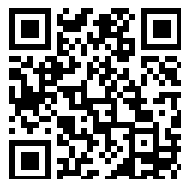
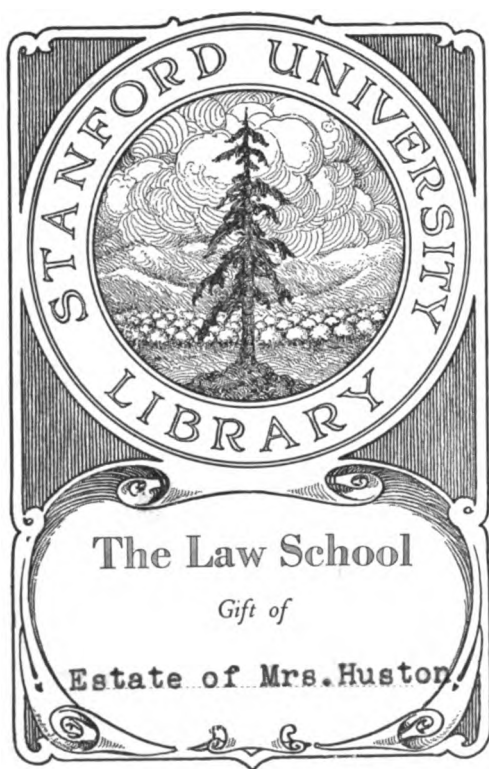

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READINGS

ON THE

HISTORY AND SYSTEM OF THE COMMON LAW

COMPILED BY

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CONTENTS.

Encomia on the Common Law	5	↑
I Fundamental conceptions	7	
Justice	7	
Law	8	
Law and morals	13	
Rights	20	
Persons	30	
II History of the Common Law	45	*
1 English law before the Conquest	46	
2 The development of the Common Law	53	
(a) The king's peace	53	
(b) The king's writ	59	
(c) The king's courts	61	
(d) The custom of the realm	79	
(e) Precedents and case law	84	
(f) The jury	88	
(g) The supremacy of law	109	
3 The development of equity	118	
4 The Law Merchant	135	
5 The Reform movement	141	
III Sources and forms of law	149	
Legislation	150	152 e
Judicial decisions	166	
Books of authority	191	
IV The Common Law in America	201	
V Courts: their organization and jurisdiction	245	
1 self help	245	
2 courts in general	258	
3 jurisdiction	276	
VI The common law actions	289	
VII The elements of procedure	303	
1 at law	303	
2 in equity	339	
VIII The elements of public law	350	

1096

ENCOMIA ON THE COMMON LAW.

For the English Laws, although not written, may as it should seem, and that without any absurdity, be termed Laws. . . . For, if from the mere want of writing only, they should not be considered as Laws, then, unquestionably, writing would seem to confer more authority upon Laws themselves, than either the Equity of the persons constituting, or the reason of those framing them.

Glanvill, Preface (1187).

The realm of England was first inhabited by the Britons; afterwards it was ruled and civilized under the government of the Romans; then the Britons prevailed again; next it was possessed by the Saxons, who changed the name of Britain into England. After the Saxons, the Danes lorded it over us, and then the Saxons prevailed a second time; at last the Normans came in, whose descendants retain the kingdom at this day: and during all that time, wherein those several nations and their kings prevailed, England has nevertheless been constantly governed by the same customs, as it is at present: which if they were not above all exception good, no doubt but some or other of those kings, from a principle of justice, in point of reason, or moved by inclination, would have made some alteration, or quite abolished them. . . . So that there is no pretence to say, or insinuate to the contrary, but that the laws and customs of England are not only good, but the very best.

Fortescue, *De Laudibus Legum Angliae*. Cap. 17 (about 1453).

And it is to be noted that all the deriving of reason in the law of England proceedeth of the first principles of the law, or of something that is derived of them; and therefore no man may rightwisely judge, ne groundly reason in the laws of England if he be ignorant in the first principles.

Doctor and Student, chap. 5 (1523).

For reason is the life of the law, nay the common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall reason; for, *nemo nascitur artifex*. This legall reason *est summa ratio*. And therefore if all

the reason that is dispersed into so many severall heads, were united into one, yet could he not make such a law as the law in England is; because by many successions of ages it hath beene fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this realme, as the old rule may be justly verified of it, *neminem oportet esse sapientiores legibus*: no man out of his own private reason ought to be wiser than the law, which is the perfection of reason.

Co. Lit, 97b (1628).

Whereupon the deputies so appointed being now assembled in a full and free representation of these colonies, taking into their most serious consideration the best means of attaining the ends aforesaid, do in the first place, as Englishmen, their ancestors, in like cases have usually done, for asserting and vindicating their rights and liberties, declare. . . .

5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

6. That they are entitled to the benefit of such of the English statutes as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

Declaration of Rights of the Continental Congress (1774).

You shall understand how great a heritage is the law of England, whereof we and our bretheren across the ocean are partakers, and you shall deem treaties and covenants a feeble bond in comparison of it; and you shall know with certain assurance that, however arduous has been your pilgrimage, the achievement is a full answer. So venerable, so majestic, is this living temple of justice, this immemorial and yet freshly growing fabric of the Common Law, that the least of us is happy who hereafter may point to so much as one stone thereof and say, The work of my hands is there.

Pollock, Oxford Lectures, III.

I.

FUNDAMENTAL CONCEPTIONS.

JUSTICE.

The object of Law is the administration of justice. Law is a body of rules for the systematic and regular public administration of justice. Hence we may ask, at the outset, what is justice?

INSTITUTES OF JUSTINIAN, I, I, secs. I, 3.

Justice is the set and constant purpose which gives to every man his due. The precepts of law are these: to live honorably, to injure no one, and to give every man his due.

KANT, RECHTSLEHRE (2 ed.), xxxiii.

Right is therefore the sum of the conditions under which the will of one can be brought into harmony with the will of another according to a universal law of freedom. Every act is right which, in itself, or in accordance with its maxim, can co-exist with the freedom of the will of each and all according to a universal law.

SPENCER, JUSTICE, sec. 27.

Hence, that which we have to express in a precise way, is the liberty of each limited only by the like liberties of all. This we do by saying:—Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man.

PAULSEN, ETHICS (Thilly's translation), chap. 9.

(Justice, as a moral habit, is that tendency of the will and mode of conduct which refrains from disturbing the lives and interests of others, and, as far as possible, hinders such interference on the part of others.) This virtue springs from the individual's respect for his fellows as ends in themselves and as his coequals. The different spheres of interests may be roughly classified as follows: body and life; the family, or the extended individual life; property, or the totality of the instruments of action; honor, or the ideal existence; and finally freedom, or the possibility of fashioning one's life as an end in itself. The law defends these different spheres, thus giving rise to a corresponding number of spheres of rights, each being

protected by a prohibition. . . . To violate the rights, to interfere with the interests of others, is injustice. All injustice is ultimately directed against the life of the neighbor; it is an open avowal that the latter is not an end in itself, having the same value as the individual's own life. The general formula of the duty of justice may therefore be stated as follows: Do no wrong yourself, and permit no wrong to be done, so far as lies in your power; or, expressed positively: Respect and protect the right.

POLLOCK, FIRST BOOK OF JURISPRUDENCE, 30-31.

Law presupposes ideas, however, rudimentary, of justice. But, law being once established, just, in matters of the law, denotes whatever is done in express fulfilment of the rules of law, or is approved and allowed by law. Not everything which is not forbidden is just. Many things are left alone by the state, as it were under protest, and only because it is thought that interference would do more harm than good. In such things the notion of justice has no place. . . . The words "just" and "justice," and corresponding words in other tongues, have never quite lost ethical significance even in the most technical legal context. The reason of this (unduly neglected by some moderns for the sake of a merely verbal and illusive exactness) is that in the development of the law both by legislative and by judicial processes appeal is constantly made to ethical reason and the moral judgment of the community. Doubtless the servants of the law must obey the law, whether the specific rules of law be morally just in their eyes or not: this, however, is only saying that the moral judgment we regard is the judgment of the community, and not the particular opinion of this or that citizen. Further, some conflict between legal and moral justice can hardly be avoided, for morality and law can not move at exactly the same ratio. Still, in a well-ordered State such conflict is exceptional and seldom acute. (Legal justice aims at realising moral justice within its range, and its strength largely consists in the general feeling that this is so.)

LAW.

Justice may be administered according to the discretion of the person who administers it for the time being, or according to law. (Law means uniformity of judicial action, generality, equality, and certainty in the administration of justice.) The advantages of law are: (1) It enables us to predict the course the administration of justice will take. (2) It prevents errors of individual judgment.

(3) It protects against improper motives on the part of judicial officers. (4) It gives the magistrate the benefit of all the experience of his predecessors.)

BLACKSTONE, COMMENTARIES, I, 44-46.

Thus much I thought it necessary to premise concerning the law of nature, the revealed law, and the law of nations before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations are governed; being thus defined by Justinian, "*jus civile est quod quisque sibi populus constituit.*" I call it municipal law, in compliance with common speech; for though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation which is governed by the same laws or customs.

Municipal law, thus understood, is properly defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." Let us endeavor to explain its several properties as they arise out of this definition. And, first, it is a rule: not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason; this has permanency, uniformity, and universality, and therefore is properly a rule. It is also called a rule, to distinguish it from advice or counsel, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the law depends not upon our approbation, but upon the maker's will. Counsel is only a matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

It is also called a rule to distinguish it from a compact or agreement; for a compact is a promise proceeding from us, law is a command directed to us. The language of a compact is, "I will, or will not, do this;" that of a law is, "thou shalt, or shalt not, do it." It

is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising anything at all. Upon these accounts law is defined to be "a rule."

Municipal law is also "a rule of civil conduct." This distinguishes municipal law from the natural, or revealed; the former of which is the rule of moral conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour than those of mere nature and religion: duties which he has engaged in by enjoying the benefits of the common union; and which amount to no more than that he do contribute, on his part, to the subsistence and the peace of the society. It is likewise "a rule prescribed." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, as is the case of the common law of England. It may be notified *viva voce*, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. . . . But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance of what he might know were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But farther: municipal law is "a rule of civil conduct prescribed by the supreme power in a state." For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty

and legislature are indeed convertible terms; one can not subsist without the other.

The term *civil* law is strictly and etymologically applicable to the special or peculiar system or body of laws of any particular state or people, for which we commonly employ the term municipal law. But the *jus civile Romanorum*, or legal system of the Romans, was long preeminently the civil law. Hence the term came to mean Roman law; and it is too well fixed in that meaning to render restoration of the true sense easy or perhaps advisable. Municipal law, the term generally made use of to denote the system or body of law of a particular state, is unfortunately chosen, but well settled in good usage.

(Three common uses of the term *law* require to be distinguished: These are (1) *Law* as used in the natural and physical sciences, (2) *Natural law*, or *law of nature*, as the term is used by writers on the philosophy of law, (3) *Law in the juridical sense*.) In the natural sciences, *law* is used to mean deductions from human experience of the course of events. Thus, the "law of gravitation" is a record of human observation and experience of the manner in which bodies which are free to move do, in fact, move toward one another. By *natural law* or *the law of nature*, writers upon legal subjects mean the principles which philosophy and ethics discover as those which should govern human actions and relations. Laws of nature, in this sense, might be defined thus: "Natural and necessary inferences from the facts of nature, with respect to which obligatory rules of human conduct ought to be framed. (*Law in the juridical sense* is: The body of rules recognized or enforced by public or regular tribunals in the administration of justice.) The idea which the three have in common is order or regularity—the idea of a rule or principle underlying a sequence of events, whether natural or moral or judicial. It is usual to distinguish law in the juridical sense from so-called natural law under the name of positive law. The following extracts deal with law in the juridical sense.

HOLLAND, ELEMENTS OF JURISPRUDENCE, chap. 3 (conclusion).

A law, in the proper sense of the term, is therefore a general rule of human action, taking cognisance only of external acts, enforced by a determinate authority, which authority is human, and, among human authorities, is that which is paramount in a political society.

More briefly, a general rule of external human action enforced by a sovereign political authority.

All other rules for the guidance of human action are called laws merely by analogy; and any propositions which are not rules for human action are called laws by metaphor only.

SALMOND, JURISPRUDENCE, sec. 5.

The law is the body of principles recognized and applied by the state in the administration of justice.

Or, more shortly: The law consists of the rules recognized and acted on in courts of justice.

It will be noticed that this is a definition, not of *a* law, but of *the* law, and our first concern is to examine the significance of this distinction. The term *law* is used in two senses, which may be conveniently distinguished as the abstract and the concrete. In its abstract application we speak of the law of England, the law of libel, criminal law, and so forth. Similarly we use the phrases law and order, law and justice, courts of law. It is to this usage that our definition is applicable. In its concrete sense, on the other hand, we say that Parliament has enacted or repealed a law. We speak of the by-laws of a railway company or municipal council. We hear of the commerce laws or the navigation laws. The distinction demands attention for this reason, that the concrete term is not co-extensive with the abstract in its application. Law or the law does not consist of the total number of laws in force. The constituent elements of which the law is made up are not laws but rules of law or legal principles. That a will requires two witnesses is not rightly spoken of as a law of England; it is a rule of English law. (A law means a statute, enactment, ordinance, decree, or any other exercise of legislative authority.) It is one of the sources of law in the abstract sense. A law produces statute law, just as custom produces customary law, or as a precedent produces case-law.

LEE, HISTORICAL JURISPRUDENCE, 3-4.

What, then, is law? It may be considered either as it has become by the evolution of thought, or as it was when it first became differentiated from closely related elements of the primitive human consciousness. The definition of the analytic jurists according to the former method is as follows: According to Austin and Bentham, a law may be resolved into a general command, one emanating from a sovereign or law-giver and imposing an obligation upon citizens, which obligation is enforced by a sanction or penalty, threatened in the case of disobedience. This definition, never quite true, never quite applicable, is for all that not to be wholly rejected in its political sense. Yet it is too unsatisfactory, too impracticable, to be recognized as a complete definition of even the most modern concrete law, though therein lies its chief claim to authority. And

certainly such a definition does not apply to the early law, or that from which modern law has been evolved. In the early forms of society there was, in place of the skilfully defined modern law, a body of custom, not attributable to any sovereign authority or law-giver. This custom was regarded as binding upon the whole body of persons forming the primitive social group in which such custom obtained. Furthermore, that custom was enforced in a rude manner, either by permitting the person injured by its violation to avenge himself as best he could, or by depriving the offender of certain rights, such as the aid and society of members of the group. In such a state, law would be best defined as that body of customs regarded as binding upon the members of a group or class, and enforced by their authority. This is law as first discerned in all nations; it is the form in which it constantly appears in the course of history. Only with the rise of the abundant modern legislation has it been seen that law might be conceived as the command of a sovereign body.

LAW AND MORALS.

BLACKSTONE, COMMENTARIES, I, 41.

This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to every other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.

LOAN ASSOCIATION V. TOPEKA, 2 Wall. (U. S.), 655, 662.

Miller, J.: It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic repository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, State and National, is

opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of the governments, are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C. and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.

BONHAM'S CASE, 8 Rep. 118a.

Lord Coke: And it appears in our books, that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void. . . . (So if an act of parliament gives to any to hold, or to have consueance of, all manner of pleas arising before him within the manor of D., yet shall he hold no plea, to which he himself is a party) for, as hath been said, *iniquum est aliquem suae rei esse judicem*.

This notion that there is an appeal from legislation to common right and reason or to the law of nature, and that courts are bound to give effect to the latter as against positive law in conflict therewith, formerly had no little vogue and still reappears in occasional *dicta*, sometimes as an absolute dogma, sometimes as a mere rule of moral obligation, and sometimes in its true place of a rule of interpretation.

In practice we may admit two propositions only:

(A. As between a man and his conscience, he may under some circumstances be justified morally in disobeying a law. He may appeal to his reason and conscience for internal justification; but the courts can and will look only to the law.)

UNITED STATES V. HARMON, 45 Fed. Rep. 414, 422.

Philips, J.: The proposition is that a man can do no public wrong who believes that what he does is for the ultimate public good. The underlying vice of all this character of argument is that it leaves out of view the existence of the social compact, and the idea

of government by law. (If the end sought justifies the means, and there were no arbiter but the individual conscience of the actor to determine the fact whether the means are justifiable, homicide, infanticide, pillage and incontinence might run riot.) . . . Society is organized on the theory, born of the necessities of human well-being, that each member yields up something of his natural privileges, predilections, and indulgences for the good of the composite community; and he consents to all the motto implies, *salus populi suprema est lex*; and, as no government can exist without law, the law-making power within the limits of constitutional authority, must be recognized as the body to prescribe what is right and prohibit what is wrong. It is the very incarnation of the spirit of anarchy for a citizen to proclaim that like the heathen he is a law unto himself.

BERTHOLF v. O'REILLY, 74 N. Y. 509.

Andrews, J.: If an Act can stand when brought to the test of the Constitution, the question of its validity is at an end, and neither the executive nor the judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the *dicta* of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities. . . . No law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the State, it is not justified by public necessity, or designed to promote the public welfare. (We repeat, if it violates no constitutional provision, it is valid and must be obeyed.)

B. There are certain points of contact between law and morals, where the courts look primarily to general principles of right and justice for guidance. These are three: discretion, judicial legislation, and interpretation.

BOUVIER, LAW DICTIONARY.

(Discretion—The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.)

NORRIS v. CLINKSCALES, 47 S. C. 488.

Benet, J.: (The term discretion implies the absence of a hard and fast rule.) The establishment of a clearly defined rule would be the end of discretion. And yet discretion should not be a word for arbitrary will or unstable caprice.

HAYWOOD v. COPE, 25 Beav. (Eng.) 140, 151.

Romilly, M. R.: It is most important that the profession, and those who have to advise in reference to this subject should understand the rule which is adopted in this and the other Courts, which is, that the discretion of the courts must be exercised according to fixed and settled rules; you can not exercise a discretion by merely considering what, between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; (you must have some settled rule and principle upon which to determine how that discretion is to be exercised.)

Four propositions may be laid down with reference to the exercise of discretion: (1) Whether or not a matter is one for law or for discretion is settled by law, and the court has no power to put it in the one category or the other at pleasure. (A court has no discretion to apply the law or not as it sees fit.) (2) Where discretion is conferred, it must really be exercised as such; the court can not act oppressively or arbitrarily under pretence of exercising discretion. (Such arbitrary or oppressive action under color of exercising discretion is called abuse of discretion.) (3) (If discretion reposed in a court or judge is in fact exercised as such, the manner of its exercise will not be reviewed.) (4) (But if the discretion is abused, the abuse may be reviewed and corrected by a higher tribunal.)

(Judicial law-making refers to decision by judges of cases of a novel character, not governed or imperfectly governed by existing rules of law, whereby new rules arise.) It is a survival from times when there was little or no legislation, and when legislative and judicial functions were undifferentiated and confused. Its scope and importance in our system of law are continually diminishing. Like judicial discretion, this power is not arbitrary and unrestricted, but must be exercised along well-settled lines. The chief agent in judicial law-making is analogy, and the process consists in choosing between competing analogies of existing rules and selecting that which appears most in harmony with the rest of the legal system and most consonant with reason and justice.

BLACKSTONE, COMMENTARIES, I, 59-61.

(The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law

was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.) Let us take a short view of them all.

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

2. (If words happen to be still dubious, we may establish their meaning from the context, with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate.) Thus the proeme, or preamble, is often called in to help the construction of an act of Parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is; and, when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.

3. (As to the subject matter, words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end.) Thus, when a law of our Edward III forbids all ecclesiastical persons to purchase provisions at Rome, it might seem to prohibit the buying of grain and other victual; but, when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the pope were called provisions, we shall see that the restraint is intended to be laid upon such provisions only.

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

5. (But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it.) For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise ascribed to Herennius. There was a law that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to those who stayed in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither stayed in the ship on that account, nor contributed anything to its preservation.

From this method of interpreting laws by the reason of them, arises what we call equity, which is thus defined by Grotius: "the correction of that wherein the law (by reason of its universality) is deficient." For, since in laws all cases can not be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases which, according to Grotius, *lex non exacte definit, sed arbitrio boni viri permittit*.

SHARSWOOD'S NOTE to the foregoing passage.

What the learned commentator here says is certainly inaccurate, if it leads to the supposition that any other rules of interpretation

are applied to statutes in courts of equity than in courts of law. On the contrary, herein equity follows the law. . . . What the commentator does mean, perhaps, is what is generally termed the equity of a statute, which is in reality a compendious mode of expressing his fifth rule of interpretation. Those cases are said to be within the equity of a statute which, though not directly comprehended by its language, are nevertheless within the intention of the lawgiver, reached by its reason and spirit.

SALMOND, FIRST PRINCIPLES OF JURISPRUDENCE, 83-84.

We have defined a principle of law as a principle recognized and acted upon by the State in the administration of justice. It follows that the validity of a legal principle is entirely independent of its truth. It is a principle of law, not because it is true, but because it is accepted and acted upon by the State as true. That two and two make five is open to grave objections as a principle of mathematics, but may be a perfectly valid rule of law. As Hobbes says: *Authoritas non veritas facit legem*. Nor does the existence of a legal principle imply or involve any belief in its truth. To accept a principle as true for the purposes of action is a different thing from believing it to be true; for though a principle be not true, it may be expedient to act upon it as if it were.

Hence a divergence of law from truth and fact is in all cases possible, and in many cases expedient, and in all legal systems such a divergence exists to a very great extent. We have ever to distinguish that which is in deed and in truth from that which is in law. Negligence in fact is not necessarily negligence in law and *vice versa*. Fraud in fact may not be fraud in law; malice in law may not be malice in fact.

Since the aim of the administration of justice is the maintenance or protection of rights, it follows that among the most important of legal principles must be those defining rights. Now the law may recognize as a right that which is not so in truth, or may fail to recognize one which in truth exists. Hence we have to distinguish between rights in fact and rights in law, that is to say, between natural rights and legal rights. And similarly of wrongs, duties, and liabilities.

RIGHTS.

In order to attain its end, the law recognizes or defines certain powers or capacities in persons of influencing the actions of others. The courts give effect to these powers or capacities of influence by protecting those in whom they reside in the exercise of them, or by enforcing them against those against whom they are conferred, or by vindicating them by some form of redress when they are interfered with. These powers or capacities of influence are called rights.

AUSTIN, JURISPRUDENCE (3 Ed.), I, 407.

Duty is the basis of Right. That is to say, parties who have rights, or parties who are invested with rights, have rights to acts or forbearances enjoined by the sovereign upon other parties.

Or (in other words) parties invested with rights are invested with rights, because other parties are bound by the command of the sovereign, to do or perform acts; or to forbear or abstain from acts.

In short, the term 'right' and the term 'relative duty' signify the same notion considered from different aspects. Every right supposes distinct parties: A party commanded by the sovereign to do or to forbear, and a party towards whom he is commanded to do or to forbear. The party to whom the sovereign expresses or intimates the command, is said to lie under a duty: that is to say a relative duty. The party towards whom he is commanded to do or to forbear, is said to have a right to the acts or forbearances in question.

HOLLAND, JURISPRUDENCE, chap. 7.

What then is a 'legal right?' But first, what is a right generally?

(It is one man's capacity of influencing the acts of another by means, not of his own strength, but of the opinion or the force of society.) When a man is said to have a right to do anything, or over anything, or to be treated in a particular manner, what is meant is that public opinion would see him do the act, or make use of the thing, or be treated in that particular way, with approbation, or at least with acquiescence; but would reprobate the conduct of anyone who should prevent him from doing the act, or making use of the thing, or should fail to treat him in that particular way.

A 'right' is thus the name given to the advantage a man has when he is so circumstanced that a general feeling of approval, or at least of acquiescence, results when he does or abstains from doing certain acts, and when other people act or forbear to act in

accordance with his wishes, while a general feeling of disapproval results when any one prevents him from so doing or abstaining at his pleasure, or refuses to act in accordance with his wishes. . . .

Jurisprudence is specifically concerned only with such rights as are recognized by law and enforced by the power of a State. We may therefore define a 'legal right,' in what we shall hereafter see is the strictest sense of that term, as a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others. . . .

It may be as well to re-state in a few words precisely what we mean by saying that any given individual has 'a right.'

If a man by his own force or persuasion can carry out his wishes, either by his own acts, or by influencing the acts of others, he has the 'might' so to carry out his wishes.

If, irrespectively of having or not having this 'might,' public opinion would view with approval, or at least with acquiescence, his so carrying out his wishes, and with disapproval any resistance made to his so doing; then he has a 'moral right' so to carry out his wishes.

If, irrespectively of his having, or not having, either the might, or moral right on his side, the power of the State will protect him in so carrying out his wishes, and will compel such acts and forbearances on the part of other people as may be necessary in order that his wishes may be so carried out, then he has a 'legal right' so to carry out his wishes.

(If it is a question of might, all depends upon a man's own powers of force or persuasion. If it is a question of moral right, all depends on the readiness of public opinion to express itself upon his side. If it is a question of legal right, all depends upon the readiness of the State to exert its force on his behalf.) It is hence obvious that a moral and a legal right are so far from being identical that they may easily be opposed to one another. Moral rights have, in general, but a subjective support, legal rights have the objective support of the physical force of the State. The whole purpose of laws is to announce in what cases that objective support will be granted, and the manner in which it may be obtained. In other words, Law exists, as was stated previously, for the definition and protection of rights.

Every right, whether moral or legal, implies the active or passive furtherance by others of the wishes of the party having the right.

Wherever any one is entitled to such furtherance on the part of others, such furtherance on their part is said to be their 'duty.'

Where such furtherance is merely expected by the public opinion of the society in which they live, it is their 'moral duty.'

Where it will be enforced by the power of the State to which they are amenable, it is their 'legal duty.'

(The correlative of might is necessity, or susceptibility to force; of moral right is moral duty; of legal right is legal duty.) These pairs of correlative terms express, it will be observed, in each case the same state of facts viewed from opposite sides.

A state of facts in which a man has within himself the physical force to compel another to obey him, may be described either that A has the might to control B, or that B is under a necessity of submitting to A. So when public opinion would approve of A commanding and of B obeying, the position may be described either by saying that A has a moral right to command or that B is under a moral duty to obey. Similarly, when the State will compel B to carry out, either by act or forbearance, the wishes of A, we may indifferently say that A has a legal right, or that B is under a legal duty.

SALMOND, JURISPRUDENCE, sec. 72.

(A right is an interest recognized and protected by a rule of right. It is any interest, respect for which is a duty, and the disregard of which is a wrong.)

All that is right or wrong, just or unjust, is so by reason of its effects upon the interests of mankind, that is to say, upon the various elements of human well-being, such as life, liberty, health, reputation, and the uses of material objects. If any act is right or just, it is so because and in so far as it promotes some form of human interest. If any act is wrong or unjust, it is because the interests of men are prejudicially affected by it. Conduct which has no influence upon the interests of anyone has no significance either in law or morals.

Every wrong, therefore, involves some interest attacked by it, and every duty involves some interest to which it relates, and for whose protection it exists. The converse, however, is not true. Every attack upon an interest is not a wrong, either in fact or in law, nor is respect for every interest a duty, either legal or natural. Many interests exist *de facto* and not also *de jure*; they receive no recognition or protection from any rule of right. The violation

of them is no wrong, and respect for them is no duty. For the interests of men conflict with each other, and it is impossible for all to receive rightful recognition. The rule of justice selects some for protection, and the others are rejected.

The interests which thus receive recognition and protection from the rules of right are called rights. Every man who has a right to anything has an interest in it also, but he may have an interest without having a right. Whether his interest amounts to a right, depends on whether there exists with respect to it a duty imposed upon any other person. In other words, a right is an interest the violation of which is a wrong.

Every right corresponds to a rule of right, from which it proceeds, and it is from this source that it derives its name. That I have a right to a thing means that it is right that I should have it. All right is the right of him for whose benefit it exists, just as all wrong is the wrong of him whose interests are affected by it. . . .

Rights, like wrongs and duties, are either moral or legal. A moral or natural right is an interest recognized and protected by the rule of natural justice—an interest the violation of which would be a moral wrong, and respect for which is a moral duty. A legal right, on the other hand, is an interest recognized and protected by the rule of legal justice—an interest the violation of which would be a legal wrong done to him whose interest it is, and respect for which is a legal duty. "Rights," says Ihering, "are legally protected interests." . . .

It should be noticed that in order that an interest should become a legal right, it must obtain not merely legal protection, but also legal recognition. The interests of beasts are to some extent protected by the law, inasmuch as cruelty to animals is a criminal offence. But beasts are not for this reason possessed of legal rights. The duty of humanity so enforced is not conceived by the law as a duty towards beasts, but merely as a duty in respect of them. There is no bond of legal obligation between mankind and them. The only interest and the only right which the law recognizes in such a case is the interest and right of society as a whole in the welfare of the animals belonging to it. He who illtreats a child violates a duty which he owes to the child, and a right which is vested in him. But he who illtreats a dog breaks no *vinculum juris* between him and it, though he disregards the obligation of humane

conduct which he owes to society or the State, and the correlative right which society or the State possesses. Similarly, a man's interests may obtain legal protection as against himself, as when drunkenness or suicide is made a crime. But he has not for this reason a legal right against himself. The duty to refrain from drunkenness is not conceived by law as a duty owing by a man to himself, but as one owing by him to the community. The only interest which receives legal recognition is that of society in the sobriety of its members.

HOLLAND, JURISPRUDENCE, chap. 8.

We have next to consider more particularly what is the character of those elements from which a Right results. They are:

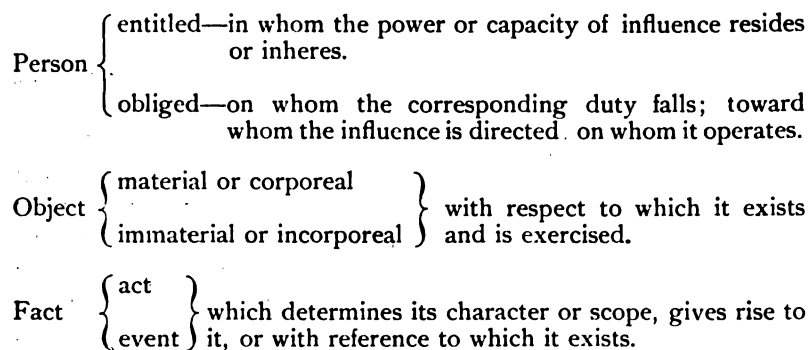
(1) A person 'in whom the right resides' or who is 'clothed with the right,' or who is benefitted by its existence.

(2) In many cases, an object over which the right is exercised.

(3) Acts or forbearances which the person in whom the right resides is entitled to exact.

(4) A person from whom these acts or forbearances can be exacted; in other words, against whom the right is available; in other words, whose duty it is to act or forbear for the benefit of the subject of the right.

The elements of a legal right may be expressed diagrammatically as follows:



In addition to natural rights and legal rights, political rights should also be distinguished. (By political rights we mean powers or capacities of taking an active part in the government, which the State concedes to or recognizes in certain classes of citizens.) Ancient law did not distinguish legal from political rights. It allowed

the former only to those who had the latter. In modern states we may say:

(Natural rights belong to or reside in human beings.

Legal or civil rights belong to or reside in persons, natural (i. e., human beings) or juristic (e. g., municipalities, corporations).

(Political rights belong to citizens or to those upon whom the State has conferred a partial citizenship.)

As the three categories are not necessarily identical, it follows that possession of one form of rights does not imply possession of the others.

In modern times the law aims to accord civil or legal rights to all natural persons to the extent of their moral or natural rights. The tendency is also to extend political rights as widely as possible. Ancient law limited them and confused them. It conceded no legal rights to the foreigner; if the State gave him partial political rights, that fact gave him partial legal rights also. To-day all human beings are persons, i. e., subjects of at least some legal rights. Formerly this was not so.

MARKBY, ELEMENTS OF LAW, sec. 164.

Sometimes a right exists only as against one or more individuals, capable of being ascertained and named; sometimes it exists generally against all persons, members of the same political society as the person to whom the right belongs; or, as is commonly said, somewhat arrogantly, it exists against the world at large. Thus in the case of a contract between A and B, the right of A to demand performance of the contract exists against B only; whereas in the case of ownership, the right to hold and enjoy the property exists against persons generally. This distinction between rights is marked by the use of terms derived from the Latin: the former are called rights *in personam*; the latter are called rights *in rem*.

HOLLAND, JURISPRUDENCE, chap. 9.

A right is available either against a definite person or persons, or against all persons indefinitely. A servant, for instance, has a right to his wages for the work he has done available against a definite individual, his master; while the owner of a garden has a right to its exclusive enjoyment available against no one individual more than another, but against everybody.

This distinction between rights has been expressed by calling a right of the definite kind a right *in personam*, of the indefinite kind a right *in rem*. And these terms, though not perfectly satisfactory, have obtained a currency which is of itself a recommendation, and moreover are perhaps as good as any substitutes which could be

suggested for them. The former term indicates with tolerable perspicuity a right available '*in personam (certam)*,' against a definite individual, while the latter implies that the right is capable of exercise over its object, '*in rem*,' without reference to any one person more than another.

SCHEME OF RIGHTS AT COMMON LAW.

I. *In personam*.

1. Contractual, arising independently of preexisting rights out of contract or quasi-contract.
2. Delictual, arising from violation of preexisting rights *in rem*, i. e., from torts.

II. *In rem*.

1. Personal integrity. The right not to be injured in body or mind by the acts or negligence of others.
 - a. life.
 - b. body.
 - c. health:
 - i. bodily.
 - ii. mental.
 - d. reputation.
2. Personal liberty. The right of free motion and locomotion except as restricted by law and restrained lawfully by the proper officers acting in the proper manner.
3. Society and control of family and dependents.
4. Private property.

BLACKSTONE, COMMENTARIES, I, 129-140.

These may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property. . . .

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

1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in its mother's womb. . . .

2. A man's limbs (by which for the present we understand only those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law) are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right; and they can not be wantonly destroyed or disabled without a manifest breach of civil liberty.

Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man to save either life or member, is looked upon as done upon the highest necessity and compulsion. . . .

3. Besides those limbs and members that may be necessary to a man in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating and wounding; though such insults amount not to destruction of life and member.

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

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

II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that, in this kingdom, it cannot ever be abridged at the mere discretion of the magistrate, without the express permission of the laws. Here again the language of the great charter is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I., it is enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16 Car. I. c. 10, if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council, he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court

Habeas corpus = the writ (or body) delivering
a person into the hands of the law.

of king's bench or common pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II c. 2, commonly called the *habeas corpus* act, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail or sureties for the prisoner's appearance, it is declared by 1 W. and M. st. 2, c. 2, that excessive bail ought not to be required. . . .

The confinement of the person, in any wise, is an imprisonment; so that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. And the law so much discourages unlawful confinement, that if a man is under duress of imprisonment, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like, he may allege this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and, either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into, if necessary, upon a *habeas corpus*. If there be no cause expressed, the jailer is not bound to detain the prisoner; for the law judges in that respect, saith Sir Edward Coke, like Festus the Roman governor, that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged.

A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king, indeed, by his royal prerogative, may issue out his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign parts without license. This may be necessary for the public service and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England out of the land against his will; no, not even a

criminal. For exile and transportation are punishments at present unknown to the common law; and, wherever the latter is now inflicted, it is either by the choice of the criminal himself, to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the great charter declares that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act, 31 Car. II c. 2 (that second *magna carta*, and stable bulwark of our liberties), it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas (where they cannot have the full benefit and protection of the common law): but that all such imprisonments shall be illegal. . . .

The law is in this respect so benignly and liberally construed for the benefit of the subject, that, though within the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man out of the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador. For this might, in reality, be no more than an honorable exile.

III. The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes it is enacted, that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the

land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if anything be done to the contrary, it shall be redressed, and holden for none.

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land. In vain it may be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or not. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament.

PERSONS.

(By persons, in law, we mean those entities, natural or artificial, which the law clothes with the power of exercising a legal control over the acts of others.) Persons are of two classes, natural, and juristic or artificial. (In modern law, every human being is recognized as a natural person, and hence a legal person.) Modern law allows a legal personality to every natural person. Juristic persons

are aggregates of persons or of rights, or even objects, which for convenience the law treats as subjects of legal rights and hence as persons.) The most important form is the corporation, which may be public,—e. g., municipalities, such as cities and towns, school districts, irrigation districts, sanitary districts, etc.,—or private, including public service corporations, such as railway companies, and ordinary business corporations.

MARKBY, ELEMENTS OF LAW, SECS. 131-132.

Persons are human beings capable of rights. To constitute a human being capable of rights two things are necessary, birth and survival of birth.

There are expressions to be found in English law books which look as if the foetus, or even the embryo, in the mother's womb were capable of rights. Thus we find it said that the unborn child may take by devise or inheritance. But I think the true meaning of this is, not that the unborn child really takes, but that the right is reserved for the child until the moment of its birth.

BLACKSTONE, COMMENTARIES, I, 130.

An infant in ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.

BLACKSTONE, COMMENTARIES, I, 132.

These rights of life and member can only be determined by the death of the person; which was formerly accounted to be either a civil or natural death. (The civil death commenced, if any man was banished or abjured the realm by the process of the common law, or entered into religion;) that is, went into a monastery, and became there a monk professed: in which case he was absolutely dead in law, and his next heir should have his estate. For such banished man was entirely cut off from society: and such a monk, upon his profession, renounced solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life and the commands of the temporal magistrate, the genius of the English laws would not suffer those persons to enjoy the benefits of society who secluded themselves from it and refused to submit to its regulations. A monk was therefore counted *civilliter mortuus*, and when he entered into religion might, like other dying men,

make his testament and executors; or if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators had the same power, and might bring the same actions for debts due to the religious, and were liable to the same actions for those due from him, as if he were naturally deceased. Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors, and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due. In short, a monk or religious was so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion; for which reason leases, and other conveyances for life, were usually made to have and to hold for the term of one's natural life. But, even in the times of popery, the law of England took no cognizance of profession in any foreign country, because the fact could not be tried in our courts; and therefore, since the Reformation, this disability is held to be abolished: as is also the disability of banishment, consequent upon abjuration, by Statute 21 Jac. I, c. 28.

TOWN OF BALTIMORE V. TOWN OF CHESTER, Supreme Court of Vermont (1881). (53 Vt. 315.)

Veazey, J.: The term civil death, as used in the books, seemed to involve, first, a total extinction of the civil rights and relations of the party, so that he could neither take nor hold property, but his estate passed to his heirs as though he were really dead, or was forfeited to the crown; and of this kind were the cases of monks professed, and abjuration of the realm. . . . Second, an incapacity to hold property, or to sue in the king's courts attended with forfeiture of the estate and corruption of blood; and the king took the property to the exclusion of the heirs. . . .

There were cases in the English law where the party was sentenced to perpetual imprisonment or perpetual banishment for an offense not attended with forfeiture of his estate. . . . And it would seem that perpetual imprisonment or perpetual banishment, without forfeiture of the estate, did not in England produce civil death. . . .

As crimes do not work a forfeiture of the estate or corruption of blood in this State, there is lacking that taint from crime which seems to have constituted, at common law, one of the essential elements of civil death. . . .

We have statutes providing what shall be the effect of imprisonment for crime in certain respects. A life sentence operates as the natural death of a person, so far as it in any way relates to his marriage or the settlement of his estate. Gen. Stats. ch. 120, 19. A sentence for three years or more is a cause for divorce. Ch. 70, 18. For certain purposes the wife is deemed a feme sole while the husband is in state prison. Ch. 71, 13. These seem to be all based on the principle that a prisoner's legal rights, subject to his personal restraint, are unaffected by the imprisonment, except as specially provided by statute.

In several states there are statutes providing that persons adjudged to imprisonment for life shall be civilly dead. See *In re Nerac*, 35 Cal. 392, 95 Am. Dec. 111; *Avery v. Everett*, 110 N. Y. 317, 6 Am. St. Rep. 368, 1 L. R. A. 264, 18 N. E. Rep. 148.

Complete loss of legal personality must be distinguished from incapacity to perform legally valid acts. A person who is civilly dead has lost his legal identity; the old legal personality is extinct, and there is either a new one or none at all in its place. But a person whose legal personality is unaffected may have lost or may not have attained legal capacity to act in some or all cases. (Accordingly we distinguish normal persons,—persons of full and complete capacity,—and abnormal persons,—persons of partial or limited capacity.) Ancient law conceded full legal capacity to comparatively few. Modern law aims to confer full legal capacity as widely as possible, and in general creates legal incapacities only where there are natural incapacities also. The only substantial exception in our modern law is that for historical reasons married women still labor under a partial legal incapacity in many jurisdictions. In such jurisdictions they have only a limited power of contracting. With this exception, the legal incapacities recognized in modern law coincide substantially with natural incapacities.

In the common law there are now five conditions which create legal incapacity, total or partial: (1) Infancy or minority, (2) coverture, (3) idiocy and lunacy or insanity, (4) conviction of treason or felony, (5) alienage.

BLACKSTONE, COMMENTARIES, I, 464.

3. Infants have various privileges, and various disabilities: but their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts. An infant can-

3

married woman

not be sued but under the protection, and joining the name, of his guardian; for he is to defend him against all attacks as well by law as otherwise: but he may sue either by his guardian, or prochein amy, his next friend who is not his guardian. This prochein amy may be any person who will undertake the infant's cause, and it frequently happens, that an infant, by his prochein amy, institutes a suit in equity against a fraudulent guardian. In criminal cases an infant of the age of fourteen years may be capitally punished for any capital offence: but under the age of seven he cannot. The period between seven and fourteen is subject to much uncertainty: for the infant shall, generally speaking, be judged *prima facie* innocent; yet if he was *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty or discretion. And Sir Matthew Hale gives us two instances, one of a girl of thirteen, who was burned for killing her mistress; another of a boy still younger, that had killed his companion, and hid himself, who was hanged; for it appeared by his hiding that he knew he had done wrong, and could discern between good and evil: and in such cases the maxim of law is, that *malitia supplet aetatem*. So also, in much more modern times, a boy of ten years old, who was guilty of a heinous murder, was held a proper subject for capital punishment, by the opinion of all the judges.

With regard to estates and civil property, an infant hath many privileges, which will be better understood when we come to treat more particularly of those matters: but this may be said in general, that an infant shall lose nothing by non-claim, or neglect of demanding his right; nor shall any other laches or negligence be imputed to an infant, except in some very particular cases.

It is generally true, that an infant can neither alien his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract that will bind him. But still to all these rules there are some exceptions: part of which were just now mentioned in reckoning up the different capacities which they assume at different ages: and there are others, a few of which it may not be improper to recite, as a general specimen of the whole. And, first, it is true, that infants cannot alien their estates: but infant trustees or mortgagees, are enabled to convey, under the direction of the court of chancery or exchequer, or other courts of equity, the estates they hold in

(Infant's liabilities of infants)
 see notes.

trust or mortgage, to such person as the court shall appoint. Also it is generally true, that an infant can do no legal act. An infant may also purchase lands, but his purchase is incomplete: for, when he comes to age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason; and so may his heirs after him, if he dies without having completed his agreement. It is further, generally true, that an infant, under twenty-one, can make no deed but what is afterwards voidable: yet in some cases he may bind himself apprentice by deed indented or indentures, for seven years; and he may by deed or will appoint a guardian to his children, if he has any. (Lastly, it is generally true, that an infant can make no other contract that will bind him: yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and other necessities; and likewise for his good teaching and instruction whereby he may profit himself afterwards.) And thus much, at present, for the privileges and disabilities of infants.

BLACKSTONE, COMMENTARIES, I, 442.

(By marriage, the husband and wife are one person in law) that is, the very being or (legal existence of the woman is suspended during the marriage,) or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a feme-covert, *faemina viro co-operta*; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. (I speak not at present of the rights of property, but of such as are merely personal.) For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage. A woman indeed may be attorney for her husband; for that implies no separation from, but is rather a representation of, her lord. And a husband may also bequeath any thing to his wife by will; for that cannot take effect till the coverture is determined by his death. (The husband is bound to provide his wife with necessities by law,) as much as himself; and, (if she contracts

debts for them, he is obliged to pay them; but for any thing besides necessities he is not chargeable.) Also if a wife elopes, and lives with another man, the husband is not chargeable even for necessities; at least if the person who furnishes them is sufficiently apprised of her elopement. If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together. If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own: neither can she be sued without making the husband a defendant. There is indeed one case where the wife shall sue and be sued as a feme sole, viz. where the husband has abjured the realm, or is banished, for then he is dead in law; and, the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she had no remedy, or could make no defence at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately; for the union is only a civil union. But in trials of any sort they are not allowed to be witnesses for, or against, each other: partly because it is impossible their testimony should be indifferent, but principally because of the union of person; and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, "*nemo in propria causa testis esse debet*;" and if against each other, they would contradict another maxim, "*nemo tenetur seipsum accusare*." But, where the offence is directly against the person of the wife, this rule has been usually dispensed with; and therefore, by statute 3 Hen. VII. c. 2, in case a woman be forcibly taken away, and married, she may be a witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife: because a main ingredient, her consent, was wanting to the contract: and also there is another maxim of law, that no man shall take advantage of his own wrong; which the ravisher here would do, if, by forcibly marrying a woman, he could prevent her from being a witness who is perhaps the only witness to that very fact.

In the civil law the husband and the wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries; and therefore in our ecclesiastical courts, a woman may sue and be sued without her husband.

But though our law in general considers man and wife as one person, yet there are some instances in which she is separately con-

sidered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary. She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion. And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her: but this extends not to treason or murder.

The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinet*. The civil law gave the husband the same, or a larger, authority over his wife: allowing him, for some misdemeanors, *flagellis et fustibus acriter verberare uxorem*; for others, only *modicam castigationem adhibere*. But with us, in the politer reign of Charles the Second, this power of correction began to be doubted; and a wife may now have security of the peace against her husband or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior.

BLACKSTONE, COMMENTARIES, I, 304.

A lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason. A lunatic is indeed properly one that hath lucid intervals, sometimes enjoying his senses, and sometimes not, and that frequently depending upon the change of the moon. But under the general name of *non compos mentis* (which Sir Edward Coke says is the most legal name) are comprised not only lunatics, but persons under frenzies; or who lose their intellects by disease; those that grow deaf, dumb, and blind, not being born so; or such, in short, as

are judged by the court of chancery incapable of conducting their own affairs. To these also, as well as idiots, the king is guardian, but to a very different purpose. For the law always imagines that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives. And therefore it is declared by the statute 17 Edw. II. c. 10, that the king shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they come to their right mind; and the king shall take nothing to his own use; and, if the parties die in such estate, the residue shall be distributed for their souls by the advice of the ordinary, and of course (by the subsequent amendments of the law of administration) shall now go to their executors or administrators.

On the first attack of lunacy, or other occasional insanity, while there may be hope of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody under the direction of their nearest friends and relations; and the legislature, to prevent all abuses incident to such private custody, hath thought proper to interpose its authority by statute 14 Geo. III. c. 49, (continued by 19 Geo. III. c. 15,) for regulating private madhouses. But when the disorder is grown permanent, and the circumstances of the party will bear such additional expense, it is proper to apply to the royal authority to warrant a lasting confinement.

The method of proving a person *non compos* is very similar to that of proving him an idiot. The lord chancellor, to whom, by special authority from the king, the custody of idiots and lunatics is intrusted, upon petition or information, grants a commission in nature of the writ *de idiota inquirendo*, to inquire into the party's state of mind; and if he be found *non compos*, he usually commits the care of his person, with a suitable allowance for his maintenance, to some friend, who is then called his committee.

PRESBURY v. HULL, Supreme Court of Missouri, 1863 (34 Mo. 29.)

Bates, J.: The statute of Missouri, which enacts that a sentence of imprisonment in the penitentiary for a term of less than life, suspends all civil rights of the person so sentenced during the term thereof, applies only to sentences in the State courts. We know of no similar act as to sentences by the Federal courts, and without

such act there is no such suspension. A sentence for life even would not have the effect of making the convict civilly dead. (Platner v. Sherwood, 6 John. Chy. 118.) Here the sentence was for one year.

It is of no consequence that Wolff's offense might have been punished by a State court (if it be so); for it is not the fact of criminality which, in any case, suspends his rights, but the conviction and sentence to the penitentiary.

BLACKSTONE, COMMENTARIES, IV, 380, 388.

When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence from the common law is attainder. For when it is now clear beyond all dispute that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him than barely to see him executed. He is then called attain, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man; for, by an anticipation of his punishment, he is already dead in law. This is after judgment; for there is great difference between a man convicted and attainted: though they are frequently through inaccuracy confounded together. After conviction only a man is liable to none of these disabilities; for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment; the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed; he may obtain a pardon, or be allowed the benefit of clergy; both which suppose some latent sparks of merit which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of anything to be said in his favor. Upon judgment, therefore, of death, and not before, the attainder of a criminal commences; or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore, either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted. The consequences of attainder are forfeiture and corruption of blood.

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

[Forfeiture and corruption of blood are now abolished.]

KENT, COMMENTARIES, II, 53, 61, 63.

We proceed next to consider the disabilities, rights, and duties of aliens.

(1) Disabilities of Aliens.—(An alien cannot acquire a title to real property by descent, or created by other mere operation of law.) The law *quae nihil frustra* never casts the freehold upon an alien heir who cannot keep it. This is a well-settled rule of the common law. The right to real estate by descent is governed by the municipal law of the individual states. Nor can an alien take as tenant by the curtesy or in dower. It is understood to be the general rule, that even a natural-born subject cannot take by representation from an alien, because the alien has no inheritable blood through which a title can be deduced. If an alien purchase land, or if land be devised to him, the general rule is, that in these cases he may take and hold, until an inquest of office has been had; but upon his death the land would instantly and of necessity (as the freehold cannot be kept in abeyance), without any inquest of office, escheat and vest in the state, because he is incompetent to transmit by hereditary descent.

Though an alien may purchase land, or take it by devise, yet he is exposed to the danger of being divested of the fee, and of having his lands forfeited to the state, upon an inquest of office found. His title will be good against every person but the state, and if he dies before any such proceeding be had, we have seen that the inheritance cannot descend, but escheats of course. If the alien should undertake to sell to a citizen, yet the prerogative right of forfeiture is not barred by the alienation, and it must be taken to be subject to the right of the government to seize the land. His conveyance is good as against himself, and he may, by a fine, bar

persons in reversion and remainder, but the title is still voidable by the sovereign upon office found.

Aliens are capable of acquiring, holding, and transmitting movable property, in like manner as our own citizens, and they can bring suits for the recovery and protection of that property. They may even take a mortgage upon real estate by way of security for a debt, and this I apprehend they may do without any statutory permission, for it has been the English law from the early ages. It is also so held in the Supreme Court of the United States, and that the alien creditor is entitled to come into a court of equity to have the mortgage foreclosed, and the lands sold for the payment of his debt. The question whether the alien in such a case could become a valid purchaser of the mortgaged premises sold at auction at his instance, is left untouched; and as such privilege is not necessary for his security, and would be in contravention of the general policy of common law, the better opinion would seem to be, that he could not, in that way, without special provision by statute, become the permanent and absolute owner of the fee.

Even alien enemies, resident in the country, may sue and be sued as in time of peace; for protection to their persons and property is due, and implied from the permission to them to remain, without being ordered out of the country by the President of the United States. The lawful residence does, *pro hac vice*, relieve the alien from the character of an enemy, and entitles his person and property to protection. The effect of war upon the rights of aliens we need not here discuss, as it has been already considered in a former part of this course of lectures, when treating of the law of nations.

During the residence of aliens amongst us, they owe a local allegiance, and are equally bound with natives to obey all general laws for the maintenance of peace and the preservation of order, and which do not relate specially to our own citizens. This is a principle of justice and of public safety universally adopted; and if they are guilty of any illegal act, or involved in disputes with our citizens, or with each other, they are amenable to the ordinary tribunals of the country.

KENT, COMMENTARIES, II, 268, 273, 274.

(A corporation is a franchise possessed by one or more individuals, who subsist, as a body politic, under a special denomination, and are vested, by the policy of the law, with the capacity of perpetual

U succession, and of acting in several respects, however numerous the association may be, as a single individual.)

The object of the institution is to enable the members to act by one united will, and to continue their joint powers and property in the same body, undisturbed by the change of members, and without the necessity of perpetual conveyances, as the rights of members pass from one individual to another. All the individuals composing a corporation, and their successors, are considered in law as but one person, capable, under an artificial form, of taking and conveying property, contracting debts and duties, and of enjoying a variety of civil and political rights. One of the peculiar properties of a corporation is the power of perpetual succession; for, in judgment of law, it is capable of indefinite duration. The rights and privileges of the corporation do not determine or vary, upon the death or change of any of the individual members. They continue as long as the corporation endures.

It is sometimes said that a corporation is an immortal as well as an invisible and intangible being. But the immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists. It is so far from being immortal, that it is well known that most of the private corporations recently created by statute are limited in duration to a few years. There are many corporate bodies that are without limitation, and, consequently, capable of continuing so long as a succession of individual members of the corporation remains and can be kept up.

1 Corporations are [redacted] aggregate [redacted] A corporation sole consists of a single person, who is made a body corporate and politic, in order to give him some legal capacities and advantages, and especially that of perpetuity, which, as a natural person, he cannot have. A bishop, dean, parson, and vicar are given in the English books as instances of sole corporation; and they and their successors in perpetuity take the corporate property and privileges; and the word "successors" is generally as necessary for the succession of property in a corporation sole, as the word "heirs" is to create an estate of inheritance in a private individual. A fee will pass to a corporation aggregate, without the word "successors" in the grant, because it is a body which, in its nature, is perpetual; but, as a general rule, a fee will not pass to a corporation sole, without the word "successors," and it will continue for the life only of the individual clothed with the corporate character. There are very few points of corporation law applicable to a corporation sole.

Another division of corporations, by the English law, is into ecclesiastical and lay. The former are those of which the members are spiritual persons, and the object of the institution is also spiritual. With us they are called religious corporations. This is the description given to them in the statutes of New York, Ohio, and other states, providing generally for the incorporation of religious societies, in an easy and popular manner, and for the purpose of managing, with more facility and advantage, the temporalities belonging to the church or congregation. Lay corporations are again divided into eleemosynary and civil. An eleemosynary corporation is a private charity, constituted for the perpetual distribution of the alms and bounty of the founder. In this class are ranked hospitals for the relief of poor, sick, and impotent persons, and colleges and academies established for the promotion of learning and piety, and endowed with property, by public and private donations. Civil corporations are established for a variety of purposes, and they are either public or private. Public corporations are such as are created by the government for political purposes, as counties, cities, towns, and villages; they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good; and such powers are subject to the control of the legislature of the state. They may also be empowered to take or hold private property for municipal uses; and such property is invested with the security of other private rights. So corporate franchises attached to public corporations are legal estates coupled with an interest, and are protected as private property. If the foundation be private, the corporation is private, however extensive the uses may be to which it is devoted by the founder, or by the nature of the institution. A bank, created by the government, for its own uses, and where the stock is exclusively owned by the government, is a public corporation. So a hospital created and endowed by the government, for general purposes, is a public and not a private charity. But a bank whose stock is owned by private persons is a private corporation, though its object and operations partake of a public nature, and though the government may have become a partner in the association by sharing with the corporators in the stock. The same thing may be said of insurance, canal, bridge, turnpike, and railroad companies. The uses may, in a certain sense, be called public, but the corporations are private, equally as if the franchises were vested in a single person. A hospital founded by

a private benefactor is, in point of law, a private corporation, though dedicated by its charter to general charity. A college, founded and endowed in the same manner, is a private charity, though from its general and beneficent objects it may acquire the character of a public institution. If the uses of an eleemosynary corporation be for general charity, yet such purposes will not of themselves constitute it a public corporation. Every charity which is extensive in its object may, in a certain sense, be called a public charity. Nor will a mere act of incorporation change a charity from a private to be a public one. The charter of the crown, said Lord Hardwicke, cannot make a charity more or less public, but only more permanent. It is the extensiveness of the object that constitutes it a public charity. A charity may be public, though administered by a private corporation. A devise to the poor of a parish is a public charity. The charity of almost every hospital is public, while the corporations are private. To hold a corporation to be public, because the charity was public, would be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions since the time of Lord Coke.

In England, corporations are created and exist by prescription, by royal charter, and by act of Parliament. With us they are created by authority of the legislature, and not otherwise. There are, however, several of the corporations now existing in this country, civil, religious, and eleemosynary, which owed their origin to the crown under the colony administration. Those charters granted prior to the Revolution were upheld, either by express provision in the constitutions of the states, or by general principles of public and common law of universal reception; and they were preserved from forfeiture by reason of any nonuser or misuser of their powers, during disorders which necessarily attended the Revolution.

II.

HISTORY OF THE COMMON LAW.

There are two great systems of law, the Roman or Civil Law and the English or Common Law. Roman law, beginning as the law of the city of Rome, became the law of the Roman Empire and thus of the ancient world, and eventually, by absorption or reception from the twelfth to the eighteenth century, the law of modern continental Europe. It is now the foundation or a principal ingredient of the law in continental Europe, including Turkey, Scotland, Central and South America, Quebec and Louisiana, and all Spanish, Portuguese, or Dutch colonies or countries settled by those peoples. The common law, Teutonic in origin, was developed by the English courts from the thirteenth to the nineteenth centuries, and has spread over the world with the English race. It now prevails in England and Ireland; the United States, except Louisiana; Canada, except Quebec; Australia; India, except over Hindus and Mohammedans as to inheritance and family law; and the principal English colonies except in South Africa.

DILLON, LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA, 155.

Now the great fact which, as we approach this subject, meets our view, is that the common law (including in the phrase "common law," as here used, the supplemental equity system of the Court of Chancery which grew out of the common law and constitutes a part of it) underlies the whole system of American law and jurisprudence. The expression, "the common law" is used in various senses: (a) sometimes in distinction from statute law; (b) sometimes in distinction from equity law; and (c) sometimes in distinction from the Roman or civil law. I use it in this lecture in the latter sense. I do not stop to inquire how the common law came to be introduced here and adopted by us. I deal with the fact as it exists, which is that the common law is the basis of the laws of every state and territory of the union, with comparatively unimportant and gradually waning exceptions. And a most fortunate circumstance it is, that, divided as our territory is into so many states, each supreme within the limits of its power, a common and uniform general system of jurisprudence underlies and pervades them all; and

this quite aside from the excellences of that system, concerning which I shall presently speak. My present point is this: That the mere fact that one and the same system of jurisprudence exists in all of the states, is of itself of vast importance, since it is a most powerful agency in promoting commercial, social, and intellectual intercourse, and in cementing the national unity.

The history of the common law system may be treated of conveniently under five heads: (1) English law before the Conquest, (2) the development of the common law, (3) the development of equity, (4) the law merchant, (5) the reform-movement.

I.

ENGLISH LAW BEFORE THE CONQUEST.

POILLOCK, ENGLISH LAW BEFORE THE NORMAN CONQUEST, 14 Law Quar. Rev. 291.

For most practical purposes, the history of English law does not begin till after the Norman Conquest, and the earliest things which modern lawyers are strictly bound to know must be allowed to date only from the thirteenth century, and from the latter half of it rather than the former. Nevertheless a student who does not look further back will be puzzled by relics of archaic law which were not formally discarded until quite modern times, and he may easily be misled by plausible but incorrect explanations of them such as have been current in Blackstone's time and much later. . . . The extreme antiquities of our law may not often be required in practice, but it is not safe to neglect them altogether, and still less safe to accept uncritical explanations when it does become necessary to consider them.

From the LAWS OF AETHELBERIT (Kent, about 600 A. D.). Thorpe's translation.)

33. If there be seizing by the hair, let there be L scaetts for bot.

34. If there be an exposure of the bone, let bot be made with III shillings.

35. If there be an injury of the bone, let bot be made with IV shillings.

36. If the outer bone be broken, let bot be made with X shillings.

37. If it be both, let bot be made with XX shillings.

38. If a shoulder be lamed, let bot be made with XXX shillings.

*They grew out of custom.
Law was very formal.*

39. If an ear be struck off, let bot be made with XII shillings.
40. If the other ear hear not, let bot be made with XXV shillings.
41. If an ear be pierced, let bot be made with III shillings.
42. If an ear be mutilated, let bot be made with VI shillings.
43. If an eye be (struck) out, let bot be made with L shillings.
44. If a mouth or an eye be injured, let bot be made with XII shillings.
45. If the nose be pierced let bot be made with IX shillings.
46. If it be one ala let bot be made with III shillings.
47. If both be pierced, let bot be made with VI shillings.
48. If the nose be otherwise mutilated, for each let bot be made with VI shillings.
49. If it be pierced, let bot be made with VI shillings.
50. Let him who breaks the chin-bone pay for it with XX shillings.
51. For each of the four front teeth, VI shillings; for the tooth which stands next to them, IV shillings; for that which stands next to that, III shillings; and then afterwards, for each a shilling.
52. If the speech be injured, XII shillings. If the collar bone be broken, let bot be made with VI shillings.
53. Let him who stabs (another) through an arm, make bot with VI shillings. If an arm be broken, let him make bot with VI shillings.
54. If a thumb be struck off, XX shillings. If a thumb nail be off, let bot be made with III shillings. If the shooting (i. e. fore) finger be struck off, let bot be made with VIII shillings. If the middle finger be struck off, let bot be made with IV shillings. If the gold (i. e. ring) finger be struck off, let bot be made with VI shillings. If the little finger be struck off, let bot be made with III shillings.
55. For every nail a shilling.
56. For the smallest disfigurement of the face, III shillings; and for the greater, VI shillings.
57. If anyone strike another with his fist on the nose, III shillings.
58. If there be a bruise, a shilling; if he receive a right hand bruise, let him (the striker) pay a shilling.
59. If the bruise be black in a part not covered by the clothes, let bot be made with XXX scaetts.

60. If it be covered by the clothes, let bot for each be made with XX scaetts.

61. If the belly be wounded, let bot be made with XII shillings; if it be pierced through, let bot be made with XX shillings.

From the LAWS OF ALFRED (Wessex, about 890 A. D.). (This and the succeeding extracts from the Anglo-Saxon laws are from Thorpe's translation.)

We also command: that the man who knows his foe to be home-sitting fight not before he demand justice of him. If he have such power that he can beset his foe, and besiege him within, let him keep him within for VII days, and attack him not, if he will remain within. And then, after VII days, if he will surrender, and deliver up his weapons, let him be kept safe for XXX days, and let notice of him be given to his kinsmen and his friends. If, however, he flee to a church, then let it be according to the sanctity of the church, as we have before said above. But if he have not sufficient power to besiege him within, let him ride to the ealdorman and beg aid of him. If he will not aid him, let him ride to the king before he fights. In like manner also, if a man come upon his foe, and he did not before know him to be home-staying; if he be willing to deliver up his weapons, let him be kept for XXX days, and let notice of him be given to his friends, if he will not deliver up his weapons then he may attack him. If he be willing to surrender, and to deliver up his weapons, and anyone after that attack him, let him pay as well wer as wound, as he may do, and wite, and let him have forfeited his maegship. We also declare, that with his lord a man may fight without risk of legal consequences, if anyone attack the lord; thus may the lord fight for his man. After the same wise, a man may fight with his born kinsman, if a man attack him wrongfully, except against his lord. That we do not allow. And a man may fight without legal consequences, if he find another with his lawful wife, within closed doors, or under one covering, or with his lawfully born daughter, or with his lawfully born sister, or with his mother, who was given to his father as his lawful wife.

From ALFRED AND GUTHRUM'S PEACE (A. D. 879).

2. Then is this: If a man be slain, we estimate all equally dear, English and Danish, at viii half marks of pure gold. . . .

3. And if a king's thegn be accused of manslaying, if he dare to clear himself, let him do that with xii king's thegns. If any one

accuse that man who is of less degree than the king's thegn, let him clear himself with xi of his equals and with one king's thegn. And so for every suit which may be for more than iv mancuses. And if he dare not, let him pay for it threefold, as it may be valued.

From the LAWS OF ATHELSTAN (about 930).

12. And we have ordained that no man buy any property out of port over xx pence; but let him buy there within, on the witness of the portreeve, or of another unlying man; or further on the witness of the reeves at the folknote.

From the "ORDINANCE OF THE HUNDRED" OF EDGAR (950-975).

4. And we have ordained, concerning unknown cattle; that no one should possess it without the testimonies of the men of the hundred, or the tithingman, and that he be a well-trusty man; and unless he have either of these, let no vouching to warranty be allowed him.

POLLOCK, ENGLISH LAW BEFORE THE NORMAN CONQUEST, 14 Law Quar. Rev. 291, 292.

The courts were open air meetings of the freemen who were bound to attend them, the suitors as they are called ^{of shire or hundred.} ~~in the law of~~ Anglo-Norman and later mediaeval law; there was no class of professional lawyers; there were no judges in our sense of learned persons especially appointed to preside, expound the law, and cause justice to be done; the only learning available was that of the bishops, abbots, and other great ecclesiastics. This learning, indeed, was all the more available and influential because before the Norman Conquest, there were no separate ecclesiastical courts in England. There were no clerks, nor apparently, any permanent officials of the popular courts; their judgments proceeded from the meeting itself, not from the presiding officer, and were regularly preserved only in the memory of the suitors.

From the SECULAR ORDINANCE OF EDGAR.

Cap. 1. . . . This, then, is first what I will: that every man be worthy of folk right, as well poor as rich; and that righteous dooms be judged to him; and let there be such remission in the bot as may be becoming before God and tolerable before the world.

Cap. 6. And let the hundred gemot be attended as it was before fixed; and thrice in the year let a burh-gemot be held, and twice a shire gemot; and let there be present the bishop of the shire and

the ealdorman, and there both expound as well the law of God as the secular law.

Extracts from POILLOCK, ENGLISH LAW BEFORE THE NORMAN CONQUEST.

Some considerable time before the Norman Conquest, but how long is not known, bishops and other great men had acquired the right of holding courts of their own and taking the profits in the shapes of fines and fees, or what would have been the king's share of the profits. My own belief is that this began very early, but there is no actual proof of it. Twenty years after the conquest, at any rate, we find private jurisdiction constantly mentioned in the Domesday Survey, and common in every part of England; about the same time, or very shortly afterwards, it was recognized as a main ingredient in the complex and artificial system of feudalism. After having grown in England, as elsewhere, to the point of threatening the king's supremacy, but having happily found in Edward I. a master such as it did not find elsewhere before the time of Richelieu, the manorial court is still with us in a form attenuated almost to the point of extinction. . . .

Rigid and cumbrous as Anglo-Saxon justice was in the things it did provide for, it was, to modern eyes, strangely defective in its lack of executive power. Among the most important functions of courts as we know them is compelling the attendance of parties and enforcing the fulfilment both of final judgments and of interlocutory orders dealing with the conduct of proceedings and the like. Such things are done as of course under the ordinary authority of the court. . . . But this reign of law did not come by nature; it has been slowly and laboriously won. Jurisdiction began, it seems, with being merely voluntary, derived not from the authority of the state but from the consent of the parties. People might come to the court for a decision if they agreed to do so. They were bound in honour to accept the result; they might forfeit pledges deposited with the court; but the court could not compel their obedience any more than a tribunal of arbitration appointed at this day under treaty between sovereign states can compel the rulers of those states to fulfil its award. Anglo-Saxon courts had got beyond this most early stage, but not very far beyond it.

The only way to bring an unwilling adversary before the court was to take something of his as security till he would attend the demand; and practically the only things that could be taken with-

out personal violence were cattle. Distress in this form was practiced and also regulated from a very early time. It was forbidden to distrain until right had been formally demanded . . . and refused. Thus leave of court was required, but the party had to act for himself as best he could. If distress failed to make the defendant appear, the only resource left was to deny the Law's protection to the stiff-necked man who would not come to be judged by law. He might be outlawed, and this must have been strong enough to coerce most men who had anything to lose and were not strong enough to live in rebellion; but still no right could be done to the complainant without his submission. The device of a judgment by default, which is familiar enough to us, was unknown, and probably would not have been understood.

Final judgment, when obtained, could in like manner not be directly enforced. The successful party had to see to gathering the "fruits of judgment," as we say, for himself. In case of continued refusal to do right, he might take the law into his own hands, in fact wage war on his obstinate opponent. The ealdorman's aid, and ultimately the king's, could be invoked in such extreme cases as that of a wealthy man, or one backed by a powerful family, setting the law at open defiance. But this was an extraordinary measure, analogous to nothing in the regular modern process of law.

From the LAWS OF INE (about 690).

Cap. 9. If any one take revenge before he demand justice, let him give up what he has taken to himself and pay (the damage done) and make bot with 30 shillings.

From the LAWS OF CNUT (1016-1035).

Cap. 19. And let no man take any distress, either in the shire or out of the shire before he has thrice demanded his right in the hundred. If at the third time he have no justice, then let him go at the fourth time to the shire-gemot, and let the shire appoint him a fourth term. If that then fail, let him take leave either from hence or thence, that he may seize his own.

From the JUDICIA CIVITATIS LUNDONIAE OF ATHELSTAN (about 930).

Cap. viii. 2. And if it then should happen that any kin be so strong and so great, within land or without land . . . that they refuse us our right, and stand up in defence of a thief, that

we all of us ride thereto with the reeve within whose manung it may be.

From the "ORDINANCE OF THE HUNDRED" OF EDGAR.

7. In the hundred, as in any other gemot, we ordain that folk-right be pronounced in every suit, and that a term be fixed when it shall be fulfilled. And he who shall break that term, unless it be by his lord's decree, let him make bot with xxx shillings and on the day fixed fulfill that which he ought to have done before.

3. And the man who neglects this and denies the doom of the hundred, and the same be afterwards proved against him, let him pay to the hundred xxx pence; and for the second time lx pence, half to the hundred, half to the lord. If he do so a third time, let him pay half a pound; for the fourth time, let him forfeit all he owns and be an outlaw, unless the king allow him to remain in the country.

From the LAWS OF ATHELSTAN (about 960).

12. If anyone when thrice summoned fail to attend the gemot, let him pay a penalty to the king, and let it be announced seven days before the gemot is to be. But if he will not do right nor pay the penalty, then let all the chief men belonging to the burh ride to him and take all that he has and put him in pledge. But if anyone will not ride with his fellows, let him pay penalty to the king.

CASE OF EADWINE AGAINST EANWENE, BEFORE THE COUNTY COURT AT AYLTON. Essays in Anglo-Saxon Law, 365 (prior to 1033).

Here is made known in this writing that a shire-gemot sat at Aylton in King Cnut's day. There came Bishop Aethelstan, and Ealdorman Ranig, and Eadwine, (son) of the ealdorman, and Leofwine, son of Sulfsig, and Thurkil White; and Tofig Proud came there on the king's errand; and there was sheriff Bryning, and Aegelweard of Frome, and Leofwine of Frome, and Godwin of Stoke, and all the thanes in Herefordshire. Then came there Eadwine son of Eanwene, faring to the gemot, and made claim against his own mother for a piece of land; namely, Wellington and Cradley. Then asked the bishop who was to answer for his mother; then answered Thurkil White and said that it was his part (to do so), if he knew the case. As he did not know the case, they appointed three thanes from the gemot, and should ride where she was; namely, at Fawley; these were Leofwine of Frome, and Aegel-

sie the Red, and Winsie Shipman. And when they came to her, then asked they what tale she had about the lands which her son sued for. Then said she that she had no land that belonged to him in any way, and she was vehemently angry with her son, and called her kinswoman Leofled, Thurkil's wife, to her, and said to her before them thus: Here sits Leofled, my kinswoman, whom I grant both my land and my gold, both raiment and garment, and all that I own, after my day. And she afterwards said to the thanes: Do thanelike and well. Declare my errand to the gemot before all the good men, and make known to them whom I have granted my land to, and all my property; and to my son nothing whatever; and ask them to be witness to this. And they then did so, rode to the gemot, and made known to all the good men what she had laid on them. Then Thurkil White stood up in the gemot and asked all the thanes to give his wife clear the lands that her kinswoman granted her, and they did so. And Thurkil rode then to Saint Aethelbert's minster, by leave and witness of the whole people, and caused (this) to be recorded in a church book.

GLOSSARY.

Bot—Composition. A sum of money paid to an injured person to buy off the vengeance that would otherwise be sought.

Burh—Borough.

Folk-mote—Assembly of the freemen in the county court.

Manung—District under the jurisdiction of a reeve.

Wer—The pecuniary estimation of a man, by which the value of his oath and the sum to be paid for his death were determined. A sum paid to the kindred of the person killed to buy off their vengeance.

Wite—A fine. A payment by way of punishment. A payment to the king to buy off his vengeance for an affront to him.

2.

THE DEVELOPMENT OF THE COMMON LAW.

(a) *The King's Peace.*

From the LAWS OF AETHELBIHT (600).

Cap. 2. If the king call his people to him and any one there do them evil, let him compensate with a two-fold bot and fifty shillings to the king.

Cap. 3. If the king drink at anyone's house, and anyone there do any offense, let him make two-fold bot.

Cap. 5. If a man kill another in the king's mansion, let him make bot with 50 shillings.

Cap. 8. The fine for breach of the king's protection 50 shillings.

Cap. 13. If a man slay another in an eorl's enclosure, let him make bot with 12 shillings.

Cap. 15. The fine for breach of an eorl's protection 6 shillings.

Cap. 17. If anyone be the first to make an inroad into a man's enclosure, let him make bot with 6 shillings; let him who follows, with 3 shillings; after, each a shilling.

From the LAWS OF WIIHTRAED (Kent about 700).

Cap. 2. That the fine for breach of the protection of the church be 50 shillings, the same as the king's.

From the LAWS OF INE (about 690).

Cap. 6. If any one fight in the king's house, let him be liable in all his property, and be it in the king's doom whether he shall or shall not have life. If any one fight in a minster, let him make bot with one hundred and twenty shillings. If any one fight in an ealdorman's house, or in any other distinguished wita's, let him make bot with LX shillings, and pay a second LX shillings as wite. But if he fight in a gafol-gelda's house, or in a gebur's, let him pay CXX, shillings as wite and to the gebur VI shillings. And though it be fought on mid-field, let one hundred and twenty shillings be given as wite. But if they have altercation at a feast, and one of them bear it with patience let the other give XXX shillings as wite.

From the LAWS OF ALFRED.

Cap. 5. We also ordain to every church which has been hallowed by a bishop, this frith; if a fah-man flee to or reach one, that for seven days no one drag him out. But if any one do so, then let him be liable in the king's fine for breach of his protection and the church-frith; more if he there commit more wrong, if, despite of hunger, he can live; unless he fight his way out. If the brethern have further need of their church, let them keep him in another house, and let not that have more doors than the church. Let the church-ealdor take care that during this term no one give him food. If he himself be willing to deliver up his weapons to his foes, let them keep him xxx days, and let them give notice of him to his kinsmen. It is also church-frith; if any man seek a church for any of those offences, which had not been before revealed, and there

confess himself in God's name, be it held forgiven. He who steals on Sunday, and at Yule, or at Easter, or on Holy Thursday, and on Rogation days; for each of these we will that the bot be twofold, as during Lent-fast.

Cap. 15. If a man fight before an archbishop or draw his weapon, and he be taken; be it in the king's doom, either death, or life, as he may be willing to grant him. If he escape, and be taken again, let him pay for himself according to his wer-gild, and make bot for the offense, as well wer as wite, according as he may have wrought.

Cap. 15. If a man fight before an archbishop or draw his weapon, let him make bot with one hundred and fifty shillings. If before another bishop or an ealdorman this happens, let him make bot with one hundred shillings.

Cap. 38. If any man fight before the king's ealdorman in the gemot, let him make bot with wer and wite as it may be right; and before this cxx shillings to the ealdorman as wite. If he disturb the folkmote by drawing his weapon, cxx shillings to the ealdorman as wite. If aught of this happen before a king's ealdorman's junior, or a king's priest, xxx shillings as wite.

Cap. 40. The king's burh-bryce shall be cxx shillings. An archbishop's ninety shillings. Any other bishop's, and an ealdorman's, ix shillings. A twelve-hynde man's, xxx shillings. A six-hynde man's, xv shillings. A ceorl's edor-bryce, v shillings. If aught of this happen when the fyrd is out, or in Lent fast, let the bot be twofold. If any one in Lent put down holy law among the people without leave, let him make bot with cxx shillings.

From the LAWS OF ETHELRED (978-1016).

II. Cap. 6. If the frith breach be committed within a burh, let the inhabitants of the burh themselves go and get the murderers, living or dead, or their nearest kindred, head for head. If they will not, let the ealdorman go; if he will not, let the king go; if he will not, let the ealdordom lie in unfrith.

From the SECULAR DOOMS OF CNUT.

Cap. 83. And I will that every man be entitled to immunity from molestation to the gemot and from the gemot, except he be a notorious thief.

From the LAWS OF ETHELRED.

VI. Cap. 13. Be every church in the peace of God and of the king, and of all Christian folk.

From the LEGES EDWARDI CONFESSORIS (1043-1066. But these so-called laws of Edward the Confessor were "ascertained" in the next century).

12. The peace of the king is of many kinds. One given by his own hand, which the English call kinges hand sealde grith. Another of the day on which first he was crowned. This last eight days. At the birth of our Lord, eight days, and eight at Easter, and eight at Whitsunday. Another is given by its special writ. Another which the four highways have; namely, Watlingstrete, Fosse, Hikenildstrete, Ermingstrete, of which two stretch out in the length of the kingdom and two in the breadth. Another which the waters have, by the navigation on which, from various places, food is brought to the cities and boroughs. This peace, however, of his own hand, of the days of his coronation, and of the writ, is under the law of one penalty. In like manner the four highways and the great waters in regard to attack. But if any work be built let it be destroyed and a half be given as a recompense. Whoever has broken the peace in the eighteen hundreds of the Danelag, his body also is at the mercy of the king, by the law of England his wer, that is his price, and the recompense for the slaying of those slain he shall pay to the lords of those slain. The recompense for slaying a serf or bondman in the Danelag is twelve ora; in the case of freemen, three marks. By the English law to the king or archbishop, three marks for their men; to a bishop of the shire, to a nobleman of the shire, or to the steward of the king, twenty solidarii; to the other barons, ten solidarii. Let him make restitution to the parents or prepare for war. Whence the English had a saying: *Bicge spere of side othe bere*, which means, either buy from them that the spear be covered up, or bear it. But let the peace of the four highways and of the great waters, placed in the greater judgment of penalties which we have above mentioned, be held for assault. And if mills, fisheries or any other things whatever be prepared for destroying the freedom of them, let these things be destroyed, the roads and waterways repaired and a recompense to the king shall not be forgotten. Other roads from city to city, from borough to borough, by which men travel for selling their wares or other business of their own, are under the law of the shire. And if anything be built for their disturbance, let it be pulled down to the ground and the ways repaired, and according to the law of the shire, to the sheriff and his lieutenant let restitution be made.

In like manner in regard to smaller navigable streams with those things that are necessary to cities and boroughs, namely, woods and the rest. They shall be under the law of the smaller roads in regard to penalties.

From the STATUTES OF WILLIAM THE CONQUEROR. (Henderson's translation.)

3. And I will moreover that all men whom I have brought with me, or who have come after me, shall be in my peace and quiet. And if one of them shall be slain, the lord of the murderer shall seize him within five days if he can; but if not, he shall begin to pay me forty six marks of silver so long as his possessions shall hold out. But when the possessions of the lord of that man are at an end, the whole hundred in which the slaying took place shall pay in common what remains.

Extracts from POLLOCK, THE KING'S PEACE, Oxford Lectures, 65.

First, only the four roads are the king's; then every common road which leads to the king's city, borough, castle or haven; and as most roads of any importance must, sooner or later, answer this description if followed far enough, the king's highway came to be, as it now is, merely a formal or picturesque name for any public road whatever. As late as the fourteenth century, however, it was an opinion still held by some that not every common road was royal, insomuch that the soil and freehold of a common road could be vested in an individual owner only if it was not *via regia*. The very survival of the term "the king's highway" shows that the idea of peculiar legal sanctity clung about highways in popular imagination long after they had ceased to be more under the king's peace than any other English ground. . . .

After the Conquest, then, the various forms in which the king's special protection had been given disappear, or rather merge in his general protection and authority, for the details that occur in the compilations bearing the names of Henry the First and Edward the Confessor, welcome as they are by way of supplement to earlier documents, are mere echoes of traditions no longer living. The king's peace is proclaimed in general terms at his accession. But, though generalized in its application, it still was subject to a strange and inconvenient limit in time. The fiction that the king is everywhere present, though not formulated, was tacitly adopted; the

protection once confined to his household was extended to the whole kingdom. The fiction that the King never dies was yet to come. It was not the peace of the Crown, and authority having continuous and perpetual succession, that was proclaimed, but the peace of William or Henry. When William or Henry died, all authorities derived from him were determined or suspended; and among other consequences, his peace died with him. What this abeyance of the king's peace practically meant is best told in the words of the Chronicle, which says upon the death of Henry I (anno 1135): "Then there was tribulation soon in the land, for every man that could forthwith robbed another." Order was taken in this matter (as our English fashion is) only when the inconvenience became flagrant in a particular case. At the time of Henry III's death his son Edward was in Palestine. It was intolerable that there should be no way of enforcing the king's peace till the king had come back to be crowned: and the great men of the realm, by a wise audacity, took upon them to issue a proclamation of the new king's name forthwith. This good precedent being once made, the doctrine of the king's peace being in suspense was never afterwards heard of.

We said that the king's peace and protection had become the established right of every peaceable subject. Nevertheless a trace of the archaic ideas persisted as long as the art of common law pleading itself. The right was to be enjoyed only on condition of being formally demanded. In order to give the king's courts jurisdiction of a plea of trespass it was needful to insert in the writ the words *vi et armis*, which imported a breach of the peace; and it was usual, if not necessary, also to add expressly the words *contra pacem nostram*. Without the allegation of force and arms the writ was merely "vicountiel," that is, the sheriff did not return it to the Superior Court but had to determine the matter in the County Court. By so many steps and transformations did it become possible for Lambarde and Blackstone after him, to say, with unconscious inversion of the historical order of development, and as if the matter were in itself too obvious to need explanation: "The king's majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to punish such as break it; hence it is usually called the king's peace."

(b) The King's Writ.

When the king was applied to for justice, or desired to vindicate his authority, he issued his writ to the sheriff or some other suitable person directing what was to be done. In ancient times executive and judicial functions were not distinguished. The king's writ was used for all purposes connected with the business of administration, the writs in judicial proceedings originally being in no way different from those in purely administrative affairs. Gradually a regular set of writs for judicial proceedings grew up, which in time became fixed in form and determined the scope and course of relief in the king's courts.

ABBOT OF ST. EDMUND V. ABBOT OF PETERBOROUGH (reign of William I). (Translated from Bigelow, *Placita Anglo-Normannica*, 32.)

William King of England to the Abbot of Peterborough, Greeting: I command and require you that you permit the abbot of St. Edmund to receive sufficient stone for his church, as he has had hitherto, and that you cause him no more hindrance in drawing stone to the water, as you have heretofore done. Witness the Bishop of Durham.

THE ABBOT OF ABINGDON V. MEN OF STANTON (1105 or 1107). (Translated from Bigelow, *Placita Anglo-Normannica*, 89.)

Henry, King of England, to Nigel of Oilly and William Sheriff of Oxford, Greeting. I command you that you do full right to the Abbot of Abingdon concerning his sluice which the men of Stanton broke, and so that I hear no more complaint thereof for defect of right, and this under penalty of ten pounds. Witness Ralph the Chancellor, at Westminster.

ABBOT FARITIUS V. JORDAN DE SACKVILLE (about 1108). (Translated from Bigelow, *Placita Anglo-Normannica*, 99.)

Henry King of England to Jordan de Sackville, Greeting. I command you to do full right to Abbot Faritius and the church of Abingdon concerning the land which you took from them, which Ralph of Cainesham gave to the church in alms; and unless you do this without delay, I command that Walter Giffard do it, and if he shall not have done it, that Hugh of Bocheland do it, that I may hear no complaint thereof for defect of right.

GLANVILL, *TREATISE ON THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND* (between 1187 and 1189). (Beames's translation.)

Book I, chap. V. When any one complains to the king, or his justices, concerning his Fee, or his Freehold, if the complaint be

such as be proper for the determination of the King's Court, or the King is pleased that it should be decided there, then the party complaining shall have the following writ of summons.

Chap. VI. The King to the Sheriff, Health. Command A that, without delay, he render to B one hyde of land, in such a vill, of which the said B complains that the aforesaid A hath deforced him; and unless he does so, summon him by good summoners, that he be there, before me or my Justices, *in crastino post octabas clausi Paschae* at such a place, to show wherefore he has failed; and have there the summoners and this writ.

[He then sets forth and explains some twelve other writs issued in the king's name, marking various stages in the litigation, ending with the following:]

Chap. XX. The King to the Sheriff, Health. I command you that without delay, you deliver possession to N of one hyde of land, in such a vill, which he claims against R of which the said R put himself upon my assise, because the said N has recovered that land in my Court by a recognition.

BLACKSTONE, COMMENTARIES, III, 272.

First, then, of the original, or original writ: which is the beginning or foundation of the suit. When a person hath received an injury, and thinks it worth his while to demand a satisfaction for it, he is to consider with himself, or take advice, what redress the law has given for that injury; and thereupon is to make application or suit to the crown, the fountain of all justice, for that particular specific remedy which he is determined or advised to pursue. As, for money due on bond, an action of debt; for goods detained without force, an action of detinue or trover; or, if taken with force, an action of trespass *vi et armis*; or to try the title of lands, a writ of entry, or action of trespass in ejectment; or for any consequential injury received, a special action on the case. To this end he is to sue out, or purchase by paying the stated fees, an original, or original writ, from the court of chancery, which is the *officina justitiæ*, the shop or mint of justice, wherein all the king's writs are framed. It is a mandatory letter from the king, on parchment, sealed with his great seal, and directed to the sheriff of the county where injury is committed, or supposed to be committed, requiring him to command the wrong-doer or party accused either to do

justice to the complainant or else to appear in court and answer the accusation against him. Whatever the sheriff does in pursuance of this writ, he must return or certify to the court of common pleas, together with the writ itself; which is the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause. For it was a maxim introduced by the Normans, that there should be no proceedings in common pleas before the king's justices without his original writ; because they held it unfit that those justices, being only the substitutes of the crown, should take cognizance of anything but what was thus expressly referred to their judgment. However, in small actions below the value of forty shillings, which are brought in the court baron or county court, no royal writ is necessary; but the foundation of such suits continues to be (as in the times of the Saxons) not by original writ, but by plaint; that is, by a private memorial tendered in open court to the judge, wherein the party injured sets forth his cause of action; and the judge is bound of common right to administer justice therein, without any special mandate from the king. Now, indeed, even the royal writs are held to be demandable of common right, on paying the usual fees; for any delay in the granting them, or setting an unusual or exorbitant price upon them, would be a breach of magna carta c. 29, "*nulli vendemus, nulli negabimus aut differemus, justitiam vel rectum.*"

(c) *The King's Courts.*

Extracts from HOLDSWORTH, HISTORY OF ENGLISH LAW.

The term "*Curia Regis*" means (i) the place where the king resided attended by the chief officials of his court and household; (ii) the supreme central court of the country where the business of the government in all its branches was transacted. The names of the officials, the forms of the legal proceedings, and the terms used to describe them were Norman. It was, in fact, a strong central court of this nature which was wanting to the Anglo-Saxon constitution.

The king had in Anglo-Saxon times a certain exclusive jurisdiction. The laws of Cnut and of Henry I. give us a list of the pleas of the crown. Contempt of the king is a specified offence. Certain places like the royal streets, certain persons like the king's

theigns are under the king's immediate jurisdiction. The king has his special peace. But the county, the hundred and the greater lords have also their peace and their jurisdiction.

Under the Norman kings we get a strong central court but no very distinct separation into departments of government. The Exchequer, it is true, in Henry I's reign seems to be beginning to have a distinct organisation. But the Exchequer was staffed by the same body of officials who regularly took their places in the *Curia Regis*. At this period it is the personality of the king which gives to the *Curia Regis* its power, as the reign of Stephen clearly shows. The laws of Henry I. recognise the law of the king's court as supreme all over the country. It constitutes a fourth species of law, superior to the tribal customs of the West Saxons, the Mercians, and the Danes in its stability and power. But we can see from these same laws that it has not yet attained either a definite jurisdiction or a definite organisation.

The legal reforms of Henry II. gave to the *Curia Regis* a more definite jurisdiction; and, as a consequence we begin to see at the end of this period the beginnings of a more definite organization of the powers of the state. . . .

The following is a list of the chief legislative acts which are of importance to legal history. (1) The Constitutions of Clarendon (1164). They were an attempt to settle the matters in dispute between church and state, and the limits of the jurisdiction of the lay and the ecclesiastical courts. (2) The Assize of Clarendon (1166). This is a set of instructions to the itinerant justices and sheriffs with reference to their duties and their jurisdiction. (3) The Inquest of Sheriffs (1170). This directs a general inquiry into the methods in which the sheriffs had been conducting the local government of the country. (4) The Assize of Northampton (1176) was a reenactment and enlargement of the Assize of Clarendon. (5) The Grand Assize provided a new method for the trial of actions relating to the ownership of land. (6) The Assize Utrum provided for the trial of the question whether land is a lay fee or held in frankalmoigne. (7) The Possessory Assizes. The Assize of novel disseisin provided for the trial of the question whether A has disturbed B's seisin. The Assize of mort d'ancestre provided for the trial of a dispute as to who is the heir of the person last seised of a given estate of freehold. The Assize of darrein presentment provided for the trial of a dispute as to who was

last seized of the right to present to a vacant living. In all these assizes the trial was by jury. In all these assizes the proceedings were by royal writ addressed either to the justices of the *Curia Regis*, to the sheriff, or to the lord of whom the land was held.

The result is that the *Curia Regis* draws to itself jurisdiction over criminal cases, and over actions relating to the ownership or possession of land held by free tenure. The pleas of the crown are now no longer described by the formless list which we find in the laws of Henry I. The opening words of Glanvil's treatise contain a classification which would have been impossible at the beginning of Henry II's reign. "*Placitorum*," he says, "*aliud est criminale, aliud civile. Item placitorum criminalium, aliud pertinet ad coronam domini regis, aliud ad vicecomitem.*" . . . The civil pleas of the crown determined in the *Curia Regis* are pleas concerning baronies, the advowsons of churches, status, dower, the non-observance of a fine made in the *Curia Regis*, homage, reliefs, purprestres, debts of the laity, ownership, and possession. The civil pleas of the crown determined by the sheriff are the ownership of freehold where the lord has made default, and the ownership of villeins. The sheriff hears these pleas of the crown "*per breve domini regis.*" In the laws of Henry I. the sheriff is vaguely stated to be unable to hear pleas of the crown "*sine diffinitis prelocucionibus*," but no attempt is made to describe the form which these royal mandates may take. Glanvil always gives the text of the various writs by which these proceedings are begun. We can see from Glanvil's book that the jurisdiction of the *Curia Regis* is an elastic jurisdiction. The register of original writs is constantly expanding. "As yet the king is no mere vendor, he is a manufacturer and can make goods to order; the day has not come when the invention of new writs will be hampered by the claims of a parliament; but still in Glanvil's day the *officina justitiæ* has already a considerable store of ready made wares and English law is already taking the form of a commentary upon writs."

Some organization of the *Curia Regis* becomes necessary. For some years after the accession of Henry I. the *Curia Regis* does not begin to split into departments. What division there is is rather a division between officials than between departments. The different members of the king's household—the justices, the chancellor, the treasurer, the chamberlain, the constable and the marshal—distribute among themselves the powers of government.

The court itself is now a large court composed of all the greater vassals of the crown and the leading officials of the state, now a small executive body, now a law court consisting of a few royal judges. Sometimes the king himself, sometimes the members of the *Curia* or of the Exchequer travel over the country. But any court whether held before the king himself or before his justices is *Curia Regis*—the court which administers royal justice as distinct from the justice administered by the communal or the feudal courts.

At the end of this period we find that the court is beginning to split into various divisions in which we can discern the judicial system of the future.

I. The Common Law Courts.

Before describing in detail the various courts of common law we may notice that the courts were royal courts and that judges of these courts were royal justices. From this three consequences followed. (1) The king had originally a large control over the business before the court. We have seen that in early days the king actually decided cases. There are instances of this in Henry III., Edward I. and Edward II.'s reign. But when Fortescue wrote at the end of the 15th century it had ceased to be usual. Coke merely stated the existing practice in answer to James I.'s claim to decide cases for himself. Though the crown had thus ceased to take part in the proceedings of courts of law, he had many privileges and prerogatives in relation to such proceedings. It was claimed for him in James I.'s reign that he could peremptorily interfere to stop proceedings in any common law court by the writ of *Rege Inconsulto*. It was clear that he could sue in what court he pleased. In addition he had other smaller procedural advantages. Perhaps the right of the Attorney or Solicitor General to reply in a criminal case, though the prisoner has called no witnesses, is one of the last surviving of that "garland of prerogatives" which the older law gave to him. (2) The judges held their offices as a rule during the royal pleasure. The manipulation of the bench by the Stuarts led to the clause in the Act of Settlement which provided that the judges should hold office "*quamdiu se bene gesserint*"; but that it should be lawful for the crown to remove them on an address by the two Houses of Parliament. (3) They vacated their offices on the demise of the crown. An Act of Anne provided that the judges, with other officers of the crown, should continue to hold their offices for a space of 6 months after the demise of the crown.

An Act of George III.'s reign provided that the judges' tenure of office should be unaffected by the demise of the crown.

The following courts comprised the Courts of Common Law:—

1. The court of Common Pleas. 2. The court of King's Bench.
3. The court of Exchequer. 4. The court of Exchequer Chamber.

GLANVILL, DE LEGIBUS ET CONSUEUDINIBUS REGNI ANGLIAE, Cap. 3, 4 (1187). (Beames's translation.)

Civil Pleas are divided into such as are discussed and determined in the King's Court only, and such as fall within the Jurisdiction of the Sheriffs of Counties. In the former Court, are discussed and determined, all such Pleas as concern Baronies, Advowsons of Churches, questions of condition, Dower, when the Woman has been entirely debarred from receiving it; for breach of Fine made in the King's Court; concerning the performing of Homage, and the receiving of Reliefs, and concerning Purprestures, and Debts owing by lay persons. These Pleas, indeed, relate to the propriety of the thing only: concerning those which refer to the possession, and which are discussed and decided by Recognitions, we shall speak in their proper place.

To the Sheriffs of Counties these Pleas appertain: the Plea concerning the Right of Freehold, when the Courts of the Lords are proved to have failed in doing justice, the nature of which we shall speak of in another place; and the Plea concerning Villeins-born: such Pleas being, in each instance, sanctioned by the King's Writ.

Extracts from *DIALOGUS DE SCACCARIO* (1178–1179). (From Henderson, *Historical Documents of the Middle Ages*.)

Disciple. What is the exchequer?

Master. The exchequer is a quadrangular surface about ten feet in length, five in breadth, placed before those who sit around it in the manner of a table, and all around it it has an edge about the height of one's four fingers, lest any thing placed upon it should fall off. There is placed over the top of the exchequer, moreover, a cloth bought at the Easter term, not an ordinary one but a black one marked with stripes, the stripes being distant from each other the space of a foot or the breadth of a hand. In the spaces moreover are counters placed according to their values; about these we shall speak below. Although, moreover, such a surface is called exchequer, nevertheless this name is so changed about that the court itself which sits when the exchequer does is called exchequer; so that if at any time through a decree any thing is established by

common counsel, it is said to have been done at the exchequer of this or that year. As, moreover, one says to-day "at the exchequer," so one formerly said "at the tallies."

D. What is the reason of this name?

M. No truer one occurs to me at present than that it has a shape similar to that of a chess board.

D. Would the prudence of the ancients ever have called it so for its shape alone, when it might for a similar reason be called a table (tabularium)?

M. I was right in calling thee painstaking. There is another, but a more hidden reason. For just as, in a game of chess, there are certain grades of combatants and they proceed or stand still by certain laws or limitations, some presiding and others advancing: so, in this, some preside, some assist by reason of their office, and no one is free to exceed the fixed laws; as will be manifest from what is to follow. Moreover, as in chess the battle is fought between kings, so in this it is chiefly between two that the conflict takes place and the war is waged,—the treasurer, namely, and the sheriff who sits there to render account; the others sitting by as judges, to see and to judge.

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D. Is that exchequer, in which such a conflict goes on, the only one?

M. No. For there is a lower exchequer which is also called the Receipt, where the money is handed over to be counted, and is put down in writing and on tallies, so that afterwards, at the upper exchequer, an account may be rendered of them; both have the same origin, however, for whatever is declared payable at the greater one is here paid; and whatever has been paid here is accounted for there.

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D. What is the nature or arrangement of the lower exchequer?

M. As I see, thou canst not bear to be ignorant of any of these things. Know then that the lower exchequer has its persons, distinct from each other by reason of their offices, but with one intent devoted to the interests of the king, due regard, nevertheless, being paid to equity; all serving, moreover, not in their own names but in the names of their masters; with the exception of two knights, he namely, who conducts the assays, and the melter. Their offices

depend on the will of our king; hence they seem to belong rather to the upper than to the lower exchequer as will be explained below. The clerk of the treasurer is there with his seal. There are also two knights of the chamberlains. There is also a certain knight who may be called the silverer, for, by reason of his office, he presides at the testing of silver. There are also four tellers to count the money. There is also the usher of the treasury and the watchman. These, moreover, are their offices: The clerk of the treasurer, when the money has been counted and put in boxes by the hundred pounds, affixes his seal and puts down in writing how much he has received, and from whom, and for what cause; he registers also the tallies which have been made by the chamberlains concerning that receipt. Not only, moreover, does he place his seal on the sacks of money, but also, if he wishes, on the chests and on the separate boxes in which the rolls and tallies are placed, and he diligently supervises all the offices which are under him, and nothing is hidden from him. The office of the knights, who are also called chamberlains because they serve in the name of the chamberlains, is this: They carry the keys of the chests; for each chest has two locks of a different kind, that is, to neither of which the key of the other can be fitted; and they carry the keys of them. Each chest, moreover, is girded with a certain immovable strap, on which, in addition, when the locks are closed the seal of the treasurer is placed; so that neither of the chamberlains can have access except by common consent. Likewise it is their duty to weigh the money which has been counted and placed by the hundred shillings in wooden receptacles, so that there be no error in the amount; and then, at length, to put them in boxes by the hundred pounds as has been said. But if a receptacle is found to have any deficiency, that which is thought to be lacking is not made good by calculation, but straightway the doubtful one is thrown back into the heap which is to be counted. And take note that certain counties from the time of king Henry I. and in the time of king Henry II. could lawfully offer for payment coins of any kind of money provided they were of silver and did not differ from the lawful weight; because indeed, by ancient custom, not themselves having moneys, they sought their coins from on all sides; such are Northumberland and Cumberland. Coins thus received, moreover, although they came from a farm, were nevertheless set apart from the others with some marks placed on them. But the remaining counties were ac-

customed to bring only the usual and lawful coin of the present money as well from farms as from pleas. But after the illustrious king whose renown shines the brighter in great matters, did, in his reign, institute one weight and one money for the whole kingdom, each county began to be bound by one necessity of law and to be constrained by the manner of payment of a general commerce. All, therefore, in whatever manner they are bounden, pay the same kind of money; but nevertheless all do not sustain the loss which comes from the testing by combustion. The chamberlains likewise make the tallies of receipts, and have in common with the clerk of the treasurer to disburse the treasure received when required by writs of the king or an order of the barons; not, however, without consulting their masters. These three, all together or by turns, are sent with treasure when it is necessary. These three have the principal care of all that is done in the lower exchequer.

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M. Although the offices of those who have seats at the greater exchequer seem to differ in certain functions, the purpose, nevertheless, of all the offices is the same, to look out for the king's advantage; with due regard for equity, however, according to the fixed laws of the exchequer. The arrangement of ordering of the latter is confirmed by its antiquity and by the authority of the nobles who have their seats there. It is said to have begun with the very conquest of the kingdom made by king William, the arrangement being taken, however, from the exchequer across the seas; but they differ in very many and almost the most important points. Some believe it to have existed under the Anglo-Saxon kings, taking their argument in this matter from the fact that the peasants and already decrepit old men of those estates which are called of the crown, whose memory is gray in these matters, knew very well, having been taught by their fathers, how much extra money they are bound to pay on the pound for the blanching of their farm. But this argument applies to the payment of the farm, not to the session of the exchequer. The fact also seems to be against those who say that the blanching of the farm began in the time of the Anglo-Saxon kings, that in Domesday book, in which a diligent description of the whole kingdom is contained, and in which the value is expressed of the different estates as well of the time of king Edward as of the time of king William, under whom it was made,—there is no mention at all of the blanching of the farm: from which

it seems probable that, after the time when that survey was made in the reign of the aforementioned king, the blanching of the farm was fixed upon by his investigators on account of causes which are noted below. But at whatever time it came into use, it is certain that the exchequer is conformed by the authority of the great, so that it is allowed to no one to infringe its statutes or to resist them by any kind of rashness. For it has this in common with the Court itself of the lord king (*Curia Regis*), in which he in his own person administers the law, that no one is allowed to contradict a record or a sentence passed in it. The authority, moreover, of this court is so great, as well on account of the pre-eminence of the royal image, which, by a special prerogative, is kept on his seal of the treasury, as on account of those who have their seats there, as has been said; by whose watchfulness the condition of the whole kingdom is kept safe. For there sits the Chief Justice of the lord king by reason of his judicial dignity, as well as the greatest men of the kingdom, who share familiarly in the royal secrets; so that whatever has been established or determined in the presence of such great men subsists by an inviolable right. In the first place there sits, nay also presides, by reason of his office, the first man in the kingdom,—namely, the Chief Justice. With him sit, solely by command of the sovereign, with momentary and varying authority, indeed, certain of the greatest and most discreet men in the kingdom, who may belong either to the clergy or to the court. They sit there, I say, to interpret the law and to decide upon the doubtful points which frequently arise from incidental questions. For not in its reckonings, but in its manifold judgments, does the superior science of the exchequer consist. For it is easy when the sum required has been put down, and the sums which have been handed in are placed under it for comparison, to tell by subtraction if the demands have been satisfied or if anything remains. But when one begins to make a many-sided investigation of those things which come into the fisc in varying ways, and are required under different conditions, and are not collected by the sheriffs in the same way,—to be able to tell if the latter have acted otherwise than they should, is in many ways a grave task. Therefore the greater science of the exchequer is said to consist in these matters. But the judgments on doubtful or doubted points which frequently come up can not be comprehended under one form of treatment; for all kinds of doubts have not yet come to light.

MAGNA CARTA. (These extracts are from the great Charter of Henry III.)

Cap. xi. Common Pleas shall not follow our court, but shall be holden in some place certain.

Cap. xii. Assises of novel disseisin and of mortdancestor shall not be taken but in the shires, and after this manner; if we be out of this realm, our Chief Justicer shall send our Justicers through every county once in the year, which with the knights of the shires shall take the said assises in those counties; and those things that at the coming of our aforesaid Justicers, being sent to take those assises in the counties, cannot be determined, shall be ended by them in some other place in their circuit; and those things which for difficulty of some articles cannot be determined by them, shall be referred to our Justicers of the Bench, and there shall be ended.

BRITTON, book I, chap. 1 (about 1290). (Nichols's translation.)

1. First, with regard to our selves and our Court, we have ordained, that, inasmuch as we are not sufficient in our proper person to hear and determine all the complaints of our said people, we have distributed our charge in several portions, as is here ordained.

2. We will that our jurisdiction be superior to all jurisdictions in our realm; so that in all kinds of felonies trespasses and contracts, and in all manner of other actions personal or real, we have power to give, or cause to be given, such judgment as the case requires without any other process, whenever we have certain knowledge of the truth, as judge. And the Steward of our household shall take our place within the verge of our household; and his office shall extend to the hearing and determining the presentments of the articles of our Crown, when we shall see good.

3. Further, we will that Justices Itinerant be assigned to hear and determine the same articles in every county and franchise every seven years; and that our Chief Justices of Ireland and Chester have the like power.

4. With respect to the Justices assigned to follow us and hold our place wheresoever we shall be in England, we will that they have cognizance of amending false judgments, and of determining appeals and other pleas of trespass committed against our peace, and that their jurisdiction and record shall extend so far as we shall authorise by our writs.

5. We will that the Earl of Norfolk, by himself or another knight, be attendant upon us and upon our Steward, to execute our com-

mands and the attachments and executions of our judgments and those of our Steward throughout the verge of our house, so long as he shall hold the office of Marshal.

6. In our household let there be a Coroner to execute the business of the Crown throughout the verge and wheresoever we shall be or come within our realm; and let the same person or some other be assigned to assay all weights and measures in every our verge throughout our realm according to our standards; and these two duties he shall not fail to do by reason of any franchise, unless such franchise be granted in fee farm or in alms by us or our predecessors.

7. In every county let there be a sheriff who shall be attendant on our commands and those of our Justices; and let him have record of pleas pleaded before him by our writs; and under the sheriffs let there be hundredres serjeants and beadles attendant on the sheriffs. And in every county let there be coroners chosen for keeping the pleas of our peace, as shall be authorized in the chapters concerning their office, and let them have record of things relating to their office.

8. Moreover our will is, that there be Justices constantly remaining at Westminster, or at such other place as we shall be pleased to ordain, to determine common pleas according as we shall authorise them by our writs; and these Justices shall have record of the proceedings held before them by virtue of our writs.

9. Also our will is, that at our Exchequers at Westminster and elsewhere our Treasurers and our Barons there have jurisdiction and record of things which concern their office, and to hear and determine all causes relating to our debts and seignories and things incident thereto, without which such matters could not be tried; and that they have cognizance of debts owing to our debtors, by means whereof we may the more speedily recover our own.

10. And we will, that Justices be assigned in every county to have cognizance in such causes of petty assises and other matters, as we shall assign them by our letters patent, of which causes we will that they have record. Let Justices also be appointed to deliver the gaols in every county, once in every pleadable week, while they find anything to do; and let them likewise have record of the pleas brought before them and of their judgments.

11. And although we have granted to our Justices to bear record of pleas pleaded before them, yet we will not that their record

be any warrant to them in their own wrong, nor that they be permitted to erase their rolls or amend them or record contrary to the enrollment. And we will that the power of our Justices be limited in this manner, that they go not beyond the articles of our writs, or of presentments of jurors, or of complaints before them made, save that they shall have the cognizance of vouchers to warranty, and of other incidental matters without which the original causes could not be determined. And we forbid, that any have power of amending any false judgment of our Justices, except the Justices who follow us in our Court, who are authorised by us for that purpose, or ourselves, with our Council; for this we specially reserve to our own jurisdiction.

12. We forbid all our Coroners and Justices, and all others to whom we have given authority of record, that any, except our Steward and our Justices of Ireland and of Chester, without our leave substitute another in his place, to do any act of which he himself ought to make record; and if anything be done before such substitutes, we will that it be of no force, though it should be of abjuration or outlawry.

Extracts from COKE'S FOURTH INSTITUTE.

[Court of King's Bench.] Under these words (*proprias causas*) are included three things. First, all pleas of the crowne; as all manners of treasons, felonies, and other pleas of the crown which *ex congruo*, are aptly called *proprie causae regis*, because they are *placita coronae regis*. Secondly, regularly to examine and correct all and all manner of errors in fait, and in law, of all the judges and justices of the realm in their judgments, processe, and proceedings in courts of record, and not only in, pleas of the crown, but in all pleas, reall, personall, and mixt, (the court of the exchequer excepted, as hereafter shall appear.) And this is *proprium quarto modo* to the king in this court: for regularly no other court hath the like jurisdiction, and therefore may be well called *propria causa regis*. And these two be of high and sovereign jurisdiction. Thirdly, this court hath not only jurisdiction to correct errors in judiciall proceedings, but other errors and misdemeanors extrajudiciall tending to the breach of the peace or oppression of the subjects, or raising of faction, controversy, debate, or any other manner of misgovernment; so that no wrong or injury, either publick or private, can be done, but that this shall be reformed or punished in one court or other by due course of law. As if any

person be committed to prison, this court upon motion ought to grant an *habeas corpus*, and upon returne of the cause do justice and relieve the party wronged. And this may be done though the party grieved hath no priviledge in this court. It granteth prohibitions to courts temporall and eclesiasticall, to keep them within their proper jurisdiction. Also this court may baile any person for any offence whatsoever.

Fourthly, this court may hold plea by writ out of the chancery of all trespasses done *vi et armis*, of replevins, of *quare impedit*, &c.

Fifthly, this court hath power to hold plea by bill for debt, detinue, covenant, promise, and all other personall actions, *ejectione firmæ*, and the like, against any that is in *custodia mareschalli*, or any officer, minister, or clerk of the court: and the reason hereof is, for that if they should be sued in any other court they should have the priviledge of this court; and lest there should be a fayler of justice (which is so much abhorred in law) they shall be impleaded here by bill though these actions be common ples, and are not restrained by the said act of Magna Charta, *ubi supra*. Likewise the officers, ministers, and clerks of this court priviledged by law in respect of their necessary attendance in court, may impleade others by bill in the actions foresaid.

[Court of Common Pleas.] Out of these, three things are to be observed: first what shall be said *communia placita*. They are not called *communia placita* in respect of the persons, but in respect of the quality of the pleas. Regularly pleas are divided into pleas of the crown, and into common or civil pleas. Pleas of the crowne are treason and felony, and misprision of treason and felony &c. This court is the lock and the key of the common law in common pleas, for herein are reall actions, whereupon fines and recoveries (the common assurances of the realm) do passe, and all other reall actions by originall writs are to be determined, and also of all common pleas mixt or personall: in divers of which, as it appeareth before in the chapter of the King's Bench, this court and the king's bench have a concurrent authority. . . .

So as in the exchequer there are these seven courts. 1. The court of pleas. 2. The court of accounts. 3. The court of receipt. 4. The court of the exchequer chamber being the assembly of all the judges of England for matters in law. 5. The court of exchequer chamber for errors in the court of exchequer. 6. A

court in the exchequer chamber for errors in the king's bench.
7. This court of equity in the exchequer chamber. . . .

Of Writs of Error in Parliament. If a judgment be given in the king's bench either upon a writ of error, or otherwise, the party grieved may upon a petition of right made to the king in English, or in French (which is not *ex debito justitiæ*, but for decency, for that the former judgment was given *coram rege*) and his answer thereunto, *fiat justitia*, have a writ of error directed to the chief justice of the king's bench for removing of the record *in præsens parliamentum*, and thereupon the roll itself, and a transcript in parchment is to be brought by the chief justice of the king's bench into the lords' house in parliament: and after the transcript in parchment is examined by the court with the record, the chief justice carrieth back the record itself into the king bench, and then the plaintife is to assign the errors, and thereupon to have a *scire fac'* against the adverse party, returnable either in that parliament, or the next; and the proceeding thereupon shall be *super tenorem recordi, et non super recordum*. And the proceeding upon the writ of error is only before the lords in the upper house, *secundum legem et consuetudinem parliamenti*.

BLACKSTONE, COMMENTARIES, III, 55; 57.

The next court that I shall mention is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions. This is the court of exchequer chamber; which was first erected by statute 31 Edw. III, c. 12. to determine causes by writs of error from the common law side of the court of exchequer. And to that end it consists of the lord chancellor and lord treasurer, taking unto them the justices of the king's bench and common pleas. In imitation of which a second court of exchequer chamber was erected by statute 27 Eliz. c. 8. consisting of the justices of the common pleas, and the barons of the exchequer; before whom writs of error may be brought to reverse judgments in certain suits originally begun in the court of king's bench. Into the court also of exchequer chamber (which then consists of all the judges of the three superior courts, and now and then the lord chancellor also,) are sometimes adjourned from the other courts such causes, as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court below. From all the branches of this court of exchequer chamber a writ of error lieth to the House of Peers.

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

These are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom (except London and Middlesex, where courts of nisi prius are holden in and after every term, before the chief or other judge of the several superior courts; and except the four northern counties, where the assizes are holden only once a year,) to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster hall. These judges of assize came into use in the room of the ancient justices in eyre, *justiciarii in itinere*.

SMITH, ACTIONS AT LAW (3 ed. 1847), 8.

And, though the Queen's Bench and exchequer had at first, as has been explained, no jurisdiction over purely civil causes, those being all entrusted to the Common Pleas, yet, by a series of fictions, they contrived to draw all personal actions within their jurisdiction. For the Queen's Bench declared that a person in the custody of its marshal was before it for every purpose, and, as actions of trespass were considered to be still within its jurisdiction, being of a criminal nature, and a fine payable to the Crown by the defendant, the plaintiff was permitted to issue a writ charging the defendant with a trespass, which being then a cause for which a man might be arrested, he was taken and committed to the Marshalsea; and, being once there, the plaintiff might declare against him for any cause of action. Afterwards, they carried the principle further, and held, that the defendant's appearance or putting in bail would answer the same purpose; for that in those cases, though not in the real, he was in the constructive custody of the marshal. And, therefore, till a few years since, all writs issuing out of the Queen's Bench described the cause of action to be trespass, in bailable cases, mentioning the real ground afterwards in an *ac etiam* clause, as if it were merely subsidiary to the fictitious one; and every declaration by bill in the Queen's Bench stated the defendant to be in the custody of the Marshal of Marshalsea. As to the Court of Exchequer, that tribunal adopted a simpler mode of extending its jurisdiction; for the plaintiff in his writ and declaration stated that he was a debtor to the king, and less able to pay his debts

by reason of the defendant's conduct; and this, though in ninety-nine cases out of a hundred, a mere fiction, was not allowed to be contradicted, and was held to render the cause of action a matter affecting the revenue, so as to invest the exchequer with a jurisdiction over it; thus did the Courts of Queen's Bench and Exchequer obtain a jurisdiction co-extensive with that of the Common Pleas in actions personal; a jurisdiction which the Uniformity of Process Act now recognises and confirms, while it abolishes the fictions by which it was acquired. . . .

Such being a slight history of the superior courts, the subject next to be inquired into is their present constitution. The first objects which engage our attention while occupied on this part of the subject are the Judges, of whom there are in each court five, in the Queen's Bench and Common Pleas a chief justice created by writ and four puisne judges created by patent. In the Exchequer, a chief baron and four puisne barons created by patent. The number, which often varied, was in each Court for a long time four, but was increased to five by Stat. 1 Wm. 4, c. 70.

Extracts from HOLDSWORTH, HISTORY OF ENGLISH LAW.

The Judicature Acts. The first Judicature Act was passed in 1873, and came into operation in 1875. By virtue of its provisions (as modified by later Acts) the Court of Chancery, the Courts of King's Bench, Common Pleas, and Exchequer, the Court of Admiralty, the Court of Probate, the Divorce Court, and the London Court of Bankruptcy were consolidated, and formed into one Supreme Court of Judicature in England.

The Supreme Court of Judicature was then divided into two parts, (1) the High Court of Justice, (2) the Court of Appeal. Both these branches of the Supreme Court were constituted superior courts of record. The clause of the Act of Settlement relating to the judges' tenure of office was re-enacted, and they were incapacitated from sitting in the House of Commons. It was provided that the judges of the High Court and the Court of Appeal respectively should, without prejudice to existing rights, have similar privileges and be subject to similar duties.

(i) The High Court of Justice.

The existing judges of the Court of Chancery, the Courts of Common Law, the Probate and Divorce Court, and the Court of Admiralty were constituted judges of the High Court. But it was provided that the Chancellor of the Exchequer, and the Lord High

Treasurer should no longer have the judicial powers which they might formerly have exercised in the Court of Exchequer. For the future any barrister of ten years' standing was qualified to be appointed judge in the Court. The style of the judges is "Justices of the High Court."

To the High Court was assigned the jurisdiction exercised by the following courts:—

(1) The High Court of Chancery as a common law court as well as a court of Equity, including the jurisdiction of the Master of the Rolls as a judge or master of the Court of Chancery, and any jurisdiction exercised by him in relation to the court of Chancery as a common law court;

(2) The Court of King's Bench;

(3) The Court of Common Pleas at Westminster;

(4) The Court of Exchequer as a court of Revenue as well as a common law court;

(5) The High Court of Admiralty;

(6) The Court of Probate;

(7) The Court for Divorce and Matrimonial Causes.

It was provided that, for the convenience of business (but not so as to prevent any Judge of the Court from sitting wherever required) the High Court should be divided into the following divisions:—

(1) The Chancery Division.

To this division was assigned (1) all causes and matters which by any act of Parliament were assigned to the court of Chancery; (2) the administration of the estates of deceased persons; (3) the dissolution of partnerships or the taking of partnership or other accounts; (4) the redemption or foreclosure of mortgages; (5) the raising of portions or other charges on land; (6) the sale and distribution of the proceeds of property subject to any lien or charge; (7) the execution of trusts charitable or private; (8) the rectification or setting aside, or cancellation of deeds or other written instruments; (9) the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases; (10) the petition for sale of real estates; (11) the wardship of infants, and the care of infants' estates.

(2) The King's Bench Division.

(3) The Common Pleas Division.

(4) The Exchequer Division.

To these divisions was assigned the jurisdiction which would have belonged to these courts before the passing of the Act.

In pursuance of a statutory power given to the crown, these divisions were in 1881 merged in the King's Bench Division. The powers which belonged to the respective presidents of these Divisions were vested in the Lord Chief Justice of the King's Bench, who had, by a previous act, been given the title of the Lord Chief Justice of England.

(5) The Probate Divorce and Admiralty Division.(ii) The Court of Appeal.

The following persons are declared to be *ex officio* members of the Court:—The Lord Chancellor, the Master of the Rolls, the Lord Chief Justice of England, the President of the Probate, Divorce, and Admiralty Division, and any person who has held the office of Lord Chancellor, if, on the request of the Lord Chancellor, he consents to act. The crown is empowered to create not more than five ordinary judges of the Court of Appeal. Persons qualified to be so appointed are barristers of not less than ten years' standing, persons qualified to be appointed Lords Justices of Appeal in Chancery, or persons who have held the office of Judge of the High Court for not less than one year. They are to be styled Lords Justices of Appeal.

The following jurisdiction was given to the Court of Appeal:

(1) The jurisdiction and powers of the Lord Chancellor and Court of Appeal in Chancery, both as a court of equity and as a court of appeal in bankruptcy.

(2) The jurisdiction and powers of the court of Exchequer Chamber: together with jurisdiction to hear applications for a new trial or to set aside a verdict or judgment in the High Court.

(3) The jurisdiction of the Privy Council in respect of Admiralty and Lunacy Appeals.

The Appellate Jurisdiction Act was passed in 1876. That act recognised and reformed the Appellate jurisdiction of the House of Lords. It also provided a scheme by which the House of Lords and the Judicial Committee of the Privy Council—the two highest courts of appeal in the British dominions—will eventually be, for the most part, composed of the same official members.

In order to increase the judicial strength of the Court it was provided that the Crown might appoint two persons to act as Lords of Appeal in Ordinary. They take rank and sit and vote as Barons during their life. They hold their offices on the same terms as the other judges. Any barrister in England or Ireland, or any advocate in Scotland of fifteen years' standing, or any person who has held high judicial office for two years, is eligible for this office. In the hearing of Admiralty appeals the House may require the assistance of nautical assessors.

The House can not hear any appeal unless not less than three of the following persons are present:—The Lord Chancellor, the Lords of Appeal in Ordinary, or such peers of Parliament as are holding or have held high judicial office. The House may sit to hear appeals during a prorogation, and, if the Crown by sign manual warrant so direct, during a dissolution of Parliament.

Appeals lie to the House of Lords from the Court of Appeal in England, and from any court in Scotland or Ireland from which error or appeal lay to the House of Lords immediately before the passing of the Appellate Jurisdiction Act.

(d) *The Custom of the Realm.*

BLACKSTONE, COMMENTARIES, I, 67.

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

I. As to general customs, or the common law properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course by which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for ex-

ample, that there shall be four superior courts of record, the Chancery, the King's Bench, the Common Pleas, and the Exchequer;—that property may be acquired and transferred by writing;—that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favorably, and deeds more strictly;—that money lent upon bond is recoverable by action of debt;—that breaking the public peace is an offence, and punishable by fine and imprisonment;—all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law for their support.

Some have divided the common law into two principal grounds or foundations: 1. Established customs; such as that, where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest: and 2. Established rules and maxims: as, "that the king can do no wrong," "that no man shall be bound to accuse himself," and the like. But I take these to be one and the same thing. For the authority of the maxims rests entirely upon general reception and usage; and the only method of proving that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it.

But here a very natural, and very material, question arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. The knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes*," which Fortescue mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given of the existence of such a custom as shall form a part of the common law. The judgment itself, and all proceedings previous thereto, are carefully registered and preserved, under the name of records in public repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance.

GLANVILL, Preface. (Beames's translation.)

Each decision is governed by the Laws of the Realm, and by those Customs which, founded on reason in their introduction, have for a long time prevailed; and, what is still more laudable, our King disdains not to avail himself of the advice of such men (although his subjects) whom, in gravity of manners, in skill in the Law and Customs of the Realm, in the superiority of their wisdom and Eloquence, he knows to surpass others, and whom he has found by experience most prompt, as far as consistent with reason, in the administration of Justice, by determining Causes and ending suits, acting now with more severity, and now with more lenity, as they see most expedient. For the English Laws, although not written, may as it should seem, and that without any absurdity, be termed Laws, (since this itself is a Law—that which pleases the Prince has the force of Law) I mean, those Laws which it is evident were promulgated by the advice of the Nobles and the authority of the Prince, concerning doubts to be settled in their Assembly. For, if from the mere want of writing only, they should not be considered as Laws, then, unquestionably, writing would seem to confer more authority upon Laws themselves, than either the Equity of the persons constituting, or the reason of those framing them. But, to reduce in every instance the Laws and Constitutions of the Realm into writing, would be, in our times, absolutely impossible, as well on account of the ignorance of writers, as of the confused multiplicity of the Laws.

MARKBY, ELEMENTS OF LAW, secs. 90, 91, 92.

90. The resource of the English lawyers when called on to fill the gap which was elsewhere supplied by the Roman Law was custom. Of this custom the judges were themselves, in the last resort, the repository. But the judges usually observed a discreet silence as to the source from which they derived the rules upon which their decisions were based. Here and there a judge or a counsel *arguendo* would mention a precedent, but if we may trust the reports contained in the Year Books, even this was rare. Still there appears to have been very little tendency to innovation; and there was doubtless a tradition of the courts to which every judge knew that he must conform at the peril of his reputation. Some record of the proceedings of the Superior courts of justice was always kept, and we have a series of such records commencing as early as the 6 Ric. II (1394). These early records might, and

probably did, afford some guide in future cases, though they were not drawn up with that object. Moreover, at least as early as the reign of Edward I the practice was begun of drawing up in addition to these records, reports of cases heard and determined, the main and apparently the sole object of which was to furnish judges with precedents to guide them in their future decisions. In these Year Books there is very little argument, but only an ascertainment by oral discussion of the points at issue with the decision of the court. The reporter however frequently criticises the decision, and sometimes indicates in a note the general proposition of law which he supposes the decision to support. Reference is also sometimes made by the reporter to other cases involving the same point. The later Year Books give the arguments somewhat more fully, but still we do not find previous cases frequently cited. From this we might be disposed to infer that the practice of citing cases in support of an argument or a judgment was still very rare even in the reign of Henry the Eighth, when the last Year Book was published. Yet this can hardly be so, for the reports of Plowden in the reign of Edward VI, which are much fuller than the latest Year Books, show that cases were at that time freely cited, and it is not likely that the practice came suddenly into existence. Moreover, we can scarcely account for the existence of the Year Books at all unless we suppose that the lawyers studied them and made some use of them. The importance attached to the Year Books is further shown by the numerous reprints of them which were issued as soon as the art of printing was discovered, and also by the popularity of the abridgments made of them by Fitzherbert and Brooke. Probably, therefore, the influence of precedent upon the decisions of the judges is not to be measured by the number of cases quoted in the Year Books.

91. It is, however, always as indicating the custom of England, and not as authority, that the decisions of earlier judges were cited during all this period and even afterwards. In the patent of James I for the appointment of official reporters it is indeed recited that the common law of England is principally declared by the grave resolutions and arrests of the reverend and learned judges upon the cases that come before them from time to time, and that the doubts and questions likewise which arise upon the exposition of statute laws are by the same means cleared and ruled. Nevertheless we find Blackstone still saying that the first ground and chief

corner-stone of the laws of England is general and immemorial custom. But long before Blackstone's time, and in some measure perhaps owing to the patent of James I, a very important change had taken place in the view held by judges as to the force of prior decisions. These decisions were at first evidence only of what the practice had been, guiding, but not compelling, those who consulted them to a conclusion. But when Blackstone wrote, each single decision standing by itself had already become an authority which no succeeding judge was at liberty to disregard. This important change was very gradual, and the practice was very likely not altogether uniform. As the judges became conscious of it they became much more careful of their expression, and gave much more elaborate explanation of their reasons. They also betrayed greater diffidence in dealing with new cases to which no rule was applicable, cases of first impression as they were called; and they introduced the curious practice of occasionally appending to a decision an expression of desire that it was not to be drawn into a precedent.

92. Thus it comes to pass that English case law does for us what the Roman law does for the rest of Western Europe. And this difference between our common law and the common law of continental Europe has produced a marked difference between our own and foreign legal systems. Where the principles of the Roman law are adopted the advance must always be made on certain lines. An English or American judge can go wherever his good sense leads him. The result has been, that whilst the law of continental Europe is formally correct it is not always easily adapted to the changing wants of those amongst whom it is administered. On the other hand, the English law, whilst it is cumbrous, ill-arranged, and barren of principles, whilst it is obscure and not unfrequently in conflict with itself, is yet a system under which justice can be done. Anyhow it stands alone in the history of the world. The records of decisions have no doubt at all times and in all countries served as evidence of custom, just as the Year Books formerly served, and the court rolls of manors still serve, amongst ourselves. And even without the influence of custom judges are never likely to disregard or to remain uninfluenced by the decisions of their predecessors. But nowhere else than in England and in countries which have derived their legal systems from England have the decisions of judges been systematically treated as authoritative.

(e) Precedents and Case Law.

HOLLAND, JURISPRUDENCE, chap. V.

In the weight which they attach to the decision of a court legal systems differ very widely. While in England and in the United States a reported case may be cited with almost as much confidence as an Act of Parliament, on the Continent a judgment, though useful as showing the view of the law held by a qualified body of men, seems powerless to constrain another court to take the same view in a similar case.

The continental view is an inheritance from the law of Rome; for although Cicero enumerates '*res judicatae*' among the sources of law, and the Emperor Severus gave binding force to the '*auctoritas rerum perpetuo similiter indicatorum*,' the ordinary principle was finally established by a Constitution of Justin. The Codes of Prussia and Austria expressly provide that judgments shall not have the force of law, and although the Codes of France, Italy, and Belgium are silent on the point, the rule in all these countries is substantially the same, viz. that previous decisions are instructive but not authoritative; subject to certain special provisions of a strictly limited scope.

In England cases have been cited in court at least as early as the time of Henry I. They are however stated by Lord Hale to be 'less than law,' though 'greater evidence thereof than the opinion of any private persons, as such, whatsoever'; and his contemporary Arthur Duck, remarks that the Common Law judges, in case of difficulty '*non recurrunt ad ius civile Romanorum, ut apud alias gentes Europæas, sed suo arbitrio et conscientiae relinquuntur.*' But in Blackstone's time the view was established that 'the duty of the judge is to abide by former precedents,' and it has long been well understood that our courts are arranged in this respect in a regular hierarchy, those of each grade being bound by the decisions of those of the same or higher grade, while the House of Lords is bound by its decisions.

There have been of late some symptoms of an approximation between the two theories. While on the continent judicial decisions are reported with more care, and listened to with more respect than formerly, indications are not wanting that in England and the United States they are beginning to be somewhat more freely criticised than has hitherto been usual.

From the PRIOR OF LEWES V. THE BISHOP OF ELY (1304). Year Book, 32 Edw. I., Horwood ed. p. 39.

Herle (of counsel for plaintiff, *arguendo*): But consider whether he shall be admitted to aver these three causes: for the judgment to be by you now given will hereafter be an authority in every *quare non admisit* in England; therefore consider if he shall be received to aver these three causes.

ANONYMOUS CASE, COMMON PLEAS (1341). Y. B. Pasch. 15 Edw. III., No. 56.

Dower. Thorpe (counsel for defendant, pleading): She was not when her husband died of such age as she could merit dower. Hillary (J.): State with certainty of what age she was. Thorpe: Not nine years old. Gayneford (counsel for plaintiff): She was nine years old and more. Ready, etc. Thorpe: Show her age to have been such that she would have been dowable thereat, viz. ten years at least. Hillary, J.: In the case of John Benstede the widow was endowed at the age of nine years and a half. (Pike's translation.)

ANONYMOUS CASE, COMMON PLEAS (1462). Y. B. 2 E. 4, 27.

In debt on a bond against A. R. late of F. the defendant says that at the time the writ etc. he was conversant at M. without this that he ever lived at F. in the manner etc. Littleton (counsel for defendant): To this you shall not be received against the bond. Billing (counsel for plaintiff): That is not an estoppel, for this was adjudged, M. 34 H. 6 fol. 19 [i. e., Michaelmas Term in the 34th year of Henry VI.], here in the case of one J. Weeks, late of Bristow. Needham and Danvers alone were on the Bench. Needham (J.) said that this is no estoppel, for it is with the bond, for it may be that F is a place called F. in a town, and no farm or hamlet or place known outside of the town or hamlet, or that his name is R. M. of F. which F. is his own house in the town . . . Danvers (J.) agreed . . . Littleton: I understand not, Sir, this was decided before you here in your time. M. 37 H. 6. fo. 5. Needham (J.): No Sir, I believe not unless the bond makes mention of a town by express words, that is to say of the town of F.

BOLE V. HORTON, COMMON PLEAS (1670). (Vaughan, 360, 382. Extract from the opinion of Vaughan, C. J.

An extra-judicial opinion, given in or out of a court, is no more than the *Prolatum* or saying of him who gives it, nor can be taken

for his opinion, unless everything spoken at pleasure must pass as the speaker's opinion. An opinion given in Court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or a contrary, Opinion had been broached, is no Judicial opinion, nor more than a *gratis dictum*. But an opinion, though erroneous, concluding to the Judgment, is a Judicial Opinion, because delivered under the sanction of the Judge's Oath, upon deliberation, which assures it is or was when delivered the Opinion of the deliverer. Yet, if a court gives judgment judicially, another court is not bound to give like judgment, unless it think that judgment first given was according to law. For any court may err, else errors in judgment would not be admitted nor a reversal of them. Therefore if a Judge conceives a Judgment given in another court to be erroneous, he being sworn to judge according to Law, that is in his own conscience, ought not to give the like judgment, for that were to wrong every man having a like cause because another was wronged before, much less to follow extra-judicial Opinions unless he believes those Opinions are right.

BLACKSTONE, COMMENTARIES, I, 69 (1765).

It is an established rule to abide by former precedents where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.

MIREHOUSE V. RENNELL, House of Lords (1833). (1 Cl. & F. 527).

Extract from the opinion of Parke, B.: Our Common Law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise: a we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied,

because we think that the rules are not as convenient and reasonable as we ourselves could have decided. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of Law as a science.

DILLON, LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA, 231.

The point I wish you to notice is that the authoritative force of judicial precedents is an established and up to the present time at least an essential part of the English and American systems of law. Let us trace more at large the scope and effect of this important doctrine. What is judicial precedent? Judicial precedent is not simply part of the law in a general sense,—that it is natural to yield to the influence of example and to follow what has been practiced,—but it is a part of our law in a sense and with effects which are distinctively and most strikingly peculiar. The doctrine as established is shortly this: that a decision by a court of competent jurisdiction of a point of law lying so squarely in the pathway of judicial judgment that the case could not be adjudged without decision, is not only binding upon the parties to the cause or judgment, but the point so decided becomes, until it is reversed or overruled, evidence of what the law is in like cases, which the courts are bound to follow not only in cases precisely like the one which was first determined, but also in those which however different in their origin or special circumstances stand, or are considered to stand, upon the same principle. What is to be observed and remembered is that the adjudged case has an authoritative and not merely persuasive force. The doctrine is not limited in its scope and binding effect to cases which determine the true construction of a statute, but extends to the far larger class of cases which does not depend upon positive legislation, but must be determined by general reasoning. There is a difference of opinion among writers as to whether the precedent actually constitutes the law or is only authoritative evidence thereof. It is not proposed now to enter upon this discussion; it is enough to remark at this time that the precedent has in our legal system an authoritative effect. In Continental Europe a judicial decision has no authoritative force in any other case, whether in the same or any other court. But in England and in this country a point solemnly decided has the force and effect of law, binding the judges in all other cases that clearly fall within its

principle, and which the judges are therefore bound to follow and apply, unless, to use Blackstone's well-known and much criticized qualification, the precedent is "flatly absurd or unjust."

To this doctrine we owe a weight of obligation which can not easily be overstated. By reason of the consequent importance, they have been reported for several hundred years, so that at this time the volumes of reports in England and this country number about eight thousand. These embody the learning, wisdom, and experience of the judges (often men of great intellectual powers) who during this long period have made the law and the practical administration of justice the subjects of profound study. Indirectly the reports embody also the results of the researches, studies, experience and ability of the bar during the same period, since of these judges have had the advantage in the argument of the causes so decided. Indeed, the doctrine of judicial precedent implies that the point to the decision whereof such force is attributed should have been argued by opposing counsel.

The value of these reports to the lawyer and to the judge is, I repeat, absolutely incalculable. It is a mine of wealth possessed by none but English-speaking peoples. Here the lawyer finds his true riches. What the art collections in the Vatican, in the Tribune Room, the Pinacotheka, in the Dresden Gallery, and in the Louvre are to the artist, the judicial reports are to the English and American lawyer. I yield to no one in my estimate of the store of riches they contain. I have not yet mentioned one of the chief elements of their possible usefulness. They are capable of being made quite as valuable to the legislator as to the lawyer, since the uninterrupted light of the experience of many generations of men shines forth from them to mark out and illumine the legislator's pathway. He need scarcely take a single step in the dark.

(f) *The Jury.*

i. *Archaic modes of trial.*

BIGELOW, HISTORY OF PROCEDURE IN ENGLAND, chap. IX.

The next step in the procedure was the appearance of the parties before the judges at the trial term. The medial judgment, as we have seen must have directed a trial in one of the following modes, to-wit, by compurgation, by witnesses, by charters, by record, by the ordeal, by the duel, or by the inquisition or recognition. Each

*the judgment of the
freemen (Witan). Courts other*

of these will now be considered in order, from the final point of view, the trial.

First, then, the compurgation. This in its essential features, consisted in bringing forward of a specified number of persons, by the party adjudged to give the proof to make oath in his favor: the number varying in ordinary cases from one to forty-eight, being dependent upon the rank of the parties, of the compurgators (one thegn, for example, being equal to six villeins), the value of the property, if property were involved, and the nature of the suit. These persons were to swear not to facts but to the credibility of the party for whom they appeared; though knowledge of the facts was probably deemed an important consideration in the making of the selection.

Trial by witnesses to the fact was very common both in the pre-Norman and in the Norman periods. Unlike compurgators who swore to their principal's credibility, witnesses to the fact swore to matters *de visu et auditu*. They differed, however, essentially from the inquisitors and recognitors of the time, and from modern witnesses. They gave their testimony in ordinary cases in accordance with the narrow formula of the medial judgment; they were not examined as to facts; and they appeared (in this particular like modern witnesses) at the instance of the party for whom they testified. The judge might examine them as to their competency, but if this were established, if they were sworn to be legal men of the neighborhood, they were entitled to give an answer according to the prescribed formula. They were triers, not witnesses in the modern sense, and few of the questions which arise at the present day upon the testimony of witnesses, such as the admissibility of evidence, could arise under the procedure of the Norman (pre-Norman) period. Both civil and criminal cases were tried in this way. Civil cases may be found in the records almost without number.

Of trial by charters, little need be said. The effect and interpretation of documents were ordinarily matter for the judges; and trial by charters had in consequence more of the features of trials of the present day than any other form of litigation except that by inquisition and recognition. The event was not, as it was in trial by wager of law and by party-witness, largely and often wholly in the hands of the party who had delivered the last good pleading. Nor was it necessarily left to some external test, incapable in fact of discovering the truth. But as in the case of trial by inquisition,

the truth was if possible sought by a rational and satisfactory mode of inquiry, as by a comparison of the seal in question with other seals of the same party, admitted to be genuine.

The next mode of trial to be noticed was the ordeal, commonly called *Judicium Dei*, sometimes simply *judicium*. It was, like the duel, the final test, from which there was no appeal. It was a solemn invocation to Heaven to decide the matter in dispute and the result of the test was regarded by the credulous masses as effected by the direct interposition of the Almighty. But it was only when the party had no charters and could furnish neither witnesses nor compurgators, that he resorted to ordeal, except in cases provided for by special legislation, as by the Assises of Clarendon and Northampton. It was applicable to women equally with men; and it was the legal mode of exculpation of a man accused by a woman of the murder of her husband.

The ordeal was more extensively employed in the procedure of the pre-Norman period than in the later. It was the typical mode of trial among the English, contrasting English procedure with the procedure of their Norman conquerors. With them it was, until the Conquest, the only *Judicium Dei* so far as existing monuments bear witness. It was used frequently in civil as well as in criminal cases before and for a considerable time after the Conquest. Even Normans who affected to despise the peculiar institutions of the English, sometimes resorted to the ordeal. In the time of the Conqueror his Norman Bishop Remigius purged himself of a charge of treason by the ordeal of fire, sustained by one of the household of the accused.

The ordeal may possibly have continued to be legal mode of trial for civil causes in the twelfth century so far as anything directly to the contrary appears, but the encroachment of the duel, of compurgation and of the inquisition was constantly narrowing its application to such cases and probably long before the end of the century, probably indeed, before the middle of it, it had become practically obsolete in civil litigation. Its use appears at the same time to have become somewhat narrowed in criminal procedure. In the latter half of the twelfth century and probably earlier the duel had come to be recognized as a mode of trial in appeals of treason if not in appeals of crime generally; though in the case of presentments, where compurgation had probably been the common mode of trial,

the Assises of Clarendon and Northampton had provided for trial by ordeal.

This mode of trial finally received a fatal blow from the well known decree of the Lateran Council of the year 1215, at which it was ordered that the ordeal should be discontinued throughout Christendom.

There were four forms of ordeal, towit, by cold water, by hot water, by hot iron and by morsel or "corsnaed." The first two were in the time of Glanvill for the poor and partly unfree classes, the "rustics"; the third was for the lay freemen; whilst the last, as we have seen, was for the clergy. The accused, however, appears to have had an election at one time between the modes by fire and by water. Whether this was true in the twelfth century is doubtful.

Each was undergone after the most solemn religious ceremonial. In the case of the cold water ordeal, a fast of three days duration was first submitted to in the presence of a priest; then the accused was brought into the church where a mass was chanted, followed by the communion. Before communion, however, the accused was adjured by the Father, Son and Holy Ghost, by the Christian Religion which he professed, by the only begotten Son, by the Holy Trinity, by the Holy Gospels, and by the Holy Relics, not to partake of the communion if he was guilty. Communion having been partaken *adjuratio aquae* is made by the priest in which the water is asked to cast forth the accused if guilty, and to receive him into its depths if innocent. After these ceremonies, the accused is stripped, kisses the book and the cross, is sprinkled with holy water, and then cast into the depths. If he sank he was adjudged not guilty; if he swam he was pronounced guilty.

Similar religious ceremonies were performed in the other forms of ordeal. If the accuser elected for the accused the trial by hot water, the water was placed in a vessel and heated to the highest degree. Then if the party were accused of an inferior crime, he plunged his arm into the water as far as the wrist and brought forth a stone suspended by a cord; if he were accused of a great crime, the stone was suspended deeper, so as to require him to plunge his arm as far as his elbow. The hand of the accused was then bandaged and at the end of three days the bandage was removed. If it now appeared that the wound was healed the accused was deemed innocent, but if it had festered he was held guilty.

If trial by hot iron was elected, a piece of iron weighing either one or three pounds according to the nature of the crime charged, was heated under the direction of men standing by, whose duty it was to see that a proper heat was obtained, and kept until the time for the test had arrived. During the final ceremonies the fire was left and the iron allowed to remain in the embers. It was raised and with an invocation to the deity, given into the naked hand of the accused, who carried it the distance of nine feet when it was dropped, and the hand bandaged as in the case of the hot water ordeal to abide by the same test.

The ordeal of the morsel accompanied by similar ceremonials was undergone by the accused undertaking to swallow a piece of barley bread or a piece of cheese of the weight of an ounce; if he succeeded without serious difficulty, he was deemed innocent, but if he choked and grew black in the face he was deemed guilty.

From the ANGLO-SAXON LAWS.

The oath of him who discovers his property that he does not do it either for hatred or for envy.

By the Lord I accuse not N. either for hatred or for envy or for unlawful lust of gain; nor know I anything soother; but as my informant to me said, and I myself in sooth believe, that he was the thief of my property.

And the other's oath that he is guiltless:

By the Lord I am guiltless both in deed and counsel, of the charge of which N. accuses me.

His companion's oath who stands with him.

By the Lord the oath is clean and unperjured which N. has sworn.

Oath if a man finds his property unsound after he has bought it.

In the name of Almighty God, thou didst engage to me sound and clean which thou soldest to me, and full security against after-claim, on the witness of N., who then was with us two.

How he shall swear who stands with another in witness.

In the name of Almighty God, as I here for N in true witness stand, unbidden and unbought, so I with my eyes oversaw and with my ears overheard that which I with him say.

Oath that he knew not of foulness or fraud.

In the name of Almighty God, I knew not on the things about which thou suest, foulness or fraud, or infirmity or blemish, up to that day's tide that I sold it to thee; but it was both sound and clean without any kind of fraud.

In the name of the Living God, as I money demand, so have I lack of that which N. promised me when I mine to him sold.

Denial.

In the name of the Living God I owe not to N. sceatt or shilling or penny or penny's worth; but I have discharged to him all that I owed to him, so far as our verbal contracts were at first.

GLANVILL, book II, chap. 3. (Beames's translation.)

When at last, both the litigating parties are present in court, and the demandant has proceeded to claim the tenement in question, the Tenant may pray a View of the land. . . . After the three reasonable essoins which accompany the view of the land, both parties being again present in court, the demandant should set forth his demand and claim in this manner. . . . The demand and claim of the demandant being thus made, it shall be at the election of the tenant either to defend himself against the demandant by duel or to put himself upon the King's Grand Assise, and require a Recognition to ascertain which of the two have the greater Right to the Land in dispute.

But here we should observe, that after the Tenant had once waged the Duel he must abide by his choice, and can not afterwards put himself upon the Assise. In this stage of the suit the tenant may again avail himself of the reasonable Essoins in succession with respect to his own person and of the same number with regard to the person of his Champion. All the Essoins which can with propriety be resorted to having expired, it is requisite before the Duel can take place, that the Demandant should appear in court, accompanied by his Champion armed for the contest. Nor will it suffice, if he then produce any other champion than one of those upon whom he put the proof of his claim, neither indeed, can any other contend for him, after the duel has been once waged.

But if he who has waged the duel should, in the interval, pending suit, happen to die, a distinction is to be made. If he died a natural death, and this is declared by the Vicinage, (as it ought always to be, if there exist any doubt concerning the fact), the demandant may in the first place recur to one of those upon whom he placed his proof, or to another proper person, even if he have not named any other, provided that such other be an unobjectionable witness—and thus the Plea may begin again. If, however, his death was occasioned by his own fault, the Principal shall lose the cause. It may be asked whether the Champion of the Demandant

can substitute another in Court to make that proof which he took upon himself? According, indeed, to the law, and ancient custom of the realm, he can not appoint any other, unless it be his legitimate son, and here it may be observed, that the Champion of the Demandant should be such a person as is a proper witness of the fact. Nor is it lawful for the Demandant to prosecute his appeal in his own person, because it is not permitted unless by the intervention of a proper witness, who has heard and seen the fact.

But the Tenant may defend himself, either in his own proper person, if he choose so to do, or by any other unobjectionable witness, if he prefer that course. But if he has produced a Champion, and such a Champion should die in the interval, it may be asked, what the law is, whether the tenant may defend himself by another champion, or whether he ought to lose his suit, or his seisin only? We must have recourse to our former distinction. It should be remarked that the champion of the tenant cannot substitute another in court for the purpose of undertaking the defence, unless it be his lawful son.

But, it frequently happens, that a hired champion is produced in court, who on account of a reward has undertaken the proof. If the adverse party should except to the person of such a champion, alleging him to be an improper witness, because he had accepted a reward to undertake the proof, and should add, that he was prepared to prove this accusation against the champion (if the latter chose to deny it) either by himself or by another, who was present when the champion had taken the reward, the party shall be heard upon this charge, and the principal duel shall be deferred. If, upon this charge, the champion of the demandant should be convicted and conquered in the duel, then his principal shall lose the suit, and the champion himself, as conquered, shall lose his law, namely, he shall thenceforth never be admitted in court, as a witness for the purpose of making proof by duel, for any other person; but with respect to himself, he may be admitted, either in defending his own body, or in prosecuting an atrocious personal injury as being a violation of the King's peace. He may also defend his right to his own Fee and Inheritance, by Duel.

The duel being finished, a fine of sixty shillings shall be imposed upon the party conquered in the name of Recreantise, and besides which he shall lose his law; and if the Champion of the Tenant should be conquered his Principal shall lose the Land in question,

with all the fruits and produce upon it at the time of Seisin of the fee, and never again shall be heard in Court concerning the same Land. For those matters, which have been once determined in the King's Court by Duel, remain forever after unalterable. Upon the determination of the suit, let the Sheriff be commanded by the following writ, to give possession of the land to the successful party.

This is the course of proceeding, when the Demandant has been successful in the Duel. But if he has been conquered, in the person of his Champion, then the Tenant shall be freed from his claim, without any possibility of being again disturbed by him. Thus far concerning the duel, where the Tenant should chuse or elect that mode of defending himself, against his Adversary.

ii. Development of the jury.

CAPITULARY OF LOUIS I., KING OF THE FRANKS (829). (Translated from Walter, *Corpus Juris Germanici*, II, 388.)

VI. We will that every inquest (*inquisitio*) which is to be made of matters pertaining to the right of our fisc be made not by witnesses who shall have been brought forward, but by those who in that county are known to be best and most truthful; by their testimony let there be an inquest, and according to what they shall have testified, let them be retained or paid.

ABBOT OF ST. AUGUSTINE'S CASE, before the King's son in his absence (Temp. William I.). (Translated from Bigelow, *Placita Anglo-Normannica*, 33.)

William, the son of the king to William, sheriff of Kent, Greeting: I command that you command Hamo, son of Vitalis, and the honest men of the vicinage of Sandwich, whom Hamo has named, that they declare the truth concerning the ship of the Abbot of St. Augustine, and if that ship proceeded through the sea on the day when the king last crossed the sea, then I command that it now proceed until the King comes into England, and meanwhile let the said Abbot be resealed. Witness the Bishop of Salisbury and Chancellor at Woodstock.

(Execution in same case.)

William, son of the King, to William, sheriff of Kent, Greeting: I command that you reseise the Abbot of St. Augustine of his ship, as I commanded by my other writ, and as it was found by the honest men of the county that the Abbot was then seised on the day

when last the king crossed the sea ; and let him hold it in peace. Witness the Chancellor at Windsor. And this without delay that I may hear no more complaint thereof. Witness the same.

Extracts from GLANVILL, book II.

But if the tenant should prefer putting himself upon the king's Grand Assise, the Demandant must either adopt the same course, or decline it. If the Demandant has once conceded in Court that he would put himself upon the Assise, and has so expressed himself before the Justices of the Common Pleas, he can not afterwards retract, but ought to stand or fall by the Assise.

The Grand Assise is a certain royal benefit bestowed upon the people, and emanating from the clemency of the prince, with the advice of his nobles. So effectually does this proceeding preserve the lives and civil condition of Men, that every one may now possess his right in safety, at the time that he avoids the doubtful event of the Duel. Nor is this all: the severe punishment of an unexpected and premature death is evaded, or, at least the opprobrium of a lasting infamy, or that dreadful and ignominious word that so disgracefully resounds from the mouth of the conquered Champion.

This legal Institution flows from the most profound Equity. For that Justice, which, after many and long delays, is scarcely, if ever, elicited by the Duel, is more advantageously and expeditiously attained, through the benefit of this Institution. This Assise, indeed, allows not so many Essoins as the Duel, as will be seen in the sequel. And by this course of proceeding, both the labor of men, and the expenses of the poor are saved. Besides, by so much as the testimony of many credible witnesses, in judicial proceedings, preponderates over that of one only, by so much greater Equity is this Institution regulated than that of the Duel. For since the Duel proceeds upon the testimony of one Juror, this constitution requires the oaths of twelve lawful men, at least. These are the proceedings which lead to the Assise. The party who puts himself upon the Assise should, from the first, and in order to prevent his Adversary from subsequently impleading him, sue out a writ for keeping the peace, the suit being already pending between the parties concerning the Tenement, and the Tenant having put himself upon the Assise.

By means of such Writs, the Tenant may protect himself, and may put himself upon the Assise, until his Adversary, appearing

in Court, pray another Writ, in order that four lawful Knights of the County, and of the Vicinage, might elect twelve lawful Knights from the same Vicinage, who should say, upon their oaths, which of the litigating parties, have the greater right to the Land in question. The Writ for the summoning of the four Knights is as follows:

"The King to the Sheriff, Health. Summon, by good summoners, four lawful Knights of the Vicinage of Stoke, that they be at the Pentecost before me, or my Justices, at Westminster, to elect on their oaths, twelve lawful Knights of that Vicinage, who better know the truth, to return, on their oaths, whether M. or R. have the greater right in one Hyde of Land in Stoke, which M. claims against R. by my Writ, and of which R. the Tenant, hath put himself upon my assise and prays a Recognition to be made, which of them have the greater right in that Land; and, cause their names to be imbreviated. And summon, by good summoners, R. who holds the Land, that he be there to hear the election, and have there the Summoners, etc."

Upon this occasion, whether the Tenant appear or absent himself, the four Knights shall proceed upon their oaths to elect the twelve. But, if the tenant himself be present in Court, he may possibly have a just cause of Exception against one or more of the twelve, and concerning this he should be heard in Court. It is usual, indeed, for the purpose of satisfying the absent party, not to confine the number to be elected to twelve, but to comprise as many more as may incontrovertibly satisfy such absent party, when he return to Court. For Jurors may be excepted against by the same means by which Witnesses in the Court Christian are justly rejected. It should also be observed, that if the party, who has put himself upon the grand Assise, appear, although some of the four Knights are absent, the twelve may be elected by one of the four taking to himself two or three other Knights from the same County, if such happen to be in Court, though not summoned for the purpose, provided such course of proceeding meet with the approbation of the Court, and be mutually consented to by the litigating parties. But, for greater caution, and to avoid all possible cavil, it is usual to summons six or more Knights to Court, for the purpose of making the election.

The election of the twelve Knights having been made, they should be summoned to appear in Court, prepared upon their oaths to de-

clare, which of them, namely, whether the Tenant, or the Demandant, possess the greater right to the property in question.

When the Assise proceeds to make the Recognition, the right will be well known either to all the Jurors, or some may know it, and some not, or all may be alike ignorant concerning it. If none of them are acquainted with the truth of the matter, and this be testified upon their oaths in Court, recourse must be had to others, until such can be found who do know the truth of it. Should it, however, happen that some of them know the truth of the matter, and some not, the latter are to be rejected, and others summoned to Court, until twelve, at least, can be found who are unanimous. But, if some of the jurors should decide for one party, and some of them for the other, then others must be added, until twelve, at least, can be obtained who agree in favor of one side. Each of the Knights summoned for this purpose ought to swear, that he will neither utter that which is false, nor knowingly conceal the truth. With respect to the knowledge requisite on the part of those sworn, they should be acquainted with the merits of the cause, either from what they have personally seen and heard, or from the declaration of their Fathers, and from other sources equally entitled to credit, as if falling within their own immediate knowledge.

When the twelve Knights, who have appeared for the purpose of making Recognition, entertain no doubt about the truth of the thing, then, the Assise must proceed to ascertain, whether the Demandant, or Tenant, have the greater right to the subject in dispute.

But if they decide in favor of the Tenant, or make any other declaration, by which it should sufficiently appear to the King, or his justices, that the Tenant has greater right to the subject in dispute, then, by the Judgment of the Court, he shall be dismissed, for ever released from the claim of the Demandant, who shall never again be heard in Court with effect concerning the matter. For those questions which have been lawfully determined by the King's Grand Assise, shall upon no subsequent occasion be with propriety revived. But, if by this Assise it be decided in Court in favor of the Demandant, then, his Adversary shall lose the Land in question, which shall be restored to the Demandant, together with all the fruits and produce found upon the Land at the time of Seisin.

Extracts from GLANVILL, book XIII.

The general course of proceedings, as they more usually occur in Court upon the foregoing Writs of Right, having been so far treated of, it now remains to speak concerning the steps commonly resorted to, where Seisin alone is in question. As these questions are, under the beneficial provisions of a law of the Realm, which is termed an Assise, usually and for the most part decided by a Recognition, our subject leads us to treat of the different kinds of Recognition.

There is one species of Recognition which is called mort d'Ancestor—another *de ultimis presentationibus* of Parsons to their churches—another whether a Tenement be an Ecclesiastical Fee or Lay Fee—another, whether any one was seised of a Freehold on the day of his death, as of fee or as of pledge,—another, whether anyone be under age or of full age—another whether any one died seised of a certain Freehold as of Fee, or as of ward,—another, whether any one presented the last Parson to a Church by virtue of a Fee that he held in his Demesne, or by virtue of a Wardship. And others of a similar description, which, as they frequently arise in Court when the parties are present, are, with their consent and the advice of the Court, directed in order to determine the point in controversy. But there is another Recognition which is called Novel Disseisin. . . .

In the last place, it remains for us to speak, concerning that species of Recognition, which is called Novel Disseisin. When any one, therefore, unjustly and without a Judgment, has disseised another of his freehold; and the case fall within the King's Assise, or in other words, within the time for such purpose appointed by the King with the advice of his Nobles (which is sometimes a greater, sometimes, a less period) he shall have the following Writ.—

“The King to the Sheriff, Health. N. complains to me, that R. has, unjustly and without a Judgment, disseised him of his free Tenement, in such a vill, since my last Voyage into Normandy; and, therefore I command you, that if the aforesaid N. should make you secure of prosecuting his claim, then, you cause the Tenement to be resealed, with the chattels taken on it, and that you cause him with his chattels to be in peace, until the Pentecost; and, in the meantime, you cause twelve lawful and free Men of the Neighborhood to view the land, and their names to be imbreviated; and sum-

mon them, by good summoners, that they be then before me, or my Justices, prepared to make the Recognition; and put by gage and safe pledges, the aforesaid R. or his Bailiff, if he be not found, that he be then there to hear such Recognition, and have there, etc. Witness, etc."

But in this recognition, the party who has proved the *Novel Disseisin*, may obtain that the Sheriff should be directed to deliver him the Chattels and the Fruits, which have, by the authority of the King's Writ, or that of his Justices, been in the meantime seised. In no other Recognition does the Judgment of the Court usually make any mention concerning the Chattels or Fruits.

BRITTON, book I, chap. 5. (Nichols's translation.)

Afterwards let the jurors be charged of what fact they are to speak the truth. And then let them go and confer together, and be kept by a bailiff, so that no one speak to them; and if any one does so, or if there be any one among them who is not sworn, let him be committed to prison, and all the rest amerced for their folly in suffering it.

10. If they can not all agree in one mind, let them be separated and examined why they can not agree; and if the greater part of them know the truth and the other part do not, judgment shall be according to the opinion of the greater part. And if they declare upon their oaths, that they know nothing of the fact, let others be called who do know it; and if he who put himself on the first inquest will not put himself on a new jury, let him be remanded back to penance till he consents thereto.

ANONYMOUS CASE LIB. ASSISARUM, 41, 11 (1367). (Thayer's translation.)

In another assise before the same justices at Northampton, the assise was sworn; and they were all agreed but one, who would not agree with the xi, and afterwards they were remanded, and remained all day and the next day without eating or drinking, and afterwards the justices demanded of him if he would agree with his companions, and he said never, for he would die first in prison. Wherefore they took the verdict of the xi and commanded him to prison. And upon this a day was given in the Common Bench on the matter of the verdict. Kirketon (counsel for plaintiff) prayed judgment on the verdict, etc. Thorpe, (C. J.) said they were all agreed that this was not a verdict taken from xi and that a verdict

could not be taken from xi. But Kirketon told how Willoughby (J.) in trespass took the verdict of xi and sent the twelfth to prison and the attaint was sued against the xi, and also W. Thorpe (J.) in an assise of the xx year of the present king (1345) took verdict of xi. Thorpe (C. J.): "That is no example to us, for they were greatly reproved for this." . . . And afterwards by assent of all the justices it was held that this was not a verdict, wherefore judgment was that the panel be quashed and null, and that he that was in prison be delivered. . . . Note that the justices said that they ought to have carried the assise with them in a cart until they were agreed.

FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE*, chaps. 25, 26 (about 1453). (Amos's translation.)

25. Whensoever the parties contending in the King's Courts are come to the issue of the Plea, upon the matter of fact, the justices forthwith, by virtue of the King's writ, write to the sheriff of the county, where the fact is supposed to be, that he would cause to come before them, at a certain day, by them appointed, twelve good and lawful men of the neighborhood, where the fact is supposed, who stand in no relation to either of the parties who are at issue, in order to enquire and know upon their oaths, if the fact be so as one of the parties alleges, or whether it be as the other contends it, with him. At which day the sheriff shall make return of the said writ before the same Justices, with a panel of the names of them whom he had summoned for that purpose. In case they appear, either party may challenge the array, and allege that the Sheriff had acted therein partially, and in favor of the other party, (viz.) by summoning such as are too much parties in the cause and not indifferent; which exception, if it be found to be true upon the oath of two men of the same panel pitched on by the Justices, the panel shall immediately be quashed and then the Justices shall write to the Coroners of the same County, to make a new panel; in case that likewise should be excepted against, and be made to appear to be corrupt and vicious, this panel also be quashed. Then the justices shall choose two clerks of the court, or others of the same county, who, sitting in the court, shall upon their oaths, make an indifferent panel, which shall be excepted to by neither of the parties; but being so impanelled and appearing in Court, either party may except against any particular person; as he may at all times, and in all cases, by alleging that the person so impanelled is of kin,

either by blood or affinity to the other party; or in some such particular interest, as he can not be deemed an indifferent person to pass between parties, of which sort of exceptions there is so much variety, as is impossible to shew in a small compass; if any one of the exceptions be made appear to the Court to be true and reasonable, then he against whom the exception is taken, shall not be sworn, but his name shall be struck out of the panel; in like manner shall be done with all the rest of the panel; until twelve be sworn so indifferent, as to the event of the cause, that neither of the parties can have reasonable matter of challenge against them: Out of these twelve, four at least, shall be Hundredors, dwelling in the Hundred where the Vill is situate, in which the fact disputed is supposed to be; and every one of the Jury shall have lands or revenues, for the term of his life, of the yearly value at least of twelve scutes. This method is observed in all actions, criminal, real or personal; except where in personal actions, the damages, or thing in demand, shall not exceed forty marks English money: because, in such like actions of small value, it is not necessary nor required that the Jurors should be able to expend so much; but they are required to have lands or revenues, to a competent value at the discretion of the Justices; otherwise they shall not be accepted; lest by reason of their meanness and poverty, they may be liable to be easily bribed, or suborned; and in case, after all exceptions taken, so many be struck out of the panel, that there does not remain a sufficient number to make up the jury, then it shall be given in charge to the Sheriff, by virtue of the King's writ, that he add more Jurors; which is usually and often done, that the enquiry of the truth upon the issue in question may not remain undecided, for want of Jurors. This is the form how Jurors, who enquire into the truth, ought to be returned, chosen and sworn in the King's Courts of Justice; it remains to enquire and explain, how they ought to be charged and informed as to their declaration of the truth of the issue before them.

26. Twelve good men and true men being sworn, as in the manner above related legally qualified, that is, having over and besides their movables, possessions in land sufficient (as was said) wherewith to maintain their rank and station; neither suspected by nor at variance with either of the parties; all of the neighborhood; there shall be read to them in English, by the court, the Record and nature of the plea, at length, which is depending between the parties;

and the issue thereupon shall be plainly laid before them concerning the truth of which those who are sworn are to certify the court; which done, each of the parties, by themselves or their Counsel, in presence of the court, shall declare and lay open to the Jury all and singular the matters and evidences whereby they think they may be able to inform the Court concerning the truth of the point in question; after which each of the parties has a liberty to produce before the Court all such witnesses as they please, or can get to appear on their behalf; who being charged upon their oaths, shall give in evidence all that they know concerning the truth of the fact, concerning which the parties are at issue: and, if necessity so require, the witnesses may be heard and examined apart, till they shall have deposed all that they have to give in evidence, so that what the one has declared shall not inform or induce another witness of the same side to give his evidence in the same words or to the very same effect. The whole of the evidence being gone through the Jurors shall confer together, at their pleasure, as they shall think most convenient, upon the truth of the issue before them; with as much deliberation and leisure as they can well desire, being all the while in the keeping of an officer of the Court, in a place assigned to them for that purpose, lest anyone should attempt by indirect methods to influence them as to their opinion, which they are to give in the court. Lastly, they are to return into the court and certify the Justices upon the truth of the issue so joined in the presence of the parties, (if they please to be present), particularly the person who is plaintiff in the cause; what the Jurors shall so certify in the Laws of England, is called the verdict. In pursuance of which verdict, the Justices shall render and form their judgment. Notwithstanding if the party, against whom such verdict is obtained, complain that he is thereby aggrieved, he may sue out a writ of Attaint, both against the Jury and also against the party who obtained; in virtue of which, if it be found upon the oath of twenty-four men (returned in manner before observed, chosen and sworn in due form of law, who ought to have much better estates than those who were first returned and sworn), that those, who were of the original panel and sworn to try the fact, have given a verdict contrary to evidence, and their oath; every one of the first Jury shall be committed to the public gaol, their goods shall be confiscated, their possessions seized into the king's hands, their habitations and houses shall be pulled down,

their wood-lands shall be felled, their meadows shall be plowed up and they themselves ever thenceforward be esteemed, in the eye of the law, infamous, and in no case whatsoever are they to be admitted to give evidence in any Court or Record; the party, who suffered in the former trial, shall be restored to everything they gave against him, through occasion of such their false verdict; and who then (though he should have no regard to conscience or honesty) being so charged upon his oath would not declare the truth from the bare apprehensions and shame of so heavy a punishment, and the very great infamy which attends a contrary behaviour? And if, perhaps, one or more among them should be so unthinking or daring as to prostitute their own character, yet the rest of the Jurors, probably would set a better value on their reputations than suffer either their good name or possessions to be destroyed and seized in such a manner; now, is not this method of coming at the truth better and more effectual than that way of proceeding, which the Civil Laws prescribe? No one's cause or right is, in this case, lost, either by death or failure of witnesses. The Jurors returned are well known, they are not inferior in condition; neither strangers, nor people of uncertain characters, whose circumstances or prejudices may be unknown. The witnesses [i. e., jurors] are of the neighborhood, able to live of themselves, of good reputation and unexceptionable characters, not brought before the Court by either of the parties, but chosen and returned by a proper officer, a worthy, disinterested and indifferent person, and obliged under a penalty to appear upon the trial. They are well acquainted with all the facts, which the evidences depose, and with their several characters. What need more of words? There is nothing omitted which can discover the truth of the case at issue, nothing which can in any respect be concealed from, or unknown to a Jury who are so appointed and returned, I say, as far as it is possible for the wit of man to devise.

ANONYMOUS CASE, Year Book 21 and 22, Edw. I., 273 (1293).
(Thayer's translation.)

Roubery (J. to the assise): How say you he is next heir? The assize: Because he was born and begotten of the same father and the same mother, and his father on his death-bed acknowledged that he was his son and heir. Roubery (J): You shall tell us in another way how he is next heir or be shut up without meat or drink till tomorrow morning. And then they said that he was born before the ceremony, but after the betrothal.

BUSHEL'S CASE, COMMON PLEAS, 1670. (Vaughan, 135.)

The King's writ of Habeas Corpus . . . issued out of this court, directed to the then sheriffs of London, to have the body of Edward Bushel, by them detained in prison, together with the day and cause of his caption and detention, on Friday then next following, before this court, to do and receive as the court shall consider.

[Vaughan, C. J. delivered the opinion of the court from which the following extracts are taken:]

In the present case it is returned that the prisoner, being juryman, among others charged at the session court at the old Baily, to try the issue between the King and Penn and Mead, upon the indictment for assembling unlawfully and tumultuously, did against the full and manifest evidence openly given in court, acquit the prisoners indicted in contempt of the King, etc.

The verdict of a jury, and evidence of a witness are very different things, in the truth and falsehood of them. A witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a juryman swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact enquired after; which differs nothing in the reason, though much in the punishment, from what a judge, out of various cases considered by him, infers to be the law in the question before him.

The judge . . . cannot know the fact possibly, but from the evidence which the jury have, and consequently he cannot know the matter of fact, nor punish the jury for going against their evidence, when he cannot know what their evidence is. It is true, if the jury were to have no other evidence for the fact, but what is deposed in court, the judge might know their evidence, and the fact from it, equally as they, and so direct what the law were in the case; though even when the judge and jury might honestly differ in the result from the evidence, as well as two judges may, which often happens.

But the evidence which the jury have of the fact is much other than that; for, being returned of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in court, but to this evidence the judge is stranger. 2. They may have evidence from their own personal knowledge, by which they may be assured, and some-

times are, that what is deposed in court, is absolutely false; but to this the judge is a stranger, and he knows no more of the fact than he hath learned in court, and perhaps by false depositions, and consequently knows nothing. 3. The jury may know the witnesses to be stigmatized and infamous, which may be unknown to the parties, and consequently to the court. 4. In many cases the jury are to have view necessarily, in many, by consent, for their better information; to this evidence likewise the judge is a stranger. 5. If they do follow his direction, they may be attainted, and the judgment reversed for doing that, which if they had not done, they should have been fined and imprisoned by the judge which is unreasonable. 6. If they do not follow his direction, and be therefore fined, yet they may be attainted, and so doubly punished by distinct judicatures for the same offence, which the common law admits not. . . . 7. To what end is the jury to be returned out of the vicinage whence the cause of action ariseth? To what end must hundredors be of the jury, whom the law supposeth to have nearer knowledge of the fact than those of the vicinage in general? To what end are they challenged so scrupulously to the array and poll? To what end must they have such a certain freehold, and be *probi & legales homines*, and not of affinity with the parties concerned? To what end must they have in many cases the view, for their exacter information chiefly? To what end must they undergo the heavy punishment of the villanous judgment, if after all this they implicitly must give a verdict by the dictates and authority of another man, under pain of fines and imprisonment, when sworn to do it according to the best of their knowledge? A man cannot see by another's eye, nor hear by another's ear, no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet they being not assured it is so from their own understanding, are forsworn, at least *in foro conscientiae*. 9. It is absurd a jury should be fined by the judge for not going against their evidence, when he who fineth knows not what it is; as where a jury find without evidence in court on either side. So if the jury find upon their knowledge, as the course is if the defendant plead *solvit ad diem* to a bond proved, and offers no proof. The jury is directed to find for the plaintiff, unless they know payment was made of their own knowledge, according to the plea. And it is absurd to fine a jury for finding against their evidence, when the judge knows but part of

it; for the better and greater part of the evidence may be wholly unknown to him. [The jurors were discharged.]

WOOD V. GUNSTON, UPPER BENCH (1655) (Style, 466).

Wood brought an action upon the case against Gunston for speaking of scandalous words of him; and amongst other words, for calling him a Traytor, and obteyns a verdict against him at the Bar, wherein the jury gave 1500*l* damages. Upon the supposition that the damages were excessive, and that the jury did favour the Plaintiff, the Defendant moved for a new tryal. But Sergeant Maynard opposed it, and said that after a verdict the partiality of the Jury ought not to be questioned, nor is there any Presidents for it in our Books of the Law, and it would be of dangerous consequence if it should be suffered, and the greatness of the damages given can be no cause for a new tryal, but if it were, the damages are not here excessive, if the words spoken be well considered, for they tend to take away the Plaintiff's estate, and his life. Windham on the other side pressed for a new tryal, and said it was a packed business, else there could not have been so great damages, and the Court hath power in extraordinary cases, such as this is, to grant a new tryal. Glyn, Chief Justice. It is in the discretion of the Court in some cases to grant a new tryal, but this must be a judicial, and not an arbitrary discretion and it is frequent in our Books for the Court to take notice of miscarriages of Juries, and to grant new tryals upon them, and it is for the people's benefit that it should be so, for a Jury may sometimes by indirect dealings be moved to side with one party and not be indifferent betwixt them, but it cannot be so intended of the Court; wherefore let there be a new tryal the next term, and the Defendant shall pay full costs, and the judgment to be upon this Verdict to stand for security to pay what shall be recovered upon the next verdict.

HIXT V. GOATS, KING'S BENCH (1615) (1 Rolle, 257.)

Sir Baptist Hixt had judgment in the Common Pleas against Goats and Fleetwood, and now on writ of error it was assigned for error that the covenant alleged was that whereas a bargain was made for certain land between the plaintiff and defendants, the defendant covenanted that if there were not so many acres upon the measure as the defendant had said to the plaintiff that the land sold amounted to, that he would repay 11 *l*. for each acre which lacked of the number, and alleged that upon the measure so many

acres in certain were lacking as amounted at 11 *l.* an acre to 700 *l.*, and the issue was whether they were lacking, and the jury found for the plaintiff and gave 400 *l.* damages. Croke (of counsel for plaintiff in error): It seems that this issue is repugnant, for of necessity if so many acres were lacking as the plaintiff alleged, they ought to find 700 *l.* damages, and if they do not find that so many are lacking, the verdict ought not to be found against the plaintiff. Coke (C. J.): It seems to be good enough, for there may be divers reasons why in equity they ought not to give so much damage as this amount, for it seems here that the jurors are chancellors, and it seems such verdict is good in an action on the case because only damages are to be recovered, but it is otherwise where a debt is to be recovered, and judgment was affirmed by the court as to this point. (Translated from the Law-French original.)

RAVENCROFT *v.* EYLES, COMMON PLEAS (1766). (2 Wilson, 294.) Extract from the opinion of Wilmot, C. J.

The quantum of damages is nothing to the purpose, for if the jury had power in this case to give damages, we must now take it that they have done right; and I am of the opinion that the jury were not confined to give the exact damages in the final judgment, but had a power and discretion to assess what damages they thought proper, for this being an action upon the case, the damages were totally uncertain and at large.

[This was an action against a sheriff for permitting an imprisoned debtor to escape, so that the plaintiff lost the amount of his judgment against the debtor.]

ALDER *v.* KEIGHLEY, EXCHEQUER OF PLEAS (1846). (15 Meeson & Welsby, 117.)

The learned judge in summing up, directed the jury that . . . the assignees . . . were entitled to recover the 600 *l.* minus the 100 *l.* and the discount . . . Pollock. C. B. . . . The question is, what was the contract, and was it broken by the defendant? No doubt all questions of damages, are, strictly speaking, for the jury; and however clear and plain may be the rule of law on which the damages are to be found, the act of finding is for them. But there are certain established rules according to which they ought to find; and here there is a clear rule—that the amount which would have been received if the contract had been kept is the measure of the damage if the contract is broken.

SEDGWICK, DAMAGES, 201-2. (1 Ed. 1847.)

It is in truth but slowly, and at comparatively a recent period, that the jury has relinquished its control over even actions of contract, and that any approach has been made to a fixed and legal measure of damage. But by degrees the salutary principle has been recognized, and it is now well settled, that in all actions of contract . . . and in all cases of tort where no evil motive is charged, the amount of compensation is to be regulated by the direction of the court, and the jury cannot substitute their vague and arbitrary discretion for the rules which the law lays down.

(g) *The Supremacy of Law.*

DICEY, LAW OF THE CONSTITUTION, 171.

Two features have at all times since the Norman Conquest characterized the political institutions of England.

The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government. This authority of the state or the nation was during the earlier periods of our history represented by the power of the Crown. The King was the source of law and the maintainer of order. The maxim of the Courts, *tout fuit in luy et vient de lui al commencement*, was originally the expression of an actual and undoubted fact. This royal supremacy has now passed into that sovereignty of Parliament which has formed the main subject of the foregoing chapters.

The second of these features, which is closely connected with the first, is the rule or supremacy of law. This peculiarity of our polity is well expressed in the old saw of the Courts, "*La ley est le plus haute inheritance, que le roy ad; car par la ley il meme et toutes ses sujets. sont rules, et si la ley ne fuit, nul roi, et nul inheritance sera.*"

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts has been pushed to its utmost limit. With us every official from the Prime Minister down to a constable or a collector of taxes is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their

lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, are as responsible for any act which the law does not authorize as is any private and unofficial person. Officials, such for example as soldiers or clergymen of the Established Church, are, it is true, in England as elsewhere, subject to laws which do not affect the rest of the nation, and are in some instances amenable to tribunals which have no jurisdiction over their fellow-countrymen; officials, that is to say, are to a certain extent governed under what may be termed official law. But this fact is in no way inconsistent with the principle that all men are in England subject to the law of the realm; for though a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen.

An Englishman naturally imagines that the rule of law (in the sense in which we are now using the term) is a trait common to all civilized societies. But this supposition is erroneous. Most European nations had indeed, by the end of the eighteenth century, passed through that stage of development (from which England emerged before the end of the sixteenth century) when nobles, priests and others could defy the law. But it is even now far from universally true that in continental countries all persons are subject to one and the same law, or that the Courts are supreme throughout the state. If we take France as a type of continental state, we may assert, with substantial accuracy, that officials, under which word should be included all persons in public service, are in their official capacity, protected from the ordinary law of the land, exempted from the jurisdiction of the ordinary tribunals, and subject in many respects only to official law administered by official bodies.

MAGNA CARTA (1215, reissued in 1216, 1217, 1225).

Cap. XIV. A free man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; and a merchant likewise, saving to him his merchandise; and any other's villein than ours shall be likewise amerced, saving his wainage, if he fall into our mercy. And none of the said amerciements shall be assessed, but by the oath of honest and lawful men of the vicinage. Earls and barons shall not be amerced but by their peers, and after the manner of their offence. No man of the church shall be amerced

after the quantity of his spiritual benefice, but after his lay-tenement, and after the quantity of his offence.

Cap. XIX. No constable nor his bailiff, shall take corn or other chattels of any man, if he be not of the town where the castle is, but he shall forthwith pay for same unless that the will of the seller was to respite the payment; and if he be of the same town, the price shall be paid unto him within forty days.

Cap. XXI. No sheriff nor bailiff of ours, or any other shall take horses or carts of any man to make carriage, except he pay the old price limited, that is to say, for carriage with two horse, x d. a day; for three horse xiv d. a day. No demesne cart of any spiritual knight or person, or any lord, shall be taken by our bailiffs: nor we, nor our bailiffs, nor any other, shall take any man's wood for our castles, or other our necessities to be done, but by the license of him whose the wood is.

Cap. XXIX. No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed, nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

Extracts from COKE'S SECOND INSTITUTE. (These extracts are from Lord Coke's Commentary on Cap. XXIX of Magna Carta.)

"No man shall be taken (that is) restrained of liberty, by petition or suggestion to the king or to his counsell, unless it be by indictment or presentment of good and lawfull men, where such deeds be done."

"No man shall be disseised, &c."

Hereby is intended that lands, tenements, goods and chattels shall not be seized into the king's hands, contrary to this great Charter, and the law of the land: nor shall any man be disseised of his lands or tenements or dispossessed of his goods and chattels contrary to the law of the land.

A custom was alleged in the town of C. that if the tenant cease by two years, that the lord should enter into the freehold of the tenant, and hold the same untill he were satisfied of the arrearages, and it was adjudged a custom against the law of the land, to enter into a man's freehold in that case without action or answer.

"No man destroyed" etc.

That is, fore-judged of life or limb, disinherited, or put to torture or death.

Every oppression against law, by colour of any usurped authority, is a kind of destruction, for, *quando aliquid prohibetur, et omne, per quod debetur ad illud*: and it is the worse oppression, that is done by colour of justice.

"But by the law of the land." For the true sense and exposition of these words see the statute of 37 E. 3, cap. 8 [i. e., 37th year of Edw. III.] where the words by the law of the land are rendered without due process of law, for there it is said, though it be contained in the great charter, that no man be taken, imprisoned or put out of his freehold, without process of the law: that is by indictment or presentment of good and lawfull men, where such deeds be done in due manner. or by writ originall of the common law.

Without being brought in to answer but by due process of the common law.

No man be put to answer without presentment before justices, or thing of record, or by due process, or by writ originall, according to the old law of the land.

Wherein it is to be observed, that this chapter is but declaratory of the old law of England.

[Lord Coke then explains under what circumstances a man may be arrested and imprisoned lawfully; what warrant he who makes the arrest must have; if a writ is required, what it shall contain, and proceeds:]

Imprisonment doth not only extend to false imprisonment, and unjust; but for detaining of the prisoner longer than he ought, where he was at the first lawfully imprisoned.

If the king's writ comes to the sheriffe, to deliver the prisoner, if he detains him, this detaining is an imprisonment against the law of the land.

If the sheriffe or gaoler detain a prisoner in the gaole after his acquittall unless it be for his fees, this is false imprisonment.

Now it may be demanded, if a man be taken, or committed to prison *contra legem terrae*, against the law of the land, what remedy hath the party grieved? To this it is answered: first, that every act of parliament, made against any injury, mischief, or grievance, doth either expressly or implicitly give a remedy to the party wronged, or grieved; as in many of the chapters of this great charter

appeareth; and therefore he may have an action grounded upon this great charter.

2. He may cause him to be indicted upon this statute at the king's suit.

3. He may have an *habeas corpus* out of the king's bench or chancery, though there be no privilege, etc., or in the court of common pleas or of exchequer for any officer or privileged person there; upon which writ the gaoler must retourne by whom he was committed, and the cause of his imprisonment, and if it appeareth that his imprisonment be just and lawfull, he shall be remanded to the former gaoler, but if it shall appeare to the court that he was imprisoned against the law of the land, they ought by force of this statute to deliver him; if it be doubtfull and under consideration he may be bailed.

4. He may have action of false imprisonment.

5. He may have a writ *de homine replegiando*.

ANONYMOUS CASE, COURT OF KING'S BENCH (1338). Y. B. Mich. 12, Edw. III., No. 23.

In a replevin where the defendant avowed the distress [i. e., seizure of property] for the cause that he was made collector of the fifteenths, etc., and did not show a warrant. Whereupon the plaintiff demanded judgment whether he ought to be received to that avowry without a specialty. It was said that he was sub-collector and had to make an oath, and that he would not have any other warrant. Sharesull (J) said that he could not by law be driven to act in that capacity without a special warrant, and that if he were arrested on that account, he would have a writ of false imprisonment. (Pike's translation.)

REGINALD DE NERFORD'S CASE, COURT OF KING'S BENCH (1339-40). Y. B. Hil. 11 Edw. III.; No. 34.

Note. Reginald de Nerford and others were convicted as disseisors with force and arms wherefore an *exegi facias* issued, which writ the sheriff returned to the effect that the king had instructed him by letter under the Targe that he had pardoned them their trespasses and the imprisonment, and commanded that they should not be put to damage on that account and so by reason of the king's message he had done nothing, and he returned the king's letter.

Willoughby, J. The letter should have been sent to us, and then we should have commanded the sheriff to stay proceedings; but the sheriff could not legally by virtue of any such letter have stayed proceedings otherwise than by warrant from the same place from which he had the order to outlaw. Wherefore the sheriff was in mercy [i. e., was fined] and a fresh *exegi facias* issued. (Pike's translation.)

FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE, chap. 9.

A King of England cannot, at his pleasure, make any alterations in the laws of the land, for the nature of his government is not only regal, but political. Had it been merely legal he would have a power to make what innovations and alterations he pleased, in the laws of the kingdom, impose tallages and other hardships upon the people, whether they would or no, without their consent, which sort of government the civil laws point out, when they declare *Quod principi placuit legis habet vigorem*: but it is much otherwise with a king, whose government is political, because he can neither make any alteration or change in the laws of the realm without the consent of the subject, nor burthen them, against their wills, with strange impositions, so that a people governed by such laws as are made by their own consent and approbation enjoy their properties securely and without the hazard of being deprived of them, either by the king or any other.

DARCY V. ALLEN, COURT OF KING'S BENCH (1603). (Moore, 671.)

In the King's Bench: an action on the case; and a count that, whereas men of mean trades and occupations in the commonwealth apply themselves to idle games with cards, the queen, by way of redress and restraint of this enormity, made letters patent to Ralph Bowes, authorizing him and his factors and deputies to provide playing cards, and prohibiting all others to import playing cards into the realm or to make or sell them in the realm for a certain term of years now expired, and [reciting the grant] she made another like grant to Darcy, who provided cards accordingly; yet the defendant brought cards into the realm and sold them and did things contrary to the privilege granted to the plaintiff, and to his damage to the amount of £2,000. The defendant pleaded the customs of London that a freeman may buy and sell all things merchantable, and that, since he was a freeman and haberdasher of London, and cards were things merchantable, he bought and sold them; and he

The King
is above
the law
& cannot
govern as
he pleases

demanded judgement. The plaintiff demurred in law. . . . Afterwards, Mich. 44 and 45 Eliz. (1602) it was argued by Dodderidge, against the patent, and by Fleming, solicitor, with the patent; and afterwards, the same term, by Fuller, against the patent, and Coke, Attorney General, with the Patent. And Dodderidge said that the case was tender, concerning the prince's prerogative and the subject's liberty and must be argued with much caution; for he that hews above his head chips will fall into his eyes, and *qui majestatem scrutator principis opprimetur splendore ejus*. Yet since it is the honor and safety of the prince to govern by the laws . . . therefore the princes of this realm have always been content that their patents and grants should be examined by the laws, and so is her Majesty that now is. In this examination it has always been held that the queen's grants procured against the usual and settled liberty of the subjects are void, and also those which tend to their grievance and oppression.

It was resolved by Popham, Chief Justice, *et per totam curiam*, that the said grant to the plaintiff of the sole making of cards within the realm was utterly void, and that for two reasons; 1. that it is a monopoly and against the common law. 2. That it is against divers Acts of Parliament.

CONFERENCE BETWEEN KING JAMES I. AND THE JUDGES OF ENGLAND (1612). (12 Rep. 63.)

Note, upon Sunday, the 10th of November of this same term, the king, upon complaint made to him by Bancroft, Archbishop of Canterbury, concerning prohibitions, was informed that when the question was made of what matters the ecclesiastical Judges have cognizance, either upon the opposition of the statute concerning tithes, or any other thing ecclesiastical, or upon the statute i El. concerning the high commission, or in any other case in which there is not express authority in law, the King himself may decide it in his royal person; and that the Judges are but the delegates of the king, and that the king may take what causes he shall please to determine from the determination of the Judges, and may determine them himself. And the Archbishop said that this was clear in divinity that such authority belongs to the king by the word of God in the scripture. To which it was answered by me in the presence and with the clear consent of all the Judges of England, and Barons of the Exchequer, that the King in his own person cannot adjudge any case, either criminal as treason, felony, &c.

or betwixt party and party concerning his inheritance, chattels or goods, &c., but this ought to be determined and adjudged in some court of justice, according to the law and custom of England, and always judgements are given, *ideo consideratum est per curiam* so that the court gives the judgment; and the King hath his court viz: in the upper house of Parliament, in which he with his lords is the supreme Judge over all other judges; for if error be in the Common Pleas, that may be reversed in the King's Bench; and if the court of King's Bench err, that may be reversed in the upper house of Parliament, by the King with the assent of the Lords spiritual and temporal, without the Commons, in this respect the King is called Chief Justice, and it appears in our books that the King may sit in the Star Chamber, but this was to consult with the Justices upon certain questions proposed to them, and not *in judicio*; so in the King's Bench he may sit, but the court gives the judgement: and it is commonly said in our books that the king is always present in the court in judgement of law, but upon this he cannot be nonsuit; but the judgements are always given *per curiam*; and the Judges are sworn to execute justice according to law and the custom of England. And it appears by the Act of Parliament of 2 Ed. 3 cap. 9, 2 Ed. 3. cap. 1, that neither by the great seal nor by the little seal justice shall be delayed; *ergo*, the king cannot take any cause out of any of his Courts, and give judgement upon it himself, but in his own cause he may stay it, it as it doth appear. 11 H. 4. 8. And the judges informed the King that no King after the Conquest assumed to himself to give any judgement in any cause whatever, which concerned the administration of justice within this realm, but these were solely determined by the courts of justice: and the king cannot arrest any man, as the book is in 1 H. 7. 4. for the party cannot have remedy against the King: so if the King give any judgement what remedy can the party have? Vide 39 Ed. 3 one who had a judgement reversed before the council of state; it was held utterly void, for that it was not a place where judgement may be reversed. Vide 1 H. 7. 4. Hussey, Chief Justice who was Attorney to Ed. 4. reports that Sir John Markham, Chief Justice, said to King Edw. 4 that the King cannot arrest a man for suspicion of treason or felony, as others of his lieges may; for that if it be wrong to the party grieved, he can have no remedy; and it was greatly marvelled that the Archbishop durst inform the King that such absolute power and authority as is aforesaid belonged to the King

by Word of God. Vide 4 H. 4 Cap. 22, which being translated into Latin, the effect is, *judicia in curia Regs reddita non annihilentur, sed stet judicium in suo robore quosque per judicium curiae Regis tanquam erroneum*, &c. Vide West 2 cap. 5. Vide le stat. de Marlbridge, Cap. 1. *Provisum est concordatum, et concessum, quod tam majores quam minores iustitiam habeant et recipiant in curia domini Regis, et vide le stat. de Magna Carta, cap. 29.* 25 Ed. 3. cap. 5. None may be taken by petition or suggestion made to our lord the King or his council, unless by judgement: and 43 Ed. 3. cap. 3. no man shall be put to answer without presentment before the Justices, matter of record, or by due proofs, or by writ original according to the ancient law of the land: and if anything be done against it, it shall be void in law and held for error. Vide 28 Ed. 3. c. 3. 37 Ed. 3. cap. 18. Vide 17 R. 2. *ex rotulis Parliamenti in Turri*, art. 10. A controversy of land between parties was heard by the king, and sentence given, which was repealed, for this, that it did belong to the common law. Then the King said that he thought the law was founded upon reason, and that he and others had reason as well as the judges: to which it was answered by me that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgement of law which law is an art which requires long study and experience before that a man can attain to the cognizance of it; and that the law was the golden met wand and measure to try the causes of the subjects and which protected his Majesty in safety and peace: with which the King was greatly offended and said that then he should be under the law, which was treason to affirm, as he said: to which I said that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*. [Coke who was Chief Justice and spokesman of the judges is reporting this.]

3.

THE DEVELOPMENT OF EQUITY.

MAINE, ANCIENT LAW, 23, 27.

A general proposition of some value may be advanced with respect to the agencies by which Law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity, and Legislation. Their historical order is that in which I have placed them. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or other of them. But I know of no instance in which the order of their appearance has been changed or inverted.

The next instrumentality by which the adaptation of law to social wants is carried on I call Equity, meaning by that word any body of rules existing by the side of the original civil law, founded on distinct principles, and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles. The Equity, whether of the Roman Praetors or of the English Chancellors, differs from the Fictions which in each case preceded it, in that the interference with law is open and avowed. On the other hand, it differs from Legislation, the agent of legal improvement which comes after it, in that its claim to authority is grounded, not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles, to which it is alleged that all law ought to conform. The very conception of a set of principles, invested with a higher sacredness than those of the original law, and demanding application independently of the consent of any external body, belongs to a much more advanced stage of thought than that to which legal fictions originally suggested themselves.

Extracts from COKE'S FOURTH INSTITUTE (written in the reign of James I.).

In chancery are two courts, one ordinary, *coram domino rege in cancellaria*, wherein the lord Chancellor or lord keeper of the great seale proceeds according to the right line of the laws and statutes of the realm, *secundum legem et consuetudinem Angliae*. Another extraordinary, according to the rule of equity, *secundum aequum et bonum*. And first of the former court. He hath power to hold plea of *scire fac*¹ for repeal of the King's letters patents, of peti-

¹*Scire facias*, order to show cause.

tions, of *monstrans de droits*,¹ traverse of offices,² partitions in chancery, of *scire fac'* upon recognizances in this court, writs of *audita querela* and *scire fac'* in the nature of an *audita querela*³ to avoid executions in this court, . . . and all personal actions by or against any officer or minister of that court in respect of their service or attendance therein.

This court is *officina justitiæ*, out of which all originall writs and all commissions which pass under the great seale go forth, which great seal is *clavis regni*, and for those ends this court is ever open.

Having spoken of the court of ordinary jurisdiction, it followeth according to our former division, that we speak of the extraordinary proceeding, according to the rule of equity, *secundum æquum et bonum*. . . .

Albeit our ancient authors, the Mirrour, Glanvill, Britton and Fleta doe treat of the former Court in Chancery, and of originall writs and commissions issuing out of the same, yet none of them do once mention this court of equity. We have also considered what cases in this court of equity have been reported in our books, and we find none before the reign of H. 6, and in that king's time and afterward plentifully.

GOODWIN, THE EQUITY OF THE KING'S COURT BEFORE THE REIGN OF EDWARD I., 12.

If it would seem to be true that Glanvill and Bracton borrow their conception of equity from the *æquitas* of the Roman law, they are, nevertheless, but applying new terms to an institution as essentially Teutonic as Roman. In the early Germanic State, the king exercised a jurisdiction based on broader principles of right and justice than that of the ordinary tribunals; he was not in a like degree bound down to the formality of the law and could decide the case before his court according to principles of equity. The Frankish king of the Merovingian period granted to those whom he had taken into his special protection a writ containing the privilege of withdrawing their suits from the local courts in favor of the king's court, there to be decided *secundum acquitatem*. In the Carolingian period, the man who had suffered from the strictness and formality of the ordinary court, might seek alleviation (*moderatio*) from the king. . . . Although the Roman law, which

¹ Showing of right. A proceeding to obtain relief against the crown.

² Proceedings to recover property of which the crown has taken possession on escheat or forfeiture.

³ Proceedings for relief against a judgment by reason of subsequent events operating as a discharge.

reserved the exercise of equity for the *consistorium principis*, may well have had its influence on the court of the Frankish kings, nevertheless, as Professor Brunner clearly points out, the fact that the same equitable jurisdiction existed in Anglo-Saxon England, in Iceland, and in Sweden, proves its origin as a Germanic as well as a Roman institution.

From the SECULAR ORDINANCE OF EDGAR (959-975).

Cap. 2. And let no one apply to the king in any suit, unless he at home may not be worthy of law or cannot obtain law. If the law be too heavy, let him seek a mitigation of it from the king; and for any bot-worthy crime, let no man forfeit more than his wer.

MITFORD, PLEADINGS IN CHANCERY (2 ed. 1787), 6.

A suit to the extraordinary jurisdiction of the court of chancery, on behalf of a subject merely, is commenced by preferring a bill, in the nature of a petition, to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal; or to the king himself in his court of chancery, in case the person holding the seal is a party, or the seal is in the king's hands. But if the suit is instituted on behalf of the crown, or of those who partake of its prerogative, or whose rights are under its particular protection as the objects of a public charity, the matter of complaint is offered to the court by way of information, given by the proper officer, and not by petition. Except in some few instances, bills and informations have always been in the English language; and a suit preferred in this manner in the court of chancery has been therefore commonly termed a suit by English bill, by way of distinction from the proceedings in suits within the ordinary jurisdiction of the court, which, till the statute of 4 Geo. II, c. 26 (1730), were entered and enrolled, more anciently in the French or Norman tongue, and afterwards in the Latin, in the same manner as the pleadings in the other courts of common law.

WILLIAM DODD v. JOHN BROWNING ET AL. Temp. Henry V. Calendars of Proceedings in Chancery, I, xiii. (This is the plaintiff's bill.)

To my worthy and gracious Lord Bishope of Wynchester, Chancellor of Yngelonde:

Beseching mekely youre povre bedeman William Dodde, charyotr, wech passed overe the see in service wt our liege lorde and was oon of his charioterys in his viages; & of his treste ffed in my land Johan Brownyng and Johan . . . hull of Chickewell wt my

wyfe, which Johan & Johan after azenst my will & wetynge pot my land to ferme, and delyvered my mevable good the valewe of xx marke where hem leste; & thus they kepe my dede & the dentre wt my mevable good unto myne undoynge; also which am undo for brusinge in service of our liege lorde, & in service of yt worthy Princesse my lady of Clarence & ever wolde yef my lemys might serve worthy prince sone. At reverence of God, and of that perefless Princes his moder, take this matre at hert of alms and charitie.

MARGARET APPILGARTH v. THOMAS SERGEANTSON. Temp. Henry VI. (1439). Calendars of Proceedings in Chancery, I, xli. (This is the plaintiff's bill.)

To the right reverent Fadre in God, the Bisshop of Bathe, Chaunceller of England.

Besecheth mekely Margaret Appilgarth of York wydewe, that where Thomas Sergeantson of the same, at divers times spak to yor saide besecher ful sadly and hertly in hir conceit, and sought upon hir to have hir to wyfe, desiring to have of hir certain golde to the some of xxxvj li. for costes to bee made of their mariage, & to emploie in marchandise to his encrese & profit as to hir husbande. Whereuppon she havynge ful byleve & trust in his trouthe & langage, nor desiring of him eeny contract of matrymoine, delivered him the saide some at diverse tymes; afre the which liverree furthwith he nat willing to relivere the saide some to yor saide bisechere hathe take to wyfe an othre woman, in grete deceit, hurt, & uttre undooynge of hir, without yor gracieux help & socor in this partie. Please it to yor good grace to considre the premisses, and that yor saide bisechere no remedy hath by the comone lawe to get ageine the saide some; & ther upon to graunte a writ ageins the said Thomas to appere afore you at a certaine day upon a certaine peyne by you to bee lymyt, to bee examined upon the premisses; & ther upon make him to doo as good feith & consciens wol in this partie. And she shall pray God for you.

ANONYMOUS CASE, COURT OF COMMON PLEAS (1465). Y. B. 4 E. IV., 8, 9. (Digby's translation.)

(Action of trespass *quare clausum fregit*. The defendant pleaded that plaintiff held the land to his use. Plaintiff demurred.)

Catesby (counsel for defendant). Wherefore should the defendant not avail himself of this matter, when it follows by reason that the defendant enfeofed the plaintiff to the use of the defendant, and so that the plaintiff is only in the land to the use of the defendant

and the defendant made the feoffment to the plaintiff in trust and confidence? And the plaintiff suffered the defendant to occupy the land, so that by reason that the defendant occupied the land at his will, this proves that the defendant shall have the advantage of this feoffment in trust, in order to justify his occupation of the land by this cause, &c.

Moile (J). This is a good ground of defence in Chancery, for the defendant there shall aver the intent and purpose upon such a feoffment, for in the Chancery a man shall have remedy according to conscience upon the intent of such a feoffment, but here by the course of the common law in the Common Pleas or King's Bench it is otherwise, for the feoffee shall have the land; and the feoffor shall not justify contrary to his own feoffment, that the said feoffment was made in confidence, or the contrary.

Catesby. The law of Chancery is the common law of the land, and there the defendant shall have advantage of this matter and feoffment; wherefore then shall he not have it in the same manner here?

Moile (J.) That cannot be so here in this court, as I have already said, for the common law of the land is different from the law of Chancery on this point.

Extracts from A REPLICATION OF A SERJAUNTE AT THE LAWES OF ENGLAND TO CERTAINE POINTES ALLEAGED BY A STUDENT OF THE SAID LAWES OF ENGLAND. Written temp. Henry VIII. in answer to certain points in the contemporary treatise called Doctor and Student. (Hargrave's Law Tracts, 323.)

[In Doctor and Student the student had explained that where a bond had been given and paid, but no release had been taken, though the bond was enforceable at law, the obligor might prevent suit upon it and obtain cancellation by a subpoena in chancery. To this the serjeant takes exception.]

I mervaille moche what autorite the chancellor hath to make such a writ in the Kinge's name, and howe he dare presume to make soche a writ to let the Kinge's subjects to sue his lawes, the which the kinge himselfe cannot do rightewiselye; for he is sworne the contrarie, and it is saide *hoc possumus quod de jure possumus*. Also the king's judges of this realme, that bee appointed to minyster his lawes of his realme be sworne to minister his lawes of the realme indifferentlye to the kinge's subjects; and so is not the chancellor. Also the serjaunts at the lawe be sworne to see the king's subjects

to be justified by the lawes of this realme determinable by the king's judges and not by my lord chancellor. Yet this notwithstandinge, if the kinge's subjects, upon a surmised bill put into the chauncerie, shal be prohibited by a subpoena to sue accordinge to the lawes of the realme, and be compelled to make aunsweare before my lord chauncellor, than shall the lawe of the realme be set as voyde and taken as a thing of none effecte, and the king's subjects shall be ordered by the discretion of the chauncellor and by no lawe, contrarie to all good reason and all good policy. And so me seemeth, that such a sute by a subpoena is not onlye against the law of the realme, but also against the lawe of reason. Also me seemeth, that it is not confoarmable to the lawe of God. For the lawe of God is not contrary in itself, that is to say, one in one place, and contrary in another place, if it be well perceyved and understood, as ye can tell, Mr. Doctour; but this lawe is one in one courte contrarie in another court. And so me seemeth, that it is not onlie againste the lawe of reason, but also against the lawe of God. Also me seemeth, that this suite by a subpoena is againste the common well of the realme. For the common well of everie realme is to have a good lawe, so that the subjects of the realme maie be justified by the same, and the more plaine and open that the lawe is, and the more knowledge and understanding that the subject hath of the lawe, the better it is for the common well of the realme; and the more uncertaine that the lawe is in any realme, the lesse and the worse it is for the common well of the realme. But if the subjects of any realme shall be compelled to leave the lawe of the realme, and to be ordered by the discretion of one man, what thinge may be more unknownen or more uncertaine? But if this manner of suite by a subpoena be maintayned, as you Mr. Student wold have it, in what uncertaintie shall the king's subjects stahde, whan they shall be put from the lawe of the realme, and be compelled to be ordered by the discretion and conscience of one man! And namelie for as moch as conscience is a thinge of great uncertaintie; for some men thinke that if they treade upon two strawes that lye acrossse, that they ofende in conscience, and some man thinketh that if he lake money, and another hath too moche, that he may take part of his with conscience; and so divers men divers conscience; for everie man knoweth not what conscience is so well as you Mr. Doctour.

Student. Howe is it than, that the chancellours of England have used this?

Serjaunte. Verelie I thincke for lacke of knowledge of the goodnes of the lawes of the realme; for moste commonly the chancelours of England have been spiritual men, that have had but superficial knowledge in the lawes of the realme; and whan soch a byll hath been made unto them, that soche a man should have greate wronge to be compelled to paie two times for one thinge, the chancellour, not knowinge the goodness of the common lawe, neyther the inconvenience that mighte ensue by the saide writ of subpoena, hath temerouslye directed a subpoena to the plaintiff in the kinge's name, commandinge him to cease his suite that he hath before the king's justices, and to make aunsweare before him in the chauncerie: and he regardinge no lawe, but trustinge to his owne wit and wisdom, giveth judgment as it pleaseth himselfe, and thinketh, that his judgment being in soche authoritie is farre better and more reasonable than judgments that be given by the king's justices according to the common lawe of the realme. In my conceite in this case I may liken my lord chaunceler, which is not learned in the lawes of the realme, to him, that stands in the Vale of White-horse farre from the horse and holdeth the horse; and the horse seemeth and appeereth to him a goodly horse and well proportioned in every point, and that if he come neere to the place wher the horse is he can perceave no horse nor proportion of any horse. Even so it fareth by my lord chauncelor that is not learned in the lawes of the realme; for whan such a bill is put unto him, it appeereth to him to be a matter of great conscience and requireth reformation; and the matter in the bill appeereth so to him, because he is farre from the understandinge and the knowledge of the lawe of the realme and the goodnes thereof: but if he draw neere to the knowledge and understandinge of the common law of the realme, so that he maie come to the pefecte knowledge and goodnes of it, he shall well perceive that the matter containyd in the bill put to him in the chauncerie is no matter to be reformed there, and namelie in soche wise as is used. Moreover, Mr. Student, I marvaile moche, that ye say that men that have wronge maye be holpen in many cases by a subpoena, in so moche as you have in your *Natura Brevium* sevrall writts and divers natures for the reformation of everie wronge that is donne and committed contrarye to the lawes of the realme; and amonge all your writs that you have in your *Natura Brevium*, ye have none there called subpoena, neyther yet the nature of him declared there, as ye have of all the writs specified in the saide booke. Wherefore

me seemeth it standeth not with your studie, neither yet with your learninge of the lawes of the realme, that any man that is wronged should have his remedie by a subpoena. If a subpoena had been a writ ordained by the lawe of the realme to reforme a wronge, as other writs in the saide booke be, he shold have bin set in the booke of *Natura Brevium*, and the nature of him declared there, and for the reformation of what wronge it layeth, as it is in the writs contayned in the saide booke; and for as moche as it is not so, it is a writ abused in my mynde contrarie to the common lawe of the realme, and contrary to reason, and all good conscience, and yet is coloured by the pretence of conscience.

Extracts from COKE'S FOURTH INSTITUTE.

In the parliament holden 13 R. 2 (1390) the commons petitioned to the king that neither the chancellor nor other counsellor doe make any order against the common law, nor that any judgment be given without due processe of law. Whereunto the king's answer was, The usages heretofore shall stand, so as the king's royalty be saved.

. . .

In the parliament holden in 17 R. 2 (1394), it is enacted at petition of the commons, that forasmuch as people were compelled to come before the king's council, or in chancery, by writs grounded upon untrue suggestions, that the chancellor for the time being presently after that such suggestions be duly found and proved untrue, shall have power to ordain and award damages according to his discretion to him who is so travelled unduly as is aforesaid. .

[Lord Coke now quotes or cites three similar petitions of the commons in the reigns of Henry IV. and Henry V., and proceeds:]

The commons petitioned that no writs or privy seals be sued out of the chancery, exchequer, or other places to any man to appear at a day upon a pain, either before the king and his counsell, or in any other place, contrary to the ordinary course of the common law; whereunto the king answered that such writs should not be granted without necessity.

Amongst the petitions of the commons you shall find this, That all writs of subpoena and *certis de causis*, going out of the chancery and the exchequer may be enrolled, and not granted of matters determinable at the common law, on pain the plaintiff doe pay by

way of debt to the defendant forty pound: whereunto is answered the king will be advised.¹

It is enacted to endure untill the next parliament, that the exception (how that the party hath sufficient remedy at the common law) shall discharge any matter in chancery. At the next parliament you shall find a petition in these words: No man to be called by privy seal or subpoena to answer any matters but such as have no remedy by the common law, and that to appear so by the testimony of two justices of either bench, and by indenture between them and the plaintiff. . . .

In anno 31 H. 6, cap. 2 (1453) there is a proviso in these words: Provided that no matter determinable by the law of this realm shall be by the said act determined in other form than after the course of the same law in the king's courts having jurisdiction of the same law.

LORD CAMPBELL, *LIVES OF THE CHIEF JUSTICES* (3 ed.), I, 332.

Lord Chancellor Ellesmere having very properly granted an injunction against suing out execution on a judgment obtained in the King's Bench by a gross fraud, Lord Chief Justice Coke, asserting that this was a subversion of the common law of England, and contrary to an act of parliament, induced the party against whom the injunction was granted to prepare an indictment against the opposite party, his counsel, his solicitor, and the Master in Chancery who had assisted the Chancellor when the injunction was granted. He then took infinite pains in seeking out and marshalling the evidence by which the prosecution was to be supported. The grand jury, however, threw out the indictment; and the matter being brought before the King (James I), he decided with a high hand in favour of the Court of Chancery (1616).

HAYNES, *OUTLINES OF EQUITY*, 14.

The history of the growth and development of equity jurisdiction is, indeed, by no means, as not unfrequently supposed, that of a gradual, slow encroachment. On the contrary, turning to the earliest records, we see at first the chancellors trying apparently to redress every grievance of whatever nature, which would otherwise be remediless; while the labours of the more recent judges consisted, not merely in developing heads of equity already founded, but in pruning the luxuriance of the earlier jurisdiction.

¹The formula when the king vetoes a bill.

In illustration of this position, let me turn to the book which I now take up, and which contains the most authentic information we possess respecting the early proceedings in chancery. It is the first volume, "Calendars in Chancery of Queen Elizabeth," printed by order of the record commissioners. Prefixed to the calendars is contained a selection of bills and petitions of dates anterior to Queen Elizabeth's reign, accompanied, in the later instances, by the answers, replications, and depositions of the witnesses. The general character of these early proceedings is in the preface to the publication thus described: "Most of the ancient petitions appear to have been presented in consequence of assaults and trespasses and a variety of outrages which were cognizable at common law, but for which the party complaining was unable to obtain redress, in consequence of the maintenance and protection afforded to his adversary by some powerful baron, or by the sheriff, or by some officer of the county in which they occurred." I need hardly observe to the youngest beginner amongst you, that any such cause for coming into equity has long since ceased to exist; and even if any such in fact existed, it would clearly at the present day constitute no ground for equitable interposition. . . .

But in truth, we find considerable inaccuracy of opinion respecting the true function of equity prevailing at a much later date than that of these precedents. Thus, the celebrated confidential adviser of Henry the Seventh, Archbishop Morton, appears, according to a report in the Year Books, to have denied even the distinction between "technical equity" and "equity in the sense of natural justice." The report of the case which is noticed by both Mr. Spence and Lord Campbell is rather curious.

It appears that one of two executors, colluding with a debtor to the testator's estate, had released the debtor. The coexecutor filed a bill against the executor and the debtor. The chancellor was disposed to grant relief. Fineux, counsel for the defendant, observes "that there is the law of the land for many things,—and that many things are tried in Chancery which are not remediable at common law; and some are merely matter of conscience, between a man and his confessor," thus pointing out accurately the distinctions between law, equity, and religion. But the chancellor retorts: "Sir, I know that every law is, or ought to be, according to the law of God" (ignoring thus altogether any distinction between law and religion); and then, merging completely the chancellor in the archbishop, he

continues: "and the law of God is, that an executor, who is evilly disposed, shall not waste all the goods, etc. And I know well that if he do so, and do not make amends, if he have the power, *il sera damné* in hell." And then the chancellor proceeds to lay down some rather unsound law.

EARL OF OXFORD'S CASE, In Chancery (1616). (2 White & Tudor, Lead. Cas. 642.)

Lord Chancellor Ellesmere: 1. The law of God speaks for the plaintiff. Deut. xxviii.

2. And equity and good conscience speak wholly for him.

3. Nor does the law of the land speak against him. But that and equity ought to join hand in hand in moderating and restraining all extremities and hardships.

By the law of God, he that builds a house ought to dwell in it; and he that plants a vineyard ought to gather the grapes thereof. Deut. xxviii. 30.

And yet here in this case, such is the conscience of the doctor, the defendant, that he would have the houses, gardens, and orchards, which he neither built nor planted; but the chancellors have always corrected such corrupt consciences, and caused them to render *quid pro quo*; for the common law itself will admit no contract to be good without *quid pro quo*, or land to pass without a valuable consideration; and therefore equity must see that a proportionable satisfaction be made in this case.

[The Chancellor then cites and discusses a precedent, and proceeds:]

And his Lordship, the plaintiff in this case, only desires to be satisfied of the true value of the new building and planting since the conveyance, and convenient allowance for the purchase.

And equity speaks as the law of God speaks, but you would silence equity.

First. Because you have a judgment at law.

Secondly. Because that judgment is upon a statute law.

To which I answer,—

First. As a right of law can not die, no more can equity in chancery die; and, therefore, *nullus recedat a Cancellaria sine remedio*, 4 E. 4, 11, a. Therefore the Chancery is always open; and although the term be adjourned, the Chancery is not; for conscience and equity are always ready to render to everyone their due, 9 E.

4, II a. The Chancery is only removable at the will of the king and Chancellor; and by 27 E. 3, 15, the Chancellor must give account to none, but only to the King and Parliament.

The cause why there is a Chancery is, for that men's actions are so divers and infinite, that it is impossible to make any general law which may aptly meet with every particular act, and not fail in some circumstances.

The office of the Chancellor is to correct men's consciences for frauds, breaches of trusts, wrongs, and oppressions, of what nature soever they be, and to soften and mollify the extremity of the law, which is called *summum jus*.

But, secondly, it is objected that this is a judgment upon a statute law.

To which I answer, it hath ever been the endeavor of all parliaments to meet with the corrupt consciences of men as much as might be, and to supply the defects of the law therein; and if this cause were exhibited to the Parliament, it would soon be ordered and determined by equity; and the Lord Chancellor is, by his place, under his majesty, to supply that power until it may be had, in all matters of meum and tuum, between party and party; and the Lord Chancellor doth not except to the statute or the law (judgment) upon the statute, but taketh himself bound to obey that statute, according to 8 Ed. 4; and the judgment thereupon may be just; and the college, in this case, may have a good title in law, and the judgment yet standeth in force.

SELDEN, TABLE TALK, tit. Equity (Selden died 1654. His *Table Talk* was published by his amanuensis after his death.)

Equity in law is the same that the spirit is in religion, what everyone pleases to make it. Sometimes they go according to conscience, sometimes according to law, sometimes according to the will of the court. Equity is a roguish thing; for the law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard. For if the measure we call a chancellor's foot, what an uncertain measure this would be. One chancellor has a long foot, another a short foot, another an indifferent foot; 'tis the same thing in the chancellor's conscience.

SPENCE, EQUITABLE JURISDICTION OF THE COURT OF CHANCERY, I, 413.

Some extravagances which originated perhaps in too high an estimate on the part of the Chancellors of Henry VIII and Elizabeth, of their individual endowments, and erroneous views as to the nature of their office, occasioned in part by the language of flattery, gave occasion to the great Selden to remark, more perhaps in jest than in earnest, that equity was a roguish thing; it was according to the conscience of him that was Chancellor, and as that was larger or narrower, so was equity. This might indeed have been a true picture of the court on its original foundation, had not the equitable doctrines and provisions of the Roman Law been taken as the principles on which its decisions were to be founded; but it is plain that the jurisdiction never could have been established if the conscience of the judge had been his only guide. It may be remarked, however, that too much consideration was sometimes given to the Conscience of the Queen. It is "the holy conscience of the Queen, for matter of equity," said Sir C. Hatton [temp. Elizabeth], "that is in some sort committed to the Chancellor."

But generally during this reign, as well as before, equity and conscience as rules of decision, were deferred to principles deduced from the Roman jurisprudence, the sanction of which was occasionally directly adverted to, independently of the private conscience of the judge. Nothing is recorded as having been delivered judicially from the bench which can warrant the supposition that the private opinion or conscience of the judge, or what is perhaps equivalent, his whim or caprice, independent of principle and precedent, was a legitimate ground of decision.

No doubt precedents had to be made when cases of extremity, to use the language of the times, arose, calling for the interference of the court to correct the rigor of the law or to supply its defects.

These precedents, though not of binding authority like judgments at law, for if they had been at that time a Court of Equity must afterwards have been erected to correct the Court of Chancery; nor entered of record as judgments at law, were frequently, from Henry VI downwards, reported in the Year Books,—to be referred to, no doubt, as future guides. These, together with other cases, were collected and published in the reigns of Elizabeth, James, and Charles.

The Chancellors in many cases expressly referred to precedent as the ground of their decisions. *now always.*

We find the Chancellor in the time of Car. I, where the case exhibited no novelty in its circumstances so as to call for a precedent to be made, refusing to interfere because there was no precedent; and there are instances of references to the chief justices and other judges to see whether the Lord Chancellor had jurisdiction in the cause. Lord Ellesmere (temp. James I) fully recognizing the force of precedent, endeavored to provide against the irregularities, to which he occasionally gave way, being converted into precedents. I may add that the precedents collected by Tothill and Sir George Cary, have been cited by subsequent judges, amongst others by the great Lord Hardwicke [Chancellor, 1737-1756], so that there is an uninterrupted chain in the influence of precedent from the earliest times, in the application of the principles of equity and conscience, positively, that is where they ought to be applied, and negatively, that is, where the law ought to be left to its own operation.

When, therefore, Lord Nottingham declared (1676), that with such a Conscience as is only *naturalis et interna* this court has nothing to do, the Conscience by which he was to proceed was merely *civilis* and *politica*, he was not making a rule, but declaring what had become of the established doctrine of the Court.

GEE v. PRITCHARD, in Chancery (1818). (2 Swanst. 402.)

Lord Eldon, Chancellor, said: It is my duty to submit my judgment to the authority of those who have gone before me; and it will not be easy to remove the weight of the decisions of Lord Hardwicke and Lord Apsley. The doctrines of this Court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I can not agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.

BLACKSTONE, COMMENTARIES, III, 434, 436.

But the systems of jurisprudence in our courts, both of law and equity, are now equally artificial systems, founded on the same principles of justice and positive law, but varied by different usages

in the forms and mode of their proceedings; the one being originally derived (though much reformed and improved) from the feodal customs as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies introduced by their clerical chancellors.

Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law, viz., the true construction of securities for money lent, and the form and effect of a trust or second use; upon these main pillars hath been gradually erected that structure of jurisprudence which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the legal system which hath hitherto been delineated in these commentaries; however, different they may appear in their outward form, from the different taste of their architects.

1. And, first, as to the mode of proof. When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction, and, that being once discovered, the judgment is the same in equity as it would have been at law. But, for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every court in all matters of account. As incident to accounts, they take a concurrent cognizance of the administration of personal assets, consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto; of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, receivers, factors, and agents. It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts.

From the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud; all matters in the private knowledge of the

party, which, though concealed, are binding in conscience; and all judgments at law, obtained through such fraud or concealment. And this, not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment obtained by suppressing the truth; and which, had the same facts appeared on the trial as now are discovered, he would never have attained at all.

2. As to the mode of trial. This is by interrogatories administered to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside. If therefore the cause arises in a foreign country, and the witnesses reside upon the spot; if, in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if witnesses residing at home are aged or infirm; any of these cases lays a ground for a court of equity to grant a commission to examine them, and (in consequence) to exercise the same jurisdiction, which might have been exercised at law, if the witnesses could probably attend.

3. With respect to the mode of relief. The want of a more specific remedy, than can be obtained in the courts of law, gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory agreements. A court of equity will compel them to be carried into strict execution, unless where it is improper or impossible: instead of giving damages for their non-performance. And hence a fiction is established, that what ought to be done shall be considered as being actually done, and shall relate back to the time when it ought to have been done originally: and this fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. So of waste, and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction. Over questions that may be tried at law, in a great multiplicity of actions, a court of equity assumes a jurisdiction, to prevent the expense and vexation of endless litigations and suits. In various kinds of frauds it assumes a concurrent jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief: as by setting aside fraudulent deeds, decreeing reconveyances, or directing an absolute conveyance merely to stand as a security. And thus, lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands, a court

of equity holds plea of all debts, encumbrances, and charges that may affect it or issue thereout.

4. The true construction of securities for money lent is another fountain of jurisdiction in courts of equity. When they held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum *bona fide* advanced, with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it; but this ownership is mutually transferred, and the mortgagor is barred from redemption if, when called upon by the mortgagee, he does not redeem within a time limited by the court; or he may when out of possession be barred by length of time, by analogy to the statute of limitations.

5. The form of a trust, or second use, gives the courts of equity an exclusive jurisdiction as to the subject-matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction: but the trust is governed by very nearly the same rules, as would govern the estate in a court of law, if no trustee was interposed: and by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of the common law.

These are the principal (for I omit the minuter) grounds of the jurisdiction at present exercised in our courts of equity: which differ, we see, very considerably from the notions entertained by strangers, and even by those courts themselves before they arrived to maturity; as appears from the principles laid down, and the jealousies entertained of their abuse, by our early juridical writers cited in a former page; and which have been implicitly received and handed down by subsequent compilers, without attending to those gradual accessions and derelictions, by which in the course of a century this mighty river hath imperceptibly shifted its channel. Lambard in particular, in the reign of queen Elizabeth, lays it down, that "equity should not be appealed unto, but only in rare and extraordinary matters: and that a good chancellor will not arrogate authority in every complaint that shall be brought before him

upon whatsoever suggestion: and thereby both overthrow the authority of the courts of common law, and bring upon men such a confusion and uncertainty, as hardly any man should know how or how long to hold his own assured to him." And certainly, if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty would be a worse evil than any hardship that could follow from rules too strict and inflexible. Its powers would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respects by law and not by will. But since the time when Lambard wrote, a set of great and eminent lawyers, who have successively held the great seal, have by degrees erected the system of relief administered by a court of equity into a regular science, which can not be attained without study and experience, any more than the science of law: but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what mode of suit, as readily and with as much precision in a court of equity as in a court of law.

4-

THE LAW MERCHANT.

CARTER, *EARLY HISTORY OF THE LAW MERCHANT IN ENGLAND*, 17 *Law Quar. Rev.* 232.

Although the custom of the King's Court became the common law of the land, there were three classes of persons who were in a varying degree exempt from it, the priest, the Jew, and the merchant. The relation of the priest to the Canon law of the Church has been treated of authoritatively by Professor Maitland; the place taken by the Jew will be further elucidated, we hope, by the promised volume of the Selden Society on the Jewish Plea Rolls; the position of the merchant is still in need of authentic treatment. We know, however, that side by side with the custom of the King's Court existed the 'custom of merchants,' whatever that was. The reasons for this obscurity are twofold; few merchant cases came up for decision in the King's Courts, and the local records such as those of the Piepoudre Court of Bristol, the great western port of the kingdom, have most unfortunately been lost or destroyed.

And yet by piecing together fragments of evidence collected here and there, we can arrive at an opinion to the effect that there was a definite body of mercantile law, slightly affected perhaps by local variations, which was recognized in this country and in the ports of Europe, and that it was administered there and here in Courts of similar character supported by the royal authority. It was really Law, and it was really International. The history of the law merchant in this country can shortly be stated. It was from the first administered in local and popular Courts of *mercatores et marinarii*, and was intimately connected with the King in Council. There is statutory recognition of this connexion in the Statute of the Staple. The Court of Admiralty after a struggle usurped the jurisdiction, the common law Courts in turn destroyed the Admiralty jurisdiction by repeated prohibitions, while the merchants, dissatisfied with the illiberal policy of the common lawyers, might have resorted to the Courts of Chancery whose doctrines and practice were very similar to their own, had not Lord Mansfield appeared to create the mercantile law of this country.

BLACKSTONE, COMMENTARIES, I, 75 (1765).

To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the custom of merchants, or *lex mercatoria*; which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it; being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions; for it is a maxim of law, that "*cuiuslibet in sua arte credendum est.*"

The rules relating to particular customs regard either the proof of their existence; their legality when proved; or their usual method of allowance. And first we will consider the rules of proof:

As to gavelkind, and borough-English, the law takes particular notice of them, and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded, and as well the existence of such customs must be shown, as that the thing in dispute is within the custom alleged. The trial in both cases (both to show the existence of the custom, as, "that in the manor of Dale, lands shall descend only to the heirs male, and never to the heirs female;" and also to show "that the lands in question are within that manor") is by a jury of twelve men, and not by the

judges; except the same particular custom has been before tried, determined, and recorded in the same court.

WOODDESSON, *ELEMENTS OF JURISPRUDENCE*, lxxix (1792).

But the branch of the law of nations, which there have been the most frequent occasions of regarding, especially since the great extension of commerce, and intercourse with foreign traders, is called the law of Merchants. This system of generally received law has been admitted to decide controversies touching bills of exchange, policies of insurance, and other mercantile transactions, both where the subjects of any foreign power, and (for the sake of uniformity) where natives of this realm only, have been interested in the event. Its doctrines have of late years been wonderfully elucidated, and reduced to rational and firm principles, in a series of litigations before a judge, long celebrated for his great talents, and extensive learning in general jurisprudence, and still more venerable for his animated love of justice. Under his able conduct and direction, very many of these causes have been tried by a jury of merchants of London; and such questions of this kind as have come before the Court of King's Bench in term time, are laid before the public by a copious and elaborate compiler.

The law of merchants, as far as it depends on custom, constitutes a part of the voluntary, not of the necessary, law of nations. It may, therefore, so far as it is merely positive, be altered by any municipal legislature, where its own subjects only are concerned.

WOODDESSON, *LECTURES ON THE LAW OF ENGLAND*, III, 53 (1792).

By the custom of merchants, he to whom a bill is payable, commonly called the holder, ought, within a reasonable time after his receipt of it, to present the bill to him, to whom it is directed, for his acceptance, and such person ought also, within a reasonable time, to accept the bill, or refuse payment of it; and reasonable notice ought to be given to drawers and indorsers of nonpayment or nonacceptance by those liable in the first instance.

The declarations in actions on bills of exchange, after stating the particular facts, adds, "by reason whereof, and by the custom of merchants, the defendant became liable to pay, and, being so liable, undertook and faithfully promised to pay the contents of the bill."

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On the other hand, if two persons draw a bill of exchange payable "to our order," this, indeed, was thought by the court of King's Bench to render them so far partners as to that transaction (though admitted not to be so otherwise,) that an indorsement by one of them was binding and effectual: but the cause was finally determined by a special jury in London, who were decidedly of opinion, that, by the usage of merchants and bankers, the indorsement ought to have been by both the payees.

In what cases, and how far, insurers shall be liable, is governed chiefly by the custom of merchants; and some at least of that profession are usually impanelled on the jury to try these suits.

CHRISTIAN'S NOTE TO 1 BL. COMM. 75 (1803).

The *lex mercatoria*, or the custom of merchants, like the *lex et consuetudo parliamenti*, describes only a great division of the law of England. The laws relating to bills of exchange, insurance, and all mercantile contracts, are as much the general law of the land as the laws relating to marriage or murder. But the expression has very unfortunately led merchants to suppose, that all their crude and new-fangled fashions and devices immediately become the law of the land; a notion which, perhaps, has been too much encouraged by our courts. Merchants ought to take their law from the courts, and not the courts from merchants; and when the law is found inconvenient for the purposes of extended commerce, application ought to be made to parliament for redress. Merchants ought to be considered in no higher degree than their own legislators or judges upon subjects of commerce, than farmers or sportsmen in questions upon leases or the game-laws. For the position of Lord Coke ought never to be forgotten:—"That the common law has no controller in any part of it, but the high court of parliament; and if it be not abrogated or altered by parliament, it remains still, as Littleton saith." (Co. Litt. 115). This is agreeable to the opinion of Mr. Justice Foster, who maintains that "the custom of merchants is the general law of the kingdom, and therefore ought not to be left to a jury after it has been settled by judicial determinations."

LORD CAMPBELL, LIVES OF THE CHIEF JUSTICES, 3 ed., III, 274. (Life of Lord Mansfield.)

In the reign of George II., England had grown into the greatest manufacturing and commercial country in the world, while her

jurisprudence had by no means been expanded or developed in the same proportion. The legislature had literally done nothing to supply the insufficiency of feudal law to regulate the concerns of a trading population; and the Common law judges had, generally speaking, been too unenlightened and too timorous to be of much service in improving our code by judicial decisions. Hence, when questions necessarily arose respecting the buying and selling of goods,—respecting the affreightment of ships,—respecting marine insurances,—and respecting bills of exchange and promissory notes, no one knew how they were to be determined. Not a treatise had been published upon any of these subjects, and no cases respecting them were found in our books of reports,—which swarmed with decisions about lords and villeins,—about marshalling the champions upon the trial of a writ of right by battle,—and about the customs of manors, whereby an unchaste widow might save the forfeiture of her dower by riding on a black ram, and in plain language confessing her offence. Lord Hardwicke had done much to improve and systematise Equity—but proceedings were still carried on in the courts of Common Law much in the same style as in the days of Sir Robert Tresilian and Sir William Gascoigne. Mercantile questions were so ignorantly treated when they came into Westminster Hall, that they were usually settled by private arbitration among the merchants themselves. If an action turning upon a mercantile question was brought into a court of law, the judge submitted it to the jury, who determined it according to their own notions of what was fair, and no general rule was laid down which could afterwards be referred to for the purpose of settling similar disputes.

He [Lord Mansfield] saw the noble field that lay before him, and he resolved to reap the rich harvest of glory which it presented to him. Instead of proceeding by legislation, and attempting to codify as the French had done very successfully in the *Coustumier de Paris*, and the *Ordonnance de la Marine*, he wisely thought it more according to the genius of our institutions to introduce his improvements gradually by way of judicial decision. As respected commerce, there were no vicious rules to be overturned,—he had only to consider what was just, expedient, and sanctioned by the experience of nations farther advanced in the science of jurisprudence. His plan seems to have been to avail himself, as often as opportu-

nity admitted, of his ample stores of knowledge, acquired from his study of the Roman civil law, and of the juridical writers produced in modern times, by France, Germany, Holland, and Italy,—not only in doing justice to the parties litigating before him, but in settling with precision and upon sound principles a general rule, afterwards to be quoted and recognised as governing all similar cases. Being still in the prime of life, with a vigorous constitution, he no doubt fondly hoped that he might live to see these decisions, embracing the whole scope of commercial transactions, collected and methodised into a system which might bear his name. When he had ceased to preside in the Court of King's Bench, and had retired to enjoy the retrospect of his labours, he read the following just eulogy bestowed upon them by Mr. Justice Buller, in giving judgment in the important case of *Lickbarrow v. Mason*, respecting the effect of the indorsement of a bill of lading:—

“Within these thirty years the commercial law of this country has taken a very different turn from what it did before. Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances put together. Before that period we find that, in courts of law, all the evidence in mercantile cases was thrown together; they were left generally to a jury; and they produced no general principle. From that time, we all know, the great study has been to find some certain general principle, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon enlarged, and explained, till we have been lost in admiration at the strength and stretch of the understanding. And I should be very sorry to find myself under a necessity of differing from any case upon this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country.”

I naturally begin with the law of INSURANCE,—almost his own creation; and I might copy the whole of a copious treatise on the subject by Mr. Justice Park, which is composed almost entirely of his decisions and *dicta*.

Likewise with regard to bills of exchange and promissory notes. Lord Mansfield first promulgated many rules that now appear to

us to be as certain as those which guide the planets in their orbits. For example, it was till then uncertain whether the second indorsee of a bill of exchange could sue his immediate indorser without having previously demanded payment from the drawer; and it was said three Chief Justices had ruled the point one way at *Nisi Prius*, and as many Chief Justices had ruled it the other way.

5.

THE REFORM MOVEMENT.

The Reform Movement, which completed by means of legislation the modernizing of the common law, begun by the court of chancery and carried on by the law merchant, may be said roughly to cover the period from 1776 to 1876. We may begin with 1776 for two reasons: (1) Because in that year Jeremy Bentham published his first work, the *Fragment on Government*; (2) because in the same year the American Declaration of Independence set free a new group of common-law legislatures to take a hand in the renovation of our law. The period may be said to close with the taking effect of the English Judicature Act of 1873. Although legislation is still active in all common-law jurisdictions, it is no longer directed to sweeping and far-reaching changes. The tendency now is to codify and restate rather than to alter.

BLACKSTONE, COMMENTARIES, III, 267.

But this intricacy of our legal process will be found, when attentively considered, to be one of those troublesome, but not dangerous evils, which have their root in the frame of our constitution, and which therefore can never be cured, without hazarding everything that is dear to us. In absolute governments when new arrangement of property and a gradual change of manners have destroyed the original ideas on which the laws were devised and established, the prince by his edict may promulge a new code, more suited to the present emergencies. But when laws are to be framed by popular assemblies, even of the representative kind, it is too Herculean a task to begin work of legislation afresh, and extract a new system from the discordant opinions of more than five hundred counsellors. A single legislator or an enterprising sovereign, a Solon or Lysurgus, a Justinian or a Frederick, may at any time form a concise and perhaps an uniform plan of justice: and evil betide that presumptuous subject who questions its wisdom or utility. But who, that is acquainted with the difficulty of new model-

ing any branch of our statute laws (though relating but to roads or to parish settlements) will conceive it ever feasible to alter any fundamental point of the common law with all its appendages and consequents and set up another rule in its stead? When therefore by the gradual influence of foreign trade and domestic tranquility the spirit of our military tenures began to decay and at length the whole structure was removed, the judges quickly perceived that the forms and delays of the old feudal actions (guarded with their several outworks of essoins, vouchers, aid prayers, and a hundred other formidable entrenchments) were ill suited to that more simple and commercial mode of property which succeeded the former, and required a more speedy decision of right to facilitate exchange and alienation. Yet they wisely avoided soliciting any great legislative revolution in the old established forms which might have been productive of consequences more numerous and extensive than the most penetrating genius could foresee; but left them as they were to languish in obscurity and oblivion, and endeavored by a series of minute contrivances to accommodate such personal actions as were then in use, to all the most useful purposes of remedial justice: and where, through the dread of innovation, they hesitated at going so far as perhaps their good sense would have prompted them, they left an opening for the more liberal and enterprising judges who have sate in our courts of equity to shew them their error by supplying the omissions of the courts of law. And since the new expedients have been refined by the practice of more than a century, and are sufficiently known and understood they in general answer the purpose of doing speedy and substantial justice, much better than could now be effected by any great fundamental alterations. The only difficulty that attends them arises from their frictions and circuities; but when once we have discovered the proper clew that labyrinth is easily pervaded. Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless, and therefore neglected. The inferior apartments now accommodated to daily use are cheerful and commodious, though their approaches may be winding and difficult.

BLACKSTONE, COMMENTARIES, IV, 442.

We have seen in the course of our inquiries in this and the former volumes that the fundamental maxims and rules of the law

which regard the rights of persons and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wisdom of ages: that the forms of administering justice came to perfection under Edward I; and have not been much varied nor always for the better since: that our religious liberties were fully established at the Reformation: but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely regained till after the restoration of King Charles, nor fully and explicitly acknowledged and defined till the æra of the happy revolution. Of a constitution so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise which is justly and severely its due:—the thorough and attentive contemplation of it will furnish its best panegyric. It hath been the endeavour of these Commentaries, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan; to explain the use and distribution of its parts, and from the harmonious concurrence of those parts, to demonstrate the elegant proportion of the whole.

POLLOCK, *THE LAW OF ENGLAND, I—L VICTORIAE*, 3 *Law Quar. Rev.* 643.

Blackstone caught and expressed the spirit of his time with consummate skill, but he caught it only just in time. Hardly was his ink dry when Bentham sounded a blast that rudely disturbed the supposed finality of the common law, and (what was even a greater matter) the independence of the United States, insured the free and ample development of English legal ideas in directions and for purposes as yet unknown. With the nineteenth century we are started in a wide and ever expanding field of new adventures.

The commencement of our sovereign lady's regnal year coincides approximately with the opening of a new period of development in the law of England. That period is not yet closed, but enough has been done to make it certain that for the future historian of our law on what shore of what ocean soever he is destined to arise, Her Majesty's reign will not be less eventful or interesting than that of Edward I. or Elizabeth.

LORD BROUGHAM, *SPEECHES*, II, 288 (1838).

The age of law reform and the age of Jeremy Bentham are one and the same. No one before him ever seriously thought of ex-

posing the defects in our English system of jurisprudence. He it was who first made the mighty step of trying the whole provisions of our jurisprudence by the test of expediency, fearlessly examining how far each part was connected with the rest, and with a yet more undaunted courage inquiring how far even its most consistent and symmetrical arrangements were framed according to the principles which should pervade a code of laws, their adaptation to the circumstances of society, to the wants of men, and to the promotion of human happiness.

Extracts from A CENTURY OF LAW REFORM (1901). (These extracts are from the Introductory Lecture of Dr. Odgers.)

We find since 1800 a marked improvement both in the substance of our criminal law and in the whole tone of its administration. In the year 1800 there were more than 200 crimes punishable with death! Of these more than two-thirds had been made capital during the eighteenth century. Sir Samuel Romilly asserted that there was no other country in the world "where so many and so large a variety of actions were punishable by loss of life." Nearly all felonies were capital. If a man falsely pretended to be a Greenwich pensioner, he was hanged. If he injured a county bridge, or cut down a young tree, he was hanged. If he forged a bank note, he was hanged. If he stole property valued at five shillings; if he stole anything above the value of one shilling from the person; if he stole anything at all, whatever its value, from a bleaching ground; he was hanged. If a convict returned prematurely from transportation; or if a soldier or sailor wandered about the country begging without a pass: he was hanged. And these barbarous laws were relentlessly carried into execution. A boy only ten years old was sentenced to death in 1816; whether he was actually executed I can not say.

Thanks to Sir Samuel Romilly, and later to Sir James Mackintosh, the number of capital offences was gradually reduced; and now we have but four crimes punishable with death, two of which very rarely occur. In 1800, too, our prisons were sinks of iniquity and disease; the gaolers feared to enter a cell lest they should catch gaol-fever; and a sentence of imprisonment was often a sentence to death. Now great care is taken of the health and morals of our convicts in prison. And a criminal trial now is conducted in a very different fashion from a trial in 1800. The prisoner now is treated with the utmost fairness and consideration.

In Common Law, and in the procedure of the Courts which enforce it, many great changes have taken place during the century. Of course a contract is much the same now as it was in 1800. But in 1800 no contracts, except negotiable instruments were assignable. Only the original parties to a contract could sue on it. Now the benefit of nearly every contract is assignable. On the other hand, wagering contracts in 1800 could be enforced in the courts of law; and all sorts of extraordinary actions were the result. If a bet was made, not upon any illegal sport, or any game or race, the result was a legal debt, for which an action would lie; and such actions were solemnly tried in open court. This was put to an end by an Act passed in 1845.

With a few exceptions, the principles of law applicable to torts remain much as they were in 1800. The most marked change was made by Lord Campbell's Fatal Accidents Act, 1846. As the law stood in 1800, if a passenger was upset in a stage-coach and his leg broken, he could sue the proprietor and recover damages for the pain which he had suffered, the injury done him, and the medical and other expenses which had been incurred. But if he was killed outright by the accident, his family and his executors had no redress whatever. They could not even recover his funeral expenses! His right of action was said to be personal and to have died with him. So it was a bad thing pecuniarily for the proprietor of a stage-coach, if his passengers recovered from their injuries; it was to his advantage, if there was to be an accident at all, that they should all break their necks. This was put a stop to by Lord Campbell's Act in 1846.

The principles of equity have not materially changed since 1800. What was a breach of trust then is a breach of trust now, though great and much-needed relief has been afforded to trustees by enabling them to plead the Statute of Limitations in many cases where their default was not fraudulent. The rules laid down by Lord Eldon in *Ellison v. Ellison* are still applied in cases of Voluntary Trusts. The law as to constructive notice declared by Lord Hardwicke in *Le Neve v. Le Neve* and other cases endured till 1882, when it was modified by the Conveyancing Act. The old doctrines of the Courts of Equity as to conversion and election, ademption of legacies, priority of mortgages, and marshalling assets, remain sub-

stantially in force to this day; though the rules relating to the administration of the estates of deceased persons have been altered by many statutes.

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In the law of real property, on the other hand, changes of enormous importance have been made during the century. . . .

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In conveyancing, too, the changes have been equally startling. In 1800 no man could convey to another freehold land in possession by a simple deed. Such land did not lie in grant. Either the purchaser and the vendor had to visit the spot and go through the elaborate ceremony of a feoffment with livery of seisin; or, what was more usual, the parties had recourse to the device of creating an unnecessary tenancy by means of a Lease and then supplementing it by a subsequent Release—two deeds and double the cost. An end was put to this in 1845. Fines and recoveries were abolished in 1833. Since then title-deeds themselves have been so shortened and simplified by the Conveyancing Acts that they no longer deserve Lord Westbury's severe censure. You remember that he spoke of title deeds as being "difficult to read, impossible to understand, and disgusting to touch."

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In 1800 there was no such thing as an ordinary limited liability company. There were a few trading companies each incorporated by its own private Act of Parliament. But apart from these, every trading concern in which more than one man was interested was just a common law partnership, and each partner was personally liable for the whole of the debts of the firm. Now any one can take as many shares as he likes in a limited liability company, and as soon as he has paid for his shares in full he is free from all further liability to the creditors of the company. Whether the change was a good one or a bad one, it is hard to say. It has no doubt greatly encouraged and facilitated commercial enterprise; it has carried British capital into every corner of the inhabited globe.

There was no Bankruptcy Court in 1800. Bankruptcy was originally regarded as a crime; in the earliest Bankruptcy Acts the bankrupt is always alluded to as "the offender." But before 1800 bankruptcy had come to be regarded as the proper remedy for traders in embarrassed circumstances. But this relief was limited to "traders"; no one else could avail himself of the Bankruptcy Laws.

A private gentleman, an attorney, a solicitor, a stock-broker, a farmer, or a grazier, was not a trader, nor was any labourer or workman. If any of these persons could not pay his just debts, he had to rot in the Marshalsea or the Fleet till his friends or relatives took pity on him and found the money. This was then the deliberate policy of our law, that if a man was hopelessly in debt he must be locked up and deprived of all chance of earning any money with which to pay his creditors! The creditor seized his body in satisfaction of the debt. This is the state of things which Dickens so powerfully describes in *Pickwick* and in *Little Dorrit*. Nor does he exaggerate in the least. You can learn a great deal of law from Dickens' novels. And remember that he was a student of the Middle Temple, though he was never called to the Bar.

The first step for the relief of these insolvent debtors was taken in 1808; when an Act was passed exempting from imprisonment in certain cases judgment debtors who had been taken in execution for any debt or damages not exceeding £20, exclusive of costs. Other statutes followed in 1844, 1845, and 1846.

And there was no Divorce Court in 1800. At the commencement of the century, the marriage bond could be severed by nothing less than an Act of Parliament. That is still, I believe the law of Ireland, which is still without a Divorce Court. And before asking for an Act of Parliament, the injured husband was required, first, to sue the adulterer at law and obtain a verdict against him for damages, and then to take proceedings in an Ecclesiastical Court for a decree of divorce *a mensa et thoro*. When he had succeeded in these two Courts, he might commence his application to Parliament. In other words, only a very wealthy man could obtain a divorce in England in 1800.

Next to lunatics, our polite text-book writers always place married women! And great indeed are the changes that have been made in this branch of our law. In 1800 a married woman had scarcely any rights; she could make no contracts, acquire no personal property, and all her earnings belonged to her husband. Such at least was the rule at law. In equity it was possible for a woman to have a marriage settlement executed before marriage, and thus preserve her property to her sole and separate use. The first few years of the new century witnessed two decisions which es-

tablished for the first time the right of a married woman who had married without a settlement to have some portion of her own personal property settled upon herself and her children. Now a wife is in a position of almost complete equality with her husband. An entire change has been introduced by the Married Women's Property Acts of 1870, 1874, 1882, and 1893. A married woman now can make a contract with reference to her separate property just as though she were unmarried; she can sell it or dispose of it by will; her earnings are her own.

NOTE.—In addition to Jeremy Bentham (1748–1835), the following names deserve to be remembered in connection with the Reform Movement:

Sir Samuel Romilly (1757–1818) was Solicitor General in 1806. He sat in Parliament from that date till his death and devoted himself to reform of Criminal Law.

Henry Brougham, afterwards Lord Brougham and Vaux (1778–1868), after a brilliant career at the bar, became Chancellor in 1830, holding that office four years. Sitting in the House of Commons from 1815 to 1830, he was one of the most effective and energetic of the champions of Law Reform.

Henry Bickersteth, afterwards Lord Langdale (1783–1851), was called to the bar in 1811, and became Master of the Rolls in 1835. Bentham said of him, "Of all my friends Bickersteth was the most cordial to Law Reform to its utmost extent."

David Dudley Field (1805–1894), the foremost advocate of Law Reform in America, was admitted to the bar in New York in 1828 and began to write upon Reform of Procedure in 1839. In 1847 the legislature of New York appointed him upon the commission which prepared the Code of Civil Procedure in which he took a leading part. Codes based upon it are now in force in twenty-seven states. In 1857 he was placed at the head of a new commission which prepared three codes, a political code (public law), a civil code (private law), and a penal code. Ten states have adopted the last, and California has adopted the three. These codes were also adopted by the territory of Dakota, and are in force in North Dakota and South Dakota.

III.

SOURCES AND FORMS OF LAW.

SALMOND, JURISPRUDENCE, sec. 31.

The expression source of law (*fons juris*) has several meanings which it is necessary to distinguish clearly. We must distinguish in the first place between the formal and the material sources of the law. A formal source is that from which a rule of law derives its force and validity. It is that from which the authority of the law proceeds. The material sources, on the other hand, are those from which is derived the matter, not the validity of the law. The material source supplies the substance of the rule to which the formal source gives the force and nature of law.

The formal source of the whole body of the civil law is one and the same, namely the will and power of the state as manifested in courts of justice. Whatever rules have the sanction and authority of the body politic in the administration of justice have thereby the force of law; and in such force no other rules whatever have any share. The matter of the law may be drawn from all kinds of material sources, but for its legal validity it must look to the tribunals of the state and to them alone. Customary law, for example, has its material source in the usages of those who are subject to it; but it has its formal source in the will of the state, no less than statutory law itself.

We may conveniently distinguish the two ideas by the terms "sources of law" and "forms of law." By sources of law, we refer to the methods and agencies by which rules of law are formulated; by forms of law, we refer to the modes in which the rules are expressed,—the literary shapes they assume.

In the common-law system there are three forms of law:

- (1) LEGISLATION, under which, using the term in its wider sense, we have in America three varieties:
 - i. constitutions.
 - ii. federal treaties.
 - iii. statutes. { federal
 { state.
- (2) JUDICIAL DECISIONS. The decisions of the superior courts in England and their analogues in other common-law jurisdictions.
- (3) BOOKS OF AUTHORITY.

LEGISLATION.

BLACKSTONE, COMMENTARIES, I, 63.

The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds: the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law.

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

When I call these parts of our law *leges non scriptae*, I would not be understood as if all those laws were at present merely oral, or communicated from the former ages to the present solely by word of mouth. It is true indeed that in the profound ignorance of letters, which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic Druids committed all their laws as well as learning to memory; and it is said of the primitive Saxons here, as well as their brethern on the continent, that *leges sola memoria et usu retinebant*. But, with us at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However, I therefore style these parts of our law *leges non scriptae*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.

BLACKSTONE, COMMENTARIES, I, 85-91.

Let us next proceed to the *leges scriptae*, the written laws of the kingdom, which are statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in parliament assembled. The oldest

of these now extant, and printed in our statute books, is the famous magna charta, as confirmed in parliament 9 Hen. III., though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law.

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments. At present we will only take notice of the different kinds of statutes, and of some general rules with regard to their construction.

First, as to their several kinds. Statutes are either general or special, public or private. A general or public act is an universal rule, that regards the whole community; and of this the courts of law are bound to take notice judicially and *ex officio*; without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns; such as the Romans entitled *senatus decreta*, in contradistinction to the *senatus consulta*, which regarded the whole community; and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formally shown and pleaded. Thus, to show the distinction, the statute 13 Eliz. c. 10, to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the bishop of Chester to make a lease to A. B. for sixty years is an exception to this rule; it concerns only the parties and the bishop's successors; and is therefore a private act.

Statutes also are either declaratory of the common law, or remedial of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, in *perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus the statute of treasons, 25 Edw. III. cap. 2, doth not make any new species of treasons, but only, for the benefit of the subject, declares and enumerates those several kinds of offence which before were treason at the common law. Remedial statutes are those which are made

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to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the common law, where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into enlarging and restraining statutes. To instance again in the case of treason; clipping the current coin of the kingdom was an offence not sufficiently guarded against by the common law; therefore it was thought expedient, by statute 5 Eliz. c. 11, to make it high treason, which it was not at the common law: so that this was an enlarging statute. At common law also spiritual corporations might lease out their estates for any term of years, till prevented by the statute of 13 Eliz. before mentioned: this was, therefore, a restraining statute.

Secondly, the rules to be observed with regard to the construction of statutes are principally these which follow.

I 1 There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy. that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy. Let us instance again in the same restraining statute of 13 Eliz. c. 10: By the common law, ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases, to the impoverishment of their successors; the remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives, or twenty-one years. Now, in the construction of this statute, it is held, that leases, though for a longer term, if made by a bishop, are not void during the bishop's continuance in his see; or, if made by a dean and chapter, they are not void during the continuance of the dean; for the act was made for the benefit and protection of the successor. The mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the grantors;

but the leases, during their continuance, being not within the mischief, are not within the remedy.

(2.) A statute, which treats of things or persons of an inferior rank, cannot by any general words be extended to those of a superior. So a statute treating of "deans, prebendaries, parsons, vicars, and others having spiritual promotion," is held not to extend to bishops, though they have spiritual promotion, deans being the highest persons named, and bishops being of a still higher order.

(3.) Penal statutes must be construed strictly. Thus the statute I Edw. VI. c. 12, having enacted that those who are convicted of stealing horses should not have the benefit of clergy, the judges conceived that this should not extend to him that should steal but one horse, and therefore procured a new act for that purpose in the following year. And, to come nearer our own times, by the statute 14 Geo. II. c. 6, stealing sheep, or other cattle, was made felony, without benefit of clergy. But these general words, "or other cattle," being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute, 15 Geo. II. c. 34, extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name.

(4.) Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken, where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally. Upon this footing the statute of 13 Eliz. c. 5, which avoids all gifts of goods, etc., made to defraud creditors and others, was held to extend by the general words to a gift made to defraud the queen of a forfeiture.

(5.) One part of a statute must be so construed by another, that the whole may (if possible) stand: *ut res magis valeat, quam pereat.* As if land be vested in the king and his heirs by act of parliament, saving the right of A. and A. has at that time a lease of it for three years: here A. shall hold it for his term of three years, and afterwards it shall go to the king. For this interpretation furnishes matter for every clause of the statute to work and operate upon. But,

6. A saving, totally repugnant to the body of the act, is void. If, therefore, an act of parliament vests land in the king and his heirs, saving the right of all persons whatsoever; or vests the land of A. in the king, saving the right of A.; in either of these cases the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king.

7. Where the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one. And this upon a general principle of universal law, that "*leges posteriores priores contrarias abrogant.*" consonant to which it was laid down by a law of the twelve tables at Rome, that "*quod populus postremum jussit, id jus ratum esto.*" But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative. As if a former act says, that a juror upon such a trial shall have twenty pounds a year; and a new statute afterwards enacts, that he shall have twenty marks: here the latter statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end. But if both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter-sessions, and a latter law makes the same offence indictable at the assizes, here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assizes, and not elsewhere.

8. If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose. So when the statutes of 26 and 35 Hen. VIII. declaring the king to be the supreme head of the church, were repealed by a statute 1 and 2 Philip and Mary, and this latter statute was afterwards repealed by an act of 1 Eliz. there needed not any express words of revival in Queen Elizabeth's statute, but these acts of King Henry were impliedly and virtually revived.

9. Acts of parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII. c. 1, which directs that no person for assisting a king *de facto* shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder. Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero; in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavor to tie up the hands of succeeding legislatures. "When you repeal the law itself, (says he,) you at the same time repeal the prohibitory clause, which guards against such repeal."

10. Lastly, acts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus if an act of parliament gives a man power to try all causes that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent

of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

KENT, COMMENTARIES, I, 454-468.

A statute, when duly made, takes effect from its date, when no time is fixed, and this is now the settled rule. It was so declared by the Supreme Court of the United States in *Matthews v. Zane*, and it was likewise so adjudged in the Circuit Court in Massachusetts, in the case of *The Brig Ann*. I apprehend that the same rule prevails in the courts of the several states, and that it cannot be admitted that a statute shall, by any fiction or relation, have any effect before it was actually passed. A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law, as to all cases of crimes and penalties; and in every other case relating to contracts or property, it would be against every sound principle. It would come within the reach of the doctrine, that a statute is not to have a retrospective effect; and which doctrine was very much discussed in the case of *Dash v. Van Kleeck*, and shown to be founded not only in English law, but on the principles of general jurisprudence. A retrospective statute, affecting and changing vested rights, is very generally considered, in this country as founded on unconstitutional principles, and consequently inoperative and void. But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects, and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights, as a statute to conform former marriages defectively celebrated, or a sale of lands defectively made or acknowledged. The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. But the cases cannot be extended beyond the circumstances on which they repose, without putting in jeopardy the energy and safety of the general principles.

The English rule formerly was, that if no period was fixed by the statute itself, it took effect by relation, from the first day of the session in which the act was passed, and which might be some weeks, if not months, before the act received the royal sanc-

tion, or even before it had been introduced into Parliament. This was an extraordinary instance of the doctrine of relation, working gross injustice and absurdity; and yet we find the rule declared and uniformly adhered to, from the time of Henry VI. All the judges agreed, in the case of *Partridge v. Strange*, in the 6th Edward VI., that the statute was to be accounted in law a perfect act from the first day of the session; and all persons were to be punished for an offence done against it after the first day of the session unless a certain time was appointed when the act should take effect. In the case of *The King v. Thurston*, this doctrine of carrying a statute back by relation to the first day of the session was admitted in the K. B.; though the consequence of it was to render an act murder which would not have been so without such relation. The case of *The Attorney-General v. Panter* is another strong instance of the application of this rigorous and unjust rule of the common law, even at so late and enlightened a period of the law as the year 1772. An act for laying a duty on the exportation of rice thereafter to be exported, received the royal assent on the 29th of June, 1767, and on the 10th of June of that year the defendants had exported rice. After the act passed, a duty of one hundred and fifteen pounds was demanded upon the prior exportation, and it was adjudged, in the Irish Court of Exchequer, to be payable. The cause was carried by appeal to the British House of Lords, on the ground of the palpable injustice of punishing the party for an act innocent and lawful when it is done; but the decree was affirmed, upon the opinion of the twelve judges, that the statute, by legal relation, commenced from the first day of the session. The K. B., also, in *Latless v. Holmes*, considered the rule to be too well settled to be shaken, and that the court could not take notice of the great hardship of the case. The voice of reason at last prevailed; and by the statute of 33 Geo. III. c. 13, it was declared that statutes are to have effect only from the time they receive the royal assent; and the former rule was abolished, to use the words of the statute, by reason of "its great and manifest injustice."

There is a good deal of hardship in the rule as it now stands, both here and in England; for a statute is to operate from the very day it passes, if the law itself does not establish the time. It is impossible in any state, and particularly in such a wide-spread dominion as that of the United States, to have notice of the existence

of the law, until some time after it has passed. It would be no more than reasonable and just, that the statute should not be deemed to operate upon the persons and property of individuals, or impose pains and penalties for acts done in contravention of it, until the law was duly promulgated. The rule, however, is deemed to be fixed beyond the power of judicial control, and no time is allowed for the publication of the law before it operates, when the statute itself gives no time. Thus, in the case of *The Brig Ann*, the vessel was libelled and condemned for sailing from Newburyport, in Massachusetts, on the 12th of January, 1808, contrary to the act of Congress of the 9th of January, 1808, though it was admitted the act was not known in Newburyport on the day the brig sailed. The court admitted that the objection to the forfeiture of the brig was founded on the principles of good sense and natural equity; and that unless such time be allowed as would enable the party, with reasonable diligence, to ascertain the existence of the law, an innocent man might be punished in his person and property for an act which was innocent, for aught he knew, or could by possibility have known, when he did it.

The Code Napoleon adopted the true rule on this subject. It declared that laws were binding from the moment their promulgation could be known, and that the promulgation should be considered as known in the department of the imperial residence one day after that promulgation, and in each of the other departments of the French empire after the expiration of the same space of time, augmented by as many days as there were distances of twenty leagues between the seat of government and the place. The New York Revised Statutes have also declared the very equitable rule that every law, unless a different time be prescribed therein, takes effect throughout the state on, and not before, the 20th day after the day of its final passage.

If the statute be constitutional in its character, and has duly gone into operation, the next inquiry is respecting its meaning; and this leads us to a consideration of the established rules of construction, by which its sense and operation are to be understood.

There is a material distinction between public and private statutes, and the books abound with cases explaining this distinction in its application to particular statutes. It is sometimes difficult to draw the line between a public and private act, for statutes frequently relate to matters and things that are partly public and

partly private. The most comprehensive, if not the most precise, definition in the English books is, that public acts relate to the kingdom at large, and private acts concern the particular interest or benefit of certain individuals or of particular classes of men. Generally speaking, statutes are public; and a private statute may rather be considered an exception to a general rule. It operates upon a particular thing or private persons. It is said not to bind or include strangers in interest to its provisions, and they are not bound to take notice of a private act, even though there be no general saving clause of the rights of third persons. This is a safe and just rule of construction; and it was adopted by the English courts in very early times, and does great credit to their liberality and spirit of justice. It is supported by the opinion of Sir Matthew Hale, in *Lucy v. Levington*, where he lays down the rule to be, that though every man be so far a party to a private act of Parliament as not to gainsay it, yet he is not so far a party as to give up his interest. To take the case stated by Sir Matthew Hale, suppose a statute recites that whereas there was a controversy concerning land between A and B, and enacts that A shall enjoy it, this would not bind the interest of third persons in that land, because they are not strictly parties to the act, but strangers, and it would be manifest injustice that the statute should affect them. This rule, as to the limitation of the operation of private statutes, was adopted by the Supreme Court of New York, and afterwards by the Court of Errors, in *Jackson v. Catlin*. It is likewise a general rule, in the interpretation of statutes limiting rights and interests, not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intended by necessary implication. There is another material distinction in respect to public and private statutes. The courts of justice are bound, *ex officio*, to take notice of public acts without their being pleaded, for they are part of the general law of the land, which all persons, and particularly the judges, are presumed to know. Public acts cannot be put in issue by plea. *Nul tiel record* cannot be pleaded to a public statute; the judges are to determine the existence of them from their own knowledge. But they are not bound to take notice of private acts, unless they be specially pleaded, and shown in proof, by the party claiming the effect of them. In England the existence even of a private statute cannot be put in issue to be tried by a jury on the plea of

nul tiel record, though this may be done in New York under the Revised Statutes.

The title of the act and the preamble to the act, are, strictly speaking, no parts of it. They may serve to show the general scope and purport of the act, and the inducements which led to its enactment. They may, at times, aid in the construction of it; but generally they are loosely and carelessly inserted, and are not safe expositors of the law. The title frequently alludes to the subject-matter of the act only in general or sweeping terms, or it alludes only to a part of the multifarious matter of which the statute is composed. The constitution of New Jersey, in 1844, has added a new and salutary check to multitudinous matter, by declaring that every law shall embrace but one object, and that shall be expressed in the title. So also in New York, by the revised constitution of 1846, art. 3, sec. 16, no private or local bill shall embrace more than one subject, and that shall be expressed in the title. The title, as it was observed in *United States v. Fisher*, when taken in connection with other parts, may assist in removing ambiguities where the intent is not plain; for when the mind labors to discover the intention of the legislature, it seizes everything, even the title, from which aid can be derived. So the preamble may be resorted to in order to ascertain the inducements to the making of the statute; but when the words of the enacting clause are clear and positive, recourse must not be had to the preamble. Notwithstanding that Lord Coke considers the preamble as a key to open the understanding of the statute, Mr. Barrington, in his *Observations on the Statutes*, has shown, by many instances, that a statute frequently recites that which is not the real occasion of the law, or states that doubts existed as to the law, when in fact none had existed. The true rule is, as was declared by Mr. J. Buller and Mr. J. Grose, in *Crespigny v. Wittenoom*, that the preamble may be resorted to in restraint of the generality of the enacting clause, when it would be inconvenient if not restrained, or it may be resorted to in explanation of the enacting clause, if it be doubtful. This is the whole extent of the influence of the title and preamble in the construction of the statute. The true meaning of the statute is generally and properly to be sought from the body of the act itself. But such is the imperfection of human language, and the want of technical skill in the makers of the law, that statutes often give occasion to the most perplexing and dis-

troubling doubts and discussions, arising from the ambiguity that attends them. It requires great experience, as well as the command of a perspicuous diction, to frame a law in such clear and precise terms as to secure it from ambiguous expressions, and from all doubt and criticism upon its meaning.

It is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a view of the whole and of every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms. When the expression in a statute is special or particular, but the reason is general, the expression should be deemed general. *Scire leges, non hoc est verbarum tenere sed vim ac potestatem*, and the reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction and absurdity. This was the doctrine of Modestinus, Scaevola, Paulus, and Ulpianus, the most illustrious commentators on the Roman law. When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and the remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion. These rules, by which the sages of the law, according to Plowden, have ever been guided in seeking for the intention of the legislature, are maxims of sound interpretation, which have been accumulated by the experience, and ratified by the approbation of ages.

The words of a statute, if of common use, are to be taken in their natural, plain, obvious, and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense, unless it clearly appears from the context or other parts of the instrument, that the words were intended to be applied differently from their ordinary or their legal acceptance. The current of authority at the present day, said Mr. Justice Bronson, is in favor of reading statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions, for the purpose of either limiting or extending their operation. ~~X~~ A saving clause in a statute is to be rejected, when it is directly repugnant to the purview or body of the act, and could not stand without rendering the act inconsistent and destructive of itself. Lord Coke, in *Alton Wood's Case*,

(today obsolete.)

gives a particular illustration of this rule, by a case which would be false doctrine with us, but which serves to show the force of the rule. Thus, if the manor of Dale be, by express words given by statute to the king, saving the right of all persons interested therein, or if the statute vests the lands of A in the king, saving the rights of A, the interest of the owner is not saved, inasmuch as the saving clause is repugnant to the grant; and if it were allowed to operate, it would render the grant void and nugatory. But there is a distinction in some of the books between a saving clause and a proviso in the statute, though the reason of the distinction is not very apparent. It was held by all the barons of the Exchequer, in the case of *The Attorney-General v. The Governor and Company of Chelsea Waterworks* that where the proviso of an act of Parliament was directly repugnant to the purview of it, the proviso should stand, and be held a repeal of the purview, because it speaks the last intention of the lawgiver. It was compared to a will, in which the latter part, if inconsistent with the former, supersedes and revokes it. But it may be remarked upon this case of *Fitzgibbon*, that a proviso repugnant to the purview of the statute renders it equally nugatory and void as a repugnant saving clause; and it is difficult to see why the act should be destroyed by the one, and not by the other, or why the proviso and the saving clause, when inconsistent with the body of the act, should not both of them be equally rejected. There is also a technical distinction between a proviso and an exception in a statute. If there be an exception in the enacting clause of a statute, it must be negatived in pleading; but if there be a separate proviso, that need not, and the defendant must show it by way of defence.

Several acts in *pari materia*, and relating to the same subject, are to be taken together, and compared, in the construction of them, because they are considered as having one object in view, and as acting upon one system. This rule was declared in the cases of *Rex v. Loxdale*, and *The Earl of Ailesbury v. Pattison*; and the rule applies, though some of the statutes may have expired, or are not referred to in the other acts. The object of the rule is to ascertain and carry into effect the intention; and it is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. Upon the same principle, whenever a power is given by a statute, everything necessary to

the making of, it effectual or requisite to attain the end is implied. *Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud.*

Statutes are likewise to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. This has been the language of the courts in every age; and when we consider the constant vehement, and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of reason, and the best birthright and noblest inheritance of the subject, we cannot be surprised at the great sanction given to this rule of construction. It was observed by the judges, in the case of *Stowell v. Zouche*, that it was good for the expositors of a statute to approach as near as they could to the reason of the common law; and the resolution of the barons of the Exchequer, in *Heydon's Case*, was to this effect. For the sure and true interpretation of all statutes, whether penal or beneficial, four things are to be considered: What was the common law before the act; what was the mischief against which the common law did not provide; what remedy the Parliament had provided to cure the defect; and the true reason of the remedy. It was held to be the duty of the judges to make such a construction as should repress the mischief and advance the remedy.

In the construction of statutes, the sense which the contemporary members of the profession had put upon them is deemed of some importance, according to the maxim that *contemporanea expositio est fortissima in lege*. Statutes that are remedial, and not penal, are to receive an equitable interpretation, by which the letter of the act is sometimes restrained, and sometimes enlarged, so as more effectually to meet the beneficial end in view, and prevent a failure of the remedy. They are construed liberally, and *ultra* but not *contra* the strict letter. This may be illustrated in the case of the registry acts, for giving priority to deeds and mortgages, according to the dates of the registry. If a person claiming under a registered deed or mortgage had notice of the unregistered prior deed when he took his deed, and procured the registry of it in order to defeat the prior deed, he shall not prevail with his prior registry, because that would be to counteract the intent and policy of the statutes, which were made to prevent and not to uphold frauds. Statutes

are sometimes merely directory, and, in that case, a breach of the direction works no forfeiture or invalidity of the thing done; but it is otherwise if the statute be imperative.

If an act be penal and temporary by the terms or nature of it, the party offending must be prosecuted and punished before the act expires or is repealed. Though the offence be committed before the expiration of the act, the party cannot be punished after it has expired, unless a particular provision be made by law for the purpose. If a statute be repealed, and afterwards the repealing act be repealed, this revives the original act; and if a statute be temporary, and the statute be repealed, and afterwards the repealing act be repealed, this revives the original act; and if a statute be temporary, and limited to a given number of years, and expires by its own limitation, a statute which had been repealed and supplied by it is *ipso facto* revived. If, before the expiration of the time, a temporary statute be continued by another act, it was formerly a question under which statute acts and proceedings were to be considered as done. In the case of the College of Physicians it was declared, that if a statute be limited to seven years, and afterwards by another statute be made perpetual, proceedings ought to be referred to the last statute, as being the one in force. But this decision was erroneous, and contrary to what had been said by Popham, Ch. J., in *Dingley v. Moor*; and all acts civil and criminal, are to be charged under the authority of the first act. Thus, in the case of *Rex v. Morgan*, on an indictment for perjury, in an affidavit to hold to bail, it was laid to have been taken by virtue of the statute of 12 Geo. I., which was a temporary law for five years, and which was afterwards, and before the expiration of it, continued by the act of 5 Geo. II., with some alterations. Lord Chief Justice Hardwicke said, that when an act was continued by a subsequent act, everybody was estopped to say the first act was not in force; and as the act in question was not altered in respect to bail, the offence was properly laid to have been done against the first act. In *Shipman v. Henbest*, the King's Bench held, that if a statute be permitted even to expire, and be afterwards revived by another statute, the law derives its force from the first statute, which is to be considered in operation by means of revival. If, however, a temporary act be revived after it has expired, the intermediate time is lost, without a special provision reaching to the intermediate time.

If a statute inflicts a penalty for doing an act, the penalty implies ~~a prohibition, and the thing is unlawful~~, though there be no prohibitory words in the statute. Lord Holt, in *Bartlett v. Viner*, applied this rule to the case of a statute inflicting a penalty for making a particular contract, such as a simoniacal or usurious contract; and he held that the contract was void under the statute, though there was a penalty imposed for making it. The principle is now settled, that the statutory prohibition is equally efficacious, and the illegality of a breach of the statute the same whether a thing be prohibited absolutely or only under a penalty. The New York Revised Statutes make the doing an act contrary to a statute prohibition a misdemeanor, though no penalty be imposed. Whether any other punishment can be inflicted than the penalty given by the statute has been made a serious question. The Court of K. B., in *Rex v. Robinson*, laid down this distinction, that where a statute created a new offence, by making unlawful what was lawful before, and prescribed a particular sanction, it must be pursued, and none other; but where the offence was punishable at common law, and the statute prescribed a particular remedy, without any negative words, express or implied, the sanction was cumulative, and did not take away the common-law punishment, and either remedy might be pursued. The same distinction had been declared long before; and the proper inquiry in such cases is, was the doing of the thing for which the penalty is inflicted lawful or unlawful before the passing of the statute? If it was no offence before, the party offending is liable to the penalty, and to nothing else. The distinction between statutory offences, which are *mala prohibita* only, or *mala in se*, is now exploded, and a breach of the statute law, in either case, is equally unlawful and equally a breach of duty; and no agreement founded on the contemplation of either class of offences will be enforced at law or in equity.

There are a number of other rules of minor importance, relative to the construction of statutes, and it will be sufficient to observe, generally, that the great object of the maxims of interpretation is to discover the true intention of the law; and whenever that intention can be indubitably ascertained, and it be not a violation of constitutional right, the courts are bound to obey it, whatever may be their opinion of its wisdom or policy. But it would be quite visionary to expect, in any code of statute law, such precision of thought and perspicuity of language as to preclude all uncer-

tainty as to the meaning, and exempt the community from the evils of vexatious doubts and litigious interpretations. Lord Coke complained, that in his day great questions had oftentimes arisen "upon acts of Parliament, overladen with provisos and additions, and many times on a sudden penned or corrected, by men of none, or very little judgment in law."

WHEN STATUTES TAKE EFFECT:

(a) AT COMMON LAW. If no date was fixed in the statute, it took effect by relation from the first day of the session at which it was passed.

(b) IN ENGLAND. By a statute of George III., statutes take effect from the date when they receive the royal assent, unless a different date is fixed.

(c) FEDERAL STATUTES. These take effect from the date of approval by the president, unless a different date is fixed.

(d) STATE STATUTES. This matter is governed by constitutional or statutory provisions in the several states, and there is no uniform rule. Most of the states provide a certain time after passage and approval at which statutes shall take effect. In this state they become effective three months after adjournment of the session at which they were passed except that where an emergency exists they may be made expressly to take effect upon approval. Const. Nebr., art. III, sec. 24.

JUDICIAL DECISIONS.

BLACKSTONE, COMMENTARIES, I, 69-72.

For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is man-

ifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded. And it hath been an ancient observation in the laws of England, that whenever a standing rule of law of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined, time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions, and therefore can never be departed from by any modern judge without a breach of his oath and the law. For herein there is nothing repugnant to natural justice; though the artificial reason of it, drawn from the feudal law, may not be quite obvious to everybody. And therefore, though a modern judge, on account of a supposed hardship upon the half brother, might wish it had been otherwise settled, yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seize any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was not law. So that the law, and the opinion of the judge, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law. Upon the whole, however,

we may take it as a general rule, "that the decisions of courts of justice are the evidence of what is common law:" in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future.

The decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of reports which furnish the lawyer's library. These reports are history of the several cases, with a short summary of the proceedings, which are preserved at large in the record: the arguments on both sides, and the reasons the court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain the records, which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of king Edward the Second inclusive; and from this time to that of Henry the Eighth, were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown,¹ and published annually, whence they are known under the denomination of the year books. And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day; for, though king James the First, at the instance of Lord Bacon, appointed two reporters with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands; who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by Lord Chief-Justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his writings are so highly esteemed, that they are generally cited without the author's name.

¹ This tradition that the Year Books were the work of reporters appointed and paid by the crown seems to have been shown to have no foundation.

WILSON v. BUMSTEAD, Supreme Court of Nebraska, 1881 (12 Nebr. 1).

Maxwell, J.: In the application of the principles of the common law, where the precedents are unanimous in the support of a proposition, there is no safety but in a strict adherence to such precedents. If the court will not follow established rules, rights are sacrificed, and lawyers and litigants are left in doubt and uncertainty, while there is no certainty in regard to what, upon a given state of facts, the decision of the court will be. If the common law rule is inadequate, the proper course is by legislation, and such was the course pursued in this case. As no action would lie at common law, the remedy is entirely statutory, and the conditions, upon which the right to maintain the action rest, must be complied with.

ATTORNEY GENERAL v. LUM, Supreme Court of Wisconsin, 1853 (2 Wis. 507).

Smith, J.: This opinion of the Supreme Court, pronounced by the Chief Justice, would seem to be conclusive, as to the right here sought to be enforced. But it is contended that the opinions pronounced by the Supreme Court, are not of binding authority upon the Circuit Court, and it is intimated, that though inferior courts may treat such opinions never so contemptuously, yet the mere *remittitur* certified and transmitted by our clerk, is the only authoritative direction to the court below.

This is not the correct view of the law. It is not intended to be declared that all the reasoning, and instances of illustration, introduced in an opinion of this court, are to be adopted by inferior tribunals, from which cases, or matters may come here by appeal, writ of error, or otherwise; but it is insisted and declared that the opinion of the court upon the points in judgment, presented and passed upon in cases brought here for adjudication, are the law of the land, until overruled or otherwise annulled, and that inferior courts and tribunals must yield obedience to the law thus declared. We should be unfaithful to the high trust committed to us, should we fail to discharge this solemn duty of enforcing the law in this respect, upon the faithful and complete execution of which, the most sacred and vital rights of the citizen must frequently depend: and every inferior officer, judicial or ministerial, must know, and be informed that such acquiescence and obedience

will be rigidly exacted, and resistance will be most effectually subdued.

JOHNSON v. FALL, Supreme Court of California, 1856 (6 Cal. 359).

The opinion of the Court was delivered by Mr. Justice Terry. Mr. Chief Justice Murray concurred.

At common law all wagers were recoverable, except such as were prohibited by law, were against public policy, or calculated to affect the interest, character or feelings of third parties. This principle is too well established to require either argument or authority. But it is contended by counsel that, inasmuch as the English Judges have uniformly looked with disfavor on this class of cases, and have frequently taken occasion to express their regret that a different rule had not been established, this Court should, as the question is for the first time presented in the State, without regard to precedent, declare all wagers illegal, on account of their manifest immoral tendency.

Such a course would, we conceive, be a usurpation of functions properly belonging to another department of government. The common law having been adopted as the rule of decision in this State, it is our duty to enforce it, leaving all questions of its policy, as applied to a particular class of contracts, for the consideration of the Legislature.

The questions which are made in the argument of counsel, as to the general utility of the work, which was the subject of the wager, its effect upon the interest of third parties, as well as the tendency of the wager to advance or retard such work, are, we conceive, questions of fact, which cannot properly be decided by a Court on demurrer.

The judgment of the Court below is reversed, and the cause remanded.

MCDOWELL v. OYER, Supreme Court of Pennsylvania, 1853 (21 Pa. St. 417).

Black, C. J.: . . . The judgment we are about to give might well be rested on the mere authority of the cases I have cited. When a point has been solemnly ruled by the tribunal of the last resort, after full argument and with the assent of all the judges, we have the highest evidence which can be produced in favor of the unwritten law.

It is sometimes said that this adherence to precedent is slavish; that it fetters the mind of the judge, and compels him to decide without reference to principle. But let it be remembered that *stare decisis* is itself a principle of great magnitude and importance. It is absolutely necessary to the formation and permanence of any system of jurisprudence. Without it we may fairly be said to have no law; for law is a fixed and established rule, not depending in the slightest degree on the caprice of those who may happen to administer it. I take it that the adjudications of this Court, when they are free from absurdity, not mischievous in practice, and consistent with one another, are the law of the land. It is this law which we are bound to execute, and not any "higher law," manufactured for each special occasion out of our own private feelings and opinions. If it be wrong, the government has a department whose duty it is to amend it, and the responsibility is not in any wise thrown upon the judiciary. The inferior tribunals follow our decisions, and the people conform to them because they take it for granted that what we have said once we will say again. There being no superior power to define the law for us as we define it for others, we ought to be a law unto ourselves. If we are not, we are without a standard altogether. The uncertainty of the law—an uncertainty inseparable from the nature of the science—is a great evil at best and we would aggravate it terribly if we could be blown about by every wind of doctrine, holding for true to-day what we repudiate as false to-morrow.

Of course I am not saying that we must consecrate the mere blunders of those who went before us, and stumble every time we come to the place where they have stumbled. A palpable mistake, violating justice, reason, and law, must be corrected, no matter by whom it may have been made. There are cases in our books which bear such marks of haste and inattention, that they demand reconsideration. There are some which must be disregarded, because they cannot be reconciled with others. There are old decisions of which the authority has become obsolete, by a total alteration in the circumstances of the country and the progress of opinion. *Tempora mutantur*. We change with the change of the times, as necessarily as we move with the motion of the earth. But in ordinary cases, to set up our mere notions above the principles which the country has been acting upon as settled and established, is to

make ourselves not the ministers and agents of the law, but the masters of the law and the tyrants of the people.

PRATT V. BROWN, Supreme Court of Wisconsin, 1854 (3 Wis. 603).

Smith, J.: These and kindred propositions were presented to the supreme court under its former organization, in the case of *Stevens v. Marshall*, 3 Chand., 222, and that case is strongly urged upon us to induce us to concur therein; for it cannot be denied that a majority of the court did hold in conformity with the propositions here insisted upon. As, however, these are questions affecting not merely the routine of practice, nor rights determined by the lapse of time, or palpable legislative enactment, we do not feel at liberty as we would wish, to throw ourselves back upon that decision, and thus evade further responsibility. It is true that when a principle of law, doubtful in its character, or uncertain in the subject matter of its application, has been settled by a series of judicial decisions, and acquiesced in for a considerable time, and important rights and interests have become established under such decisions, courts will hesitate long before they will attempt to overturn the result so long established. So when it is apparently indifferent, which of two or more rules is adopted, which one shall have been adopted by judicial sanction, it will be adhered to, though it may not, at the moment, appear to be the preferable rule. But when a question arises involving important private or public rights, extending through all coming time, has been passed upon on a single occasion, and which decision can in no just sense be said to have been acquiesced in, it is not only the right, but the duty of the court, when properly called upon, to reexamine the questions involved, and again subject them to judicial scrutiny. We are by no means unmindful of the salutary tendency of the rule *stare decisis*, but at the same time, we cannot be unmindful of the lessons furnished by our own consciousness, as well as by judicial history, of the liability to error, and the advantages of review.

We therefore enter upon the discussion of the questions involved in this case, not for the purpose of again reopening the subject matter thereof to criticism or investigation, but for the purpose of discharging our full duty in the premises.

ETTING v. BANK OF THE UNITED STATES, Supreme Court of the U. S. 1826 (11 Wheat. 59).

Marshall, C. J.: In the very elaborate arguments which have been made at the bar, several cases have been cited which have been attentively considered. No attempt will be made to analyze them, or to decide on their application to the case before us, because the judges are divided respecting it. Consequently, the principles of law which have been argued cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it. Judgment affirmed.

WEAVER v. GARDNER, Supreme Court of Kansas, 1875 (14 Kan. 347).

Brewer, J.: This is not an open question in this court. As long ago as the case of *George v. Hatton*, 2 Kas., 333, it was decided that in an action like this no indorsement was required on the summons, it not being an action for the recovery of money only, but that if an amount was indorsed, it was not error to take judgment for that amount together with a decree for the sale of the land. Counsel contends that the decision in that case properly rests on other grounds, and that the comments of Chief Justice Crozier upon this question are mere *obiter dicta*. We do not so understand it. It was made one of the points announced in the syllabus, and the decision may as fairly be said to rest upon this as upon any other ground. We are aware of contrary rulings in Ohio: *Williams v. Hamlin*, 1 Handy, 95; 1 Nash's Pl. & Prac., 4th ed., p 67. And if this was an open question we might be disposed to give considerable weight to these authorities. But being merely a question of practice, and having been once settled in this state, we deem it better to adhere to that ruling. Doubtless it has been accepted by the profession during the last ten years as the correct interpretation of the statute, and many rights founded upon it. *Stare decisis*, is eminently appropriate in such cases.

AUD v. MAGRUDER, Supreme Court of California, 1858 (10 Cal. 282).

Baldwin, J.: In overruling the case of *Bryan v. Berry*, we feel less reluctance, because we think that the principle there laid down is of injurious import. We think that principles of commercial law, long established and maintained by a consistent course of decision in the other States, should not be disturbed; that the tendency

of such disturbance, in any instance, is to confusion and uncertainty, and gives rise to perplexing litigation, and doubts and uneasiness in the public mind. Almost any general rule governing commercial transactions, if it have been long and consistently upheld as a part of the general system, is better than a rule superseding it, though the latter were much better as an original proposition. Men knowing how the law has been generally received and repeatedly adjudged, govern themselves and are advised by their counsel accordingly; but if Courts establish new rules whenever they are dissatisfied with the reasons upon which the old ones rest, the standards of commercial transactions would be destroyed, and commercial business regulated by a mere guess at what the opinion of Judges for the time might be, and not by a knowledge of what the doctrines of recognized works of authority and the precedents of the Courts are. The commercial law has a system of its own, built up by centuries and the wisdom of learned jurists all over the world. It is not local, but applicable to all the States, with few modifications; and California, eminently commercial in its character, and in close commercial connection with the other States, finds her interests and safety in adhering to the well-settled general rules which prevail in those States as the laws of trade. We repeat, the stability and certainty of these rules are of more importance than any fancied benefits which might accrue from any innovation upon the system. Innovation begets innovation, and we cannot always see with clearness what is to be the consequence of the new rule established. This case itself is a good illustration; for, if the doctrine be carried to its logical consequences, and whenever it appears on the face of a security for money, a party is a surety, he is entitled to be held as a guarantor, what becomes of undertakings, acceptances for accommodation, etc.? for, in the latter cases, why might not parol evidence be admitted to show that the party was only accommodation acceptor, in a contest between the original parties, as to show the same fact, as is frequently done, when suit is brought to recover money of the principal which the acceptor has paid on the acceptance? And so, where the party does not sign as surety, but really is such?

The doctrine of *stare decisis*, seriously invoked by the respondent's counsel, can have no effect; or, if any, only the effect to induce us the more readily to return to a principle recognized, we believe, for many years everywhere else in the commercial world. The con-

servative doctrine of *stare decisis* was never designed to protect such an innovation.

Judgment reversed, and cause remanded.

LINDSAY v. LINDSAY, Supreme Court of Indiana, 1874 (47 Ind. 283).

Osborn, J.: We are requested to grant a rehearing in this case, that the cases of Leard v. Leard, 30 Ind. 171, Nebeker v. Rhoads, 30 Ind. 330, and DeMoss v. Newton, 31 Ind. 219, may be reconsidered and overruled.

Langdon v. Applegate, 5 Ind. 327, was decided at the November term, 1854. It was followed and adhered to by many decisions, and, without legislation, rights of property would have been disturbed by overruling it. The rule established by those cases was regarded as fixed and settled, and so continued until the decision in the case of The Greencastle, etc., Turnpike Co. v. The State, ex rel. Malot, 28 Ind. 382, at the November term, 1867, when the rule was changed, and Langdon v. Applegate and all the cases following it were overruled. It is quite likely that the legislature had knowledge before that opinion was delivered, that Langdon v. Applegate would be overruled, and for the purpose of averting the consequences, which would otherwise result from such a ruling, passed the act of March 9th, 1867. The object of the legislature clearly appears on the face of the act. The constitutionality of that act was deliberately sustained in Leard v. Leard, 30 Ind. 171, which was followed by Nebeker v. Rhoads, 30 Ind. 330, and DeMoss v. Newton, 31 Ind. 219. It was cited and recognized as authority in Pierce v. Pierce, 46 Ind. 86.

If we doubted the correctness of the decisions cited, we should be unwilling to overrule them. They have become a rule of property in this State, and to overrule them would disturb titles to real estate, acquired by purchase on the faith of, and in reliance upon, the rule thus established. We should be unwilling to make a decision involving such consequences, except for very convincing reasons. Blackstone lays it down as an established rule, to abide by former precedents, when the same point comes again into controversy, unless flatly absurd. 1 Bl. Com. 70, 71.

Public confidence in the decisions of courts rests in a great measure in their adherence to decided cases. Chancellor Kent, in his Commentaries, 1 Kent, 476, says:

"The community have a right to regard it" (a decision of the court) "as a just declaration or exposition of the law, and to regulate their actions and contracts by it. . . .

"If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law."

To the same effect are *Bellows v. Parsons*, 13 N. H. 256; *Taylor v. French*, 19 Vt. 49; *Boon v. Bowers*, 30 Miss. 246; *Emerson v. Atwater*, 7 Mich. 12; *Goodell v. Jackson*, 20 Johns, 693, 722; *Day v. Munson*, 14 Ohio St. 488; *Loeb v. Mathis*, 37 Ind. 306, 312; *Harrow v. Myers*, 29 Ind. 469; *Carver v. Louthain*, 38 Ind. 530, 538; *Tinder v. The Duck Pond Ditching Association*, 38 Ind. 555; *Stanford v. Stanford*, 42 Ind. 485, 489; *Grubbs v. The State*, 24 Ind. 295, and numerous other cases.

In the case last cited, it is said on page 296: "This principle has so often received the sanction of appellate courts, that it has become a maxim for their guidance, and it is especially important that it should not be forgotten here, where the judges hold for short terms, and where, unfortunately, the entire court may be changed at once."

We might not be willing to go to the extent of some of the authorities cited. We do mean to hold, however, that when a court of appeals of the last resort has, by its decisions, established a rule of property under which rights have been acquired as in this case, an adherence to such decisions by the same court becomes a duty, except for the most convincing and overwhelming reasons.

MALAN V. SIMPSON, Supreme Court of New York, 1861 (20 How. Pr. 488).

Barnard, Justice.: The question presented for consideration is, whether a term fee of ten dollars can be taxed for every term that a motion for a new trial of a case is on the special term calendar and not necessarily reached or postponed.

In the case of the Mechanics' Banking Association. (10 How., 400,) the general term of the superior court decided the question

in the affirmative, and even went to the length of holding that a trial fee was taxable.

In the case of *Moore* agt. *Cockroft*, 9 How., 479, the general term of the supreme court, (second district,) also decided the question in the affirmative, but held that a trial fee could not be taxed. These two cases agree in holding that term fees are taxable. There are in addition, numerous special term decisions holding the same doctrine. It is insisted on the part of the defendants' counsel, that the case of *Jackett* agt. *Judd*, (18 How., 388,) has overruled all previous decisions on this question, including the above two general term decisions. That case, it is true, is a decision directly adverse to the taxation of the term fees in question. It is, however, a mistake to suppose that the last decision on the point overruled all prior decisions.

A special term decision cannot even overrule a prior special term decision, much less a general term decision. When there are several conflicting special term decisions, the point is left in doubt; but the moment a point is decided by a general term, the doubt is removed, until a subsequent conflicting decision of another general term brings it back again. As the judiciary is at present formed, all the judges are co-ordinate in power, and the decision of one single judge in one district in no way binds another in any of the other districts (excepting in adjudicating on the same case,) so likewise the general terms are all co-ordinate and the decision of one general term, in one district is not binding on another general term in any of the other districts, with the single exception above mentioned. The decision of a general term, however, is binding on all the single judges, and all special terms, until some other general term makes a conflicting decision, when the question is, in truth, left undecided by the superior tribunal.

It also results that a decision of the general term of one of the judicial districts, will be binding authority, (although an opposite decision may be made by the general term in each of the other districts,) in that district, until the court of appeals overrule it, or the same general term by explanation in some subsequent cause in effect overrules it.

It therefore follows, that where there are conflicting decisions on a point by the general term in two districts, the law on that point will be one way in one of those two districts, and directly

the opposite in the other; whilst in the rest of the state, it would be left to the decision of the particular judge before whom the question might arise.

Consequently, the question presented in this case having been directly adjudicated upon, and decided in the affirmative by a general term of the supreme court held in the second district, and no general term having made any conflicting decision the decision of this case must follow the case of *Moore agt. Cockroft*, (9 How., 479).

The above remarks as to the effect of decisions, will of course, be understood as referring to their obligatory force; all judges and courts will at all times pay due respect, and attentively examine any decisions that may have been made by their brethren or other courts, and give to them such weight as they are justly entitled to. Motion denied with costs.

[To understand this opinion, it must be remembered that at that time the "general term" of the Supreme Court in each district was a reviewing court, having appellate jurisdiction over the orders and judgments of the "special term," which was the tribunal of original jurisdiction.]

WELLS v. OREGON R. & N. Co., U. S. Circuit Court, District of Oregon, 1883 (15 Fed. Rep. 561):

Deady, J.: Substantially the same conclusion had been reached by several other judges in the United States circuit courts in the same and similar cases reported in 2 Fed. Rep. 465; 3 Fed. Rep. 593; *Id.* 775; 4 Fed. Rep. 481; 6 Fed. Rep. 426; 8 Fed. Rep. 799.

The only case cited from the decisions of the federal courts to the contrary of these is *Chamblos v. Pa., etc. Ry. Co.* 4 Brewst. 563, in which a preliminary injunction was refused by Judge McKennan in a similar case; and also the case of *New England Exp. Co. v. Maine, etc., Ry. Co.* 57 Me. 194, and *Sergeant v. Boston, etc. Ry. Co.* 115 Mass. 416, in which the right of an express company to what are known as express facilities on the defendants' roads was denied. But the very decided weight and number of these authorities recognize the existence of the express business and the right of those engaged in it to have the proper facilities therefor allowed them by the defendants, and to secure the same by injunction in case they are refused. Until this question is settled by the supreme court, these deliberate decisions of co-or-

dinate tribunals, like the circuit courts, ought, except in an extreme case, to furnish a guide for the decision of this court. This is the rule that has been followed by justices of the supreme court on the circuit, (*Washburn v. Gould*, 3 Story, 133; *Brooks v. Bicknell*, 3 McLean, 250; *American, etc., Co. v. Fiber, etc., Co.* 3 Fisher, 363,) and in *Goodyear, etc., Co. v. Milles*, 7 O. G. 40, Judge Emmons examines the question at some length, and concludes that "if one system of co-ordinate courts more than another calls for the application of these general principles, it is that of the circuit courts of the United States. . . . Although divided in jurisdiction, geographically, they constitute a single system, and when one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action, demand that it should be followed until modified by the appellate court."

IN *EDISON ELECTRIC LIGHT CO. v. BLOOMINGDALE*, 65 Fed. Rep. 212 (1894), Lacombe, J., says:

It is, of course, the duty of the several circuit courts in the second circuit, comity to the contrary notwithstanding, to follow the decisions of the court of appeals of that circuit rather than those of a circuit court in some other circuit.

BURT v. POWIS, Supreme Court of New York, 1858 (16 How. Pr. 289).

By the court—E. Darwin Smith, Justice. The questions arising upon this appeal, are precisely the same presented to the court in the case of *Walker agt. Crane*, (17 Barb. 119.) In that case the construction, force and validity of the act of March 16th, 1852, entitled, "An act to facilitate the dissolution of manufacturing corporations in the county of Herkimer, and to secure the payment of their debts without preferences," was elaborately discussed and fully considered.

The able opinion of Judge Gridley in the case, appears to have been concurred in by the four judges of the fifth district, all present at the general term. By chapter 64 of acts of the sessions of 1855, page 65, the provisions of the aforesaid act are applied to the Seneca County Woolen Mills, which brings this case necessarily within the decision in the case of *Walker agt. Crane*, and also within the case of *The Herkimer County Bank agt. Furman*, (17 Barb. 116.) Those decisions both pronounced at the same general term, are authoritative decisions of this court upon the questions presented, and bind-

ing as such upon the judges of this court and upon referees, and all other subordinate tribunals, until overruled or reversed. The report of the referee in this action being in distinct conflict with such decision, the judgment entered thereupon must, of course, be reversed.

The referee had no right to disregard the decision of the court upon the express point before him. If there was error in that decision, the court itself at any general term might reconsider and overrule the same. Otherwise, and until that had been done, it was the law of this court binding as authority in all places, until reversed by the court of appeals. The fact that the referee in this case, supposed himself at liberty avowedly to render a judgment in open conflict with a decision of the court at general term, and that learned counsel with the above cases before them, should have called upon the referee to do so, seems to imply the prevalence to some extent of a fundamental error in respect to this court, in the assumption that the law is, or may be different in the different districts of the state. Perhaps some conflict of decision may have given rise to such an impression, and induced counsel to suppose that it was admissible to experiment upon the possibility of obtaining a different decision in one district from the decision of another. But I do not think this court in any of its branches deserves the reproach of countenancing any such experiments. Upon questions of law, the conflict of opinions between the decisions of the judges in the several districts of the state, is quite infrequent.

PARKER V. POMEROY, Supreme Court of Wisconsin, 1853 (2 Wis. 112).

By the Court, Crawford, J. The important question presented by the record in this case, and the only one upon which an error might be predicated, is whether a defendant in replevin, in whose favor a judgment for the value of the goods replevied, and damages for detention, with costs, has been rendered in the Circuit Court, is entitled to a *capias ad satisfaciendum* against the plaintiff to enforce his judgment.

We regret that this question is not open in the present case; and so far as this case is concerned, we cannot discuss it. At the December Term, 1851, of the Supreme Court, it was determined that the pleas of justification interposed by the defendants were bad, because a *ca. sa.* could not issue on a judgment in favor of the defendant in replevin, as above stated. The case was remanded, and

after a trial in the Circuit Court, it is now before us on writ of error.

However we might differ with the conclusion of the Supreme Court, as contained in the opinion given, still it must be esteemed, for all the purposes of the present case, *res adjudicata*. (*Vide* The Washington Bridge Co. v. Stewart and others, 3 Howard, 413.)

As we discover no other error in the case, we are, with reluctance, compelled to affirm the judgment of the Circuit Court.

See *Wittenberg v. Mollyneaux*, 60 Nebr. 583.

In *CALDWELL V. GALE*, 11 Mich. 77 (1862), the court says:

The first proposition is sustained by adjudged cases both in England and in this country. It appears to have had its origin as a rule of law in *Penruddock's Case*, 5 Coke, 100. It has antiquity on its side, and is, therefore, entitled to all the consideration and weight that time can give to an adjudication, as precedent for other courts to follow. We are not, however, aware that the question has ever before arisen in our courts, and we do not feel ourselves bound to follow, as precedents, adjudications outside of our own State—save adjudications in the Federal Courts on questions arising under the Constitution and laws of the Federal Government—any further than they appear to us to be warranted by the fundamental principles of the common law.

LEBANON BANK V. MANGAN, Supreme Court of Pennsylvania, 1857 (27 Pa. St. 452).

Lewis, C. J.: The decision of the Supreme Court of the United States in *Miller v. Austin*, 13 How. 218, is certainly entitled to very great respect, on account of the learning and ability of the judges who administer the law in that court. But this question does not arise upon the construction of the constitution or laws of the United States; the case before that court was a certificate of deposit issued by a bank in Mississippi, and endorsed in Ohio. The action was brought in the latter state, not upon the certificate, but upon the endorsement. Every endorsement is treated as a new and substantive contract, and is governed by the law of the place where the endorsement is made: *Slocum v. Pomroy*, 6 Cranch. 221; *Story Conf. Laws*, 314. The Federal tribunal had, therefore, no other duty to perform than to ascertain what was the law of Ohio; and its decision is nothing more than the expression of its opinion that, under the law of Ohio, the endorser was liable. Conceding this to

be a correct exposition of the law of Ohio, it furnishes no reason whatever for a change in the settled laws and usages of this state. If each state is constantly changing its rules of decision for the purpose of conforming to those of its sister states, it might happen that by the time we had accommodated ourselves to the law of Ohio, that state, influenced by the like comity, might have adopted our rule, and thus the law would be rendered uncertain in both states. But it is remarkable that a decision of the Supreme Court of Ohio, in exact conformity with the Pennsylvania decisions, was cited in the argument, and the learned judge who delivered the opinion of the Federal Court did not undertake to show that the citation was erroneous, or that the decision had been overruled by the proper tribunal of Ohio. It is, therefore, by no means certain that the case of *Miller v. Austin* is even a correct declaration of the law of Ohio. It is very certain, however, that it is no authority on this question, in opposition to the decisions of the Supreme Court of Pennsylvania.

The same remark may be made in relation to the decisions of other states on this question. When a principle of Pennsylvania law has been settled by the Supreme Court of the state, it is not to be changed in order to conform to the laws of other states. Judgment affirmed.

SHELTON v. HAMILTON, Supreme Court of Mississippi, 1852 (23 Miss. 496).

Yerger, J.: The case of *Erwin v. Dundas*, 4 How. 58, decided by the supreme court of the United States, has been pressed upon our consideration. That case went up from Alabama, and the supreme court held that a sale of lands made in Alabama, by virtue of an execution tested after the death of the defendant without revivor, was absolutely void, and not merely voidable. While we entertain a proper respect for the opinions of the supreme court, and are willing to yield to them the deference which is due to so distinguished a tribunal, yet when its decisions come in conflict with those of this court, in relation to questions over which the jurisdiction of this court is ample and its decisions final, we feel bound to adhere to our own decisions. Any other rule would subject the opinions of this court to a degree of fluctuation and change greatly to be deplored. Retrospective legislation has always been deemed unjust and oppressive. Whenever courts of justice alter or change the rules of law they have once established, and on the faith of which

contracts have been made or rights acquired, many of the most injurious effects of retrospective legislation will result from such action. Entertaining this opinion, whatever views we might have been inclined to take of the question presented in the charge of the circuit judge, if it had been one of the first impression, we shall adhere to the rule laid down by this court in the case of *Smith v. Winston*, before referred to.

SIM'S CASE, Supreme Judicial Court of Massachusetts, 1851 (7 Cush. 285).

The question was as to the constitutionality of an act of Congress of 1850. The act was substantially the same as an act of Congress of 1793 which had been held constitutional by the federal courts.

Shaw, C. J.: Since the argument in court, this morning, I am reminded by one of the counsel for the petitioner, that the law in question ought to be regarded as unconstitutional, because it makes no provision for a trial by jury. We think that this cannot vary the result. The law of 1850 stands, in this respect, precisely on the same ground with that of 1793, and the same grounds of argument which tend to show the unconstitutionality of one apply with equal force to the other; and the same answer must be made to them.

The principle of adhering to judicial precedent, especially that of the supreme court of the United States, in a case depending upon the constitution and laws of the United States, and thus placed within their special and final jurisdiction, is absolutely necessary to the peace, union and harmonious action of the state and general governments. The preservation of both, with their full and entire powers, each in its proper sphere, was regarded by the framers of the constitution, and has ever since been regarded, as essential to the peace, order and prosperity of all the United States.

If this were a new question, now for the first time presented, we should desire to pause and take time for consideration. But though this act, the construction of which is now drawn in question, is recent, and this point, in the form in which it is now stated, is new, yet the solution of the question depends upon reasons and judicial decisions, upon legal principles and a long course of practice, which are familiar, and which have often been the subject of discussion and deliberation.

Considering, therefore, the nature of the subject, the urgent necessity for a speedy and prompt decision, we have not thought

it expedient to delay the judgment. I have, therefore, to state, in behalf of the court, under the weighty responsibility which rests upon us, and as the unanimous opinion of the court, that the writ of habeas corpus prayed for cannot be granted. Writ refused.

SMOOT V. LAFFERTY, Supreme Court of Illinois, 1845 (2 Gilm. 383).

Caton, J.: The declaration in this cause states that the defendant below was sheriff of the county of Gallatin, and as such sheriff, had in his hands a certain execution and fee bills against the plaintiff below, by virtue of which he levied upon a certain ferry boat, the property of the said plaintiff, and sold it without having the same appraised by three disinterested householders, as required by the provisions of the act of January 6th, 1843, entitled "An act regulating the sales of property on judgments and executions." The declaration contains sufficient averments to show that the case was embraced within the provisions of that act. To this declaration the defendant filed a demurrer, which was overruled by the court and judgment given for the plaintiff, which is now assigned for error.

The only question presented for our consideration is the constitutionality of that law. The Supreme court of the United States, in the case of *McCracken v. Hayward*, decided at the January term, 1844, have distinctly decided that the act of 1841 is an express violation of the constitution of the United States and void. The provisions of the act first mentioned are substantially the same as those of this act. As by the constitution of the United States that court has ultimate exclusive jurisdiction of that question, we are bound by its decision.

The judgment of the circuit court is reversed with costs.

HICKS V. HOTCHKISS, Court of Chancery of New York, 1823 (7 Johns. Ch. 297).

Kent, Chancellor: The decisions of the supreme court of the United States upon questions arising upon the construction of the powers and authority of the constitution must be definitive and binding upon all the tribunals of the Union; because the constitution has made their judgments and decrees final and without appeal. Every decision by a court in the last resort, in a case within its undoubted jurisdiction, must from the necessity of the case be absolutely binding. The proposition that the state courts are equally

supreme, independent and absolute in the consideration and decision of such national questions strikes me as untenable. It would lead to the subversion of all order and subordination. There must be a paramount power somewhere in the organization of every political institution, or there is no government. The supreme court of the United States, on questions within its cognizance, is that power; and if the state courts were to undertake to disobey or elude its decisions, the consequence would be discord and confusion, or a dissolution of the national compact.

I should have deemed it my duty, therefore, to have maintained this doctrine, even if I had considered the application of a prohibition in the constitution to the discharge under the act of 1811, to have been a mistaken application.

WILKINS v. PHILIPS, Supreme Court of Ohio, 1827 (3 Ohio, 49).

By the Court: The case of Marsteller and others v. McLean, 7 Wheat. 156, was decided upon the authority of the case of Perry and others v. Jackson and others, 4 Term, 516. In this latter case, Lord Kenyon asserts that it is the first time the question had been brought up for decision whether, where the saving clause of the statute of limitations protected only a part of those joined in the action, all the plaintiffs could claim its protection. It decided against the protection, but upon grounds by no means satisfactory to us. The case was one of partnership, which, we think, was sufficient, of itself, to have warranted the decision made. This is in part relied upon, and the decision is, in part, put upon the ground of the grammatical construction of the statute. The supreme court of the United States ground themselves upon this authority. Highly as we respect the opinions of this tribunal, we can not adopt them in construction of our own statutes, where they are at variance with our own judgments. We consider the reasoning of the courts of Connecticut and Kentucky, cited by the other side, as more consonant to the general advancement of justice. It is our opinion, that, if any one of the parties who sue a writ of error is within the proviso that takes the case out of the statute of limitations, the case is saved for all the parties. The demurrer to the replication is overruled, and cause remanded for further proceedings.

COHENS v. VIRGINIA, Supreme Court of the U. S. 1821 (6 Wheat. 265).

Marshall, C. J.: The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court, in the case of Marbury v. Madison.

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected; but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

In the case of *Marbury v. Madison*, the single question before the court, so far as that case can be applied to this, was, whether the legislature could give this court original jurisdiction in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But, in the reasoning of the court in support of this decision, some expressions are used which go far beyond it. The counsel for *Marbury* had insisted on the unlimited discretion of the legislature in the apportionment of the judicial power; and it is against this argument that the reasoning of the court is directed. They say that, if such had been the intention of the article, "it would certainly have been useless to proceed farther than to define the judicial power, and the tribunals in which it should be vested." The court says, that such a construction would render the clause, dividing the jurisdiction of the court into original and appellate, totally useless; that "affirmative words are often, in their operation, negative of other objects than those which are affirmed; and, in this case (in the case of *Marbury v. Madison*), a negative or exclusive sense must be given to them, or they have no operation at all." "It cannot be presumed," adds the court, "that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it."

The whole reasoning of the court proceeds upon the idea that the affirmative words of the clause giving one sort of jurisdiction, must imply a negative of any other sort of jurisdiction, because otherwise the words would be totally inoperative, and this reasoning is advanced in a case to which it was strictly applicable. If in that case original jurisdiction could have been exercised, the clause under

consideration would have been entirely useless. Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle. The reasoning sustains the negative operation of the words in that case, because otherwise the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the article. The effort now made is, to apply the conclusion to which the court was conducted by that reasoning in the particular case, to one in which the words have their full operation when understood affirmatively, and in which the negative, or exclusive sense, is to be so used as to defeat some of the great objects of the article.

To this construction the court cannot give its assent. The general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion; limitations which in no degree affect the decision in that case, or the tenor of its reasoning.

FLORIDA C. R. CO. v. SCHUTTE, Supreme Court of the U. S. 1881 (103 U. S. 118).

Waite, C. J.: As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this Company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dismissed because it was not proved that any of the state bonds had been sold, the decision was in no just sense *dictum*. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.

In *CROSS v. BURKE*, 146 U. S. 82 (1892), Fuller, C. J. says:

It was to this act that Mr. Justice Miller referred in *Wales v. Whitney*, 114 U. S., 564, 565, as restoring "the appellate jurisdiction of this court in *habeas corpus* cases from decisions of the circuit courts and that this necessarily included jurisdiction over simi-

lar judgments of the Supreme Court of the District of Columbia." But the question of jurisdiction does not appear to have been contested in *Wales v. Whitney*, and where this is so, the court does not consider itself bound by the view expressed.

TRINITY COUNTY V. MCCAMMON, Supreme Court of California, 1864 (25 Cal. 117).

By the Court, Shafter, J., on petition for modification of opinion:

Since the decision of the appeal taken in this action, a petition has been presented on the part of the appellant, asking not for a rehearing, nor for any modification of the judgment, but for a modification of the opinion, on the ground that the opinion is to some extent *obiter*; and on the further ground that the Court has misapprehended the contents of the report made by the committee appointed by the County Judge to pass on the value of the building owned by Edgcomb, and which he proposed to sell to the county.

In so far as the opinion passes upon any question not necessary to the decision of the appeal, it will interpose no obstacle to a re-investigation of such question upon its merits in any case that may hereafter come to this Court in which the point shall be directly presented. In so far as the misapprehension of the contents of the committee's report is concerned, the document as such, was not in the transcript, and we were therefore justified in assuming that it had no contents, *aliunde* the contents set out in the proceedings. Any case coming here hereafter showing that the report comprehended topics other than those to which the present record confines it, will be a case, to that extent, different from the present, and of course one to which the opinion in this case cannot be considered as having any just application. Petition denied.

See *Williams v. Miles* (Nebr.), 96 N. W. Rep. 151.

STOW V. PEOPLE, Supreme Court of Illinois, 1850 (25 Ill. 81).

Mr. Chief Justice Caton delivered the opinion of the court:

The first question we propose to consider, is that of the jurisdiction of the court before which the prisoner was convicted. This question we shall determine solely upon the construction of the proviso of the first section of the fifth article of the constitution, without particular reference to the different acts of the legislature, by which it is supposed that the court has been deprived of jurisdiction.

That proviso is this: "Provided, that inferior local courts of civil and criminal jurisdiction may be established, by the general assemblies, in the cities of this State, but such courts shall have a uniform organization and jurisdiction in such cities." We were first called upon to consider this provision of the constitution, in reference to this very court, in the case of *Perry v. The People*, 14 Ill. 496. The objection, and the only objection then raised to the court, was, that the legislature had established one court in one city of the State only; whereas it was, by this clause of the constitution, required, when it attempted to exercise the power here conferred, to legislate for all the cities alike, and establish the same court, or courts, in each of the cities within the limits of the State. It was objected, and only objected, as this had not been done, and but one city had been provided with a court, that it was not authorized by the constitution. This, we say, was the only question presented by the record, and the only one the court was called upon to decide. That was decided by the court, and it was held that the legislature might establish courts in such cities alone, as the public exigencies in its judgment might require.

It is true that the court, in its opinion, went beyond the case before it, and in anticipation of the future, made an admonitory remark, which contains an intimation, that all the courts in all the cities, which should be established, must have a uniform organization and jurisdiction. It is this: "The 'uniformity of organization and jurisdiction' has respect to the courts and not to the cities as its antecedent. As these courts may be extended, care will be taken to introduce into other cities, one of a 'uniform' character of 'organization and jurisdiction;' as the power is restricted and confined to such character as shall produce uniformity in the mode of organization and extent of jurisdiction." The remark was undoubtedly true and pertinent, that the uniformity of organization and jurisdiction, has respect to the courts and not to the cities; but it was not necessary to say how far that uniformity was required to extend. It was sufficient that the uniformity enjoined did not refer to cities, and that the general assembly might legislate for one city and not for another. . . .

HOLCOMB v. BONNELL, Supreme Court of Michigan, 1875 (32 Mich. 6).

Graves, C. J.: On the trial before a jury the evidence tended to establish a right in Holcomb to recover, but the defense contended

that all right of action on the bond was excluded on the ground that the plaintiff had never got into actual possession under the judgment, and cited *Delashman v. Berry*, 21 Mich., 516, as decisive on the subject; and the circuit judge, taking the same view of that case, felt constrained to yield to this position of defendants, and he accordingly instructed the jury to find against Holcomb.

Without questioning in the least the correctness of the decision itself in *Delashman v. Berry*, we do not fail to observe that the language is pretty broad and open to an application much more extended than was designed unless strictly confined to the state of facts there shown. It is hardly necessary to observe that the language used in deciding cases can rarely be separated from the specific matters contemplated by the court, without leading to results completely at variance with the principle with which the expressions were meant to harmonize. In laying down propositions which appear correct in view of the actual case as shaped by the record, it is not generally considered needful to write down in guarded terms the particular limitations of the propositions, or the conditions which would not be suited to them. It is supposed they will be read not as abstractions, but as propositions inseparably bound up with the particular issue and matters the court is then dealing with, and it is in this way that the observations in the case mentioned must be considered, and without yielding to them any further than the needs of that case required. Now in *Delashman v. Berry* the plaintiff had got judgment of restitution merely, and so far as appeared, there was no impediment to hinder him from getting actual possession pursuant to the judgment. Nevertheless, without presenting any reason whatever for failing to get, or even for omitting all effort to get possession, he at once sued on the bond, and the court thought he did not, upon a just view of the statute, show a right of action. There was no pretense that his opponent by dilatory means had obstructed his right under the judgment, and had effectually prevented his getting into possession in compliance with it, until his estate had come to an end by effluxion of time.

In the present case the defendant Bonnell appealed against Holcomb's recovery before the commissioner, and in order to effectuate the appeal and keep Holcomb out, she gave this bond to secure rent; and the circuit court, whilst Holcomb's term was still running, and when it had about two-thirds of a year to continue, also gave judgment on the appeal for him, and adjudged his right to possession,

and that he was entitled to process to be put in, and she then delayed his remedy of restitution until his term was about expired; and she now resists a recovery on the bond for the reason that he did not do the very thing which the giving of the bond enabled her to prevent his doing, and which she did prevent his doing.

Having by means of the bond placed herself in a position which enabled her to delay Holcomb in getting possession, which the judgment determined he was entitled to, until his right to go in was substantially terminated by the expiration of his term, and having in fact so delayed him, she now insists that under the statute as explained in *Delashman v. Berry*, Holcomb is cut off from all remedy on the bond for the very reason that he did not obtain actual possession under his judgment.

I think this position cannot be sustained. The legislature could never have intended to require a bond as a condition of appeal, and at the same time have intended that it should be worthless if the appellant after judgment for possession in the appellate court should by mere dilatory action then delay actual restitution to the plaintiff until made impossible as a consequence of the expiration of his term. Any such view would lead to absurdity and gross injustice. It would afford a bounty to trickery. When the plaintiff recovered on the appeal in the circuit court and the defendant refrained from carrying the case further, the former was absolutely entitled to restitution, and all that remained to be done to give him restitution was absolutely due to him.

No lawful right existed anywhere to deny him. He had done all that was practicable for him to do, and was not at fault in any way. He submitted, as he was compelled to submit, so far as the record shows, to the stay obtained by defendant Bonnell, and which without the bond she could not have been in a position to obtain and she should not be allowed to defeat the bond by setting up his failure to do what she thus made it impossible for him to do.

I think the judgment should be reversed, with costs, and a new trial ordered.

Campbell, and Cooley, JJ., concurred.

BOOKS OF AUTHORITY.

KENT, COMMENTARIES, I, 499.

The reports of adjudged cases are admitted to contain the highest and most authentic evidence of the principles and rules of the com-

mon law; but there are numerous other works of sages in the profession which contribute very essentially to facilitate the researches and abridge the labor of the student. These works acquire by time, and their intrinsic value, the weight of authority; and the earlier text-books are cited and relied upon as such, in the discussions at the bar and upon the bench, in cases where judicial authority is wanting.

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One of the oldest of these treatises is Glanville's Tractatus de Legibus Angliæ, composed in the reign of Henry II., in which he was chief justiciary, and presided in the *aula regis*. It is a plain, dry, perspicuous essay on the ancient actions and the forms of writs then in use. It has become almost obsolete and useless for any practical purpose, owing to the disuse of the ancient actions; but it is a curious monument of the improved state of the Norman administration of justice. It is peculiarly venerable, if it be, as it is said, the most ancient book extant upon the laws and customs of England. It has been cited, and commented upon, and extolled, by Lord Coke, Sir Matthew Hale, Sir Henry Spelman, Selden, Blackstone, and most of the eminent lawyers and antiquaries of the two last centuries. Mr. Reeves says that he incorporated the whole of Glanville into his History of the English Law.

Bracton wrote his treatise, De Legibus et Consuetudinibus Angliæ, in the reign of Henry III., and he is said to have been a judge itinerant in that reign, and professor of law at Oxford. He is a classical writer, and has been called, by a perfect judge of his merits, the father of the English law, and the great ornament of the age in which he lived. His work is a systematic performance, giving a complete view of the law in all its titles, as it stood at the time it was written; and it is filled with copious and accurate details of legal learning. It treats of the several ways of acquiring, maintaining, and recovering property, much in the manner of the Institutes of Justinian. The style, clear, expressive, and sometimes polished, has been ascribed to the influence of the civil and canon law, which he had studied and admired; and the work evinces, by the freedom of the quotations, that he had drank deep at those fountains.

In the reign of Edward I., Bracton was reduced into a compendium by Thornton, which shows, says Selden, how great the authority of Bracton was in the time of Edward I. He continued to be the repository of ancient English jurisprudence, and the prin-

pical source of legal authority, down to the time of the publication of the Institutes of Lord Coke.

Britton and Fleta, two treatises in the reign of Edward I., were nothing more than appendages to Bracton, and from whom they drew largely. Lord Coke says that Britton was Bishop of Hereford and of profound judgment in the common law, and that Fleta was written by some learned lawyer, while in confinement in the Fleet prison. The dissertation which Selden annexed to the edition of Fleta, printed in his time, is evidence of the high estimation in which the work was then held; and it is a little singular that President Henault, in his chronological abridgment of the History of France, should refer to this ancient English treatise of Fleta as an historical authority.

Sir John Fortescue's treatise, *De Laudibus Legum Angliæ*, was written in the reign of Henry VI., under whom he was Chief Justice, and afterwards Chancellor. It is in the form of a dialogue between him and the young prince, and he undertakes to show that the common law was the most reasonable and the most ancient in Europe, and superior to the civil law. It displays sentiments of liberty, and a sense of a limited monarchy, remarkable, in the fierce and barbarous period of the Lancastrian civil wars, and an air of probity and piety runs through the work. He insisted, for instance, that the conviction of criminals by juries, and without torture, was much more just and humane than the method of the continental nations; and that the privilege of challenging jurors, and of bringing writs of attain upon corrupt verdicts, and the usual wealth of jurors, afforded that security to the lives and property of English subjects, which no other country was capable of affording. He runs a parallel, in many instances, between the common and the civil law, in order to show the superior equity of the former, and that the proceedings in courts of justice were not so dilatory as in other nations. Though some of the instances of that superiority which he adduces, such as the illegitimacy of antenuptial children and the doctrine of feudal wardships, are of no consequence, yet the security arising from trial by jury, and the security of life and property by means of the mixed government of England, and the limitations of the royal prerogative, were solid and pre-eminent marks of superiority.

// Littleton's Book of Tenures was composed in the reign of Edward IV., and it is confined entirely to the doctrines of the old English

law, concerning the tenure of real estates, and the incidents and services relating thereto. In the first book, Littleton treats of the quantity of interest in estates, under the heads of fee-simple, fee-tail, tenant in dower, tenant by the curtesy, tenant for life, for years, and at will. In the second book he treats of the several tenures and services by which lands were then held, such as homage, fealty, villenage, and knight service. In the third book, he treats of divers subjects relative to estates and their tenures, under the heads of parceners, joint tenants, estates on condition, releases, warranty, &c. He explained the learning of that period on the subject of tenures and estates, with a felicity of arrangement, and perspicuity and precision of style, that placed him above all other writers on the law. No work ever attained a more decided and permanent reputation for accuracy and authority. Lord Coke says, that Littleton's Tenures was the most perfect and absolute work, and as free from error as any book that ever was written on any human science; and he is justly indignant at the presumptuous and absurd censures which the celebrated civilian, Hotman, was pleased to bestow on Littleton's clear and accurate view of English feudal tenures. He said he had known many of his cases drawn in question, but never could find any judgment given against any of them, which could not be affirmed of any other book in our law. The great excellence of Littleton is his full knowledge of the subject, and the neatness and simplicity of his manner. He cites but very few cases, but he holds no opinion, says his great commentator, but what is supported by authority and reason. A great part of Littleton is not now law, or is entirely obsolete with us; and particularly much of the matter in the chapters on estates in fee-tail, copyholds, feudal services, discontinuance, attornment, remitter, confirmation, and warranty. But, even at this day, what remains concerning tenures cannot be well understood without a general knowledge of what is abolished; and even the obsolete part of Littleton can be studied with pleasure and profit by all who are desirous to trace the history and grounds of the law. It has been supposed by Mr. Butler that Littleton's treatise would still be a proper introduction to the institutes of the English law on the subject of real estates.

Perkins's Treatise of the Laws of England, written in the reign of Henry VIII., has always been deemed a valuable book for the learning and ingenuity displayed in it relating to the title and conveyance of real property. Coke said it was wittily and learnedly

composed; and Lord Mansfield held it to be a good authority in point of law. It treats of grants, deeds, feoffments, exchange, dower, curtesy, devises, surrenders, reservations, and conditions; and it abounds with citations, and supports the positions laid down by references to the Year Books, and Fitzherbert's Abridgment.

The Dialogue between a Doctor of Divinity and a Student in Law was written by St. Germain, in the reign of Henry VIII., and discusses, in a popular manner, many principles and points of common law. The seventeenth edition of this work was published in 1787, and dedicated to the younger students and professors of law. It has always been considered by the courts, and the best of the juridical writers, as a book of merit and authority.

But the legal productions of the preceding ages were all surpassed in value and extent in the reigns of Elizabeth and James by the results of the splendid talents and immense erudition of Bacon and Coke. The writings of Lord Bacon on the municipal law of England are not to be compared in reputation to his productions in physical and moral science; but it is nevertheless true, that he shed light and learning, and left the impression of profound and original thought, on every subject which he touched. It was the course of his life to connect law with other studies, and therefore, he admitted that his arguments might have the more variety, and perhaps the greater depth of reason. His principal law tracts are his *Elements of the Common Law*, containing an illustration of the most important maxims of the common law, and of the use of the law in its application to the protection of person, property, and character, and his *Reading upon the Statute of Uses*. Lord Bacon seems to have disdained to cite authorities in his law treatises; and in that respect he approved of the method of Littleton and Fitzherbert, and condemned that of Perkins and Staunforde. He admits, however, that in his own private copy he had all his authorities quoted, and that he did sometimes "weigh down authorities by evidence of reason;" and that he intended rather to correct the law than soothe received error, or endeavor to reconcile contradictions by unprofitable subtlety. He made a proposal to King James for a digest of the whole of the common and statute law of England; and if he had been encouraged and enabled to employ the resources of his great mind on such a noble work, he would have done infinite service to mankind, and have settled in his favor the question, which he said would be made with posterity, whether he or Coke was the greater lawyer.

The writings of Lord Bacon are distinguished for the perspicuity and simplicity with which every subject is treated.

Lord Coke's Institutes have had a most extensive and permanent influence on the common law of England. The first part is a commentary upon Littleton's Tenures; and, notwithstanding the magnitude of the work, it has reached seventeen editions. Many of the doctrines which his writings explain and illustrate have become obsolete, or have been swept away by the current of events. The influence of two centuries must inevitably work a great revolution in the laws and usages, as well as in the manners and taste of a nation. Perhaps everything useful in the Institutes of Coke may be found more methodically arranged, and more interestingly taught, in the modern compilations and digests; yet his authority on all subjects connected with the ancient law is too great and too venerable to be neglected. The writings of Coke, as Butler has observed, stand between and connect the ancient and the modern law,—the old and new jurisprudence. He explains the ancient system of law as it stood in his day, and he points out the leading circumstances of the innovation which was begun. We have in his works the beginning of the disuse of real actions; the tendency of the nation to abolish the military tenures; the rise of a system of equity jurisdiction, and the outlines of every point of modern law.

The second part of the Institutes of Coke is a commentary upon the ancient statutes, beginning with Magna Charta, and proceeding down to the reign of Henry VIII.; and his commentaries upon the ancient statutes consisted, as he himself declared, of the authentic resolutions of the courts of justice, and were not like the glosses of the civilians upon the text of the civil law, which contain so many diversities of opinion as to increase rather than to resolve doubts and uncertainties. His commentary upon Magna Charta, and particularly on the celebrated 29th chapter, is deeply interesting to the lawyers of the present age, as well from the value and dignity of the text, as the spirit of justice and of civil liberty which pervades and animates the work. In this respect, Lord Coke eclipses his contemporary and great rival, Lord Bacon, who was an inferior to Coke in a just sense and manly vindication of the freedom and privileges of the subject, as he was superior in general science and philosophy. Lord Coke, in a very advanced age, took a principal share in proposing and framing the celebrated Petition of Right, containing a parliamentary sanction of those constitutional limitations

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SOURCES AND FORMS OF LAW. 197
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upon the royal prerogative which were deemed essential to the liberties of the nation.

The third and fourth parts of the Institutes treat of high treason and the other pleas of the crown, and of the history and antiquities of the English courts. The harshness and severity of the ancient criminal code of England are not suited to the taste and moral sense of the present age; and those parts of the Institutes are of very inconsiderable value and use, except it be to enlighten the researches of the legal antiquary. In this respect, Coke's Pleas of the Crown are inferior to the work under that title by Staunforde, who wrote in the age of Philip and Mary, and was the earliest writer who treated didactically on that subject. Staunforde wrote in law French; but Lord Coke, more wisely and benevolently, wrote in English, because, he said, the matter of which he treated concerned all the subjects of the realm.

Before we quit the period of the old law, we must not omit to notice the grand abridgements of Statham, Fitzherbert, and Brooke. Statham was a baron of the Exchequer, in the time of Edward IV. His abridgment of the law was a digest of most titles of the law, comprising under each head adjudged cases from the Year Books, given in a concise manner. The cases were strung together without regard to connection of matter. It is doubtful whether it was printed before or after Fitzherbert's work, but the latter entirely superseded it. Fitzherbert was published in the reign of Henry VIII., and came out in 1514. and was, for that period, a work of singular learning and utility. Brooke was published in 1573, and in a great degree superseded the others. The two last abridgments contain the substance of the Year Books regularly digested; and by the form and order which they gave to the rude materials before them, and the great facility which they afforded to the acquisition of knowledge, they must have contributed very greatly and rapidly to the improvement of legal science. Even those exceedingly laborious abridgments were in their turn superseded by the abridgments of Rolle and his successors. . . .

The treatise of Sir Henry Finch, being a discourse in four books, on the maxims and positive grounds of the law, was first published in French, in 1613; and we have the authority of Sir William Blackstone for saying, that his method was greatly superior to that in all the treatises that were then extant. His text was weighty, concise, and nervous, and his illustrations apposite, clear and authentic.

But the abolition of the feudal tenures, and the disuse of real actions, have rendered half of his work obsolete.

Sheppard's Touchstone of Common Assurances was the production of Mr. Justice Dodderidge, in the reign of James I. It is a work of great value and authority, touching the common-law modes of conveyance, and those derived from the Statute of Uses. It treats also copiously of the law of uses and devises; but the great defect of the book is the want of that lucid order and perspicuous method which are essential to the cheerful perusal and ready perception of the merits of such a work. The second volume of *Collectanea Juridica* has an analysis of the theory and practice of conveyancing, which is only a compendious abridgment of the Touchstone; and there is a very improved edition of it by Preston, who has favored the profession with several excellent tracts on the law of real property.

Rolle's Abridgment of the Law was published soon after the restoration, with an interesting preface by Sir Matthew Hale. It brings down the law to the end of the reign of Charles I., and though it be an excellent work, and, in point of method, succinctness, and legal precision, a model of a good abridgment, Sir Matthew Hale considered it an unequal monument of the fame of Rolle, and that it fell short of what might have been expected from his abilities and great merit. It is also deemed by Mr. Hargrave a great defect in Viner's very extensive abridgment, that he should have attempted to engraft it on such a narrow substance as Rolle's work. Rolle was Chief Justice of England under the protectorate of Cromwell, and under the preceding commonwealth; but as his abridgment was printed in the reign of Charles II., he has no other title annexed to his name than that of Sergeant Rolle, and his republican dignity was not recognized.

Since the period of the English revolution, the new digests have superseded the use of the former ones; and Bacon, Viner, Comyns, and Cruise contain such a vast accession of modern law learning, that their predecessors have fallen into oblivion. Viner's Abridgment, with all its defects and inaccuracies, is a convenient part of every lawyer's library. We obtain by it an easy and prompt access to the learning of the Year Books and the old abridgments, and the work is enriched with many reports of adjudged cases not to be found elsewhere; but, after all that can be said in its favor, it is an enormous mass of crude, undigested matter, and not worth the labor

of the compilation. The Digest of Lord Chief Baron Comyns is a production of vastly higher order and reputation, and it is the best digest extant upon the entire body of the English law. Lord Kenyon held his opinion alone to be of great authority, for he was considered by his contemporaries as the most able lawyer in Westminster Hall. The title Pleader has often been considered as the most elaborate and useful head of the work; but the whole is distinguished for the variety of the matter, its lucid order, the precision and brevity of the expression, and the accuracy and felicity of the execution. Bacon's Abridgment was composed chiefly from materials left by Lord Chief Baron Gilbert. It has more of the character of an elementary work than Comyns's Digest. The first edition appeared in 1736, and was much admired, and the abridgment has maintained its great influence down to the present time, as being a very convenient and valuable collection of principles, arising under the various titles in the immense system of the English law. And in connection with this branch of the subject, it will be most convenient, though a little out of the order of time, to take notice of Cruise's recent and very valuable Digest of the Laws of England respecting Real Property. It is by far the most perfect elementary work of the kind which we have on the doctrine of real property, and it is distinguished for its methodical, accurate, perspicuous and comprehensive view of the subject. All his principles are supported and illustrated by the most judicious selection of adjudged cases. They are arranged with great skill, and applied in confirmation of his doctrines with the utmost perspicuity and force.

The various treatises of Lord Chief Baron Gilbert are of high value and character, and they contributed much to advance the science of law in the former part of the last century. His treatise on Tenures deserves particular notice, as having explained, upon feudal principles, several of the leading doctrines in Littleton and Coke; and it is a very elementary and instructive essay upon that abstruse branch of learning. His essay on the Law of Evidence is an excellent performance, and the groundwork of all the subsequent collections on that subject; and it still maintains its character, notwithstanding the law of evidence, like most other branches of the law, and particularly the law of commercial contracts, has expanded with the progress and exigencies of society. His treatise on the Law of Uses and Trusts is another work of high authority, and it

has been rendered peculiarly valuable by the revision and copious notes of Mr. Sugden.

The treatises on the Pleas of the Crown, by Sir Matthew Hale and Sergeant Hawkins, appeared early in the last century, and they contributed to give precision and certainty to that most deeply interesting part of jurisprudence. They are both of them works of authority, and have had great sanction, and been uniformly and strongly recommended to the profession. Sir Martin Wright's Introduction to the Law of Tenures is an excellent work, and the value of it cannot be better recommended than by the fact that Sir William Blackstone has interwoven the substance of that treatise into the second volume of his Commentaries. Dr. Wood published in 1722, his Institutes of the Laws of England. His object was to digest the law, and to bring it into better order and system. By the year 1754, his work had passed through eight folio editions, and thereby afforded a decisive proof of its value and popularity. It was greatly esteemed by the lawyers of that age; and an American judge (himself a learned lawyer of the old school) has spoken of Wood as a great authority, and of weight and respect in Westminster Hall.

But it was the fate of Wood's Institutes to be entirely superseded by more enlarged, more critical, and more attractive publications, and especially by the Commentaries of Sir William Blackstone, who is justly placed at the head of all the modern writers who treat of the general elementary principles of the law. By the excellence of his arrangement, the variety of his learning, the justness of his taste, and the purity and elegance of his style, he communicated to those subjects which were harsh and forbidding in the pages of Coke the attractions of a liberal science, and the embellishments of polite literature. The second and third volumes of the Commentaries are to be thoroughly studied and accurately understood. What is obsolete is necessary to illustrate that which remains in use, and the greater part of the matter in those volumes is law at this day and on this side of the Atlantic.

IV.

THE COMMON LAW IN AMERICA.

KENT, COMMENTARIES, I, 472.

The common law, so far as it is applicable to our situation and government, has been recognized and adopted, as one entire system, by the constitutions of Massachusetts, New York, New Jersey, and Maryland. It has been assumed by the courts of justice, or declared by statute, with the like modifications, as the law of the land in every state. It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes. It is also the established doctrine, that English statutes, passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country.

The best evidence of the common law is to be found in the decisions of the courts of justice, contained in numerous volumes of reports, and in the treatises and digests of learned men, which have been multiplying from the earliest periods of the English history down to the present time. The reports of judicial decisions contain the most certain evidence, and the most authoritative and precise application of the rules of the common law. Adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason; and the diligence of counsel, and the labor of judges, are constantly required, in the study of the reports, in order to understand accurately their import, and the principles they establish. But to attain a competent knowledge of the common law in all its branches has now become a very serious undertaking, and it requires steady and lasting perseverance, in consequence of the number of books which beset and encumber the path of the student.

WILLIAMS v. MILES, Supreme Court of Nebraska, 1903 (94 N. W. Rep. 705).

Pound, C.: What is the meaning of the term "common law of England," as used in chapter 15 *a*. Comp. St. 1901? Does it mean the common law as it stood at the time of the Declaration of In-

dependence, or as it stood when our statute was enacted, or are we to understand the common-law system, in its entirety, including all judicial improvements and modifications in this country and in England, to the present time, so far as applicable to our conditions? We cannot think, and we do not believe this court has ever understood, that the Legislature intended to petrify the common law, as embodied in judicial decisions at any one time, and set it up in such inflexible form as a rule of decision. The theory of our system is that the law consists, not in the actual rules enforced by decisions of the courts at any one time, but the principles from which those rules flow; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require. *Rensselaer Glass Factory v. Reid*, 5 Cow. 587. "We may look to American as well as English books and to American as well as English jurists, to ascertain what this law is, for neither the opinions nor precedents of judges can be said, with strict propriety, to be the law. They are only evidence of law." *Forbes v. Scannell*, 13 Cal. 242, 286. On this ground it was held in *Sayward v. Carlson*, 1 Wash. St. 29, 23 Pac. 830, that a statutory provision in Washington making the common law of England the rule of decision in all courts did not confine the courts to the decisions of the English courts, and of those American courts which have followed them closely, for the interpretation of the law. Such has been the understanding of this court from the beginning. What Sir Frederick Pollock has called "the immemorial and yet freshly growing fabric of the common law" is to be our guide, not the decisions of any particular courts at any particular period. The term "common law of England," as used in the statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or civil law system, which was in force in this territory prior to the Louisiana purchase. Hence the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution, in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system.

VAN NESS v. PACARD, Supreme Court of the United States, 1829
(2 Pet. 137).

Story, J.: . . . The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright: but they brought with them and adopted only that portion which was applicable to their situation. There could be little or no reason for doubting that the general doctrine as to things annexed to the freehold, so far as it respects heirs and executors, was adopted by them. The question could arise only between different claimants under the same ancestor, and no general policy could be subserved by withdrawing from the heir those things which his ancestor had chosen to leave annexed to the inheritance. But between landlord and tenant it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East, 38, was so applicable to their situation as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil as well as the public had every motive to encourage the tenant to devote himself to agriculture and to favor any erection which should aid this result; yet, in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value, if he was to lose his whole interest therein by the very act of erection? His cabin or log hut, however necessary for any improvement of the soil, would cease to be his the moment it was finished. It might, therefore, deserve consideration whether, in case the doctrine were not previously adopted in a state by some authoritative practice or adjudication; it ought to be assumed by this court as a part of the jurisprudence of such state, upon the mere footing of its existence in the common law. At present it is unnecessary to say more than that we give no opinion on this question. The case which has been argued at the bar may well be disposed of without any discussion of it.

MENG v. COFFEY, Supreme Court of Nebraska, 1903 (93 N. W. Rep. 712).

Pound, C.: . . . Not only should the inapplicability of a common-law rule be general, extending to the whole, or the greater part of the state, or at least to an area capable of definite judicial ascertainment, to justify the courts in disregarding such rule, but

we think, in view of the ease with which legislative alteration and amendment may be had, the power to declare established doctrines of the common law inapplicable should be used somewhat sparingly. In the whole course of decisions in Nebraska, from the territorial courts to the present, this power has been exercised but three times: (1) With reference to trespass upon wild lands by cattle (*Delaney v. Errickson*, 10 Neb. 492, 6 N. W. 600, 35 Am. Rep. 487), restricted, however, to wild lands by later adjudications (*Lorance v. Hillyer*, 57 Neb. 266, 77 N. W. 755); (2) with reference to the effect of covenants to pay rent in a lease after destruction of leased buildings, dissented from, however, by three of the six judges (*Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 69 N. W. 785, 36 L. R. A. 424, 61 Am. St. Rep. 554); and (3) with reference to estates by entirety (*Kerner v. McDonald*, 84 N. W. 92, 83 Am. St. Rep. 550). Of these three cases it may be remarked that the first was in line with legislation which clearly ran counter to the common-law rule, and that the other two dealt with strict feudal rules of property, based on conceptions long since become obsolete. The recent holdings as to the statute of uses (*Farmers' & Merchants' Ins. Co. v. Jensen*, 58 Neb. 522, 78 N. W. 1054, 44 L. R. A. 861), and the statute of Elizabeth concerning charitable uses (*In re Creighton's Estate* (Neb.) 84 N. W. 273), are of different nature. In the statute of uses the court did not have to do with a rule of the common law, but with an English statute, which was not adjustable to our legislation as to conveyances. In the statute of Elizabeth relating to charitable uses the court was again dealing with an English statute, and as that statute gave extrajudicial powers to the courts, which they could not exercise under our constitution, the question was one of legislative superseding of the rule, not of inapplicability. Thus the distinction between the case at bar and those in which common-law rules or English statutes have been set aside is readily apparent. Here we are confronted with no legislation to the contrary, nor are we dealing with an antiquated rule of feudal origin, but with an enlightened system of rules, founded on obvious principles of justice, and concededly applicable to the general conditions of the country and to the greater part of this state. Moreover, in each of the three cases in which common-law rules have been held inapplicable there was a complete rule at hand to take the place of the one rejected, and no complicated and extensive judicial legislation was required. In the case of trespasses by cattle the herd

law was on the statute books. The rule as to the effect of covenants in a lease to pay rent was an isolated rule, without collateral consequences, and the obvious and well-settled principle of apportionment governing all agreements, was available in its stead; and the doctrine of tenancy by the entirety stood alone, unconnected with any general body of rules, and all cases that might have been governed by it were readily referable to the rules governing tenancy in common. In like manner, with the statute of uses removed, we had a complete statutory system of conveyancing, and in the absence of the statute of charitable uses, there were still the general equitable powers of the court of chancery existing anterior to that statute. But while in those cases a single rule, part of no general system of modern application, was rejected, here the rules assailed are results of a general doctrine and part of a complete system, and to overthrow them would leave the whole body of the law of waters unsettled and confused. The subject calls for legislative, not for judicial, action.

VIDAL v. GIRARD, Supreme Court of the U. S. 1844 (2 How. 127).

Story, J.: . . . It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that State, as found in its constitution of government. The constitution of 1790 (and the like provision will, in substance, be found in the constitution of 1776, and in the existing constitution of 1838) expressly declares, "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship." Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the State, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the

annoyance of believers or the injury of the public. Such was the doctrine of the Supreme Court of Pennsylvania in *Updegraff v. The Commonwealth* (11 Serg. & Rawle, 394).

BLOOM v. RICHARDS, Supreme Court of Ohio, 1853 (2 Ohio St. 387).

Thurman, J.: . . . But were it otherwise, were such a contract void by the common law of England, it would not necessarily follow that it is void in Ohio. The English common law, so far as it is reasonable in itself, suitable to the condition and business of our people, and consistent with the letter and spirit of our federal and state constitutions and statutes, has been and is followed by our courts, and may be said to constitute a part of the common law of Ohio. But wherever it has been found wanting in either of these requisites, our courts have not hesitated to modify it to suit our circumstances, or if necessary, to wholly depart from it. *Lessee of Lindsley v. Coates*, 1 Ohio, 243; O. C. 116. Christianity, then, being part of the common law of England, there was some, though an insufficient, foundation for the saying of Chief Justice Best above quoted. But the constitution of Ohio having declared, "that all men have natural and indefeasible right to worship Almighty God according to the dictates of conscience; that no human authority can, in any case whatever, control or interfere with the rights of conscience; that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; and that no preference shall ever be given, by law, to any religious society, or mode of worship, and no religious test shall be required, as a qualification to any office of trust or profit," it follows that neither christianity, nor any other system of religion, is a part of the law of this state. We sometimes hear it said that all religions are tolerated in Ohio; but the expression is not strictly accurate—much less accurate is it to say, that one religion is a part of our law, and all others only tolerated: It is not by mere toleration that every individual here is protected in his belief or disbelief. He reposes not upon the leniency of government, or the liberality of any class or sect of men, but upon his natural indefeasible rights of conscience, which, in the language of the constitution, are beyond the control or interference of any human authority. We have no union of church and state, nor has our government ever been vested with authority to enforce any religious observance, simply because it is religious.

ZEISWEISS v. JAMES, Supreme Court of Pennsylvania, 1870 (63 Pa. St. 465).

The will in question contained the following provision: "Immediately after the death of both my said grand-nieces, then it is my will that my real estate aforesaid shall go to and be held in fee simple by the Infidel Society in Philadelphia, hereafter to be incorporated, and to be held and disposed of by them for the purpose of building a hall for the free discussion of religion, politics, etc."

Sharswood, J. (after holding this invalid on other grounds) said: In placing the decision on this ground, however, it must not be understood that I mean to concede that a devise for such a purpose as was evidently contemplated by this testator, even if a competent trustee had been named, would be sustained as a valid charitable use in this state. These endowments originated in England, at a period when the religious sentiment was strong, and their tendency was to run into superstition. In modern times the danger is of the opposite extreme of licentiousness. It is necessary that they should be carefully guarded from either, and preserved in that happy mean between both, which will most conduce to the true interests of society. Established principles will enable the courts to accomplish this. Charity is love to God and love to our neighbor; the fulfilment of the two great commandments upon which hang all the law and the prophets. The most invaluable possessions of man are faith, hope, charity, these three; but the greatest of these is charity. Love worketh no ill to his neighbor: therefore love is the fulfilling of the law. It is the fountain and source whence flow all good works beneficial to the souls or bodies of men. It is not easy to see how these are to be promoted by the dissemination of infidelity, which robs men of faith and hope, if not of charity also. It is unnecessary here to discuss the question under what limitations the principle is to be admitted that Christianity is part of the common law of Pennsylvania. By the third section of the ninth article of the Constitution it is indeed declared "that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship." It is in entire consistency with

this sacred guarantee of the rights of conscience and religious liberty to hold that, even if Christianity is no part of the law of the land, it is the popular religion of the country, an insult to which would be indictable as directly tending to disturb the public peace. The laws and institutions of this state are built on the foundation of reverence for Christianity. To this extent, at least, it must certainly be considered as well settled that the religion revealed in the Bible is not to be openly reviled, ridiculed or blasphemed to the annoyance of sincere believers who compose the great mass of the good people of the Commonwealth: *Updegraph v. The Commonwealth*, 11 S. & R. 394; *Vidal v. Girard's Executors*, 2 Howard (U. S.) 198. I can conceive of nothing so likely—so sure, indeed, to produce these consequences, as a hall desecrated in perpetuity for the free discussion of religion, politics, *et cetera*, under the direction and administration of a society of infidels. Indeed, I would go further, and adopt the sentiment and language of Mr. Justice Duncan in the case just referred to: "It would prove a nursery of vice, a school of preparation to qualify young men for the gallows and young women for the brothel, and there is not a sceptic of decent manners and good morals who would not consider such a debating club as a common nuisance and disgrace to the city." Judgment affirmed.

BLACKSTONE, COMMENTARIES, I, 82.

The canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over. This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see; all which lay in the same disorder and confusion as the Roman civil law, till, about the year 1151, one Gratian, an Italian monk, animated by the discovery of Justinian's pandects, reduced the ecclesiastical constitutions also into some method, in three books, which he entitled *Concordantium Canonum*, but which are generally known by the name of *Decretum Gratiani*. These reached as low as the time of pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX., were published in much the same method, under the auspices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Noni*. A sixth book was added by Boniface VIII. about the year 1298, which is called *Sextus Decretalium*. The Clementine constitutions, or decrees of Clement V., were in like manner authenticated in 1317, by his successor John XXII.,

who also published twenty constitutions of his own, called the *Extravagantes Joannis*, all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes, in five books, called *Extravagantes Communes*: and all these together, Gratian's decree, Gregory's decretals, the sixth decretal, the Clemetine constitutions, and the extravagants of John and his successors, form the *corpus juris canonici*, or body of the Roman canon law.

Besides these pontifical collections, which, during the times of popery, were received as authentic in this island, as well as in other parts of Christendom, there is also a kind of national canon law, composed of legatine and provincial constitutions, and adapted only to the exigencies of this church and kingdom. The legatine constitutions were ecclesiastical laws, enacted in national synods held under the cardinals Otho and Othobon, legates from pope Gregory IX. and pope Clement IV. in the reign of king Henry III., about the years 1220 and 1268. The provincial constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton, in the reign of Henry III., to Henry Chichele, in the reign of Henry V.; and adopted also by the province of York in the reign of Henry VI. At the dawn of the Reformation, in the reign of king Henry VIII., it was enacted in parliament that a review should be had of the canon law; and, till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And, as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England.

As for the canons enacted by the clergy under James I. in the year 1603, and never confirmed in parliament, it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity, whatever regard the clergy may think proper to pay them.

There are four species of courts in which the civil and canon laws are permitted, under different restrictions, to be used: 1. The courts of the archbishops and bishops, and their derivative officers, usually called in our law courts Christian, *curiæ Christianitatis*, or the ecclesiastical courts. 2. The military courts. 3. The courts of

admiralty. 4. The courts of the two universities. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon customs corroborated in the latter instance by act of parliament, ratifying those charters which confirm the customary law of the universities. The more minute consideration of these will fall properly under that part of these commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them.

1. And, first, the courts of common law have the superintendency over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and, in case of contumacy, to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal.

2. The common law has reserved to itself the exposition of all such acts of parliament as concern either the extent of these courts, or the matters depending before them. And therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.

3. An appeal lies from all these courts to the king, in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own. And, from these three strong marks and ensigns of superiority, it appears beyond a doubt that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviore lege*; and that, thus admitted, restrained, altered, new-modelled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical laws.

CRUMP v. MORGAN, Supreme Court of North Carolina, 1843 (3 Ired. Eq. 91).

Ruffin, J.: . . . Again it was said, that these are the adjudications of the ecclesiastical courts, and are founded, not on the common law, but on the canon and civil laws, and therefore not entitled to respect here. But it is an entire mistake to say, that the

canon and civil laws, as administered in the ecclesiastical courts of England, are not parts of the common law. Judge Blackstone, following Lord Hale, classes them among the unwritten laws of England and as parts of the common law, which, by custom, are adopted and used in peculiar jurisdictions: 1 Bl. Com. 79; Hale's Hist. Com. L. 27, 32. They were brought here by our ancestors as part of the common law, and have been adopted and used here in all cases to which they were applicable, and whenever there has been a tribunal exercising a jurisdiction to call for their use. They govern testamentary causes and matrimonial causes. Probate and reprobate of wills stand upon the same grounds here as in England, unless so far as statutes may have altered it: *Dickenson v. Stewart*, 1 Murph. 99; *Ward v. Vickers*, 2 Hayw. (N. C.) 164; *Redmond v. Collins*, 4 Dev. 430 (27 Am. Dec. 208). Divorce causes fall within the same category.

LE BARRON v. LE BARRON, Supreme Court of Vermont, 1862 (35 Vt. 365).

Poland, Ch. J. This is a petition by the wife for a sentence of nullity of marriage, for the alleged physical impotence of the husband.

At the last stated session of the court in Washington county the petitioner filed a motion for the appointment of a commissioner or referee, to inquire and report as to the allegation of the defendant's impotence, and that the defendant be required to answer interrogatories touching said allegation; and also to submit to a personal examination by medical men, under the superintendence and direction of such commissioner. So far as the motion prays that the defendant be compelled to answer interrogatories, or to be examined by physicians, the defendant resists it. This being the first time within our knowledge that an application of this character has been made in this state, and only three members of the court being present, it was deemed advisable to hold the matter under advisement until the present term, to obtain the opinion of the whole court.

The objection to the motion is based upon this ground: that the whole jurisdiction and power of the court over the subject of granting divorces and annulling marriages, is given by statute; that the court has no power except such as the statute confers; and that, as the statute does not give the court the power to require such an examination, therefore it does not possess it. If this be the true view of the jurisdiction and power of the court—that they can

only exercise such powers as are expressly given by statute—then the objection of the defendant must be sustained, and the motion denied.

To enable us to determine this question, it becomes necessary to examine into the real source and extent of the jurisdiction of the court over this subject.

The legal power to annul marriages has been recognized as existing in England from a very early period, but its administration, instead of being committed to the common law courts, was exercised by their spiritual or ecclesiastical courts. Under the administration of those courts, for a long period of time, the principles and practice governing this head of their jurisdiction, ripened into a settled course and body of jurisprudence, like that of the courts of chancery and admiralty, and constituted, with those systems, a part of the general law of the realm, and in the broad and enlarged use of the term, a part of the common law of the land, and was so held by the courts of that country.

This country having been settled by colonies from that, under the general authority of its government, and remaining for many years a part of its dominion, became and remained subject and entitled to the general laws of the government, and they became equally the laws of this country, except as far as they were inapplicable to the new relation and condition of things. This we understand to be well settled, both by judicial decision and the authority of eminent law writers. But if this were not so, the adoption of the common law of England, by the legislature of the state, was an adoption of the whole body of the law of that country, (aside from their parliamentary legislation,) and included those principles of law administered by the courts of chancery and admiralty, and the ecclesiastical courts, (so far as the same were applicable to our local situation and circumstances, and not repugnant to our constitution and laws,) as well as that portion of their laws administered by the ordinary and common tribunals.

As the jurisdiction in England was exclusively committed to the spiritual courts, and had never been exercised by the ordinary law courts, the same could not be exercised by the courts of law in this country, until it was vested in them by the law-making power. As we have never had any ecclesiastical courts in this country, who could execute this branch of the law, it was in abeyance until some tribunal was properly clothed with jurisdiction over it, or rested in

the legislature. It was probably on this ground that the legislatures of the states proceeded in granting divorces, as many of them did, in former times. When the legislature establish a tribunal to exercise this jurisdiction, or invest it in any of the already established courts, such tribunal becomes entitled, and it is their duty, to exercise it, according to the general principles of the common law of the subject, and the practice of the English courts, so far as they are suited to our condition and the general spirit of our laws, or are modified or limited by our statute.

Such has been held to be the effect of a creation of a court of chancery, or giving equity jurisdiction, either total or partial, to a court of law, by the legislature. Such jurisdiction is to be exercised according to the general principles and practice of the chancery courts of the mother country.

The uniform and settled practice in the ecclesiastical courts of England, in this class of cases, is to require a medical examination, and to compel the party to submit to it, if he will not do so voluntarily. *Norton v. Seton*, 1 Eng. Ecc. Rep. 384; *Briggs v. Morgan*, Id. 408. In the last case, Lord STOWELL states the reason and foundation of the rule: "It has been said that the means resorted to for proof on these occasions, are offensive to natural modesty; but nature has provided no other means, and we must be under the necessity of saying that all relief shall be denied, or of applying the means within our power. The court must not sacrifice justice to notions of delicacy of its own."

Upon authority and reason, we are clearly satisfied that the power exists in the court to compel such examination, although the statute does not provide for it.

NASH v. HARRINGTON, Supreme Court of Vermont, 1826 (2 Aiken, 9).

Hutchinson, J.: . . . We are driven, then, to the question, will the court here adopt the rules of the law merchant, touching the necessity of demand upon the maker, and notice back to the indorser, in order to charge him, as the same are known in England? The court see no reason why they should not, where the circumstances of the parties do not render them inapplicable. Where the law in England requires notice to be given back on the same day, if the facilities of demand and notice back are the same

here, there is no reason why the rule should not be the same. The law merchant is a part of the common law of England, and as such is adopted by statute here, so far as it is applicable to our local situation and circumstances, and is not repugnant to the constitution, or any act of the legislature of this state. And so far the courts of this state are bound to recognize it.

THE *PAQUETE HABANA*, Supreme Court of the United States, 1900 (175 U. S. 677).

Gray, J.: . . . International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton v. Guyot*, 159 U. S. 113, 163, 164, 214, 215.

PATTERSON V. WINN, Supreme Court of the United States, 1831 (5 Pet. 233).

Story, J.: . . . We think it clear that by the common law, as held for a long period, an exemplification of a public grant under the great seal is admissible in evidence as being record proof of as high a nature as the original. It is a recognition in the most solemn form by the government itself of the validity of its own grant, under its own seal, and imports absolute verity as matter of record.

The authorities cited at the bar fully sustain this doctrine. There was in former times a technical distinction existing on this subject which deserves notice. As evidence, such exemplifications of letters patent seem to have been generally deemed admissible. But where, in pleading, a profert was made of the letters patent, there, upon the principles of pleading, the original under the great seal was required to be produced: for a profert could not be of any copy or exemplification. It was to cure this difficulty that the statutes of 3 Edw. VI., ch. 4, and 13 Eliz., ch. 6, were passed, by which patentees and all claiming under them were enabled to make title in

pleading by showing forth an exemplification of the letters patent, as if the original were pleaded and set forth. These statutes being passed before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute a part of our common law.

SPAULDING v. CHICAGO & N. W. R. Co., Supreme Court of Wisconsin, 1872 (30 Wis. 111).

Dixon, C. J.: That the statute 6 Anne, c. 3, 6, enacted in 1707, with the interpretation heretofore supposed to have been given to it in England in the time of Blackstone and before, is in force as part of the common law of this state, was assumed by this court in the case of Kellogg v. The Chicago and Northwestern Railway Company, 26 Wis. 223, 267, 272. As will be seen by the reference, the words of that statute, "in whose house or chamber any fire shall accidentally begin," had been construed as if the statute read, "in whose house or chamber any fire shall negligently begin," thus exempting from liability, as Blackstone says, for the loss or damage sustained by others, the owner or occupant through whose negligence or through the negligence or carelessness of whose servants the fire was set, his own loss being regarded as sufficient punishment for such negligence. That statute, with the construction so said to have been put upon it in England, at and long before the time of our revolution, has no doubt generally been considered as constituting a part of the common law of this state as it probably has of all or nearly all of the other states of the Union. It was, as we have every reason to think, so looked upon as part of the law of the colonies before the revolution and during the period of their dependence upon the laws and constitutions of Great Britain.

But with respect to the other British statute upon which reliance is placed by the railway company here, and which was also enacted before the revolution, namely, the statute 14 Geo. III., c. 78, sec. 86, enacted in 1774, which enlarged the operation of the statute of Anne, by declaring "that no action, suit or process whatever, shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall after the said twenty-fourth day of June accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby," it is more than doubtful whether any effect can be given to it as a part of the common law of this country. The

rule fixing the period of our revolution as the time from which the English statutes and acts of parliament shall be considered as part of the common law of this country, or that those statutes enacted before that time and which were adapted to our condition and circumstances as a people, shall be so considered, is a general one adopted for convenience merely, and which should govern in the generality of cases, but not one intended to apply always and to all cases or to all statutes which may have been so enacted, without regard to any other facts or circumstances. The fundamental idea represented by the rule and upon which it is based is, that those statutes which were so enacted and which were suited to the condition and circumstances of our colonial ancestors, had been received, acted upon and ratified by them as part of the jurisprudence and laws of the colonies before the separation from the mother country, and which, upon the separation, the colonists took with them as the still continuing law, except where subsequently repealed or modified by positive legislative enactment. This view of the reasons and grounds of the rule would seem to exclude the statute in question from the operation of it, since the same was enacted on the very eve of the revolution, and at a time when we know our ancestors, in their colonial state, could not have become familiar with, or have ratified or adopted it, and at a time, too, when, as history shows, all or nearly all respect for British sovereignty and British laws or acts of parliament then being passed, was well nigh extinct throughout the colonies. That our ancestors did not, and could not have adopted and acted upon this statute as part of their laws before their independence, is, therefore, very certain. It is certain from a consideration of the time and circumstances under which the statute was enacted, and also from a consideration of the law as we know it to have been constantly understood and administered in this country since the revolution. As to the statute of Anne, we know that it, with the construction previously supposed to have been put upon it, has been generally understood and regarded as constituting a rule of our common law, because it has been expressly so adjudged in some cases, and because in all the history and records of our judicial proceedings there exists not a precedent, under circumstances where there might have been thousands, of an action or recovery contrary to the provisions of that statute as the same is alleged to have been understood in England, and was doubtless understood in the colonies before the revolution took place. But

as to this statute of Geo. III., the history of our law shows clearly and beyond the possibility of question or doubt, that it never has been so understood or applied by the courts of this country. The cases are most numerous, and to be found in the courts of almost every state of the Union, as well as in the federal courts, where actions have been maintained and recoveries had against proprietors and occupants, on whose land or estate fires have been negligently set or negligently permitted to begin or spread so as to extend to and consume or cause injury to the property of others. In such cases it has been invariably held that the negligent party is answerable in damage for the losses of third persons so caused and sustained.

KREITZ v. BEHRENSMEYER, Supreme Court of Illinois, 1894 (149 Ill. 59).

Phillips, J.: . . . It is conceded that no statute exists in this state declaring the rights of a *de jure* officer to recover from a *de facto* officer the salary paid such *de facto* officer, who has discharged the duties of the office under a wrongful or mistaken purpose. There is no legislation on that subject in this state. The right of recovery, if it exists, depends, therefore, on the principles of the common law. The common law is a system of elementary rules and of general judicial declarations of principles, which are continually expanding with the progress of society, adapting themselves to the gradual changes of trade, commerce, arts, inventions, and the exigencies and usages of the country. Judicial decisions of common-law courts are the most authoritative evidence of what constitutes the common law. By chapter 28, Starr & C. Stat. Ill., the common law of England is declared in force in this state. By reference to the decisions of the common-law courts of England, the common law of that country is to be found. An examination of the decisions of the courts of that country shows a uniform declaration of the principle that a *de jure* officer has a right of action to recover against an officer *de facto* by reason of the intrusion of the latter into his office, and his receipt of the emoluments thereof. Among others, the following opinions of English courts may be referred to as sustaining this right of recovery: Vaux v. Jefferen, 2 Dyer, 114; Arris v. Stukely, 2 Mod. 260; Lee v. Drake, 2 Salk. 468; Webb's Case, 8 Coke, 45. By the adoption of the common law of England, the principle announced in these cases was adopted as the law of this state, for the principle is of a general nature, and ap-

plicable to our constitution. On the basis of a sound public policy, the principle commends itself, for the reason that one would be less liable to usurp or wrongfully retain a public office, and defeat the will of the people or the appointing power, as loss would result from wrongful retention or usurpation of an office. The question has frequently been before the courts of the different states and of the United States, and the great weight of authority sustains the doctrine of the common law, as shown by the opinions of the judges in different states; and in most of the states these are based on the common law, without reference to any statute.

CATHCART V. ROBINSON, Supreme Court of the United States, 1831 (5 Pet. 264).

Marshall, C. J.: . . . This being a voluntary conveyance, is, at this day, held by the courts of England to be absolutely void under the statute of 27 Elizabeth, against a subsequent purchaser, even although he purchased with notice. (1 Mad. Ch. 271, 18 Ves. 110; 2 Taunton, 523). Their decisions do not maintain that a transaction valid at the time is rendered invalid by the subsequent act of the party. They do not maintain that the character of the transaction is changed, but that testimony afterwards furnished may prove its real character. The subsequent sale of the property is carried back to the deed of settlement, and considered as proving that deed to have been executed with a fraudulent intent to deceive a subsequent purchaser.

The statute of Elizabeth is in force in this district. The rule which has been uniformly observed by this court in construing statutes is to adopt the construction made by the courts of the country by whose Legislature the statute was enacted. This rule may be susceptible of some modification, when applied to British statutes which are adopted in any of these States. By adopting them they become our own as entirely as if they had been enacted by the Legislature of the State. The received construction in England at the time they are admitted to operate in this country indeed, to the time of our separation from the British empire—may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But however we may respect subsequent decisions, and certainly they are entitled to great respect, we do not admit their absolute authority. If the English courts vary their construction of a statute which is common to the two countries, we do not hold ourselves bound to fluctuate with them.

At the commencement of the American Revolution the construction of the statute of 27 Elizabeth seems not to have been settled. The leaning of the courts towards the opinion that every voluntary settlement would be deemed void as to a subsequent purchaser was very strong, and few cases are to be found in which such conveyance has been sustained. But these decisions seem to have been made on the principle that such subsequent sale furnished a strong presumption of a fraudulent intent, which threw on the person claiming under the settlement the burden of proving it from the settlement itself, or from extrinsic circumstances, to be made in good faith, rather than as furnishing conclusive evidence not to be repelled by any circumstances whatever.

There is some contrariety and some ambiguity in the old cases on the subject; but this court conceives that the modern decisions establishing the absolute conclusiveness of a subsequent sale to fix fraud on a family settlement, made without valuable consideration—fraud not to be repelled by any circumstances whatever—go beyond the construction which prevailed at the American Revolution, and ought not to be followed.

The universally received doctrine of that day unquestionably went as far as this. A subsequent sale, without notice, by a person who had made a settlement not on valuable consideration, was presumptive evidence of fraud, which threw on those claiming under such settlement the burden of proving that it was made *bona fide*. This principle, therefore, according to the uniform course of this court, must be adopted in construing the statute of 27 Elizabeth as it applies to this case.

In *FABLE V. BROWN*, 2 Hill. Eq. (S. C.), 378, 390 (1835), Harper, J., says:

With respect to the civil law, however enlightened and admirable a system of jurisprudence it may be, it is not our law, nor have our courts any authority to declare it so. Our legislature has adopted another system of laws. Where our law is obscure or doubtful, it is frequently of great utility in explaining or determining it, more especially as a great portion of our law was derived from that source. But if the common law be clear, we are not authorized to depart from it because the provisions of another system may be better and more suited to our circumstances; nor if it be defective, are Courts authorized to supply the deficiency by drawing from a foreign source.

PIERCE V. PROPRIETORS OF CROWN POINT CEMETERY, Supreme Court of Rhode Island, 1872 (10 R. I. 227).

Potter, J.: . . . It has been the boast of many of the sages of the law that there is no wrong without a remedy. Says Lord Coke (Co. Lit. 197, *b*, 1 Thomas's Coke, 902): "The law wills that, in every case where a man is wronged and endangered, he shall have a remedy." Lord Holt, in *Ashby v. White*: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it. . . . It is a vain thing to imagine a right without a remedy." Lord Raym. 938; S. C., 6 Modern, 45; Judgment of Lord Holt in *Ashby v. White*, etc., reprinted, 1837; 1 Smith's Lead. Cases, 342, 356. And see Lord Abinger's interpretation of the old maxim, "*Boni judicis est ampliare jurisdictionem*." And the late Chief Justice Ames has well expressed it in his opinion in the case of *Reynolds v. Hoxie*, 6 R. I. 463, 468, that it is perfectly understood that there cannot be a wrong under our jurisprudence for which the law does not in some form provide a remedy.

And in the report upon the codification of the laws in Massachusetts, December, 1836, made by Joseph Story, Theron Metcalf, Simon Greenleaf, Luther S. Cushing, and C. E. Forbes, they say "In truth, the common law is not in its nature and character an absolutely fixed, inflexible system, like the statute law, providing only for cases of a determinate form, which fall within the letter of the language, in which a particular doctrine or legal proposition is expressed. It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade and commerce, and the mechanic arts, and the exigencies and usages of the country. There are certain fundamental maxims in it which are never departed from. There are others again which, though true in a general sense, are at the same time susceptible of modifications and exceptions, to prevent them from doing manifest wrong and injury.

"When a case, not affected by any statute, arises in any of our courts of justice, and the facts are established, the first question is, whether there is any clear and unequivocal principle of the common law, which directly and immediately governs it and fixes the rights of the parties. If there be no such principle, the next question is, whether there is any principle of the common law, which, by analogy or parity of reasoning, ought to govern it. If neither of these

sources furnishes a positive solution of the controversy, resort is next had (as in a case confessedly new) to the principles of natural justice, which constitute the basis of much of the common law; and if these principles can be ascertained to apply in a full and determinate manner to all the circumstances, they are adopted, and decide the rights of the parties. If all these sources fail, the case is treated as remediless at the common law, and the only relief which remains is by some new legislation by statute, to operate upon future cases of the like nature."

TUCKER V. ST. LOUIS LIFE INS. CO., Supreme Court of Missouri, 1876 (63 Mo. 588).

Sherwood, J.: . . . The code is not sufficiently comprehensive to embrace every varied phase which a case may assume before reaching judicial determination, and in consequence of this, resort must be frequently had to common law methods of procedure, both in ordinary actions at law, as well as in proceedings looking merely to equitable relief. Numerous decisions of this court exemplify this.

This being the case, and the code not prescribing the method to be pursued where a defendant asks affirmative relief from a co-defendant, except that a judgment giving affirmative relief may be rendered in such cases (Wagn. Stat. 1051, 2) we must look to a certain extent to the rules of pleading and practice adopted by courts of chancery.

MATHEWSON V. PHOENIX IRON FOUNDRY, U. S. Circuit Court, District of Rhode Island, 1884 (20 Fed. Rep. 281).

Colt, J.: . . . But it is said that common-law marriages were never considered valid in Rhode Island. The question has not been passed upon by the state court. The argument is based upon the history of legislation upon the subject, and especially upon the older statutes. The earliest statute relating to marriage was passed at the first session of the general assembly ever held in Rhode Island, in 1647, and it provided that no other marriages should be held lawful except those contracted according to the form of the statute. The act declares:

"No contract or agreement between a man and woman to owne each other as man and wife shall be owned from henceforth throw-out the whole colonie as a lawful marriage, nor the children or issue so coming together to be legitimate or lawfullie begotten, but such as are in the first place with the parents, then orderly published in

two severall meetings of the townsmen, and lastly confirmed before the head officer of the town, and entered into the towne clerk's booke."

Then follows a penalty against those going contrary to the "present ordinance." 1 Col. Rec. 187.

By act of March 17, 1656, parties were required to publish their intention of marriage, and objection to such marriage might be heard before two magistrates, when, if disallowed, it was referred to the "general court of tryalls." Id. 330.

The act of May 3, 1665, after condemning the loose observance of the statute of 1647, orders that act and subsequent acts to be punctually observed, and inflicts an additional penalty of fornication on persons who should presume to marry otherwise, or live together as man and wife. The act then proceeds expressly to validate the relations of all such then living within the colony "that are reputed to live together as man and wife by the common observation or account of their neighborhood." 2 Col. Rec. 104.

By the act of 1701 it was ordered that all marriages take place after due publication of intentions, etc., and a fine was imposed on officers presuming to join persons in marriage without such publication, excepting those married according to the laws, customs, and ceremonies of the church of England and Quakers. The exception was afterwards extended to Jews. This act was entitled "An act for preventing clandestine marriages," and this same title we find in the several subsequent revisions of the statutes until the revision of 1857. 3 Col. Rec. 435; Pub. Laws, 1663-1745, p. 30; Digest of 1767, pp. 172-175.

By act of December, 1733, settled ministers and elders of every denomination were authorized to join persons in marriage after due publication, and upon receiving certificate. They were required to keep and return to the town clerk a record thereof for registry, and a fine was imposed upon them for marrying without publication. 4 Col. Rec. p. 490; Pub. Laws 1663-1745, p. 176.

It is claimed that these enactments are controlling, and that they show that common-law marriages were never recognized in Rhode Island. The common law has always existed in Rhode Island, except so far as modified or changed by statute. This is true of marriage, as well as other subjects. The legislature may have seen fit in early times to do away entirely with the common law, and to make marriage illegal unless it conformed to the statutory regula-

tions. But if the legislature had at any time repealed all statutes on the subjects, the common law would have been revived. And, in so far as the legislature has seen fit to change the statute, to make it less restrictive by not declaring all other marriages illegal, as in the earliest enactments, in so far it has restored the common-law right. If, upon a proper construction of the statute in force, we find the common-law right is not denied, then it still exists, though it may not have existed under former and different statutes. Unless the statute under consideration, upon a proper construction, prohibits marriages *per verba de praesenti*, we do not think we should, by implication derived from old statutes, decide against their validity. To make marriages void and children illegitimate, by implication, is a serious thing. Because, under earlier statutes a marriage not made in conformity therewith, may have been invalid, we do not feel warranted in implying that such is the proper interpretation of the statute of 1857. We think it safer to hold that in modifying the terms of the statute the legislature intended to modify the law; and, as we have before said, our conclusion is that the statute of 1857 does not make a marriage *per verba de praesenti*, or at common law, void; this being the construction put upon similar statutes in most of the states, and in the supreme court of the United States.

UNITED STATES V. ARREDONDO, Supreme Court of the United States, 1832 (6 Pet. 691).

Baldwin, J.: . . . There is another source of law in all governments—usage, custom, which is always presumed to be adopted with the consent of those who have been affected by it. In England, and in the States of this Union which have no written constitution, it is the supreme law; always deemed to have had its origin in an act of a State Legislature of competent power to make it valid and binding, or an act of Parliament; which, representing all the inhabitants of the kingdom, acts with the consent of all, exercises the power of all, and its acts become binding by the authority of all. (2 Co. Inst. 58; Wills, 116.) So it is considered in the States and by this court. (3 Dall. 400; 2 Peters, 656, 657.)

A general custom is a general law, and forms the law of a contract on the subject matter; though at variance with its terms, it enters into and controls its stipulations as an act of Parliament or State Legislature. The court not only may, but are bound to notice and respect usage and general customs as the law of the land equally

with the written law, and, when clearly proved, they will control the general law; this necessarily follows from its presumed origin—an act of Parliament or a legislative act. Such would be our duty under the second section of the Act of 1824, though its usages and customs were not expressly named as a part of the laws or ordinances of Spain. The first section of that act, giving the right to claimants of land under titles derived from Spain to institute this proceeding for the purpose of ascertaining their validity and jurisdiction to the court to hear and determine all claims to land which were protected and secured by the treaty, and which might have been perfected into a legal title under and in conformity to the laws, usages and customs of Spain; makes a claim founded on them one of the cases expressly provided for. We cannot impute to Congress the intention to not only authorize this court, but to require it to take jurisdiction of such a case, and to hear and determine such a claim according to the principles of justice; by such a solemn mockery of it as would be evinced by excluding from our consideration usages and customs (which are the law of every government) for no other reason than that in referring to the laws and ordinances in the second section Congress had not enumerated all the kinds of laws and ordinances by which we should decide whether the claim would be valid if the province had remained under the dominion of Spain. We might as well exclude a royal order because it was not called a law. We should act on the same principle if the words of the second section were less explicit, and according to the rule established in *Henderson v. Poindexter*, 12 Wheat. 530, 540.

KING v. EDWARDS, Supreme Court of Montana, 1870 (1 Mont. 235).

Knowles, J.: The mining customs of any particular mining district have the force and effect of laws, or, in other words, are laws. The local courts in each one of the States and Territories, where placer mining is prosecuted to any extent, have so recognized them, and finally, congress, by an act in July, 1866, recognized these rules and customs as law.

The title to mineral lands is vested in the United States. Any citizen of the United States, or any person who has declared his intention to become such, may, by complying with the local rules and customs of any district, become vested with the right to possess and mine any specific portion of mining ground. The customs which point out the manner of locating mining ground are condi-

tions precedent. A substantial compliance with them is necessary. The right to possess and mine any mining claim is derived from the United States by virtue of this compliance. The United States is divested of this right as effectually as if these rules and customs were acts of congress, for they now are the American common law on mining for precious metals.

BLACKSTONE, COMMENTARIES, I, 76.

When a custom is actually proved to exist, the next inquiry is into the legality of it; for, if it is not a good custom, it ought to be no longer used. "*Malus usus abolendus est*" is an established maxim of the law. To make a particular custom good, the following are necessary requisites:

1. That it have been used so long, that the memory of man runneth not to the contrary. So that, if any one can show the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist.

2. It must have been continued. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the right; for an interruption of the possession only, for ten or twenty years, will not destroy the custom. As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the right be any how discontinued for a day, the custom is quite at an end.

3. It must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. Customs must be reasonable; or rather, taken negatively, they must not be unreasonable. Which is not always, as Sir Edward Coke says, to be understood of very unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of October, would

be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his, and then the tenants will lose all their profits.

5. Customs ought to be certain. A custom, that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom, to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain: for the value may at any time be ascertained; and the maxim of law is, *id certum est, quod certum reddi potest*.

6. Customs, though established by consent, must be (when established) compulsory; and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

Lastly, customs must be consistent with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent; which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom.

LEACH v. PERKINS, Supreme Court of Maine, 1840 (17 Me. 462).

Shepley, J. The rights of parties are to be determined by law, and not by any local custom or usage, unless there be proof, that such custom or usage is certain, general, frequent, and so ancient as to be generally known and acted upon. In such cases, if the courts adjudge it to be reasonable, it affects the right of the parties upon

the presumption, that they have made their contract with reference to it: 3 Wash. C. C. 149; 8 Serg. & R. 539. The usages of trade in a particular city or place, are thus received to explain the intention of the parties, and to ascertain their rights under a contract presumed to be made with reference to them: 2 Bos. & Pul. 432; 3 Id. 23; 7 Mass. 36; 3 Wend. 283. The usage of trade has also been admitted to explain what the parties intended by the use of a doubtful word or phrase, or term of art, in a policy of insurance, bill of lading, and deed: 7 Johns. 385; 8 Serg. & R. 535; 6 Greenl. 154. And in a particular profession, art, or branch of trade, as among printers: 1 S. C. Const. 308; 3 Greenl. 276. And among carriers: 2 Nott & M. 9; 3 Day, 346; 3 Conn. 9. And in the lumber trade: 6 Greenl. 200. The usages of banks in certain cities and places have been received upon the presumption that the parties contracted with reference to them: 11 Mass. 85; 9 Wheat. 581. So has a custom in certain places, that a tenant should take "the way-going crop:" 5 Binn. 287; or receive compensation for labor for the benefit of the forthcoming crop: 1 Brod. & B. 224. In these and many other cases, usage has been received to explain the intention of the parties in making a contract, and thus to have an influence upon their rights. But custom does not appear to have been received to establish the right, or to prove the origin of the relation by which the parties become responsible to each other. Mr. Justice Thompson, in speaking of the admission of the usage of the departments of the government to allow a commission on the disbursements of the public money, excludes any inference that it might be received for such a purpose, remarking that "it was not for the purpose of establishing the right, but to show the measure of compensation and the manner in which it was to be paid:" 7 Pet. 28.

The case of *Thompson v. Harrington*, 12 Pick. 425, has been regarded in the argument as authorizing the reception of usage as corroborative proof of the existence of a contract. In the report of the case it is stated, that the judge instructed the jury, that "usage might serve in some measure to show what was the intention of the parties, or to substantiate the testimony" of the witnesses. In the opinion of the court no allusion is made to any such instruction, and the principle upon which the court sustained the admission is in accordance with the preceding cases in that state. The language of the court is, "usage was admissible in evidence to explain the act of the owners, and to enable the jury to determine whether that act

amounted to a letting to hire, or an appointment of a master." The customs or usages here alluded to are not those customs which have existed in a place or country so long, that the memory of man runneth not to the contrary, and which, when established as the rules of the common law require, become a part of it; but are such as are to be established by the proof of the facts showing the accustomed mode of dealing or of conducting a certain trade or branch of business. And when the mode of conducting the business, or in other words, the usage is proved, the law determines, as in other cases, what are, under the circumstances, the rights of the parties. And it is no more competent to prove what would be the legal rights of the parties arising out of such usage, than to prove by witnesses the law of the contract in any other case.

Whether a usage is proved, is a fact for the jury to find: 2 Gill & J. 136. But it would be the duty of the court to instruct them, that if it was not proved to be certain and general, and to partake of the other requisities, before stated, that the testimony should have no influence upon the rights of the parties.

The custom as stated in this bill of exceptions is presented rather as a mode agreed upon among the parties interested to build vessels, than as a well established method of actually conducting the process of building; and proof was admitted, "that the owners were not jointly responsible for materials and labor for the vessel, and that no one was authorized to make contracts for materials and labor, etc., for the vessel so as to bind the owners generally," apparently as part of the proof of the custom. It is alleged in argument, that testimony to prove not only the custom but its legal effect upon the rights of the parties, was not in fact admitted, but the language used does not appear to be susceptible of any other construction. It may be that upon a new trial the facts in relation to the manner of building in the place where the vessel was built, will be so fully proved as to establish a usage with all the necessary requisites, to authorize the presumption, that these parties contracted with reference to it; but as it is presented in this bill of exceptions, the evidence should not have been admitted.

If the plaintiff fails in establishing any usage, he may prove that the parties building the vessel agreed among themselves, as stated, that his contract was made with a knowledge of and in obedience to such agreement, and thus be entitled to recover. Nor is there any necessity, as the argument supposes, that such a mode of building

vessels should be abandoned if the usage fails, for the parties may accomplish the object of relieving themselves from responsibility for the whole of the materials and labor by an agreement to that effect among themselves, and by taking care to make it known to each one with whom a contract is made, so as to have proof that he contracted with a knowledge that he must rely only upon the person with whom he contracted.

Exceptions sustained and new trial granted.

ADAMS V. PITTSBURGH INSURANCE CO., Supreme Court of Pennsylvania, 1880 (95 Pa. St. 348).

Mercer, J.: "*Consuetudo*," said Sir Edward Coke, "is one of the main triangles of the laws of England; those laws being divided into common law, statute law, and particular customs, for if it be the general custom of the realm, it is part of the common law:" Co. Lit. 113-15. "A custom used upon a certain reasonable cause depriveth the common law:" Littleton, p. 112, 169. In *Vanhearth v. Turner*, Winch. Rep. 24, Chief Justice Hobart said: "the custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice, and if any doubt arise to them about the custom they may send for the merchants to know their custom." That a custom so general and notorious may exist as to authorize the captain of a steamboat to effect an insurance on it for the benefit of the owners without their express directions, we think well settled by authority. It would not be in conflict with any statute, nor would it be unreasonable or contrary to public policy. In *Vanness v. Pacard*, 2 Pet. 148, it was held that evidence was properly received to prove that a custom and usage existed in the city of Washington which authorized a tenant to remove any building erected by him. In *Gordon v. Little*, 8 S. & R. 533, it is held a usage or custom varying the liability of common carriers by water from that of a common law may be proved, even to give construction to the words "inevitable dangers of the rivers." The usage of trade in respect to particular voyages, or risks to which a policy of insurance relates, has always been invoked to give construction to its meaning. Park on Ins. 30. Usage may add a new construction variant from the face of the instrument, as much as if it had been contained in a new clause or by a reference to it. *Eyre v. Marine Ins. Co.*, 5 W. & S. 116.

It is well settled, as a general rule, that the intention of the parties to a contract shall prevail unless it be to do something either *malum in se*, or *malum prohibitum*. *Snowden v. Warder*, 3 Rawle, 101.

A custom so long persisted in as to be known and practiced by a community is the law of the particular business in which it exists. Such a custom is presumed to be in the view of the parties when they contracted about its subject-matter. *McMaster v. Pennsylvania Railroad Co.*, 67 Penn. St. 374; *Carter v. Philadelphia Coal Co.*, 27 Penn. St. 286. To make a usage obligatory on the parties, it should be so well settled that persons engaged in the trade must be considered as contracting in reference to it. No particular period of time is requisite to the establishment of a usage so as to affect contracts; 1 Phil. on Ins. 83. The true test is that it has existed a sufficient length of time not only to have become generally known to the dealers who are to be affected by it, but also to warrant the presumption that contracts are made in reference to such usage or custom. *Smith v. Wright*, 1 Cal. 43; *Snowden v. Warder*, *supra*. This rule is especially applicable to commercial transactions, and either party to such a contract may prove the usage. *Id.* In all matters of trade usage is of vital importance, and in policies of insurance in particular, a great latitude of construction as to usage has been admitted. Phil. on Ins. 80. There is a great necessity for giving effect to a custom in regard to the insurance of a steamboat in the custody of one not the owner. The perils of navigation are so well known, that a due regard for some indemnity against loss is justly recognized as a necessary precaution. Hence it was held in *Oliver v. Green*, 3 Mass. 134, that a part owner of a vessel who had chartered the other part with a covenant to pay the value in case of a loss, might insure the whole vessel as his property, without disclosing that he had a special property only, in a moiety thereof. So in *De Forest v. Fulton Fire Ins. Co.*, 1 Hall, 94, it was held that a commission merchant might recover on a policy of insurance for goods in his possession, destroyed by fire, beyond the value of his property therein, without any express orders from the consignors of the goods to effect such insurance, on proof that such was the usage of commission merchants in the city of New York.

DESHA v. HOLLAND, Supreme Court of Alabama, 1847 (12 Ala. 513).

Collier, C. J.: It can not be assumed that the custom which the plaintiff sought to establish was unreasonable, and therefore con-

trary to law. The powers of a factor in the cotton trade certainly authorize him to appoint an agent to examine the condition of cotton consigned to him for sale or shipment, and to invest such agent with authority to put it in a situation that it may be disposed of in the one mode or the other. If he think proper, he may appoint the bailee with whom it is deposited for safe keeping to perform this service. It is for the interest of the owner of the cotton that the factor should possess such a power; for an internal damage in a compressed bale, we all know, frequently extends itself very rapidly, so that if the factor was compelled to obtain a special authority in such case, the loss to the owner would be frequently increased, before the progress of the damage could be arrested. If, then, he may appoint an agent to act for him in each, or in all cases, where cotton is consigned to him, is not a custom which makes the warehouseman an agent *pro re nata* altogether reasonable? It is but the substitution of a standing, continuous authority, as a substitute for one specially created as occasion may require, and its reasonableness, whatever may be said of its liability to abuse, can not be pronounced against.

If the warehouseman be an honest and prudent man, it would really seem peculiarly proper that he should be authorized to cause cotton stored with him to be freed from internal damage. Such damage, it is said, and generally credited, sometimes generates combustion. To prevent such a result, the warehouseman and his agents would be likely to exercise circumspection—discover the damage more readily than any one else, and thus be enabled to take the promptest measures to prevent its extension. Besides, their experience would soon give them facilities for making such discovery more readily than most other persons. Assuming the existence of the custom which makes the warehouseman the subagent of the factor, we can conceive of no objection to its extension, so as to make the latter the debtor of the pickery, for separating the damaged from the merchantable cotton. In this view of the case, we think the evidence objected to was properly admitted. It is not indispensable to the validity of a custom that it should be universally acquiesced in; for this would be to annul all customs as to those who are unwilling to abide by them. Instead of having the force of law, and being of general obligation, they would depend for their operation upon the gratuitous assent of every person against whom they were invoked. It is enough if a custom be "general and uniform."

STRONG v. GRAND TRUNK R. Co., Supreme Court of Michigan, 1867 (15 Mich. 206).

Cooley, J.: . . . Before any custom can be admitted into the law, it must appear that the usage has been general and uniform, the custom peaceably acquiesced in, and not subject to contention and dispute: Broom's Legal Maxims, 5th Am. ed., 828; see *Oelricks v. Ford*, 23 How. 49. It is not very clear that the evidence in this case establishes any such custom. The testimony of witnesses shows that the question of shortage is frequently the subject of dispute. Captain Elsie says: "The custom is sometimes acquiesced in by the captains of vessels, and sometimes disputed. If the shortage is small, they generally pay it; if it is large, they generally dispute it, and leave it to be settled by the owners." Mr. Stephenson, the general freight agent of the defendants, says: "I have known captains refuse to pay the shortage, but we always have the freight in our own hands before we settle. We invariably refuse to pay the captains until the two principals are agreed." Captain Montgomery, after testifying that the custom is universal, says: "I have known the question of shortage disputed at least a hundred times." Several other witnesses give evidence that the custom is general, but the impression which the whole evidence leaves upon our minds is, that the deduction of shortage is submitted to when the carrier concedes that it is his fault, or where the amount is not beyond what is usual and incident to transportation; but that it is disputed in other cases. A custom varying the common law must be clearly proved; but we do not find clear evidence in this case that ship-owners concede their liability to have deductions made from freight earned for the value of property receipted for by mistake. That the railway companies assert the right is fully shown; but it must be generally assented to as well as asserted before the custom can be established.

Another essential to a good custom is, that it be certain. The evidence of usage in this case does not inform us whether, under it, the carrier is to have any remedy for the freight deducted, and if he is, whether that remedy is left to common-law rules, or is provided for by the custom itself. We will not assume that the carrier is to be deprived of all remedy, for that would be so manifestly unjust and unreasonable that it could not be seriously urged that the law should sanction it.

CITIZENS' BANK OF BALTIMORE V. GRAFFLIN, Court of Appeals of Maryland, 1869 (31 Md. 507).

Stewart, J.: . . . We concur with the ruling of the court in its first instruction, that there was no sufficient evidence of any usage prevailing with the banks in the city of Baltimore, or the Citizens' National Bank (the defendants here, to justify the jury in inferring that such usage entered into and made part of the contract between the parties in relation to the draft in question.

To permit usage to govern and modify the law in relation to the dealings of the parties, it must be uniform, certain, and sufficiently notorious to warrant the legal presumption that the parties made their contract with reference to the usage, and not according to the general and established law applicable to the case.

The evidence for such purpose should be very strong and conclusive to authorize the usage to regulate and control the contract between the parties in derogation of the established law.

The testimony advanced in this instance, however definite as to the character of the usage in question, was not sufficient to show that it was a general and notorious usage, without which it would not furnish the criterion by which to determine and adjudicate the relative rights of the parties in conflict with the general law upon the subject.

SOUTHWESTERN FREIGHT & COTTON PRESS CO. V. STANARD, Supreme Court of Missouri, 1869 (44 Mo. 71).

Wagner, J.: Plaintiff brought its action against the defendant for the conversion of two hundred barrels of flour. The defendant was the owner of a steam flouring mill in the city of St. Louis; and in the latter part of September, 1867, he was at the Merchants' Exchange, and entered into an agreement with Lamb and Quinlin, then merchants of that city, to sell them two hundred barrels of flour, of the brand "Eagle Steam," at the price of thirteen dollars per barrel. The flour had to be made ready for delivery, and a day was fixed on which it was to be delivered, which was a few days subsequent to the agreement of sale. On the first day of October, the parties again met, when the defendant gave to Lamb and Quinlin, the purchasers, an order written on a card, which is in the words and figures following, viz.: "Eagle Mills, deliver to Lamb and Quinlin, two hundred barrels Eagle Steam flour. St. Louis, October 1, 1867. E. O. Stanard."

Nothing was said at the time the agreement was entered into, or when the order was given, as to when payment should be made. There had been frequent previous dealings between the parties, and credit had been extended on purchases of flour for a few days; but these credits were mere voluntary courtesies, and the dealings were considered as cash transactions. On the same day that the order was given, Lamb and Quinlin sold and transferred the order to the plaintiff, and received a bill of lading for the flour for transshipment to New York. Upon this, plaintiff indorsed their draft for two thousand two hundred dollars, which, after being protested, it eventually had to pay.

On the evening of the day on which the order was given and transferred, plaintiff demanded the delivery of the flour; but defendant's agent, in charge of his mill, and acting by his direction and commands, refused to deliver the same, on account of Lamb and Quinlin's insolvency. On the facts as substantially detailed above, the circuit court declared that the plaintiff was not entitled to recover. In consequence of this declaration, the plaintiff took a nonsuit, and after an unavailing motion to have the same set aside, the cause is brought into this court by appeal.

A large mass of evidence was introduced to show a custom among the merchants that the effect of the order was to vest the title to the flour in the purchasers, and that from the time the card was handed over to them, they became the absolute owners, and that the transference of the same to the plaintiff divested the defendant of all interest.

But this branch of the case was not made out; there was great diversity among the witnesses as to the force and meaning of the supposed custom, and so far from tending to establish any open, uniform, and notorious rule, the most of the witnesses restricted themselves to declaring what their individual opinions were, and the obligations they should have deemed resting upon them had they been placed in the defendant's situation. This, of course, was all illegal, and should have been excluded.

A custom, to be good, must be general, uniform, certain, and notorious; and to be binding on parties to a transaction, must be directly known to them, or so universal and general in its character that knowledge may well be presumed. Where a contract is made as to a matter about which there is a custom well established, such custom is to be understood as forming a part of the contract, and

may always be referred to for the purpose of showing the intention of the parties in all those particulars which are not expressed in the contract. But evidence of custom, however, is never admissible to oppose or alter a general principle or rule, so as to make the rights and liabilities of parties other than they are at law. What constituted a delivery of the flour was a question of law; and the rights and liabilities of the vendor or vendee must be ascertained and fixed by the same standard.

OELRICKS v. FORD, Supreme Court of the United States, 1859 (23 How. 49).

Nelson, J.: One of the principal grounds of objection to the ruling of the court is, its refusal to submit the question of usage, which was the subject of evidence on the trial, to the jury.

The witnesses, introduced by the defendants to prove the usage, speak in a very qualified manner as to its existence, as well as to the instances in which they have known it to have been adopted or acquiesced in; and all of them admit they have no knowledge that it was general among the dealers. Some of them state that they recognized and had acted upon a custom in their own business, under which either party to the contract might require a margin to a reasonable amount, to be put up to secure the performance, and that the contract might be rescinded if the party refused; that they could not say such was the general custom; that different persons have different customs; some consider there is such a usage, and some do not. One witness states that he had, at all times in his business, considered it to be a right which might be exercised by either party to a time contract, whenever he apprehended a risk; that if the party was solvent, he supposed there was no right to demand it; another, that in his business he had always considered such contracts to be subject to the right of either party to demand the margin; that the occasion of exercising it was rare, as contracts made by his house were made with responsible persons; that he did not know that this was a general usage in Baltimore. The broker who negotiated the contract for the defendants states that he considered it a clearly understood right of both parties to such contracts to demand a margin to a reasonable amount; that he entertained the belief, from conversations with various merchants on the subject; that he recollected but one instance where, when the demand was made, the margin was put up, which was a margin of twenty-five cents on the barrel in a contract for 500 barrels.

There were ten witnesses, flour merchants for many years in the city, who state that they knew of no such usage.

It will thus be seen, from a careful analysis of the evidence, that the defendants wholly failed to prove any general or established usage or custom of the trade in Baltimore, as claimed in the defense. Every witness called on their behalf fails to prove facts essential to make out the custom in the sense of the law; on the contrary, most of them expressly disprove it. They express opinions upon the subject of a margin as a right to be exercised in their own business, but admit that it is not founded upon any general usage; and none of them speak of its having been claimed or exercised in his own business but in one or two instances. Whether a usage or custom of the kind set up existed in the trade in Baltimore, was a question of fact to be proved by persons who had a knowledge of it from dealing in the article of flour. Opinions of persons, as to what rights they might exercise in their own business in respect to time contracts, fall far short of any legal proof of the fact, especially when they admit that there was no general usage of the kind known to them.

Then, as to the precise limit or character of the custom claimed, the opinions of the witnesses are various and indefinite. The margin, they say, must be reasonable, but the pretended usage contains no rule by which a reasonable margin may be determined. It is said the amount may be referred to merchants. But there is no evidence that this is a part of the custom, or that any such mode of adjusting it ever occurred in the trade. Some of the witnesses state, that the margin must be a sum of money sufficient to make the party safe according to the state of the market. One states that, at the time the demand was made in this case for a margin, flour had fallen, and the price lower than the price in the contract; yet this, in his judgment, did not affect the right to make the demand, as the general opinion among dealers was, that the price would advance; that there were great fluctuations in the price, and that, in such a condition of things, a reasonable margin would depend upon the extent and character of the fluctuations, and upon the speculative ideas of the future value of flour.

The broker of the defendants, who purchased this flour, states his view of the reasonableness of the margin, which is the difference between the intrinsic value of the flour and its speculative value; by intrinsic value, he says he means the cost of the production; and

by speculative value, the price at which it was rating above its intrinsic value; and to a question what, in his opinion, would be a reasonable margin under the custom, when flour in the market was lower than the contract price, he answered that he considered the demand reasonable in this case, because he believed flour was going up to \$12 per barrel. It would be difficult to describe a custom more indefinite and unsettled.

MERCHANTS INS. CO. v. PRINCE, Supreme Court of Minnesota, 1892 (50 Minn. 53).

Gilfillan, C. J.: This is an action by an insurance company against its agents for premiums alleged to have been received by them on policies issued by it through them as its local agents in St. Paul. It is conceded that the authority of the defendants as agents was terminated by plaintiff in the spring of 1890, though there seems some question as to the exact date of the withdrawal of authority. They had been its local agents some ten years. The real controversy in the case is upon the claim of defendants to a right, after their agency was terminated, to cancel policies issued by it through them within a certain period, say since the date of their last report to the company; not to cancel them for the benefit of the company, or because its interests might require it, but to do so in their own interest, and so that they might turn over the insurance represented by the policies to some other company of which they might have the agency. There was no attempt to prove any express contract between the plaintiff and defendants to continue the authority of the latter to cancel policies after the termination of their agency generally. But that right or authority is claimed by reason of an alleged custom in the insurance business in St. Paul. Evidence to prove such a custom was introduced by defendants.

The plaintiff makes the point that the evidence was not sufficient to establish such a custom. We will not, however, consider that point, but come to the question presented by an instruction to the jury pursuant to the defendants' fifth request, as follows: "If you find from the evidence that it was a common, recognized custom in St. Paul at the time here in question that, upon the change of agency, the retiring agent canceled and took up all policies already paid for if he saw fit, as a part of the closing of the agency, you will find for the defendants as to those policies." The custom referred to is characterized in defendants' fourth request, likewise given and excepted to, thus: "That agents, in case of change in

agency, considered the business worked up and secured by them belonged to them, to the extent that, at least, took up all policies issued or delivered since the making of the last correct report pending the change of agency." As one of the witnesses for the defendants testified, the agent generally considers the business he works up as his own, and does with it as he sees fit. The proposition that any part of the business done by an agent for his principal, and for doing which the principal pays him, belongs to the agent, rather upsets our notions of the rights growing out of the relation of principal and agent. Is such a local custom valid? Is it reasonable? For, if unreasonable in the legal sense, it is not valid. While a custom may not be reasonable merely because it is not contrary to any established rule of law, there is a uniform concurrence of authorities that, in the legal sense, it is to be deemed unreasonable if it be opposed to the policy of the law, as where it tends to unsettle well-established rules of law, established for the protection of the rights of parties. Thus of a usage that a factor may pledge the goods of his principal (*Newbold v. Wright*, 4 Rawle, 195); that the master of a vessel may sell the cargo without necessity (*Bryant v. Commonwealth Ins. Co.*, 6 Pick. 131); to charge interest where the statute provides none shall be charged (*Henry v. Risk*, 1 Dall. 265); authorizing a landlord to re-enter for a forfeiture in a manner different from that provided by law (*Stoever v. Whitman*, 6 Binn. 417); requiring two thousand two hundred and forty pounds for a ton where the statute provides two thousand pounds shall be a ton, unless otherwise specified in the contract (*Evans v. Myers*, 25 Pa. St. 114; *Green v. Moffett*, 22 Mo. 529); that when a seller of goods receives the consignee's note without the buyer's indorsement, the latter is discharged, and the maker of the note alone is responsible (*Prescott v. Hubbell*, 1 McCord, 94); so of a usage contrary to the rule *caveat emptor*: *Barnard v. Kellogg*, 10 Wall. 383; *Dickenson v. Gay*, 7 Allen, 29. The cases of *Johnson v. Gilfillan*, 8 Minn. 395 and *Globe Milling Co. v. Minneapolis Elevator Co.*, 44 Minn. 153, are in the same line.

These are but a few of the cases that might be cited to the same effect. But where the rule of law is established, not merely to define the rights of parties under particular circumstances, but to protect those rights by enforcing good faith and fair dealing between them, the reason for excluding local usage to the contrary of the rule is still stronger. The requirement of good faith is the basis

of the rules of law governing the duties of an agent to his principal. The agent is held to the utmost good faith in the business of his principal, and, to secure this, he is not permitted to place himself in a position antagonistic to the interest of his principal, nor to secure any advantage to himself from the business without the full and free consent of the principal. It was because such a usage would tend to subvert this principle of the law of agency it was held in *Farnsworth v. Hemmer*, 1 Allen, 494 and *Raisin v. Clark*, 41 Md. 158 that a usage permitting an agent employed to sell or exchange property to take commissions from both seller and buyer was void.

There could be no question that, pending his agency, an agent of an insurance company authorized to issue policies cannot, without the consent of the company, treat the business represented by policies issued through him as in any sense his business, or the business of any one but his principal; and, if he has authority to cancel policies, he could only exercise it for the benefit of his principal. A usage that he might cancel policies for his own advantage would be so subversive of all the principles underlying the rules of the law of agency as to be void. Defendants do not claim otherwise. Their claim amounts really to this: that by the usage, upon the revocation by the company of the revocable authority conferred on the agent, a part of the business, conceded to be that of the company up to that time, becomes the business of the agent, so that he may do with it what he pleases, and that as to that part of the business the revocation clothes him with power that he did not have before. The proposition would justify a custom that any agent, as soon as his authority should be withdrawn, might at once, for his own advantage, undo, so far as it could be undone, all the business that he had done for his principal.

The rules of law established to secure and enforce good faith in fiduciary relations are so necessary and so salutary that no local custom to the contrary can be sustained. Order reversed.

MILLER v. MOORE, Supreme Court of Georgia, 1889 (83 Ga. 684).

Bleckley, C. J.: . . . It was not competent to vary the general law of the State, raising a warranty in favor of the purchasers, by showing a local usage in Augusta operating upon the corn trade, to the effect that the acceptance of corn in bulk, and paying for it after inspection, were considered as waiving or releasing all claim upon the seller to answer for any defects of quality. Doubtless the

custom is binding upon those who have recognized it in their own transactions, and thus adopted it for their own dealings; but persons who have not done so are entitled to stand upon the general law. Jones, Com. & Tr. Cont. 122, 123; Hatcher v. Comer, 73 Ga. 418; Thompson v. Ashton, 14 Johns. 316; Barnard v. Kellogg, *supra*; Yates v. Pym, 6 Taunt. 446.

HOLMES v. JOHNSON, Supreme Court of Pennsylvania, 1862 (42 Pa. St. 159).

The opinion of the court was delivered, March 10th, 1862, by Read, J.: The plaintiff and defendants in this case are all coloured persons, and, on the trial below, the defendants offered to prove, "That in the region from whence these people came, the Eastern Shore of Maryland, it is not the custom for coloured people to form legal marriages; that marriage among them is the exception and not the rule; that the majority of them cohabit promiscuously, and that this mode of promiscuous cohabitation is the custom there among free coloured persons as well as slaves;" which offer the court rejected.

A custom, however ancient, if contrary to morality, religion, and the law of the land, cannot be a legal one, and it is clearly unreasonable, and cannot be compulsory. Tried by this standard the rejection of this offer to prove such a custom so contrary to the moral sense of a Christian community was eminently proper. There are however, other objections to the proposed custom as stated in the offer, which it may be proper to consider:—

These persons came, according to the evidence, from near Snow Hill, on the Pocomoke river, in Worcester county, which adjoins Accomac county, on the Eastern Shore of Virginia. By the census of 1850, the slave population in the five lower counties, including Worcester, numbered 21,718, while the free coloured amounted to 14,544. In 1790, the whole number of slaves in Maryland was 103,036, whilst the free coloured were only 8,043; while in 1850, the slaves were 90,368, and the free coloured 75,723; and in 1860, the slaves had decreased to 85,382, and the free coloured no doubt, had increased at least to an equality, for the aggregate free population had increased 153,517 in that decade.

Now, as there is no legal marriage amongst slaves (opinion of Daniel Dulany, 1 Maryland Rep. 561; Jackson v. Lervey, 5 Cowen 402, 403), it would have been easy for any gentleman coming from the lower part of the Eastern Shore of Maryland to have proved a

very large portion of the offer; that it was not the custom for slaves to form legal marriages, and that this was the rule to which there was really no exception. Such proof would have established the custom included in the offer in the proposition of twenty-one parts out of thirty-five, and this would have varied at different periods according to the relative proportions of slave and free coloured; at the earliest period, proving the custom almost entirely from the legalized practice of the slave class.

It is certain that the institution of marriage is not only recognised by the laws of Maryland as existing with the free coloured race, but we know that, amongst slaves in the slave states, the ceremony is often performed, although not followed by the usual legal consequences. And in the census of Maryland, in 1850, under the head of marriages, married whites and free coloured are classed together, as well as the number of dwellings and families of the white and free coloured population.

BRYANT V. COMMONWEALTH INS. CO. Supreme Judicial Court of Massachusetts, 1828 (6 Pick. 131).

A custom was alleged that the master of a stranded vessel might proceed to sell the cargo even though there was no necessity to do so.

Putnam, J.: . . . But the plaintiffs relied much, at the trial, upon a usage to sell property on the beach in similar circumstances; and the jury have found that there was such a usage. We cannot think that such a usage was of any validity. We have seen that it was not uniform. Some cargoes have been carried to Norfolk and not sold on the beach. It could not have any lawful commencement or continuance, in any case where there was no necessity to make the sale. It was against common faith and honesty. Necessity only will authorize the sale. A usage to sell without necessity would be void. It would be of no more validity, than would be a usage for the master and people to turn pirates when the vessel should take the ground. So far as it could be proved, that property, situated in all respects as this was, had been disposed of for the benefit of all concerned, on the spot, so far, and no farther, it would be evidence tending to satisfy the jury that the sale was reasonable and necessary. So that it comes to the question, after all, whether or not the master was justified by the circumstances and the necessity of the case, to make the sale as he did. Upon that question we have all a strong opinion that it was not reasonable or necessary.

TREMBLE v. CROWELL, Supreme Court of Michigan, 1869 (17 Mich. 493).

Graves, J.: The defendants in error sued Tremble in the court below, in assumpsit, and sought to recover from him certain money which they alleged they had paid him for a quantity of fish he had sold to them, and which had proved to have been unsound and valueless. The declaration contained the common and money counts, and also a special count in which the defendants in error alleged in the usual manner that the plaintiff in error warranted the fish to be good, sound, and fit for the market.

The plaintiffs below, after giving evidence to show that they were wholesale fish dealers at Toledo, in the state of Ohio, and purchased of the defendant, who was a fisherman at Bay City, and paid therefor, about \$1500 worth of fish, of which, on their arrival at Toledo, some sixty-eight half barrels were found to be spoiled and valueless, offered evidence to prove that there was a settled uniform usage, that under a contract for the sale of fish for cash, and where there was no express warranty if the fish or any portion of them proved to be unsound, the vendor should be liable to pay back to the purchaser the money paid for such unsound fish, and the evidence was admitted under objection.

Subsequently the circuit judge, in submitting the case to the jury, instructed them that if they should find such a settled uniform usage it was valid, and that, by virtue thereof, the plaintiffs would be entitled to recover the money paid for the unsound fish, unless the parties made a contract excluding, by its very terms, the operation of such usage; and to this direction the defendant below excepted.

These objections present the main questions in the case.

It will be observed that the usage relied on would, if established, place the dealers in fish in Bay City and vicinity, in a position very different from that held by persons in the same business in other parts of the state; and would tacitly annex to all contracts there made for the sale of fish, unless expressly excluded by the contract itself, a stipulation which would tend, inevitably, to supersede all official as well as private inspection; and would prescribe a specific redress in case of the sale of "tainted" or "damaged" fish, entirely different from that marked out by the statute.

Would such a usage be a reasonable one if conclusively proved? It appears to me that it would not.

The legislature have thought proper to provide for a system of public inspection of various articles, and among them the article of fish; and have made numerous and precise regulations on that subject: 1 Comp. L., p. 386; also, 392 to 394.

They have provided for the election of inspectors; have required them to make inspection when desired so to do; have specified the manner in which it should be done; have provided that the fish inspected should be designated by the inspector as number "one," or "two," according to quality, and have required the inspectors to report annually to the secretary of state the quantity, quality, and kinds inspected during the year.

They have also provided that, if any person shall sell, within the state, or export, or cause to be exported therefrom, any tainted or otherwise damaged fish, unless with the intent that the same shall be used for some other purpose than as food, he shall forfeit \$10 for every one hundred pounds of such fish; and that upon the trial the burden of proof shall be upon the vendor to show for what purpose such fish were sold or exported.

By another section they have declared that it shall not be obligatory upon any one to have fish inspected; but that all contracts for the sale of fish shall be deemed made with reference to those provisions of the statute regulating the quality, quantity, and other descriptions, unless the parties otherwise expressly agree: Comp. L., § 1236.

Although the statute is not imperative on the subject of inspection, the penal provision against the sale of "tainted" or damaged fish is so; and the whole act is plainly expressive of a legislative purpose to provide the system of regulations for the trade, which the legislature deemed the best. Whether the usage in question would directly and necessarily conflict with any of these statutory regulations need not be determined, since in my opinion the usage cannot be sustained if found to be inconsistent with the policy or spirit of the statute.

It appears to me to be a part of the policy of the law in question to encourage the practice of official inspection and discourage a contrary course, to regulate the traffic in fish in the manner most likely to insure fairness between dealers, and maintain everywhere the reputation of a most important branch of the commerce of the state.

As the supposed usage assumes that the article is purchased without the safeguard of inspection, and that the buyer will be saved from loss on a purchase of uninspected fish by the right given him by the usage to recover of the vendor the price actually paid; the effect of the usage must be to cause dealers to dispense with inspection, and pave the way for those consequences which the law was designed to avert; and, at the same time, to defeat the desirable objects which the legislature intended to promote.

Without attempting to contrast the usage with specific provisions, I think there can be no doubt but that it would introduce a practice altogether at variance with the spirit and plain policy of the inspection laws; and that if it were accepted as binding, it would go far to render those laws nugatory, and to supersede inspection altogether by responsible public officers.

Entertaining this opinion, I think that the usage in question was and is invalid, and that it could furnish no basis for a recovery in this case.

This conclusion, if correct, makes it unnecessary to consider the other questions in the case.

I think the judgment of the court below should be reversed with costs. The other justices concurred.

V.

COURTS: THEIR ORGANIZATION AND JURISDICTION.I. SELF-HELP.

BLACKSTONE, COMMENTARIES, III, 2, 15.

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

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 which I 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 the peace which happens is chargeable upon him only who began the affray.) 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 whom he bears a near connection) makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; 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.

II. Recaption or reprisal is another species of remedy by the mere act of the party injured. (This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent, or master, may lawfully 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.) 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 remedy than the ordinary process of law. If therefore he can so contrive it as to gain possession of his property again without force or terror, the law favors and will justify his proceeding. But as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption 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; 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 and tenements when another person without any right has taken possession thereof. (This depends in some measure on like reasons with the former; and like that, too, must be peaceable and without force.) There is some nicety required to define and distinguish the cases in which such entry is lawful or otherwise; it will therefore be more fully considered in a subsequent chapter; being only mentioned in this place for the sake of regularity and order.

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

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 the non-payment of rent, or other duties; or distraining another's cattle damage-feasant, that is, doing damage or trespassing upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to

ascertain whose cattle they were that committed the trespass or damage.

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

RECAPTION.

IN BOWLER V. ELDREDGE, Supreme Court of Errors of Connecticut, 1846 (18 Conn. 1).

Williams, C. J.: . . . The 4th plea rests upon very different considerations.

The defendants do not, in that, rely upon a decree or order, the correctness of which cannot be examined; but they say, the facts which exist will justify the acts they have done; and they offer to prove these facts before the court.

They say, this vessel was in the legal custody and possession of an officer of the United States, by virtue of legal process, and had been wrongfully taken out of his possession; and he therefore had a right to repossess himself of it; and this he did through the defendants, who acted as his servants and agents, and by his authority.

The plaintiff, on the other hand, contends, that if this were so, they had no right to take this property by force out of his possession; that it was in custody of the law, and must there remain until taken out by legal process.

It is not claimed that any force was used by the defendants, but such as is implied in every wrongful act of trespass. The words *vi et armis* imply nothing more. 3 Burr. 1701, 1731. The question then arises, whether, if this property has been illegally taken from the custody of the defendant, he may repossess himself of it.

As to real estate, there cannot be a doubt that at common law, if the owner has been dispossessed, he might, within a reasonable time, if he could prevail by fair means, enter by force and take possession of his own estate. 1 Hawk. Pl. Cr. ch. 64, p. 274. 13 Vin. Ab. 380. Co. Litt. 257, n. 1. Hyatt v. Wood, 4 Johns. R. 150. Ives v. Ives, 13 Johns. R. 237. And although, to prevent breaches of the peace, and the oppression of the weak by the powerful, forcible entries are by statute restrained, yet even at this day, if a tenant hold over, and the landlord takes possession by force and strong hand, so that he may be indicted for a forcible entry, the tenant cannot treat him as a trespasser. Taunton v. Costar, 7 Term. R. 431. And in a more recent case, where the landlord broke open the doors of the house with a crowbar, after his tenant's lease had expired, no person being in, and only some of the tenant's furniture remaining, he was justified in an action of trespass brought by the tenant against him. Turner v. Meymott, 1 Bing. 158, (8 E. C. L. 280). And it is said, by a highly respectable writer on common law, the force may not be justifiable; the party may be answerable for a breach of the peace or a forcible entry; but not in an action of trespass, to a party in the wrongful possession; for the possession is a sufficient ground to sustain an action of trespass against a wrongdoer. It is otherwise, when the person entering shows a legal title. Read's case, 6 Rep. 24, 2 Saund. 47, c. Hyatt v. Wood, 4 Johns. R. 158; 1 Johns. R. 44. And it is said, by the author of the commentaries, that where one is deprived of his property in goods or chattels personal, or where one's wife, child or servant is wrongfully detained, the owner, husband, parent or master may lawfully claim and retake them, wherever he happens to find them. 3 Bla. Com. 41. 1 Sw. Dig. 461. And a writer on criminal law, of high authority, says, "It seems certain, that even at this day, he who is wrongfully dispossessed of his goods, may justify the retaking of them by force, from the wrongdoer, if he refuses to redeliver them; for, the violence which happens through the resistance of the wrongful possessor, being originally owing to his own fault, gives him no just cause of complaint, inasmuch as he might have prevented it by doing as he ought." 1 Hawk. Pl. Cr. 274, ch. 64. Blackstone and other commentators very properly say, that this may be done, provided it be not done in a riotous manner, and not attended with a breach of the peace. They do not, however, by this, mean, that if a husband reclaims his wife, or a parent his child, or an owner his goods, he

will, for such act, be liable in an action of trespass to the wrong-doer; though he might be answerable for a breach of the peace. Hawkins explains this more fully than the other authors above cited, when speaking of forcible entry; for, says he, however he may be punishable at the king's suit, for doing what is prohibited by statute, as a contemner of the law and disturber of the peace, he shall not be liable to pay any damages for it to the plaintiff, whose injustice gave him the provocation in that manner to right himself. Ch. 64, sect. 2. And in *Lec v. Atkinson*, Cro. Jac. 236; S. C., Yelv. 172, where the owner of a horse let it for two days, and finding that the person who hired it was going another way than that for which he hired the horse, by force retook the horse within the two days; it was held that he was not justified, not because he might not have right to retake his own, but he had parted with the possession for those two days; thus recognizing the right of recapture, though not under such circumstances. So, too, if a distress is taken without cause, or contrary to law, before it is impounded: the party may rescue it. Co. Litt. 160-1, 3 Bla. Com. 12. *Cotsworth v. Betison*, 1 Ld. Raym. 104; S. C., 1 Salk. 247.

It is said, however, that this property was in custody of the law; and, therefore, the defendants had no right to reclaim it in this way. That must depend upon the other question, whether it was lawfully detained by the officer; for if not, his official character could not give him, as against him who had a prior claim, a right. His process, though good as against the party, would not give him a right to take the goods of a third person, or the goods of this person, out of the lawful possession of another.

This court has decided that a person committed to prison under an illegal process was not accountable, in a public prosecution, for freeing himself from that imprisonment, even by a breach of the peace. And we are of opinion that the marshal of New York, having the legal custody of this property, had a right to repossess himself of it when in the hand of this plaintiff. We, therefore, are of opinion that the 4th plea is sufficient; and so we advise the superior court.

In this opinion the other judges concurred.

SPENCER v. MCGOWEN, Supreme Court of New York, 1835 (13 Wend. 256).

Error from the *Tompkins C. P.* Spencer sued M'Gowen and Shepard, in an action of trespass for the taking of a horse, which

had been delivered to him Nov. 3, 1830, as the plaintiff in a writ of replevin issued against one Carter. The plaintiff further proved that the horse in question had been mortgaged with other property, by Carter, to one M'Cormick, to secure the payment of a certain sum of money; that the mortgage had been assigned to him, the plaintiff; that it had become forfeited; and that by an award of arbitrators, made in pursuance of a submission between him and Carter, he had a lien upon the horse. The defense set up on the trial was, that Carter was a tenant of one Bloodgood, and that previous to the issuing of the writ of replevin, to wit: Oct. 25, 1830, the horse in question was taken, with other property, as a distress for rent, by M'Gowen, as the bailiff of the landlord. Shepard was the receptor of the property, and it was left on the premises. The horse having subsequently been delivered by the sheriff to Spencer, by virtue of the writ of replevin, Shepard took the horse from Spencer's stable, and delivered him to M'Gowen, who sold him by virtue of the distress warrant. The jury, under the charge of the court, found a verdict for the defendants, on which judgment was entered. The plaintiff having excepted to the charge of the court, sued out a writ of error.

By the Court, Sutherland, J. It is contended by the plaintiff in error, that under the Act in relation to the Action of Replevin, 2 R. S., 525, sec., 13, etc., the defendants were bound to have demanded a jury from the sheriff to try their title to the horse, before they could summarily regain the possession of him. The 13th section provides, that if the defendant in the action of replevin, or any other person who may be in possession of the goods and chattels specified in the writ, shall claim property therein or in any part thereof, he may give notice to the sheriff thereof, and demand a jury to try his title. The 14th and 15th sections regulate the mode of proceeding. The 16th section provides that if the jury find against the title of the claimant, the sheriff shall forthwith make deliverance to the plaintiff in replevin. The 17th enacts that if the jury find in favor of the claimant, the sheriff shall not deliver the property to the plaintiff in replevin, unless he will indemnify him to his satisfaction, and refund to the claimant the fees of the sheriff and jury in trying the title. These provisions are designed rather for the security and benefit of the sheriff, than of the party claiming the property; for although the jury may find in favor of the title of the claimant, the sheriff may still and perhaps must deliver

the property to the plaintiff in replevin, if he will indemnify him. The person claiming title to the property is not prohibited by these provisions from taking any other course to try or enforce his right, which upon general principles he might have done before this Act was passed.

If the property of A is in the possession of B, and is taken under an execution or a writ of replevin against B, if A can peaceably obtain the possession of it, and can establish his title, the plaintiff in the execution or replevin cannot maintain trespass against him.

(A man is never a trespasser in peaceably obtaining possession of his own property.) Hyatt v. Wood, 3 Johns., 239; 4 Id., 150, 313. The defendants in this case had a special property in the horse, by virtue of the proceedings under the landlord's warrant, when the replevin was served. The replevin suit was not against them, but against the tenant.

MOORE v. SHENK, Supreme Court of Pennsylvania, 1846 (3 Pa. St. 1).

Gibson, C. J.: . . . But the direction that the property was not revested in the defendant by his demand of it and offer to restore it, because he repossessed himself of it by force, was wrong. Each party had expressly reserved a right to put an end to the bargain by giving back what he had received under it. When, therefore, the defendant signified his determination to rescind, and tendered the animal with the money he had received, the parties were *ipso facto* remitted to their original rights. The remitter was so entire that the defendant could have maintained trover or replevin on the wagoner's refusal to deliver. Was it disturbed or prevented by any act of force subsequently committed in regaining the possession pursuant to it? It is true that the right of recaption cannot be pleaded in justification of violence. "If, for instance," says Sir William Blackstone, (3 Com. 5.) "my horse is taken away, and I find him in a common, a faire, 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, but must have recourse to an action at law:" in other words, the right of recaption will not justify a collateral trespass committed in the prosecution of it. But recaption, being founded on a title already existing, is not an act necessary to revest the title, like an entry on land for a condition broken; but it is a remedy, like an action, to regain the possession by virtue of a title complete. If it were the former,

an action could be maintained without at least an attempt at recaption precedent to it. The defendant's original title was restored by the tender, and no principle of the common law declares his illegal enforcement of it to be a forfeiture of it. Even a right of entry on land might have originally been enforced by violence, and possession thus gained be held with a strong hand, (2 Comm. 148:) it is only by special provision in the statutes of forcible entry and detainer, that a party deforced may have a writ of restitution. As regards chattels, the common law principle is unchanged. Though the defendant could not have defended himself against an action of trespass for the force, he certainly can defend himself against an action for the property.

HARVEY v. DEWOODY, Supreme Court of Arkansas, 1856 (18 Ark. 252).

Hanly, J.: . . . The defense, set up in the plea is a justification of the trespass complained of in the declaration. The facts upon which the justification is based are, in substance, that the town of Des Arc was, by an act of the Assembly of this State, approved 28th December, 1854, incorporated: that, by said act, the corporate powers of said town were vested in one mayor and four councilmen, to be chosen in a certain manner—that five of the defendants were elected under the provisions of said charter, one as mayor, and the other four as councilmen—that at the same election, the remaining defendant Robinson was elected and chosen constable of said town: all strictly in conformity with the provisions of the act of incorporation—that all qualified in their respective offices, and entered upon the discharge of the duties thereof—that, at a certain time named, it was ascertained that a certain tenement or house situate in said town, owned by the plaintiff, had become a common or public nuisance, by endangering the property and health of many of the good citizens of said town by its exposed condition, and liability to take fire, and because of the fact of its being used by the public as a privy, etc.—that it was thought by them in their official capacity, that the public health and security to property in said town required and demanded that said house or tenement should be declared a public nuisance, and be abated as such—that with this view they aver that on a certain day and time in said plea named and stated, they met in their corporate capacity, as by law they had a right to do, and passed an ordinance declaring said house or tenement of the plaintiff a public nuisance, and providing for its abatement by requiring the

constable of said town, the defendant Robinson, to notify the plaintiff of the proceedings of the defendants as mayor and council of said town, touching said house or tenement, and inform him that should he not within thirty days next thereafter abate said nuisance by removing the cause thereof, that they in their official capacity, as mayor, council and constable, would abate the same by tearing down such house or tenement—that said defendant Robinson, as such constable, gave the required notice under said ordinance to said plaintiff—that more than thirty days elapsed after such notice was so given, and the cause of said nuisance being still unremoved or abated by said plaintiff, under the provisions of said ordinance the said defendant Robinson as constable proceeded to and did pull down and destroy said house or tenement, as the only means of abating said nuisance, and the plea avers that this is the same trespass of which the plaintiff complains in his declaration.

Under this state of facts, which are admitted on the record, it may not be unprofitable, by way of illustrating our views, to announce a few principles of law, which we regard as involved in this cause.

A nuisance, in its common acceptation, means, literally, annoyance. In law, its signification is more restricted. According to Blackstone, it means or signifies, "anything that worketh hurt, inconvenience or damage." See 3 Blacks. Com. 216.

Nuisances are of two kinds:—common or public, and private. See Bac. Abr. 146.

The first class is defined to be such an inconvenience or troublesome offense as annoys the whole community, in general, and not merely some particular person. See 1 Hawk. P. C. 187; 4 Blacks. Com. 166-7; It is said to be difficult to define what degree of annoyance is necessary to constitute a nuisance. In relation to trades, it seems that when a trade renders the enjoyment of life or property uncomfortable, it becomes a nuisance for the reason, that the neighborhood have a right to have pure and fresh air. See 1 Burr. 333. 2 Car. & P. 485; 2 Lord Raym. 1163. 1 Str. 686.

The second class, or private nuisances, is anything done to the hurt or annoyance of the lands, tenements or hereditaments of another. See 3 Blacks. Com. 215. 5 Bac. Abr. 146.

For a common or public nuisance, the usual remedy at law is by indictment. For a private nuisance the ordinary remedy at law,

is case. See 3 Blacks. Com. C. 13; 10 Mass. R. 72; 7 Pick. 76; 3 Harr. & McH. 441.

Courts of chancery exercise jurisdiction both as to common or public, and private nuisances, by restraining persons from setting them up, by inhibiting their continuance, or compelling their abatement. See 2 Story's Eq., sec. 924, p. 260.

As we have said, both courts of law and equity afford ample redress, and sufficiently prompt remedies in case of nuisances. But it seems the law is not satisfied with these, as affording full protection to the public or citizen, in many cases, for it is generally conceded that any person may abate a public nuisance. See 2 Salk. 458. 5 Bac. Abr. 152. 3 Id. 498. And it seems that this right extends as well to private as to common or public nuisances. See 5 Bac. Abr. ubi sup. 2 Bouv. Law. Dic., 3-2, p. 18. 2 Barn. & Cress. 311. 3 Dowl. & R. 556.

A public nuisance may be abated without notice (2 Salk. 458): and so may a private nuisance, which arises by an act of commission. And where the security of lives or property may require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it, an individual would be justified in abating a nuisance from omission without notice. 2 Barn. & Cress. 311. 3 Dowl. & R. 556, as above.

As to private nuisances, it has been held, that if a man in his own soil erect a thing which is a nuisance to another, the party injured may enter the soil of the other and abate the nuisance, and justify the trespass. See 9 Mass. R. 316. 4 Conn. 418. 5 Id. 210. 4 N. H. R. 527.

Distress for rent has been abolished or greatly modified by statute in most American jurisdictions. Distress of cattle damage feasant has also been modified or regulated by statutes (commonly known as the Herd Law), but is generally permitted.

Entry and Seizure are now obsolete.

BLACKSTONE, COMMENTARIES, III, 18.

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

I. If a person indebted to another makes his creditor or debtee his executor, or if such a 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. 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 a 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 made executor, he would be put in a worse condition than all the rest of the world besides. For though a ratable payment of all the debts of the deceased, in equal degree, is clearly the most equitable method, yet, as every scheme for a proportionable distribution of the assets among all the creditors hath been hitherto found to be impracticable, and productive of more mischiefs than it would remedy, so that the creditor who first commences his suit is entitled to a preference in payment; it follows that, as the executor can commence no suit, he must be paid the last of any, and of course must lose his debt, in case the estate of his testator is insolvent, unless he be allowed to retain it. The doctrine of retainer is therefore the necessary consequence of that other doctrine of the law, the priority of such creditor who first commences his action. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation as if he had sued himself as executor and recovered his debt; which he never could be supposed to have done while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion. Nor shall an executor of his own wrong be in any case permitted to retain.

II. Remitter is where he who hath the true property or *jus proprietatis* in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and of course defective, title; in this case he is remitted, or sent back by operation of law, to his ancient and more certain title. The right of entry, which he hath gained by a bad title, shall be *ipso facto* annexed to

his own inherent good one: and his defeasible estate shall be utterly defeated, and annulled, by the instantaneous act of law, without his participation or consent. As if A. disseizes B., that is, turns him out of possession, and dies, leaving a son C.; hereby the estate descends to C. the son of A., and B. is barred from entering thereon till he proves his right in an action; now, if afterwards C., the heir of the disseizor, makes a lease for life to D., with remainder to B. the disseizee for life, and D. dies; hereby the remainder accrues to B., the disseizee: who, thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of law remitted, or in of his former and surer estate. For he hath hereby gained a new right of possession, to which the law immediately annexes his ancient right of property.

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

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

And thus much for these extrajudicial remedies, as well for real as personal injuries, which are furnished or permitted by the law, where the parties are so peculiarly circumstanced as not to make it eligible, or in some cases even possible, to apply for redress in the usual and ordinary methods to the courts of public justice.

Remitter is now obsolete.

2. COURTS IN GENERAL.

BLACKSTONE, COMMENTARIES, III, 22.

The next, and principal, object of our inquiries is the redress of injuries by suit in courts: (wherein the act of the parties and the act of law co-operate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument by which the parties are enabled to procure a certain and adequate redress.)

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, the law allows an extrajudicial remedy, yet that does not exclude the ordinary course of justice (but it is only an additional weapon put into the hands of certain persons in particular instances, where natural equity or the peculiar circumstances of their situation required a more expeditious remedy than the formal process of any court of judicature can furnish.) Therefore, though I may defend myself, or relations, from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods if I have a fair and peaceable opportunity, this power of recaption does not debar me from an action of trover or detinue: I may either enter on the lands on which I have a right of entry, or may demand possession by a real action; I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may distrain for rent, or have an action of debt, at my own option: if I do not distrain my neighbor's cattle damage-feasant, I may compel him by action of trespass to make me a fair satisfaction: if a heriot, or a deodand, be withheld from me by fraud or force, I may recover it though I never seized it. And with regard to accords and arbitrations, these, in their nature being merely an agreement or compromise, most 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 ministered by suit or action, without running into the palpable absurdity of a man's bringing action against himself; the two cases wherein they happen being such wherein the only possible legal remedy would be directed against the very person himself who seeks relief.

In all other cases it is a general and indisputable rule, that where there is a legal right there is also a legal remedy, by suit or action at law, whenever that right is invaded. And in treating of these remedies by suit in courts, I shall pursue the following method: first, I shall consider the nature and several species of courts of justice; and, secondly, I shall point out in which of these courts, and in what manner, the proper remedy may be had for any private injury; or, in other words, what injuries are cognizable, and how redressed, in each respective species of courts.

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

A court is defined to be a place wherein justice is judicially administered. And, as by our excellent constitution the sole executive power of the laws is vested in the person of the king, it will follow that all courts of justice which are the medium by which he administers the laws, are derived from the power of the crown. 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. In all these courts the king is supposed in contemplation of law to be always present; but, as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a prodigious variety of courts, some with a more limited, others with a more extensive, jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review. All these in their turns will be taken notice of in their respective places: and I shall therefore here only mention one distinction, that runs throughout them all; viz., that some of them are courts of record, others not of record. A court of record is that where the acts and judicial proceedings are

enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and supereminent authority that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary. And if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But, if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are the king's courts, in right of his crown and royal dignity, and therefore no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with the power of fine or imprisonment makes it instantly a court of record. A court not of record is the court of a private man; whom the law will not entrust with any discretionary power over the fortune or liberty of his fellow subjects. Such are the courts-baron incident to every manor, and other inferior jurisdictions: where the proceedings are not enrolled or recorded; but as well their existence as the truth of the matters therein contained shall, if disputed, be tried and determined by a jury. These courts can hold no plea of matters cognizable by the common law, unless under the value of 40s., nor of any forcible injury whatsoever, not having any process to arrest the person of the defendant.

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 judex, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officer to apply, the remedy. It is also usual in the superior courts to have attorneys, and advocates or counsel, as assistants.

An attorney at law answers to the procurator, or proctor, of the civilians and canonists. And he is one who is put in the place, stead, or turn of another, to manage his matters of law. Formerly every suitor was obliged to appear in person, to prosecute or defend his suit, (according to the old Gothic constitution,) unless by special license under the king's letters-patent. This is still the law in criminal cases. And an idiot cannot to this day appear by attorney, but in person; for he hath not discretion to enable him to appoint a

proper substitute: and upon his being brought before the court in so defenceless a condition, the judges are bound to take care of his interests, and they shall admit the best plea in his behalf that any one present can suggest. But, as in the Roman law, "*cum olim in usu fuisset, alterius nomine agi non posse, sed, quia hoc non minimam incommoditatem habebat, coeperunt homines per procuratores litigare,*" so with us, upon the same principle of convenience, it is now permitted in general, by divers ancient statutes, whereof the first is statute Westm. 3, c. 10, that attorney may be made to prosecute or defend any action in the absence of the parties to the suit. These attorneys are now formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster hall, and are in all points officers of the respective courts of which they are admitted; and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges. No man can practice as an attorney in any of those courts, but such as is admitted and sworn an attorney of that particular court: an attorney of the court of king's bench cannot practice in the court of common pleas; nor *vice versa*. To practice in the court of chancery it is also necessary to be admitted a solicitor therein: and by the statute 22 Geo. II., c. 40, no person shall act as an attorney at the court of quarter-sessions but such as has been regularly admitted in some superior court of record. So early as the statute 4 Henry IV. c. 18, it was enacted, that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty. And many subsequent statutes have laid them under further regulations.

Of advocates, or (as we generally call them) counsel, there are two species or degrees: barristers, and sergeants. The former are admitted after a considerable period of study, or at least standing, in the inns of court; and are in our old books styled apprentices, *apprenticii ad legem*, being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were sixteen years standing, at which time, according to Fortesque, they might be called to the state and degree of sergeants, or *servientes ad legem*. How ancient and honorable this state and degree is, with the form, splendor, and profits attending it, hath been so fully displayed by many learned writers, that it need not be here enlarged on. I shall only observe, that sergeants at law are bound by a sol-

emn oath to do their duty to their clients: 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; the original of which was probably to qualify the puisne barons of the exchequer to become justices of assize, according to the exigence of the statute of 14 Edw. III. c. 16. From both these degrees some are usually selected to be his majesty's counsel learned in the law; the two principal of whom are called his attorney and solicitor-general. The first king's counsel under the degree of sergeant was Sir Francis Bacon, who was made so *honoris causa*, without either patent or fee; so that the first of the modern order (who are now the sworn servants of the crown, with a standing salary) seems to have been Sir Francis North, afterwards lord-keeper of the great seal to king Charles II. These king's counsel answer, in some measure, to the advocates of the revenue, *advocati fisci*, among the Romans. For they must not be employed in any cause against the crown without special license; in which restriction they agree with the advocates of the fisc: but in the imperial law the prohibition was carried still further, and perhaps was more for the dignity of the sovereign; for, excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned in private suits between subject and subject. A custom has of late years prevailed of granting letters-patent of precedence to such barrister as the crown thinks proper to honor with that mark of distinction: whereby they are entitled to such rank and pre-audience as are assigned in their respective patents; sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being. These (as well as the queen's attorney and solicitor-general) rank promiscuously with the king's counsel and together with them sit within the bar of the respective courts; but receive no salaries, and are not sworn, and therefore are at liberty to be retained in causes against the crown. And all other sergeants and barristers indiscriminately (except in the court of common pleas, where only sergeants are admitted) may take upon them the protection and defence of any suitors, whether plaintiff or defendant; who are therefore called their clients, like the dependents upon the ancient Roman orators. Those indeed practiced gratis, for honor merely, or at most for the sake of gaining influence: and so likewise it is established with us, that a counsel can maintain no action for his fees; which are given, not as *locatio vel conductio*, but as *quiddam honorarium*; not as a salary or hire,

but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation: as is also laid down with regard to advocates in the civil law, 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. 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 the unseemly licentiousness of prostitute and illiberal men, (a few of whom may sometimes insinuate themselves even into the most honorable professions,) it hath been holden that a counsel is not answerable for any matter by him spoken relative to the cause in hand and suggested in his client's instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured. And counsel guilty of deceit or collusion are punishable by the statute Westm. 1, 3 Edw. I. c. 28, with imprisonment for a year and a day, and perpetual silence in the courts; a punishment still sometimes inflicted for gross misdemeanors in practice.

The strict and correct designations of members of the legal profession are:

COUNSEL (Counsellor at Law), when before the court trying a cause, arguing matter of law, or applying for orders.

ATTORNEY AT LAW, in actions at or courts of law.

SOLICITOR IN CHANCERY, in suits in or courts of equity.

PROCTOR, in proceedings in or courts of admiralty.

In England, the profession is divided into two branches, counsel being called Barristers, and, in recent times, the other branch of the profession, Solicitors.

In the United States all members of the profession are both attorneys and counsellors; but the term Solicitor is frequently used where there are separate courts of equity and in the federal courts.

VON SCHMIDT V. WILBER, Supreme Court of California, 1893 (99 Cal. 511).

Harrison, J.: . . . A court is a tribunal presided over by one or more judges, for the exercise of such judicial power, as has been conferred upon it by law. Blackstone, following Coke, defines it as "a place where justice is judicially administered," (3 Bl. Comm. 23;) but it is also essential that this place be designated by law, and that the person or persons who are authorized to administer justice be at that place for the purpose of administering justice at such

Barristers also.

These are barristers who practice in equity and courts.

times as may be also designated by law. The times fixed by law for the transaction of judicial business are called "terms," and the periods between the end of one term and the beginning of the next are called "vacations." These "terms" vary in different jurisdictions according to the statutes by which they are fixed; in some states ending at fixed dates, and in others continuing until the commencement of a succeeding term. Formerly, in England, there were four terms of court in each year, and their duration was so fixed that there were only 91 days in each year during which the courts could be in session. As the judicial business increased, it became impossible to transact it all within these periods of time, and there grew up the practice of hearing many matters "out of court" with the same effect as if heard while the court was in session; but the matters which were thus heard were only such as pertained to causes pending in court, and which were of a nature to expedite or facilitate the judicial disposition of the pending cause, to which they were merely subsidiary or collateral. At a later day the practice arose of hearing and disposing of such matters at certain hours during "term time" while the court was not in formal session, and subsequently certain hours of each day were fixed, at which one of the judges would hear these matters while the court was actually in session. The motions and orders thus made were said to be heard and disposed of "at chambers," for the reason that they were heard by the judge at his chambers, rather than in the court room, but the term "chambers" finally became extended so as to include any place, either in or out of the court room, at which a judge may hear applications or make orders while the court is not in session, in matters pending in that court. The distinction between those matters which could be heard in court and those which could be heard at chambers arose from convenience, rather than from any other cause, but they were limited to the subsidiary and incidental steps in practice and procedure, leaving to the court the judicial determination of the issues presented by the pleadings, and which formed a part of the record. The term "court," as used in the Code of Civil Procedure, means sometimes the place where the court is held, sometimes the tribunal itself, and sometimes the individual presiding over the tribunal, and in many cases is used synonymously, as well as interchangeably, with "judge;" and whether the act is to be performed by the one or the other is generally to be determined by the character of the act, rather than by such designation. Section 166

provides that a judge "may, at chambers, grant all orders and writs which are usually granted in the first instance upon an *ex parte* application;" and section 1004 provides that orders made out of court may be made by the judge of the court in any part of the state. Prior to the adoption of the present constitution there were fixed terms in this state for the transaction of judicial business by the several district courts, and any act done by a court after its term had ended was void. *Bates v. Gage*, 40 Cal. 183. Upon the adoption of the present constitution, all terms of court were abolished, and by its provisions (article 6, 5) the superior courts are always open, and (section 6) in San Francisco there may be as many sessions of said court at the same time as there are judges thereof; and "the judgments, orders and proceedings of any session of the superior court, held by any one or more of the judges of said courts respectively, shall be equally effectual as if all the judges of said respective courts presided at such session." Under the present constitution of this state, therefore, whenever a judge of the superior court is present at the place designated for the transaction of judicial business, and there assumes to transact such business, his acts may be considered as the acts of the court of which he is a judge.

BLACKSTONE, COMMENTARIES, III, 275.

These terms are supposed by Mr. Selden to have been instituted by William the Conqueror; but Sir Henry Spelman hath clearly and learnedly shown, that they were gradually formed from the canonical constitutions of the church; being indeed no other than those leisure seasons of the 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 Christian magistrates, to distinguish themselves from the heathens, who were extremely superstitious in the observation of their *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 hay-time and harvest. All Sundays also, and some

particular festivals, as the days of the purification, ascension, and some others, were included in the same prohibition; which was established by a canon of the church, A. D. 517; and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian code.

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, 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 *Mirror* mentions only one vacation of any considerable length, containing the months of August and September, yet Britton is express, that in the reign of king Edward the First no secular plea could be held, nor any man sworn on the evangelists, in the times of Advent, Lent, Pentecost, harvest, and vintage, the days of the great litanies, and all solemn festivals. But he adds, that the bishops did nevertheless grant dispensations, (of which many are preserved in Rymer's *Foedera*.) that assizes and juries might be taken in some of these holy seasons. And soon afterwards a general dispensation was established by statute Westm. 1, 3 Edw. I. c. 51, which declares, that "by the assent of all the prelates, assizes of novel disseisin, mort d'ancestor, and darrein presentment shall be taken in advent, septuagesima, and Lent; and that at the special request of the king to the bishops." The portions of time, that were not included within these prohibited seasons, fell naturally into a fourfold division, and, from some festival day that immediately preceded their commencement, were denominated the terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael: which terms have been since regulated and abbreviated by several acts of parliament.

In England, Hilary Term began January 3, and ended February 12; Easter Term began the second Wednesday after Easter Sunday and ended the Monday after Ascension Day; Trinity Term began the Friday after Trinity Sunday, and ended the second Wednesday thereafter; Michaelmas Term began October 9, and ended November 28. The Judicature Act of 1873 abolished these terms.

In this country, in most jurisdictions, the terms of court are provided for by statute. In a few jurisdictions terms have been done away with. }

HOBART V. HOBART, Supreme Court of Iowa, 1877 (45 Ia. 501).

Beck, J.: . . . III. Code, sec. 2222, authorizing and governing proceedings for divorce, contains the following provision: "No divorce shall be granted on the testimony of the plaintiff; and all such actions shall be heard in open court on the testimony of witnesses, or depositions taken as in other equitable actions triable upon oral testimony, or by a commissioner appointed by the court." The trial required in this section is to be had in open court. We are first charged with the task of determining the purport and effect of the words "open court." The language is simple and its meaning obvious. The trial must be in a court. Blackstone, adopting Coke's definition, says, "a court is a place where justice is judicially administered." 3 Bl. Com. 24. But this definition obviously wants fullness; it is limited to the place of a court in its expression. In addition to the place, there must be the presence of the officers constituting the court, the judge or judges certainly, and probably the clerk authorized to record the action of the court; time must be regarded, too, for the officers of a court must be present at the place and at the time appointed by law in order to constitute a court. To give existence to a court, then, its officers and the time and place of holding it must be such as are prescribed by law. The Circuit Court is to be held by the Circuit Judge (Code, Chap. 5, Title III), and its terms are prescribed by law (§ 163). The places of holding it are also prescribed, and it cannot be held elsewhere (§ 192). To constitute the Circuit Court, then, the Circuit Judge must be in the discharge of judicial duties at the time and in the place prescribed by law for the sitting of the court. }

LOURNOY V. CITY OF JEFFERSONVILLE, Supreme Court of Indiana, 1861 (17 Ind. 169).

Perkins, J.: . . . The provision is not unconstitutional because it imposes upon a ministerial officer the performance of a judicial act.

The issuing of the writ, as we have said, is a ministerial act, as much as the issuing of an attachment, or *capias* for the arrest of the body, upon an affidavit.

Judicial acts, within the meaning of the Constitution of Indiana, are such as are performed in the exercise of judicial power. But

the judicial power of this State is vested in courts. A judicial act then, must be an act performed by a court, touching the rights of parties, or property, brought before it by voluntary appearance; or by the prior action of ministerial officers, in short, by ministerial acts. See *Waldo v. Wallace*, 12 Ind. 569, where the constitutional provisions are quoted. The acts done out of court, in bringing parties into court, are, as a general proposition, ministerial acts; those done by the court in session, in adjudicating between parties, or upon the rights of one in court, *ex parte*, are judicial acts. 3 Blacks. Comm., p. 25.

And the act is none the less ministerial, because the person performing it, may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act. In *Betts v. Dimon*, 3 Conn. 107, where it was held that the administration of the poor debtor's oath was a ministerial, not a judicial act, Hosmer, C. J., in delivering the opinion of the Court said: "Every selectman, before the appointment of an overseer, and every sheriff, previous to taking bail, makes inquiry to aid him in the legal performance of his duty."

So in *Crane v. Camp*, 12 Conn. 463, it was held that a justice of the peace acted ministerially in appointing freeholders to assess damages sustained by taking land for a public highway, though it was necessary for him to make inquiry as to the fitness of the persons appointed.

A ministerial act may, perhaps, be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done.

With respect to the scope of their jurisdiction, courts are (1) of general jurisdiction, or (2) of special or limited jurisdiction. The former are usually called superior courts, the name borne by the three common-law courts to which they are analogous. In Nebraska, the District Court is a court of general jurisdiction; the justices' courts are courts of limited jurisdiction.

Courts are also of (1) original jurisdiction, or (2) of appellate jurisdiction. A court's jurisdiction is original when causes, or a certain class of causes, are brought there in the first instance; it is appellate when, having originated in some other court, they are brought to the court in question to obtain review of the order or judgment entered.

Courts are often given both kinds of jurisdiction. Thus, the Supreme Court of the United States has original jurisdiction of controversies between states of the Union, though its jurisdiction is chiefly appellate. In like manner, the Supreme Court of Nebraska has general appellate jurisdiction; but it has also original jurisdiction of actions to which the state is a party and *any other classes of controversies.* *the only one from a private case.*

Jurisdiction may be, also, (1) exclusive, or (2) concurrent. The jurisdiction of a court is exclusive when controversies, or a class of controversies, must be taken before the court in question, and nowhere else; it is concurrent when they may be taken before the court in question or some other tribunal at the election of the parties plaintiff. Thus, in Nebraska, the County Court has exclusive original jurisdiction of probate of wills, administration of estates and guardianship proceedings; it has concurrent jurisdiction with the District Court of actions for the recovery of money (with some exceptions) not exceeding \$1,000. *a choice of 2 courts for a case*

GRIGNON V. ASTOR, Supreme Court of the United States, 1844 (2 How. 319). 

Baldwin, J.: . . . The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. (6 Peters, 729). A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original general jurisdiction, over any particular subjects; they are not courts of special or limited jurisdiction, they are not inferior courts, in the technical sense of the term, because an appeal lies from their decisions. That applies to "courts of special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings

must show their jurisdiction;" that of the courts of the United States is limited and special, and their proceedings are reversible on error, but are not nullities, which may be entirely disregarded. (3 Peters, 205). They have power to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless revised on error or by appeal. The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities. The Circuit Court of this district has original, exclusive, and final jurisdiction in criminal cases; its judgment is a sufficient cause on a return to a writ of *habeas corpus*; "on this writ this court cannot look behind the judgment and re-examine the charges on which it was rendered. A judgment in its nature concludes the subject in which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive in this court as it is in other courts. It puts an end to all inquiry into the fact by deciding it." (3 Peters, 204, 205).

OSGOOD V. BLACKMORE, Supreme Court of Illinois, 1871 (59 Ill. 261).

Walker, J.: . . . Had this been a confession before the clerk, and not in open court then there would have been great force in the objection. But where a court of superior general jurisdiction has proceeded to adjudicate and to decree in a matter before it, all reasonable intendments will be indulged in favor of its jurisdiction. But when the court is of limited or inferior jurisdiction, such in-

tendments will not be indulged, but the facts necessary to confer jurisdiction must appear in the proceedings.

This being the presumption, then, the court being of general and superior jurisdiction, and being in session when this judgment was rendered, we must presume that the court first heard evidence that the requisite notice was given to render the note due and payable, before the judgment was rendered. The presumption which the law indulges in favor of its jurisdiction can only be overcome, in a collateral proceeding, when the record itself shows there was no jurisdiction, and there is nothing in the record of the confession in this case which tends in the slightest degree to contradict the presumption. Had the record stated that no proof was heard as to any notice having been given, then the presumption would have been rebutted. Or had it appeared from the record that the note was not, and could not have been due, then the record would have shown that the attorney in fact had no power to enter the appearance of the defendants, and having no power, the court would have failed to acquire jurisdiction of the persons of the defendants, and the case would have been like *Chase v. Dana*, *supra*. But to render this note payable, an act had to be performed that must be proved before a recovery could be had, and we must presume in favor of the judgment of the superior court, that evidence was heard that the notice had been given to render the note due, and which conferred jurisdiction over the defendants.

Fox v. Hoyt, Supreme Court of Errors of Connecticut, 1838 (12 Conn. 491).

Church, J.: . . . Two causes of error are assigned as apparent upon this record: First, that it does not appear that justice Adams gave notice to the parties in writing, to appear before him, for the trial of said action, on the 20th day of January; nor that the notice was served, either by reading, or leaving a copy with the parties, in conformity with the provisions of the statute of 1833. And secondly, that it does not appear, that justice Adams found or adjudged any debt to be due to the plaintiff.

1. The statute of 1833, in addition to the act for regulating courts, &c., enacts, "that whenever any writ, suit, or civil process, shall be made returnable before any justice of the peace, and at the time appointed for the trial of the same, said justice shall be absent from the town where the trial is to be had, said justice may, at any time within twenty days after the said time for trial, proceed to try

said cause, in the same manner as he might have done at said time named for trial: Provided, that he shall give six days previous notice of the time and place of said trial, to the parties in said cause, in writing, to be read in hearing of said parties, or a true and attested copy thereof to be left at their usual place of abode." Before the enactment of this law, if a justice of the peace was absent, at the time of trial, no legal provision existed for the continuance of his power and jurisdiction over the action; and no further proceedings could be had in the suit.

That the justice in this case, after the return day of the writ, the 13th day of January, could proceed no further, unless he caused the parties to be notified in writing, in the manner prescribed by the statute, is not a matter for dispute and cannot be. But the question is, whether the facts necessary to constitute a legal notice, should have been detailed upon the record of the justice, and for want of this, the judgment be erroneous? Or was it enough that it was found and stated, by the justice, that "the parties were duly notified?"

This action, at its commencement, was clearly within the jurisdiction of the justice. The sum in demand, the process and the parties, were such as gave to him jurisdiction. And the fact that on the return day, the justice was absent from the town, did not take away his jurisdiction over the cause, which had been legally commenced. The statute sustained the powers of the court, preserved the action alive, authorized future proceedings, and directed the manner of them. The justice, therefore, having before him a cause, as it appeared from the face of the process and proceedings, of which he had jurisdiction, had, as a matter of course, jurisdiction over all interlocutory acts legally necessary to a final judgment. It would seem to follow from these premises, if they are true, that the finding of the justice, that the parties were duly notified, is conclusive evidence of its truth. The supreme court of the United States, in the case of *Vorhees v. The United States Bank*, 10 Peters 472, in discussing this subject, says: "There is no principle better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears. This rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from their initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record,

which thenceforth proves itself, without referring to the evidence on which it has been adjudged."

If this doctrine is applicable to the present case of which there can be no doubt, the consequence is irresistible, that the fact of notice having been adjudicated, must be taken to be true, without referring to the evidence upon which the adjudication was predicated. The justice, by his record, says, the parties were duly notified; by which is meant, that they were notified, in the manner prescribed by law. This is the obvious meaning of the language used. This the justice had a right to enquire after, and to find as an essential fact; and in doing so, he must be presumed to have acted right. This principle has been often recognized, even when applicable to tribunals of special and limited powers. *Service v. Heermance*, 1 Johns. Rep. 91. *Frary v. Dakin*, 7 Johns. Rep. 75.

It was claimed for the defendant, in the argument, that a justice's court in this state is one of special and limited jurisdiction, and could not justify its proceedings at all, unless upon the face of them every fact appeared, which was necessary to confer jurisdiction.

We are not persuaded that it is necessary for the determination of this case, that we should look after and decide the precise distinction between courts of general and courts of limited jurisdiction, or whether a justice's court be the one or the other. For if we are correct in the opinion already expressed, that justice Adams in this case had jurisdiction from the commencement of this suit, which was not foregone, by his absence on the return day of the writ; then the principle which the defendant would derive from this claim, has no application here.

If by a court of general jurisdiction, is meant one of unlimited powers, then we have none such in this state; nor do we know of any elsewhere. And if by a court of limited jurisdiction, is meant one whose powers are subordinate to some other court; then all but courts of dernier resort, are of this character. Such is not the sense in which this subject has been understood, either in England or in this country. We think that a court of record proceeding according to the common law of the land, and whose judgments may be revised by writ of error, is a court whose proceedings and judgments import verity, and until reversed will protect all who obey them; and in this respect, there is, in this state no distinction between courts of justices of the peace and the county and superior courts. In this sense, the courts of common pleas of New Jersey,

Massachusetts, Vermont and Ohio, have been considered as courts of general jurisdiction.

Between all these courts and mere special tribunals, such as commissioners on insolvent estates, committees, military tribunals, and many others, which are not courts of record, and are established for some special and perhaps temporary purpose, there exists a very marked distinction in regard to the credit and sanction to which their proceedings are entitled, and the immunities, which may be claimed by themselves, and such as act under them.

TRADER v. MCKEE, Supreme Court of Illinois, 1839 (1 Scam. 558).

Lockwood, Justice, delivered the opinion of the Court:

This was originally an action commenced before a justice of the peace, and was brought by appeal into the Circuit Court of Cook county. It appears from the bill of exceptions taken in the cause, that the action was founded on several judgments obtained before a justice of the peace in the State of Indiana, by McKee, against Moses S. and Tegal Trader. The defendants below objected to the transcripts of the judgments rendered by the justice of the peace, as evidence in the cause; which objection the Court overruled, and received the transcripts in evidence, and gave judgment for the plaintiff below. Among other errors relied on is the following, to wit: That it does not appear, from the evidence offered, that the justice before whom the judgments purport to have been rendered had any jurisdiction over the persons of the defendants or over the subject matter of said actions. The law is well settled, that in courts not of record, in order to justify their taking cognizance of a cause, their jurisdiction must affirmatively appear. In order to have received these transcripts in evidence, it was incumbent on the plaintiff to have shown, that by the laws of Indiana the justice of the peace had jurisdiction over the subject matter upon which he attempted to adjudicate.

DENISON v. SMITH, Supreme Court of Michigan, 1876 (33 Mich. 155).

Campbell, J.: Smith sued Denison jointly with one Bush, upon contract, in the superior court of Grand Rapids. Suit was commenced by declaration, and the sheriff made return of service on both defendants in Kent county, and did not certify that either was served in Grand Rapids. Judgment was rendered by default, on

the 10th of July, 1875. On the 19th of July, upon an *ex parte* motion, the sheriff was allowed to amend his return so as to show service on Bush in Grand Rapids before service was made on Denison. The errors assigned in this court are based upon the irregularity of the default, when no jurisdiction appeared.

The jurisdiction of the superior court is declared to extend to civil cases involving more than one hundred dollars, where service of declaration or process is made on one or all of the defendants within the city of Grand Rapids, or where the plaintiff resides in Grand Rapids and service is made on a defendant in Kent county. L. 1875, p. 44, 13. It does not appear from the declaration that the plaintiff resides in Grand Rapids, and therefore the jurisdiction depended on the proper service of process on Bush.

The court in question, though having a large jurisdiction over causes of action, is a court of special and limited jurisdiction as to persons, and in all such cases jurisdiction must be shown, and cannot be presumed. In *Turrill v. Walker*, 4 Mich. R., 177, it was held a circuit court process could not be served without the county, in the absence of any statute authorizing it, and that court, though having general powers, could have no jurisdiction over persons not found where they could be lawfully served. A municipal court created for a city would be an anomaly, if it could send its process abroad for general purposes. The powers of the circuit courts to reach defendants beyond the county, is confined to cases where one, at least, is served within it. In the case of joint debtors the practice is governed by section 5748 of the Compiled Laws. That section expressly contemplates a service at home on one or more defendants, before the plaintiff can sue out further process or deliver a declaration to be served beyond the county on the rest, and in the case of process it evidently requires a return of "not found" as a preliminary. The language, though not precise, contemplates some evidence of service on one as a foundation for a further writ, and the same provision allows the plaintiff to have his declaration and notice of rule to plead, which are a substitute for process, "served on the defendants not elsewhere served in any other county in this state." It was never intended that an absent defendant should be pursued until service was made and proved on the other within the jurisdiction. That is a condition precedent. A defendant has a right to know from the record whether he is subject to the jurisdiction; and where it depends on a previous service on some one

else, that can only be shown by the return of service, or by appearance.

Neither can a court render judgment against a party who has not appeared, without some evidence of jurisdiction.

3. JURISDICTION.

 **SHELDON v. NEWTON**, Supreme Court of Ohio, 1854 (3 Ohio St. 494).

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

collaterally in question. *United States v. Arredondo*, 6 Pet. 709; *Rhode Island v. Massachusetts*, 12 Pet. 718.

We wholly dissent from the position taken in argument, that the jurisdiction of the court, or the effect of its final order, can be made to depend upon the records disclosing such a state of facts to have been shown in evidence, as to warrant the exercise of its authority. To adopt the language of the court, in answer to the same position, in *Voorhes v. The United States Bank*, 10 Pet. 473: "We can not hesitate in giving a distinct and unqualified negative to this proposition, both on principle and authority too well and long settled to be questioned." It was distinctly repudiated in the early case of *Ludlow's Heirs v. Johnston*, 3 Ohio, 560; and has been no less positively denied in every subsequent case, including *Adams v. Jeffries*, 12 Ohio, 253. The tribunal in which these proceedings were had, was a court of record, of general common-law and chancery jurisdiction; and while it is true, that in the exercise of this particular authority, it may be regarded as a tribunal of special and limited powers prescribed by statute, it is still to be remembered, that it was the tribunal created by the constitution, with exclusive jurisdiction over probate and testamentary matters, and had no one single characteristic of those inferior courts and commissions, to which the rule insisted upon has been applied by the English and American courts. All its proceedings are recorded, and constitute records, in the highest sense of the term, importing absolute verity, not to be impugned by averment or proof to the contrary, and conclusively binding the parties, and all who stand in privity with them. The distinction is not between courts of general and those of limited jurisdiction, but between courts of record, that are so constituted as to be competent to decide on their own jurisdiction, and to exercise it to a final judgment without setting forth the facts and evidence on which it is rendered, and whose records, when made, import absolute verity; and those of an inferior grade, whose decisions are not of themselves evidence, and whose judgments can be looked through for the facts and evidence which are necessary to sustain them. *McCormick v. Sullivant*, 10 Wheat. 199; *Griswold v. Sedwick*, 1 Wend. 131; *Baldwin v. Hale*, 17 Johns. 272; *Grignous Lessee v. Astor*, 2 How. 341; 2 Binn. 255; 4 Ib. 187.

HUNT v. HUNT, Court of Appeals of New York, 1878 (72 N. Y. 217).

Folger, J.: . . . We come now to consider the question of the jurisdiction of the court.

It is plain that every State has the right to determine the *status*, or domestic and social condition of persons domiciled within its territory. *Strader v. Graham*, 10 How. (U. S.) 82; *Cheever v. Wilson*, 9 Wall. 108; *Barber v. Root*, 10 Mass. 260; *Kinnier v. Kinnier*, *supra*. So it is that every State may determine for itself for what causes that status may be changed or affected, and hence upon what grounds, based upon what acts or omissions of persons holding the relation to each other of marriage, they may be separated and that relation dissolved; and it may prescribe what legal proceedings shall be had to that end, and what courts of its sovereignty shall have jurisdiction of the matrimonial status and power to adjudge a dissolution of that relation. All citizens of that State, domiciled within it and owing to it allegiance, are bound by the laws and regulations which it prescribes in that respect. When, without infringement of the Constitution of the State, its statutes have conferred upon any of its courts the general power to act judicially upon the matrimonial *status* of its citizens, or of persons within its territorial limits, and to adjudge a dissolution of the relation of husband and wife; then, we take it, such court has jurisdiction of the subject-matter of divorce. A text-writer of repute says, that "it is the act or acts which constitute the cause of action," which "is the subject-matter in a suit for divorce." See 3 Am. Law Reg. (N. S.) 206. And in *Holmes v. Holmes*, 4 Lans. 388, the learned and able judge who delivered the opinion of the court speaks of the acts relied upon to obtain a divorce as being the subject-matter. The definitions of lexicographers imply a broader scope to the phrase, a more general meaning. It is: "The cause; the object; the thing in dispute." *Bouvier's Law Dict.* "The matter or thought presented for consideration in some statement or discussion." *Webster's Dict.* Power given by law to a court, to adjudge divorces from the ties of matrimony, does give jurisdiction of the subject-matter of divorce. Though the proceedings before that court, from first to last of the testimony, in an application for divorce, should show that a state of facts does not exist which makes a legal cause for divorce, yet it cannot be said that the court has not jurisdiction of the subject-matter; that it has not power to entertain the pro-

ceeding, to hear the proofs and allegations, and to determine upon their sufficiency and legal effect. Then jurisdiction of the subject-matter does not depend upon the ultimate existence of a good cause of action in the plaintiff in the particular case. See *Groenvelt v. Burwell*, 1 L.d. Raym. 465, 467. A court may have jurisdiction of all actions in assumpsit, of that subject-matter. An action by A, in which judgment is demanded against B as the indorser of a promissory note, falls within that jurisdiction. Such court may entertain and try the action, and give a valid and effectual judgment in it. Though it should appear in proof that there had never been presentment and demand, nor notice of non-payment, yet a judgment for A against B, though against the facts, without the facts to sustain it, would not be void as rendered without jurisdiction. It would be erroneous and liable to reversal on review. Until reviewed and reversed, it would be valid and enforceable against B, and entitled to credit when brought in play collaterally. If given by such a court in a sister State against one of whose person that court had jurisdiction, it would be a judgment which the courts of this State would be bound to credit and enforce. Jurisdiction of the subject-matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question. One court has jurisdiction in criminal cases; another in civil cases; each in its sphere has jurisdiction of the subject-matter. Yet the facts, the acts of the party proceeded against, may be the same in a civil case, as in a criminal case—as, for instance, in a civil action for false and fraudulent representations and deceit, and in a criminal action for obtaining property by false pretenses. We should not say that the court of civil powers had jurisdiction of the criminal action, nor *vice versa*, though each had power to pass upon allegations of the same facts. So that there is a more general meaning to the phrase “subject-matter,” in this connection, than power to act upon a particular state of facts. It is the power to act upon the general, and so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power. A suitor for a judgment of divorce may come into any court of the State in which he is domiciled, which is empowered to entertain a suit therefor, and to give judgment between husband and wife of a dissolution of their married state. If he does not

establish a cause for divorce, jurisdiction to pronounce judgment does not leave the court. It has power to give judgment that he has not made out a case. That judgment would be valid and effectual as to bind him thereafter, and to be *res adjudicata* as to him in another like attempt by him. If that court, however, should err, and give judgment that he had made out his case, jurisdiction remains in it so to do. The error is to be corrected in that very action. It may not be shown collaterally to avoid the judgment, while it stands unreversed, whether the judgment be availed of in the State of its rendition, or a sister State; granted always that there has been jurisdiction of the parties to it. The judgment is in such case, also, *res adjudicata* against the party cast in judgment. The relevancy of this discussion will appear when we come to consider more particularly some of the points made by the plaintiff. We conclude that jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action.

RANEY v. McRAE, Supreme Court of Georgia, 1854 (14 Ga. 589).

Lumpkin, J.: . . . But it is further insisted that this judgment is a nullity for want of jurisdiction in the court to give it. And this exception is founded on the fact that the declaration does not aver that the defendants resided in Stewart county.

Parties can not by consent, whether express or implied, confer jurisdiction over the subject-matter. Titles to land must be tried in the superior court, and in the county where they lie. But it is otherwise as to the person. The provision in the constitution fixing the residence of the defendant as the place of trial guarantees a personal privilege, which may be waived.

MARSDEN v. SOPER, Supreme Court of Ohio, 1860 (11 Ohio St. 503).

Brinkerhoff, J.: . . . The only question arising on the record, which we deem it worth while to notice, is the question whether the court of common pleas had jurisdiction of the persons of the defendants below, so as to authorize that court to take cognizance of, and to render a judgment in the case affecting their rights.

It will be noticed that the plaintiff in this judgment is not the payee of the note on which judgment is taken, but an indorsee; and that the warrant of attorney under which judgment was confessed, purports to authorize such confession, "in favor of any holder of

this obligation," after the same becomes due. But, it was held, in broad and general terms, in the case of *Osborn v. Hawley*, 19 Ohio Rep., 130, that a warrant of attorney to confess judgment, attached to a note, and forming a part of the same instrument, is not negotiable, and when the note is transferred, becomes invalid and inoperative. It is true, the report of that case does not inform us whether the warrant of attorney in that case purported to authorize the confession of a judgment in favor of the payee of the note alone, or whether its terms extended, as in this case, to any holder of the note after due. But, however this may have been in that case, we suppose that, if this judgment rested upon the confession under the warrant of attorney alone, it would be very questionable whether the court of common pleas had any rightful jurisdiction of the defendants in the judgment.

But, did they not, after the entry of judgment against them, confer jurisdiction, by such an appearance and proceeding in the case, as constituted a waiver of exception to the jurisdiction? It seems to us that they did. They were not obliged to proceed by motion, but might have resorted to proceedings in error, in the first instance. But they chose to appear and move to vacate the judgment. This, they might properly do, either on the alleged ground of a want of jurisdiction, or alleged irregularity or error, outside of the question of jurisdiction. What was, in fact, the ground of the motion, we are not informed; for, by agreement of parties, no record of the motion was made. In this matter, we are left to conjecture. If the motion was grounded upon irregularity, or error in the judgment alone, aside from the question of jurisdiction, the motion itself would constitute such an appearance as would have the effect to waive the question of jurisdiction. If the motion was based on an alleged want of jurisdiction, it would be no such appearance or waiver; and if the motion had been erroneously determined against the defendants in the judgment, they might have taken their exceptions, and reversed the ruling of the court. But, instead of doing this, while they were in the proper court, at a proper time, and while the whole matter was under the control of that court, they voluntarily consented to the dismissal of the motion, and, by so doing, it seems to us, they voluntarily consented to let the judgment stand against them, and ought not now to be allowed to allege a want of jurisdiction in the court which rendered it. Judgment affirmed.

THE LUCY, Supreme Court of the United States, 1869 (8 Wall. 307).

Mr. Chief Justice Chase delivered the opinion of the court:

We think that the motion to dismiss, made in this case, must be allowed.

The decree of condemnation passed in the District Court on the 4th of August, 1862, and on the 15th an appeal was allowed to this court.

By the Act of Feb. 23, 1847, 9 Stat. at L., 131, the District Court for the Northern District of Florida was established, with the jurisdiction and powers of a District and Circuit Court of the United States; and appeals were allowed from its decrees in the same manner and under the same regulations, as appeals from the circuit court.

At this time the Act of 1803, 2 Stat. at L., 244, governed appeals from the District to the Circuit Courts, and from the Circuit Court to this court. No appeal in admiralty could be taken directly from the District Court to this court, except when, as in the case of the Southern District Court of Florida, the District Court exercised the jurisdiction of the Circuit Court as well as that of the District Court.

If this state of the law had undergone no change at the date of the decree of condemnation in this case, the allowance of an appeal to this court would have been quite regular.

But, on the 15th day of July, 1862, Congress passed an Act establishing a Circuit Court for a circuit which included the Southern District of Florida, and repealing the former Act, which conferred upon the District Court, Circuit Court jurisdiction. The effect of this Act was to vest in the Circuit Court for that circuit the whole appellate jurisdiction exercised by other Circuit Courts in respect to decrees in admiralty. It left the original jurisdiction in admiralty of the District Court, untouched.

It was in virtue of this original jurisdiction that the District Court had cognizance of the case of *The Lucy*. The appellate jurisdiction of the case was vested by the Act in the Circuit Court.

It follows that, when the decree was pronounced in August, no appeal could be taken to this court, but only to the Circuit Court, and that the allowance of an appeal to this court was a nullity.

This objection to the jurisdiction is decisive; but, if it were otherwise, the fact that no transcript of the record was filed at the

next term, would be fatal to the appeal. *Castro v. U. S.*, 3 Wall., 47; *Ins. Co. v. Mordecai*, 21 How., 195.

No consent of counsel can give jurisdiction. Appellate jurisdiction depends on the Constitution and the Acts of Congress. When these do not confer it, courts of the United States cannot exercise it.

We cannot take cognizance of a case not brought before us in conformity with the law.

The case at bar, therefore, must be dismissed.

DEWHURST v. COULTHARD, Supreme Court of the United States, 1799 (3 Dal. 409).

The following statement of a case was presented by E. Tilghman to the court, at the instance of the attorneys for both the parties, in the suit in the circuit court of the New York district, with a request, that it might be considered and decided.

"This was an action commenced by Isaac Coulthard, against John Dewhurst in the Supreme Court of the state of New York, and was removed by petition to the circuit court of the United States for the New York district, agreeably to the act of Congress in such case made and provided, by the defendant, he being a citizen of the state of Pennsylvania.

"The plaintiff's action is prosecution against the above defendant, as the indorser of a foreign bill of exchange drawn by G. B. Ewart of the city and state of New York, on Thomas Barnes of Baldork near London, dated the tenth day of January one thousand seven hundred and ninety-two.

"On the part of the defendant, it is admitted that at the time of the making and indorsing said bill, the said John Dewhurst was a citizen of, and resident in, the city and state of New York and that he duly received notice of the protest of the said bill, for non-acceptance and non-payment.

"That on or about the twenty-fifth day of May, one thousand seven hundred and ninety-two, the defendant removed to the city of Philadelphia, in the state of Pennsylvania, where he has resided since that period. That shortly after his removal to Philadelphia, viz., on or about the seventh day of June, one thousand seven hundred and ninety-two, a commission of bankruptcy was awarded and issued forth against him, in pursuance of two certain acts or statutes of the said state of Pennsylvania, the one entitled, 'An act for the regulation of bankruptcy;' the other entitled, 'An Act to amend

an act entitled, an act for the regulation of bankruptcy.' And in pursuance of which said statutes the defendant did actually deliver, assign and transfer, to the commissioners appointed under the said commission, the whole of his effects, as well in the state of Pennsylvania as elsewhere, which consisted principally of credits due to the said defendant, in the state of New York. It is further admitted, that the said John Dewhurst in all things complied with the said statutes of bankruptcy before referred to, and that on the eleventh of August, one thousand seven hundred and ninety-two, he obtained a certificate of bankruptcy duly executed.

"Upon the above state of the case, it is submitted to the Supreme Court of the United States, to determine, whether the certificate issued under the laws of Pennsylvania, operates as a discharge of the said debt, notwithstanding its being contracted in another state, where there was no bankrupt law, and while the defendant was resident in the said state of New York. If the court should be of opinion that it does, it is agreed that judgment be entered for the defendant; otherwise for the plaintiff, for eleven hundred and twenty dollars damages, and six cents costs."

The court, on the ensuing morning, returned the statement of the case, declaring, that they could not take cognizance of any suit or controversy, which was not brought before them, by the regular process of the law. Motion refused.

BLAIR V. STATE BANK OF ILLINOIS, Supreme Court of Missouri, 1843 (8 Mo. 313).

Scott, J.: H. Raisin & Co. made an assignment of their effects, for the benefit of their creditors, to the appellant, Blair. The effects assigned were insufficient to pay all his debts. The appellee, the State Bank of Illinois, was the holder of two bills of exchange on Raisin & Co., the indorsers of which were preferred creditors under the assignment. Blair, the assignee, declared a dividend of the assets amongst the preferred creditors of twenty-five per cent. upon their respective claims. The State Bank of Illinois having failed, its notes in circulation were forty-four per cent. below par. An action of assumpsit was instituted by the Bank against Blair. The declaration contained the common counts, and the parties having agreed upon the foregoing statement of facts, they made the right of the plaintiff to recover dependent on the solution of the question, whether Blair, the assignee, could buy the notes of the State Bank of Illinois, and with them pay the dividend due the Bank, carrying

the profits arising from the transaction into the general fund, for distribution among the creditors at large. The court below rendered judgment for the bank, from which Blair has appealed to this Court.

If Blair wished to know whether the notes of the Bank could have been used as a set-off to the action against him, we know of no other mode by which it could be ascertained, than by pleading them by way of set-off. But we cannot see the object in raising this question. Raisin & Co.'s effects were insufficient to pay all their debts. The agreed case admits, that the indorsers of the bills of exchange were preferred creditors under the assignment; that is, we suppose, were to have the debts for which they were liable paid before the other creditors. Now, if Blair should have purchased the paper of the Bank, and with it have paid her dividend under the assignment, and carried the profits into the trust fund, would not these profits have rightly belonged to the Bank, standing in the place of the preferred creditors? Twenty-five per cent. of the amount of the bills of exchange, converted into bank-paper at forty-four per cent. discount, would not have paid the bills, and until the Bank had been paid, at least in her own paper, she being a preferred creditor, a question as to the legality of the conversion of the funds into bank-paper could not well arise between her and the other creditors—that is, should not all the money accruing under the assignment, be first applied to the satisfaction of the preferred creditors.

But be these matters as they may, we do not feel ourselves at liberty to entertain questions presented in the manner in which this is done. The parties to a suit at law or equity may agree on the facts of a case, and suffer the court to declare the law arising on those facts, but to agree on facts not in the cause, and under the pretense of a suit at law, to obtain the opinion of this court on matters wholly disconnected with the suit, cannot be tolerated. Here we are called upon, in an action of assumpsit, to declare the law governing the conduct of a trustee in the management of the trust-fund, a duty peculiarly the province of a court of equity, which, with unrestrained freedom, takes a whole transaction into consideration, from the beginning to the end, giving attention to every circumstance which can in any wise affect its opinion. The straight-laced proceedings of a court of law wholly disqualify it for such a task, and neither the consent nor the release of errors, nor any other act

of the parties, can induce this court to permit itself to be converted into one in which questions of law may be mooted, at the will of suitors. Appeal dismissed.

BREWINGTON V. LOWE, Supreme Court of Indiana, 1848 (1 Ind. 21).

Smith, J.: The record in this case purports to contain the proceedings in an action of trespass *quare clausum fregit*, instituted in the Dearborn circuit court, by Joshua Brewington against George P. Lowe. The declaration contains five counts, the *locus in quo* specified in each count being different. The defendant pleads in abatement to the jurisdiction of the court, that the said several closes, in the first, second, and third counts mentioned are situate within the county of Ohio, and that the closes in the fourth and fifth counts mentioned are within the county of Ripley. The replications allege that all of said closes are in the county of Dearborn tendering issues to the country. The cause was then submitted to the court for trial, and there was a finding and judgment for the defendant.

By a bill of exceptions it appears that upon the trial the following facts were admitted: 1. That the closes described in the second and third counts of the declaration are situate in that territory stricken or attempted to be stricken from Dearborn county to form and organize Ohio county by the act of the legislature of the fourth of January, 1844; 2. That the close described in the first count is situate in the territory stricken or attempted to be stricken from Dearborn county, and added or attempted to be added to Ohio county by the act of the seventh of January, 1845; 3. That the closes in the fourth and fifth counts mentioned are situate in that part of Dearborn county taken or attempted to be taken to form part of Ripley county by the act of December 27, 1816. It also appears that upon the trial the plaintiff offered certain testimony with a view of establishing the fact that, by the act of December 27, 1816, detaching a portion of the county of Dearborn for the formation of the county of Ripley, the former county was reduced so as to contain less than four hundred square miles of territory, and that consequently, that act as well as the subsequent acts forming the county of Ohio out of the territory then remaining to Dearborn county, were, so far as regarded the rights of the latter county, unconstitutional and void, and could not divest the courts of that county of the jurisdiction they had previously been authorized to exercise within

the limits of the territory thus attempted to be detached. This testimony was excluded by the circuit court on the ground that it was not competent for the court to hear testimony, the object of which was to show that the several acts of the legislature, above referred to, were void by reason of their unconstitutionality.

In the history given of this case by the counsel for the plaintiff in error, and his statement is confirmed by the counsel for the defendant, we are informed that this suit was not instituted to settle any matter really in controversy between the nominal parties, but as a device by certain persons who believed "that the legislature had been imposed upon as to the quantity of land in Dearborn county," when the acts above referred to were passed, and were desirous to test the constitutionality of those acts by bringing them in question in some way before a judicial tribunal. These persons accordingly procured surveys to be made of the territory embraced within the counties of Dearborn and Ohio, and then instituted this action avowedly for the purpose of testing the constitutionality of the acts of the legislature forming the counties of Ripley and Ohio, by describing closes in the different counts of the declaration situate in each of the several pieces of territory which had been taken by those acts from the county of Dearborn, and thus raising an issue as to the jurisdiction of the Dearborn circuit court within the territory thus detached. We think these proceedings were instituted under a mistaken apprehension of the proper functions of the judiciary. Courts of justice are established to try questions pertaining to the rights of individuals. An action is the form of a suit given by law for the recovery of that which is one's due, or a legal demand of one's right. In such actions, if there is found to be a conflict of laws as they relate to the particular case under consideration, whether such conflict arises from constitutional reasons or otherwise, there can be no doubt that, from the very nature of the case, a decision must be rendered according to the laws which are paramount. But courts will not go out of their proper sphere to determine the constitutionality or unconstitutionality of a law. They will not declare a law unconstitutional or void in the abstract, for that would be interfering with the legislative power, which is separate and distinct. It is only from the necessity of the case, when they are compelled to notice such law as bearing upon the rights of the parties to a question legally presented for adjudication that they will go into an examination of its validity, and then the decision has reference

only to that particular question, except so far as it may operate as a precedent, when it may afterwards become necessary to decide similar cases.

But unless some individual right directly affecting the parties litigant is thus brought in question so that a judicial decision becomes necessary to settle the matters in controversy between them relative thereto, the courts have no jurisdiction; and it would be a perversion of the purposes for which they were instituted and an assumption of functions that do not belong to them, to undertake to settle abstract questions of law in whatever shape such questions may be presented. The impropriety of doing so in the present case is manifest from the facts, that the question professed to be litigated considered with reference either to the point of law attempted to be raised, or the importance of the interests involved is one of very grave character, and the parties who would be chiefly affected by its decision are not before the court, and have no opportunity of being heard. Indeed, it is well settled that courts will not take cognizance of fictitious suits instituted merely to obtain judicial opinions upon points of law: *Loughead v. Bartholomew, Wright (Ohio)*, 90; *Hoover v. Hanna*, 3 Blackf. 48; *Bunn v. Riker*, 4 Johns. 434 (4 Am. Dec. 292); *Jones v. Randall*, Cowp. 37; *Da Costa v. Jones*, Id. 729; *Allen v. Hearn*, 1 T. R. 56; *Atherfold v. Beard*, 2 Id. 610; *Newling v. Francis*, 3 Id. 697; *Egerton v. Furzeman*, 1 Car. & P. 613.

As we are distinctly informed by both parties that this is a fictitious suit, without inquiring into the grounds upon which the judgment was rendered, as it was for the defendant, and only for costs, the judgment below will be affirmed at the plaintiff's costs in this court.

The judgment is affirmed, with costs.



VI.

THE COMMON LAW ACTIONS.

So much of substantive law is, for historical reasons, bound up in procedure, that it is highly important for the student to become acquainted at once with the more important common law actions. Although these actions are now superseded by more simple and flexible forms of procedure, they have given rise to or correspond to important distinctions in the substance of the law, which are still of daily application.

The principal common law actions are ten: (1) Ejectment, (2) Detinue, (3) Replevin, (4) Debt, (5) Covenant, (6) Special Assumpsit, (7) General (Indebitatus) Assumpsit, (8) Trespass, (9) Trespass on the Case (Case), (10) Trover. This is the final form of these actions, after they had developed into a logical system. Historically, Ejectment, Assumpsit, Case, and Trover were developments out of Trespass, and Assumpsit and Trover were in form to the end actions of Trespass on the Case.

SCHEME OF THE COMMON-LAW ACTIONS.

I. To recover property.

To recover real property, ... REAL ACTIONS.

The real actions are obsolete, except that the Writ of Entry is in use in Massachusetts, New Hampshire, and Maine.

2. To recover possession—

Of real property, ... EJECTMENT.

Of personal property—

acquired lawfully by the defendant, but subject to a superior right of immediate possession in the plaintiff,

taken by the defendant from the plaintiff, . . . DETINUE.
REPLEVIN.

Replevin, in this country, has entirely superseded detinue, and lies in all cases to recover possession of personal property.

3. To recover damages.

(1) Ex contractu.

To recover a liquidated sum of money, due upon specialty, record, statute, or simple contract, ... DEBT.

To recover damages for breach of a covenant, or promise under seal, ... COVENANT.

To recover damages for breach of a simple contract,
~~under verbal contract.~~ ASSUMPSIT.

To recover damages upon Quasi Contract (no promise, but the case dealt with in law 'as if there had been one'),
an implied promise GENERAL ASSUMPSIT.

(2) Ex delicto. — a tort

To recover damages for a direct physical interference with the person or property, ... TRESPASS.

Where the trespass consists in taking chattel property out of the plaintiff's possession, the action is called TRESPASS DE BONIS ASPORTATIS, or Trespass de bonis.

Where the trespass is committed upon real property, the action is called TRESPASS QUARE CLAUSUM FREGIT, or Trespass quare clausum.

To recover damages for wrongful acts not within the scope of other actions (and not breaches of contract) which cause injury, without direct physical interference with person or property, (e. g., Libel, Slander, a Nuisance, Deceit), ... CASE.

To recover damages for the conversion of chattels, TROVER.

BLACKSTONE, COMMENTARIES, III, 117.

With us in England the several suits, or remedial instruments of justice, are from the subject of them distinguished into three kinds: actions personal, real, and mixed.

Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs; and they are the same which the civil law calls "*actiones in personam, quae adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere.*" Of the former nature are all actions upon debt or promises; of the latter, all actions for trespasses, nuisances, assaults, defamatory words, and the like.

Real actions, (or, as they are called in the Mirror, feodal actions,) which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life. By these actions formerly all disputes concerning real estates were decided; but they are now pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process: a much more expeditious method of trying titles being since introduced, by other actions personal and mixed.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained. As for instance an action of waste: which is brought by him who hath the inheritance in remainder or reversion, against the tenant for life who hath committed waste therein, to recover not only the land wasted, which would make it merely a real action; but also treble damages, in pursuance of the statute of Gloucester, which is a personal recompense; and so both, being joined together, denominate it a mixed action.

Extracts from POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, book II, chap. 9.

We have yet to speak of the most distinctively English trait of our mediaeval law, its "formulary system" of actions. We call it distinctively English; but it is also in a certain sense very Roman. While the other nations of Western Europe were beginning to adopt as their own the ultimate results of Roman legal history, England was unconsciously reproducing that history; it was developing a formulary system which in the ages that were coming would be the strongest bulwark against Romanism and sever our English law from all her sisters.

The phenomenon that is before us cannot be traced to any exceptional formalism in the procedure which prevailed in the England of the eleventh century. All ancient procedure is formal enough, and in all probability neither the victors nor the vanquished on the field at Hastings knew any one legal formula or legal formality that was not well known throughout many lands. No, the English peculiarity is this, that in the middle of the twelfth century, the old oral and traditional formalism is in part supplanted and in part reinforced by a new, written and authoritative formalism for the like of which we shall look in vain elsewhere unless we go back to a remote stage of Roman history. Our *legis actiones* give way to a formulary system. Our law passes under the dominion of a system of writs which flow from the royal chancery. What has made this possible is the exceptional vigour of the English kingdom, or if we look at the other side of the facts, the exceptional malleableness of a thoroughly conquered and compactly united kingdom. . . .

The last years of Henry III.'s day we may regard as the golden age of the forms. We mean that this was the time in which the number of forms which were living and thriving was at its maxi-

mum. Very few of the writs that had as yet been invented had become obsolete, and, on the other hand, the common law's power of producing new forms was almost exhausted. . . Bracton can still say; *Tot erunt formulae actionum quot sunt formulae brevium.* ^{There are as many forms of action as forms of writs.} Only some slight power of varying the ancient formulas will be conceded to the Chancellor; all that goes beyond this must be done by statutes, and when Edward I. is dead, statutes will do little for our ordinary private law. The subsequent development of forms will consist almost entirely of modifications of a single action, namely Trespass, until at length it and its progeny—Ejectment, Case, Assumpsit, Trover—will have ousted nearly all the older actions. This process, if regarded from one point of view, represents a vigorous, though contorted, growth of our substantive law; but it is the decline and fall of the formulary system, for writs are being made to do work for which they were not originally intended, and that work they can do only by means of fictions.

Extracts from FITZHERBERT, NATURA BREVIVM. (Sir Anthony Fitzherbert was a justice of the Court of Common Pleas in the reign of Henry VIII.)

WRIT OF ASSISE OF NOVEL DISSEISIN. The King to the Sheriff, &c. A hath complained to us that B unjustly and without judgment hath disseised him of his freehold in C after the first passage of our lord King Henry, son of King J., into Gascoigne; and therefore we command you, that if the aforesaid A shall make you secure to prosecute his claim, then cause that tenement to be seized, and the chattels which were taken in it, and the same tenement with the chattels to be in peace until the first assise, when our justices shall come into those parts, and in the meantime cause twelve free and lawful men of that venue to view that tenement and their names to be put into the writs, and summon them by good summoners, that they be before the justices aforesaid at the assise aforesaid ready to make recognizance thereupon, and put by gages and safe pledges the aforesaid B, or (if he shall not be found) his bailiff, that he may be then and there to hear that recognizance &c. And have there the summoners, the names of the pledges, and this writ &c.

WRIT OF EJECTIONE FIRMAE (EJECTMENT). (A writ of *Ejectione Firmæ* lieth, where a man doth lease lands for years &c., and afterwards the lessor doth eject him, or a stranger doth eject him of his

term, the lessee shall have a writ of *Ejectione Firmæ* and the form of the writ is such:

The King to the Sheriff &c. If A shall make secure &c, then put &c. B that he be before our justices &c., to shew wherefore with force and arms he entered into the manor of E, which T demised to the said A for a term which is not yet passed, and the goods and chattels of him the said A to the value of &c, found in the same manor, took and carried away and ejected him the said A from his farm aforesaid, and other wrongs to him did, to the great damage of &c.

WRIT OF DEBT. (A writ of debt properly lieth where a man oweth another a certain sum of money by obligation, or by bargain for a thing sold, or by contract, or upon a loan made by the creditor to the debtor, and the debtor will not pay the debt at the day appointed that he ought to pay it, then the creditor shall have an action of debt against him for the same; and it may be sued in the county before the sheriff by *justicies*, as well as in the Common Pleas;) and the form of the writ is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only and not in the *debet* and if it be in the *debet* it shall abate. It shall always be in the *debet* and *detinet* when he who makes the bargain or contract, or lends the money, or he to whom the bond is made, bringeth the action against him who is bounden, or party to the contract or bargain, or unto the lending of money. . . . But if a man sell twenty quarters of wheat or a horse; if he bring debt for the horse the writ shall be in the *detinet* only; and the form of the writ, sued in the county before the sheriff for money, is such:

The defendant owed a liquidated or fixed sum of money.
This writ is for money.

The King to the Sheriff of Surry, Greeting: We command you that you justice A that justly and without delay he render to B twenty shillings which he oweth to him as it is said, as he can reasonably show that he ought to render it to him, that we may hear no more clamour for want of justice &c. Witness &c.

And if the writ of debt be for other goods or chattels than money, then the writ of debt shall be such:

The King to the Sheriff &c. We command you that you justice A &c., that he render to B a certain book, or a certain cup, or a certain horse, or two lambs of the price of &c., which he unjustly detains from him &c.

And the form of the writ of debt in the Common Pleas is:

The King to the Sheriff &c. Command A that justly &c. he render to B one hundred shillings, which he owes to him and unjustly detains, as it is said: and unless he will do it, and if the said B shall make you secure &c., then summon by good summoners the aforesaid A &c.

WRIT OF COVENANT. (Writs of covenant are of divers natures; for some are merely personal, and some covenants are real; to have a real thing, as lands and tenements; as a covenant to levy a fine of land is a real covenant.) But a writ of covenant which is more personal, is where a man by deed doth covenant with another to build him a house &c., or to serve him, or to infeoff him &c.; and he with whom the covenant was so made shall have a writ of covenant against him. And here is a note in the Register,¹ which is this: a writ of covenant ought not to be made according to law Merch. without a deed, because no plea of covenant can be without deed, and every man ought to be judged according to his deed, and not by another law; and the form of the writ is such:

The King to the Sheriff &c. Command A that &c. he keep his covenant with B &c., touching the damage and loss by the breach of trust and default of W, the son of R, apprentice of the aforesaid B, committed within sx years to be restored to him the said B, and unless &c.

WRIT OF DETINUE. (A writ of detinue in case lieth where a man delivereth goods or chattels unto another to keep, and afterwards he will not deliver them back again;) then he shall have an action of detinue of those goods and chattels; and so if a man deliver goods or money put up in bags, or in a chest, or in a cupboard, unto another to keep, and he will not redeliver the goods or the money in the bags; he to whom they should be delivered shall have a writ of detinue for those goods &c. But if a man deliver money not in any bag or chest to redeliver back, or to deliver over unto a stranger; now he to whom the money should be delivered shall not have an action of detinue for the money, but a writ of account; because detinue ought to be for a thing which is certain; as of money in bags, or of a horse, or of a hundred cows, or such certain things. And this writ may be vicountiel and shall be sued before the sheriff in the County if the plaintiff please, or he may sue it in the Common Pleas; and the form of the writ in the Common Pleas is:

¹Register—*Registrum Brevium*, the register of original writs.

The King to the Sheriff &c. Command A &c. that &c. he render to B one charter which he unjustly detains from him, as he saith and unless &c.

WRIT OF TRESPASS. There are two manners of writs of trespass: One is of a trespass which is vicountiel, and is directed unto the sheriff and is not returnable, but shall be determined in the county before the sheriff; and in this writ he shall not say *quare vi et armis* &c., but the form of the writ is such:

The King to the Sheriff of Lincolnshire, Greeting: W of B hath complained unto us, that C made an assault upon him the said W at N, and beat, wounded, and illtreated him, and other enormous things to him did, to the no small damage and grievance of him the said W. And therefore we command you, that you hear that plaint, and afterwards justly cause him to be thereupon brought before you, that we may hear no more clamour thereupon for want of justice. Witness &c.

And by this writ the sheriff shall hear and determine the trespass, &c. by inquest according to the common law. . . . And so for every manner of trespass done, a man may chuse to have such a writ directed unto the sheriff, to end the matter before him in the county, or to sue a writ unto the sheriff returnable in the Common Pleas or the King's Bench.

And if the writ of trespass be returnable, then the writ shall be of another form, for then these words, *vi et armis* shall be in the writ; and if it want those words, the writ shall abate; if they be not writs of Trespass upon the Case; which writs of Trespass shall not have these words *quare vi et armis* in the writ, although they are returnable in the Common Pleas or King's Bench; and if they have the words *quare vi et armis* in the writs, it shall be good cause to abate the writs. And the form of a writ returnable in the King's Bench is such:

The King to the Sheriff &c. If A shall make you secure &c., then put by gages and safe pledges B that he be before us on the morrow of All Souls, wheresoever we shall then be in England (and if it be returnable in the Common Pleas, then thus; before our Justices at Westminster) to show wherefore with force and arms he made an assault upon the said A at N and beat and wounded and ill treated him, so that his life was despaired of, and other enormous things to him did, to the damage of him the said A and against

our peace. And have there the names of the pledges and this writ. Witness &c.

*Shander
side.* WRIT OF TRESPASS ON THE CASE. There is another form of writ of trespass, upon the case, which is to be sued in the Common Pleas or King's Bench; and in that writ he shall not say *vi et armis* &c., but in the end of the writ he shall say *contra pacem*; and the form is such:

The King to the Sheriff &c. If Maud of D &c., then put &c., that he be &c. to answer as well us as Maud wherefore, seeing that the same Maud lately in our court obtained our certain writ of prohibition against the aforesaid I that he should not prosecute any plea in the Court Christian touching chattels and debts, which do not concern testament or matrimony, and the said Maud delivered the said writ to the aforesaid I at C, he the said I, having received our said writ there, cast it into the dirt and trod it under his feet, and also hath prosecuted the plea aforesaid in the same Court Christian, in contempt of us, and to the great damage of the said Maud, and against our peace. And have &c.

Another Writ: Wherefore in the water of Plim, along which, between Humber and Gaunt, there is a common passage for ships and boats, he fixed piles across the water, whereby a certain ship, with thirty quarters of malt of him the said W was sunk under water, and twenty quarters of the malt, of the price of one hundred shillings perished, and other wrongs, &c.

STATUTE OF WESTMINSTER II (13 Edward I., St. 1) (1285).

And whensoever from henceforth it shall fortune in the Chancery that in one case a writ is found, and in like case, falling under like law and requiring like remedy is found none, the clerks of the chancery shall agree in making the writ, or the plaintiffs may adjourn it until the next parliament, and let the cases be written in which they cannot agree, and let them refer themselves until the next parliament, by consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to minister justice with complainants. (Translation of Cambridge Edition).

Extracts from STEPHEN, PRINCIPLES OF PLEADING IN CIVIL ACTIONS (1824), II, 14.

There are some peculiarities attached to the Action of Ejectment which require explanation. As a remedy for recovery of land its

history is as follows. At a very early period, that is, soon after the reign of Ed. III. real and mixed actions began gradually to fall into neglect, in consequence of their being more dilatory and intricate in their forms of proceeding than personal actions, and of their being cognizable only in the Court of Common Pleas.

In lieu of them, recourse was had to certain personal actions, which, though they did not claim the specific recovery of land (like those of the real and mixed classes), were yet attended with incidents that indirectly produced that benefit. Of these, the principal and that which is alone retained in modern practice, was the action of ejectment—(*ejectio firmæ*)— in which damages were claimed by a tenant for a term of years, complaining of forcible ejection or ouster from the land demised. In favor of this mode of remedy, the courts determined that the plaintiff was entitled not only to recover the damages claimed by the action, but should also, by way of collateral and additional relief, recover possession of the land itself for the term of years of which he had been ousted.

In consequence of the establishment of this doctrine, which gave ejectment an effect similar to that of a real or mixed action, claimants of land were led to have recourse to it, in lieu of those inconvenient remedies. Regularly, indeed, none could resort to this form of suit but those who had sustained ouster from a term of years, such being the shape of the complaint; but it was rendered much more extensive in its application, by the invention of a fictitious system of proceeding, which enabled claimants of land, in almost every instance, upon whatever title they relied (whether term of years or freehold), to bring their cases ostensibly within the scope of this remedy. This fictitious method, being favored and protected by the courts, passed into regular practice; and the consequence is, that ejectment has long been the usual remedy for the specific recovery of real property. Whenever the case is such that the claimant has in him the right of entry, the fiction on which an ejectment rests is held to be allowable. And as in every case of lawful claim to land, there is now a right of entry, unless the circumstances are such that an action of writ of right of dower, dower, or *quare impedit* is applicable, it follows that under all other circumstances an action of ejectment may be brought; and wherever it may be brought, it forms (since the late abolition of real and mixed actions in general) the only remedy.

Of personal actions, the most common are the following—Debt, Covenant, Detinue, Trespass, Trespass on the Case, and Replevin.

It is provided by the statute 2 Will. IV. c. 39, that personal actions in the superior courts shall be commenced by writ of summons, or writ of *capias*, in such forms as are given by the act—by summons where the defendant is not to be arrested—by *capias* where he is.

The Action of Debt lies where a party claims the recovery of a debt, i. e. a liquidated or certain sum of money alleged to be due to him.

The form of Summons in Debt is as follows:

William the Fourth, &c., to C. D. of, &c., in the county of—— greeting. We command you (or as before or often, we have commanded you) that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of ——, in an action of debt at the suit of A. B. And take notice that in default of your so doing, the said A. B. may cause an appearance to be entered for you, and proceed therein to judgment and execution. Witness ——, at Westminster, the —— day of ——.

The form of *Capias* in Debt is as follows:—

William the Fourth, &c., to the Sheriff —— greeting. We command you (or as before or often, we have commanded you) that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take C. D. of ——, if he shall be found in your bailiwick, and him safely keep until he shall have given you bail, or made deposit with you, according to law, in an action of debt at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from your custody. And we do further command you, that on execution hereof you do deliver a copy hereof to the said C. D. And we hereby require the said C. D. to take notice that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of ——, to the said action, and that in default of his so doing, such proceedings may be had and taken as mentioned in the warning hereunder written, or indorsed hereon. And we do further command you, the said sheriff, that immediately after the execution hereof, you do return this writ to our said court together with the manner in which you shall have executed the same, and the day of the execution hereof; or that if the same shall remain unexecuted, then that you do so return the

same at the expiration of four calendar months from the date hereof, or sooner, if you shall be thereto required by order of the said court, or of any judge thereof. Witness ———, at Westminster, the ——— day of ———.

The Action of Covenant lies where a party claims damages for a breach of covenant, i. e. of a promise under seal.

The form of the Summons and Capias is similar to that in Debt (the name of the action only excepted).

The Action of Detinue lies where a party claims the specific recovery of goods and chattels or deeds and writings, detained from him. This remedy is in somewhat less frequent use than any of the other personal actions above enumerated. The form of the Summons and Capias is similar to that in Debt (the name of the action only excepted).

The Action of Trespass lies where a party claims damages for a trespass committed against him. A trespass is an injury committed with violence, and this violence may be either actual or implied; and the law will imply violence, though none is actually used, where the injury is of a direct and immediate kind, and committed on the person, or tangible and corporeal property, of the plaintiff. Of actual violence, an assault and battery is an instance; of implied, a peaceable but wrongful entry upon the plaintiff's land. The form of the Summons and Capias is similar to that in Debt (the name of the action only excepted.)

The Action of Trespass upon the Case lies where a party sues for damages for any wrong or cause of complaint to which covenant or trespass will not apply. This action originates in the power given by the statute of Westminster 2, to the clerks of the Chancery to frame new writs in consimili casu with writs already known. Under this power they constructed many writs for different injuries, which were considered as *in consimili casu* with, that is, to bear a certain analogy to, a trespass. The new writs invented for the cases supposed to bear such analogy, received, accordingly, the appellation of writs of trespass on the case (*brevia de transgressionem super casum*), as being founded on the particular circumstances of the case thus requiring a remedy, and to distinguish them from the old writ of trespass; and the injuries themselves, which are the subject of such writs, were not called trespasses, but had the general names of torts, wrongs, or grievances. The writs of trespass on the case, though invented thus, *pro re nata*, in various forms, ac-

according to the nature of the different wrongs which respectively called them forth, began nevertheless, to be viewed as constituting, collectively, a new individual form of action; and this new genus took its place, by the name of Trespass on the Case, among the more ancient actions of debt, covenant, trespass, &c. Such being the nature of this action, it comprises, of course, many different species. There are two, however, of more frequent use than any other species of trespass on the case, or, perhaps, than any other form of action whatever. These are *assumpsit* and *trover*.

The action of *assumpsit* lies where a party claims damages for breach of simple contract, i. e. a promise not under seal. Such promises may be expressed or implied; and the law always implies a promise to do that which a party is legally liable to perform. This remedy is consequently of very large and extensive application. The action of *trover* is that usually adopted (by preference to that of *Detinue*) to try a disputed question of property in goods and chattels. In form, it claims damages; and is founded on a suggestion in the writ (which in general is a mere fiction,) that the defendant found the goods in question, being the property of the plaintiff; and proceeds to allege that he converted them to his own use.

The form of the Summons and *Capias* in Trespass on the Case is similar to that in Debt (the name of the action only excepted.)

The Action of *Replevin*, though entertained in the superior courts is not commenced there; and the writs of summons and *capias*, provided by 2 Will. IV. c. 29, for the commencement of personal suits in the superior courts, are consequently not applicable to this action. A *replevin* is entertained in the superior courts by virtue of an authority which they exercise of removing suits, in certain cases, from an inferior jurisdiction, and transferring them to their own cognizance. Where goods have been distrained, a party making plaint to the sheriff may have them *replevied*, that is, redelivered to him upon giving security to prosecute an action against the distrainer for the purpose of trying the legality of the distress; and—if the right be determined in favor of the latter—to return the goods. The action so prosecuted is called an action of *Replevin*, and is commenced in the county court. From thence it is removed into one of the superior courts by a writ either of *recordari facias loquelam* or *accedas ad curiam*. In form, it is an action for damages, for the illegal taking and detaining of the goods and chattels. It is held

that a replevin may be had, and an action of replevin brought, upon other kinds of illegal taking, besides that by way of a distress; but in no other case is the proceeding now known in practice.

NEBRASKA CODE OF CIVIL PROCEDURE, sec. 2. The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished; and in their place there shall be hereafter but one form of action which shall be called a civil action.

POMEROY, CODE REMEDIES (1876), secs. 28, 29.

28. In the year 1848 the Legislature of New York adopted the Code of Procedure. The fundamental principles of this code, so far as it is now necessary to notice them without going into detail, are the following: (1) The abolition of the distinction between suits in equity and actions at law, and the distinctions between legal and equitable procedure, so far as such an amalgamation or consolidation is possible with the judicial institutions which have been retained; (2) The abolition of all common-law forms of action, and the establishment of one ordinary, universal means by which rights are maintained and duties enforced in a judicial controversy, called a "civil action;" (3) The application to this "civil action" of the familiar equitable rather than legal rules, methods and principles, so far as practicable, and especially in reference to the parties, the pleadings, and to the form and character of the judgment. It is evident, from the most cursory examination of this code, that its authors, and presumably the legislature, intended that the various provisions which they introduced in reference to the parties to an action, to the pleadings therein, and to the judgment which might be rendered, and which were a concise statement of the well-settled doctrine of equity relating to these subjects, should apply fully and freely to all actions which might thereafter be brought, and should not be confined to actions that, under the former practice, would have been equitable. Whether the courts have at all times recognized and carried out this plain intention of the statute may well be doubted. I have been careful, in the above statement as to the union of law and equity. The language of the code is as follows: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights and the redress of

private wrongs, which shall be denominated a civil action." A subsequent provision, based upon the clause in the State constitution which preserves the jury trial "in all cases in which it has heretofore been used," recognizes the fact that the jury trial must still be retained in all actions which were before denominated legal, with the unimportant exception which formerly existed,—namely, where the trial will require the examination of a long account,—and thus, in express terms, prevents an absolute identity in the judicial proceedings which result in remedies that would have been legal and in those which result in remedies that would have been equitable. As I have already said, the perpetuation of the very fundamental element of difference between the trial at law and the trial in equity—and the perpetuation cannot be avoided as long as the constitution remains unchanged in this respect—prevents a complete removal of the difference between legal and equitable procedure and the absolute union of law and equity into one homogeneous system. How far the differences between the final remedies which courts of law granted exclusively,—namely, the recovery of a specific tract of land or of a specific chattel, and the recovery of money in the form of pecuniary compensation,—and the infinite variety of special remedies which courts of equity were accustomed to grant, may in themselves prevent such a perfect union, I shall discuss and attempt to determine in a subsequent chapter.

29. The New York Code, in respect to the fundamental principles and provisions which I have stated, has been adopted in twenty-two States and Territories of this country—in the States of Ohio, Indiana, Wisconsin, Iowa, Minnesota, Kentucky, Missouri, Kansas, Nebraska, Nevada, Oregon, California, North Carolina, South Carolina, Florida, Arkansas, Connecticut, and in the Territories of Washington, Montana, Idaho, Dakota, Wyoming, Arizona, Colorado. I need not now compare these different State and Territorial codes in their details; it is enough for my present purpose to say that they all embody the same three fundamental principles.

VII.

THE ELEMENTS OF PROCEDURE.

I. AT LAW.

SMITH, ELEMENTARY VIEW OF THE PROCEEDINGS IN AN ACTION AT LAW, 19.

The history and constitution of the Courts in which an action is commenced, having been thus stated, it is time to proceed to the consideration of the steps taken in the action itself. Before doing so, however, it is right to state in what manner these formal steps are liable to be affected or controlled by the summary, or, as it is sometimes called, equitable jurisdiction, of the Courts, for the jurisdiction of the superior Courts is of two descriptions, summary and formal. The latter consists in the sanction given by the authority of the Court to those formal *de cursu* proceedings which constitute the ordinary and regular steps in a suit; thus, it is by virtue of its formal jurisdiction that the Court issues a writ to compel the defendant to appear; that it allows the plaintiff to sign judgment against him if he make default in pleading; that it issues process commanding the sheriff to convene a jury for the purpose of trying the cause; and, finally, that it awards execution in favour of the successful party. This is all done by virtue of its formal *de cursu* jurisdiction.

But the Courts have another sort of jurisdiction, a jurisdiction exercised in any stage of the suit in which it becomes necessary, and enabling them, in a summary manner, and on equitable principles, to prevent hardships, irregularities, and abuses, which would otherwise take place in the course of proceedings. This is called their summary jurisdiction, and is exercised by making rules and orders; not that every rule emanates from the equitable jurisdiction of the Court, some rules there are which constitute part of its formal *de cursu* proceedings; for instance, a rule to plead, is as regular a step as the plea itself. It is not, therefore, intended to state, that all rules, or all orders, emanate from the summary and equitable jurisdiction of the Court, but those only, on granting or refusing which, the Court or judge hears argument and exercises a discretion.

In treating of the summary jurisdiction of the Courts, we will inquire, 1st, in what cases it exists; 2ndly, how it is exercised.

First, then, when does it exist? It exists, either at common law, or under the provisions of certain acts of Parliament. So far as it exists at common law, it is calculated to effect one of four purposes.

1. To prevent the regulations of the Courts from being infringed.
2. To prevent their authority from being abused.
3. To prevent it from producing hardship *(to put off a law for some time to give time)*.
4. To enforce good conduct on the part of those who are peculiarly within their jurisdiction. *(its officers & clerks & lawyers)*.

First, then, the Court interferes summarily, to prevent breaches of its own regulations. Under this head do all those cases range themselves, in which it interferes to set aside proceedings for irregularity. . . . In every case where a rule or regulation of the Court is infringed, it will, on application, set aside the proceeding which has infringed it. But it is most important to remember, that every application upon this score must be made as speedily as possible. . . .

Secondly,—The Court exercises its summary jurisdiction to prevent its own process or authority from being abused. Thus, if a designing person were, by false representations, to induce a poor ignorant man to sign a *cognovit*, or execute a warrant of attorney, the Court would relieve him. So, if a warrant of attorney were given to secure usurious interest. So, if a judgment were signed contrary to good faith. So, if a plaintiff vexatiously bring two actions for the same cause, the Court will force him to elect between them. In these cases, and such as these, the Courts interfere, in order to prevent their rules and their authority, created, as both are, for the advancement of justice, from being perverted and abused, so as to produce injustice and oppression. And it is plain that the administration of the laws would be in danger of falling into disrepute, were it not for this salutary exercise of their jurisdiction.

Thirdly,—The third class of cases in which the Courts exercise their summary jurisdiction, is, where it is necessary so to do, in order to prevent their own rules from producing hardship. Thus, where a defendant, through some accident, has not delivered his plea within the proper time, and judgment by default is signed against him, this, though illiberal, when done so hastily as to amount to what is called “snapping a judgment,” is nevertheless regular, because the rules of the Court give the plaintiff a right to do

it. However, as it would be an extremely hard thing if he were to be shut out of a good defence by a slight mistake on the part of his attorney, the Court, to prevent this hardship, will interpose its summary jurisdiction in his favour, and will set aside the judgment upon proper terms. In a word, whenever the suitor can point out some great hardship likely to arise from a strict observance of the rules by which the practice of the Court is governed, there he may apply for relief, which, ordinarily, will be granted; unless, indeed, he be wilfully late in making application, or, unless the grant of relief to him, would impose hardship on the opposite party. But this relief is granted as a favour, not as a right, and the Court will, in bestowing it, impose any terms it thinks proper. Thus, it almost invariably imposes the payment of any costs which the other party may have incurred, and frequently, as for instance, in the case of setting aside a regular judgment, insists upon an affidavit of merits; and this is very right, for, how ridiculous would it be to relieve a defendant from a judgment when he has no meritorious defence to the action, but is only anxious to postpone the payment of a fair debt, and set up vexatious quibbling objections to a just demand.

Under this head are also to be ranked applications for further time to plead, orders for which are all considered in the light of relaxations of the strict practice of the Court, and so likewise are the applications so frequently made for leave to amend.

Fourthly. The Courts exercise their summary jurisdiction for the purpose of preventing misconduct in their own officers and persons immediately under their control. Thus, as attorneys are officers of the Courts, supposed to be always in attendance there, and invested as such with certain privileges and immunities, the Courts think themselves bound to enforce the strictest observance of good faith and propriety on their part, and will always listen to complaints founded upon their conduct as attorneys, I say as attorneys, for the Courts do not attempt to exercise control over their conduct in their own private affairs, which have nothing to do with their professional character.

BLACKSTONE, COMMENTARIES, III, 279.

The next step for carrying on the suit, after suing out the original is called the process; being the means of compelling the defendant to appear in court. This is sometimes called original process, being

founded upon the original writ; and also to distinguish it from mesne or intermediate process which issues, pending the suit, upon some collateral interlocutory matter; as to summon juries, witnesses, and the like. Mesne process is also sometimes put in contradistinction to final process, or process of execution; and then it signifies all such process as intervenes between the beginning and end of a suit.

But process, as we are now to consider it, is the method taken by the law to compel a compliance with the original writ, of which the primary step is by giving the party notice to obey it. This notice is given upon all real praecipes, and also upon all personal writs for injuries not against the peace, by summons, which is a warning to appear in court at the return of the original writ, given to the defendant by two of the sheriff's messengers, called summoners, either in person or left at his house or land in like manner as in the civil law the first process is by personal citation, *in jus vocando*. This warning on the land is given, in real actions, by erecting a white stick or wand on the defendant's ground, (which stick or wand among the northern nations is called the *baculus nunciatorius*;) and by statute 31 Eliz. c. 3., the notice must also be proclaimed on some Sunday before the door of the parish church.

If the defendant disobeys this verbal monition, the next process is by writ of attachment or *pone*, so called from the words of the writ, "*pone per vadium et salvos plegios*, put by gage and safe pledges, A. B. the defendant, etc." This is a writ not issuing out of chancery, but out of the court of common pleas, being grounded on the non-appearance of the defendant at the return of the original writ; and thereby the sheriff is commanded to attach him, by taking gage, that is, certain of his goods, which he shall forfeit if he doth not appear; or by making him find safe pledges or sureties who shall be amerced in case of his non-appearance. This is also the first and immediate process, without any previous summons upon actions of trespass *vi et armis*, or for other injuries, which, though not forcible, are yet trespasses against the peace, as deceit and conspiracy; where the violence of the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attached, without any precedent warning.

If after attachment, the defendant neglects to appear, he not only forfeits this security, but is moreover to be further compelled by writ of *distringas* or distress infinite; which is a subsequent proc-

ess issuing from the court of common pleas, commanding the sheriff to distrain the defendant from time to time, and continually afterwards by taking his goods and the profits of his lands, which are called issues, and which by the common law he forfeits to the king if he doth not appear. But now the issues may be sold, if the court shall so direct, in order to defray the reasonable costs of the plaintiff. In like manner, by the civil law, if the defendant absconds, so that the citation is of no effect, "*mittitur adversarius in possessionem bonorum ejus.*"

And here, by the common as well as the civil law, the process ended in case of injuries without force; the defendant, if he had any substance, being gradually stripped of it all by repeated distresses, till he rendered obedience to the king's writ; and, if he had no substance, the law held him incapable of making satisfaction, and therefore looked upon all further process as nugatory. And besides, upon feudal principles, the person of a feudatory was not liable to be attached for injuries merely civil, lest thereby his lord should be deprived of his personal services. But, in case of injury accompanied with force, the law, to punish the breach of the peace, and prevent its disturbance for the future, provided also a process against the defendant's person in case he neglected to appear upon the former process of attachment, or had no substance whereby to be attached; subjecting his body to imprisonment by the writ of *capias ad respondendum*. But this immunity of the defendant's person, in case of peaceable though fraudulent injuries, producing great contempt of the law in indigent wrong-doers, a *capias* was also allowed to arrest the person, in actions of account, though no breach of the peace be suggested, by the statutes of Marlberge, 52 Hen. III. c. 23, and Westm. 2, 13 Edw. I. c. 11, in actions of debt and detainue, by statute 25 Edw. III. c. 17, and in all actions on the case, by statute 19 Hen. VII. c. 9. Before which last statute a practice had been introduced of commencing the suit by bringing an original writ of trespass *quare clausum fregit*, for breaking the plaintiff's close *et armis*; which by the old common law subjected the defendant's person to be arrested by writ of *capias*; and then, afterwards, by connivance of the court, the plaintiff might proceed to prosecute for any other less forcible injury. This practice (through custom rather than necessity, and for saving some trouble and expense, in suing out a special original adapted to the particular injury) still continues in almost all cases, except in actions

of debt; though now, by virtue of the statutes above cited and others, a *capias* might be had upon almost every species of complaint.

If therefore the defendant being summoned or attached makes default, and neglects to appear; or if the sheriff returns a *nihil*, or that the defendant hath nothing whereby he may be summoned, attached, or distrained; the *capias* now usually issues: being a writ commanding the sheriff to take the body of the defendant if he may be found in his bailiwick or county, and him safely to keep, so that he may have him in court on the day of the return, to answer to the plaintiff of a plea of debtor trespass, etc., as the case may be. This writ, and all others subsequent to the original writ, not issuing out of chancery, but from the court into which the original was returnable, and being grounded on what has passed in that court in consequence of the sheriff's return, are called judicial, not original writs; they issue under the private seal of that court, and not under the great seal of England; and are teste'd, not in the king's name, but in that of the chief (or, if there be no chief, of the senior) justice only. And these several writs, being grounded on the sheriff's return, must respectively bear date the same day on which the writ immediately preceding was returnable. . . .

But where a defendant absconds, and the plaintiff would proceed to an outlawry against him, an original writ must then be sued out regularly, and after that a *capias*. And if the sheriff cannot find the defendant upon the first writ of *capias*, and return a *non est inventus*, there issues out an *alias* writ, and after that a *pluries*, to the same effect as the former; only after these words, "we command you," this clause is inserted, "as we have formerly," or "as we have often commanded you:" "*sicut alias*," or "*sicut pluries, praecepimus*." And, if a *non est inventus* is returned upon all of them, then a writ of *exigent* or *exigi facias* may be sued out, which requires the sheriff to cause the defendant to be proclaimed, required, or exacted, in five county courts successively, to render himself; and if he does, then to take him as in a *capias*; but if he does not appear, and is returned *quinto exactus*, he shall then be outlawed by the coroners of the county. Also by statute 6 Hen. VIII. c. 4, and 31 Eliz. c. 3, whether the defendant dwells within the same or another county than that wherein the *exigent* is sued out, a writ of proclamation shall issue out at the same time with the *exigent*, commanding the sheriff of the county, wherein the defendant dwells, to make three proclamations thereof in places the

most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place. Such outlawry is putting a man out of the protection of the law, so that he is incapable to bring an action for redress of injuries; and it is also attended with a forfeiture of all one's goods and chattels to the king. And therefore, till some time after the conquest, no man could be outlawed but for felony; but in Bracton's time, and somewhat earlier, process of outlawry was ordained to lie in all actions for trespasses *vi et armis*. And since his days, by a variety of statutes, (the same which allow the writ of *capias* before mentioned,) process of outlawry doth lie in divers actions that are merely civil; provided they be commenced by original and not by bill. If after outlawry the defendant appears publicly, he may be arrested by a writ of *capias utlagatum*, and committed till the outlawry be reversed. Which reversal may be had by the defendant's appearing personally in court or by attorney, (though in the king's bench he could not appear by attorney, till permitted by statute 4 & 5 W. and M. c. 18;) and any plausible cause, however slight, will in general be sufficient to reverse it, it being considered only as a process to compel an appearance. But then the defendant must pay full costs, and put the plaintiff in the same condition as if he had appeared before the writ of *exigi facias* was awarded.

Extracts from SMITH, ELEMENTARY VIEW OF THE PROCEEDINGS IN AN ACTION AT LAW.

We have now arrived at the commencement of the action itself, the first step in which is the process.

Process, is the means employed for the purpose of obliging the defendant to appear in Court, to answer to the action. It also serves the purpose of giving him timely notice of the nature of the claim against him, so that he may, if he please, satisfy it, and thus save himself from the necessity of answering the action at all. And for this purpose, the process always informs him who the plaintiff is, and what is the nature of the intended action; and, where the cause of action is a debt, the process must, according to a very salutary rule of Hilary, 1832, have an indorsement, stating the precise amount of the plaintiff's demand.

The process of the Superior Courts of law consists of writs. Writs are letters missive from the sovereign, commanding the doing or forbearing of some act. Thus, a writ of *mandamus* issues, as its name imports, to command a performance, a writ of prohibition,

as its name imports, to command the forbearance of some act. Writs are always directed to the person on whom the command is imposed; they are always witnessed or tested, as it is called, in the name of some person appointed for that purpose of law, and they are always returnable in some Court or other, that is, there is always some person who is, by law compellable to bring them into that Court, and certify to it what has been done in pursuance of them. These observations apply to all writs whatever. A return of a writ is the sheriff's answer or certificate to the Court, touching that which he is commanded to do by any writ directed to him.

The writ of summons is a judicial writ, i. e., a writ issuing out of the Court in which the defendant is to be sued; and as it is now the commencement of the action it cannot be issued before the cause of action is complete. it is directed to the defendant, whom it commands that, within eight days after the service of the writ on him inclusive of the day of such service, he do cause an appearance to be entered for him in the Court in which the action is brought, in an action on promises, or debt, or as the case may be, at the suit of the plaintiff, and requires the defendant to take notice, that in default of his so doing, the plaintiff may cause an appearance to be entered for him, and proceed to judgment and execution.

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An *Alias* Writ of Summons, and a *Pluries*, continue the first writ, and differ only from it, the former, by mentioning that it commands the defendant, "as before he was commanded," and the latter by its mentioning that it commands him, "as often he was commanded." Each has a memorandum and indorsements, similar to those on the first Writ of Summons.

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As soon as the defendant has appeared, the pleadings commence.

These are the altercations which take place between the plaintiff and defendant, for the purpose of ascertaining the nature of the complaint, the grounds of defence, and the points in controversy between the parties. These pleadings were, in the early ages of the common law, delivered *viva voce* by the counsel. The writ by which the action was commenced, used to be brought into Court with the sheriff's return upon it, and the plaintiff's counsel, after it had been read, proceeded to expand the charge contained in it into a connected story, by adding time, place, and other circumstances. Thus, if the writ mentioned the cause of action to be tres-

pass, the plaintiff's counsel stated, where, when, and how, the trespass was committed, and what special damage had resulted from it. This statement was called the count, from the French *conte*, a tale or story. The defendant's counsel, on his part, stated the defence with similar precision, and this was called the plea. The plaintiff's counsel replied: the defendant's, if necessary, rejoined; and so on, until they had come to a contradiction either in law or fact. If either conceived that the last pleading on the opposite side was untrue in fact, he positively denied it, and was then said "to take issue upon it." If he conceived it to be bad in law, he demurred, so called from the French *demeurer*, to abide, because he abided by the determination of the point of law, conceiving that the insufficiency of his opponent's pleading furnished him with a sufficient answer to his case. Thus was an issue produced either of fact or law. If of law, it was decided by the Court; if of fact, tried, in most cases, by a jury.

While the proceedings were going on, the officer of the Court sat at the feet of the judges, entering them on a parchment roll of record. This record bore different names at different times. When the pleadings only were in process of being entered, it was called "the plea roll;" when the issue had been joined and entered on it, it was called "the issue roll;" and when the judgment had been recorded on it, it was called "the judgment roll;" being all along the same piece of parchment, but bearing different names at different periods of the suit.

When business increased, and causes became complicated, the system of *viva voce* pleading was found inconvenient, and, instead of pronouncing the pleadings aloud, they were drawn on paper, and filed in the office of the Court, or delivered between the parties. The judges heard nothing about them until issue or demurrer, and, thus, considerable time was saved. As to the roll, that was at first transcribed from the written pleadings by the officers, as anciently from the *viva voce* ones. Afterwards, the officers, finding themselves pressed for time requested the attorneys to transcribe it themselves; and bring it to the office; and the attorneys, finding this irksome, began to omit carrying it in at all, except in cases where it was wanted for some particular purpose; so that, in most cases, the roll existed only in contemplation of law; and now, does not exist at all till a late period of the suit.

Although the pleadings are now transcribed on paper, they are governed by the very same rules which regulated them when pronounced *viva voce*. There is scarce any branch of the law which has undergone so few changes as the theory of pleading. Comyn's Digest is as useful to a pleader to-day as it was when it was written; and it is curious to remark, that, while the new rules have altered the ancient practice in most other cases to which they have been applied, their effect on pleading has been to bring it back to its old bounds, and to destroy innovations which had crept in on the ancient system, and reject that which was not essential in the old forms.

The first step in the pleadings is the declaration. The declaration in the words of Lord Coke "is an exposition of the writ, and addeth time, place, and other circumstances that the same may be triable." The general requisites of it are:—1. That it should correspond with the writ; for example, if it appear from the declaration that the cause of action accrued after the writ was issued the declaration will be bad. 2. It must state all facts necessary in point of law to support the action and no more. 3. These facts must be set forth with certainty and truth.

The plaintiff is not confined to the statement of one cause of action only, for the declaration may consist of several counts, and each of those counts may state a different cause of action. Thus, the first count of a declaration in *assumpsit* may be on a bill of exchange, the second on a promissory note, the third for goods sold and delivered, and so on. But there is this limitation, namely, that all the counts must belong to the same form of action; thus, a declaration must not contain one count in debt, and another in *assumpsit*, one count in trespass, and another in case.

There is, however, one exception to this rule, namely, the debt and *detinue* may be joined together in the same declaration.

It had been decided in several cases, that any variance between a material part of the statement of the cause of action in the declaration and the evidence adduced at the trial in support of it, was fatal, and a ground of nonsuit. The consequence of this was, that plaintiffs were continually nonsuited, in the most vexatious manner, on account of slight variances between the declaration and the evidence; and to such an extreme was this carried, that there is one case of *Walters v. Mace*, 2 B. & A. 756, in which the plaintiff was nonsuited, because, in copying Lord Waterpark's title in the declara-

tion the clerk, instead of writing Baron Waterpark of Waterpark, had written Baron Waterpark of Waterfork. In order to prevent the fatal mischief often occasioned by these trifling variances pleaders used to insert a great number of counts in the declaration, stating the cause of action, in different ways, in hopes that, if the evidence varied from some, it might not from others; and that one count, at least, might be found free from objection on the score of variance.

The plea is the defendant's answer to the declaration by matter of fact, and is either a plea in abatement or a plea in bar. A plea in abatement is one which shews some ground for abating or quashing the original writ in a real or mixed action, or the declaration in a personal action, and makes prayer to that effect; it therefore does not contain an answer to the cause of action, but shews that the plaintiff has committed some informality, and points out how he ought to have proceeded, or, in technical language, "gives him a better writ or declaration." Pleas in abatement are not usual; they are discouraged by the courts as tending to throw technical difficulties in the plaintiff's way. They must by stat. 4 Anne c. 16, always be verified by affidavit, which must be delivered with the plea, unless, as in *Johnson v. Popplewell*, 2 Tyrwh. 717, the distance of the intended deponent's residence from town induces a judge to grant further time. They cannot be amended, and the power of pleading several matters does not extend to them.

A plea in bar, which is the sort of plea most usually resorted to, is a peremptory and substantial answer to the action. Such a plea is either a traverse or a plea in confession and avoidance; there is, indeed, a third sort of plea, entitled "A plea in estoppel" but this is of rare practical occurrence. A plea, when it denies some essential part of the declaration is said to be a traverse. It is "in confession and avoidance" when it admits the averments of fact in the declaration to be true, but shews some new matter not mentioned in the declaration, which destroys the plaintiff's right of action. Thus, in an action against the maker of a note, if the defendant plead "he did not make the note," that is a traverse. But if he plead "that he did make it, but for an illegal consideration of which the plaintiff was aware," that is a plea in confession and avoidance. A traverse always concludes to the country, that is, in these words, "and of this the said defendant puts himself upon the country, &c."

A plea in confession and avoidance always concludes with a verification, i. e. in these words, "and this the said defendant is ready to verify, &c."

At common law, the defendant was allowed but one plea to each count of the declaration; and, for this restriction, a very unsatisfactory reason was assigned, namely, that, as one defence is sufficient to rebut the action, the defendant could have no occasion to set up more. But it is obvious that a defendant may have several good defenses against the same action, and yet may reasonably wish to plead them all, in order that, if by some accident, his evidence of one of them should fail, he may rely upon another. Accordingly, by stat. 4 & 5 Anne, c. 16, the defendant is at liberty to plea several pleas by leave of the court.

The subsequent steps in pleading are the replication, containing the plaintiff's answer to the plea; the Rejoinder, the Defendant's answer to the replication; the Surrejoinder, the Rebutter, and the Surrebutter, and so on. The pleadings seldom reach to Surrebutter, but they sometimes do, and there is nothing to prevent their going beyond it, but the steps beyond Surrebutter have no distinctive names. At each of these steps the party replying, rejoining, or framing any other pleading, must either traverse or confess and avoid, that is, must either deny some material part of the adversary's last pleading, or must admit such last pleading to be true, but allege some new matter, altering the legal effect of it, and showing that he himself is, nevertheless entitled to judgment. If he traverse he concludes to the country, that is, if plaintiff, he concludes by saying, "and of this the said plaintiff prays may be inquired of by the country, &c.;" if defendant, by saying, "and of this the said defendant puts himself upon the country, &c." If he confess and avoid, he concludes with a verification, that is, by saying, "and this he is ready to verify, &c." Thus the pleadings go on, step by step, till at last the parties come, as they necessarily must, to a direct contradiction, which, upon a fact, is called "an issue," if upon a point of law, "a demurrer."

It has been already said, that at each step in the pleadings either party may, if he think fit, instead of pleading, replying, rejoining, etc., demur to the last pleading of his adversary. that is, he may say it is not sufficient in law. Thus if A sue B as the maker of a

promissory note, or as the acceptor of a bill of exchange, of which he, A, is the indorsee, and B pleads that the payee gave him no consideration for it, instead of replying to this plea, A might demur, because, even admitting it to be true, it would be no defense against an indorsee, who must be presumed to have given value until the contrary is shewn, because promissory notes and bills of exchange are an exception to the rule which prevails in the case of other simple contracts; there the law presumes there was no consideration till it appear, and therefore the plaintiff must aver in his declaration on a simple contract that it was made on a good consideration; but in the case of contracts on bills or notes, a consideration is presumed till the contrary appear. If the opposite party thinks the law is in his favor, he joins in demurrer, and then the point is argued and decided by the Court *in Banco*. If he finds that he has made a mistake, he usually amends, which a judge will allow him to do on payment of the costs occasioned to the opposite party by his misleading.

A demurrer is either general or special. A general demurrer lies when the objection is a substantial one, as in the case just put by way of example. A special demurrer must be used where the objection is merely technical and formal, as, for instance, if the defendant were, as in the case of *Margetts v. Bays*, 4 A. & E. 489, to plead that the supposed debt if any, did not accrue within six years, that would, according to that case, be bad on special demurrer, as neither traversing the declaration nor confessing and avoiding it; for it is one of the fundamental rules of pleading, that after the declaration the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance; but the statute 27 Eliz. c. 5, requires that the objection, when a technical and formal one, should be pointed out specially at the conclusion of the demurrer.

It frequently happens that the defendant, in his plea, takes issue or demurs, and then the pleadings terminate, and the decision of the issue or demurrer is the next thing to be attended to. It sometimes, however, happens that the pleadings run on through the steps of Replication, Rejoinder, and even though more rarely Rebutter and Surrebutter. If the plaintiff neglects to take any of those steps which it is incumbent on him to take, within due time,

he is liable to judgment of non pros., and the defendant, in case of similar neglect on his side to judgment by default.

Assuming that the different steps are taken in their due time, an issue either of law or fact, is ultimately produced, and the object of the pleadings thus accomplished. For the object of the whole system of pleading is to bring the parties to an issue, to elicit the real points in controversy between them. If these are points of law, they are argued before the Court, if of fact, tried by a jury. Frequently it turns out that there are several issues, some of law and some of fact. Thus one count or one plea may be demurred to, and the others traversed. When this happens, the demurrer must be decided by the Court, and the issues of fact by a jury. But when the defendant's plea goes to bar the action if the plaintiff demur to it, and the demurrer is determined in favor of the plea, judgment of *nil capiat*, it seems, shall be entered, notwithstanding there may be also one or more issues in fact, because on the whole it appears that the plaintiff had no cause of action. So where several pleas go to destroy the action, and one or more issues are joined on some of the pleas, and there are one or more demurrers to the rest, if the Court determine the demurrer in favor of the defendant before the issues are tried, they shall not be tried, and if after, it will make no difference in each case, judgment of *nil capiat* shall be given against the plaintiff. Saund. vol. i, 80.

The mode in which these decisions are obtained is therefore the next matter to be considered.

Before, however, stating the mode in which an issue is decided, it appears right to touch on one or two matters of very ordinary occurrence, and which usually take place during the pleadings, at all events previous to the decision of the issue.

Another application which may be, and frequently is, made, both by plaintiffs and defendants, is for the oyer of a deed, or inspection of some written instrument. With respect to oyer, the rule is, that whenever either party in his pleadings states a deed which operates at common law, or letters of administration, he is bound to make *profert*, as it is called, that is, he is obliged to say that he brings the instrument into court, being a translation of the words *profert in curiam*, used by the ancient pleaders. The other party may then, if he please, crave oyer of its contents, which the party making *profert* is obliged to give him, and he is entitled to as

many days for taking his next step in pleading after he has had the oyer, as he was before he demanded it.

The practice of making *profert* and demanding oyer is of great antiquity, and forms part of the old system of *viva voce* pleading. Under that system, the party who relied on a deed used to produce it in the open court; the opposite party might pray to hear it read, which he did by using the Norman word oyer "to hear" a corruption of which into O yes is still used by a crier making proclamation. On oyer being craved the deed was read aloud by the officer of the court, a practice for which that of the attorneys demanding it from one another was afterwards substituted.

The defendant, when he has craved and obtained oyer of a deed, ought properly to set it out at full length at the head of his plea, in order that it may appear upon record, and be referred to if necessary.

As to inspection. It sometimes happens that one of the parties is in fairness entitled to inspect some document, the contents of which will be of service to him in conducting his case, but which not being pleaded, or not operating at common law, there is no *profert* of it, and consequently he cannot demand oyer. Under such circumstances his course is to apply, by way of motion, that he may be permitted to inspect the document in question which he will be allowed to do, if it turn out that he is in fairness and equity entitled to do so.

Another ordinary application on the part of defendants is, that several actions may be consolidated, they undertaking to abide by the event of one of them. This application is most frequently made in actions against underwriters upon a policy of insurance, where, as the question is the same against each underwriter, since, if one be liable to the loss the rest of course are so, it is usual for the defendants to move for what is called the consolidation rule; a rule which was invented by Lord Mansfield, and the effect of which is to bind the defendants in all the actions by the verdict in one.

In the instance given it is necessary that several actions should be brought, the defendants being separate and several, and generally the plaintiff's consent to the rule must be had. But cases sometimes occur in which separate actions are vexatiously commenced against a defendant, as where several causes of actions are complete at the

same time or nearly so, whereupon the court will interfere and consolidate the actions, or suspend the trial.

It sometimes happens that the plaintiff is resident out of the jurisdiction of the court, in which case, as it is obvious that the defendant would, in case of the action proving unsuccessful have no means of obtaining his costs, the court will, upon an application made in proper time, stay his proceedings until he give security for costs. There is a rule of Hilary, 1832, sec. 98, which obliges the defendant to make this application before issue joined. When the application is made in due time, it is so much of course to grant it that even a foreign potentate suing in our courts is obliged to find security.

The last of these occasional applications of which notice need here be taken is for the purpose of changing the venue. The venue as has already been said, is the county mentioned in the margin of the declaration, and it has been shown in what cases it is local, and in what transitory; that it is local when the cause of action could not have taken place in any other county, as, for instance in actions of trespass *quare clausum fregit*; transitory, where the cause of action might have happened in another county, as in actions of trespass for assault and battery. Now at common law, the rule was, that in a transitory action the plaintiff might lay the venue wherever he pleased. But this was found to create so much vexation, in consequence of plaintiffs laying venues at a great distance from the defendant's residence, that it was enacted by stat. 2 Rich. 2, c. 2, that the venue should be laid in the county where the cause of action arose.

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Anciently there were a variety of modes of trial appropriated by the law, as it once stood, to various states of circumstances. Those which remain in force are:—

1. Trial by inspection is when the matter in dispute being the object of sight, the judges of court, upon the evidence of their senses shall decide it.

2. By certificate, a mode confined to one or two very unusual causes, is where the evidence of the person certifying is the only criterion of the point in dispute. Thus the certificate under seal of the king mareschal that A was absent with the king and his army, shall be conclusive of that fact.

3. By witnesses. Without a jury, when the judge forms his sentence upon the credit of the witnesses examined, as when a widow brings writ of dower, and the plea is, that the husband is not dead. This being regarded as a dilatory plea, is allowed to be tried in this mode, which is more unusual still than either of the former.

4. By the record. This takes place when issue happens to be joined between the parties, as it sometimes is, upon the existence or non existence of a particular record; as whether A is an earl or not, is triable by the crown-patent only, which is a matter of record, or if created by writ, then by record of Parliament. In such a case, as it is a maxim that a record can only be proved by itself, and it is so absolute as to admit of no contradiction, it would be useless to convene a jury for the purpose of determining that which the court on the production of the record is bound to take notice of. Accordingly, when some pleading denies the existence of a record, the issue joined thereon, and which is called an issue of *nul tiel record*, concludes with an entry, stating that which would anciently have been stated by the court *viva voce* on such an occasion, namely, that a day is assigned for the production of the alleged record and the judgment of the court thereon. On the day named which must be in Term, as the issue is triable only before the Court in Banc, the record, being brought into court is examined with the statement in the pleading which alleges it, and if they correspond, the party asserting its existence obtains judgment, otherwise his adversary.

The fifth and last existing mode of trial, and that which is alone of any very great practical importance, is by jury, and this requires a somewhat more protracted consideration. It is applicable to the trial of every issue of fact, which according to the modern practice is joined on the pleadings, except in the case of an issue taken upon the existence of a particular record.

When the plaintiff has made up his mind to try the cause, he must prepare his briefs and evidence. The brief contains a statement of the pleadings, case, and evidence, for the information of the counsel whom he intends to employ. With respect to the evidence, that will of course be either oral or documentary. Where the attendance of witnesses is required, he may procure it by suing out writs of subpoena, copies of which must be served a reasonable

time before the trial, on the intended witnesses, and their necessary expenses, at the same time tendered to them; after which, if they neglect to attend, the plaintiff may proceed against them, either by way of attachment, to punish their contempt of court, or by way of action, to indemnify him for the injury he has sustained in consequence of their absence. The writ of subpoena may be issued to any part of England. If the witness be either in a foreign state, or in England under such circumstances as render his personal attendance in court impossible, application must be made to the court, which has power to order his examination before the master, prothonotary, or any other person, if he be within its jurisdiction, or to issue a commission for his examination if he be without. As to documentary evidence, if the instruments, the proof of which is required be in the party's own possession, he must produce them; if in that of his adversary, he must give him a notice to produce them, and, in case of non-compliance, will be allowed to give secondary evidence of their contents. If they be in the hands of a third person, the attendance of that person with them must be in force by a *subpoena duces tecum*.

We will now suppose that the jury have been summoned, and are in attendance, and the cause called on as it will be if properly entered in its due turn. If no motion be made to put off the trial, and the plaintiff being ready is not forced to withdraw his record, the first step taken is to empanel and swear the jury. The jurors are called over and sworn, and as they are called over, may, in the case of a common jury, if either party object to them, or any of them, be challenged. Challenges are either to the array or to the polls. Challenges to the array are exceptions to the entire panel, in consequence to some partiality imputed to the sheriff or other officer who arrayed him. Challenges to the polls, are exceptions to particular jurors, and are of four kinds: First, *propter honoris respectum*, as, if a lord of parliament were to be empaneled; secondly, *propter defectum*, as if one of the jurors be an infant, alien, idiot, or lunatic, or have not a sufficient estate; thirdly, *propter affectum*, or for partiality, and this is either principal, i. e., carrying with it a manifest ground of suspicion, or to the favour. A challenge is principal when the juror is related within the ninth degree to either party, or has been arbitrator, or is interested in the cause, or has an action depending with one of the parties, or

has taken money for his verdict, or formerly been a juror in the same cause, or is a master, servant, counsellor, steward, or attorney to, or of the same society or corporation with one of the parties; all these are principal causes of challenge, which, if true, cannot be overruled, for jurors must be *omni exceptione majores*. A challenge to the favour is grounded only on some probable cause of suspicion, as acquaintance or the like, the validity of which is determined by triors; these, if the first juror be challenged, are two indifferent persons named by the court; if they find one man indifferent, he shall be sworn, and he with 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.

Fourthly, *propter delictum*; this species of challenge may take place when the juror is tainted by some crime or misdemeanour which affects his credit.

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As soon as the jury have been sworn, the junior counsel for the plaintiff opens, that is, shortly states the pleadings, and the leading counsel on that side which has the right to begin proceeds to address the jury. This right to begin is frequently a matter of the very greatest importance, for it is an invariable rule that the counsel who begins has, if the opposite side call witnesses, a right to reply; and it is well known from experience, that in a doubtful case, the reply of an able advocate frequently determines the fate of the action. And this occasions sometimes the exertion of great ingenuity on the part of the pleaders who put every art in practice for the purpose of securing for their clients a privilege of so much importance. An inexperienced person is sometimes surprised seeing an experienced pleader admit facts to his own disadvantage upon the record, which he might, if he so pleased, have traversed not divining that these seeming omissions are purposely committed, with a view of securing, if possible, the last word to the jury.

The question, which side shall be entitled to begin, is governed by general maxims, *Ei incumbit probatio, qui dicit non qui negat*; for, as it is very difficult, and sometimes impossible, to prove a negative, it is natural that the *onus* of proof should be upon the party asserting the affirmative, and this is generally speaking, the rule of law; for instance, if to an action on a promissory note, the defendant pleaded "that he did not make the note" the affirmative

being on the plaintiff, it would be for him to begin; but, if the defendant had pleaded "that he paid the note," then the affirmative would be on him, and he would begin at the trial.

The case having been opened, witnesses are called for the party beginning, the counsel on the opposite side has then an opportunity of laying his case before the jury, and if he call witnesses, the party who commenced has a right to the reply. The judge then sums up, and the jury returns the verdict, which is either general, for the plaintiff or defendant, or special, stating all the facts of the case, and leaving it to the court to pronounce a proper judgment. When a special verdict is found, the case is set down for argument, and discussed before the full court, in the same way as a demurrer; and the judgment pronounced upon it may, if the unsuccessful party please, be reviewed by it of error.

But the most ancient modes of carrying a point of law raised at the trial before a superior tribunal, were by bill of exceptions or demurrer to the evidence. The latter species of proceeding is now almost obsolete; it consisted in either party's admitting all the facts adduced in evidence to be true, and every conclusion which the evidence given, conduced to prove, but asserting that the law arising upon them all was in his own favour, and that he was entitled to judgment, the precise operation of which is to take from the jury and refer to the judges the application of the law to the facts, whereas ordinarily the judge declares to the jury what the law is upon the facts, which they find, and then they compound their verdict of the law and the fact thus ascertained.

A bill of exceptions is a proceeding by no means unusual, even at the present day. It occurs, when the counsel for either party is dissatisfied with the direction of the judge trying the cause, in point of law, or with his rejection or admission of evidence. In such a case, he may draw up his objections in writing, and tender them to the judge at the trial and before verdict, who is, if they be truly stated, bound by stat. West. 2 (13 Edw. 1 cv. 31) to affix his seal to the document. This bill of exceptions is then tacked to the record, of which it becomes part, and may be carried into a court of error if advisable; and the only mode of taking advantage of it is by writ of error, for the court in which the action was brought does not

take any notice of it, but gives judgment as if it were not in existence.

It sometimes happens, that instead of going on to verdict, the trial is suddenly put an end to in a mode not requiring the intervention of the jury. This may happen in four different ways; first, by the plaintiff's suffering a nonsuit; secondly, by the parties agreeing to withdraw a juror; thirdly, by the judge discharging the jury from finding any verdict.

With regard to a nonsuit,—the word is derived from the Latin *non sequitur*, or more nearly from the French *ne suit pas*, because the plaintiff does not follow up his suit to its legitimate conclusion; for, in the ancient times before the jury gave their verdict, the plaintiff was called upon to hear it, in order that, if it proved adverse to him, he might be held answerable for the fine which was in those days levied upon an unsuccessful plaintiff. If he did not appear when thus called upon, he was nonsuited, that is, adjudged to have deserted his action, and the court gave judgment against him for his default. And hence proceeds the ceremony which takes place even at this day, of calling the plaintiff to come into the court when about to be nonsuited and warning him, that he will lose his writ of *nisi prius*, that is, that he will lose the benefit of the jury process by which he has convened the jury who are now about to become superfluous in consequence of his default in not appearing.

Another consequence of the ancient practice is, that a plaintiff cannot be nonsuited against his will; for a default is, in the nature of things, voluntary, and when he is called upon to appear, he may, if he think fit, make answer by his counsel, and, if he do, there can be no nonsuit; and, although it is usual and certainly highly proper, for the plaintiff's counsel to yield to the opinion of the judge, when the latter intimates that his case is not made out, and that he ought to suffer a nonsuit, still, there have been instances, in which the plaintiff's counsel have persisted in appearing, and have even gained a verdict by their pertinacity. But it is very dangerous to resist the judge, when he is of opinion that there ought to be nonsuit, for, if the plaintiff disregard his intimation he is certain to direct the jury to find the verdict for the defendant, and though it is true that the plaintiff whether he submit to a nonsuit, or have a verdict found against him, must equally pay costs to the defendant, still there is this great practical difference between a verdict for the defendant and a nonsuit, namely, that the former has the effect of forever barring and determining his right of action, whereas, after the latter

he may bring a fresh action, and if he come prepared with better evidence, may perhaps succeed in it.

The withdrawal of a juror takes place when neither party feels sufficient confidence to render him anxious to persevere till verdict. In such case, they may, by consent, for it cannot be done otherwise, withdraw a juror, and, as that leaves the jury incomplete, there can be no verdict, and the trial comes to an end, a party who consents to such arrangement is bound by it, and the court will stay fresh proceedings in the same cause, as being contrary to good faith. It is a kind of drawing stakes, and leaves each party to pay his own costs.

It sometimes becomes necessary to discharge the jury, either on account of the sudden illness of a jurymen, as in *Rex v. Edwards*, 3 Campb. 207, or because they cannot agree, in which case, when there is no hope of their resolving on a verdict, it is now the practice to discharge them.

The proceedings next to be considered, are those in which the result of the trial at *nisi prius* obtained in the manner above described may, in the ensuing Term, be impeached or controlled. These are:

1. A motion for a new trial.
2. To enter a verdict or nonsuit, pursuant to leave reserved.
3. For a *venire de novo*.
4. For judgment *non obstante veredicto*.
5. In arrest of judgment.
6. For a repleader.

A motion for a new trial, which is the most ordinary of these applications, is a proceeding of which we find no instance till the year 1665. In that year, in the case of *Wood v. Gunston Styles*, 462, 466, we meet with the first reported instance of a motion for a new trial. In ancient times, the mode of impeaching the verdict, if not warranted by the evidence, was one of the most barbarous and most extraordinary that it could have entered into the imagination of man to devise. It was supposed that, if twelve men gave an untrue verdict, they must have been actuated to do so by corrupt motives; and, therefore, the unsuccessful party was at liberty to sue out a writ called "a writ attaint," of which there is an account in *Finch's Law*, 484, and which, at first, applied to real actions only, but was extended by 34 Edw. 3, c. 7, to all actions whatever.

Under the authority of this "writ of attaint," a jury of twenty-four men was convened, to try the validity of the first verdict; the same evidence only was allowed upon the second trial, as had been given on the first; and if, upon the second trial, the jury of twenty-four returned a verdict contrary to that of the first jury, not only was the first verdict set aside, but the Court pronounced upon the jury who gave it, judgment that they should lose all civil rights, and be perpetually infamous; that they should forfeit all their goods, and the profits of their lands; should be themselves imprisoned, their wives and children driven out of doors, their houses razed, and their lands wasted. Although the barbarity of this proceeding caused it, as may be readily supposed, to become obsolete as civilization progressed, yet there are instances of its having been resorted to in the reign of Elizabeth, and it was not formally abolished until stat. 6 Geo. 4, c. 50, s. 60.

When this absurd and frightful process fell into disuse, the courts, finding it absolutely necessary that some mode should exist of rectifying the erroneous verdict of a jury, began to listen to the applications which have now become frequent, and they founded their power of doing so on this principle, namely, that if the jury gave a wrong verdict, that would not warrant them in pronouncing an iniquitous judgment: and therefore if there appeared reason to fear that such would be the consequence they had the right to refer the cause to another examination, and, accordingly, a motion for a new trial may now be made on any ground which raises a fair probability that the verdict at the first trial was erroneous.

The grounds on which an application for a new trial is usually based are 1st, that the judge who tried the cause misdirected the jury in point of law, or committed a mistake by admitting evidence which ought to have been refused, or rejecting evidence which ought to have been admitted; for, in such cases, as the jury have been misinformed of the true point they were convened to try, or have been deprived of proper, or furnished with improper materials to build their conclusion on, it cannot be expected that they should have returned a proper verdict; and, though it was once thought, that, if a judge rejected evidence which, though admissible in point of law, could not be reasonably supposed to bear sufficient weight to have induced the jury to arrive at a different verdict, even had it been submitted to them, the rejection of such evidence would not be a sufficient ground for a new trial: still, as it is impossible to esti-

mate the precise effect which an additional fact, however trivial, may produce, upon the minds of others, the Court of Exchequer, in the late case of *Crease v. Barrett*, 5 Tyrwh. 475, expressed their opinion, that, if the evidence improperly rejected could have had any effect whatever on the jury, there ought to be a new trial.

Another ground of application is, that the successful party misbehaved. As in the case of *Coster v. Merest*, 3 B. & B. 272, where handbills reflecting on the plaintiff's character had been distributed about the court and even shewn to the jury. So if any of the jury have misbehaved, it is a ground for a new trial, as in *Ramadge v. Ryan*, 9 Bing. 333.

Another ground on which a new trial is sometimes allowed, is, that the damages are excessive. In actions, indeed, for personal tort, such as slander, or malicious prosecution, and especially in actions for criminal conversation or seduction, the courts are extremely averse to grant a new trial, unless the damages given at the first were perfectly outrageous. New trials have been granted also when the former verdict was obtained by surprise, or the witnesses for the prevailing party are manifestly shewn to have committed perjury. In short, whenever it can be made out to the satisfaction of the court that a new trial should be had, there the application may be made, and it is in the power of the court to accede to it.

One of the commonest grounds on which new trials are applied for, is, that the verdict has been either against the weight of the evidence, or without any evidence at all. Where there was no evidence at all to warrant the conclusion come to by the jury the court will always grant a new trial. But, where there was some evidence upon the winning side, they interfere, if at all, with great reluctance, considering that where there is conflicting testimony, it is the province of the jury, not the court, to strike the balance.

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A motion for *venire de novo*, is a proceeding very similar to that for a new trial, and its effect, if granted, is identical; for, when a *venire de novo* is awarded, another trial of the cause is had, as if a rule for a new trial had been made absolute; and, indeed, the very name of the proceeding itself so signifies, for the words *venire de novo* mean no more than that a new *venire* (which is the first of the two writs constituting the jury process) is to be directed to the

sheriff. Still there are several distinctions between a motion for a *venire de novo*, and for a new trial. The new trial is grantable for any reason which renders it right, fit, and just that the first verdict should undergo revision. And, though, in some cases, for instance those of misdirection, or the improper admission or exclusion of evidence, a new trial is a matter of right; still there are also many cases in which it lies in the absolute discretion of the Court to grant or refuse it; or, if they grant it, to modify the rule by which they do so, by introducing such conditions as they deem proper. But it is otherwise with the award of a *venire de novo*, which is a proceeding far more ancient than the motion for a new trial. In cases where it is grantable, the Court is bound to grant it, and can exercise no discretion on the subject. But then those cases are comparatively few in number, and the grounds for awarding it are not, as in many of the instances in which a new trial is granted, of an equitable description, but are of a more technical sort—such as the wrongful disallowance of a challenge, or some defect in the working of the verdict, which renders it uncertain and ambiguous. Nor can the Court, as in the case of a new trial, impose any a condition on the party claiming the *venire de novo*, or exercise any discretion as to costs.

A motion for judgment *non obstante veredicto*, is one which, it is said in the late case of *Rand v. Vaughan*, 1 Bing. N. C. 767, can only be made by a plaintiff. The lord chief justice there states that there is no instance to be found in any of the books of such a judgment having awarded at the instance of a defendant. It is given when, upon an examination of the whole pleadings, it appears to the Court that the defendant has admitted himself to be wrong, and has taken issue on some point which though decided in his favour by the jury, still does not at all better his case.

A motion in arrest of judgment is the exact reverse of that for judgment *non obstante veredicto*. The applicant in the one case insists that the plaintiff is entitled to the judgment of the Court, although a verdict has been found against him. In the other case, that he is not entitled to the judgment of the Court, although a verdict has been delivered in his favour. Like the motion for judgment *non obstante veredicto*, that in arrest of judgment must always be grounded upon something apparent on the face of the pleadings; for instance, if in an action against the indorser of a bill of exchange, the plaintiff were to omit to allege in his declaration that the de-

fendant had notice of dishonour, judgment would be arrested even after a verdict in his favour.

A motion for a repleader becomes necessary where it appears that, in the course of pleading, the parties have so mistaken the true question in the case, that they have raised an issue, which for whom-ever it may be found, will not decide the cause either one way or the other. In such case as the verdict leaves it totally *in dubio* which party will ultimately prove entitled to recover, the only course by which the true state of the merits can be ascertained is to award a repleader that is, to direct that the parties shall begin again at that part of the pleadings in which the mistake which led to the immaterial issue was committed and replead, till they have arrived at one more fitted to decide the cause. When it becomes necessary to take this course, as both parties are in fault, neither is entitled to the costs of the proceedings which have turned out useless.

If none of the above applications be successfully made, the next occurrence in the suit is Judgment. This is the sentence of the law upon the matter appearing from the previous proceedings in the suit; and, unless the Court be equally divided in opinion, in which case no judgment can be given, it is for the plaintiff, by the defendant's confession or default; for the defendant, upon nonsuit, or as in the case of nonsuit, non pros., *retraxit*, *nolle prosequi*, discontinuance, or *stet processus*; and for either party upon demurrer, issue of *nul tiel record* or verdict.

Judgments are either interlocutory or final. Interlocutory judgments are occasionally given upon some plea, proceeding, or default occurring in the course of the action, and which does not terminate the suit. Of this nature are judgments on demurrer, to certain dilatory pleas called Pleas in Abatement. But the most common kind of interlocutory judgments are those which are given when 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 happens when the defendant suffers judgment by default, or confession, or upon a demurrer, or *nul tiel record*, in any of which cases if a specific ascertained demand be sued for, the judgment is final, because then there can be no doubt as to what the plaintiff ought to recover; but, if the demand be of damages unless the defendant will admit that they amount to the whole sum laid in the declaration, a jury must be called on to assess them; therefore the judgment given by

the Court, and entered on the record in such a case, is, that the plaintiff ought to recover his damages; but because the Court knows not what damages he has sustained, the sheriff is commanded to inquire by a jury, and return the inquisition into court. The process directed to the sheriff for this purpose is called Writ of Inquiry, and when he has returned his inquisition to the Court, final judgment is given that the plaintiff do recover the amount assessed. In some cases, indeed where, though the form of action be for damages, yet it is easy to compute precisely what those damages must amount to, as where the action is brought on a bill of exchange, the Court will order their own officer to assess them instead of issuing a writ of inquiry. And in certain other cases where the claim is really unliquidated, though it appears liquidated in the declaration, the court will direct an inquiry.

As to a final judgment, it puts an end to the action altogether, by declaring either that the plaintiff is or that he is not entitled to recover, and if he be entitled to recover, specifying what.

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Incident to the judgment are the costs, which are awarded therein to the successful party. . . . Costs are either interlocutory or final. Interlocutory costs are given upon matters arising in the course of the suit: they are generally awarded on motion, and lie in the discretion of the court which exercises its equitable jurisdiction either in granting or refusing them.

Final costs are given by statute, and depend on the event of the action.

The law applicable to final costs, depends on reasons altogether different from those which govern the costs of interlocutory proceedings by way of motion or summons: to grant or refuse the latter, rests, as has been already pointed out, in the equity and discretion of the court or judge disposing of the application; the former, as they cannot be given without a positive enactment, so neither, when given by such enactment can they be taken away; except by virtue of some power emanating from an enactment equally positive.

The easiest and simplest mode of treating the subject of costs is to consider—first, the common law regarding them; second, the enactment by which plaintiffs are entitled to them; third, those by which defendants are so.

First, then, with regard to the state of the common law respecting costs.

The rule adopted by the civil law and all those various codes which have in modern times been copied from it was expressed by that maxim; "*victus victori in expensis damnandus est.*" And so consistent does it seem with right and justice that the prevailing party should be reimbursed by the defeated one, the costs occasioned by the latter's obstinate resistance to a well-grounded claim or vexatious prosecution of an unjust demand, that it is not easy to conceive how a contrary rule could have been adopted, even by a people so uncultivated as our ancestors. The true reason will perhaps be found in the great simplicity of the proceedings in those early times when there was little or no personal property, few or no contracts, and all trials concerned the ownership of land. When a court was to be found in every manor of which the lord was himself judge, and where the neighboring freeholders constituted both witnesses and jury, little or no expense could have been incurred, and there was, consequently, little or no necessity for reimbursement. Some checks indeed there were, even in those times, on vexatious litigation, for a fine was imposed on the plaintiff if he failed, as a punishment for his unjust prosecution; while, on the other hand, the jury usually were directed in assessing damages against the defendant to take into consideration the expense to which the plaintiff had been wrongfully subjected through his obstinacy. However, when forms became less simple, and litigation more expensive, it was found necessary to adopt some more certain means of indemnifying the successful party. The Legislature, therefore, interfered, and this brings us to the consideration of those Acts of Parliament from which a plaintiff's right to costs derives its origin.

The first of these took place during the reign of that great improver of all branches of English law, Edward I. The statute of Gloucester passed in the sixth year of his reign, c. 1, provides in its second section, "that the demandant shall recover against the tenant the costs of the writ purchased, and that this act shall hold place in all cases where a man recovers damages." A very liberal interpretation was given to this act, the words "costs of the writ purchased" have been held to include the whole costs of the suit of which that writ is the commencement; and though the words "demandant," and "tenant" do not, *prima facie*, appear applicable to

personal actions, yet the direction which ensues, "that the statute shall extend to all cases in which a man recovers damages," has been held to extend it to actions of Trespass, Trover, Case, Assumpsit, Debt upon Contract, Covenant, Replevin, and Ejectment, in all which the plaintiff is at this day entitled to his costs, by virtue of the Statute of Gloucester.

We now come to defendants whose interests, in this respect, were not attended to so soon as those of plaintiffs; for previous to the Statute of Gloucester, as has been already mentioned, judges had been in the habit of directing the juries to allow the plaintiff, when successful, some compensation for his costs, in assessing the amount of damages; and it was as a substitute for this that the Statute of Gloucester gave him costs. But the defendant, as he never recovered damages, had of course, never been able to obtain compensation through the medium of the jury; so that the framers of the Statute of Gloucester who considered themselves as providing a substitute for the antecedent practice of assessing compensation by the jury took no notice of the case of the defendant, to whom that practice never had extended. Justice and reason were, however, too strongly in his favor to suffer him to be long neglected. Accordingly, by stat. 23 Hen. 8, c. 15, it was directed that in debt, covenant, detinue, and case, the defendant, if the plaintiff should be nonsuited, or a verdict passed against him, should recover such costs as the plaintiff would have recovered had he been successful: and this statute was extended by stat. 4 Jac. 1 c. 3, to all actions whatever in which the plaintiff if he succeeded, would be entitled to costs; so that by the joint operation of these two statutes, whenever there is a nonsuit, or a verdict for the defendant, he has a right to costs, if the plaintiff would have had a right to them.

The plaintiff having obtained judgment, is in the ordinary course of things, entitled to issue execution, but there are certain proceedings in the nature of appeals, by means of which, the judgment is sometimes rendered ineffectual, and the prevailing party's right to execution superseded.

This may in some cases be done by a writ of *audita querela* which is sued out when a defendant against whom judgment has been given, and who is therefore in danger of execution, or perhaps actually in execution, has some good matter of discharge which has

happened since the judgment, and therefore applies to the court to be relieved against the oppression of the plaintiff. It is named from the words with which it commences, stating that the complaint of the defendant hath been heard, and enjoins the court to do justice between him and the plaintiff. However, as the court will now in most of the cases where an *audita querela* used to be sued out give summary relief on motion, this species of proceeding has fallen into neglect.

A Writ of Error is an original writ issuing out of the Court of Chancery, in the nature as well of a *certiorari* to remove a record from an inferior to a superior court, as of a commission to the judges of such superior court to examine the record, and to affirm or reverse it according to law; and it lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit in a court of record. Co. Litt. 288 b. It is an appeal against the judgment, grounded either on the suggestion of some fact which renders the judgment erroneous, as for instance, when the plaintiff or defendant dies before verdict or interlocutory judgment; or on some error in point of law, apparent on the face of the proceeding. When it is grounded upon the suggestion of a fact, it is mostly brought in at one of the courts at Westminster in which the judgment was given. Such a proceeding is called a writ of error *Coram Vobis*, or if the judgment be one of the king's bench, *Coram Nobis*, on account of its being founded on the record which, in the one case, remains in the Court of our Lord the King, before the king himself, and in the other case before the king's justices.

A Writ of Error from either of the three courts at Westminster to a superior court is founded on some defect of law manifest upon the record. By stat. 1 Wm. 4, c. 70, writs of error upon any judgment of the king's bench, common pleas, or exchequer, shall be returnable only before the judges, or judges and barons, as the case may be, of the other two courts, in the exchequer chamber, whence error again lies to the House of Lords, the decision of which is final.

It must be sued out within twenty years after judgment, except indeed in the case of a person being an infant, feme covert, *non compos mentis*, in prison, or beyond the seas. It is generally brought by the party against whom the judgment has been given, but may be sued out by a plaintiff to reverse his own judgment, if erroneous, and enable him to bring another action. But the person

who brings it must be either party or privy to the judgment or prejudiced by it, and therefore capable of deriving an advantage from its reversal. And if there be one judgment against several, they cannot bring separate writs of error, but must all join in bringing a single one, for otherwise the plaintiff might be harassed by a multiplicity of writs of error.

The writ is sued out of the court of chancery and directed to the person in the court below who has the custody of the record; as, in the king's bench and common pleas, to the lord chief justice; in the exchequer, to the treasurer and barons. It commands the inferior court to certify the record to the court of appeal, and the superior court to examine it and affirm or reverse the judgment according to law. And in order that a writ of error may operate as a stay of execution, it is unless the court or a judge on special application, order otherwise, necessary that the defendant prosecuting a writ of error, and who is then called plaintiff in error, should put in bail, with two sufficient sureties, to prosecute his writ of error with effect, and also to pay, if the writ of error be non prossed, or the judgment affirmed, all the debt, damages, and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of the execution. These sureties are bound by recognizance in double the sum recovered, except in the case of a penalty, and in the case of a penalty, in double the sum really due and double the costs. Within twenty days after the allowance of the writ of error, the plaintiff in error must get a transcript of the record prepared, and examined by the clerk of the errors of the court in which judgment was given; otherwise his writ of error will be non prossed; this transcript the clerk of the errors must annex to the writ of error, and deliver it when it becomes returnable, to the clerk of the errors in the court of error. After the writ has been returned into the court above, the plaintiff in error may, by stat. 5, Geo. 1, c. 13, move the court of error to amend any defect that he perceives in it; this could not have been done at common law, since the writ of error is the only authority of that court, and no court can at common law amend its own commission; or the defendant in error may move to quash the writ, and will be entitled to his costs if he succeed. It may also abate by the death of the plaintiff in error before errors assigned, or by the marriage of the plaintiff in error, being a woman, or by the death of the chief justice before he has signed his return. If none of these

things happen, the plaintiff in error must within eight days after the delivery of the writ, with the transcript annexed, to the clerk of the errors of the court of error, assign errors, otherwise he may be non prossed.

The Assignment of Error is in the nature of a declaration, stating the grounds for imputing error to the record upon which the plaintiff relies. The assignment of errors as well as the subsequent pleadings thereon, must be delivered between the attorneys of the parties litigant: and the plaintiff, having delivered it, may demand a Plea of Joinder in Error, from the opposite party, who must within twenty days, deliver one or demur, otherwise the judgment will be reversed.

The usual plea or Joinder in Error as it is called, is *in nullo est erratum*,—*Anglice*, and that there is no error in the record; which is in the nature of a demurrer, and refers the whole record to the judgment of the court, or the defendant in error may plead a special plea containing some matter, which confesses that the record is erroneous, but insists that the plaintiff has no right to take advantage of the error, ex. gr., a release of errors, or the Statute of Limitations; to this special plea the plaintiff may either reply or demur, and the defendant may either demur or rejoin to his replication: so that at last, as in the pleadings at the commencement of the suit, an issue either of law or fact, is joined; which, if of law, is determined on argument, and if fact, is tried by a jury; and judgment given according to the verdict.

The judgment of the court is either to affirm the former judgment; to recall it for error in fact; to reverse it for error in law; that the plaintiff be barred of his Writ of Error, when a plea of release of errors or of the Statute of Limitations is found for the defendant; or that there be a *venire facias de novo*. And if the judgment be reversed, the court of error will not merely overturn the decision of the court below, but will give such a decision as the court below ought to have given. If it become necessary to enter the judgment of the court of error, it is entered on the original record, which remains in the custody of the court below, which is empowered to award such further proceedings as may be necessary thereon.

When the judgment is affirmed or the writ of error non prossed, the defendant in error is entitled to damages and costs, if after verdict for the plaintiff below, to double costs; and may have execution for them by *ca. sa.*, *fi. fa.* or *clegit*. He is also entitled to interest

upon the judgment for the time that execution has been delayed by the writ of error. If judgment be reversed, each party must pay his own costs, and the plaintiff in error will, if execution have been levied upon him, be entitled to a Writ of Restitution, and will be restored to all he has lost.

If the judgment be not reversed, vacated, or set aside, the prevailing party has a right to issue execution. This if the judgment be, as it almost always is, for so much money, is mostly by Writ of *Fieri Facias*, *Capias ad Satisfaciendum* or *elegit*.

A *fieri facias* is, like the *capias ad satisfaciendum* and *elegit* a judicial writ, and issues out of the court in which the judgment against the defendant was recovered. Except in counties palatine (where it is addressed to the palatine officer), it is directed to the sheriff of the county where the venue in the action was laid, commanding him that of the goods and chattels of the defendant, he cause to be made the sum recovered, and have it before the court on the return day: this being delivered to the sheriff or his deputy, he makes a warrant to one of his officers, or if he be the officer of a county palatine, grants his mandate to the sheriff, who, in his turn issues a warrant to his officer.

At common law a *fieri facias* bound the defendant's goods from the time of its test: so that they might have been taken, no matter into whose hands they had passed, and though sold *bona fide* for a valuable consideration. However, as against purchasers, the goods are now bound only from the time of delivering the writ to the sheriff. If indeed after the delivery of the writ the defendant assign his goods away, except in market overt, the sheriff may take them in execution. Under this writ anything may be seized and sold that is a chattel belonging to the defendant, except his necessary wearing apparel: the sheriff may sell leases and terms of years belonging to the defendant, *fructus industriales*, such as growing corn, which would go to the executor, and fixtures, when the execution is against a tenant who could have removed them; but he cannot carry away or sell for the purpose of being carried away, from lands let to farm, any straw, chaff, colders, turnips, manure, compost, ashes, or seaweed in any case whatever: nor any hay, grass, tares, vetches, roots, or vegetables; being the produce of such land, and which by any agreement made for the benefit of the landlord, and for which the sheriff shall receive a verbal notice before the sale, ought not to be taken therefrom.

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When the writ becomes returnable, the sheriff may return *feri feci*, i. e., that he has levied the sum named in the writ, or a part of it, which he is ready to pay to the execution creditor: or that he has taken goods which remain unsold for want of buyers; or *nulla bona*, i. e., that the defendant has no goods within his bailiwick; or any other legal excuse for not levying. If money have been levied, and the sheriff neglect to pay it over, the creditor may obtain it from him either by rule of court or action. If part only be levied, and of course when *nulla bona* is returned, he may have a new execution for the residue; and, if he think proper, still to proceed by *feri facias* may sue out either an *alias fieri facias* into the same, or a *testatum fieri facias* into any other county. If the return be, that the goods are unsold for defect of buyers, he may have a writ of *venditioni exponas* commanding the sheriff to sell them. And, lastly, if the return be false, an action may be brought against the sheriff.

A *capias ad satisfaciendum* is a writ by which the sheriff is commanded to take the defendant, and him safely keep, so that he may have him in court on the return day to satisfy the plaintiff. This process lies against every one who was not personally privileged against arrest at the commencement of the suit, and against some who were, such as attorneys.

The sheriff must execute it literally according to its terms, and has no power, instead of arresting the defendant, to receive the money due from him, but, if the defendant wish to liberate himself by payment, he must have recourse to the execution creditor, who is bound, on tender of the sum due, to sign a proper authority for his discharge. On the return day of this writ the sheriff generally returns *Cepi Corpus et paratum habeo*, i. e. that he has taken the body of the defendant and has it ready; or that the defendant is so ill that he cannot remove him without danger to his life; or he may return *non est inventus*, i. e., that the defendant is not found within his bailiwick. If the last return be made, the plaintiff may sue out an *Alias Capias* into the same, or a *Testatum Capias* into another county, or he may, if he please, sue out an *Exigi Facias* and proceed to Outlawry.

If the defendant be taken, he either remains in the custody of the sheriff in the county gaol, or is removed by Habeas Corpus to the prison of the Superior Court. In either case the law sets so high a value upon the liberty of the subject, that it considers the execution a satisfaction of the judgment as against him; and, therefore,

though the defendant had died in prison, or been discharged by privilege of Parliament, the plaintiff's remedy would have been at an end, but for stat. 2 Jac. 1, c. 13 and 21 Jac. 1, c. 24, the former of which gives execution after the privilege of Parliament has ceased, and the latter execution against the deceased's goods and chattels; and if the defendant escape from the sheriff, or be rescued, the plaintiff may have new process to retake him, though he will also in that case have a remedy against the sheriff or gaoler for his dereliction of duty.

An *Elegit* is a writ first given by the statute of Westminster the second, 13 Ed. 1, c. 18, which enacted that where a debt is acknowledged or recovered in the King's Court, or damages awarded, it shall be in the election of him who sues for such debt or damages, to have a Writ of *Fieri Facias*, or that the sheriff deliver to him all the chattels of the debtor, saving his oxen and beasts of the plough, and a moiety of his land, until the debt be levied by a reasonable price or extent.

This writ of execution against a defendant's land may be had as well after his death as before it. The sheriff, on receiving it, is to empanel a jury who inquire of the goods and chattels of the defendant, and appraise them, and also inquire of his lands and tenements. The goods and chattels are delivered to the plaintiff at the price at which they have been valued by the jury: a mode different from that pursued in executing a *Fieri Facias*, under which the sheriff must sell the goods which he has taken. If the goods and chattels were not sufficient to satisfy the plaintiff's demand, the sheriff was to extend a moiety of the lands, under which term were included reversions and rent-charges belonging to defendant, but copy-holds, rent-seck, advowsons in gross, or glebe belonging to a parsonage or vicarage were not extendible, nor were lands held in trust so, 29 Car. 2, c. 3, s. 10: though, by that statute, some species of trust property, to which the defendant was entitled at the time of execution sued, might have been extended.

The sheriff was to deliver a moiety of the land to the plaintiff by metes and bounds, giving him, however, in general only legal possession thereof, and leaving him to obtain the actual possession by ejectment. After the lands had been extended by virtue of this writ, the plaintiff could have no further execution, unless, indeed, he was evicted out of the whole; in which case he might, by statute 32 Hen. 8, c. 3 sue out a *Scire Facias* to obtain one. If, however, he was

evicted of part only, he had no remedy, that case not having been provided for in the statute. When the plaintiff had been, by perception of the rents and profits, satisfied his entire demand, and defendant might recover his land again by bringing an ejectment or *Scire Facias ad Computandum* in a Court of law, or by application to a Court of equity, or he might move the Court out of which the execution issued to refer it to the master to take an account of the plaintiff's receipts, and order him to quit possession, if it appeared that his demand was satisfied.

None of these writs of execution can be sued out after a year and a day from the time of judgment, unless indeed the delay has been caused by the act of the Court, or the consent of the parties. In general, therefore, when that time has elapsed, it is necessary to revive the judgment by a writ of *Scire Facias*, the nature of which will be immediately described.

It has been just remarked, that after the expiration of a year and a day, the plaintiff cannot sue out any of the above Writs of Execution, without reviving his judgment by a writ of *Scire Facias* the reason of which is, that, after so long a space of time, the Court *prima facie*, presumes his demand to be satisfied. We will present the reader with a short account of the proceedings by which the revival of a judgment is effected.

A *Scire Facias* is a writ founded upon some matter of record. When brought, as it may be, to repeal a patent, it is an original writ, issuing out of the Court of Chancery; in other cases it is a judicial writ, and is sued out of the Court in which the record on which it is founded happens to be.

It is considered as the commencement of a new action, and has, therefore, been enumerated at the beginning of this Treatise, among Actions Personal. Among the great variety of purposes to which it may be applied, it is here intended to consider only the mode in which it is used, for the purpose of reviving a judgment.

The *Scire Facias* states the judgment recovered by the plaintiff, and that execution still remains to be had, and commands the sheriff to make known to the defendant that he be in Court at the return day, to shew why the plaintiff ought not to have execution. After the judgment has been revived by means of this writ, the plaintiff must take out execution within a year and a day from the revival; for if he do not, or if the defendant happens to die, he cannot after-

wards take out execution, but will be forced to bring a new *Scire Facias*.

A *Scire Facias* upon a judgment is necessary, not only when the plaintiff has delayed to take out execution within a year and a day, but also when any new person is to be benefited or charged by the execution of the judgment; for it is a rule that executions, and all other judicial writs, must pursue and correspond with the judgments on which they are founded; therefore, if a judgment be obtained against A., and he die, a writ of execution cannot issue against his executor, for he was no party to the judgment; so, if the plaintiff obtain judgment, and marry, execution cannot issue in favour of her husband, for he is not mentioned in the record. In these and similar cases, a writ of *Scire Facias* is sued out, which recites the facts as they have happened; the judgment given upon that writ includes the new party intended to be benefited or charged, and execution may be afterwards sued out upon that judgment.

BLACKSTONE, COMMENTARIES, III, 442.

The first commencement of a suit in chancery is by preferring a bill to the lord chancellor, in the style of a petition; "humbly complaining sheweth to your lordship your orator A B, that," etc. This is in the nature of a declaration at common law, or a libel and allegation in the spiritual courts; setting forth the circumstances of the case at length, as, some fraud, trust, or hardship; "in tender consideration whereof," (which is the usual language of the bill,) "and for that your orator is wholly without remedy at the common law," relief is therefore prayed at the chancellor's hands, and also process of subpoena against the defendant, to compel him to answer upon oath to all the matters charged in the bill. And, if it be to quiet the possession of lands, to stay waste, or to stop proceedings at law, an injunction is also prayed, in the nature of an interdictum by the civil law, commanding the defendant to cease.

This bill must call all necessary parties, however remotely concerned in interest, before the court; otherwise no decree can be made to bind them; and must be signed by counsel, as a certificate of its decency and propriety. For it must not contain matter either scandalous or impertinent: if it does, the defendant may refuse to answer it, till such scandal or impertinence is expunged, which is done upon an order to refer it to one of the officers of the court, called a master in chancery; of whom there are in number twelve, including the master of the rolls, all of whom, so late as the reign

of queen Elizabeth, were commonly doctors of the civil law. The master is to examine the propriety of the bill: and if he reports it scandalous or impertinent, such matter must be struck out, and the defendant shall have his costs; which ought of right to be paid by the counsel who signed the bill.)

When a bill is filed in the office of the six clerks, (who originally were all in orders; and therefore when the constitution of the court began to alter, a law was made to permit them to marry,) when, I say, the bill is thus filed, if an injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case. If the bill be to stay execution upon an oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an injunction will issue of course; and, when the answer comes in, the injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an injunction be wanted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by *affidavits*, the court will grant an injunction immediately, to continue until the defendant has put in his answer, and till the court shall make some further order concerning it, and when the answer comes in, whether it shall then be dissolved or continued till the hearing of the cause, is determined by the court upon argument, drawn from considering the answer and affidavit together.

But, upon common bills, as soon as they are filed, process of *subpoena* is taken out: which is a writ commanding the defendant to appear and answer to the bill, on pain of 100 l. But this is not all; for if the defendant, on service of the *subpoena*, does not appear within the time limited by the rules of the court, and plead, demur, or answer to the bill, he is then said to be in *contempt*; and the respective processes of contempt are in successive order awarded against him. The first of which is an *attachment*, which is a writ in the nature of a *capias*, directed to the sheriff, and commanding him to attach, or take up, the defendant, and bring him into court. If the sheriff returns that the defendant *non est inventus*, then an *attachment with proclamations* issues, which, beside the ordinary form of attachment, directs the sheriff, that he cause public proclamations to be made, throughout the country, to summon the defendant upon his allegiance, personally to appear and answer. If this be also returned with a *non est inventus*, and he still stands out in con-

tempt, a *commission of rebellion* is awarded against him, for not obeying the king's proclamations according to his allegiance; and four commissioners therein named, or any of them, are ordered to attach him wheresoever he may be found in Great Britain, as a rebel and contemner of the king's laws and government, by refusing to attend his sovereign when thereunto required: since, as was before observed, matters of equity were originally determined by the king in person, assisted by his council; though that business is now devolved upon his chancellor. If upon this commission of rebellion a *non est inventus* is returned, the court then sends a *sergeant-at arms* in quest of him; and if he eludes the search of the sergeant also, then a *sequestration* issues to seize all his personal estate, and the profits of his real, and to detain them, subject to the order of the court. Sequestrations were first introduced by Sir Nicholas Bacon, lord keeper in the reign of queen Elizabeth; before which the court found some difficulty in enforcing its processes and decrees. After an order for a sequestration issued, the plaintiff's bill is to be taken *pro confesso*, and a decree to be made accordingly. So that the sequestration does not seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree. Thus much if the defendant absconds.

If the defendant is taken upon any of this process, he is to be committed to the Fleet or other prison till he puts in his appearance or answer, or performs whatever else this process is issued to enforce, and also clears his contempts by paying the costs which the plaintiff has incurred thereby. For the same kind of process (which was also the process of the court of star-chamber till its dissolution) is issued out in all sorts of contempts during the progress of the cause if the parties in any point refuse or neglect to obey the order of the court.

The process against a body corporate is by *distringas*, to distrain them by their goods and chattels, rents and profits, till they shall obey the summons or directions of the court. And if a peer is a defendant, the lord chancellor sends a *letter missive* to him to request his appearance, together with a copy of the bill; and if he neglects to appear, then he may be served with a *subpoena*; and if he continues still in contempt, a sequestration issues out immediately against his lands and goods, without any of the mesne process of attachments, etc., which are directed only against the person, and therefore cannot affect a lord of parliament. The same process is-

sues against a member of the house of commons, except that the lord chancellor send him no letter missive.

The ordinary process before mentioned cannot be sued out till after the service of the *subpoena*, for then the contempt begins; otherwise he is not presumed to have notice of the bill; and therefore by absconding to avoid the *subpoena* a defendant might have eluded justice till the statute 5 Geo. II. c. 25, which enacts that where the defendant cannot be found to be served with process of *subpoena*, and absconds (as is believed) to avoid being served therewith, a day shall be appointed him to appear to the bill of the plaintiff, which is to be inserted in the London gazette, read in the parish church where the defendant last lived, and fixed up at the royal exchange; and, if the defendant doth not appear upon that day, the bill shall be taken *pro confesso*.

But if the defendant appears regularly, and takes a copy of the bill, he is next to *demur*, *plead* or *answer*.

A demurrer in equity is nearly of the same nature as a demurrer in law, being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill; as for want of sufficient matter of equity therein contained; or where the plaintiff, upon his own showing, appears to have no right; or where the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehavior. For any of these causes a defendant may demur to the bill. And if, on demurrer, the defendant prevails; the plaintiff's bill shall be dismissed: if the demurrer be overruled, the defendant is ordered to answer.

A plea may be either to the *jurisdiction*, showing that the court has no cognizance of the cause, or to the *person*, showing some disability in the plaintiff, as by outlawry, excommunication, and the like: or it is in *bar*; showing some matter wherefore the plaintiff can demand no relief, as an act of parliament, a fine, a release, or a former decree. And the truth of this plea the defendant is bound to prove, if put upon it by the plaintiff. But as bills are often of a complicated nature, and contain various matter, a man may plead as to part, demur as to part, and answer to the residue. But no exceptions to formal *minutiae* in the pleadings will be here allowed; for the parties are at liberty, on the discovery of any errors in form, to amend them.

An answer is the most usual defence that is made to a plaintiff's bill. It is given upon oath, or the honor of a peer or peeress: but

where there are amicable defendants, their answer is usually taken without oath, by consent of the plaintiff. This method of proceeding is taken from the ecclesiastical courts, like the rest of the practice in chancery; for there, in almost every case, the plaintiff may demand the oath of his adversary in supply of proof. Formerly this was done in those courts with compurgators, in the manner of our waging of law; but this has been long disused; and instead of it the present kind of purgation, by the single oath of the party himself, was introduced. This oath was made use of in spiritual courts, as well in criminal cases of ecclesiastical cognizance as in matters of civil right; and it was then usually denominated the oath *ex officio*: whereof the high commission court in particular made a most extravagant and illegal use; forming a court of inquisition, in which all persons were obliged to answer in cases of bare suspicion, if the commissioners thought proper to proceed against them *ex officio* for any supposed ecclesiastical enormities. But when the high commission court was abolished by statute 16 Car. I. c. 11, this oath *ex officio* was abolished with it, and it enacted, by statute 13 Car. II. st. 1, c. 12, "that it shall not be lawful for any bishop or ecclesiastical judge to tender to any person the oath *ex officio*, or any other oath, whereby the party may be charged or compelled to confess, accuse, or purge himself of any criminal matter." But this does not extend to oaths in a civil suit; and therefore it is still the practice, both in the spiritual courts and in equity, to demand the personal answer of the party himself upon oath. Yet if in the bill any question be put that tends to the discovery of any crime, the defendant may thereupon demur, as was before observed, and may refuse to answer.

If the defendant lives within twenty miles of London, he must be sworn before one of the masters of the court: if farther off, there may be a *dedimus potestatem*, or commission to take his answer in the country, where the commissioners administer him the usual oath; and then, the answer being sealed up, either one of the commissioners carries it up to the court, or it is sent by a messenger, who swears he received it from one of the commissioners, and that the same has not been opened or altered since he received it. An answer must be signed by counsel, and must either deny or confess all the material parts of the bill; or it may confess and avoid, that is, justify or palliate the facts. If one of these is not done, the answer may be excepted to for insufficiency, and the defendant be compelled to put in a more sufficient answer. A defendant cannot pray anything

in this his answer but to be dismissed the court; if he has any relief to pray against the plaintiff, he must do it by an original bill of his own, which is called a *cross-bill*.

After answer put in, the plaintiff upon payment of costs may amend his bill, either by adding new parties or new matter, or both, upon the new lights given him by the defendant; and the defendant is obliged to answer afresh to such amended bill. But this must be before the plaintiff has replied to the defendant's answer, whereby the cause is at issue; for afterwards, if new matter arises, which did not exist before, he must set it forth by a *supplemental-bill*. There may be also a bill of *revivor* when the suit is abated by the death of any of the parties; in order to set the proceedings again in motion, without which they remain at a stand. And there is likewise a bill of *interpleader*; where a person who owes a debt or rent to one of the parties in suit, but, till the determination of it, he knows not to which, desires that they may interplead, that he may be safe in the payment. In this last case it is usual to order the money to be paid into court for the benefit of such of the parties to whom upon hearing the court shall decree it to be due. But this depends upon circumstances; and the plaintiff must also annex an *affidavit* to his bill, swearing that he does not collude with either of the parties.

If the plaintiff finds sufficient matter confessed in the defendant's answer to ground a decree upon, he may proceed to the hearing of the cause upon bill and answer only. But in that case he must take the defendant's answer to be true, in every point. Otherwise the course is for the plaintiff to reply generally to the answer, averring his bill to be true, certain, and sufficient, and the defendant's answer to be directly the reverse; which he is ready to prove as the court shall award; upon which the defendant rejoins, averring the like on his side: which is joining issue upon the facts in dispute. To prove which facts is the next concern.

This is done by examination of witnesses, and taking their *depositions* in writing, according to the manner of civil law. And for that purpose *interrogatories* are framed, or questions in writing; which, and which only, are to be proposed to, and asked of, the witnesses in the cause. These interrogatories must be short and pertinent: not leading ones; (as, "did not you see this? or, did not you hear that?") for if they be such, the depositions taken thereof will be suppressed and not suffered to be read. For the purposes of

examining witnesses in or near London, there is an examiner's office appointed; but for such as live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them, to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to examine them there upon their own oaths, and (if foreigners) upon the oaths of skilful interpreters. And it hath been established that the depositions of a heathen who believes in the Supreme Being, taken by commission in the most solemn manner according to the custom of his own country, may be read in evidence.

The commissioners are sworn to take the examinations truly and without partiality, and not to divulge them until published in the court of chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of *subpoena*, as in the courts of common law, to appear and submit to examination. And when their depositions are taken, they are transmitted to the court with the same care that the answer of a defendant is sent.

If witnesses to a disputable fact are old and infirm, it is very usual to file a bill to perpetuate the testimony of those witnesses, although no suit is depending; for, it may be, a man's antagonist only waits for the death of some of them to begin his suit. This is most frequent when lands are devised by will away from the heir at law, and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will *verbatim* therein, suggesting that the heir is inclined to dispute its validity: and then, the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will; after which the cause is at an end, without proceeding to any decree, no relief being prayed by the bill: but the heir is entitled to his costs, even though he contests the will. This is what is usually meant by proving a will in chancery.

When all the witnesses are examined, then, and not before, the depositions may be published, by a rule to pass publication; after which they are open for the inspection of all the parties, and copies may be taken of them. The cause is then ripe to be set down for hearing, which may be done at the procurement of the plaintiff, or defendant, before either the lord chancellor or the master of the rolls, according to the discretion of the clerk in court, regulated by the nature and importance of the suit, and the arrear of causes depending before each of them respectively. Concerning the au-

thority of the master of the rolls, to hear and determine causes, and his general power in the court of chancery, there were (not many years since) divers questions, and disputes very warmly agitated; to quiet which, it was declared by statute 3 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, and so as they shall not be enrolled, till the same are signed by his lordship. Either party may be *subpoenaed* to hear judgment on the day so fixed for the hearing; and then, if the plaintiff does not attend, his bill is dismissed with costs; or, if the defendant makes default, a decree will be made against him, which will be final, unless he pays the plaintiff's cost of attendance and shows good cause to the contrary on a day appointed by the court. A plaintiff's bill may also at any time be dismissed for want of prosecution, which is in the nature of a non-suit at law, if he suffers three terms to elapse without moving forward in the cause.

When there are cross-causes, on a cross-bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of them. The method of hearing causes in court is usually this. The parties on both sides appearing by their counsel, the plaintiff's bill is first opened, or briefly abridged, and the defendant's answer also, by the junior counsel on each side; after which the plaintiff's leading counsel states the case and the matters in issue, and the points of equity arising therefrom; and then such depositions as are called for by the plaintiff are read by one of the six clerks, and the plaintiff may also read such part of the defendant's answer as he thinks material or convenient: and after this the rest of the counsel for the plaintiff make their observations and arguments. Then the defendant's counsel go through the same process for him, except that they may not read any part of his answer; and the counsel for the plaintiff are heard in reply. When all are heard, the court pronounces the *decree*, adjusting every point in debate according to equity and good conscience; which decree being usually very long, the minutes of it are taken down, and read openly in court by the registrar. The matter of costs to be given to either party is not here held to be a point of right by merely discretionary (by the statute 17 Ric. II. c. 6) according to the circumstances of the case, as they appear more or less favorable to the party

vanquished. And yet the statute 15 Hen. VI. c. 4 seems expressly to direct, that as well damages as costs shall be given to the defendant, if wrongfully vexed in this court.

The chancellor's decree is either *interlocutory* or *final*. It very seldom happens that the first decree can be final, or conclude the cause; for, if any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial by written depositions, that it will not bind the parties thereby, but usually directs the matter to be tried by jury; especially such important facts as the validity of a will, or whether A. is the heir at law of B., or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But, as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of king's bench, or at the assizes, upon a *feigned issue*. For (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is brought, wherein the plaintiff by a fiction declares that he laid a wager of 5 *l* with the defendant that A. was an heir at law to B.; and then avers that he is so; and therefore demands the 5 *l*. The defendant admits the feigned wager, but avers that A. is not the heir to B.; and thereupon that issue is joined, which is directed out of chancery to be tried; and thus the verdict of the jurors at law determines the fact in the court of equity. These feigned issues seem borrowed from the *sponsio judicialis* of the Romans; and are also frequently used in the courts of law, by consent of the parties, to determine some disputed rights without the formality of pleading, and thereby to save much time and expense in the decision of a cause.

So, likewise, if a question of mere law arises in the course of a cause, as whether by the words of a will an estate for life or in tail is created, or whether a future interest devised by a testator shall operate as a remainder or any executory devise, it is the practice of this court to refer it to the opinion of the judges of the court of king's bench or common pleas, upon a case stated for that purpose, wherein all the material facts are admitted, and the point of law is submitted to their decision; who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. And upon such certificate the decree is usually founded.

Another thing also retards the completion of decrees. Frequently long accounts are to be settled, encumbrances and debts to be inquired into, and a hundred little facts to be cleared up, before a de-

cree can do full and sufficient justice. These matters are always, by the decree on the first hearing, referred to a master in chancery to examine, which examinations frequently last for years; and then he is to report the fact, as it appears to him, to the court. This report may be excepted to, disproved, and overruled; or otherwise is confirmed, and made absolute, by order of the court.

When all issues are tried and settled, and all references to the master ended, the cause is again brought to hearing upon the matters of equity reserved, and a final decree is made; the performance of which is enforced (if necessary) by commitment of the person, or sequestration of the party's estate. And if by this decree either party thinks himself aggrieved, he may petition the chancellor for a *rehearing*; whether it was heard before his lordship, or any of the judges sitting for him, or before the master of the rolls. For, whoever may have heard the cause, it is the chancellor's decree, and must be signed by him before it is enrolled; which is done of course unless a rehearing is desired. Every petition for a rehearing must be signed by two counsel of character, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to be reheard. And upon the rehearing, all the evidence taken in the cause, whether read before or not, is now admitted to be read; because it is the decree of the chancellor himself, who now only sits to hear reasons why it should not be enrolled and perfected; at which time all omissions of either evidence or argument may be supplied. But, after the decree is once signed and enrolled, it cannot be reheard or rectified but by bill of review, or by appeal to the house of lords.

A bill of *review* may be had upon apparent error in judgment appearing on the face of the decree; or, by special leave of the court, upon oath made of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review.

An *appeal* to parliament, that is, to the house of lords, is the dernier resort of the subject who thinks himself aggrieved by an interlocutory order or final determination in this court; and it is effected by *petition* to the house of peers, and not by *writ of error*, as upon judgments at common law. This jurisdiction is said to have begun in 18 Jac., I., and it is certain that the first petition, which

appears in the records of parliament, was preferred in that year; and that the first which was heard and determined (though the name of appeal was then a novelty) was presented a few months after; both levelled against the lord chancellor Bacon for corruption and other misbehavior. It was afterwards warmly controverted by the house of commons in the reign of Charles the Second. But this dispute is now at rest: it being obvious to the reason of all mankind, that, when the courts of equity became principal tribunals for deciding causes of property, a revision of their decrees (by way of appeal) became equally necessary as a writ of error from the judgment of a court of law. And, upon the same principle, from decrees of the chancellor relating to the commissioners for the dissolution of chauntries, etc., under the statute 37 Hen. VIII. c. 4, (as well as for charitable uses under the statute 43 Eliz. c. 4.) an appeal to the king in parliament was always unquestionably allowed. But no new evidence is admitted in the house of lords upon any account; this being a distinct jurisdiction: which differs it very considerably from those instances, wherein the same jurisdiction revises and corrects its own acts, as in rehearings and bills of review. For it is a practice unknown to our law, (though constantly followed in the spiritual courts,) when a superior court is reviewing the sentence of an inferior, to examine the justice of the former decree by evidence that was never produced below. And thus much for the general method of proceeding in the courts of equity.



VIII.

THE ELEMENTS OF PUBLIC LAW.

BLACKSTONE, COMMENTARIES, I, 241.

I. And, first, the law ascribes to the king the attribute of sovereignty, or pre-eminence. . . . Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be in vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: but who, says Finch, shall command the king? Hence it is likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more; and, if such a power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

Are then, it may be asked, the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries, or public oppressions? To this we may answer, that the law has provided a remedy in both cases.

And, first, as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion. . . . For the end of such action is not to compel the prince to observe the contract, but to persuade him. And, as to personal wrongs, it is well observed by Mr. Locke, "the harm which the sovereign can do in his own person not being likely to happen often, nor to extend itself far; nor being able by his single strength to subvert the laws, nor oppress the body of the people, (should any prince have so much weakness and ill nature as to endeavor to do it,) the inconveniency therefore of some particular mischiefs that may happen sometimes, when a

heady prince comes to the throne, are well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being thus set out of the reach of danger.

Next, as to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law hath also assigned a remedy. For, as the king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the king himself can do no wrong: since it would be a great weakness and absurdity in any system of positive law to define any possible wrong, without any possible redress.

For, as to such public oppressions as tend to dissolve the constitution and subvert the fundamentals of government, they are cases which the law will not, out of decency, suppose; being incapable of distrusting those whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable. For, wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of sovereignty. If therefore, for example, the two houses of parliament, or either of them, had avowedly a right to animadvert on the king, or each other, or if the king had a right to animadvert on either of the houses, that branch of the legislature, so subject to animadversion, would instantly cease to be part of the supreme power; the balance of the constitution would be overturned, and that branch or branches, in which this jurisdiction resided, would be completely sovereign. The supposition of law therefore is, that neither the king nor either house of parliament, collectively taken, is capable of doing any wrong: since in such cases the law feels itself incapable of furnishing any adequate remedy. For which reason all oppression which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any stated rule, or express legal provision; but if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies. . . .

II. Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute perfection. The king

can do no wrong: which ancient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs, is not to be imputed to the king, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to any injury: it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

The king, moreover, is not only incapable of doing wrong, but even of thinking wrong: he can never mean to do an improper thing: in him is no folly or weakness. And therefore, if the crown should be induced to grant any franchise or privilege to a subject contrary to reason, or in any wise prejudicial to the commonwealth, or a private person, the law will not suppose the king to have meant either an unwise or an injurious action, but declares that the king was deceived in his grant; and thereupon such grant is rendered void, merely upon the foundation of fraud and deception, either by or upon those agents whom the crown has thought proper to employ. For the law will not cast an imputation on that magistrate whom it intrusts with the executive power, as if he was capable of intentionally disregarding his trust; but attributes to mere imposition (to which the most perfect of sublunary beings must still continue liable) those little inadvertencies, which, if charged on the will of the prince, might lessen him in the eyes of his subjects. . . .

In further pursuance of this principle, the law also determines that in the king can be no negligence, or laches, and therefore no delay will bar his right. *Nullum tempus occurrit regi* has been the standing maxim upon all occasions; for the law intends that the king is always busied for the public good, and therefore has no leisure to assert his right within the times limited to subjects. In the king also can be no stain or corruption of blood; for, if the heir to the crown were attainted of treason or felony, and afterwards the crown should descend to him, this would purge the attainer *ipso facto*. And therefore when Henry VII., who, as earl of Richmond, stood attainted, came to the crown, it was not thought necessary to pass an act of parliament to reverse this attainder; because, as lord Bacon, in his history of that prince, informs us, it

was agreed that the assumption of the crown had at once purged all attainders. Neither can the king in judgment of law, as king, ever be a minor or under age; and therefore his royal grants and assents to acts of parliament are good, though he has not in his natural capacity attained the legal age of twenty-one. By a statute, indeed, 28 Hen. VIII. c. 17, power was given to future kings to rescind and revoke all acts of parliament that should be made while they were under the age of twenty-four; but this was repealed by the statute 1 Edw. VI. c. 11, so far as related to that prince; and both statutes are declared to be determined by 24 Geo. II. c. 24. It hath also been usually thought prudent, when the heir-apparent hath been very young, to appoint a protector, guardian, or regent, for a limited time; but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority; therefore he hath no legal guardian.

III. A third attribute of the king's majesty is his perpetuity. The law ascribes to him in his political capacity an absolute immortality. The king never dies. Henry, Edward, or George may die; but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir, who is, *eo instanti*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death that his natural dissolution is generally called his demise; *demissio regis, vel coronae*: an expression which signifies merely a transfer of property; for, as is observed in Plowden, when we say the demise of the crown, we mean only that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. Thus, too, when Edward the Fourth, in the tenth year of his reign, was driven from his throne for a few months by the house of Lancaster, this temporary transfer of his dignity was denominated his demise; and all process was held to be discontinued as upon a natural death of the king.

To understand the principles of public law in our system, one must know the doctrines of the common law with reference to the king and his relation to the commonwealth and to the law. The State, with us, occupies the position held by the king at common law.

The common law holds that the king :

- (1) Is above all men but rules under God and the law.
- (2) Is the fountain of justice.
- (3) Is the fountain of honor.
- (4) Is *parens patriae*.
- (5) Is the paramount lord of the soil.
- (6) Is representative of the commonwealth in its corporate capacity.

1. The king was above all men, but ruled *sub deo et lege*, under God and the law. That is, when he exercised the powers accorded him by law, he was beyond all legal human control; only his sense of right and justice or the fear of revolt could restrain him. Should he transcend the legal limits of his power, he could not be dealt with by the courts in the ordinary manner. His person was beyond reach of any process, and no judgments of courts could run against him. The courts were his courts, and had no power to sit in judgment upon him. But while the courts could not judge the king, they could judge the legal validity of his acts. When he acted outside of the powers accorded him by law and beyond the scope of his royal authority, his acts had no legal validity, and whenever they came in question in the course of orderly litigation between individuals, the courts would pass upon their legal validity, and, if they were invalid, would refuse to give effect to them. This is a part of the doctrine of the supremacy of the law, which is fundamental in our common-law system.

This doctrine is a part of the common law in America. The people of the United States and the peoples of the several States, in respect of the subjects committed to or reserved by them respectively, have succeeded to the position of the English Crown. When they, or their legislative or executive representatives, act as such within the limits appointed by the constitutions, they are not legally accountable anywhere or to anyone. Nor may the State, the People, or the Legislature, as such, be tried by the courts or brought before them. But if and whenever people or legislature transgress and act beyond or outside of the legally appointed limits, their acts are simply void, and the courts will refuse them any effect whatever, should such acts be brought before them in the course of orderly litigation between individuals. For example, a petition or command of all the electors of the State not to enforce a law would be legally of no force. The court would be bound to enforce it until it was repealed or superseded in the regular way.

But while the validity of the king's acts could be passed on by the courts, it could be done only in controversies between individuals in which such acts were involved incidentally. The courts had no jurisdiction or legal control over the king. In strict theory, they merely represented him. Hence it was a maxim of the common law that the king could do no wrong; that is, he could do no legal wrong, could commit no actionable injury. If his act injured the

subject, the latter must obtain relief, not redress, not of right, but of grace, not by action but by petition.

BLACKSTONE, COMMENTARIES, III, 254.

That the king can do no wrong, is a necessary and fundamental principle of the English constitution; meaning only as has formerly been observed, that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he, but his ministers, accountable for it to the people; and, secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice. Whenever therefore it happens that, by misinformation, or inadvertance, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign, (for who shall command the king?) yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes to *know* of any injury, and to *redress* it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

The distance between the sovereign and his subjects is such, that it rarely can happen that any *personal* injury can immediately and directly proceed from the prince to any private man; and, as it can so seldom happen, the law in decency supposes that it never will or can happen at all; without infringing the dignity and destroying the sovereignty of the royal person, by setting up some superior power with authority to call him to account. The inconveniency therefore of a mischief that is barely possible is (as Mr. Locke has observed) well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being set out of the reach of coercion. But injuries to the rights of *property* can scarcely be committed by the crown without the intervention of its officers; for, whom the law in matters of right entertains no respect or delicacy, but furnishes various methods of detecting the errors or misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice.

The common-law methods of obtaining possession or restitution from the crown, of either real or personal property, are, 1. By *petition de droit*, or petition of right: which is said to owe its original

to king Edward the First. 2. By *monstrans de droit*, *manifestation de droit*, manifestation or plea of right: both of which may be preferred or prosecuted either in the chancery or exchequer. The former is of use, where the king is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself; in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate; and then, upon this answer being endorsed or underwritten by the king, *soit droit fait al partie*, (let right be done to the party,) a commission shall issue to inquire of the truth of this suggestion: after the return of which, the king's attorney is at liberty to plead in bar; and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. Thus, if a disseisor of lands which are holden of the crown dies seised without any heir, whereby the king is *prima facie* entitled to the lands, and the possession is cast on him either by inquest of office, or by act of law without any office found; now the disseisee shall have remedy by petition of right, suggesting the title of the crown, and his own superior right before the disseisin made. But where the right of the party, as well as the right of the crown, appears upon record, there the party shall have *monstrans de droit*, which is putting in a claim of right grounded on facts already acknowledged and established, and praying the judgment of the court, whether upon those facts the king or the subject hath the right. As if, in the case before supposed, the whole special matter is found by an inquest of office, (as well the disseisin, as the dying without an heir,) the party grieved shall have *monstrans de droit* at the common law. But as this seldom happens, and the remedy by *petition* was extremely tedious and expensive, that by *monstrans* was much enlarged and rendered almost universal by several statutes, particularly 36 Edw. III. c. 13, and 2 & 3 Edw. VI. c. 8, which also allowed inquisitions of office to be traversed or denied wherever the right of a subject is concerned, except in a very few cases. These proceedings are had in the petty-bag office in the court of chancery; and, if upon either of them the right be determined against the crown, the judgment is, *quod manus domini regis amoveantur et possessio restitatur petenti, salvo jure domini regis*; which last clause is always added to judgment against the king, to whom no *laches* is ever imputed, and whose right (till some late statutes) was never defeated by any

limitation or length of time. And by such judgment the crown is instantly out of possession; so that there needs not the indecent interposition of his own officers to transfer the seisin from the king to the party aggrieved.

II. The methods of redressing such injuries as the crown may receive from the subject are,—

I. By such usual common-law actions as are consistent with the royal prerogative and dignity. As therefore the king, by reason of his legal ubiquity, cannot be disseised or dispossessed of any real property which is once vested in him, he can maintain no action which supposes a dispossession of the plaintiff; such as an assize or an ejectment; but he may bring a *quare impedit*, which always supposes the complainant to be seised or possessed of the advowson; and he may prosecute this writ, like every other by him brought, as well in the king's bench as the common pleas, or in whatever court he pleases. So, too, he may bring an action of trespass for taking away his goods; but such actions are not usual (though in strictness maintainable) for breaking his close, or other injury done upon his soil or possession.

With us, the State occupies the same position. It can do no legal wrong; that is, it can not be proceeded against in the courts for anything that it does. Where it attempts to act outside of its constitutional powers in violation of private rights, the citizens injured may proceed against the individuals assuming to act under the State's authority, and the circumstance that the illegal action was had in the name of the State will afford them no protection. But the State itself can not be sued or held legally liable. Again, the State allows claims against itself and even pays its debts of grace only, not by legal compulsion.

2. The king was the fountain of justice, that is to say, he alone, or those who sat by his authority, could redress injuries and administer justice. Persons who had been injured or wronged must apply to his courts, not engage in private war or endeavor to right their own wrongs by self-help. With us, the State is the fountain of justice. Except in the few and narrowly limited cases where the common law allows self help, the courts set up and maintained by the State must be applied to for redress of injuries. Moreover, all contracts and agreements that have the effect of ousting the courts of the State of their jurisdiction are held contrary to public policy and void.

3. The king was the fountain of honor, that is, all titles of nobility and the like proceeded from him. We are not concerned with this attribute.

4. The king was *parens patriae*, father of his country,—that is, he was the guardian of public interests of all kinds, and hence his courts of law and equity had a general superintendence of all manner of matters where the public rights might be jeopardized. Chief of these are:

(a) Superintendence and administration of charities and charitable trusts. This was done by the Chancellor, as keeper of the king's conscience, and is one of the functions of courts of equity.

(b) Prevention of encroachment upon or appropriation or misuse of natural advantages open to the whole community, or things of which the property is in no one and the use is in all,—e. g., the seashore, navigable waters, public roads. Such encroachment, appropriation, or misuse constituted a nuisance for which an indictment would lie, or an information in the court of chancery by the king's attorney general to procure its abatement.

(c) Holding public officers to their legal duties. This was done by the "prerogative writs," issued from the court of king's bench,—e. g., *Mandamus*, *Prohibition*.

(d) Granting and regulating franchises, or rights to exercise some public employment, to make use of public agencies, or to have a legal personality where there is no natural personality. The king granted these, and his courts regulated them by the writ of *Quo Warranto*.

Subject to constitutional provisions, all of these powers belong to the State, and are exercised by its courts.

5. The king was paramount lord of the soil. In consequence, we get two important doctrines:

(a) Eminent domain. The power of the king or State, as paramount lord, to use or take all private property for the public use, whenever the public safety or the public good so require, on paying just compensation.

(b) Escheat. As paramount lord, the king or State succeeds whenever the ownership of property becomes vacant.

6. The king was the representative of the commonwealth in its corporate capacity. Hence he had:

(a) Perpetual succession.

(b) Exemption from statutes of limitation. The maxim of the common law is *nullum tempus occurrit regi*.

(c) Immunity from the doctrine of courts of equity as to laches. The old books said the king was always busied for the public good, and therefore had no leisure to assert his right within the times limited to subjects. To-day, we say that the State, that is the public at large, ought not to be prejudiced by the negligence of its officers.

KING OF PRUSSIA v. KUEPPER, Supreme Court of Missouri, 1856 (22 Mo. 550).

Scott, Judge, delivered the opinion of the court:

This case comes up on a demurrer, and raises the question whether a foreign sovereign can sue in our courts. It seems to be now well settled in England that a foreign sovereign can sue in her courts both at law and in equity. In the case of *Hullet & Co. v. The King of Spain*, Lord Redesdale said: "I have no doubt but a foreign sovereign may sue in this country, otherwise there would be a right without a remedy. He sues here on behalf of his subjects, and if foreign sovereigns were not allowed to do that, the refusal might be a cause of war." (1 Dow. & Clark, 175; *The King of Spain v. Machado*, 3 Con. Eng. Chan. 645; 1 Clark & Finnelly, 333; *The Columbian Government v. Rothschilds*, 2 Con. Eng. Chan. 48.)

Kings have been allowed to sue in the United States. In the case of the *King of Spain v. Oliver*, (1 Pet. C. C. R. 276), the suit was entertained without question as to the right of a foreign sovereign to sue. So the case of the *Republic of Mexico v. Arrangois and others* (11 How. Prac. Rep. 1) was entertained by the courts of New York. In our courts, a writ in the name of the state of Indiana was brought and passed through all of them, without any question as to the right to do so. (*Tagart v. State of Indiana*, 15 Mo. 209).

If the subjects of foreign governments will contract obligations or affect themselves with liabilities to their kings or princes, and afterwards migrate to the United States, there is nothing in the nature of our institutions which shields them from their just responsibilities. While our government grants the rights and privileges of citizenship to all foreigners who are naturalized under our laws, there is neither policy nor justice in screening them from the civil liabilities which they have contracted to the government to which they were once subject. Our tribunals afford no assistance in the enforcement of the penal code of foreign nations, nor would they aid despotic rulers in the exercise of an arbitrary power, in making special and retrospective laws affecting foreigners residing here, who were once their subjects. But when laws have been made abroad, and debts have been contracted under those laws, there is no reason for refusing our assistance in their collection. Though foreign laws may be enacted by a power, and in a way inconsistent with the spirit of our institutions, that is no reason why they should not be enforced against those who have incurred responsibilities in respect of them.

Foreign nations have the same right to determine the form of government most conducive to their happiness that we have, and to deny the validity of their laws because they have not been made in a manner conformable to our notions of government, would be to destroy all comity among nations and introduce endless wars and quarrels. The averments in the petition show that by the laws of Prussia the defendant's intestate was indebted to his sovereign, and he should be made to answer for it.

It was maintained that this suit should have been brought in the courts of the United States, as the constitution of the United States expressly provides "that the judicial power shall extend to all cases between a state or the citizens thereof and foreign states, citizens or subjects."

The state courts, undoubtedly before the existence of the federal government had cognizance of causes in which foreign states were plaintiffs. The jurisdiction remains unless it has been taken away by the constitution and laws of the United States. The grant of judicial powers by the constitution, in some cases is exclusive; in others, it is concurrent at the will of Congress; that is, congress may make it exclusive or concurrent as it seems best. In cases in which the state courts had cognizance before the adoption of the constitution of the United States, that jurisdiction remains unless it is taken away. Congress has conformed its action to this principle, and has suffered a portion of the judicial powers of the United States to be exercised by the state courts. (1 Kent. 398; Story's Com. § 1784.) The jurisdiction in cases of the character under consideration, has not been exclusively vested in the federal courts; hence the state courts may still exercise jurisdiction in all such cases.

With the concurrence of the other judges, the judgment will be reversed and the cause remanded.

THE SAPPHIRE, Supreme Court of the United States, 1871 (11 Wall. 164).

Mr. Justice Bradley delivered the opinion of the Court:

This is an appeal from the Circuit Court of the United States for the District of California. It is a case of collision between the American ship Sapphire and the French transport Euryale, which took place in the harbor of San Francisco on the morning of December 22, 1867, in which the Euryale was considerably damaged. A libel was filed in the district court in the name of the emperor Napoleon III as owner of the Euryale against the Sapphire. The

claimants filed an answer, depositions were taken, and the court decreed in favor of the libelant and awarded him \$15,000, the total amount claimed. The claimants appealed to the circuit court, which affirmed the decree. They then appealed to this court.

The first question raised is as to the right of the French Emperor to sue in our courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our own courts. To deny this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the third circuit by Justice Washington and Judge Peters in 1810. 2 Wash. (C. C.) 431. The constitution expressly extends the judicial power to controversies between a state or citizens thereof, and foreign states, citizens or subjects, without reference to the subject-matter of the controversy. Our own government has largely availed itself of the like privilege to bring suits in the English courts in cases growing out of our late civil war. Twelve or more of such suits are enumerated in the brief of the appellee, brought within the last five years in the English Law, Chancery and Admiralty Courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into court by suit.

The next question is whether the suit has become abated by recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the Euryale, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning emperor or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced, and receive the fruits of it. A deed to or treaty with a sovereign, as such, inures to his successors in the government of a country. If

a substitution of names is necessary or proper, it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the real and substantial ownership of the *Euryale* has occurred by the recent devolution of the sovereign power. The vessel had always belonged and still belongs to the French nation.

If a special case should arise in which it should be shown that injustice to the other party would ensue from a continuance of the proceedings after the death or deposition of a sovereign, the court in the exercise of its discretionary power, would take such order as the exigency might require to prevent such a result.

DELAFIELD *v.* STATE OF ILLINOIS, Court of Errors of New York, 1841 (2 Hill, 160).

Bronson, J.: It is rarely, if ever, too late to object to the jurisdiction of a court, where the defect of power to hear and determine appears on the face of the proceedings. And although the question of jurisdiction was not made before the Chancellor, it may, I think, be started here for the first time. Where, as in this case, the objection, if valid, is of such a character that it could not have been obviated by an amendment, had it been made at an earlier stage of the proceedings.

Two objections are urged going to the power of the Court of Chancery to take cognizance of the cause. It is said: 1. That at the common law a state cannot sue; and 2. That it cannot sue in the courts of another state.

Whatever difficulty there may be when a foreign government comes into our courts, I cannot entertain a doubt that one of the states of this union may sue in its political or corporate capacity. In that capacity it may contract and acquire rights; and there can be no reason why, like every other legal being, it should not be allowed to sue for the redress of wrongs. It is a matter of every day observation that such suits have been brought and maintained; and I am not aware that any one has ever thought before of making a question about it. I see no difference whether the state sues in its own courts or in those of another jurisdiction. Although the right of the people of this state to sue is recognized by the laws, there is, I believe, no direct provision that such suits may be maintained. The right depends on the general principle that every person, whether natural or artificial, capable of making a contract or

suffering a wrong, may have an action to enforce and to redress the other.

This is a suit by a state against a citizen of another state; and the appellant insists that the suit might have been brought in the supreme court of the U. S., and that the jurisdiction of that court in cases of this character, is exclusive. Const. U. S. art. 3, 1, 2. If this argument is well founded, the court of chancery had no jurisdiction, and the decree is either utterly void, or should be reversed for error.

Prior to the adoption of the federal constitution, a state might sue, but could not be sued; and there may be some reason for supposing that states were mentioned in the article relating to the judicial power of the U. S., for the purpose of providing a forum in which they might be impleaded as defendants; and that the jurisdiction of the federal courts does not extend to cases in which the suit was prosecuted by a state, except in the single case where the parties on both sides are states. But it is unnecessary to consider that question.

Assuming that the counsel were right in saying that the suit might have been brought in the Supreme Court of the U. S., the question then is, whether the jurisdiction of that court is exclusive; or whether the state courts may exercise concurrent powers.

[The learned judge then discusses a number of decisions of the Supreme Court of the United States, and concludes:]

From this brief review I think it clear that the federal judiciary has never asserted any principle which forbids our taking cognizance of a cause on the ground that a state is party plaintiff or complainant; and as an original question, I am unable to entertain a doubt concerning it.

WISCONSIN v. PELICAN INS. CO., Supreme Court of the United States, 1888 (127 U. S. 265).

Mr. Justice Gray, after stating the case, delivered the opinion of the court:

This action is brought upon a judgment recovered by the State of Wisconsin in one of her own courts against the Pelican Insurance Company, a Louisiana corporation, for penalties imposed by a statute of Wisconsin for not making returns to the insurance commissioner of the State as required by that statute. The leading

question argued at the bar is whether such an action is within the original jurisdiction of the court.

The ground on which the jurisdiction is invoked is not the nature of the cause, but the character of the parties, the plaintiff being one of the States of the Union, and the defendant a corporation of another of those States.

The Constitution of the United States, as originally established, ordains in art. 3, sec. 2 that the judicial power of the United States shall extend "to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects;" and that in all cases "in which a State shall be party" this court shall have original jurisdiction. The Eleventh Article of Amendment simply declares that "the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

By the Constitution, therefore, this court has original jurisdiction of suits brought by a State against citizens of another State, as well as of controversies between two States; and it is well settled that a corporation created by a State is a citizen of the State, within the meaning of those provisions of the Constitution and Statutes of the United States which define the jurisdiction of the federal courts. *Kansas Pac. R. Co. v. Atchison T. & S. F. R. Co.*, 112 U. S. 414; *Paul v. Virginia*, 8 Wall, 168, 178; *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. 518.

Yet, notwithstanding the comprehensive words of the Constitution, the mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another State or her citizens; and a consideration of the cases in which it has heretofore had occasion to pass upon the construction and effect of these provisions of the Constitution may throw light on the determination of the question before us.

As to "controversies between two or more States:" The most numerous class of which this court has entertained jurisdiction is that of controversies between two States as to the boundaries of their territory, such as were determined before the Revolution by the

King in council, and under the Articles of Confederation (while there was no national judiciary) by committees or commissioners appointed by Congress.

The books of reports contain but few other cases in which the aid of this court has been invoked in controversies between two States.

In *Fowler v. Linsey* and *Fowler v. Miller*, actions of ejectment were pending in the Circuit Court of the United States for the District of Connecticut between private citizens for lands over which the States of Connecticut and New York both claimed jurisdiction; and a writ of *certiorari* to remove those actions into this court as belonging exclusively to its jurisdiction was refused, because a State was neither nominally nor substantially a party to them. 3 Dall. 411. Upon a bill in equity afterwards filed in this court by the State of New York against the State of Connecticut to stay the actions of ejectment, this court refused the injunction prayed for, because the State of New York was not a party to them, and had no such interest in their decisions as would support the bill. *New York v. Connecticut*, 4 Dall. 1, 3.

This court has declined to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their governments. Thus, in *Kentucky v. Dennison*, 24 How. 66, where the State of Kentucky, by her governor, applied to this court in the exercise of its original jurisdiction for a writ of *mandamus* to the Governor of Ohio to compel him to surrender a fugitive from justice, this court, while holding that the case was a controversy between two States, decided that it had no authority to grant the writ. And in *New Hampshire v. Louisiana*, and *New York v. Louisiana*, 108 U. S. 76, it was adjudged that a State, to whom, pursuant to her statutes, some of her citizens holding bonds of another State had assigned them in order to enable her to sue on and collect them for the benefit of the assignors, could not maintain a suit against the other State in this court. See also *Cherokee Nation v. Georgia*, 5 Pet. 1, 20, 28, 51, 75.

In *South Carolina v. Georgia*, 93 U. S. 4, this court, speaking by Mr. Justice Strong, left the question open, whether "a State, when suing in this court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that

it will sustain some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court;" and dismissed the bill, because no unlawful obstruction of navigation was proved. p. 14.

As to "controversies between a State and the citizens of another State." The object of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens. *Federalist*, No. 80; Chief Justice Jay, in *Chisholm v. Georgia*, 2 Dall. 419, 475; Story, *Const.* 1638, 1682. The grant is of "judicial power," and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all.

By the law of England and of the United States, the penal laws of a country do not reach beyond its own territory, except when extended by express treaty or statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country. *Wheat. Internat. L.* 8th ed. §§ 113, 121.

Chief Justice Marshall stated the rule in the most condensed form, as an incontrovertible maxim: "The courts of no country execute the penal laws of another." *The Antelope*, 10 *Wheat.* 66, 123.

The only cases in which the courts of the United States have entertained suits by a foreign State have been to enforce demands of a strictly civil nature.

PEOPLE v. CITY OF ST. LOUIS, Supreme Court of Illinois, 1848 (5 *Gilman*, 351).

Opinion of the court by Caton, J.: The question of jurisdiction may be disposed of in a few words. Independent of any statutory provision, the State as a political corporation has a right to institute a suit in any of her courts, whether it be required by her pecuniary interests or the general public welfare demand it. If the subject of the suit be local, the suit must be commenced in the county of its locality, unless she is authorized by special statute to

commence it elsewhere. The subject of this suit is local, and the bill was properly filed in St. Clair county, where the alleged nuisance was about being erected. Whatever might have been said against the right of the court to bring the city of St. Louis before it as a party, that question is waived by the voluntary appearance and filing a demurrer to the merits of the bill. All the other parties were brought before the court in the mode pointed out by law.

HANS v. LOUISIANA, Supreme Court of the United States, 1890 (134 U. S. 1).

Bradley, J.: . . . The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between states as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Pennsylvania v. Lord Baltimore*, 1 Ves. Sr. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the articles of confederation, and were brought before the tribunal provided for that purpose in those Articles. 131 U. S. App. 1. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the states. Of other controversies between a state and another state or its citizens which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 288, 289, and cases there cited.

The suability of a state without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm v. Georgia*; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of states. *Osborn v. Bank of the United States*, 9 Wheat. 738; *Davis v. Gray*, 16 Wall., 203; *Board of Liquidation v. McComb*, 92 U. S. 531; *U. S. v. Lee*, 106 U. S., 196; *Poindexter v. Greenhow*, 109

U. S., 63; Virginia Coupon Cases, 114 U. S. 269. In all these cases the effort was to show, and the court held, that the suits were not against the state or the United States, but against the individuals; conceding that if they had been against either the state or the United States, they could not be maintained.

Mr. Webster stated the law with precision in his letter to Baring Bros. & Co. of October 16, 1839. 6 Webster's Works, 537. "The security for state loans" he said, "is the plighted faith of the state as a political community. It rests on the same basis as other contracts with established governments, the same basis, for example, as loans made by the United States, under the authority of Congress; that is to say, the good faith of the government making the loan, and its ability to fulfill its engagements."

In *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 321, Mr. Justice McLean, delivering the opinion of the court said: "What means of enforcing payment from the state had the holder of a bill of credit? It is said by the counsel for the plaintiffs, that he could have sued the State. But was a State liable to be sued? . . . No sovereign state is liable to be sued without her consent. Under the Articles of Confederation, a State could be sued only in cases of boundary. It is believed that there is no case where a suit has been brought, at any time, on bills of credit against the State; and it is certain that no suit could have been maintained on this ground prior to the constitution."

"It may be accepted as a point of departure unquestioned," said Mr. Justice Miller, in *Cunningham v. Macon*, and B. R. Co. 109 U. S., 446, 451, "that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the constitution."

Undoubtedly a state may be sued by its own consent, as was the case in *Curran v. Arkansas*, 15 How. 304, 309, and in *Clark v. Barnard*, 108 U. S. 436, 447. The suit in the former case was instituted by virtue of a state law which the legislature passed in conformity to the constitution of that state. But this court decided in *Beers v. Arkansas*, 61 U. S., 20 How. 527, that the state could repeal that law at any time: that it was not a contract within the terms of the constitution prohibiting the passage of state laws im-

pairing the obligation of a contract. In that case the law allowing the state to be sued was modified, pending certain suits against the State on its bonds, so as to require the bonds to be filed in court, which was objected to as an unconstitutional change of the law. Chief Justice Taney, delivering the opinion of the court, said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted; and may withdraw its consent whenever it may suppose that justice to the public requires it. . . . The prior law was not a contract. It was an ordinary Act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards if, upon experience, it was found that further provisions were necessary to protect the public interests; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the state, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this power the state violated no contract with the parties." The same doctrine was held in *Memphis & C. R. Co. v. Tennessee*, 101 U. S., 337, 339; *South & N. A. R. Co. v. Alabama*, 101 U. S. 832, and *Ex parte Ayers*, 123 U. S., 443, 505.

MICHIGAN STATE BANK v. HASTINGS, Supreme Court of Michigan, 1844, (1 Dougl. 225).

Whipple, J.: It is insisted that the state is the real party in interest, and that, for this reason, the court below had no jurisdiction of the case. The demurrer was sustained by the court below upon the sole ground that the state was, in fact, the party defendant: *Walk. Ch. 9*. And as the chancellor gave no opinion upon the several other points raised by the case, and which, it is under-

stood, were argued before him, it is fair to presume that he entertained a strong conviction of the correctness of his views upon this single question. This consideration alone has induced me to give to this point a very full and careful examination, the result of which has been the undoubting conviction, that, notwithstanding the state is directly interested in the event of this suit, yet this circumstance constituted no objection to the jurisdiction of the Court of Chancery, and that the demurrer cannot be sustained upon this ground.

The principle is well settled that, while a state may sue, it cannot be sued in its own courts, unless, indeed, it consents to submit itself to their jurisdiction. This is done in cases where the state claims something in opposition to a claim set up by an individual, and where the controversy depends upon the solution of legal principles involved in intricacy and doubt. These questions can be best determined by the judiciary; and an act of the legislature, conferring jurisdiction upon the courts in the particular case, is the usual mode by which the state consents to submit its rights to the judgment of the judiciary. The method, at common law, of obtaining possession or restitution from the crown, of real or personal property, is by what is termed a petition of right; and Blackstone states the general rule thus: "If any man has, in point of property, a just demand upon the king, he must petition him in his Court of Chancery, where his chancellor will administer right as matter of grace, though not upon compulsion:" 1 Bl. Com. 203. This is consonant to what is laid down by writers on natural and public law. Puffendorf says that, "a subject, so long as he continues a subject, hath no way to oblige his prince to give him his due where he refuses it; though no wise prince will ever refuse to stand to a lawful contract. And, if the prince gives the subject leave to enter an action against him upon such contract in his own court, the action itself proceeds rather upon natural equity, than upon the municipal laws. For the end of that action is, not to compel the prince to observe the contract, but to persuade him:" 2 Pet. Cond., 646. It is useless, however, to multiply authorities upon the question as to whether a state can be sued in its own courts. The only remedy for a party who has entered into a contract with a state, is by an appeal to the legislature, who, it is fair to presume, will, from motives of public duty, make provision for its full execution, and do ample justice to the party with whom it may have

contracted; or else refer the case to the decision and judgment of the judiciary, by a special legislative enactment.

The real question for us to determine is, what is to be understood by the rule, admitted by both parties to be well established, that a state cannot be sued in its own courts, or, in other words, that a suit cannot be instituted against a state in its own courts. On the part of the defendants it is contended, that although the state is not, and could not have been made a party to the record, yet the bill, on its face, shows that the state is the party in interest; and this being the case, the court can no more take jurisdiction, than it could have done, had the state been made a party defendant to the bill, and appeared in that character upon the record. On the other hand, it is contended on the part of the complainants, that in cases where jurisdiction depends upon the party, it is the party named in the record; and that the court will not, upon a question of jurisdiction, stop to inquire as to the interest of third persons, not named in the record, and who may be affected by the judgment or decree.

Can it be said that a person is sued, or that a suit has been instituted against a person, when such person is not named as a party defendant in the proceedings in a cause, and does not appear in that character upon the record? I apprehend not. Can a person, in a suit at law, be considered as a party defendant, unless his name appears as such in the writ, declaration, and other pleadings filed in the orderly and regular course prescribed by law for conducting suits, and the practice of courts? He certainly cannot. Can a person be considered as a party defendant in a suit in chancery, unless he is made such party in the bill, and in the process by which defendants are legally brought into court? I think not. I have in vain searched for a case in the English books, where a person has been regarded as a party to a suit, who is not made one by the proceedings in the case, and does not appear as a party in the record. The record in all cases is to determine who are parties to a case. In this case nothing appears on the record to show that the state is, in a legal and technical sense, a party defendant. But, it is said that the interest of the present defendants is merely nominal, and that the state is the real party in interest, and of consequence the real party to the record. The determination of this question must depend upon the facts stated in the bill, and the law arising upon those facts. It may be that this assumption of

counsel is not warranted by the law and the facts. It may turn out, that, in point of law, the state are not exclusively interested in the case; that they have no rightful interest in the subject matter of this suit; and that the present defendants are not merely nominal, but real parties in interest. But, before entering upon an extended examination of these questions, let it be assumed that the state has a direct legal interest in the subject matter of the suit, and of course in its result. Does it necessarily follow that the court below had no jurisdiction of the case? The act of 17th February, 1842 (S. L. 1842, p. 110), provides that the trustees therein named, should, in behalf of the state, take charge of the assets assigned by the Michigan State Bank, with power to lease, sell, or convey the same; and to pay into the treasury the moneys they may collect, to be used for the redemption of state scrip. The defendants, it is alleged in the bill, have now in their possession a large amount of the assets so assigned, and assume to hold and control the same by virtue of the act aforesaid. The right of the defendants, therefore, to hold, control, and dispose of the assets in question, is based upon that act. It is fair to presume, then, that the defendants will carry into effect its provisions; indeed, it is charged in the bill, that they have converted into money a large portion of the assets, and are disposing of the same from time to time. Now, suppose that the act under which the defendants claim the right to hold these assets, is nugatory and void. It would follow, as a necessary legal inference, that their possession is tortious and their acts void. Suppose, also, that it should appear that the state, at the time the act referred to was passed, had, in point of law, no interest or property in those assets. Would it be contended, under such a state of things, that the preventive justice of the country could not be invoked by the complainants, to stay the proceedings of the defendants, under the other averments contained in the bill? It could not be contended, although the state were not a party to the record. The state need not be made a party to the record, for the reason that it would not, in the supposed case, have any legal interest in the subject matter of the suit; but, if a legal interest did actually exist, it could not be made a party, for the reason that a state cannot be sued. But shall it be said that there is no power to stay the arm of a state officer, acting under the authority of a law which is void? Must a party against whom the blow is aimed, await calmly until that blow is actually struck, and then seek a remedy,

when that remedy would be utterly inefficient? Not so is the law. Upon a case made by a bill, showing the entire want of authority on the part of an officer to do an act, which act, when actually done, would leave the injured party remediless, a court of equity would grant an injunction to ward off the blow, although the state might be directly interested in having the act done. To illustrate my views upon this point: the state claims title to a tract of land, rendered valuable, chiefly in consequence of the timber growing on it; suppose the state were to put the land in possession of an agent, with instructions to cut down the timber, and appropriate it to the uses designated by the state. Suppose one of its citizens, claiming title to the land under a grant from the state, should file his bill, showing himself the legal owner of the land, under a title derived directly from the state, and charging upon the agent of the state thus engaged under its authority, acts which amount to waste. Would a court of chancery refuse its interposition, because the defendants, who were committing the wrong and destroying the inheritance, were acting under the authority of the state, and because the state, which has an interest in the case, is not and could not be made a party? I think not. But suppose, after the timber has been actually cut and severed from the freehold, the claimant should bring replevin or detinue against the agent of the state, who was in actual possession of the timber. Would a court of law dismiss the cause for want of jurisdiction, upon proof of the fact that the defendant was acting under the authority of the state, and that the timber was the property of the state, that the state was directly interested in the event of the suit? I apprehend not, and that in this, as in other cases, the court would impose upon the defendant the necessity of establishing his defense by evidence. Again: Suppose that instead of treating the agent as a tortfeasor, the claimant would waive the tort and bring assumpsit for money held by him and arising from the sale of the timber, under the authority of the state. Would a court of law turn the plaintiff out of court because the state claimed the money? I apprehend not. I might multiply these illustrations indefinitely, but will content myself with one or two others, which are familiar to our courts, and of frequent occurrence. Suppose the state, having obtained a judgment against A, levies an execution, founded on the judgment, upon property owned by B; the officer making the levy refuses to recognize the claim of B, who thereupon brings replevin for the property; the

officer appears and justifies under the judgment and execution; but these show that the state is the real party in interest; would the court, for this reason, assume that they had no jurisdiction of the cause? I take it not. They would say to the officer that his process commanded him to take the property of the judgment debtor, and not of a stranger, and that his acts were void. An individual imports goods from a foreign country, which the collector of a port claims are liable to duty; this is denied by the importer. In order to obtain possession of the goods, however, he pays to the collector the amount of duty demanded, protesting against its validity; an action is brought by the importer against the collector, to recover back the money thus illegally demanded by the collector, and by him paid. It is quite clear, that, in such a case, the real parties in interest are the importer and the United States; and yet the courts are in the daily habit of entertaining jurisdiction in such cases. The illustration is a very striking one in favor of the position, that it is the party to the record, and not the interest of strangers to that record in the subject matter of the suit, which determines the question of jurisdiction.

ORLEANS NAVIGATION CO. v. SCHOONER AMELIA, Supreme Court of Louisiana, 1820 (7 Mart. 590).

Martin, Judge: The plaintiffs have seized, and pray for the sale of, a vessel of the United States, to obtain payment of three hundred and odd dollars, which they claim for toll, which accrued on her passage up and down the canal Carondelet. The attorney of the United States claims a restoration of her, and this, among other grounds, that the United States are not suable *in personam* nor *in rem*. The court of the First District has given judgment for the plaintiffs, and the United States have appealed.

That the plaintiffs have a right to a compensation, if the United States have made use of a canal dug and kept in repair at the exclusive expense of the former, can, perhaps, no more be doubted than that the sailors employed in the vessel are entitled to a compensation for their services. If she was the property of any other person, natural or politic, but the sovereign, the Amelia could be seized and sold, or her owner sued, for the payment of the claim of her sailors or those of the company through whose canal she has passed. Yet the sailors of a vessel of the United States cannot obtain their wages by a suit *in personam* or *in rem* in the ordinary courts of justice. The reason is, that these tribunals are

established to coerce private persons, whether citizens or aliens, but not to decide on demands against the sovereign, who has appointed other officers to adjust and discharge claims against him. If, therefore, the plaintiffs have any demand against the United States, they mistook their remedy.

After the seizure, the officers of the United States might come into court to demand the restoration of public property illegally seized, without thereby giving jurisdiction of the claim against the United States. This view of the subject renders an examination of the other points useless.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed and that the schooner *Amelia* be restored to the officers of the United States, and that the plaintiffs pay costs in both courts.

BRIGGS v. LIGHT BOATS, Supreme Judicial Court of Massachusetts, 1865 (11 Allen, 157).

Extracts from opinion of Gray, J.:

The statutes of Massachusetts provide that any person to whom money is due for labor and materials furnished in the construction of a vessel in this commonwealth shall have a lien upon her, which shall be preferred to all other liens except mariners' wages, and shall continue until the debt is satisfied, unless dissolved by his failure to file in the office of the city or town clerk, within four days from the departure of the vessel from the port at which she was when the debt was contracted, a certificate, under oath, of his account, of the name of the person with whom the contract was made, the name of the owner of the vessel, if known, and the name or description of the vessel; and which may be enforced by petition to the superior court, containing a statement of the labor and materials, the amount due therefor, a description of the vessel, and all other material facts and circumstances, and praying for a sale of the vessel, and the application of the proceeds to the discharge of the demand. The petition may be entered in court, or filed in the clerk's office in vacation, a process of attachment issued against the vessel, and notice given to the owner thereof to appear and answer to the petition, by serving him with an attested copy of the petition, and order of notice; or the petition may be inserted in a writ of original summons, with an order of attachment, and served, returned, and entered like other civil actions. Gen. Sts. c. 151, § 12, § 13, § 15, § 16; c. 150, § 14. The attachment may be dissolved as

in ordinary civil actions, by the owner of the property giving bond to pay the amount recovered within thirty days after final judgment. Gen. Sts. c. 151, § 15, c. 123, §§ 104-106. The court may at any time allow either party to amend his pleadings as in actions at common law. Gen. Sts. c. 151, § 17. Any number of persons having such liens upon the same vessel may join in one petition, "and the respondent may defend as to each petitioner." § 18.

In each of the cases now before us, the petitioners, in a petition filed in the clerk's office, allege that by virtue of a contract with Stephen Andrews they had furnished labor and materials for and on account of a light-boat, which had been used in its construction, and for which a certain amount was now due to them; that the boat had been built and completed at New Bedford at the ship-yard of Andrews and had never been removed thence; and that Andrews had since transferred her to the United States, who were now the owners thereof, subject to the lien of the petitioners, and the petitioners prayed for an attachment and sale of the vessel to satisfy their demand, and for notice to the said owners and all parties interested to appear and answer to the petition. The court thereupon issued a process of attachment against the vessel, and ordered notice to the United States by service on their attorney for this District. The vessel was attached and notice given accordingly; and the United States, by their attorney, appeared specially, and pleaded to the jurisdiction that, at the time of filing the petition, and long before, the vessel was the public property of the United States, and in their possession, and held and owned by them, for public uses, and as an instrument employed by them for the execution of their sovereign and constitutional powers, and therefore, not subject to the process or jurisdiction of the court; and, saving this plea to the jurisdiction, answered on the merits.

These reasons have satisfied us that there is no principle upon which the courts of this commonwealth can entertain jurisdiction of these petitions. A careful examination of all the authorities cited at the bar, and some additional research, have confirmed this opinion. We shall state the result of this investigation with more fullness and detail than would be admissible in a case of less interest and moment.

But the question whether the King of England could be sued at common law is rather a matter of historical interest, than of present

application; for all the books agree that it has not been allowed since the reign of Edward I. See authorities above cited, and also Com. Dig. Action, C. 1; Praerogative, D. 78; Bac. Ab. Prerogative, E. 7; Year Book 30, Ed. I., 171, 173, 189; the case of The Constable of England, Keilw. 171, b, 172 a.

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In the United States it has always been held an essential attribute of sovereignty in a State not to be liable to be sued without its own consent; and that consent has not usually been given except in special cases. The law of this commonwealth affords sufficient examples. The general principle that the State cannot be sued at law or in equity is perfectly well settled. *Commonwealth v. Andre's Heirs*, 3 Pick. 225. *Pingree v. Coffin*, 12 Gray, 321.

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It is equally well settled that, without the assent of the United States no action at law can be maintained against them in their own courts; nor a bill in equity to restrain the United States from collecting a judgment obtained at law, even on the ground that it has since been paid. *U. S. v. Clark*, 8 Pet. 444. *U. S. v. M'Lemore*, 4 How. 286. *Hill v. U. S.*, 9 How. 386. *Freeside v. Walker*, 11 How. 290. *Nations v. Johnson*, 24 How. 204. In the first of these cases, Chief Justice Marshall said: "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some Act of Congress, or the court cannot exercise jurisdiction over it." Such authority has been given in a few classes of cases, most commonly in those analogous to proceedings in the English Exchequer as a Court of Revenue, or concerning claims to property acquired by the United States by treaty.

In every aspect in which we can look at these suits, in the light of principle or of authority, we cannot escape the conclusion that the state courts have no jurisdiction or right to entertain them, and our judgment must therefore be Petitions dismissed, without costs.

GOLDSMITH v. REVENUE CUTTER, Supreme Court of Oregon, 1877 (6 Or. 250).

By the Court, Watson, Judge: One of the findings of fact of the court below is, that the revenue cutter, defendant, was, and for some time prior to the commencement of this action, had been

continuously in the charge and possession of Captain J. W. White, and Lieutenant J. Brown, officers of the United States, or of men employed by them, or one of them, on behalf of and in the service of the United States, and that it was at the time of its seizure by the sheriff, under the warrant issued in this action, in the actual charge and possession of a servant of the United States, acting under the direction and orders of said officers; and that the watchman of the Oregon Iron Works, who remained on board the vessel at night from the 2nd to the 14th of November, 1876, was subject to the orders and control of those officers.

We think that these findings of fact are equivalent to finding that at the time of the commencement of this action and the seizure of the vessel the government of the United States, was, by its officers and servants, in the possession of the vessel. We are further of the opinion that such possession was sufficient to exempt the property from the process of the courts of this state. It came clearly within the principles announced in the case of the *Davis*, 10 Wall. 15. We quote from the opinion in that case the definition of a possession by the government of the United States, which will exempt property from the process of the courts. "The possession which will do this must be an actual possession, and not that mere constructive possession which is very often implied by reason of ownership, under circumstances favorable to such an implication. We are speaking now of a possession which can only be changed, under the process of the court, by bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist. The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession. This, we think, is a sufficiently liberal definition of the possession of property by the government to prevent any unseemly conflict between the courts and the other departments of the government, and which is consistent with the principle which exempts the government from suit and its possession from disturbance by judicial process."

We think that the findings of fact in this case clearly show that the officers of the United States were at the time of the seizure of the revenue cutter in such an actual and rightful possession of the vessel that, had they chosen to resist, a collision would have resulted between them and the officers of the court.

The United States cannot be sued in the Courts, nor can its property be taken from its possession by process issued by the courts without its consent expressed by law enacted by Congress. (*Briggs v. Light Boats*, 11 Allen, 157). It is contended by counsel for appellants that the exemption of the government of the United States from suit in the courts is in the nature of a personal privilege, and must be pleaded in abatement, and that the United States, having pleaded to the merits, cannot thereafter raise the question. We cannot assent to this doctrine.

The exemption of the government from being sued in the courts without its consent is an attribute of its sovereignty, and its consent to be sued must be shown by some act of Congress expressly to that effect. In the case of the *U. S. v. Clark*, 8 Pet., 444, Chief Justice Marshall said: "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some Act of Congress, or the court cannot exercise jurisdiction over it."

We are aware that the learned judge of the United States District Court for this District has, in a proceeding to enforce a lien under the state law, upon the same vessel, defended in this action, rendered a decision which might at first view seem adverse to the views which we have herein expressed. (*The Revenue Cutter*, *U. S. Claimant*, decided in *U. S. District Court for Oregon*, January 2, 1878.) We have carefully examined the opinion in that case, and find nothing in it adverse to the views of the law which we herein express. The court in that case found the facts in regard to the possession of the United States differently from the findings of the court below. It found that the United States at the time of the seizure was not in the rightful possession of the vessel.

We have repeatedly decided that under our statute the findings of fact of the court below, like the special verdict of a jury, are not reviewable here. It is not for us to express any opinion as to the correctness of the findings of fact of the court below, in regard to the possession of the vessel.

We are governed by those facts as presented by the findings. Had the United States District Judge found that the United States was in the actual possession of the vessel at the time of the seizure, we are satisfied from the reasoning used by him, that he would have arrived at the same conclusion of law as we herein announce. The notice of appeal contains a number of assignments of error, but we

think that all of any importance are disposed of by the views already announced.

The decision of the court below dismissing the complaint was correct, and the judgment must be affirmed.

MANNING v. NICARAGUA, Supreme Court of New York, 1857 (14 How. Pr. 517).

Clerke, Justice: The principal if not the exclusive object of this action, is to enforce the recovery of a demand against the Accessory Transit Company, assigned by the state of Nicaragua, to the plaintiffs. The plaintiffs have deemed it proper to make the state of Nicaragua co-defendants with Accessory Transit Company; and the latter demur to the complaint, on the ground that as sovereign, or a sovereign state, cannot be sued in the courts of another state.

Undoubtedly, a sovereign, or a sovereign state, in their political capacity, cannot be sued in the courts of another state or nation, for the purpose of enforcing any remedy against them. In short, they are not subject to the coercive power of any judicial tribunal, except where they may have expressly consented, as by treaty, (a possible case,) or like the sovereign states of this confederation, by a federal compact, for the purpose of forming "a more perfect union." But, cannot a state be made a defendant in an action, for the purpose of giving it an opportunity to appear, and thus to enable a court to decide more intelligently and equitably, in relation to demands which are sought to be enforced against other defendants? There is nothing necessarily derogatory to the character or independence of a state, to be mentioned merely as defendants, conjointly with others in an action. The joinder may amount to nothing more than an invitation to appear by their representatives or agents; and it may be their desire to accept the invitation, if they consider that their appearance would be conducive to justice or to their own interests. States, as well as individuals, it may be presumed as a general rule, are the best judges of what affects their own dignity and advantage; and it may be safely left to their own sovereign option to determine whether they shall take part, or not, in any judicial controversy; not for the purpose of submitting themselves to the coercive power of the court, but, as I have said, for the purpose of enabling it to arrive at a correct and satisfactory determination. If then, the mere joinder of a state in a civil action, is no derogation from its dignity, or infringement of its sovereignty, the action is not on that account, necessarily and inevitably unten-

able; and a demurrer to the complaint on that ground cannot be maintained. The objection upon which it is founded is, at least, premature.

The appearance indeed of the state cannot be enforced, any more than a judgment against it; and if it should not voluntarily appear, the court may or may not be able to adjust or determine the ultimate rights of the other parties. If it should find itself incapable of doing this, in consequence of not having the state before it, or in consequence of not being able to adjudicate against the other defendants, without being able to adjudicate also against the state, it will, as a matter of necessity, dismiss the action. But, evidently, it cannot be ascertained until the hearing, whether the state shall exercise its option to appear, or whether the final adjudication can be properly made without its appearance; and consequently, if my position that the state may or may not appear at its option, is correct, the objection presented by the Accessory Transit Company, cannot be entertained in this form, or at this stage of the action.

MOORE V. TATE, Supreme Court of Tennessee, 1889 (87 Tenn. 725).

Folkes, J.: The party for whose use the suit is brought is the real plaintiff; so that the state of Alabama is, to all intents and purposes, the party plaintiff in the action brought to recover judgment on the acceptance set out in the declaration.

While a sovereign state may bring and maintain a suit as any other suitor, she cannot be sued in her own or a foreign court, unless she has signified her consent thereto, either by statute or by some other unequivocal means.

These universally recognized principles are not challenged by the learned counsel for the defendants, but his contention is, that the state of Alabama, having invoked the jurisdiction of the courts of this state, for the purpose of recovering a judgment against a citizen of Tennessee, must submit itself to the same jurisdiction, for the purpose of allowing such citizen to interpose any defense he may have, to the extent of preventing any recovery against him; "that when the state undertakes to litigate with the citizen the latter may, by way of set-off or counterclaim, make such defense as will defeat the recovery, though not entitled to a judgment over against the state, in the absence of some legislative enactment authorizing the recovery."

This contention goes too far. It is true that when the state voluntarily places itself in the position of a suitor, whether in its own courts or in those of a sister state, it will be held to have laid aside its sovereignty, and to have taken on the garb of an ordinary suitor, so far as concerns all proper matters of adjudication growing out of the cause of action sued on, and the defendant would be entitled to plead and prove any and all matters properly defensive, including credits and set offs, so far as the latter are dependent on, connected with, and grew out of the transaction which constitutes the subject-matter of the suit: See *State v. Ward and Briggs*, 9 Heisk. 111; *Tappan v. W. & A. R. R. Co.*, 3 Lea, 106.

Such defenses, though sometimes called set-offs, are not strictly set-offs. "A counterclaim is sometimes a mere set-off; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counterclaim is, that they are wholly independent suits, which, for convenience of procedure, are combined in one action,"—as was said in *Winterfield v. Bradnum*, L. R. 3 Q. B. 326; 4 Am. & Eng. Ency. of Law, 332, and cases cited.

Set-off was unknown to the common law. It was allowed in England by statute, 2 George II., chapter 22, which has in the main been generally adopted in this country.

As introduced into this state by statute, the right of set-off is incidental to and dependent upon the fact of the plaintiff having established a right of recovery against the defendant. If this fails, the right of set-off does not exist: *Edington v. Pickle*, 1 Sneed, 122. Such was the construction given to the act of 1815, chapter 53.

It is likewise restricted in its operation to the abatement or extinguishment of the plaintiff's demand, as the case might be. Under the act of 1852, carried into the code, section 3632 (Milliken and Ventrees), where the set-off pleaded by the defendant is found to exceed the claim of the plaintiff, the court is directed to render judgment in favor of the defendant, and against the plaintiff, for the excess of the set-off over the plaintiff's demand.

"The plaintiff may, at any time before the jury retires, take a nonsuit or dismiss his action as to any one or more defendants; but if the defendant has pleaded a set-off or counterclaim, he may elect to proceed on such counter claim in the capacity of a plaintiff": Milliken and Ventrees' Code, sec. 3678.

In this connection, it may be stated that the record in this case shows that when the plaintiff's demurrer to defendant's plea of set-off was overruled, the plaintiff moved to be allowed to dismiss his suit, which was by the court refused, upon the defendants electing to proceed, in the capacity of plaintiffs, to have their counterclaim adjudged to the extent of plaintiff's demand.

Not being allowed to dismiss unconditionally and absolutely, so as to carry the whole case, the plaintiff, reserving exceptions to the action of the court, elected to continue the prosecution of its suit.

The statute enacts that mutual demands held by the defendant against the plaintiff at the time of action brought, and matured when offered, may be pleaded by way of set-off or cross-action: Sec. 3628, subd. 1.

To give to the language of this statute a literal meaning would be to allow defendant's contention. But are we authorized to do so? Such reading would also embrace a debt barred by the statute of limitations, a gambling debt, a demand for usury, a *premium pudicitiae*, any demand *turpi causa*, or against public policy. It is manifest that none of these mutual demands are within the meaning of the statute, because they are not enforceable by suit at law.

The evil that the statute was intended to remedy was, that where two persons held separate and disconnected debts against each other, they were driven to the expense and vexation of two separate suits. As the books say, they were "distinct and inextinguishable except by actual payment or release." The statute was intended to dispense with the necessity for two suits, and to permit one suit to settle the whole. It did not give, and was not intended to give, a right of suit to either party where none existed before, or make other change in rights, but merely to pool the remedies. The mutual demands referred to and provided for were such, and such only, on which separate suits would lie independent of the statute.

In 7 Wait's Actions and Defenses, 477, it is said: "And it is laid down as a rule that a claim is available in set-off at law only when it is a debt on which the defendant could maintain an action at law against the plaintiff." To this general proposition the author cites numerous authorities, covering a great variety of claims on which suits will not lie at all, or cannot be brought by a defendant in his own name and right. Among the cases cited for the text as above quoted is *Battle v. Thompson*, 65 N. C. 406, where it was expressly adjudged that a party sued on a bill single, payable to

the public treasurer, given for cotton sold by such treasurer, could not plead by way of set-off to such action valid coupons taken from the bonds of the state. The judge delivering the opinion says: "The test of a set-off or counterclaim under the statute is this: Could the defendant maintain an action against the plaintiff? Tried by this test, the defense fails, for a citizen cannot maintain an action against the state."

If our own consideration of the question had not led us to the same conclusion, we would be constrained to give much weight to this decision, in view of the fact that our statutes on the subject are derived from North Carolina as the mother state.

Whether a state should consent to be sued, so as to put itself on an equality with the citizen, is not a matter for the courts, but for the legislature.

Our own state for awhile authorized itself to be sued, but by act of 1865, chapter 36, section 34, repealed the statute authorizing such suits, which repealing statute was not held obnoxious to any constitutional objections: *Watson v. Bank*, 3 Baxt. 395.

The same considerations of public policy which prompted the legislature to prohibit suits directly against the state would lead the courts to hold that she should not be sued indirectly, under the general terms of the statute of set-offs, which do not expressly allow such suit.

If such right to plead a set-off exists as against the state by force of the statute (and it cannot exist without the statute as to matters not growing out of and connected with the particular transaction,) then it must necessarily follow that the defendants would be entitled to judgment over for the excess, for the right to judgment for such excess is as much an essence of our statute as is the right to plead the set-off defensively since the act of 1852.

When the defendants here opposed the effort of the plaintiff to take a nonsuit, did they not do so under the statute which authorized them to proceed in the capacity of plaintiffs? If in the capacity of plaintiffs they prosecuted their set-off, are they not suing the state? Does the fact that they only asked to have their claim adjudged to the extent of plaintiff's demand make them any the less plaintiffs when they hold the state in court against its will for the purpose of having the set-off adjudged?

The defendants insist that if such were the proper construction to be applied to our own state, it should not be extended to a foreign state, who is permitted to sue, in our own courts, a citizen of this state; that this is carrying comity too far. It would certainly be but scant courtesy to a sister state to extend to her the privileges of a suitor in our courts were we to couple with such privilege burdens which are not incident to such position when not assumed by this state.

It is difficult to anticipate to what excesses such conduct might lead, and to what extent retaliatory measures might be carried.

But apart from such selfish considerations, it is sufficient to say that it is without exception, so far as we know, that the courts of one state, in dealing with a sister state, extend to it all the privileges enjoyed by the state in which the court is held, unless there be some imperative rule of law to the contrary.

So that, in the consideration of the case at bar, we have treated, and propose to treat, the question as though it concerned the state of Tennessee.

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Where and how can it be said that the state of Alabama has consented to be sued on the coupons declared on in the plea of set-off here? The only answer vouchsafed is that by voluntarily bringing her suit against the citizen, she thereby signifies her consent to the cross-action. The logic of which is, that she can never maintain her action against a recalcitrant debtor without at the same time exposing herself to the hazard of being met and overwhelmed with the presentation of her outstanding securities which the exigencies of the government may have rendered it necessary to withhold payment of, in whole or in part, temporarily or otherwise; and all this upon the construction of a statute which does not in terms apply, and was manifestly never intended to apply, to the sovereign.

But without further discussion, we hold that an independent claim cannot be set off against a demand of the state, defensively or otherwise, without the affirmative consent of the state, and that the courts of this state will apply to a sister state suing here the same rule in this respect that is applicable to our own state when a plaintiff.

It follows, therefore, that the judgment of the circuit judge must be reversed, and judgment rendered here for the full amount of

the balance due on the acceptance sued on, as ascertained in the judgment of the court below, with interest and costs.

PEOPLE v. BROWN, Supreme Court of Illinois, 1873 (67 Ill. 435).

Mr. Justice Breese delivered the opinion of the Court:

This is an original suit in this court, by the people, against the sureties of the sheriff of Lake county, on his official bond, a defalcation by the sheriff in paying over a portion of the State revenue collected by him being alleged in the declaration.

Formal pleadings were waived by the parties, and a decision sought upon an agreed state of facts, which brings up the question, and it is the only question in the case: Can the mistake of the Auditor of Public Accounts, in stating the account of the sheriff, by which the defendants were prevented from obtaining indemnity from the sheriff, be pleaded as a defense to this action?

The defendants have submitted no argument to sustain their defense.

The Attorney General, on behalf of plaintiffs, claims that the fact that defendants were prejudiced by the erroneous and mistaken information they received from the Auditor, would not constitute a defense even as between natural persons, so long as such officer acted in good faith and without intention to deceive—that the doctrine of estoppel in pais is based upon a fraudulent purpose and a fraudulent result, and if the element of fraud is wanting, there is no estoppel. There must be deception, and change of conduct in consequence, in order to estop a party from showing the truth, citing 2 Story's Eq. Jur. sec. 1543.

The doctrine on this subject we understand to be, that, when a person, by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things, and induces him to act upon that belief, so as to change his previous position, he will be estopped to aver against the latter a different state of things. Text writers denominate this estoppel by conduct, in order to which all of the following elements must be present: 1. There must have been a representation concerning material facts. 2. The representation must have been made with knowledge of the facts. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention it should be acted upon. 5. It must have been acted upon. In this connection, it is said, the representation here spoken of is one external to, and not necessarily implied in, the transaction

itself, and fraud, or something tantamount thereto, is now the distinctive character of this kind of estoppel. Bigelow on Estoppel, introduction, p. 60.

Some of these necessary elements appear in this transaction, but the essential one, fraud, is wanting. There is no pretence the auditor designedly misrepresented the state of the sheriff's account, and the extent of his liability. That officer is presumed to employ competent clerks and assistants, on whose fidelity and accuracy he must, in most cases, implicitly rely, and must base his official statements on such communications or reports as they make to him. If they err, as they may sometimes, the error goes into his statements, and without any just impeachment of his fidelity, may be the cause of loss and injury to another.

As between individuals, it is no doubt true, if one, by words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act upon it so as to change his previous condition, he will be estopped to deny the truth of the representation. As between the government and an individual, we have found no case holding the former would be estopped by any statement of its officials from recovering its own.

It is a familiar doctrine, that the State is not embraced within the Statute of Limitations, unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues and property would be at fearful hazard, should this doctrine be applicable to a State. A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officers, forbids the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government.

The doctrine is well settled that no laches can be imputed to the government, and by the same reasoning which excuses it from laches, and on the same grounds, it should not be affected by the negligence or even wilfulness of any of its officials.

The State not being estopped by the mistaken statement of the Auditor, judgment must be entered for the plaintiffs for the amount admitted to be due, without interest, namely: twelve hundred dollars and fifteen cents, for which execution will issue. Judgment for the plaintiffs.

GIBSON v. CHOUTEAU, Supreme Court of the United States, 1872 (13 Wall. 92).

Field, J.: . . . It also appeared in evidence that the defendants, previous to the issue of the patent, had been in possession of the demanded premises more than ten years, the period prescribed by the statute of Missouri, within which actions for the recovery of real property must be brought. By the statutes of the State, ejectment will lie on certain equitable titles. It may be maintained on a New Madrid location, against any person not having a better title.

Gen. Stats. of Mo. of 1825, ch. 151, secs. 1, 11.

The defendants, therefore, contended that the Statute of Limitations, which had run against the equitable title, created by the location of the O'Carroll claim, was also a bar to the present action founded upon the legal title acquired by the patent of the United States; and in this position they were sustained by the Supreme Court of the State, reversing the decision, in that respect, of the inferior court, where the action was brought.

It is a matter of common knowledge that statutes of limitation do not run against the State. That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, and was founded on the principle of public policy, that as he was occupied with the cares of government he ought not to suffer from the negligence of his officers and servants. The principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public. It is upon this principle that in this country the statutes of a State prescribing periods within which rights must be prosecuted are not held to embrace the State itself, unless it is expressly designated or the mischiefs to be remedied are of such a nature that it must necessarily be included. As legislation of a State can only apply to persons and things over which the State has jurisdiction, the United States are also necessarily excluded from the operation of such statutes. *U. S. v. Hoar*, 2 Mass. 312; *People v. Gilbert*, 18 Johns. 288.

STATE v. PRATTE, Supreme Court of Missouri, 1843 (8 Mo. 286).

Tompkins, J.: . . . It was objected, that this bond is like one given to the State, and that the statute of limitations does not run against the State. The principle which prevents the statute of limitations from running against the State, does not apply to official

bonds given to the State for the use of individuals, who may be aggrieved by the misconduct of those officers. In such cases although the bond is nominally given to the State for the sake of convenience, yet, in reality, every cause of action on the bond, besides those the State may herself have, is a private concern, and not at all within the principle which, from considerations of policy, forbids the State to be barred by the statute of limitations from suing, in cases in which she herself, in her corporate capacity, may be interested. *Montgomery v. Hermandes*, 12 Wheaton, 134, shows that the statute of limitations on official bonds, given to the United States for the use of individuals, runs not from the giving of the bond, but from the breach of the condition; and although the condition of a marshal's bond is broken by his neglect to bring money into court directed to be brought in, or to pay it over to the party, yet, if the proceedings be suspended by appeal, so that the party injured has no right to demand the money, or to sue for the recovery of it, his right of action has not accrued so as to bar it, if not commenced within six years. This will illustrate what is said about the right of action accruing on an administrator's bond. The demurrer to the second plea was rightly sustained, and the judgment of the Circuit Court must be affirmed. The cause will be remanded, and the plaintiff have leave to withdraw his demurrer, if he wish.

COUNTY OF ST. CHARLES v. POWELL, Supreme Court of Missouri, 1856 (22 Mo. 525).

Leonard, Judge, delivered the opinion of the court.

In 6 Bacon's Abr. tit. "Prerogative," E. 5, it was said that when a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king should not be bound, unless the statute is made by express words to extend to him. It is upon this principle that, by the English common law, statutes of limitations do not apply to actions brought by the crown, unless there be an express provision including it; and Story (*United States v. Hoar*, 2 Mason, 312), after referring to the reason given by Blackstone, (1 Com. 247), says that the true reason of the king's prerogative, "*nullum tempus occurrit regi*," is to be found in the great public policy of preserving the public rights, revenues and property from injury and loss by the negligence of public officers. But whatever the reasons of the prerogative may have been, it was originally adopted, it is believed,

in all the American states, governed by the common law. It seems, however, to have had no place in the Roman law of the prescription of actions, except to enlarge the time within which the public authorities, both general and local, were required to bring their suits. (1 Mackeldey's Civil Law by Kaufman, 200, 202.) The new French code expressly renounces it (Civil Code, sec. 2227); and our own state has recently done so too. (Practice Act, 1849, art. 2 10).

The immunity, however, it seems, was, even at common law, an attribute of sovereignty only, and did not belong to the municipal corporations or other local authorities established to manage the affairs of the political subdivisions of the state. It was so expressly held in the Lessee of the city of Cincinnati against the First Presbyterian church, (8 Ohio, 309), and in *Armstrong v. Dalton*, (4 Dev. N. C. 569); and we are not aware of any case to the contrary. In Marion county against Moffett, (15 Mo. 604.) the omission of a public functionary to do an act required by law for the security of the public interest, was not allowed to operate as a release of the security; but the decision had nothing to do with the application of the statute of limitations to cases of that character. The money here sued for belonged to the county and not to the state at large. It was vested in the county by a legislative donation—impressed, it is true, with a trust for local improvements; but yet it belonged exclusively to the county, although for local and not for general purposes.

BLACKSTONE, COMMENTARIES, III, 110.

A writ of *mandamus* is in general, a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice. It is a high prerogative writ, of a most extensively remedial nature; and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution of an office; but it issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance. A *mandamus* therefore, lies to compel the admission or restoration of the party applying to any office or franchise

of a public nature, whether spiritual or temporal; to academical degrees; to the use of a meeting house, etc.: it lies for the production inspection, or delivery of public books and papers; for the surrender of the *regalia* of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it is impossible to recite minutely. But at present we are more particular to remark, that it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them; and this, not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice. A *mandamus* may therefore be had to the courts of the city of London, to enter up judgment; to the spiritual courts to grant an administration, to swear a churchwarden, and the like. This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below: whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made, (except in some general cases where the probable ground is manifest,) directing the party complained of to show cause why a writ of *mandamus* should not issue: and, if he shows no sufficient cause, the writ itself is issued, at first in the alternative, either to do thus, or signify some reason to the contrary; to which a return, or answer, must be made at a certain day. And, if the inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place a *peremptory mandamus*, to do the thing absolutely; to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other person makes no return, or fails in his respect and obedience, he is punishable for his contempt by attachment. But if he, at the first, returns a sufficient cause, although it should be false in fact, the court of king's bench will not try the truth of the fact upon affidavits; but will for the present believe him, and proceed no further on the *mandamus*. But then the party injured may have an action against him for his false return, and (if found to be false by the jury) shall

recover damages equivalent to the injury sustained; together with a *peremptory mandamus* to the defendant to do his duty.

STATE V. GOVERNOR, Supreme Court of Ohio, 1856 (5 Ohio St. 528).

Bartley, C. J.: . . . 1. Can the chief executive officer of the state be directed or controlled in his official action by proceedings in *mandamus*? It is claimed, on the part of the defense, that, inasmuch as the government is by the constitution divided into the three separate and co-ordinate departments, the legislative, the executive, and the judicial, and inasmuch as each department has the right to judge of the constitution and laws for itself, and each officer is responsible for an abuse or usurpation in the mode pointed out in the constitution, it necessarily follows that each department must be supreme within the scope of its powers, and neither subject to the control of the other for the manner in which it performs, nor its failure to perform, either its legal or constitutional duties. This argument is founded on theory rather than reality. That each of these co-ordinate departments has duties to perform in which it is not subject to the controlling or directing authority of either of the others, must be conceded. But this independence arises not from the grade of the officer performing the duties, but the nature of the authority exercised. Under our system of government, no officer is placed above the restraining authority of the law, which is truly said to be universal in its behests—"all paying it homage, the least as feeling its care, and the greatest as not exempt from its power." And it is only where the law has authorized it, that the restraining power of one of these co-ordinate departments can be brought to operate as a check upon one of the others. The judicial power can not interpose and direct in regard to the performance of an official act which rests in the discretion of any officer, whether executive, legislative, or judicial. In *Marbury v. Madison*, 1 Cranch, 170, Chief Justice Marshall said: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined."

The constitutional provision declaring that "the supreme executive power of this state shall be vested in the governor," clothes the governor with important political powers, in the exercise of which he uses his own judgment or discretion, and in regard to which his determinations are conclusive. But there is nothing in the nature

of the chief executive office of this state which prevents the performance of some duties merely ministerial being enjoined on the governor. While the authority of the governor is supreme in the exercise of his political and executive functions which depend on the exercise of his own judgment or discretion, the authority of the judiciary of the state is supreme in the determination of all legal questions involved in any matter judicially brought before it. Although the state can not be sued, there is nothing in the nature of the office of governor which prevents the prosecution of a suit against the person engaged in discharge of its duties. This is fully sustained by the analogy of the doctrine of the Supreme Court of the United States, in the case of *Marbury v. Madison*; 1 Cranch, 170.

However, therefore, the governor, in the exercise of the supreme executive power of the state, may, from the inherent nature of the authority in regard to many of his duties, have a discretion which places him beyond the control of the judicial power, yet in regard to a mere ministerial duty enjoined on him by statute, which might have been devolved on another officer of the state, and affecting any specific private right, he may be made amenable to the compulsory process of this court by *mandamus*.

The official act of the governor in question, in regard to issuing the proclamation asked for, is a duty prescribed by statute, not necessarily connected with the supreme executive power of the state, ministerial in its nature, and a duty which might have been enjoined on some other officer. It is contended that this duty rests in the discretion of the governor, by virtue of the provision requiring that "he shall, if he be satisfied that the law has, in all respects, been complied with, issue his proclamation," etc. The facts connected with the organization of the company, and the other essential preparations preliminary to the commencement of the business of banking, are required to be certified to the governor; and on finding that the law has been complied within these respects, the proclamation is required. The duty is imperative on his being satisfied of a given state of facts. It is his duty to look into the evidence presented to him, and act on a given state of facts. He has no uncontrollable power of judgment as to either the law or the facts. On his finding the existence of the requisite fact, the law is peremptory in requiring the performance of the duty. True it is, if the evidence presented be not clear and satisfactory as to the compliance with the requirements of the law, but leaves ground for

doubt, the act is not authorized. The duty enjoined, therefore, although subject to a condition, is ministerial in its nature.

The governor, in his letter to the president of the board of control, refusing to issue his proclamation, expressly admits that he is satisfied as to the existence of the requisite state of facts, and places his refusal solely on the ground of the legal difficulties which are presented. . . .

With a clear and accurate conception of his own duty thus expressed, the governor does not assume the exercise of a discretion in regard to the question in this case, which would make his determination final and conclusive; on the contrary, he concedes the authority of the judiciary over the question. And on the subject of the power of this court to entertain jurisdiction over this case, we are unanimous in our conclusion.

BLACKSTONE, COMMENTARIES, III, 112.

A prohibition is a writ issuing properly only out of the court of king's bench, being the king's prerogative writ; but for the furtherance of justice, it now may also be had in some cases out of the court of chancery, common pleas, or exchequer; directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. . . . And if either the judge or the party shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it; and an action will lie against them, to repair the party injured in damages. •

BLACKSTONE, COMMENTARIES, III, 262.

A writ of *quo warranto* is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right. It lies also in case of non-user or long neglect of a franchise, or mis-user or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. This was originally returnable before the king's justices at Westminster; but afterwards only before the justices in eyre, by virtue of the statutes of *quo warranto*, 6 Edw.

I. c. I, and 18 Edw. I. st. 2; but since those justices have given place to the king's temporary commissioners of assize, the judges on the several circuits, this branch of the statutes has lost its effect; and writs of *quo warranto* (if brought at all) must now be prosecuted and determined before the king's justices at Westminster. And in case of judgment for the defendant, he shall have an allowance of his franchise; but in case of judgment for the king, for that the party is entitled to no such franchise, or hath disused or abused it, the franchise is either seised into the king's hands, to be granted out again to whomever he shall please; or, if it be not such a franchise as may subsist into the hands of the crown, there is merely judgment of *ousting*, to turn out the party who usurped it.

The judgment on a writ of *quo warranto* (being in the nature of a writ of right) is final and conclusive even against the crown. Which, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by *information* filed in the court of king's bench by the attorney-general, in the nature of a writ of *quo warranto*; wherein the process is speedier, and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the crown; but hath long been applied to the mere purposes of trying the civil right, seising the franchise, or ousting the wrongful possessor; the fine being nominal only.

BLACKSTONE, COMMENTARIES, III, 129.

The writ of *habeas corpus*, the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice.

But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. This is a high prerogative writ, and therefore by the common law issuing out of the court of king's bench not only in term-time, but also during the vacation, by a *fiat* from the chief justice or any other of the judges, and running

into all parts of the king's dominions; for the king is at all times entitled to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon; unless the term shall intervene, and then it may be returned in court. Indeed, if the party were privileged in the courts of common pleas and exchequer, as being (or supposed to be) an officer or suitor of the court, an *habeas corpus ad subjiciendum* might also by common law have been awarded from thence; and, if the cause of imprisonment were palpably illegal, they might have discharged him: but, if he were committed for any criminal matter, they could only have remanded him, or taken bail for his appearance in the court of king's bench, which occasioned the common pleas for some time to discountenance such applications. But since the mention of the king's bench and common pleas, as co-ordinate in this jurisdiction, by statute 16 Car. I. c. 10, it hath been holden, that every subject of the kingdom is equally entitled to the benefit of the common-law writ, in either of those courts, at his option. It hath also been said, and by very respectable authorities, that the like *habeas corpus* may issue out of the court of chancery in vacation; but upon the famous application to lord Nottingham by Jenks, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation; and therefore his lordship refused it. In the king's bench and common pleas it is necessary to apply for it by motion to the court, as in the case of all other prerogative writs, (*certiorari*, prohibition, *mandamus*, etc.,) which do not issue as of mere course, without showing some probable cause why the extraordinary power of the crown is called in to the party's assistance. For, as was argued by lord chief justice Vaughan, "it is granted on motion, because it cannot be had of course, and there is therefore no *necessity* to grant it; for the court ought to be satisfied that the party hath a probable cause to be delivered." And this seems the more reasonable because (when once granted) the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner. So that if it issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the king's service, a wife, a child, a relation, or a domestic confined for insanity or other prudential

reasons, might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court. And therefore Sir Edward Coke, when chief Justice, did not scruple in 13 Jac. I. to deny a *habeas corpus* to one confined by the court of admiralty for piracy; there appearing, upon his own showing, sufficient grounds to confine him. On the other hand, if a probable ground be shown that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which "may not be denied, but ought to be granted to every man that is committed or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other."

In a former part of these commentaries we expatiated at large on the personal liberty of the subject. This was shown to be a natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case without the special permission of law. A doctrine coeval with the first rudiments of the English constitution, and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes and the violence of the Norman conquest; asserted afterwards and confirmed by the Conqueror himself and his descendants; and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous and usurping princes, yet established on the firmest basis by the provisions of *magna carta*, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty by rendering its protection impossible; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon a *habeas corpus* may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner.

And yet, early in the reign of Charles I., the court of king's bench, relying on some arbitrary precedents, (and those perhaps misunderstood,) determined that they could not upon a *habeas corpus* either bail or deliver a prisoner, though committed without

any cause assigned, in case he was committed by the special command of the king, or by the lords of privy council. This drew on a parliamentary inquiry, and produced the *petition of right*, 3 Car. I. which recites this illegal judgment, and enacts that no person hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Sheldon and others were committed by the lords of the council, in pursuance of his majesty's special command under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms (including also a long vacation) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they, however, annexed a condition of finding sureties for the good behavior, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time declaring that "if they were again remanded for that cause perhaps the court would not afterwards grant a *habeas corpus*, being already made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present: according to Mr. Sheldon's own account of the matter, whose resentment was not cooled at the distance of four-and-twenty years.

These pitiful evasions gave rise to the statute 16 Car. I. c. 10, Sec. 8, whereby it is enacted that if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*, upon demand or motion made to the court of king's bench or common pleas; who shall thereupon, within three court-days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding the prisoner. Yet still, in the case of Jenks, before alluded to, who in 1676 was committed by the king in council for a turbulent speech at Guildhall, new shifts and devices were made use of to prevent his enlargement by law, the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum*, etc., whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty

to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party, and many other vexatious shifts were practiced to detain state-prisoners in custody. But whoever will attentively consider the English history may observe that the flagrant abuse of any power by the crown or its ministers has always been productive of a struggle, which either discovers the exercise of that power to be contrary to law, or (if legal) restrains it for the future. This was the case in the present instance. The oppression of an obscure individual gave birth to the famous habeas corpus act, 31 Car. II. c. 2, which is frequently considered as another magna carta of the kingdom; and by consequence and analogy has also in subsequent times reduced the general method of proceedings on these writs (though not within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty.

The statute itself enacts, 1. That on complaint and request in writing by or on behalf of any person committed and charged with any crime, (unless committed for treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any petit-treason or felony; or upon suspicion of such petit-treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process,) the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writs shall be endorsed as granted in pursuance of this act, and signed by the person awarding them. 3. That the writ shall be returned and the prisoner brought up within a limited time, according to the distance, not exceeding in any case twenty days. 4. That officers and keepers neglecting to make due return, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of committment, or shifting the custody of a prisoner from one to another without sufficient reason or authority, (specified in the act,) shall for the first offence forfeit 100 *l.*, and for the second offence 200 *l.*, to the party grieved, and be disabled to hold his

office. 5. That no person once delivered by *habeas corpus* shall be recommitted for the same offence, on penalty of 500 *l.* 6. That every person committed for treason or felony shall, if he requires it the first week of the next term, or the first day of the next session of oyer and terminer, be indicted in that term or session, or else admitted to bail: unless the king's witnesses cannot be produced at that time: and if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence: but that no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended, but shall be left to the justice of the judges of assize. 7. That any such prisoner may move for and obtain his *habeas corpus* as well out of the chancery or exchequer as out of the king's bench or common pleas; and the lord chancellor or judges denying the same, on sight of the warrant or oath that the same is refused, forfeit severally to the party grieved the sum of 500 *l.* 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported, or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions, on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than 500 *l.*, to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of *praemunire*; and shall be incapable of the king's pardon.

This is the substance of that great and important statute: which extends (we may observe) only to the case of committments for such criminal charge, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But even upon writs at the common law it is now expected by the court, agreeable to ancient precedents and the spirit of the act of parliament, that the writ should be immediately obeyed, without waiting for any *alias* or *pluries*; otherwise an attachment will issue. By which admirable regulations, judicial as well as parliamentary, the remedy is now complete for removing the in-

jury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention, of government. For it frequently happens in foreign countries (and has happened in England during temporary suspensions of the statute) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.

BELKNAP v. BELKNAP, Court of Chancery of New York, 1817 (2 Johns. Ch. 463).

The suit was brought to enjoin the inspectors appointed under an act of the legislature to drain certain swamps and bogs from going beyond their authority under the act and damaging the water power of plaintiff's mill.

Kent, Chancellor: . . . These cases relate to acts of interruption by private individuals; but there are other cases still more applicable, because they relate to the proceedings of persons acting under a statute.

Thus, in the case of *Hush v. Trustees of Morden College*, 1 Ves. 188, Lord Hardwicke allowed an injunction to restrain turnpike commissioners from entering on the land of the plaintiff to dig gravel, as it was not a case within their authority. The Lord Chancellor said he should not interpose in a doubtful case until that doubt was removed and the matter determined at law; but there the case was plain, and if the commissioners went beyond their jurisdiction, they were as much trespassers as private persons; and though they might be responsible at law, that would be only for a particular wrong, and the remedy would not be equal to the remedy in this court. In the late case of *Shand v. Aberdeen Canal Company*, 2 Dow, 519, which was a Scotch case, determined, on appeal, in the House of Lords, Lord Eldon said that if the canal commissioners exceeded their powers they became trespassers, but chancery would restrain them by injunction, and keep them strictly within the limits of their power. The case of *Agar v. Regents Canal Co.*, Coop. Eq. 77, is still more recent, being as late as 1815, and it shows that the jurisdiction of chancery on this subject is well settled and in constant exercise, and that the cases maintain the most steady uniformity in their doctrine and belief. The bill in that case was filed by the plaintiff as owner of an estate through which the defendants proposed to make a canal, under a private Act of Parliament. The prayer of the bill was to restrain the de-

defendants from carrying the canal through his garden and brick-yard, and the injunction was allowed so far as to restrain the defendants from deviating, in cutting the canal, from the line prescribed. The Lord Chancellor admitted that the plaintiff might have lain by and rested on his legal rights, and then brought trespass; but he was also at liberty to come into chancery in the first instance, for a preventive remedy; and if there was any dispute as to the fact, which course the defendant ought to pursue, he would direct an issue.

These cases remove all doubt on the point of jurisdiction, and the observation of Lord Hardwicke alludes to its pre-eminent utility. This is not a case of an ordinary trespass impending, but one great and special, leading to lasting mischief, and the destruction of the estate, and tending to multiplicity of suits. There is no fact in this case to be ascertained. The whole case turns upon the construction of the Act, and, considering it in the light that I do, the prayer of the bill ought to be granted.

Let the injunction, therefore, against any proceedings on the part of the defendants, touching the outlet in the bill mentioned, be made perpetual. Injunction continued.

CLARK v. MILLER, Court of Appeals of New York, 1874 (54 N. Y. 528).

This was an action against a supervisor for refusal to present to the board of supervisors plaintiff's claim for damages occasioned by laying out a road across his land.

Johnson, C.: . . . The next question is, whether the plaintiff may have an action for this wrong. In my opinion it ought to be deemed settled in the law of this State that a ministerial officer, charged by statute with an absolute and certain duty, in the performance of which an individual has a special interest, is liable to an action if he refuses and omits to perform it. The discussion in *Hover v. Barkhoof*, 44 N. Y. 113, and especially the opinion of Earl. Com., in that case, and the cases cited by him, relieved me from the necessity of further examination of it. That the opinion or belief of the defendant as to his duty does not affect his liability, is established by *People v. Brooks*, 1 Den. 457. Honest ignorance does not excuse a public officer for disobedience to the law.

There is nothing in the position that the plaintiff's remedy is by *mandamus*. That remedy exists, in general, only where the law affords no other, to prevent a failure of justice. But as we have

seen, in this case the plaintiff makes out a right to his action at law, and in such cases it can never be necessary to resort to a *mandamus*, even if that remedy happens to be legally available. In this case that remedy would not have been available to the plaintiff and effectual to procure payment of his claim. It could not have been applied for until the defendant was in default; and that default could not have been ascertained to exist until the last moment for presenting claims for audit. That late period would have rendered an application for a *mandamus*, if granted, practically ineffectual to afford the plaintiff the relief he was entitled to.

In respect to the rule of damages, I have no doubt that the defendant is answerable for the whole amount, which, by his refusal to perform his duty, the plaintiff has been unable to obtain. The law will not limit his recovery to any thing less than the amount of the reassessment; for such a limit would drive him to a succession of actions, in none of which could he, if the defendant's position is correct, recover more than interest. It cannot be assumed that the defendant would be taught by the result of one action and proceed to do his duty, and thus avoid another. The plaintiff is not thus to be put off. The defendant's misconduct has deprived him of obtaining his money, and the defendant must answer to the whole injury which he has occasioned.

HAZARD v. ISRAEL, Supreme Court of Pennsylvania, 1808 (1 Bin. 240).

Action of trespass against a sheriff. It was shown that the deputy sheriff went to plaintiff's house to levy on property of an estate, against which he had an execution. He levied on goods of the plaintiff instead.

Tilghman, C. J.: . . . It was also contended that the sheriff was not answerable in an action of trespass for the conduct of his deputy. We are clearly of opinion that for all civil purposes he is answerable, though not criminally. There appears to be some doubt on the point in the case of *Saunderson v. Baker et al.*, reported in 3 Wils. 309; but the doubt is probably owing more to the inaccuracy of the reports than to any other cause. The same case is better reported in 2 W. Bl. 832. In *Ackworth v. Kempe*, Doug. 40, where the case of *Saunderson v. Baker et al.* was considered, Lord Mansfield looks upon the law to be quite clear in the manner I have stated it. It is a principle not lately introduced, but founded

upon ancient authorities. And most inconvenient it would be if the law were otherwise; for the sheriff's deputies are frequently men of small property, and sometimes of bad character; and the responsibility ought to rest on the principal who had the sole power of appointing and removing them.

163

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