act to be put in force there: and, while the same is so in force, may issue regulations and directions for speedy interments; for visitation from house to house; for the dispensing of medicines, guarding against the spread of disease, and affording such medical aid and accommodation as may be required. And it is enacted that the execution of all such directions issued by the Privy Council, shall belong to the "local authority for executing that Act;" that is to say, to the guardians and overseers of each parish (*s*).

Thirdly. By 18 & 19 Vict. c. 121 (*t*), called "The Nuisances Removal Act for England, 1855" (*u*), it is enacted, that the "local authority" established for the execution of that Act,—that is, in general, the "Local Board of Health" of the place wherever such a body exists (*v*),—shall appoint, or join with other local autho-

(*r*) 20 & 21 Vict. c. 97, s. 3.

(*s*) 23 & 24 Vict. c. 77, s. 11. As to the local authorities for preventing diseases in the *metropolis*, see 18 & 19 Vict. c. 120; 23 & 24 Vict. c. 77, s. 10.

(*t*) This Act repeals (so far as they relate to England) the 11 & 12 Vict. c. 123, and 12 & 13 Vict. c. 111, on the same subject. There had been a previous Act of 9 & 10 Vict. c. 96, which expired in 1848. As to the construction of 18 & 19 Vict. c. 121, see Draper, *app. v. Sperring*, resp., 9 Weekly Reports, C. P. 656. *The Queen v. Cotton*, 1 E. & E. 203.

(*u*) This Act is amended in cer-

tain of its provisions by 23 & 24 Vict. c. 77, ss. 1—9; 26 & 27 Vict. c. 117; 29 & 30 Vict. c. 41, and the second part of 29 & 30 Vict. c. 90; which last statute is called "The Sanitary Act, 1866."

(*v*) As to a Local Board of Health, *vide sup.* p. 284. In any place where there is no such Board, other local authorities for the removal of nuisances are appointed by the 23 & 24 Vict. c. 77, according to the following order:—The Town Council; the Trustees or Commissioners under Local Improvement Acts; and lastly, the Guardians or Overseers;—each of the three bodies above mentioned being in turn the

rities in appointing, for each place a "Sanitary Inspector" or "Inspectors." The duties of such inspectors are to attend at the office of the Board and their meetings; to enter their minutes and keep their accounts; to examine into the state of facts with regard to nuisances (*x*); and generally to fulfil the instructions of the Board as the occasion may arise. The local authority and their officers are empowered to examine any premises as to which suspicion of nuisance exists or complaint is made; and to inspect all articles of food exposed for sale or in the course of carriage or preparation for sale or use. And they may also summon any offender before two justices of the peace in petty sessions, and obtain an order requiring the abatement or discontinuance of any nuisance that may have been found on such premises; or for the destruction of any article of food so examined, which the justices may deem unfit for the food of man (*y*).

local authority, in case of the non-existence of the body next before it in the series. There is, however, a proviso that, in certain cases, the local authority may be the "Highway Board," or the "Nuisances Removal Committee," of the place (if there were such bodies acting when that Act passed), but only so long as they continue to employ sanitary inspectors. As to the *metropolis*, see 18 & 19 Vict. c. 120; 23 & 24 Vict. c. 77, s. 6.

(*x*) In 18 & 19 Vict. c. 121, s. 8, a description is given of the different "nuisances" which are to be deemed as falling within the statute.

(*y*) 18 & 19 Vict. c. 121, ss. 12—27. And see *Ex parte* the Mayor of Liverpool, 8 Ell. & Bl. 537; *The Queen v. Cotton*, 1 E. & E. 203. As to the funds out of which the

expenses which may attend the proceedings of the local authority are to be defrayed, see 23 & 24 Vict. c. 77, s. 4.

In addition to the statutes of which some account is given in the text of this chapter, there are the following enactments more or less immediately connected with the subject of the sanitary condition of the people.

Alkali Works.—26 & 27 Vict. c. 124; 31 & 32 Vict. c. 36.

Arsenic, (sale of).—14 & 15 Vict. c. 13.

Bakehouses.—26 & 27 Vict. c. 40.

Bath.—9 & 10 Vict. c. 74; 10 & 11 Vict. c. 61.

Burials.—12 & 13 Vict. c. 111, ss. 9—12; 17 & 18 Vict. c. 87; 18 & 19 Vict. c. 79; c. 105, ss. 11—13; c. 128; 20 & 21 Vict. c. 81; 21

- & 22 Vict. c. 98, s. 49; 22 Vict. c. 1; 23 & 24 Vict. c. 64; 24 & 25 Vict. c. 61, s. 21; 25 & 26 Vict. c. 100.
- Cattle, (Contagious Disorders among).*—11 & 12 Vict. cc. 105, 107; 13 & 14 Vict. c. 71; 14 & 15 Vict. c. 69; 15 & 16 Vict. c. 11; 16 & 17 Vict. c. 72; 19 & 20 Vict. c. 101; 26 & 27 Vict. c. 95; 28 & 29 Vict. c. 119; 29 & 30 Vict. cc. 2, 15, 102, 110; 31 & 32 Vict. c. 111.
- Contagious (Venereal) Diseases at certain Naval and Military Stations.*—29 & 30 Vict. c. 35; 31 & 32 Vict. c. 80.
- Factories, &c.*—42 Geo. 3, c. 73; 3 & 4 Will. 4, c. 103; 4 & 5 Will. 4, c. 1; 7 & 8 Vict. c. 15; 8 & 9 Vict. c. 29; 9 & 10 Vict. c. 40; 10 & 11 Vict. cc. 29, 70; 13 & 14 Vict. c. 54; 16 & 17 Vict. c. 104; 19 & 20 Vict. c. 38; 23 & 24 Vict. c. 78; 24 & 25 Vict. c. 117; 25 Vict. c. 8; 26 & 27 Vict. c. 38; 27 & 28 Vict. cc. 48, 98; 30 & 31 Vict. c. 103.
- Gas.*—22 & 23 Vict. c. 66; 23 & 24 Vict. c. 146.
- Lodging Houses and Dwellings.*—14 & 15 Vict. c. 28, c. 34; 16 & 17 Vict. c. 41; 18 & 19 Vict. c. 121, s. 43, c. 132; 31 & 32 Vict. c. 130.
- Mines.*—5 & 6 Vict. c. 99; 18 & 19 Vict. c. 108 (repealing 13 & 14 Vict. c. 100); 23 & 24 Vict. c. 151; 25 & 26 Vict. c. 79.
- Public Walks, &c.*—23 & 24 Vict. c. 30.
- Sewers.*—23 Hen. 8, c. 5; 3 & 4 Edw. 6, c. 8; 13 Eliz. c. 9; 3 & 4 Will. 4, c. 22; 4 & 5 Vict. c. 45; 12 & 13 Vict. c. 50; 24 & 25 Vict. c. 133; 28 & 29 Vict. c. 75; 29 & 30 Vict. c. 90, Part I.; 30 & 31 Vict. c. 113; 31 & 32 Vict. c. 115.
- Workshops.*—30 & 31 Vict. c. 146.
- There are also the following Acts containing enactments of the same general character having regard to the *Metropolis*.
- As to the Local Management of the Metropolis.*—18 & 19 Vict. c. 120 (amended by 19 & 20 Vict. c. 112; 21 & 22 Vict. c. 104, and 25 & 26 Vict. c. 102; 26 & 27 Vict. c. 68).
- Building Act.*—18 & 19 Vict. c. 122 (amended by 23 & 24 Vict. c. 52, and 24 & 25 Vict. c. 87).
- Burials.*—13 & 14 Vict. c. 52; 14 & 15 Vict. c. 89; 15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134; 20 & 21 Vict. cc. 35, 31.
- Gas.*—23 & 24 Vict. c. 125.
- Regulation of Traffic.*—30 & 31 Vict. c. 134; 31 Vict. c. 5.
- Relief of Poor.*—27 & 28 Vict. c. 116; 28 & 29 Vict. c. 34.
- Sewers.*—18 & 19 Vict. cc. 30, 120; 21 & 22 Vict. c. 104; 25 & 26 Vict. c. 102; 26 & 27 Vict. c. 68.
- Smoke Furnaces.*—16 & 17 Vict. c. 128; 18 & 19 Vict. c. 121, s. 43; 19 & 20 Vict. c. 107.
- Water.*—15 & 16 Vict. c. 84.

CHAPTER X.

OF THE LAWS RELATING TO PUBLIC CONVEYANCES.



It has been the policy of the legislature of this country to exercise, over this department of social economy, merely a general supervision; and to trust to the enterprise of individuals or associations, for providing for the welfare and convenience of the public in this important particular.

In our treatment of it, we shall distribute the subject under the following heads: I. Stage Coaches. II. Railways. III. Conveyances by Water.

I. The provisions relative to *stage coaches* in general (*a*), will be found embodied in 2 & 3 Will. IV. c. 120:—amended by 3 & 4 Will. IV. c. 48; 2 & 3 Vict. c. 66; and 5 & 6 Vict. c. 79.

By the first of these Acts, a “stage carriage” is determined to be every carriage, (whatever be its form or construction,) which is drawn by animal power (*b*); and used for the purpose of conveying passengers for hire, to and from any place in Great Britain; and travelling at the

(*a*) The provisions relating to hackney coaches in London, and to “Metropolitan Stage Carriages,” (which last term, according to 6 & 7 Vict. c. 86, comprises “any stage carriages except such as shall, on “every journey, go to or come from “some town or place beyond the “limits of the city of London and “the liberties thereof and Metropolitan Police District,”) are not noticed in the text, their character

being merely local. But they will be found in 1 & 2 Will. 4, c. 22; 6 & 7 Vict. c. 86; 13 & 14 Vict. c. 7; 16 & 17 Vict. cc. 33, 127; 30 & 31 Vict. c. 134; and 31 Vict. c. 5.

(*b*) There have also been statutes recently passed (24 & 25 Vict. c. 70; 28 & 29 Vict. c. 83; and 31 & 32 Vict. c. 111), regulating the use of *locomotives* (or engines drawing or propelling carriages) on roads.

rate of three miles or more in the hour; and for which separate fares shall be charged to separate passengers (*c*).

No carriage is to be kept for this purpose, unless the person who keeps it has a licence from the Board of Inland Revenue, which must be yearly renewed, and in respect of which certain duties are made payable (*d*); nor unless there be on the carriage such numbered plates and particulars as are directed by the Acts; and these particulars specify the christian and surname of the proprietor, or one of the proprietors; the extreme places to which the licence extends; and the greatest number of inside and outside passengers which the carriage may lawfully convey (*e*).

Numerous penalties are imposed on the drivers of these carriages, for offences or neglects which would seem to militate against the safety or convenience of the public. Among these may be mentioned—driving a stage coach without or with a defective licence, or without having such plates and particulars as above referred to (*f*); carrying too many passengers or too much luggage (*g*); intoxication, negligence, or furious driving; and in short, any misconduct, either in the driver or conductor, which shall endanger the safety or the property of any person (*h*).

Besides all which, it is provided, that if it shall happen that the driver, conductor, or guard of a stage carriage,

(*c*) 2 & 3 Will. 4, c. 120, s. 5.

(*d*) Sect. 6. These duties now form part of the excise; 10 & 11 Vict. c. 42, s. 2. Their amount was reduced by 18 & 19 Vict. c. 78, ss. 1, 2, which statute also repeals so much of the 2 & 3 Will. 4, c. 120, as authorizes a composition for these duties.

(*e*) 2 & 3 Will. 4, c. 120, s. 36; 5 & 6 Vict. c. 79, ss. 11, 13, 14. As to *mail* coaches, and how far they are excepted, see 2 & 3 Will. 4, c.

120, s. 46; 5 & 6 Vict. c. 79, s. 12.

(*f*) 2 & 3 Will. 4, c. 120, ss. 30—36; 5 & 6 Vict. c. 79, s. 14.

(*g*) 3 & 4 Will. 4, c. 48, ss. 2, 3, 4; 5 & 6 Vict. c. 79, s. 15.

(*h*) 2 & 3 Will. 4, c. 120, s. 48. It may be here observed that wanton or furious driving, racing or other wilful misconduct or neglect on the part of a person in charge of *any* carriage (whether a stage carriage or otherwise), when followed by any bodily harm to any person, is a

shall have committed any offence against that Act, but is not known,—or being known, cannot be found,—the *proprietor* shall be liable to the same penalty as if he had been driver when the offence was committed (*i*). But it will be a sufficient answer to the charge if he can prove by evidence other than his own testimony, to the satisfaction of the justice of the peace before whom the complaint is heard, that the offence was committed without his privity or knowledge, and that he has derived no benefit therefrom; and that he has, moreover, used his endeavour to find out such driver, conductor, or guard, and given all reasonable information in answer to inquiries respecting him (*k*).

II. *Railways.*

Besides the special Acts from time to time passed which authorize the construction of particular railways,—and in most of which are incorporated the “Railway Clauses Consolidation Act, 1845” (8 & 9 Vict. c. 20), as also, in the case of special Acts passed after July, 1863, the “Railway Clauses Act, 1863” (26 & 27 Vict. c. 92),—there exist also the following statutes affecting railways in general: 1 & 2 Vict. c. 98; 3 & 4 Vict. c. 97; 5 & 6 Vict. c. 55; 7 & 8 Vict. c. 85; 8 & 9 Vict. c. 42; 8 & 9 Vict. c. 96; 9 & 10 Vict. c. 28; 9 & 10 Vict. c. 57; 12 & 13 Vict. c. xl; 13 & 14 Vict. c. xxxiii; 13 & 14 Vict. c. 83; 14 & 15 Vict. c. 64; 15 & 16 Vict. cap. c; 17 & 18 Vict. c. 31; 22 & 23 Vict. c. 59; 24 & 25 Vict. c. 97, ss. 35—38; c. 100, ss. 32—34; 29 & 30 Vict. c. 108; 30 & 31 Vict. c. 127; 31 Vict. c. 18; and 31 & 32 Vict. cc. 79, 119.

Under these statutes, the general supervision and regu-

misdeemeanor, punishable by imprisonment to the extent of two years, and with or without hard labour. (24 & 25 Vict. c. 100, s. 35.)

(*i*) 2 & 3 Will. 4, c. 120, s. 49.

As to the production of the driver, &c. by the proprietor, see also 6 & 7 Vict. c. 86, s. 35; 12 & 13 Vict. c. 92, s. 22.

(*k*) 2 & 3 Will. 4, c. 120, s. 49.

lation of all railways is entrusted to the Board of Trade (*l*); and it is made unlawful to open any railway, or portion of railway, for the public conveyance of passengers, until one month's notice in writing shall have been given to such Board, by the company to whom the railway may belong, of its intention to open the same for such traffic; and ten days' notice of the time when the railway will be complete and ready for their inspection (*m*).

It is further enacted, by the statutes above mentioned, that the Board of Trade may postpone the opening of any railway, until satisfied that the public may use the same without danger; and may order every railway company to make returns to them of the aggregate traffic in passengers, cattle, and goods, of the occurrence of any serious accident, and of all tolls and rates from time to time levied (*n*). The Board may also appoint proper persons as inspectors of railways (*o*).

Every railway company (whether specially called upon to do so by such order or not) must report to the Board of Trade every accident attended with serious personal injury, within forty-eight hours of its occurrence (*p*); and is required to lay before the board for its approbation certified copies of the bye-laws and regulations by which it is governed (*q*): which bye-laws may be disallowed by the board at its pleasure. And the board is moreover empowered to direct the attorney-general to proceed against any railway company for non-compliance with the provisions either of their special Act, or of the Acts of general regulation; or on their commission of any act unauthorized by law (*r*).

(*l*) By 9 & 10 Vict. c. 105, this jurisdiction was transferred from the Board of Trade, to certain commissioners appointed by her Majesty, called "Commissioners of Railways;" but this Act is now repealed by 14 & 15 Vict. c. 64; and the jurisdiction restored to the Board of Trade.

(*m*) 5 & 6 Vict. c. 55, ss. 4, 5.

(*n*) 3 & 4 Vict. c. 97, s. 3; 5 & 6 Vict. c. 55, s. 8.

(*o*) 3 & 4 Vict. c. 97, s. 5; 7 & 8 Vict. c. 85, s. 15.

(*p*) 5 & 6 Vict. c. 55, s. 7.

(*q*) 3 & 4 Vict. c. 97, ss. 7, 8.

(*r*) 7 & 8 Vict. c. 85, ss. 16—18.

Provisions are also made to regulate the liability of a railway company for neglect or default in the carriage of goods (*s*); to authorize the summary apprehension and punishment of any engine-driver or servant of the company guilty of any misconduct (*t*); and to subject to severe punishment all ill-disposed persons obstructing or injuring any railway engine or carriage, or endangering the safety of the passengers (*u*).

Railway companies are obliged to maintain and repair good and sufficient fences along their lines (*x*); to transport, at a settled rate, military and police forces (*y*), and mails (*z*); to afford all reasonable facilities for the conveyance of traffic, without undue preference of particular persons or companies, or particular descriptions of traffic (*a*); to permit and facilitate the introduction of electrical telegraphs upon their lines (*b*); to construct their

(*s*) See 8 & 9 Vict. c. 20, s. 89; 14 & 15 Vict. c. 19, ss. 6, 8, 10; 17 & 18 Vict. c. 31, s. 7; 31 & 32 Vict. c. 129, ss. 14—21, et vide sup. vol. II. p. 89, n. (*a*).

(*t*) 3 & 4 Vict. 97, ss. 13, 14; 5 & 6 Vict. c. 55, ss. 17, 18.

(*u*) 24 & 25 Vict. c. 97, ss. 35—38; c. 100, ss. 32—34. By c. 95, the previous provisions on this subject contained in 3 & 4 Vict. c. 97, and 14 & 15 Vict. c. 19, are repealed.

(*x*) 5 & 6 Vict. c. 55, s. 10.

(*y*) Sect. 20; 7 & 8 Vict. c. 85, s. 12.

(*z*) 1 & 2 Vict. c. 98; 7 & 8 Vict. c. 85, s. 11.

(*a*) 17 & 18 Vict. c. 31, ss. 1—6. By this Act of 17 & 18 Vict. c. 31, called "The Railways and Canal Traffic Act, 1854," it is made lawful for any company or person to make complaint, in England, to the Court of Common Pleas, in respect of any thing done or omitted to be done by

any Railway Company in violation of the Act; and, if necessary, a writ of injunction or interdict may be issued by that court to restrain the company from any further violation of it; and general rules may be made by that court for proceedings under the Act. A set of such rules was accordingly issued hearing date 31st January, 1855. The cases on this Act are numerous. Among recent ones, are *In re Nicholson and the Great Western Railway Company*, 7 C. B. (N. S.) 755; *In re Ransome and the Eastern Counties Railway Company*, 8 C. B. (N. S.) 709; and *In re Palmer and the London and South-Western Railway Company*, Law Rep., 1 C. P. 588.

(*b*) 7 & 8 Vict. c. 85, ss. 14, 15. As to maliciously injuring such telegraphs, see 24 & 25 Vict. c. 97, ss. 37, 38. As to their purchase by government, see 31 & 32 Vict. c. 110.

railway (as a general rule) on a gauge of four feet eight inches and a half in England, and five feet three inches in Ireland (*c*); to keep a strict account of money received for the conveyance of passengers, or from other sources, upon their respective lines; to deliver the same to the Board of Inland Revenue; and to pay a monthly duty thereupon (*d*).

By one of the statutes above mentioned, viz. 7 & 8 Vict. c. 85, it is provided, that if,—at any time after twenty-one years from the passing of the special Act for any passenger railway established after the year 1844,—the average divisible profits for three successive years upon the paid-up capital stock of such passenger railway company shall be found to equal or exceed 10*l.* per cent., the Lords of the Treasury shall be at liberty, (an act of parliament being first obtained for that purpose,) to revise and reduce the fares, upon condition of giving the company a guarantee to make good their profits to the amount of 10*l.* per cent. during the existence of such reduced scale. The Treasury is also enabled, after the same period, to purchase any such railway on behalf of her Majesty, whatever may be the rate of divisible profits which may have been earned thereon (*e*). By the same Act passenger railway companies are also, in general, required to secure to the poorer class of travellers the means of travelling by railway at moderate fares and in carriages protected from the weather (*f*). By the same statute they are, moreover, prohibited from raising loans

(*e*) 9 & 10 Vict. c. 57.

(*d*) 5 & 6 Vict. c. 79, s. 4; 10 & 11 Vict. c. 42.

(*e*) 7 & 8 Vict. c. 85, ss. 1—4. The sum to be paid for the railway is to be at the rate of *twenty-five years* purchase of the average profits for the preceding three years; but, if such profits are less than 10*l.* per cent. and the company is dissatis-

fied, the price is to be settled by arbitration. (Sect. 3.)

(*f*) The rate of fare for third-class passengers by the cheap or government trains thus provided is not to exceed *one penny* per mile. See also on this subject 21 & 22 Vict. c. 75, made perpetual by 23 & 24 Vict. c. 41.

for the future on negotiable securities, except as authorized by parliamentary enactment (*g*); and by 8 & 9 Vict. c. 16, ss. 38—55, a variety of additional regulations are made in regard to the case of their borrowing money on bond or mortgage (*h*).

We may also specifically notice two of the group of statutes above cited. In the 30 & 31 Vict. c. 127, there are to be found a variety of provisions as to the position of railway companies, in regard to their financial arrangements and the protection of their creditors on the one hand and the shareholders on the other, in case of their being unable to meet their engagements (*i*). And the 31 & 32 Vict. c. 119, deals with the accounts of companies and the protection of their shareholders by inspection, and a proper system of audits; while it also contains a variety of provisions to secure the safety and comfort of the general public. Of these clauses we can only refer here to the important regulation that in every passenger train which travels more than twenty miles without stopping, there shall be provided such sufficient means of communication between the passengers and the servants of the company in charge of the train as the Board of Trade shall approve (*j*).

III. *Conveyances by water.*

The class of legislative provisions that require to be noticed under this head, are those which relate to the carriage of passengers in merchant vessels (*k*).

(*g*) 7 & 8 Vict. c. 85, s. 19.

(*h*) As to the legal remedy on the mortgage debentures and bonds of railway companies, see *Hart v. Eastern Union Railway Company*, 7 Exch. 246; *Virtue v. East Anglian Railway Company*, 6 Railway Cases, 252; *Prince v. Great Western Railway Company*, 16 Mee. & W. 244; *Shelford on the Law of Railways*, pp. 157—161, 3rd edit.

(*i*) General Orders of the Court of Chancery for practice under this Act were issued on the 24th January, 1868.

(*j*) 31 & 32 Vict. c. 119, s. 22.

(*k*) There are also provisions as to boats and barges on the River Thames; but these being of a local character are not noticed in the text. (See as to these, 2 & 3 Philip & Mary, c. 16; 22 & 23 Vict. c. cxxxiii.)

And first, by the Merchant Shipping Act, 1854, (17 & 18 Vict. c. 104,) it is provided (*l*) that every "passenger steamer"—that is, "every British steam-ship carrying "passengers to, from, or between any place or places "in the united kingdom, excepting steam ferry boats "working in chains, commonly called steam bridges,"—shall be surveyed and reported upon to the Board of Trade at least twice in the year (*m*); and shall proceed on no voyage with passengers, unless the owner or master has received from the board a certificate applicable to the voyage, and showing that the provisions of the Act have been complied with (*n*). And if the person in charge receives on board any number of passengers greater than the number allowed by the certificate, the owner or master is liable to pecuniary penalties. Provisions are also made against various kinds of misconduct by the passengers (*o*); and, by sect. 354, the master of every ship carrying any passenger between any place in the united kingdom (or the channel islands), and any other place so situate, shall, when navigating within the limits of any district for which pilots are licensed, (unless he or his mate has a certificate enabling him to conduct the vessel himself,) employ a qualified pilot; and, if he fails to do so, is liable to a penalty not exceeding 100*l*. (*p*).

There are also the 18 & 19 Vict. c. 119, called "The Passengers' Act, 1855," and the 26 & 27 Vict. c. 51, "The Passengers' Amendment Act, 1863," which extend generally to every sea-going vessel, whether British or foreign,

(*l*) Of the previous Acts as to passengers in merchant vessels, the 4 Geo. 4, c. 88, and 14 & 15 Vict. c. 79, were repealed by 17 & 18 Vict. c. 120, sched.; and the 15 & 16 Vict. c. 44, by 18 & 19 Vict. c. 119, s. 1. The 16 & 17 Vict. c. 84, as to passages between Ceylon and certain parts of the East Indies,—and 18 & 19 Vict. c. 104, called "The Chinese Passengers' Act, 1855," are still in force.

(*m*) 17 & 18 Vict. c. 104, ss. 309—312. And see 25 & 26 Vict. c. 63, s. 34. As to these Acts (considered in their reference to other subjects), vide sup. p. 261.

(*n*) 17 & 18 Vict. c. 104, ss. 312, 318.

(*o*) Sects. 322—325; and see, also, 25 & 26 Vict. c. 63, ss. 35—37.

(*p*) See The Hauna, Law Rep., 1 Adm. & Ecc. 283.

carrying more than *fifty* passengers (*q*), from the united kingdom, to any place out of Europe, and not being within the Mediterranean Sea (*r*); and, also, to every such colonial voyage as therein described (*s*). These Acts commit the execution of their provisions to “the Emigration Commissioners” (*t*); or, in her Majesty’s possessions abroad, to the emigration officers there appointed; or where there are none, or in their absence, to the chief officer of customs therè (*u*). They provide that no “passenger ship” shall (under penalty of forfeiture to the crown) clear out to sea, until duly surveyed and reported seaworthy: nor until the master shall have obtained, from the emigration authority at the port of clearance, a certificate that the requirements of the Acts have been duly complied with; and that the ship is seaworthy, in safe trim, and in all respects fit for her voyage, and her passengers and crew in a fit state to proceed: nor until the master shall have joined in a bond to the crown in the sum of 2,000*l.*, conditioned, *inter alia*, for the seaworthiness of the vessel (*x*). The Acts also make a great variety of regulations, calculated to limit the number and to ensure the safety and accommodation of the passengers, but too numerous and too specific in their nature to be conveniently detailed on the present occasion (*y*); and the Acts extend moreover the general provisions which they contain, subject to such variations as the case may require, to *colonial* voyages—that is, voyages of more than four

(*q*) See 26 & 27 Vict. c. 51, s. 3.

(*r*) See 18 & 19 Vict. c. 119, s. 4.

(*s*) *Ibid.*

(*t*) Sect. 6. These commissioners are persons appointed by warrant dated 27th November, 1847, under the style of “The Colonial Land and Emigration Commissioners,” to be, during her Majesty’s pleasure, “commissioners in the united kingdom for sale of the waste lands of the crown of her Majesty’s colonies, and for

superintending the emigration of the poorer classes of her Majesty’s subjects to such colonies.”

(*u*) 18 & 19 Vict. c. 119, ss. 8, 9.

(*x*) Sects. 11, 12, 19; 26 & 27 Vict. c. 51, ss. 13, 17. By this last section, if neither the owners or charterers reside in the united kingdom, the bond is to be for 5,000*l.*

(*y*) 18 & 19 Vict. c. 119, ss. 13—94.

hundred miles, or three days, from any place within any of her Majesty's possessions abroad, except Hong Kong and the territories belonging, at the date of the Passengers' Act, 1855, to the East India Company (*z*). They enact, also, that the master of every ship bringing passengers into the united kingdom, from any place out of Europe, and not within the Mediterranean Sea, shall twenty-four hours after arrival deliver to the proper emigration authority a correct list, under his signature, specifying the names, ages, and callings of all the passengers embarked, and the ports from whence they came; and which of them (if any) have died, (with the supposed cause of death,) or have been born, during the voyage; and, if the master shall fail to deliver such list or it be wilfully false, he incurs a penalty not exceeding 50*l.* (*a*). Moreover, if any ship bringing passengers *into* the united kingdom from any place out of Europe, shall have on board a greater number of passengers or persons than in the proportions respectively comprised in the Acts for carrying passengers *from* the united kingdom, the master shall be liable to such pecuniary penalties as therein particularly set forth (*b*).

Lastly, we may notice that by the 25 & 26 Vict. c. 63, s. 5, it is enacted, that every steam-ship which is required by the 17 & 18 Vict. c. 104, to have a master possessing a certificate from the Board of Trade (*c*), shall also have an engineer or engineers possessing a certificate from the same Board (*d*).

(*z*) 18 & 19 Vict. c. 119, ss. 95, 99. With respect to any vessel plying between ports in *Australia*, regulations as to the proper number of passengers may be made by the governor of the colony, from which such vessel shall proceed.

(24 & 25 Vict. c. 52.)

(*a*) 18 & 19 Vict. c. 119, s. 100.

(*b*) Sect. 101.

(*c*) Vide sup. p. 264.

(*d*) See 25 & 26 Vict. c. 63, ss. 5—12, 23, 24.

CHAPTER XI.

OF THE LAWS RELATING TO THE PRESS.

THE law of property in books and other publications has been already discussed under the head of copyright, in that part of the present work in which the right to that species of property fell under consideration (*a*). Our attention will now be directed to the law which relates to the *means* of publication—in other words, to the press.

This mighty engine for good or for evil is one that in its nature requires to be kept under some restraint, while it is perhaps even yet more essential that the restraint should not be carried so far as to preclude a reasonable liberty of discussion. In this country no censorship is exercised over the press (*b*): yet its excesses are held in check by restrictive provisions, the general object of which is to ascertain in every instance by whom publications are printed; so as to make the publisher amenable, whenever the case so requires, to the civil remedy of injured parties, or to the correction of criminal justice (*c*).

(*a*) Vide sup. vol. II. p. 34.

(*b*) The censorship of the press, which under some form or other had existed with intermissions from the time of Hen. 8, came to an end in the reign of Will. 3, by the expiration of an Act then in force. See Lord Macanlay's History of England, vol. i. p. 167.

(*c*) It may be remarked here that the offence of libel may be prosecuted either by *indictment* or *information*, as we shall have occasion hereafter to explain (vide post, vol. IV. p. 344); but, as regards *defamatory* libels, an information will not be granted unless the person applying for leave to file the same makes

The nature of these provisions will appear on an examination,—first, of those statutes which bear upon printing in general,—secondly, of those which relate to newspapers and pamphlets.

First, as to printing in general.

The regulations which concern this subject are to be found in the statute 39 Geo. III. c. 79, amended by 51 Geo. III. c. 65, and by 2 & 3 Vict. c. 12. The necessity for them was originally suggested (as the Act first mentioned sets forth) by the multitude of writings of an irreligious, treasonable and seditious nature, which had latterly been published by certain societies: and the substance of their enactments is as follows:—

Every person, who possesses any printing-press or types for printing, must, by the 39 Geo. III. c. 79, s. 23, deliver notice thereof (attested by one witness) to the clerk of the peace of the county or other division where the same is intended to be used, according to the form in the schedule to the Act annexed. And a similar notice is to be delivered to the clerk of the peace, by any person who intends to carry on the business of a letter-founder or printing-press maker (*d*). And every person who shall keep, use, make or sell any printing-press or types, without having given such notice and obtained such a certificate as the Acts require, shall forfeit 20*l*. But an exception as to this is made in favour of the royal printers, and of the public presses of the Universities of Oxford and Cambridge (*e*).

It is also provided by the same Act, under the like penalty, that every person who shall sell types or presses shall keep an account in writing of all persons to whom they shall be sold; and shall produce such account to

an affidavit pointedly asserting his innocence of the charge. (4 Bl. Com. 451, n. by Christian.)

(*d*) 39 Geo. 3, c. 79, s. 25.

(*e*) As to the exclusive privileges

of the Queen's printer and of the Universities of Oxford and Cambridge in printing the Bible, acts of parliament, &c., vide sup. vol. II. p. 40.

any justice of the peace who shall require to inspect the same (*f*). And that every person who shall print any paper for hire or reward shall carefully preserve a copy of the same; and shall write thereon, in fair and legible characters, the name and address of his employer; and shall produce such copy to any justice who shall demand a sight thereof (*g*).

It is moreover provided by 2 & 3 Vict. c. 12, that every person who shall print any paper or book whatsoever, for publication or dispersion, must print upon the front thereof (if the same be printed upon one side only), or upon the first or last leaf of every paper or book consisting of more than one leaf, in legible characters, his name and usual place of abode or business (*h*),—and that every person who shall publish or disperse, or assist in publishing or dispersing, any paper or book printed without such particulars,—shall, for every copy so printed, forfeit a sum not exceeding 5*l*. But no action or proceeding in any court or before any justice of the peace shall be commenced under this provision, except in the name of the attorney-general or solicitor-general. And it is further enacted, that in the case of books or papers printed at the University Press of Oxford or the Pitt Press of Cambridge, the printer, instead of printing his name thereon, shall print the following words, “Printed at the University Press, Oxford,” or “The Pitt Press, Cambridge,” as the case may be.

It is, however, to be observed, that the above provision with respect to the printer’s name and place of abode does not extend (*i*) to any papers printed by the authority and for the use of either House of Parliament, or for any public Board or Office (*k*); or to the impres-

(*f*) 39 Geo. 3, c. 79, s. 26.

(*g*) Sect. 29.

(*h*) See *Bensley v. Bignold*, 5 B. & A. 335; *Marchant v. Evans*, 2 Moore, 14.

(*i*) See 39 Geo. 3, c. 79, s. 28;

2 & 3 Vict. c. 12, s. 6.

(*k*) See 51 Geo. 3, c. 65, s. 3; 2 & 3 Vict. c. 12, s. 6.

sion of any engraving; or to the printing by letter-press of the name, or the name and address, or business, of any person, and of the articles in which he deals. Moreover, it extends not to any papers for the sale of estates or goods by auction or otherwise; or to any bank note or security for payment of money, bill of lading, policy of insurance, letter of attorney, deed or agreement, transfer or assignment of public stock or securities, or dividend warrant thereon; or to any receipt for money or goods; or to any proceedings in any court of law or equity;—notwithstanding the whole or any part of the said securities, instruments and matters aforesaid shall be printed (*l*).

Secondly, as to newspapers and pamphlets.

Shortly before the introduction of the above regulations relative to printed books and papers in general, provisions of the same tendency had been devised by the legislature in reference to that highly influential class of publications just mentioned. But the Act at that time passed has been since repealed (*m*); and the provisions now in force for the control of newspapers and pamphlets are contained in 60 Geo. III. & 1 Geo. IV. c. 9; 11 Geo. IV. & 1 Will. IV. c. 73, and 6 & 7 Will. IV. c. 76 (*n*).

By the first of the Acts, it is among other things provided, that no person, under a penalty of 20*l.*, shall print or publish for sale any newspaper (*o*)—or any pamphlet

(*l*) See 51 Geo. 3, c. 65, s. 3; 2 & 3 Vict. c. 12, s. 6.

(*m*) 38 Geo. 3, c. 78. This and the subsequent Act, 5 Will. 4, c. 2, are repealed by 6 & 7 Will. 4, c. 76, s. 32.

(*n*) There is, on the other hand, a late Act favourable to the circulation of newspapers—viz. 18 Vict. c. 27—providing more amply for their transmission by the post. The

same Act provides that, except for the purpose of such transmission, it shall be no longer necessary (as it once was) that the printing of newspapers should be on paper *stamped* for denoting the duties on the same. And it also provides for the transmission, by post, of periodical publications.

(*o*) Under the expression “newspapers,” as used in the above Acts,

or other paper containing any public news, intelligence or occurrence, or any remarks or observations thereon, or upon any matter in church and state, which shall not exceed two sheets of certain dimensions therein specified, or which shall be published for sale at a less price than 6*d.*,—until he shall have given security with two or three sufficient sureties, that the printer or publisher shall pay any fine or penalty at any time adjudged against him, for printing or publishing any blasphemous or seditious libel (*p*).

By the second of these Acts it is provided that the security above referred to, may be taken in such form as to secure the payment of any damages or costs to be recovered in *actions* for libels, as well as to secure the payment of fines or penalties upon conviction on an indictment or information for the same.

By the last of these Acts it is enacted, among other things, that no person shall, under a penalty of 50*l. per diem*, print or publish, or cause to be printed or published, any newspaper, (the London Gazette only excepted,) before there shall be delivered to the proper revenue officer for the district a declaration in writing, containing the correct title of the newspaper—the true description of the house in which it is to be printed, and of that in which it is to be published,—and the true name, addition, and place of abode of every intended printer and publisher thereof, and (with certain qualifications) those

are included, not only papers containing public news, but those also which contain any remarks or observations on public news, published periodically, or in parts or numbers, at intervals not exceeding twenty-six days,—provided any of the parts or numbers do not exceed two sheets of the dimensions specified in the Acts, or shall be published for less than sixpence. Periodical papers

of *advertisements* are also included. (See 60 Geo. 3 & 1 Geo. 4, c. 9, ss. 1, 2, 3; 6 & 7 Will. 4, c. 76, s. 4; *Ex parte Higginbotham*, 9 D. P. C. 201; *Attorney-General v. Bradbury*, 7 Exch. 97.)

(*p*) 60 Geo. 3 & 1 Geo. 4, c. 9, s. 8. As to the mode of enforcing these recognizances, see *Ex parte Duke of Brunswick*, 3 Exch. 829.

of the proprietors (*q*). And it is also provided that every such declaration shall be signed by the printers and publishers therein specified, and by such of the proprietors therein specified as shall be resident within the united kingdom, and shall be renewed as often as changes in the concern shall occur; and that any false statement therein as to the printers, publishers, or proprietors, shall be deemed a misdemeanor (*r*).

It is also enacted, that copies of such declarations, (certified as true copies,) shall be admitted in all proceedings, civil or criminal, and on all occasions touching such newspapers, as conclusive evidence, against the persons signing the same, of the truth of all matters therein set forth (*s*); and that the Board of Inland Revenue shall cause to be entered the title of every newspaper duly registered, and also the names of the printers and publishers, as the same appear in the declarations; and that all persons shall have free liberty to inspect such book gratuitously (*t*).

The printer or publisher of every newspaper must also, under a penalty of 20*l.*, deliver at the ordinary price, at the proper office, one copy thereof as often as published, with his name and place of abode written thereon in his proper hand, or by some person duly appointed to sign for him. And in case any person shall make application within two years afterwards for the newspaper so signed and delivered, in order that it may be produced in evidence in any proceeding, civil or criminal,—the board shall either deliver it to him, or cause it to be produced in court for that purpose (*u*).

There is an additional regulation, that at the end of every newspaper, and of every supplement sheet to the

(*q*) See *Holcroft v. Hoggins*, 2 C. B. 488. 325.
 (*r*) 6 & 7 Will. 4, c. 76, s. 8.
 (*s*) 6 & 7 Will. 4, c. 76, s. 6. See (*t*) Sect. 10.
Stephens v. Robinson, 2 Tyr. 280; (*u*) Sect. 13.
Houstoun v. Mills, 1 M. & Rob.

same, shall be printed the christian name and surname, addition and place of abode of the printer and publisher ; together with a true description of the house or building wherein the same is printed and published respectively, and a statement as to the day of the week, month and year on which the same is published. And any person knowingly printing or publishing a newspaper without these particulars, or with a false statement as to name, addition, place or day, or a description of place different from that in the declaration before mentioned, shall forfeit 20*l.* (*x*).

And it is further provided, that all penalties under this Act, or under that of 60 Geo. III. & 1 Geo. IV. above-mentioned, may be sued for in the name of the attorney-general or solicitor-general, or of the solicitor of the Board of Inland Revenue, or of any officer of stamp duties,—but by no other person whatever (*y*).

(*x*) 6 & 7 Will. 4, c. 76, s. 14.

(*y*) 60 Geo. 3 & 1 Geo. 4, c. 9 ; 6 & 7 Will. 4, c. 76, s. 27.

CHAPTER XII.

OF THE LAWS RELATING TO HOUSES OF PUBLIC
RECEPTION AND ENTERTAINMENT.

THE regulations of a general kind which have been made by the legislature in reference to the subject-matter of the present chapter, relate to Public Houses and to Theatres (*a*).

1. As to Public Houses.

As to these, we may, in the first place, remark, that the enactments affecting public houses (in which term we do not for the present purpose include the houses recently established under the name of refreshment houses), are of two kinds: the first having in view the subject of *revenue*, the other of *police*—that is, the proper regulation of these places of public reception, and the prevention of the abuses to which they are naturally liable.

The statutes first referred to relate to the Excise, a

(*a*) There is, also, a statute which, as it is local only in its character, is not included among the enactments mentioned in the text. This Act (25 Geo. 2, c. 36, made perpetual by 28 Geo. 2, c. 19, s. 1), requires every house, room, garden, or other place, kept in *London* or *Westminster*, or within a *circuit of twenty miles*, for public dancing, music, or other *public entertainment of the like kind*, "to be licensed by the quarter sessions, under penalty of being

deemed and punishable as a disorderly house;" and over the doors of such places, there must be affixed and kept the words "Licensed pursuant to Act of Parliament of the twenty-fifth of King George the second;" and they are not allowed to be opened for the purpose of amusement before five o'clock in the afternoon. The cases on the construction of this Act are numerous. *Hall v. Green* (9 Exch. 247) is one of the most recent.

tax the general nature of which has been sufficiently noticed in a former volume (*b*); and by one of these it is, amongst other things, provided (*c*), that any person selling wine, spirits, beer, cider or perry, by retail, who shall carry on such his trade without taking out an *excise licence*, shall for every such offence forfeit 50*l.* (*d*).

Acts of the other description, viz., those which concern police, commence as early as the reign of Edward the sixth (*e*): but of these, the principal one now in force is 9 Geo. IV. c. 61; by which every keeper of an inn, alehouse or victualling house, must, in addition to his excise licence (*f*), obtain, from the *justices* having jurisdiction in the place where the house is situate, a licence to sell exciseable liquors by retail to be drunk or consumed on his premises (*g*). Such licences are granted at the general annual licensing meeting held for the purpose, but may be refused if there be reasonable objection on the ground of character or otherwise (*h*).

No excise licence for the sale of wine or spirits to be consumed on the premises, can be issued by the officers of excise to any person who has not previously obtained the justices' licence just mentioned (*i*); but an excise licence to sell beer, and cider, and perry, for consumption off the premises (*k*), may, by 11 Geo. IV. & 1 Will.

(*b*) Vide sup. vol. II. p. 601.

(*c*) 6 Geo. 4, c. 81, s. 26.

(*d*) As to excise licences, see also 7 & 8 Geo. 4, c. 53; 4 & 5 Will. 4, c. 51; 4 & 5 Vict. c. 20; 18 & 19, Vict. c. 38; 23 Vict. c. 27; and 24 & 25 Vict. c. 91.

(*e*) See 5 & 6 Edw. 6, c. 25.

(*f*) See *R. v. Drake*, 6 Mau. & Sel. 116; *R. v. Downes*, 3 T. R. 560; 1 Wms. Burn, 29.

(*g*) Every borough with a separate commission of the peace, (although it may not have a separate

quarter sessions,) is included in this jurisdiction (24 & 25 Vict. c. 75, s. 4).

(*h*) If a licence be refused, an appeal lies to the quarter sessions for the county. See *R. v. Middlesex Justices*, 3 B. & Ad. 938; *Reg. v. Deane*, 3 Q. B. 96; *Queen v. Bolton*, 11 Q. B. 379; *Queen v. Cockburn*, 4 Ell. & Bl. 265; *The Queen v. Sylvester*, 2 B. & Smith, 322.

(*i*) 9 Geo. 4, c. 61, s. 17.

(*k*) See *Cross, app. v. Watts*, resp. 13 C. B. 239.

IV. c. 64; 4 & 5 Will. IV. c. 85; and 3 & 4 Vict. c. 61,—commonly called the Beer Acts (*l*),—be obtained without any licence from the justices (*m*).

All licences to sell exciseable liquors are granted subject to conditions having in view the preservation of sobriety and decorum, the breach of which subjects the publican to penalties, which are generally made recoverable before two justices. And there are also enactments (*n*), by which it is provided that no licensed victualling, or beer house, or other house or place of public resort, shall be opened for the sale of wine, spirits, beer, or other fermented or distilled liquors, on Sunday, Christmas day, Good Friday, or any Fast or Thanksgiving day, before half-past twelve o'clock (or other usual time for the termination of morning divine service), or between the hours of three and five in the afternoon, or after eleven in the afternoon, or before four in the morning of the day following. There is, however, an exception made in the Acts with regard to refreshments supplied to any lodger in the house, or to a *bonâ fide* traveller (*o*).

Finally, by 27 & 28 Vict. c. 64 (amended by 28 & 29 Vict. c. 77), no licensed victualler within the limits of the Metropolitan police district, the city of London, or of such boroughs or districts as shall adopt the Act, shall keep his house open for the sale or consumption of any exciseable liquor or other article whatsoever, between the hours of one or four o'clock in the morning. And by 30 & 31 Vict. c. 142, it has been now enacted,

(*l*) See also 24 & 25 Vict. c. 91, ss. 10, 13, 14.

(*m*) By 11 Geo. 4 & 1 Will. 4, c. 64, s. 32, *beer* is defined to include *ale* and *porter*.

(*n*) See 11 & 12 Vict. c. 49; 18 & 19 Vict. c. 118; *Harris v. Jenns*, 9 C. B. (N. S.) 152. The 18 & 19

Vict. c. 118, repeals 17 & 18 Vict. c. 79, on the same subject.

(*o*) See *Taylor, app. v. Humphreys*, resp. 10 C. B. (N. S.) 429; *Tennant v. Cumberland*, 1 E. & E. 401; *Peache v. Colman*, Law Rep. 1 C. P. 324.

with the hope of discouraging tipping, that no action shall henceforth be maintainable in any court to recover any debt due for ale, porter, beer, cider or perry consumed on the premises where the same was sold or supplied.

In addition to the public houses already mentioned, a distinct class of houses for the refreshment of the public have now been sanctioned by the legislature, and placed under systematic regulation. We refer to "refreshment houses," which are established by 23 Vict. c. 27 (amended by 24 & 25 Vict. c. 91, ss. 8—11), and wherein they are defined as "houses, rooms, shops or buildings, kept open for public refreshment, resort and entertainment (*p*), at any time between the hours of ten (*q*) at night and five in the morning, not being licensed for the sale of beer, cider, wine or spirits respectively" (*r*); and in order to keep such refreshment house, it is made necessary to obtain from the officers of Inland Revenue an excise licence bearing an excise duty (*s*); and no unlawful gaming or disorderly persons shall, knowingly, be allowed therein under a penalty (*t*); and constables and police officers are empowered to enter any such house as often as and when they think proper (*u*). It is also provided, that any person who shall be so licensed to keep a refreshment house, and shall pursue therein the business of a confectioner,—or who shall keep open such house for the purpose of selling, to be consumed therein, animal or other victuals, wherewith wine or other fermented liquors are usually drunk,—shall be also entitled (subject to the terms of the Act) to take out an excise licence to sell foreign wine by retail in such house, to be consumed on the premises, with-

(*p*) See Taylor v. Oram, 1 H. & Colt. 370.

(*q*) See 24 & 25 Vict. c. 91, s. 8. By 23 Vict. c. 27, the hour was *nine*.

(*r*) 23 Vict. c. 27, s. 6.

(*s*) Sects. 1, 2, Sched. No. 1.

(*t*) Sect. 32.

(*u*) Sect. 18.

out having any other licence or authority in that behalf (*y*); but, before he can obtain for the first time such licence to sell foreign wine on his premises, certain particulars specified in the Act must be forwarded, through the Board of Inland Revenue, to the justices of the court of petty sessions holden for the place where the house is situated—and such justices are empowered to object to the granting of the licence if, on the ground of character or otherwise, there is found to be any sufficient objection (*z*). It is further provided (without reference to refreshment houses), that any person keeping a shop for the sale of goods and commodities shall be entitled to take out another sort of excise licence, to sell therein foreign and British wine by retail; but in reputed quart or pint bottles only, and not to be consumed in the shop (*a*). And, lastly, we may mention, among other matters which our limits prevent us from particularizing, that refreshment houses are placed generally under the same limits as to the hours during which they may be kept open, as have been already specified with regard to licensed victualling and other public houses (*b*).

2. As to Theatres.

The statute 6 & 7 Vict. c. 68, intituled “An Act for regulating Theatres,” first repeals the then existing enactments as to theatres (*c*), and then proceeds to prohibit, under penalties, all persons from having or keeping (*d*) any house or other place of public resort in Great Britain, for the public performance of stage plays (*e*),

(*y*) 23 Vict. c. 27, ss. 1, 7, Sched. No. 2. See 24 & 25 Vict. c. 91, s. 10.

(*z*) 23 Vict. c. 27, s. 13.

(*a*) Sect. 1, Sched. No. 3.

(*b*) Vide sup. p. 308.

(*c*) There were enactments on this subject in 39 Eliz. c. 4; 3 Jac. 1, c. 21; 12 Ann. st. 2, c. 93; 10 Geo.

2, c. 28; 28 Geo. 3, c. 30.

(*d*) See *The Queen v. Strugnell*, Law Rep., 1 Q. B. 93.

(*e*) A “stage play” is defined by the Act to include any tragedy, comedy, farce, opera, burletta, interlude, melo-drama, pantomime, or other entertainment of the stage

unless they shall have the authority of letters-patent from the crown, or a licence from the lord chamberlain of the household, or licence from at least four justices assembled at a special session, to be holden in the division where the proposed theatre is to be situate (*f*).

The jurisdiction of the lord chamberlain as to licensing, is defined by the Act as extending to all theatres, (not being patent theatres,) within the parliamentary boundaries of London and Westminster; and within the boroughs of Finsbury and Marylebone, the Tower Hamlets, Lambeth, and Southwark; and also within those places where the sovereign shall occasionally reside. The jurisdiction of the justices extends, generally, to all places beyond these limits (*g*). But it is provided, that no licence shall be granted by either of these authorities, except to the actual and responsible manager of the proposed theatre for the time being; who is to give security for the due observance of such regulations as the authorities may impose: and also that no licence from the justices shall be in force at the universities of Oxford or Cambridge, or within fourteen miles of the same, without consent of the chancellor or vice-chancellor (*h*). Penalties are moreover imposed on any person who, for hire, shall act, or cause to be acted, any part of a stage play, in a place not being a patent theatre or duly licensed (*i*).

The statute further empowers the justices to make

or any part thereof; but not a theatrical representation in a booth or show duly allowed by the justice of the peace, or other person having authority in that behalf, at a fair or feast, &c. (6 & 7 Vict. c. 68, s. 23.) As to what is an "entertainment of the stage" within the meaning of this section, see *Wigan v. Strange*, Law Rep., 1 C. P. 175.

(*f*) 6 & 7 Vict. c. 68, s. 2. By 2 & 3 Vict. c. 47, s. 46, the commis-

sioners of police may authorize a superintendent with constables to enter any place used within the metropolitan police district for dramatic entertainment, and which is not a licensed theatre, and take into custody all persons found therein. (See *Fredericks v. Howie*, 1 H. & C. 381; *v. Payne*, *ib.* 584.)

(*g*) 6 & 7 Vict. c. 68, s. 3.

(*h*) Sect. 10.

(*i*) Sect. 11.

suitable rules for ensuring order and decency in the theatres to be licensed by them, and for regulating the times when they are to be open; which rules may be rescinded or altered by a secretary of state: and in case of a riot or breach of rule in any such theatre, the justices may order the same to be closed.

The lord chamberlain may also,—as to all theatres licensed by him, and also as to patent theatres,—order the same to be closed, in case of riot or on any public occasion whatever (*k*). It is also provided, that one copy of every new stage play,—and, indeed, of every new act, scene, part, prologue or epilogue of a play—intended to be acted for hire at any theatre in Great Britain, shall be sent seven days previously to the lord chamberlain, for his allowance; and without such allowance it shall not be lawful to act the same (*l*). The lord chamberlain is moreover empowered to forbid, under penalties in case of disobedience, the representation or performance of any stage play, or part thereof, in any theatre whatever, whenever such a course shall appear to him advisable, whether for the preservation of good manners or decorum, or with a view to preserve the public peace (*m*).

(*k*) 6 & 7 Vict. c. 68, s. 8.

(*m*) Sect. 14.

(*l*) Sect. 12.

CHAPTER XIII.

OF THE LAWS RELATING TO PROFESSIONS.



IN most employments the rewards resulting from success, and the discredit and failure consequent upon incompetency, form a natural and sufficient security to the public, that they will not be undertaken without the necessary qualifications; but there are professions productive of evils so serious, when improperly exercised, and so liable at the same time to be exercised by unfit persons, as to make it proper to subject them to the restraints of legal regulation. Those which our law deems to be of that character, (or those at least which have especially attracted the notice of our legislature as such,) are the professions of medicine and of law.

And, first, as to the medical profession.

The necessity of placing under supervision the practitioners of physic and surgery was early acknowledged; for we find so long ago as the third year of Henry the eighth, a statute (c. 11) by which it is enacted, that no person within London, or seven miles thereof, shall practise as a physician or surgeon without examination and licence (*a*).

(*a*) By 3 Hen. 8, c. 3, the bishop of the diocese was associated with the faculty for the purpose of such examination and licence. By the same Act the privileges of the Universities of Oxford and Cambridge, with regard to degrees in medicine and surgery, are expressly preserved.

By 17 & 18 Vict. c. 114, and 21 & 22 Vict. c. 90, s. 53, the right of practising physic (not including, however, in that term the practice of surgery, pharmacy, or midwifery) is extended to graduates of the University of *London*.

By royal charter of date 23rd September, 10 Hen. VIII. confirmed by the statute 14 & 15 Hen. VIII. c. 5, and the 32 Hen. VIII. c. 40, a college of physicians in London was established (*c*); and it was ordained, that this college should choose four physicians yearly, to supervise all others within London and seven miles thereof, “as also their medicines and receipts,” so that such as offended should be punished with fines, imprisonment, or other means; and that no person should be at liberty to practise physic or surgery within that circle, except by the licence of the college; and this charter of Hen. VIII. was subsequently confirmed and enlarged by the Act of 1 Mar. sess. 2, c. 9, and by certain other Charters of later dates, viz., the 8th of October, in the fifteenth year of James the first, and the 26th of March, in the fifteenth year of Charles the second (*d*).

With regard to *surgeons*, the first of the statutes we have cited (viz. 3 Hen. VIII. c. 11) expressly includes this class of practitioners within its provisions. In the same reign, the united “company of barbers and surgeons of London” were again regulated by the statute 32 Hen. VIII. c. 42, and the 34 & 35 Hen. VIII. c. 8 (*e*); and afterwards by a charter in their favour, bearing date the 15th of August, 5 Car. I., all persons, (except such physicians as therein mentioned,) were

(*c*) By 14 & 15 Hen. 8, c. 5, the president was to be elected out of certain physicians of the college, termed *elects*; but the provisions with regard to these officers were repealed by 23 & 24 Vict. c. 66, s. 5—an Act to be presently referred to in the text.

(*d*) The following are some of the cases in which questions respecting the privileges of the college of physicians, under these Acts and charters, have arisen:—*R. v. Askew*, 4 Burr. 2186; *Rose v. Physicians’*

College (in error), 5 Bro. P. C. 553; *R. v. Physicians’ College*, 7 T. R. 282; *Moises v. Thornton*, 8 T. R. 303; *Collins v. Carnegie*, 1 Ad. & El. 695.

(*e*) At the date of these statutes there appear to have been two distinct companies of surgeons,—one called the *Barbers of London*, the other the *Surgeons of London*—the two callings being at that period often pursued by the same class of persons.

prohibited from exercising surgery within London and Westminster, or within seven miles from London, for profit, unless first duly examined and admitted by the company. And by statute 18 Geo. II. c. 15, and charter of the 22nd of March, 40 Geo. III. and again by charter of the 14th of September, in the seventh year of Victoria, "The Royal College of Surgeons of England" was established in its present constitution. By this last charter there was created a new class of members, called *fellows*, from whom and by whom the council of the college were to be in future elected; and it provides that all future examiners shall be elected by, and hold their office at the pleasure of, the council. The charter also contains a clause, that no bye-law or ordinance thereafter to be made by the council shall be of any force, until the royal approbation thereof shall have been signified to the college, under the hand of a principal secretary of state; or shall have been otherwise approved in such manner as parliament shall direct.

With respect to *apothecaries*, this class of practitioners first obtained a charter from James the first, which was afterwards confirmed and enlarged by the statute 55 Geo. III. c. 194. These provide, that no person shall practise as an apothecary, or act as an assistant to an apothecary, in any part of England or Wales, unless he shall have been examined and shall have received a certificate of his being duly qualified from the "Society of the Art and Mystery of Apothecaries of the City of London" (f).

This certificate is not to be granted to any person below the age of twenty-one, nor to any who has not

(f) 55 Geo. 3, c. 194, s. 14. As to what constitutes practice as an apothecary, see *The Apothecaries' Company v. Warburton*, 3 B. & Ald. 40. As to the certificate, see *Young v. Geiger*, 6 C. B. 541. By 6 Geo. 4, c. 133, s. 4, every person holding

a warrant as surgeon or assistant surgeon in the army or navy may practise as an apothecary, without undergoing the examination or obtaining the certificate required by 55 Geo. 3, c. 194.

served an apprenticeship of five years to some apothecary, and can produce testimonials of sufficient medical education and good moral conduct; and any person practising without such certificate is not only disabled by this Act from recovering his charges (*g*), but is moreover made liable to a penalty of 20*l.* for every such offence (*h*).

It is also provided, that any apothecary refusing to compound or sell, or negligently compounding or selling, any medicines as directed by any prescription or order signed with the initials of any physician lawfully licensed, shall incur certain penalties (*i*). And, further, that the society of apothecaries—or any two or more qualified persons by them appointed—may at all reasonable times in the daytime enter any apothecary's shop and examine whether the medicines and drugs there kept be wholesome, and may destroy such as they find otherwise, and report the names of the offenders: who are made thereupon liable to a fine of 5*l.* for the first, 10*l.* for the second, and 20*l.* for the third offence (*k*).

The Act contains, however, a proviso that nothing therein shall affect the business of a *chemist and druggist* (*l*), with reference to the buying, preparing, compounding, dispensing (*m*), and vending, of drugs, medicines, and medicinal compounds, wholesale and retail (*n*); nor shall interfere with the rights of the uni-

(*g*) 55 Geo. 3, c. 194, s. 21. See *Young v. Geiger*, 6 C. B. 541.

(*h*) See *Brown v. Robinson*, 1 Car. & P. 264; *The Apothecaries' Company v. Greenwood*, 2 B. & Adol. 709.

(*i*) Sect. 5.

(*k*) Sect. 3.

(*l*) Sect. 28. But by 15 & 16 Vict. c. 56 (amended by 31 & 32 Vict. c. 121), every person retailing or compounding such *poisons* as the Acts specify, or assuming the title

of chemist or druggist, must be duly examined, registered and certified by the "Pharmaceutical Society of Great Britain."

(*m*) As to the meaning of *dispensation* in pharmacy, see *Apothecaries' Company v. Burt*, 5 Exch. 363.

(*n*) It may be here noticed, that by 14 & 15 Vict. c. 13 (which is not affected by the 15 & 16 Vict. c. 56, and 31 & 32 Vict. c. 121, above mentioned), the sale of *arsenic* and

versities of Oxford or Cambridge, the College of Physicians or of Surgeons, or the Society of Apothecaries respectively, except as altered by that Act.

Such were the different charters and statutes by which the medical profession in England (including in that term physicians, surgeons and apothecaries) was chiefly governed till within a recent period. But in the year 1858, the legislature interfered with the object of enabling persons requiring medical aid to distinguish qualified from unqualified practitioners; and an act of parliament then passed, which introduced important and salutary regulations in this behalf. And of the 21 & 22 Vict. c. 90 ("The Medical Act, 1858"),—as amended by the 22 Vict. c. 21, the 23 Vict. c. 7, the 23 & 24 Vict. c. 66, the 25 & 26 Vict. c. 91, and the 31 Vict. c. 29,—such a general account shall be here given as is consistent with our limits.

By these Acts a "general council" of medical education and registration of the united kingdom is established as a body corporate, with a perpetual succession and a common seal, and with a capacity to hold lands for the purposes of the Act (*o*). Such council consists

arsenious preparations is subjected to certain special rules. Particulars of the sale are to be signed by the purchaser, comprising his name and address, the quantity sold, and the purpose for which it is required; and where he is unknown to the vendor, the sale must be in the presence of a common acquaintance. The purchaser must, moreover, be a person of full age; and the arsenic must be coloured with an *admixture of indigo or soot*, unless where represented by the purchaser to be required for some purpose for which it would be rendered unfit by such admixture; in which case it may be

sold uncoloured in a quantity of not less than ten pounds. But the Act does not extend to arsenic forming part of the prescription of a qualified member of the medical profession, nor to such as is sold wholesale to a retail dealer, upon an order in writing in the ordinary course of business.

(*o*) 25 & 26 Vict. c. 91, s. 1. The copyright of the British Pharmacopœia, published by the general council, is vested in that body by the same Act, but the price of the work to the public is to be fixed by the Commissioners of the Treasury. (*Ibid.*)

of members chosen from time to time by certain colleges and bodies—including the Royal Colleges of Physicians and Surgeons, and Society of Apothecaries already mentioned,—together with six persons nominated by the crown (*o*), and a president who is elected by the council itself (*p*). Each of the electing bodies returns one representative (*q*).

To this general council is entrusted the duty of carrying out, through the agency of their secretary, a system of registration of all medical practitioners, calculated to ensure their addresses and qualifications being generally known,—the registers being (with this object) printed, published and sold to the public under the style of “The Medical Register” (*r*).

Upon these registers are entitled (*s*) to be placed (on payment of a fixed fee), first, any person who, at the date fixed for the commencement of the Act, viz. on the 1st October, 1858, was possessed of any one or more of the following qualifications; viz. 1, as fellow, member (*t*), licentiate, or extra licentiate of the Royal College of Physicians in London; 2, as fellow, member (*u*), or licentiate of the Royal College of Physicians of Edinburgh; 3, as fellow or licentiate of the King and Queen’s College of Physicians of Ireland; 4, as fellow, member,

(*o*) Of these, four are to be appointed for England, one for Scotland, and one for Ireland. (20 & 21 Vict. c. 90, s. 4.)

(*p*) Ibid.

(*q*) The electors (in addition to the colleges and society mentioned in the text) are the universities of Oxford, Cambridge, Durham, London (see *The Queen v. Storrar*, 2 Ell. & Ell. 133), and Dublin; the universities of Edinburgh and Aberdeen (collectively); the universities of Glasgow and St. Andrews (collectively); the Queen’s University in Ireland;

the Colleges of Physicians and of Surgeons of Edinburgh; the Faculty of Physicians and Surgeons of Glasgow; the King and Queen’s College of Physicians in Ireland; the Royal College of Surgeons in Ireland; and the Apothecaries’ Hall in Ireland (21 & 22 Vict. c. 90, s. 4).

(*r*) 21 & 22 Vict. c. 90, s. 27.

(*s*) By 21 & 22 Vict. c. 90, ss. 15, 27.

(*t*) See 22 Vict. c. 21, s. 4.

(*u*) Ibid.

or licentiate in midwifery of the Royal College of Surgeons of England; 5, as fellow or licentiate of the Royal College of Surgeons of Edinburgh; 6, as fellow or licentiate of the Faculty of Physicians and Surgeons of Glasgow; 7, as fellow or licentiate of the Royal College of Surgeons in Ireland; 8, as licentiate of the Society of Apothecaries of London; 9, as licentiate of the Apothecaries' Hall, Dublin; 10, as doctor or bachelor or licentiate of medicine, or master in surgery, of any University of the United Kingdom; 11, as having the diploma or licence in surgery of any University in Ireland duly authorized to grant the same (*v*); 12, as doctor of medicine by doctorate granted prior to the passing of the Act by the Archbishop of Canterbury; 13, as doctor of medicine of any Foreign or Colonial University or College, and practising as a physician in the United Kingdom before 1st October, 1858, and producing certificates to the satisfaction of the council of his having taken his degree of doctor of medicine after regular examination, or satisfying the council under 21 & 22 Vict. c. 90, s. 46, that there is sufficient reason for admitting him to be registered (*x*).

Secondly, any person is entitled to be registered who, after the 1st October, 1858, shall become (subject to the provisions of the Acts) possessed of any one or more of the first eleven of the above qualifications (*y*). Thirdly,

(*v*) See 23 Vict. c. 7, s. 1.

(*x*) 21 & 22 Vict. c. 90, s. 46. By this section (as to which see 22 Vict. c. 21, s. 5), the general council is enabled to dispense with such parts of the Act or of the regulations made under it as they shall think fit, in favour of practitioners at the date of the Act in any part of her Majesty's dominions other than Great Britain and Ireland, by virtue of any of the qualifications described in Schedule A;

and in favour of practitioners in the United Kingdom, before the passing of that Act, with colonial diplomas or degrees; and also in favour of such persons as shall have been naval or military surgeons, or surgeons in the public service, or in the service of any charitable institution; and also in favour of medical students who commenced their studies before the Act passed.

(*y*) See 21 & 22 Vict. c. 90, ss. 15 27.

any person is entitled to be registered who, prior to the 1st August, 1815, was actually practising medicine in England, on his producing a declaration signed by himself to that effect (*z*).

Such being the persons entitled to be registered, the Acts proceed to provide that, after 1st January, 1859, none other than registered persons shall be entitled to claim the title of legally or duly qualified medical practitioners (*a*); nor to recover any charge in any court of law for any medical or surgical advice or attendance (*b*), or for the performance of any operation, or for any medicine which they have both prescribed and supplied (*c*); nor to hold any of the government or other medical appointments specified in the Act (*d*); nor to sign any certificate required by act of parliament to be signed by a medical practitioner (*e*). The Acts provide, on the other hand, that every person duly registered shall be not only entitled (*f*), according to his qualification, to practise medicine or surgery, or both (as the case may be), in any of her Majesty's dominions (*g*)—but also to recover in any court of law, with full costs of suit, reasonable charges for professional aid, advice and visits, and the costs of any medicines or other medical or surgical appliances by him supplied to his patients. It is necessary, however, to mention that this last enactment is subject to a qualifying proviso with regard to *physicians*, whose em-

(*z*) 21 & 22 Vict. c. 90, s. 17. See the form sched. (B.) As to making false declaration, see sect. 39.

(*a*) Sect. 34. As to the penalties attaching to a false assumption of title, see s. 40, and *Ellis v. Kelly*, 6 H. & N. 222.

(*b*) See *De la Rosa v. Prieto*, 16 C. B. (N. S.) 578.

(*c*) Sect. 32. See *Wright v. Greenroyd*, 1 B. & S. 758.

(*d*) Sect. 36.

(*e*) Sect. 37.

(*f*) Sect. 21. See *Turner v. Reynall*, 14 C. B. (N. S.) 328.

(*g*) But with regard to practising in the *colonies*, see 31 Vict. c. 29. It may be observed, here, that the name of any person proved guilty of infamous conduct in any professional respect, may be ordered by the council to be erased from the register. See *Ex parte La Mert*, 4 B. & Smith, 582.

ployment (like that of barristers) had always previously been held to be of a merely honorary description and insufficient—unless in virtue of an actual contract (*h*)—to support an action for their fees (*i*). Accordingly, the Acts provide that any College of Physicians may pass a bye-law to the effect that none of their fellows or members shall be entitled to sue for their fees, and that such bye-law may be pleaded in bar to any action commenced for the recovery thereof. This proviso, however, does not extend to *surgeons*; who have always been held entitled to recover a reasonable compensation for their services, even in the absence of a special contract (*h*).

In addition to the power of recovering their charges thus expressly conferred on registered practitioners, the Acts also exempt them, if they so desire, from serving on juries or inquests, or in the militia, or any corporate or parochial office (*l*).

Besides its functions as above described in reference to the formation of registers, authority is given to the general council, if it shall find that any of the bodies which are entitled by the Acts to grant qualifications attempt to impose upon any candidate for examination any obligation to adopt, or refrain from adopting, the practice of any particular theory of medicine or surgery, to make representation accordingly to the Privy Council (*m*). It is also empowered to require information from any such bodies as to the course of study and examination which they require from candidates; and, if such course seems not such as to secure the possession

(*h*) See *Veitch v. Russell*, 3 Q. B. 928.

(*i*) Co. Litt. 265 n. See *Chorley v. Bolcot*, 4 T. R. 317; *Little v. Oldaker*, 1 Car. & M. 370; *Buttersby v. Lawrance*, *ibid.* 277.

(*k*) See *Lipscombe v. Holmes*, 2

Camp. 441; *Baxter v. Gray*, 4 Scott, N. R. 374; *Simpson v. Rolfe*, 4 Tyr. 325; *Richmond v. Coles*, 1 Dowl. (N. S.) 560.

(*l*) 21 & 22 Vict. c. 90, s. 35.

(*m*) Sect. 23.

of the requisite knowledge and skill, to represent the same to the Privy Council. And the Privy Council, either in this or the preceding case, may deprive such body so reported of the power of granting qualifications, either for a time or altogether (*n*).

The Acts further provide (*o*), that it shall be lawful for her Majesty to grant to the corporation of the Royal College of Physicians of London (*p*) a new charter under the name of the "Royal College of Physicians of England," the acceptance of which shall operate as a surrender of all previous charters, except that granted by Henry VIII.: and of all the privileges conferred by or enjoyed under the 14 & 15 Hen. VIII. c. 5, which shall be inconsistent with such new charter (*q*).

Finally, there is a provision, that nothing in the Acts contained shall affect the business of a *chemist* and *druggist*.

We have also to notice, in connexion with the medical profession, the 2 & 3 Will. IV. c. 75, intituled "An Act for regulating Schools of Anatomy;" by which it is provided, that the executor or other person having lawful possession of the body of a deceased person,—and not being intrusted with it for interment only,—may permit the body of such person to undergo anatomical examination, unless in his lifetime he shall have expressed, in such manner as in the Act specified, a wish

(*n*) 21 & 22 Vict. c. 90, ss. 18—21.

(*o*) The Acts also empower the Royal College of Surgeons of England to examine and grant certificates of fitness as *dentists*, to persons desirous of being so examined. (21 & 22 Vict. c. 90, s. 48.) They also provide for the publication, by the general council, of a new "British Pharmacopœia." (Sect. 54; and see 25 & 26 Vict. c. 91, ss. 2, 3.)

(*p*) See 23 & 24 Vict. c. 66.

(*q*) Provisions are also contained in 21 & 22 Vict. c. 90, with regard to granting fresh charters to the Royal College of Physicians of Edinburgh, under the name of the "Royal College of Physicians of Scotland," and, also, as to granting charters to "The Royal College of Physicians of Ireland," and to a "Royal College of Surgeons of Scotland." (Sects. 49—52.)

to the contrary: or unless the surviving husband or wife, or other known relation of such person, shall otherwise require(*r*). And further, that the secretary of state for the home department may grant licences to practise anatomy, to any members of the royal college of physicians or surgeons, or to any graduates or licentiates in medicine, or any professor or teacher of anatomy, medicine or surgery or any student attending any school of anatomy,—on application by such parties for the purpose, countersigned by two justices of the peace in such manner as the Act provides: and that it shall be lawful for persons so licensed to receive or possess for anatomical examination, or to examine anatomically, the body of any person deceased, if permitted so to do by a person having lawful authority as aforesaid in that behalf. But no anatomical examination shall be lawful, unless conducted at some place of which such secretary of state shall have had a week's notice as a place where it is intended to practise anatomy: and the secretary of state is to appoint inspectors for all such places, who are to make quarterly returns as to the dead bodies carried in for examination. By this Act also, together with some preceding statutes relating to the criminal law, all former provisions of the legislature authorizing the dissection of the bodies of criminals after their *execution* are repealed.

II. As to the legal Profession.

We shall here speak only of *attornies and solicitors*, the members of the other branch of the profession being (as observed in a former volume) in general left to the supervision of the Inns of Court, by which they are called to the bar (*s*).

(*r*) See *The Queen v. Feist*, 27 L. J., M. C. 164.

(*s*) Vide sup. vol. I. p. 19. As to attornies and solicitors, see also

The statutes relating to the attornies of the courts of law and the solicitors of the courts of equity, formerly very numerous and complicated, are now chiefly contained in the 6 & 7 Vict. c. 73, amended by 23 & 24 Vict. c. 127 (*u*).

By these statutes it is enacted, that no person shall act as an attorney or solicitor, or as such sue out any writ or process, or commence, carry on, solicit or defend any action or other proceeding in the name of any other person or in his own name, in any court of civil or criminal jurisdiction, or in any court of law or equity in England or Wales,—unless he shall have been admitted, enrolled, and be otherwise duly qualified, to act as attorney or solicitor, either previously to, or else in pursuance of, those Acts (*x*).

To entitle a person to such admission and enrolment, it is required, 1st, that he shall have served as clerk for five years, (having been first duly bound by contract in writing,) with some practising attorney or solicitor in England or Wales: or for *three* years if he shall have taken a degree, (after examination and under such circumstances as in the Act mentioned,) at Oxford, Cambridge, Dublin, Durham, or London, or at the Queen's University in Ireland, or in any of the Universities in

post, bk. v. c. III. As to *notaries public*, see 41 Geo. 3, c. 79; 6 & 7 Vict. c. 90; *Queen v. Scriveners' Company*, 3 Q. B. 939.

(*u*) See also 7 & 8 Vict. c. 86; 14 & 15 Vict. c. 88; 19 & 20 Vict. c. 81; and as to the admission to practise in England of *colonial* attornies, see 20 & 21 Vict. c. 39.

(*x*) 6 & 7 Vict. c. 73, s. 2. A person who acts as an attorney or solicitor, contrary to this enactment, is declared by 23 & 24 Vict. c. 127,

s. 26, to be guilty of contempt of court, to be incapable of recovering his fees, and to be liable to a penalty of 50*l.* (And see *Ex parte Buchanan*, 8 Q. B. 833.) But by 7 & 8 Vict. c. 101, s. 68, clerks and officers to boards of guardians, &c., under the Poor Laws, may commence or defend proceedings before magistrates in special or petty sessions, or out of sessions, without being qualified as attornies. (And see 23 & 24 Vict. c. 127, s. 33.)

Scotland (*y*); or if he shall have been a barrister (*z*) or have been a clerk to some practising attorney, solicitor or proctor for the term of ten years (*a*); or have been admitted and enrolled as a writer to the Signet, or as a solicitor in the Supreme Courts of Scotland, or as a procurator before any of the sheriff courts (*b*). And, 2ndly, it is required that, in addition and subsequently to such service, he be examined by, or by the direction of, one or more of the judges at Westminster,—or (in the case of a solicitor) by the Master of the Rolls,—touching his articles and service, as well as his general fitness and capacity to practise.

For the purpose of such examination the judges, or any eight of them, including the three chiefs,—or (in the case of a solicitor) the Master of the Rolls,—may from time to time appoint examiners, and make such rules as to the examination as they may think proper (*c*). And the judges, (or Master of the Rolls, as the case may be,) upon being satisfied by such examination, or by the certificates of such examiners, of the competency of any candidate for admission, shall administer to him an oath

(*y*) 23 & 24 Vict. c. 127, s. 2, repealing 6 & 7 Vict. c. 73, s. 7. There is also power given to the chief justices and Master of the Rolls to order, if they think fit, that *four* years' service shall be sufficient if the clerk shall have successfully passed some examination as specified in the Order, in any of the above universities. (23 & 24 Vict. c. 127, s. 5; *Ex parte Bradford*, 1 E. & E. 417.)

(*z*) 23 & 24 Vict. c. 127, s. 3.

(*a*) Sect. 4. See *In re Sherry*, Law Rep., 3 Q. B. 164.

(*b*) Sect. 15.

(*c*) 6 & 7 Vict. c. 73, ss. 16, 17, 18; 23 & 24 Vict. c. 127, ss. 8, 9. By these provisions, in addition to

the examination *subsequent* to the service, the judges and Master of the Rolls may cause all persons becoming bound—with the exception of such as have been called to the bar, or have taken a degree in one of the above universities, or passed certain university examinations, (including the local and non-gremial examinations at Oxford and Cambridge,)—to be examined in such branches of *general knowledge* as shall be thought proper; and may also cause persons becoming bound, to be examined *pending* the service, touching the progress they have made in their studies. See the Regulations, 26th July, 1861, and 6th June, 1862.

to the effect, "that he will truly and honestly demean himself in practice," and also the oath of allegiance; and after such oaths shall cause him to be admitted as an attorney of the said courts of law at Westminster,—or as solicitor of the High Court of Chancery, as the case may be,—and his name to be enrolled as an attorney or solicitor of such courts; and such admission shall be written on parchment, signed by such judges, (or Master of the Rolls,) and impressed with the proper stamps (*d*).

It is moreover enacted, that there shall be a *Registrar* of attornies and solicitors, whose duty it shall be to keep an alphabetical list or roll of all attornies and solicitors, and to issue certificates to persons who have been duly admitted and enrolled; and the duties of this office are committed to the "Incorporated Law Society," until some person shall be appointed in their room (*e*).

Such a certificate from the Registrar, of due admission and enrolment, must be produced to the proper authorities, by any person desirous of practising as an attorney or solicitor, in order that it may be duly impressed with the proper stamp duty, authorizing him to practise for the ensuing year (*f*). And in order to obtain such Registrar's certificate, a declaration in writing, (signed by the attorney desirous of practising, or by his partner, or in some cases by his London agent,) containing his name and address, the courts of which he is an admitted attorney or solicitor, and the date of his admission, must be delivered to the Registrar (*g*). And if any attorney or solicitor shall practise in any of the

(*d*) 6 & 7 Vict. c. 73, ss. 15, 16.

(*e*) Sect. 21.

(*f*) See 6 & 7 Vict. c. 73, s. 22; 23 & 24 Vict. c. 127, s. 18. The value of the stamp on the yearly certificate is at present regulated by 16 & 17 Vict. c. 63, as follows:—If the attorney or solicitor resides within ten miles from the general

post office in London, and shall have been admitted three years, £9 (or if he shall not have been admitted 3 years, £4: 10s.): if he shall reside elsewhere, and shall have been admitted three years, £6 (or if he shall not have been so long admitted, £3).

(*g*) 6 & 7 Vict. c. 73, s. 23.

courts aforesaid, without having obtained a stamped certificate for the current year, he shall be incapable of maintaining any action or suit to recover his fees or disbursements for business done under such circumstances (*h*).

The statute we are considering also contains the following regulations;—among others of less general interest:—

That no attorney or solicitor shall have more than two clerks, bound by contract in writing as aforesaid, at one and the same time; nor any such clerk after he shall have left off business, or while he himself acts as a clerk: and that if he become bankrupt, or be imprisoned for debt for twenty-one days, the court may order his clerk to be discharged or assigned over to some other person (*i*).

That a person so bound as aforesaid as clerk for five years to an attorney, or solicitor, may serve one of those years as pupil with a practising barrister, or certificated special pleader, or with the London agent of the attorney or solicitor to whom he is bound (*h*).

That clerks whose masters have died or left off business during the term, or whose articles have been cancelled or discharged, may enter into new articles with other masters, which shall be available for the residue of the term (*l*).

That all persons admitted as attorneys of one of the superior courts of law at Westminster may, upon pro-

(*h*) 6 & 7 Vict. c. 73, s. 26. See *Brunswick v. Crowl*, 4 Exch. 492. Although *uncertificated*, an attorney may recover sums due for business not having reference to any suits or proceedings. (See *Greene v. Reece*, 8 C. B. 88.) It may be observed, that an attorney, who neglects to procure or renew his certificate for one whole year, cannot afterwards procure one from the Registrar, or cause his original one

to be renewed, without the order of a court or judge. (As to this, see 6 & 7 Vict. c. 73, s. 25; and 23 & 24 Vict. c. 127, s. 23.) It has been decided that proceedings taken by an uncertificated attorney are nevertheless valid. (*Sparling v. Brereton*, Law Rep., 2 Eq. Ca. 64.)

(*i*) 6 & 7 Vict. c. 73, ss. 4, 5.

(*h*) Sect. 6.

(*l*) Sect. 13. See *Ex parte Wallis*, 2 B. & Smith, 416.

duction of a certificate thereof, be admitted in any other court of law in England or Wales, upon signing the roll of the same: and that persons admitted as solicitors in the High Court of Chancery may, in like manner, obtain their admission in all other Courts of equity; and in the Court of Bankruptcy (*m*).

That no attorney or solicitor, who shall be in prison, may, as such, commence or defend any action, suit, or proceeding in law, equity, or bankruptcy; or maintain an action for fees for any business done during his confinement (*n*). And that no practising attorney or solicitor shall be a justice of the peace for any county within England or Wales: though he is capable of being a justice in a county corporate; or in any city, town, liberty, or place having justices by charter, commission or otherwise (*o*).

That no attorney or solicitor shall commence an action or suit for his fees or charges in respect of any business whatever, until after the expiration of one calendar month after a bill of his costs and charges, signed by such attorney or solicitor, shall have been delivered to the party to be charged (*p*): and such party may, on a proper application, obtain an order referring such bill

(*m*) 6 & 7 Vict. c. 73, s. 27. See as to *Welsh* attorneys, *Ex parte Roberts*, 6 Man. & G. 1049. As to admission to practise in the Lord Mayor's Court, see *Queen v. Lord Mayor, &c. of London*, 13 Q. B. 1. As to admission to practise in the *palatine* courts, see 23 & 24 Vict. c. 127, ss. 13, 14. An attorney has, by the common law, the privilege of not being liable to be sued, as the general rule, except in the court or courts to which he belongs. (See *Gage's case*, Hob. 177; *Gardner v. Jessop*, 2 Wils. 42; *Lewis v. Kerr*, 2 Mee. & W. 226; *Walford v. Fleet-*

wood, 14 Mee. & W. 449.) But this privilege will not exempt him from being sued in a *county* court established under 9 & 10 Vict. c. 95 (12 & 13 Vict. c. 101, s. 18).

(*n*) 6 & 7 Vict. c. 73, s. 31.

(*o*) Sects. 33, 34.

(*p*) Sect. 37. As to the delivery of an attorney's bill, in compliance with this section, see *Cozens v. Graham*, 12 C. B. 398; *Haigh v. Ousey*, 7 Ell. & Bl. 578. As to its delivery when the party to be charged is a joint-stock company, see *Blandy v. De Burgh*, 6 C. B. 623; *Mant v. Smith*, 4 H. & N. 324.

to be taxed, and staying all proceedings to recover the amount thereof in the meantime (*q*). An order may also be obtained directing an attorney or solicitor to deliver his bill (when he has not done so); and also an order for his delivering up, upon payment of what is due, all deeds, papers and documents in his possession or power touching the business in such bill comprised (*r*).

It is provided, however, that the Acts of which we have above spoken shall not extend to the examination, admission, rights, or privileges of any person appointed to be solicitor to the treasury, customs, excise, post-office, stamp duties, or any other branch of the revenue: or appointed solicitor of the city of London; or the assistant of the council for the affairs of the admiralty or navy; or the solicitor to the board of ordnance (*s*).

(*q*) Before this statute, a bill was not liable to be taxed unless the whole or part of it was for business done in *court*. As to taxing bills for *agency* business, see *Smith v.*

Dimes, 4 Exch. 32.

(*r*) 6 & 7 Vict. c. 73, s. 37. See *Brooks v. Bockett*, 9 Q. B. 847.

(*s*) 6 & 7 Vict. c. 73, s. 47; and see 23 & 24 Vict. c. 127, s. 16.

CHAPTER XIV.

OF THE LAWS RELATING TO BANKS.

THE invention of banking appears to be due to the Republic of Venice. So early as the year 1171, Jews were accustomed to keep benches in the market-place of that state for the exchange of money and bills; and *banco* being the Italian for *bench*, banks may have taken their denomination from this circumstance.

In our own country, the business of banking was originally carried on chiefly by the goldsmiths; and accordingly we find it recited in an Act of the 22 & 23 Car. II. “that several persons, being goldsmiths and others, “ by taking up or borrowing great sums of money, and “ lending out the same for extraordinary hire or profit, “ have gained and acquired to themselves the reputation “ and name of bankers” (*a*).

Afterwards, in the reign of William and Mary, the project was conceived, (in imitation, as it would seem, of the banks of Amsterdam and Genoa, already founded,) of establishing in England a national institution of the same description (*b*); and in 1694, parliament was accordingly prevailed upon, though with difficulty (owing to apprehensions then entertained of the policy of the measure), to pass an Act sanctioning the creation of that great corporate body, which has since become so cele-

(*a*) See Jacob's Dict. in tit. Bankers.

(*b*) Its principal projector was Mr. William Paterson, a Scotch gentleman.

brated, under the denomination of “The Governor and Company of the Bank of England.”

Our present laws relative to banking apply either to the Bank of England or to private banks,—or to certain establishments of recent origin, commonly denominated joint-stock banks. In proceeding to give some account of the legal history of the first, we shall be led by necessary connexion to notice that of the two latter also.

The Act already referred to as the origin of the Bank of England, was the 5 W. & M. c. 20. It empowered their Majesties to receive voluntary subscriptions from any persons (native or foreign), or from any bodies corporate, to the amount of 1,200,000*l.*, to be paid into the Exchequer towards the prosecution of the war with France (*c*); and, by letters patent under the Great Seal (which were in fact afterwards granted under date 27th July, 1694), to incorporate all such subscribers into a company, to be called “The Governor and Company of the Bank of England;” and such subscribers were to be paid, by way of interest, out of the duties to be levied under that Act, 100,000*l.* per annum (*d*). It was provided, however, that the Crown should not borrow more than 1,200,000*l.*, so as to owe more than that sum at a time, unless upon such funds as should be agreed in parliament (*e*); and—in order that their Majesties’ subjects might not be oppressed by the said corporation, by their monopolizing or “engrossing any sort of goods, wares or merchandize,”—such corporation was prohibited from buying and selling goods (*f*). But the Act declared the Bank entitled, nevertheless, to deal in bills of exchange; or to buy and sell bullion, gold, or silver; or to sell any goods whatsoever, which should be left with it in pledge, and not redeemed at the time agreed upon,

(*c*) 5 W. & M. c. 20, ss. 19, 41.

(*d*) Sects. 19, 20.

(*e*) Sect. 26.

(*f*) Sect. 27.

or within three months after; or to sell goods, the produce of lands which it should have purchased (*g*): and from the time of the passing of the Act, or soon afterwards, we find that the Bank began the practice, which it has ever since maintained, of issuing its own notes (*h*).

By subsequent Acts, its capital was progressively enlarged, and an exclusive privilege or monopoly established in its favour (*i*); for by one of these, 8 & 9 Will. III. c. 20, (explained by 15 Geo. II. c. 13, s. 5,) it was enacted, that no other bank, or company in the nature of a bank, should be established by act of parliament within this kingdom (*k*); and by others, (viz. 6 Ann. c. 22 and 39 & 40 Geo. III. c. 28,) that it should not be lawful in England for any other corporation, or for more than six persons united in partnership, to borrow, owe, or take up any money on their bills or notes, payable on demand, or at less time than six months from the borrowing thereof (*l*). And though these exclusive privileges, (popularly called the Bank Charter,) have been since in part relinquished, they are also in part still extant, as we shall have occasion more particularly to explain in the course of the chapter.

Subject, however, to the Bank Charter, as from time to time modified, the trade of banking has, from its first introduction, been always free; and other banks, besides the Bank of England, have consequently been long established among us, and that both in London and the country; though, as between the country and the London banks, the following distinction has practically obtained, that some of the former have carried on business, like the Bank of England, as *banks of issue*; that is, have made payments by their own notes: while, on the other

(*g*) 5 W. & M. c. 20, s. 28.

(*h*) See the Bank of England v. Anderson, 3 Bing. N. C. 653, 654.

(*i*) As to the Bank's exclusive

privilege, see also Booth v. Bank of England, 6 Bing. N. C. 415.

(*k*) 8 & 9 Will. 3, c. 20, s. 28.

(*l*) 9 Ann. c. 22, s. 9.

hand, the latter have been *banks of mere deposit*; that is, have made payments in cash and Bank of England notes only, and not in notes of their own.

The character of the Bank of England, and of its transactions, has always maintained, nevertheless, an importance far greater than that of any of these establishments: for while it has carried on the business ordinarily incident to banking,—such as receiving deposits of money, issuing its own paper, and discounting mercantile bills, it has been also employed as a great engine of state, in receiving and paying the interest due to the public creditors,—for which it has received an allowance from the public (*m*); in circulating exchequer bills; in accommodating the government with immediate advances, on the credit of distant funds; and in assisting, generally, in all the great operations of finance. Its advances to the government, however, are subject to the restrictions imposed by 59 Geo. III. c. 76: which enacts, in conformity with an early regulation (*n*), that it shall not be lawful for the Bank to advance or lend to the Crown any money upon the credit of any government security, or in any other manner whatever, without the express and distinct authority of parliament for that purpose first obtained—but without prejudice to its right of *purchasing* exchequer bills or government securities, or of advancing upon the credit of exchequer bills lawfully issued (*o*) such money as may be required to make good a deficiency in the Consolidated Fund at the close of any quarter of a year (*p*).

In the year 1797, owing to a temporary failure in

(*m*) As to the bank allowance for managing the public debt, see 24 & 25 Vict. c. 3, s. 2; 25 Vict. c. 3, s. 3. By 24 & 25 Vict. c. 3, previous provisions on this subject contained in 48 Geo. 3, c. 4, and 56 Geo. 3, c. 97, and some of those contained in 7 & 8 Vict. c. 32, are

repealed. As to the public debt, vide sup. vol. II. p. 610.

(*n*) 5 W. & M. c. 20, s. 30.

(*o*) See 57 Geo. 3, c. 48; 59 Geo. 3, c. 19.

(*p*) As to the consolidated fund, vide sup. vol. II. p. 615.

public credit, and a consequent run upon the Bank, it was deemed necessary to restrain it for a limited period from making payments in cash; and an Act of parliament, 37 Geo. III. c. 45, was passed in that year for the purpose, the provisions of which were continued, by subsequent Acts, until the 1st of May, 1823, when the restriction ceased (*g*).

In the year 1826, the Bank consented to an arrangement (*r*), by which it was authorized, (so far as its already existing powers might be deemed inadequate to the purpose,) to extend the circulation of its paper, by establishing, in the country, district banks of its own; which should be managed by its agents on the spot, and called *branches* of the Bank of England. While on the other hand the Bank, at the same period, relinquished in part its exclusive privileges: so as to admit, (within certain limits, and subject to certain conditions,) the introduction of other banking corporations,—and also of banking companies not incorporated, the members whereof might exceed six in number,—with power to issue bills or notes, though payable on demand, or at less time than six months from the borrowing: which banking companies were commonly denominated *joint-stock banks* (*s*).

Both these objects were carried into effect by the 7 Geo. IV. c. 46. As to the first of them, viz. the establishment of Branches of the Bank of England, it was provided, that it should be lawful for the said governor and company to authorize any agents to carry on banking in their behalf, at any place in England; and to give them the necessary powers of management and superintendence; and to issue to such agents, or their officers or servants, cash, bills, notes, and other secu-

(*g*) See 37 Geo. 3, c. 91; 38 Geo. 3, c. 1; 42 Geo. 3, c. 40; 43 Geo. 3, c. 18; 44 Geo. 3, c. 1; 54 Geo. 3, c. 99; 55 Geo. 3, c. 28; 56 Geo. 3, c. 40; 58 Geo. 3, c. 37; 59 Geo. 3,

c. 49.

(*r*) See 7 Geo. 4, c. 46, ss. 1, 15.

(*s*) So called, also, in the title of 1 & 2 Vict. c. 96, and 7 & 8 Vict. c. 113, &c.

rities: subject, however, to a proviso, that this power should be exercised in such manner, as might from time to time be appointed by bye-laws made at a general court: and, in default of such bye-laws, by the governor, deputy governor and directors of the Bank, or the major part of them (*t*). In addition to which, it was enacted by the same statute, and by 3 & 4 Will. IV. c. 98, that all promissory notes on demand of the Bank of England which should be issued at any place in England out of London, where banking should be carried on on its behalf,—should be made payable in coin at the place where such notes should be issued; and that, though such bank should not be liable to pay at any of its branches any of its notes not made specially payable at such branch bank, it should, on the other hand, be bound to pay in London all notes whether those of the Bank of England itself, or of any of its branches (*u*).

As to the second object, viz. the introduction of Joint Stock Banks, the 7 Geo. IV. c. 46, provided, that after the passing of that Act it should be lawful for any corporation erected for the purpose of banking,—or for any number of persons in co-partnership, though consisting of more than six,—to carry on in England the trade of bankers: and to issue their bills or notes at any places in England exceeding sixty-five miles from London, payable on demand, or otherwise, at some place or places specified upon such bills or notes, exceeding sixty-five miles from London, and not elsewhere. It also required the names and places of abode of all the members of every such bank to be registered at the Stamp Office in London; and made each of its members liable, in his individual capacity, to an execution for any of its debts; and provided that such banks might sue and be sued in the name of a “public officer” appointed by each bank for that purpose. But joint-stock banks were after-

(*t*) 7 Geo. 4, c. 46, s. 15.

(*u*) 3 & 4 Will. 4, c. 98, ss. 4, 6.

wards placed under other regulations by successive Acts of parliament now repealed (*v*); and are at present regulated by the still later Act of 25 & 26 Vict. c. 89, to which we have elsewhere referred, and to which we shall again refer at the close of this chapter.

The Bank Charter had been originally limited to determine upon twelve months' notice after 1st August, 1705; but the period was from time to time extended by successive Acts of parliament (*w*). By one of these, already alluded to,—the statute 3 & 4 Will. IV. c. 98,—the former privileges were confirmed, subject to the modifications they had received; but it was declared that any corporation or partnership, (though consisting of more than six,) might carry on banking in London, or within sixty-five miles thereof, provided that it did not borrow, owe, or take up in England any money on its bills or notes payable on demand, or at less than six months from the borrowing. And the Act reserved a power to any corporation or partnership carrying on business beyond the radius of sixty-five miles,—and not having any house of business or establishment as bankers in London or within the radius,—to make and issue their bills and notes, payable on demand or otherwise, at the place where issued (being beyond that radius), and also in London; and to have an agent or agents in London, or at any other place at which such bills or notes should be made payable, for the purpose of payment only (*x*). But it was provided that no such bill or note should be for any sum less than 5*l.*, or be re-issued in London or within sixty-five miles thereof (*y*).

(*v*) See 25 & 26 Vict. c. 89, s. 205, and third schedule to that Act.

(*w*) See the following statutes:—
3 Geo. 1, c. 8; 15 Geo. 2, c. 13; 24 Geo. 2, c. 4; 4 Geo. 3, c. 25; 21 Geo. 3, c. 60; 39 & 40 Geo. 3, c.

28; 55 Geo. 3, c. 16; 56 Geo. 3, c. 96; 7 Geo. 4, c. 46; 3 & 4 Will. 4, c. 98; 7 & 8 Vict. c. 32.

(*x*) 3 & 4 Will. 4, c. 98, s. 2. See also 3 & 4 Will. 4, c. 83.

(*y*) 3 & 4 Will. 4, c. 98, s. 1.

This last Act also made the following regulation: that after the 1st August, 1834,—unless and until the legislature should otherwise direct,—tender of a note of the Bank of England, (expressed to be payable to bearer on demand,) should be a legal tender to the amount therein expressed, for all sums above 5*l.*, so long as such bank continued to pay, on demand, their notes in legal coin; but this is made subject to a proviso, that such note shall not be a legal tender by the Bank itself or by any of its branches (*z*).

Such, succinctly stated, may be said to have been the course of the legislature in reference to banking in this country down to a recent period; but in the year 1844 was passed the Act of 7 & 8 Vict. c. 32, by which great and extensive changes in the law on this subject were introduced (*a*). For that statute laid down a new system of regulation, which affects not only the Bank of England, but all bankers whomsoever: its main object being to place the general circulation of the country upon a sounder footing; to subject to reasonable restraint the issue of paper money; and to prevent as much as possible those fluctuations in the currency to which many of our commercial embarrassments have been ascribed (*b*).

First, then, as to the *Bank of England*. By this Act the Bank charter was continued; but it was again subjected to certain modifications; and made determinable by giving twelve months' notice (*c*), and on repayment by parliament of certain debts therein particularized. It

(*z*) 3 & 4 Will. 4, c. 98, s. 6. As to the meaning of a *legal tender*, vide sup. vol. II. p. 556.

(*a*) See also 19 & 20 Vict. c. 20, and 17 & 18 Vict. c. 83, s. 11.

(*b*) As to the policy of this Act of 1844, see an able article in the *Edinburgh Review*, in the year 1858,

(No. 217).

(*c*) It was provided by the Act that this notice might be given by vote or resolution of the House of Commons at any time after 1st August, 1855. (7 & 8 Vict. c. 32, s. 27.)

also provided, that the issue of Bank of England notes payable on demand, should thereafter be kept distinct from the general banking business—that the Bank should, on the 31st August, 1844, transfer to its “issue department” securities to the value of 14,000,000*l.* (including the debt due to it by the public), and also so much of the gold coin, and gold and silver bullion (*d*), then held by it, as should not be required by its banking department:—that, thereupon, there should be delivered out of the issue department into the banking department, such an amount of Bank of England notes as, together with those in circulation, should be equal to the aggregate amount of the securities, coin, and bullion so transferred to the issue department:—that the whole amount of its notes in circulation, (including those delivered to the banking department,) should be deemed to be issued on the credit of such securities, coin, and bullion:—that the amount of such securities should not be increased, but might be diminished and again increased, so as not to exceed on the whole the sum of 14,000,000*l.* (*e*):—and that after such transfer as just mentioned to its issue department, it should not be lawful for the Governor and Company to issue Bank of England notes,

(*d*) The silver bullion is not to exceed one-fourth of the gold coin and bullion (7 & 8 Vict. c. 32, s. 3).

(*e*) See post, pp. 339, 340, *u.* (*g*). In the year 1857, a great commercial emergency having arisen, so that the Bank was unable to meet its demands for discounts and advances on approved securities, without exceeding the limits prescribed by law, the governor and company of the Bank were informed by Government, that it was prepared to propose to parliament a bill to indemnify them from any such excess. Bank of England notes were accordingly issued in exchange for securities, he-

yond the amount limited by law; and parliament afterwards passed an Act indemnifying the Bank in that respect, and for a short suspension of so much of the Act of 1844 as limits the amount of such securities (see 21 & 22 Vict. c. 1). A similar crisis occurred previously in 1847, and, subsequently, in the year 1866,—on each of which occasions Government took the same course, though no actual infringement of the law took place on either, as the commercial panic subsided before the Bank had made advances in excess of their legal limits.

either into its banking department, or to any person whatever, save in exchange for other Bank of England notes, or gold coin, or gold or silver bullion, or securities acquired in the issue department under the provisions of the Act. The Act further provided, that an account of the notes issued by the issue department, and of the securities, gold coin and gold and silver bullion therein—and also of the capital stock and deposits, money and securities in the banking department—should be transmitted weekly to the commissioners of stamps and taxes, (now called the Board of Inland Revenue,) in such form as the Act prescribed, and published by them in the London Gazette. And by the same statute it was also provided, that all persons should be entitled to demand from the issue department of the Bank of England notes in exchange for gold bullion, at the rate of *3l. 17s. 9d.* per ounce of standard gold (*f*).

As to *banks of issue* (other than the Bank of England): the Act of 1844 provided, that in future it should not be lawful for any banker to draw, accept, make, or issue any bill or note, or engagement for the payment of money, payable to bearer on demand—or to borrow, owe, or take up any money, on his bills or notes payable to bearer on demand. But this prohibition was coupled with a proviso that it should be lawful for any banker, who on the 6th May in that year was carrying on the business of a banker, and was then lawfully issuing his own notes, to continue to issue them; though if he should become bankrupt, or cease to carry on the business, or discontinue the issue of notes, either by agreement with the Bank of England, or otherwise, his privilege in this respect was to be at an end, and incapable of revival. It also provided, that a banker issuing his

(*f*) 7 & 8 Vict. c. 32, s. 4. Vide sup. vol. II. p. 558. By 7 & 8 Vict. c. 32, s. 7, the Bank of England is discharged from liability to *stamp*

duty on their notes payable on demand. See, as to stamps on bankers' notes in general, 55 Geo. 3, c. 184; 9 Geo. 4, c. 23; 17 & 18 Vict. c. 83.

own notes in virtue of the above proviso should not thereafter have in circulation a greater amount of notes than the average amount which he had circulated before the Act; such average to be ascertained in such manner as the Act specifies. And further, that if any such banker as last aforesaid should cease to issue his own notes, it should be lawful for her Majesty in council, upon application of the Bank of England, to authorize the Bank of England to increase the 14,000,000*l.* of securities in the issue department, in the proportion of two-thirds of the amount so withdrawn from circulation (*g*).

As to *banks in general*, (other than the Bank of England,) it was provided by the same Act of 1844 (*h*), that every banker should, on the 1st of January in every year, or within fifteen days after, make a return to the Board of Inland Revenue, of the name, residence, and occupation of every member of the partnership; of the name of the firm; and of the place where the business is carried on: and that such Board should, on or before the 1st of March in every year, publish the same in some newspaper circulating either in the town or county.

It was also declared, that, for the future, it should be lawful for all banking co-partnerships, (though exceeding six in number,) carrying on the business of banking in London, or within sixty-five miles thereof,—to draw, accept, or indorse bills of exchange (provided they were not payable to bearer on demand), anything in the Act of 3 & 4 Will. IV. c. 98, to the contrary notwithstanding (*i*).

(*g*) 7 & 8 Vict. c. 32, s. 5. Under this provision and an order in council issued thereunder, the sum of 14,000,000*l.* had, in December, 1857, become increased to 14,475,000*l.* (See the preamble to 21 & 22 Vict.

c. 1.)

(*h*) 7 & 8 Vict. c. 32, s. 21.

(*i*) As to the recovery of penalties under the provisions of 7 & 8 Vict. c. 32, see 8 & 9 Vict. c. 76, s. 5.

By 20 & 21 Vict. c. 49, s. 12, it was provided, that it should be lawful for any number of persons, not exceeding *ten*, to carry on in partnership the business of banking in the same manner and upon the same conditions in all respects as any company of not more than *six* persons could before the passing of that Act have done (*j*).

Another Act which affects banks is the 25 & 26 Vict. c. 89, to our general account of which (as amended by 30 & 31 Vict. c. 131) we beg leave to refer the reader (*k*). These statutes relate, as we have seen, both to banks and other companies, and so far as their regulations are not pointed exclusively at the former, a reference to that part of the work will be sufficient. But the Act first named has regulations which concern banks exclusively, and of these it is proper to take notice in this place.

First it is enacted, that no company or association consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless registered as a company under that Act, or formed in pursuance of some other Act or of letters-patent (*l*).

Secondly, that no banking company claiming to *issue notes* in the united kingdom, shall be entitled to *limited liability* in respect of such issue, but shall continue subject to unlimited liability in respect thereof; and if necessary the assets shall be marshalled for the benefit of the general creditors, and the members shall be liable for the whole amount of the issue in addition to the sum for which they would be liable as members of a limited company (*m*).

Thirdly, that every banking company *existing at the date of the passing of the Act*, which registers itself as a *limited company*, shall, at least thirty days previous to

(*j*) The greater part of the Act of 20 & 21 Vict. c. 49, has been repealed, but not the part above extracted. See 25 & 26 Vict. c. 89, s. 205, and second part of Third

Schedule.

(*k*) Vide sup. p. 143.

(*l*) 25 & 26 Vict. c. 89, s. 4.

(*m*) Sect. 182.

obtaining a certificate of registration with limited liability, give notice that it is intended so to register the same, to every person and partnership firm who have a banking account with the company—such notice to be given in such manner as the Act directs.

We have also, to mention the 27 & 28 Vict. c. 33, an Act passed in order to enable certain banking co-partnerships discontinuing the issue of their own notes, to sue and be sued in the name of their public officer. And, finally, the 30 & 31 Vict. c. 29, to which we have made some reference in a former volume and which contains certain regulations with regard to the sale and purchase of the shares in joint-stock banking companies (*n*).

(*n*) Vide sup. vol. II. p. 76.

CHAPTER XV.

OF THE LAWS RELATING TO THE REGISTRATION OF
BIRTHS, DEATHS, AND MARRIAGES.

THE registration of births, deaths, and marriages,—a practice so important in every country, for the authentication of the civil rights of individuals, and the promotion of many objects connected with the science of political economy,—has been but recently introduced among us: though another species of registration, having reference to baptisms, burials, and marriages, had been long in use; and is, in regard to the two former ceremonies, still in force. It is to this more antient method, which, (as connected with the offices of the Church, and originally directed by the canon law,) may be termed the *ecclesiastical*, that we shall first advert; and our attention will next be directed to the new method of registering births, deaths, and marriages, which may be termed, by way of distinction from the former, the *civil*.

I. As to the ecclesiastical mode of registration.

This system is said to be coeval with the Protestant Church; having been first established by Cromwell, Lord Vicegerent, in the thirtieth year of Henry the eighth, 1538 (*a*). Various enactments for its confirmation were passed in succeeding reigns; and by a canon (*b*) in the time of James the first, still in force, and by several statutes, particularly 52 Geo. III. c. 146, further provisions were made for its regulation.

(*a*) Godolph. Abridg. 144.(*b*) Canon 70, 1 Jac. 1, 1667.

This statute, so far as it relates to the registry of *marriages*, was repealed on the introduction of the civil method hereafter to be described; but it still remains in force as regards *baptisms* and *burials* (*c*), and provides, that registers of public and private baptisms and burials, solemnized according to the rites of the established Church, in any parish or chapelry in England, shall be made by the rector, vicar, curate or other officiating minister of the parish, in books of parchment or durable paper; wherein such particulars shall be inscribed,—within seven days at the latest after the ceremony (*d*),—and in such form and manner as in the schedule to the Act annexed are set forth (*e*).

In cases where the baptism or burial is performed in any place other than the parish church or churchyard, by a clergyman not being the rector, vicar or curate of the parish, he must transmit on that or the following day a certificate that he has performed such ceremony, to the minister of the parish, who shall duly enter it among the parish registers (*f*).

The books wherein such entries are made are to be carefully preserved by the officiating minister in a dry well-painted iron chest; and are not to be removed therefrom except for the purpose of making such entries, or other such specific purposes as mentioned in the Act (*g*).

An annual copy of the contents of these register books, certified by the minister, is to be transmitted by the churchwardens, by post, to the Registrar of the diocese (*h*); who is bound to make report to the bishop

(*c*) 6 & 7 Will. 4, c. 86, s. 1. See 16 & 17 Vict. c. 134, s. 8, in reference to the registration of such burials as are had in ground provided under the *Burial Acts*, (cited sup. p. 287, n.)

(*d*) 52 Geo. 3, c. 146, s. 3.

(*e*) Sect. 1.

(*f*) Sect. 4. It is enacted, by 20 & 21 Vict. c. 81, s. 16, that this provision shall not apply where the ceremony of burial is performed in ground provided under the *Burial Acts*.

(*g*) 52 Geo. 3, c. 146, s. 5.

(*h*) The registrar of every vicar-

whether he has duly received such copy or not (*i*). And alphabetical lists of the entries are directed to be made out by such registrar; which are to be open to public search at reasonable times upon payment of certain fees (*k*).

It has also been enacted, that any person who knowingly inserts any false entry into these registers or the certified copies, or who forges any part thereof, or wilfully destroys or injures the same, or knowingly certifies any fraudulent or defective copy, shall be guilty of felony; and he is liable to penal servitude for life or not less than five years, or to imprisonment, with or without hard labour and solitary confinement, to the extent of two years (*l*).

The statute of George the third extends only to such burials as are performed according to the rites of the established Church, but by 16 & 17 Vict. c. 134, there are also provisions for the registration of such interments as take place in grounds provided by the Burial Acts (*m*); and now by 27 & 28 Vict. c. 97, for such as take place in any burial-ground in England whatever, the duty being (where not otherwise provided for) thrown on the company, body, or persons to whom such burial-ground belongs, and the register-books being directed to be sent from time to time to the registrar of the diocese.

II. Of the civil system of registration.

The above is a succinct account of the ecclesiastical and more antient method of registration; but the entries thereby obtained were found in fact to be often both in-

general or diocese has also, by 7 & 8 Vict. c. 68, s. 2, to transmit a yearly report of his fees, &c. to a principal secretary of state.

(*i*) See 52 Geo. 3, c. 146, s. 14; 24 & 25 Vict. c. 98, ss. 36, 37; 27 & 28 Vict. c. 47.

(*k*) 52 Geo. 3, c. 146, s. 12. See *Steele v. Williams*, 8 Exch. 625.

(*l*) 24 & 25 Vict. c. 98, ss. 36, 14.

(*m*) These Acts are cited sup. p. 287, n.

complete and inaccurate, and otherwise inadequate to the purposes designed,—being, (among other objections,) commemorative not of births and deaths generally, but only of such as are attended with the proper ceremonies of the church. Accordingly, on the 28th of March, 1833, a committee of the House of Commons was appointed to consider and report upon “the general state of parochial registers, and the laws relating to them, and on a general registration of births, baptisms, deaths, and marriages in England and Wales;” and the report of this body led to the introduction, (wholly independent of and co-existent with the method for registering baptisms and burials above mentioned,) of the system for registering *births, marriages, and deaths*, which we are about to describe.

The statutes which contain the law upon this subject are the 6 & 7 Will. IV. cc. 85, 86, the 7 Will. IV. & 1 Vict. c. 22, and the 21 & 22 Vict. c. 25 (*n*).

By these Acts the guardians of every poor law union throughout England and Wales,—or the Poor Law Board, in the case of places not possessing a board of guardians (*o*),—are directed to divide the union or parish of which they have the care into as many districts as they shall think proper (subject, in case of a division by guardians, to the approval of the Registrar-general hereinafter mentioned),—and each of such districts is to be called by a distinct name, and shall possess a *Registrar*, who shall be resident therein (*p*).

The Registrars of each union are subjected to the supervision of their “Superintendent Registrar,”—an office to be filled as of right, (in case of his due quali-

(*n*) As to 6 & 7 Will. 4, c. 85, intituled “An Act for Marriages in England,” vide sup. vol. II. p. 267.

(*o*) 6 & 7 Will. 4, c. 86, s. 10. As to *extra-parochial* places, see 20

Vict. c. 19.

(*p*) 6 & 7 Will. 4, c. 86, ss. 7, 10, 11, 16. As to the position of this officer, see 29 & 30 Vict. c. 113, s. 1.

fication and acceptance,) by the clerk to the guardians of the union, during the pleasure of the Registrar-general (*q*).

These superintending registrars are in their turn subjected to the authority of an officer, to be appointed under the Great Seal,—and to hold office during the pleasure of the crown,—called “the Registrar-general of births, deaths, and marriages in England” (*r*); to whom, subject to such regulations as shall be made by a principal secretary of state (*s*), the general management of the whole system, and of the practical details of carrying it out (where no specific directions are given by the Acts), are entrusted.

Provision is also made by the Acts, for the establishment of a proper office, to be called the “General Register Office” (*t*); and of register offices for each union (to be placed under the respective Superintendents), for the preservation and safe custody of the registers when collected (*u*). And the Acts also contain regulations as to the uniform construction and durable materials of the *books* wherein the entries are to be made (*x*).

Such is an outline of the machinery of the system—the practical working out of which depends, it will be seen, in the first instance, upon the *Registrars*.

Their duties are threefold.

1. As to *births*. Every Registrar is authorized and required to inform himself carefully of every birth which shall happen in his district; and to learn and register, as soon after the event as may conveniently be done, such particulars as are required, by the schedule annexed to the 6 & 7 Will. IV. c. 86, to be registered

(*q*) 6 & 7 Will. 4, c. 86, ss. 7, 10, 11, 16. As to the position of the “Superintendent Registrar,” see 29 & 30 Vict. c. 113, s. 1.

(*r*) 6 & 7 Will. 4, c. 86, s. 2.

(*s*) Sect. 5.

(*t*) By 15 & 16 Vict. c. 25, this

office may be established in any place or places that may appear to the commissioners of the treasury to be fit and convenient.

(*u*) 6 & 7 Will. 4, c. 86, s. 9.

(*x*) Sect. 17.

touching such birth (*y*). And the father or mother of any child born,—or the occupier of any house in England wherein any child shall be born,—*may*, within forty-two days after the day of such birth,—give notice thereof to the Registrar of the district (*z*). And within the same period, the father or mother of any child born in England—or, in case of their death or other inability, the occupier of the house—*shall*,—upon being requested so to do,—give information, to the best of his or her knowledge and belief, of the several particulars required to be known and registered touching the birth of such child (*a*).

After the expiration of the above-mentioned period of forty-two days, registration may still take place; but in this case a solemn declaration as to the truth of the particulars required must be made by the father or guardian, or some person present at the birth (*b*); and the entry of the birth must, in that case, be signed not only by the Registrar but by the Superintendent Registrar; and a fee is payable to each of these officers by the person requiring the registry to be made (*c*). But after the expiration of six calendar months from the time of the birth, no registry thereof can upon any pretence be made,—except only in the case of a child born at sea (*d*).

2ndly. As to *marriages*.—The forms as to the registration of marriages were incidentally described in a former part of the work, so far as to supersede the necessity of now recurring to them (*e*); and it therefore only remains to advert to the duties of the Registrar—

3rdly. As to *deaths*.—Every Registrar is authorized and required to inform himself carefully of every death

(*y*) 6 & 7 Will. 4, c. 86, s. 18.

(*z*) Sect. 19.

(*a*) Sect. 20. Upon pain of being liable to an indictment for a misdemeanor. (See *R. v. Price*, 11 Ad. & El. 727.)

(*b*) Sect. 22.

(*c*) 6 & 7 Will. 4, c. 86, s. 22.

(*d*) Sect. 23.

(*e*) Vide sup. vol. II. pp. 271, 278.

which shall happen in his district; and to learn and register, as soon after the event as conveniently may be done, such particulars concerning the same as are specified in the schedule annexed to 6 & 7 Will. IV. c. 86 (*f*). And the occupier of every house in England, in which any death shall happen, *may*, within five days after the day of such death, give notice thereof to the Registrar of the district (*g*). And some person present at the death, or in attendance during the last illness, of any person dying in England,—or in default of all such persons, the occupier of the house in which such death has happened, (or if the occupier be the person dying, then some inmate thereof,) *shall*—within eight days after the day of the death—give information, (upon being requested so to do,) to the Registrar, according to the best of his or her knowledge and belief, touching such particulars as are required to be known and registered touching the death. And in the case of an inquest upon the body, such information is to be conveyed to the Registrar by the coroner before whom such inquest is held (*h*).

And it is further provided, that four times in every year, each district Registrar shall deliver to his Superintendent a certified copy of all the entries made by him (*i*),—and finally the register itself, upon the book being filled. And that the Superintendent, at the same intervals, shall transmit the same to the Registrar-general (*k*).

The duties of this last-mentioned officer, into whose hands the documents thus ultimately fall, consist,—in addition to the general supervision of the working of the whole system,—in examining, arranging and indexing the certified copies so sent. And, also, in compiling abstracts of their contents, to be transmitted once a year

(*f*) 6 & 7 Will. 4, c. 86, s. 18.

(*g*) Sect. 19.

(*h*) Sect. 25. As to this, see 21

& 22 Vict. c. 25, s. 5.

(*i*) 6 & 7 Will. 4, c. 86, s. 32.

(*k*) Sect. 34.

to a principal secretary of state ; by whom such abstracts are afterwards to be laid before parliament (*l*).

The abstracts which have been in fact delivered by the Registrar-general, in pursuance of the duty last mentioned, are the more valuable from its having been required, (as a matter of official regulation,) that, in the registers of deaths, a medical statement in each instance of the *cause* of death should be annexed,—in addition to the particulars required by the statute. This part of the information obtained under the new system seems calculated to advance, in a very important degree, the interests of mankind ; by furnishing accurate data, upon a large scale, to those who are engaged in nosological inquiries, or in endeavours to improve the sanatory condition of the labouring classes.

Before we conclude this chapter, we may remark, that, at the time of the introduction of the new system of civil registration, certain commissioners were appointed for inquiring into the state and authenticity of any registers (other than parochial) which at that time existed. This commission succeeded, in the course of a few years, in discovering about 7,000 which were deemed authentic ; and the documents so discovered were, by 3 & 4 Vict. c. 92, placed under the care of the Registrar-general,—together with records of the marriages and baptisms heretofore performed in the Fleet and King's Bench prisons, and at other irregular places. And the same statute provides, that all registers and records deposited in the General Register Office by virtue of that Act, except such registers as therein particularized of marriages and baptisms at the Fleet and elsewhere,—shall be deemed to be in legal custody ; and shall be receivable in evidence in all courts of justice, subject to the provisions of that Act (*m*).

(*l*) 6 & 7 Will. 4, c. 86, s. 6.

(*m*) 3 & 4 Vict. c. 92, s. 6. And see 21 & 22 Vict. c. 25, s. 3.

BOOK V.
OF CIVIL INJURIES.

CHAPTER I.

OF THE REDRESS OF INJURIES BY THE MERE ACT
OF THE PARTIES.

AT the opening of these Commentaries, the objects of municipal law were considered as consisting in the establishment and maintenance of the *rights* severally due to the different members of the community; rights having been previously defined as the liberties and advantages guaranteed, by the implied contract of society, to each individual, in return for his submission to those laws by which the same rights are secured to his fellow citizens (*a*). And this occasioned the distribution of our laws into two portions; one relating to *rights*; and the other to violation of rights, or (in more ordinary language) *wrongs*.

In the consideration of the first of these subjects, *rights* were distinguished into four kinds, viz. 1, Personal rights; 2, Rights of property; 3, Rights in private relations; 4, Public rights;—and these have respectively formed the subject of the four preceding Books of

(*a*) Vide sup. vol. i. pp. 29, 141.

our Commentaries. We are now, therefore, to proceed to the examination of *wrongs*, an inquiry evidently posterior in its nature to the former, as right is the positive idea of which wrong is the mere privation; and the two subjects stand in the same connection with each other as *jus* with *injuria*, or *fas* with *nefas* (*b*).

Wrongs—as we had also occasion before to remark (*c*)—are divisible into two sorts; *civil injuries* and *crimes*. The former are the violations of private or public rights, when considered in reference to the injury sustained by the individual, and consequently as subjects for *civil redress* or *compensation*: the latter are the violations of private or public rights, when considered in reference to their evil tendency as regards the community at large, and accordingly visited with *punishment* (*d*). To investigate the first of these species of wrongs, with their legal remedies, or modes of redress, will be our employment in the present Book; and the other species will be reserved till the next or concluding volume.

[The more effectually to accomplish the redress of civil 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 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

(*b*) 3 Bl. Com. 2.

(*c*) Vide sup. vol. i. pp. 142, 144.

(*d*) According to Blackstone, (vol. iii. p. 2,) “the former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals. The latter are a breach and violation of public rights and duties which affect the whole com-

munity, considered as a community.” But there is an inaccuracy in this form of definition. It makes the difference depend on the nature of the right violated. But it is clear that a violation of the *same* right will sometimes amount to a civil injury and sometimes to a crime,—as in the case of a battery.

of private wrongs, by *suit* or *action* in courts. But as there are certain injuries of such a nature that some of them permit, and others require, a more speedy remedy, than can be had in the ordinary forms of justice, there is allowed in those cases an extra-judicial or eccentric kind of remedy. Of these we shall first of all treat, before we 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.

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; and, secondly, that which arises from the joint act of all the parties together: both of which we shall consider in their order.

Of the first sort, or that which arises from the sole act of the injured party, is,

I. The *defence* of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of peace which happens, is chargeable upon him only who began the affray (*e*). For the law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or those to

(*e*) 2 Roll. Abr. 546; 1 Hawk. P. C. 131. But see Bac. Abr. Master and Servant (P), where it is ob-

served that, on the master's right to defend the servant, there has been a difference of opinion.

[whom he bears a near connection,) it makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers, that the future process of law is by no means an adequate remedy for injuries accompanied with force; 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-defence, 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 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 defence and prevention; for then the defender would himself become an aggressor (*f*).

II. *Recaption* or *reprisal* is another species of remedy by the mere act of the party injured. This may be resorted to when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains his 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 (*g*). 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, concealed or carried out of his reach—if he had no speedier

(*f*) 1 Hale, P. C. 485, 486. Vide post, vol. IV. pp. 140, 144.

(*g*) If an action be brought for an assault committed in such recap-

tion, it may be successfully answered by showing that no *unnecessary* violence was used. (*Blades v. Higgs*, 10 C. B., N. S. 713.)

[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 favours 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 shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen (*h*); but must have recourse to an action at law.

III. As recaption is a remedy given to the party himself, for an injury to his *personal* property, so, thirdly, a remedy of the same kind for injuries to *real* property, is by *entry* on lands, when another person without any right has taken possession thereof.] In this case, which depends in some measure on like reasons with the former, [the party entitled may make a formal but peaceable entry on the lands, declaring that thereby he takes possession (*i*), which notorious act of ownership is equivalent to a feodal investiture by the lord. Or he may enter on any part of the property, declaring it to be in the name of the whole: but if the estate lies in different counties, he must make

(*h*) *Higgins v. Andrews*, 2 Roll. R. 55, 56; *Masters and Powlie's case*, *ibid.* 208; 2 Roll. Abr. 565, 566.

an entry may be made, after the right of entry accrues, see 3 & 4 Will. 4, c. 27. Et vide post, bk. v. c. IX.

(*i*) As to the time within which

[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 freeholders of Sussex (*k*). 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 (*l*); for as their seisin is distinct, so also must be the act which divests that seisin.] But no entry can in the nature of things be made on hereditaments *incorporeal* (*m*); and in every case where this remedy is available, it [must be pursued in a peaceable and easy manner; and not with force or strong hand (*n*). 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 antient possessor *in statu quo*: the criminal injury or public wrong, by breach of the king's peace, is punished by fine to the king.] Accordingly, by 5 Rich. II. st. 1, c. 8, 15 Rich. II. c. 2, and 8 Hen. VI. c. 9, forcible entries and detainers are strictly prohibited; [and by the last of these statutes, upon complaint made to any justice of the peace of a forcible entry, with strong hand, on lands or tenements; or of 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 shall put in gaol the offenders till they shall have made fine and ransom to the king, and treble damages to the party grieved. But this, by a subsequent clause in the same statute, enforced by 31 Eliz. c. 11, [does not extend to such as endeavour to keep possession

(*k*) Co. Litt. 252 b; 3 Bl. Com. 175. Blackstone's illustration of the doctrine of entry would have been more apt had it been drawn from two *adjoining* counties.

(*l*) Co. Litt. 252.

(*m*) 3 Bl. Com. 206.

(*n*) See *Newton v. Harland*, 1 Man. & G. 644; *Harvey v. Bridges*, 14 Mee. & W. 442.

[*manu forti* after three years' peaceable enjoyment of either themselves, their ancestors, or those under whom they claim (*o*).]

IV. [A fourth species of remedy by the mere act of the party injured, is the *abatement*, or removal, of nuisances. What nuisances are, and their several species, we shall find a more proper place to inquire under one of our subsequent divisions (*p*). At present we shall only observe, that whatsoever unlawfully annoys or doth damage to another, is a nuisance: and that 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 (*q*);] nor occasions—in case of a *private* nuisance—any damage, beyond what the abatement necessarily requires (*r*). Thus if [a house or a wall is erected so near to mine that it stops my antient lights, which is a *private* nuisance, I may enter my neighbour's land and peaceably pull it down (*s*);] or if the boughs of my neighbour's tree are allowed to grow so as to overhang my land, which they had not been accustomed to do, I may, on his refusal to remove such part of them as are in that position, effect the removal myself (*t*). [Or if a new gate be erected across the public highway (which is a *common*, or *public*, nuisance), any of the king's subjects passing that way may cut it down and destroy it (*u*). 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

(*o*) As to forcible entry and detainer, see also 4 Inst. 176; 21 Jac. 1, c. 15; *R. v. Wilson*, 3 Ad. & Ell. 817; *R. v. Harland*, *ibid.* 826; *Newton v. Harland*, 1 Man. & Gr. 644, et vide post, vol. IV. p. 342.

(*p*) Vide post, bk. v. c. VIII.

(*q*) 2 Rep. 101; 9 Rep. 55; *Houghton v. Butler*, 4 T. R. 364.

(*r*) See *Cooper v. Marshall*, 1

Burr. 261; *Lodie v. Arnold*, 2 Salk. 458.

(*s*) *R. v. Rosewell*, 2 Salk. 459.

(*t*) *Norris v. Baker*, 1 Roll. Rep. 394; *Lodie v. Arnold*, *ubi sup.* As to trees overhanging public ways, see 5 & 6 Will. 4, c. 50, s. 65.

(*u*) *James v. Hayward*, *Cro. Car.* 184.

[as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.

V. A fifth case in which the law allows a man to be his own avenger, or to minister redress to himself, is that of *distraining* cattle or goods for non-payment of rent or other duties; or, distraining another's cattle *damage feasant*, that is, doing damage or trespassing upon land. The former species of distress is intended for the benefit of the landlord, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter kind arises 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.

As the law of distresses is a point of great use and consequence, it shall be considered 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.

And, first, it is necessary to premise, that a distress (*v*), *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 a wrong committed. 1. The most usual injury for which a distress may be taken, is that of non-payment of rent. It was observed in a former volume, that distresses were incident, by the common law, to every *rent service*, and, by particular reservation, to *rent charges* also;] and that by statute 4 Geo. II. c. 28, the same remedy was also extended in general to *rent seck*, *rents of assize*, and *chief rents* (*x*).

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

(*x*) Vide sup. vol. I. pp. 691, 692. As to distress for rent service, see *Giles v. Spencer*, 3 C. B. (N. S.) 244.

[So that we may lay it down as an universal principle that a distress may now be taken for any kind of rent in arrear (*y*); the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it (*z*).] But as it is of the definition of rent, that its amount shall be certain or be capable of being readily reduced by either party to certainty, so it is held that where the sum to be paid by the tenant is not fixed by agreement express or implied (*a*), but depends on what shall be considered as a reasonable compensation for the use of the premises demised,—no distress for it can legally be made (*b*). 2. [For neglecting to do suit to the lord's court, or other certain personal service, the lord may distrain of common right (*c*). 3. For ameracements in a court leet, a distress may be had of common right; but not for ameracements in a court baron, without a special prescription to warrant it (*d*). 4. Another injury, for which distresses may be taken, is where a man finds beasts of a stranger wandering in his grounds *damage*

(*y*) See *Bradbury v. Wright*, 2 Dong. 624; *Newman v. Anderton*, 2 N. R. 224; *Buttery v. Robinson*, 3 Bing. 392. Rent is said to be *in arrear* if it remain unpaid at any time after the expiration of the year, quarter, or other period, at which it may have been made payable. Thus in a *yearly* tenancy, and with absence of any express stipulation to the contrary, it is not in arrear till after the expiration of the year. (See *Buckley v. Taylor*, 2 T. R. 600; *Collett v. Curling*, 10 Q. B. 785.)

(*z*) As to distress by the executor of a lessor seised in fee, see 32 Hen. 8, c. 37; 3 & Will. 4, c. 42, s. 37.

(*a*) So if there be no *actual* demise, but an *agreement to let* only, and no rent has been paid (which

would operate as an admission of a tenancy) there can be no distress. (*Dunk v. Hunter*, 5 Barn. & Ald. 322.)

(*b*) See *Regnard v. Porter*, 7 Bing. 451; *Warner v. Pochett*, 3 B. & Adol. 928; *Dunk v. Hunter*, 5 B. & A. 322. As to the term within which a distress may be made after the right to distrain accrues, see 3 & 4 Will. 4, c. 27, ss. 2, 3, 42; *James v. Salter*, 2 Bing. N. C. 505; 3 Bing. N. C. 544. As to distraining for an *apportioned* rent, see *Neale v. Mackenzie*, 1 Mee. & W. 758; *Revis v. Watson*, 5 Mee. & W. 255.

(*c*) *Co. Litt.* 96; 2 Wms. Saund. 168, n. (1); *Bro. Abr.* tit. Distress, 15.

(*d*) *Brownl.* 36.

[*feasant*; that is, doing him hurt or damage, by treading down his grass or the like (*e*); in which case,] supposing the trespass not to be rendered excusable by the defective state of the fences, or the like (*f*), [the owner of the soil may distrain them, while they so remain on his grounds, till satisfaction be made him for the injury he has thereby sustained (*g*).]

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 the particular exemption (*h*). And, 1. As everything which is distrained is presumed to be the property of the wrongdoer, it will follow that such things] as were formerly considered as having no intrinsic value, or wherein a man [could have no absolute property, (as dogs, cats, rabbits, and the like, and all animals *feræ naturæ*,) cannot be distrained. Yet if deer, (which are of such nature,) 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 merchandize, that they may be distrained for rent (*i*). 2. Whatever is in the personal use or occupation of any man, is for the time

(*e*) It seems that the common law right of distress for damage *feasant* is not confined to *cattle*, but may extend to inanimate things doing damage (see *Ambergate, &c. Railway Company v. Midland Railway Company*, 2 Ell. & Bl. 793).

(*f*) 2 Wms. Saund. 284 e, note (4).

(*g*) Besides these distresses, which are at the common law, there are others introduced, in special cases, for recovery of duties and penalties imposed by act of parliament,—

as for the assessments made by commissioners of sewers (7 Ann. c. 10; 24 & 25 Vict. c. 133, s. 38), or for the relief of the poor (43 Eliz. c. 21; 17 Geo. 2, c. 38, s. 7; 4 & 5 Will. 4, c. 76, s. 49). Such distresses as these, being in the nature of an execution (*Hutchins v. Chambers*, 1 Burr. 589), are usually attended with a power of *sale*.

(*h*) Co. Litt. 47.

(*i*) *Davies v. Powel*, C. B. Hil. 11 Geo. 2; Willes, 47.

[privileged and protected from any distress,] in order to prevent the danger, which might otherwise arise, of a breach of the peace (*k*); as, for example, an axe with which a man is cutting wood, or a horse while a man is riding him (*l*). But it has been said that [horses drawing a cart may (cart and all) be distrained for rent in arrear (*m*).]

3. Things delivered to a person following a public trade, to be carried, wrought, or managed in the way of such his trade, shall not be liable to distress for rent owing from the bailee (*n*); [as a horse standing in a smith's shop to be shod, or standing in a common inn; or cloth in a tailor's house (*o*); or corn sent to a mill or market;] or goods sent to an auctioneer to be sold by him (*p*). [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 (*q*); 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

(*k*) *Storey v. Robinson*, 6 T. R. 138; Co. Litt. 47.

(*l*) It is laid down by Blackstone, (vol. iii. p. 8,) on the authority of a case in 1 Sid. 440, that a horse may be distrained while his rider is upon him. But the contrary is the law. (*Storey v. Robinson*, ubi sup. And see *Field v. Adames*, 12 Ad. & El. 649.)

(*m*) 3 Bl. Com. 8.

(*n*) See *Simpson v. Hartopp*, Willes, 512; *Gisbourn v. Hurst*, 1 Salk. 250; 2 Wms. Saund. 290, n. (*f*); 1 Smith's Leading Cases,

187; *Muspratt v. Gregory*, 3 Mee. & W. 677; *Joule v. Jackson*, 7 Mee. & W. 454; *Gibson v. Ireson*, 3 Q. B. 39; *Finden v. M'Laren*, 6 Q. B. 891.

(*o*) See *Read v. Burley*, Cro. Eliz. 549.

(*p*) *Williams v. Holmes*, 8 Exch. 861.

(*q*) So held as to horses or earriages standing in a livery stable; see *Francis v. Wyatt*, 3 Burr. 1498; *Crosier v. Tomkinson*, 2 Kent. 439; *Parsons v. Gingell*, 4 C. B. 545.

[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 be put in by consent of the owner of the beasts, they are distrainable immediately afterwards for rent in arrear by the landlord. And 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 (*r*). But if the lands were not 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 laid down and risen up to feed; which in general is held to be one night at least (*s*); and then the law presumes, that the owner may have notice that 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 the grounds without the negligence or default of their 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 (*t*): for the law will not suffer the landlord to take advantage of his own or his tenant's wrong (*u*).] 4. Things in the custody of the law, such as property already taken *damage feasant* or in execution, are not distrainable (*x*). Nor, 5 (gene-

(*r*) Co. Litt. 47.

(*s*) Gilb. Dist. by Hunt, 3rd ed. 47.

(*t*) *Hemp v. Crewes*, 2 Lntw. 1580.

(*u*) See *Poole v. Longueville*, 2 Saund. 289.

(*x*) Co. Litt. 47 a; *Smith v. Russell*, 3 Taunt. 400; *Wright v. Dewes*, 1 Ad. & Ell. 641. See also 56 Geo.

3, c. 50, s. 6. On the other hand, the goods of a tenant cannot be taken in execution if his landlord puts in a claim for rent in arrear, unless such arrears, to the extent of one year's rent (8 Ann. c. 14), be first paid; or (if the tenancy be for a term less than a year), to the extent of the arrears of rent accruing

rally speaking), money, unless it be in a *sealed bag* (*y*). 6. [Nothing shall be distrained for rent, which may not be rendered again in as good plight as when it was distrained (*z*): for which reason milk, fruit, and the like, cannot be distrained; a distress at 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, antiently, sheaves or shocks of corn could not be distrained, because some damage must needs accrue in their removal; though a cart loaded with corn might, as that could be safely restored. But now, by statute 2 W. & M. c. 5, corn in sheaves or cocks, or loose in the straw, or hay in barns or ricks, or otherwise, may be distrained, as freely as other chattels (*a*). 7. *Fixtures*, or things fixed to the freehold, may not be distrained; as caldrons, windows, doors, and chimney-pieces; for they savour of the realty (*b*). For this reason also corn growing could not be distrained, till the statute 11 Geo. II. c. 19, empowered landlords to distrain growing corn, grass, or other products of the earth, and to cut and gather them when ripe (*c*).] Besides the preceding articles which are *absolutely* privileged, there are others which are privileged *sub modo*,—as, 8thly, beasts of the plough (*averia caruæ*) and sheep, and instruments of

during four such terms (7 & 8 Vict. c. 96, s. 67). And by 14 & 15 Vict. c. 25, s. 2, if the growing crops of a tenant be seized and sold in execution, such crops, so long as they remain on the lands, shall, in default of other sufficient distress, be liable to be distrained upon for rent becoming due after the seizure and sale. See also 19 & 20 Vict. c. 108, s. 75, as to the landlord's right to claim rent as against an execution under the warrant of a *county court*,—a case to which the provision of 8 Ann. c. 14, is inapplicable.

(*y*) 1 Roll. Ab. 667; Vin. Abr. Dist. (H); *Wilson v. Duckett*, 2 Mod. 61.

(*z*) *Darby v. Harris*, 1 Q. B. 895; *Morley v. Pincombe*, 2 Exch. 101.

(*a*) *Johnson v. Faulkner*, 2 Q. B. 925.

(*b*) See *Niblett v. Smith*, 4 T. R. 504; *Dalton v. Whitem*, 3 Q. B. 961.

(*c*) See *Miller v. Green*, 8 Bing. 92. Trees or shrubs in a nursery-ground are not within this statute. (*Clark v. Gaskarth*, 8 Taunt. 431.)

husbandry; and 9thly, the instruments of a man's trade or profession; for example, [the axe of a carpenter, the books of a scholar, and the like (*d*).] And as to all of these the rule is, that they are exempt from distress, provided there be other sufficient distress on the premises, but not otherwise (*e*):

Thirdly. Let us next consider how distresses may be taken, disposed of, or avoided. And in the course of the inquiry we shall find, that under this head, viz. in what relates to the manner of disposing of distresses, a very important innovation has been made by modern statutes upon the antient law. For formerly distresses [were looked upon in no other light, generally speaking, 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 some other causes: over which the distrainer has no other power than to retain them till satisfaction is made. But distresses for *rent* in arrear being found by the legislature to be the shortest and most effectual method of compelling the payment of such rent,] many beneficial laws have, from time to time, been made for rendering the remedy in this case more perfect, and for allowing the thing taken to be *sold*.

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

(*d*) See the case of *Nargett v. Nias*, 1 E. & E. 439.

(*e*) Co. Litt. 47 a; 2 Inst. 132; *Gorton v. Faulkner*, 4 T. R. 565; *Piggott v. Birtles*, 1 Mee. & W. 441; in which cases it was held that, even though there be other sufficient distress, yet if it consist of growing crops which are only distrainable

by *statute*, the landlord may, notwithstanding, distrain things privileged *sub modo*. And see *Hutchins v. Chambers*, 1 Burr. 589, where it was held that *averia caruæ* were distrainable for poor rate, even though there be other distress. As to what animals are *averia caruæ*, see *Keen v. Priest*, 4 H. & N. 236.

[In the first place, then, all distresses must be made *by day* (*f*), unless in the case of *damage feasant*; an exception being there allowed, lest the beasts should escape before they are taken (*g*). And, when a person intends to make a distress, he must, by himself or his bailiff, make entry on the demised premises; and this formerly must have been during the continuance of the lease, but now, (by 9 Ann. c. 14,) 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 (*h*). If the lessor does not find sufficient distress on the premises, he could, as the law once stood, 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.] And, as the general rule, the distress must still be on the premises demised (*i*). But by 9 Ann. c. 14, and 11 Geo. II. c. 19, the landlord may now (*k*) [distrain any goods of his tenant, carried off the premises fraudulently or clandestinely, wherever he finds them, within thirty days after the removal, unless they have been meanwhile *bonâ fide* sold for a valuable consideration: and all persons privy to, or assisting in, such fraudulent conveyance, shall forfeit double their value to the landlord. The landlord may also distrain,] for rent service (*l*), [the beasts of his tenant feeding upon any commons or wastes appendant or appurtenant to the demised premises.] It is to be noticed, that the landlord may not break open a house of which the rent is in arrear, to make a distress; for

(*f*) 7 Rep. 7 a.

(*g*) Co. Litt. 142.

(*h*) As to what is a continuing possession, *Taylorson v. Peters*, 7 A. & E. 110.

(*i*) *Buszard v. Capel*, 8 Barn. &

Cress. 141.

(*k*) See *Angell v. Harrison*, 17 L. J. (Q.B.), 25; *Dibble v. Bowater*, 2 Ell. & Bl. 564.

(*l*) 11 Geo. 2, c. 19, s. 8. See *Miller v. Green*, 8 Bing. 92.

that is a breach of the peace (*m*). But when he is in the house he may break open an inner door; and (by 11 Geo. II. c. 19) if goods have been fraudulently removed from the premises and locked up to prevent a distress, he may, by the assistance of the peace officer of the parish, break open in the day time any place whither they have been so removed; [oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein.

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 (*n*). But if he distrain for the whole, and there be not sufficient on the premises, or if he happen to mistake in the value of the thing distrained, and so take an insufficient distress, he may take a second distress to complete his remedy (*o*).

Distresses must be proportioned to the thing distrained for. By the statute of Marlbridge, (52 Hen. III. c. 4.) if any man take a great or unreasonable distress, for rent in arrear, he shall be heavily amerced for the same. Thus if the landlord distrain two oxen for twelve pence rent, the taking of *both* is an unreasonable distress (*p*); but, if there were no other distress nearer the value to be found, he might reasonably have distrained *one* of them. And for homage or fealty, or suit and service, it is said that no distress can be excessive (*q*); for as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again (*r*). The remedy for excessive

(*m*) Co. Litt. 161; Comberb. 17; Brown v. Glenn, 16 Q. B. 254; Ryan v. Shiloch, 7 Exch. 72; Eldridge v. Stacey, 15 C. B. (N. S.) 458; Attack v. Bramwell, 3 B. & Smith, 520; Nash v. Lucas, Law Rep., 2 Q. B. 590.

(*n*) 2 Lutw. 1532; see Dawson v. Cropp, 1 C. B. 981; Lee v. Cooke, 3 H. & N. 205.

(*o*) Cro. Eliz. 13; stat. 17 Car. 2,

c. 7; Hutchins v. Chambers, 1 Burr. 590.

(*p*) 2 Inst. 107.

(*q*) Bro. Abr. tit. Assize, 291, Prerogative, 98.

(*r*) Such a distress (remarks Blackstone, vol. iii. p. 231) may be repeated from time to time till the stubbornness of the party is conquered, and is called a *distress infinite*.

[distresses is by a special action on the statute of Marlbridge; for an ordinary action for the trespass is not maintainable upon this account, it being no injury at the common law (*s*).

When 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 things were 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 (*t*). 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 (*u*).] Accordingly by 2 W. & M. sess. 1, c. 5, an action on the case for treble damages will lie for illegally taking out of pound upon a distress for rent. And in case of distress *damage feasant*, it is enacted by 6 & 7 Vict. c. 30, that if any person shall release or attempt to release cattle lawfully seized by way of such distress, from the pound or place where they shall be impounded, or on the way to or from such pound or place, or shall destroy such pound or place, or any part thereof, or any lock or bolt thereof,—he shall, on conviction before two justices of the peace, be liable to a penalty not exceeding 5*l.*, and to payment of the reasonable charges and expenses; and in default may be committed to the house of correction, with hard labour, for

(*s*) See 1 Ventr. 104; Fitzgih. 85; Fisher *v.* Algar, 2 C. & P. 374; Hutchins *v.* Chambers, 1 Burr. 590; Roden *v.* Eyton, 4 C. B. 427; Tancred *v.* Leyland, 16 Q. B. 669; Glynn *v.* Thomas, 11 Exch. 870.

(*t*) Co. Litt. 160, 161.

(*u*) Co. Litt. 47. It has been

doubted whether rescue of goods distrained, or pound breach (if without breach of the peace), are indictable offences: but it seems that they are. (1 Russ. on Crimes, 411.) A tender of amends after impounding is too late. See Singleton *v.* Williamson, 7 H. & N. 747.

not more than three calendar months or less than fourteen days (*x*).

[A *pound* (*parcus*, which signifies any inclosure,) is either *pound overt*, that is, open overhead; or *pound covert*, that is, close. By the statute 1 & 2 P. & M. c. 12, no distress of cattle can be driven out of the hundred where it is taken, unless to a pound overt within the same shire; and within three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the distress. And by statute 11 Geo. II. c. 19, 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 hâc vice*, for securing of such distress (*y*).] If a live distress, of animals, be impounded, the onus of their support is thrown, by the legislature, upon the persons impounding the same. For, by 12 & 13 Vict. c. 92, ss. 5, 6 (*z*), the impounder is bound to supply them with sufficient food and water, upon penalty of twenty shillings for every refusal or neglect so to do, to be adjudged by a justice in a summary way. Any person, moreover, is authorized to enter any place where animals are impounded without sufficient food and water for more than twelve hours, and supply them, without being liable to an action for such entry (*a*); and the costs of such food and water are to be paid by the owner of the animal, before it is removed, to the person who supplied the same. [A distress of household goods, or other dead chattels, which are liable to be stolen, or damaged by

(*x*) But the justices cannot hear any case in which a question of title to land arises, or any question as to a bankruptcy or execution, or the obligation to repair walls, &c. (6 & 7 Vict. c. 30, s. 2.)

(*y*) See *Washborn v. Black*, 11 East, 504, n. (*a*); *Pitt v. Shew*, 4 B. & Ald. 208; *Swann v. Earl Fal-*

mouth, 8 Barn. & Cress. 456; *Woods v. Durrant*, 16 Mee. & W. 149; *Tennant v. Field*, 8 Ell. & Bl. 336; *Johnson v. Upham*, 2 Ell. & Ell. 250.

(*z*) This statute repeals 5 & 6 Will. 4, c. 59.

(*a*) See *Co. Litt. 47*, and see *Smith v. Wright*, 6 H. & N. 821.

[weather, ought to be impounded in a pound covert, else the distrainer must answer for the consequences (*b*).

When impounded, the goods were formerly, as has been 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 that the distrainer is not at liberty to work or use a distrained beast (*c*). 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 until he contests the right of distraining, by replevying the chattels,] a proceeding of which we shall presently say more.

[The distress therefore in these cases, though it puts the owner to inconvenience, and is consequently a punishment to him, yet if he continues obstinate, and will make no satisfaction or payment, is no remedy at all to the distrainer. But for a debt due to the crown, unless paid within forty days, the distress was always saleable at the common law (*d*). And for an amercement imposed at a court leet, the lord may also sell the distress (*e*): partly because, being the king's court of record, its process partakes of the royal prerogative (*f*); but principally because it is in the nature of an execution to levy a legal debt.] And in modern times, it has been expressly provided, in like manner, by several acts of parliament (*g*), that in all cases of distress for rent, [if the tenant or owner do not, within five days after the distress is taken,

(*b*) See *Mason v. Newland*, 9 C. & P. 575; *Wilder v. Speer*, 8 A. & E. 547; *Bignell v. Clarke*, 5 H. & N. 485.

(*c*) See *Smith v. Wright*, 6 H. & N. 821. Unless, indeed (as in the case of milking kine), it be for the benefit of the owner. (*Bagshawe v. Goward*, Cro. Jac. 148.) The law is the same in the case of *estrays*. Vide

sup. vol. II. p. 583.

(*d*) Bro. Abr. tit. Distress, 71.

(*e*) 8 Rep. 41.

(*f*) Bro. Abr. tit. Distress, 71; *R. v. Speed*, 12 Mod. 330.

(*g*) 2 W. & M. sess. 1, c. 5; 8 Ann. c. 14; 4 Geo. 2, c. 28; 11 Geo. 2, c. 19. As to distresses for small rents, 57 Geo. 3, c. 93.

[and notice of the cause thereof given him (*h*), replevy the same with sufficient security,] the distress may be appraised by two sworn appraisers, and sold towards satisfaction of the rent and charges; the overplus, if any, being rendered to the owner himself (*i*). By such means therefore [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.]

As for the proceeding called a replevin, to which we just had occasion to refer, it will be sufficient for the present to state, that to replevy, (*replegiare*, to take back the pledge), is when a person who has been distrained upon, either for damage feasant, for suit and service, or for rent, applies to the proper authority to interpose (*j*), and thereupon [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 be determined against him, to return the cattle or goods once more into the hands of the distrainer.] Replevin, however, and the course of proceeding which it involves, is a subject which will be more fully considered at a subsequent stage of this work, and which it will be therefore unnecessary to pursue farther in this place (*k*). Enough has been stated to show its general nature and object, and that while it relieves the owners of the cattle

(*h*) See *Wilson v. Nightingale*, 8 Q. B. 1054; *Lucas v. Tarleton*, 3 H. & N. 116.

(*i*) See *Jacob v. King*, 5 Taunt. 451; *Lyons v. Tomkies*, 1 Mee. & W. 693; *Knight v. Egerton*, 7 Exch. 407; *Evans v. Wright*, 2 H. & N. 527. By 57 Geo. 3, c. 93, s. 6, every broker who makes a distress, in any case whatsoever, is to give a copy of his charges, &c. (See Hart

v. Leach, 1 Mee. & W. 560.)

(*j*) This application used to be made to the sheriff; it is now made to the registrar of the county court for the district, 19 & 20 Vict. c. 108, ss. 63, 64. This enactment applies to all cases of replevin, 23 & 24 Vict. c. 126, s. 22.

(*k*) Vide post, bk. v. c. VIII. et c. XI.

or goods from the inconvenience of their being longer detained from him, during the time in which the right is still undecided, it answers, on the other hand, to the distrainer, [the same end as the distress itself, since the owner gives security to return the distress, if the right be determined against him.]

Before we quit this subject, it should be observed, that [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 made the distrainers trespassers *ab initio* (l).] But now, by the statute 11 Geo. II. c. 19, s. 19 (m), it is provided, that where any distress shall be made for any kind of *rent* justly due, and any subsequent unlawful act or irregularity shall be committed by the party distraining, the distress itself shall not therefore be deemed unlawful, or the parties making it trespassers *ab initio*; [but 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 (n).]

VI. [The seizing of heriots, when due on the death of a tenant, is another species of self-remedy; not much unlike that of taking cattle or goods in distress (o). 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 lies only in *prender*, and not in *render*,) the lord may seize the identical thing itself, but cannot distrain

(l) 1 Ventr. 37. As to the circumstances under which distrainers can be considered as trespassers, *ab initio*, see the Six Carpenters' case, 8 Co. Rep. 1466; *Evans v. Elliott*, 5 Ad. & E. 142; *West v. Nibbs*, 4 C. B. 172; *Attack v. Bramwell*, 3 B. & Smith, 520.

(m) See *Gambrell v. Earl of Falmouth*, 5 Ad. & El. 403.

(n) See *Harvey v. Pocock*, 11 Mees. & W. 740; *Rodgers v. Parker*, 18 C. B. 112.

(o) As to heriots, vide sup. vol. I. p. 648.

[any other chattel for it (*p*). The like speedy and effectual remedy, by seizure, is given with regard to many things that are said to lie in franchise; as waifs, wrecks, estrays, and the like; all of which the persons entitled thereto may seize, without the formal process of a suit or action, Not that they are debarred of their remedy by action; but they 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.]

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

I. *Accord* is an agreement to make satisfaction entered into [between the party injuring and the party injured; which, when performed, is a bar of all actions upon this account. As if a man contract to build a house or deliver a horse, 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 (*q*).] But it is to be observed under this head, first, that the action will not be taken away by mere accord without actual satisfaction. For example, in the case supposed, the mere agreement to accept the sum of money will not, until actual payment of the amount, bar the action on the original agreement to build the house or deliver the horse;—for this would only be substituting one right of action for another. Secondly, that the taking a smaller sum of money in lieu of a greater sum of fixed or certain

(*p*) See Co. Cop. s. 25; *Odiham v. Brandwood*, Cro. Car. 260.
v. Smith, Cro. El. 590; *Major v.* (*q*) 9 Rep. 79.

amount, does not answer to the legal idea of satisfaction. Thus, if a man owe 100*l.*, an agreement between him and his creditor that he shall pay 50*l.* in satisfaction, will not, though the latter sum be actually paid, suffice in law to bar the action on the original debt (*r*). But if any thing except money be taken in lieu of a fixed sum of money, the action for the latter will be barred, however much its amount may exceed the value of the thing so accepted.

II. [*Arbitration* (*s*)] is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong (*t*), to the judgment

(*r*) Pinnel's case, 5 Rep. 117 a; Wright *v.* Acres, 6 A. & E. 726; Bayloy *v.* Homan, 3 B. N. C. 920. Curlewis *v.* Clark, 3 Exch. 375. As to the nature of an accord, see Wilkinson *v.* Byers, 1 A. & E. 106; Perry *v.* Attwood, 25 L. J., Q. B. 408. In an action by several plaintiffs for a joint demand, the defendant may plead an accord and satisfaction with *one*. (Wallace *v.* Kelsall, 7 M. & W. 264.) As to an accord by a *stranger*, see Thurman *v.* Wild, 11 A. & E. 453; Jones *v.* Broadhurst, 9 C. B. 173.

(*s*) Under the head of arbitration, the cases in the books are extremely numerous. The following, of recent date, may be consulted with advantage: Tillam *v.* Copp, 5 C. B. 211; Leslie *v.* Richardson, 6 C. B. 378; Richardson *v.* Worsley, 5 Exch. 613; Wade *v.* Dowling, 4 Ell. & Bl. 44; Harrison *v.* Creswick, 13 C. B. 399; In re Beck and Jackson, 1 C. B. (N. S.) 695; Hodgkinson *v.* Fernie, 3 C. B. (N. S.) 189; Roberts *v.* Eberhardt, *ibid.* 482.

(*t*) This method of decision has been also authorized by statute,

in a variety of cases; as, in questions as to *tithes and commons* (6 & 7 Will. 4, c. 71; 8 & 9 Vict. c. 118); as to compensation for lands taken for *undertakings of a public nature* (8 & 9 Vict. c. 16), for *railways* (8 & 9 Vict. c. 20), for *markets and fairs* (10 & 11 Vict. c. 14), for *water works* (c. 17), for *harbours, docks and piers* (c. 27), for *improvements in towns* (c. 34), for *land drainage* (c. 38, and 24 & 25 Vict. c. 133), or for *cemetries* (c. 65). And even some criminal matters—not amounting to felony—may be thus disposed of; for example, an indictment for an *ordinary assault* (Elworthy *v.* Reid, 2 Sim. & Stu. 372), or for a *nuisance* (Dobson *v.* Groves, 6 Q. B. 637); but, in such cases, it is essential that the prosecutor should also have had a remedy by action. (The Queen *v.* Hardey, 14 Q. B. 529; The Queen *v.* Blakemore, *ibid.* 544.) See also the provisions of 12 & 13 Vict. c. 45, s. 12—15, allowing a reference to arbitration, in certain cases where the remedy would otherwise be only by appeal to the general or quarter

[of two or more *arbitrators*, who are to decide the controversy; and if they do not agree, it is usual to add, that another person be called in as *umpire*—*imperator* or *impar* (*x*),—to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed (*y*). This decision, in any of these cases, must be in writing, and is called an *award*. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice (*z*). But the right of real property cannot thus pass by a mere award (*a*); 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 collusively without the consent of the superior. 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 (*b*).] Originally the submission to arbitration used to be, and may still be, [by word or by deed, yet both of these being revocable in their nature, it became the practice to enter into mutual bonds, with condition to stand to the award or arbitration of the arbitrators or umpire therein named,] or, in default thereof, to pay a certain penalty. [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 difficult and almost impossible to be adjusted in a trial at law, the legislature has now estab-

sessions of the peace. And sec 22 & 23 Vict. c. 59, enabling railway companies to settle their differences with other companies by arbitration.

(*x*) Whart. Angl. Sacr. i. 772; Nichols. Scot. Hist. Libr. c. i. *prope finem*.

(*y*) As to the appointment of ar-

bitrators and of umpire, some new provisions will be found in 17 & 18 Vict. c. 125, ss. 12—14.

(*z*) Brownl. 55; 1 Freem. 410.

(*a*) 1 Roll. Abr. 242; Marks v. Marriott, 1 Ld. Raym. 115.

(*b*) Doe v. Rosser, 3 East, 15. And see 17 & 18 Vict. c. 125, s. 16, post, p. 375, n. (*e*).

[lished the use of them, as well in controversies where causes are depending, as in those where no action is brought,—enacting by statute 9 & 10 Will. III. c. 15, that all merchants and others, who desire to end any controversy, suit, or quarrel (for which there is no other remedy but by personal action or suit in equity), may agree that their submission of the action or suit to arbitration or umpirage shall be made a rule of any of the courts of record (*c*), and may insert such agreement in their submission or promise, or in the condition of the arbitration bond: which agreement being proved upon oath by one of the witnesses thereto, the court shall make a rule that such submission and award shall be conclusive (*d*). 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 undue means used in its procurement, [or other misbehaviour 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 of those rules and orders which are issued by the courts] in other cases (*e*).

(*c*) If the submission be not in writing, the case is not within the Act, and cannot therefore be made a rule of court, — *v. Mills*, 17 Ves. 419.

(*d*) By 17 & 18 Vict. c. 125 (The Common Law Procedure Act, 1854), s. 17, every agreement or submission to arbitration by consent—whether by deed or by instrument not under seal—may be made a rule of court *unless* an intention of the parties to the contrary appear

thereby.

(*e*) As to the course of proceeding by attachment, to enforce an award, see *Queen v. Hemsworth*, 3 C. B. 745. It may be remarked here, that besides the proceeding by way of attachment, as for a contempt, an *action* may be brought on the award; and that where the award directs possession of land to be delivered to any party, or that any such party is entitled to the possession of such land, the court may

The law on this subject has also been much improved by more recent enactments; for, in the first place, it has been provided by 3 & 4 Will. IV. c. 42, that the power of any arbitrator or umpire appointed in pursuance of a submission containing such agreement as aforesaid to make the arbitration a rule of court—or appointed by any rule of court, or judge's order, or order of *nisi prius*, in any action—shall not be revocable by either party without leave of the court; and that the court or a judge may command the attendance of witnesses before the arbitrator, whose failure to attend shall be deemed a contempt of court; and, that, if in any such submission, rule or order of reference, it shall be agreed or ordered that the witnesses shall be examined on oath, the arbitrator is required to administer such oath accordingly; and any such witness giving false evidence shall be deemed guilty of perjury. Moreover, by the 17 & 18 Vict. c. 125 (called "The Common Law Procedure Act, 1854)," provisions are made by which certain matters may be *compulsorily* remitted to this manner of decision. For by the 3rd section of that Act it is provided, that if, in an action, it shall be made to appear at any time after the issuing of the writ of summons, to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consists wholly, or in part, of matters of mere account, which cannot conveniently be tried in the ordinary way,—it shall be lawful for the court or judge, either themselves to decide the matter in a summary way, or to order that the same be referred to an arbitrator appointed by the parties, or to an officer of the court, upon such terms as to costs and otherwise, as such court or judge shall think reasonable (*f*). And by the 6th section of the statute, the

order possession to be delivered to him accordingly, which shall have the effect of a judgment in ejectment. (17 & 18 Vict. c. 125, s. 16.)

(*f*) As to 17 & 18 Vict. c. 125, s. 3, see *Brown v. Emerson*, 17 C. B. 361; *Chapman v. Van Toll*, 8 Ell. & Bl. 396. The Act also allowed

same order of reference may be made upon the trial of any issue of fact by a judge without a jury,—which by consent of the parties is allowed by that Act,—if it shall appear to him that the questions arising thereon involve matter of account which cannot conveniently be tried before him (*g*).

As to the effect of an award, when made, and not set aside by the court for invalidity, it is in general conclusive and final; and upon an action or other proceeding brought to enforce it, no objection to its validity can be made, unless in respect of such defect as may happen to be apparent *on the face of the award itself*: the rule being that all *extrinsic* objections must be taken in the shape of a substantive application to the court in banc to set the award aside on that ground (*h*); and any such application must be made before the last day of the term next after the award is made and published (*i*).

the reference, in country causes, to be to the judge of a county court (see *Cummins v. Birkett*, 3 H. & N. 156), but so much of the Act as permitted this to be done was repealed by 21 & 22 Vict. c. 74, s. 5.

(*g*) As to trial by judge without a jury, vide post, cap. x.

(*h*) See *Braddick v. Thompson*, 8 East, 344; *Paull v. Paull*, 2 Dowl. 340; *Grazebrook v. Davis*, 5 B. & C. 534; *Macarthur v. Campbell*, 2 Ad. & El. 52.

(*i*) 9 & 10 Will. 3, c. 15, s. 2. See *Young v. Timmins*, 1 Tyrw. 230, n. If the award be on a compulsory reference under 17 & 18 Vict. c. 125, the application to set it aside must be made within the first seven days of the term next after the award (sect. 9). It may be here mentioned, that to such compulsory references the ordinary rules as to setting aside awards will apply. (See *Hogge v. Burgess*, 3 H. & N. 293.)

CHAPTER II.

OF REDRESS BY THE MERE OPERATION OF LAW.

[THE remedies for private wrongs, which are effected by the mere operation of the law, will fall within a very narrow compass, there being, it is believed, only two instances of this sort capable of being suggested; 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 *remitter*.]

I. As to *retainer*. The law relating to executors and administrators has been already discussed in a former part of the work (*a*), where, amongst other matters, it was mentioned that [if a person indebted to another, makes his creditor his executor, or if such creditor obtains letters of administration to his debtor, in these cases the law gives him a remedy for his debt, by allowing him to *retain* so much as will pay himself, before any other creditors whose debts are of equal degree (*b*). This is a remedy by the mere act of law, and grounded upon this reason,—that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity; 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

(*a*) Vide sup. vol. II. p. 217.

543; *Glaholm v. Rowntree*, 9 A. &

(*b*) See 1 Roll. Abr. 922; Plowd.

E. 710.

[made executor, he would be put in a worse condition than all the rest of the world besides;] as every other creditor but himself is in a condition to commence an action, and obtain judgment for recovery of his debt. But, as the law stands, the effect of this right of retainer is to put him in some measure in a *better* position than other creditors; because it enables him to obtain payment *first*, (among all those of equal degree,) and before any other has had time to commence an action. And this seems to illustrate a remark of Lord Bacon, that [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 (*c*).] However [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 co-executor in equal degree; but both shall be discharged in proportion (*d*). Nor shall an executor of his own wrong be in any case permitted to retain (*e*).]

II. *Remitter* is where he who hath the right of entry in lands, but is out of possession, obtains afterwards the possession of the lands by some subsequent, and of course defective, title; in which case he is remitted, or sent back, by operation of law, to his antient and more certain title (*f*). The possession which he hath gained by a

(*c*) Bac. Elem. c. 9.

(*d*) Vin. Abr. tit. Executors, D. 2.

(*e*) 5 Rep. 80.

(*f*) Litt. ss. 659, 693, 695; Co. Litt. 363 b; Gilb. Ten. 129. As to

the effect of the Statute of Uses in modifying the doctrine of *remitter*, see 1 Saund. Uses, 166. As to *remitter* generally, Doe v. Woodroffe, 10 Mee. & W. 608.

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 (*g*). Thus, if A. disseises B., that is, wrongfully turns him out of possession of the freehold, and afterwards demises the land to B. (without deed) as tenant from year to year, under which demise B. entereth; this entry is a remitter to B., who is in of his former and surer estate (*h*). But if A. had demised to him for years by deed, or by matter of record, there B. would not have been remitted. For if a man by deed takes a lease of his own lands, it shall bind him to the rent and covenants; because a man can never be allowed to affirm that his own deed is ineffectual, since that is the greatest security on which men rely in all manner of contracting. The same law, if it had been by matter of record; for that is of its own nature uncontrollable evidence, which a man cannot be allowed to controvert (*i*).

[The reason given by Littleton, 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 (*k*).] For as he himself is in possession of the land, there is no other person upon whom he can make entry (*l*).

(*g*) Co. Litt. 358; Wood *v.* Sir J. Shurley, Cro. Jac. 409.

(*h*) Litt. s. 695; Gilb. Ten. 129.

(*i*) Gilb. Ten. ubi sup.

(*k*) Litt. s. 661; Litt. by Butl. 347 b, n. (1).

(*l*) Blackstone (vol. iii. p. 19) treats of *remitter* as if it had no application except to the case where the disseisee was out of possession under such circumstances that he

could only recover possession by *real action*. But it was also applicable (as it still is) to the case stated in the text, of his being out of possession, with right of recovering possession *by entry*. (Litt. s. 693; Gilb. Ten. 129; Co. Litt. by Butl. 347 b, n. (11).) And now, in consequence of the change of the law, by which real actions in general are abolished (a subject to which

[And thus much for these extrajudicial remedies, which are furnished or permitted by the law, where the parties injured are so peculiarly circumstanced as not to make it possible to apply for redress in the usual and ordinary methods.]

we shall have occasion to refer more particularly hereafter), the former case can no longer arise, and it is *only in the latter that any example of remitter can occur.*

CHAPTER III.

OF THE COURTS IN GENERAL.



[THE next 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.

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 courts 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 my 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] an action of ejectment: [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 for the debt,

(*a*) Vide sup. p. 351.

[at my own option: if I do not *distrain* my neighbour's cattle *damage feasant*, I may compel him by action of trespass to make me a fair satisfaction: if a heriot 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. But as to remedies by the mere operation of law, those are indeed given, because no remedy can be administered by action,] without running into the absurdity of a man's bringing an action against himself.

In treating of the remedies by suit in courts, we shall begin with some remarks on their nature and incidents in general, and then proceed to consider the several species of them erected and acknowledged by the laws of England.

[A court is defined to be a place wherein justice is judicially administered (*b*). And, as by our excellent constitution the sole executive power of the laws is vested in the person of the sovereign, it will follow that all courts of justice, (which are 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 can exist,—the king's consent in the two former is expressly, and in the latter impliedly, given (*d*). In all these courts the sovereign 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.

For the more speedy, universal, and impartial administration of justice between subject and subject, the

(*b*) Co. Litt. 58.

(*d*) Co. Litt. 260.

(*c*) Vide sup. vol. II. p. 538.

[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 places: but we may here mention one distinction that runs through them all; viz., that some of them are courts *of record*, others *not of record*. A court of record is one where the acts and judicial proceedings are enrolled 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 (*e*). 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 (*f*). 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 courts of the sovereign, in right of the crown and royal dignity (*g*);] and therefore every court of record has authority to fine and imprison for contempt of its authority (*h*); while on

(*e*) As to records, vide sup. vol. I. p. 48.

(*f*) Co. Litt. 260; sup. vol. I. p. 498, n. (*d*).

(*g*) Finch, L. 231.

(*h*) 8 Rep. 38 b; Hawk. b. 2, c. 22, s. 1; Bac. Abr. Courts, E.; R. v. Clement, 4 B. & Ald. 233; R. v. Davidson, 5 B. & Ald. 337; R. v. James, *ibid.* 894. As to contempt of court generally, see Miller v. Knox, 4 Bing. N. C. 574; Doc. d.

Cardigan v. Bywater, 7 C. B. 794. The nature of the several courts of justice, and the extent of their power to fine and imprison for contempt, are also carefully examined in *Ex parte Fernandez*, 10 C. B. (N. S.) 1. As to a contempt committed in a *county* court, see 9 & 10 Vict. c. 95, s. 113; 12 & 13 Vict. c. 101, s. 2; Levy v. Moylan, 10 C. B. 189.

the other hand [the very erection of a new jurisdiction, with power of fine or imprisonment, makes it instantly a court of record (*i*).] But the common law courts *not* of record are of inferior dignity, and in a less proper sense the king's courts—and these are not intrusted by the law with any power to fine or imprison the subjects of the realm, unless by the express provision of some Act of parliament (*j*). And in these, [the proceedings not being enrolled or recorded, as well their existence, as the truth of the matters therein contained, shall, if disputed, be tried and determined by a jury (*k*).

In every court there must be at least three constituent parts, the *actor*, *reus*, and *judex*: the *actor*, or plaintiff, who complains of an injury done: the *reus*, or defendant, who is called upon to make satisfaction for it; and the *iudex*, 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 higher courts, to have attornies and counsel, as assistants.]

Of these last we have already found occasion, in other parts of this work, to make mention (*l*). But in reference more particularly to their connection with courts of justice, it is to be understood that an attorney at law, or, as he is called in the courts of equity, a solicitor [answers to the *procurator*, or proctor, of the civilians and canonists (*m*). And he is one who is put in the place, stead, or *turn* of another, to manage his proceed-

(*i*) See *Groenvelt v. Burwell*, Salk. 200; *Grenville v. College of Physicians*, 12 Mod. 388.

(*j*) *Dyson v. Wood*, 3 Barn. & Cress. 449.

(*k*) 2 Inst. 311; 8 Rep. 38 b; 11 Rep. 43 b; 3 Bl. Com. 24.

(*l*) As to attornies, vide sup. p. 323; as to counsel, sup. vol. i. p. 17.

(*m*) Pope Boniface the eighth, in 6 Decretal. l. 3, t. 16, s. 4, speaks of "*procuratoribus, qui in aliquibus partibus atornati nuncupantur.*"

[ings in a cause (*n*). Formerly every suitor was obliged to appear in person, to prosecute or defend his suit,—according to the old Gothic constitution (*o*),—unless by special licence under the king's letters patent (*p*).] And an infant or a married woman cannot to this day, in point of *form*, appear in court by attorney; but, even when an attorney is actually employed for them, should be described in the proceedings as appearing in person or by guardian, according to the nature of the case (*q*). [But, as in the Roman law, "*cum olim in usu fuisset, alterius nomine agi non posse, sed quia hoc non minimam incommoditatem habebat, ceperunt homines per procuratores litigare*" (*r*), so with us, upon the same principle of convenience, it is now permitted in general, that attornies may be made to prosecute or defend any action in the absence of the parties to the suit (*s*).] These attornies are now formed into a regular corps; they are admitted—as elsewhere explained at large (*t*)—to the execution of their office by the superior courts (*u*); [and are in all

(*n*) As to his responsibility in compromising a cause against the directions of his client, see *Fray v. Voules*, 1 E. & E. 839.

(*o*) *Stiernh. De Jur. Goth.* l. i. c. 6.

(*p*) F. N. B. 25.

(*q*) *Bro. Abr. t. Ideot*, 4; *Co. Lit.* 135 b; 2 *Saund.* 212, n. (4); *Beverley's case*, 4 *Rep.* 124 b; *Oulds v. Sansom*, 5 *Taunt.* 261. The same rule applies, it is said, to an *idiot*, though not to a lunatic. (See *Beverley's case*, *ubi sup.*; *Humphreys v. Griffiths*, 6 *Mee. & W.* 89.)

(*r*) *Inst. Lib.* 4, tit. 10.

(*s*) According to Blackstone this was first permitted by stat. Westm. 2, c. 10 (see 3 *Bl. Com.* 26). It was provided, however, by a previous

statute (statute of Merton, 20 Hen. 3, c. 10), that every freeman might make attorney in suit to the court of the county, tithing, hundred, and wapentake, or the court of his lord. And even in the time of Henry the second, a party who had appeared in person, might afterwards appoint an attorney (*responsalis*) to represent him thenceforth in the cause. (*Glan. lib. xi. c. 1.*)

(*t*) *Vide sup.* p. 323.

(*u*) So early as the statute 15 Edw. 2, regulations were made as to the admission of attornies; and by 4 Hen. 4, c. 18, it was enacted, that attornies should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty.

[points officers of the respective courts in which they are admitted (*v*); 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 (*x*).]

Of counsel, called, among the civilians, *advocates* (*y*), there are (as mentioned in a former place) two species or degrees: barristers and serjeants. We have seen that the [former are admitted after a considerable period of study, or at least standing, in the Inns of Court (*z*); and in our old books they are styled apprentices, *apprenticii ad legem*, being looked upon as merely learners, and not qualified to execute the full office of an advocate till they are of sixteen years' standing; at which time, according to Fortescue (*a*), they might be called to the state and degree of serjeants, or *servientes ad legem* (*b*). How ancient and honourable this state and degree is, hath been so fully displayed by many learned writers, that it need not be here enlarged on (*c*).] It is sufficient to observe,

(*v*) By 20 & 21 Vict. c. 77, s. 45, c. 85, s. 15, and by 22 & 23 Vict. c. 6, they are enabled to practise in the *Court of Probate*, in the *Court of Divorce*, and in the *High Court of Admiralty*.

(*w*) Some of these privileges are mentioned, post, p. 391.

(*y*) As to the college of advocates at Doctors Commons, vide post, p. 456.

(*z*) Vide sup. vol. I. p. 19.

(*a*) De LL. c. 50.

(*b*) A barrister, upon taking the degree of the *voif*, or becoming a serjeant, (a promotion conferred at the discretion of the lord chancellor, and for which no particular length of standing at the bar is now required,) retires from the inn of court by which he was called to the bar,

and becomes a member of *Serjeants' Inn*. In former times the serjeants occupied three Inns: Scroop's Inn, or Serjeants' Place, opposite St. Andrew's Church, Holborn; Serjeants' Inn, Fleet Street; and Serjeants' Inn (once called Faryndon Inn), Chancery Lane; but only the last remains at the present day a law society. In the Hall of this Inn, during term, the judges and serjeants dine together; and there the judges sit as *visitors* of the inns of court.

(*c*) Fortesc. c. 50; 10 Rep. pref.; Dugdal. Orig. Jurid.; Case of the Serjeants, 6 Bing. N. C. 235. To which may be added a tract by Serjeant Wynne, printed in 1765, entitled "Observations touching the Antiquity and Dignity of the

[that serjeants at law are bound, by a solemn oath, to do their duty to their clients (*d*): and that, by custom, the judges of the courts of Westminster are always admitted into this venerable order, before they are advanced to the bench (*e*).] From among the barristers and serjeants, some are usually selected, who are made by letters patent her majesty's counsel learned in the law; the two principal of whom are called her attorney and solicitor-general. [The first king's counsel under the degree of serjeant, was Sir Francis Bacon, who was so made *honoris causâ*, and without either patent or fee (*f*): so that the first of the modern order, (who are now the sworn servants of the crown,) seems to have been Sir Francis North, afterwards lord keeper of the great seal to King Charles the second (*g*). These 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 licence (*h*); in which restriction they agree with the advocates of the fisc (*i*): but in the imperial law the prohibition was carried still farther, 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 in private suits between subject and subject (*k*). A custom has of late years prevailed of grant-

"Degree of Serjeant at Law;" and "*Serviens ad Legem*," by Mr. Serjeant Manning. Et vide sup. vol. I. p. 17, n. (*n*).

(*d*) 2 Inst. 214.

(*e*) Fortesc. c. 50. Blackstone (vol. iii. p. 27) says that "the original of this was probably to qualify the puisné barons of the Exchequer to become justices of assize, according to the exigence of the statute 14 Edw. 3, c. 16."

(*f*) See his Letters, 256.

(*g*) See his Life by Roger North, 37.

(*h*) Hence a queen's counsel cannot plead in court for the defendant in a criminal prosecution, without a licence from the crown to plead in that particular case. This permission is never refused, but at one time could be procured only at an expense of about 9*l.*, which, however, is now reduced to about 2*l.* 2*s.*

(*i*) Cod. 2, 2, 1.

(*k*) Cod. 2, 7, 13.

[ing letters patent of precedence, to such barristers as the crown thinks proper to honour with that mark of distinction; whereby they are entitled to such rank and pre-
audience as are assigned in their respective patents (*l*);] which is [sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being (*m*). These rank promiscuously with the king's counsel, and sit together with them and the serjeants *within* the bar of the respective courts,] instead of sitting *without* it, as is the case with counsel in general (*o*): but they are not the sworn servants of the crown, and, consequently, without any licence had for that purpose, are at liberty to be retained in any cause against the crown. And all other barristers, and all serjeants (other than queen's serjeants) may [indiscriminately take upon them the protection and defence of

(*l*) 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 at the bar.

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| <p>1. The attorney-general. By royal mandate, 14th December, 1814, the attorney and solicitor-general are to have place and audience before the premier serjeant. (See 6 Taunt. 424.) In the time of Blackstone, they took rank after him, and also after the antient serjeant.</p> <p>2. The solicitor-general.</p> <p>3. The premier serjeant (so constituted by special patent).</p> <p>4. The antient serjeant, (or the first created among the queen's serjeants.)</p> <p>5. The queen's serjeants.</p> <p>6. The queen's counsel; and those who have patents of precedence.</p> <p>7. Serjeants at law.</p> | <p>8. The Recorder of London.</p> <p>9. Advocates of the civil law.</p> <p>10. Barristers.</p> <p>It is to be observed, that this list does not include the <i>queen's advocate</i>, whose rank seems to be not fully settled. He is, however, usually placed immediately after the attorney-general. See Manning's "<i>Serviens ad Legem</i>," pp. (19), (20). It may also be noticed, that when there is a <i>queen consort</i>, her attorney and solicitor-general rank with those king's counsel who have patents of precedence. (Seld. Tit. of Hon. 1, 6, 7.)</p> <p>(<i>m</i>) As to the privileges of serjeants not having patents of precedence, see <i>Memorandum</i> T. T. 1864, 16 C. B. (N. S.) 577.</p> <p>(<i>o</i>) In the court of Exchequer, two barristers, called the <i>post-man</i> and the <i>tub-man</i> (from the places in which they sit), have a precedence in motions. (See <i>R. v. Bishop of Exeter</i>, 7 Mee. & W. 188.)</p> |
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[any suitors, whether plaintiff or defendant (*p*); who are therefore called their *clients*, like the dependents upon the antient Roman orators. Those indeed practised *gratis*, for honour merely, or at most for the sake of gaining influence; and so likewise it is established with us (*q*) that a counsel can maintain no action for his fees (*r*); which are given, not as *locatio vel conductio*, but as *quiddam honorarium*; not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation (*s*). As it is also laid down with regard to advocates in the civil law (*t*), whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80*l.* of English money (*u*). And, in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to

(*p*) At one time, an exception to this existed as regards the Court of Common Pleas, the serjeants having the exclusive privilege of being heard in that court, at its sittings in *banco*. And though in 1834 a warrant issued under the sign manual, directing that this privilege should cease, yet the Court of Common Pleas refused to act upon its authority, and decided that, as the privilege was founded on immemorial usage, it could not be taken away by the warrant of the crown. (Case of the Serjeants, 6 Bing. N. C. 235.) However it was afterwards enacted by 6 & 7 Vict. c. 18, s. 61, that, in appeals to the Common Pleas from the revision courts, all barristers should be entitled to audience. And now by 9 & 10 Vict. c. 54, (see 3 C. B. 537,) it is provided generally, that all barristers, according to their respective rank and seniority, shall have equal right and privilege of practising, pleading, and audience, in the

Common Pleas, with the serjeants. See also 20 & 21 Vict. c. 85, s. 15, allowing all barristers to practise in the Court of *Divorce*; 21 & 22 Vict. c. 95, s. 2, allowing them to practise in the *Court of Probate*; and 22 & 23 Vict. c. 6, allowing them to practise in the *High Court of Admiralty*.

(*q*) Davis, pref. 22; 1 Ch. Rep. 38.

(*r*) It has been made a question whether the rule invalidates a *special contract* to pay a fixed sum of money, instead of the usual fees for professional services to be rendered. (See judgment of Erle, C. J., in *Kennedy v. Broun*, 13 C. B. (N. S.) 677.) In the analogous case of a *physician*, such an actual contract has been held capable of being enforced. (See *Veitch v. Russell*, 3 Q. B. 928.)

(*s*) Davis, 23.

(*t*) Ff. 11, 6, 1.

(*u*) Tac. Ann. 1, 11, 7.

[the unseemly licentiousness of prostitute and illiberal men, (a few of whom may sometimes insinuate themselves even into the most honourable 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 client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless (*v*): but if he mention an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured (*w*). And counsel guilty of deceit or collusion are punishable by the statute of Westminster the first (3 Edw. I. c. 28) with imprisonment for a year and a day, and perpetual silence in the courts; a punishment] that even in more modern times has been [inflicted for gross misdemeanors in practice (*x*).]

We shall close this chapter with a remark applicable both to attorneys and counsel, viz. that they possess the exclusive privilege of transacting business in the courts of justice in matters in which they are not personally concerned. For no man can conduct the practical proceedings in a cause to which he is himself not party, unless he be an attorney (*y*); nor is any man allowed to address the

(*v*) See *Hodgson v. Scarlett*, 1 B. & Ald. 232. But the subsequent publication of such matter is unlawful. (*Flint v. Pike*, 4 B. & C. 473.) As to the power and responsibility of counsel in binding their clients by arrangements entered into for them, in court, see *In re Hoblen*, 8 Beav. 101; *Mole v. Smith*, 1 Jac. & Walk. 673; *Swinfen v. Swinfen*, 18 C. B. 485; 1 C. B. (N. S.) 364; 24 Beav. 559; *Chambers v. Mason*, 5 C. B. (N. S.) 59; *Swinfen v. Lord Chelmsford*, 5 H. & N. 890; *Strauss v. Francis*, Law Rep., 1 Q. B. 379.

(*w*) *Brook v. Sir H. Montague*, Cro. Jac. 90.

(*x*) Ray. 376.

(*y*) See 6 & 7 Vict. c. 73, s. 2. Independently of their exclusive right of conducting the practical proceedings (or business out of court), it is by the attorneys alone that the counsel are retained and instructed to address the court;—it being unusual for the counsel to communicate for these purposes with the party himself. It has been decided, however, that there is no compulsory rule on this subject; and

court, in such a cause, unless he be either attorney or counsel (*z*). In the superior courts, indeed, the latter province belongs to counsel alone, exclusively even of the attorneys (*a*).

that it is governed only by the conventional usage of the bar, founded on considerations of propriety and convenience. (See the judgment of Lord Campbell, *Doe d. Bennett v. Hale*, 15 Q. B. 171.)

(*z*) It is to be noticed, however, that by 15 & 16 Vict. c. 54, s. 10, it is provided, as to the *county courts*, that any person, though not a barrister or attorney, may *by leave of the judge* address the court, on behalf of the plaintiff or defendant.

(*a*) *Collier v. Hicks*, 2 B. & Ad. 668. This privilege of counsel is of great antiquity. Notices of it occur in the reign of Henry the third. (*Plac. Ab.* 137; *Canc. Rot.* 22, temp. 32 Hen. 3; *Matt. Par. Hist.* p. 1077.) And it is probable that it was of much earlier date than

this. As to the extent of this privilege at *quarter sessions*, see *Ex parte Evans*, 9 Q. B. 279. We may remark here, that practising barristers and attorneys are, by 6 Geo. 4, c. 50, s. 2, exempt from serving on juries; and by 5 & 6 Vict. c. 109, s. 6, from serving as parish constables; and they are also exempt from the office of overseers. (See *Arch. Justice of the Peace, Poor*, 113.) Moreover, they are privileged from being arrested in civil cases, while attending the courts, *eundo, morando et redeundo*. See *Newton v. Constable*, 2 Q. B. 157; *Flight v. Cook*, 1 D. & L. 714; *Phillips v. Pound*, 7 Exch. 881; *Jones v. Marshall*, 2 C. B. (N. S.) 615; *Ex parte Cobbett*, 7 Ell. & Bl. 955.

CHAPTER IV.

OF THE COURTS OF GENERAL JURISDICTION—AND,
HEREIN, OF THOSE OF COMMON LAW AND EQUITY.

WE are next to consider the several species and distinctions of courts of justice, which are acknowledged and used in this kingdom. We may here take occasion to notice, that, on 18 Sept. 1867, a royal commission was appointed, authorized to enquire into and report upon the whole system of our courts of justice, with a view to their improved arrangement. And these are either such as are of public and general jurisdiction throughout the whole realm,—that is to say, the universally established courts of common law and equity (*a*), the ecclesiastical courts, and the courts maritime (*b*),—or else such as are only of a private and special jurisdiction in some particular parts of it. In the present chapter, we shall treat of such public courts as are courts of common law and equity.

[The policy of our antient 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 in the kingdom; wherein injuries were redressed, in an easy and expeditious manner, by the suffrage of neighbours and friends. These little

(*a*) As to the distinction between common law and equity, vide sup. vol. I. p. 84.

(*b*) The *ecclesiastical* and *maritime laws*, though founded on the imperial and canonical constitutions, are in one sense to be considered as

part of the *common law* of the realm (vide sup. vol. I. p. 63). It will be observed, however, that, in the distinction above laid down, they are distinguished, (as convenience usually requires,) from the *common law*.

[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 to determine such cases as, by reason of their weight and difficulty, demanded a more solemn discussion; the 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 (c).] These inferior courts for administration of justice on the spot, at least the name and form of them, still continue in our legal constitution: but as the superior courts have in practice obtained for the most part a concurrent original jurisdiction with the inferior (d); and as there is besides a power of removing plaints or actions from the latter to the former: upon these accounts (among others) it has happened that these petty tribunals have fallen into decay, and almost into oblivion; though one of them (as we shall presently see) has recently been selected as the stock on which to found a new species of inferior court, with an enlarged jurisdiction, and of a very efficient character.

[The order we shall observe in discoursing on these several courts, which have been constituted for the redress of *civil* injuries, (for with those of a jurisdiction merely *criminal* we are not at present concerned,) will

(c) Blackstone here remarks (vol. iii. p. 31), that a similar institution (which he considers as “highly agreeable to the dictates of natural reason, as well as of more enlightened policy”) prevailed in the Jewish Republic (see Exodus xviii.), and also in Mexico and Peru, before their discovery by the Spaniards. (See Mod. Un. Hist. xxxviii. 469; xxxix. 14.)

(d) It has however long been the rule, that an action in a superior court to recover a liquidated demand under 40s., will be stayed. (see *Nurden v. Fairbanks*, 5 Exch. 738); and other methods are also established to discourage actions below a certain value from being brought in the superior courts (vide post, p. 403).

[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 narrow limits; and so ascending gradually to those of the most extensive and transcendent power.

1. The Court-baron is a court incident to every manor in the kingdom, to be holden by the steward within the said manor (*e*). This court baron is of two natures (*f*): the one is a customary court, of which we formerly spoke, appertaining entirely to the *copyholders*, in which their estates are transferred by surrender and admittance, and other matters transacted relative to their tenures only (*g*.) The other, is a court of common law, held before the *freehold* tenants who owe suit and service to the lord of the manor, and are *pares* of each other, and bound by their feudal tenure to assist their lord in the dispensation of domestic justice; and of this court [the steward of the manor is rather the registrar than the judge. These two species of courts baron, though in their nature distinct, are frequently confounded together (*h*.)] The freeholders' court (with which alone, as being a court of *justice*, we are now concerned) was antiently held every three weeks; [and its most important business was to determine, by writ of right, all controversies relating to the right of lands within the manor (*i*.)] But this jurisdiction was greatly curtailed by 3 & 4 Will. IV. c. 27, s. 36, which abolished all real and mixed actions (except dower, *quare impedit*, and ejectment), and all plaints, except for dower or for free-bench; and now by 23 & 24 Vict. c. 126, s. 26, no writ of right for dower or plaint, for dower or free-bench, and no *quare impedit*, shall be brought in any court whatever; but, in cases where such would lie at the date of that Act, an action may be commenced by

(*e*) 4 Inst. 268.

(*h*) 3 Bl. Com. p. 34.

(*f*) Co. Litt. 58.

(*i*) Bl. Com. ubi sup.

(*g*) Vide sup. vol. I. pp. 227, 229.

writ of summons in the Court of Common Pleas. In addition to its jurisdiction in real actions, the court baron, at common law, may [also hold plea of any personal actions,—of debt, trespass on the case, or the like, —where the debt or damages do not amount to 40s. (*j*).] But the proceedings have been always liable to be [removed into the superior courts by writs of *pone*, or *accedas ad curiam*, according to the nature of the suit (*k*); and after judgment given, by a writ of *false judgment* requiring the courts at Westminster to rehear and review the cause (*l*);] and from these circumstances (which were found productive of great vexation and delay), and also by reason of the general inefficiency of the tribunal, the court baron has long fallen into almost entire disuse (*m*). And as it does not belong to the class of courts of record, it consequently falls within that provision of the 30 & 31 Vict. c. 142, which enacts, that from the date of that Act no action or suit which can be brought in any county court, shall thenceforth be commenced or be maintainable in any hundred or other inferior court not being a court of record (*n*).

II. [A Hundred court is only a larger court baron, being held for all the inhabitants of a particular hun-

(*j*) Finch, 248. Blackstone observes here (vol. iii. p. 34), that the same sum—*i. e.* three marks—bounded also the jurisdiction of the *stierding* courts, among the antient Goths; and he cites Stiernhook, *De Jure Goth.* l. i. c. 2.

(*k*) F. N. B. 4, 70; Finch, L. 444, 445. As to the practice on removal by writ of *pone*, see *Robinson v. Mainwaring*, 10 Q. B. 274.

(*l*) F. N. B. 18. As to writs of *false judgment*, see *Scott v. Bye*, 2 Bing. 344; *Walker v. Watson*, 8 Bing. 414; *Finch v. Brook*, 1 Bing. N. C. 253; *S. C.* 2 Bing. N. C. 324; *Overton v. Swettenham*, 3 Bing. N.

C. 786; 1 Man. & Gr. 41, n. (*u*); *Crookes v. Longden*, 5 Bing. N. C. 410; *Dempster v. Purnell*, 1 D. P. C. (N. S.) 168; *Brown v. Gill*, 3 D. & L. 823.

(*m*) By 9 & 10 Vict. c. 95, s. 14, provision is made enabling the lord of any hundred or of any honor, manor, or liberty, having any court in right thereof, in which debts or demands may be recovered, to surrender to her Majesty the right of holding such court; and after such surrender the court shall be discontinued.

(*n*) 30 & 31 Vict. c. 142, s. 28.

[dred, 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 (*o*). It likewise is no court of record; resembling the former in all points, except that in point of territory it is of a greater jurisdiction (*p*). This court is said by Sir Edward Coke to have been derived out of the sheriff's 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 (*q*); but its institution was probably coeval with that of hundreds themselves, which (as formerly observed) were derived from the polity of the antient Germans (*r*).] We may remark with respect to this court, that [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.] But in practice no resort to the hundred court has been made in recent times (*s*) and (as we have just seen) it is expressly mentioned in the recent statute as to the county courts as being in effect superseded by the modern tribunals of that name, of which we are presently to speak.

(*o*) As to the office of steward of the hundred court or court baron, see *Bradley v. Carr*, 3 Man. & Gr. 221.

(*p*) 2 Finch, L. 248; 4 Inst. 267. By 9 & 10 Vict. c. exxvi. the Hundred Court of *Salford* was made a court of record, with a constitution in general similar to that of a county court established under 9 & 10 Vict. c. 95.

(*q*) 2 Inst. 71.

(*r*) Vide sup. vol. I. p. 131. Blackstone remarks (vol. iii. p. 34), in reference to the *centeni*, or inhabitants of the *hundred* among the antient Germans, that Cæsar (De Bell. Gall. l. 6, c. 22) mentions the judicial power exercised by them in

their hundred courts:—“*Principes regionum, atque pagorum, inter suos jus dicunt, controversiasque minuunt.*” Blackstone cites, also, the following passage from Tacitus:—“*Eliguntur in consiliis et principes, qui jura per pagos vicosque reddunt: centeni singulis, ex plebe comites, consilium simul et auctoritas, adsunt*” (De Mor. Germ. c. 13); and adds, that in the Gothic constitution the hundred court was denominated *hæreda*. (Stiernhook, De Jure Goth. l. i. c. 22).

(*s*) As to the surrender to the Crown of the right of holding a hundred court for the recovery of debts or demands, vide sup. p. 396, note (*m*).

III. The sheriff's county court is a common law court existing in every county, and incident to the jurisdiction of that officer, as noticed in a former volume (*t*). It has never ranked as a court of record, but from the earliest times down to the year 1846 might hold pleas of debt or damages under the value of 40s. (*u*). It might also, by virtue of a special writ called a *justicies* (now totally out of use,) entertain all personal actions to any amount, [such 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 (*v*).] And it might also hold plea of many real actions, before such actions were abolished, as has just been mentioned (*w*). The freeholders of the county were the real judges in this court; the sheriff being the president only, and the officer to carry its decisions into execution (*x*). [The great conflux of freeholders, supposed always to attend at the county court,—which Spelman calls "*forum plebeia justitiæ et theatrum comitivæ potestatis*" (*y*),—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 are still there proclaimed; and why all popular elections which the freeholders are to make, —as formerly of sheriffs and conservators of the peace, and now of coroners, verderors (*z*) and knights of the shire,—must ever be made *in pleno comitatu*, or in full county court. By the statute 2 Edw. VI. c. 25, it was enacted that this court shall never be adjourned longer than for one month, consisting of twenty-eight days. And this was also the antient usage, as appears from the laws of King Edward the elder (*a*): "*præpo-*

(*t*) Vide sup. vol. II. p. 666.

(*u*) See 4 Inst. 266; Tinniswood
v. Pattison, 3 C. B. 243.

(*v*) Finch, 318; F. N. B. 152;
Com. Dig. (C.) 5, 7, 8.

(*w*) Vide sup. p. 395.

(*x*) 3 Bl. Com. p. 36.

(*y*) Gloss. *v. Comitatus*.

(*z*) As to these officers of the
royal forests, see Reg. *v. Conyers*, 8
Q. B. 981.

(*a*) C. 11.

[*situs* (that is, the sheriff) *ad quartam circiter septimanam frequentem populi concionem celebrato : cuique jus dicito : litesque singulas dirimito.*” In those antient times this county court was of great dignity and splendour; 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 (*b*). But its dignity became much impaired, when the bishop was prohibited and the earl neglected to attend it;] and in modern times but little resort to it has been had as a court for the recovery of debt or damages. And now its jurisdiction in this respect seems to be wholly superseded, by the creation of the modern courts of the same name, to which we are about to advert.

IV. The County Courts—the establishment of which took place as follows:—

The disuse into which the contentious jurisdiction of the sheriff’s county court gradually fell, was chiefly owing to the dilatory and expensive character of its proceedings, as applied to the recovery of demands of small amount; and as the remedy afforded by the superior courts was, in this respect, still more objectionable, this state of things gave rise, long since, to the formation of courts of *requests* or *conscience* (as they were indifferently called) in various parts of the kingdom by special Acts passed for that purpose. These local courts, however, proved in their turn inadequate to the purpose,—chiefly because confined to sums of too trivial an amount, and extending only to particular places or small districts (*c*).

(*b*) Wilkins’s Leg. Anglo-Sax. LL. Eadg. c. 5.

(*c*) The several courts of conscience or request then in existence were in effect abolished (subject only to a few exceptions) by 9 & 10 Vict. c. 95, and the Order in Council 9th May, 1847. It was also

afterwards provided, by 15 & 16 Vict. c. 54, s. 7, that on the petition of the council of any borough, or the majority of the ratepayers of any parish, within the limits of which any court of local jurisdiction other than a county court is established,—her Majesty may, by

And the necessity being generally felt of providing throughout the whole kingdom some satisfactory and uniform plan of proceeding (*d*) for recovery of all debts and demands below the amount which could conveniently be sued for in the superior courts,—it was conceived that for this purpose there might be advantageously established throughout the country at large, a system of inferior courts with better machinery and a more ample jurisdiction than those hitherto in use, which should have the name of county courts, as being in some sense a graft upon the common law court of that name (*e*). This design was carried out in the year 1846, and having been found upon the whole to work satisfactorily, the jurisdiction originally conferred on the tribunals then created has been largely increased in a variety of directions; and, in particular, an *equitable* jurisdiction has been now bestowed upon them in relief of the High Court of Chancery. Of the general system thus established by the 9 & 10 Vict. c. 95, and by the statutes subsequently passed for its amendment or extension (*f*), a short account shall here be given.

The Act of 9 & 10 Vict. c. 95, directed that this new plan of judicature should be established by her Majesty in council, in such counties as should be thought fit (*g*); which was accordingly done by an order in council of the 9th March, 1847; and by the same order,—as well as by

order in council, exclude the jurisdiction of such local court, throughout the whole, or any part, of the district of the county court, so far as matters within the jurisdiction of the county court are concerned.

(*d*) See preamble of 9 & 10 Vict. c. 95.

(*e*) It is, however, to be remarked, that, beyond the name common to both, there seems but little connection between the two, and that the districts of the new county courts are not made universally coincident

with the divisions of counties.

(*f*) These are 12 & 13 Vict. c. 101; 13 & 14 Vict. c. 61; 15 & 16 Vict. c. 54; 17 & 18 Vict. c. 16; 19 & 20 Vict. c. 108; 20 & 21 Vict. c. 36; 21 & 22 Vict. c. 74; 22 Vict. c. 8; 22 & 23 Vict. c. 57; 28 & 29 Vict. c. 99; 29 & 30 Vict. c. 14; 30 & 31 Vict. c. 142; 31 & 32 Vict. c. 71.

(*g*) 9 & 10 Vict. c. 98, s. 1. The courts of the universities of Oxford and Cambridge are exempted from the Act (sects. 1, 140, 141).

authority of the Lord Chancellor under a subsequent Act (*h*),—a certain number of *districts* are appointed in which county courts are to be held. In certain towns and places in each of the districts so appointed (*i*), the county court is held at least once in every calendar month, or at such other interval as is directed by the Lord Chancellor (*h*); and such court is constituted a court of record (*l*). These districts are assigned in unequal numbers to judges (*m*) who are chosen by the Lord Chancellor from amongst the serjeants and barristers-at-law; and for each district there are registrars (*n*) and other officers (*o*); and (by 30 & 31 Vict. c. 142) a plaint may be entered in the county court within the district of which the defendant, or one of the defendants, shall dwell or carry on business at the time of bringing the action or suit (*p*),—or (by leave of the judge or registrar) in the county court within the district in which he shall have dwelt or carried on business within six calendar months before,—or (by the like leave) in the county court in the district in which the cause of action wholly or in part arose, without regard to the place of residence or business of the defendant (*q*).

The county courts thus constituted have jurisdiction, primarily and principally, for the recovery of small debts and demands (*r*); and such jurisdiction includes generally

(*h*) 21 & 22 Vict. c. 74.

(*i*) 9 & 10 Vict. c. 95, s. 2. On 31st March, 1855, the number of districts was 495. These were divided into sixty circuits; for each of which there was a different judge.

(*h*) See 9 & 10 Vict. c. 95, ss. 2, 56; 30 & 31 Vict. c. 142, s. 19.

(*l*) 9 & 10 Vict. c. 95, s. 3.

(*m*) 21 & 22 Vict. c. 74, s. 2.

(*n*) See as to these officials 29 & 30 Vict. c. 14.

(*o*) 9 & 10 Vict. c. 95, s. 3, and see sects. 9, 23, 24, 31; 19 & 20 Vict. c. 108, ss. 6—17. A *deputy*

judge is allowed in case of the illness or unavoidable absence of the judge himself; (see 9 & 10 Vict. c. 95, s. 20; 19 & 20 Vict. c. 108, ss. 6—11.)

(*p*) As to the *metropolitan* districts, see 19 & 20 Vict. c. 108, s. 18; 30 & 31 Vict. c. 142, s. 3.

(*q*) 30 & 31 Vict. c. 142, s. 1, in substitution for 9 & 10 Vict. c. 95, s. 60.

(*r*) As to other jurisdictions since entrusted to the judges of these courts, vide post, p. 407, *u.* (*u*).

all actions where the debt, damage or demand claimed is not more than 50*l.*, whether on balance of account, or otherwise (*s*). But to this there are certain qualifications: for their jurisdiction does not extend to the action for recovery of land called an ejectionment, or to actions in which the title to any corporeal or incorporeal hereditaments shall be *bonâ fide* in question (*t*),—unless where the value or rent of the property in question shall not exceed 20*l.* per annum (*u*); nor to an action in which the title to any toll, fair, market or other franchise shall be *bonâ fide* in question (*x*); nor to an action in which the validity of any devise, bequest, or limitation, under will or settlement, may be disputed (*y*); nor to an action for a malicious prosecution, libel, slander, seduction, or breach of promise of marriage (*z*). However, *by agreement in writing of both parties*, the jurisdiction of the county court is also made capable of embracing any action whatever which may be brought in any superior court of common law (*a*). And by 30 & 31 Vict. c. 142, s. 10, the defendant in any action in a superior court for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort, may, under certain circumstances, obtain an order remitting the cause to be tried in a county court (*b*). In order moreover to promote the resort to

(*s*) 9 & 10 Vict. c. 95, s. 58; 13 & 14 Vict. c. 61; 19 & 20 Vict. c. 108, s. 24. As to the action of *replevin*, see 9 & 10 Vict. c. 95, s. 119; 19 & 20 Vict. c. 108, s. 66.

(*t*) 9 & 10 Vict. c. 95, s. 58.

(*u*) 30 & 31 Vict. c. 142, ss. 11, 12. Prior to these enactments, actions of ejectionment or involving title to corporeal or incorporeal hereditaments were altogether excluded from the county courts (9 & 10 Vict. c. 95, s. 58).

(*x*) 9 & 10 Vict. c. 95, s. 58.

(*y*) *Ib.* But an undisputed legacy,

or distributive share under an intestacy to the amount of 50*l.*, may be recovered in the county court. (9 & 10 Vict. c. 95, s. 65; 13 & 14 Vict. c. 61.) And this exception to its jurisdiction must be taken subject to the *equitable* jurisdiction conferred by 28 & 29 Vict. c. 99, as to which *vide post*, p. 406.

(*z*) 9 & 10 Vict. c. 95, s. 58.

(*a*) 19 & 20 Vict. c. 108, s. 28. See also sect. 25.

(*b*) The mode of obtaining *such* order is to make affidavit that the plaintiff has no visible means of

the county courts in cases of no considerable amount, it is enacted by 30 & 31 Vict. c. 142, s. 5, that, if in any action in a superior court of record the plaintiff shall recover,—whether by verdict, judgment by default, or on demurrer or otherwise,—no more than 20*l.* if the action is founded on contract, or 10*l.* if founded on tort; he shall not be entitled to any costs of suit unless the judge shall certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall, by rule or order, allow such costs (*c*); and, further (by sect. 7), that, in any action of contract in a superior court where the claim does not exceed 50*l.*, the defendant may call on the plaintiff to show cause why the action should not be tried in the county court; and, unless there be good cause shown, an order to that effect shall be made accordingly (*d*).

The Acts also regulate the course of the proceedings,—for the particulars of which we must refer to the enactments themselves, and the general rules and orders passed under their authority (*e*). We may, however, mention

paying the defendant's costs. But the plaintiff may avoid the order by giving security for such costs, or satisfying the judge that he has a cause of action fit to be prosecuted in the superior court. (30 & 31 Vict. c. 142, s. 10.)

(*c*) As to the case of an action by or against the judge or officer of a county court, see 19 & 20 Vict. c. 108, ss. 19—21; *Mann v. Bucherfield*, 20 L. J., Q. B. 265. See also 30 & 31 Vict. c. 142, s. 29, containing a similar enactment in regard to actions or suits brought unnecessarily in inferior courts other than the county court, and in which less than £10 shall be recovered.

(*d*) On the other hand, it is pro-

vided by 19 & 20 Vict. c. 108, s. 39, that if, in an action on contract commenced in a County Court, the plaintiff claims more than 20*l.*, or in an action of *tort* (that is, for wrong independent of contract) more than 5*l.*, and the defendant gives notice that he objects to the action being tried in such court, and gives security for the amount with costs,—all proceedings in the County Court shall be stayed.

(*e*) See the rules, orders and forms for regulating the practice of the County Courts, which came into force on 1st January, 1868; superseding, with a few exceptions the rules, orders and forms previously issued.

generally, that the first step in any suit in the county court, is to enter a *plaint* in a book kept by the registrar for the purpose (*d*), which is followed by a *summons*, served by the high bailiff of the court on the defendant (*e*); and upon the day in that behalf named in the summons the plaintiff must appear, and the defendant must also appear and answer; and, upon answer being made in court, the judge proceeds in a summary way to try the cause (*f*); and gives judgment upon such evidence—taken *vivâ voce* and upon oath—as the parties on either side shall adduce. And it is provided, that the judge, in all actions, shall determine all questions, as well of fact as of law, unless a jury shall be summoned (*g*). But when the amount claimed exceeds 5*l.*, a jury may be summoned, at the requisition either of plaintiff or defendant; and even where it does not exceed 5*l.*, a jury may be summoned, at discretion of the judge, on application of either of the parties (*h*),—such jury (in either case) to consist of five persons qualified to serve as jurors in the superior courts; and they must be unanimous in their verdict (*i*). When the judgment is for the plaintiff, and the order for payment is not complied with, execution may issue against the goods of the defendant; or, in cases of fraud or contumacy, he may be committed to prison for forty

(*d*) 9 & 10 Vict. c. 95, s. 59.

(*e*) *Ib.* By the 47th of the above “Rules and Orders,” the summons is to be dated on the day on which the plaint was entered, and its date is to be the *commencement of the suit*.

(*f*) 9 & 10 Vict. c. 95, s. 74. There are some few special matters of defence (*viz.*, set-off, infancy, coverture, statute of limitations and bankruptcy discharge), on which if the defendant intends to rely, he must give due notice to the registrar, by whom the same will be communicated to the plaintiff. (*Ibid.*

s. 76.) And if the action be brought for the price or value of goods sold and delivered to the defendant, to be dealt with in the way of his trade, profession or calling, the plaintiff may issue a special summons, and, unless the defendant shall give due notice of his intention to defend, may sign judgment for the amount of his claim, without establishing it by any proof. (30 & 31 Vict. c. 142, s. 2.)

(*g*) 9 & 10 Vict. c. 95, s. 69.

(*h*) *Ibid.* s. 70.

(*i*) *Ibid.* ss. 72, 73.

days (*h*), which imprisonment however is not to operate as an extinguishment of the cause of action. And if the amount recovered (exclusive of costs) exceeds 20*l.*, and there are no goods, the judgment may be removed into a superior court, and there enforced by the same modes of execution as a judgment originally obtained there (*l*).

Finally, we may observe that it is competent to the judge, after having given his decision, to accede, if he so think fit, to an application that there shall be a new trial, and may impose such terms as he shall think reasonable (*m*). And also, that (by 13 & 14 Vict. c. 61, s. 14), when the debt or damage claimed is above 20*l.*, an appeal to any of the superior courts of common law lies from the decision of the judge upon any matter *of law*, or upon the admission or rejection of any evidence (*n*): and that such appeal is to be heard in term time by the full court, or, out of term, by any two or more of the judges sitting as a court of appeal (*o*). But the appellant must give

(*h*) 9 & 10 Vict. c. 95, ss. 94, 98, 99. The defendant is, however, first summoned to show cause why he did not pay: and by 22 & 23 Vict. c. 57, the judge may not commit for the defendant's not attending or alleging a sufficient excuse, unless it shall appear that, on incurring the debt or liability, he obtained credit on false pretences, or by fraud, or breach of trust,—or wilfully incurred such debt or liability without having at the time a reasonable expectation of being able to pay or discharge the same,—or shall have made gift, delivery or transfer of any property, or charged, removed or concealed the same, with intent to defraud his creditors or any of them,—or has had since the judgment sufficient means and ability to pay, either altogether or by any instalments which the court has

ordered, and shall have refused or neglected to do so. And in reference to the last ground for commitment, it has been since enacted (by 24 & 25 Vict. c. 134, s. 105), that the judge is to take into his consideration all the debts and liabilities of the person summoned, and his conduct in disposing of his money or property since the judgment.

(*l*) 9 & 10 Vict. c. 95, s. 103; 12 & 13 Vict. c. 101, s. 1; 19 & 20 Vict. c. 108, s. 49.

(*m*) 9 & 10 Vict. c. 95, s. 89.

(*n*) By 30 & 31 Vict. c. 142, s. 13, an appeal, by leave of the judge, may be allowed in *any* action, if he shall think it reasonable and proper that an appeal shall be allowed.

(*o*) See 15 & 16 Vict. c. 54, s. 2; and 19 & 20 Vict. c. 108, s. 68; As to the appeal from the county court, see *The London and North*

security for the costs of the appeal, and, if he be defendant, for the amount also of the judgment; and no appeal will lie, if before the decision is pronounced both parties agree in writing that the decision of the judge shall be final(*g*).

The scope of these courts was at first confined in regard to their ordinary and litigious jurisdiction to such matters as could be concurrently brought in one of the superior courts of law; but, as their convenience became more appreciated, the opinion gradually gained ground that it would be desirable to confer on them an analogous jurisdiction in cases involving questions of equity where comparatively small interests were involved, which would otherwise have to be entertained, if at all, through the expensive and dilatory method of proceedings in the Court of Chancery. For this purpose there has now been passed the 28 & 29 Vict. c. 99, entitled "An Act to confer on the County Courts a limited Jurisdiction in Equity." Of this statute it would be improper here to give any detailed account, but it may be desirable to state that under its provisions the county courts have now (subject to an appeal to one of the Vice-Chancellors) all the powers and authority of the High Court of Chancery in the following matters(*r*). 1. Account or administration suits wherein the estate does not exceed in value the sum of 500*l*. 2. Suits for the execution of trusts in which the estate or fund shall not exceed the same amount. 3. Foreclosure and redemption suits, or for enforcing any charge or lien, where the mortgage

Western Railway Company, app. *v.* Grace, resp., 2 C. B. (N. S.) 555; Warner *v.* Riddeford, 4 C. B. (N. S.) 180; Carr *v.* Stringer, 1 Ell., Bl. & Ell. 123; Stone *v.* Dean, ib. 504.

(*g*) 19 & 20 Vict. c. 108, s. 69. As to *costs* in County Courts, see 19 & 20 Vict. c. 108, ss. 33–37, and the Scale of Costs appended to

the Rules and Orders of January, 1868. As to writs of *certiorari*, or *prohibition*, or *mandamus*, to those courts, 19 & 20 Vict. c. 108, ss. 38–44, 49, 67.

(*r*) 28 & 29 Vict. c. 99, s. 1. The Rules and Orders of January, 1868, contain also regulations for the equitable proceedings in County Courts.

charge or lien shall not exceed that sum. 4. Suits for specific performance, or for the rectification, of agreements where the property sold or leased does not exceed that amount in value (*s*). 5. Proceedings under the Trustee Relief Acts, with a similar qualification as to the value of the property. 6. Proceedings as to the maintenance or advancement of infants,—with a similar qualification. 7. Suits for the dissolution or winding-up of partnerships,—the assets not exceeding that amount. 8. Proceedings for orders in the nature of injunctions, arising out of the equitable jurisdiction conferred by the Act (*t*).

In addition to the jurisdiction already mentioned, the judges of the county courts have a variety of others,—comprising some of an original, and others of an auxiliary kind; but, as they are numerous and unconnected in general with the main object of these courts, viz. the recovery of small debts and demands, no specific account of them can here be attempted (*u*).

(*s*) See 30 & 31 Vict. c. 142, s. 9.

(*t*) By 30 & 31 Vict. c. 142, s. 8, provisions are made for the *transfer* of proceedings commenced in the High Court of Chancery to a County Court. It may also be noticed that, by sect. 26 of this last Act, any money paid into court in equitable proceedings is to be invested by the registrar, within forty-eight hours, in the post-office savings-bank of the town.

(*u*) The following enactments confer miscellaneous jurisdiction on the judges of the County Courts, in reference to their several objects:—14 & 15 Vict. c. 52 (The Absconding Debtors Arrest Act, 1851);—16 & 17 Vict. c. 51 (The Succession Duties Act, 1853);—c. 107 (The Custom Act, 1853);—c. 137 (The

Charitable Trusts Act, 1853)—17 & 18 Vict. c. 104 (The Merchant Shipping Act, 1854);—c. 112 (The Literary and Scientific Institutions Act, 1854);—18 & 19 Vict. c. 32 (Stannary Courts Amendment Act);—c. 63 (Friendly Societies Act);—c. 67 (Summary Procedure on Bills of Exchange and Promissory Notes Act);—c. 121 (The Nuisances Removal Act for England, 1855);—c. 122 (The Metropolitan Building Act, 1855); 17 & 18 Vict. c. 108, s. 73 (as to Receiving Acknowledgments of Married Women);—21 & 22 Vict. c. 70, s. 8 (The Designs Act, 1858);—c. 95, ss. 10, 13 (as to Probates and Administrations); 23 & 24 Vict. c. 136 (The Charitable Trusts Act, 1860);—24 & 25 Vict. c. 134 (The Bankruptcy Act, 1861);—25 & 26 Vict.

The several species of courts hitherto noticed have been considered in this place under the head of courts of *general* jurisdiction, because dispersed generally throughout the realm; but other courts fall under the same head, the jurisdiction whereof is not locally limited but applicable to the whole kingdom at large. Of which sort is,

IV. The Court of Exchequer,—the origin of which is as follows:—[By the antient Saxon constitution there was only one superior court of justice in the kingdom; and that court had cognizance both of civil and spiritual causes; viz., the *wittenagemote* or general council, which assembled annually or oftener, wherever the king kept his Christmas, Easter or Whitsuntide, as well to do private justice as to consult upon public business. At the Conquest the ecclesiastical jurisdiction was diverted into another channel; and the Conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown. He therefore established a constant court in his own hall, thence called by Bracton, and other antient authors, *aula regia* or *aula regis* (*x*). This court was composed of the king's great officers of state resident in his palace, and usually attended on his person: such as the lord high constable and lord mareschal, who chiefly presided in matters of honour 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 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

c. 87 (The Industrial and Provident Societies Act, 1862);—c. 89, s. 126 (The Companies Act, 1862);—30 & 31 Vict. c. 131 (The Companies Act, 1867);—31 & 32 Vict. c. 71 (The

County Courts Admiralty Jurisdiction Act, 1868).

(*x*) Lib. 3, tr. 1, c. 7. See also 3 Turn. Hist. Ang. Sax. p. 177.

[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*; 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 (y).

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 burthensome 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 Charta, and enacts, that "*communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo*" (z). This certain place was established

(y) Spelm. Gl. 331, 332, 333; Gilb. Hist. C. P. Introd. 17.

(z) Vide sup. vol. I. p. 16. "This precedent" (says Blackstone, vol. iii. p. 39) "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. (Mod. Un. Hist. xxiii. 396.) And thus also, in

[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 judge became so too, and a chief, with other justices, of the Common Pleas, was thereupon appointed; with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject. Which critical establishment of this principal court of common law, at that particular juncture and that particular place, gave rise (as formerly explained) to the inns of court in its neighbourhood; and, thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it.

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 the third. And in further pursuance of this example, the other several offices of the chief justiciar were, under Edward the First (who new modelled 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 mareschal 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

<p>“ 1495, the Emperor Maximilian “ the first, fixed the imperial cham- “ ber (which before always travelled “ with the court and household) to</p>	<p>“ be constantly held at Worms, from “ whence it was afterwards trans- “ lated to Spire.” (Ibid. xxix. 467.)</p>
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[justice between man and man was thrown into so provident an order, that the great judicial officers were made to form a check upon each other: the Court of Chancery issuing all original writs under the great seal to the other courts: the Exchequer managing the king's revenue; the Common Pleas being allowed to determine all causes between private subjects; and the Court of King's Bench retaining all the jurisdiction which was not cantoned out to other courts, and particularly the sole cognizance of pleas of the crown, or criminal causes (a).]

The Court of Exchequer, then, (to which our attention is at present particularly directed,) was at first [intended principally to order the revenues of the crown, and to recover the king's debts and duties (b);] though it has since acquired, and originally by usurpation (c),

(a) The King's Bench had also assigned to it the superintendence of both the other superior courts: as, after judgment given by either of these, it was to the King's Bench that recourse was to be had to correct any error *in law* that might be found in the proceedings. And this superiority it continued to retain until a recent period; but by 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, such errors in the Common Pleas or Exchequer, as well as those in the King's Bench itself, are now redressed exclusively in a court of separate jurisdiction, viz., the Court of Exchequer Chamber.

(b) 4 Inst. 103—116; see *Attorney-General v. Sewell*, 4 Mee. & W. 77.

(c) The nature of this usurpation was as follows:—By the original constitution of this court, to which it was incident, (as stated in the text,) to call the king's farmers and

debtors to account, such parties as these were privileged in their turn to sue and implead all manner of persons in the same court that they were themselves thus called into. For this purpose they resorted to a writ called a *quo minus*, in which the plaintiff suggested that he was the king's farmer or debtor, and that the defendant had 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. Afterwards, and by gradual connivance, this surmise of being debtor to the king was allowed to be inserted by persons who did not really stand in that capacity; and came to be considered as mere words of course, so as to open the court to all the nation equally. The same fiction was permitted on the equity side of the court; where any person might file a bill against another upon a bare suggestion that

the additional character of an ordinary court of justice between subject and subject. [It is called the Exchequer (*Scaccarium*), from the chequed cloth, resembling a chess-board, which covered the table there, and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters (*c*).] And it consists of two divisions, the *Receipt* of the Exchequer, which manages the royal revenue (*d*), and the *Court*, or *judicial* part of it, with which alone we are at present concerned.

This court was, from the time of the separation of the Exchequer from the *aula regia* down to a recent period, subdivided into a court of equity and a court of common law (*e*). But by statute 5 Vict. c. 5, all the power and jurisdiction of the Court of Exchequer as a court of equity, or otherwise than as a court of law or court of revenue was transferred to the Court of Chancery (*f*). The Court of Exchequer now therefore consists of a *revenue* side and of a common law or *plea* side (*g*). In the capacity of a court of law on the revenue side, it

he was the king's accountant,—a suggestion which was never controverted. This usurpation, as well as the analogous one in the Queen's Bench, (to be hereafter noticed,) long since ripened into an indefeasible and unquestionable title. And at length, by 2 Will. 4, c. 39, the writ of *quo minus* was abolished; and a new method substituted, giving a direct and proper jurisdiction to this court.

(*c*) 3 Bl. Com. p. 44.

(*d*) As to the receipt of the Exchequer, vide sup. vol. II. p. 563.

(*e*) See 3 Bl. Com. 45.

(*f*) As to the equitable jurisdiction of the Exchequer sitting as a court of *revenue* since this statute, see *Attorney-General v. Hallett*, 15

Mee. & W. 687. By 5 & 6 Vict. c. 86, certain offices on the revenue side are abolished; and the business theretofore transacted therein is transferred to *her majesty's remembrancer in the Exchequer*. See also 22 & 23 Vict. c. 21, regulating the office of Queen's remembrancer, and amending the practice and procedure on the revenue side of the Court of Exchequer, and 24 & 25 Vict. c. 92. Under these last Acts "general rules" were issued, which will be found printed in the 6th volume of the Exchequer Reports. See also 7 H. & N. 505.

(*g*) For regulations of the officers of this court on the plea side, see 2 & 3 Will. 4, c. 110.

ascertains and enforces, by proceedings appropriate to the case, the proprietary rights of the Crown against the subjects of the realm (*h*); in the capacity of a court of common law on the plea side, it administers redress between subject and subject in all actions personal, though not in real actions, viz. dower and *quare impedit* (*i*). It is a court of record; and its judges (or *barons*, as they are termed in this court) are six in number, one being termed the *chief* baron (*j*). Proceedings to correct any error that may be found in the judgment of this court may be taken into the Court of Exchequer Chamber; to which tribunal we shall have occasion more particularly to advert in the course of the present chapter.

V. The Court of Common Pleas—or, as it is sometimes technically called, the Court of Common Bench,—whose origin has been already explained, is also a court of record (*h*); and in that capacity takes cognizance of

(*h*) As to the procedure and practice in crown suits in the exchequer, see 28 & 29 Vict. c. 104. *Regulæ Generales* under this Act were issued in E. T. 1866. (See Law Rep., 1 Ex. 389.) It may be remarked that in any case in which the profit of the Crown comes in question, a cause commenced in another court may, on the application of the attorney-general, be removed into the Exchequer. (See *Attorney-General v. Hallett*, 15 Mee. & W. 97; *Adams v. Freemantle*, 2 Exch. 453; 23 & 24 Vict. c. 34, s. 4.)

(*i*) These are the only real actions now existing. But the Court of Exchequer has never had jurisdiction in actions of this class, which, as elsewhere observed, was formerly a very numerous one. Its jurisdiction includes *ejectment*,

which (as will be seen hereafter) is, as now subsisting, somewhat anomalous in its character.

(*j*) At the date of the passing the 31 & 32 Vict. c. 125 (the Parliamentary Elections Act, 1868), there were only five judges of this Court, but by that Act her Majesty was empowered to appoint to it an additional *puisné* judge. Mr. Selden (Tit. of Hon. 2, 5, 16,) conjectures the judges of this court “to have been antiently made out of such as were barons of the kingdom or parliamentary barons, and thence to have derived their name.”

(*h*) See 8 & 9 Vict. c. 34, abolishing the separate seal office of the Courts of Queen’s Bench and Common Pleas; and 13 & 14 Vict. c. 75, as to the fees to be received by certain officers of the Common Pleas.

all actions between subject and subject, without exception; including formerly the extensive class of real actions, of which it still retains the surviving species, viz. actions for dower and *quare impedit* (*h*). And over real actions, (which formerly excelled all others in importance,) it has always exercised an *exclusive* jurisdiction; as it did also over fines and recoveries, while these modes of assurance existed, and still does, over the forms of conveyance now substituted for them. Hence it has always been considered as the principal seat of learning relative to ordinary actions between man and man, and is styled by Lord Coke, the lock and key of the common law (*l*). It has not authority, however, like the Exchequer, in matters relating to the revenue; but, on the other hand, it has been in modern times entrusted by the legislature with an exclusive jurisdiction in appeals from the decisions of the revising barristers (*m*), and in cases under the “Railway and Canal Traffic Act, 1854” (*n*). It is, moreover, to this court that petitions against elections or returns are to be presented under the “Parliamentary Elections Act, 1868” (*o*). Its judges are six in number, one chief and five puisné justices (*p*), and from a judgment of this court proceedings in error may be taken into the Exchequer Chamber.

VI. [The Court of Queen’s Bench (*q*)—so called because the sovereign used formerly to sit there in person (*r*),—the style of the court still being *coram ipsâ reginâ*,]—is also a court of record, and the [supreme

(*h*) See 23 & 24 Vict. c. 126, s. 26.

(*l*) 4 Inst. 99.

(*m*) Vide sup. vol. II. p. 381.

(*n*) 17 & 18 Vict. c. 31, as to which vide sup. p. 293, n. (*a*).

(*o*) 31 & 32 Vict. c. 125.

(*p*) At the date of the 31 & 32 Vict. c. 125, they were five only,

but see sect. 11 of that Act.

(*q*) This court is called the King’s Bench in the reign of a king; and during the protectorate of Cromwell it was styled the Upper Bench.

The *Bail Court* is a branch of this court, constituted under 11 Geo. 4 & 1 Will. 4, c. 70, s. 1.

(*r*) 4 Inst. 78.

[court of common law in the kingdom. It consists of a chief justice and five *puisné* justices (*p*), who are, by their office, the sovereign conservators of the peace, and supreme coroners of the land. Yet, though the sovereign himself used to sit in this court, and still is supposed so to do, he did not, neither by law is he empowered (*q*) to, determine any cause or motion but by the mouth of his judges, to whom he has committed his whole judicial authority (*r*).

This court, which (as we have seen) 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 sovereign's person wherever he goes; for which reason all process issuing out of this court in the sovereign's name is returnable *ubicunque fuerimus in Angliâ*." It hath, indeed, for some centuries past, usually sat at Westminster, being an antient palace of the crown; but might remove with the sovereign to York or Exeter, if he thought proper to command it. And we find that, after Edward the first had conquered Scotland, it actually sat at Roxburgh (*s*).] And it is, more-

(*p*) At the date of 31 & 32 Vict. c. 125 (the Parliamentary Elections Act, 1868), there were *four* puisné justices only of this court, but see sect. 11 of that Act.

(*q*) The king used to decide causes in person, in the *Aula Regia*. "*In curiâ domini regis ipse in propriâ jura decernit.*"—(Dial. de Scacch. l. i. s. 4.) And James the first is said to have sat in the King's Bench in person, but to have been informed by his judges that he could not deliver an opinion.

(*r*) 4 Inst. 71. Lord Coke says, that the words in *Magna Charta*, c. 29, "*nec super eum ibimus, nec super eum mittemus nisi, &c.*,"

signify that we shall not sit in judgment ourselves, nor send our commissioners or judges to try him. (2 Inst. 46.) But that this is an erroneous construction of these words, appears from the *Magna Charta* granted by King John in the sixteenth year of his reign, which is thus expressed:—"Nec super eos per vim vel per arma ibimus, nisi per legem regni nostri, vel per judicium parium suorum." (See Introd. to Blackstone's Mag. Ch. p. xiii.—Christian's Bl. vol. iii. p. 41 (n.))

(*s*) M. 20, 21 Edw. 1; Hale, Hist. C. L. 200. Blackstone adds here, (vol. iii. p. 42,) "that the moveable

over, [especially provided in the *Articuli super Chartas*, 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 (*t*).

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 (*u*); the latter in the plea side of the court (*x*). 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 enjoys, (though originally by usurpation, as in the case of the Exchequer,) a general jurisdiction and cognizance over all actions between subject and subject, those of the real class only excepted (*y*). It does not meddle however

“ quality of this court, as well as
 “ its dignity and power, are fully expressed by Bracton, when he says
 “ (Lib. 3, c. 10) that the justices of
 “ this court are ‘*capitales, generales, perpetui, et majores; a latere regis residentes; qui omnium aliorum corrigere tenentur injurias et errores.*’ ”

(*t*) 28 Edw. 1, c. 5.

(*u*) See 6 & 7 Vict. c. 20, for abolishing certain offices on the crown side of the Queen's Bench, and regulating the crown office. This Act has been since amended by 23 & 24 Vict. c. 54.

(*x*) See 6 Geo. 4, c. 82, to abolish

the sale of offices in the Court of King's Bench, &c.

(*y*) The usurpation of the Queen's Bench originated as follows:—The jurisdiction of this court in civil actions was formerly confined to actions of trespass, or other injury alleged to be committed *vi et armis*. But 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, that is, of the prison keeper of the court. To make this privilege available against *any* defendant, the fiction was invented of surmising,

with matters of revenue. Proceedings in error may be taken from this court into the Exchequer Chamber (*z*).

The three courts last enumerated, when mentioned collectively, are usually described as the Superior courts of the common law (*a*): or when taken in connection with the Court of Chancery, to be presently mentioned, as the Superior courts generally, or the Courts at Westminster: where they are all in fact holden (*b*). And by these appellations they are usually distinguished from the courts of special jurisdiction, of which we are to speak hereafter; and also from the court baron, hundred court, and county courts, of which we spoke at the beginning of this chapter; all of which are described as Inferior courts, though discriminated from each other, as being either of record, or not of record (*c*). The judges

that the defendant had committed a breach of the peace in Middlesex or any other county in which the court sat, and in which it was consequently held to possess an extraordinary criminal jurisdiction; and by aid of this false suggestion, a writ, called a bill of Middlesex, or a writ of *latitat* founded on a bill of Middlesex (as the case might be), was issued against him; by virtue of which he was supposed to be committed to the custody of the marshal, so as to bring him within the jurisdiction of the court as to any personal action.

(*z*) This is the case not only in actions first commenced in the Queen's Bench, but also upon judgments in the Queen's Bench upon error from a county palatine. (*Nesbit v. Rishton*, 9 A. & E. 426.) It is the case, also, where error is brought upon an indictment. (*R. v. Wright*, 1 A. & E. 434.)

(*a*) The legislature has latterly adopted this appellation. (See 11 Geo. 4 & 1 Will. 4, c. 58; 3 & 4 Will. 4, c. 42; 1 & 2 Vict. c. 100; 9 & 10 Vict. c. 95, s. 78; 22 & 23 Vict. c. 63, s. 5, &c.) The term *superior court*, however, in its more antient, strict and technical application, has a wider meaning, and embraces the courts of the counties palatine (*Peacock v. Bell*, 1 Saund. 73), and also the courts of parliament (see *Howard v. Gossett*, 10 Q. B. 359) and the courts of assize (see *Ex parte Fernandez*, 10 C. B. (N. S.) 27).

(*b*) It is, however, to be understood that this statement must be taken as applying strictly only to the sittings of the common law courts *in bank*. And the Courts of Chancery, except on certain occasions, are held at Lincoln's Inn.

(*c*) Thus the county courts established under 9 & 10 Vict. c. 95,

of these superior courts of the common law are also often popularly called, by way of pre-eminence, the *Judges of the Land*, or simply the *Judges*; and though inferior in rank to the chief judge of the Court of Chancery, (or lord chancellor,) they are of high dignity and precedence,—taking rank before baronets, and being the constitutional advisers of the House of Lords on matters of law (*d*). They are now eighteen in number, that is, six for each court; but the number has varied considerably at different periods of our legal history (*e*). In modern times, indeed, it remained fixed for a long period, at twelve; but in consequence of the increase of business, an additional judge was appointed, about the beginning of the reign of Will. IV., to each of the three courts (*f*); and by 31 & 32 Vict. c. 125, a similar increase to their number was authorized in reference to the jurisdiction conferred upon them by that statute in the trial of election petitions (*g*). And it may be remarked that, previously to this last alteration, it was provided by 30 & 31 Vict. c. 68, that certain parts of the business of the courts which used to be disposed of by the

are not superior courts, though they are made courts of record. (*Levy v. Moylan*, 10 C. B. 210.) And from them an appeal lies, in certain cases, into any of the superior courts of law (vide sup. p. 405). Generally, from the inferior courts of record, and from the common law courts of the counties palatine, error lies into the Queen's Bench. (3 Bl. Com. 411; 1 Roll. Ab. 745; Carter, 222.) As to the removal into the superior courts of the judgments of inferior courts of record, in order to obtain more effectual execution, see 19 Geo. 3, c. 70, s. 4; 1 & 2 Vict. c. 110, s. 22. As to bailiffs of inferior courts generally, and execution under process thereof, 7 Vict. c. 19;

7 & 8 Vict. c. 96, s. 60, &c.; 8 & 9 Vict. c. 127. As to appointing assessors for the same, see 7 & 8 Vict. c. 96, s. 72.

(*d*) See the Table of Precedence, sup. vol. II. p. 652.

(*e*) Dugd. Orig. Jnrid. c. 18.

(*f*) See stat. 11 Geo. 4 & 1 Will. 4, c. 70, ss. 1, 2. The salary of the chief justice of the Queen's Bench is 8,000*l.* per annum, and of the chief justice of the Common Pleas and chief baron of the Exchequer respectively, 7,000*l.*, and of each of the puisné judges and barons, 5,000*l.* (2 & 3 Will. 4, c. 116; 14 & 15 Vict. c. 41.)

(*g*) See 31 & 32 Vict. c. 125, s. 11.

judges sitting in chambers, might be dealt with (in the first instance, and subject to an appeal to a judge,) by the *Masters* of the courts, under general rules issued for that purpose (*h*). The judges of the land are all created by the queen's letters patent, by which their precedency is declared, as mentioned in a former volume (*i*); and by 12 & 13 Will. III. c. 2, and 1 Geo. III. c. 23, they are not liable to removal, except upon address of both houses of parliament (*j*).

VII. [The High Court of Chancery is the only remaining, and in matters of civil property by much the most important of any of the 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 cancelling the king's letters-patent when granted contrary to law, which is the highest

(*h*) See Reg. Gen. M. T. 1867; and as to the Masters of the courts, see 7 Will. 4 & 1 Vict. c. 30. It may be observed here that the jurisdiction assigned by the above rules to the masters extends generally to all *chamber* business except in matters relating to the liberty of the subject, and except also (unless by consent of parties) in respect of certain other matters. The matters so excepted include criminal proceedings, removal of causes, prohibitions and injunctions, compulsory references, interpleader, discovery, reviewing taxation, staying proceedings after verdict, taking acknowledgments of married women, giving leave to sue *in formâ pauperis*, and making charging orders.

(*i*) Vide sup. vol. II. p. 653.

(*j*) As to the judges and officers

of the superior courts of common law collectively, certain enactments, relating to the following subjects, may also be noticed:—

Chamber business, 11 Geo. 4 & 1 Will. 4, c. 70; 1 & 2 Vict. c. 45; *Commissioners for taking oaths*, 22 Vict. c. 16; *Court fees* 3 Geo. 4, c. 69; 11 Geo. 4 & 1 Will. 4, c. 58; 7 Will. 4 & 1 Vict. c. 30, s. 6; 13 & 14 Vict. c. 75; 28 & 29 Vict. c. 45; 29 & 30 Vict. c. 101; *General rules and orders*, 3 & 4 Will. 4, c. 42, s. 1; 1 & 2 Vict. c. 100; 13 & 14 Vict. c. 16; 15 & 16 Vict. c. 76, ss. 223, 225; 17 & 18 Vict. c. 125, s. 97; 18 & 19 Vict. c. 26; 23 & 24 Vict. c. 126, s. 37; 30 & 31 Vict. c. 61; *Nisi prius officers*, 15 & 16 Vict. c. 73; *Surplus fees appropriation*, 30 & 31 Vict. c. 122; *Vacation sittings in banc*, 1 & 2 Vict. c. 32.

[point of his jurisdiction (*j*). 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 superintendence 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, when seals came in use, he had always the custody of the sovereign's great seal. So that the office of chancellor, or lord keeper, (whose authority, by statute 5 Eliz. c. 18, is declared to be exactly the same,) is with us at this day created by the mere delivery of the Great Seal into his custody (*k*); 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, (if of the peerage,) to every temporal lord (*l*). His salary is 10,000*l.* per annum (*m*). [He is a privy councillor by his office (*n*); and, according to Lord Chancellor Ellesmere, prolocutor (or speaker) of the House of Lords by prescription (*o*).

(*j*) 4 Inst. 88.

(*k*) Lamb. Archcion, 65; 1 Roll. Abr. 385.

(*l*) Stat. 31 Hen. 8, c. 10, ss. 4, 8. See the Table of Precedence, sup. vol. II. p. 652, where it is stated (on the authority of Blackstone) that the Lord Chancellor comes imme-

diately after the Archbishop of Canterbury.

(*m*) 14 & 15 Vict. c. 82, s. 17; 15 & 16 Vict. c. 87, s. 16.

(*n*) Selden, Office of Lord Chancellor, sect. 8.

(*o*) Of the Office of Lord Chancellor, edit. 1561.

[To him, (under the crown,) belongs the appointment of all justices of the peace throughout the kingdom (*p*). Being formerly usually an ecclesiastic, (for none else were then capable of an office so conversant in writings,) and presiding over the royal chapel (*q*), he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of royal foundation; and patron of all the king's livings] of the value of 20*l.* per annum or under, in the king's books (*r*). [He is also 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] formerly [in the Exchequer, there are two distinct tribunals; the one ordinary, being a court of common law] and of record; the other extraordinary, being a court of equity and not of record (*s*).

[The ordinary legal court here referred to is much more antient than the court of equity. Its jurisdiction

(*p*) In the case of magistrates for the county he usually makes these appointments on the nomination of the lord lieutenant (vide sup. vol. II. p. 683).

(*q*) Madox, Hist. of Exchequer, 42.

(*r*) This limit is stated by Blackstone (vol. iii. p. 48) as "under the value of twenty marks;" and he cites 38 Edw. 3; 3 F. N. B. 35. But, according to Mr. Christian, (who cites Gibs, 764, and 1 Burn's Ecc. Law, 129), since the new valuation of benefices in the time of Henry the eighth, it has been considered as 20*l.* per annum or under, probably on the ground that the twenty marks temp. Edward the third were equivalent to 20*l.* temp. Henry the eighth. And see Lord Chancellor's

case, Hobart, 214. As to the *sale* of certain livings the patronage whereof is vested in the lord chancellor for the time being under 26 & 27 Vict. c. 120, vide sup. p. 106.

(*s*) No court can be a court of record in the proper and technical sense, unless it has been ranked as such from time immemorial; or has been made such by the express provision of some act of parliament. The High Court of Chancery, on the equity side, is in no such predicament, and therefore, notwithstanding its high dignity, is no court of record. (4 Inst. p. 84.) It is, however, noticeable that the county courts, which have now a concurrent though limited equitable jurisdiction, are made courts of record by express enactment. (Vide sup. p. 401.)

[is to hold plea upon a *scire facias* to repeal and cancel the king's letters-patent, when made against law, or upon untrue suggestions (*t*); and to hold plea of petitions, *monstrans de droit*, traverses of offices, and the like; when the sovereign has been advised to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right (*u*). On proof of which, as he can never 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.] The Court of Chancery on this common law side, in the times of the military tenures, [might likewise hold plea (by *scire facias*) of partitions of lands in co-parcenary and of dower,—where any ward of the crown was concerned in interest (*x*).] Suits or proceedings, however, on the common law side of the Court of Chancery, are rare (*y*); and it is provided by 12 & 13 Vict. c. 109 (ss. 32, 33), that where any issue (or question), either of fact or law, arises in any action, suit or proceedings there, a transcript of the record in chancery in which such issue is contained may be sent into one of the superior courts of the common law, to be there determined; that is to say, if it be an issue in fact, to be tried by a jury; and if an

(*t*) See 12 & 13 Vict. c. 109; 15 & 16 Vict. c. 83.

(*u*) 4 Rep. 54. As to suits proceeding from or affecting the crown, vide post, vol. IV. p. 71.

(*x*) Co. Litt. 171; F. N. B. 62; Bro. Abr. tit. Dower, 66; Moor, 565. Blackstone adds (vol. iii. p. 49), "as it now may also do of the tithes of forest land, where granted by the king, and claimed by a stranger against the grantee of the crown; and of executions on statutes, or recognizances in nature thereof, by the statute 23 Hen. 8,

"c. 6," and he cites Bro. Abr. tit. Dismes, 10, and 2 Roll. Abr. 469.

(*y*) Blackstone (vol. iii. p. 49), remarks, "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 being brought therefrom since the 14 Eliz. A.D. 1572." He also says that such writ of error lies to the Queen's Bench, and disagrees with an opinion to the contrary of Lord Keeper North in 1682, which is reported in 1 Vern. 131, and 1 Eq. Ca. Ab. 129.

issue in law, to be determined by the court itself, according to the ordinary course of proceeding before those jurisdictions (*a*).

[In this ordinary, or legal, court is also kept the *officina justitiæ*; out of which all original writs that pass under the Great Seal (*b*),—all commissions of charitable uses, sewers, idiotcy, 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 debito justitiæ*, any writ that his occasions may call for. These writs (relating to the business of the subject), and the returns to them, were, according to the simplicity of antient 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 parvâ bagâ*; and thence hath arisen the distinction of the *hanaper* office (*c*), and *petty bag* office (*d*), which both belong to the common law court in Chancery.]

But the extraordinary Court of Chancery, or court of equity, is now become by far of the greatest judicial consequence. Its province (as may be inferred from its appellation) is to administer that large portion of our law which, as we have elsewhere explained, is distinguished

(*a*) As to the construction of this Act, see *Garrard v. Tuck*, 8 C. B. 258. It may be noticed here, that by 21 & 22 Vict. c. 27, it is made lawful for the Court of Chancery, if it shall think fit, to cause any question of fact arising in any suit or proceeding to be tried by a special or common jury before the court itself.

(*b*) By 12 & 13 Vict. c. 109, s. 11, a seal is to be provided, to be called "*The Chancery Common Law Seal*," and by sect. 14, all such

writs, &c., as used to issue out of the petty bag office under the *Great Seal* (except certain writs and instruments particularly specified), shall in future be under "*The Chancery Common Law Seal*."

(*c*) As to the *comptrollers of the hanaper*, see 5 & 6 Vict. c. 103, transferring their duties to other officers.

(*d*) As to this office, see *Baddeley v. Denton*, 1 L. M. & P. 172; *Still v. Booth*, *ibid.* 440.

from the common law, by the term *equity* (*e*). [This distinction between law and equity, as administered in different courts (*f*), is not at present known, nor seems to have ever been known, in any other country, at any time (*g*); and yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans (*h*); the *jus prætorium*, or discretion of the prætor, being distinct from the *leges*, or standing laws (*i*); but the power of both centred in one and the same magistrate, who was equally intrusted to pronounce the rule of law, and to apply it to particular cases, by the principles of equity. 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. For though equity is mentioned by Bracton (*k*), as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton, (composed under the auspices and in the name of Edward the first, and treating particularly of courts and their several juris-

(*e*) As to equity, see also sup. vol. I. p. 84.

(*f*) This anomaly of administering equity and law in distinct courts, is approved by Lord Bacon. (See *De Ang. Scient. lib. viii. ch. 3, app. 45.*)

(*g*) The *council of conscience*, instituted by John the third, 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.

(*h*) Thus too the court of session in Scotland, and every 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 Kaims, *Hist. Law Tracts*, i. 325, 330; *Princ. of Equit.* 44.)

(*i*) Thus Cicero: "*jam illis promissis non esse standum, quis non videt, quæ coactus quis metu et deceptus dolo promiserit? Quæ quidem pleraque jure prætorio liberantur, nonnulla legibus.*"—*Offic. l. i. x.*

(*k*) *L. ii. c. 7, fol. 23*; also *f. 3 a, s. 5*; see *Plowd. 467.*

[dictions,) is there a syllable to be found relating to the equitable jurisdiction to the Court of Chancery.] Nor is it very clear in what manner or under what circumstances that anomaly was first established in this country (*l*). But it was probably the result of the rude and imperfect constitution of our courts of the common law, which derived their authority in each case from the king's *original writ*, issued at the commencement of the suit, in some fixed and antient form,—so that they found, or supposed, themselves unable to afford any remedy beyond what the writ so issued specifically required or authorized. For it seems that, owing to this cause, there was a frequent failure of justice in the common law courts: and that, under such circumstances, [the application 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, which was virtually abolished by the statute 16 Car. I. c. 10 (*m*); 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* (*n*), but also after its

(*l*) Some interesting information as to the early history of the Court of Chancery and the growth of its jurisdiction, will be found in the Introduction to Lord Campbell's Lives of the Chancellors; and in Spence on the Equitable Jurisdiction of the Court.

(*m*) The matters cognizable in this court, immediately before its dissolution, were "almost all suits, " that by colour 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. See also Camden on the Law Courts.)

(*n*) "*Nemo ad regem appellet pro aliqua lite, nisi jus domi consequi non possit. Si jus nimis severum sit, alleviatio deinde queratur apud regem.*"—LL. Edg. c. 2.

[dissolution, in the reign of King Edward the first (*o*); and perhaps during its continuance, in that of Henry the second (*p*).

In these early times the chief judicial 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 antient precedent, it was provided by statute of Westminster the second, (13 Edw. I. c. 24,) that “whensoever from thenceforth in one case a writ shall be found in the Chancery, and in a like case, falling under the same right and requiring the like remedy, 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 (*q*), 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 (*r*). 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*) Lambard. Archeion, 71.

(*p*) Johannes Sarisburiensis, (who died A.D. 1182, in the twenty-sixth year of Henry the second,) 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.*”

(*q*) A great variety of new precedents of writs, in cases before unprovided for, are given by this very statute of Westminster the second.

(*r*) Lamb. Archeion, 61.

[except that of obtaining a discovery by the oath of the defendant (*s*).

But when, about the end of the reign of King Edward the third, uses of land were introduced (*t*),—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 (*u*); and John Waltham, who was bishop of Salisbury and chancellor to King Richard the second, (by a strained interpretation of the above-mentioned statute of Westminster the second,) devised a writ of *subpœna*, returnable to the Court of Chancery only, to make the feoffee to uses accountable to his *cestui que use*; which process was afterwards extended to other matters wholly determinable at the common law, upon false and fictitious suggestions; for which, therefore, the chancellor himself was, by statute 17 Rich. II. c. 6, directed to give damages to the party unjustly aggrieved. But, as the 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*, as a spiritual offence against conscience, in case of non-payment of debts or any breach of civil contracts (*x*); till checked by the Constitutions of Clarendon (*y*), which declared that, “*placita de debitis, quæ fide interposita debentur, vel absque interpositione fidei, sint in justitiâ regis* :”—therefore probably the ecclesiastical chancellors, who then held the seals, were remiss in abridging their own

(*s*) Blackstone (vol. iii. p. 52) remarks that this was also the opinion of Fairfax, a very learned judge in the time of Edward the fourth, who says, “*Le subpœna ne serroit my cy soventement use come il est ore, si nous attendomus tiels actions sur les cases, et main- teinomus le jurisdiction de ceo*

“*court, et d’auter courts*.”—(Year B. 21 Edw. 4, 23.)

(*t*) Vide sup. vol. I. p. 360.

(*u*) Spelm. Gloss. 106; R. v. Standish, 1 Lev. 242.

(*x*) Lord Lyttelt. Hen. 2, Book 3, p. 361, note.

(*y*) 10 Hen. 2, c. 15; Speed. 468.

[new-acquired jurisdiction; especially as the spiritual courts continued (*z*) to grasp at the same authority as before, in suits *pro læsione fidei*, so late as the fifteenth century (*a*), till finally prohibited by the unanimous concurrence of all the judges. However, it appears from the parliamentary rolls (*b*), that in the reigns of Henry the fourth and fifth, 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 the fourth, being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the statute, 4 Henry IV. c. 23, whereby judgments at law are declared irrevocable unless by attainr or writ of error, yet his son put a negative at once upon their whole application: and in Edward the sixth's time, the process by bill and *subpœna* was become the daily practice of the court (*c*).

But this did not extend very far: for in the antient treatise, entitled *Diversité des Courtes* (*d*), supposed to be

(*z*) In the fourth year of Henry the third, suits in courts christian, *pro læsione fidei* upon temporal contracts, were adjudged to be contrary to law. (Fitzh. Abr. tit. Prohibition, 15.) But in the statute or writ of *circumspectè agatis*, supposed by some to have issued in the thirteenth year of Edward the first, but more probably (3 Pryn. Rec. 336) in the ninth year of Edward the second, suits *pro læsione fidei* were allowed to the ecclesiastical courts; according to some antient copies, (Berthelet, Stat. Antiq. Lond. 1531, 90*b*; 3 Pryn. Rec. 336,) and the common English translation

of that statute; though in Lyndewood's copy, (Prov. l. 2, t. 2,) and in the Cotton MS. (Claud. D. 2), that clause is omitted.

(*a*) Year Book, 2 Hen. 4, 10; 11 Hen. 4, 88; 38 Hen. 4, 29; 20 Edw. 4, 10.

(*b*) Rot. Par. 4 Hen. 4, Nos. 78 and 110; 3 Hen. 5, No. 46, cited in Prynne's Abr. of Cotton's Records, 410, 422, 424, 548; 4 Inst. 83; 1 Roll. Abr. 370, 371, 372.

(*c*) Rot. Parl. 14 Edw. 4, No. 33 (not 14 Edw. 3, as cited 1 Roll. Abr. 370, &c.)

(*d*) Tit. Chancery, fol. 296, Rastell's edit. A.D. 1534.

[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. No regular judicial system at that time prevailed in the court; but the suitor, when he thought himself aggrieved, found a desultory and uncertain 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 the third in 1372 and 1373 (*e*), to the promotion of Sir Thomas More by King Henry the eighth, in 1530. After which the Great Seal was indiscriminately committed to the custody of lawyers, or courtiers (*f*), or churchmen (*g*), 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 intrusted to Dr. Williams, then Dean of Westminster, but afterwards bishop of Lincoln; who had been Chaplain to Lord Ellesmere, when chancellor (*h*).

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,

(*e*) Spelm. Gloss. 111; Dugd. Chron. Ser. 50.

(*f*) Wriothesley, St. John, and Hatton.

(*g*) Goodrick, Gardner, and Heath.

(*h*) Biog. Brit. 4278.

[obtained by gross fraud and imposition (*i*). This matter being brought before the king, was by him referred to his learned counsel for their advice and opinion; who reported so strongly in favour of the courts of equity (*k*), that his majesty gave judgment on their behalf: but, not contented with the irrefragable 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 (*l*). Sir Edward Coke submitted to the decision (*m*), and thereby made atonement for his error: but this struggle, together with the business of *commendams*—in which he acted a very noble part (*n*),—and his controlling the commissioners of sewers, were the open and avowed causes, first of his suspension, and soon after of his removal, from his office (*o*).

Lord Bacon, who succeeded Lord Ellesmere, reduced

(*i*) Bacon's Works, iv. 611, 612, 632.

(*k*) Whitelocke of Parl. ii. 390; 1 Chan. Rep. Append. 11.

(*l*) "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 honour, &c."—1 Chan. Rep. App. 26.)

(*m*) See the entry in the Council Book, 26th July, 1616 (Biogr. Brit. 1390).

(*n*) 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 pro-

ceed 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.)

(*o*) See Lord Ellesmere's speech to Sir Henry Montague, the new chief justice, 15th November, 1616. (Moor's Reports, 828.) However, Sir Edward might probably have retained his seat, if, during his suspension, he would have complimented Lord Villiers, (the new favourite,) with the disposal of the most lucrative office in his court. (See Biogr. Brit. 1391.)

[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 the first, 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 nearly twenty years; and afterwards to the Earl of Shaftesbury, who, (though a lawyer by education,) had never practised at all. Sir Heneage Finch, who succeeded, in 1673, 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 (*p*).]

(*p*) In recent times, a great variety of enactments have been passed for the improvement of the High Court of Chancery in reference chiefly to the following subjects:—*Abolition of offices*, 2 & 3 Will. 4, c. 111; 5 & 6 Vict. c. 103; *Admi-*

nistration of oaths, 11 & 12 Vict. c. 10; 16 & 17 Vict. c. 78; *Chamber business*, 30 & 31 Vict. c. 87; *Common law side*, 12 & 13 Vict. c. 109; *Judges of appeal*, 14 & 15 Vict. c. 83; 30 & 31 Vict. c. 64; 31 & 32 Vict. c. 11; *Office of examiner*,

The judicial duties of this court of equity have been long shared in some measure by an officer of high rank, called the Master of the Rolls, originally appointed only for the superintendence of the writs and records appertaining to its common law department (*q*), but accustomed also to sit on the equity side as a separate, though subordinate judge (*r*). [Concerning his authority to hear and determine causes, and his general power in the Court of Chancery, there were formerly divers questions and disputes very warmly agitated; to quiet which, it was declared by 3 Geo. II. c. 30, 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 (*s*).] And by a modern enactment, 3 & 4 Will. IV. c. 94, s. 24, the Master of the Rolls (subject to the same qualification) is specially directed to hear motions, pleas and demurrers, as well as causes generally, which shall be set down for hearing before him. The vast increase of business, however, to which reference has been already made, and the

16 & 17 Vict. c. 22; *Persons in contempt and pauper defendants*, 23 & 24 Vict. c. 149; 27 & 28 Vict. c. 15; *Pleading, practice, and procedure*, 3 & 4 Vict. c. 94; 4 & 5 Vict. c. 52; 5 Vict. c. 5; 8 & 9 Vict. c. 105; 13 & 14 Vict. c. 35; 15 & 16 Vict. c. 86; 17 & 18 Vict. c. 100; 18 & 19 Vict. c. 134; 21 & 22 Vict. c. 27; 25 & 26 Vict. c. 42; *Relief of suitors*, 15 & 16 Vict. c. 87; 16 & 17 Vict. c. 98; *Service of process*, 2 Will. 4, c. 33; *Vice-chancellors*, 5 Vict. c. 5, s. 19; 14 & 15 Vict. c. 4; 15 & 16 Vict. c. 80, ss. 52—58.

(*q*) 4 Inst. 82.

(*r*) The Master of the Rolls was at one time the chief of a body of

officers of the court (with certain judicial as well as administrative powers) called the *Masters in Chancery*, among whom was included the *accountant-general*. This last-mentioned office is still preserved, but the other Masters in Chancery were abolished by 15 & 16 Vict. c. 80, s. 59, with certain temporary reservations (as to which see 17 & 18 Vict. c. 100; 23 & 24 Vict. c. 149, s. 1).

(*s*) 3 Bl. Com. 450. See 7 Will. 4 & 1 Vict. c. 46, as to the salary of the Master of the Rolls, and 1 & 2 Vict. c. 94, which vests in him the custody of all the public records.

progress of which has been particularly marked during the last half-century, having at length become such as to render the antient force of the Court of Chancery wholly inadequate to the labours it had to perform, it was found necessary, in the year 1813, to appoint another assistant to the Lord Chancellor in his judicial functions, under the title of Vice-Chancellor of England (*t*); and after the transfer to the Court of Chancery, in the year 1841, of the equity business of the Exchequer, two more Vice-Chancellors were added to its judicial list (*u*); and each of these sits, (like the Master of the Rolls,) separately from the Lord Chancellor. A further addition has now also been made (*x*), of two judges called the lords justices of the *Court of Appeal* in Chancery (*y*); which court is to consist of the Lord Chancellor together with these judges, and possesses all the jurisdiction exercised by the Lord Chancellor himself, so far as his judicial business in Chancery is concerned, without prejudice, however, to his right to sit, as formerly, alone. To this court,—the powers of which may be exercised, not only by its full body, but by either of its judges, together with the Lord Chancellor, or by both the judges, (or for some purposes by either of them sitting separately,) apart from the Lord Chancellor (*z*),—an appeal from the Master of the Rolls, or from any of the Vice-Chancellors, may be referred; or such appeal may be entertained by the Lord Chancellor sitting alone in his proper jurisdiction; and from these jurisdictions, an ultimate appeal lies to the House of Lords.

(*t*) See 53 Geo. 3, c. 24.

(*u*) See 5 Vict. c. 5, s. 19; 14 & 15 Vict. c. 4; and 15 & 16 Vict. c. 80, ss. 52—58.

(*x*) See 14 & 15 Vict. c. 83, and 30 & 31 Vict. c. 64.

(*y*) The Court of Appeal in Chancery entertains (among other matters) appeals in *bankruptcy* (see

12 & 13 Vict. c. 106, s. 12; 14 & 15 Vict. c. 83, s. 7; 24 & 25 Vict. c. 134, ss. 66, 214). The lords justices, moreover, if belonging to the Privy Council, are members of the *Judicial Committee* of that body.

(*z*) See 30 & 31 Vict. c. 64, s. 1; 31 & 32 Vict. c. 11.

VIII. [The next Court that shall be mentioned is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions. This is the Court of Exchequer Chamber;] which is subject to considerable variety in its form. For first it exists as a court of mere debate; [such causes from the other courts being sometimes adjourned into it, as the judges, upon argument, find to be of great weight and difficulty, before any judgment is given upon them in the court below (*a*).] And in such cases, it [consists of all the judges of the three Superior courts of common law; and now and then the lord chancellor also.] Considered as a court of error, in which light we are now principally concerned with it, it [was first erected by statute 31 Edw. III. c. 12, to determine causes upon writs of error from the common law side of the Court of Exchequer. And to that end it consisted of the lord chancellor and lord treasurer, taking unto them the justices of the King's Bench and Common Pleas. In imitation of which, a second Court of Exchequer Chamber was erected by statute 27 Eliz. c. 8, consisting of the justices of the Common Pleas and the barons of the Exchequer; before whom writs of error might be brought to reverse judgments in certain suits originally begun in the Court of King's Bench.] But both these constitutions are now abolished. For a royal commission having issued in 1828 to inquire into the pleadings and practice of the Superior courts of the common law, it recommended, among many other improvements, a new arrangement of this court, which was afterwards carried into effect by 11 Geo. IV. & 1 Will. IV. c. 70, s. 8. According to this arrangement the judgments of each of the Superior courts of common law, in all suits whatever, are (upon proceedings in error in law being instituted for the purpose) subject to revision by the judges of the other two,

(*a*) 4 Inst. 119; *Warraine v. Smith*, 2 Bulst. 146.

—sitting collectively as a Court of error for that purpose, in the Exchequer Chamber (*b*). The composition of this Court consequently admits of three different combinations, consisting of any two of the Courts below, viz. those which were not parties to the judgment supposed to be erroneous.

From each combination of this Court (*c*), proceedings in error may be taken into—

IX. [The House of Lords; which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only in case of appeal, or proceedings in error, to rectify any injustice or mistake of the law, committed by the courts below. To this authority this august tribunal succeeded of course 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 the residue of that noble assembly, from which every other great court was derived.] Hence the House of Lords is, as the general rule, a tribunal of appeal, in all causes of common law or equity, commenced in any court of England (*d*),—such appeal being either original,

(*b*) The number of judges required to form a session of the court does not seem fixed. *Ex relatione*, Sir Archer Croft, Master of the Queen's Bench, as cited 2 B. & Smith, p. 707, *in notis*.

(*c*) See 11 Geo. 4 & 1 Will. 4, c. 70, s. 8.

(*d*) There is no appeal to the Lords from the Ecclesiastical, Maritime, or Prize Courts in England; nor from Man, Jersey, Guernsey,

Sark, or Alderney; nor from India or any of the *colonies*;—the appeal in these cases being to the Queen in Council. And the appeal from a court-martial is to the Queen in person; as is also the appeal from the Lord Chancellor, in matters of idiocy or lunacy. From the Court of the Stannaries, too, the final appeal is not to the Lords, but to the Judicial Committee of the Privy Council. On the other hand, from the courts

or after the intervention of a previous appeal to another court, as the case may be; and it is also in all such causes [the last resort, from whose judgment no further appeal is permitted; but every subordinate tribunal must conform to its determinations; the law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that (if possible) they will make themselves masters of those questions upon which they undertake to decide; and in all dubious cases refer themselves to the opinions of the judges, who are summoned by writ to advise them: since upon their decision all property must finally depend (e).]

X. We have next to notice a tenth [species of courts, of general jurisdiction and use, which are derived out of, and act as collateral auxiliaries to, the foregoing; namely, the Courts of Assize and *Nisi prius*.

These are composed of two or more commissioners,] called judges of assize, or of assize and *nisi prius*, who are sent, by special commission from the crown, on *circuits* [all round the kingdom, to try, by a jury of the

of *Scotland* and *Ireland*, the appeal is to the House of Lords. As to Scotch appeals, see 6 Ann. c. 26, s. 12; 48 Geo. 3, c. 151; 53 Geo. 3, c. 64; 59 Geo. 3, c. 35; 4 Geo. 4, c. 85. As to Irish appeals, see 23 Geo. 3, c. 28; 39 & 40 Geo. 3, c. 67, art. 8.

(e) "Hitherto may also be referred the tribunal established by statute 14 Edw. 3, c. 5, consisting (though 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 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." (3 Bl. Com. p. 58.)

[respective counties, the truth of such matters of fact as are then under dispute in the courts of Westminster Hall;]—there being, however, as to London and Middlesex, this exception, that instead of their being comprised within any circuit, courts of *nisi prius* are held there for the same purpose, in and after every term, before the chief or other judge of the superior courts, at what are called the London and Westminster *sittings* (*f*). [These judges of assize came into use in the room of the antient justices in eyre, *justiciarii in itinere*; who were regularly established, if not first appointed, by the Parliament of Northampton, A.D. 1176, in the twenty-second year of Henry the second, with a delegated power from the king's great court or *aula regia*, being looked upon as members thereof (*g*): and they afterwards made their circuit round the kingdom, once in seven years, for the purpose of trying causes (*h*). They were afterwards directed by *Magna Charta*, 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 assises; 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 they had sometimes a more general commission, to determine all manner of causes, being constituted *justiciarii ad omnia placita* (*i*);] but the present justices of assize and *nisi*

(*f*) The times for these sittings are now fixed by the superior courts under 17 & 18 Vict. c. 125, s. 2 ("The Common Law Procedure Act, 1854"). They were formerly regulated by the following statutes: 18 Eliz. c. 12; 12 Geo. 1, c. 31; 24 Geo. 2, c. 18; 1 Geo. 4, cc. 21, 55; 11 Geo. 4 & 1 Will. 4, c. 70, s. 7.

(*g*) Seld. Jan. 1. 2, s. 5; Spelm. Cod. 329.

(*h*) 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.*"—(Annal. Eccl. Wigorn. in Whart. Angl. Sacr. i. 495.)

(*i*) Bract. l. 3, tr. 1, c. 11.

prius, are more immediately derived from the statute of Westminster the second, (13 Edw. I. c. 30,) and consist principally of the judges of the superior courts of common law, to whom the duty is confided of thus superintending the trial of matters of fact, at the courts of assizes and *nisi prius*,—as well as that of deciding matters of law, and transacting other judicial business at their sittings *in banc* (as they are called), that is, on the bench of their respective courts at Westminster. For by the above-mentioned statute of 13 Edw. I. c. 30, the judges of assize and *nisi prius* are to be [assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county:—by statute 27 Edw. I. c. 4, (explained by 12 Edw. II. c. 3,) assizes and inquests are 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:—by statute 14 Edw. III. c. 16, 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:—and, lastly, by 2 & 3 Vict. c. 22, all justices of assize may on their respective circuits try causes pending in the Court of Exchequer, without issuing a separate commission from the Exchequer for the purpose—which before that Act had been considered necessary. [They usually make their circuits in the respective vacations after Hilary and Trinity Terms (*k*); assizes being allowed to be taken in the holy time of Lent, by consent of the bishops at the

(*k*) In the vacation after Michaelmas term, a special commission sometimes issues into certain parts of the kingdom, occasionally for the trial of causes, but chiefly to

secure the more speedy trial of persons charged with offences not triable at the quarter sessions. This is called the *winter circuit*.

[king's request, as expressed in statute Westminster the first, 3 Edw. I. c. 51. And it was also usual, during the times of popery, for the prelates to grant annual licences 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 (*l*). The prudent jealousy of our ancestors ordained (*m*), that no man of law should be judge of assize in his own county, wherein he was born, or doth inhabit; and a similar prohibition is found in the civil law (*n*), which carried this principle so far, as to make it equivalent to the crime of sacrilege for a man to be governor of the province in which he was born, or has any civil connexion (*o*).] But in modern times, this prohibition, always inconvenient, has been also deemed unnecessary; the apprehensions on which it is founded being sufficiently obviated by the high character and position of our judges. By statute 12 Geo. II. c. 27, and 49 Geo. III. c. 91, it is consequently abolished.

The judges upon their circuits, (which are at present eight in number,) now sit by virtue of four several authorities (*p*). 1. The commission of the *peace*. 2. A commission of *oyer and terminer*. 3. A commission of general *gaol delivery*.—The consideration of all which belongs properly to the subsequent book of these Commentaries. The other authority is, 4. That of *nisi prius* (*q*), which [empowers them to try all questions of fact issuing out of the courts at Westminster that are

(*l*) Instances hereof may be met with in the Appendix to Spelman's Original of the Terms, and in Parker's Antiquities, 209.

(*m*) Stat. 4 Edw. 3, c. 2; 8 Rich. 2, c. 2; 33 Hen. 8, c. 24.

(*n*) Ff. 1, 22, 23.

(*o*) C. 9, 29, 4.

(*p*) Blackstone (vol. iii. p. 60) enumerates five, (including the com-

mission of assize,) but the abolition of assizes and other real actions has thrown the commission of assize, as distinguished from the commission of nisi prius, out of force.

(*q*) As to the officers of *nisi prius* and their fees, see 15 & 16 Vict. c. 73.

[then ripe for trial by jury (*r*). These, by the antient course of the courts, were 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 arose; but with this proviso, *nisi prius*, unless before the day prefixed the judges of assize should come into the county in question;] and as in modern times they have invariably so come in the vacations preceding, the trial has always in fact taken place before those judges. And now by the effect of the statute 15 & 16 Vict. c. 76 ("The Common Law Procedure Act, 1852"), the course of proceeding in civil causes is no longer even ostensibly connected with the proviso of *nisi prius*(*s*); but the trial is allowed to take place, without the use of any such words in the process of the court, and as a matter of course before the judges sent under the commission into the several counties. [These commissions are constantly accompanied by writs of *association*, in pursuance of the statutes of Edward the first and Edward the second 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, &c., that a sufficient supply of commissioners may never be wanting. But, to prevent the delay of

(*r*) By 3 & 4 Will. 4, c. 71, assize towns may be fixed by order in council (and see as to building the shire halls for holding assizes, 7 Geo. 4, c. 63, and 7 Will. 4 & 1 Vict. c. 24, and as to Warwick, see 17 & 18 Vict. c. 35). The judges have also commission to try issues of fact arising in causes depending in the Court of Common Pleas at Lancaster. (See 18 & 19 Vict. c. 45.) By 26 & 27 Vict. c. 122, the

crown was enabled, by order in council, to make alterations in the circuits. Those now existing are the Home—the Midland—the Norfolk—the Oxford—the Northern—the Western—the North Wales—and the South Wales Circuit.

(*s*) See 15 & 16 Vict. c. 76, s. 104, abolishing the jury process of *distringas juratores*, in the award of which the proviso of *nisi prius* used to be inserted.

[justice by the absence of any of them, there is also issued of course a writ of *si non omnes*; directing that, if all cannot be present, any two of them—a justice or serjeant being one (*t*)—may proceed to execute the commission (*u*).]

Such are the courts of general jurisdiction for the determination of ordinary causes and matters, whether arising at law or in equity; but there are other courts whose province, though more special and peculiar as regards the subject-matter of litigation, are yet of jurisdiction equally general in respect of place and person; and the present chapter would consequently be incomplete without taking notice of their existence. The courts to which we refer are *the Court of Bankruptcy; the Court of Probate; and the Court for Divorce and Matrimonial Causes*. But this bare mention of them will suffice for the present purpose,—as we have already given, in the course of our second volume, such account of their constitution and course of proceeding as the nature of this work requires (*x*).

(*t*) By 13 & 14 Vict. c. 25, any person being one of her majesty's counsel, or a barrister at law with patent of precedence, may be named in the commission, though he be not of the degree of the coif.

(*u*) By 1 Geo. 4, c. 55, s. 5, any judge or baron of the Exchequer may amend a record, and make an

order in a cause on circuit, whether in a suit depending in his own court or not. By 3 Geo. 4, c. 10, the commission of the judges on circuit may be opened on the next day to the one appointed, or if that be a Sunday, &c. then on the day following.

(*x*) Vide vol. II. pp. 210, 297.

CHAPTER V.

OF THE COURTS OF GENERAL JURISDICTION (*continued*)—AND, HEREIN, OF COURTS ECCLESIASTICAL AND MARITIME.

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 common law or of equity, there still remain some other courts of a jurisdiction equally general; but which give redress for no injuries at common law or equity, but for those of an ecclesiastical and maritime nature. These are properly distinguished by the title of Ecclesiastical Courts and Courts Maritime. And we may properly begin with a remark applicable to both—that [these eccentric tribunals (which are principally guided by the rules of the imperial and canon laws), as they subsist and are admitted in England not by any right of their own, but upon bare sufferance and toleration from the municipal law, must have recourse to that law 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 (*a*).] Except so far as this adoption by the municipal law extends, it [matters not 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. The common law of England is the one uniform rule to determine the jurisdiction of our courts; and if any tribunals whatsoever attempt to exceed the limits so prescribed them, the

(*a*) Vide sup. vol. I. pp. 9, 63.

[superior courts of common law may, and do, prohibit them (*b*), and in some cases punish their judges (*c*).] With this general caution, we proceed now to consider—

I. The Ecclesiastical Courts. [Before we descend however to consider particular courts of this description, it must be premised in general, 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 (*d*). This union of power was very advantageous to them both: the presence of the 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 decree on such refractory offenders as would otherwise have despised the thunder of mere ecclesiastical censures.

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

(*b*) As to prohibition to the Ecclesiastical Courts, see *Ex parte Tucker*, 1 Man. & Gr. 519; *Tucker v. Inman*, 4 Man. & Gr. 1049.

(*c*) Hale, *Hist. C. L.* c. 2.

(*d*) "*Celeberrimo huic conven-*

tui episcopus et aldermannus intersunt; quorum alter jura divina, alter humana populum edoceto."—Wilk. *Leg. Angl. Sax.*

LL. Eadg. c. 5.

[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 our Saviour himself; and derived from the Pope to all inferior tribunals (*e*).

It was not, however, till after the Norman conquest, that this doctrine was received in England; when William the first, (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 encroachment, 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 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, which prohibited any spiritual cause from being tried in the secular courts, and commanded the suitors to appear before the bishop only, whose decisions were directed to conform to the canon law (*f*).

(*e*) "Hence the canon lays it down as a rule, that '*sacerdotes a regibus honorandi sunt, non judicandi*' (Decret. part 2, caus. II, qu. 1, c. 41); 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 injus-

tice, 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.*'" (3 Bl. Com. p. 62.)

(*f*) Hale, Hist. C. L. 102; Selden in Eadm. p. 6, l. 24; 4 Inst. 259; Wilk. Leg. Angl. Sax. 292.

[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; which was, according to Sir Edward Coke, only a restitution, after the great heat of the conquest was past, of the antient law of England (*g*). 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, in the third year of Henry the first, 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, 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.]

Such was the formation of those separate and independent courts which have been since styled the ecclesiastical (or spiritual) courts, or the courts christian (*curiæ christianitatis*). The jurisdiction that they proceeded to exercise, was the administration of justice in all ecclesiastical matters in any way connected with the Church. In

(*g*) 2 Inst. 70.

Spelm. Cod. 301.

(*h*) "*Ne episcopi sæcularium placitorum officium suscipiant.*"—

(*i*) Spelm. Cod. 310.

(*k*) Vide sup. vol. I. p. 12.

most of these (as will appear in the course of the chapter) the connection is a proper and obvious one; but there were others which, though also included in the ecclesiastical jurisdiction, had no such connection except in a forced and remote sense. These are the matters commonly designated as *testamentary* and *matrimonial*. But by the Acts of 20 & 21 Vict. cc. 77 and 85 (*l*), the jurisdiction of the ecclesiastical courts over both of these matters, after an exercise of more than seven centuries, was withdrawn and transferred to courts of which we had occasion to speak in former parts of this work (*m*). In recounting the various species of the ecclesiastical courts we shall begin with the lowest, and so ascend gradually to the supreme court of appeal (*n*).

1. The Archdeacon's Court is the most inferior court in the whole ecclesiastical polity. It is held, in each archdeaconry, before a judge appointed by the archdeacon himself, and called his official. Its jurisdiction comprises ecclesiastical causes in general, arising within the archdeaconry: and, in ordinary cases, the party may commence his suit either in this court or the bishop's; though in some archdeaconries the suit must be commenced in the former, to the exclusion of the latter (*o*). From the arch-

(*l*) The 21 & 21 Vict. c. 77, has been amended in certain particulars by 21 & 22 Vict. c. 95; and the 20 & 21 Vict. c. 85, by 21 & 22 Vict. c. 108, 22 & 23 Vict. c. 61, and 23 & 24 Vict. c. 144.

(*m*) Vide sup. vol. II. pp. 210, 297. One effect of this change has been to set aside altogether one of these tribunals, viz. the *Prerogative Court*; which was, in each province, held before a judge appointed by the archbishop thereof, for administering justice in testamentary matters (viz. those relating to probate and administration), and in those only. Its jurisdiction arose in the case (an

extremely frequent one) where the deceased left *bona notabilia* in different dioceses. As in this case the matter could not be disposed of in any single diocese, the archbishop claimed the jurisdiction by way of special *prerogative*. (Vide sup. vol. II. p. 210.)

(*n*) For further information as to these courts and the particular matters cognizable in them, see the Report of the Commissioners on Ecclesiastical Courts, dated 15th February, 1832.

(*o*) See *Woodward v. Fox*, 2 Vent. 267; *Godolph. 61*.

deacon's court an appeal generally lies, by virtue of the statute 24 Hen. VIII. c. 12, to that of the bishop.

2. The Consistory Court of the bishop is held in the several cathedrals, for the trial of all ecclesiastical causes arising within the diocese (*p*). The chancellor of the diocese (or his commissary) is the judge; [and from his sentence an appeal lies, by virtue of the same statute of Henry the eighth, to the archbishop of each province respectively.]

3. [The Court of Arches is a court of appeal belonging to the archbishop of Canterbury, whereof the judge, (who sits as deputy to the archbishop,) is called the *Dean of the Arches*; because he antiently held his court in the church of St. Mary-le-bow (*Sancta Maria de arcubus*), though] this court is now holden at Westminster (*q*). [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.] Many suits, also, are brought before him as original judge, the cognizance of which properly belongs to inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction, under a certain form of proceeding known in the canon law by the denomination of *letters of request* (*r*). From

(*p*) Vide sup. p. 116, n. (*a*.)

(*q*) In Bl. Com. p. 65, it is said, "the principal spiritual courts are now holden at *Doctors Commons*." This continued to be the case till after the changes introduced in the year 1857.

(*r*) 2 Chit. Gen. Pract. 496; see *Burgoyne v. Free*, 2 Add. 406; *Ex parte Denison*, 4 Ell. & Bl. 292. It

is to be observed that under the Church Discipline Act, 3 & 4 Vict. c. 86 (as to which vide sup. p. 16), no criminal proceeding against a clerk for an ecclesiastical offence shall be brought in any ecclesiastical court *otherwise* than by letters of request from the bishop to the dean of Arches. (See *Liddell v. Rainsford*, Weekly Notes, 1868, p. 21.)

the Court of Arches, and from the parallel court of appeal in the province of York, an appeal lies to the Privy Council, as we shall presently have occasion to show at greater length.

4. [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 (*r*) are originally cognizable by this court;] from which an appeal lies to the Court of Arches (*s*).

[We have here passed by such ecclesiastical courts as have only what is called a *voluntary*, and not a *contentious*, jurisdiction; which are merely concerned in doing or settling what no one opposes, and keeping an open office for that purpose (as granting dispensations, licences, faculties, and other remnants of the papal extortions), but do not concern themselves with administering redress to any injury;] and shall proceed to—

5. The great court of appeal in all ecclesiastical causes, viz. the Privy Council (*t*). This has been substituted in our own times for the former appeal court, viz. the Court of Delegates,—*judices delegati*, appointed by commission under the Great Seal, and issuing out of Chancery, to represent the royal person and hear the appeal (*u*). This

(*r*) Such *benefices* as are “exempt or peculiar,” are nevertheless (so far as the Act relative to pluralities and residence is concerned) subject to the jurisdiction of the archbishop or bishop within whose province or diocese they are locally situate. (See 1 & 2 Vict. c. 106, s. 108.)

(*s*) See *Parham v. Tempter*, 3 Phil. Ecc. Rep. 223.

(*t*) See 2 & 3 Will. 4, c. 92;

3 & 4 Will. 4, c. 41, s. 3; 6 & 7 Vict. c. 38; 7 & 8 Vict. c. 69, ss. 9, 12. It has been determined that the appeal from the archbishop's court, in a case where the crown is concerned as well as in other cases), is to the Privy Council, and not to the upper house of convocation. (See *Gorham v. Bishop of Exeter*, 15 Q. B. 52.)

(*u*) 3 Bl. Com. 66.

Court, in ordinary cases, consisted of three puisné judges, (one from each of the superior common law courts,) together with three or more civilians (*v*); and it was held by virtue of the statute 25 Hen. VIII. c. 19, which authorized all manner of appeals to be had and prosecuted from the archbishops' courts to the sovereign in chancery—the appeal prior to that statute having been to the Pope (*x*). [Appeals to Rome, indeed, 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 honour of the Crown, and the independence of the whole realm; and they were first introduced, in very turbulent times, in the sixteenth year of King Stephen (A.D. 1151), at the same period when (as Sir Henry Spelman observes), the civil and canon laws were first imported into England. But in a few years after, to obviate this growing practice, the Constitutions made at Clarendon in the eleventh year of Henry the second, on account of the disturbances raised by Archbishop Becket and other zealots of the holy see, expressly declare, 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 licence from the crown (*y*). But the unhappy advantage that was given, in the reigns of King John and his son Henry the third, to the encroaching 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 tho-

(*v*) See Special Report on Ecclesiastical Courts, dated 25th January, 1831.

(*w*) A commission of *review* was sometimes granted to revise the sentence of the Court of Delegates

in extraordinary cases; but, as a matter of right, no appeal lay from that court. (See 26 Hen. 8, c. 1; 1 Eliz. c. 1; 3 Bl. Com. 67.)

(*y*) Cod. Vet. Leg. 315.

[roughly 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 of the twenty-fifth year of Henry the eighth was but declaratory of the antient law of the realm(*z*).] The Court of Delegates, however, is now superseded; and by 2 & 3 Will. IV. c. 92, it is provided, that every person who might formerly have appealed to it under 25 Hen. VIII. c. 19, may, for the future, appeal to her Majesty in council (*a*). And it is further enacted by 3 & 4 Will. IV. c. 41, s. 3, 6 & 7 Vict. c. 38, s. 11, and 7 & 8 Vict. c. 69, s. 9, that her Majesty by order in council may direct that all appeals from ecclesiastical courts shall be referred to the *Judicial Committee* of the privy council (*b*).

These are the principal courts of ecclesiastical jurisdiction (*c*), none of which are courts of record, except

(*z*) 4 Inst. 341.

(*a*) See the Special Report of the Commissioners appointed to inquire into the Ecclesiastical Courts, dated 25th Jan. 1831, in which this change was recommended.

(*b*) See also 3 & 4 Vict. c. 86, s. 16, requiring an archbishop or bishop to be present at all hearings before the Judicial Committee, of appeals under that Act. As to the Judicial Committee, vide sup. vol. II. p. 494.

(*c*) Blackstone (vol. iii. p. 68) takes occasion to explain the rise and fall of the court of the king's *high commission* in causes ecclesiastical. He says, "This court was erected and united to the regal power by virtue of the statute I Eliz. c. 1, instead of a larger jurisdiction which had before been ex-

ercised under the Pope's authority. "It was intended to vindicate the dignity and peace of the Church, "by reforming, ordering and correcting the ecclesiastical state and persons; and all manner of errors, heresies, schisms, abuses, offences, 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 offence itself, and frequently over offences by no means of spiritual cognizance. For these reasons this court was justly abolished by statute 16 Car. 1, c. 11."

the Privy Council (*d*); and we now proceed to consider the wrongs or injuries which are cognizable therein. By which are to be understood only such as are made the subject of proceeding in these courts for the purpose of making an injured party satisfaction and redress for the damage which he has sustained; as we do not mean to take specific notice of any proceeding in the ecclesiastical courts for reformation of the offender, and *pro salute animæ* (*e*). And these will be reduced under the following heads:—

[First, the *subtraction*, or withholding, of *tithes* from the rector or the vicar, whether the former be a clergyman

(*d*) See 3 & 4 Will. 4, c. 41, s. 16, and 6 & 7 Vict. c. 38, s. 7.

(*e*) The offences proceeded against in the ecclesiastical courts *pro salute animæ*, are described in the Report of the Commissioners on those Courts, dated 15th July, 1832, as being those “committed by the clergy themselves, such as neglect of duty, immoral conduct, advancing doctrines not conformable to the Articles of the Church, suffering dilapidations, and the like offences;—also by laymen, such as brawling, laying violent hands and other irreverent conduct in the church or churchyard, violating churchyards, neglecting to repair ecclesiastical buildings, incest, incontinence . . . These offences are punished by monition, penance, excommunication, suspension *ab ingressu ecclesiæ*, suspension from office, and deprivation.” These courts formerly entertained also suits for *defamation*, in the case where the spiritual offence of incontinency was wrongfully imputed; but by

18 & 19 Vict. c. 41, their jurisdiction in this matter was abolished; and proceedings against laymen in the ecclesiastical courts for incontinency itself have in modern times been out of use. Moreover, their jurisdiction to entertain suits for “brawling,” against persons who are not in holy orders, was taken away by 23 & 24 Vict. c. 32, s. 1; and a remedy given for indecent behaviour in places of public worship, by way of summary conviction before two justices. We may further notice, that, subsequently to the Report from which the above extract is taken, was passed the 3 & 4 Vict. c. 86 (“for better enforcing Church discipline”), by which a particular method of preliminary investigation before commissioners, appointed by the bishop, was provided for the case of a *clerk in holy orders* charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against such laws. (As to this Act, vide sup. p. 16.)

[or a lay appropriator (*h*). But herein a distinction must be taken: for the ecclesiastical courts have no jurisdiction to try the *right* of tithes, unless between spiritual persons (*i*); but in ordinary cases, between spiritual men and lay men, are only to compel the payment of them, when the right is not disputed (*k*). By the statute of *circumspectè agatis* (13 Edw. I. st. 4), it is declared; that the court christian shall not be prohibited from holding plea, “*si rector petat versus parochianos oblationes et decimas debitas et consuetas*” (*l*): so that if any dispute arises whether such tithes be *due* and *accustomed*, this cannot be determined in the ecclesiastical court, but must be before the courts of the common law; as such questions affect 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 (*viz.* the recovery of the tithes, or their equivalent) may properly be had in the spiritual court (*m*).] However, in modern times, it has seldom happened that tithes have been sued for in the spiritual court; [for if the defendant pleads any custom, *modus*, composition, or other matters whereby the right of tithing is called into question, this takes it out of the jurisdiction of the ecclesiastical judge; for the law will not suffer

(*h*) Stat. 32 Hen. 8, c. 7. As to tithes, *vide sup.* p. 79.

(*i*) 2 Roll. Abr. 309, 310; Bro. Abr. tit. Jurisdiction, 85.

(*k*) 2 Inst. 364, 389, 490.

(*l*) Blackstone (vol. iii. p. 88) says that the 13 Edw. 1, st. 4, is rather a *writ* than a statute, and cites Barrington, 120; 3 Pryn. Rec. 336. It may be remarked that in Ruffhead's edition of the Statutes at Large it is stated, that the above proviso (though inserted in his

text) is not in the original of the statute of *circumspectè agatis*. The words are omitted also from the edition of the statutes published by the Record Commission.

(*m*) See also 2 & 3 Edw. 6, c. 13, giving the tithe owner in some cases treble the value of the tithes subtracted, to be sued for in a court temporal, as to which see 2 Inst. 250; *Graburn v. Brown*, 16 Mee. & W. 821.

[the existence of such a right to be decided by the sentence of any single—much less an ecclesiastical—judge, without the verdict of a jury.] Moreover, a summary method of recovering tithes not exceeding the value of 10*l.* (or, where due from Quakers, 50*l.*), was given by statute 53 Geo. III. c. 127, by complaint to two justices of the peace; and by 5 & 6 Will. IV. c. 74, and 4 & 5 Vict. c. 36, this proceeding before justices was made the *only* remedy to recover tithes not exceeding the above value, (no suit being allowed either in the civil or in the ecclesiastical courts,) unless the title to the tithes be *bonâ fide* brought into question,—in which case an action will lie in the courts of common law as before those statutes (*n*). Besides all which, it is to be recollected that the claim itself to tithes has now become of rare occurrence—this species of property having been, in almost every parish, now commuted into a corn rent-charge under the Tithe Commutation Acts, and for the recovery of which, when in arrear, a special mode of proceeding has been provided (*o*).

[Another injury, cognizable in the spiritual courts, is the *non-payment of other ecclesiastical dues* to the clergy; such as pensions, mortuaries, compositions, offerings, and whatsoever falls under the denomination of *surplice-fees*, for ministerial offices of the Church: all which injuries are redressed by a decree for their actual payment.] But the provisions of the statutes just mentioned with regard to the recovery (though not as the general rule for the commutation) of *tithes*, extend also to oblations and all ecclesiastical dues and demands whatsoever (*p*).

A suit, moreover, will lie in these Courts for *fees due to their officers*; but not where the *right* to them is disputed, for then it must be decided by the common law (*q*).

(*n*) See *Peyton v. Watson*, 3 Q. B. 658; *Robinson v. Purday*, 16 Mec. & W. 11.

(*o*) Vide sup. pp. 89, 91.

(*p*) Vide sup. p. 107.

(*q*) 1 Ventr. 165.

These Courts also have cognizance of *spoliation*; which [is an injury done by one clerk or incumbent to another, in taking the fruits of his benefice without any right thereunto, but under a pretended title. This injury is remedied by a decree to account for the profits so taken; and, when the *jus patronatús* (or right of advowson) doth not come into 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 pretence 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 (*r*). 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 profits 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 writ of *indicavit* (*s*). So, also, if a clerk, without any colour 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 (*t*).]

Another case in which these courts have jurisdiction, is that of [*dilapidations*, which are a kind of ecclesiastical waste, to which we have already referred (*u*). Such dila-

(*r*) F. N. B. 36.

(*s*) See 13 Edw. 1, st. 4; Artic. Cleri, 9 Edw. 2, c. 2; F. N. B. 45.

(*t*) As to the remedy of a clerk, refused admission by the bishop, to

the appellate jurisdiction of the archbishop by way of *duplex querela*, vide post, p. 542.

(*u*) Vide sup. p. 66.

[pidations may be either voluntary, by pulling down; or permissive, by suffering the chancel, parsonage-house, and other buildings thereunto belonging, to decay (*v*). And here an action lies either in the spiritual court, by the canon law; or in the courts of common law (*w*): and it may be brought by the successor against the predecessor if living, or if dead, then against his executors.]

The spiritual courts have also cognizance as to [the neglect of reparations of the church, churchyard, and the like (*x*);] and until very recently a suit might, under certain circumstances, be brought therein for nonpayment of a church-rate (*y*); though by 53 Geo. III. c. 127, 5 & 6 Will. IV. c. 74, and 4 & 5 Vict. c. 36, where the rate was not disputed, and the amount demanded did not exceed 10*l.*,—or in the case of Quakers, 50*l.*,—the remedy was before the justices of the peace (*z*). Now, however, by 31 & 32 Vict. c. 109, s. 1 (as explained in a former place), no suit or proceeding for nonpayment of a church-rate can be brought in any ecclesiastical or other court, or before any justice or magistrate (*a*).

Again, these courts have jurisdiction in all suits respecting *pews and seats* in the body of the church (*b*); but where a pew is claimed by prescription, and the right is disputed, a court of common law will, by writ of prohibition, prevent the ecclesiastical court from proceeding farther; in order that the prescription may be tried by a jury (*c*).

(*v*) See also 13 Eliz. c. 10, as to a spiritual person making over his goods with intent to defeat his successor of his remedy for dilapidations.

(*w*) *Jones v. Hill*, Cart. 224; S. C. 3 Lev. 268.

(*x*) *Circumspectè agatis*, 5 Rep. 66; and see the Report of Commissioners on Ecclesiastical Courts, dated 15th Feb. 1832, p. 51.

(*y*) 3 Bl. Com. p. 92.

(*z*) See *Ex parte Mannering*, 2 B. & Smith, 431; *Pease v. Naylor*, 3 B. & Smith, 620.

(*a*) *Vide sup.* p. 44.

(*b*) See the above Report, p. 49, and *Mainwaring v. Giles*, 5 Barn. & Ald. 361. As to seats and pews in the *chancel*, *vide sup.* p. 68.

(*c*) See the Report cited *sup.* p. 455, n. (*y*).

We have now adverted to the principal injuries for which the party grieved is entitled to find a remedy in the ecclesiastical courts. [But before we entirely dismiss this head, it may not be improper to add a short account of the *method of proceeding* in these tribunals, with regard to the redress of injuries.]

[The proceedings in the ecclesiastical courts are regulated according to the practice of the civil and canon laws; or rather according to a mixture of both, corrected and new modelled by their own particular usages, and the interposition of the courts of common law (*e*). 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 (*f*), (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 (*g*).] The proceedings out of court are conducted by *proctors*, who answer to the attornies and solicitors of the courts of law and equity (*h*); but the privilege of pleading causes in court is confined to barristers-at-law, and to such persons as, having taken the degree of doctor of laws at an English university, have been admitted to practise as *advocates* (*i*).

(*e*) Vide sup. vol. I. pp. 69—71.

(*f*) Warb. Alliance, 179.

(*g*) 2 Roll. Abr. 300, 302. So, also, a prohibition will issue if they assume a jurisdiction which does not belong to them. See *Tucker v. Inman*, 4 Man. & Gr. 1049.

(*h*) Before any one can practise as a proctor he must obtain a faculty enabling him in that behalf from

the Master of the Faculties, and must also take out an annual certificate; and on such faculty and certificate a duty is payable under 37 Geo. 3, c. 90, s. 31; 16 & 17 Vict. c. 63.

(*i*) By 20 & 21 Vict. c. 77, ss. 116, 117, the college of "Doctors of Law exercent in the Ecclesiastical and Admiralty Courts" was empow-

The ordinary course of the practice 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 (*j*). To this succeeds the *defendant's answer* upon oath, when, if he denies or extenuates the charge, they proceed to *proofs* (*k*). If the defendant has any circumstances to offer in his defence, 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.] And by an enactment of 17 & 18 Vict. c. 47, the court may summon witnesses, and examine them, or cause them to be examined, by word of mouth, and that either before or after examination by deposition or affidavit (*l*); and notes of such evidence shall be taken down in writing by the judge, or registrar, or such other person and in such manner as the judge shall direct (*m*). [When all the pleadings and proofs are concluded, they are referred to the consideration of a single judge, who *takes information* by hearing advocates on both sides, and thereupon forms his *inter-*

ered to dispose of its estate at Doctors Commons or elsewhere, and to surrender its charter of incorporation.

(*j*) See 3 & 4 Vict. c. 86, ss. 7, 8.

(*k*) In former times, when a clergyman was cited to appear before the bishop or ecclesiastical court for alleged misconduct, he might be required to make answer to it, on the oath of himself and his compurgators; that is, a certain number of his neighbours able to swear that they believed him innocent of the charge. This oath, *ex officio*, (as it was called,) was prohibited generally to laymen (12 Rep. 26); but was continued, as regarded the

clergy, till the middle of the seventeenth century, when it was abolished by 13 Car. 2, c. 12. (Report of Commissioners on Ecclesiastical Courts, 15 Feb. 1832, p. 55.)

(*l*) See also 3 & 4 Vict. c. 86, s. 17.

(*m*) It may be observed, that by 17 & 18 Vict. c. 125, ss. 20, 103, any person called as a witness, or required or desiring to make an affidavit or deposition, in any court of civil judicature in England and Ireland, who shall refuse or be unwilling to be sworn from conscientious motives, may make *affirmation* instead. (As to the form of such affirmation, see 22 Vict. c. 10.)

[*locutory decree* or *definitive sentence* at his own discretion: from which there generally lies an *appeal* in the several stages already mentioned (*k*).]

The ecclesiastical courts have power to pronounce, among other sentences, that of *excommunication*; such sentences being pronounced as a spiritual censure for offences falling under ecclesiastical cognizance: and this is described in the books to be twofold; the less and the greater. [The less excommunication is an ecclesiastical censure, excluding the party from the participation of the sacraments; the greater proceeds farther; and excludes him not only from these, but also from the company of all Christians (*l*).] Formerly, too, and until the passing of the Act to be presently mentioned, [an excommunicated man was disabled to do any act that was required to be done by a *probus et legalis homo*. He could not serve upon juries; could not be a witness in any court; and, what was worst of all, could not bring an action, either real or personal, to recover lands or money due to him.] In this state of things it was the practice of the ecclesiastical courts to avail themselves of the weapon of excommunication, in order to enforce their sentences and orders in general. For where any of these were disobeyed, the court excommunicated the disobedient party; by which not only did he become subject to the consequences above described, but the general law of England stepped in besides, to the court's assistance,—permitting the bishop, to certify the contempt to the sovereign in Chancery, and issuing thereon a writ to the sheriff of the county, [called, from the bishop's certificate, a *significavit*, or, from its effects, a writ *de excommunicato capiendo*,]—under which the sheriff was to take the offender and imprison him in the

(*k*) Vide sup. pp. 446, 447, 448. By 6 & 7 Vict. c. 38, s. 15, and 7 & 8 Vict. c. 69, s. 9, the Judicial Committee of the Privy Council is en-

abled to regulate the practice and mode of proceeding in all appeals from ecclesiastical courts.

(*l*) 3 Bl. Com. 101.

county gaol until he was reconciled to the Church. But by 53 Geo. III. c. 127, it is now provided, that no person excommunicated shall incur thereby any civil penalty or incapacity whatever, save such imprisonment, not exceeding six months, as the ecclesiastical court shall direct; and that such sentence shall be signified to the sovereign in Chancery, and thereupon enforced by a writ *de excommunicato capiendo*. And, by the same Act, excommunication, as for contempt, is in effect abolished; and in lieu thereof, where a lawful citation or sentence has not been obeyed, or contempt in face of the court has been committed, the judge shall have power to pronounce such persons contumacious and in contempt; and, after a certain period, to signify the same to the sovereign in Chancery: whereupon a writ *de contumace capiendo* shall issue from that court (*m*); which shall have the same force and effect as formerly belonged, in case of contempt, to a writ *de excommunicato capiendo* (*n*).

II. [The maritime courts consist only of the Court of Admiralty and its court of appeal (*o*);] though in her Majesty's possessions beyond the seas there are also established courts, under the denomination of Vice-Admiralty Courts, having jurisdiction over a variety of matters, including claims for wages (*p*), pilotage, salvage,

(*m*) See *R. v. Rickets*, 6 A. & E. 537; *R. v. Baines*, 12 Ad. & E. 210.

(*n*) By 2 & 3 Will. 4, c. 93, provisions are made for enforcing obedience to the decrees of the ecclesiastical courts of England and Ireland; and by 3 & 4 Vict. c. 93, and 23 & 24 Vict. c. 32, s. 1, further regulations are made for the release (in certain cases) of persons committed to gaol under the writ *de contumace capiendo*.

(*o*) It is to be noticed, however, that by 31 & 32 Vict. c. 71, a limited admiralty jurisdiction has also been conferred upon such of the *district county courts* as shall be appointed by her Majesty, by order in council.

(*p*) As the general rule, however, wages under £50 must be recovered in a summary way before two justices of the peace under 17 & 18 Vict. c. 104, ss. 188, 189; 24 & 25 Vict. c. 10, s. 10.

towage, or damages done by ships, claims in respect of bottomry or respondentia bonds, and in certain cases of mortgage, ownership, or necessaries supplied, or in respect of the building, equipment, or repair of vessels—and also in cases of the breach of the regulations of Her Majesty's navy at sea, or arising out of droits of Admiralty—and in certain cases relating to prize (*p*). The High Court of Admiralty—which is held before the judge of the admiralty (*q*)—seems to have been first of all erected by King Edward the third (*r*). And by 24 & 25 Vict. c. 10, its jurisdiction is enlarged and its procedure amended,—it is constituted a court of record for all intents and purposes,—and its decrees or orders for the payment of money are to have the same effect as judgments in the superior courts of common law (*s*).

The Admiralty Courts have jurisdiction and power to try and determine all *maritime* causes, that is, such injuries as are committed on the high seas (*t*). And generally speaking, and with the exception of any case otherwise specially provided for by act of parliament, [all admiralty causes must be causes arising wholly upon the sea, and not within the precincts of any county. For the statute 13 Ric. II. c. 5, directs that the admiral and

(*p*) By 26 & 27 Vict. c. 24, (repealing, except as to *India*, the 2 & 3 Will. 4, c. 51,) and by 30 & 31 Vict. c. 45, the jurisdiction and practice of the vice-admiralty courts are re-arranged and considerably extended. On the construction of these Acts, see *Casanova v. The Queen*, Law Rep., 1 P. C. 115.

(*q*) This judge sat properly as the *deputy* of the lord high admiral of England, while there was an officer of that description in use. By 21 & 22 Vict. c. 95, s. 1, it is provided, that the judge of the Admiralty Court and the judge of the

Court of Probate may sit for each other, either in open court or in chambers. The Admiralty Court is divided into two divisions—the *Instance* Court, and the *Prize* Court.

(*r*) 3 Bl. Com. 69, citing Gloss. 13; Archeion, 41.

(*s*) Prior to this Act, it was no court of record, notwithstanding it had power to fine and imprison for contempt. (3 Bl. Com. p. 69; *Sparks v. Martyn*, 1 Vent. 1; *Kane v. Evans*, 1 Keb. 552; Bro. Ab. tit. Error, 177.)

(*t*) 3 Bl. Com. 106.

[his deputy shall not meddle with any thing, but only things done upon the sea: and the statute 15 Ric. II. c. 3, declares that the court of the admiral hath no manner of cognizance of any contract or of any thing done within the body of any county, either by land or by water (*u*); nor of any wreck of the sea, for that must be cast on land before it becomes a wreck (*v*). 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. 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 (*x*). Therefore, 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 (*y*); 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 ship shall sail to Jamaica, or shall be in such a latitude by such a day; or a contract made upon the sea to be performed in England,—as a bond made on shipboard to pay money in London, or the like; these kinds of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law (*z*).] It is to be observed,

(*u*) As to what is *infra corpus comitatús*, see Com. Dig. Admiralty (E. 14); Jac. Law Dict. “Admiral.”

(*v*) It is provided, however, by the statute 17 & 18 Vict. c. 104, ss. 460, 464, 468, 476, 492—498, that the Court of Admiralty shall, in certain cases, have jurisdiction on claims of *salvage*; and by sect. 476, that such jurisdiction shall attach, whether the salvage service

was performed at sea, or by land, or partly at sea and partly by land. Salvage and wreck have been already treated of in this work. (Vide vol. II. pp. 18, 577 et seq.)

(*x*) Co. Litt. 261.

(*y*) 1 Ventr. 146. Bnt as to claims for wages under 50*l.*, vide sup. p. 459, n. (*p*).

(*z*) See Bridgeman’s case, Hob. 23; Hale, Hist. C. L. 35; Le Caux v. Eden, Doug. 572.

however, that [where the Admiralty Court hath jurisdiction of the original subject-matter in the cause, it hath also jurisdiction of all consequential questions, though properly determinable at common law (*a*). 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 (*b*).]

In addition to his general jurisdiction over maritime causes, the judge of the Admiralty has a special commission from the Crown to adjudicate on *prize of war* (*c*); and moreover has to decide on *booty of war*, (i. e. prize on shore,) when specially referred to him by her majesty (*d*).

[The proceedings of the High Court of Admiralty bear much resemblance to those of the civil law, but are not entirely founded thereon: and it likewise adopts and makes use of other laws, as occasion requires; such as the Rhodian laws, and the laws of Oleron (*e*)]—bodies of law derived from places antiently celebrated for their skill in naval affairs, viz. the island of Rhodes in the Mediterranean, and the island of Oleron in France. [The first process in this court, is frequently by arrest of the defendant's person (*f*): and it also takes recognizances or stipulation of certain *fidejussors* in the nature of bail (*g*); and in cases of default it may imprison both

(*a*) 13 Rep. 53; *Ridley v. Egglefield*, 2 Lev. 25; Hardr. 183.

(*b*) *Crosse v. Digges*, 1 Sid. 158.

(*c*) 2 Chit. Gen. Pr. 538 a; 1 Doug. 594; *Lindo v. Rodney*, 2 Doug. 613, n.; *Mitchell v. Rodney* (in error), 2 Bro. P. C. 423; *Faith v. Pearson*, 6 Taunt. 439.

(*d*) 3 & 4 Vict. c. 65, s. 22. The wide and interesting subject of "booty of war" (which can be barely referred to in a work of the

present kind) will be found thoroughly discussed in the recent case of "the *Banda and Kirwee Booty*," reported Law Rep., 1 Ad. & Ece. pp. 109—269.

(*e*) Hale, Hist. C. L. 36; Co. Litt. 11.

(*f*) Clerke, Prax. Cur. Ad. s. 13.

(*g*) *Ibid.* s. 11; 1 Roll. Abr. 531; *Par v. Evans*, Raym. 78; *Degrave v. Hedges*, Ld. Raym. 1286.

[them and their principal (*h*).] Formerly, the proceedings in the Court of Admiralty were conducted exclusively by advocates and proctors, but now by 22 & 23 Vict. c. 6, all serjeants, barristers, attornies and sollicitors, are also empowered to practise therein.

Such in a general point of view is the nature of the jurisdiction and practice of the High Court of Admiralty (*i*); but it will be proper here to advert to some specific regulations which have been recently introduced in reference to this subject, by certain Acts of recent date.

Thus, by 3 & 4 Vict. c. 65, it is provided, among other things, as follows:—

1. That the Dean of Arches shall be assistant to and be competent to sit for the judge of the High Court of Admiralty, in all suits and proceedings in the said court; and that the advocates, surrogates and proctors of the Court of Arches, shall be competent to practise in the Court of Admiralty.

2. That whenever any ship shall be under arrest by process issuing from the High Court of Admiralty,—or the proceeds of any ship having been so arrested shall have been brought into the Registry of the same court,—the court shall have jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship; and to decide any suit instituted by any such person, in respect of any such claims or causes of action respectively (*j*).

3. That in all suits the court may summon before it and examine witnesses by word of mouth; and either before or after examination by deposition, or before a commissioner appointed by the court: and notes of such evidence shall be taken down by the judge or registrar or such other person as the court may direct.

(*h*) 1 Roll. Abr. 531; God. 193, post, vol. IV. p. 398.
260.

(*j*) See also 24 & 25 Vict. c. 10, s. 11.

(*i*) As to the *criminal* jurisdiction of the Admiralty Court, vide

4. That it shall be lawful for a judge, or such commissioner, to require the attendance of any witnesses, and the production of any deeds and other writings by writ in the nature of *subpœna*, or *subpœna duces tecum*, as used in her Majesty's Court of Queen's Bench at Westminster (*h*).

5. That in any contested suit, the Court of Admiralty shall have power to direct a trial, by jury, of an issue on any question of fact; and that the substance of such issue shall be specified by the judge at the time of directing the same; and, in case of dispute, the form of it shall be settled by him; and the trial thereon shall be had before some judge of the superior courts of common law at the sittings at *nisi prius*, or before some judge of assize; and a new trial may afterwards be granted on application of any of the parties within three calendar months: and further, that the granting or refusing such issue or new trial may be matter of appeal to her Majesty in council.

6. That it shall be lawful for the judge of the Court of Admiralty, (subject to the approbation of her Majesty in council,) from time to time to make rules and orders respecting the practice of such court, and the conduct and duties of the officers and practitioners therein; and to repeal or alter the same.

7. That no action shall lie against such judge, for error in judgment; and that he shall have all the privileges and protection which appertain to the judges of the superior courts of common law.

8. That the keeper of every common gaol shall be bound to receive and take into his custody all persons who shall be committed thereunto by the Court of Admiralty, or by any coroner of the Admiralty.

9. That the judge shall have power to discharge any person in custody for contempt of the said court, for any cause other than the non-payment of money.

Moreover, in case of claim in the High Court of Ad-

(*h*) As to an order for *inspection*, see *ibid.* s. 18.

miralty against any ship, freight, goods or other effects whatsoever, it is made lawful by 17 & 18 Vict. c. 78, for the plaintiff to proceed by way of *monition*, without proceeding to arrest the subject-matter of the suit; and, on proof of the personal service of the citation, the court may proceed to hear the cause and make due order therein (*l*).

By a statute of earlier date (13 & 14 Vict. c. 26), affecting the jurisdiction rather than the practice of the court, it was also provided,—that, whenever any of her Majesty's ships of war shall attack persons alleged to be *pirates* afloat or ashore,—the High Court of Admiralty, or any court of Vice-Admiralty in her Majesty's dominions beyond the seas, may determine whether such was the real character of the persons attacked:—that all ships and goods taken from pirates by such ships, or officers and crews, may be proceeded against in any of such courts, and be liable to condemnation as droits and perquisites of her Majesty in her office of Admiralty;—but that if any part of the property shall be duly proved to have been taken from her Majesty's subjects, or the subjects of any foreign power, the same shall be restored to the former owner, on paying, in lieu of salvage, a sum of money equal to one-eighth part of the true value, to be distributed among the recaptors as the Act directs (*m*).

From the sentence of the admiralty judge, an *appeal*, at one time, used to lie in general to the Court of Delegates;

(*l*) 17 & 18 Vict. c. 78, s. 13.

(*m*) Besides the above Acts, there are also the following:—3 & 4 Vict. c. 66, to regulate the salaries of the officers of the High Court of Admiralty; 17 & 18 Vict. c. 19, as to its jurisdiction in cases of prize and salvage; c. 104, ss. 1, 460, 464, 476, 486, 498, as to its jurisdiction in

salvage; 24 & 25 Vict. c. 10, as to its jurisdiction in cases of damage, and questions between co-owners of ships and claims for wages, &c., and amending its practice; 31 & 32 Vict. c. 78, as to proceedings by the admiralty in reference to naval stores, &c.

and from certain of the vice-admiralty courts appeals might be brought either before the Court of Admiralty in England, or the sovereign in council (*n*). [But in case of prize vessels taken in time of war in any part of the world, and condemned in any courts of admiralty and vice-admiralty as lawful prize, the appeal lay to certain commissioners, consisting chiefly of the privy council, and called lords commissioners in prize cases. 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.] However, by 2 & 3 Will. IV. c. 92, the appellate jurisdiction of the delegates was transferred to the sovereign in council. And by 3 & 4 Will. IV. c. 41, s. 2, all appeals whatever in prize suits, and other proceedings in the admiralty or vice-admiralty courts, or any other court abroad, which might then be made either to the High Court of Admiralty or to the lords commissioners in prize cases, were directed in future to be made to the sovereign in council. And by the statute last named, and by 6 & 7 Vict. c. 38, and 7 & 8 Vict. c. 69, the Privy Council is empowered to refer all such appeals to the Judicial Committee. It has also been recently provided, by 24 Vict. c. 10, s. 32, that any party aggrieved by any interlocutory or other order or decree of the Court of Admiralty may, with the permission of the judge, appeal therefrom to her Majesty in Council as fully and effectually as from any *final* decree or sentence of the court (*o*).

(*n*) 3 Bl. Com. 69.

(*o*) Notice may be here taken of the ancient and long disused *court of chivalry* (or *court military*), which used to be held before the lord high constable and earl marshal

of England. It was not a court of record, but had a jurisdiction criminal as well as civil,—relating, in the former case, to deeds of arms and war, and, in the latter, to the redressing of injuries of

honour, and of encroachments in matters of coat-armour, precedence, and other distinctions of families. As a court of honour, it gave satisfaction by ordering reparation in point of honour, as for instance to compel the defendant *mendacium sibi ipsi imponere*—to take the lie that he has given upon himself—or make such other submission as the laws of honour may require; but the case must have been such that no relief could be had by action in a court of common law; and it could give no pecuniary satisfaction or damages. As to encroachments and usurpations in heraldry and coat-armour, it was its business, (according to Sir Matthew Hale), to adjust the right of armorial ensigns, bearings, crests, supporters, penons, &c., and also rights of place and precedence, subject to any royal patent or act of parliament; but the marshalling of coat-armour, which was formerly the pride and study of all the best families in the kingdom, becoming greatly disregarded, fell into the hands of certain officers and attendants upon this court called *heralds*, whose testimony as to descent is no longer

of the same weight as formerly, nor even in general admissible in a court of justice. Yet 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 the heralds upon oath, are still allowed to be good evidence of pedigree. (See *Matthews v. Port*, Comb. 63; *Taylor on Evidence*, 2nd ed. p. 1358.) The proceedings in the court of chivalry were by petition in a summary way; and the trial was not by jury, but by witnesses, or by combat, modes of trial, of which an account will be found hereafter (bk. v. ch. x., and bk. vi. ch. xxii.); and there was an appeal to the sovereign in person. (As to the court of chivalry, see also *Black. Com.* vol. iii. p. 68; vol. iv. p. 267; 13 Ric. 2, c. 2; *Com. Dig. Courts*; *Bac. Ab. Courts*; *Parker's case*, 1 Lev. 230; *Show. Parl. Ca.* 60; 4 Inst. 125. As to the office of earl marshal, see the *Posthumous Discourse of Camden* on that subject.)

CHAPTER VI.

OF COURTS OF A SPECIAL JURISDICTION.



IN the two preceding chapters we have considered the courts whose jurisdiction is 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 special, confined to particular spots,] or districts of the realm. These are,

I. The courts of the Commissioners of Sewers. These are tribunals erected by virtue of a commission under the great seal pursuant to the statute of sewers (*a*), whose powers [are confined to such county or particular place as their commission shall expressly name.] The jurisdiction of these commissioners is to overlook the repairs of the banks and walls of the sea coast and of navigable rivers, (or, with consent of a certain proportion of the owners and occupiers, to make new embankments,) and also to cleanse such rivers, and the streams communicating therewith (*b*). [They are courts of record, and conse-

(*a*) 23 Hen. 8, c. 5. This Act was amended by 13 Eliz. c. 9; 3 & 4 Will. 4, c. 22; 4 & 5 Vict. c. 45, and 12 & 13 Vict. c. 50. As to its construction, see Callis on Sewers; Emerson *v.* Saltmarshe, 7 Ad. & Ell. 266; Taylor *v.* Loft, 8 Exch. 269; The Queen *v.* Baker, Law Rep. 2 Q. B. 621. As to the sewers of the *Metropolis*, see 18 & 19 Vict. cc. 30, 120, ss. 146—

148; 21 & 22 Vict. c. 104, s. 1; 25 & 26 Vict. c. 102, ss. 1, 2—6, 22, 44—57, 59, 61, 66, 68, 69; 26 & 27 Vict. c. 68; 28 & 29 Vict. c. 19.

(*b*) By 3 & 4 Will. 4, c. 22, s. 10, the nature of the banks, streams, &c. falling within the jurisdiction of the commissioners is defined. And see further as to the extent of their power, sects. 19, 21 of the same Act.

[quently may fine and imprison for contempt (*c*); and in the execution of their duty they may proceed by jury, or upon their own view, and may take order for the removal of any annoyances, or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney-marsh (*d*), or otherwise at their own discretion. They may also assess such rates, or scots, upon the owners of lands within their district as they shall judge necessary: and, if any person refuses to pay them, the commissioners may levy the same by distress of his goods and chattels;] or they may sell his lands in order to pay such scots or assessments (*e*). And by a statute, 24 & 25 Vict. c. 133, passed in the year 1861, (chiefly in reference to the drainage of land for agricultural purposes), it was made lawful for her Majesty, upon the recommendation of the inclosure commissioners, to direct commissions of sewers into all parts of England, *inland* as well as maritime (*f*); and to assign as the limits

(*c*) See *Inhabitants of Oldbury v. Stafford*, 1 Sid. 145.

(*d*) Romney-marsh, in the county of Kent, a tract containing 24,000 acres, is governed by certain antient 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.)

(*e*) As to sewers rates, see 23 Hen. 8, c. 5; 7 Ann. c. 10; 3 & 4 Will. 4, c. 22; 4 & 5 Vict. c. 45; 12 & 13 Vict. c. 50, ss. 2, 7; 24 & 25 Vict. c. 133, s. 38.

(*f*) The Act is not however to include the *Metropolis* as defined by 18 & 19 Vict. c. 120. It may be noticed that 24 & 25 Vict. c. 133, Part II., authorizes the constitution, with the consent of the inclosure

commissioners, of *elective drainage districts* throughout the country; within which districts, respectively, all matters of drainage shall be vested in a Board having the same powers as commissioners of sewers. But no such district may be made within the limits of any commission of sewers, or of any borough or district under a local board of health, or improvement commissioners, without the consent of the commissioners, council or board, as the case may be (sect. 63). We may also here mention two recent statutes passed mainly with the object of facilitating the distribution (under the superintendence of the different sewer authorities and for agricultural purposes), of *sewage matter* over lands. These are the 28 & 29 Vict. c. 75, and the 30 & 31 Vict. c. 113.

for their jurisdiction any areas that, having regard to facilities for draining, may be thought most expedient; and it is enacted, that their powers shall extend not only to the maintenance and improvement of existing works in reference chiefly to sewers and other watercourses, outfalls and defences against water, but also to the construction of new ones (*h*). In cases, however, where land is to be purchased for new works otherwise than by agreement with the owner thereof, the commissioners must obtain the sanction of parliament (*i*); and provisions are made to ensure due compensation being afforded to owners of property interfered with for the objects of the Act (*k*).

The conduct of Commissioners of Sewers is under the control of the Court of Queen's Bench, [which will prevent or punish any illegal or tyrannical proceedings (*l*). In the reign of King James the first (8th Nov. 1616), the privy council did indeed take 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 actions 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 (*m*). The pretence for which arbitrary measure was no other than the tyrant's plea (*n*) 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."]

(*h*) The term *watercourse* in this Act is to include "all rivers, streams, drains, sewers and passages through which water flows." (24 & 25 Vict. c. 133, s. 3.) The powers of the commissioners are particularly defined in sects. 16—18.

(*i*) As to the manner of obtaining

such sanction, see 24 & 25 Vict. ss. 22—26.

(*h*) 24 & 25 Vict. c. 133, s. 18 et seq.

(*l*) *Hetley v. Sir J. Boyer*, Cro. Jac. 336.

(*m*) *Moor*, 825, 826.

(*n*) *Milt. Parad. Lost*, iv. 393.

But now it is clearly held, that this (as well as all other inferior jurisdictions) is subject to the discretionary coercion of the Court of Queen's Bench (*o*).

II. [The Court of the Duchy chamber of Lancaster is another special jurisdiction concerning all matter of equity relating to lands holden of the crown in right of the duchy (*p*): which is a thing very distinct from the county palatine of Lancaster; and, indeed, the duchy comprises much territory which lies at a vast distance from the county palatine—as particularly a very large district surrounded by the city of Westminster.] The duchy court is held before the chancellor of the duchy (who is also chancellor of the county palatine) or his deputy, and [the proceedings are the same as on the equity side of the High Court of Chancery (*q*); so that it seems not to be a court of record: and it has been holden that the High Court of Chancery has a concurrent jurisdiction with the duchy court, and may take cognizance of the same causes (*r*).]

III. Another species of courts with a limited local jurisdiction are the courts which appertain to the counties palatine of Lancaster and Durham (*s*). These, which

(*o*) Smith's case, 1 Ventr. 66; The Case of Cardiff Bridge, Salk. 146.

(*p*) Owen v. Holt, Hob. 77; Fisher v. Patten, 2 Ley, 24. The 13 & 14 Vict. c. 60 (the "Trustee Act, 1850,") is, by its 21st section, made applicable to this court. It may be noticed here, that in certain mining districts belonging to the duchy of Lancaster there are courts called the Barmote Courts, for regulation of the mines, and for deciding questions of title and other matters relating thereto. See as to these

courts, 14 & 15 Vict. c. 94.

(*q*) 4 Inst. 206.

(*r*) 1 Chan. Rep. 55; Toth. 145; Hard. 171.

(*s*) 4 Inst. 213, 218; Finch. R. 452. There were formerly other courts of a nature analogous to those of the counties palatine, viz. the courts of the *cinque ports* (vide sup. vol. II. p. 533); but the jurisdiction of these courts, in relation to civil suits and proceedings, was taken away by 18 & 19 Vict. c. 48, ss. 1, 2, amended by 20 & 21 Vict. c. 1.

comprise courts both of law and of equity (*t*), are held before the respective chancellors of the counties palatine, or other the judges of the court commissioned for that purpose (*u*). Of the counties palatine themselves we have spoken in a former place (*x*); but, for our present purpose, it is proper further to remark that they have not only these their proper courts, but that they were formerly exempt from the ordinary process of the superior courts of law at Westminster. [For, as originally all *jura regalia* 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 have been 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.] And even after these franchises were re-united to the crown, yet still the maxim continued to prevail, that the ordinary writs ran not into a county palatine; and therefore (until a recent period) all process issuing out of the superior courts of common law at Westminster, and intended to be executed in one of these counties, used to be directed, in the first instance, to the chancellor thereof, who thereupon issued his mandate to the sheriff. And the judges of assize who go circuit therein, still [sit by virtue of a special commission from the crown, as owner of the franchise, and under the seal thereof; and not by the usual commission under the Great Seal of England.] But in other respects the former practice has been altered;

(*t*) See 13 & 14 Vict. c. 43, amending the practice and proceedings of the court of chancery of the county palatine of Lancaster; and 23 & 24 Vict. c. 145, and 28 & 29 Vict. c. 40, as to provisions respecting trustees, mortgagees and others, in matters within the jurisdiction of the court.

(*u*) See 15 & 16 Vict. c. 76, s. 230.

(*x*) Vide sup. vol. I. pp. 134—138, where it is also mentioned that the "Court of Session" for the county palatine of *Chester* was abolished by 11 Geo. 4 & 1 Will. 4, c. 70.

for now, by 15 & 16 Vict. c. 76 (The Common Law Procedure Act, 1852), all writs issuing out of the superior courts of the common law at Westminster, to be executed in the counties palatine, shall be, as in other cases, directed and delivered to the sheriff, and executed and returned by him: and all records of the superior courts shall be brought to trial, and entered and disposed of in the counties palatine in the same manner as in other counties (*y*). Moreover (as mentioned in a former place) the practice and proceedings in the courts of the counties palatine are now by the same Procedure Act, and by other statutes passed with the same general object, made conformable, in general, to those of the superior courts of Westminster (*z*). Finally we may notice that the court of Common Pleas at Lancaster and the court of Pleas at Durham, are both courts of record; and that proceedings in error may be taken from their judgments into the Court of Queen's Bench (*a*); [which is to be considered as an ensign of superiority reserved to the crown at the original creation of the franchises.]

IV. The Court for the Stannaries of Cornwall and Devon, for the administration of justice among the tinners therein, is also a court of record with a special jurisdiction. It is held before a judge called the vice-warden; and it is founded on an antient privilege granted to the workers in the tin mines, to sue and be sued in their own court, [that they may not be drawn from their

(*y*) 15 & 16 Vict. c. 76, ss. 103, 122.

(*z*) Vide sup. vol. I. p. 136, n. (*n*).

(*a*) See 15 & 16 Vict. c. 76, s. 233; 17 & 18 Vict. c. 125, s. 102; 23 & 24 Vict. c. 126, s. 42. Formerly a jurisdiction in appeal from the *chancery* court of the county palatine of Lancaster, was exercised by the chancellor of the duchy and

county palatine, in the court of the duchy chamber, sitting with two judges of assize for the county at the time being; but by 17 & 18 Vict. c. 82, the chancellor of the duchy and county palatine and the two lords justices of appeal in the High Court of Chancery are made the court of appeal from the *chancery* court of Lancaster.

[business, which is highly profitable to the public, by attending their lawsuits in other courts (*b*). The privileges of the tanners are confirmed by a charter of the thirty-third year of Edward the first, and fully expounded by a private statute (*c*), 50 Edw. III., which has since been explained by a public Act, 16 Car. I. c. 15;] and their courts, which were formerly distinct for the several stannaries, are now united into one, and regulated by recent statutes (*d*). What relates to our present purpose is only this: that all tanners and labourers in and about the stannaries, during the time of their working therein *bonâ fide*, may sue and be sued in this court in all matters arising within the stannaries, excepting pleas of land, life and member (*e*). No writ of error lies from hence to any of the superior courts of common law (*f*); but it has been enacted that from all decrees and orders of the vice-warden on the equity side of his court, and from all his judgments on the common law side thereof, there shall lie an *appeal* to the lord-warden,—assisted by two or more assessors, who shall be members of the judicial committee of the privy council, or judges of the high court of chancery or courts of common law at Westminster;—and that from the

(*b*) 4 Inst. 232.

(*c*) See this at length in 4 Inst. 232.

(*d*) 6 & 7 Will. 4, c. 106; 2 & 3 Vict. c. 58; 11 & 12 Vict. c. 83, and 18 & 19 Vict. c. 32; and see as to these courts Carew's History of Cornwall, p. 94; Doderidge's History of Cornwall, p. 94; *Rowe v. Brenton*, 8 B. & C. 737; and *Harvey v. Gilbard*, 1 W. W. & H. 552.

(*e*) Until the establishment of the county courts under 9 & 10 Vict. c. 95, the actual labourers were privileged not to be sued in any *other* court than those of the stannaries,

in matters arising *within the stannaries*. (See the Laws of the Stannaries, p. 35.) But now the plaintiff, in such cases, may choose between the stannary court and the county court of the district in which the cause of action arose. (See 9 & 10 Vict. c. 95, s. 141; *Newton v. Nancarrow*, 15 Q. B. 144.) And if a cause of action, where a tanner was party, arose *out* of the stannaries, it was always allowable to bring the action elsewhere. (4 Inst. 231; Com. Dig. Courts, L. 1.)

(*f*) 4 Inst. 231.

decision of the lord-warden there shall be a final appeal to the judicial committee of the privy council (*g*).

V. [The several courts within the city of London (*h*), (as also those in other cities, boroughs and corporations throughout the kingdom,) which are held by prescription, charter, or act of parliament,—are also of the same private and limited kind (*i*).] Of these borough and other local courts it may be said in general, that they arose originally from the favour of the Crown to those particular districts wherein we find them erected, so that their inhabitants might prosecute their suits and receive justice [at home :—that, for the most part, the superior courts at Westminster-hall have a concurrent jurisdiction with these, or else a superintendency over them (*h*); and are bound by the statute 19 Geo. III. c. 70, to give assistance to such of them as are courts of record, by issuing writs of execution on their judgments, where the person or effects of the defendant are not within the inferior

(*g*) 18 & 19 Vict. c. 32, s. 26. An appeal formerly lay from the Cornwall stannary court to the lord-warden, and from thence to the privy council of the Prince of Wales as Duke of Cornwall, and from thence to the sovereign. (3 Bl. Com. p. 80.)

(*h*) The chief of these, are as follows:—1. The *Court of Hustings*, which is a tribunal analogous to the antient (or sheriff's) county court. 2. The *Lord Mayor's Court*. As to this court, see *The Lord Mayor of London v. Cox*, Law Rep., 2 H. L. 239; *Davies v. Mackenny*, Law Rep., 3 Ch. Ap. 209; and the statute 20 & 21 Vict. c. clvii, by which Act its practice and procedure were amended and its powers enlarged. In this court the recorder, or, in his absence, the common-serjeant, pre-

sides as judge; and, to review its proceedings, error may be brought in the Exchequer chamber. 3. The *City of London* (formerly called the *Sheriffs' Court*, which is now classed as one of the county courts. (See 30 & 31 Vict. c. 142, s. 35.)

(*i*) A detailed statement as to all the borough and other local courts throughout the kingdom, as they existed prior to the year 1846 and the introduction of the county courts,—showing the extent of their jurisdiction, the authority under which they were usually held, and their forms of process, &c.—will be found in the Fourth Report of the Common Law Commissioners appointed in 1828, Appendix, Part II.

(*h*) *Groenwelt v. Burwell*, Salk, 144; S. C. 263.

[jurisdiction (*l*);—and that their proceedings ought to be according to the course of the common law, unless otherwise ordered by parliament; for though the sovereign may erect new courts, yet he cannot alter the established course of law.] It is also to be observed, that by the Municipal Corporations Act, (5 & 6 Will. IV. c. 76,) in those boroughs to which that Act extends and in which there is a separate court of quarter sessions,—the recorder is constituted, by virtue of his office, the judge of any court of record for civil actions existing within the borough,—that is to say, if such court be not regulated by the provisions of any local Act, or if a barrister of five years' standing did not sit as a judge or assessor therein when the Municipal Act passed; and provisions are also contained in that statute to regulate the jurisdiction of such courts of record and the qualification and summoning jurors therein (*m*). Moreover, by 6 & 7 Will. IV. c. 105, s. 9, the recorder may appoint a deputy judge; and may make rules for the practice of such court, subject to the approval of the judges of the superior courts (*n*). Under 2 & 3 Vict. c. 27, it is required that every borough court of record shall be open for the trial of issues of fact and of law four times at least in each year,—and with no greater interval than four calendar months. But it is to be noticed that by 15 & 16 Vict. c. 54; s. 7, the council of any borough or ratepayers

(*l*) As to the removal of suits therefrom to the superior courts, see 1 & 2 Ph. & M. c. 63; 21 Jac. 1, c. 23; 19 Geo. 3, c. 70; 7 & 8 Geo. 4, c. 71; 1 & 2 Vict. c. 110, s. 22; 8 & 9 Vict. c. 127, s. 20.

(*m*) 5 & 6 Will. 4, c. 76, s. 118, &c.; and see 6 & 7 Will. 4, c. 105, s. 9; 7 Will. 4 & 1 Vict. c. 78, ss. 32—36.

(*n*) By 15 & 16 Vict. c. 76 ("The Common Law Procedure Act, 1852"), s. 228, her Majesty is em-

powered to direct from time to time, by order in council, that all or any part of the provisions of that Act, or of the rules made in pursuance thereof, shall apply to all or any courts of record in England or Wales; and a similar provision is contained in the 17 & 18 Vict. c. 125 ("The Common Law Procedure Act, 1854") s. 105, and in the 23 & 24 Vict. c. 126 ("The Common Law Procedure Act, 1860"), s. 44.

of any parish within the limits of which any local court other than a county court is established, may petition the crown in council for the exclusion from such local court of all causes whereof the county court has cognizance. And that by 30 & 31 Vict. c. 142, s. 29, it is enacted that where any action or suit which could have been brought in a county court, shall be brought in any other court than one of the superior courts of law, and the verdict recovered shall be for a less sum than £10, the plaintiff shall have no more costs from the defendant than if the proceeding had been in the county court,—unless the judge shall certify that it was properly brought in his court. From borough and other local courts of record, a writ of error lies, in general, to the Court of Queen's Bench.

VI. There is yet another species of private courts, which must not be passed over in silence, viz., the Courts of the Universities of Oxford and Cambridge (*o*). To these learned bodies antient royal grants have been made, (confirmed by act of parliament,) committing to them, respectively, a jurisdiction, *inter alia*, in personal actions in general, to which any member or servant of the university is a party;—in every case at least where the cause of action arose within the liberties of the university, and such member or servant was resident in the university when it arose, and when the action was brought (*p*).

(*o*) 3 Bl. Com. 84. The proceedings in the chancellor's court at *Oxford* (commonly called the vice-chancellor's court) used, in the time of Blackstone, to conform to the civil law. It is now however provided by 25 & 26 Vict. c. 26, s. 12, that rules for its practice and forms of procedure may be made from time to time by the vice-chancellor of the university, with the approval of

three of the judges of her Majesty's superior courts. In the chancellor's court at Cambridge, the civil law is in use (vide sup. vol. 1. p. 69).

(*p*) See 4 Inst. 227; *Browne v. Renouard*, 12 East, 12; *Thornton v. Ford*, 15 East, 634; *Turner v. Bates*, 10 Q. B. 292. This privilege, both as to Cambridge and Oxford, was, until recently, of an *exclusive* kind, the university being entitled,

[These privileges were granted, that the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations (*q*).] And the most antient charter [containing this grant to the university of Oxford, was 28 Hen. 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.] And later in the same reign [an act of parliament was obtained (*r*), confirming *all* the charters of the two universities, and those of the 14 Hen. VIII. and 3 Eliz., by name. Which *blessed Act*, as Sir Edward Coke entitles it (*s*), established their privileges hereon without any doubt or opposition.]

[We have now gone through the chief species of special courts, which have been instituted for the local redress of private wrongs (*t*); a subject which may be closed by

when an action under such circumstances was brought in any of the superior courts, to enter there a *claim of connusance*; by which it was withdrawn from that jurisdiction, and transferred to the court of the university. But as to Cambridge, this privilege is not now in every case exclusive. For by 19 & 20 Vict. c. xvii., intituled "An Act to confirm an Award for the settlement of matters in difference between the University and Borough of Cambridge, and for other purposes connected therewith," it is provided by sect. 18, that "the right of the university, or any member thereof, to claim connusance of any action or criminal proceeding wherein any

person shall be a party who is *not* a member of the university, shall cease and determine."

(*q*) It is remarked by Blackstone, (vol. iii. p. 84,) that "privileges of this kind are of a very high antiquity, being generally enjoyed by all foreign universities as well as our own, in consequence of a constitution of the Emperor Frederick, A.D. 1158." (See Cod. 4, tit. 13.)

(*r*) 13 Eliz. c. 29.

(*s*) 4 Inst. 227.

(*t*) Among the courts of special jurisdiction, was formerly that of the *great sessions in Wales*. For the ordinary writs for commencement of a suit formerly did not run into Wales, and this principality had

[one general observation from Sir Edward Coke: viz. that these particular jurisdictions, derogating as they do 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 (*u*).]

separate courts of its own;—it being provided by 34 & 35 Hen. 8, c. 26, and 18 Eliz. c. 8, that a session should be held twice a year in each county of Wales, by judges appointed by the crown, to be called the “great session” of the several counties in Wales. But the court of great sessions was abolished by 11 Geo. 4 & 1 Will. 4, c. 70, and the Welsh judicature entirely incorporated with that of England. This alteration was founded on the First Report of the Common Law Commissioners appointed in 1828. As to the recording fines and recoveries levied and suffered in the court of great sessions in Wales, see 5 & 6 Vict. c. 32.

There are certain other courts of special jurisdiction to which some notice is due, though they also are now either expressly abolished or have fallen into general disuse. These are:—1. The *Court of the Marshalsea*, which held plea of all trespasses committed within the verge of the court, where one of the parties was of the royal household; and of all debts and contracts, where both parties were of that establishment. This court was abolished by 12 & 13 Vict. c. 101, s. 13:—2. The *Palace Court* at Westminster, which held plea of all personal actions arising within twelve miles of the palace at Whitehall. This was also abolished by 12 & 13 Vict. c. 101, s. 13:—3. The *Court of Piedpoudre*

(*curia pedis pulverizati*), so called from the dusty feet of the suitors frequenting the same, which is a court of record incident, as of common law, to every fair and market. Of this court the steward of the owner of the market is the judge, with power to administer justice for all commercial injuries in that very fair or market, and not in any preceding one (see 3 Bl. Com. pp. 33, 34; Bac. Ab. Court of Piepoudre; Com. Dig. Market, G.):—4. The *Forests Courts*, for the government of the royal forests in different parts of the kingdom, and for the punishment of all injuries done to the *venison* or deer, to the *vert* or greensward,—and to the *covert* in which the deer are lodged (see 3 Bl. Com. p. 71; Com. Dig. Chase, R. 1, 2; Bac. Ab. Courts, Courts of the Forest; R. v. Conyers, 8 Q. B. 981):—and, 5. The *Court of Policies of Assurance*, a court established by 43 Eliz. c. 12, and 13 & 14 Car. 2, c. 23, for determining in a summary way, under commission from the Lord Chancellor, all causes concerning policies of assurance in London. (See 3 Bl. Com. p. 75.) But questions concerning such policies are now always determined in the ordinary course of a suit at law; and both the above statutes are now expressly repealed by 26 & 27 Vict. c. 125.

(*u*) 2 Inst. 548.

CHAPTER VII.

OF INJURIES COGNIZABLE IN THE COMMON LAW COURTS, — AND HEREIN OF THE REMEDY BY ACTION GENERALLY.



WE shall now proceed to the examination of the injuries which are cognizable in the courts of the common law (*a*), —having already incidentally given such account of those injuries which are cognizable in the ecclesiastical and maritime courts as the limits of this work allow (*b*), and reserving till a future opportunity the consideration of those which are cognizable in the courts of equity (*c*). And here we may make this general remark, that, in one or other of the different courts mentioned in the preceding chapters, every possible injury that can exist in contemplation of our laws is capable of being redressed; it being a settled and invariable principle in the laws of England, that every wrong must have a remedy (*d*).

In the course of the disquisition upon which we are about to enter, we shall at present confine ourselves to [such wrongs as may be committed in the mutual inter-

(*a*) Vide sup. p. 389 et seq. In a certain sense, the laws *ecclesiastical and maritime* are part of the common law of England (vide sup. vol. I. p. 63); but it is more usual and convenient to speak of them in a sense exclusive of the common law.

(*b*) Vide sup. pp. 444, 453.

(*c*) Vide post, vol. IV. p. 33 et seq.

(*d*) "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 that right is invaded." (3 Bl. Com. 23.)

[course between subject and subject; which the crown, as the fountain of justice, is officially bound to redress in the ordinary forms of law: reserving such injuries or encroachments as may occur between the crown and the subject, to be distinctly considered hereafter; as the remedy in such cases is generally of a peculiar and eccentric nature.]

First, then, as to the several injuries between subject and subject, cognizable in the courts of common law.

[Since all wrong may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right whereof the party injured is deprived (*e*). This may either be effected by the specific delivery or restoration of the subject-matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded: or where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages; as in case of assault, breach of contract, &c.: to which damages the party injured has acquired an incomplete or inchoate right, the instant he receives the injury, though such right be not fully ascertained till they are assessed by the intervention of the law;] that is, by the verdict of a jury (*f*). The instruments whereby this remedy is obtained, (which are sometimes considered in the light of the remedy itself,) are a diversity of *actions*, that is, suits at the common law, which are defined by the *Mirroure* to be “the lawful demand of one’s right” (*g*), or as *Bracton* and *Fleta* express it, in the words of *Justinian*, *jus prosequendi in judicio quod alicui debetur* (*h*).

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

(*e*) Vide sup. vol. I. p. 142.

(*g*) Ch. 2, s. 1.

(*f*) Vide sup. vol. II. pp. 11, 12.

(*h*) Sec Inst. 4, 6.

[the *Pandects*, “*compositæ sunt, quibus inter se homines disceptarent; quas actiones, ne populus prout vellet institueret, certas solennesque esse voluerunt*” (i). 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 people (k).] And the establishment of some *formulæ* was undoubtedly useful, to define the cases in which the law considered a wrong to have been sustained, and to ascertain the nature of the remedy which it allowed; and thus to prevent the uncertainty that would otherwise have attended a subject of so much importance as the right of action (l). Or, as Cicero expresses it, “*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*” (m). With us in England, accordingly, the several actions have been from time immemorial conceived in fixed forms of complaint, each exclusively appropriate to the particular kind of injury for which redress is demanded (n).

Actions are subject, in the first place, to this principal division—that they are either *personal, real, or mixed* (o).

(i) Ff. 1, 2, 2, s. 6.

(k) Cic. pro Mursena, s. 11; De Orat. 1. i. c. 41.

(l) Blackstone (vol. iii. p. 118) says, “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.”

(m) Pro Q. Roscio, s. 8.

(n) See Glanville, passim; Bract. lib. 5, De Exceptionibus, c. 17, s. 2. It is to be observed that certain sta-

tutes of recent date, viz. the Common Law Procedure Acts of 1852, 1854, and 1860 (15 & 16 Vict. c. 76; 17 & 18 Vict. c. 125, and 23 & 24 Vict. c. 126), though introducing the most extensive changes into the practice of the common law courts (of which due notice will be taken hereafter) contain no provision for abolishing the *forms of action*; and these therefore remain as heretofore. (See *Bracegirdle v. Hinks*, 9 Exch. 361; *Nargatt v. Nias*, 28 L. J. 143.)

(o) This, the antient division of actions, considered in regard to their

Personal actions are those whereby a man claims the specific recovery of a debt or of a personal chattel, or else satisfaction in damages for some injury done to his person or property (*p*).

Real actions,—or, as they are called in the *Mirroure*, *feudal* actions,—which concern real property only, are those whereby the plaintiff, here called the demandant, claims the specific recovery of any lands, tenements or hereditaments (*g*). By these actions formerly all disputes concerning real estates were decided; but in modern times they gradually became less frequent in practice (*r*), 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 moreover since introduced by other actions, and particularly by the species called ejection, of which we shall have occasion presently to speak. And by 3 & 4 Will. IV. c. 27, s. 36, this class of actions (subject to one or two exceptions) was at length expressly abolished.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and

nature, is still unaltered, though all actions are now (as will appear in the course of this book) assimilated, in general, to each other in their practical procedure. It may be useful here to remark that the phraseology of this division is drawn from the civil law. (See Inst. 4, 6.) Among the Romans the *actio in rem* (or real action) asserted a right to something against all the world, and the *actio in personam* (or personal action) a right merely against a particular person. By all actions of the first species (and by many of the second) the thing withheld was recovered. By other personal actions (particularly such as arose out of a *tort*) damages

only were recovered; and by others again, both the subject-matter of the suit and damages were recovered, and these last were called mixed actions (*actiones mixtæ*). Hence it will be observed that the connection between the classification of actions in the two systems, is little more than nominal.

(*p*) 3 Bl. Com. 117.

(*g*) Bl. Com. ubi sup. citing *Mirr.* c. 2, s. 6.

(*r*) Blackstone's expression (vol. iii. p. 118) is, that "they are now "pretty generally laid aside, &c." But this had been the case long before his time; see *Co. Litt.* by *Harg.* 239 a, note (1).

also personal damages for a wrong sustained (*g*). But they partake, in the main, of the character of real actions, and are often so called (*r*); and they were included in the provision of 3 & 4 Will. 4, c. 7, above mentioned.

The real and mixed actions which escaped the general demolition of their class, were the following: *writ of right of dower*, *dower*, and *quare impedit* (*s*); and to the same class seems to belong (though somewhat doubtfully), the existing action of *ejectment* (*t*). The two first of these *lie* (in the language of the law), that is, are applicable, and are the remedies to be used, where the demandant claims lands or tenements by the particular title of dower (*u*); the first being applicable where a woman is endowed of part of her dower, and is deprived of the residue, lying in the same town, by the same tenant by whom she was endowed of part (*v*); and the second being proper in all other cases where she is entitled to dower (*x*):—*quare impedit* lies where the right to present to a benefice has been disturbed, and the object is to recover the presentation thereof:—*ejectment*,

(*g*) Bl. Com. ubi sup.

(*r*) Co. Litt. 285 b; Roscoe, Real Actions, 1.

(*s*) Although the actions of *dower* and *quare impedit* still exist, yet (as will be more fully explained hereafter) their distinctive characteristics, as real actions, have been now in a great measure lost by the assimilation of their procedure, in general, to that which obtains in other actions. (Vide post, c. XI.)

(*t*) Ejectment, prior to the statute 15 & 16 Vict. c. 76, (by which its form was remodelled,) was often considered as a *mixed* action (see 3 Bl. Com. 214); and was expressly so denominated in the stat. 3 & 4 Will. 4, c. 27. The correctness, however, of that arrangement is

doubtful, for in its then form it was clearly a species of the personal action of trespass. (See Fitz. Ab. tit. Ejectione Firmæ, 2.) Under the Common Law Procedure Act, 1852, above referred to, it is difficult to fix its technical character. It seems indeed to fall properly under the definition of a real action, because it claims the specific recovery of land without damages. But in its incidents, it has no connection whatever with the antiquated remedies to which that appellation commonly belongs.

(*u*) As to an estate in dower, vide sup. vol. I. p. 275.

(*v*) Roscoe on Real Actions, 29.

(*x*) Ibid. 39.

where lands or tenements (other than such as is claimed as dower) are unlawfully withheld, and the object is their recovery. And as to the actions of *dower* and *quare impedit*, it may be observed here, that, by a peculiarity that has always attached (and still attaches) to the class of real and mixed actions, they can be brought in none of the superior courts of common law except the Court of Common Pleas (*y*). But ejectment may be brought in any of such courts.

Personal actions are founded either on *contracts* (*z*) or on *torts*, a term used to signify such wrongs as are in their nature distinguishable from breaches of contract;—and these torts are often considered as of three kinds, viz. *nonfeazance*, or the omission of some act which a man is by law bound to do; *misfeazance*, being the improper performance of some lawful act; or *malfazance*, being the commission of some act which is in itself unlawful (*a*). Actions founded on contract, are sometimes described in our books as actions *ex contractu*; and those on tort, as actions *ex delicto* (*b*).

The forms of personal action in use, are the following; *debt*, *covenant*, *assumpsit*, *detinue*, *trespass*, *trespass on the case*, and *replevin*; the three first being founded on contract, the remainder on tort (*c*). Of these in their order.

(*y*) See acc. 23 & 24 Vict. c. 126, s. 26.

(*z*) As to contracts, vide sup. vol. II. p. 54.

(*a*) 1 Chit. Pl. 134, 1st edit.

(*b*) These expressions, also, are derived from the civil law. Thus: "*In personam actio est, quotiens cum aliquo agimus, qui nobis vel ex contractu vel ex delicto obligatus est.*" Gaius, iv. 2.

(*c*) The above classification seems for most purposes correct; but it is to be noticed—1. As to *assumpsit*, that properly and *technically* considered it is one species of the form of *trespass on the case*, though,

being the common remedy for the breach of a promise not made by deed, it is usually treated in practice as founded on contract and ranked as a distinct form. 2. As to *detinue*, that, though founded on a *tort*,—viz. the wrongful detainer of a chattel (see acc. Gladstone v. Hewitt, 1 Cr. & J. 565), the Court of Common Pleas have nevertheless held that it is, for some purposes, to be looked at as "falling within the class of actions called actions on contract. (See Walker v. Needham, 3 Man. & Gr. 557; Danby v. Lamb, 13 C. B. (N. S.) 423.) And 3, as to *trespass on the case*, that, among other spe-

“Debt” lies where the object is the recovery of a certain sum of money alleged to be due from the defendant to the plaintiff (*d*); “covenant,” where redress in damages is sought for the breach of an agreement entered into by deed (*e*); “assumpsit,” where damages are claimed for the breach of a promise not made by deed; “detinue,” where the object is to recover a chattel personal unlawfully detained (*f*). “Trespass” lies where the plaintiff claims damages for a trespass, or (as it is more fully expressed), a trespass *vi et armis* (*g*); that is, an injury accompanied with actual force, as in the case of a battery or imprisonment—or at least implied force, as in the case of an unlawful but peaceable entry upon the plaintiff’s land. And here it may be remarked, that [trespasses savour of the criminal kind—being always attended with some violation of the peace, real or supposed, for which in strictness of law a fine ought to be paid to the crown, as well as a private satisfaction to the party injured (*h*).] “Trespass on the case” is a form of action less antient than the rest, having apparently first come into use in the reign of Edward the third (*i*); and it was invented under the authority of the statute of Westminster, (13 Edw. I. c. 24,) upon the analogy of the old form of trespass (*k*),

cies in less general use, this form includes the action of *trover*, as to which more specific information will be given hereafter.

(*d*) As to debt, vide sup. vol. II. p. 144.

(*e*) As to a covenant, vide sup. vol. I. p. 506; vol. II. p. 54.

(*f*) It will be seen hereafter that where the object is to recover *damages* for the detention, and not the chattel itself, the proper action is *trover*.

(*g*) In actions of trespass the formal words *vi et armis* and *contra pacem*, were formerly always used

in the pleadings. But by 15 & 16 Vict. c. 76, s. 49, they were directed to be omitted for the future.

(*h*) Finch, L. 198; Jenk. Cent. 158.

(*i*) Hist. of Eng. L. by Reeves, vol. iii. pp. 89, 243, 391.

(*k*) This statute provided, that “whenever from thenceforth in one case a writ shall be found in the chancery, and in a like case, falling under the same right, and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one; and if they

in order to supply a great defect in the original scheme of personal actions—a scheme devised in comparatively rude and barbarous times, and consequently comprising no forms adapted to the redress of many of those injuries which in the progress of society gradually attract notice. This kind of action—which derives its name from the comparative particularity with which the circumstances of the plaintiff's case are detailed in its written allegations (*l*)—is very comprehensive in its scope, and may be said to lie in every case where damages are claimed for an injury either to person or property, not falling within the compass of the other forms. And as regards its relation to trespass, we may notice this [settled distinction, 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—but where there is no act done, but only a culpable omission, or where the act is not *immediately* injurious, but only by *consequence* or collaterally, there no action of trespass will lie, but an action on the case for the damages consequent on such omission or act (*m*).] To which we may add, that where the subject-matter affected is not corporeal and tangible, so that the idea of *force* becomes inapplicable,—here, though the injury be by way of act done, and its operation be direct and immediate, the remedy is case and not trespass (*n*). Lastly, with respect to “replevin,” it will be sufficient for the present to remark, that it is an action of limited application, and in practice almost invariably confined to the object of trying the legality of a *distress* levied upon the plaintiff's personal chattels (*o*.)

“ cannot agree, it shall be adjourned
 “ to the next parliament, where a
 “ writ shall be framed by consent
 “ of the learned in the law; lest it
 “ happen for the future, that the
 “ court of our lord the king be
 “ deficient in doing justice to the
 “ suitors.”

(*l*) 3 Bl. Com. 122.

(*m*) *Scott v. Shepherd*, 2 Bl. Rep. 892; see *Gilbertson v. Richardson*, 5 C. B. 502.

(*n*) 1 Chitty, Pl. 143, cites Com. Dig. Action, Case, Disturbance, (A. 2).

(*o*) It lies, however, in other cases

A fitter opportunity will be found in the next chapter, of entering more at large into the applicability, in different cases, of one or other of the various forms of actions above enumerated, and also of referring to the particular *species* which some of them comprise—but there are some points besides those hitherto mentioned, which, as relating to actions in general, seem to require notice in this place.

Actions are either *local* or *transitory*; the former being founded on such causes of action as necessarily refer to some particular locality, as in the case of trespasses to land (*p*); the latter on such causes of action as may be supposed to take place anywhere—as in the case of trespasses to goods, batteries, and the like. Real actions are always in their nature local, personal are for the most part transitory. The distinction between local and transitory actions is this—that the former, as the general rule, must be tried in the county where the cause of action really arose, and by a jury of that county (*q*); the latter may be tried in any county, at the discretion (in general) of the plaintiff. It follows from this, that when an injury is committed out of England, and its nature is such as to make the action local, no action at all will lie for its redress in any English court. On the other hand, where the nature of the injury is such that the action is transitory, such action

also of goods unlawfully taken. (See *George v. Chambers*, 11 Meë. & W. 149; *Mellor v. Leather*, 1 Ell. & Bl. 619.)

(*p*) Another instance of a local action is one brought upon a matter of *record* in any of the courts at Westminster; and therefore formerly an action of *scire facias* to repeal letters patent was local. But now by 12 & 13 Vict. c. 109, s. 29, a writ of *scire facias*, in an action at suit of her Majesty for repealing

letters patent, may be directed to the sheriff of *any* county, though the record on which it is founded may remain in Middlesex or any other county.

(*q*) However by 3 & 4 Will. 4, c. 42, s. 22, power is given to a judge to order the trial in a local action to be had elsewhere, if it be shown to his satisfaction that such course will be more convenient. (As to this provision, see *Greenhow v. Parker*, 6 H. & N. 882.)

will lie in the English courts, whether the injury was committed in England or elsewhere (*r*).

Personal actions are also subject, (as sufficiently appears by preceding explanations,) to the distinction of being either brought for the specific recovery of property, or for damages. As regards the competency of the latter kind of remedy, it is to be remarked, that an action for damages will in general lie wherever a right has been invaded—or, in other words, an injury committed,—although no damage shall have been actually sustained; it being material to the establishment and preservation of the right itself, that its invasion shall not pass with impunity (*s*). Thus an action by one commoner against another, for surcharging the common, (that is, turning on more cattle than he was entitled to do,) has been held maintainable, although the plaintiff may not himself have turned on any cattle of his own during the same year, and can therefore have sustained no actual loss (*t*). In such cases, there being no ground for awarding damages to any considerable amount, the plaintiff recovers some trifling sum by way of *nominal* damages; in addition to which, the defendant has in general to sustain the costs of the action, including in some cases those incurred by his adversary (*u*).

(*r*) Formerly, if cause of action of a transitory kind arose abroad, and was put in suit in the English courts, it was necessary to have recourse in the pleadings to a legal fiction, and to allege that the cause of action arose (contrary to the truth of the fact) in some English county. In the present system of pleading no recourse is had to this fiction; but the plaintiff, in his declaration (or statement setting forth his cause of action), always specifies in the margin some English county, as that in which he proposes that the cause should be tried. (See 15 & 16 Vict.

c. 76, s. 59.)

(*s*) 1 Saund. by Wms. 346 b.

(*t*) Wells v. Watling, 2 Bl. Rep. 1233; and see Marzetti v. Williams, 1 B. & Adol. 426; Blofeld v. Payne, 4 B. & Adol. 410.

(*u*) But where the plaintiff in such action in one of the superior courts of record recovers less than 10*l.*, he will not be entitled to any costs from the defendant, unless the judge certify on the record that there was sufficient reason for bringing such action, or makes a rule or order for costs. (30 & 31 Vict. c. 142, s. 5; see also sect. 29.)

It is however requisite, in order to sustain an action for damages, that the plaintiff shall have sustained some loss or inconvenience, whether actual or nominal, of a kind proper and peculiar to himself:—for where the damage is of a merely public character, and affects the subjects of the realm at large as well as the plaintiff, no civil action lies; but the law considers the injury, in that case, as amounting to a crime, and consequently as a fit subject for an indictment. Hence no action can be maintained for an encroachment on the highway; but the offender is liable to be indicted as for a public misdemeanor. Wherever extraordinary damage, indeed, is sustained by an individual, he has in general a right of action as for redress of a civil injury, though the case may in its circumstances also amount to a crime. Thus, in the case last supposed, [if by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer any injury by falling therein, then for this particular damage, which is not common to others of the lieges, the party shall have his action (*x*).] And so in the case of unlawful violence designedly done to the person, though that always amounts, in contemplation of law, to a crime, yet the party injured is entitled to his civil remedy. But even here this distinction is to be observed, that in case such crime amounts to a felony the remedy for the private injury is *suspended* until the sufferer has fulfilled his duty to the public, by prosecuting the offender for the public crime (*y*); though in the case of a mere misdemeanor,—such as an assault, battery, libel, and the like,—the right of action is subject to no such impediment.

Moreover, though an action will lie, (as we have seen,) for an injury unattended with actual loss or damage, yet none can be maintained even for loss or damage actually

(*x*) 3 Bl. Com. 220. See Wilks v. Hungerford Market, 2 Bing. N. C. 281.

(*y*) Crosby v. Leng, 12 East, 409; and see White v. Spettigne, 13 Mee. & W. 603.

inflicted, unless it result from an injury—that is, an invasion of a right; it being a maxim, that a mere *damnum absque injuriâ* is not actionable. Thus, if I have a mill, and my neighbour builds another mill upon his own ground, *per quod* the profit of my mill is diminished, yet no action lies against him, for every one may lawfully erect a mill on his own ground. But if I have a mill by prescription on my own land (*z*), and another erects a new mill, which draws away some portion of the stream from mine, so as to diminish its former power, an action will lie against him of trespass on the case (*a*).

It may also be remarked, that a plaintiff is not entitled to recover in respect of any damage that is too *remote*; or, in other words, he cannot recover unless the damage he has suffered flows naturally and directly from the injury committed (*b*). Thus, where the plaintiff, who as director of musical performances had engaged a certain public singer, brought an action for the publication of a libel on her, alleging that she was thereby deterred from performing in public, through the apprehension of being ill received, so that the plaintiff lost the profits he would otherwise have gained,—it was held that the damage was too remote, and the action not maintainable (*c*).

Again, as to suits of every class, it is generally true that the right of action is not *assignable*, so as to enable the assignee to sue in his own name (*d*). But in certain cases, the right to sue is transferred by the operation of law. Thus the rights of action of a bankrupt, pass (with certain exceptions) to his assignees; and upon the death of either of the parties between whom a cause of action

(*z*) As to prescription, vide sup. vol. I. p. 702 et seq.

(*a*) Bac. Ab. Actions on the Case (C), and the authorities there cited.

(*b*) Com. Dig. Action on Case, Defamation.

(*c*) Ashley v. Harrison, 1 Esp. 48; and see a variety of these cases

decided on the same principle, such as Kelly v. Partington, 5 B. & Adol. 645; Knight v. Gibbs, 1 Ad. & El. 43; Green v. Button, 1 Tyr. & G. 118; Langridge v. Levy, 4 Mee. & W. 337.

(*d*) Vide sup. vol. II. pp. 45, 46, 49, and the exceptions to the above rule, there noticed.

has arisen, the right of maintaining such action survives, in general, to or against his executors or administrators; and to these, as well as to the assignees, the right also belongs of *continuing* actions, which the deceased, or the bankrupt, has commenced (*d*). In respect, indeed, to suits which are founded on certain violations of personal rights, —as, in the case, for example, of an action for slander, —the maxim is, that they *die with the person* (*e*). And by the common law, this extended to every case of *tort* (*f*). But (except in reference to causes of action for violation of personal rights of the description just referred to), this rule of the common law has been set aside by various acts of parliament. For by 4 Edw. III. c. 7, actions may be maintained *by* executors or administrators, for trespasses to the personal property of the testator or intestate. And by 3 & 4 Will. IV. c. 42, s. 2, actions may be maintained *by* executors or administrators, for any injury committed in his lifetime to his real estate, —provided it was committed within six calendar months before, and the action brought within one year after, his death. And by the statute last named, it was also provided, that actions may be maintained *against* executors or administrators, for any wrong committed by the deceased in respect of his property either real or personal, —provided it was committed within six calendar months before his death, and the action is brought within six calendar months after the executors or administrators have taken on themselves the administration. And, lastly, by 9 & 10 Vict. c. 93 (amended by 27 & 28 Vict. c. 95), it is enacted, that whenever the death of a person shall be caused by such wrongful act, neglect or default, as would, (if death had not ensued,) have entitled the party injured to maintain an action for damages, the person who would have been liable to such action may be sued for the benefit of his

(*d*) 15 & 16 Vict. c. 76, ss. 137, 138; and see 17 & 18 Vict. c. 125, s. 92.

(*e*) 3 Bl. Com. 302.

(*f*) 1 Chit. Pl. 56. As to *torts*, vide sup. p. 485.

(or her) wife, husband, parent and children (*g*); and this, although the death shall have been caused under such circumstances as amount in law to felony. And the jury may give damages proportionable to the injury resulting from such death, to be divided among the parties for whose benefit the action is brought, in such shares as the jury shall by their verdict direct (*h*).

Before we conclude this chapter, it is proper to remark, that besides the *remedy* for wrong sustained, which is found, as already stated, in the action itself, the common law courts will now afford collateral protection against the *continuance* or *repetition* of the wrong. For every person who brings an action for breach of contract or other injury, is entitled by 17 & 18 Vict. c. 125 (the "Common Law Procedure Act, 1854") to claim also in such action a *writ of injunction* against the continuance or repetition of such breach of contract, or other injury, —or against the committal of any breach of contract, or other injury of a like kind, arising out of the same contract, or relating to the same property or right. This is a protection which the common law courts had previously no jurisdiction to grant. It could be obtained only from a court of equity (*i*).

(*g*) As the general rule the action is to be brought by the executor or administrator; but if there be none, or no action be brought by them within six months after the death, the action may be brought by all or any of the parties to be benefited by the result. (27 & 28 Vict. c. 95, s. 1.)

(*h*) The cases on the construction of the 9 & 10 Vict. c. 93 (usually called "Lord Campbell's Act") are numerous. They establish (among other things) that the jury are not entitled to take into their consideration, in assessing the damages, the *feelings* of the survivors as distinct

from their pecuniary loss. These and other points on the statute will be found adverted to, in *Chapman v. Rothwell*, 1 Ell. Bl. & Ell. 168; *Duckworth v. Johnson*, 4 H. & N. 653; and *Pym v. Great Northern Railway Company*, 4 B. & Smith, 396.

(*i*) 17 & 18 Vict. c. 125, s. 89 et seq. As to these provisions, see also the 23 & 24 Vict. c. 126, ss. 32, 33. The power of claiming under them a writ of injunction does not extend to the action of *ejectment*. (*Baylis v. Le Gros*, 2 C. B. (N. S.) 316.)

CHAPTER VIII.

OF INJURIES COGNIZABLE IN THE COMMON LAW
COURTS—*continued.*

HAVING in the course of the last chapter entered into some general explanations with regard to the nature of the great common law remedy, by *action*, (a subject to which we shall have occasion to revert,) we now resume our inquiry into the civil injuries cognizable in the courts of the common law, to the right apprehension of which we have deemed some preliminary acquaintance with the scheme of actions essential.

The rights which are severally due to the different members of the community, and the establishment and maintenance of which we have considered as the great objects of municipal law,—were divided, (as we may remember,) into personal rights, rights of property, rights in private relations, and public rights (*a*). It will be convenient, therefore, in proceeding to a further investigation of the civil injuries cognizable in the courts of common law, to subject these injuries, (which are but the violations of so many rights,) to a similar distribution.

First, then, as to such injuries as affect *personal* rights, viz. the right of personal security, (comprising those of life, limbs, body, health and reputation,) and the right of personal liberty (*b*).

Of injuries which affect the *life* of man, it is sufficient

(*a*) Vide sup. vol. I. p. 145.

(*b*) *Ibid.*

to remark, that they are not merely civil wrongs, but,—where committed with intention to affect it,—amount to one of the most atrocious species of crimes (*c*). These therefore shall for the present be passed by, and reserved for the next Book of these Commentaries, viz. that which relates to the criminal law.

As to injuries affecting a man's *limbs or body*, these may be committed, 1. By *threats* (or menaces of bodily hurt), through fear of which a man's business is in fact interrupted. But it is to be noticed that [a menace alone, without any consequent inconvenience, makes not the injury: but to complete the wrong, there must be both of them together (*d*).] 2. By *assault*; which is an attempt or offer to beat a man without proceeding to touch him (*e*): [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 describes to be “an unlawful setting upon one's person” (*f*).] 3. [By *battery*; which is the beating of another. The least touching of another's person, wilfully or in anger, is a battery (*g*); for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it,—every man's person being sacred, and no other having a right to meddle with it in any the slightest manner (*h*).] Injuries to limbs and bodies may also be, 4. [By *wounding*; which consists in giving another some dangerous

(*c*) In certain cases, an injury destroying life may by statute (as we have seen) form the subject of an action for damages on behalf of the family of the deceased in respect of the *civil* wrong thereby suffered; and this, even when the death is caused under circumstances amounting to felony on the part of the defendant. (Vide sup. p. 492.)

(*d*) 3 Bl. Com. p. 120, citing Finch, L. 202.

(*e*) Bl. Com. ubi sup. See Reed v. Coker, 13 C. B. 850.

(*f*) Finch, ubi sup.

(*g*) Bl. Com. ubi sup. See Coward v. Baddeley, 4 H. & N. 478.

(*h*) On a similar principle the Cornelian law *De injuriis* prohibited *pulsation* as well as *verberation*; distinguishing verberation, which was accompanied with pain, from pulsation, which was attended with none. (Ff. 47, 10, 5.)

[hurt, and is only an aggravated species of battery.]
 5. [By *mayhem*; which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defence in fight. This is a battery attended with this aggravating circumstance, that thereby the party injured is for ever disabled from making so good a defence against future external injuries, as he might otherwise have done. Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a foretooth (*g*), and also some others (*h*); but, it is said that, the loss of one of the jaw-teeth, the ear, or the nose, is no *mayhem* at common law, as they can be of no use in fighting. For each of these injuries,—threats, assault, battery, wounding and *mayhem*,—an action] will lie, whereby adequate damages may be recovered. And for the four last, at least, [an indictment may be brought as well as an action (*i*.)] It is to be observed, however, as to all these acts, that to render them either actionable or indictable, they must be committed on an unlawful occasion; for under certain circumstances they may be justifiable, and then form no just ground of complaint either civil or criminal. Thus assault and battery are justifiable [where one who has authority, as a parent or master, gives moderate correction to his child, his scholar, or his apprentice (*j*). So also on the principle of self-defence (*k*); for if one strikes me first, or even only assaults me, I may strike in my own defence, and if sued for it, may plead *son assault demesne* (*l*), or that it was the plaintiff's own original assault that occasioned it;] and supposing a dangerous

(*g*) Finch, L. 204.

(*h*) 1 Hawk. P. C. 111.

(*i*) As to the punishment of an *assault* (which is implied in every case of battery, wounding or *mayhem*) either by indictment or (in certain cases) by way of summary conviction, vide post, vol. IV. pp.

187, 418.

(*j*) Hawk. P. C. bk. i. c. 61, s. 23; see *Winstone v. Linn*, 1 B. & C. 469.

(*k*) Vide sup. p. 353.

(*l*) *Oakes v. Wood*, 3 Mee. & W. 150.

scuffle thereon to take place, I may even, for my own preservation (but not otherwise) wound or maim my adversary, and justify it under a similar plea (*m*). [So likewise in defence of my goods or possessions, if a man endeavours to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away (*n*). 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 (*o*); 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.] 6. The limbs and bodies of individuals may also be affected by indirect or consequential, as well as immediate injury,—particularly by *negligence* in the performance of duties; as in the case where a passenger in a coach is overturned by the carelessness of the driver (*p*). The remedy for this sort of injury is an action of trespass on the case (*q*); which may be brought against the coach proprietor, not only where he is guilty of the negligence in his own person, but also where the fault was that of his servant; it being a general principle applicable to all torts whatever,—that a man is civilly liable not only for what he does in his own person, but for what he does in the person of another, who acts at the time by his authority: for “*qui facit per alium, facit per se*.” Another consequential injury to the bodies of individuals, falling under the same head, is that of damage done to the person, by a brute animal used to do mischief (*r*); in

(*m*) Cockcroft v. Smith, 2 Salk. 642.

(*n*) Finch, L. 203.

(*o*) Vide sup. p. 42.

(*p*) Brotherton v. Woodrod, 3 B. & Bing. 54; Randleson v. Murray, 8 Ad. & El. 109; Lynch v. Nurdin, 1 Q. B. 29.

(*q*) See Gordon v. Rolt, 4 Exch. 365; Sharrod v. London and North Western Ra. Co. *ibid.* 580.

(*r*) May v. Burdett, 9 Q. B. 101; Card v. Case, 5 C. B. 622, and Hudson v. Roberts, 6 Exch. 697; Cox v. Burbidge, 13 C. B. (N. S.) 430; Worth v. Gilling, Law Rep., 2

which case [the owner must answer for the consequences, if he knows of such evil habit (*s*).] There may, however, be circumstances in which mischief caused by such an animal will not support an action; as for example in the case of a dog, kept for the protection of its owner's house and yard, if carefully confined within the premises, and the injury be caused by the plaintiff's having entered the same improperly, or without sufficient caution (*t*). With respect, however, to the liability of the owners of dogs for injuries done by them, a recent Act (28 & 29 Vict. c. 60) has, on the other hand, provided that if an action be brought for an injury by a dog to *cattle or sheep*, it shall not be necessary for the plaintiff to show either a previous mischievous propensity in the dog or knowledge by the owner of such propensity, or even that the injury complained of was attributable to neglect on the part of such owner.

Injuries affecting a man's *health* are, where by any unwholesome practices of another, a man sustains any damage in his vigour or constitution. As by selling him bad provisions or wine (*u*); by the exercise of a noisome trade, which infects the air in his neighbourhood (*v*); or by the neglect or unskilful management of the surgeon, or apothecary, who attends him (*x*). [For it hath been solemnly resolved (*y*) that *mala praxis* is a great misdemeanor and offence at common law, whether it be for curiosity and experiment, or by neglect; because it

C. P. 1, are recent instances of actions brought for injuries caused by animals.

(*s*) See *May v. Burdett*, 9 Q. B. 101.

(*t*) *Bates v. Crosbie*, M. T. 1798, in the King's Bench, cited in Christian's Black. vol. iii. p. 154.

(*u*) 1 Rol. Abr. 90; *R. v. Southerton*, 6 East, 133.

(*v*) 9 Rep. 58; *Hutt*. 135; *R. v. Dewnap*, 16 East, 194.

(*x*) See *Dr. Groenvelt's case*, 1

Ld. Raym. 214; *Seare v. Prentice*, 8 East, 348; *Slater v. Baker*, 2 Wils. 359; *Hancks v. Hooper*, 7 Car. & P. 81; *Lanphier v. Phipos*, 8 Car. & P. 475.

(*y*) 3 Bl. Com. 122; Ld. Raym. ubi sup. The civil law was the same. "*Si medicus curationem dereliquerit, male quempiam secuerit, aut perperam ei medicamentum dederit, culpa adnumeratur.*" (Inst. 4, 3.)

[breaks the trust which the party had placed in his physician, and tends to the patient's destruction. These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages, by an action of trespass on the case ;] and in case of gross misconduct, the party may in some cases also be indicted (*z*).

Injuries affecting a man's *reputation* or good name are, first, by malicious and defamatory words. And as to this injury (the remedy for which is also by trespass on the case), we may in the first place remark, that though malice is a necessary ingredient, yet where words are in a legal sense "defamatory," and it does not appear that they were spoken on any such lawful occasion as to rebut the supposition of malice, the law will always conclude them to be malicious (*a*). The principal cases in which words will be considered defamatory, so as to amount to the legal injury of which we now speak, are as follows: viz. where a man utters anything of another [which may either endanger him in law, by impeaching him of some punishable crime,—as to say that he hath poisoned another, or is perjured (*b*); or which may exclude him from society,—as to charge him with having an infectious disorder tending so to exclude him (*c*); or which may impair or hurt his trade or livelihood (*d*),—as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave ;] or which may disparage him in an office of public trust,—as to say of a magistrate that he is partial and corrupt (*e*). [But scandalous words

(*z*) See *R. v. Long*, 4 Car. & P. 398; *ibid.* 407, n. (*a*).

(*a*) As to this, see 15 & 16 Vict. c. 76, s. 61.

(*b*) Finch's Law, 185. See *Huckle v. Reynolds*, 7 C. B. (N. S.) 114.

(*c*) Such as leprosy, &c.; Com. Dig. Act. Def. (D. 28). See *Bloodworth v. Gray*, 7 Man. & G. 334.

(*d*) See *Jones v. Littler*, 7 Mee.

& W. 423; *Bellamy v. Burch*, 16 Mee. & W. 590; *Southee v. Denny*, 1 Exch. 196; *Evans v. Harries*, 1 H. & N. 251; *Brown v. Smith*, 13 C. B. 596.

(*e*) 3 Bl. Com. 123; Com. Dig. ubi sup.; 2 Cro. 90; *Ashton v. Blagrave*, *Ld. Raym.* 1369. Words spoken in derogation of a peer, judge or other great officer of the realm, —which are called *scandalum*

[which concern matters merely spiritual, as to call a man a heretic or adulterer, are not, as the general rule, cognizable by a common law court (*h*);] though words imputing unchastity to a *woman*, have this peculiarity, that, by the custom of London, an action may be maintained upon them in the city courts (*i*). It is further to be observed, that [for scandalous words of the several species before mentioned,—viz. that may endanger a man by subjecting him to the penalties of the law, may exclude him from society, may impair his trade, or may disparage him in his 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.] But with regard to disparaging words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, though these also may amount to the injury now under consideration, it is [necessary that the plaintiff should aver (and prove) some particular damage to have happened, which is called laying his action with a *per quod* (*h*).] As if I say of a commission agent, that he is an unprincipled man, and borrows money without repaying it, this is not in itself actionable; but if I say this to a person who was going to deal with him, and he forbear to do so in consequence of its being said,—here,

magnatum,—are held to be particularly heinous. And though they may be such as would not be actionable in case of a common person, they are made punishable by imprisonment and damages by many ancient statutes. (3 Edw. 1, c. 34; 2 Rich. 2, st. 2, c. 5; 12 Rich. 2, c. 11; and see *King v. Sir E. Lake*, 2 Vent. 28; 3 Bl. C. 123.) No resort to this action has been had in modern times.

(*h*) *Parret v. Carpenter*, Noy, 64. Formerly such words were cogni-

zable in the ecclesiastical courts; but suits for defamation in those courts are now abolished by 18 & 19 Vict. c. 41.

(*i*) Com. Dig. ubi sup. (F. 20); Pulling's Laws of London, 186, and see the authorities there cited. As to a similar custom in the city of Bristol, see *Power v. Shaw*, 1 Wils. 62.

(*h*) See *Hopwood v. Thorn*, 8 C. B. 293; *Barnett v. Allen*, 3 H. & N. 376.

there being special damage, an action will lie against me (*l*). So if I impute heresy or adultery to another, if he can show that he was thereby exposed to some temporal damage, he may sue me in a court of common law and recover damages for such injury (*m*); and the case is the same if I impute unchastity to a woman, and she can show that she has thereby lost a marriage or some pecuniary advantage (*n*). And in like manner, if I slander another man's *title*, by spreading (not in the *bonâ fide* assertion of my own title) 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,—it is actionable, provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land (*o*).] It is, however, to be understood, that even where special damage has thus been sustained in consequence of words spoken with respect to person or property, yet if the words are not in themselves disparaging, it is *damnum absque injuriâ*, and no action can be maintained upon them (*p*). So even where the words are disparaging and attended with special damage, or are of such a kind as even without special damage will sustain an action, yet if they be [spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill-will,] they are not actionable; for in such case they are not *maliciously* spoken, which is part of the definition of the injury in question (*q*). And on the same principle, are protected all such statements as it is usual to comprehend under the name of *privileged* communications (*r*),—viz.

(*l*) See *Storey v. Challands*, 8 Car. & P. 234.

(*m*) 3 Bl. Com. 125. See *Galloway v. Marshall*, 9 Exch. 294.

(*n*) Com. Dig. ubi snp. (D. 30). See *Lynch v. Knight*, 7 H. of L. Cas. 577; *Parkins v. Scott*, 1 Hurl. & C. 153; *Wilby v. Elston*, 8 C. B. 142.

(*o*) As to slander of title, see *Smith v. Spooner*, 3 Taunt. 246; *Brook v. Raul*, 4 Exch. 521.

(*p*) *Kelly v. Partington*, 5 B. & Ad. 645.

(*q*) See *Pater v. Baker*, 3 C. B. 831.

(*r*) The cases upon what are called friendly or privileged com-

those derogatory to the private character of another, which are made on such lawful occasions as tend to rebut the *prima facie* inference of malice, which would otherwise arise from them; as where a man communicates to another circumstances which it is right that he should know in relation to a matter in which they have a mutual interest, but tending to the disparagement of a third person; or where a man, on being asked as to the character of one who has left his service, charges him with a theft (*s*). For in such cases as these no action lies, unless some proof of malice beyond the uttering of the words be given, as that the defendant knew them to be false (*t*). In reference to this injury to the reputation, it is further to be understood that if the defendant be able to prove the words to be *true*, the action will be barred; whether they were or were not in law defamatory, or whether special damage ensued or not, or whether they were spoken on a privileged occasion or not; for if true, then

munications are very numerous. The following may (amongst others) be consulted with advantage. *Rogers v. Clifton*, 3 Bos. & Pul. 594; *Knight v. Gibbs*, 1 A. & E. 43; *Martin v. Strong*, 5 A. & E. 535; *Padmore v. Lawrence*, 11 A. & E. 380; *Tusan v. Evans*, 12 A. & E. 733; *Fountain v. Boodle*, 3 Q. B. 5; *Griffiths v. Lewis*, 7 Q. B. 61; *Blagg v. Sturt*, 10 Q. B. 899; *Simpson v. Robinson*, 12 Q. B. 743; *Coxhead v. Richards*, 2 C. B. 569; *Blackham v. Pugh*, *ibid.* 611; *Bennett v. Deacon*, *ibid.* 628; *Hopwood v. Thorn*, 8 C. B. 293; *Somerville v. Hawkins*, 10 C. B. 583; *Kershaw v. Bailey*, 1 Exch. 743; *Taylor v. Hawkins*, 16 Q. B. 308; *Gilpin v. Fowler*, 9 Exch. 615; *Harris v. Thompson*, 13 C. B. 333; *Manby v. Witt*, 18 C. B. 544; *Huntley v. Ward*, 6 C. B. (N. S.) 514; *Amann v. Damm*, 8 C. B. (N. S.) 597;

Whiteley v. Adams, 15 C. B. (N. S.) 393; *Force v. Warren*, *ib.* 806; *Jackson v. Hopperton*, 16 C. B. (N. S.) 829. As to expressing an opinion on the public acts of official persons, see *Gathercole v. Miall*, 15 Mee. & W. 319. As to reporting legal proceedings, see *Lewis v. Levy*, 1 Ell. Bl. & Ell. 537; *Hoare v. Silverlock*, 9 C. B. 20. As to reporting a public meeting, see *Davison v. Duncan*, 7 Ell. & Bl. 229.

(*s*) Vide sup. vol. II. p. 252.

(*t*) In Lord Northampton's case, 12 Rep. 134, it is laid down that where the words spoken by the defendant are a mere repetition of what he has himself heard from another, and he names his author at the time, he is not liable to an action. (But see *Lewis v. Walker*, 4 B. & Ald. 614; *M'Pherson v. Daniels*, 10 B. & C. 269; *De Crespiigny v.*

the law deems them to be justifiable. And hence [if I can prove the tradesman a bankrupt, the physician a quack, and the lawyer a knave, this will destroy their respective actions (*u*).]

A second way of affecting a man's reputation is by publishing a *libel* upon him (*x*); which, as regards the present purpose, may be defined to be some writing, picture, or the like, containing malicious and defamatory matter (*y*). The nature of this injury and its remedy, are in general similar to what has been already laid down in the case of words spoken,—but subject to some material differences. For not only such imputations as will support an action for words, but all contumelious matter that tends to degrade a man in the opinion of his neighbours, or to make him ridiculous, will amount, when conveyed in writing, or by picture, or the like, to libel (*z*). Again, while oral defamation is ground for an action only, there are, in the case of publishing a libel, two remedies—one by indictment, (or by criminal informa-

Wellesley, 5 Bing. 392.) No action for slander will lie against a *witness* for speaking falsely and maliciously. The only remedy is to indict him for perjury, or to sue him for the penalty given, in such cases, by 5 Eliz. c. 9. (See *Revis v. Smith*, 18 C. B. 126.)

(*u*) 3 Bl. Com. 125. A similar rule prevailed in the civil law: "*eum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit.*" (Ff. 47, 10, 18.)

(*x*) As to what amounts to publication of a libel, see *Tidman v. Ainslie*, 10 Exch. 63.

(*y*) Besides *defamatory* libels, there are those of a blasphemous, seditious, or immoral kind: as to

which vide post, vol. IV. p. 344.

(*z*) See *Thorley v. Lord Kerry*, 4 Taunt. 355; *Cook v. Ward*, 6 Bing. 409; *Lord Churchill v. Hunt*, 2 B. & Ald. 685; *Hearne v. Stowell*, 12 A. & E. 719; *Cheese v. Scales*, 10 Mce. & W. 488; *Capel v. Jones*, 4 C. B. 259; *Campbell v. Spottiswoode*, 3 B. & Smith, 769. The proper course at the trial of an action for libel is, for the judge to define to the jury what a libel is in point of law, and then to leave it to the jury to say whether the publication in question falls within that definition. (*Parmiter v. Coupland*, 6 Mee. & W. 105.) By Mr. Fox's Act, (32 Geo. 3, c. 60,) the law is settled the same way in a criminal prosecution for libel.

tion in the Court of Queen's Bench,) and the other by action; the former for the *public* offence, (for every libel has a tendency to the breach of the peace by provoking the person libelled to break it,) and the latter to repair such person in damages, for the injury done by him (*a*). And formerly the rule was, that, on an indictment or criminal information for publishing a libel, the defendant was not allowed to allege the truth of it by way of justification; for even if true, it tended nevertheless to a breach of the peace (*b*). But in the action for damages, the defendant might, (in like manner as for words *spoken*,) adopt that line of defence (*c*). And on this latter point, the law is still the same; but on the former it is now materially altered by 6 & 7 Vict. c. 96, an Act for amending the law respecting defamatory words and libel (*d*). By this statute it is provided, that, in pleading to any indictment or information for defamatory libel, the defendant may, by way of defence (or plea), allege the truth of the matters charged; and further, that it was for the public benefit that the matters charged should be published,—showing the particular fact or facts by reason whereof it was for the public benefit: but on the other hand, that if after such plea the defendant shall be convicted, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the plea and the evidence thereon (*e*). The same Act also contains provisions intended to relieve editors and proprietors of *newspapers* and other periodical publications from an hardship to which they were subject under the former law;—such law having held them liable, absolutely and without qualification, for all libels

(*a*) As to the framing the pleadings in such action with *innuendos*, as to the defendant's meaning, see 15 & 16 Vict. c. 76, s. 61, and *Hemmings v. Gasson*, 1 Ell. Bl. & Ell. 346.

(*b*) 5 Rep. 125.

(*c*) *Lake v. Hatton*, Hob. 253; 11 Mod. 99.

(*d*) This Act was amended by 8 & 9 Vict. c. 75.

(*e*) As to this provision, see *The Queen v. Newman*, 1 Ell. & Bl. 558.

inserted in the periodical with which they were connected, though put in without their knowledge. These provisions are, that, in an *action* for a libel inserted in such publications, it shall be competent to the defendant to plead that it was inserted without actual malice, and without gross negligence (*f*); and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in the same publication a full apology (*g*):—it being, however, also provided, that, to render such plea effectual, the defendant shall, at the same time, pay into court a sum of money by way of amends for the injury sustained (*h*). The statute further enacts, that in all *indictments* or *informations* by a private prosecutor for the publication of a defamatory libel, if judgment be given for the defendant, he shall be entitled to costs from the prosecutor; and if, on a special plea of justification, the issue shall be found for the prosecutor, the defendant shall be liable to pay the prosecutor the costs occasioned by such plea (*i*). And it also contains a provision which applies to every action for defamation, whether oral or written, viz., that it shall be lawful for the defendant, (after notice in writing of his intention so to do, duly given to the plaintiff at the time of pleading,) to give in evidence in *mitigation of damages*, that he made or offered an apology to the plaintiff before the commencement of the action, — or as soon afterwards as he had an opportunity, in case the action had been commenced before an opportunity could be found.

[A third way of destroying or injuring a man's reputa-

(*f*) See *Chadwick v. Herapath*, 3 C. B. 885.

(*g*) See *Lafone v. Smith*, 3 H. & N. 735; *Jones v. Mackie*, Law Rep., 3 Exch. 1. If the publication is ordinarily published at intervals exceeding a week, the defendant may plead that he had offered to publish

the apology in any newspaper or periodical to be selected by the plaintiff. (6 & 7 Vict. c. 96.)

(*h*) See 8 & 9 Vict. c. 75, s. 2.

(*i*) As to the manner of pleading a justification, see *Tighe v. Cooper*, 7 Ell. & Bl. 639.

[tion is by preferring malicious indictments or prosecutions against him (*l*); which, under the mask of 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*, which cannot be brought but against two at the least,] and is confined to the particular case where the plaintiff has been acquitted by verdict, upon an accusation of treason or felony (*m*);—or, (which is the only way now known in practice,) by an action on the case for a false and malicious prosecution: which may be brought either against a single person; or against several, with an allegation that they conspired together for the purpose (*n*). And [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 iudice*, 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 (*o*). However, any probable cause for preferring a prosecution is sufficient to justify the defendant.] Indeed, in order to maintain this action, the burthen lies on the plaintiff of showing that no probable cause existed (*p*): and it is also essential for him to prove either that he was acquitted upon such prosecution, by verdict of a jury; or that it was in some other manner legally terminated in his favour (*q*). No action, (it may be observed here,) lies in a court of law for a malicious prosecution before a court-martial (*r*);

(*l*) See *Turner v. Ambler*, 10 Q. B. 252.

(*m*) 1 Saund. by Wms. 229 a.

(*n*) *Ibid.*

(*o*) See *Jones v. Gwynn*, 10 Mod. 219, 220; *Chambers v. Robinson*, Str. 691.

(*p*) As to the nature of this action, see *Blackford v. Dod*, 2 B. & Adol. 179; *Delisser v. Towne*,

1 Q. B. 333; *Panton v. Williams*, 2 Q. B. 169; *Musgrove v. Newell*, 1 Mee. & W. 582; *Michell v. Williams*, 11 Mee. & W. 205.

(*q*) *Morgan v. Hughes*, 2 T. R. 225; *Willes*, 520, n.; *Whitworth v. Hall*, 2 B. & Adol. 695.

(*r*) As to courts martial, *vide sup.* vol. II. p. 627.

for “ every reason which requires the original charge
 “ to be tried by a military jurisdiction, equally holds to
 “ try the probable cause by that jurisdiction” (*s*).

Injuries affecting the right of personal *liberty* are, in the first place, that 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 by subjecting the wrongdoer to a civil action, on account of the damage sustained by the loss of time and liberty.

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. Now 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 street (*t*). 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; or from some other special cause warranted for the necessity of the thing,—such as the arresting of the felon by a private person without warrant, or the impressment of mariners for the public service (*u*). False imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday; for the statute 29 Car. II. c. 7, s. 6, hath declared that such service,] except in cases of treason, felony, breach of the peace, or other indictable offence, shall be void (*v*). And so much for

(*s*) *Johnstone v. Sutton* (in error), post, vol. IV. p. 438.
 1 T. R. 549. (*v*) See *Rawlins v. Ellis*, 16 Mee. & W. 172.
 (*t*) 2 Inst. 589.
 (*u*) Vide sup. vol. II. p. 631;

the nature of this injury of false imprisonment. As for its remedy, it is either by *removal* of the injury, or by *satisfaction* for it in damages.

The means of *removal* are principally by writ of *habeas corpus*. But this is a subject on which it would be premature at present to enter, as it belongs to a subsequent place, in which are treated certain remedies in the courts distinct from the remedy by suit or action (*x*). [The *satisfactory* remedy for this injury of false imprisonment is by an action of trespass, 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 shall recover such damages for the injury he has received as a jury shall award (*y*).]

But, besides the injury of false imprisonment, the right of personal liberty may, secondly, be invaded by an arrest under process—lawful in itself, and executed at a lawful time, and in a lawful manner, but which was improperly set on foot by a party who had in fact no sufficient ground or even probable cause for taking that course; and this he may have done either in the way of a civil or a criminal proceeding. In the former case, the injury is generally described as a *malicious arrest* (*z*); in the latter as a *malicious prosecution*, of which last enough has already been said in reference to the injury it also inflicts on the reputation of the person so prosecuted (*a*). And as malicious arrest it is only another species of the same injury, and is redressed in the same form of action, viz., trespass on the case; and the law relating to it being in

(*x*) Vide post, vol. IV. p. 18.

(*y*) See as to false imprisonment, Edgell v. Francis, 1 Man. & Gr. 222; Glynn v. Houstoun, 2 Man. & Gr. 337; Jones v. Gurdon, 2 Gale & D. 183; Smith v. Eggington, 7 Ad. & El. 167; Mitchell v. Forster, 12 A. & E. 72; Bird v. Jones, 7

Q. B. 742; Turner v. Ambler, 10 Q. B. 252.

(*z*) See as to malicious arrest, Saxon v. Castle, 6 Ad. & El. 652; Smith v. Eggington, 7 Ad. & El. 167.

(*a*) Vide sup. p. 505.

almost every other respect the same, does not require to be repeated. Indeed the occasions of malicious arrest have now become rare, in consequence of that change of the law, by which arrests in civil suits before judgment are no longer allowable, except under special circumstances, and under the authority of a judge's order (*b*).

II. We arrive next, according to the order proposed, at the consideration of such injuries as affect the right of *property* (*c*); and in the first place we will consider such as affect the right of property in things *real*, or (as they may be more compendiously described) injuries to real property.

These [are principally six :—1. Ouster ; 2. Trespass ; 3. Nuisance ; 4. Waste ; 5. Subtraction ; 6. Disturbance.]

1. *Ouster*, or dispossession, is an injury, that may be sustained in respect of hereditaments either corporeal or incorporeal (*d*), and [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 (*e*). And such ouster or dispossession may either be of the *freehold*, or of *chattels real*.]

Ouster of the *freehold* is effected by various methods :

1. By *abatement* ; which is [where a person dies seized of

(*b*) Vide post, bk. v. c. x.

(*c*) Vide sup. p. 494.

(*d*) The idea of ouster, however, is more directly applicable to a corporeal hereditament, or *land*. As regards those which are incorporeal, it is in general, as Blackstone (vol. iii. p. 170) remarks, “ nothing more than a disturbance of the owner in the means of coming at or enjoying them ;” and therefore it was always held that a disseisin

of these amounted to an ouster only at the *election* of the party injured, —if, for the purpose of more easily trying the right in a real action, he was pleased to suppose himself disseised.

(*e*) There may be ouster between tenants in common, coparceners and joint tenants. (Co. Litt. 199 b, 373 b ; Smales v. Dale, Hob. 120 ; see Stedman v. Smith, 8 Ell. & Bl. 1.)

[an inheritance, and, before the heir or devisee enters, a stranger who has no right makes entry, and gets possession of the freehold; this entry of him is called an abatement, and he himself is denominated an abator (*e*).] 2. 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 (*f*);] such stranger being termed, in the technical sense of the word, an intruder. 3. By *disseisin* (*g*); which is [a wrongful putting out of him that is seised of the freehold: not, as in the other cases, a wrongful entry where the possession was vacant, but an attack upon him who is in actual possession, and turning him out of it:] and as the two former kinds were [an ouster from a freehold in law, so this is an ouster from a freehold in deed.] All these three modes, it is to be observed, are such wherein the entry of the tenant *ab initio*, as well as the continuance of his possession, is unlawful; but the two remaining are where the entry of the tenant was at first lawful, but the wrong consists in the detaining of possession afterwards. As

(*e*) Finch, L. 195. Blackstone (vol. iii. p. 168) remarks, 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, (and in a like sense it "is used in stat. Westm. 1, 3 Edw. "1, c. 17, where mention is made of "*abating* a castle or fortress); the "second is that of abating a writ or "action, where it is taken figura-

tively, and signifies the overthrow "or defeating of such writ by some "fatal exception to it; the last is "also a figurative expression, to de- "note that the rightful possession or "freehold of the heir or devisee is "overthrown by the rude interven- "tion of a stranger."

(*f*) Co. Litt. 277; F. N. B. 203, 204.

(*g*) As to disseisin, see Taylor v. Horde, 1 Ld. Ken. 143; Doe d. Maddock v. Lynes, 3 B. & C. 388; Doe v. Hall, 2 Dow. & Ry. 38; William v. Thomas, 12 East, 141.

4. By *deforcement*; [this, in its most extensive sense, is *nomen generalissimum*; 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 (*h*). So that this includes as well an abatement, an intrusion, or a disseisin, 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 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 seignior, and lands escheat to him *propter defectum sanguinis*, but the seisin of the lands is withheld from him (*i*): 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 who hath the remainder or reversion; nor is it *disseisin*, for the lord was never seised;] but being neither of these three, it is therefore a *deforcement* (*j*). [If a man marries a woman, and during the coverture is seised of lands in fee simple, or fee tail, and is disseised and dies; or dies in possession; no act having been done in either of these cases to bar or defeat his widow's dower (*k*); and the 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 (*l*);] that is, by remaining in possession of the entire lands of the deceased, without setting forth for her any particular lands, in satisfaction of her general claim to one-third. [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

(*h*) Co. Litt. 277. And see as to *deforcement*, Co. Litt. by Butl. 331 b, n. (1).

(*i*) Vide sup. vol. I. p. 448.

(*j*) F. N. B. 143.

(*k*) Vide sup. vol. I. p. 275 et seq.

(*l*) F. N. B. 8, 147.

[death of the *cestui 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 forfeiture (*m*).] Another species of forfeiture is [where two persons have the same title to land, and one of them enters and keeps possession 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 forfeiture (*n*).] In addition to all which modes of ouster, there was formerly another, viz., 5. By *discontinuance*; which was where a tenant in tail in possession made a feoffment (*o*) in fee simple, or for the life of the feoffee, or in tail,—all which are beyond the common-law power of a tenant in tail to make; for that extends no further than to make a lease for his own life, so as to be available against the issue or those in remainder or reversion (*p*). Such feoffment would formerly pass an estate in fee simple by *wrong*; and therefore on the death of the feoffor became an injury to the heir in tail, or those in remainder or reversion, (as the case might be,) which was termed a discontinuance (*q*). But now, by 8 & 9 Vict. c. 106, s. 4, a feoffment made after the 1st October, 1845, shall not have any tortious operation; so that the title by discontinuance, and consequently the injury of that species of ouster, seem to be abolished (*r*).

(*m*) Finch, L. 263; F. N. B. 201, 205—7.

(*n*) Finch, L. 293, 294; F. N. B. 197; Co. Litt. 199 b.

(*o*) Prior to the abolition of fines by 3 & 4 Will. 4, c. 74, a discontinuance might also be effected by a fine. (Co. Litt. 327 b.)

(*p*) Blackstone (vol. iii. p. 172) lays it down absolutely, that his power extends no further than to

make a lease for his own life; and this is according to the text of Littleton. But the qualification above introduced is required to make that proposition an accurate one. See Co. Litt. by Butl. 331 a, n. (1).

(*q*) Co. Litt. 327 b.

(*r*) This important effect formerly belonged to a discontinuance, that it took away the right of entry of the heir in tail, remainderman, or

Secondly. Ouster of *chattels real* consists—1. Of amotion of possession [from estates held by statute, recognizance, or elegit(*s*); which happens 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 2. Of [amotion of possession from an estate of years(*t*), which also takes place 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.]

The several species and degrees of injury by ouster being thus ascertained, the next consideration is its remedy(*u*).

But for the better illustration of this subject, as to which great changes have been introduced in modern times, it will be necessary here to take some retrospect of the *former* state of the law with respect to the means of redress for a wrongful ouster.

According to that system, the injury admitted of a variety of remedies, the competency of which depended on the lapse of time and other circumstances; and the distinctions which obtained on this subject may be compendiously stated as follows:

First. In the case of abatement, intrusion and disseisin, the party ousted might recover the possession by means of an action, that is, by one of the *real*, (in which we always include, unless the contrary is indicated, *mixed*,) actions: and these were divided into two principal

reversioner (as the case might be). But the law was altered in this respect by 3 & 4 Will. 4, c. 27. Vide sup. vol. I. p. 527, n. (*f*).

(*s*) Bl. Com. vol. iii. p. 198. As to theseveral estates here mentioned, vide sup. vol. I. pp. 319, 320.

(*t*) As to this estate, vide sup. vol. I. p. 291.

(*u*) It may be proper to remark, that the general abolition of *real* actions has, to a considerable extent, abated the importance which formerly belonged to the distinctions regarding the different kinds of ouster. The subject, therefore, has been treated rather more summarily than in Blackstone.

classes, viz., actions *possessory*, in which the object was to ascertain the right of possession: and actions *droitural*, brought to determine the right of property (*x*). But, as in the particular cases of ouster just mentioned, the abator, intruder, and disseisor, had obviously a mere naked possession without colour of right, the law also gave the injured party the alternative in such cases of recovering possession at once, (where land was the subject of the ouster,) by the extrajudicial and summary method of *entry* mentioned in the first chapter of the present book (*y*). If he neglected, however, to avail himself of this for twenty years, (being under no disability in respect of infancy or the like,) his entry after that time was barred by the statute of limitations, 21 Jac. I. c. 16.

Next, if the abator, intruder, or disseisor died seised, and the land descended to his heir,—or (in general) if the ouster took place by any of the species of forfeiture,—the heir or the deforciant (as the case might be) was considered as clothed with a species of presumptive title, sometimes called an *apparent right of possession* (*z*); for the heir in respect of his descent, and the deforciant in respect of the lawful inception of his title, had evidently a better or more colourable right than that gained by mere abatement, intrusion, or disseisin. Under such circumstances, therefore, the possessors were deemed not liable to expulsion by mere entry, but the estate or interest of the person ousted was said to be *turned to a right* (*a*); and it became necessary for him

(*x*) 2 Bl. Com. 197; 3 Bl. Com. 179. The actions possessory were divided into writs of *entry* and writs of *assize*; the former being of such a nature as *disproved* the title of the tenant by showing the unlawful commencement of his possession; the second of a nature to *prove* the title of demandant, by merely show-

ing his, or his ancestor's, possession. (3 Bl. Com. 185.)

(*y*) Vide sup. p. 355.

(*z*) 2 Bl. Com. 196; 3 Bl. Com. 179.

(*a*) By *turning to a right* it is "generally meant, that the person whose possession is usurped cannot restore it by entry, and can

to resort to a real action, either possessory or droitual. So he might be driven to betake himself to a real action even as against an abator, intruder, or disseisor; in consequence of having allowed twenty years to elapse without exercising his right of entry.

Here, however, it becomes necessary to notice the following exceptions:—First, that though in general the right of entry, as already stated, was taken away (or *toll'd*), by the descent so *cast*, (as the term was,) upon the heir of the abator, intruder, or disseisor; yet if the claimant were under any legal disability during the life of the ancestor by whom the ouster was effected,—such as infancy, or the like,—the descent had no such operation. Secondly, that by the statute 32 Henry VIII. c. 33, if the ouster took place by way of *disseisin*, no descent to the heir of the disseisor was to take away the entry; unless the disseisor himself had peaceable possession for five years. Lastly, that though in general there was no right of entry on a *deforciant*, yet a man might enter on his tenant at 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 (*b*).

Again, if the claimant, where his estate was turned to a right in the manner above described, neglected to resort to his possessory action within the period allowed by law in that behalf; (for every such action was subject to its appropriate time of limitation, varying from thirty to fifty years;)—or if the ouster took place upon a discontinuance,—the adverse party was considered as having acquired not merely an apparent, but an actual

“only recover it by action.”—Co. Litt. by Butl. 332 b, n. (1). Blackstone (vol. ii. p. 197) uses this expression as if it applied to the case where not only the entry, but the right to bring a possessory action, was taken away, and nothing re-

mained but the mere *right*, or *right of property*. But this is not the sense in which it has been ordinarily used.

(*b*) As to tenant at sufferance, vide sup. vol. I. p. 303.

right of possession (c)—the effect of which was that the claimant was driven, (as the only remaining expedient,) to bring his real action *droitural*, in order to establish his *right of property*, or *mere right*, as it was also denominated (d); and by the establishment of the right of property, the right of possession was defeated. Of such actions, the principal one was the *writ of right* (e); sometimes called, to distinguish it from others of the *droitural* class, the writ of right *proper*. They were all subject, like actions possessory, to a certain period of limitation, that in the writ of right, (which was the most extended,) being sixty years.

But though this was the antient and proper system of remedy provided by our law, for cases of ouster of land, it became gradually nearly superseded in practice, by a comparatively modern invention of anomalous character, to which claimants had been driven to resort by the inadequacy of the regular methods. For the redress by entry was one rarely in fact available,—particularly as the law required it to be made in a peaceable manner, and subjected to severe penalties those who attempted to regain their tenements by a strong hand. And with re-

(c) 2 Bl. Com. 196; 3 Bl. Com. 179. These were the principal cases; but there was also that of judgment being given against either party, (whether by default or on trial of the merits, in a possessory action—for such judgment for ever bound the right of possession. (3 Bl. Com. 191.)

(d) 2 Bl. Com. 197.

(e) There was an instance of a writ of right, commenced as recently as the year 1835. (See *Davies v. Lowndes*, 1 Bing. N. C. 597; S. C. 1 C. B. 435; 3 C. B. 808.) The writ of right was considered as “the highest writ in the law.” (3 Bl. Com. 193.) But, besides this, there

were writs *in the nature* of a writ of right; such as the writ of *formedom*, which was the remedy for tenant in tail on a discontinuance, for he could not have a writ of right proper. (3 Bl. Com. 191; see also *Tolson v. Kaye*, 6 Man. & G. 536; *Cannon v. Rimington*, 12 C. B. 1, 514.) It was competent to the tenant, when sued in a writ of right, to plead that he had more right to hold than the demandant to claim; which was called the *mise* upon the mere right; and this question, or issue, he might at his option refer, either to a species of jury called the *grand assise*, or to *trial by battle*; as to which, vide post, vol. IV. p. 501.

spect to the real actions, whether possessory or droitual, they were generally unacceptable remedies, from their liability to the following disadvantages—that the course of proceedings in them was dilatory and intricate (*f*);—that the judgment in them was conclusive, so that the plaintiff, failing by any accident in one, was not at liberty to bring another of the same species (*g*);—and that they could be brought only in one of the courts of Westminster Hall, viz., the Court of Common Pleas (*h*). From such disadvantages, however, *personal* actions were exempt; and the practitioners of our courts were thus led to the device of adapting one of these to the object of recovering the possession of land, so as to preclude the necessity of resorting to an action real. This invention appears to be due to the reign of Henry the seventh or Henry the eighth (*i*); and the personal action applied to the purpose, was the species of trespass called trespass *de ejectione firmæ*,—afterwards compendiously called an *ejectment*,—which lay where the plaintiff was a lessee for years, and claimed damages for the injury of ouster from his chattel real. The contrivance was preceded (and perhaps suggested) by a decision of the courts, declaring that, besides the judgment for damages, the plaintiff in an ejectment was entitled to an award of restitution of the term itself (*k*); and this

(*f*) 3 Bl. Com. 184, 205; Hist. Eng. L., by Reeves, vol. iv. p. 166.

(*g*) Hist. Eng. L. by Reeves, vol. iv. p. 166.

(*h*) Ibid. 170.

(*i*) Ibid., where it appears that it was not till the reign of Hen. 8, that real actions began to give place to ejectments; though the practice of applying ejectments occasionally to the trial of titles, began as early as Hen. 7. (And see 3 Bl. Com. 201.)

(*k*) So adjudged, 14 Hen. 7; and the same doctrine had been previously laid down by Fairfax, (7 Edw. 4, 6 b,) though the contrary had been held in the time of Edw. 3 and Rich. 2. The courts of law seem to have adopted this new doctrine in emulation of the practice of the courts of equity, which obliged the ejector to make specific restitution. See 3 Bl. Com. 200; Hist. Eng. L., by Reeves, vol. iii. p. 390; vol. iv. p. 165; and 1 A. & E. 751, (n.)

point being once established, the object in view was obtained through the medium of a fiction, the nature of which will be more particularly noticed hereafter; and of which it is sufficient at present to say, that it had the effect of enabling any party who had been ousted of land,—whatever the nature of his title or the circumstances of the ouster might be,—to bring his case forward in the name of a third person claiming in the character of his *lessee for years*, and complaining of an expulsion from the leasehold. Its applicability, however, was subject to this important exception; that as it involved an actual entry made, or supposed to be made, by the true claimant, on the lands in dispute for the purpose of making the pretended lease,—for it was held that a person out of possession could not lawfully convey title to another (*l*),—the fiction was incapable of being applied, except where such claimant had a *right of entry*; the effect of which exception was, that though real actions were in general supplanted by ejectment soon after its introduction, yet recourse was still necessarily had to the former kind of remedy in some particular instances. The principal of these were the case where a woman claimed dower; or where the ouster, which was the subject of complaint, had taken place by way of abatement, intrusion, or disseisin, and had been followed by a descent cast, or a lapse of twenty years without entry made; or where it had taken place by way of discontinuance;—in the first of which cases it is to be observed, that there was no right of entry in the widow, but only a right to have her portion of land set forth; and in the three last, viz., the descent cast, the non-entry

(*l*) To convey a title to another, when the grantor is not in possession of the land, falls under the legal offence of maintenance; and indeed “it was doubted at first,” says Blackstone (vol. iii. p. 201), “whe-

ther this occasional possession in “ejectment,” taken merely for the purpose of conveying the title, “excused the lessor from the legal “guilt of maintenance.”

for twenty years, and the discontinuance,—the right of entry, which had once existed, was at an end(*m*).

And such continued to be the state of the law with respect to the remedy upon ouster of land, during the long period that elapsed between the time of Henry the eighth and that of William the fourth; but in the latter reign,—the attention of the legislature having been particularly called to the improvement of our legal institutions, and among the rest to those which related to real property,—it was deemed expedient, as regards the three last cases of ouster above enumerated, to place the law upon a different basis. For it seemed unjust to the true owner of land, from whom the possession was withheld, to allow his right of entry to be defeated by such circumstances as those of descent cast and discontinuance; and inexpedient on the other hand to allow him any remedy whatever, after he had neglected to vindicate his right for more than twenty years, the period to which the proceeding by entry, and consequently by ejectment, had already been long confined. It appeared desirable, too, to expunge real actions in general from our list of remedies, as the greater part of them had been latterly found to be mere instruments of mischief in the hands of unprincipled practioners; who employed them “to defraud persons in a low condition of life of their substance, under pretence of recovering for them large estates, to which they had no colour of title”(*n*). Under the influence of these views (suggested by the Real Property Commissioners), an Act was passed in the year 1833, (3 & 4 Will. IV. c. 27,) containing *inter alia*

(*m*) The account above given of the former state of the law relating to real actions, is purposely condensed to the highest degree consistent with clearness of exposition. What Blackstone has written hereon (vol. iii. c. 10) is much more copious, and exhibits a learning and ability

not surpassed, perhaps, in any part of his Commentaries; but the changes of the law on this subject have almost annihilated the value of that part of his labours.

(*n*) First Report of Real Property Commissioners, p. 42.

the following provisions—that no descent cast or discontinuance happening after 31st Dec. 1833, should toll or defeat any right of entry, or action for the recovery of land—and that, except in certain cases of disability therein specified, no entry should be made or action brought to recover land but within twenty years after the right accrued. Moreover, with respect to the remedy for ouster by way of real or mixed actions, this same statute effected that demolition of them as a class (with one or two exceptions) the nature and extent of which has been already specified (*p*).

We may next advert to the *present* modes of remedy in the case of ouster; and, first, in the case of land, or hereditaments corporeal. The only proper remedy here, is by way of specific recovery; a mere action for damages, though it will also lie, being in general obviously inadequate to the nature of the injury; and the only modes of obtaining a specific recovery which are now generally applicable (since the alterations effected by the above statute), are by entry or by the action of ejectment; that is, by an action newly modelled by the 15 & 16 Vict. c. 76 (the “Common Law Procedure Act, 1852,”) upon the former action of the same name, discarding its fictions, but retaining its character in substance (*q*).

(*p*) Vide sup. p. 395.

(*q*) There are, however, some particular cases of ouster for which particular remedies are provided, besides those above specified. Thus in the case of a *forcible entry* and ouster (vide sup. p. 356), the statutes against forcible entries and detainers give the power to justices of the peace to restore possession. In cases between landlord and tenant, where half-a-year's rent is in arrear, and the tenant has deserted the premises and left the same uncultivated or unoccupied, without

any sufficient distress thereon,—the enactments 11 Geo. 2, c. 19, s. 16; and 57 Geo. 3, c. 52, (and within the metropolitan district, 3 & 4 Vict. c. 84, s. 13; and 11 & 12 Vict. c. 43, s. 34,) authorize a proceeding before justices of the peace to obtain restitution. (See *Ashcroft v. Bourne*, 3 B. & Ad. 684; *Edwards v. Hodges*, 15 C. B. 477; *Delaney v. Fox*, 1 C. B. (N. S.) 166.) Also by 59 Geo. 3, c. 12, ss. 17, 24, 25, paupers intruding into *parish property* may be dispossessed in the same way. And see the provisions

Of entry, enough has been already said. As to ejectment, it is to be remarked, that it lies, (as may be collected from preceding matter,) wherever there exists a right of entry in the claimant; which indeed comprises, since the alterations introduced by the above-mentioned statute of 3 & 4 Will. IV. c. 27, almost every case in which there is any right to recover land, whatever may be the nature of the title, or of the ouster sustained (*r*). On the other hand, an ejectment cannot, as we have seen, be maintained where there is *no* right of entry; and therefore it will not lie for dower, nor (in general) upon an ouster of any hereditaments incorporeal (*s*).

As to dower, there are (as already incidentally mentioned) two actions for its recovery, both being of the real class (*t*). The first of these,—the writ of right of dower,—one of the varieties of the writ of right proper, has been at all times of rare occurrence; being adopted only in the very particular predicament of the widow's having been endowed of parcel and being deforced of the residue, lying in the same town, by the wrong of the same tenant (*u*). It is the other species of dower, *unde nihil habet*, which we commonly understand when an action of dower generally is mentioned (*v*). This is brought by the widow as demandant against the heir as tenant of the freehold (*x*), and its effect is to enable

of 1 & 2 Vict. c. 74, and 19 & 20 Vict. c. 108, giving the same remedy in certain cases of tenants holding over against their landlords, mentioned, *sup.*, vol. I. p. 304.

(*r*) Ejectment lies between tenants in common, coparceners, or joint tenants, upon an actual ouster of one by the other. (Co. Litt. 199 b; Doe v. Hind, 11 East, 49.) So, one of several tenants in common, &c. may bring ejectment for his share against a stranger. (Roe v. Lonsdale, 12 East, 39.)

(*s*) Blackstone however (vol. III.

p. 206), notices an exception to this viz., in the case of tithes "in the hands of lay appropriators, by the express provision of statute 32 Hen. 8, c. 7, which hath since been extended by analogy to tithes in the hands of the clergy."

(*t*) Co. Litt. 31 a.

(*u*) 3 Bl. Com. 183.

(*v*) See an instance of this action brought in the year 1849, Garrard, *dem.*, Tuck, *ten.*, 8 C. B. 231.

(*x*) Com. Dig. Pleader, 2 Y. 15; 2 Saund. by Wms. 43 (*a*).

the former to recover from the latter the seisin of a third part of the tenements to which her dower has attached, to be set forth to her in severalty by metes and bounds for the term of her natural life, together with damages and costs (*y*). The rarity of the action in modern times is attributable partly to the circumstance that dower now seldom attaches to the land of which the husband dies seised—for the reasons of which change we must refer to a former part of this work (*z*)—and partly to the circumstance that the Court of Chancery exercises a concurrent jurisdiction with the Court of Common Pleas, where the object is to obtain an assignment of dower, and the title of the dowress is not in dispute (*a*).

With respect to the remedy upon ouster of hereditaments incorporeal, these also, it is said, may be claimed in the action of dower, supposing the claimant to be a dowress (*b*); and tithes may be recovered (as we have seen) in ejectment: and a next presentation, (as we shall see hereafter,) in an action of *quare impedit*. But, as the general rule, there is now no remedy by which incorporeal hereditaments can be specifically recovered; and the party injured must resort to a personal action of trespass on the case, in which he recovers such damages as he may have sustained by the invasion of his right (*c*). But this in general amounts to as complete a vindication of such right, as if he had obtained judgment for its specific recovery.

2. Having considered the injury of ouster, we now arrive at that of *Trespass*; by which is here intended a

(*y*) 2 Saund. by Wms. 44 (*e*). By 3 & 4 Will. 4, c. 27, s. 41, arrears of dower cannot be recovered for more than the last six years.

(*z*) Vide sup. vol. I. pp. 282, 285.

(*a*) See Rosc. Real Actions, 40; Chit. Gen. Pr. vol. i. p. 380; vol. ii. p. 420. As to the forms of proceedings in ejectment and in dower,

vide post, c. XI.

(*b*) Rosc. ubi sup.

(*c*) See Challenor v. Thomas, Yelv. 143. It may, however, be mentioned as an exceptional instance to the contrary, that in certain cases freehold rents may be recovered in the action of *debt*.

trespass committed in respect of another man's *land*, by entry on the same without lawful authority; which, as distinguished from trespass to his person or his goods, is technically called trespass *quare clausum fregit* (*e*). [For the right of *meum et tuum* (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 transgression;] and, being in the nature of an immediate and forcible injury thereto, is a trespass. [The Roman laws indeed seem to have made a direct prohibition necessary, in order to constitute this injury. "*Qui in alienum fundum ingreditur, potest a domino, si is provideret, prohiberi ne ingrediatur*" (*f*). 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 further, and has treated every entry upon another's lands (unless by the owner's leave, or in some very particular cases), as an injury or wrong, for satisfaction of which an action will lie] to recover such damages as a jury may think proper to assess (*g*); and this injury is called trespass *quare clausum fregit* (*h*),—for breaking a man's *close*,—because [every man's land is, in the eye of the law, inclosed and set apart from his neighbour's: and that either by a visible and material fence, as one field is divided from another by a hedge; or by an invisible

(*e*) As to the definition of trespass in general, vide sup. p. 486.

(*f*) Inst. 2, 1, 12.

(*g*) In case of the offence called *forcible entry*, (vide sup. p. 356,) an action will also lie by statute to recover treble damages. But this applies only to a degree of force calculated to excite fear (see R. v.

Smith, 5 Car. & P. 201); and proceedings under the statutes of forcible entry are not very usual.

(*h*) This species of action is so called from the language of the writ of trespass (now disused), which commanded the defendant to show *quare clausum querentis fregit*.

[boundary, existing only in the contemplation of the law, as when one man's land adjoins to another's in the same field.]

A person must have an actual possession by entry, to be able to maintain an action of trespass *quare clausum fregit* (*h*): and hence [before such entry and possession he cannot maintain this action, though he hath the freehold in law (*l*). And therefore an heir, before entry, cannot have his action against an abator (*m*); and 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, yet he cannot have it for any act done after the disseisin, until he hath gained possession by re-entry; but then he may well maintain it for the intermediate damage done; for after his re-entry, the law, by a kind of *jus post-liminii*, supposes the freehold to have all along continued in him (*n*). Neither, by the common law, in case of an intrusion or deforcement, could the party kept out of possession sue the wrong-doer by a mode of redress which was calculated merely for injuries committed on the land while in the *possession* of the owner. But now by the statute 6 Ann. c. 18, if a guardian or trustee for any infant, a husband seised *juri uxoris*, or a person having any estate or interest determinable upon a life or lives, shall, after the determination of their respective interests, hold over and continue in possession of the lands or tenements without the consent of the person entitled thereto, they are adjudged to be trespassers.]

(*h*) 2 Roll. Abr. 553; and see *Wheeler v. Montefiori*, 2 Q. B. 133. Blackstone says, (vol. iii. p. 210,) "that there must be a *property*, either absolute or temporary, in the soil, and actual possession by entry." It is clear, however, that he who has any exclusive possession may maintain the action, though he has no other property or interest.

(See *Lambert v. Stroother*, Willes, 221; *Catteris v. Cowper*, 4 Taunt. 547; Com. Dig. Trespass.)

(*l*) 2 Roll. Abr. 553. As to freehold in law, vide sup. vol. i. p. 441.

(*m*) 2 Roll. Abr. 553.

(*n*) 11 Rep. 5. See the case of *Barnett v. Guildford*, 11 Exch. 19.

[A man is answerable not only for his own trespass, but for that of his cattle also: for if by his negligent keeping they stray upon the land of another (and much more if he permits or drives them on), and they there tread down his neighbour's herbage, or spoil his corn or his trees, this is a trespass for which the owner must answer in damages. And the law gives the party injured a double remedy in this case; by permitting him to distrain the cattle thus *damage feasant*, or doing damage, till the owner shall make him satisfaction(*o*); or else by leaving him to the common remedy, *in foro contentioso*, by action.]

In some cases an entry on another's land or house, is justifiable; as where it is done in exercise of a right of way, a right of common, or the like: or where [a man enters to demand or pay money there payable; or to execute, in a legal manner, the process of the law;] or enters by the licence of the owner himself. [Also a man may justify entering into an inn or public house, without the leave of the owner first specially asked; because when a man professes the keeping of such inn or public house, he thereby gives a general licence to any person to enter his doors. So a landlord may justify entering to distrain for rent; and a reversioner to see if any waste be committed on the estate, for the apparent necessity of the thing(*p*).] And it has been said that [the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land,] if no greater damage be done than is necessary; [because the destroying such creatures may be profitable to the public(*q*). But in cases where a man misdemeanors him-

(*o*) As to this, vide sup. p. 358.

(*p*) Blackstone (vol. iii. p. 213) notices also, and apparently holds, the opinion, that by the common law of England the poor are allowed to enter on a man's ground and glean after harvest. But it has been since his time decided that no such

right exists. (*Steel v. Houghton*, 1 H. Bl. 51.)

(*q*) *Geush v. Mynns*, Cro. Jac. 321; *Gundry v. Feltham*, 1 T. R. 334. But see *Earl of Essex v. Capel*, before Lord Ellenborough, Hertford Assizes, A.D. 1809, cited in *Chitty's Game Law*, p. 31.

[self, or makes an ill use of the authority with which the law intrusts him, he shall be accounted a trespasser *ab initio* (*r*): as if one comes into a tavern, and will not go out in a reasonable time, but tarries there all night, contrary to the inclinations of the owner: this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass (*s*). But a bare non-feasance, as not paying for the wine he calls for, will not make him a trespasser, for this is only a breach of contract.] In like manner if a landlord distrained cattle for rent, and wilfully killed the distress, or committed any other irregularity, this by the common law made him a trespasser *ab initio* (*t*): but we have seen that, under the statutable provision of 11 Geo. II. c. 19, this is now otherwise (*u*).

3. We are next to consider the injury of *Nuisance*. [Nuisance, *nocumentum*, or annoyance, signifies any thing 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 subjects; for which reason we must refer them to the class of public wrongs or crimes (*x*): and *private* nuisances, which are the objects of our present consideration, and may be defined, any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another (*y*),] but which does not amount to a trespass. We will, first, mark out the several kinds of nuisances, and then mention their respective remedies.

First, as to *corporeal* hereditaments. [If a man builds a house so close to mine, that his roof overhangs my roof, and the water flows off his roof upon mine, this is a nuisance, for which an action will lie (*z*).] And the

(*r*) 8 Rep. 146; Finch, L. 47;
Bagshawe v. Goward, Cro. Jac.
148.

(*s*) 2 Roll. Abr. 561.

(*t*) Finch, L. 47.

(*u*) Vide sup. p. 371.

(*x*) Vide post, bk. VI. c. XII.

(*y*) F. N. B. 188.

(*z*) Ibid. 184.

case is the same if the boughs of his tree are allowed to grow so as to overhang my land, which they had not been accustomed to do (*b*). [Also, if a person keeps his hogs, or other noisome animals, so near the house of another,] previously built and inhabited (*c*), [that the stench of them incommodes him, and makes the air unwholesome,] this is a [nuisance, as it tends to deprive him of the use and benefit of his house (*d*). A like injury is, if my neighbour sets up and exercises near me any offensive trade; as a tanner's, a tallow chandler's, a brick-maker's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is "*sic utere tuo, ut alienum non lædas*:" this, therefore, is an actionable nuisance (*e*).] And the case is the same if a man, by carelessness in excavating his own ground, causes the fall of a house erected on land adjoining (*f*). [But depriving one of a mere matter of pleasure, as of a fine prospect by building a wall or the like;] or opening a window upon a neighbour, whereby his privacy is disturbed (*g*); [this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance (*h*).] The injuries that have been specified

(*b*) *Norris v. Baker*, 1 Roll. Rep. 393; *Lodie v. Arnold*, 2 Salk. 458.

(*c*) This is a necessary qualification; for if I build my house near his hog-sty, the case is altered, and it is *damnum absque injuriâ*. (1 *Smith's Leading Cases*, 4 ed. 131.)

(*d*) *Aldred's case*, 9 Rep. 58; *R. v. White*, 1 Burr. 337.

(*e*) *Morley v. Pragnel*, Cro. Car. 510. Upon this difficult subject the following modern cases may be usefully consulted: *Stockport Waterworks Company v. Potter*, 7 H. & N. 160; *Hole v. Barlow*, 4 C. B. (N. S.) 334; *Cavey v. Ledbitter*, 13 C. B. (N. S.) 470; *Bamford v.*

Turnley, 3 B. & Smith, 62. Per Willes, J., in *The Wanstead Board of Health v. Hill*, 13 C. B. (N. S.) 484; *Crump v. Lambert*, Law Rep., 3 Eq. Ca. 409.

(*f*) *Dodd v. Holme*, 1 Ad. & El. 493; and see *Wyatt v. Harrison*, 3 B. & Adol. 876; *Humphries v. Brogden*, 12 Q. B. 739; *Smith v. Kenrick*, 7 C. B. 515; *Alston v. Grant*, 3 Ell. & Bl. 128; *Bonomi v. Backhouse*, 1 Ell. Bl. & Ell. 622.

(*g*) *Chandler v. Thompson*, 3 Camp. 82.

(*h*) 9 Rep. 58; *Tapling v. Jones*, 11 H. L. 290.

chiefly concern houses; but the same doctrines will govern other property—as for example *land*. Thus it has been decided that [if one erects a smelting-house for lead so near the land of another, that the vapour and smoke kill his corn and grass, and damage his cattle therein, this is a nuisance (*i*).] And it may be laid down generally, that if one does any act, in itself lawful, which yet, being done where it is, necessarily tends to damage the land of another, it is a nuisance; [for it is incumbent on him to find some other place to do that act, where it will be less offensive (*k*).] So also, if my neighbour is bound to scour a ditch and does not, whereby my land is overflowed, his omission to perform this legal duty is an actionable nuisance (*l*).

Next, as to *incorporeal* hereditaments, the principle of the law is the same. Thus, [it is a nuisance to stop or divert water that ought to run to another's meadow or mill (*m*).] And, again, [if I have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it, or putting logs across it, or ploughing over it, it is a nuisance; for, in the first case, I cannot enjoy my right at all; and in the latter, I cannot enjoy it so commodiously as I ought (*n*). 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 (*o*). 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 it is held reasonable that every man should have a market within such a distance,—one-third of a day's journey,—

(*i*) 1 Roll. Abr. 89.

(*m*) F. N. B. 184.

(*k*) See the cases cited sup. p.

(*n*) F. N. B. 183.

527, n. (*e*).

(*o*) F. N. B. 184; 2 Roll. Abr.

(*l*) 3 Bl. Com. 218, citing F. N. 140.

B. 184.

from his own home; so 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 (*p*).] But where the reason ceases, the law also ceases with it. [Therefore it is no nuisance to erect a mill so near to mine, as to draw away the custom, unless the miller also intercepts the water; nor is it a nuisance to set up any trade, or a school, in neighbourhood or rivalry 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 injuriâ* (*q*).]

The remedy at law for this injury of nuisance is by action of trespass on the case (*r*), in which the party injured may recover a satisfaction in damages for the injury sustained; having also, as it may be recollected, the right to *abate* the nuisance by his own act, a subject of which we have already taken sufficient notice (*s*).

4. The fourth subject for consideration is *Waste*. This (as explained in a former part of this work) is any spoil and destruction done, or allowed to be done by the tenant, to houses, woods, lands, or other corporeal hereditaments, during the continuance of his particular estate therein (*t*); [which the common law expresses very signi-

(*p*) See Bl. Com. vol. iii. p. 210; Br. 1. 4, c. 46; 2 Inst. 567. Blackstone says, also, "if a ferry is erected on a river, so near another antient ferry as to draw away its custom, it is a nuisance to the owner of the old one," and cites 2 Roll. Abr. 140.

(*q*) Hale on F. N. B. 184.

(*r*) Among the real actions now abolished, there were two by which the actual removal of the nuisance might be effected, viz., the *assize of nuisance* and the writ of *quod per-*

mittat prosternere (see 3 Bl. Com. 220).

(*s*) Vide sup. p. 357. It has also been the practice in many cases to resort to a court of *equity* for an injunction to stay or prevent the nuisance. This relief may now also be had in an action for a nuisance, from the court of common law in which such action is pending. See 17 & 18 Vict. c. 125, s. 79 et seq., and 23 & 24 Vict. c. 126, ss. 32, 33.

(*t*) Vide sup. vol. I. p. 266.

[ificantly by the word *vastum*;) and this waste is either voluntary or permissive; the one a matter of commission, as by pulling down a house, the other of omission only, as by suffering it to fall into ruin by want of necessary reparations. [Whatever does a lasting damage to the freehold or inheritance, is waste. Therefore the removal of a wainscot, floors, or other things once fixed to the freehold of a house, is,] generally speaking, waste; though it is held, by way of exception from the ordinary rule, that a tenant who has made erections for the purposes of trade, or has put up ornamental fixtures of a kind removable without material damage, may lawfully remove them (*u*). It has been decided that if [a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste; but otherwise if the house be burned by the carelessness or negligence of the lessee.] In both these cases, however, it is to be understood that [a tenant bound by covenant or other express contract to keep the house in repair, is compellable to rebuild, unless the contract was made expressly subject to exception in the event of such inevitable accident.] Waste may also [be committed in ponds, dove-houses, warrens, and the like, by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance (*x*). Timber also is part of the inheritance (*y*). Such are oak, ash, and elm, in all places; and by the custom of some particular counties, in which other kinds of trees are generally used for building, they are for that reason considered as timber (*z*); and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste (*a*). But underwood, the

(*u*) See Amos on Fixtures, 138—
150.

(*a*) Co. Litt. 53.

(*y*) 4 Rep. 62.

(*x*) As to *willows*, see Phillips *v.*

Smith, 14 Mee. & W. 589. As to
beech trees, see Matthews *v.* Mat-
thews, 7 C. B. 1018.

(*a*) Co. Litt. 53.

[tenant may cut down at any seasonable time that he pleases (*b*); and he may also take sufficient *estovers* (*c*), of common right, unless restrained (which is usual) by particular covenants or exceptions (*d*). Again, the conversion of land from one species to another, is waste. Thus to convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture, into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste (*e*). For, as Sir Edward Coke observes, when such a close, which is conveyed and described as pasture, is found to be arable, and *è converso*, it not only changes the course of husbandry, but the evidence of the estate (*f*). And the same rule is observed, for the same reason, with regard to converting one species of *edifice* into another, even though it is improved in its value (*g*). Moreover, to open land to search for mines of metal, coal, and the like, is waste; for it is a detriment to the inheritance (*h*); but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use (*i*); for it is now become the mere annual profit of the land.] In general, any acts or any neglects destructive of the inheritance are wrongful on the part of any tenant having an estate less than the inheritance (*h*). But a tenant in fee, whether fee-simple or fee-tail, is not impeachable for waste: nor is a tenant in tail, even after possibility of issue extinct, because his estate was at its creation an estate of inheritance. Nor is a lessee for life or years, if his lease be expressly made, as is sometimes the case, “without impeachment of waste” (*l*).

(*b*) 2 Roll. Abr. 817.

(*c*) Vide sup. vol. I. p. 265.

(*d*) Co. Litt. 41.

(*e*) Lord Darcy *v.* Askwith, Hob. 296.

(*f*) Co. Litt. 53.

(*g*) Cole *v.* Green, 1 Lev. 309.

(*h*) 5 Rep. 12.

(*i*) Lord Darcy *v.* Askwith, ubi sup.

(*h*) Vide sup. vol. I. pp. 266, 267, 269, 302.

(*l*) Even in these cases, however, the tenant will be restrained in equity from *destroying* the premises, as by pulling down a house, &c. (See Seagram *v.* Knight, Law Rep., 2 Ch. App. 678, and the cases cited, sup. vol. I. p. 266, n. (*t*).)

Neither does the law regard any act, by whomsoever committed, as amounting to waste, unless there be some substantial and considerable damage (*m*); and therefore in a case where the damage done was found to be less than 40*d.*, judgment was given for the defendant (*n*).

The form of remedy for waste (*o*) is by action on the case by the person in reversion or remainder, against the wrong doer, to recover such damages as a jury may award (*p*). And such action may be had not only against the tenant, but against any stranger by whom an act has been wrongfully committed, by which the premises have been damaged (*q*); and it will lie at the suit

(*m*) *Doe d. Grubb v. Lord Burlington*, 5 B. & Ad. 507.

(*n*) See the *Governors, &c. of Harrow School v. Alderton*, 2 Bos. & Pul. 86.

(*o*) Waste, properly so called, is an injury sustained by the reversioner or remainder-man on a particular estate. The term occurs, however, occasionally, in the books, in a somewhat different sense. Thus when there is a person having common of estovers in any place, and the owner of the wood demolishes the whole wood and thereby destroys all possibility of taking estovers,—this is described as a species of waste on the part of such owner. (See 3 Bl. Com. p. 224.)

(*p*) Prior to the provisions of 3 & 4 Will. 4, c. 27, for abolition of real and mixed actions, there was also the mixed action of *waste*, by which (see 6 Edw. 1, c. 5) both the demised premises and damages for the waste might have been recovered; and in aid of which there was also the writ of *estrepement*, to prevent the commission of the injury *pendente lite*. But in later times this action had become for the most part

supplanted by the personal action of trespass on the case (for the reasons of which change, see Co. Litt. 53 b, 54 a, 218 b; 2 Saund. by Wms. 252, u. 7); and the object of the writ of *estrepement* was effected by an application to a court of equity for an injunction,—a relief which may now equally be had in the court of common law in which the action is brought (17 & 18 Vict. c. 125, ss. 79 et seq.; 23 & 24 Vict. c. 126, ss. 32, 33). It may also be observed, that, by our more antient law, waste was not punishable in any tenant except guardian in chivalry, tenant in dower and tenant by the curtesy; and that these were punishable only by way of damages (2 Inst. 146), except in the case of a guardian;—and he forfeited his wardship by the provisions of the Great Charter (2 Inst. 300). But the 6 Edw. 1, c. 6, inflicted forfeiture and treble damages in the case of waste committed by a tenant in dower, by the curtesy, for life, or years.

(*q*) Accordingly, if my house or premises be injured by a fire caused by the negligence of a neighbour,

of one joint tenant, or tenant in common, against another who has destroyed the subject of joint or common property (*r*). We may also remind the reader that an analogous action on the case—called in this instance an action for *dilapidations*,—may be maintained by a rector or vicar against his predecessor, or the executors of his predecessor, (and this for *permissive* as well as *voluntary* waste,) it being held that the incumbent of a living is bound to keep the parsonage house and chancel of the church in good and substantial repair; restoring and rebuilding where necessary, according to the original form (*s*).

5. *Subtraction* is another species of injury affecting a man's real property; [and it happens when any person who owes any suit, duty, custom, or other service to another, withdraws or neglects to perform it.] And these consist in general of *fealty, suit of court, rent, and customary services*.

Fealty and suit of court are among the conditions upon which the antient lords granted out their lands to their feudatories; and consisted in the obligation on the part of those tenants to take the oath of fealty to the lord, and attend and follow his courts by serving on juries there (*t*): and of the same nature also are such *rents* as fall under the legal denomination of *rent service* (*u*); these being the stated returns due, either by antient or modern reservation, from the tenant to his lord,—whether in provisions, arms, or the like, or in money: to which last almost all rents are now reduced. And the subtraction or non-observance of any of these conditions of grant, [is an injury to the freehold of the lord, by diminishing the

he may be sued by me for the damage he has thereby occasioned. (See *Filliter v. Phippard*, 11 Q. B. 347.)

(*r*) 1 Chit. Gen. Pr. 272.

(*s*) As to this action, vide sup. p.

67.

(*t*) As to fealty, vide sup. vol. I. pp. 185, 256, 265, 645.

(*u*) As to rent service, vide sup. vol. I. p. 692.

[value of his seigniority.] Besides which, there arises, whenever *rent* becomes due, (whatever may be its nature, and whether it is connected with the tenure or not,) a *debt* between the parties; the non-payment of which is a pecuniary injury, independent of the wrong done to the freehold (*x*).

For the withholding of fealty and suit of court, and in general for all rents, there is the peculiar remedy by distress; of which we have already treated (*y*); [and it is the only remedy at the common law, for the two first of these.] But to recover rent there is also a remedy by action (*z*), the nature of which will be more particularly explained, when we arrive at the consideration of that species of injury which consists of breach of contract.

As to *customary services*; the one of most frequent occurrence 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 (*a*).] If under such circumstances, any of them go to another mill and withdraw their suit (their *secta*, à *sequendo*) from the antient mill, this is not only a damage, but an injury to the owner; because this custom might have a very reasonable foundation; [viz. the erection of such mill by the ancestors of the owner for the convenience of the inhabitants, on condition that when erected, they should grind their corn there only.

(*x*) As to debt, vide sup. vol. 11. p. 144.

(*y*) As to a distress, vide sup. p. 358.

(*z*) Formerly there were several *real* actions (now abolished by 3 & 4 Will. 4, c. 27) to recover rent in arrear, viz., the assize of *mort d'ancestor* and of *novel disseisin*, the writ *de consuetudinibus et servitiis*, and the writ of right *sur disclaimer*. (See as to these, 3 Bl. Com. 184,

232; Roscoe on Real Actions, 31, 32, 63, 75.) On the other hand there were also real actions to redress the oppressions of the lord; as the writ *ne injuste vexes*, and writ of *mesne*. (See as to these, 3 Bl. Com. 284; Roscoe on Real Actions, 37, 38.)

(*a*) As to this service or custom, see *Harbin v. Green*, Hob. 233; *Drake v. Wigglesworth*, Willes, 654.

[And, for this injury, the owner may recover damages in an action on the case (*b*).]

6. The last species of real injuries—which, in some instances, amounts also to the injury of *nuisance*, of which we have already treated—is that of *disturbance*; which is the wrongful obstruction of the owner of an incorporeal hereditament, in its exercise or enjoyment: and we shall mention five sorts of this injury,—disturbance of *franchise*; disturbance of *common*; disturbance of *ways*; disturbance of *tenure*; and disturbance of *patronage*.

Disturbance of *franchise* happens when a man who has any species of franchise, as [of holding a court leet, of keeping a fair or market, of free warren, of taking toll, of seizing waifs or estrays, or (the like), is disturbed or incommoded in the lawful exercise thereof. As if another, by 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 free warren; 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, all which it is impossible here to recite or suggest, there is an injury done to the legal owner: his property is diminished, and the profits arising from such his franchise are diminished.] To remedy which, he is entitled to sue for damages by an action on the case, or, in case of the refusal to pay toll, may take a distress if he pleases (*c*).

[The disturbance of *common* comes next to be considered—where any act is done by which the right of another to

(*b*) This action has been resorted to in modern times (see *Vyvyan v. Arthur*, 1 B. & C. 410; *Richardson v. Walker*, 2 B. & C. 827). Formerly the owner of the suit was enabled to compel the specific performance of the service due, by the writs (now

abolished) *de sectâ ad molendinum*, *ad furnum*, *ad torrale*, and the like. (F. N. B. 123; *Roscoe on Real Actions*, 36.)

(*c*) *Heddy v. Wheelhouse*, Cro. Eliz. 558.

[his right of common is incommoded or diminished (*f*). This may happen, 1. Where one who hath no right of common puts his cattle into the land; and thereby robs the cattle of the commoners of their respective shares of the pasture. Or if one, who 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 (*g*); and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common (*h*).] In general, however, [if 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 drive them off, or distrain them *damage feasant* (*i*);] or the commoner may bring an action on the case, (or the lord, an action of trespass,) to recover damages. 2. [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 them into a smaller compass. This injury by surcharging can, properly speaking, only happen where the common is appendant or appurtenant, and of course limitable by law, or where, when in gross, it is expressly limited and certain; for where a man hath common in gross, *sans nombre*, or *without stint*, as it is more commonly called, he cannot be a surcharger. However, even where a man is said have common without stint, still there must be left sufficient for the lord's own beasts (*h*); for the law will not suppose that at the original grant of the common the lord meant to exclude himself. The usual remedies for

(*f*) As to common, vide sup.
vol. I. p. 668.

(*g*) 1 Roll. Ab. 396.

(*h*) Co. Litt. 122.

(*i*) 9 Rep. 112.

(*h*) 1 Roll. Ab. 399.

[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 action on the case, in which any commoner may be plaintiff,] and that as well against the lord, as against another commoner (*l*). 3. In addition to the above, [there is another disturbance of common, when the owner of the land, or other person, so incloses or otherwise obstructs it (*m*), that the commoner is precluded from enjoying the benefit to which he is by law entitled (*n*). This may be done either by erecting fences, or by driving the cattle off the land, or by ploughing up the soil of the common (*o*). 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;] though, on the other hand, the lord may lawfully erect a warren, provided the rabbits do not increase so as to occasion this inconvenience (*p*). For each of these injuries, the commoner may have his action of trespass on the case (*q*); and, in certain instances,—as where the obstruction is

(*l*) Freem. 273; 1 Saund. by Wms. 346, n. (2). Until the general abolition of real actions, there was also the writ of *admeasurement of pasture*; as to which see F. N. B. 126.

(*m*) By 38 Geo. 3, c. 65, to depasture commons, &c. with *diseased sheep*, is made an offence punishable with a pecuniary penalty before a justice of the peace, and there is a similar provision in 11 & 12 Vict. c. 107, s. 2.

(*n*) It is to be remembered, however, that the lord, or other proprietor of the waste, may *approve*, that is, inclose the land, and convert it to the uses of husbandry, provided he leaves sufficient com-

mon to the tenants, according to the proportion of their land. As to this, vide sup. vol. i. p. 673.

(*o*) *Leverett v. Townshend*, Cro. Eliz. 198. It seems difficult to distinguish this disturbance of common from the particular species of *waste*, to which reference is made, sup. p. 532, u. (*o*).

(*p*) See *Bellew v. Langdon*, Cro. Eliz. 876; *Hadesden v. Gryssel*, Cro. Jac. 195; *Hassard v. Cantrell*, Lutw. 108; 3 Bl. Com. 237.

(*q*) Before the abolition of real actions, he was also entitled to the writ of *novel disseisin* or *quod permittat*; as to which, see 3 Bl. Com. p. 22; Roscoe on Real Actions, p. 40.

occasioned by a fence or wall,—the law allows him to *abate*, or throw it down (*r*).

[The third species of disturbance, that of *ways*, is very similar in its nature to the last,] and it principally happens when a person who hath a right of way over another's grounds [is obstructed by inclosures or other obstacles, or by ploughing 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.] Here, also, the remedy is by action on the case, or by abating the obstruction (*s*).

[The fourth species of disturbance is that 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. To have an estate well tenanted is an advantage that every landlord must be very sensible of; and therefore the driving away of a tenant from off his estate is an injury of no small consequence. So that if 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, and gives him a reparation in damages against the offender by an action on the case (*t*).

The fifth species of disturbance,—and by far the most considerable,—is that of disturbance of *patronage*; which

(*r*) 1 Saund. by Wms. 353 a. The commoner, however, cannot cut down trees wrongfully planted by the lord, or kill his rabbits destroying the common, or even fill up the coney-burrows; but his remedy is by action on the case only. (Ibid.) The remedy by *injunctio* noticed

sup. 529, n. (*s*), applies also to disturbance of common.

(*s*) There is also a remedy by *injunctio*, as to which vide sup. p. 521, n. (*s*).

(*t*) See Hal. Anal. c. 40; 1 Roll. Ab. 108.

[is a hindrance or obstruction of the patron to present his clerk to a benefice (*u*).

This injury was distinguished at common law from another species of injury, in regard to an advowson, called *usurpation*; which happens when a stranger that hath no right presenteth a clerk, and he is thereupon admitted and instituted (*x*); in which case of usurpation the patron, by the common law, was absolutely ousted and dispossessed, and lost, not only his turn of presenting *pro hâc vice*, 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* (*y*). The reason given for his losing the present turn, and not being able to eject 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. And the patron also lost the inheritance of his advowson, unless he recovered it in a writ of right, because by such usurpation,]—and consequent fulness or *plenarty* (as it was called) of the church by the act of the usurper,—his own possession of the advowson was considered as displaced; and the law allowed no remedy, either by presentation or possessory action, nor otherwise than by a writ of right, to a person put out of possession of an hereditament of this description. The only remedy therefore which the patron had left, was to try the mere right in a writ of *right of advowson*. Thus stood the common law.

(*u*) As to patronage, or the right of presentation to benefices, vide sup. p. 29.

(*x*) Co. Litt. 277. As to admission and institution, vide sup. p. 31.

(*y*) 6 Rep. 49; F. N. B. 30. This was a peculiar writ of right framed for this special purpose, but in every other respect corresponding with other *writs of right*, as to which vide sup. p. 516.

[But bishops in antient 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 the statute of Westminster the second, 13 Edw. I. c. 5, s. 2,] that if the possessory action of *quare impedit* (a) should be brought within six months after the avoidance, the patron should, notwithstanding such usurpation, recover that very presentation; and this recovery gave back to him the seisin of the advowson. Yet, after this provision [if the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and the patron, to recover it, was still 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, 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 (b). 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,] and,

(a) The statute of Edw. I. gave a similar efficacy to another possessory action, called an assise of *darreign presentment*, which was one of those abolished by 3 & 4 Will. 4, c. 27, s. 36. This action lay only where a man had an advowson by descent from his ancestors; but a *quare im-*

pedit was (and is) equally available whether a man claims title by descent or by purchase. (3 Bl. Com. 245.)

(b) As to this statute, see *Robinson v. Marquis of Bristol*, 20 L. J. (C. P.) 208.

within that time, may be remedied by bringing a *quare impedit*.

The above-mentioned remedy by *quare impedit* is now therefore the only action used in any case of the disturbance of patronage; and the course of proceeding in it will hereafter be considered in its proper place (*c*). At present we shall only notice the circumstances by which it is usually preceded.

[Upon the vacancy of a living, the patron, we know, is bound to present within six calendar months, otherwise it will lapse to the bishop (*d*). But if the presentation be made within that time, the bishop is bound to admit and institute the clerk if found sufficient; unless the church be full, or there be notice of any litigation. For if any opposition be intended, it is usual for each party to enter a *caveat* with the bishop, to prevent his institution of his antagonist's clerk. An institution after a *caveat* entered, is void by the ecclesiastical law; but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity (*e*). 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 occur. Yet if the patron or clerk on either side request him to award a *jus patronatús*, he is bound to do it. A *jus patronatús* is a commission from the bishop, directed usually to his chancellor and others of competent learning; who are to summon a jury of six clergymen and six laymen, to inquire into and examine who is the rightful patron (*f*); and if, upon such inquiry made and certificate thereof returned to the commissioners, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events from being

(*c*) Vide post, bk. v. c. xi.

Rep. 191.

(*d*) Vide sup. p. 73.

(*f*) 1 Burn, 24.

(*e*) *Hitching v. Glover*, 1 Roll.

[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* (*g*); 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: and if the superior court adjudges the cause of refusal to be insufficient it will grant institution to the appellant (*h*).

Thus far matters *may* go on in the ecclesiastical courts; 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 *quare impedit* for the temporal injury done to his property, in disturbing him in his presentation.] For the patron [is always plaintiff in this action, and not the clerk; as the temporal law supposes the injury to be offered to the former only, by obstructing or refusing the admission of his nominee, and not to the latter, who hath no right in him till institution, and of course can suffer no injury.] But as to the parties *against* whom the action is to be brought, it is to be observed that all these three persons, the pseudo-patron, his clerk, and the ordinary, may be disturbers of a right of advowson: [the pretended patron by presenting to a church to which he has no right, and thereby making it litigious or disputable; the clerk by demanding or obtaining institution, which tends to and promotes the same inconvenience; and the ordinary by refusing to admit the real patron's clerk, or admitting the clerk of the pretender.] Accordingly, if the delay arises from the bishop alone, [as upon pretence of incapacity or the like, then he only may be named as defendant; if there be another presentation set up, then the pretended patron and his clerk must be joined in the action; or it may be

(*g*) 1 Burn, 159.

(*h*) The appeal on a *duplex querela* from the archbishop's court is

to the Judicial Committee of the Privy Council. (See *Gorham v. Bishop of Exeter*, 15 Q. B. 52.)

[brought against the patron and his clerk, leaving out the bishop, or against the patron only. However, 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, he is entitled to present by lapse; as he is not party to the suit (*i*); but if he be named, no lapse can possibly accrue till the right is determined. Again, if the false 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; for the right of the patron is the principal question in the cause (*k*). And if the 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 reasons it is the safer way to insert all three in the writ (*l*).]

Finally, we may remark, that though in a *quare impedit* the patron only, and not the clerk, is allowed to sue the disturber, yet there is one species of presentation in respect of which a remedy, to be sought in the temporal courts, is put, by statute, into the hands of the clerk presented, as well as of the owners of the advowson; and this is in the case of a presentation to a benefice belonging to a Roman Catholic patron, which (according to the place in which it is situate) is vested by law in the University of Oxford or of Cambridge (*m*). For in such case, besides the action of *quare impedit* which the university as patron is entitled to bring, it is provided, by 12 Anne,

(*i*) *Lancaster v. Lowe*, Cro. Jac. 93.

(*k*) 7 Rep. 25; *Elvis v. Archbishop of York*, Hob. 392.

(*l*) 3 Bl. Com. 248. Blackstone's remarks here seem not to be affected by the circumstance, that for the

original writ of which he is speaking has now been substituted (by 23 & 24 Vict. c. 126, s. 26) the ordinary writ of summons by which other actions are commenced.

(*m*) Vide sup. p. 70.

st. 2, c. 14, s. 4, that either the university or the clerk presented by them shall be [at liberty to file a bill in equity against any person presenting to such livings and disturbing their right of patronage,—or against his *cestui que trust*, or any other person whom they have cause to suspect,—in order to compel a discovery of any secret trusts for the benefit of Papists, in evasion of those laws whereby this right of advowson is vested in these learned bodies: and also (by the stat. 11 Geo. II. c. 17) to compel a discovery whether any grant or conveyance, said to be made of such advowson, was made *bonâ 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 temporal law permit the clerk himself to interfere in recovering a presentation of which he is afterwards to have the advantage.]

III. We are next to consider the injuries that may be offered to the right of *property in things personal* (*m*); and this, first, as regards things in *possession*; next, things in *action* (*n*).

First, 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 several branches—such as the taking them away unlawfully—their unlawful detention, though the original taking might be lawful—and such tortious acts as subject the owner to the loss of them, though the wrong-doer himself may be guilty neither of caption nor

(*m*) Vide sup. p. 483.

(*n*) As to this distinction, vide sup. vol. II. p. 11.

detainer. Our present subject will therefore involve four several heads:—1, the injury of unlawfully taking chattels from the owner; 2, that of unlawfully detaining them from him; 3, that of unlawfully depriving him of them, by means other than detention; 4, that of doing damage to them while in his possession.

1. And, first, of an unlawful *taking*. The nature of this requires no illustration, and our attention therefore is to be chiefly directed to its remedy. The first remedy we shall notice is that of procuring [the restitution of the goods themselves, together with damages for the loss sustained by their unjust invasion; which is effected by action of *replevin*, an institution which the *Mirroure* ascribes to Glanvil, chief justice to King Henry the second (*o*.)] This action is seldom resorted to in practice, but in one instance of an unlawful taking,—viz. that of a wrongful distress (*p*); and it is always preceded by an application on the part of the owner, to the proper authority, to cause the goods taken to be *replevied* (*q*); that is, re-delivered to the owner, upon his giving such security as the law requires for trying the legality of the distress. An application for this purpose used formerly to be made in the common law county court incident to the jurisdiction of the sheriff (*r*); but by the Acts establishing and regulating the new district courts of the same name (*s*), it is now to be made to the Registrar of one of *those* courts, viz. that one within the district of which the distress was taken (*t*). The Registrar, on receiving this application, causes the goods to be replevied accordingly by the high bailiff of the court, and delivered to the owner on

(*o*) 3 Bl. Com. p. 145.

(*p*) As to other cases of wrongful taking in which replevin will lie, see Co. Litt. 145 h; Vin. Ab. Replevin (B.); Com. Dig. Action (M. 6); *George v. Chambers*, 11 Mee. & W. 149; *Morrell v. Martin*, 3 Man. & Gr. 581; *Mellor v. Leather*, 1 Ell. &

Bl. 619.

(*q*) Vide sup. p. 370.

(*r*) Vide sup. p. 398.

(*s*) Vide sup. p. 399.

(*t*) See 9 & 10 Vict. c. 95, s. 119; 19 & 20 Vict. c. 108, ss. 63, 64; 23 & 24 Vict. c. 126, s. 22.

his giving security, of such amount as mentioned in the Acts, to commence in the county court an action of replevin against the distrainer, within one month from the date thereof; to prosecute such action with effect and without delay; and to make return of the goods, if in the result a return of the same shall be adjudged (*u*). The owner, (or replevisor,) is also entitled, however, at his option, to give security to commence such action in one of the superior courts instead of the inferior jurisdiction; but in this case the security must be conditioned that he will do so within one week (instead of one month) from its date, and not only that he will prosecute with effect and without delay, and make return of the goods if a return shall be adjudged,—but also that, (unless he obtains judgment in such action by default,) he will prove before the superior court that he had good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question; or that the rent or damage, in respect of which the distress was made, exceeded 20*l.* (*x*). Security in one or other of these forms having been given, the replevisor proceeds accordingly to commence his action of replevin either in the county or superior court, as the case may be: but if he brings it in the former, it may be *removed*, by the defendant, (or distrainer,) into any superior court by writ of *certiorari*. To obtain such writ the defendant must apply to one of the superior courts or to a judge, and must give security, (not exceeding £150,) to defend such action with effect, and—unless the replevisor shall discontinue, or shall not prosecute such action, or become nonsuit therein—to prove before the superior court that he, the defendant, had good ground for believing to the effect already set forth in the case of an action brought

(*u*) 19 & 20 Vict. c. 108, s. 66; 1867, Sched. of Forms, No. 156.
County Court Rules and Orders, (*x*) *Ibid.* s. 65; *Ibid.* No. 155.

in the superior court by the replevisor (*y*). And so much, for the present, with respect to the action of replevin:—the subsequent progress of which in a superior court (and that in the county court is precisely analogous) will be explained hereafter, when we shall have occasion to describe the proceedings in actions (*z*).

Another action for the unlawful taking of a man's goods, and one of much more extensive use, being applied to every injury of that description, is the action of

(*y*) 19 & 20 Vict. 108, s. 67.

(*z*) Vide post, c. XI. It has been thought undesirable to encumber the text with any statement of the law of replevin by the act of the sheriff, as it existed before the introduction of the new county courts in the year 1846. But the following notices of it may be useful.

By the old common law, the only remedy for the party wishing to replevy his goods was by a writ of *replegiari facias*, issuing out of Chancery, and commanding the sheriff to replevy. Afterwards by 52 Hen. 3, c. 21; 13 Edw. 1, c. 2; 1 Ph. & M. c. 12; and 11 Geo. 2, c. 19,—the sheriff was directed, for the more speedy relief of the owner, to replevy without writ, upon his levying a plaint and finding *plegii de prosequendo*, and also *de retorno habendo* in the event of the right being determined against him; and (in case of rent) security also to prosecute the suit with effect and without delay. Either party, however, might remove the plaint from the county court to one of the superior courts of law by writ of *recordari*; and as, if any right of freehold came into question, the jurisdiction of the sheriff was at all events at an end, it was usual to remove it in the first instance.

Again, in any case of distress, it might happen that the distrainor claimed a property in the goods taken. If he did, the party distrained upon might sue out a writ *de proprietate probandâ*; which was inquired into before the sheriff prior to any replevin. It might also happen that the distress was carried out of the county, or concealed. In this case the sheriff might return to a writ of *replegiari facias*, that the goods were *eloiigned* (*elongata*) to places to him unknown; and thereupon the party distrained upon was to have a writ of *capias in withernam, in vetito* (or, more properly, *repetito*) *namio*; by which the sheriff was commanded to take a second or reciprocal distress, in lieu of the first which was *eloiigned*; so that there was thus distress against distress, one being taken to answer the other, by way of *reprisal*, which seems to be the meaning of the old word *withernam*. And for this reason it was held, that goods taken in *withernam* could not be replevied, until the original distress was forthcoming. (For a fuller exposition of the ancient law on these points, see 3 Bl. Com. pp. 147—150.)

trespass (*a*). [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*, is nevertheless a transgression, for which an action of trespass will lie; wherein the plaintiff shall not recover the thing itself, but only damages for the loss of it.] Or the party aggrieved [may, at his choice, have another remedy in damages, by action of trover and conversion, of which more will presently be said.

2. Deprivation of possession may also be by an unjust *detainer* of another's goods, although the original taking was lawful. As if I distrain another's cattle damage feasant, and before they are impounded he 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 against me to recover them (*b*); in which he shall recover damages for the *detention*, though 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 (*c*):] in which [the judgment is conditional that the plaintiff recover the goods, (or, if they cannot be had, their respective values,) and also certain damages for detaining them (*d*).] Formerly the defendant, on this judgment, had always his option of redelivering the goods or their value; but now,—in cases where the value is assessed in the verdict,—application may be made by the plaintiff to the

(*a*) This action, in other applications of it, has already been considered, vide *sup.* p. 522.

(*b*) F. N. B. 89.

(*c*) F. N. B. 138. As to this action, see *Jones v. Dowle*, 9 Mee. & W. 19; *Williams v. Archer*, 5 C. B.

318; *Reeve v. Palmer*, 5 C. B. (N. S.) 84.

(*d*) As to the form of judgment in detinue brought in a *county court*, see *County Court Rules and Orders*, 1867, Sched. of Forms, No. 160.

court or a judge, for a special writ of execution, under which the goods may be seized, or the property of the defendant distrained, till a return be made (*e*). But as one object in the action of detinue is to obtain (if possible) specific restitution, so 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.] This form of action was also formerly subject, (as were some other of our legal remedies,) to the incident of *wager of law* (*vadiatio legis*),—a proceeding which consisted in the defendant's discharging himself from the claim on his own oath, bringing with him at the same time into court eleven of his neighbours, to swear that they believed his denial to be true (*f*). This relic of a very antient and general institution, which we find established not only among the Saxons (*g*) and Normans (*h*), but among almost all the Northern nations that broke in upon the Roman empire (*i*), continued to subsist among us even till the last reign, when it was at length abolished by 3 & 4 Will. IV. c. 42, s. 13 (*j*): and as it exposed plaintiffs in detinue to great disadvantage, it had long had the effect of throwing that action almost entirely out of use, and introducing in its stead the action of trover;

(*e*) See 17 & 18 Vict. c. 125, s. 78; *Chilton v. Carrington*, 15 C. B. 730. Before the above provision, recourse for this purpose could only be made to a court of equity. (See *Pusey v. Pusey*, 1 Vern. 273.)

(*f*) 3 Bl. Com. 341.

(*g*) *Ibid.* 343.

(*h*) Gr. Constumier, c. xxvi.

(*i*) See 3 Bl. Com. 342, where it is observed, that its origin may be traced as far back as the Mosaical law: "If a man deliver unto his neighbour 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 neighbour's goods: and the owner of it shall accept thereof, and he shall not make it good."—Exod. xxii. 10.

(*j*) An instance of it occurred in the practice of our courts as lately as in 1824. (*King v. Williams*, 2 Barn. & Cress. 538.) But, in modern times, such an occurrence had been extremely rare.

which still continues to be the favourite remedy in a case of unlawful detention of goods.

This action of *trover and conversion* is a species of trespass upon the case; and originally lay only for recovery of damages against such person as had *found* another's goods and wrongfully *converted* them to his own use; from which finding and converting, it derived its name. [The freedom of this action from wager of law and the less degree of certainty requisite in describing the goods in the declaration (*k*), gave it so considerable an advantage over the action of detinue, that, (by a fiction of law,) the action of trover was 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 over when demanded.] This fiction consisted in an allegation in the declaration that the plaintiff lost the goods, and that the defendant found them,—so as to bring the case within the proper scope of an action of *trover*; and this statement (which was matter of form only, and of which no proof was required) was inserted, although in fact the goods might never have been lost, and might have come to the defendant's possession in some other way, and not by finding. And these formal allegations were retained up to the present times; but by a provision in 15 & 16 Vict. c. 76, (The Common Law Procedure Act, 1852,) they were directed for the future to be omitted: so that nothing more needs now to be stated in the declaration, than that the defendant wrongfully converted the goods to his own use; or that he wrongfully deprived the plaintiff of the use and possession of his goods (*l*). And proof of such conversion or deprivation will be sufficient to

(*k*) *Hartford v. Jones*, Salk. 654.

(*l*) See 15 & 16 Vict. c. 76, s. 49, sched. (B.) 28, and *Munster v. The South-Eastern Railway Com-*

pany, 4 C. B. (N. S.) 679, *in notis*. Notwithstanding this alteration, it is to be noticed that the action still retains its name of *trover*.

sustain the action. Indeed, it will be enough to prove that the goods belonged to the plaintiff, and came to the defendant's possession, and that he refused or neglected, upon request, to deliver them up; for a refusal to deliver them on request, is, in itself, *primâ facie* sufficient evidence of a conversion (*m*). Under such circumstances, then, and supposing no right to detain them to be established by the defendant, the plaintiff will be entitled to judgment; and shall recover damages equal to the value of the thing converted, but not the thing itself, no specific claim of which is made in this form of action (*n*). It is further to be observed, with respect to the remedy of trover, that resort to it is frequently had not only in the case where goods are wrongfully detained upon a lawful taking, but also where they have been unlawfully taken as well as detained. For though trespass, as we have seen, is a proper form where the injury is founded on a wrongful caption, yet if the owner of the goods chooses to waive that ground of complaint, and to treat the case as one of wrongful detention only, he is at liberty to do so, and thus enable himself to maintain an action of trover; which, for particular reasons of a technical kind, is sometimes found to be a more convenient form than trespass.

3. The injury of dispossessing or depriving another of his personal chattels, may be effected (as already observed) otherwise than by wrongful caption or detainer; and there are various torts,—or in other words, various acts of unlawful commission or omission,—which, though widely differing from each other in their specific nature, are nevertheless reducible under this common head.

(*m*) 10 Rep. 56. As to what amounts to a conversion, see *Green v. Dunn*, 3 Camp. 215, (*n*.); *Philpott v. Kelley*, 3 A. & E. 106; *Canot v. Hughes*, 2 Bing. N. C. 448; *Granger v. Hill*, 5 Scott, 561; *Counce v.*

Spanton, 7 Man. & G. 903; *Rushworth v. Taylor*, 8 Q. B. 699; *Heald v. Carey*, 11 C. B. 977; *Burroughs v. Bayne*, 5 H. & N. 296.

(*n*) 3 Bl. Com. 153.

Thus, I may be deprived either of goods or money from my having delivered over goods, or lent money, in consequence of a representation made by one person, as to the circumstances or character of another. And if such representation was untrue, to the knowledge of the person by whom it was made, it is an injury for which I may maintain against him an action on the case (*n*); and the law is the same in the case of any other injury occasioned by the fraudulent misrepresentation of another (*o*),—as for example if he sells me an infected animal as a sound one (*p*). But such an action is essentially founded on the fraud or deceit of the party charged; and therefore it will not lie in any case where the representation, though untrue in fact, was made *bonâ fide* (*q*). And by Lord Tenterden's Act, (9 Geo. IV. c. 14, s. 6,) no action shall be brought to charge any person by reason of any representation concerning the character, ability or dealings of another, to the intent that such other person may obtain credit, money or goods, unless such representation be made in *writing*, signed by the party to be charged therewith (*r*). Again, I may be deprived of money to which I am entitled under the judgment of a court of law, in consequence of the wrongful omission of the sheriff to seize the goods or person of the defendant, under the writ of execution which I have sued out upon it; or from his wrongfully permitting the defendant, after his being

(*n*) See *Foster v. Charles*, 6 Bing. 396; *S. C.* 7 Bing. 105; *Corbett v. Brown*, 8 Bing. 35; *Polhill v. Walter*, 3 B. & Ad. 114.

(*o*) See *Pewtriss v. Austen*, 6 Taunt. 522; *Humphrys v. Pratt*, 5 Bligh, N. S. 154; *Taylor v. Ashton*, 11 Mee. & W. 401; *Behn v. Kemble*, 7 C. B. (N. S.) 260.

(*p*) *Mullett v. Mason*, Law Rep. 1 C. P. 559.

(*q*) See *Haycraft v. Creasy*, 2

East, 92; *Smout v. Ilbery*, 10 Mee. & W. 1; *Ormrod v. Hnth*, 14 Mee. & W. 651; *Collins v. Evans* (in error), 5 Q. B. 820.

(*r*) As to what cases are within this section of the Act, see *Haslock v. Fergusson*, 7 Ad. & El. 86; *Swan v. Phillips*, 8 Ad. & El. 457; *Pilmore v. Hood*, 5 Bing. N. C. 97; *Devaux v. Steinkeller*, 6 Bing. N. C. 84; *Tatton v. Wade*, 18 C. B. 371.

arrested by virtue of my writ of execution, to escape from custody. And in these instances the remedy is by action on the case against the sheriff (*s*).

4. Besides being deprived of the possession of his personal property, its owner may be injured also by its *abuse and damage*: [as by hunting his 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,] by any of those modes of negligent or wilful mischief which are too obvious to require a more particular detail. And as personal property may, in some instances, be of an intangible or incorporeal nature,—as in the case of a copyright or patent right,—so there are injuries relating to these matters which properly fall under the present head, such as the piracy of a literary composition, or the infringement of a patent (*t*). Of a similar description, too, is the injury committed by one manufacturer who sells goods under the mark of another; even though the latter should have obtained no patent; this being an invasion of his exclusive right to sell in his own name (*u*). Torts, by way of abuse or damage of personal chattels, are redressed either by trespass,—where the act is in itself immediately injurious; or by trespass on the case,—where it is injurious rather in a conse-

(*s*) See *Williams v. Mostyn*, 4 Mee. & W. 145; *Guest v. Elwes*, 5 Ad. & Ell. 118. Formerly (by the statute of Westminster 2, 13 Edw. 1, c. 1) the sheriff in the action for an escape, was liable for the whole debt and costs of the original action; but by 5 & 6 Vict. c. 98, s. 31, his liability is now confined to the damages actually sustained by the execution creditor, in respect of the escape. Besides this action, the sheriff suffering an escape is liable to an attachment. See *Reg. v. Leicester-*

shire (Sheriff of), 1 L. M. & P. 414; *Arden v. Goodacre*, 11 C. B. 367.

(*t*) As to *copyright*, vide sup. vol. II. p. 34 et seq.; as to *patent right*, *ibid.* p. 25 et seq.

(*u*) See *Sykes v. Sykes*, 3 Barn. & Cres. 541; *Blofeld v. Payne*, 4 B. & Ad. 410; *Rodgers v. Nowill*, 17 L. J. (C. B.) 52; *Burgess v. Hills*, 26 Beav. 244; *Leather Cloth Company v. American Leather Cloth Company*, 11 H. of L. Ca. 523. See also 25 & 26 Vict. c. 88, s. 11.

quential than a direct sense; according to a distinction that has been referred to in a former place (*x*). But such torts as relate to intangible chattels, are always remediable in the latter form of action only, and are not the proper subjects of an action of trespass. In the case of an infringement of copyright or patent right, or the like, it may also be right to remark in this place, that redress is very frequently sought, not only by an action in a court of law to recover damages for the injury already suffered, but also by obtaining an *injunction*, either from a court of equity or as part of the remedy claimed in such action; so as to restrain the wrong-doer from the further invasion of the right, and compel him to account for the profits already derived from the wrongful sale (*y*).

Hitherto of injuries affecting the right of things personal in *possession*. [We are now to consider, secondly, those which regard things in *action* only; or such rights as are founded in and arise from *contracts*,] the nature and several divisions of which were explained in the preceding volume (*z*).

Contracts, as we have there seen, are subject to the several distinctions of being either under seal, or by parol; verbal or written; express or implied: and they also comprise many individual species, the principal of which we had formerly occasion to consider in detail. Their violation, in any instance, constitutes that general description of injury known by the name of *breach of*

(*x*) Vide sup. p. 486.

(*y*) As to injunctions against infringement of copyright or patent right in a court of equity, see *Barfield v. Nicholson*, 2 Sim. & Stu. 1; *Bailey v. Taylor*, 1 Russ. & Mylne, 73; *Stevens v. Benning*, 6 De Gex, M. & G. 223; *Fox v. Hill*, 2 De Gex & J. 353; *Crookes v. Petter*, 6 Jur. (N. S.) 1131. As to injunctions for

this purpose, granted by a court of common law, see *Holland v. Fox*, 2 W. R. (C. B.) 858; *Gittins v. Symes*, 15 C. B. 362. The power of the common law courts in this respect is of recent creation, and founded on 15 & 16 Vict. c. 83, s. 42, and 17 & 18 Vict. c. 125, ss. 79–82.

(*z*) Vide sup. vol. II. pp. 54–146.

contract : and in general the remedy, where the contract is under seal, is by action of debt or covenant ; when it is not under seal, by debt, or by *assumpsit* (*a*),—otherwise called an action on promises—and this, whether such parol or unsealed contract be written or verbal, express or implied. It may be here expedient, however, to advert in detail to some particular contracts,—consisting principally of those which, from their superior frequency or importance, have attracted our specific notice in former parts of the work. The remedies in these particular cases, may be stated as follows :—

1. As regards the breach of *covenants in leases* (*b*) ;—for example, of the covenant to repair on the part of the tenant, or that for quiet enjoyment on the part of the landlord,—the remedy for either party is by action of covenant ; which is also the proper form in case of the breach of any of those *covenants relating to title*, that are ordinarily contained in conveyances of real estate (*c*). But in case of a covenant in a lease to *pay rent*, upon a lease for years, or other estate less than freehold, the breach of it may be redressed either by action of covenant or of debt ; for in this case, the landlord having a claim to a liquidated sum of money, there arises between him and the tenant a debt in point of law (*d*) ; which debt he may demand, if he thinks proper, in lieu of the more general claim for damages in respect of the breach of covenant. For a freehold rent, indeed, viz. a rent issuing out of a freehold estate, whether of inheritance or for life, no action of debt lay, by the common law, during the continuance of the freehold out of which it issued (*e*) ; for the action under such circumstances would have been for the recovery of the realty, which was beyond the province of an action merely personal like debt : and it seems that, to this day, no rent of

(*a*) As to the action of *assumpsit*,
vide sup. p. 485, n. (*c*).

(*b*) Vide sup. vol. I. pp. 532.

(*c*) Vide sup. vol. I. p. 506.

(*d*) Vide sup. vol. II. p. 145.

(*e*) 3 Bl. Com. 232.

inheritance is recoverable by an action of debt (*e*); but by the statutes 8 Ann. c. 14, and 5 Geo. III. c. 17, such action may now be brought to recover freehold rents reserved on a lease for life (*f*). Also debt will not lie for arrears of a rent-charge, or an annuity, granted in fee, in tail, or for life, during the continuance of such estate (*g*); but the proper remedy is by covenant; or by another action, that has now however fallen into disuse, called an action of annuity (*h*). On the other hand, where rent falls into arrear under a parol contract, no action of covenant can be maintained, (that form being exclusively applicable to contracts under seal,)—but debt will lie; and by the statute 11 Geo. II. c. 19, s. 14, the plaintiff may also resort,—though he could not by the common law,—to the action of assumpsit (*i*).

2. Under a contract of *sale* of goods (*k*),—if the vendee complains of a non-delivery of the article sold, a breach of warranty, or the like,—his remedy, where the contract was by parol only, (as is usually the case,) and not by deed, is by the action of assumpsit; and if the vendor complains of non-payment of the price—there being in this case a *debt* between the parties—the remedy is by debt or assumpsit, at the option of the plaintiff. And if the action be brought for breach of contract to deliver specific goods for a price in money, then, by the effect of a recent enactment (19 & 20 Vict. c. 97, s. 2), the plaintiff may apply for and obtain leave from the judge before whom the cause is tried, that the jury, in finding

(*e*) *Webb v. Jigs*, 4 Mau. & Sel. 113.

(*f*) See 3 Bl. Com. p. 232. These statutes are referred to by Blackstone as if they applied to rents of inheritance also; but they are confined to rents reserved on lease for life. As to the remedies for the executors of tenants in fee simple or fee tail, for arrears in his lifetime,

see 23 Hen. 8, c. 37, s. 1.

(*g*) *Kelly v. Clubbe*, 3 Brod. & Bing. 130; Bac. Abr. Annuity and Rentcharge.

(*h*) Bac. Ab. ubi sup.

(*i*) See *Brett v. Read*, Cro. Car. 343; 1 Roll. Abr. 7, l. 23; *Naish v. Tatlock*, 1 H. Bl. 323.

(*k*) Vide sup. vol. II. p. 68.

that he is entitled to recover, shall find also by their verdict what are the goods in respect of which he is so entitled, and which remain undelivered; what sum he would have been liable to pay for them; what damages he will have sustained if the goods shall ultimately be delivered by force of a writ of execution; and what damages, if not so delivered. And thereupon, in case of judgment for the plaintiff, the court or a judge may order execution to issue for the delivery of the goods, on payment by the plaintiff of the sum so found payable by him, without giving the defendant the option of retaining the goods upon paying the damages assessed; and, in default of delivery, the sheriff shall distrain the defendant by all his lands and chattels, until he deliver the goods, or (at the option of the plaintiff) cause to be made of the defendant's goods the assessed value or damages, or a due proportion thereof.

3. Where upon a contract of *bailment* (*l*), the bailor complains of a failure to redeliver the article, the remedy is (according to the circumstances) by detinue, trover, assumpsit, or an action on the case for negligence.

4. Where upon a *loan of money* (*m*), the amount is not repaid according to the contract, and there are arrears either on account of principal or interest, the remedy, if the contract be under seal, is debt or covenant; if it be not under seal, then debt or assumpsit. And here we may take the opportunity of remarking, that there are in the nature of things other pecuniary claims analogous to that for *money lent*, viz. the claim for *money paid* by the plaintiff for the defendant at his request; for *money received* by the defendant, for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff, upon an *account stated* between them (*n*). Indeed it is often difficult to determine, upon a given

(*l*) Vide sup. vol. II. p. 80.

(*m*) Vide sup. vol. II. p. 90.

(*n*) See the statement of causes

of action, contained in schedule B. to the 15 & 16 Vict. c. 76 (Common Law Procedure Act, 1852). An

state of facts, into which of these claims the plaintiff's case properly resolves itself. Each of them, however, is the proper subject for an action of debt or assumpsit.

5. As to the contract of *partnership* (*p*), we have elsewhere remarked, that questions of account between partners, generally fall under the jurisdiction of a court of equity; and, (except in a form of action called *account* which in modern times has rarely come into use,) are not cognizable in one of the superior courts of law (*q*). But an action of debt, assumpsit or covenant (according to circumstances) may be brought by one partner against the other, on an express agreement to do or forbear from some particular act not involving any question of account (*r*); or on an agreement to pay a liquidated balance or the like (*s*). So, though one partner cannot sue the other, at law, for appropriating to his own exclusive use a chattel of the partnership; yet if one of the partners has destroyed such a chattel, it seems that the other may maintain an action of trespass (*t*).

6. The breach of a contract of *guarantee* (*u*), if contained in an instrument under seal, is redressed by action of debt or covenant; if the contract be not under seal, then by action of debt or assumpsit. The remedy by the surety against the principal, where the former has been compelled to make a payment under the guarantee, is by debt or assumpsit, as for money paid by the former to the use of the latter; and any one of several sureties,

action, as upon an *account stated*, lies only where the plaintiff and defendant have come to an account, and a balance has been acknowledged; though the simple acknowledgment that a particular sum is due will, without any *further* accounting, be sufficient.

(*p*) Vide sup. vol. II. p. 99.

(*q*) Vide sup. vol. II. p. 105. Partnership accounts may now, however, within certain limits as to

the sum in dispute, be dealt with in the *county* court in the exercise of its equitable jurisdiction; vide sup. p. 407.

(*r*) *Bedford v. Button*, 1 Bing. N. C. 391.

(*s*) *Chit. Cont.* 238; *Smith v. Barrow*, 2 T. R. 476.

(*t*) *Co. Litt.* 200 a, b; see *Bull. N. P.* 34; *Martyn v. Knowllys*, 8 T. R. 145.

(*u*) Vide sup. vol. II. p. 106.

who has paid more than his rateable proportion, is entitled to claim contribution from the others, in either of such forms of action (*x*).

7. Upon *bonds* (*y*), the remedy of the obligee, in case of breach of contract by the obligor, is by action of debt only, which is always brought as for the amount of the penalty; but according to the course of practice, as explained in a former part of the work (*z*), the plaintiff is allowed to recover no more upon a bond conditioned for the payment of money, than the principal sum due, with interest and costs; nor (generally) upon a bond conditioned for the performance of any other act, more than shall be assessed by way of damages. The action of debt is also the proper one in regard to all other contracts secured by penalties, if the plaintiff elects to proceed as for the penal sum; but the form of such contracts is in general such as to give him an option of claiming damages, without regard to the penal stipulation; and if the claim be made in this shape, the form of the action is covenant, or assumpsit, according to distinctions already explained.

8. For breach of contract on a *bill of exchange* or *promissory note* (*a*), the remedy is by assumpsit; or, (where there was a privity of contract between the parties to the suit,) by debt also. Thus the payee, or any indorsee, of a bill or note, may maintain assumpsit against the maker, but only the payee may maintain debt against him. So assumpsit lies against the acceptor of a bill, at the suit of an indorsee, or of the payee, or of a drawer, who has been compelled to take it up; but debt will not lie against him at the suit of any of these parties, except the drawer (*b*).

(*x*) A recent provision in favour of the surety, contained in 19 & 20 Vict. c. 97, s. 5, is noticed, sup. vol. II. p. 107.

(*y*) Vide sup. vol. II. p. 109.

(*z*) Vide sup. vol. II. p. 111.

(*a*) Vide sup. vol. II. p. 115.

(*b*) See *Priddy v. Henbury*, 1 Barn. & Cres. 674; *Cresswell v. Crisp*, 2 Dowl. 635; *Kinahan v. Palmer*, 2 Jones, Ex. Rep. Ireland; *Hatch v. Traves*, 11 Ad. & Ell. 702;

9. Upon a *policy of marine or fire insurance* (c), the remedy of the assured, in case of breach of contract by the insurer, is by covenant, where the policy is under seal; by assumpsit where it is not. On a policy of *life insurance* (d) under seal, the remedy is by debt or covenant; on one not under seal, debt or assumpsit.

10. And, lastly, upon *charter-parties* (e), the form of remedy, in case of breach of contract, is governed by the same distinction with respect to the nature of the instrument, as being sealed or unsealed. In the former case, if the action be brought by the charterer against the owner for not receiving or properly stowing or delivering the cargo, the form is covenant; if by the owner against the charterer, for not supplying a full cargo, it is also covenant; but if for non-payment of freight, it may be either covenant or debt, at the option of the plaintiff. On the other hand, where the charter-party is not under seal, assumpsit must be substituted for covenant in all the before-mentioned cases; and for non-payment of freight, the form of action is debt or assumpsit, at the option of the plaintiff.

We have now sufficiently considered the injuries which affect such things in action, as arise out of contracts: but there are some things in action which cannot properly be said to have that origin; and the withholding of which will nevertheless constitute an injury, viz. such debts as result from the obligation to pay money pursuant to a sentence of the law, or an enactment of the legislature: as when, in a court of law, judgment is obtained by

Cloves v. Williams, 2 Bing. N. C. 868. *Debt* lies by indorsee against his immediate indorser, *Stratton v. Hill*, 3 Price, 253; *Watkins v. Wake*, 7 Mee. & W. 488. It was at one time doubted whether debt would lie in any case on a bill or note, unless expressed to be *for value*

received. But it is now held, that the omission of these words is not material in that respect. See *Chitty on Bills* (6th ed.), p. 67.

(c) Vide sup. vol. II. pp. 128, 134.

(d) Vide sup. vol. II. p. 137.

(e) Vide sup. vol. II. p. 141.

one man against another, for a specific sum of money ; or when by an act of parliament of that class called penal statutes, a pecuniary forfeiture is inflicted for committing some specified offence, and made recoverable, as it usually is, either by the Crown, or by the party aggrieved, or by a common informer. We have explained in a former place (*f*), that an obligation or liability to pay a specific sum of money, constitutes a *debt*,—so that the party against whom the judgment is obtained is immediately considered as owing to his adversary the amount awarded ; and the party who transgresses the penal statute, as immediately owing to the Crown, to the party aggrieved, or to the common informer, (as the case may be,) the amount of the penalty (*g*). The remedy for the recovery of such debt, or chose in action, when withheld, is by action of debt on the judgment, or on the penal statute, respectively ; and in the latter case, this remedy is generally designated as a penal action ; or, where one part of the forfeiture is given to the Crown, and the other part to the informer, a *popular* or *qui tam* action, because it is brought by a person *qui tam pro domino rege quam pro se ipso sequitur* (*h*).

IV. With regard to injuries which affect the rights of a man in his *private relations* (*i*) ; [and, in particular, such as may be done to persons under the four following

(*f*) Vide sup. vol. II. p. 144.

(*g*) Blackstone (vol. iii. p. 160) considers the debt, in such cases, as growing out of an implied contract, viz. the original contract entered into by all mankind, who partake the benefits of society, to submit to the constitution of the state of which they are members. But though this seems correctly laid by him and other jurists, as the foundation of the general obligation to obey the

law, there is perhaps an unnecessary subtlety in supposing it the basis of the kind of debts in question. It is more natural to consider such debts, as not *founded* upon any contract at all.

(*h*) It may be here noticed that by 22 Vict. c. 32, her Majesty is enabled to remit penalties after conviction, though payable to some party other than the Crown.

(*i*) Vide sup. p. 494.

[relations,—husband and wife; parent and child: guardian and ward; master and servant.]

1. The injuries that may be offered to a man, considered as a *husband*, are principally three; [*abduction*, or taking away a man's wife; *adultery*, or criminal conversation with her; and *beating*, or otherwise abusing her.]

And, first, [*abduction* may be either by fraud and persuasion, 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 action of trespass, *de uxore raptâ et abductâ* (*j*). This action lay at the common law: and thereby the husband shall recover, not the possession of his wife (*k*), but damages for taking her away; and by statute of Westminster the first, (3 Edw. I. c. 13,) the offender may also be imprisoned two years, and be fined at the pleasure of the Crown. Both the Crown and the husband may, therefore, have this action (*l*); 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 (*m*).]

Adultery is not punishable by our law as a crime; its penal correction being left to the Spiritual courts, which may proceed against the offender *pro salute animæ* (*n*); but considering it in another aspect, viz. as a grievous civil injury, the law, as it stood up to a very recent period, gave satisfaction for it to the husband, by an

(*j*) F. N. B. 89.

(*k*) 2 Inst. 434.

(*l*) 4 Inst. 434.

(*m*) B. N. P. 78. "The old law," says Blackstone (vol. iii. p. 139) "was so strict on 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 (Bro. Ab. tit. Trespass, 213); but a stranger 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." (Bro. Ab. ubi sup 207, 440.)

(*n*) Vide sup. p. 481, n. (*e*).

action for *criminal conversation*. In this action, the damages recovered were usually very large and exemplary. But they were properly increased and diminished by the circumstances of each particular case (*o*): as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the degree and nature of the seduction employed; the previous behaviour and character of the wife; the manner in which she had been previously treated by the husband; the husband's obligation, by settlement or otherwise, to provide for children probably spurious, and so on (*p*). The damages would also be mitigated where the husband was proved to have been himself first guilty of conjugal infidelity (*q*); and if it appeared, that he connived at or consented to his own dishonour (*r*), or lived, at the time of the adultery, in a state of absolute and permanent separation from his wife (*s*), the action would be wholly barred. It was also a point that deserves remark in reference to the law of this action, that it could not be maintained without proving a marriage in fact,—though, in other cases, reputation and cohabitation are, as the general rule, sufficient evidence of marriage (*t*). But though it will still be useful to recollect these rules, the action for criminal conversation is now abolished, and its place supplied by a different form of proceeding (*u*); it being provided by 20 & 21 Vict. c. 85, s. 33, that a husband may, by petition to the new Court of Divorce established by that statute, claim *damages* from any person, on the ground of his having committed adultery with the wife of the petitioner. It is also provided that such petition shall be served on the alleged adulterer and the wife, unless the court shall dispense

(*o*) B. N. P. 26.

(*p*) 3 Bl. Com. 139.

(*q*) *Bromley v. Wallace*, 4 Esp. 237.

(*r*) See *Bennett v. Allcott*, 2 T.

R. 166.

(*s*) See *Weedon v. Timbrell*, 5

T. R. 357.

(*t*) *Morris v. Miller*, Burr. 2057.

(*u*) 20 & 21 Vict. c. 85, s. 59.

with such service, or direct some other service to be substituted; and that the claim of damages shall be heard and tried on the same principles and according to the same rules as formerly applied to an action for criminal conversation; and that the damages shall be ascertained in all cases, (as before,) by the verdict of a jury. But the Act also introduces the new principle of giving power to the court to direct, after the verdict has been given, in what manner the damages shall be paid or applied; and to direct that the whole or a part shall be settled for the benefit of the children, (if any,) of the marriage, or as a provision for the maintenance of the wife (*v*).

For the injury of *beating* a man's wife, or otherwise ill-using her, [if it be a common assault, battery or imprisonment, the law gives the usual remedy to recover damages by an action of trespass, 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 (*w*), for this ill usage,] with an allegation, by way of special damage, that he has lost the benefit of her society, (called an allegation *per quod consortium amisit*,) in which action he shall recover a satisfaction in damages (*x*).

2. With respect to the injury capable of being done to a man in the relation of *parent*, it seems to be now

(*v*) As to this claim for damages in the Divorce Court, see *Keats v. Montezuma*, 1 Swab. & Trist. 334; *Bell v. Marquis of Anglesey*, *ibid.* 565; *Pounsford v. Bulpin*, 2 Swab. & Trist. 389; *Bent v. Footman*, *ibid.* 392.

(*w*) By 15 & 16 Vict. c. 76, s. 40, however, the husband may add claims in his own right, in an ac-

tion brought in the joint names of himself and wife for injuries done to the latter.

(*x*) *Guy v. Livesey*, Cro. Jac. 501; *Hide v. Scysson*, *ibid.* 538. As to the case where, by negligence of the defendant, the plaintiff's wife is *killed*, see 9 & 10 Vict. c. 93, sup. p. 484.

clearly established that there is no instance in which an injury can be sustained by a parent in his merely parental character; and that in the case of a battery or other ill-treatment inflicted on a child, the action for redress must in general be brought in the name of the child himself, whether he have attained to his full age or not (*y*). There are cases, indeed, in which the parent is entitled to sue in respect of misconduct towards the child; but as the right of suit attaches to him in all such instances, in the capacity of master, and not strictly in that of parent, the consideration of them will belong more properly to our fourth head.

3. An injury may be done to a man as a *guardian*, by stealing or ravishing away his ward. For [though guardianship in chivalry is now totally abolished, which was the only kind of guardianship beneficial to the guardian, yet the guardian in socage was always, and is still, entitled to an action of ravishment, in the form of trespass, if his ward, or pupil, be taken from him (*z*); but then he must account to his pupil, for the damages which he so recovers (*a*).] However a more speedy and summary method of redressing all complaints relative to wards and guardians, [hath of late obtained, by an application to the Court of Chancery; which, it will be remembered, is the supreme guardian, and hath the superintendent jurisdiction, of all the infants in the kingdom.]

4. To the relation between *master and servant*, and the rights accruing therefrom, there are several species of injuries incident. One is retaining a man's hired servant before his time is expired: [which, as it is an

(*y*) Hall *v.* Hollander, 4 Barn. & Cress. 660. This case may be considered as overruling the opinion to which Blackstone inclined, (vol. iii. p. 141,) that an action may be maintained by a father for the abduction of his child, as well as by a

husband for that of his wife.

(*z*) F. N. B. 139.

(*a*) Hale on F. N. B. 139. This action is also given to *testamentary* guardians by 12 Car. 2, c. 24. (See Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 108.)

[ungentlemanlike, so it 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: and the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for this injury the law has given him a remedy by action on the case (*b*); and he may also have an action against the servant for non-performance of his agreement (*c*). But if the new master was not apprized of the former contract, no action lies against *him* (*d*), unless, indeed, he refuses to restore the servant upon demand. Another point of injury is that of beating, confining, or disabling a man's servant, so that he is not able to perform his work: which depends upon the same principle as the last, viz. the property which the master has, by his contract, acquired in the labour of his servant. In this case, beside 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,] or, at his election, trespass on the case (*e*); [in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit* (*f*); and then the jury will make him a proportionable pecuniary satisfaction (*g*).] It is in this manner, and in this alone, that by our law a parent is enabled to claim redress for a battery, or other ill usage, inflicted on his child; or even for the seduction of his daughter;—viz. as a master, and in an action of trespass (or on the case), *per quod servi-*

(*b*) See *Lumley v. Gye*, 2 Ell. & Bl. 216; *Evans v. Walton*, Law Rep. 2 C. P. 615.

(*c*) F. N. B. 167. See *Keane v. Boycott*, 2 H. Bl. 511; *Gunter v. Astor*, 4 Moore, 12.

(*d*) F. N. B. 167; *Winch*. 51.

(*e*) *Chamberlain v. Hazlewood*, 5

Mee. & W. 515.

(*f*) 9 Rep. 113; 10 Rep. 130.

(*g*) Blackstone remarks (vol. iii. p. 142) that a similar practice prevailed at Athens; where masters were entitled to an action against such as beat or ill-treated their servants; and he cites *Potter's Antiq.* l. i. c. 26.

tium amisit; and, therefore, unless he is able to prove that his child was in his service at the time the injury was committed, he is without remedy (*h*); from which it follows that he is without remedy when the child resided, at the time, with another master, though that master may himself maintain an action (*i*). But where a parent is plaintiff in a case of seduction, the courts incline to relieve him, as much as possible, from any difficulty connected with proof of the loss of service; considering the action as brought *in substance* to repair the outrage done to parental feeling,—and it has been held, therefore, that in such an action, the mere residence of the child with him at the time, affords sufficient proof that the relation of master and servant existed between them (*h*). Upon the same principle, too, the jury is directed, in assessing the damages, to take into account the dishonour done to the plaintiff, as well as the loss of service (*l*); though, on the other hand, they are also bound to pay attention to all such circumstances connected with the behaviour of any of the parties, as tend to lessen the merits of the plaintiff's case. It is further to be remarked, with respect to an action for seduction, that none can be maintained, in any case, by the daughter herself—for *volenti non fit injuria*.

Such then is the state of the law, (briefly considered,) with respect to injuries resulting from the violation of rights in private relations,—as to which it may be observed in general, that [notice is only taken of the wrong

(*h*) See *Hall v. Hollander*, 4 Barn. & Cress. 660; *Blamire v. Hayley*, 6 Mee. & W. 55; *Grinnell v. Wells*, 7 Man. & G. 1033; *Eager v. Grimwood*, 1 Exch. 61; *Davies v. Williams*, 10 Q. B. 725; *Manley v. Field*, 7 C. B. (N. S.) 96; *Evans v. Walton*, *ubi sup.*

(*i*) *Irving v. Dearman*, 11 East,

24; see *Thompson v. Ross*, 5 H. & N. 16.

(*h*) See *Jones v. Brown*, 1 Esp. 217; *Maunder v. Venn*, Moo. & M. 323; *Torrence v. Gibbens*, 5 Q. B. 297; *Rist v. Faux*, 4 B. & Smith, 409.

(*l*) *Stark. Ev. part iv. p. 1309.*

[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 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 is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in any thing, during her coverture (*m*). The child hath no property in his father or guardian, as they have in him, for the sake of giving him education and nurture (*n*).] And so [the servant, whose master is disabled, does not thereby lose his maintenance or wages.] He has no interest in his master personally considered. [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.]

V. The only injuries that remain to be noticed are those sustained by a man in respect of his *public* rights.

(*m*) Vide sup. vol. II. p. 289.

(*n*) Blackstone (vol. iii. p. 142) remarks that the wife or child had nevertheless, if the husband or parent were slain, a peculiar species of *criminal* prosecution allowed them, in the nature of a civil satisfaction, and called an *appeal*. This proceeding, though long since antiquated, was still in force when Blackstone wrote; and was strangely revived in our own days, in the case of Ashford v. Thornton (1 Barn. & Ad. 405). It was soon afterwards, however, abolished by statute 59 Geo. 3, c. 46. It may be proper also to

remark, in reference to the position in the text that the loss of the inferior, arising from an injury to the superior, is disregarded,—that by a recent alteration in the law, this antient principle is in some degree set aside; for by 9 & 10 Vict. c. 93, the executor or administrator of a party deceased may now bring an action for such injury as shall have caused his *death*; and such action shall be for the benefit of the wife or child, as well as of the husband or parent, of the deceased, as the case may be. (Vide sup. p. 492.)

This subject, however, will not detain us long, for injuries of this description, between subject and subject, are in general of such a nature as to be remediable, not so much by action as by indictment; or by some of the prerogative writs, to which we shall have occasion to advert hereafter (*o*). Yet there are various instances in which an action may be maintained in respect of the violation of public rights: as where a special damage is sustained by an individual, in consequence of the obstruction of a highway (*p*); or where the returning officer at a parliamentary election refuses to receive the vote of an individual, so that the election takes place without his being allowed to exercise his elective right;—in both which instances the remedy is by action on the case. In the latter of them great difficulty was originally felt in entertaining the action; it being urged on the other side, that the offence was a parliamentary one, and not properly cognizable out of parliament; and also that it involved no private injury that the law could notice. Yet it was ultimately adjudged that an action lay in this case at common law; since the law gave a remedy for every injury, and, by this act of the returning officer, the plaintiff was deprived of the greatest privilege of a subject, viz. that of consenting to the laws by which he is bound (*q*). It was further held, that the concurrent jurisdiction of parliament in the matter created no difficulty; particularly as the very grievance which was the subject of complaint, was that the plaintiff was not properly represented there. A somewhat similar description of injury has been since provided for, by a positive enactment of the legislature; for by 31 & 32 Vict. c. 125, s. 48, “if any returning officer shall wilfully delay, neglect, or refuse, duly to return any person who ought to be returned to serve in parliament for any county or

(*o*) Vide post, c. XII.

(*p*) *Wilkes v. Hungerford Market*, 2 Bing. N. C. 281.

(*q*) *Ashby v. White*, *Ld. Raym.* 938. See *Pryce v. Belcher*, 3 C. B. 58; 4 C. B. 866.

“borough, such person may, in case it has been deter-
“mined on the hearing of an election petition under the
“Act that such person was entitled to have been re-
“turned, sue the officer in any of her Majesty’s courts
“of record at Westminster, and recover double the
“damages he shall sustain by reason thereof, together
“with full costs of suit; provided such action is com-
“menced within one year after the commission of the
“act on which it is grounded, or within six months
“after the conclusion of the trial relating to such
“election” (r).

(r) This is a re-enactment of the 11 & 12 Vict. c. 98, s. 102.

CHAPTER IX.

OF THE LIMITATION OF ACTIONS.



WE have now considered the various injuries between one subject of the realm and another, of which the courts of common law take notice; and the general nature of the remedies provided in these courts, by way of action. When any of these injuries have been committed, it follows that a right of action has arisen; but after ascertaining this, there still remains another point for consideration before it can be determined that such right still subsists, viz. how long it has existed; for there is established, by certain statutes called the *Statutes of Limitation*, a certain period, after which the remedy by action or suit is barred by the mere effect of lapse of time.

[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 an injury committed at any distance of time. Upon these accounts the law therefore holds, that *interest reipublicæ, ut sit finis litium*; 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 (*a*).] Nor are these the only reasons on which the bar by lapse of time

(*a*) So also under the imperial civil law various periods of limitation were assigned, and by a constitution of Honorius and Theodosius, actions could not be brought more than thirty or in some cases

forty years after the right accrued. By the earlier Roman law there was no limitation of such actions as arose out of the *jus civile*, though it was otherwise as to most of the Prætorian actions.

is founded; for if the plaintiff were permitted to bring a claim forward at any period, however remote, there would be danger of its being delayed until the defendant had, by some casualty, been deprived of the documentary or other evidence by which it might once have been successfully encountered; and the delay might even be practised with the fraudulent design of exposing him to this disadvantage. Besides which, it is to be considered, that great hardship always attaches to the case of a party, who, after a long possession,—not originating in any fraud or other misconduct of his own,—finds himself unexpectedly liable to eviction; while, on the other hand, a supine claimant is entitled to no favour or protection from the law: the maxim being, that *vigilantibus, non dormientibus, jura subveniunt*.

The course of legislation upon the subject under consideration, has been such as to lead naturally to its division into such statutory limitations as have reference to land and the rights issuing thereout, and such as have reference strictly to things personal. The first of these two branches shall be now discussed:—

I. Of limitations as to entry or distress on land, and proceedings for the recovery of the realty, or of rights issuing thereout.

It was in reference to real actions, while still the only forms of action for recovery of the realty, that the law of limitations was first established. And, originally, such actions were limited from some particular event, or fixed era. Thus, by the antient law in the time of Henry the second, the demandant, in a writ of right, could not claim upon any seisin earlier than the reign of Henry the first, nor, by the statute of Merton, (20 Hen. III. c. 8,) earlier than the reign of Henry the second; nor by Statute of Westminster the first, (3 Edw. I. c. 39,) earlier than that of Richard the first (*b*). And the same species

(*b*) See 3 Bl. Com. p. 196, and Com. Dig. Temps (G).

of limitation, though from more recent dates, was, by the same statutes, from time to time appointed for many other kinds of real action. But these dates were allowed afterwards to continue so long unaltered, that in process of time they became, in effect, no limitation at all; which gave rise at length to the Statute of Limitation, 32 Hen. VIII. c. 2. This Act took a different course, and limited real actions not from any fixed date or event, but according to a fixed interval of antecedent time; and provided, that where, in any writ of right or any action possessory, the demandant claimed upon his own seisin, it must be a seisin within thirty years back; where on the seisin of his ancestor, it must, (in a writ of right) be a seisin within sixty, or (in a possessory action) within fifty years (*c*). And afterwards, by 21 Jac. I. c. 16, s. 1, it was enacted, that all writs of formedon (*d*) should be brought within twenty years after the cause of action first fallen; and also that no person should make *entry* into any lands or hereditaments, but within twenty years after his right should first accrue; from which last enactment it followed, that the same period of twenty years also became the limitation, (as it still is,) in every action of ejectment, for no ejectment can be brought unless where the plaintiff is entitled to enter on the lands (*e*).

And thus stood the doctrine of limitation in general, so far as relates to the recovery of real property, during the whole of the long period that elapsed from the reign of Henry the eighth to that of William the fourth; upon

(*c*) 3 Bl. Com. 189. This statute extended to *rents, suits, and services*, as well as other hereditaments; but only to those which were customary or prescriptive, and not to those created by deed, or reserved on a particular estate. (*Ibid.*) Nor did it extend to services of a casual kind, such as by possibility might

not become due within the period of limitation,—such as fealty. (*Com. Dig. Temps* (G), 9.)

(*d*) As to formedon *in descender*, see *Rimington v. Cannon*, 22 L. J. (C. P.) 153.

(*e*) *Christ. Bl. Com.* vol. iii. p. 204, n. (2), p. 206.

which branch of the law, however, as it stood during that period, it may be proper, for the further information of the reader, to make some additional remarks. First, then, it may be observed, that there originally existed no provision that was applicable to *claims by the Crown*; for the maxim formerly was, that *nullum tempus occurrit regi*, and the statute of Henry the eighth was not so framed as to bind the Crown's rights. [By the statute indeed of 21 Jac. I. c. 2, a time of limitation was extended to the case of the sovereign, viz. sixty years precedent to 19th February, 1623 (*f*);] but this of course became ultimately ineffectual by reason of the gradual efflux of time. It was however at length provided, by 9 Geo. III. c. 16, that in suits relating to land, the Crown should be bound by the lapse of sixty years; by which statute,—as amended in certain points by 24 & 25 Vict. c. 62,—the law relating to this subject is still governed (*g*). Secondly, we may remark, that even up to the reign of William the fourth there existed [no limitation with regard to the time within which any actions touching *advowsons* were to be brought, at least none later than the times of Richard the first and Henry the third; for by the statute 1 Mar. st. 2, c. 5, the 32 Hen. VIII. c. 2, is declared not to extend to any writ of right of *advowson*, *quare impedit*, or assize of *darreign* presentment, or *jus patronatús* (*h*).] And the reason for this seems to have been because [it may very easily happen, that the title to an *advowson* may not come in question, nor the right have an opportunity to be tried, within the period of sixty years,—which was the longest time of limitation assigned by the statute of Hen. VIII.]

(*f*) 3 Inst. 189.

(*g*) See also 21 Jac. 1, c. 14, making some regulations as to *in-formations of intrusion*, where the Crown has been out of possession twenty years; and see 7 & 8 Vict. c. 105; 23 & 24 Vict. c. 53; 24 &

25 Vict. c. 62, s. 2, as to suits arising *within the duchy of Cornwall*.

(*h*) 3 Bl. Com. 250. And see 7 Ann. c. 18, allowing *quare impedit*, &c. to be brought upon any prior presentation, however distant.

Indeed, [instances are not wanting wherein two successive incumbents have continued for upwards of a hundred years (*i*). Had therefore the last of these incumbents been the clerk of an usurper, or 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.]

The state of the law of limitation above described having fallen under the consideration of the Commissioners appointed in the last reign, for revision of the law relative to real property in general, they took occasion in their Reports to suggest various improvements on this subject, which were founded on the general principle, that twenty years is an allowance of time reasonably sufficient in every case for the recovery of corporeal hereditaments,—provided the claimant labour under no disability to assert his pretensions. These recommendations were afterwards embodied into the statute 3 & 4 Will. IV. c. 27 (*k*); and this Act which now governs the law of limitation in all legal and equitable proceedings, (other than those to which the Crown is a party,) for recovery of things real, and also in some proceedings having a different object,—comprises a body of enactments too numerous and diversified to be capable of complete enumeration in a work like the present (*l*). A selection shall therefore be made of such as seem to require our chief attention.

And, first, we may here remind the reader that by

(*i*) See 3 Bl. Com. 251

(*k*) Among the cases which have been decided on the construction of this Act, are the following:—Grant *v.* Ellis, 9 Mee. & W. 113; Owen *v.* De Beauvoir, 16 Mee. & W. 547; S. C. (in error), 5 Exch. 166; Forsyth *v.* Bristowe, 9 Exch. 716;

Manning *v.* Phelps, 10 Exch. 59; Humfrey *v.* Gery, 7 C. B. 567.

(*l*) As to one of the enactments passed over in the text, viz., that contained in sect. 40 of 3 & 4 Will. 4, c. 27, see the subsequent enactment of 23 & 24 Vict. c. 38, s. 11.

this statute was effected that abolition of most of the real and mixed actions to which we have already adverted (*m*),—so as to leave to parties deprived of land, no remedy, in general, but either entry or ejectment. For as, in real and mixed actions, suitors were allowed to bring forward claims referable to periods so remote as thirty, fifty, or even sixty years, they could not have been retained without alteration, consistently with the principle on which, as above remarked, this Act is founded; and as they were open to additional objection from their dilatory character, and the technical difficulties with which they were surrounded, there appeared no doubt upon the whole as to the expediency of their extirpation.

But besides this measure, the statute contains a copious and elaborate development of the new system of limitation,—from which we shall extract the following provisions:—

I. That (by sect. 2) no person (*n*) shall, after the 31st December, 1833, make entry or distress upon, or bring an action to recover, any land (*o*) or rent (*p*),—unless within *twenty* years next after the time at which the right of entry, distress, or action, shall first have accrued (*q*),

(*m*) 3 & 4 Will. 4, c. 27, s. 36.
Vide sup. p. 395.

(*n*) The term “person,” as defined by 3 & 4 Will. 4, c. 27, s. 1, for the purposes of that Act, is made to extend to any body politic, corporate or collegiate, and to any *class* of creditors or other persons, as well as an individual.

(*o*) The term “land” is defined, by 3 & 4 Will. 4, c. 27, s. 1, to extend (for the purposes of that Act) to all corporeal hereditaments, and also to tithes, (other than tithes belonging to a spiritual or eleemosynary corporation sole,) whether freehold or copyhold. As to the limitation of actions to recover *tithes*, vide Ely

v. Cash, 15 Mee. & W. 618.

(*p*) “Rent” is defined, by the same section, to extend to all heriots, services and suits, for which distress may be made; and to all annuities and periodical sums of money charged on land, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole.

(*q*) The statute (by sect. 3) defines with great care the time at which the right shall be considered as *first accruing*, in different cases that may arise (see *Sturgis v. Darell*, 4 H. & N. 622); and contains special provisions applicable to the case of estates *tail* (as to which, see *Austen v. Llewellyn*, 9 Exch. 276). As

either to the person himself, or those through whom he claims (*r*). This rule is subject, however (by sect. 16), to qualification in the case of persons under disability; it being provided that, if, at the time at which the right of any person shall first accrue, he (or she) shall be under the disability of infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas,—then he, or the person claiming through him, may, though twenty years have expired, enter, distrain, or sue within *ten* years next after the person to whom the right accrued shall have died or ceased to be under disability, whichever event shall first happen; but (by sect. 17) no such right of entry, distress, or action, shall be exercised, except within *forty* years next after the right accrues,—even though the disability may have attached during the whole of the forty years, or although the term of ten years above mentioned shall not have yet expired.

2. That (by sect. 24) after the 31st December, 1833, no person claiming any land or rent in *equity*, shall bring any suit to recover the same, but within the same period during which, by virtue of the provisions of the Act, he might have entered, distrained, or brought an action for recovery thereof, if his estate had been legal, instead of equitable. This is subject, however (by sects. 25, 26), to the following provisions:—*First*, That when land or rent is vested in a trustee upon some express trust, the

to the effect of this statute, upon the former doctrine relative to adverse possession, as applied to the subject of limitation, see *Doe v. Lansdell v. Gower*, 17 Q. B. 589.

(*r*) This expression is defined by 3 & 4 Will. 4, c. 27, s. 1, to mean any person by, through or under or by the act of whom the person so claiming became entitled to the estate or interest claimed, as heir,

issue in tail, tenant by the curtesy, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise; and also any person who was entitled to an estate or interest to which he, or some person through whom he claims, became entitled as lord by escheat.

right of the *cestui que trust* or any one claiming through him, to sue the trustee or any one claiming through him, in order to recover the same,—shall be deemed to have first accrued when such land or rent was conveyed to a purchaser for a valuable consideration; and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him. *Secondly*, That in every case of a concealed fraud, the right to sue in equity for the recovery of land or rent shall be deemed to have first accrued when such fraud was, or with reasonable diligence might have been, first known or discovered by the person injured: but not so as to enable any owner of lands or rents to sue in equity for their recovery or for setting aside any conveyance of them on account of fraud, against any *bonâ fide* purchaser for valuable consideration,—provided he did not assist in the commission of such fraud, nor at the time of purchase knew or had reason to believe, that any such fraud had been committed. *Thirdly*, That (by sect. 27) nothing in the Act contained shall interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may *not* be barred by virtue of that Act. *Fourthly*, That (by sect. 28) when a mortgagee shall have received the profits of any land, or any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, except within twenty years next after the time at which the mortgagee obtained the same,—unless in the meantime he shall have given an acknowledgment of title or of the right of redemption, to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person. And such acknowledgment, moreover, must be in writing signed by the mortgagee, or the person claiming through him; nor can such redemption suit be brought except within twenty years next after

such acknowledgment, or the last of such acknowledgments, if more than one was given (*s*).

3. That (by sect. 42) after the 31st December, 1833, no arrears of rent or of interest (in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy) or any damages in respect of any such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within *six* years after the same shall have become due or been acknowledged in writing to the person entitled thereto or his agent, signed by the party chargeable or his agent. There is, however, a proviso to meet the case of a prior mortgagee or encumbrancer having been in receipt of the land or profits (*t*).

4. That (by sect. 29) after the 31st December, 1833, no entry, distress, action or suit to recover land or rent, shall be made or brought by any spiritual or eleemosynary corporation sole, after the determination of such period as hereinafter mentioned next after the time at which the right of such corporation sole, or his predecessor, to make or bring the same shall first have accrued;—viz. the period during which two persons in succession shall have held the office or benefice in respect whereof such land or

(*s*) 3 & 4 Will. 4, c. 27, s. 28, also contains provisions as to the case of there being more mortgagors or mortgagees than one, and the effect of acknowledgment to or by one of them. We may notice here, that by a subsequent Act, 7 Will. 4 & 1 Vict. c. 28, (reciting that doubts had occurred as to the meaning of the Act in question as to the limitation in case of *mortgages*;) it is declared that it shall be lawful for any person claiming under a mortgage of land to make an entry or bring an action at law or suit in equity to recover it, at any time

within twenty years from the last payment on account of principal or interest, though more than twenty years from the time the right first accrued. As to this provision, see *Doe v. Palmer v. Eyre*, 17 Q. B. 366; *Doe v. Baddeley v. Massey*, 20 L. J. (Q. B.) 434.

(*t*) As to the construction of this section, see *Edmonds v. Waugh*, Law Rep., 1 Eq. Ca. 418; *Ex parte Clarke*, Law Rep., 2 Eq. Ca. 313. As to the limitation in respect of a *legacy*, see *Coope v. Cresswell*, *per cur.*, Ib. 2 Ch. Ap. p. 116.

rent shall be claimed, together with six years after a third person shall have been appointed thereto, if the times of such two incumbencies and six years (taken together) shall amount to the full period of *sixty* years; and if not, then during such further number of years as will make up the sixty years.

5. That (by sect. 30) after the 31st December, 1833, no person shall bring any *quare impedit*, or other action or suit, to enforce a right to present to or bestow any ecclesiastical benefice as the patron thereof, after the expiration of such period as thereafter mentioned,—viz. the period during which three clerks in succession shall have held the same, all having obtained possession thereof adversely to the right of such person, or of some one through whom he claims, provided such incumbencies taken together shall amount to the full period of sixty years; and, if not, then after the expiration of such further time as will make up the sixty years.

6. That (by sect. 33) after the 31st December, 1833, no person shall bring any such proceeding as mentioned in the last paragraph, after the expiration of *one hundred* years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of such person, or of one through whom he claims, or who is entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title,—unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right, held or derived under the same title (*u*).

(*u*) The periods thus limited as above for enforcing a right to present to or bestow an ecclesiastical benefice, extend to the case where a

bishop claims as *patron*; but the Act does not affect the right of any bishop to collate by reason of *lapse*. (See 6 & 7 Vict. c. 54, s. 3.)

II. Of limitations as to certain actions not brought for recovery of things real.

1. A period of limitation with respect to most of these is fixed by 21 Jac. I. c. 16, s. 3 (*x*): which provides in substance, that all actions of trespass, except those hereinafter particularized; all actions of detinue, trover, replevin or account (*y*); all actions upon the case, except for verbal slander; and all actions of debt on simple contract, or for arrears of rent not due upon specialty (*z*);—shall be limited to *six* years after the cause of action accrued;—that actions of trespass for assault, menace, battery, wounding and imprisonment, shall be limited to *four* years; and that actions on the case for verbal slander, shall be limited to *two* years. But to these rules there are exceptions in favour of persons labouring under *disability* (*a*). For, if the person *entitled to sue* shall, when the cause of action accrued, be an infant, a feme covert, or *non compos*,—it is provided by the statute now under consideration that he (or she) may sue within the same period after the removal of the disability, as is allowed to persons having no such impediment (*b*). And by 4 Ann. c. 16, s. 19, if any person

(*x*) As to time from which this limitation begins to run in particular cases, see *Collinge v. Heywood*, 9 Ad. & Ell. 633; *Rhodes v. Smethurst*, 6 M. & W. 351; *Waters v. Earl of Thanet*, 2 Q. B. 757; *Howell v. Young*, 5 B. & C. 259; *Tobacco Pipe Makers' Company v. Loder*, 20 L. J. (Q. B.) 414; *Webster v. Kirk*, 17 Q. B. 949; *Bonomi v. Backhouse*, 9 H. of L. Cases, 503.

(*y*) In 21 Jac. 1, c. 16, s. 3, "actions of account between merchants" are excepted from this limitation—but they are brought within it by 19 & 20 Vict. c. 97, s. 9. As to the former law, see *Cottam v. Partridge*, 4 Man. & G.

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(*z*) See also as to arrears of rent, 3 & 4 Will. 4, c. 27, s. 42, sup. p. 579; 3 & 4 Will. 4, c. 42, s. 3, post, p. 594.

(*a*) 21 Jac. 1, c. 16, s. 7.

(*b*) See *Le Veux v. Berkeley*, 5 Q. B. 836; *Townsend v. Deacon*, 3 Exch. 706. The statute of 21 Jac. 1, c. 16, also (sect. 7) makes exception in other cases, viz. that of *imprisonment* of the party entitled to sue, and that of his being *beyond the seas*. But these are no longer disabilities under this statute; for, by 19 & 20 Vict. c. 97, s. 10, no person or persons shall be entitled to commence an action or suit, at any time

liable to be sued shall, when the cause accrued, be beyond the seas (*c*),—a similar extension of the time for bringing the action shall in that case also be permitted; a provision, however, which must be taken in connexion with the recent enactment of 19 & 20 Vict. c. 97, s. 11, viz. that where the cause of action lies against two or more joint debtors, the person entitled to sue shall not be entitled to any extension of time, against such of them as were not beyond seas when the cause of action accrued; and on the other hand, that he shall not be barred from suing the joint debtor or debtors, after his or their return, by reason only that judgment has been already recovered against one or more of the others (*d*).

The operation of the statute of James with respect to actions upon *simple contract*, was at one time considerably narrowed by the doctrine which prevailed, that not only a payment on account of principal or interest, but any mere verbal acknowledgment, made before action brought (*e*), that the debt was due,—would suffice to take the case *out of the statute* (according to the common phrase), by raising an implied *assumpsit* or promise to pay the debt; upon which promise, (as upon a new cause of action,) the same time for instituting a suit would be allowed, as upon the original contract. But the law on this subject has been since materially altered; for by Lord Tenterden's Act (9 Geo. IV. c. 14, s. 1), it is enacted, that in actions of debt or on the case grounded

beyond the period fixed by 21 Jac. 1, c. 16, s. 3, by reason only of such person, or one or more of such persons, being beyond the seas or imprisoned at the time when the cause of action or suit accrued. (See *Cornil v. Hudson*, 8 Ell. & Bl. 429.)

(*c*) By 19 & 20 Vict. c. 97, s. 12, no part of the United Kingdom, Man, Guernsey, Jersey, Alderney, and Sark, nor the adjacent islands,

being part of the dominions of her Majesty, shall be deemed "beyond seas" within the meaning of 4 Ann. c. 16.

(*d*) As to the law on this point, before the enactment mentioned in the text, see *Towns v. Mead*, 16 C. B. 123.

(*e*) See *Bateman v. Pindar*, 3 Q. B. 574.

upon any simple contract, no acknowledgment, or promise, shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the 21 Jac. I. c. 16, unless it be contained in some *writing* (*f*), signed by the party to be charged (*g*); and that where there are two or more joint contractors, no such joint contractor shall be chargeable, in respect only of the written acknowledgment of the other. Moreover, by 19 & 20 Vict. c. 97, s. 14 (*h*), it is now provided, (in reference to the statute of James, and to the effect of a *payment* on account of principal or interest in respect of a joint contract or debt,) that no co-contractors, or co-debtors, shall lose the benefit of the limitation, by reason only of payment of any principal or interest by any of the others (*i*).

2. The statute of 21 Jac. I. c. 16, was also in itself materially defective; for it made no provision for actions on bonds, indentures, or other instruments *under seal*; and consequently parties having claims on such instruments were at liberty to sue upon them in covenant or debt, at any period of time, however distant. And though,

(*f*) As to what is a sufficient acknowledgment or promise for this purpose, see the following among other cases:—*Spong v. Wright*, 9 Mee. & W. 629; *Cripps v. Davis*, 12 Mee. & W. 159; *Hart v. Prendergast*, 14 Mee. & W. 741; *Williams v. Griffith*, 3 Exch. 335; *Gardner v. M'Mahon*, 3 Q. B. 561; *Willins v. Smith*, 4 Ell. & Bl. 180; *Evans*, app., *Simons*, resp., 9 Exch. 282; *Goate v. Goate*, 1 H. & N. 29; *Holmes v. Mackrell*, 3 C. B. (N. S.) 789; *Rackham v. Marriott*, 2 H. & N. 196; *Cornforth v. Smethard*, 5 H. & N. 18; *Tanner v. Smart*, 6 B. & C. 603; *Buckmaster v. Russell*, 10 C. B. (N. S.) 745; *Everall v. Robertson*, 1 E. & E. 16; *Francis*

v. Hawkester, 1 E. & E. 1052; *Lee v. Wilmot*, Law Rep. 1 Exch. 364.

(*g*) By 19 & 20 Vict. c. 97, s. 13, a writing signed by an *agent duly authorized* to sign will suffice.

(*h*) See *Jackson v. Woolley*, 8 Ell. & Bl. 778; *Cockrill v. Sparkes*, 1 Hurl. & C. 699.

(*i*) As to *payments* in particular cases, and their effect to take the case out of the statute, see *Cleave v. Jones*, 20 L. J. (Exch.) 238; *Burn v. Boulton*, 2 C. B. 476; *Wainman v. Kynman*, 1 Exch. 118; *Bodger v. Arch*, 10 Exch. 333; *Walker v. Butler*, 25 L. J. (Q. B.) 377; *Turney v. Dodwell*, 3 Ell. & Bl. 136; *Maber v. Maber*, Law Rep., 2 Exch. 153.

to prevent the injustice which such a state of the law would otherwise have occasioned, it became the practice on the trial of such actions, for the judge to recommend the jury, in cases where no payment on account of principal or interest had been made or demanded within twenty years, to presume that the bond or other specialty had been satisfied,—this method of proceeding was found not to be attended with the same advantage, or to adapt itself so correctly to the purposes of justice, as a law of direct limitation. Such limitation has been consequently now provided with respect to claims on instruments under seal,—as well as some other cases, not embraced by the statute of James (*k*). For it is enacted by the 3 & 4 Will. IV. c. 42, s. 3, that all actions of debt for rent upon any indenture of demise, or of covenant or debt on any bond or other specialty, and all proceedings on recognizances,—shall be brought within *twenty years* after the cause of action or proceeding accrued; and that all actions of debt upon an award, (where the submission is not under seal,) or for a copyhold fine, or for an escape, or for money levied upon any writ of *feri facias*,—shall be brought within *six years* (*l*). This enactment is, however, subject to exception in the case of any person who, when entitled to sue, is under disability—as an infant, feme covert, or person *non compos* (*m*); and also to a proviso, that if any acknowledgment in writing be signed by the party liable or his agent, or payment or satisfaction made on account of any arrears of prin-

(*k*) See *Coope v. Cresswell*, Law Rep. 2 Ch. Ap. 116.

(*l*) There are also enactments of date prior to this statute, fixing six years as the period of limitation in certain cases not provided for by the statute of James. See 4 Ann. c. 16, s. 17, with respect to the recovery of *seamen's wages*; and 55 Geo. 3, c. 127, s. 5, with respect to

the recovery of the value of *tithes*.

(*m*) In the cases in which a period of limitation is fixed by 3 & 4 Will. 4, c. 42, s. 3, "absence beyond seas" of the party entitled to sue, was also (by sect. 4) made a disability; but its character in this respect has now been abolished by 19 & 20 Vict. c. 97, s. 10.

principal or interest, the person entitled to the action may bring the same within twenty years after such acknowledgment, payment or satisfaction (*n*). By 19 & 20 Vict. c. 97, s. 14, it is, however, provided, that where there are several co-contractors or co-debtors, none of them shall lose the benefit of the limitation given by the 3 & 4 Will. IV. c. 42, s. 3, by reason only of payment on account of any principal or interest by any of the others.

3. By statute 31 Eliz. c. 5, all suits and indictments upon any *penal statutes*, where the forfeiture is to the Crown alone, must be prosecuted within *two years* from the commission of the offence (*o*); where the forfeiture is to a common informer alone, within *one year* (*p*); where to the Crown and a common informer jointly, then by the common informer within one year, and by the Crown within two years after that year is expired. But this statute did not extend to penal actions at suit of the party grieved; and therefore by 3 & 4 Will. IV. c. 42, s. 3, it is required that these shall be brought within *two years* after the offence shall have been committed, unless the particular statute which creates the forfeiture shall have expressly enacted otherwise.

4. By 5 & 6 Vict. c. 97, s. 5, it is enacted, that the period within which any action may be brought for any thing done under the authority, or in pursuance, of any *local or personal act of parliament*, shall be *two years*;

(*n*) 3 & 4 Will. 4, c. 42, s. 5. See *Forsyth v. Bristow*, 8 Exch. 716.

(*o*) This statute extended also to all *informations* upon any penal statutes; but so much of it as "relates to the time limited for exhibiting an information for a forfeiture upon any penal statute" is now repealed by 11 & 12 Vict. c. 43, s. 36; which Act, however, goes on to provide (sect. 11), that all

informations for offences punishable on summary conviction shall be laid within *six calendar months* from the time when the matter arose, unless the time for the information has been otherwise specially limited. (See *Re Edmondson*, 17 Q. B. 67.)

(*p*) *Chance v. Adams*, 1 Ld. Raym. 78. (See *Dyer v. Best*, Law Rep. 1 Exch. 152.)

or in case of continuing damage, then *one year* after such damage shall have ceased (*q*).

5. Lastly, by 11 & 12 Vict. c. 44, s. 8, it is provided, that no action shall be brought against any *justice of the peace* for anything done in the execution of his office, unless commenced within *six calendar months* after the act committed (*r*).

And thus much of the law of limitation—whether as regards entry or distress on land and suits for recovery of the realty, or as regards suits not brought for such recovery. Between which the following distinction is observable,—that as regards the former, the statute 3 & 4 Will. IV. c. 27, has, by its express provision, the effect of extinguishing the *right*, as well as barring the *remedy* (*s*); but, as regards the latter, the limitation bars the remedy by suit or action only. So that though I can bring no action to recover a debt on contract, after the expiration of the limited period, there is nothing to prevent my obtaining payment of it after that period in any other manner—as, through the medium of any lien that I may hold on the property of the debtor (*t*).

We may also remark (in conclusion), with respect to actions the limitation of which is fixed by 21 Jac. I. c. 16, or by 3 & 4 Will. IV. c. 42,—that, though periods are limited within which the action shall in different

(*q*) By 5 & 6 Vict. c. 97, s. 5, a general repeal is made of all prior enactments by which any *other* period of limitation is provided for any of the cases within the section.

(*r*) There are similar provisions contained in many different Acts, with respect to *constables* and other public officers acting in execution of their duties; but the period of limi-

tation varies in the different cases. See 24 Geo. 2, c. 44, s. 8; 3 Geo. 4, c. 126, s. 147; 7 & 8 Geo. 4, c. 31, ss. 3, 12; 5 & 6 Will. 4, c. 50, s. 109; c. 76, s. 133; 18 & 19 Vict. c. 118, s. 165; 9 & 10 Vict. c. 95, s. 188; 11 & 12 Vict. c. 63, s. 189.

(*s*) 3 & 4 Will. 4, c. 27, s. 34.

(*t*) See *Higgins v. Scott*, 2 B. & Ad. 413.

cases be commenced, yet in favour of vigilant plaintiffs the law provides a method of constantly keeping the right of action alive notwithstanding any lapse of time, (or, as it is commonly expressed, of *saving* the Statute of Limitation); viz. by commencing an action and getting the writ of summons therein renewed every six months,—that is, impressed by the proper officer of the court, with a seal bearing the date of such renewal. For by the 15 & 16 Vict. c. 76, s. 11, it is provided, that such writ, so renewed from time to time, will suffice continually to prevent the operation of the Statute of Limitation, though nothing further be done in the meantime in the action (*u*).

(*u*) See *Nazer v. Wade*, 1 B. & Smith, 728.

CHAPTER X.

OF THE PROCEEDINGS IN AN ACTION.

—◆—

UNDER the head of redress by suit in courts, we have already, in preceding pages, turned our attention to that very large and important class of injuries which are cognizable in the courts of common law, and to the remedy which those courts afford in different cases by action (*a*);—and we are now to consider the *manner* in which that remedy is pursued and applied, and the course of proceedings which it involves. But as some of these proceedings are such that, according to the ordinary practice of the courts, they can be transacted only during particular periods of the year called *Terms*,—it will be convenient to advert shortly to those forensic seasons, before we enter on the main business of the chapter.

[The *Terms* are supposed by Mr. Selden to have been instituted by William the Conqueror (*b*); but Sir H. 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 year which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. Throughout all Christendom, in very early times, the whole year was one continual Term for hearing and deciding causes. For the

(*a*) Vide sup. cc. VII., VIII.

(*b*) Jan. Ang. l. 2, s. 9.

[Christian magistrates, to distinguish themselves from the heathens who were extremely superstitious in the observation of the *dies fasti et nefasti*, 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 haytime 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 (*c*).

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 (*d*), 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 three 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 *Mirrou* (*e*) mentions only one vacation of any considerable length,—containing the months of August and September,—yet Britton is express (*f*) that in the reign

(*c*) Spelman, Of the Terms.

(*e*) Cap. 3, s. 8.

(*d*) C. 3, De Temporibus et Diebus Pacis.

(*f*) Cap. 53.

[of King Edward the first, no secular pleas could be held, nor any man sworn on the Evangelists, in the times of Advent, Lent, Pentecost, harvest, and vintage, in the days of the great litanies, and in all solemn festivals. But he adds, that the bishops did nevertheless grant dispensations,—of which many are preserved in Rymer's *Fœdera (g)*,—that assizes and juries might be taken in some of these holy seasons. And soon afterwards a general dispensation was established by the statute of Westminster the first, (3 Edw. I. c. 51,) which declares, that “by the assent of all the prelates, *assize of novel disseisin, mortancestor, and darreign 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(*h*).] Their present regulation depends on the statute 11 Geo. IV. & 1 Will. IV. c. 70, amended by 1 Will. IV. c. 3.

At the time when the statute 11 Geo. IV. & 1 Will. IV. c. 70, was passed, Michaelmas Term began on the 6th November, and ended on the 28th of the same month; Hilary Term began on the 23rd January, and ended on the 12th February, unless any of these four days happened to fall on a Sunday—for then the Term began or ended on the day following. Easter Term began on the Wednesday fortnight after Easter Sunday, and ended on the Monday three weeks afterwards. Trinity Term on the Friday after Trinity Sunday, and ended on the

(g) Temp. Hen. 3, *passim*.

(h) Prior to these Acts, Trinity Term, in particular, had been regu-

lated by 32 Hen. 8, c. 21; and Michaelmas Term, by 16 Car. 1, c. 6, and 24 Geo. 2, c. 48.

Wednesday fortnight after it began (*i*). Two of the terms thus depended on the *moveable* feasts of Easter and Trinity, which was attended with some inconvenience. But by the above Act and by 1 Will. IV. c. 3, they are now fixed to certain periods; and all the four Terms are otherwise newly regulated; it being by them provided that Hilary Term shall begin on the 11th and end on the 31st January; that Easter Term shall begin on the 15th April, and end on the 8th May; that Trinity Term shall begin on the 22nd May, and end on the 12th June; and that Michaelmas Term shall begin on the 2nd November, and end on the 25th. And it is further enacted by 11 Geo. IV. & 1 Will. IV. c. 76, s. 6, that if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter-day, fall within Easter Term, there are to be no sittings in *banc* (*h*) on any of such intervening days (*l*), but the Term shall be prolonged, and continue for such number of days of business as shall be equal to the number of the intervening days before mentioned, exclusive of Easter-day; and the commencement of the ensuing Trinity Term is in such case to be postponed, and its continuance prolonged for an equal number of days of business (*m*). And further (by 1 Will. IV. c. 3, s. 3), that in case the day of the month on which any term is to *end* shall fall on a Sunday, the Monday next after shall be deemed to be the last day of the Term. The case of the day of the month on which the term is to *begin* falling on a Sunday, is not provided for by these Acts. It has been decided, however, that, for the purpose of computation, the Sunday must in that case be

(*i*) See Christian's Blackstone, vol. iii. p. 278.

(*h*) Vide sup. p. 438.

(*l*) Such intervening days are nevertheless to be taken as a part

of the Term, though there are no *sittings in banc* upon them. (1 Will. 4, c. 3, s. 3.)

(*m*) See Wright v. Lewis, 9 Dowl. 183; Donnes v. Bostock, *ibid.* 241.

considered as the first day of the Term; although, as the courts do not sit, no judicial act can be done, or supposed to be done, till the following Monday (*p*).

With respect to the kind of proceedings which are conducted exclusively in Term, we may remark, that in general all sittings in *banc* are of that character. But the sittings in the courts of *assize* and *nisi prius* (*q*) are held for the most part in Vacation; that is, during the intervals between the Terms: and—with the exception of a reasonable period of partial recess, viz. from 10th August to 24th October (*r*),—all proceedings taking place between the parties or their attornies, *out of court*, that is, not in the actual presence of the judges, may usually be transacted during the same intervals, as well as in Term time (*s*); and by 17 & 18 Vict. c. 125, s. 95, the courts may now (where they find it expedient for the despatch of business), hold sittings in *banc*, or for trial of issues in fact, at any time either in Term or Vacation, not falling within the period of recess above mentioned (*t*). And so much with respect to Terms—the explanation of which seemed a necessary introduction to the proper subject of the chapter, viz. the proceedings in an action, to which we are now to invite the reader's attention.

(*p*) See *Doe v. Roe*, 1 Dowl. 63.

(*q*) Vide sup. pp. 436, 437.

(*r*) Reg. Gen. H. T. 1853, (Pr.) r. 9. As to the *holidays* allowed in the common law courts and offices, see 3 & 4 Will. 4, c. 42, s. 43; Reg. Gen. H. T. 1853, (Pr.) r. 173.

(*s*) The practice on this subject was formerly very different. All writs must have been made returnable in term; every pleading and every entry of judgment, even when in fact delivered or entered in vacation, must always have been intitled of some antecedent term; the plain-

tiff, though at liberty to *declare* in vacation, could not compel the defendant to plead until the subsequent term: and a party obtaining a verdict in vacation, on the trial of any issue, or any inquisition of damages, had also to wait in every case until the term next following, before he could sign final judgment, or take out execution. (See the Second Report of the Common Law Commissioners appointed in 1828, p. 28.)

(*t*) See *Tabor v. Edward*, 3 C. B. (N. S.) 64.

[The most natural and perspicuous way of considering the proceedings in an action, will be to pursue the order and method wherein the proceedings themselves follow each other, rather than to distract and subdivide the subject by any more logical analysis.] And the regular and orderly parts of a suit at law are these: I. The process; II. The pleadings; III. The trial and evidence; IV. The judgment; V. The proceedings in error (where the judgment is supposed to be erroneous); VI. The execution.

I. To begin, then, with the *process* :—

The first object in an action, is to procure the defendant's *appearance*, in order that he may have an opportunity of being informed of the plaintiff's demand or complaint, and of encountering it in such manner as he may think fit. The term *appearance*, (whether applied to plaintiff or defendant,) has reference to an antient state of practice, by which the litigant parties personally, or by their respective attornies, actually confronted each other in open court. But their appearance has for centuries past ceased to be an actual one; and as regards the plaintiff, no particular form is now used in substitution for it; but as regards the defendant, the form is observed of his delivering to the proper officer of the court, a memorandum importing either that he appears in person, or that some attorney, whose name is given, appears on his behalf—a practice that obviously secures the important object, of protecting defendants from the danger of having a judgment obtained against them by surprise. This appearance is previously commanded by a *writ*, (or mandate from the sovereign,) which is termed, in technical language, the *process* in the action.

The process in antient times comprised a variety of different writs, of different degrees of stringency, issued consecutively upon each other, where the first for any

reason failed to be effectual (*x*). But it always began with an *original writ*; which was an instrument issued out of Chancery, in the name of the sovereign, under the Great Seal, (instead of being merely under the seal of the court of common law itself, as was usual with other process,) commanding the sheriff to require the defendant to appear in the court of common law, to answer to some particular cause of action in the writ set forth. This mode of commencing a suit, was antiently in universal use, and is a practice of remote antiquity. We may also take occasion to remark here, that great technical importance was attached to a writ of this description. For as it had constituted from time immemorial the first step in the suit, and always set forth, (in general or special terms according to the nature of the case,) the circumstances upon which the suit was founded, it had incidentally the effect of defining the scope and number of our legal remedies themselves; it being held that no action would lie unless the case was one for which a precedent could be found, in the *Register of Original Writs*. Thus the law of writs, (that is, of original writs,) became in effect identical with that of actions; and the same remedy was described indifferently as a *writ* of trespass, (for example,) or of dower, —or an *action* of trespass, or of dower. In course of time, however, new modes of commencement were devised, by connivance of the judges, in order to avoid the expense of an original writ, (for which a fine or fee, of considerable amount, was in many cases payable to the crown); and with the view, also, of enabling the Courts of Queen's Bench and Exchequer to effect that encroachment or usurpation on the jurisdiction of the Common Pleas, to which we referred in a former part of this

(*x*) All these writs fell under the common term of the *process*; and those subsequent to the first or original writ, were also called the *mesne process*,—to distinguish them from the original writ, and also from writs of execution, which were termed *final process*.

volume (*y*). We shall not encumber our text with any attempt to explain the nature of these devices, or the manner in which they severally operated, which are now become matters of mere curiosity. It will suffice to say that they had the effect of irregularly introducing, into each of the three courts, the use of a variety of writs of different descriptions by way of alternatives for the antient course of suing out an original writ under the Great Seal; and that the result of this was, at length, to involve the first stages of the suit in great and unnecessary complexity. The Commissioners appointed in 1828 for inquiry into the course of proceedings at common law, having been consequently led to recommend the adoption of a simple and more uniform system, an act of parliament (2 Will. IV. c. 39) was eventually passed for the purpose (*z*).

But this system, though unquestionably comprising many capital improvements, was afterwards thought to have been too moderate and cautious in its deviations from the antient course; and was therefore itself amended (at the suggestion of a succeeding commission), by the 15 & 16 Vict. c. 76 (called the Common Law Procedure Act, 1852); and still further amendments were subsequently made by 17 & 18 Vict. c. 125, (called the Common Law Procedure Act, 1854,) and by 23 & 24 Vict. c. 126—called the Common Law Procedure Act, 1860 (*a*).

(*y*) Vide sup. pp. 411, n. (*c*), 416, n. (*h*).

(*z*) See the First Report of the Common Law Commissioners appointed in 1828.

(*a*) The provisions of these Acts apply in general, not only to the superior courts of the common law at Westminster, but to any courts of record in England or Wales, to which the Crown, by order in coun-

cil, may, from time to time, think proper to apply the same. They also apply in general to the Court of Common Pleas in the county palatine of Lancaster; and to the Court of Pleas in the county palatine of Durham. (See 15 & 16 Vict. c. 76, ss. 228, 229; 17 & 18 Vict. c. 125, ss. 100, 105; 23 & 24 Vict. c. 126, ss. 40, 44.)

According to the method of proceeding established by these Acts,—which in part retain, and in many important respects innovate upon, the antecedent practice (*b*),—all actions are to be commenced by a writ of summons in a prescribed form (*c*),—viz. by a writ issued in the queen's name, out of the court in which the action is brought, directed to the intended defendant, describing him as of the county and place where he is supposed to reside or be, and commanding him to cause an *appearance*, (a term already explained,) to be entered for him in that court, in an action at the suit of the plaintiff, within eight days after the writ shall be *served* upon him, the defendant (*d*). It is also to be indorsed with the name and place of abode of the plaintiff's attorney; and, where he is agent for another attorney in the country,

(*b*) The practice of the superior courts of common law is now mainly governed by these Acts, and by such General Rules as the courts have made thereon; viz. Reg. Gen. Hil. T. 1853; Mich. V. 1854; E. T. 1855; M. T. 1855; E. T. 1856; E. T. 1857; M. T. 1857; H. T. 1858; E. T. 1858; H. T. 1862; T. T. & M. T. 1867. It also depends, however, in part, on 2 Will. 4, c. 39, 3 & 4 Will. 4, c. 67, and 1 & 2 Vict. c. 110; for where these have been neither repealed nor altered by the Common Law Procedure Acts or by other statutes, their provisions are still in force. And the practice also in part depends on the immemorial usage of the courts, upon points which none of these Acts or General Rules affect.

(*c*) In the case of *ejectment*, a special writ of summons is provided by 15 & 16 Vict. c. 76, differing in some respects from the ordinary one

referred to in the text, the form of which is given in Sched. (A.) of that Act. And until very recently, the real actions of *dower* and *quare impedit* were commenced by original writ; but this is now altered by 23 & 24 Vict. c. 126, s. 26, as to the effect of which, vide post, c. XI. Also, in the particular case of an action on a *bill of exchange* or *promissory note*,—if commenced within six months after it has become payable,—the plaintiff may by 18 & 19 Vict. c. 67, proceed *summarily*, in the manner described, sup. vol. II. p. 120, n. (*l*)'; and the writ of summons will, in that case, deviate from the ordinary form, and warn the defendant that the plaintiff may proceed to judgment and execution, unless the defendant shall *obtain leave* to appear, and shall in fact appear, within twelve days after service.

(*d*) See 15 & 16 Vict. c. 76, s. 2, sched. (A.)

with the name and place of abode of the latter; or if no attorney is employed, then with a memorandum that it has been sued out by the plaintiff in person, mentioning particularly his place of residence (*e*). Moreover, if it be for payment of any *debt*, the amount of the debt and costs claimed is to be indorsed thereon, with a notice that if the amount be paid to the plaintiff or his attorney within four days from the service, further proceedings will be stayed (*f*). And it is in the option also of the plaintiff, in any case where his claim is for a debt, or liquidated sum of money (with or without interest) arising upon a contract express or implied, and the defendant resides within the jurisdiction of the court, to make a *special* indorsement of the *particulars* of the claim; in such summary form as the 15 & 16 Vict. c. 76 prescribes (*g*).

In suing out the writ care must be taken that it is between the proper *parties*; in other words, that it should purport to be a writ between such persons as, according to the form of action meant to be pursued, ought to be respectively plaintiff or plaintiffs, defendant or defendants; as to which the rule is that *all* such persons,

(*e*) 15 & 16 Vict. c. 76, s. 6.

(*f*) Sect. 8. The defendant is at liberty, however, notwithstanding such payment, to have the costs *taxed*; and if more than one-sixth is disallowed, the plaintiff's attorney will have to pay the costs of taxation. (Ibid.) With respect to the indorsements mentioned in the text, it is to be observed that their omission does not render the writ *void*. It is only an irregularity, rendering the writ liable to be set aside or amended. (Ibid. sect. 20.)

(*g*) 15 & 16 Vict. c. 76, s. 25. See the form of such special indorsement, *ibid.* sched. (A.), No. 4. The cases in which this special indorse-

ment may be made, are thus exemplified in the Act (s. 25): "a bill of exchange, promissory note or cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, or on a guarantee, (whether under seal, or not,) where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque or note." As to the construction of this provision, see *Rogers v. Hunt*, 10 Exch. 474; *Rodway v. Lucas*, *ibid.* 665.

and on the other hand *no other* such person, should be joined (*h*).

This writ remains in force for six calendar months; at any time before the expiration of which, supposing the writ not to have been yet served, it may be *renewed* (in order to keep the suit alive) for a similar period; and such renewal may be repeated as often as there may be occasion, all renewals being effected by the simple method of procuring a stamp to be impressed upon it by the proper officer (*i*). One or more *concurrent* writs may also be issued at any time within the first six months, and will remain in force to the end of that period, and are capable, like the primary one, of being renewed; these being in the same form with the primary one, except that they have the word “concurrent” impressed upon them by the proper officer (*h*),—and being intended for the convenience of a plaintiff, who, in the case of joint defendants residing in different places, or of a sole defendant whose residence is unknown, may wish to be supplied with several writs of the same tenor, with a view to contemporaneous service, or attempts at service, in different localities (*l*).

The writ, either primary or concurrent, (duly renewed, if renewal has become necessary,) must not only be served, but the service of it must, (where practicable,)

(*h*) A wrong joinder of parties was formerly, in almost every case, a ground for fatal objection, as the suit proceeded. But it is now provided by 23 & 24 Vict. c. 126, s. 19, that the *joinder of too many plaintiffs* shall not be fatal, but judgment may be given in favour of one or more of them, though the defendant will on the other hand be entitled, though unsuccessful, to his costs occasioned by such joinder. (As to the construction of this enactment,

see *Bellingham v. Clark*, 1 B. & Smith, 332.)

(*i*) 15 & 16 Vict. c. 76, s. 11. (See *Black v. Green*, 15 C. B. 262; *Anon.* 1 Hurl. & C. 664.) The stamp should bear upon it the *date* of the renewal.

(*h*) *Ibid.* sect. 9. The stamp should bear upon it the *date* of issuing the concurrent writ.

(*l*) By sect. 14, the writ of summons may be served in any county.

be a *personal* one (*m*); that is, a copy of the writ must be left with the defendant in person, showing him at the same time the writ itself, if he so requires (*n*). But if personal service should be found impracticable, then the plaintiff is entitled to apply to the court out of which the writ issued, or to any judge, for an order that he should be at liberty to proceed *as if* personal service had been effected; and such order, (subject to any condition that the circumstances may seem to require,) the court or judge is empowered to make accordingly,—but only on being satisfied that reasonable efforts have been used to effect personal service, and either that the writ has come to the defendant's knowledge, or that he wilfully evades the service of the same, and has not appeared thereto (*o*).

Supposing personal service to be effected, and no appearance to be entered by the defendant pursuant to the exigency of the writ,—or supposing an order dispensing with personal service to be obtained, and no appearance entered,—then, in either case, if the writ has a *special indorsement of particulars*, (which it will be recollected can only be if the claim is for a debt or liquidated sum of money,) the plaintiff is entitled to sign final judgment forthwith, as *for want of appearance* (*p*). And this

(*m*) 15 & 16 Vict. c. 76, s. 17.

(*n*) As to what amounts to personal service, see *Goggs v. Lord Huntingtower*, 12 Mee. & W. 503; *Christmas v. Eicke*, 6 D. & L. 40. If the writ be issued against a corporation aggregate, it may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of the corporation. If against the inhabitants of a hundred or other like district, on the high constable or one of the high constables. If against the inhabitants of any franchise, liberty, city, town

or place not being part of a hundred or other like district, on some peace officer thereof. *Ibid.* sect. 16. (See *Walton v. Universal Salvage Company*, 16 Mee. & W. 438.)

(*o*) Sect. 17. See *Kitchin v. Wilson*, 4 C. B. (N. S.) 483; *Davies v. Westmacott*, 7 C. B. (N. S.) 829.

(*p*) Sect. 27. Prior to this enactment it was an invariable rule in every personal action, that, until the defendant had *appeared*, no judgment in the action could in any case be awarded. But if he failed to appear after a personal

judgment may be for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, (if any,) to the date of the judgment; and with a regulated sum for costs: or if the plaintiff be not content with the regulated costs, then such amount of costs as the court shall tax in the particular case (*q*).

But if, on the other hand, an appearance is duly entered by the defendant pursuant to the writ, the plaintiff is then, of course, not entitled to sign judgment. In such case, (or if the writ was not *specialy indorsed*,) his course is to *declare*; that is, to make a written statement, according to a prescribed form, of the nature of the claim or complaint on which the action is founded (*r*).

service had been effected, the plaintiff might have caused an appearance to be entered for him (commonly known as an appearance *see. stat.*, it having been authorized by 12 Geo. 1, c. 29); and where a personal service proved impracticable, the plaintiff might have obtained leave to take out a writ of *distringas* against his goods and chattels; and where the defendant had no goods capable of being seized, and was returned *non est inventus*, the plaintiff might have resorted to process of *outlawry* against him; and under this process, if the defendant, after being duly *exacted* and *proclaimed* became an *outlaw*, all property that he might have was forfeited and seized into the hands of the Crown; but the Court of Exchequer would make an order to apply it in satisfaction of the plaintiff's claim. As judgment may now be signed *for want of appearance*, process of *outlawry* in the case above described is no longer necessary; (see 15 & 16 Vict. c. 76, s. 24;) but this process is also competent to the plaintiff, where, *after* judgment, defendant

is returned *non est inventus* to a writ of *capias ad satisfaciendum* issued against him: and in this case (as also in some others not connected with the proceedings in an action), *outlawry* is still in use.

(*q*) 15 & 16 Vict. c. 76, s. 27. (As to *interest* in such cases, see *Rodway v. Lucas*, 10 Exch. 665; and as to *costs*, Reg. Gen. Hil. T. 1853, E. T. 1857.) Under such circumstances, however, the defendant may, even after final judgment has been signed, be let in to defend, upon an application supported by satisfactory affidavits, accounting for the non-appearance, and disclosing a defence upon the merits. (15 & 16 Vict. c. 76, s. 27.) As to this application, see *Whiley v. Whiley*, 4 C. B. (N. S.) 653.

(*r*) 15 & 16 Viet. c. 76, s. 28. The declaration and all the subsequent pleadings are in general *delivered* out of court, between the parties or their attorneys; but where the defendant makes default in appearance, the declaration is not so delivered, but *filed* in the proper office of the court,

And as the declaration is the first of a series of mutual allegations which the parties are allowed to interchange with the view to the development of the point in controversy between them, (which allegations are technically called *pleadings*,) we have thus arrived at the second stage of the suit.

We must revert, however, to the subject of process in order to observe, that the account above given of it always supposes the defendant to reside within the jurisdiction of the court. When he resides out of it (*s*) there is some variation. The time for appearance in such case,—instead of a fixed number of eight days,—is regulated by the distance, from England, of the place where he resides; and the court or judge, upon being satisfied that there is a cause of action which arose within the jurisdiction, or in respect of a breach of a contract made within the jurisdiction (*t*), and that the writ was personally served, (or that reasonable efforts were made to do so,) and that it came to the defendant's knowledge, and that either he wilfully neglects to appear, or is living out of the jurisdiction in order to delay his creditors,—may direct from time to time that the plaintiff shall be at liberty to proceed in the action, in such manner, and subject to such conditions, as seem fit (*u*). In this case, too, no special indorsement of particulars is used; and though where the writ is for payment of any debt, it should be indorsed with the amount of the debt and costs claimed, in like manner as if the defendant resided within the jurisdiction; yet the time limited for payment should not be confined to the ordinary period of four days, but extended to the same period as is limited by the writ for appearance (*x*). The

(*s*) The Act of 15 & 16 Vict. c. 76, s. 18, here adds the words, "in any place except in Scotland or Ireland."

(*t*) *Ib.* See *Green v. Braddyll*, 1

H. & N. 69; *Binet v. Picot*, 4 H. & N. 365.

(*u*) *Ib.* See *Bates v. Bates*, 9 C. B. (N. S.) 561.

(*x*) *Ib.* et sched. (A.), No. 2.

plaintiff also cannot in such case obtain judgment for want of appearance, without first giving proof, in such manner as the Act specifies, of the amount of the debt or damages sustained (*y*). In addition to which, it is to be observed, that, supposing the defendant to be not only resident abroad, but a foreigner, he is to be served not with the writ itself, but with a *notice* of it explanatory of the proceedings, in such form as in the Act set forth (*z*).

It will also be proper to advert here to a collateral incident, which may occur in the case of a defendant resident within the jurisdiction, at the time that the writ issues, but who is suspected of an intention to abscond from the realm, in order to place his person and property out of reach, and consequently to render fruitless any judgment that may be ultimately obtained against him. Under such circumstances, if the plaintiff can show upon affidavit, to the satisfaction of a judge of one of the superior courts, that he has a cause of action against any defendant to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that such defendant is about to quit England,—the judge will make an order that the defendant be held to bail for such sum (not exceeding the amount of the debt or damages), as shall appear expedient (*a*). This order may be made at any time between the commencement of the action and final judgment: and having obtained it, the plaintiff is at liberty to sue

(*y*) 15 & 16 Vict. c. 76, s. 18, sched. (A.), No. 2.

(*z*) *Ibid.* s. 19, sched. (A.), No. 3. See *Ingate v. Lloyd Austriaco*, 4 C. B. (N. S.) 704.

(*a*) 1 & 2 Vict. c. 110, s. 3. As to an order to hold to bail, see the following cases: *Gibson v. Spalding*, 11 Mee. & W. 173; *Arkenheim v. Colegrave*, 13 Mee. & W. 620;

Daniels v. Fielding; *Graham v. Sandrienielli*; *Talbot v. Bulkeley*, 16 Mee. & W. 191, 200; *Hargreaves v. Hayes*, 5 Ell. & Bl. 272; *Burns v. Chapman*, 5 C. B. (N. S.) 481; *Stein v. Valkenhuysen*, 1 Ell. Bl. & Ell. 65. Various provisions as to bail are made by Reg. Gen. Hil. T. 1853, (Pr.) r. 81—111, 130, 132, 134.

out a writ of *capias ad respondendum*, directing the sheriff to arrest the defendant; who remains in custody on such arrest, until he shall have either given a bail bond to the sheriff, with reasonable sureties (*b*), or made a deposit of the amount for which the arrest was ordered, together with 10*l.* for costs (*c*). The object both of bail bond and deposit, is to afford security to the plaintiff, that afterwards, viz. within eight days inclusive from the arrest, the defendant shall put in *special bail* to the action: that is, procure two responsible persons, (being either housekeepers or freeholders,) to enter into a recognizance, engaging that in the event of judgment being given against him, he shall either pay the debt (or damages), and costs; or will render himself to prison in satisfaction thereof; or that they will themselves make payment thereof on his behalf (*d*). But it is now time to return to the progress of the suit.

II. We resume, therefore, secondly, the consideration of the *pleadings*. By the 15 & 16 Vict. c. 76,—the statute which has chiefly amended the process in an action,—great alteration also has been introduced into the course of the pleadings (*e*), the object of the reform

(*b*) As to proceedings against the bail, see *Betts v. Smyth*, 2 Q. B. 113; 17 & 18 Vict. c. 125, s. 90.

(*c*) 1 & 2 Vict. c. 110, s. 3—7. See *Welchman v. Sturgis*, 6 D. & L. 739.

(*d*) As to taking special bail, see 4 Will. & M. c. 4. It is provided by 14 & 15 Vict. c. 52 (called "The Absconding Debtors' Arrest Act"), in aid of the proceeding by *capias* above described, that the creditor may, even before any action is brought, apply to a commissioner in bankruptcy, or a judge of a county court, for a warrant to arrest;

and that any arrest thereon shall be considered as an arrest under the *capias* to be subsequently issued. (As to this statute, see *Eld v. Vero*, 8 Exch. 655; *Warden v. Stone*, 7 Ell. & Bl. 603; *Williams v. Gibbons*, 4 B. & Smith, 617.)

(*e*) From a period of very remote antiquity down to the time of passing this Act, the pleadings were of a highly artificial character, and had been elaborated, by the care of judges and practitioners during many successive centuries, into a regular system or science called *pleading*, or more properly *special pleading*, which constituted a dis-

being to establish a new or amended method built on the old foundations, but with an improved design as regards the objects of simplicity and despatch.

The general result contemplated by the present method, (entirely following in this respect the method which it supplanted,) is the development of the point in controversy between the parties, in order that, if it should turn out to be matter of law, it may be referred to the decision of the judges of the court; or if matter of fact, to trial by jury, or such other method as the law may have provided for the trial of a question of that particular kind. When this result is attained, the parties are said to be *at issue*, (*ad exitum*,) or at the end of their pleading; and the emergent question itself is termed *the issue*; and, according to the nature of the case, may turn out to be either an *issue in law* or an *issue in fact*.

The manner in which the parties are thus brought to issue, remains also in substance the same as formerly, though in many respects simplified. A general idea of it may be obtained from the following explanations.

First, we may remark, that the pleadings or mutual allegations are always to consist of matter of *fact*, and of fact only—for all matters of *law* are judicially noticed by the court, and supposed to be known by the adverse party also, or to the pleader who conducts the altercation for him: and therefore the allegations on either side, of the facts respectively relied upon, will always suffice to develop the legal positions which apply to the case between the parties, and the question or questions of law, (if any,) which are in dispute between them. It is also a rule of the same general nature, that, in their allega-

tion, they are to be precise and distinct branch of the law, with treatises and professors of its own. It was a system highly rated by our antient lawyers, and had at least the merit of developing the point in controversy, with the severest

precision. But its strictness and subtlety were a frequent subject of complaint; and one object of the 15 & 16 Vict. c. 76, was to relax and simplify its rules.

tion of fact, the pleaders are to abstain from any statement of the *evidence* by which the fact is to be established; for matter of evidence, though essential for the consideration of the jury, by whom the issue or question of fact is to be tried, is superfluous so far as the object of pleading is concerned,—which is merely to ascertain whether the question is matter of fact or matter of law, and if the former, to develop it in a shape sufficiently precise to show its general nature and import—but not to determine on which side of the question the truth lies, that being the province, not of pleading, but of trial.

These principles being premised, we may proceed to a general examination of the nature and order of the pleadings themselves.

The first of these is the *declaration* (*narratio*). This, as well as every subsequent pleading, is to be *intituled* of the proper court, and of the day of the month and year when pleaded (*i*). At the commencement also of the declaration, and in the margin of it, is always to be inserted some county, called the *venue in the action*; the object of its insertion being to show in what county the plaintiff *lays the action*; that is, proposes to have the action tried, in the event of arrival at an issue in fact to be tried by jury. In local actions, the venue must be alleged according to the truth of the fact; in transitory ones, the plaintiff may lay the action in what county he pleases, subject to the right of the defendant to apply to have the venue *changed* (*k*); which alteration will in general be ordered upon affidavit that the cause of action arose wholly in some other county (*l*); though the plaintiff has, on the other hand, the opportunity of opposing such order, by showing that evidence material to

(*i*) 15 & 16 Vict. c. 76, s. 54.

(*k*) As to the distinction between local and transitory actions, vide sup. p. 488.

(*l*) Except by consent, no venue shall be changed without special order of the court or a judge. (Reg. Gen. Hil. T. 1853, Pr. r. 18.)

the support of his case arose in the county where the venue is laid (*m*). The declaration then proceeds to allege, in short and precise terms, the circumstances of the plaintiff's complaint, so as to show him entitled to maintain one of those forms of action to which we formerly had occasion to advert (*n*); and concludes with an allegation of the sum he claims from the defendant (*o*).

After the plaintiff has delivered his declaration, it is the defendant's turn to consider in what manner it shall be encountered; and he is to address himself to this subject in the following manner. If the matter it contains, appear on the face of it substantially insufficient in point of law, to entitle the plaintiff to the redress he claims, the defendant's course is to *demur*; that is, to deliver a written formula, called a *demurrer*, (from *demorari*,) importing that he denies such sufficiency, and will wait the judgment of the court whether he is bound to answer (*p*). If, on the other hand, the plaintiff's state-

(*m*) As to the present practice in changing venue, see *De Rothschild v. Shilston*, 8 Exch. 503; *Begg v. Forbes*, 13 C. B. 614; *Hellewell v. Hobson*, 3 C. B. (N. S.) 761; *Durie v. Hopwood*, 7 C. B. (N. S.) 835; *Flueter v. McClelland*, 8 C. B. (N. S.) 357; *Schuster v. Wheelwright*, *ibid.* 383.

(*n*) Vide sup. pp. 483—487. Examples of the manner in which some of the more ordinary causes of action may be stated are given in 15 & 16 Vict. c. 76, sched. (B.) It is to be observed that where the declaration is for a debt or liquidated demand, and no "special indorsement" was upon the writ of summons, the practice requires that there should be delivered collaterally with the declaration, and at the same time with it, the *particulars of the plaintiff's demand*, con-

taining a more detailed account of the nature and amount of his claim. (Reg. Gen. Hil. T. 1853, Pr. rr. 19, 20.) But where there has been a special indorsement of particulars on the writ of summons, no other particulars than those so indorsed are required. (15 & 16 Vict. c. 76, s. 25.)

(*o*) 15 & 16 Vict. c. 76, s. 59. If however the action be brought to recover *specific goods*, the declaration concludes with claiming their return or their value, together with some sum for their detention. (*Ibid.*)

(*p*) A demurrer must be in the form prescribed by 15 & 16 Vict. c. 76, s. 89. It was formerly either *general* or *special*; that is, it either objected in general terms only, or set forth a particular objection. And by 27 Eliz. c. 5, and 4 Ann.

ment appears *ex facie* sufficient in point of law, the defendant's course is to *plead*; that is, to deliver a *plea*; the general object of which, is to make answer in point of *fact* to the declaration. If he neither demurs nor pleads within the time allowed by the practice of the court for that purpose, the plaintiff will be entitled to sign judgment against him as for *default of plea* (*q*).

The plea may be either *dilatory* or *peremptory*. Dilatory pleas,—which by statute 4 Ann. c. 16, cannot be received unless supported by affidavit of their truth (*r*),—are founded on some matter of fact not connected with the merits of the case, but such as may exist without impeaching the right of action itself; and such pleas are either *to the jurisdiction*, showing that, by reason of some matter therein stated, the case is not within the jurisdiction of the court; or of *suspension*, showing some matter of temporary incapacity to proceed with the suit; or *in abatement*, showing some matter for *abating* or quashing the declaration. The effect of such a dilatory plea if established, is, that it defeats the particular action, leaving the plaintiff at liberty to commence another in a better form, if the case should be such as to admit of an amendment of that description (*s*). On the other hand, peremptory pleas, (more usually called pleas *in*

c. 16, it was provided, that all objections of *mere form* were to be raised in the shape of special, and not of general, demurrer. But now by 15 & 16 Vict. c. 76, s. 51, no pleading shall be deemed insufficient for any defect which could theretofore only be objected to by special demurrer.

(*q*) The usual time allowed for pleading in bar is eight days (15 & 16 Vict. c. 76, s. 63); for pleading a dilatory plea four days only.

(*r*) This affidavit may be waived by the plaintiff. (*Graham v. Ingle-*

by, 4 Exch. 651.)

(*s*) Pleas of *misnomer* of the plaintiff or defendant, and of *non-joinder* of a necessary party as defendant, were once among the most frequent instances of dilatory pleas; but the temptation to a vexatious use of them is now much diminished by the effect of certain enactments. See as to the former, 3 & 4 Will. 4, c. 42, s. 11; as to the latter, sect. 8 of the same statute; and 15 & 16 Vict. c. 76, ss. 38, 39.

bar,) are founded on some matter tending to impeach the right of action itself; and their effect consequently is to defeat the plaintiff's claim altogether.

Pleas in bar are subject also to various divisions. For, first, they comprise the class of *general issues*, which are denials of the whole matter in the declaration, or at least of the principal fact upon which it is founded,—as, in trespass or trespass on the case, that the defendant is *not guilty (t)*; in debt on bond or other deed, that *it is not his deed*; in other cases of debt, that he *never was indebted as alleged*; in assumpsit, that he *did not promise as alleged*;—while all other pleas in bar are distinguished from these general issues, by the term of *special pleas*. Again, pleas in bar are distinguished from each other, according to their subject-matter, as pleas in *justification*, (or *excuse*,) and pleas *in discharge*. A plea in justification or excuse, is one that tends to show that there was *never* any right of action;—as where, in trespass for assault and battery, the defendant pleads *son assault demesne*, viz. that it was the plaintiff's own original assault; or in an action on the case for slander, that the words, alleged to have been spoken of the plaintiff, are true. But pleas in discharge are those which show that the cause of action, though once existing, has been barred by matter subsequent; as by payment, or release, or accord and satisfaction, or by a statute of limitation, or a *set-off (u)*; which last occurs where the plaintiff sues for a debt, and the defendant alleges a reciprocal debt due to him from the plaintiff, and claims to have it allowed

(*t*) As to the plea of "not guilty" by *statute*, see *Edwards v. Hodges*, 15 C. B. 477.

(*u*) This plea of set-off answers very nearly to the *compensatio* or *stoppage* of the civil law. (Ff. 16, 2, 1.) It was not allowed at the common law, but is given by 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24.

As to particulars of set-off see Reg. Gen. Hil. T. 1853, (Pr.) r. 19. By 23 & 24 Vict. c. 126, s. 20, a defendant may have the benefit of a set-off, by proving that all the plaintiffs named are indebted to him, though one or more of them is im-
properly joined.

by way of discharge from the action, either wholly or in part, as the case may be (*x*).

With respect to all pleas in bar, however, it is a fundamental rule, that they must either *traverse* (*y*),—that is, deny,—the matter of fact in the declaration, or *confess and avoid* it; that is, admitting it to be true, show some new matter of fact tending to obviate or take off its legal effect (*z*). Thus, the general issue of *not guilty*, in an action for assault and battery, denies the act of violence alleged; while, on the other hand, the plea of *son assault demesne*, in the same action, confesses that act, but *avoids* it by showing circumstances of excuse or justification. So in an action for money payable for goods bargained and sold by the plaintiff to the defendant, the general issue of *never indebted* traverses the bargain and sale; a plea of payment confesses both, but *avoids* them by

(*x*) Examples of the proper manner of pleading different pleas are given in the 15 & 16 Vict. c. 76, sched. (B.): where may be found most of the general issues, and the most ordinary pleas and replications.

(*y*) It is provided by 15 & 16 Vict. c. 76, ss. 76—79, “that a defendant may either traverse generally such of the facts contained in the declaration as might have been denied by any one plea; or may select and traverse separately any material allegation in the declaration, although it might have been included in a general traverse.” Also, “that a plaintiff shall be at liberty to traverse the whole of any plea or subsequent pleading of the defendant by a general denial, or, admitting some part or parts thereof, to deny all the rest; or to deny any one or more allegations.” Also, “that

“a defendant shall be at liberty in like manner to deny the whole or part of a replication or subsequent pleading of the plaintiff.”

(*z*) It will be proper to notice here that by an alteration introduced by the Common Law Procedure Act, 1854, of a very remarkable kind, as calling on the *Common law* courts to take notice of the doctrines of *Equity*, it is provided, that in any cause in which, if judgment were obtained against the defendant, he would be entitled upon *equitable* grounds to relief, he may plead the facts which entitle him to such relief, by way of defence; and such plea shall begin with the words, “For defence on equitable grounds,” or words to the like effect. (17 & 18 Vict. c. 125, s. 83.) This enactment, however, is qualified by a proviso enabling the court, under circumstances, to strike out such plea; as to which vide post, p. 611, n. (*e*).

showing matter of discharge. And a plea that does not conform to this rule, will in general be insufficient in substance, so as to entitle the defendant to *demur*. There are, however, some exceptions to the rule. Thus the defendant, in an action for a debt or liquidated demand, may avail himself of a plea of *tender*; that is, he may plead that he has been always ready to pay the debt demanded, and before the commencement of the action tendered it to the plaintiff, and now brings it into court, ready to be paid to him;—or he may, in most actions, resort to a plea of *payment of money into court*; viz. that he brings a certain sum of money into court, ready to be paid to the plaintiff, and that it is enough to satisfy the plaintiff's claim (*a*); or in any action, he may have occasion to plead by way of *estoppel* (*b*); as that the plaintiff ought not to be permitted to make a particular allegation, because he has formerly done some solemn act, (as by deed under his hand and seal,) involving an assertion to the contrary. As to all which pleas, it is evident that they are in the nature of exceptions to the general rule above stated. For in the two first, (admitting, as they do, the right of action,) there is a con-

(*a*) The effect of this plea (as to which, see 3 & 4 Will. 4, c. 42, s. 21; 15 & 16 Vict. c. 76, ss. 71, 72; 23 & 24 Vict. c. 126, ss. 23—25), is, that it puts the plaintiff to the alternative of either accepting the proposed sum, or proceeding at his peril so far as future costs are concerned. (See Reg. Gen. Hil. T. 1853, Pr. r. 12.) But it is not allowed in actions for assault and battery, false imprisonment, libel, (except in the particular case mentioned, sup. p. 504,) slander, malicious arrest or prosecution, or detaching the plaintiff's daughter or

servant. And where it is pleaded only by one of several defendants, the leave of the court or judge must first be obtained. By 23 & 24 Vict. c. 126, ss. 23, 24, the plaintiff was, for the first time, enabled to pay money into court in replevin. And by sect. 25 of the same statute, the defendant may, by leave of the court or a judge, take the same course in an action on a bond for payment of money, or for detaining plaintiff's goods—in which actions this proceeding was formerly inadmissible.

(*b*) As to estoppel, vide sup. vol. I. p. 498, n. (*d*).

fession, without avoidance; and in the last, there is neither traverse, confession, nor avoidance (*c*).

The plea being delivered, it is then to be encountered by the plaintiff, upon peril that, if he fail to do so within the proper period, the defendant is entitled to sign judgment by default (*d*). In encountering the plea, the plaintiff is put to the same alternative as the defendant was with regard to the declaration; that is, he must either demur for substantial insufficiency in law, or plead some matter of fact (*e*). If the plaintiff pleads, he is said to

(*c*) At the time of passing the Common Law Procedure Act, 1852, (15 & 16 Vict. c. 76,) it was a rule that the defendant could not plead *specially* such matter as amounted in effect to the general issue, but must plead the general issue in terms; it being, at that time, essential to the nature of a special (or affirmative) plea, that the matter of it should be such as to give *colour* to the plaintiff's claim,—so that a plea that gave no colour ought to be by way of traverse. Thus, if, in an action of trespass, the defendant's case was that he claimed by feoffment with livery from A., by force of which he entered on the lands in question, he could not plead the matter in that form, because it would amount to a plea of *not guilty* of the trespass; and he was therefore obliged to plead not guilty. This rule, however, might be evaded by *expressly* giving colour to the plaintiff. Thus, in the case supposed, the defendant, after setting forth his own title by feoffment with livery, might proceed to allege, (by a mere fiction,) that the plaintiff, claiming by colour of a prior deed of feoffment without livery, entered; upon whom, the defendant, entered; and

the defendant might thus refer to the judgment of the court which of the two titles was the best. For it was held that colour thus *expressly* given cured the want of implied colour, which would otherwise have vitiated the plea. All this subtlety, however, (though curious as illustrating the close logic applied, in ancient times, to the subject of pleading,) is now very properly set aside; for by 15 & 16 Vict. c. 76, s. 64, *colour*, (that is, express colour,) shall no longer be necessary in any pleading. How far the rule itself that express colour was intended to evade, (*viz.*, that prohibitory of a special plea amounting to the general issue,) is affected by the Act, does not distinctly appear from it; but it is obvious that such a mode of pleading would at all events often lead to unnecessary prolixity.

(*d*) The plaintiff must, as a general rule, reply within *four* days after notice to reply has been delivered to him by the defendant. (15 & 16 Vict. c. 76, s. 53.)

(*e*) By a provision of the Common Law Procedure Act, 1854, analogons to that already noticed, *sup.* p. 609, n. (*z*), it is provided, that the plaintiff may reply, in answer to any plea

reply, which he does by delivering a *replication*; and to this also the same alternative applies that was before noticed in the case of the plea, viz. that it must either traverse the last pleading, or confess and avoid it (*f*). But here also, as in the case of the plea, may occur an occasional exception to the regular course; for the plaintiff may sometimes find it expedient to reply by way of *estoppel* (*g*);—or, in other cases, to reply by way of *new assignment*; that is, to allege that he brought his action not for the cause supposed by the defendant, but for some other cause to which the plea at present pleaded has no application; a species of reply which, like the estoppel, neither confesses nor denies the matter of the plea, its true drift being to show that the plea is irrelevant, or beside the mark (*h*). But in general, the replication is subject, (as before stated,) to the alternative of traverse, or confession and avoidance; and upon the

of the defendant, facts which avoid such plea upon *equitable* grounds, and such replication shall begin with the words, "For replication on equitable grounds," or words to the like effect (17 & 18 Vict. c. 125). But both enactments are subject (by sect. 86) to the following proviso, "that in case it shall appear to the court, or any judge thereof, that any such equitable plea, or equitable replication, cannot be dealt with by a court of law, so as to do justice between the parties, it shall be lawful for such court or judge, to order the same to be struck out, on such terms as to costs and otherwise, as to such court or judge may seem reasonable." Upon the construction and effect of the enactments here in question, see (amongst others) the following cases: *Mines Royal Societies v. Magnay*, 10 Exch. 489; *Wodehouse*

v. Farebrother, 5 Ell. & Bl. 277; *Vorley v. Barrett*, 1 C. B. (N. S.) 225; *Flight v. Gray*, 3 C. B. (N. S.) 320; *De Pothonier v. De Maltos*, 1 Ell. Bl. & Ell. 461; *De Ros v. Foster*, 12 C. B. (N. S.) 272.

(*f*) In the case, however, of the replication or other subsequent pleading, a traverse is not now required (as formerly) to be *in terms*. For by 15 & 16 Vict. c. 76, s. 79, either party may plead in answer to the plea or subsequent pleading of his adversary, that *he joins issue* thereon; and this shall be deemed to be a denial of the substance of the plea or other subsequent pleading, and an issue thereon.

(*g*) Vide sup. p. 610.

(*h*) By 15 & 16 Vict. c. 76, s. 87, one new assignment only shall be pleaded to any number of pleas to the same cause of action.

same principles are constructed all the subsequent allegations that may occur on either side, until the pleading is exhausted (*i*). These we shall accordingly particularize no further, except by remarking that, to the replication, the defendant may *rejoin*, or deliver an answer called a *rejoinder*; that the plaintiff may answer the rejoinder, by a *surrejoinder*; that the defendant may upon that deliver a *rebutter*; and that this may be followed by a *surrebutter*, on the part of the plaintiff; but beyond a *surrebutter* the pleadings seldom happen to extend; and after that stage, they are not distinguished by any separate denomination (*j*).

To the whole of this series applies the general rule, that neither party may desert or [vary from the title or defence, which he has once insisted on. For this, (which is called a *departure* in pleading,) might occasion endless altercation. Therefore the replication must support the declaration, and the 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 (*k*).]

At some stage of this series, more or less remote, it is obvious that the parties will necessarily be *brought*

(*i*) We may remark here that as some security for the regular and proper construction of the pleadings, the pleas, &c. (with certain exceptions,) were formerly required to be under the signature of counsel. But now by 15 & 16 Vict. c. 76, s. 85, such signature shall not be required to any pleading.

(*j*) Blackstone remarks (vol. iii. p. 310), that these pleas, replications, &c. answer to the pleadings in

the action of the Roman law, under the names of *exceptio*, *replicatio*, *duplicatio*, *triplicatio*, &c. (See as to these, Inst. 4, 14.)

(*k*) It is noticeable that the 15 & 16 Vict. c. 76, has made no difference in respect of the effect of *departure* in pleading. A pleading liable to this defect is still bad on demurrer. (*Brine v. Great Western Railway Company*, 2 B. & Smith, 402.)

to issue; for as the allegation of new matter cannot be interminable, (particularly as no *departure* is allowed,) they must at length arrive, either at some exception by way of demurrer, to the sufficiency of the last pleading in point of substance,—which is an issue in law; or at the denial on one side, of some matter of fact alleged on the other,—which is an issue in fact. And, in either case, the attainment of this result is marked by the delivery, on the part of his adversary, to the party demurring or traversing, of an appropriate formula, called a *joinder in demurrer*, where the issue is in law,—and a *joinder of issue*, where the issue is in fact (*l*).

The case, however, is occasionally such as to give rise to a new series of pleading, before the ultimate issue between the parties is attained. For [it may sometimes happen that after the defendant has pleaded, nay, even after issue joined, there may have arisen some new matter, which it is proper for the defendant to plead; as that the plaintiff 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, he is permitted to plead it, by what is called a plea *puis darrein continuance* (*m*). For it would be unjust to exclude him from the benefit of this new defence, which

(*l*) The proper formula in either case will be found in 15 & 16 Vict. c. 76, ss. 79, 89. The party demurring may give notice to join in demurrer, in four days, otherwise judgment. (Reg. Gen. Hil. T. 1853, Pr. r. 14.)

(*m*) It was so named because pleaded since the last adjournment; for the adjournments of the court were formerly called *continuances*. And by the 15 & 16 Vict. c. 76, s. 69, such a plea (which is still often spoken of under its antient appella-

tion) must have an allegation that the matter arose after the last pleading. This provision goes on to enact that such a defence may, when necessary, be pleaded at *nisi prius*, between the 10th of August and the 24th of October; but (unless by order of the court or a judge) shall be in no case allowed, unless accompanied with an affidavit that the matter thereof arose within eight days next before the pleading of the same.

[it was not in his power to make when he pleaded the former (*n*).] But in order to do this, he necessarily relinquishes the former defence, and pleads the new matter by way of substitution for it; to which the plaintiff replies. And an issue in law or fact is thus ultimately obtained upon the plea *puis darrein continuance*, according to the principles already explained with respect to that originally pleaded.

With a view to clearness of statement, we have hitherto supposed the declaration to comprise only a single matter of demand or complaint, and the plea only a single matter of defence; and the same character of unity to pervade the whole course of the pleading. But it is necessary here to remark, that the plaintiff may have occasion to bring forward several distinct matters of demand or complaint; and that in that case he is allowed to insert them in the declaration cumulatively,—provided they are not claims in different rights, or between different parties (*o*),—in the form of several distinct statements, technically denominated *counts* (*p*). So the defendant may have occasion to bring forward several distinct matters of defence, in regard to the same matter of demand or complaint; and he is permitted in that

(*n*) 3 Bl. Com. 316.

(*o*) By 15 & 16 Vict. c. 76, s. 41, it is provided, that causes of action, of whatever kind (with the exception of replevin and ejection), provided they be by and against the same parties, and in the same rights, may be joined in the same suit; (see *Davies v. Davies*, 1 Hurl. & C. 451.) And by sect. 40, a husband is enabled to claim in respect of an injury done to his wife, and also to claim in his own right, in the same action. Before this statute, not only claims in different rights or between different parties were incapable of being joined, but, generally speak-

ing, claims in different *forms of action*; for example, there could not be a count in debt and another in trespass.

(*p*) This formerly led to the abuse of inserting in the declaration a variety of counts, where there was in fact only *one* cause of action;—that is, of shaping a single cause of action in various modes, so that, failing to prove one count, the plaintiff might have a chance of proving another. But now several counts on the same cause of action are not, in general, allowed. (Reg. Gen. Hil. T. 1853, Pl. rr. 1, 2, 3.)

case, (upon first obtaining the leave of the court or a judge for the purpose,) to resort to as many different pleas (*q*). And it is competent to him also, by the like leave, to plead and demur concurrently to the same matter of demand or complaint (*r*). So the plaintiff may afterwards exercise similar rights on his part;—for by the like leave he may make several replications in answer to the same matter of defence, or may demur and reply, concurrently, to the same matter of defence; and the same principle is established with respect to every subsequent step in the series of allegations (*s*).

(*q*) 15 & 16 Vict. c. 76, s. 81. A rule of court was formerly required for this purpose in every case; but now by 15 & 16 Vict. c. 76, s. 82, a judge's order will suffice; and by sect. 84, certain pleas of ordinary occurrence may now be pleaded together, *as of course*, and without either rule or order for the purpose. The pleas which may be so pleaded are the following, or any two or more of them:—a plea denying any contract or debt alleged in the declaration; a plea of tender as to part; a plea of the statute of limitations; of set-off; of the bankruptcy of the defendant; of his discharge under an insolvent Act; of *plene administravit*; of *plene administravit præter*; of infancy, or coverture; of payment; of accord and satisfaction; of release; of not guilty; of a denial that the property, an injury to which is complained of, is the plaintiff's; of leave and licence; and of *son assault demesne*. In other cases, the court or judge is at liberty to require from the defendant or his attorney, as the conditions of the leave applied for, an affidavit, "That he is advised and believes that he

"has just ground to traverse the
"several matters proposed to be
"traversed by him, and that the
"several matters sought to be
"pleaded as aforesaid by way of
"confession and avoidance are re-
"spectively true in substance and
"in fact." (Ibid. s. 81.)

(*r*) 15 & 16 Vict. c. 76, s. 80. In this case the court or judge is at liberty to require from the defendant or his attorney an affidavit to the same effect as set forth in the last note, but with this addition, "that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law."

(*s*) 15 & 16 Vict. c. 76, ss. 80, 81. At every step, however, the court or judge may require, where leave to plead several matters is applied for, an addition thereto to the same effect as in note (*q*), sup., and where leave to plead and demur is applied for, an affidavit to the same effect as in note (*r*) sup. It is also a rule that pleas founded on one and the same principal matter, and varying only in statement, description, or circumstances, shall not be allowed. (15 & 16 Vict. c. 76, s. 83; Reg. Gen.

It is obvious, therefore, that the pleading will not always lead to the production of a *single* issue only, but often, (and indeed in practice most commonly,) to the production of *several*. To return now to the progress of the suit.

We have said that issues in law are to be referred to the decision of the judges of the court. This is done 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 is delivered between the parties; and usually by the plaintiff's attorney, to the attorney for the defendant. The demurrer is then *set down for argument*; which may be done at the request of either party; and notice of it is forthwith given to the adversary; and, four clear days before the day appointed for argument, the plaintiff delivers copies of the demurrer book to the lord chief justice, and to the senior puisne judge of the court (*t*); and the defendant delivers copies to the two other judges, (only four in each court sitting at the same time); and, on the appointed day, the case is called on for argument (*u*). After hearing counsel on either side, the court deliver their judgment. For example, [in an action of trespass, if the defendant in his plea confesses the fact, but

Hil. T. 1833, Pl. r. 2.) It may be remarked here, that at common law the system of pleading widely differed as regards the right of pleading several pleas, &c., from that which is now established. For, to avoid confusion and prolixity, defendants were confined, under the system at common law, to a single plea in respect of each distinct matter of demand or complaint; and could not plead and demur concurrently to the same matter; and the same restrictions obtained throughout the whole series. The

first innovation upon this strictness was by the provision of 4 Ann. c. 16, allowing the *defendant*, by leave of the court, to plead several pleas to the same matter; but, with this exception, the common law rule remained unaltered until the 15 & 16 Vict. c. 76.

(*t*) It will be remembered that in the Court of Exchequer of Pleas, the judges are termed *barons*.

(*u*) As to demurrer books and setting down for argument, see Reg. Gen. Hil. T. 1853, (Pr.) rr. 15, 16.

[justifies it *causâ venationis*,—for that he was hunting,—and to this the plaintiff demurs, that is, admits the truth of the plea, but denies the justification to be legal; now on arguing this demurrer, if the court be of opinion that a man may not justify trespass in hunting, they will give judgment for the plaintiff; if they think that he may, then judgment is given for the defendant. And thus is an issue of law, on demurrer, disposed of.] As to which, however, we may further remark, that the judges, in delivering their judgment, usually also made known the *reasons* for their opinion.

III. The *trial and evidence*.

If the result of the pleading be not an issue at law, but an issue or issues in fact, it then becomes necessary to determine on which side of every such issue or question the truth lies; a point that is not left, like matter of law, to the court or judges, but to such other methods of decision as are appropriate by the laws of England to the particular kind of question: and this decision of fact is what is technically understood by the term *trial*,—as to which it may be remarked that in one form or other it constitutes, in every civilized country, the chief business of the courts of justice; [for experience will abundantly show that above a hundred of our law suits arise from disputed facts, for one where the law is doubted of (*u*).]

Of trials there are several different species, according to the difference of subject or thing to be tried,—but with the exception of trial by jury, the scope of each is

(*u*) This remark of Blackstone is still applicable. He proceeds (vol. iii. p. 330) to give the following account of the state of business in his time. “About twenty days in the year are sufficient in Westminster Hall to settle, upon solemn argument, every demurrer or point of law that arises throughout the

“nation; but two months are annually spent in deciding the truth of facts before six distinct tribunals,—exclusive of Middlesex and London, which last afford a supply of causes much more than equivalent to any two of the largest circuits.”

very limited, and its occurrence very infrequent. The several methods are as follows (*x*):—1. Trial by record; 2. Trial by certificate; 3. Trial by witnesses; 4. Trial by jury (*y*).

1. First then of the trial by *record*. And here, first, we may remind the reader that the *records* of a court are its proceedings or transactions as entered or drawn up by its officers; and then placed in a treasury (or place of deposit), *in perpetuam rei memoriam* (*z*). The

(*x*) There is a new mode of trial introduced by the Common Law Procedure Act, 1854, which has not been included in the text, being scarcely one of the regular modes, but depending on the consent of the parties, and the sanction of the court. This may be called *trial by the judge*. For, by 17 & 18 Vict. c. 125, s. 1 (see also Reg. Gen. M. T. 1854, sched.), it is now enacted, that the parties to any cause may, by consent in writing, signed by them or their attorneys, leave the decision of any issue in fact to the court, provided the court or a judge shall, in their or his discretion, think fit to allow such trial; and such issue may thereupon be tried and damages assessed where necessary, in open court, either in term or vacation, by any judge who might otherwise have presided at the trial thereof by jury, either with or without the assistance of any other judge or judges, of the same court or included in the same commission at the assizes. (See *Andrews v. Elliott*, 5 Ell. & Bl. 502; 6 Ell. & Bl. 338.)

(*y*) Blackstone (vol. iii. p. 330) mentions seven methods of trial; comprising, in addition to those in our text, trial by *inspection*, trial by *wager of battel*, and trial by

wager of law. But as regards the first, it seems doubtful how far, since the abolition of real actions, fines, and appeals of maihem, it can now be considered as in force; and *wager of battel* has been expressly abolished by 59 Geo. 3, c. 46; and *wager of law* by 3 & 4 Will. 4, c. 42, s. 13. The nature of this last method has been explained in a former place (vide sup. p. 549). As to the two others, it will be sufficient for the present purpose to remark, that the account given of the trial by *inspection*, by Blackstone, is, that it takes place 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 testimony of their own senses shall decide the point in dispute; and that the trial by *wager of battel* in *civil* cases, was the decision of the question of right in the real action called the writ of right, by a personal contest between the champions of the respective parties armed with batons. A further account of *wager of battel*, (as formerly applied to *criminal* cases,) will be found in a succeeding part of the work, vide post, bk. VI. c. XXII.

(*z*) Vide sup. vol. I. p. 48.

term record is also used indifferently, to express the matter itself which is so entered or transcribed. The time and manner of drawing up these records, in the course of an action, will appear hereafter. At present it is sufficient to observe, that, when complete, they are regarded by our law with very peculiar consideration. For they constitute the only strict and proper proof of the proceedings of the court in which they are preserved; and are also proof thereof of so transcendent and absolute a nature as to admit of no contradiction (*a*). The practice too of drawing up and preserving such documents is confined to the higher courts of justice, so as to have created the distinction, which we have elsewhere had occasion to notice, between courts of record and courts not of record (*b*). As to the mode of trial now in question, it is used only in the particular instance where a matter so recorded, (for example, a judgment,) is pleaded by one of the parties; and the other 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 is ready to verify by the record, “and prays that the same may be seen and inspected by “the court;” and therefore a day is given for the inspection accordingly;—and if the record be not in the same, but in another court, the party by whom its existence is asserted is commanded to bring it in (*c*). Afterwards on the day appointed, the same party moves for judgment in his own favour, which may be opposed by his antagonist: and if the record is found to be in court,

(*a*) Co. Litt. 260 a; et vide sup. vol. I. p. 498, n. (*d*).

(*b*) Vide sup. p. 384.

(*c*) See 2 Chitty on Pleading, 624, 625; Reg. Gen. Hil. T. 1853, (Fr.) rr. 10, 38. It is to be observed, that if it be a record of the same court, the record itself must be produced; if a record of an inferior

court, a transcript; to obtain which a writ of *certiorari* must be issued; but if a record of a superior court, the record of it is to be brought into Chancery by *certiorari*, and an exemplification of it afterwards sent by *mittimus* to the court where the action is pending.

and to maintain the issue, judgment is then given for the party by whom its existence was asserted; but in the opposite event, against him. In the same manner titles of nobility, as “whether earl or no earl,” “baron or no baron,” shall be tried by the sovereign’s patent only, which is a matter of record (*d*); or in the case of creation by writ, then by the record of parliament (*e*). [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 (*f*). And also whether a manor be to be held in antient demesne or not, shall be tried by the record of *Domesday* in the Exchequer (*g*).]

2. [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. As therefore such evidence, if given to a jury, must have been conclusive, the law, to save trouble and circuitry, permits the fact to be determined upon such certificate merely. Thus, first, 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, says Littleton, by the certificate of the mareschal of the king’s host, in writing under his seal; which shall be sent to the justices (*h*). So if, in order to avoid an outlawry or the like, it was alleged that the defendant was in prison *ultra mare* at Bordeaux, or in the service of the mayor of Bordeaux, that place being, at the time, part of the dominions of the Crown, this should have been tried by the certificate of the

(*d*) 3 Bl. Com. p. 331; 6 Rep. 53; *Rex v. Knollys*, 1 Ld. Ray. 10.

(*e*) Co. Litt. 16 b; and note (3) by Harg.

(*f*) 9 Rep. 31.

(*g*) 3 Bl. Com. p. 331. It is to be observed, that in the instances here mentioned, by Blackstone, of

proof by the royal letters-patent, by treaty, and by *Domesday*, the word record is taken in a somewhat larger sense, and not in its strict technical meaning, according to which it refers exclusively to the proceedings of a *court of justice*.

(*h*) Litt. s. 102.

[mayor (*h*). And, in like manner, we find 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 (*i*). Secondly, in matters within the realm, the customs of the city of London shall be tried by the certificate of the mayor and aldermen, certified by the mouth of the recorder (*j*), upon a surmise from the party alleging it, that the custom ought to be thus tried; else it must be tried by a jury (*k*):—as, for example, the custom of distributing the effects of freemen deceased (*l*); of enrolling apprentices; or that he who is free of one trade may use another,—if any of these or 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 (*m*). Thirdly, in some cases, the sheriff of London's certificate shall be the final trial; as if the issue be whether the defendant be a citizen of London or a foreigner, in case of privilege pleaded to be sued only in the city courts (*n*). Of a nature somewhat similar to which, is the trial of the privilege of the University of Oxford, if the chancellor claims conusance] of a cause between two private persons,—as the practice of the Superior courts allows him to do,—where one of

(*h*) 3 Bl. Com. p. 334.

(*i*) *Bartue and the Duchess of Suffolk's case*, Dy. 176, 177.

(*j*) Co. Litt. 74; *Plummer v. Ben-
tham*, 1 Burr. 248.

(*k*) Bro. Ab. tit. Trial, pl. 96. As to the form of the suggestion for the purpose of obtaining a trial by certificate of the custom of London,

see *Crosby v. Hetherington*, 5 Scott, N. R. 654.

(*l*) By 19 & 20 Vict. c. 94, this custom is abolished, in reference to all persons dying after 1st January, 1854.

(*m*) *Day v. Savage*, Hob. 114.

(*n*) 3 Bl. Com. p. 334, citing 2 Roll. Ab. 588.

the parties is a privileged person (*o*). [In this case, the charters, confirmed by act of parliament, direct the trial of the question, “whether a privileged person or no,” to be determined by the certificate and notification of the chancellor under seal; to which it 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; because the charters direct only that the privilege be allowed on the chancellor’s certificate, when the claim of consuance 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. Fourthly, in matters of ecclesiastical jurisdiction, the *ability of a clerk* presented, and the *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 (*p*): but *induction* shall be tried by a

(*o*) Vide sup. p. 477. The university of Cambridge has a similar privilege, but it is now (by 19 & 20 Vict. c. xvii.) more restricted than in the case of Oxford. Ibid. u. (*o*).

(*p*) 2 Inst. 632; Show. Parl. c. 81; 2 Roll. Ab. 583. Blackstone (vol. iii. p. 335) also enumerates among the matters to be tried by the bishop’s certificate, “*marriage*, and “of course, *general bastardy*.” And he proceeds to remark as follows: “If a man claims an estate “by descent, and the tenant alleges “the demandant to be a bastard, or “if, in dower, the heir pleads no “marriage, 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, “(Hob. 213), because whether the “plaintiff was found 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 (Dy. 79). For a special “bastard is one born before mar- “riage, of parents who afterwards “intermarry; which is bastardy by “our law, though not by the eccle- “siastical. It would, therefore, be “improper to refer the trial of that “question to the bishop, who, whe- “ther the child be born before or “after marriage, will be sure to cer- “tify him legitimate.” But it is to be considered how far the law as to the trial of marriage has been now

[jury, because it is a matter of public notoriety (*q*), and is likewise the corporal investiture of the temporal profits (*r*). Resignation of a benefice may be tried in either way,—but it seems most properly to fall within the bishop's cognizance (*s*). Fifthly, the trials of all customs and practices 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 (*t*). And thus much for those several issues or matters of fact, which are proper to be tried by certificate.]

3. [A third species of trial is that by *witnesses, per testes*, without the intervention of a jury. 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 an action of dower, and the tenant pleads that the husband is not dead, this, being looked upon as a dilatory plea, is, in favour of the widow, and for greater expedition, allowed to be tried by witnesses examined before the judges; and so, saith Finch, shall no other case in *our* law (*u*).]

4. [The subject of our next inquiry, will be the nature and method of the trial by *jury*; called also, in technical language, the trial *per pais*, or *by the country*; a

altered by 20 & 21 Vict. c. 85, s. 2, which withdraws the cognizance of all matters matrimonial from the Ecclesiastical Courts.

(*q*) Sir H. Sidney *v.* Bishop of Gloucester, Dy. 228.

(*r*) Vide sup. p. 32.

(*s*) 2 Roll. Ab. 583.

(*t*) 9 Rep. 31.

(*u*) 3 Bl. Com. p. 336, citing Finch, L. 423. Sir E. Coke, however, mentions some others as oc-

curing in real actions. (1 Inst. 6; 9 Rep. 30.) It is to be observed, that what is said by Blackstone as to the rarity of the trial by witnesses, is still correct, notwithstanding the mode of trial without a jury, in the County Courts, (vide sup. p. 404,) and the mode of trial by the judge, mentioned sup. 619, n. (*w*); for the term *trial by witnesses* is not applied to either of these.

[trial that hath been used time out of mind in this nation,] and the origin of which is so remote that it has not hitherto been satisfactorily traced (*v*).

This being the ordinary, and in practice almost the invariable, mode of trial in the English law, and at the same time one of the most important and celebrated of its institutions, we shall proceed to the dissection and examination of it in all its parts.

Here, however, it may be proper to explain, that there are different forms of this proceeding. The first is a trial *at bar*; that is, a trial before the judges of the superior court of law in which the action is brought, sitting for that purpose in *banc* (*x*). This method is comparatively rare, and takes place only in causes of difficulty or importance; or where the Crown is concerned in interest, and insists on its right to have the

(*v*) Blackstone (vol. iii. p. 349) considers this mode of trial as having been “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.” He also says, that it is mentioned in England as early as in the laws of Ethelred, for which he cites Wilk. Ll. Anglo-Sax. 117. He speaks, however, of the date of its first establishment among us as unknown; and the same uncertainty is confessed in a much later work,—where, though trial by jury is considered as having been in use among the Anglo-Saxons, it is remarked, that “no record marks the date of its commencement.” (Turner’s Hist. Ang. Sax. vol. iii. p. 223, 6th edit.) We must add, that when the Anglo-Saxon memorials are carefully scrutinized, we find them to be such as

even to justify a doubt whether trial by jury, (in any sense corresponding to our use of that term,) did actually exist among us at any time before the Norman Conquest. (See Hickee, Thes. Diss. Epist.; Hallam, Mid. Ag. vol. ii. p. 396, 7th ed.; Hist. Eng. Law, by Reeves, vol. i. pp. 24, 83.) The most probable theory seems to be, that we owe the germ of this, (as of so many other of our institutions,) to the Normans. (Vide sup. vol. I. p. 46.) At the date of Bracton’s work, in the time of Henry the third, it had taken among us, (in substance,) the shape which it now wears; but its rudiments appear as early as the reign of Henry the second. Indeed, the particular species of it, called the *grand assize*, which was appropriate to the trial of the question of *mere right*, (vide sup. p. 506,) was established by a positive law of that monarch’s reign. (Glanv. l. 2, c. 7.)

(*x*) Vide sup. pp. 438, 591.

cause so tried. As between private parties, it can take place only by special permission of the court (*y*). The second is the trial at *nisi prius*; which takes place, as formerly explained (*z*), either before a judge, at the sittings for London or Middlesex, or before the judges of assize upon the different circuits;—and in the latter case as well as the former, it is conducted in effect before a single judge only—it not being the practice for more than one judge to sit in the same cause, upon circuit. But of these methods we propose to discuss the trial at *nisi prius* only, which is the ordinary and regular one,—and shall only remark with respect to the trial at bar that it has in general the same incidents with this, particularly as regards the law of evidence, which applies to both alike (*a*).

When therefore an issue in fact has been joined (*b*), and the trial thereof is intended to take place at *nisi prius*, the plaintiff's attorney is first to *make up and deliver the issue*; that is, to draw up a transcript, on paper, of all the pleadings, and deliver it to the defendant's attorney, that he may ascertain it to be a correct copy of the pleadings which have actually taken place: which transcript is itself called *the issue*,—its most material part.

(*y*) See 11 Geo. 4 & 1 Will. 4, c. 70, s. 7; *Dimes v. Lord Cottenham*, 1 L., M. & P. 318. As to the practice on this mode of trial, see *Buron v. Denman*, 1 Exch. 769; 15 & 16 Vict. c. 76, s. 97; Reg. Gen. Hil. T. 1853, (Pr.) r. 41.

(*z*) Vide sup. p. 438.

(*a*) A trial by jury in certain actions (involving demands of small amount) pending in the superior courts used also occasionally to take place before some judge of an inferior court of record or before the under-sheriff, (or in London before

one of the sheriff's *secondaries*), on a *writ of trial* directed to such judge or sheriff, under 3 & 4 Will. 4, c. 42, s. 17. But that provision is repealed by 30 & 31 Vict. c. 142, s. 6. Where, however, after judgment by default, in an action for unliquidated damages, or on judgment for the plaintiff on demurrer, the amount of damages have to be ascertained, they are still *assessed*, before the sheriff or other officer, by a *jury*.

(*b*) Vide sup. p. 614.

being the question or issue in which the pleadings have terminated (*c*).

The next step is to *enter the proceedings on record*; which the plaintiff's attorney does by transcribing on a parchment roll the issue so made up, and delivering the same at the proper office of the court (*d*). This roll is called the *Nisi Prius Record* (*e*).

The jury for trial of the issue or issues, which the *nisi prius* record comprises, is constituted as follows:— In any county, except London and Middlesex, a precept is issued by the judges of assize to the sheriff, directing him to summon a sufficient number of jurors for the trial of all issues, whether civil or criminal, which shall come on for trial at the next assizes (*f*). But, in London or Middlesex, a precept issues to the sheriff, under the hand of a judge, for summoning a sufficient number of jurors for the trial of all issues in the superior courts, at the next sittings of *nisi prius* which shall be held in those counties (*g*). In either case, however, a printed panel, or slip of parchment containing the names of the jurors, is to be made by the sheriffs, and kept open to public inspection; and a copy of it is to be delivered out to the parties, and annexed to each *nisi prius* record sent from the superior court for trial at those assizes or sittings (*h*). And this panel is to contain the names, abodes and additions of a number of jurors not less than forty-eight, nor exceeding seventy-two, taken from the *jurors' book*; which book, by statute

(*c*) As to the form of this transcript, see Reg. Gen. Hil. T. 1853 (Pr.), schedule, No. 1.

(*d*) 15 & 16 Vict. 76, s. 102.

(*e*) See as to its form, Reg. Gen. above cited, sched. No. 2.

(*f*) 15 & 16 Vict. c. 76, s. 105.

(*g*) Ibid. s. 107. By 17 & 18 Vict. c. 125, s. 59, it is provided, "that the several courts, or any judge thereof, may make all such rules or orders upon the sheriff or

"other person as may be necessary to procure the attendance of a special or common jury for the trial of any cause or matter pending in such courts at such time and place, and in such manner, as they or he may think fit." See Reg. Gen. T. T. 1864; 16 C. B. (N. S.) 576.

(*h*) 15 & 16 Vict. c. 76, ss. 105—107.

6 Geo. IV. c. 50 (*i*), is to be annually made out in each county, out of lists returned from each parish, of persons therein qualified to serve as jurors (*k*).

The course above described, however, applies only in cases where the trial is intended to be by a *common jury*; that is, a jury consisting of persons who possess only the ordinary qualification in point of property, to which we shall have occasion hereafter to refer. But it is in the option either of plaintiff or defendant, in lieu of this, to have the cause tried by a *special jury*; viz., a jury consisting of persons who, in addition to the ordinary qualifications (*l*), are of a certain station in society; viz., esquires or persons of higher degree, or bankers or merchants (*m*). To provide for *country* causes to be tried by special jury, the sheriff is directed, by the same precept of the judge of assize already mentioned, to summon a sufficient number of special jurymen, not exceeding forty-eight in all, to try all the special jury causes at the then approaching assizes: and a printed panel of the special jurors so summoned, is to be kept in the sheriff's office for public inspection; and a copy of it delivered out to parties, and annexed to the *nisi prius* record, in the same manner as in the case of common jurors (*n*). But

(*i*) 6 Geo. 4, c. 50, s. 12. It is by this statute,—as amended by 25 & 26 Vict. c. 107, and taken in connection with 15 & 16 Vict. c. 76, ss. 104 to 116, and 17 & 18 Vict. c. 125, s. 59,—that the whole practice relative to summoning jurors, and the qualification of jurors, is now mainly regulated.

(*k*) As to the expenses of making out these lists, see 7 & 8 Vict. c. 101, s. 60. By 6 Geo. 4, c. 50, the churchwardens and overseers of each parish were required to make out the lists, by *precepts* issued to them annually for that purpose by the high constables of the county; but by 25

& 26 Vict. c. 107, the duties of the high constables in this behalf are transferred to the *clerk of the peace*.

(*l*) As to these, vide post, p. 637.

(*m*) See 6 Geo. 4, c. 50; 3 & 4 Will. 4, c. 42, s. 35; 15 & 16 Vict. c. 76, ss. 112, 113; Reg. Gen. Hil. T. 1853, (Pr.) rr. 44, 45; Dresser v. Norman, 6 C. B. (N. S.) 427.

(*n*) No special jury need, however, be summoned by the sheriff, unless he has received notice to do so from a party to one or more of the causes to be tried. (Reg. Gen. Hil. T. 1853, (Pr.) r. 47.) As to

with respect to London and Middlesex (or *town*) causes, the practice is somewhat different; for where any such cause is intended to be tried by a special jury, a rule of court must be obtained for the purpose (*o*); and, due notice of such intention having been given to the opposite party and to the sheriff, recourse is to be had, by the sheriff, to the *special jurors' list*; which is a list annually made out by him of persons qualified to act as special jurors (*p*). Tickets corresponding with the names of the jurors on this list, being put into a box and shaken, the officer takes out forty-eight (*q*); to any of which names either party may object for incapacity; and supposing the objection to be established, another name is substituted; and these forty-eight names having at a subsequent period been reduced to twenty-four, by striking off such as each party shall in his turn wish to be removed, the twenty-four are accordingly summoned, and their names are placed upon a panel,—to be kept for inspection, delivered out, and annexed to the *nisi prius* record, according to the practice in country causes (*r*). This last method is commonly described as the *striking* of a special jury (*s*).

We may now return to the particular suit in which we have supposed issue to have been joined, and a *nisi prius* record entered.

The next step for the plaintiff to take, provided he has previously given *notice of trial*—a notice which he is entitled to give as early as the delivery of the repli-

the fee of the sheriff for attendance at the trial in common and special jury cases, see Reg. Gen. T. T. 1864; 16 C. B. (N. S.) 576.

(*o*) 15 & 16 Vict. c. 76, s. 110; see Reg. Gen. Hil. T. 1853, r. 45. This rule is obtained, as of course, on the production of a motion paper, signed by counsel.

(*p*) 6 Geo. 4, c. 50, s. 31.

(*q*) 15 & 16 Vict. c. 76, s. 110.

(*r*) *Ibid.*

(*s*) 6 Geo. 4, c. 50, s. 32. By 15 & 16 Vict. c. 76, s. 108, the court may, if they think fit, order a special jury, in any particular *country* cause also, to be struck as before the Act.

cation (*t*),—is to *enter the cause for trial* (*u*). For this purpose, the panel already described having been annexed to the *nisi prius* record, that record is to be taken to the proper officer of the court, and entered with him. And as, if it be not so entered, the cause cannot be tried, it is therefore [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 the trial, giving proper notice to the plaintiff, which proceeding is called the *trial by proviso* (*x*).] It has moreover been now provided (by 15 & 16 Vict. c. 76, s. 101), that if, after issue joined, such issue has not been brought on to be tried according to the course of the court (*y*), the defendant, after such notice as the practice also prescribes in that behalf, shall be at liberty to suggest on the record, that the plaintiff has failed to proceed to trial, though duly required to do so; and may then sign judgment for his costs (*z*).

[Let us now pause awhile, and observe with Sir Matthew Hale (*a*), in these first preparatory stages of the trial, how admirably this constitution is adapted and

(*t*) It must be a ten days' notice at least, in all cases, except that of an ejectment by a landlord against a tenant holding over, where the right of entry accrues after Hilary or Trinity Term; in which case, only six days are required. And if (in any action) the defendant is under terms to take "short notice," only four days are required. (15 & 16 Vict. c. 76, ss. 97, 217.) As to notice of trial, see Reg. Gen. Hil. T. 1853, (Pr.) rr. 34—37, 40, 41.

(*u*) As to entry of causes for trial in London and Middlesex, see Reg. Gen. Hil. T. 1853, (Pr.) r. 83.

(*x*) See as to this Reg. Gen. Hil.

T. 1853, (Pr.) r. 42. As to a *writ of trial* being carried down by proviso, see *Nicholson v. Jackson*, 1 C. B. 622.

(*y*) The course of the court in this respect, is described in 15 & 16 Vict. c. 76, s. 101.

(*z*) 15 & 16 Vict. c. 76, s. 101. Upon a failure by one of the parties to proceed to trial, pursuant to notice, it is also provided that a rule for the *costs of the day* may be obtained by the other party without motion. (15 & 16 Vict. c. 76, s. 99; and see Reg. Gen. Hil. T. 1853, (Pr.) r. 39.)

(*a*) Hist. C. L. c. 12.

[framed for the investigation of truth, beyond any other method of trial in the world. For, first, the person summoning the jurors is a man of some fortune and consequence; that so he may be not only the less tempted to commit wilful 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 course of proceeding, it is, as we have seen, so managed, that [the parties may have notice of the jurors, and of their sufficiency or insufficiency, characters, connexions, and relations, that so they may be challenged upon just cause.] Thirdly, [as to the place of their appearance: which in certain causes of weight and consequence, is at the bar of the court, but in ordinary cases, at the assizes, or sittings at *nisi prius*, held in the county where the cause of action arises or is laid (*b*), and the 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 in the capital, 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 many 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 county where the former, and for the most part the latter also, reside. Fourthly, [the persons before whom they are to appear, and before whom the trial is to be held, are the judges of the courts at Westminster, if it be a trial at bar, or at the London or Middlesex sittings; or the judges of assize delegated from the courts at Westminster by the Crown, if the trial be held in the country; persons whose learning and dignity secure their

(*b*) As to the distinction in this respect between local and transitory actions, vide sup. p. 488.

[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 also 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 peace and the like (*b*).] And we may further remark, that [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 judges, 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 (*c*).]

But let us now return to the assizes, or sittings at *nisi prius*, where, (all previous steps having been regularly settled,) we will suppose the cause to be called on in court. The *nisi prius* 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* (*d*).]

(*b*) So much consequence was formerly attached to this consideration, that it was, as we have seen, once ordained that no man of the law should be judge of assize in his own county. Vide sup. p. 439.

(*c*) The establishment of the system of County Courts, in causes

of comparatively small amount and importance, (as to which, vide sup. p. 399 et seq.) is not to be considered as any disparagement to these remarks; but as a sacrifice made, in such causes, to the great objects of economy and expedition.

(*d*) Vide post, p. 641, n. (*m*).

The calling of the jury consists in successively drawing out of a box, into which they have been previously put, the names of the jurors on the panels annexed to the nisi prius record, and calling them over in the order in which they are so drawn (*e*); and the twelve (*f*) persons whose names are first called, and who appear, are sworn as the jury; unless some just cause of challenge or excuse, with respect to any of them, shall be brought forward. It sometimes happens, however, that, on the application of one of the parties before the trial, a rule of court or judge's order has been obtained, directing that a *view* should be had, by certain of the jurors on the panel, of the messuages, lands or place in question: [in which case, six or more of the jurors, to be agreed on by the parties, or nominated by the sheriff, shall be appointed to have the matter in question shown to them by two persons named in such rule or order; 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 (*g*).]

(*e*) 6 Geo. 4, c. 50, s. 26; 15 & 16 Vict. c. 76, ss. 108, 110.

(*f*) In this patriarchal and apostolical number of twelve, of which a jury in the superior courts always consists, "Lord Coke has discovered," (says Blackstone, vol. iii. p. 366,) "abundance of mystery." (See Co. Litt. 155.) And he proceeds to remark, that 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 quedam esset religio.*" Mr. Hallam also (Hist. Mid. Ag. vol. ii. p. 401,

7th ed.) remarks upon the veneration with which this number was regarded in Scandinavia generally, and cites Spelman's Glossary, voce *Jurata*; Du Cange, voce *Nembda*; and the Edinb. Review, vol. xxxi. p. 115; which last he characterizes as "a most learned and elaborate essay." He observes, too, that Spelman has produced several instances of the regard paid to twelve, in the early German laws; and we have seen in a former note, that there is distinct evidence that twelve jurors were in use among the Anglo-Saxons for an *inquisition*, though there seems no sufficient proof that it was used by them as the number for trial. Vide sup. p. 625, n. (*v*).

(*g*) As to a *view*, see 6 Geo. 4, c. 50, s. 24; 15 & 16 Vict. c. 76,

After the jurors have appeared, and before they are sworn, they are liable to be [*challenged* by either party. Challenges are of two sorts—challenges to the *array*, and challenges to the *polls*.

Challenges to the array are an exception at once to the whole panel in which the jury are arrayed, or set in order, by the sheriff (*g*); and they may be made upon account of partiality or some default in the sheriff, or his under officer, who arrayed the panel;] as if the sheriff be a party in the suit, or related by either blood or affinity to either of the parties. [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 a good cause of challenge to the array (*h*).]

s. 114; by the last of which enacts the *writ* of view formerly required in such cases is dispensed with. See also Reg. Gen. Hil. T. 1853, (Pr.) rr. 48, 49, by which the rule may be drawn up by the officer, upon the affidavit of the party applying, without any motion. By 17 & 18 Vict. c. 125, s. 58, it is also now provided that either party may apply to the court or a judge for the *inspection* by the jury, or by the party himself, or by his witnesses, of any real or personal property, the inspection whereof is material to the determination of the question in dispute; but this is to be without prejudice to the provisions of any preceding Act as to obtaining a *view* by a jury.

(*g*) It has been thought doubtful, if a challenge to the array can be made, when the jury is *special*. See 1 Arch. Pr. by Chitty (8th edit.), p. 424.

(*h*) Formerly, if a lord of parliament had a cause to be tried, and

no *knighthood* was returned upon the jury, it was a cause of challenge to the array. (Co. Litt. 156 a; Selden, Baronage, ii. 2.) But this objection is now taken away. See 24 Geo. 2, c. 18; 6 Geo. 4, c. 50, s. 28. Moreover, it was once necessary that some of the jury should be returned from the neighbourhood where the cause of action was laid in the declaration, so that if none were returned at least from the same hundred, the array might be challenged for want of *hundredors*; an objection founded on the early practice of our law, by which the jurors, in the origin of the institution of trial by jury, were summoned altogether *de vicineto*, and were indeed in the nature of *witnesses*, rather than judges. But the necessity for the hundredors was by successive statutes gradually abolished. (See 27 Eliz. c. 6; 4 Anne, c. 16; 24 Geo. 2, c. 18. And see as to criminal cases, 6 Geo. 4, c. 50, s. 13.) The array might also for-

A challenge to the array may be either by way of *principal* challenge, or a challenge *to the favour*; the former being on one of the direct grounds above described; the latter, on grounds that imply only a probability of bias or partiality, as that the son of the sheriff has married the daughter of the adverse party, or the like (*i*); and there seems to be this practical difference between them, that the first, if sustained in point of fact, must be allowed as of course; the allowance of the latter, is matter of judgment and discretion only (*h*). If the challenge be controverted by the opposite party, it is to be left to the determination of two persons, to be appointed by the court (*l*); and if these persons, called *triors*, decide in favour of the objection, the array is to be quashed, and a new jury impanelled by the coroner (*m*); who acts in this, as in many other instances, as substitute for the sheriff in executing process, where the latter is deemed an improper person (*n*).

[Challenges to the polls, *in capita*, are exceptions to particular jurors, and seem to answer to the *recusatio judicis* in the civil and canon laws; by the constitution of which, a *judex* might be refused upon any sus-

merly be challenged if an *alien* were party to the suit, and if, (after that fact was established and application made to the court for the purpose,) the sheriff did not return a jury *de medietate linguæ*, that is, a jury one half of which consisted of aliens, supposing so many to be found in the place. And this trial by a jury *de medietate* is still allowed in trials for felony or misdemeanor; but cannot now be claimed in a civil action. (See 6 Geo. 4, c. 50, ss. 3, 47.)

(*i*) Co. Litt. 156 a.

(*h*) Ibid.; and sec 3 Bl. Com. 363.

(*l*) It is said that a principal

challenge may be tried by the court itself, without the intervention of triors. (Arch. Pr. by Chitty (8th ed.), p. 427.) See Mayor of Carmarthen v. Evans, 10 Mee. & W. 274.

(*m*) Newman v. Edmonds, 1 Bulst. 114; 2 Hale, P. C. 275; R. v. Edmonds, 4 B. & Ald. 471. If any exception lies to the coroners, the jury is to be arrayed by two clerks of the court, or two persons of the county named by the court and sworn. These are called *elisors* or electors, and no challenge is allowed to their array. (3 Bl. Com. 354; Fortesc. de Laud. LL. c. 25; Co. Litt. 158.)

(*n*) Bl. Com. ubi sup.

[picion of partiality (*o*). By the laws of England also, in the times of Bracton (*p*) and Fleta (*q*), a judge might be refused for good cause; but now the law is otherwise, and it is held that judges and justices cannot be challenged (*r*). For the law will not suppose a possibility of bias or favour in a judge who is already sworn to administer impartial justice;] and whose conduct upon the judgment seat is under the immediate check of public observation. [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 misbehaviour 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, (who are judges of fact only, and are merely private persons,) do not fall under the same principle, and are consequently allowed. They are reduced to four heads by Sir E. Coke,—*propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum* (*s*).

1. [*Propter honoris respectum*; as if a lord of parliament be impanelled on a jury, he may be challenged by either party, or he may excuse himself as exempted by law (*t*).] 2. *Propter defectum*; as if a jurymen be an alien born, this is defect of birth (*u*): in connection with which we may notice the defect of sex,—no female being capable of serving on a jury (*x*). But the principal deficiency is defect of estate sufficient to qualify a man to be a juror. This formerly depended on a variety of

(*o*) Cod. 3, l. 16; Decretal. l. 2, t. 28, c. 36.

(*p*) L. 5, c. 15.

(*q*) L. 6, c. 37.

(*r*) Co. Litt. 294.

(*s*) Ib. 156 b.

(*t*) 6 Geo. 4, c. 50, s. 2. It has been doubted whether, since the peerage has been thus made matter of *exemption*, it is any longer matter of *challenge* by the parties. (See

Arch. Pr. by Chitty, 8th ed., p. 424.)

(*u*) 6 Geo. 4, c. 50, s. 3. See as to the challenge of *alienage* to a special juror, *R. v. Sutton*, 8 B. & C. 417.

(*x*) Except, of course, in the case of a jury of matrons, upon the writ *de ventre inspiciendo*. (As to this, see 6 Geo. 4, c. 50, s. 1, and 3 Bl. Com. 362.)

statutes, but now on the 6 Geo. IV. c. 50, alone (*y*). By this statute the general qualification of a juror is as follows:—He must be between twenty-one and sixty years of age; and must have within the county in which he resides, and in which the action is to be tried, in his own name, or in trust for him, 10*l.* by the year above reprises, in lands or tenements of freehold, copyhold, or customary tenure, or of antient demesne; or in rents issuing out of such lands or tenements; or in such lands, tenements and rents taken together, in fee simple, fee tail, or for the life of himself or some other person. Or else he must have within the same county 20*l.* by the year, above reprises, in lands or tenements, held by lease for twenty-one years or longer, or for a term of years determinable on any life or lives. Or he must, at the least, be a householder, rated or assessed to the poor rate,—or to the inhabited house duty,—in Middlesex, on a value of not less than 30*l.*, or (in any other county) on a value of not less than 20*l.* (*z*). And if he does not possess one

(*y*) It appears from Blackstone (vol. iii. p. 362), that by the statute of Westminster the second, (13 Edw. 1, c. 38,) the general qualification for juries in assizes was 20*s.* by the year; which was increased to 40*s.* by 21 Edw. 1, st. 1, and 2 Hen. 5, st. 2, c. 3. This was doubled by 27 Eliz. c. 6, which required an estate of freehold, to the yearly value of 4*l.* at the least. But the value of money greatly decreasing, the qualification was raised by a temporary Act, (16 & 17 Car. 2, c. 3,) to 20*l.* per annum, and on the expiration of that Act was afterwards fixed by 4 & 5 W. & M. c. 24, at 10*l.* per annum, and 6*l.* in Wales, of freehold land or copyhold; which was the first time that copyholders were allowed to serve on juries in the superior courts. In

addition to which, it was afterwards provided, by 3 Geo. 2, c. 25, that any leaseholder for 500 years absolute, or any term determinable on a life or lives, of the clear yearly value of 20*l.* over and above the rent, should be qualified.

(*z*) 6 Geo. 4, c. 50, s. 1. The Act adds, “or he must occupy a house containing no less than fifteen windows,”—a qualification which had reference to the *window tax*, since abolished. The above qualifications apply not only to juries impanelled to try issues, (whether out of the superior courts or out of the new county courts,) but also to jurors on writs of trial or of inquiry. They do not apply, however, to the jurors in towns corporate, or counties corporate, possessing jurisdictions of their own; the panels of

or other of these qualifications, it is a ground of challenge (*a*). 3. [Jurors may be challenged *propter affectum*; for suspicion of bias or partiality. This may be either a *principal* challenge or *to the favour*;] the distinction between which has been already explained in reference to challenges to the array. As regards challenges to the polls; it is laid down as a cause of principal challenge—[that a juror is of kin, to either party, within the ninth degree (*b*); that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him:] and that, on the other hand, challenges to the favour,—are where the objection is founded on [some probable circumstances of suspicion, as acquaintance and the like (*c*).] Challenges of either kind are determined, like those to the array, by *triors*; the practice as to whom, in the case of challenges to the polls, is stated to be as follows. [The triors, in case the first man called be challenged, must be two indifferent persons named by the court; and if they try one man,

whose juries are to be prepared in manner before accustomed (6 Geo. 4, c. 50, s. 50); and as to *London* jurors, returned to try issues out of the superior courts, the 6 Geo. 4, c. 50, provides a different qualification, viz. that a juror must be a householder or the occupier of a shop, warehouse, counting-house, chambers or office, for the purpose of trade or commerce, within the city; and have lands, tenements or personal estate of the value of 100*l*. (Sect. 50.) With regard to *London* jurors, it is also to be observed, that the mode of procedure in making out the lists and summoning the

jurors, is not altered or affected by the 25 & 26 Vict. c. 107, which alters the mode of summoning jurors in other cases.

(*a*) 6 Geo. 4, c. 50, s. 27.

(*b*) See *Onions v. Nash*, 7 Price, 263; *Hewitt v. Ferneley*, *ibid.* 234.

(*c*) Finch, L. 401. It is remarkable that in the *nemda* or jury of the antient Goths, there was a distinction similar to ours, as to the nature of the challenges: "*Licebat palam excipere, et semper ex probabilis causâ tres repudiari; etiam plures ex causâ prægnanti et manifestâ.*"—Stiern. l. 1, c. 4.

[and find him indifferent, he shall be sworn; and then he and the two triors shall try the next; and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest (*d*). 4. Challenges *propter delictum*, are for some crime or misdemeanor that affects the juror's credit and renders him infamous;]—as for an attainder of treason or felony, (unless he shall have obtained a free pardon,) or for outlawry or excommunication (*e*).

Besides these challenges (*f*), 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 matters of *exemption*; whereby their service is excused, and not excluded. These exemptions formerly depended on various statutes, customs, and charters; but now depend upon the 6 Geo. IV. c. 50, s. 2, the 21 & 22 Vict. c. 90, s. 35, and the 25 & 26 Vict. c. 107, s. 2. The persons exempted under the first of these enactments, are as follow;—peers; judges of the superior courts; clergymen; Roman Catholic priests; dissenting ministers, whose place of meeting is duly registered, and who follow no secular occupation but that of schoolmaster; serjeants, barristers, and advocates, actually practising;

(*d*) Co. Litt. 158. It is said that a principal challenge to the polls may, like a principal challenge to the array, be tried by the *court*, without the intervention of triors. (Arch. Pr. by Chitty (8th edit.), p. 428.)

(*e*) 6 Geo. 4, c. 50, s. 3.

(*f*) It is to be observed, that the case of a formal challenge, whether to the array or to the polls, has now become infrequent; for where the sheriff is not indifferent, the jury may be impanelled in the first instance by the coroner; and supposing it to be impanelled by the sheriff, this will be a sufficient

ground not only for challenge, but for moving in arrest of judgment after the verdict. (Arch. Pr. by Chit. 8th edit., p. 422.) So in case of any objection to a particular juror, the usual course now is, simply to intimate the objection to the proper officer of the court; who, unless the matter be disputed on the other side, will refrain from calling him. So that the learning of challenges, in civil cases at least, (though still of importance,) is rarely illustrated by the modern practice of the courts.

attornies, solicitors, and proctors, actually practising, and taking out their certificates; officers of all courts of law or equity, or of ecclesiastical or admiralty jurisdiction, actually exercising their duties; coroners, gaolers, and keepers of houses of correction; physicians, surgeons, and apothecaries, duly admitted to practise and practising; officers of the royal army or navy, on full pay; pilots and masters of vessels in the buoy or light service, duly licensed; servants of the royal household; officers of customs and excise; sheriff's officers; high constables; and parish clerks (*g*). To these must now be added (under the statutes of Victoria), the following persons;—registered medical practitioners (*h*) and pharmaceutical chemists; managing clerks to attornies, solicitors, and proctors, actually practising; and all subordinate officers in gaols and houses of correction (*i*).

If a sufficient number of jurors do not appear, or if by means of challenges or exemptions a sufficient number of unexceptionable ones do not remain, either party may pray a *tales*. [A *tales* is a supply of *such* men as are summoned upon the panel, in order to make up the deficiency. For this purpose a writ of *decem tales*, *octo tales*, and the like, was used to be issued to the sheriff, at common law.] But now at the assizes, or sittings at *nisi prius*, the judge is empowered, by the 6 Geo. IV. c. 50, s. 37, at the request of either party, to award a *tales de circumstantibus* (*j*); that is, to command the sheriff to return so many other men duly qualified as shall be present, or can be found, to make up the number required for making up a full jury; and to add their names to the former panel. But in the case of common jurors,—of whom seventy-two are usually returned on the same common jury panel (*k*),—it happens of course but rarely, that the whole are exhausted so as

(*g*) See 6 Geo. 4, c. 50, s. 2.

(*h*) 21 & 22 Vict. c. 90, s. 35.

(*i*) 25 & 26 Vict. c. 107, s. 2.

(*j*) F. N. B. 166; Reg. Brev. 179.

(*k*) Vide sup. p. 627.

to make a *tales* necessary; and in special jury causes, the deficiency is, by the same statute, directed to be made up from the common jury panel, if a sufficient number can be found. But if such number be not found, there is then to be a *tales de circumstantibus*, in manner before directed (*l*).

The necessary number of twelve qualified persons being at length obtained, they are then separately sworn upon the New Testament (*m*), “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,” *jurati*, and the “jurors” *juratores* (*n*).

[The jury are now ready to hear the merits; and to fix their attention the closer to the facts which they are impanelled and sworn to try, *the pleadings are opened to them*] on the part of the plaintiff; and, (as a general rule,) the case then stated [by counsel on that side which

(*l*) 6 Geo. 4, c. 50, s. 37. As to a *tales* in a special jury cause, see *Gatliff v. Bourne*, 2 M. & Rob. 100; *Snook v. Southwood*, 1 R. & M. 429; *British Museum v. White*, 3 Car. & P. 289. It is provided by 15 & 16 Vict. c. 76, s. 113, that where notice has not been given that a cause is to be tried by special jury, it may be tried by a jury from the panel of common jurors.

(*m*) This applies only to persons professing the Christian religion, and not proposing to be sworn in a different manner, as they may claim to be, if they please, under 1 & 2 Vict. c. 105. And if the juror summoned refuse or be unwilling from alleged conscientious motives to be sworn at all, he may now (by 30 & 31 Vict. c. 35, s. 8) make solemn affirmation instead.

(*n*) Blackstone remarks (vol. iii. p. 366), that the *selecti iudices* of

the Romans bore in many respects a remarkable resemblance to our juries,—“for they were first returned by the prætor; then their names were drawn by lot, till a certain number was completed; then the parties were allowed their challenges; next they struck what we call a *tales*; lastly, like our jury, they were sworn.” (See *Ascon.* in *Cic. Verr.* 1, 6.) He also remarks, that a learned writer of our own, Dr. Pettingall, bath shown, in an elaborate work (published A.D. 1769), so many resemblances between the *δικασται* 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. As to the derivation of our juries; however, vide *snp.* p. 625, n. (*v*).

[holds the affirmative of the question in issue (*o*). For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question (*p*); in which our law agrees with the civil: "*ei incumbit probatio, qui dicit, non qui negat; cum per rerum naturam factum negantis probatio nulla sit*" (*q*). The opening counsel briefly informs them what has been transacted in the action,] up to that stage of its prosecution; explains [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 (*r*). The nature of the case, and the evidence intended to be produced, are next laid before them by counsel also on the same side;] and when their evidence is gone through, and in some cases summed up also (*s*), the advocate on the other side opens the adverse case, and supports it, if its nature so require, by evidence; which he is also entitled to sum up; and then the party which began is heard by way of

(*o*) In all actions for *unliquidated damages*, the plaintiff shall begin, though the affirmative of the issue is on the defendant. See *Mercer v. Whall*, 5 Q. B. 447; *Cooper v. Wakley*, Moo. & M. 248.

(*p*) *Calder v. Rutherford*, 3 Brod. & Bing. 302; *Evans v. Birch*, 3 Camp. 10. But there are cases in which the law presumes the affirmative; and where consequently his case must be proved by the party asserting the negative. See *Williams v. East India Company*, 3 East, 192.

(*q*) Ff. 22, 3, 2; Cod. 4, 19, 23.

(*r*) Blackstone remarks (vol. iii. p. 367), that "instead of this, formerly, the whole record and process of the Latin pleadings were read to the jury in English by the court, and the matter in issue

"clearly explained to their capacities."

(*s*) By 17 & 18 Vict. c. 125, s. 18, it is provided, that "the party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins, his intention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any); and the right to reply shall be the same as at present." The 28 & 29 Vict. c. 18, contains a similar provision with regard to *criminal trials*; (vide post, vol. IV. p. 516.)

reply. But no reply is allowed, (save only in the case of the Crown,) unless evidence be given in answer to the case first stated.

The nature of the present work is not adapted to a disquisition on the numberless niceties and distinctions which attend the law of evidence. We must confine ourselves to a few observations on the nature of evidence in general, and a notice of some of its leading rules and maxims.

Proofs or evidence, (for the terms are generally used as synonymous,) are either *written* or *parol*. The former consist of records, deeds or other writings (*t*); the latter of witnesses personally appearing in court, and (as the general rule) sworn to the truth of what they depose.

With respect to witnesses, there is a process to bring them in by writ of *subpœna ad testificandum* (*u*); which commands them, laying aside all excuses, and on pain of forfeiting 100*l.*, to appear at the trial, and give their evidence. And it may contain a clause of *duces tecum*; requiring them to bring, at the same time, all such deeds or writings in their possession or power, as the party who issues the subpœna may think material for his purpose. In the event of the non-attendance of a person so subpœnaed, and his inability to show any lawful ground of excuse, (such as that of dangerous illness,) he is considered as having committed a contempt of court; and is liable to an attachment, (a species of criminal process,)

(*t*) As to the admissibility in evidence of letters of an agent, *Jones v. Shears*, 4 A. & E. 832; of entries in parish books, *Taylor v. Devey*, 7 A. & E. 409; of an antient survey of a manor, *ibid.* 617; of books of treasurer of charity, *Doe v. Hawkins*, 2 Q. B. 212; of judgments, *Christy v. Tancred*, 9 Mee. & W. 438; of public books not judicial, *Jewison v. Dyson*, *ibid.* 540; *Rowe v. Brenton*,

8 B. & C. 743; of title deeds, *Wolleston v. Hakewill*, 3 Man. & Gr. 297.

(*u*) By 17 & 18 Vict. c. 34, a *subpœna* may now be had to compel the attendance of witnesses at the trial of an action in any of the superior courts of law, *from any part of the united kingdom*. As to the application of this statute, see *O'Flanagan v. Geoghegan*, 16 C. B. (N. S.) 636.

under which he may be punished for such contempt. And an action at common law will also lie against him, at suit of the party grieved, to recover compensation for any loss that may be occasioned by the non-attendance (*a*). [But no witness is bound to appear at all unless his reasonable expenses for the whole period of his attendance, *eundo, morando, et redeundo*, are tendered him: nor if he appears, is he bound to give evidence till such charges are actually paid him;] and he is also protected during the same period from any arrest for debt (*b*). If it be ascertained beforehand (*c*) that a person required as a witness, will be unable to attend the trial from permanent sickness or infirmity, or absence in parts beyond the court's jurisdiction, the court is empowered, by 1 Will. IV. c. 22 (*d*), to issue a commission for his examination at any place *out* of the jurisdiction (*e*), or (without issuing a commission) to order his examination at any place *within* the jurisdiction, (as the case may require): and such examination, (which may be on interrogatories or

(*a*) An action will also lie on the stat. 5 Eliz. c. 9, to recover a penalty of 10*l.* at the suit of the party grieved. But this statutory proceeding is not an usual one. As to the action at common law for non-attendance, see *Davis v. Lovell*, 1 Horn. & Hurl. 451; *Couling v. Coxe*, 6 D. & L. 399. As to attachment for non-attendance, *Scholes v. Hilton*, 10 Mee. & W. 15; *Chapman v. Davis*, 1 Dowl. N. S. 239.

(*b*) See *Meekins v. Smith*, 1 H. Bl. 636, where it was laid down that the same privilege of exemption from arrest applies to *all* persons, (whether witnesses or not,) who have *bonâ fide* occasion to attend the trial. It has been before stated that it extends to the counsel and attorneys. Vide sup. p. 392, n. (*a*).

(*c*) As the general rule, the court will not entertain an application of this nature, till after issue has been joined. (See *Mondel v. Steele*, 8 Mee. & W. 300; *Finney v. Beasley*, 17 Q. B. 86.)

(*d*) This statute recites and extends certain provisions contained in 13 Geo. 3, c. 63, which referred to *India* only.

(*e*) If the place where the examination is to be had is in any of the colonies or foreign dominions of the Crown, the commission is addressed to a court or judge there. The manner in which the examination is to be had by such court or judge is regulated, in certain cases, by 22 Vict. c. 20. (As to this Act, see *Campbell v. Att.-Gen.*, Law Rep., 2 Ch. App. 571.)

otherwise, as the court shall direct,) may afterwards, under certain circumstances, be read in evidence at the trial. The circumstances which justify its being so read are the death of the witness since his deposition was taken, or his continued sickness, infirmity or absence in parts beyond the jurisdiction of the court (*f*):—but otherwise it cannot be used without the consent of the party against whom it is offered (*g*). So, also, if it be thought desirable by either party with a view to his case at the trial, he is enabled by 17 & 18 Vict. c. 125, s. 50 (*h*), to obtain an order for the disclosure and production, by the opposite party, of any document in his possession or power,—unless he can show some sufficient objection to its production; and also, (sect. 51,) to obtain leave to deliver to the opposite party or his attorney *interrogatories* in writing, in order to obtain from him a discovery

(*f*) As to the discretion of the judge under this provision, see *Duke of Beaufort v. Crawshay*, Law Rep., 1 C. P. 699.

(*g*) 1 Will. 4, c. 22, s. 10. As to commissions and orders to examine witnesses before trial, see also 6 & 7 Vict. c. 82, ss. 5, 6; 17 & 18 Vict. c. 125, ss. 46, 47; Reg. Gen. Hil. T. 1853, Pr. r. 33. This mode of examination cannot be resorted to in a *criminal* prosecution, either at common law or under the above statutes. (*Queen v. Inhabitants of Upton St. Leonards*, 10 Q. B. 827.) We may take occasion to remark here, that, by 19 & 20 Vict. c. 113, an order may now be obtained from the court or a judge for the examination of witnesses in England, whose testimony is required in *foreign* courts, before which any civil or commercial matter is pending; and also that a somewhat analogous proceeding (under 22 & 23 Vict. c. 63) may take place to ascertain the

law in any part of her majesty's dominions.

(*h*) See as to this provision, *Forshaw v. Lewis*, 10 Exch. 712; *Scott v. Zygomald*, 4 Ell. & Bl. 483; *Herschfeld v. Clarke*, 11 Exch. 712; *Smith v. Great Western Railway Company*, 6 Ell. & Bl. 405. We may notice also here the antecedent provision of 14 & 15 Vict. c. 99, s. 6, (in aid of the power of the courts as at common law), making either party compellable, in any action or proceeding at law, to allow the other an *inspection* of all documents relating to the action or proceeding. On this subject, see the following cases: *Scott v. Walker*, 2 Ell. & Bl. 555; *Doe d. Avery v. Longford*, 1 B. C. C. 37; *The London Gas Light Company v. Parish of Chelsea*, 6 C. B. (N. S.) 411; *Shadwell v. Shadwell*, *ibid.* 697; *The Penarth Harbour Company v. Cardiff Waterworks Company*, 7 C. B. (N. S.) 816.

of such matters as are material to the action or defence respectively (*i*).

[All witnesses, that have the use of their reason, are to be received and examined (*h*).] To this, indeed, there were formerly a variety of exceptions. For no party to the suit was allowed, in any case, to give evidence; and persons *interested* in the testimony they were to give, —however slight that interest might be (*l*),—were also incompetent to be heard as witnesses on the side of the question to which their interest inclined (*m*). Moreover, persons that were *infamous*, that is, of such character that they might be challenged as jurors *propter delictum* (*n*), were wholly inadmissible as witnesses. But the principle of absolute exclusion in these cases, though once among the most settled peculiarities of the English law, has been eradicated from it by modern acts of parliament; and the objection is now admissible only as affecting the *credibility*, and not the *competency* of the witness. For it was, in the first place, provided, generally, by 6 & 7 Vict. c. 85, that no person offered as a witness should thereafter be excluded, on the ground of incapacity from interest or from crime, from giving evidence on any issue or inquiry whatever (*o*); and it is also now further

(*i*) See as to this provision *Martin v. Hemming*, 10 Exch. 478; *Osborn v. The London Dock Company*, *ibid.* 698; *James v. Barnes*, 17 C. B. 596; *May v. Hawkins*, 11 Exch. 210; *Flintercroft v. Fletcher*, *ibid.* 543; *Whateley v. Cronter*, 5 Ell. & Bl. 709; *Croomes v. Morison*, *ibid.* 984; *Chester v. Wortley*, 17 C. B. 410; 18 C. B. 239; *Tetley v. Easton*, 18 C. B. 643; *Bird v. Malzy*, 1 C. B. (N. S.) 308; *Moor v. Roberts*, 2 C. B. (N. S.) 671; *Adams v. Lloyd*, 3 H. & N. 351. *Bartlett v. Lewis*, 12 C. B. (N. S.) 249.

(*h*) A child, however, too young

to understand the nature of an oath, or an adult unable, from mental infirmity, to understand it, is incompetent. (1 Stark. Ev. 81.)

(*l*) See *Doe v. Bramwell*, 3 Q. B. 307.

(*m*) A few exceptions had been from time to time introduced by statute, to meet particular cases: see 11 Ann. st. 1, c. 18, s. 13; 13 Geo. 3, c. 78, s. 77; 9 Geo. 4, cc. 32, 33.

(*n*) 3 Bl. Com. 370. As to this cause of challenge, *vide sup.* p. 639.

(*o*) *Udal v. Walton*, 14 Mee. & W. 254; *Att.-Gen. v. Hitchcock*, 1 Exch. 91.

enacted by 14 & 15 Vict. c. 99, that even the *parties* to a suit themselves shall be both competent and compellable to give evidence on behalf of any of the parties thereto; though this is subject to exception where the question asked tends to criminate the person examined; or where it is put in any action for breach of promise of marriage, or in any proceeding instituted in consequence of adultery (*p*). Finally, by 16 & 17 Vict. c. 83, the wife (or husband) of any party is placed, in this respect, in the same position as the party himself, subject only to the qualification following—that a husband and wife cannot give evidence for or against each other in any *criminal* proceedings, or in any proceedings in consequence of adultery; and that neither can be compelled to disclose any matters which they have learned by communication from each other during their marriage. There is, however, still in force one exception to the general rule that all witnesses having the use of their reason may be examined; viz. that no one shall be received to testify who professes not to believe in the existence of a God by whom perjury will be punished (*q*).

The oath, (which is to speak “the truth, the whole truth, and nothing but the truth,”) is administered to witnesses in general upon the New Testament; but to the believers in other religions than the Christian, in the forms appropriate to their creed (*q*). And by 1 & 2 Vict. c. 105, it is declared and enacted, that in all cases in which an oath is administered to any person on any occasion whatever, he shall be bound thereby, provided it be administered in such form and with such ceremonies as he may declare to be binding. And by 17 & 18 Vict.

(*p*) See *Pyne v. Pyne*, 1 Swab. & Trist. 178.

(*q*) See *Omichund v. Barker*, 1 Atk. 49; *Maden v. Catanach*, 7 H. & N. 360. If incompetency on this ground be suspected, the practice is to examine the witness on the *voir*

dire (as it is termed), *dicere veritatem*, in order to ascertain his competency before his evidence in the cause is taken. (See *The Queen v. Whitehead*, Law Rep., 1 C. C. R. 33.)

c. 125, s. 20, if any person called *as a witness* shall be unwilling from alleged conscientious motives to be sworn, the court, upon being satisfied of the sincerity of the objection, shall permit him to substitute his solemn affirmation (*r*). But both the enactments last mentioned are subject to the proviso that, upon a false statement of fact, the witness may be convicted of perjury, as though he had been sworn to it, in the form and with the ceremonies commonly adopted.

A witness is not bound to answer any question that tends to expose him to punishment as a criminal or to penal liability (*s*), or to forfeiture of any kind (*t*). But by 46 Geo. III. c. 37, it is declared and enacted, that he cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to expose him to a penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he *owes a debt*, or is otherwise subject to a *civil suit*. So, also, upon the general principle of the convenience of public justice, no questions are permitted to be asked, which tend to the discovery of the channels through which information has been given to the officers of justice in criminal prosecutions (*u*).

A counsel, attorney, or solicitor, is not bound or even at liberty to divulge the secrets of the cause with which

(*r*) This provision applies only to *civil* courts, but a similar one has been since passed (24 & 25 Vict. c. 66) in reference to *criminal* proceedings. (Vide post, vol. IV. p. 522.) It is to be observed, also, that an *affirmation* is allowed in lieu of oath, on *all* occasions, in the case of Quakers, Moravians and Separatists. See 3 & 4 Will. 4, c. 49, s. 82; 1 & 2 Vict. c. 77; 6 & 7 Vict. c. 85, s. 2; 22 Vict. c. 10.

(*s*) See Stark. Ev. 136; 14 & 15

Vict. c. 99, s. 3; *Bradlaugh v. Edwards*, 11 C. B. (N. S.) 377. As to the effect of a *pardon* on this privilege of a witness, see per Crompton, J. in the *Queen v. Boyes*, 1 B. & Smith, 324.

(*t*) Phill. on Evidence, vol. 2, p. 420. See *Boyle v. Wiseman*, 10 Exch. 647; *Fisher v. Ronalds*, 12 C. B. 762.

(*u*) *Hardy's case*, 44 St. Tr. 816; *Attorney-General v. Briant*, 15 Mees. & W. 169.

he may have become confidentially intrusted (*v*); nor can official persons be called upon to disclose any matter of state, the publication of which may be prejudicial to the community (*x*). But the law recognizes no other privilege in this matter; and compels all other professional persons, whether physicians, surgeons, or divines, to divulge the secrets (if relevant to the issue) with which they have become professionally acquainted: and will not allow even a servant or private friend to withhold a relevant fact, though of the most delicate nature, and communicated to him in the strictest confidence (*y*).

A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness, in the opinion of the judge, prove adverse, contradict him by other evidence; or, by leave of the judge, he may prove that he has made, at some other time, a statement inconsistent with his present testimony. In order, however, to protect the witness in such case against unfair surprise, it is necessary, before such proof be given, that the circumstances of the supposed former statement, so far as is sufficient to designate the particular occasion, should be mentioned to him; and that he should be asked whether or not he has made such statement (*z*).

[One witness, if credible, is *sufficient* evidence to a

(*v*) See *Reg. v. Duchess of Kingston*, 11 St. Tr. 246; *Wilson v. Rastall*, 4 T. R. 753; *Cromack v. Heathcote*, 2 Brod. & Bing. 4; *Bramwell v. Lucas*, 2 B. & C. 745; *Griffith v. Davies*, 5 B. & Ad. 502; *Marston v. Downes*, 1 A. & E. 31; *Doe v. Seaton*, 2 A. & E. 171; *Turquand v. Knight*, 2 Mee. & W. 98; *Doe v. Watkins*, 3 Bing. N. C. 421; *Weeks v. Argent*, 16 Mee. & W. 817; *Volant v. Soyer*, 22 L. J., C. P. 83; *Brown v. Foster*, 3 Jur. (N. S.) 245, Exch. As to the case of a *trustee*,

see *Davies v. Waters*, 9 Mee. & W. 608.

(*x*) See *Beatson v. Skene*, 5 H. & N. 832.

(*y*) See *Wilson v. Rastall*, ubi sup; *Rex v. Duchess of Kingston*, ubi sup; *Valliant v. Dodemead*, 2 Atk. 524.

(*z*) 17 & 18 Vict. c. 125, s. 22. See *Greenhough v. Eccles*, 5 C. B. (N. S.) 786. There is a similar enactment with regard to *criminal* trials (28 & 29 Vict. c. 18, s. 3).

[jury of any single fact; though undoubtedly the concurrence of two or more corroborates the proof. For 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*” (a).]

After the examination of the witness by the party for whom he is called, which is termed his *examination in chief*, he is subject to *cross-examination* by the opposite party,—which being concluded, he may then be *re-examined* by the party calling him, in reference to any matter suggested by the cross-examination (b). The evidence he has given thus passes through a close and severe scrutiny; while on the other hand it receives all the support and protection which the interests of justice require.

The object of the cross-examination, it should be observed, may not only be to obtain new facts not before elicited, but to impeach the character of the witness for veracity. He may therefore be asked if he has not given a contrary account of the same matter on a former occasion, and if he does not distinctly admit this, proof

(a) Cod. 4, 20, 9. Blackstone remarks here (vol. iii. p. 370) upon the qualification with which this rule is followed by our modern civilians. As they do not allow a less number than two witnesses to be “*plena probatio*,” they call the testimony of one, though never so clear and positive, *semiplena probatio* only, on which 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 favour, this immediately converts the half proof into a whole one.” Our law has always taken and still takes a very different course. It allows one witness to suffice as stated in the text; and as to the evidence of the parties to the suit used formerly to reject it altogether; though by 14 & 15 Vict. c. 99, they are now both competent and compellable to be examined.

(b) As to the practice on cross-examination and re-examination, see *Prince v. Samo*, 7 A. & E. 627.

may then be given, *aliunde*, that he has done so (*c*). But the law, in this case, also, makes the same proviso for his protection as in the case where he is interrogated as to former statements, by the party producing him (*d*); and makes besides this further proviso, that if it is intended to contradict him by his former statement in *writing*, his attention must, before the contradictory proof be given, be called to those parts of the writing which are to be used for the purpose of contradiction (*e*). Evidence may also be offered to prove that he has been convicted of perjury or the like; or, generally, that he is of such a character as not to deserve to be believed upon his oath. But no evidence can be given against him of particular acts of misconduct, for this would be to engraft another trial upon that which is already before the jury; and not only perplex the administration of justice, but put the witness himself to the unfair disadvantage of being assailed on charges of which he had no previous notice (*f*). He may, however, be questioned as to whether he has been convicted of any felony or misdemeanor; and if he denies the fact or refuses to answer, the conviction may be proved (*g*).

The nature of the evidence itself, whether obtained from witnesses, or from written instruments, is the next point that naturally presents itself for consideration; and the main principles of the law connected with this subject shall here be briefly stated.

(*c*) 17 & 18 Vict. c. 125, s. 23.

(*d*) Vide sup. p. 647.

(*e*) 17 & 18 Vict. c. 125, s. 24; 28 & 29 Vict. c. 18, ss. 4, 5.

(*f*) 1 Stark. Ev. 145. See Queen's case, 2 Brod. & Bing. 299; Spencely v. De Willot, 7 East, 108; Carpenter v. Wall, 11 A. & E. 803.

(*g*) 17 & 18 Vict. c. 125, s. 25. By the same section a certificate

containing the substance and effect only of the indictment and conviction, purporting to be signed by the clerk of the court or other proper officer, shall, upon proof of the identity of the person, be sufficient evidence of the conviction without proof of the signature or official character of the person appearing to have signed.

First, then, we may remark, that no evidence is necessary, as to any matters of which the court will take judicial notice; as, for instance, of the existence of a war in which the country is engaged, and which has been publicly proclaimed, or recognized in acts of parliament (*h*). Nor is any needed as to matters which the law presumes,—as that a man is innocent till the contrary be shown,—that all official acts have been done in due form;—or that a child born to a woman during her marriage with her husband is legitimate (*i*). Nor is evidence in general necessary, with respect to matters which the opposite party has at any time admitted to be true (*k*): and it is of course always dispensed with as to matters upon which an admission has been made for the express purpose of being used at the trial. And in reference to this subject we may remark, that by 15 & 16 Vict. c. 76, s. 117, either party may call on the other, by notice, to admit, for the purpose of the trial, any document, saving all just exceptions; and in case of refusal or neglect to do so, the costs of proving the document shall be paid by the party so called upon, whatever may be the result of the cause,—unless, indeed, at the trial the judge shall certify that such refusal to admit was

(*h*) See *R. v. Beranger*, 3 M. & S. 67; *Russell v. Dickson*, 6 Bing. 442; *Alcinous v. Nigreu*, 4 Ell. & Bl. 217. As to the admission, without proof, of acts of state, judicial proceedings, and the like, and of certain official documents, purporting to be genuine, see 8 & 9 Vict. c. 113; 14 & 15 Vict. c. 99, ss. 7—14; c. 100, s. 22.

(*i*) 1 Bl. Com. 457. See *Goodright v. Saul*, 4 T. R. 251, 356; *R. v. Mansfield*, 1 Q. B. 449; *Say & Sele Peerage*, 1 H. of L. Cases, 509; *Hargrave v. Hargrave*, 9

Beav. 552.

(*k*) See *Rex v. Gardner*, 2 Camp. 513; *Rex v. Topham*, 4 T. R. 126; *Brickett v. Hulse*, 7 Ad. & E. 454. As to the effect of admissions implied upon the pleadings, by omitting to traverse a fact alleged or otherwise, see *Digby v. Thompson*, 4 B. & Ad. 821; *Stracey v. Blake*, 1 Mee. & W. 168; *Bennison v. Davison*, 3 Mee. & W. 179; *Smith v. Martin*, 9 Mee. & W. 304; *Spencer v. Barough*, *ibid.* 425; *Bingham v. Stanley*, 2 Q. B. 117; *Gould v. Oliver*, 2 Man. & G. 208.

reasonable; and, on the other hand, no costs of proving any document will, in general, be allowed to a party who neglects to give such notice to his adversary (*l*).

Again, it is a fundamental rule, that no evidence is admissible except upon the point in issue (*m*). [Therefore, in an action of debt, where the defendant denies his bond, by the plea that it is not his deed, and the issue is whether it be his deed or no,—he cannot give a release of this bond in evidence;] for that does not destroy the bond, but shows only that it is discharged; and therefore does not support his side of the issue, which is the allegation that the bond alleged against him is not his deed. Instead of such a plea, he should have pleaded the release.

Another rule of the same general nature is, that none but the best evidence shall be adduced (*n*); by which we are to understand, that that which is of a secondary, shall not be substituted for that which is of a primary kind, where the primary evidence is accessible; a rule founded on the presumption that such a substitution is probably prompted by some sinister motive. Thus it is inflexibly held, that the contents of no *private* deed or writing,—as distinguished from a record or other public document (*o*),—can be proved by a copy (still less by mere oral evidence), if the writing be in existence, and can be procured by the party by whom the proof is offered,—but the writing itself must be produced (*p*). And if

(*l*) As to *notice to admit*, see Reg. Gen. H. T. 1853, (Pr.) rr. 29, 30, and Lush, Fr. p. 364, 2nd edit.

(*m*) 3 Bl. Com. 367; B. N. P. 298; Hey v. Moorhouse, 6 Bing. N. C. 52.

(*n*) 3 Bl. Com. 368. See Taylor on Evidence, p. 340—368, 2nd edit.

(*o*) See 14 & 15 Vict. c. 99, s. 7. As to the *subpœna* to produce an

original record, see Reg. Gen. Hil. T. 1853, (Pr.) r. 32

(*p*) See M'Gahey v. Alston, 2 Mee. & W. 206; Jones v. Tarleton, 9 Mee. & W. 675; Howard v. Smith, 3 Man. & Gr. 254; Queen v. Llanfaethly, 2 Ell. & Bl. 940. We may remark here, that by 17 & 18 Vict. c. 125, s. 87, the court or a judge may order, in an action on a bill of exchange or other negotiable instru-



there be occasion to prove its execution by a witness,—a proof that the law in general requires, unless it be thirty years old, and come out of the possession of some person naturally entitled to the custody (*q*),—this could only be done, as the law until recently stood, by calling the particular person (if any) whose name was thereon written as attesting the execution (*r*); or by calling one of them at least, if there were several; or else by proving that such attesting witnesses are all dead or otherwise incapable of giving their testimony (*s*), and then adducing secondary evidence of the execution, as by proof of the handwriting to one or more of their signatures (*t*). And so strict was this rule in its nature, that even the admission of the party against whom the instrument was produced, that it was executed by him, (unless such admission were made for the express purpose of the trial,) would not suffice to excuse the absence of the attesting witness (*u*). But the law in this respect has undergone an important change: for by 17 & 18 Vict. c. 125, s. 26, it is not now necessary to prove by the *attesting witness* any instrument to the validity of which attestation is not requisite; and such instrument may be proved, by admission or otherwise, as if there had been no attesting witness thereto (*v*).

On the other hand, however, it is held that there are no degrees in secondary evidence; but that where the circumstances are such as to excuse a party from giving the proper or primary proof, he is at liberty to resort to

ment, that the loss of it shall not be set up at the trial, provided a satisfactory indemnity is given against the claims of any other person.

(*q*) B. N. P. 255; 2 Phill. on Ev. 203; Doe *d.* Neale *v.* Samples, 8 A. & E. 151.

(*r*) Gillott *v.* Abbott, 7 A. & E. 783.

(*s*) Adams *v.* Kerr, 1 B. & P. 360.

(*t*) See Nelson *v.* Whittall, 1 B. & Ald. 19.

(*u*) Abbott *v.* Plumbe, 1 Doug. 216; R. *v.* Harringworth, 4 M. & S. 354.

(*v*) And see 28 & 29 Vict. c. 18, s. 7, establishing a similar practice in *criminal* trials.

any species of secondary evidence within his power (*x*). Thus, where the defendant is let into secondary evidence of the contents of a letter,—by his showing that the letter itself is in the possession of the plaintiff, who has had notice to produce it in court, but fails to do so (*y*),—he is then at liberty to give *oral* evidence of its contents; and is not bound to produce a *copy*, though in fact he should have kept one (*z*).

Another principal rule is, that *hearsay*, that is, a statement by a witness of what has been said or declared out of court, by a person not party to the suit, is not admissible as evidence. For our law deems it unsafe to rely upon the assertions of any one, unless he be called as a witness in the cause, and deliver his testimony under the sanction of an oath, and the check which the power of cross-examination imposes (*a*). And this rule is so absolute, that the death of the person by whom the fact was so asserted out of court, and the consequent impossibility of producing him as a witness, makes no difference. Upon the same principle no written entry or memorandum, made by a person not party to the suit, can in general be admitted as evidence, even after his death, as between the plaintiff and defendant; for this falls under the same consideration, and is in effect not distinguishable from hearsay evidence.

The rejection of hearsay is subject, however, to exception in particular cases. For, first, the declaration of a third person is, in certain instances, admitted as forming part of the *res gestæ*; or, else, as deriving particular credibility from the circumstances under which it was made. Thus, if a question arises, whether a third person committed an act of bankruptcy, by absencing him-

(*w*) *Doe v. Ross*, 7 Mee. & W. 102.

(*y*) As to a *notice to produce* and the manner of proving it, see 15 & 16 Vict. c. 76, s. 119.

(*z*) *Brown v. Woodman*, 6 Car. & P. 206, per Parke.

(*a*) See *Wright v. Doe*, 7 A. & E. 384; *Stobart v. Dryden*, 1 Mee. & W. 615.

self from his house, his own declaration made at the time, that he absented himself to avoid a creditor, is good evidence (*b*). So the books of stewards, or other receivers, though strangers to the suit, are admitted in evidence after their death, so far as the entries therein tend to charge them with the receipt of money; because such acknowledgments, having been made against their own interest, are entitled on that ground to particular weight (*c*). Again, declarations or statements in the nature of hearsay are admitted, where evidence of that description happens to constitute the natural and appropriate means of proof; as upon questions of pedigree, custom, boundary, and the like (*d*). To which we may add, as another exception from the general rule, that a statement made by a third person will be receivable as evidence against the plaintiff or defendant in the cause, if the plaintiff or defendant be proved to have been present when the statement was made, and to have heard its import; for it then becomes material to consider whether, by his language or demeanour on the occasion, it appeared to receive his assent (*e*).

Lastly, we may notice as a further rule, so far as written instruments are concerned, (and one of recent introduction,) that where the genuineness of a writing is in dispute, evidence on that point may be given, by witnesses speaking on *comparison* of such writing with any other writing which has been proved to the satisfaction of the judge to be genuine (*f*).

These rules relate to the *admissibility* of evidence in

(*b*) 1 Stark. Ev. 48.

(*c*) See *Higham v. Ridgeway*, 10 East, 109; *Doe v. Coulthred*, 7 A. & E. 235; *Percival v. Nanson*, 7 Exch. 1. As to entries against interest, see 2 *Smith's Leading Cases*, 193; *Fursdon v. Clogg*, 10 Mee. & W. 574.

(*d*) See *Davies v. Lowndes*, 5

Bing. N. C. 161; *Thomas v. Jenkins*, 6 A. & E. 525; *Barraclogh v. Johnson*, 8 A. & E. 99; *Brisco v. Lomax*, *ibid.* 198; *Doe v. Hawkins*, 2 Q. B. 212; *Bradley v. James*, 13 C. B. 822.

(*e*) 1 Stark. Ev. 50.

(*f*) 17 & 18 Vict. c. 125, s. 27.

different cases (*g*). As to its *effect*, we may remark in general, that it may be either *positive* or *circumstantial* (*h*); by the former of which we commonly understand a proof of the very fact in question; by the latter, a proof of circumstances from which, according to the ordinary course of human affairs, the existence of that fact may reasonably be *presumed* (*i*). And the strength of circumstantial or presumptive evidence varies according to the nature and particular combination of the facts proved. It may either be barely sufficient to decide the question, supposing no evidence to be offered to the contrary; or it may be strong enough to prevail against evidence offered on the other side, or even so violent as not to admit of being repelled by any adverse evidence whatever, except under very particular circumstances.

(*g*) As to the objection to the reception of written instruments, founded on the want or insufficiency of *stamp*, ubi sup. vol. I. p. 500, n. (*o*).

(*h*) Blackstone (vol. iii. p. 371) defines circumstantial evidence as the proof of such circumstances as “either necessarily or usually attend the fact itself.”

(*i*) It is to be observed that the presumptions here referred to are of a different kind from the presumptions of *law* before mentioned, (vide sup. p. 652,) which are in truth mere legal maxims in the abstract, on which, as on other points of law, the jury are to follow implicitly the direction of the judge. But the presumptions now in question, arise from special circumstances; and are inferences which in general the jury are at liberty to adopt or reject; though even here their discretion is in some instances controlled by precedent, or the ma-

nifest reason of the case. Thus (amongst other instances) we have legal decisions upon the sufficiency of the presumption of life, under particular circumstances; see *Nepean v. Doe*, 2 Mee. & W. 894; of loss of ship, *Green v. Brown*, 2 Str. 1199; of seisin in fee, *Jayne v. Price*, 5 Taunt. 326; *Doe v. Williams*, 2 Mee. & W. 749; of death without issue, *Doe v. Woolley*, 8 B. & C. 22; *Earl of Roscommon's case*, 6 Clark & Fin. 97; of a reconveyance, *Fenney v. Jones*, 3 M. & Scott, 472; *Doe v. Williams*, 1 Mee. & W. 749; of unity of possession, *Clayton v. Corby*, 2 Gal. & D. 174; of authority as agent, *Owen v. Barrow*, 1 N. R. 101; *Ward v. Evans*, Salk. 442; of payment, *Welch v. Seaborn*, 1 Stark. Rep. 474; *Oswald v. Legh*, 1 T. R. 270; *R. v. Stephens*, 1 Burr. 434; of payment by cheque, *Egg v. Barnett*, 3 Esp. 196; of due stamping, *Doe v. Coombs*, 3 Q. B. 687.

Such are the general principles of law relative to the evidence; which, it is to be observed, [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 mistakes 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 (*h*); and this he is obliged to seal by the Statute of Westminster the second, 13 Edward I. c. 31 (*l*).] 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 Court of Exchequer Chamber, after judgment signed in the court below (*m*). [But a *demurrer to the 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 which has been alleged, but denies the sufficiency of them all, in point of law, to maintain or overthrow the issue (*n*); which draws the question of law from the cognizance of the

(*h*) As to a bill of exceptions, see Reg. Gen. H. T. 1862.

(*l*) Blackstone (vol. iii. p. 372) proceeds thus: "or if he refuses to seal, the party may have a compulsory writ against him (Reg. Br. 182; 2 Inst. 487), 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."

(*m*) *Davenport v. Tyrrell*, 1 W. Bl. 679. See *Bigge v. Parkinson*, 7 H. & N. 955.

(*n*) Co. Litt. 72; 5 Rep. 104.

[jury to be decided (as it ought) by the court *in banc*. But neither these demurrers to evidence, nor bills of exceptions, (particularly the former,) are at present so much 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* (*o*).

This open examination of witnesses *vivâ voce*, in the presence of all mankind, is much more conducive to the clearing up of truth (*p*) than the private and secret examination taken down in writing] by courts whose practice is modelled on the civil law (*q*); [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 the depositions in his own form and language; but the witness 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

(*o*) 3 Bl. Com. p. 373. A demurrer to the evidence may indeed be said to have now fallen into *total* disuse. As to the proceedings which took place under it, see *Fanshaw v. Cocksedge*, 3 Bro. P. C. 690.

(*p*) Hale, Hist. C. L. 254—256.

(*q*) As to the present practice of our ecclesiastical courts, in the examination of witnesses, as affected by the 17 & 18 Vict. c. 47, vide *sup.* p. 457.

[method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike when their depositions are reduced to writing, and read to the judge in the absence of those who made them; and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it (*r*).]

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; recapitulating in greater or less detail, as he may deem necessary, the statements of the witnesses, and the contents of the documents adduced on either side: commenting upon the manner in which they severally bear upon the issue, and giving his opinion upon any matter of law that may arise upon them; but leaving the jury to determine for themselves the credit and weight to which they are respectively entitled, and to decide whether, upon the whole, the preponderance of proof is in favour of the plaintiff or defendant (*s*).

(*r*) Blackstone (vol. iii. p. 374) remarks, that the public giving of testimony *ore tenus*, although familiar among the *antient* Romans, “as may be collected from Quintilian,” (Instit. Orat. l. 5, c. 7,) “who lays down very good instructions for examining and cross-examining witnesses,” and though continued as low as the time of Hadrian, (see ff. 22, 5, 3,) is rejected by the modern civil law.

(*s*) Before the case is left to the jury, and in the progress of the trial, it often happens that an objection is taken either by the plaintiff or defendant, on the ground of some particular discrepancy between the alle-

gations which the adverse party has made in his pleadings, and the evidence offered in support of his allegations. Such discrepancy upon a particular point, as distinguished from a total failure of proof upon the substance of the case, is called a *variance*; and objections founded on variances were formerly allowed to a very inconvenient extent. But by 9 Geo. 4, c. 15, and 3 & 4 Will. 4, c. 42, ss. 23, 24; and (more generally) by 15 & 16 Vict. c. 76, ss. 36, 37, 222; 17 & 18 Vict. c. 125, s. 96, and by 23 & 24 Vict. c. 126, s. 36, the court or a judge is now empowered to allow an amendment of all defects and errors whenever such amend-

[The jury, after the proofs are summed up,] if they express a wish so to do, withdraw from the court [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 (*t*),—till they are all unanimously agreed (*u*).] Accordingly [if they eat or drink at all, or have any

ments shall be necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties.

(*t*) “A method of accelerating unanimity,” (says Blackstone, vol. iii. p. 375,) “not wholly unknown in other constitutions of Europe, and in matters of greater concern. For by the Golden Bull of the empire, 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.”

(*u*) “This necessity of a total unanimity,” (remarks Blackstone, vol. iii. p. 376,) “seems to be peculiar to our own constitution, (see Barring. on the Stats. 19, 20, 21); or at least in the *nembda*, or jury of the antient Goths (Stiern. l. i. c. 4), 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.” With us the principle as to unanimity results, as a consequence, from the rule of requiring as many as twelve to concur, in connexion with that of admitting only twelve to sit upon the jury. The former originated in the regard antiently paid to this particular number (vide sup. p. 633); the latter probably from its being

deemed unnecessary to swear in more than twelve, when the verdict of twelve would always suffice. It is to be observed, however, that in *grand* juries it is the practice to swear in a larger number (usually twenty-three); though less, (if amounting to twelve or more,) can make a valid presentment. The principle of requiring unanimity, whatever may be its origin, is attended at least with one practical advantage of the utmost importance; that in the event of a difference of opinion, it secures a discussion, and enables any one dissentient juror to compel the other eleven fully and calmly to reconsider the question. Some remarks will be found on this subject in the Third Report of the Common Law Commissioners appointed in 1828, p. 70; where it is recommended, that if, after a deliberation of twelve hours, nine out of the twelve concur, their verdict should be received. It may be incidentally remarked that by 22 & 23 Vict. c. 7, (amending 17 & 18 Vict. c. 59,) it is provided as to verdicts in civil causes in *Scotland*, that if, after three hours, nine of the jury shall agree, the verdict of the nine shall be sufficient; and if, after six hours, they have not agreed, they may be discharged, if the court think fit, without a verdict.

[eatables about them, without consent of the court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict (*w*). Also, if they speak with either of the parties or their agents after they have gone from the bar, or if they receive any fresh evidence in private, or if, to prevent disputes, they cast lots for whom they shall find,—any of these circumstances will entirely vitiate the verdict (*x*).] And by the antient rule, (which, in strictness, seems to be still in force,) 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 (*y*), the judges are not bound to wait for them; but may carry them round the circuit, from town to town, in a cart (*z*).] In practice, however, if the jury are unable to agree upon their verdict, one of them is often *withdrawn* by consent of the parties to the suit, so that no verdict can be given (*a*); or the whole jury may (with the like consent) be *discharged* from finding any verdict (*b*); or, again, they may (even without such consent) be discharged by the *judge*, after having retired for a considerable time for deliberation (*c*).

(*w*) *Hughes v. Budd*, 8 Dowl. P. C. 315; but see *Morris v. Vivian*, 10 Mee. & W. 137, where it was held to be a matter for the discretion of the court, whether they would grant a new trial under such circumstances.

(*x*) But the affidavit of one of the jury, as to the mode in which he and his fellows came to a verdict, cannot be received. (*Burgess v. Langley*, 5 Man. & G. 722.)

(*y*) *Mirroure*, c. 4, s. 24.

(*z*) *Lib. Ass.* fol. 40, p. 11. See a note in 1 B. & Smith, p. 429; with regard to this alleged antient custom. See also *Reg. v. Winsor*, Law Rep., 1 Q. B. 305.

(*a*) *Stodhart v. Johnson*, 3 T. R. 657; *Harries v. Thomas*, 2 Mee. & W. 38. If a juror be withdrawn by consent, and the action be afterwards proceeded with, or a fresh action brought, the defendant may apply to stay proceedings. (*Gibbs v. Ralph*, 15 L. J. (Ex.) 7.)

(*b*) *Everett v. Youells*, 3 B. & Ad. 349. As to the distinction observable between a discharge of the jury without giving a verdict, in civil and in criminal cases, see *The Queen v. Charlesworth*, 1 B. & Smith, 460.

(*c*) See *Seally v. Powis*, 3 Dowl. 372; *R. v. Johnson*, 5 Ad. & El. 513.

[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 was liable in case he failed in his suit, as a punishment for his false claim (*d*). To be *amerced*, or a *mercie*, is to be at the mercy of the Crown with regard to the fine to be imposed; *in misericordiâ domini regis pro falso clamore suo*.] The amercement is disused, but an allusion to it may still be traced; for [if the plaintiff does not appear, no verdict can be given, and the plaintiff is then said to be *nonsuit*; *non sequitur clamorem suum*. Therefore, it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain the issue, to be voluntarily nonsuited or withdraw himself (*e*); whereupon the crier is ordered to *call the plaintiff*; and if neither he nor any body 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 again for the same cause of action; but after a verdict had and judgment consequent thereupon, he is for ever barred,] unless the judgment be reversed as erroneous, [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.]

(*d*) Finch, L. 189, 252.

(*e*) A nonsuit is appropriate only to the case of the plaintiff's withdrawing himself. He cannot, therefore, be nonsuited against his will; for, instead of withdrawing, it is in his option to appear, (by himself or his attorney,) when the jury are ready to deliver their verdict. But

if he has failed in the opinion of the jury (under the direction of the judge) to maintain his side of the issue, and he elects to appear, there will then, in lieu of the nonsuit, be a verdict against him; which, for the reason stated in the text, is generally less eligible. (See *Dewar v. Purday*, 3 Ad. & El. 166.)

By the verdict, (*verè dictum*,) [they openly declare themselves to have found the issue, for the plaintiff, or for the defendant (*f*); and if for the plaintiff, they also assess the damages sustained by the plaintiff in consequence of the injury upon which the action is brought (*g*).]

Sometimes, if there arises upon the facts proved in the case, any difficult matter of law, the course is adopted of finding a *special* verdict—a course [grounded on the Statute of Westminster, 13 Edw. I. c. 30, s. 2,] and the adoption of which is entirely at the choice of the jury (*h*). A verdict of this description is drawn up in the form of making the jury [state the naked facts, as they find them to be proved (*i*); concluding conditionally,] that if upon the whole matter the court shall be of opinion that the issue ought to be found for the plaintiff, they then find

(*f*) The verdict is said in our books to be either *privy* or *public*—and it is stated by Blackstone, (vol. iii. p. 377,) that “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;” though he adds, that, “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.” He also states that a privy verdict is of no force, unless afterwards affirmed openly in court, and that the jury may then vary from it, if they please; and that it is “a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged in.” At the present day it is wholly disused.

(*g*) By 3 & 4 Will. 4, c. 42, s. 28, the jury may upon the trial of any issue or inquisition of damages allow *interest* at the current rate upon debts from the time when they were payable, if made payable by a written instrument, and at a time certain; or if payable otherwise, then from the time when demand of payment shall have been made in writing, with notice that interest will be claimed. (See *Mowatt v. Lord Londesborough*, 4 Ell. & Bl. 1.) And, by sect. 29, they may give damages in the nature of interest, in actions of trover and trespass *de bonis asportatis*, over and above the value of the goods; and also, in actions on policies of assurance, over and above the money insured.

(*h*) See *Mayor of Devizes v. Clark*, 3 A. & E. 506.

(*i*) See *Fryer v. Roe*, 13 C. B. 427.

for the plaintiff, and assess the damages accordingly ; 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 (*j*).] But either party, if dissatisfied with the decision, is at liberty to appeal to the proper court of error in the Exchequer chamber (*k*).

Another method of finding a species of special verdict, is when the jury find a verdict, generally, for the plaintiff, but subject nevertheless,—as the law of the case is doubtful,—to the opinion of the court above, on a *special case*, stated by the counsel on both sides, and containing a statement of facts mutually agreed upon. The proceeding by way of special case is in general similar to that by way of special verdict, and it may lead in like manner to the court of error (*l*); the chief difference, indeed, between them being that a special case is not entered upon the *record*. Among things common to both, it may also be remarked that neither proceeding can take place without consent of the jury (though in practice they never object to what the parties propose on the subject), as the rule of law is, that the jury are always at liberty, without either special verdict or special case, to find their verdict absolutely, if they think fit, either for plaintiff or defendant (*m*).

[When the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so

(*j*) See Reg. Gen. Mich. T. 1853, (Pr.) r. 16; Reg. Gen. H. T. 1862.

(*k*) As to this court, vide sup. p. 434.

(*l*) Formerly this was otherwise; for there could be no proceeding in *error* upon the judgment on a special case; but by 17 & 18 Vict. c. 125, s. 32, error may now be brought on such a judgment in the

same manner as upon judgment on a special verdict, unless the parties agree to the contrary. See also 15 & 16 Vict. c. 76, s. 208. As to the practice on a special case, see also Reg. Gen. Mich. T. 1854, in sched. No. 18; and Reg. Gen. H. T. 1862.

(*m*) 3 Bl. Com. 378, cites Litt. s. 368. See also *The Mayor of De- vizes v. Clark*, 3 A. & E. 506.

[ends the trial by jury ;—a trial which, besides the other vast advantages which we have occasionally observed in its progress, is also as expeditious, and cheap, as it is convenient, equitable, and certain:] and indeed [the trial by jury ever has been looked upon as the glory of the English law.] In estimating its advantages it is to be considered, that [if the administration of justice 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 frequently have an involuntary bias towards those of their own rank and dignity,—for 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 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 by more artfully 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 (*n*).]

The peculiar importance too of this mode of trial deserves remark as applied to criminal cases, and most of all to those in which the Crown is directly concerned. It may be truly affirmed, that [the most transcendent privilege which any subject can enjoy or wish for is, that he cannot be affected either in his property, his liberty or his person, but by the unanimous consent of twelve of his neighbours and equals;] and there can be no doubt that this institution [has secured the just liberties of this nation for a long succession of ages. And therefore a celebrated French writer (*o*), 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 time when their liberties were lost, were strangers to the trial by jury.]

IV. The issues of law or fact having been decided in the several methods above described, and it thus being ascertained whether the plaintiff is entitled to maintain his action for the civil injury which is the subject of complaint, or the defendant, on the other hand, to be discharged from the action, the next step is the *judgment*, that is, the formal award of redress in the one case, or discharge in the other. And as regards the issue in law, we have already been led in part to advert to this pro-

(*n*) 3 Bl. Com. p. 380. The institution of the new County Courts, in which the decision of matters of fact as well as law is generally intrusted to the judge, must not be considered as any indication that the views of Blackstone on the subject to which the above extract refers, are disregarded at the present day.

For though in favour of the great objects of cheapness and dispatch, the parties are enabled in these courts to dispense with trial by jury, yet either of them is entitled to insist on that mode of decision, where the claim exceeds 5*l*. (Vide sup. p. 404.)

(*o*) Montesq. Sp. L. xi. 6.

ceeding (*p*), the judgment in that case being in effect given at the time that the court deliver their opinion or decision upon the legal question, though it is not formally drawn up and entered on record till afterwards. But if the issue be an issue in fact, and tried by jury, the course of practice is as follows.

In the first place, whatever has been done subsequently to the joining of issue, and the awarding of the trial, is entered on the back of the *nisi prius* record, and is called the *postea*; the substance of which is, that *afterwards* the said plaintiff and defendant appeared in person or by their attorneys, at the place of trial, and a jury being sworn, found such a verdict; [or that the plaintiff, after a jury sworn, made default, and did not prosecute his suit, or as the case may happen (*q*).]

The unsuccessful party may then, within such interval of time as the practice allows for the purpose (*r*), move the court in *banc* (*s*) for a *new trial*, or for *arrest of judgment*, or for *judgment non obstante veredicto*, or for a *repleader* (*t*).

(*p*) Vide sup. p. 617.

(*q*) As to the form of the *postea*, see Reg. Gen. Hil. T. 1853, (Pr.) in sched. Nos. 3, 4.

(*r*) By Reg. Gen. Hil. T. 1853, (Pr.) r. 50, no such motion, where the cause is tried in term, shall be allowed after four days from the trial, nor in any case after the expiration of the term; nor, where the cause is tried out of term, after the first four days of the ensuing term;—unless, (in any of these cases,) the cause be allowed by the court to be entered in a list of *postponed motions*. As to this list, see Reg. Gen. H. T. 1853, (Pr.) rr. 51—54.

(*s*) As to the term "*in banc*," vide sup. p. 438.

(*t*) In addition to the applications

mentioned in the text, the defendant may also move *to enter a nonsuit*, or the plaintiff to *set aside a nonsuit, and enter a verdict*;—the effect being, in either case, if the rule is granted, and made absolute, that no second trial is required. But such motions can only be made as *upon a point reserved*, that is, by leave of the judge who tried the cause, granted during the course of the trial. By 17 & 18 Vict. c. 125, s. 33, it is provided, that in every rule *nisi* for a new trial, or to enter a verdict, or nonsuit, the *grounds* upon which such rule has been granted, shall be shortly stated. (See *Grayson v. Andrews*, 10 Exch. 427.)

And, 1. As to the motion for a *new trial*. The ground of this may be an irregularity in the proceedings connected with the trial, such as want of notice of trial; or any other matter *dehors*, (that is, extrinsic to,) the record, tending to show, that, though the trial may have been in due form, yet it has not done justice between the parties; as, for example, [any flagrant misbehaviour of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury among themselves; or that it appears to the court, that the jury have brought in a verdict without, or contrary to, evidence (*u*), so that he is reasonably dissatisfied therewith: or that they have given exorbitant] or insufficient [damages; or that the judge himself has misdirected the jury, so that they found an unjustifiable verdict (*x*).] For any of these reasons, or for any of a similar kind, it is competent to the unsuccessful party, whether plaintiff or defendant, to move that the verdict that has been given be set aside, and a new trial had: the effect of which motion, if granted, is, that a trial of the same issue, (by a new jury duly summoned and impanelled as in other cases,) is instituted *de novo* (*y*).

[The exertion of these superintendent powers of the courts in setting aside the verdict of a jury, and granting a new trial on account of misbehaviour of the jurors, is of a date extremely antient. There are instances, in the Year Books of the reigns of Edward the third (*z*),

(*u*) Where a new trial is ordered on the ground that the verdict was *against evidence*, the costs of the first trial shall *abide the event*, unless the court shall otherwise order. (17 & 18 Vict. c. 125, s. 44.)

(*x*) In the case of an application for a new trial on the ground that the judge *has not ruled according to law*, an appeal from the decision of the court (unless unanimous) is

given by the 17 & 18 Vict. c. 125, ss. 35, 36, to the ordinary courts of error.

(*y*) If the fresh trial be ordered in consequence of a mis-trial apparent on the record, the form is termed a *venire de novo*. As to this award, see *Wood v. Bell*, 6 Ell. & Bl. 355, 363.

(*z*) 24 Edw. 3, 24; Bro. Ab. tit. *Verdite*, 17.

[Henry the fourth (*a*), and Henry the seventh (*b*),—of judgments being stayed (even after a trial at bar), and new trial awarded, because the jury had eaten and drunk without consent of the judge, and because the plaintiff had privately given a paper to a jurymen, before he was sworn. And upon these the chief justice, Glynn, in 1655, grounded the first precedent that is reported in our books (*c*) 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 misbehaviour.] About that time, however, [it was clearly held for law (*d*) that whatever matter was of force to avoid a verdict ought to be returned upon the *postea*, and not merely surmised by the court,—lest posterity should wonder why a new trial 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* (*e*); 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 (*f*).] Nor can there be any doubt that this is a reasonable and salutary course of practice. [If every verdict was final in the first instance, it would tend to destroy this valuable method of trial.] For [either party may be surprised by a piece of evidence which, had he known of its pro-

(*a*) 11 Hen. 4, 18; Bro. Ab. tit. 207.
Enquest, 75.

(*b*) 14 Hen. 7, 1; Bro. Ab. tit. Verdite, 18.

(*c*) Style, 466.

(*d*) See *Graves v. Short*, Cro. Eliz. 616; *Palm*. 325; 1 *Brownl*.

(*e*) See *R. v. Lord Fitz-Water*, 1 Sid. 235; *Goodman v. Cotherington*, 2 Lev. 140.

(*f*) *Bright v. Eynon*, 1 Burr. 395.

[duction, he could have explained or answered; or may be puzzled by a legal doubt which a little recollection would have solved. Besides, 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 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. 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 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, and nothing is now tried but the real merits of the case. A sufficient ground, however, must 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. Counsel are heard on both sides, to impeach 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 colours are taken off, and all points of law which arose at the trial are, upon full deliberation, clearly explained and settled. Nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied, that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice 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 justice is hardly reconcileable to conscience. Nor is it granted where the scales of evidence hang nearly equal: but that which leans against the former verdict ought always very strongly to preponderate (c).]

2. [*Arrests of judgment* arise from *intrinsic* causes appearing on the face of the record,] showing that, notwithstanding any verdict given for the plaintiff, he is not entitled to judgment; and it is only on the part of the

(c) In antient times the principal remedy for reversal of a verdict unduly given was by writ of *attaint*, which was a proceeding for setting aside, by a jury of twenty-four, the verdict of a jury of twelve; the effect of which was, that if the jury of twelve were found to have given a false verdict, they incurred infamy, with imprisonment and forfeiture of their goods; which two latter punishments were in course of time commuted into a pecuniary penalty. (3 Bl. Com. pp. 388, 402.) For it was deemed at the early period when this proceeding was first established,—when the consti-

tution of juries was different from what it now is, and they were summoned to *testify on their own knowledge* as to the truth of the facts in dispute, (see Plac. Ab. 3, Norfolk. &c.; 2 Hist. of Eng. Law, by Reeves, p. 270, &c.)—that a false verdict must necessarily be a perjured one. The writ of *attaint* was a form of proceeding at least as old as the reign of Henry the second; and remained in force, (though quite fallen out of use,) till abolished by the stat. 6 Geo. 4, c. 50, s. 60. A full account of it is given in Blackstone's Commentaries, *ubi sup.*

defendant, therefore, that a motion in arrest of judgment is made. As if, in an action for slanderous words, the defendant denies the words, and issue is joined thereon, now if a verdict be found for the plaintiff, that the words were actually spoken as affirmed, here—though that fact is established, yet the defendant may move in arrest of judgment that the words are not in their nature actionable; and if the court be of that opinion, the judgment shall be arrested, and never entered for the plaintiff. And it may be laid down generally, that whatever objection, in point of substance, the defendant might have taken at an earlier stage, by way of demurrer, he is also entitled to take at this stage, in arrest of judgment; but no more in this shape, than in the other, can he be allowed to bring forward any objection in point of mere form. The case was formerly very different; for by the ancient law, even the most trifling objection in point of form, might be alleged in arrest of judgment; though in somewhat later times, by the statutes of *amendment* and *jeofail*,—so called because when a pleader, in the days of oral pleading, perceived any slip in the form of his allegation, he acknowledged such error by the expression of *j'ay faillé*, and obtained liberty to amend,—objections of mere form not brought forward by way of *special demurrer*, (which was the proper method for taking formal objections,) were, at a subsequent stage of the cause, cured or *aided* (*d*). But it is now provided, by the Common Law Procedure Act, 1852, that no judgment shall be arrested, stayed, or reversed, for any imperfection, omission, defect in or lack of form (*e*); and, moreover, that where a motion shall be made in arrest of judgment by reason of the omission to allege

(*d*) See *Wilkinson v. Sharland*, 10 Exch. 724.

(*e*) 15 & 16 Vict. c. 76, s. 50. By s. 51, also, no pleading shall be

deemed insufficient for any defect which could heretofore have been objected to only by special demurrer. Vide sup. p. 606, n. (*p*).

some material fact, or other cause, the plaintiff shall be at liberty, by leave of the court, to enter a suggestion of the existence of the matter omitted, or any matter which, if true, would remedy the alleged defect; to which the defendant shall be at liberty to plead, and the parties may thereon proceed to issue and trial, as in ordinary cases (*g*).

3. A motion for *judgment non obstante veredicto* is also made in respect of some intrinsic objection apparent on the face of the record: but differs in this particular, from the motion in arrest of judgment, that it is usually made on the part of the plaintiff, and not of the defendant; and is accordingly grounded on an objection to the case of the latter, and not of the former party (*h*). Thus, where the plea *confesses*, and attempts to *avoid*, the declaration, by some matter which amounts to no sufficient avoidance of it in point of law, and the plaintiff, instead of demurring, has taken issue upon the truth of the plea in fact, and that issue has been found in favour of the defendant,—yet the plaintiff may move that, without regard to the verdict, the judgment be given in *his* favour. For the plea having confessed the matter of fact in the declaration, and having opposed it by an allegation which, though true in fact, is bad in law, it appears upon the whole that the plaintiff is entitled to maintain his action (*i*). But the same rule applies to the motion for *judgment non obstante veredicto*, as to the motion in arrest

(*g*) 15 & 16 Vict. c. 76, ss. 143, 144. See *Manby v. Boycott*, 2 Ell. & Bl. 46; *Fisher v. Bridges*, *ibid.* 128, n.

(*h*) See *Reg. v. Darlington School*, 6 Q. B. 682, in which case Parke, B., said it might be made by *defendant* if the plaintiff's replication confessed but failed to avoid the plea.

(*i*) As to *judgment non obstante*,

&c., see *Gilb. C. P.* 126; *Lambert v. Taylor*, 4 Barn. & Cress. 138; *Merry v. Chapman*, 8 A. & E. 524, n.; *Negelen v. Mitchell*, 7 Mee. & W. 612; *Atkinson v. Davies*, 2 Dowl. N. S. 778; *Shrewsbury v. Blount*, 2 Man. & Gr. 508; *Beaty v. Warren*, 4 Man. & Gr. 158; *Pim v. Grazebrook*, 2 C. B. 429.

of judgment, that it can be founded on no objection of a merely formal kind, but only on such as involves the substance and merits of the controversy. And the same practice obtains upon the motion now in question, as upon the other, of allowing the party whose pleading is in fault, to enter a suggestion of any matter of fact, which, if true, would remedy the alleged defect (*j*).

4. The motion for a *repleader* is, where [by the misconduct or inadvertence of the pleaders, the issue is 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 (*k*).] As if in an action against an executor, the defendant, instead of pleading that the testator made no such promise as alleged in the declaration, pleads that he himself made no such promise (*l*); or, if in an action of debt on bond conditioned to pay ten pounds ten shillings on a certain day, the defendant pleads payment of ten pounds (*m*),—in such cases the court will, after a verdict, award a repleader, (*quod partes replacitent*); the effect of which is, that [the pleadings must begin *de novo* at that stage of them, whether it be the plea, replication, or rejoinder, &c. wherein there appears to have been the first defect or deviation from the regular course.] But repleaders are not now very usual; for they are awarded only where it is apparent to the court that the case of the party in default might probably be made good by a different manner of pleading (*n*). It is besides a rule, that a repleader is never granted in favour of the party who made the first fault, when the issue has been found against that

(*j*) 15 & 16 Vict. c. 76, ss. 143, 144.

(*k*) A repleader may be awarded by a court of *error*, Reg. Gen. Hil. T. 1853, (Pr.) 24.

(*l*) 2 Vent. 196.

(*m*) See *Kent v. Hall*, Hob. 135;

and see *Spong v. Wright*, 9 Mee. & W. 629; *Atkinson v. Davies*, ubi sup.

(*n*) *R. v. Phillips*, Burr. 301, 302; 3 Bl. Com. 395; and see *Negelen v. Mitchell*, 7 M. & W. 612.

party (*o*); nor in any case except where complete justice cannot otherwise be attained (*p*).

Where the verdict is a general one, and no special case or bill of exceptions occurred at the trial,—which is the ordinary state of circumstances,—then, if the judgment on the verdict is not, by some of the means above pointed out, suspended or averted within the period allowed for the purpose, it follows that the party who obtained the verdict is entitled to judgment, at any time after the expiration of that period (*q*).

He accordingly then proceeds to *sign* judgment; that is, to obtain the certificate of the proper officer of the court that judgment is given in his favour; which, (in the case of a judgment upon verdict,) stands in the place of any actual delivery of it by the judges themselves. And, upon the signing of the judgment, *costs* are also taxed in his favour by the same officer;—a subject on which we shall presently have occasion to speak more at large.

After signing judgment, the next step is to *enter the judgment on record*, by transcribing the whole proceedings on a parchment roll, and depositing this roll, and filing it of record, in the treasury of the court; and this, though properly the act of the court, is in practice

(*o*) *Bennett v. Holbeck*, 2 Saund. 319 c; and see *Gordon v. Ellis*, 7 M. & G. 607.

(*p*) *Goodburne v. Bowman*, 9 Bing. 532. As to cases where a re-pleader will not be granted, see *Negelen v. Mitchell*, 7 Mee. & W. 612; *Gwynne v. Burnell*, 2 Cl. & Fin. 572; *Willoughby v. Willoughby*, 6 Q. B. 722; *Gregory v. Duke of Brunswick*, 3 B. C. 481; *Crossfield v. Morrison*, 7 C. B. 286; *Doogood v. Rose*, 9 C. B. 132; *Rutland v. Bagshaw*, 14 Q. B. 869.

(*q*) By 15 & 16 Vict. c. 76, s. 120, and Reg. Gen. Hil. T. 1853,

(Pr.) r. 57, the party obtaining a verdict is entitled to sign judgment and issue execution in *fourteen* days, unless the judge who tries the cause, or some other judge, or the court, shall otherwise order. But in such case the opposite party will be entitled to move that the *judgment and execution may be set aside*, and a new trial granted, or such other relief as the case may require; or he may, after verdict against him, apply for a judge's order to *stay execution* with a view to his making a motion to the court.

performed, whenever it takes place, by the successful party, or rather by his attorney (*r*).

Hitherto we have pursued the history of a cause that comes to issue through the instrumentality of pleading. But its course may be of a very different and more summary kind. For, first, it was provided by the Common Law Procedure Act, 1852, with a view to avoid, where practicable, the expense and delay attendant upon pleading, that where there is any question of *fact* in dispute between the parties, they may at any time after writ of summons, and before judgment, state such question in the form of an issue, but without pleadings; and such issue may be entered for trial, and tried accordingly, in the same manner as an issue joined in the ordinary way; or, if agreed on the facts, may state any question of *law* in a special case for the opinion of the court, without any pleadings; and may in either case agree, that, upon the finding of the jury on such issue, or upon the opinion of the court being given on such question, judgment may be entered for any specified sum of money to be paid by one of the parties to the other (*s*). Again, it may happen that one of the parties becomes entitled to judgment before any issue is attained. For in an action judgment will be awarded, not only where (as hitherto supposed) the [facts are confessed by the parties, and the law determined by the court (as in the case of judgment upon *demurrer*), or where the law is admitted by the parties, and the facts disputed (as in the case of judgment on a

(*r*) No entry of the judgment on record, is, in the majority of cases, in fact ever made: but on signing the judgment, the form is pursued of making an *incipitur* on the paper on which it is signed (called the *judgment paper*), that is, an entry of the initial words in which the judgment *would* be recorded. And by 15 & 16 Vict. c. 76, s. 206, this

will warrant taxing costs and issuing execution. (See also Reg. Gen. Hil. T. 1853, (Pr.) rr. 56, 70.)

(*s*) 15 & 16 Vict. c. 76, s. 42—48, (See *Bishop v. Elliott*, 11 Exch. 113.) It is to be observed, that, to enable pleadings to be dispensed with, a *judge's order*, founded on the *consent* of both parties, must be previously obtained.

verdict), but also where both the fact and the law arising thereon are admitted by the defendant.] Of this kind is judgment by *confession*, otherwise called judgment on *cognovit actionem*;—and judgment for *default of appearance* to the writ of summons (*t*), and for *default of plea* to the declaration; which last is otherwise called judgment by *nihil dicit*. And, lastly, judgment will be awarded [where the plaintiff is convinced that either the fact or law is insufficient to support his action, and therefore abandons his prosecution, which is the case of a judgment upon a *nonsuit*,] and also of a judgment upon *nolle prosequi* (*u*). In all these cases, however, the practical course is so far the same, that the successful party proceeds, upon the matter being terminated in his favour, to sign judgment, tax costs, and enter his judgment on record, in manner above described.

The judgment, though pronounced or awarded by the judges, (or supposed to be so, where no actual delivery of it takes place,) is, properly speaking, [not *their* determination 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 stands 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 in fact; but if both be confessed, (or determined to be right,) the con-

(*t*) This sort of judgment has been recently introduced by the 15 & 16 Vict. c. 76. (Vide sup. p. 599.)

(*u*) As to judgment by *nolle prosequi*, see 3 & 4 Will. 4, c. 42, s. 32; *Bowden v. Horne*, 7 Bing. 716; *Fagan v. Dawson*, 4 Man. & G. 711; *Boyle v. Webster*, 21 L. J. (N. S.) Q. B. 202. The books of

practice speak also of judgments on *non sum informatus*; (where the defendant's attorney declares he has no instructions to say anything in answer to the plaintiff;) and of judgments on *retrahit*; where the plaintiff says he *withdraws* his claim. But these forms do not now occur.

[clusion 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*, 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.

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 demurrer, to pleas in abatement of the suit or action; for in these it is considered by the court that the defendant do answer over, *respondeat ouster*; that is, put in a more substantial plea. 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. This can only happen where the plaintiff recovers; for where judgment is given for the defendant,

[it is always complete as well as final.] And it happens where the defendant suffers judgment to go against him by *confession*, or *for default of plea*, in any action brought for recovery of damages. In such a case as this, 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 that the said inquisition be returned into court. This process is called a *writ of inquiry* (*x*); in the execution of which the sheriff, by his under sheriff, [sits as judge, and tries by a jury,—subject to nearly the same law and conditions as apply to 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 (*y*).] In like manner, when a demurrer is determined for the plaintiff in an action wherein damages are recovered, the judgment is entered in the same interlocutory form, and is followed by a like writ of inquiry. But in many cases though the action is brought in point of form for damages, (or *sounds* in

(*x*) By 1 Will. 4, c. 7, a writ of inquiry may be returnable whether in term time or vacation; and by 3 & 4 Will. 4, c. 42, s. 18, judgment may be signed and execution issue forthwith after the return, unless the sheriff certify that judgment ought not to be signed until defendant shall have had an opportunity to apply to the court to set aside the execution of the writ; or unless a judge shall think fit to stay

the judgment. And see Reg. Gen. Hil. T. 1853, (Pr.) r. 55. As to notice of inquiry, see Reg. Gen. Hil. T. 1853, (Pr.) rr. 34—37, 40.

(*y*) There is one case in which a writ of inquiry may be executed not before the sheriff, but the judge at *nisi prius*; viz., in an action on a bond conditioned for performance of any act other than the payment of money. See stat. 8 & 9 Will. 3, c. 11, et sup. vol. II. p. 113.

damages, according to the technical term,) yet the amount recoverable by the plaintiff is substantially a matter of mere calculation, and one therefore upon which a jury would have no discretion to exercise. And in all such cases—whether the judgment be by confession, default or on demurrer—the course (as laid down by the Common Law Procedure Act, 1852) is not to issue any writ of inquiry, but to apply for an order of the court or a judge, that the amount which the plaintiff is entitled to recover be ascertained by one of the masters of the court (*z*).

Final judgments are such as at once put an end to the action, by the immediate award of the sum of money or specific thing due to the plaintiff, or of the discharge of the defendant from the action as the case may be. This kind of judgment takes place in whatever manner the suit is determined, whether it be on demurrer, verdict, confession, default of appearance, default of plea, nonsuit, or *nolle prosequi*. But this distinction is always to be understood, with respect to cases where there has been no verdict,—that if the action be for recovery of *damages*, the final judgment is always preceded by an interlocutory judgment and writ of inquiry, or reference to the master thereon, to ascertain the amount of those damages; but if the action be for recovery of *a debt* or liquidated sum of money, then the judgment is final in the first instance (*a*). And we may remark here, that final judgments in the first instance, as upon *confession* or *default of plea*, are often agreed upon before an action is brought, and constitute a very usual form of security for money; the course being for the debtor to execute a *warrant of attorney* to some attorney named by the creditor, empowering him to suffer a judgment to pass against the debtor in one of the above forms, in an action of debt to be brought by the creditor against the debtor for the specific sum due; though this practice

(*z*) 15 & 16 Vict. c. 76, s. 94. rr. 171—173.

See Reg. Gen. Hil. T. 1853, (Pr.)

(*a*) See 15 & 16 Vict. c. 76, s. 93.

is subject to several restrictive regulations for the prevention of fraud or oppression (*b*).

As to the form in which final judgment is entered. If the judgment be for the plaintiff on any issue in *fact*, or on an issue in *law* arising on a plea in bar, the form is that he do recover (*quod recuperet*) the debt or damages, —on an issue in law arising on a dilatory plea, let the defendant answer over, *respondeat ouster*. On a judgment for the defendant on a declaration or on a plea in bar, the form is, that the plaintiff take nothing by his writ (*nil capiat per breve*), and that the defendant may go thereof without a day, *eat inde sine die*, (i. e. without any further continuance or adjournment,)—and on an issue arising on a dilatory plea, that the plaintiff's writ be quashed (*c*).

At common law, all judgments had relation to the first

(*b*) 3 Bl. Com. 397. The instrument given, is either a *warrant of attorney*, a *cognovit actionem* or a *consent to a judge's order* for judgment against the defendant. The chief difference between them is, that the two latter are given in the course of an action already commenced. The regulations referred to in the text, are chiefly contained in 1 & 2 Vict. c. 110, ss. 9, 10; which enact that no *warrant of attorney* or *cognovit* shall be of any force unless there be present some attorney of one of the superior courts on behalf of the person giving it, expressly named by him, and attending at his request to inform him of the nature and effect of the instrument before the same is executed; which attorney shall subscribe his name as a witness to the due execution, and thereby declare himself to be attorney for the party, and state that

he subscribes as such attorney. (And see Reg. Gen. Hil. T. 1853, (Pr.) rr. 25—27.) As to the effect allowed to judgments on warrants of attorney in cases of *bankruptcy*, see 6 & 7 Vict. c. 66, and 12 & 13 Vict. c. 106, ss. 133, 135, 136. And as to the effect, in cases of *bankruptcy*, of a *consent order*, see sect. 137 of the Act last mentioned, and *Dimmock v. Bowley*, 2 C. B. (N. S.) 542.

(*c*) Formerly, in the case of a judgment for the plaintiff, these words were added, "and that the defendant be amerced for his wilful delay of justice;" and in the case of judgment for the defendant, on a plea in bar, that the plaintiff "be also amerced for his false claim," *pro falso clamore suo*. The amercement became at an early period merely nominal, and is not now inserted in the judgment. It was also formerly adjudged in cer-

day of the Term in which they were signed, though in point of fact not signed till afterwards (*d*); the Term being considered, for this and some other purposes, as consisting but of one day. But by the present rules of practice, all judgments, whether interlocutory or final, shall be entered of record, of the day of the month and year, whether in Term or Vacation, when they were actually signed, and shall not have relation to any other day; provided, however, that it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc* (*e*).

Upon a final judgment in one of the superior courts of law (*f*) execution may issue against the *person* of the debtor, or against his *goods and chattels*, or against any *lands, tenements, and hereditaments*, of which he himself, or any person in trust for him, shall have been seised or possessed, or over which he shall have any disposing power, exercisable without the assent of any other person, for his own benefit, at the time when the

tain cases, that the defendant be arrested, *capiat*, till he pay a fine to the Crown, for his falsehood or the like. This is now abolished, in some actions, by 5 W. & M. c. 12, and, in all, disused.

(*d*) See *Jefferson v. Morton*, 2 Saund. by Wms. 8 k.

(*e*) Reg. Gen. 1853, (Pr.) r. 56. As to judgment *nunc pro tunc*, see *Miles v. Williams*, 9 Q. B. 47; *Fishmongers' Company v. Robertson*, 3 C. B. 970; *Freeman v. Tranah*, 12 C. B. 406; *Heathcote v. Wing*, 11 Exch. 355; *Moor v. Roberts*, 3 C. B. (N. S.) 844. The rule of court above mentioned is a re-enactment of a rule to the same effect made in the reign of Will. 4; and even as early as the time of Charles the second it had been provided in favour of *bonâ fide* purchasers for

valuable consideration, that, as against such purchasers, judgments should bind the lands of the debtor only from such time as they should be signed, and should not relate to the first day of the term. (29 Car. 2, c. 3, ss. 13—15.)

(*f*) Decrees and orders in equity, lunacy and bankruptcy, and rules of the courts of law, whereby any money shall be payable to any person, have the effect of judgments in the superior courts of common law (see 1 & 2 Vict. c. 110, s. 18; 27 & 28 Vict. c. 112, s. 2); and decrees and orders of the Court of Divorce and of the Court of Probate are, (by 20 & 21 Vict. c. 85, s. 32, and c. 77, s. 25,) placed on the same footing as decrees and orders in equity (see *Ex parte Holden*, 13 C. B. N. S. 641).

judgment is entered up, or at any time afterwards (*h*). But the operation of judgments on lands, as thus generally stated, must be taken in connection with and subject to the following important provisions. First, it is enacted by 23 & 24 Vict. c. 38, s. 1, that (as regards a *bonâ fide* purchaser for valuable consideration or a mortgagee) no judgment to be thereafter entered up shall affect any land unless a writ or other due process of execution thereon shall have been issued and registered with the Senior Master of the Court of Common Pleas (*i*). And, secondly, by 27 & 28 Vict. c. 112, s. 2, that no judgment entered up after 29th July, 1864, shall affect any land until it shall have been actually delivered in execution under an *elegit* or other lawful authority (*h*). By this last statute also, it is provided, that the writ or other process of execution shall be thenceforth registered in the name of the debtor against whom it was obtained, instead of (as previously) in the name of the creditor (*l*). The provisions of this Act were intended to assimilate the effect of judgments on the *land* of the debtor to that which before prevailed with regard to their operation on his *goods and chattels*;

(*h*) 1 & 2 Vict. c. 110, s. 11. A judgment against a mortgagee would formerly bind the land mortgaged, even though the mortgage was paid off and the land actually conveyed to a purchaser or another mortgagee; but it is now provided by 18 & 19 Vict. c. 15, s. 11, that this shall no longer be the case as to future transactions.

(*i*) See also the earlier enactments of 4 & 5 Will. & M. c. 20; 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11; 18 Vict. c. 5; and the following cases, *Kemp v. Waddington*, Law Rep., 1 Q. B. 355; *In re Bishop's Waltham Railway Co.*, Law Rep., 2 Ch. App. 382; and *Gardner v. London, Chatham and*

Dover Railway Co. ib. 385.

(*h*) Prior to this enactment (under 1 & 2 Vict. c. 110, s. 13), a judgment operated as a *charge in equity*, from the time of entering up the same, on all lands whereof at that date the judgment debtor was seised, possessed or interested for any estate whether at law or equity.

(*l*) A creditor to whom the land of his debtor is thus delivered in execution, and whose writ of execution is duly registered, is enabled (by 27 & 28 Vict. c. 112, s. 4) to obtain from the Court of Chancery, by petition in a summary way, an order for the sale of his debtor's interest therein.

and these have been always bound, as between the parties, from the date or *teste* of the writ of execution—and as against purchasers, from the time of actual seizure under the execution (*m*).

Moreover, by 1 & 2 Vict. c. 110, s. 17, it is provided, that every judgment debt shall carry interest, at the rate of 4*l.* per cent. per annum, from the time of entering up the judgment, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment (*n*).

[Thus much for judgments, to which (as the general rule) *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*,” though the common law did not allow any (*o*).] They are accordingly taxed (as already remarked) at the same time that the judgment is signed, and form part of its aggregate amount (*p*). But the law of costs deserves a more particular attention than could conveniently have been bestowed upon it when the subject was before touched upon, and we therefore resume the consideration of them in this place.

The first statute which gave costs *eo nomine* to the

(*m*) The law on this subject is more particularly stated, sup. vol. II. pp. 51, 52.

(*n*) See *Newton v. Grand Junction Railway Company*, 16 Mee. & W. 139.

(*o*) Cod. 3, 1, 13. The *exceptions* to the general rule stated in the text are those where the action should have been brought in the county court (as to which vide sup. p. 403).

(*p*) As to taxing costs, see 7 Will. 4 & 1 Vict. c. 30, s. 23; 6 & 7 Vict. c. 73, ss. 37—43; Reg. Gen. Hil. T. 1853, (Pr.) rr. 59—62,

and Directions to the Masters of the Court issued in the same Term. There are many cases of vexatious proceeding, in which the legislature had formerly provided, that the party in fault should be punished by the payment to his adversary of *double*, or (sometimes) *treble* costs. But by 5 & 6 Vict. c. 97, all such provisions are now repealed; and it is enacted, that the adversary shall be entitled only to a full and reasonable indemnity, to be taxed by the proper officer; which taxation shall, as in ordinary cases, be subject to review.

plaintiff, was the statute of Gloucester, 6 Edw. I. c. 1 (*o*). In reality, indeed, costs were always considered and included in the *quantum* of damages, in those actions in which damages were given (and even now costs for the plaintiff are always entered on the roll by the court, as increase of damages); but because those damages were frequently inadequate to the plaintiff's expenses, the Statute of Gloucester orders costs to be also added. But as the general rule no costs were allowed the *defendant*, in any shape, till the statutes 23 Hen. VIII, c. 15; 8 Eliz. c. 2; 4 Jac. I. c. 3; 8 & 9 Will. III. c. 11; and 4 Ann. c. 16; and these very equitably gave the defendant, if he prevailed, the same costs as the plaintiff would have had in case he had recovered (*p*). But even after these enactments, there still remained several cases in which the law was defective on this subject, both as regards the plaintiff and the defendant. These defects, however, have now been remedied by a variety of provisions, and chiefly by the statutes 9 Ann. c. 20; 1 Will. IV. c. 21; 3 & 4 Will. IV. c. 42, ss. 31—34; 4 & 5 Will. IV. c. 39; 15 & 16 Vict. c. 76, ss. 81, 145, 223; 17 & 18 Vict. c. 125, ss. 42, 44, 57, 67, 93; and 23 & 24 Vict. c. 126, ss. 11, 27, 32. And it is (among other matters) laid down under these enactments, that though the party who succeeds generally, shall have the general costs of the cause; yet his adversary succeeding on any particular issue, whether in law or fact, shall be entitled to the costs of the issue on which he is victorious (*q*).

(*o*) 3 Bl. Com. 399. As to the history of costs, see Burgess *v.* Langley, 5 Man. & G. 723, *in notis*; Partridge *v.* Gardner, 4 Exch. 303; Howell *v.* Rodbard, *ibid.* 309; Bentley *v.* Dawes, 10 Exch. 347; Cannon, *dem.*, Rimington, *ten.*, 12 C. B. 514.

(*p*) Blackstone (*ubi sup.*) points out one exception to this, *viz.*, that

by the Statute of Marlbridge (52 Hen. 3, c. 6), costs were given to the *defendant* in one particular case relative to wardship in chivalry.

(*q*) See, especially, 15 & 16 Vict. c. 76, s. 81; and Reg. Gen. Hil. T. 1853, (Pr.) r. 62. By 3 & 4 Will. 4, c. 42, s. 31, which for the first time provides, that *executors* and *administrators*, when *plaintiffs*, shall

Moreover, in order to prevent the abuse of suing in the superior courts in matters of small amount, it has been provided by 30 & 31 Vict. c. 142, s. 5, that a plaintiff who resorts to one of these courts and recovers no more than 20*l.* in an action arising on a contract,—or no more than 10*l.* if founded on tort,—will have no costs of suit, unless the court or a judge shall certify on the record that there was sufficient reason for his taking that course. And, also, (by 43 Geo. III. c. 46, s. 4,) that if a plaintiff, instead of taking out execution upon a judgment he has recovered, shall bring an action thereon, he will have no costs of suit, except the court or a judge shall otherwise order (*r*). Nor, again, are any costs allowed in a penal action to a plaintiff suing as a common informer, unless they are expressly given by the statute on which he sues: for, as the action itself creates the right, he has no claim to damages; and by the general rule of law, where there are no damages, there can be no costs (*s*).

With respect to pauper suitors, that is, such as will swear themselves not worth 5*l.* in the world, except their wearing apparel and the matter in question in the cause (*t*),—it is to be observed, that they are by statute 11 Hen. VII. c. 12, and 23 Hen. VIII. c. 15, exempt from the payment of court fees; and they are entitled to have counsel and attorney assigned to them by the court without fee; and are excused from paying costs when unsuccessful, though it is said they shall suffer other punishment, at the discretion of the judges (*u*). And

be liable to costs, power is given to the court or a judge to exempt them from such liability by special order in any particular case. (Redmayne *v.* Moon, 25 L. J., Q. B. 311.) As to costs in proceedings by and against the Crown, vide post, vol. IV. pp. 76, 88.

(*r*) See *Adams v. Ready*, 6 H. &

N. 261.

(*s*) *College of Physicians v. Harrison*, 9 B. & C. 524.

(*t*) See 3 Bl. Com. 400.

(*u*) Bl. Com. ubi sup. These Acts have no application to the case of a *defendant*, whose poverty, however extreme, will not avail him in the matter of costs. Blackstone

a person thus suing *in formâ pauperis* [may recover costs, though he pays none; for the counsel and clerks are bound to give their labour to *him*, but not to his antagonists.]

After judgment,—unless the party condemned takes some course to be relieved from its effect,—he will be liable to execution. But he may obtain such relief (*v*), where there is ground for it, by—

V. *Proceedings in error* (*x*). Error lies [for some sup-

says (vol. iii. p. 400) that it was formerly usual to give pauper plaintiffs, if non-suited, their election, *either to be whipped or pay their costs*. But in modern practice no instance of the award of *any* punishment, in such cases, has occurred. As to suing *in formâ pauperis*, see *Pratt v. Delarue*, 10 Mee. & W. 512; *Doe v. Owens*, *ibid.* 514; *Hall v. Ive*, 7 Man. & G. 1001; Reg. Gen. Hil. T. 1853, rr. 121, 122.

(*v*) Besides the proceeding in error, Blackstone (vol. iii. pp. 402, 405) speaks of a writ of *attaint*, a writ of *deceit*, and a writ of *audita querela*. But the two first of these are now abolished, and the last may be said to be nearly obsolete. The writ of *attaint* we have before had occasion to notice, *vide sup.* p. 672, n. (*e*). The writ of *deceit* was an action brought in the Common Pleas to reverse a judgment obtained in any *real* action, by fraud or collusion between the parties, to the prejudice of a right of a third person. It was abolished by 3 & 4 Will. 4, c. 27, s. 36. The *audita querela* (as to the nature of which, see also *Holmes v. Pemberton*, 1 E. & E. 367), is a writ that lies for the defendant against whom judgment is

given,—and who is therefore in danger of execution, or is perhaps actually in execution,—but who is entitled to be relieved upon some matter of discharge which has happened since the judgment; as if the plaintiff has given a general release, or if the defendant has since paid the debt. It is a writ directed to the court in which the judgment is recovered, stating that the complaint of the defendant has been heard, *audita querela defendantis*; and then setting forth the matter of complaint, and enjoining the court to call the parties before them, and cause justice to be done. But the indulgence now shown by the courts in granting relief upon *motion*, has almost superseded the remedy by *audita querela*. (See 2 Saund. 137 e.) And by Reg. Gen. Hil. T. 1853, (Pr.) r. 79, no writ of *audita querela* is now allowed unless by rule of court or order of a judge.

(*x*) These proceedings formerly began by a *writ* of error, sued out of the common law side of the Court of Chancery, addressed to the chief justice of the court below in which the judgment was given, and commanding him to

[posed mistake in the proceedings in a court of record; for to amend errors in a base court, not of record, a writ of *false judgment* lies (*y*).] Error lies either upon matter of *fact* or matter of *law*. The errors in *fact* which may give rise to a proceeding of this kind are not numerous, but among them are the following:—that the defendant, being an infant, appeared by attorney, and not by guardian (*z*); or that the plaintiff or defendant was a married woman when the suit commenced (*a*). But the most usual species of the proceeding by way of error, is that which is founded upon some supposed mistake of *law*, apparent on the face of the record (*b*)—such as might have formed a sufficient ground, at the proper time, for a motion in arrest of judgment, or a motion for a judgment *non obstante veredicto* (*c*).

Formerly the suitors were much perplexed by proceedings in error instituted [upon very slight and trivial grounds, as mis-spellings, and other mistakes of the clerks.] For these in general were held sufficient, unless amended, to vitiate the proceedings, even after judgment: and were at the same time incapable of amendment, after judgment was actually recorded, unless within

send a transcript of the record to the Court of Error. But now, by 15 & 16 Vict. c. 76, s. 148, this writ is, in almost every case, (see *Arding v. Holmer*, 26 L. J., Exch. 72,) dispensed with; and the proceedings begin with the memorandum hereafter described.

(*y*) As to the writ of *false judgment*, see *Overton v. Swettenham*, 3 Bing. N. C. 786; *Crooks v. Longden*, 5 Bing. N. C. 410.

(*z*) *Bird v. Pegg*, 5 B. & Ald. 418.

(*a*) *King v. Jones*, Ld. Raym. 1525.

(*b*) Error may now also, as we have seen, sup. p. 665, be brought

upon a Special case; though that is *not* matter of record; and we have also noticed, sup. p. 669, n. (*x*), an analogous proceeding (introduced by 17 & 18 Vict. c. 125, ss. 34, 35, 36, and called, by that Act, an *Appeal*) which may be instituted before the Court of Error, in reference to any decision of the court below, upon a motion for a new trial, where it is moved as on a ruling contrary to law,—or on a motion for leave to enter a verdict, or for leave to enter a nonsuit; though such motion and decision never appear upon record. (See also 23 & 24 Vict. c. 126, ss. 4—11, 42.)

(*c*) Vide sup. pp. 672, 674.

the very Term in which the act so recorded was done; for during the term the record was [held to be in the breast of the court, but afterwards it admitted of no alteration (*d*).] But this strictness has been relaxed by many modern statutes; and it is now provided, that no judgment shall be reversed for any imperfection, omission, or defect of form (*e*). And, further, that the superior courts, or any judge thereof, or any judge sitting at *nisi prius*, shall at all times make all such amendments in any proceeding “as may be necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties;” and may do this, either with or without costs, and upon such terms as to the court or judge may seem fit (*f*). It is also now enacted, that no judgment shall be reversed for any error, unless the proceeding for the purpose be commenced and prosecuted with effect, within *six years* after such judgment is signed or entered of record, or within six years after the removal of any disability under which the party aggrieved may have laboured at the time his title to bring error accrued (*g*). And further, that execution shall not be stayed by proceedings in error, brought by the defendant in the action, on any judgment, without

(*d*) Blackstone (vol. iii. pp. 408, 411) attributes this strictness partly to a “narrowness of thinking,” on the part of the judges, and partly to a “real shallowness, but affected timidity,” engendered by some severity shown in the reigns of Edward the first and Edward the third, with regard to the offence of surreptitiously erasing and altering records,—particularly the inflicting of rigorous forfeitures and punishments on most of the judges, for alleged malpractices in this particular.

(*e*) 15 & 16 Vict. c. 76, s. 50. Such defects were, even before this enactment, for the most part cured,

after judgment, by the statutes of *jeofail and amendment* before mentioned; vide sup. p. 673.

(*f*) 15 & 16 Vict. c. 76, s. 222; 17 & 18 Vict. c. 125, s. 96; 23 & 24 Vict. c. 126, s. 36. Even before these provisions, amendments had latterly been often allowed in case of material mistake, upon condition of paying costs; and this, though the application to amend had not been made until after the judgment had been recorded, and the Term had passed, or even after error brought. (See *Richardson v. Mellish*, 1 Clark & Fin. 224.)

(*g*) 15 & 16 Vict. c. 76, s. 146.

the special order of the court or a judge,—unless such defendant enters into a recognizance, with sufficient sureties, in double the sum adjudged to be recovered, to prosecute the proceedings in error with effect, and also to pay all money and costs which may ultimately become due from him, either on the judgment itself, or the proceedings for its reversal (*h*). But, until default is made in entering into such recognizance, proceedings in error are generally a stay of execution (*i*).

As to the course of proceeding in error. Supposing the error to be in *fact*, the party aggrieved, (*i. e.* the plaintiff in error,) begins by delivering, to one of the masters of the court in which the judgment has been given, a *memorandum* in a prescribed form, alleging that there is error in fact in the proceedings; and this is accompanied by an affidavit of the matter of fact referred to (*h*). This is followed by an *assignment* of error (*l*); which is analogous to a declaration; and is met by a plea on the part of the defendant in error; and the parties may thus be conducted to an issue in law or in fact, upon which judgment of affirmance or reversal will follow. So that redress may be thus obtained in the same court by which the erroneous judgment was given (*m*). For the matter of fact assigned for error, not being apparent on the face of the proceedings, there has in reality been no error, so far as its judges are con-

(*h*) 15 & 16 Vict. c. 76, s. 151. Vide sup. pp. 602, 608. By 22 Vict. c. 16, s. 5, the provisions contained in 4 W. & M. c. 4, as to taking *special* bail, are extended to bail *in error*.

(*i*) See 15 & 16 Vict. c. 76, ss. 150, 158; *Semple v. Turner*, 6 Mee. & W. 152.

(*h*) 15 & 16 Vict. c. 76, s. 158. See *Arding v. Holmer*, 26 L. J. (Exch.) 72; where it was held that to reverse an outlawry, for error in

fact, a *writ* of error must still be used, according to the practice antecedent to this statute.

(*l*) See Reg. Gen. Hil. T. 1853, (Pr.) rr. 64—66.

(*m*) *Casteldine v. Mundy*, 4 B. & Ad. 90. In this case, however, it was held that, in error in fact on a judgment in the Common Pleas, the proceedings might be had either in that Court or in the Queen's Bench.

cerned; and the correction of the record is therefore left; without impropriety, to *them*. In the more important and ordinary case of error in *law*, the course is so far similar, that it begins with delivering to the master of the court, a *memorandum*, (but in this case without affidavit,) alleging that there is error in law. If the defendant in error intends to rely on the proceeding being barred by lapse of time, or release of errors, or other like matter of fact, he is then to give the plaintiff in error notice to assign error; and the *assignment* may lead to an issue in law or in fact, as in the case before supposed (*n*). But otherwise, the plaintiff in error proceeds, after delivering the memorandum, to enter on the judgment roll a mere *suggestion*, (in a prescribed form,) to the effect that error is alleged by the one party, and denied by the other; and the cause is then set down for argument in the Court of Exchequer Chamber (*o*), in which resides the immediate jurisdiction of correcting the errors in law of any of the three superior courts (*p*). And a master of the court the proceedings whereof are alleged to be erroneous, having brought the judgment roll into the Exchequer Chamber (*q*), that court reviews the same, and gives such judgment thereon as it thinks fit; and this judgment is entered accordingly on the roll (*r*). If by it the original judg-

(*n*) 15 & 16 Vict. c. 76, s. 182.

(*o*) See Reg. Gen. Hil. T. 1853, (Pr.) rr. 67, 68.

(*p*) Vide sup. p. 434. As to the courts of common law of the *counties palatine*, it is provided by 15 & 16 Vict. c. 76, s. 233, that the Court of Queen's Bench shall be the Court of Error from them; that it shall be sufficient to transmit to the Queen's Bench a transcript of the record below; and that the judgment of the Queen's Bench thereon shall be certified by one of the

masters, and entered on the original record below; but subject to the right of either party to bring error on that judgment, according to the course of proceeding in actions brought in the Queen's Bench itself (s. 233). And see 17 & 18 Vict. c. 125, s. 102; and 23 & 24 Vict. c. 126, s. 42.

(*q*) See Gregory v. Cotterell, 5 Ell. & Bl. 584.

(*r*) 15 & 16 Vict. c. 76, ss. 155—157. See Lane v. Hooper, 3 Ell. & Bl. 731.

ment be affirmed, the successful party is entitled to the costs incurred by the proceedings in error (*s*); but if the original judgment be reversed, no such costs are allowed (*t*). In the case last supposed, however, a writ of restitution will be awarded if necessary, by the court in which the original judgment was given, to enable the defendant there, to recover whatever has been taken from him under that judgment (*u*); or the court will grant that relief in a more summary way, and by its mere rule or order. The proceedings are for the present, therefore, thus brought to a termination (*x*). The unsuccessful party however may still, if he thinks proper, resort to an ulterior appeal, by way of error, to the House of Lords; the course of proceeding upon which is, in a general point of view, the same as in the Exchequer Chamber (*y*). But, by the practice of that House, each party, before the hearing, prepares and delivers for distribution among the Lords, a printed statement of his case; which is signed by the counsel who attended the hearing below, or who are to attend the hearing in the House of Lords (*z*). *

VI. If the regular judgment of the court, after the decision of the suit, be not suspended or reversed by

(*s*) See 3 Hen. 7, c. 10; 13 Car. 2, st. 2, c. 2, s. 10; 8 & 9 Will. 3, c. 11, s. 2; 17 & 18 Vict. c. 125, s. 43. As to taxing the costs of error, see Reg. Gen. Hil. T. 1853, (Pr.) r. 69, (Pl.) r. 25.

(*t*) See *Fisher v. Bridges*, 3 Ell. & Bl. 642.

(*u*) 15 & 16 Vict. c. 76, s. 155.

(*w*) Various provisions are contained in the 15 & 16 Vict. c. 76, to prevent proceedings in error from abating from death or marriage of parties (ss. 161—167).

(*y*) See 15 & 16 Vict. c. 76, s.

155. The costs of proceedings in error in the *House of Lords* are (it may be observed) only allowed if ordered in the judgment of the House. However, in a case where the plaintiff below obtained a judgment which was reversed in the Exchequer Chamber, but affirmed in the House of Lords, he was held entitled to the costs of the proceedings in the Exchequer Chamber. *Peek v. North Staffordshire Railway Company*, 4 B. & Smith, 627.

(*z*) It may be noticed that where the judges are *equally divided* in

one or other of the methods mentioned in this chapter, the next and last step is the *execution* of that judgment, or putting the sentence of the law in force. This is performed by different writs of execution, according to the nature of the action and of the judgment which is recovered (*z*). In the ordinary actions, to which our attention is at present immediately directed, the judgment is in general for recovery of *money* only, (either by way of debt or damages,) and not for the recovery of any specific chattel;—there being, however, an exception to this in the case of *detinue*, in which the judgment is for recovery of the goods themselves which are detained, or the value thereof, with damages and costs (*a*). And in

opinion, judgment goes for *defendant in error*. This is the rule of the House of Lords (see *The Queen v. Millis*, 10 Cl. & Fin. 534), and it is the same in the other Courts of Error.

(*z*) As to all writs of execution, it is provided by 3 & 4 Will. 4, c. 67, s. 2, that they may be *tested* on the day on which they are issued, and be made *returnable* immediately after the execution thereof. Also by 15 & 16 Vict. c. 76, s. 120, and Reg. Gen. Hil. T. 1853, (Pr.) r. 57, that when a verdict is obtained in Term, or a plaintiff has been nonsuited in or out of Term, judgment may be signed, and execution issued in *fourteen* days, unless otherwise ordered. Also by the Act last mentioned, ss. 121—125, that a writ of execution may in all cases be issued at once into any county, whether a county palatine or not, and whether the venue was laid there or not;—that the party entitled to execution may in every case levy the poundage fees and expenses over and above the sum recovered;—and that writs of execution, while un-

executed, shall not remain in force for more than a year from the *teste*, but may from time to time be renewed. (See also 17 & 18 Vict. c. 125, s. 94.) Also, by Reg. Gen. Hil. T. 1853, (Pr.) r. 70, &c., it is ordered that it shall not be necessary before issuing execution, to enter the proceedings on any roll, but that none shall be issued until the judgment paper, *postea*, or inquisition, has been seen by the proper officer. And in the same Rules, and in the schedule thereto attached, there are various other provisions as to writs of execution. It may be remarked, too, in reference to all these writs, that they are incapable of being executed on a *Sunday*. (Arch. Pr. by Chitty, 548, 8th ed.) As to the effect of a writ of execution on goods *purchased* from the execution debtor, vide sup. vol. II. pp. 50, 51.

(*a*) However, as to the judgment in *detinue* brought in a *county court*, see County Court Rules and Orders, 1867, Sched. of Forms, No. 160.

detinue, there is accordingly a special writ of execution, called [a *distringas*, to compel the defendant to deliver the goods by repeated distresses of his chattels (*b*), 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 (*c*)—shall be levied on the person or goods of the defendant.] And so, now, it is provided by the Common Law Procedure Act, 1854, that in any action for the detention of any chattel, where there has been a verdict assessing its value, the court or judge shall have power if they or he see fit, upon the application of the plaintiff, to order that execution shall issue for the return of the chattel detained,—without giving the defendant the option of retaining such chattel, upon paying the value assessed. And that if it cannot be found, and the court or judge do not otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the bailiwick, until the defendant shall render the chattel,—or, at the option of the plaintiff, shall cause to be made of the defendant's goods the assessed value of the chattel, with damages, costs, and interest besides (*d*).

Where money only is recovered, the practice of the court allows the judgment creditor to resort to one of the four following writs of execution :

1. The writ of *capias ad satisfaciendum*. [The intent of this writ is to imprison the body of the debtor, till satisfaction be made for the debt or damages, and costs. It therefore doth not lie against any privileged persons,

(*b*) 1 Roll. Ab. 737; Rast. Ent.
215.

(*c*) Bro. Ab. tit. Damages, 29.

(*d*) 17 & 18 Vict. c. 125, s. 78.
See *Chilton v. Carrington*, 15 C. B.

730.

[such as peers, or members of parliament. And Sir E. Coke also gives us a singular instance, where a defendant, in the fourteenth year of Edward the third, was discharged from a *capias* because he was of so advanced an age *quod pœnam imprisonmenti subire non potest*(*e*). It may be observed that if an action be brought against a 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 (*f*);] and if the action was originally brought against herself when solé, and pending the suit she marries, the *capias* may be either awarded against her alone, or against her and her husband jointly (*g*).

Under this writ, the sheriff cannot legally break open the house where the party is found; but where the outer door is not closed, he is warranted in breaking open an inner one (*h*).

This writ [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 once taken in execution under it, no other process can be sued out against his lands or goods(*i*).] Only by statute 21 Jac. I. c. 24, if a person, standing charged with any

(*e*) Co. Litt. 280.

(*f*) See *Bardolph v. Perry, Moor*, 704; *Larkin v. Marshall*, 4 Exch. 804; *Edwards v. Martin*, 17 Q. B. 693; *Ivens v. Butler*, 26 L. J. (Q. B.) 145; 15 & 16 Vict. c. 76, s. 141.

(*g*) *Beynon v. Jones*, 15 Mee. & W. 566; *Thorpe v. Argles*, 1 D. & L. 831; *Ex parte Butler*, 1 Hurl. & C. 637. See 15 & 16 Vict. c. 76, s. 141. Blackstone remarks (vol. iii. p. 414), that "if judgment be recovered against a husband and wife for the contract, nay, even for the personal misbehaviour of the wife during coverture, the *capias*

"shall issue against the husband only; which is one of the many great privileges of English wives." (See Cro. Jac. 323.)

(*h*) See Arch. Pr. by Chitty, 549, 8th ed.; 5 Rep. 92; *Sandon v. Jervis*, 1 Ell. Bl. & Ell. 938.

(*i*) Nor can debts due to the judgment debtor be afterwards attached under the garnishee clauses of the Common Law Procedure Acts. Taking the debtor in execution, is not however for all purposes an *extinguishment of the debt*. See *Thompson v. Parish*, 5 C. B. (N. S.) 685.

debt or damages recovered, dies in execution, the party at whose suit he stood charged [may, after his death, sue out a new execution against his lands, goods or chattels (*h*).] The writ of *capias ad satisfaciendum* is directed to the sheriff, and (on a judgment for the plaintiff) commands the sheriff [to take the body of the defendant and have him at Westminster immediately after the execution thereof, to make the plaintiff satisfaction for his demand (*l*). And if the defendant does not then make satisfaction, he must remain in custody till he does ;] or till he is otherwise lawfully released (*m*),—as on being adjudicated a bankrupt (*n*).

In the particular case where a defendant, (being about to abscond from the realm,) has been, on that ground, held to bail by a judge's order (*o*),—if judgment in the action be obtained against him, and a *capias ad satisfaciendum*

(*h*) At one time, a popular, but mistaken opinion, prevailed, that the *corpse* of a person dying in custody under a *ca. sa.* might be detained, till the judgment was satisfied. (See *The Queen v. Fox*, 2 Q. B. 246.)

(*l*) As to the responsibility of the sheriff in executing this writ, see also, *Morrish v. Murray*, 13 Mee. & W. 52 ; *Howden v. Standish*, 6 C. B. 520, et sup. p. 234.

(*m*) A written order, under the hand of the attorney in the cause, by whom the writ was issued, will now justify the sheriff or gaoler in discharging the debtor, unless written notice to the contrary shall have been given to the sheriff or gaoler by the creditor ; but such discharge shall be no satisfaction of the debt, unless made by the authority of the creditor. (15 & 16 Vict. c. 76, s. 126.)

(*n*) Vide sup. vol. II. p. 164. From the account given in that place it will be seen, that, under the 24 & 25 Vict. c. 134 (relating to the law of bankruptcy), a man can now only remain in prison for debt (unless in a few excepted cases) for a short period,—after which he is made bankrupt and released in the manner there explained. One effect of this change having been greatly to reduce the number of prisoners confined for debt in the *Queen's Prison*, an Act was afterwards passed (25 & 26 Vict. c. 104) for the discontinuance of that prison, and the removal of the prisoners to *Whitcross Street Prison*, where prisoners for debt within the district of the London Court of Bankruptcy are now confined.

(*o*) Vide sup. p. 602.

be sued out, and *non est inventus* returned thereon (*g*), [the plaintiff may sue out a process against the bail: 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 would 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 (*r*). 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 debt and damages.] And on such writ, if they show no sufficient cause, and the defendant does not surrender himself within the period prescribed by the practice of the courts in this particular (*s*), the plaintiff may have judgment and execution against the bail (*t*). It is also in the election of the plaintiff to proceed by *action of debt* against the bail, on their recognizance.

A *capias ad satisfaciendum* might, until a few years ago, issue for a judgment debt of any amount. But by 7 & 8 Vict. c. 96, s. 57 (*u*), it was enacted, that no person should be charged or taken in execution on a judgment obtained in any court, superior or inferior, in any action for the

(*g*) By 17 & 18 Vict. c. 125, s. 90, writs of execution to fix bail may be tested, returnable in vacation.

(*r*) Lutw. 1269—1273.

(*s*) See 1 Arch. by Chitty, 489, 504; Sanderson v. Brown, 7 A. & E. 261.

(*t*) As to the form and course of proceeding on the writ of *scire facias* in this and in several other cases, see 15 & 16 Vict. c. 76, s. 132; as to *ca. sa.* against bail, see Reg. Gen. Hil. T. 1853, (Pr.) rr.

74, 75.

(*u*) Even before this statute, it had been provided by 48 Geo. 3, c. 123, that a debtor in execution for a debt or damages not exceeding 20*l.* might, *after a year's imprisonment*, on application to the court in which the judgment was recovered, obtain the immediate discharge of his person. (See Reg. Gen. Hil. T. 1853, (Pr.) r. 129.) As to the construction of the above Act, see Doye v. Eley, 3 C. B. (N. S.) 764; Humphreys v. Franks, *ibid.* 765.

recovery of a *debt* not exceeding 20*l.* exclusive of the costs recovered by the judgment; subject, however, to this proviso, that where such debt should appear to the judge trying the cause, (being a judge of the superior courts, or a barrister or an attorney,) to have been incurred under *false pretences* or *with a fraudulent intent*, or without a *reasonable assurance of being able to pay or discharge the same*, it should be lawful for such judge to order the defendant to be taken and detained in execution upon such judgment, as if the Act had not passed (*x*).

2. The next species of execution is against the goods and chattels of the party against whom the judgment is recovered, and it [is called a writ of *feri facias*, from the words in it, where the sheriff is commanded *quod feri facias de bonis*, that he cause to be made of the goods and chattels of the party, the sum or debt recovered.] From this writ peers, or other persons privileged in their persons, are not exempt; and it lies, also, against executors or administrators, with regard to the goods of the deceased (*y*). [The sheriff may not break open any outer doors to execute this writ: but must enter peaceably (*z*); and may then break open any inner door in order to take the goods (*a*).] And he may sell the goods and chattels of the party against whom the writ is issued (*b*), including even his estate for years, (which is a chattel real,) or his growing crops (which are in the nature of personalty),

(*x*) Vide sup. vol. II. p. 163, n. (*o*). As to the construction of 7 & 8 Vict. c. 96, s. 57. See West v. Farlar, 1 E. & E. 179, and the cases there cited.

(*y*) 3 Bl. Com. 417. As to taking in execution goods of which the defendant is merely a *trustee*, see Fenwick v. Laycock, 2 Q. B. 108.

(*z*) 5 Rep. 92.

(*a*) Palm. 54; Pugh v. Griffiths, 7 A. & E. 827; Morrish v. Murray, 13 Mee. & W. 52.

(*b*) The sale may be either by auction, or private treaty; and it is not unusual for the sheriff to hand over the goods to the execution creditor himself, at a fair valuation. (See Herniman v. Bowker, 25 L. J., Exch. 69.)

till he has raised enough to satisfy the judgment (*b*). This, however, is subject to certain restrictions, which the law has deemed it reasonable to impose for the protection of landlords. For, first by 8 Anne, c. 14, the sheriff cannot lawfully sell goods lying upon any premises demised to a tenant, unless the landlord be first paid his rent due before the execution, to the extent, that is to say, of one year's arrears (*c*). Secondly, by 56 Geo. III. c. 50 (*d*), no sheriff shall carry off, or sell for the purpose of being carried off the premises, any straw, hay, manure or the like from any lands let to farm, in any case where by the covenants or agreements in the lease the carrying off the same is prohibited between landlord and tenant,—though such produce may be lawfully sold to any person who will agree, in writing, to use and expend the same upon the lands, according to the obligation of the tenant. And lastly, by 14 & 15 Vict. c. 25, s. 2, if growing crops are seized and sold on a *fi. fa.* or other writ of execution by the sheriff, they shall, nevertheless, so long as they remain on the lands (and where there is no other sufficient distress), be liable to be distrained for rent becoming due from the tenant after such seizure and sale. At common law, moreover, no personal chattel could be taken under this writ that was not in its nature properly capable both

(*b*) 3 Bl. Com. 417.

(*c*) See *Rissley v. Ryle*, 11 Mee. & W. 17; *Smallman v. Pollard* 6, Man. & G. 1001; *Cocker v. Musgrove* and another, 9 Q. B. 223; *White v. Binstead*, 13 C. B. 304; *Wollaston v. Stafford*, 15 C. B. 278. It is however provided, by 7 & 8 Vict. c. 96, s. 67, that no landlord of any tenement let at a *weekly* rent shall have any claim or lien upon any goods taken in execution under the process of any court of law, for more than *four weeks'* arrears of rent. And, in like manner,

in case of a tenement let for any other term *less than a year*, the landlord shall not have any such claim or lien for more than the arrears of rent accruing during *four* such terms or times of payment. (See, in reference to these provisions, *Wharton v. Naylor*, 12 Q. B. 673.) See also in reference to the landlord's claim for rent upon an execution, under warrant from a *county court*, 19 & 20 Vict. c. 108, s. 75.

(*d*) See *Wilmot v. Rose*, 3 Ell. & Bl. 563.

of manual seizure and sale. But now by 1 & 2 Vict. c. 110, s. 12, it is enacted, that the sheriff may upon a *feri facias*, (whether sued out of a superior or inferior court,) take any *money, bank notes, bills of exchange* or other *securities for money*, belonging to the party against whom the writ is sued out (*e*); and may also sue upon such bills or securities in his own name, paying over the money to be recovered thereon to the creditor. It is to be observed, that [if part only of the debt be levied on a *feri facias*, the plaintiff may have a *capias ad satisfaciendum* for the residue (*f*).] And further, that if the sheriff is unable to sell the goods at a reasonable price, he may make his return upon the writ, that they remain in his hands for want of buyers, upon which the party suing out the execution may proceed to take out a writ of *venditioni exponas*; and under this latter writ, the sheriff is bound to sell them for the best price, however inadequate, that can be obtained (*g*).

3. [A third species of execution is by writ of *levari facias* (*h*); which affects a man's goods and the *profits* of his lands, by commanding the sheriff to levy] the judgment debt on the lands and goods of the party against whom it is issued, [whereby the sheriff may seize all his goods and receive the rents and profits of his lands, till satisfaction be made (*i*). Little use 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 against ecclesiastics, which is given when the sheriff, upon a common writ of *feri facias*, returns *nulla bona*,

(*e*) See *Collingridge v. Paxton*, 11 C. B. 683.

(*f*) 1 Roll. Ab. 904; *Dennis v. Wells*, Cro. Eliz. 344. We have seen, however, sup. p. 696, that he cannot, & *converso*, after the execution of a *capias*, resort to *feri facias*, except in the case of the de-

fendant's death while in custody under the *capias*.

(*g*) *Keightley v. Birch*, 3 Camp. 521.

(*h*) As to this writ when issued out of a hundred court, see *Humphries v. Longmore*, 6 C. B. 363.

(*i*) *Finch*, L. 471.

[and that the party is a beneficed clerk, not having any lay fee.] In this case, inasmuch as the *bona ecclesiastica* are not to be touched by lay hands, a writ goes to the bishop of the diocese, in the nature of a *levari facias* (*h*), commanding him to enter into the benefice, and take and sequester the same into his possession; and hold the same until he shall have levied the amount of the judgment out of the rents, tithes, and profits thereof (*l*). And [thereupon the bishop sends out a *sequestration* of the profits of the clerk's benefice: directing the churchwardens to collect] such profits, and, after providing thereout for the offices of the church, to pay over the surplus to the judgment creditor, until the full sum due to him be raised (*m*).

4. [The fourth species of execution is by the writ of *elegit*; which is a judicial writ given by the Statute of Westminster the second, 13 Edw. I. c. 18 (*n*).] Before that statute, [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,] as established in their original form, which limited in a

(*h*) Reg. Orig. 300; Judic. 22; 2 Inst. 4.

(*l*) *Harding v. Hall*, 10 Mee. & W. 42. Or the writ may command the bishop to make of the ecclesiastical goods of the party within his diocese the amount for which the judgment is recovered. The latter form of writ is called a *fi. fa. de bonis ecclesiasticis*; the form in the text, a *levari* or *sequestrari facias*: (See *Dawson v. Symonds*, 12 Q. B. 830; Arch. Pr. by Chit. (8th edit.) 1118.)

(*m*) 2 Burn, E. L. 329. See *Bishop v. Hatch*, 1 A. & Ell. 171; *Pack v. Tarpley*, 9 A. & E. 468;

Harding v. Hall, *nbi sup.*; *Watkins v. Tarpley*, 17 L. J. (Q. B.) 47; *Phelps v. St. John*, 10 Exch. 895; *Sturgis v. Bishop of London*, 7 Ell. & Bl. 542. As to the appointment of a curate to the benefice, pending its sequestration, see 1 & 2 Vict. c. 106, s. 99. As to sequestration by the assignees of a beneficed clergyman who has become *bankrupt*, see 24 & 25 Vict. c. 134, s. 135. As to the remedies of sequestrators, see also 12 & 13 Vict. c. 67.

(*n*) As to the nature of this writ, see *Sherwood v. Clark*, 15 Mee. & W. 764; *Carter v. Hughes*, 2 H. & N. 714.

very strict manner even the right of *voluntary* assignment (*o*). [And when the restriction of alienation began to wear away, the consequence still continued; and no creditor could take the possession of land, but only levy the growing profits, so that if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute (13 Edw. I. c. 18), therefore, granted this writ,—called an *elegit*, because it is in the choice or election of the judgment creditor, whether he will sue out this writ or one of the former,—by which the judgment debtor's goods and chattels are not sold, but only appraised: and all of them, (except oxen and beasts of the plough,) are delivered to the judgment creditor, at such reasonable appraisement and price in satisfaction of his debt.] If the goods should prove not to be sufficient, then—according to the law as it stood from the time of the passing of the Statute of Westminster until the commencement of the present reign, [the *moiety* of the lands of freehold tenure which the judgment debtor had at the time of the judgment given, whether held in his own name or by any other in trust for him,] were also to be delivered to the judgment creditor,—to hold till out of the rents and profits thereof the debt were levied, or till the judgment debtor's interest therein were expired (*p*). But by 1 & 2 Vict. c. 110, s. 11, it was provided, that upon an *elegit* the sheriff shall deliver execution of *all* lands, tenements, and hereditaments, (including those of copyhold or customary tenure,) which the judgment debtor, or any person in trust for him, shall have been

(*o*) Vide sup. vol. I. pp. 481, 482, But it appears by *Magna Charta*, c. 8, that it was allowed, by the common law, for the *king* to take possession of the lands till his 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 any-

thing was owing from the vassal; and could not be said to be defrauded of his services when the ouster of the vassal proceeded from his own command. (3 Bl. Com. 419.)

(*p*) 2 Inst. 395; and see 29 Car. 2, c. 3.

seised or possessed of at the time of entering up the judgment, or at any time afterwards; or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any *disposing power* which he may, without the assent of any other person, exercise for his own benefit (*r*). And by 27 & 28 Vict. c. 112, s. 4, every creditor to whom his debtor's land shall have been actually delivered in execution under a judgment, and whose writ or other process of execution shall be duly registered, may, during the time that such registry shall continue in force, obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in such land (*s*). Finally, it is to be noticed, that this writ of *elegit* is of so high a nature that, after lands have been seized under it, the body of the defendant cannot be taken (*t*); [but if execution under it 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 in this case such writ is no more than a *feri facias* (*u*). So that body and goods may be taken in execution, or land and goods, but not body and land too, upon any judgment between subject and subject.]

Besides these writs of execution, the judgment creditor was enabled, by the 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, to resort to other modes of proceeding,

(*r*) An *elegit* is always *returned* by the sheriff; (that is, it is filed in court after execution, showing what has been done thereon;) and in this respect it differs from a *ca. sa.* and *fi. fa.*; for those writs are not usually returned by the sheriff, unless he is *ruled* to do so. When upon an *elegit*, it is returned that land has been delivered to the plaintiff, —he is entitled at once, (subject to the estates of any parties which commenced before the judgment,)

to enter such land, peaceably; or, if necessary, to recover it by ejection, on which issues the writ of *habere facias possessionem*: after which entry or writ he is *tenant by elegit*; as to whose estate, vide sup. vol. i. p. 320.

(*s*) Vide sup. p. 684.

(*t*) 3 Bl. Com. 419.

(*u*) Hob. 58. See *Queen v. Derbyshire, &c. Railway Company*, 3 Ell. & Bl. 784.

to enforce payment out of a species of property which none of these writs can in their nature conveniently reach. For, on the application of any creditor who has entered up judgment in one of the superior courts at Westminster, a judge of any such court may, by these statutes, order that the property of the debtor in government stock, or in the stock of any public company in England, corporate or otherwise, whether standing in his own name or the name of any person in trust for him, shall stand *charged* with the payment of the amount for which judgment shall have been recovered, with interest; so as to give the judgment creditor the same remedies as if the charge had been made in his favour by the judgment debtor. But this is subject to a proviso, that no proceedings shall be taken in order to have the benefit of such charge till after *six calendar months* from the date of the order; and further, that if the judgment creditor, after obtaining such charge, or any other charge or security under the powers of those Acts, shall afterwards, and before the realization of the property, take the person of the debtor in execution upon the same judgment,—he shall be deemed to have relinquished his charge or security (*x*). And in further aid of the judgment creditor, it is also provided by the Common Law Procedure Act, 1854(*y*), that he may apply to the court or a judge for a rule or order to have the judgment debtor orally examined as to the debts owing to him by any third person; and may make application for an

(*x*) As to these provisions, see *Brown v. Bamford*, 9 Mee. & W. 42; *Churchill v. Bank of England*, 11 Mee. & W. 323; *Rogers v. Holloway*, 5 Man. & G. 292; *Witham v. Lynch*, 1 Exch. 391; *Robinson v. Burbidge*, 1 L. M. & P. 94; *Graham v. Connell*, *ibid.* 438; *Watts v. Porter*, 3 Ell. & Bl. 743; *Baker v. Tynte*, 2 Ell. & Ell. 897.

(*y*) 17 & 18 Vict. c. 125, ss. 60—

67. See *Innes v. East India Company*, 17 C. B. 351; *Lockwood v. Nash*, 18 C. B. 536; *Mason v. Muggerridge*, *ibid.* 642; *Hirsch v. Coates*, *ibid.* 757; *Holmes v. Tutton*, 5 Ell. & Bl. 65; *Jones v. Jenner*, 25 L. J., Exch. 319; *Johnson v. Diamond*, 11 Exch. 431; *Dresser v. Johns*, 6 C. B. (N. S.) 429. Further provisions as to attachment of debts are made by 23 & 24 Vict. c. 126, ss. 28—31.

order that all debts found to be due from any third person, (called the *garnishee*,) to the judgment debtor, shall be *attached* to answer the judgment debt;—the service of which order shall bind such debts in the garnishee's hands (*y*). The Act also provides, that if the garnishee fails to appear upon summons to show cause why he should not pay the judgment creditor the debts attached, or so much as will suffice to pay the judgment debt,—or if, on appearance, he fails to make such payment forthwith, and yet does not dispute the debt alleged to be due from him, the judge may order execution against him for the amount; and that, if on the other hand he does dispute his liability, the judge may order that the judgment creditor be at liberty to proceed against him by a writ of the same nature as the *writ of revivor*, to which we are about presently to advert.

These are the methods which the law of England has pointed out for the execution of judgments in their ordinary course (*z*). And [when the demand of the judgment creditor is satisfied, either by the voluntary payment of the debtor, or by this compulsory process or otherwise, *satisfaction* ought to be *entered on record* (*a*),—to the end that the debtor may not be liable to be hereafter harassed a second time on the same account.]

And here our summary account of an action is brought to its proper close. But before we conclude the chapter, it is right to take notice of certain supplementary pro-

(*y*) A somewhat similar proceeding has been immemorially used in the cities of London and Bristol, under the name of *foreign attachment*, as to which see *Wadsworth v. Queen of Spain*, 17 Q. B. 171; *Bastow v. Gant*, 21 L. J., N. S. (Q. B.) 377; *Cox v. Lord Mayor of London*, Law Rep., 1 H. L. 239. See, also, The Mayor's Court of London Procedure Act, 1857 (20 &

21 Vict. c. clvii.), ss. 5, 18, 47.

(*z*) 3 Bl. Com. 421.

(*a*) As to entry of satisfaction on the roll, and acknowledgment thereof, see Reg. Gen. Hil. T. 1853, (Pr.) r. 80; E. T. 1857; 23 & 24 Vict. c. 115, s. 2; 30 & 31 Vict. c. 47. See also *Lambert v. Parnell*, 15 L. J. (Q. B.) 55; and *Catlin v. Kernot*, 3 C. B. (N. S.) 796.

ceedings which are sometimes incidental to, or follow upon, a suit at law.

I. *The motion by way of interpleader*; or, as it may be otherwise called, motion for relief from adverse claims. It often happens that a man finds himself exposed to the adverse claims of two opposite parties, each requiring him to pay a certain sum of money, or to deliver certain goods; and that he is unable to comply safely with the requisition of either, because a reasonable doubt exists to which of them the property in truth belongs. Formerly, a person so circumstanced had no means of relief except by instituting in the Court of Chancery a proceeding called a bill of interpleader, which was attended with considerable expense and delay. But by 1 & 2 Will. IV. c. 58 (b), it was provided, that,—upon application made (after declaration and before plea) on behalf of the defendant in an action of assumpsit, debt, detinue, or trover, showing that the defendant claims no interest in the subject-matter of the suit; but that the right thereto is claimed by, or supposed to belong to, some third party, who has sued, or is expected to sue, for the same; and that the defendant does not in any manner collude with such third party, but is ready to bring into court, or to pay or dispose of the subject-matter of the action in such manner as the court or any judge thereof may direct,—it shall be lawful for the court or a judge to order such third party to appear, and to state the nature and particulars of his claim, and either maintain or relinquish the same; and if he maintains it, to make himself defendant in the action already commenced, or otherwise as the case may require (c).

(b) See also 1 & 2 Vict. c. 45, s. 2, and 23 & 24 Vict. c. 126, ss. 12—18.

(c) It has been said, that a court of law acting under these provisions

is not fettered by the rules according to which a court of equity used to proceed in an interpleader bill. (*Best v. Hayes*, 1 Hurl. & C. 718.)

Or, with the consent of the plaintiff and such third party (*d*), the court or a judge may dispose of the question between them in a summary manner (*e*).

II. The *writ of revivor* is ancillary to the judgment in an action: resort being had to it when the circumstances are such that the law no longer allows the judgment to be enforced by a writ of execution as of course; but deems it reasonable to summon the party charged into court, in order to give him an opportunity of being heard before execution issues. Formerly, the writ used for this purpose was a *scire facias*; which, in like manner as a writ of execution, was directed to the sheriff; and it was by him that the defendant was summoned. But in lieu of this, a writ of revivor, (being indeed substantially the same thing, except as regards the sheriff's intervention,) has been substituted by the Common Law Procedure Act, 1852 (*f*); which also provides that this latter writ shall be directed to the defendant himself, and proceeded upon in the same manner as a writ of summons in an ordinary action (*g*).

The circumstances under which a writ of revivor issues, are always of a kind connected either with lapse of time or change of parties.

1. As to lapse of time. It was the rule of the common law that all writs of execution must be sued out within

(*d*) By 23 & 24 Vict. c. 126, s. 14, no *consent* is necessary where the court or judge is of opinion that from the smallness of the amount in dispute, or of the value of the goods seized, it is desirable and right to dispose of the matter summarily.

(*e*) By 1 & 2 Will. 4, c. 58, s. 6, a similar protection is afforded to *sheriffs* and other officers, who, under the process of the court, are called upon to seize the goods of any per-

son; and are afterwards sued, or find themselves in danger of being sued, by some third party claiming property in the same goods. And as to interpleader in county and other inferior courts, see 7 & 8 Vict. c. 96, s. 28; 9 & 10 Vict. c. 95, s. 118; 19 & 20 Vict. c. 108, s. 68; Rules and Orders, 1867, rr. 174—180, Sched. of Forms, No. 79—95.

(*f*) 15 & 16 Vict. c. 76, s. 129.

(*g*) Sect. 131.

a year and a day after the judgment is entered (*h*); for otherwise a presumption was deemed to arise that the judgment was satisfied. But after the year and day, the claimant was still allowed (originally by 13 Edw. I. c. 45) to issue a *scire facias*, calling on the defendant to show cause why execution should not issue. This period of a year and a day has now been extended by the Common Law Procedure Act, 1852, to six years; and after the expiration of that time, execution is still (as formerly after the expiration of a year and day) not suffered to issue as *of course* (*i*). But the party desiring to have execution after such six years, is enabled to apply for leave to enter a *suggestion* on the roll, to the effect that it manifestly appears to the court that he is entitled to execution (*h*); and such suggestion will be entered and execution issued accordingly, if the right shall appear manifest after hearing both parties. In cases where no such suggestion can be supported, the applicant must have recourse to his writ of revivor, or to an action on the judgment (*l*). The writ of revivor, if the judgment be less than ten years old, will be issued 'as a matter of course; if more than ten years old, it is obtained *ex parte* on a rule of court or judge's order; if more than fifteen, then only after a rule to show cause (*m*).

2. As to change of parties (*n*). This may occur, first, in the case of *death*. And here the rule formerly was, that if either plaintiff or defendant died before final judgment, the action would abate; and that if either died after the judgment and before it was satisfied, a *scire facias* by or against the representatives of the party deceased (as the case might be) was requisite in order to enforce the judgment. By 17 Car. II. c. 8,

(*h*) 3 Bl. Com. 421.

(*i*) 15 & 16 Vict. c. 76, s. 128.

(*h*) Sect. 129.

(*l*) Sect. 130.

(*m*) Sect. 134.

(*n*) See *Underhill v. Devereux*, 2 Saund. by Wms. 72 b, g; *Bosanquet v. Ransford*, 11 A. & E. 520; *Whittenbury v. Law*, 6 Bing. N. C. 345.

however, (and now, again, by the Common Law Procedure Act, 1852,) it was provided, that the death of neither party between verdict and judgment should abate the suit, so as the judgment were entered within two terms after the verdict (*p*). And by the Act last named (in extension of some prior enactments on this subject) it is enacted generally, that the death of a plaintiff or defendant shall not cause the action to abate (*q*); but that the proceedings, (supposing the right of action to survive,) shall be continued at suit of, and against, the proper party or parties (*r*);—in the case of the death of a sole plaintiff or defendant before judgment, or of one of several plaintiffs or defendants, by a suggestion of the fact on the record (*s*);—and in the case of the death of a sole plaintiff or defendant after an interlocutory and before final judgment, by a writ of revivor at suit of the plaintiff or his representatives, against the defendant or his representatives, as the case may be (*t*). Secondly, a change of parties and necessity for a writ of revivor may arise in the case of *marriage*. For where a female plaintiff or defendant married before judgment was obtained, the action would formerly in general abate (*u*); and if the marriage was after judgment and before execution, a *scire facias*, at suit of or against the husband and wife, (as the case might be,) was requisite in order to enforce the judgment (*x*). But by the 15 & 16 Vict. c. 76, the action shall no longer abate, but be continued to judgment. And the judgment and execution, against a female defendant, under such circumstances, may either

(*p*) 15 & 16 Vict. c. 76, s. 139.
See *Earl v. Brown*, 1 Wils. 302;
Wright v. Madocks, 8 Q. B. 119.
Kramer v. Waymark, Law Rep.,
1 Exch. 241.

(*q*) See the earlier enactments
on this subject contained in 8 & 9
Will. 3, c. 11, and the case of *Rolt*
v. Mayor of Gravesend, 7 C. B. 777.

(*r*) 15 & 16 Vict. c. 76, s. 135.
And see 17 & 18 Vict. c. 125, s. 92.
(*s*) 15 & 16 Vict. c. 76, ss. 136,
137, 138.

(*t*) Sect. 140.

(*u*) *Walker v. Goslin*, 11 Mee. &
W. 78.

(*x*) *Underhill v. Devereux*, 2
Saund. by Wms. 72 k.

be against her alone, or (by suggestion or writ of revivor pursuant to the Act) against the husband and wife jointly. Or, if the judgment be in favour of a female plaintiff so circumstanced, execution may be issued by authority of the husband, and without any suggestion or writ of revivor (*y*). Thirdly, a writ of revivor may be necessary in the case of *bankruptcy*. For where a plaintiff became bankrupt after he had obtained judgment and before execution, it was formerly requisite, in order to obtain execution, that a *scire facias* should issue in the name of his assignees (*z*). But by the 15 & 16 Vict. c. 76, the course of proceeding here, also, is now either to sue out a writ of revivor, or to apply for leave to enter a suggestion of the kind already described (*a*).

III. As to the writ of *scire facias*, it is used in a variety of instances in the law—in some of them as an independent and original proceeding (*b*), in others as supplementary to an action; in which latter case, it is sued out of the court in which that action was brought. In its latter application, indeed, it is now much more confined than formerly, being supplanted, (as before remarked,) by a writ of revivor, in all those cases in which it becomes necessary to revive a judgment, by reason either of lapse of time, or change of parties. It is still, however, the proper writ in several other cases of a supplementary kind, to which the writ of revivor has no application; for example, that of proceeding against bail on their recognizance (*c*), or for restitution after

(*y*) 15 & 16 Vict. c. 76, s. 141.

(*z*) *Winter v. Kretchman*, 2 T. R. 45.

(*a*) 15 & 16 Vict. c. 76, s. 129. See also the provision in sect. 142, that the bankruptcy of the plaintiff shall not be pleaded in bar in any action which the assignees may maintain for the benefit of the creditors, unless the assignees shall re-

fuse to continue the action and give security for the costs.

(*b*) Among these is the case of *scire facias* for repealing a patent; as to which, see 12 & 13 Vict. c. 109, s. 29; 15 & 16 Vict. c. 83, s. 15; sup. vol. II. p. 33; et post, vol. IV. p. 83.

(*c*) Vide sup. p. 602.

a reversal in error (*d*). But in reference to cases wherein a *scire facias* still issues out of the superior courts of common law, the Common Law Procedure Act, 1852, contains a provision, that it shall be directed and proceeded upon in like manner as the writ of revivor established by that Act (*e*). We need only add, therefore, on this subject, that it is a settled rule as to a *scire facias*, (and the same rule applies, it is presumed, to a writ of revivor,) that the defendant in such a proceeding, when supplementary to an action, shall never be allowed to plead therein any matter which he had an opportunity of pleading in the action (*f*). For the object of the proceeding is not to afford him the means of bringing the original judgment into question; but of showing, if he can, that some matter has occurred, since the judgment was given, which entitles him to be relieved from the execution.

(*d*) See 15 & 16 Vict. c. 76, s. 132.

(*e*) Sect. 132. This section enumerates a variety of cases of this description; and the enumeration seems to comprise nearly the whole of those in which a *scire facias* may now issue out of the courts in question. As to costs on a *scire facias*,

see 8 & 9 Will. 3, c. 11, s. 3; 3 & 4 Will. 4, c. 42, s. 34. As to plaintiff's moving to quash his own writ of *scire facias* or revivor, see Reg. Gen. Hil. T. 1853, (Pr.) r. 78.

(*f*) *Underhill v. Devereux*, 2 Saund. by Wms. 72 t. And see *Fowler v. Rickerby*, 2 Man. & G. 760.

CHAPTER XI.

OF THE PROCEEDINGS IN SOME PARTICULAR ACTIONS.



HAVING now taken a compendious though comprehensive view of the course of proceeding in actions in general, it may be useful to advert shortly to some varieties upon that course, as exhibited in the case of the particular actions of *dower*, *quare impedit*, *replevin*, and *ejectment*; as to which, however, it is to be understood that their deviation is confined, in general, to the instances we are about to specify, and that in other respects they are conducted in conformity to the regular system of which we have given an account.

I. The action of dower *unde nihil habet* was, until recently, commenced, not by summons, but by *original writ*, of the nature of which an account has already been given (*g*); and which, it will be remembered, was anciently the process used for beginning all suits, though, in personal actions, its use became in the course of time evaded (*h*). In real and mixed actions, however, it was retained (long after its general abandonment), together with an antiquated and cumbrous process upon it to procure the appearance of the defendant (*i*). But by the

(*g*) Vide sup. p. 521, where it is mentioned that the other action of dower, viz., "the writ of right of dower," has always been of rare occurrence. Its existence, however, is recognized in 23 & 24 Vict. c. 126, s. 26; and supposing such an action to be brought, its proceedings would be the same as those in an action of

dower *unde nihil habet*.

(*h*) Vide sup. p. 594.

(*i*) Under this process, as used in dower, the defendant (or *tenant* as he is called in a real action) was called on to appear by the sheriff's sticking up a form of written summons, and leaving it, on the premises out of which the dower is claimed,

23 & 24 Vict. c. 126, (called the Common Law Procedure Act, 1860,) both the original writ itself, and the subsequent process upon it, were, even in these cases, abolished; it being enacted (sect. 26), that no original writ of dower or dower *unde nihil habet*, and no plaint for freebench or dower in the nature of any such writ (*m*), should be brought after the commencement of that Act in any court whatsoever; but that where any such writ, action or plaint would at the date of that statute lie either in a superior or in any other court, an action may be commenced by writ of summons issuing out of the Common Pleas, in the same manner and form as the writ of summons in an ordinary action. The Act proceeds to direct (sects. 26, 27), that upon such writ shall be endorsed a notice that the plaintiff intends to declare in dower, or for freebench, as the case may be; and that the service of such writ, the appearance of the defendant,

(See *Garrard v. Tuck*, 8 C. B. 231.) And in order to secure notice to the tenant, the summons had (by 31 Eliz. c. 3, s. 2) to be *proclaimed* in the church, which proclamation was afterwards directed, by 7 Will. 4 & 1 Vict. c. 49, to be affixed to the church doors instead. And after the original writ had been returned into court, the tenant was entitled to *cast an essoign*, that is, allege an excuse for failing to appear. (See *Twining v. Lowndes*, 10 Bing. 65.) In default of appearance, the *demandant* (as the plaintiff is termed in a real action) was entitled to sue out further process, called a *grand cape*; under which the sheriff was directed to take possession into the hands of the Crown of the premises claimed; and then, if, on the return of the *grand cape*, there was still no appearance, the demandant was entitled to judgment. If on the other

hand the tenant appeared, then the next step was for the demandant to *count* (which is equivalent to declaring in a personal action), and by her count to make demand, in general terms, of the third part of the lands of her deceased husband. (See *William v. Gwyn*, 2 Saund. by Wms. 43—45 a; *Roscoe on Real Actions*, p. 282.)

(*m*) Plaints, in the nature of real or mixed actions, were the method of commencing remedies for the recovery of land in inferior courts,—such as the court baron and the ancient county court, and courts of record having jurisdiction under their charters to entertain plea of land. As to *free-bench*, it is the name under which dower is, by the custom of some manors, claimable in the lord's court in respect of lands of copyhold tenure. (See *Fitz. Nat. Brev.* 155 P.)

the proceedings in default of appearance, the pleadings, judgment, execution, and all other the proceedings and costs on such writ, shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons (*n*).

Among the pleas in bar peculiar to the action of dower, is that of *ne unques seisie que dower*, viz. that the demandant's husband was never seised of such an estate in the lands in question as could give the demandant a legal claim to dower; another is *ne unques accouple en loial matrimonie*, viz. that the demandant and her supposed husband were never joined in lawful matrimony; another, that the husband is still living; another, that the demandant eloped from her husband and lived in adultery with another person (*o*); and another is *tout temps prist*, viz. that from the death of the husband the tenant has always been and still is ready to render the demandant her dower, and rendereth the same into the court (*p*). And to the plea *ne unques accouple*, the demandant may reply that she was married at such a place, in such a diocese; on which it has been the course to award a trial by certificate (*q*); the court sending to the bishop of that diocese to certify whether there was a marriage or not. To the plea that her husband is still living, she may reply his death; and the practice has been that the issue thereon shall be tried by witnesses (*r*); but all other issues are triable by jury (*s*).

At the common law there were neither *damages* nor *costs* in dower. But by the statute of Merton, (20 Hen. III. c. 1,) it is enacted, that if a widow shall recover her

(*n*) The provisions of 15 & 16 Vict. c. 76, and 17 & 18 Vict. c. 125, in particular, are made applicable to such writ, pleadings, and proceedings. (23 & 24 Vict. c. 126, s. 27.)

(*o*) *Hetherington v. Graham*, 6 Bing. 135.

(*p*) As to this plea, see Sarah

Watson, dem., *John Watson, ten.*, 10 C. B. 3.

(*q*) As to trial of marriage by certificate of the bishop, as the law now stands, vide sup. p. 623, u. (*v*).

(*r*) As to the trial by witnesses, vide sup. p. 624.

(*s*) *Roscoe*, 222, 300.

dower of the lands whereof her husband died seised, the tenant shall yield damages, that is to say, the value of the dower from the time of the death of the husband, until the day the widow shall have judgment to recover seisin. And by the statute of Gloucester, (6 Edw. I. c. 1,)—which gives costs in all cases where the party is entitled to damages,—and by the subsequent statutes of 4 Jac. I. c. 3, and 8 & 9 Will. III. c. 11, costs were made recoverable by the successful party, (whether demandant or tenant,) in this action. In addition to which, there is now, also, the above-mentioned provision of 23 & 24 Vict. c. 126, s. 27. If the jury find a verdict for the demandant, they ought also to find, 1, that her husband died seised, and also of what estate, and the time of his death; 2, the annual value of the land; 3, the amount of damages she has sustained by the detention of her dower. And the judgment in this action, when given for the demandant, is, that she recover seisin of a third part of the tenements in demand, to be set forth by metes and bounds, together with the damages and costs (*t*).

II. The action of *quare impedit* also used to commence by original writ (*u*); and, as the general rule, such writ was returnable into the Common Pleas only (*x*). This original writ directed the sheriff to command the defendants who disturbed the presentation, (that is, in general, the bishop, patron and clerk,) to permit the plaintiff to present a fit person, (without specifying whom,) to such a vacant church which he claimed to be in his gift, and his presentation to which the defendants unjustly hindered; and unless they so did, then to appear

(*t*) William v. Gwyn, 2 Saund. by Wms. 44 e.

(*u*) As to a *quare impedit*, vide sup. pp. 484, 522, 538 et seq.; and see Tolson v. Bishop of Carlisle, 3 C. B. 41; 5 C. B. 761.

(*x*) At the suit of the *Crown*, however, it might be made returnable into the Court of Queen's Bench. (See *Dyversité des Courtes*, Ch. Bank le Roi.)

in court on such a day, to show why they hindered him (*y*). But by the Common Law Procedure Act, 1860, it is now enacted, that no *quare impedit* shall be brought, after the commencement of that Act, in any court whatsoever; but that, where a *quare impedit* would lie at the date of that statute, either in a superior or in any other court, an action may be commenced by writ of summons, issuing out of the Common Pleas, in the same manner and form as the writ of summons in an ordinary action; and upon such writ shall be indorsed a notice that the plaintiff intends to declare in *quare impedit* (*z*). And by the same Act, the service of such writ, the appearance of the defendant, the proceedings in default of appearance, the pleadings, judgment, execution, and all other proceedings and costs upon such writ, shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons (*a*).

(*y*) "Immediately on the suing out of the *quare impedit*," says Blackstone (vol. iii. p. 248), "if the plaintiff suspects that the bishop will admit the defendant or any other clerk pending the suit, he may have a prohibitory writ, called a *ne admittas*," 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 *jus patronatus*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by *scire facias*, and shall have a special action against the bishop, called a *quare incumbavit*, to recover the presentation, and also satisfaction in damages for the injury done him by incumbering the church with

"a clerk pending the suit, and after the *ne admittas* received." The *quare incumbavit*, however, was a real action, and has been abolished by 3 & 4 Will. 4, c. 27; and it would seem that there is no necessity for a *ne admittas*, where all proper parties have been made defendants in the *quare impedit*; for if the bishop be a defendant, no lapse can occur *pendente brevi*, (Wats. C. L. 112;) and if the clerk, then, though he was admitted prior or pending the *quare impedit*, he is removed by the mere effect of the judgment in that action. (Ibid. 289, 290.)

(*z*) 23 & 24 Vict. c. 126, s. 26.

(*a*) Sect. 27. The provisions of 15 & 16 Vict. c. 76, and of 17 & 18 Vict. c. 125, in particular, are made applicable to such writ, pleadings, and proceedings. (23 & 24 Vict. c. 126, s. 27.)

The plaintiff in this action must, in his declaration, show a title in himself or his ancestors, or those under whom he claims,—an actual presentation under that title, and 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 (*b*).] Indeed it was a rule at the common law, that neither the ordinary nor clerk were at liberty to plead to the right of patronage, as neither of them had any thing therein; but by 25 Edw. III. st. 3, c. 7, the ordinary may now do so, provided he has himself collated by lapse, and the clerk, if he has been collated, or presented and instituted (*c*); that is, they may respectively defend their own right so to collate, or be instituted. They may each also plead certain dilatory pleas (*d*); or if they mean to deny that they have obstructed the presentation, they may each plead in bar the general issue *ne disturba pas* (*e*); and as this does not deny the right of the plaintiff, it entitles him, so far as these defendants are concerned, to immediate judgment to recover his presentation; though he has also the option of maintaining, if he thinks fit, that a disturbance has in fact been committed, which, if proved, will give him a right to recover damages. The bishop may also plead in bar, that the clerk presented by the plaintiff was unfit, for want of learning or otherwise, to be instituted (*f*). The patron, also, is entitled to resort to certain dilatory pleas (*g*); or may

(*a*) Brickhead *v.* Archbishop of York, Hob. 250.

(*b*) See 3 Bl. Com. 249.

(*c*) 7 Rep. 26 a; Elvis *v.* Archbishop of York, Hob. 392; Queen and Middleton's case, 1 Leon. 45; Apperley *v.* Bishop of Hereford, 9 Bing. 681; Storie *v.* Bishop of Winchester, 9 C. B. 62; 17 C. B.

653; Roscoe on Real Actions, 231, 239, 241.

(*d*) Com. Dig. Abatement.

(*e*) Colt *v.* Bishop of Coventry, Hob. 193; R. *v.* Bishop of Worcester, Vaughan, 58.

(*f*) Vide sup. p. 29.

(*g*) Com. Dig. Abatement, H. 19, H. 23.

plead *plenarty*, viz. that the church has been full for six calendar months before the issue of the writ, by virtue of his own presentation (*h*); or may plead, like the ordinary and clerk, and with the same effect, the general issue of *ne disturba pas* (*i*); or may traverse the title alleged by the plaintiff in his declaration. Here, however, this difference is to be observed, that though, as a mere answer to the action, such traverse is a sufficient plea, yet it may be often necessary to go further; for in a *quare impedit* both parties are in a manner plaintiffs, and either of them entitled to a judgment that he recover the presentation, and have a writ to the bishop for the admission of his clerk: if, therefore, the patron wishes to obtain a judgment of this description, and not merely a judgment discharging him from the action, (which will naturally be the case, unless he has presented, and his clerk has been actually admitted,) he must, in addition to the traverse, set forth some matter showing title in himself (*h*).

The trial in *quare impedit* is in some instances by certificate, but in general by jury (*l*). And upon the failure of the plaintiff at the trial to make out his title, the defendant is put upon the proof of *his*,—that is, if he has asserted title in his plea. If the right be found for the plaintiff, three further points are also to be inquired into,—1. Whether the church be full or not; and if it be, upon whose presentation it is full;—2. The yearly

(*h*) Stat. Westm. 2, c. 5, vide sup. p. 540. A question is made in Roscoe on Real Actions, (p. 234,) as to the effect that the statute of 7 Anne, c. 18, has had as to a plea of plenarty. It is laid down that the *clerk* also may plead plenarty, but then he must show that the presentation was a lawful title. (*Lister v. Crameel*, Noy, 30; *S. C. 1 Brownl.* 162; *Roscoe on Real Actions*, 240.)

(*i*) *Colt v. Bishop of Coventry*,

ubi sup.; *R. v. Bishop of Worcester*, ubi sup.

(*h*) *Vaughan*, 7, 8.

(*l*) Vide sup. p. 621. See also *Roscoe on Real Actions*, 503; where it is said that not only the issue on the *ability of the plaintiff's clerk*, if the clerk be alive, must be tried by certificate; but also the several issues arising upon *institution, deprivation, resignation, or plenarty*.

value of the church;—3. Whether six calendar months have passed since the avoidance;—all which matters are material to be ascertained, in order to determine the nature of the damages to which the plaintiff may be entitled (*m*). For at common law no damages were recoverable in a *quare impedit*; but by the statute of Westminster the second, (13 Edw. I. c. 5,) if more than six calendar months have passed by reason of the disturbance of any person, so that the bishop has presented by lapse, and the true patron has lost his presentation, damages shall be adjudged against the disturber, to the amount of the value of the church for two years; or if the six calendar months have not passed, then damages to the value of the moiety of the church for one year (*n*).

The judgment for the plaintiff in a *quare impedit* is that he recover his presentation, and have a writ to the bishop, commanding him to admit his clerk (*o*); and also that he recover his damages and costs; and such also (with the exception of the damages) is the judgment for the defendant, where he has made out his own title to present (*p*). No costs, indeed, were recoverable by either

(*m*) 2 Inst. 362; 6 Rep. 49 a; Poyner v. Chorleton, Dy. 134 b; 3 Bl. Com. 249.

(*n*) 6 Rep. 51 a; 2 Inst. 362; Henslow v. Bishop of Sarum, Dy. 76 b. An additional reason is given in the books (see Wats. C. L. 291), as far as regards the first point, viz. that, unless this is ascertained, it will not appear whether the plaintiff is entitled to recover his presentation; because the church may be full upon the presentation of some stranger, not party to the *quare impedit*; and whose title may be better than the plaintiff's. According to Blackstone, (vol. iii. p. 249,) the reason for inquiry into the third point, (which he describes

as whether six calendar months have passed *between the avoidance and the time of bringing the action*.) is, that, if that period of time has passed, the case "would not be within the statute (13 Edw. I. c. 5, s. 2) which permits an usurpation to be divested by a *quare impedit* brought *infra tempus semestre*." (Vide sup. p. 541.)

(*o*) F. N. B. 38.

(*p*) Wats. C. L. 295. If the bishop, upon receiving the writ *ad admittendum clericum*, (says Blackstone, vol. iii. p. 250,) does not admit the plaintiff's clerk, the latter may sue him in a *quare non admisit*, and recover satisfaction in damages.

party, in *quare impedit*, until a recent period (*q*). But by 4 & 5 Will. IV. c. 39, it is enacted, that where a verdict is given for the plaintiff, he shall have his costs in addition to his damages; and where a verdict is given against him, or he shall discontinue, or be nonsuited, he shall pay costs to the adverse party; though this is subject to a proviso, that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the judge who shall try the cause, (or, where there is no trial by jury, the court at large,) shall certify that he had probable cause for defending the action; it being however declared, that in no case, where the defence shall be grounded on a presentation or collation previously made, shall such presentation or collation be deemed a probable cause of defence within the meaning of the proviso. In addition to which there is now the provision of 23 & 24 Vict. c. 126, s. 27 (already noticed in reference to the action of dower), which enacts that all the proceedings and *costs* upon the writ of summons in *quare impedit*, shall be subject to the same rules and practice as nearly as may be, as in an ordinary action commenced by writ of summons.

III. In the action of *replevin* (the nature of which remedy has been already explained) the proceedings used to commence by a species of original writ, which directed the sheriff not to summon the defendant into any of the superior courts at Westminster, but to replevy the goods, and determine the matter in the common law county court incident to his own jurisdiction (*r*). But this mode became obsolete; the course having been introduced by several antient statutes of *levying a plaint* in such court, *without original writ*, and thereon obtaining from the sheriff a replevin of the goods (*s*). It has

(*q*) *Edwards v. Bishop of Exeter*, 370, 545.

6 Bing. N. C. 146.

(*s*) Vide sup. p. 547, n. (*z*).

(*r*) As to replevin, vide sup. pp.

been shown, however, in a former place, that this method has now in turn been superseded by modern enactments, which direct the application for a replevin to be made to the Registrar of the county court within the district of which the distress was taken (*u*); and give the owner of the goods the option of commencing an action of replevin either in the county court, or in one of the superior courts of the common law; and if he commence it in the former, the option also of *removing* it, by *certiorari*, to one of the latter courts (*x*). To this we have now to add, that if the action of replevin be commenced in a superior court, it commences by writ of summons, as in any other personal action (*y*). If, on the other hand, it is *removed* to a superior court after being commenced in the county court, the sheriff, to whom the writ of *certiorari* for that purpose is directed, must summon the defendant to appear in the superior court, on the day when it is returnable (*z*). Before the end of the second Term after this return day, the writ, with its return, must be filed in the superior court; and if the defendant does not appear, the plaintiff obtains a four-day rule calling upon him to do so; and if he fails to comply, there is a process by *pone per vadios*, and after that by *distringas*, or, if necessary, by repeated writs of *distringas*; upon which issues may be levied from time to time, until the appearance is effected (*a*).

Upon appearance, (whether the action be commenced in a superior or in a county court,) the next step is for the plaintiff to declare; and if he omits to do so in due time, the defendant may sign judgment of *non pros*. The declaration (which states in general terms the taking of the goods in a certain place) being delivered, the sub-

(*u*) Vide sup. p. 545.

(*x*) 19 & 20 Vict. c. 108, ss. 63,
64; 23 & 24 Vict. c. 126, s. 22.

(*y*) 19 & 20 Vict. c. 108, s. 65.

(*z*) See *Davies v. James*, 1 T. R. 373.

(*a*) Roscoe on Real Actions, p. 629.

sequent course of pleading differs from that in other personal actions, chiefly in the following particular: that the defendant's plea may not only tend to his acquittal or discharge from the action (*b*), but may claim a *return* of the goods (*c*), admitting that they were taken, but insisting that they were lawfully taken as a distress. Such a plea is called an *avowry*, or (if the distress was made not in the defendant's own right but as servant for another,) a *cognizance*. In answer to an avowry, the plaintiff is now enabled by 23 & 24 Vict. c. 126, s. 23, to pay money into court in satisfaction in like manner, and subject to the same proceedings as to costs and otherwise, as upon a payment into court by a defendant in other actions; it being however provided (by sect. 24), that such payment into court shall not, nor shall the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond. If, however, the plaintiff does not adopt this course, his next pleading is called a *plea in bar*; which the defendant answers by a *replication*; and so to the end of the series; the names of all the pleadings subsequent to the avowry or cognizance being thus transposed and thrown into a reversed order from that in which they stand in ordinary cases. Also, where the distress was for rent, the statute 11 Geo. II. c. 19, gives the defendant the power of resorting to a *general* form of avowry or cognizance; a provision introduced to protect landlords from the inconvenience of specially setting forth their title. Instead of an avowry or cognizance, however, the defendant may plead in abatement or bar, which will be followed by a replication on the part of the plaintiff, according to the ordinary course of pleading. Thus, the defendant may plead in *non cepit*; viz., that

(*b*) Roscoe on Real Actions, p. 630.

(*c*) It is not necessary, however, that it should *conclude* with a claim of a return; it being provided by 15 & 16 Vict. c. 76, s. 67, that no

formal conclusion (that is, no conclusion in any particular form of words) shall be necessary to any plea, avowry, cognizance, or subsequent pleading.

he did not take the goods; which is considered as the general issue in replevin. And it is further to be understood, that the defendant is entitled to make several avowries, and both to avow and demur; and that each party has similar rights throughout the whole series of pleading, according to the principle now generally established in ordinary actions.

The issue may be made up either by plaintiff or defendant (*d*); for as the defendant, in case of a judgment in his favour, may obtain a return of the goods, both parties are considered as in a manner plaintiffs,—a circumstance in which this action is analogous to that of *quare impedit* (*e*). As to the judgment, it awards, when given in favour of the plaintiff, damages for the unlawful taking and detaining; when given for the defendant, either a return of the goods, or, if the distress was for rent, then, at the option of the defendant, a recovery of the amount of rent in arrear. For by 17 Car. II. c. 7, if the plaintiff be nonsuit before issue joined, then,—upon suggestion made on the record, in nature of an avowry or 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 impanelled 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.

Where the defendant has judgment for a return of the goods, there issues in his favour [a writ *de retorno habendo*, whereby the goods are returned again into his

(*d*) Roscoe on Real Actions, 642. (*e*) Vide sup. p. 719.

[custody, to be sold or otherwise disposed of, as if no replevin had been made.] And when this judgment is by the default or nonsuit of the plaintiff, [the plaintiff might, at the common law, have brought another replevin, and so *ad infinitum*, to the intolerable vexation of the defendant; whereupon the Statute of Westminster II. (13 Edw. I. c. 2), 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 (*f*).] On the other hand, [if pending a replevin for a former distress, a man distrains again for the same rent or service, then the party distrained upon is not driven to his action of replevin, but shall have a writ of *recaption* (*g*); and recover damages for the defendant's, the re-distrainor's, contempt of the process of the law.] In replevin, as in other actions, costs are now recoverable (*h*); and by statute 11 Geo. II. c. 19, if the replevin be founded on a distress for rent, quit rents, relief, heriot, or other service (*i*), and the plaintiff shall become nonsuit, discontinue, or have judgment against him, the defendant was made entitled to recover *double* costs of suit. But by a provision of 5 & 6 Vict. c. 96, s. 2, double costs in this case (as in all others where they are given by any public act of parliament) are now reduced to "such full and

(*f*) 2 Inst. 340.

(*g*) F. N. B. 71.

(*h*) Statute of Gloucester, 6 Edw. 1, c. 1, s. 2; 7 Hen. 8, c. 4; 21 Hen. 8, c. 19, s. 3; 17 Car. 2, c. 7,

s. 2.

(*i*) This statute applies to a rent-charge, as well as rent-service. (*Jamieson v. Trevelyan*, 10 Exch. 748.)

“ reasonable indemnity as to all expenses incurred, as
 “ shall be taxed by the proper officer in that behalf.”

IV. We now arrive at *Ejectment* (*k*), by far the most important of the actions of which we proposed in this chapter to treat; being indeed (with the exception of dower) the only action in which land is now capable of being specifically recovered. Some explanation has been already given of the manner of its introduction into our judicial system, and reference has been made to the manner in which it has been recently remodelled (*l*). But in matters of law, no reform, however valuable in other respects, can enable us to repose in entire ignorance of the institutions which it displaces; and some acquaintance with them will still be necessary to our correct apprehension of those Records and Reports from which the principles of the law, in general, are best to be collected. Before we proceed, therefore, to any explanation of the present form of an ejectment, it will be proper to advert to that which it wore prior to the late improvements. The action, at this time, began as follows:—The claimant served the tenant in possession of the land with a declaration (no previous process being issued), in the form properly belonging to a declaration in trespass *quare clausum fregit*. This declaration was a mere string of fictions, complaining at the suit of a fictitious plaintiff, (for example, John Doe,) against a fictitious defendant, (for example, Richard Roe,) that a lease for a term of years having been made to Doe, by the claimant, and Doe having entered thereupon—the defendant, Roe, ousted him;—for which Doe claimed damages (*m*). And subjoined was a *notice to*

(*k*) As to ejectment, vide *snp. pp.* 483, 517, 521.

(*l*) Vide *sup. p.* 517.

(*m*) In Blackstone's time, it was held that the person stated in the

declaration as plaintiff, must be a real person; (3 *Bl. Com. p.* 203;) but at a later period of the practice, he was always a nominal one.

appear, addressed to the tenant in possession, by name, informing him that he, Roe, was sued as a *casual ejector* only, and had no title to the premises, and would make no defence; and therefore advising him to appear in court, in the next Term, and defend his own title; otherwise he, Roe, would suffer judgment to be had against him, and thereby the party addressed would be turned out of possession.

On receipt of this friendly caution, if the tenant in possession did not in due time take the proper steps to be admitted defendant in the stead of Roe, he was supposed to have no right at all; and upon judgment being had against Roe, the casual ejector, the real tenant would be turned out of possession by the sheriff.

In the next Term, however, after the service of the declaration, he had the opportunity of procuring himself to be made defendant; for in the course of that Term, the real claimant, now called the *lessor of the plaintiff*, moved the court in the name of Doe, the fictitious plaintiff, for a rule for *judgment against the casual ejector*; upon which motion, supported by an affidavit of the due service of the declaration, the court made a rule as of course for such judgment, unless the tenant should appear and plead to issue, within the time therein mentioned. And within that time the tenant in possession signed (by his attorney) what was called a *consent rule*: binding him to confess upon the trial of the cause that he was at the time of the declaration in possession of the premises therein mentioned, or part of them; and also to confess the *lease* made by the lessor of the plaintiff, as alleged in the declaration; the *entry* of the plaintiff as therein also stated; and lastly, the *ouster* by himself the tenant in possession. And upon such consent rule being signed, the tenant in possession was allowed by the court to enter an appearance in his own name, and to plead the general issue, *not guilty*. After this, the issue was made up and sent down to trial, as in an action at

the suit of Doe, plaintiff, on the demise of A. B. (the lessor of the plaintiff), against C. D. (the tenant in possession): and it is manifest, that, under these circumstances, the matter to be tried, or real and substantial question in the cause, would turn merely upon a fourth point, viz. whether the lessor of the plaintiff had a good *title* to demise, on the day of the supposed demise stated in the declaration. The lessor of the plaintiff was bound to make out a clear title; otherwise his fictitious lessee could not obtain judgment to have possession of the land, for the term supposed to be granted. But if the lessor made out his title in a satisfactory manner, then judgment and a writ of possession was to go for John Doe, the nominal plaintiff; who by this trial had proved the right of A. B. his supposed lessor.

It might happen, however, that the new defendant, after entering into the consent rule, failed to appear at the trial and to confess lease, entry and ouster. In that case the plaintiff Doe was of necessity nonsuited, for want of proving those requisites; but judgment would in the end be entered against the casual ejector Roe; and the sheriff, under a writ of execution on such judgment, would have turned out the tenant, and delivered the possession to the plaintiff. For the condition, on which the tenant in possession was admitted a defendant, was broken; and therefore the plaintiff was put again in the same situation as if no such defendant had been admitted at all; the consequence of which, we have seen, would have been that judgment would have been entered for the plaintiff against the casual ejector.

Such was the form of an ejectment, at the time of passing the Common Law Procedure Act, 1852 (*n*). Its

(*n*) It was by a gradual advance that the strange fictions above described obtained reception. Originally the claimant used to make a formal entry, in fact, upon the premises, and there sealed and deli-

vered a lease to some other person, till a third, by a previous agreement, or otherwise, entered upon him and turned him out. An action was thereupon brought against the person last mentioned, or *casual ejector*,

form, as now remodelled by that Act (15 & 16 Vict. c. 76), will appear from the following outline.

A writ is issued out of any of the superior courts of the common law, in a prescribed form (*o*), directed to the person or persons in possession, by name, and generally “to all persons entitled to defend the possession” of the premises therein described—setting forth that some person or persons, by name, claim to be entitled to the possession, and to eject all other persons—and commanding those to whom it is directed, or such of them as deny the alleged title, to appear in the court out of which the writ issued, within *sixteen* days after the service thereof, to defend the possession of the property, or such part of it as they shall think fit. It moreover contains a notice, that, in default of appearance, the defendants will be turned out of possession; and is endorsed with the name and abode of the attorney by whom it is issued, or if there be none, the name and residence of the plaintiff, in like manner as a writ of summons in an ordinary action (*p*).

This writ, (which remains in force for three months,) is served by delivering it personally to the tenant in possession, whether on the premises or elsewhere; or by delivering it personally, on the premises, to some member of his family or household: and in either case, it should be read over, or its purport explained (*q*). But the

as he was called; of which, however, the practice required that notice should be given to the tenant in possession. But, as much trouble, says Blackstone (vol. iii. p. 202), attended this actual making of the lease, entry and ouster, a new and more easy method, when there was any actual occupier of the premises, was invented by the Lord Chief Justice Rolle, who then sat in the Court of Upper Bench. This was the method just described in the

text.

(*o*) This form will be found in the 15 & 16 Vict. c. 76, Sched. (A.), No. 13. Tenants in common may join in a single writ. (See *Elliss v. Elliss*, 1 Ell. Bl. & Ell. 81.)

(*p*) 15 & 16 Vict. c. 76, ss. 168, 169.

(*q*) *Ibid.* s. 170. By this section, the writ is to be served in the same manner as a *declaration in ejectment* was theretofore served. This manner is described in the text. In

manner of service may be varied, under special circumstances, by order of the court or a judge. And in the case of a vacant possession, the service is effected by posting a copy of the writ upon the door of the dwelling-house, or other conspicuous part of the property (*r*).

Not only the person to whom the writ is directed by name, but any other person also, (on filing an affidavit showing that he or his tenant is in possession, and obtaining the leave of the court or a judge,) may be allowed to appear and defend (*s*). Supposing no appearance to be entered, the plaintiff,—for to simplify the matter we will suppose a single party on either side,—is at liberty to sign judgment for recovery of the possession (*t*); but on the opposite supposition, viz. that of an appearance, an issue is at once made up without any pleadings, by the plaintiff or his attorney (*u*); setting forth the writ and the appearance of such a person named, and his defending for the premises,—or for a certain part of them, as the case may be (*x*). And upon the issue so made up, the parties may proceed to trial, (after a ten days' notice,) according to the course of practice in other actions (*y*); and the question to be

Edwards *v.* Griffith, 15 C. B. 397, it was however considered doubtful if it was now necessary to read over or explain the writ to the party served.

(*r*) 15 & 16 Vict. c. 76, s. 170.

(*s*) Ibid. s. 172. See Reg. Gen. Hil. T. 1853, (Pr.) rr. 112, 113. And Whitworth *v.* Humphries, 5 H. & N. 185.

(*t*) 15 & 16 Vict. c. 76, s. 177, Reg. Gen. above cited, r. 112. The form of the judgment will be found in 15 & 16 Vict. c. 76, Sched. (A.), No. 15.

(*u*) The term "issue" is here employed in its secondary sense of a transcript of the proceedings, as

sup. p. 626. For as there is no pleading there can be no issue in the proper sense, as defined sup. p. 614. Nor, for the same reason, can there be any *equitable* defence under the Common Law Procedure Act, 1854. (Neave *v.* Avery, 16 C. B. 328.) As to equitable pleadings, vide sup. pp. 609, n. (*x*), 611, n. (*e*).

(*w*) The form will be found in 15 & 16 Vict. c. 76, Sched. (A.), No. 16.

(*y*) 15 & 16 Vict. c. 76, s. 180. It may be remarked here that the statement in the text supposes that no *special case* has been stated by consent, so as to take the opinion of

determined at the trial is, whether the statement in the writ, of the title of the claimant, be true or false (*z*). But in the particular case, where the defendant claims to be joint-tenant, tenant in common, or co-parcener with the plaintiff, whose title he so far admits, but denies having ousted him, a notice must be duly given by the defendant, to that effect; and such notice must be entered, (among the other proceedings,) in the issue made up. And the question for trial will then be two-fold—first, whether the defendant has in truth any such title as joint-tenant, or the like; and secondly, whether an actual ouster of the plaintiff has taken place (*a*).

If, at the trial (*b*), the jury find for the plaintiff,—that is, find, (in the ordinary case,) that the statement in the writ of his being entitled to the possession, is true, or (in the case last supposed), that either the defendant is not such joint-tenant, or the like, or that though he is so, yet an actual ouster of the plaintiff has taken place,—judgment may be signed by the plaintiff, for the recovery of the premises, (or part of them, as the case may be,) with costs; and execution will issue accordingly;—under which possession will be delivered to him by the sheriff (*c*). But if the jury find for the defendant,—that is, find, (in

the court upon the facts, without proceeding to trial. But this may be done in ejectment, as in other actions. (Ibid. s. 179.) As to this course of proceeding in other actions, vide sup. p. 665.

(*z*) 15 & 16 Vict. c. 76, s. 180.

(*a*) Ibid. s. 189.

(*b*) Supposing the defendant not to appear at the trial, the plaintiff will have a verdict without producing any evidence. (Reg. Gen. Hil. T. 1853, Pr. r. 114.)

(*c*) 15 & 16 Vict. c. 76, ss. 185, 189. For the form in which the verdict is entered, see *ibid.* Sched.

(A.), No. 17; and for the form of the writ of execution, (which is called an *habere facias*,) see Reg. Gen. Hil. T. 1853 (Pr.), Sched. No. 23. Judgment may be signed and execution issued within such time not exceeding the fifth day in Term, after the verdict, as the court or the judge before whom the cause was tried shall order; or, if no order be made, then on the fifth day in Term after the verdict, or in fourteen days after the verdict, whichever first shall happen. (15 & 16 Vict. c. 76, s. 185.)

the ordinary case,) that the statement in the writ that the plaintiff is entitled to the possession, is false, or, (in the other,) that the defendant was entitled as joint-tenant or the like, and that there has been no actual ouster of the plaintiff,—then the defendant will be entitled to sign judgment for his costs, and take out execution accordingly (*d*).

Upon the judgment, after a special verdict, or a bill of exceptions, or (by consent) after a special case, error may be brought in the same manner as in other actions. But, (except in the case of such consent as aforesaid,) execution will not be thereby stayed, unless the plaintiff in error, (when defendant in the suit,) shall give bond to his adversary, for payment of such costs and damages as shall be awarded after affirmance;—including such compensation for *mesne* (or intervening) profits taken, or waste committed since the judgment, as may be assessed under a writ of inquiry to be issued for the purpose (*e*).

To this sketch of the general course of the existing procedure in an ejectment in ordinary cases, we have only to add, that, in order to complete the remedy, recourse must, in general, be had, (according to the practice that has always been pursued,) to another and supplementary action (*f*), viz. an ordinary action of trespass *quare clausum fregit*, to recover the mesne profits which the defendant has received during the period of his wrongful possession. In this case, the judgment in the ejectment is conclusive evidence of the plaintiff's right to all profits accruing since the period from which that judgment itself shows him to have been entitled (*g*); and also conclusive as to the receipt of such profits by the defendant; but as

(*d*) 15 & 16 Vict. c. 76, s. 186.
The defendant will be entitled to do this, within the same period after the verdict, as mentioned in the last note.

(*e*) 15 & 16 Vict. c. 76, s. 208.

(*f*) As between *landlord and tenant*, however, mesne profits may be recovered in the ejectment itself. (Vide post, p. 735.)

(*g*) See *Wilkinson v. Kirby*, 15 C. B. 430.

to profit claimed in respect of any antecedent period, the defendant is at liberty to contest both the plaintiff's title, and his own receipt of them.

It still remains, however, to take notice of certain legislative provisions in favour of *landlords*, without which our general view of the proceedings in and connected with the action of ejection is not complete (*h*).

And, first, to prevent fraudulent recoveries of the possession by collusion with the tenant of the land, it is enacted, by 15 & 16 Vict. c. 76, s. 209 (*i*), that all tenants shall, on pain of forfeiting three years' rent, give notice to their landlords of any writ in ejection delivered to them, or coming to their knowledge; and, by 11 Geo. II. c. 19, s. 13, that any landlord, (a term which has been held to extend to the heir, remainderman, mortgagee, devisee in trust, and the like,) may, by leave of court, be made a co-defendant to the action, in case the tenant himself appears to it,—or, if he make default, may, by such leave, become sole defendant (*k*).

Secondly. It is the rule of the common law, that

(*h*) There are also provisions enabling landlords to recover possession in more summary methods than by an action of ejection, in particular cases where their tenants *desert* the premises, leaving rent in arrear, or *hold over*. These are stated sup. vol. I. pp. 303, 304; and it may be here added, that a method of obtaining summary possession through the warrant of a county court judge is also given by 19 & 20 Vict. c. 108, s. 52, in the case where the landlord has a *right of re-entry* on the rent being in arrear for half a year, and where the annual rent or value of the premises does not exceed 50*l*.

(*i*) This provision is a re-enact-

ment of one to the same effect, contained in 11 Geo. 2, c. 19, s. 12.

(*k*) And see 15 & 16 Vict. c. 76, s. 172. Blackstone says (vol. III. p. 204), that long before the statute 11 Geo. 2, c. 19, the landlord had a similar right. And he also refers to the antient rule of law by which, if the tenant in a real action made default, the remainderman or reversioner had a right to come in and defend the possession. It is to be observed, that, under the present procedure, where the landlord defends, in respect of property whereof he is in possession only by his tenant, it must be stated in his appearance that he appears *as landlord*. (15 & 16 Vict. c. 76, s. 173.)

though there be a proviso for re-entry by the landlord, in the case of rent remaining in arrear, yet he cannot have the benefit of that proviso, (unless it be accompanied by an express stipulation to that effect,) without making a formal demand upon the premises out of which the rent issues. And that such demand must also be of the precise sum claimed, and be made at the precise time when it became due (*l*). But to obviate these niceties, it is provided by 15 & 16 Vict. c. 76, s. 210, that, in all cases between landlord and tenant, if half-a-year's rent be in arrear (*m*), and there be a right to re-enter for the non-payment (*n*), and no sufficient distress be found (*o*), the landlord may serve a writ in ejectment for recovery of the demised premises; or in case the same cannot be legally served, or no tenant be in actual possession, may affix a copy of the writ upon the door, or if there be no messuage, then upon some notorious part of the premises; and that such service or affixing shall stand in the place of a demand and re-entry (*p*). A recovery and execution in such an ejectment is final and conclusive both in law and equity, unless the rent and full costs be paid or tendered within six calendar months afterwards; though, on the other hand, the defendant therein may, within such period, and on the above conditions, obtain relief from the action, either in a court of equity (*q*), or in the court of law in which the ejectment is brought (*r*).

Thirdly. It is enacted by 15 & 16 Vict. c. 76, s. 213, that where the interest of any tenant holding under lease or agreement in writing, for term of years certain, or from year to year, shall have expired or been determined

(*l*) See *Duppa v. Mayo*, 1 Saund. Wms. 287.

(*m*) See *Gretton v. Roe*, 4 C. B. 576.

(*n*) See *Doe v. Bowditch*, 8 Q. B. 973.

(*o*) See *Doe v. Wandlass*, 7 T. R. 117.

(*p*) This provision is a re-enactment in substance of 4 Geo. 2, c. 28, s. 2.

(*q*) See *Doe d. Hitchins v. Lewis*, 1 Burr. 619; 4 Geo. 2, c. 28, s. 3; 15 & 16 Vict. c. 76, s. 212.

(*r*) See 4 Geo. 4, c. 28, s. 4; 23 & 24 Vict. c. 126, s. 1.

by regular notice to quit, and, after lawful demand in writing served personally, or left at the tenant's usual place of abode, possession shall have been refused,—the landlord, at the foot of his writ in ejection brought to recover the premises, may address a notice to the tenant, requiring him to find bail. And on the appearance of the tenant, and by order of the court or a judge, after hearing both parties, the tenant may be required to enter into a recognizance, with two sufficient sureties, to pay the costs and damages which shall be recovered by the plaintiff. And on his failure to find such bail, the plaintiff shall be entitled to sign judgment for recovery of the possession, with costs (s).

Fourthly. It is provided by 15 & 16 Vict. c. 76, s. 214, that whenever it shall appear in *any* ejection between landlord and tenant, that such tenant or his attorney hath been served with due notice of trial,—the judge before whom the cause is tried, whether the defendant shall appear on the trial or not, shall permit the claimant, after proof of his right, to go into evidence of the *mesne* profits thereof which have accrued from the time when the defendant's interest determined, down to the time of the trial; and the jury, finding for the claimant, shall give their verdict on the whole matter, both as to recovery of possession and as to the amount of damages to be paid for such *mesne* profits (t).

Lastly. It is provided by 15 & 16 Vict. c. 76, s. 217, that in all ejections in the courts at Westminster, by a landlord against a tenant, or against any person claiming under the tenant, for the recovery of lands or hereditaments, (in any county except London or Middlesex,)

(s) This provision is a re-enactment, in substance, of 1 Geo. 4, c. 87, s. 1. As to bail in such cases, see *Doe v. Sharpley*, 15 Mee. & W. 558; *Doe v. Roe*, 2 L. M. & P. 322; *Doe v. Roe*, 6 C. B. 272. As to the liability of the tenant so

holding over to pay *double rent* under 4 Geo. 2, c. 28, s. 1, vide sup. vol. I. p. 304.

(t) See *Smith v. Tett*, 9 Exch. 307. The above provision is a re-enactment, in substance, of 1 Geo. 4, c. 87, s. 2.

where the tenancy shall expire, or the right of entry accrue, in or after Hilary or Trinity Term,—it shall be lawful for the claimant, at any time within ten days after the tenancy expires, or the right of entry accrues, to serve a writ of ejectment, commanding the person or persons to whom it is directed, to appear within *ten* days after service thereof. And that thereon proceedings shall be had as in other cases, save that it shall be sufficient to give *six* clear days' notice of trial instead of *ten* days, which is the notice required in other cases. But the defendant, however, being at liberty to apply to a judge to *stay or set aside* the proceedings, or to postpone the trial until the next assizes (*u*).

(*u*) This is a re-enactment, in substance, of 11 Geo. 4 & 1 Will. 4, c. 70, s. 36.

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